

# Anti-Bribery and Corruption Guidance

May 2014

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Practical guidance for the banking  
sector in complying with the  
Bribery Act 2010 and meeting  
FCA obligations

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# Foreword

UK anti-