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Bribery Act Seminar
贈収賄禁止法セミナー
2011年4月27日 (水)



PricewaterhouseCoopers Legal LLP

はじめに

佐藤 穰治

本日の日程

| | | |
|-------------|---------------|---------------|
| 16:00-16:05 | はじめに | 佐藤 穰治 |
| 16:05-16:10 | 日本語による内容説明 | 金 保仁 |
| 16:10-16:30 | 贈収賄禁止法とガイドライン | Ben Cooper |
| 16:30-16:40 | Q&A | |
| 16:40-16:55 | 休憩 | |
| 16:55-17:00 | 日本語による内容説明 | 金 保仁 |
| 17:00-17:20 | 適切な手続き/内部統制 | Mark Anderson |
| 17:20-17:30 | Q&A | |
| 17:30-17:35 | おわりに | 佐藤 穰治 |
| 17:35-19:15 | カクテル・レセプション | |

日本語による内容説明－贈収賄禁止法と ガイドライン

金 保仁

*What will it mean to your company
and how will you deal with it?*

各企業にどのように影響し、それにどう対応すべきか？

Ben Cooper

Why does the Bribery Act matter?

- Act as a result of international criticism of the UK's existing antiquated legislation dated 1889, 1906 and 1916
- OECD criticism of UK – failed to enact Convention despite signing treaty in 1997
- Recent high profile cases under existing legislation include Amec, Mabey & Johnson, Balfour Beatty, Alstom, Kellogg Brown & Root and BAE
- First criminal sentence handed down to a UK executive in the UK (Dougall)

なぜ贈収賄禁止法が重要なのか？

- 当法令は1889年、1906年、1916年に制定された英国の現行法令が時代遅れである、との国際的な批判の結果もたらされた。
- **OECD** の英国に対する批判 – 1997年に国際条約が締結されたにもかかわらず、協定が法制化されていない。
- 現行法令の下で、近年 **Amec**、**Mabey & Johnson**、**Balfour Beatty**、**Alstom**、**Kellogg Brown & Root**、**BAE**等の訴訟が注目の的となる。
- 英国において初めて、英国の取締役役に有罪判決が下される (**Dougall**)。

Why does the Bribery Act matter?

- Future of SFO, OFT and FSA is being considered. Each needs to show that it is relevant and necessary to effect the combat of economic crime
- SFO admits they are 4 or 5 years behind US
- US recently introduced legislation (Dodd-Frank) which pays bounties of 10-30% of FCPA fines to whistleblowers
- FCPA charges in 2010 totalled \$1.8billion
- 8 out of top 10 largest US fines levied in 2010

なぜ贈収賄禁止法が重要なのか？

- SFO、OFT、FSAの将来像が検討されており、各機関は企業犯罪の取締りの強化に関し、自らの存在意義を示す必要がある。
- SFO は米国より 4－ 5年遅れていることを認めている。
- 米国は連邦海外腐敗行為防止法(FCPA)による 罰金の10-30%を内部告発者に報奨金として与える法令 (Dodd-Frank)を最近導入
- FCPA は2010年に総額18億ドルの罰金を徴収
- 米国の高額罰金上位10件のうち8件が 2010年に課された。

An overview of the Act

- Received Royal Assent on 8 April 2010
- Guidance issued 30 March 2011
- Will come into force on 1 July 2011
- Aim of the Act is to assist regulators and prosecuting authorities in investigation of corruption in the UK and overseas
- Emphasis of the Act is to require organisations to establish effective governance and compliance programmes not only in relation to their own business, but also with third parties
- Prosecution under the Bribery Act will be far easier to achieve

法令の概要

- 2010年4月8日に女王の裁可が下りる。
- 2011年3月30日にガイダンスが発表
- 2011年7月1日より施行開始
- この法令の目的は、英国内あるいは英国外において規制当局、検察当局による汚職・腐敗調査を強化することにある。
- 当法令が特に重点を置いているのは、当該企業のみでなく第三者を介在させる場合にも、効果的な内部統制およびコンプライアンス・プログラムを構築させることにある。
- 贈収賄禁止法の下での起訴が著しく容易となる。

The offences

1. Paying bribes
2. Receiving bribes
3. Bribing foreign public officials
4. Corporate offence of failure to prevent bribery paid on its behalf

違法行為

1. 贈賄
2. 収賄
3. 外国の公職従事者への贈賄
4. 自己のために贈賄が行われることを防止できなかった場合の企業責任

Corporate offence

- Strict liability
- Applies to relevant commercial organisation
 - UK company or partnership
 - Foreign company or partnership carrying on all or part of business in UK
- Commercial organisation liable for the acts of person associated with it, which means
 - UK commercial organisation liable if employee, subsidiary, parent, agent, joint venture or other third party pays a bribe anywhere in the world on its behalf
 - Foreign commercial organisation liable for failure to prevent bribery even where bribery takes place overseas and with no connection to UK

企業による違法行為

- 厳格な罰則
- 以下の企業に適用
 - 英国企業およびパートナーシップ
 - 英国において事業の全部あるいは一部を遂行する外国企業あるいはパートナーシップ
- 当該企業はその関連者が行った行為に対して責任を負う。つまり
 - 英国の民間企業の従業員、子会社、親会社、仲介業者、合弁事業者、その他第三者が世界中のどこにおいても、当該企業に代わり贈賄を行った場合には、当該企業が責任を負う。
 - たとえ贈収賄が英国外において英国とは関係なく行われたとしても、それを防止できなかった場合には、当該外国企業も責任を問われる。

Extent of the Act

- The Act is more stringent than the US Foreign Corrupt Practices Act as it applies to both public and private sectors
- FCPA requires corrupt intent on part of bribe giver - no strict liability for companies
- No books and records requirement under the Act, but achievable through Companies Act
- Definition of a bribe under the Act is very wide and includes:
 - Facilitation (or grease) payments
 - Hospitality
 - Charitable and political donations
- Being FCPA compliant is no longer the global benchmark

法令の適用範囲

- 当法令は公共部門および民間部門の両方に適用するため、米国のFCPAよりさらに厳格である
- FCPAは贈賄者側に贈賄の意図があったことが要求される – 企業には厳格な責任が問われない
- 当法令は記録保持義務を定めていない。会社法の規定によりほぼ同様の効果を上げることが可能
- 当法令による賄賂の定義は広範囲にわたり、以下を含む。
 - 円滑化のための支払い
 - 歓待
 - 慈善事業への寄付、政治献金
- FCPAに従っていることが、世界基準に従っていることにはならない。

Penalties and implications

Penalties

- 10 years imprisonment and / or an unlimited fine
- Personal liability for a senior officer (i.e. a director, manager or secretary) who “consent or connive” at offence by corporate entity

Implications

- Reputational damage
- Mandatory debarment from tendering for contracts
- Professional fees and management costs of defending an investigation
- Investor confidence
- Regulatory breaches

罰則およびその影響

罰則

- 10年間の禁固刑 および/あるいは上限なしの罰金
- 企業の違法行為に「同意あるいは黙認」した上級管理職に対して個人的責任（取締役、マネジャー、秘書役等）

その影響

- 企業評価への打撃
- 契約への入札からの強制的排除
- 調査に対する弁護に要する専門家への報酬および事務手続き費用
- 投資家心理への悪影響
- 規制上の違反

Possible defence to corporate offence

- Charge of failure to prevent may be defended on grounds that commercial organisation had “adequate procedures” in place at time of offence
- Ministry of Justice guidance issued on 30 March 2011 on what “adequate procedures” means
- Directors of Public Prosecutions and Serious Fraud Office also issued prosecution guidelines

企業の違法行為に対する弁護

- 贈収賄を防止できなかったことに対する弁護は、違法行為が行われた時点で「適切な手続き」が整備されていたことである。
- 何が「適切な手続き」であるかに関する司法省による2011年3月30日発表のガイダンス
- 検察庁長官およびSFOもまた起訴に関するガイドラインを発表

Adequate procedures guidance

- The guidance is based on six broad management principles which businesses need to use as a flexible guide as to what procedures are right for them
 1. Proportionate procedures
 2. Top level commitment
 3. Risk assessment
 4. Due diligence
 5. Communication
 6. Monitoring and review

適切な手続きに関するガイダンス

- ガイダンスは以下の管理原則の6つの柱に基づいており、どの手続きが各企業にとり最も適しているか、の大まかな指針として使用する必要がある。
 1. 各企業のリスクの程度に応じた手続き
 2. トップレベルにおけるコミットメント
 3. リスクの査定
 4. 事前調査
 5. コミュニケーション
 6. 監視とその後の見直し

The risk – bribery red flags

- Operations in high risk territories
- Dealings with government officials including licence applications, concessions, planning consent, visas, tax and provision of utilities
- Significant use of third parties & agents as intermediaries
- Joint ventures in high risk territories
- Large scale projects, tenders or long term contracts
- Gifts, hospitality and entertainment activities
- Political and charitable donations

リスク - 特にリスクの高い分野

- リスクの高い地域での事業
- 免許申請、利権獲得、計画の承認、査証、納税、公益設備の敷設といった政府や公共機関関係者との交渉
- 仲介者として第三者あるいは代理人を多く使用
- リスクの高い地域での合弁事業
- 大型プロジェクト、契約への入札あるいは長期契約
- 贈答品、歓待、接待
- 慈善事業への寄付、政治献金

What should you be doing?

- Take action to ensure that you conduct a risk assessment and implement a comprehensive anti-bribery programme
- This should include a review of your current governance risk and compliance procedures, your risk and compliance training programme and your gifts and hospitality policy
- This should be in place by 1 July 2011

今後とるべき対応策は？

- リスクの査定を実施し、包括的な贈収賄防止プログラムが導入されたことを検証
- この中には、現在の内部統制リスクおよびコンプライアンス手続き、リスクおよびコンプライアンスに関する研修プログラム、贈答品、接待に関する方針が含まれる。
- **2011年7月1日までにこれらを整備するべき。**

Q&A

Ben Cooper
金 保仁

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Coffee break

日本語による内容説明 — 適切な手続き/ 内部統制

金 保仁

***Bribery Act Adequate Procedures:
How much is enough?***

適切な手続き — どこまで要求されるか？

Mark Anderson

Agenda

- ***Risk assessment and analysis***
- ***Elements of a good practice bribery risk management programme***
- ***A sample project plan***
- ***Some key challenges***

内容

- リスクの査定および分析
- 実施規範としての贈収賄リスク管理プログラムの構成要素
- プロジェクト策定の一例
- 主な課題

Risk assessment and analysis

***Bribery risk
assessment
should guide
proportionate
response***

Guiding principles:

- Focus on inherent risk
- Ignore controls until you have completed the risk inventory
- Avoid preconceptions about control effectiveness or personal integrity
- Consider qualitative and quantitative methods
- Gap analysis to existing policy and control framework

リスクの査定および分析

贈収賄リスクの査定を行うことにより、リスクの程度に応じた対応を可能とする。

ガイドライン原則

- 固有のリスクに焦点を当てる
- 全リスクの把握が終了するまでリスク管理を保留
- 管理体制あるいは個人的倫理観への先入観を排除
- 質的および量的方法論の検討
- 既存の方針および管理体制とのギャップ分析

Typical risk areas

- High risk territories
- Use of intermediaries
- Joint ventures, consortia, acquisitions
- Long-term contracts
- Movement of goods
- Obtaining licences, permits, regulatory clearances, etc
- Negotiation of tax, duties, etc
- Other dealings with government
- Gifts, entertainment, travel expenses
- Sponsorship, certain other marketing
- Donations, charitable or political
- Certain kinds of CSR activity
- Lobbying
- Related party transactions / conflicts of interest
- Offset arrangements

典型的なリスク分野

- リスクの高い地域
- 仲介業者の活用
- 合弁事業、コンソーシアム、買収
- 長期契約
- 物品の移動
- 免許、認可、規制上の承認等
- 納税、租税公課の交渉
- その他公共機関との接触
- 贈答品、接待、旅費
- スポンサーシップ、その他特定のマーケティング活動
- 慈善事業への寄付、政治献金
- 特定のタイプの企業の社会的責任活動
- ロビー活動
- 関連当事者の取引 / 利害の対立
- 相殺の取り決め

Sample risk assessment

| <u>Risk Area</u> | <u>I</u> | <u>Management and Control Observations</u> | <u>R</u> | <u>Recommendations</u> |
|---|----------|--|----------|--|
| Investment business activities | | | | |
| <p>The power exercised by some of XX's investment professionals may give rise to a heightened risk of bribery and corruption. For example in the deal environment, XX employees could be bribed, for example, to negotiate a greater equity stake or lower purchase price.</p> | | <ul style="list-style-type: none"> • Interview respondents consistently expressed the view that the risks of bribes being paid by a XX employee are low and that the risks of bribery and corruption are more likely to arise within the portfolio companies themselves. • The risks of a bribe being accepted or even solicited by a XX employee are limited due to the remuneration structure and strong ethical culture within XX. • All investment decisions are subject to internal review and approval processes and all aspects of remuneration in connection with such deals are subject to an internal partner review panel. | | <ul style="list-style-type: none"> • None |
| Interaction with Government Officials | | | | |
| <p>Some sectors in which XX is active, such as infrastructure, oil and gas and mining, require the co-operation of government authorities, or the issuing of trading licences, such as from local financial regulators. As a result, XX has faced some pressures by government officials to pay bribes and could be exposed to further such risks. XX seeks and secures investment in its funds from a number of sovereign wealth funds (including those from China, Singapore, Abu Dhabi, Brunei, Kuwait, Oman, and Qatar) which are government investment vehicles. It meets with representatives of these funds regularly, but usually maintains a direct relationship rather than through placement agents (see below).</p> | | <ul style="list-style-type: none"> • A number of respondents highlighted an awareness of corruption risks involving the issuing of licences and permits, etc, but stated that they would actively seek to avoid such risks, perhaps even avoiding any involvement in high risk industries altogether. Financial regulators were not generally viewed as a significant corruption risk in any territory in which XX operates. • XX generally avoids deals connected with the privatisation of state owned industries. However, the nature of XX's infrastructure business in India gives rise to increased exposure to and interaction with government officials as fgfagfgfhgfhfhf asjjkhkj asdhkhakjsd akjshdlkhjlk jsalkjd • Another territory where there is increased interaction with government officials is in China. Sadhkhkhkjsakjhdkjhkjm n,md • Asjhdkjaskdjabskdnl sadhkajnbdm sad,m nafmnbde efkjeeffkhhkhkh wkeflwejflk ewrckfjlkmlmwef lkejflkwmf whdkjh whsdkjlhwl | | <ul style="list-style-type: none"> • As noted from our review of existing XX policies, a separate policy on interaction with government / public officials should be developed and implemented. Guidance to employees of the risks associated with interactions with public officials (particularly sovereign wealth fund representatives), including the risks associated with providing hospitality and entertainment, should also be developed. • In developing that policy and guidance, it may be advisable to seek further information from senior XX staff based in China and India to better understand the extent and nature of government relations and interactions with public officials in these high risk territories. |

Sample risk assessment

| Risk Area | I | Management and Control Observations | R | Recommendations |
|---|----------|--|----------|--|
| Investment business activities | | | | |
| <p>The power exercised by some of XX's investment professionals may give rise to a heightened risk of bribery and corruption. For example in the deal environment, XX employees could be bribed, for example, to negotiate a greater equity stake or lower purchase price.</p> | | <ul style="list-style-type: none"> Interview respondents consistently expressed the view that the risks of bribes being paid by a XX employee are low and that the risks of bribery and corruption are more likely to arise within the portfolio companies themselves. The risks of a bribe being accepted or even solicited by a XX employee are limited due to the remuneration structure and strong ethical culture within XX. All investment decisions are subject to internal review and approval processes and all aspects of remuneration in connection with such deals are subject to an internal partner review panel. | | <ul style="list-style-type: none"> None |
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Elements of a good practice anti-bribery risk management programme



実施規範としての贈収賄リスク管理プログラムの構成要素

司法省発表の 贈収賄
防止のための原則

リスクの査定

トップレベル
におけるコ
ミットメント

事前調査

1. 贈収賄リスクの査定
2. 経営トップレベルでのコミットメントおよび監督
3. 統治、監視およびネットワーク
4. 人事 – 実績奨励主義と懲罰制度
5. 調達および購入
6. ビジネス・パートナーのコンプライアンス
7. M&Aのプロセスの中にコンプライアンスを織り込む

司法省発表の 贈収賄
防止のための原則

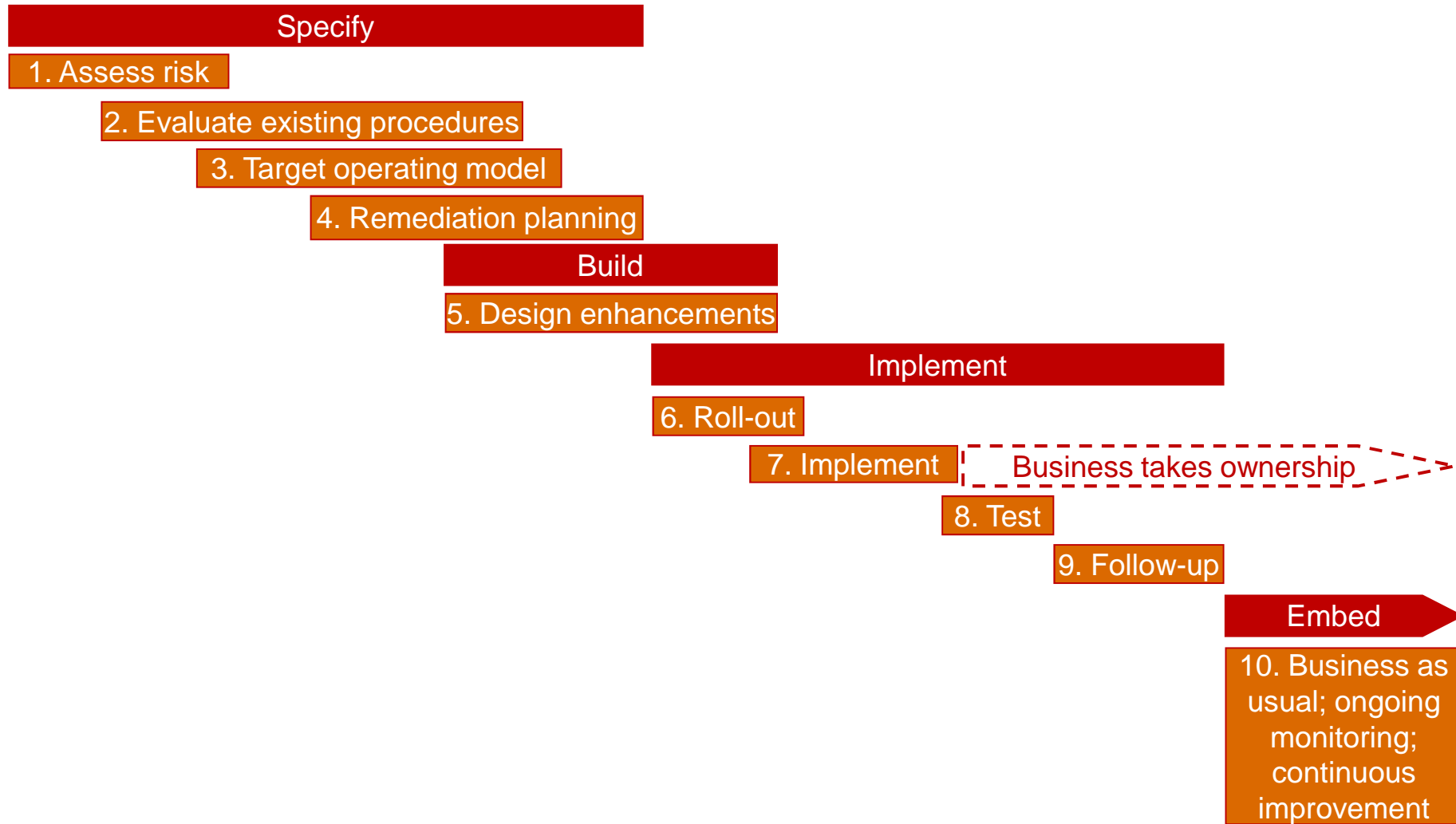
リスクの程度
に応じた適切
な手続き

コミュニケー
ション

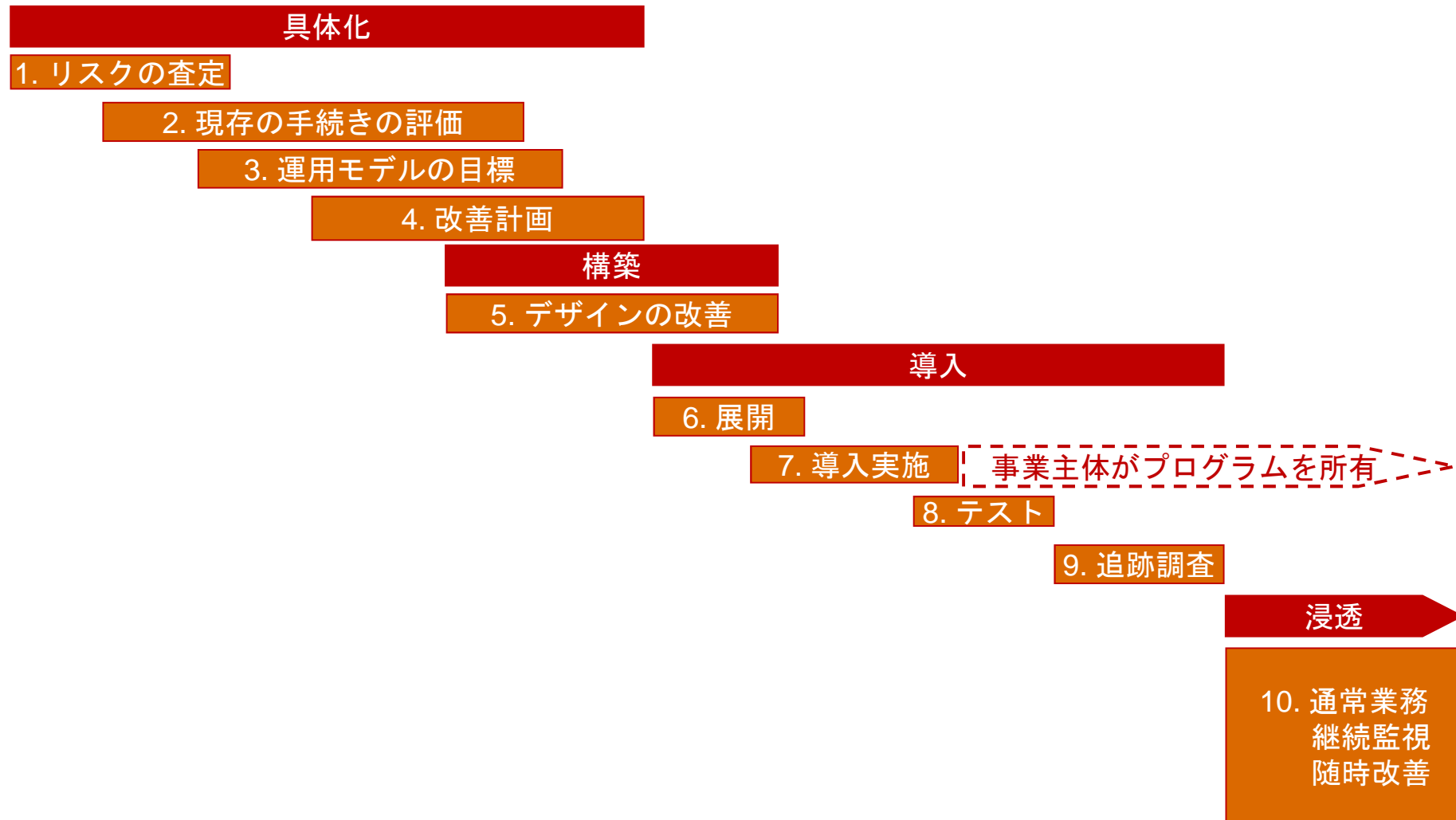
監視とその後
の見直し

8. 方針および手続き
9. 内部統制（事前防止と検知）
10. 贈答品、接待、経費
11. 研修、コミュニケーション
12. 協議および警鐘制度
13. 発覚した場合の対処と調査方法
14. モニタリング、報告、改善

A ten-step project plan



10段階のプロジェクト策定



Some key challenges

- Challenges:
 - Scope of risk assessment – how deep do you dive?
 - Overall objective – fit for purpose or best in class?
 - Governance – who owns bribery risk / other compliance risks?
 - Resource – what are the long term resource commitments?
 - Sustainability – how do you sustain momentum and balance with other compliance priorities?
 - Third party risk – what assurance do you need?
 - Evidence – of design and operating effectiveness?
 - **TIME!**

主な課題

- 課題
 - リスク査定の範囲 – どこで線引きをするか？
 - 全般的目標 – 単に目的を達成かまたは最高の？
 - ガバナンス – 誰が贈収賄リスク/他のコンプライアンス・リスクを負うか？
 - リソース – 長期的に必要とされるリソース 何か？
 - 持続可能性 – どのように推進力を維持し、他のコンプライアンス業務とのバランスをとるか？
 - 第三者を介在することによるリスク – どのような確証が必要か？
 - 検証 – 手続きの流れと運用効果？
 - 時間!

Q&A

Mark Anderson

金保仁

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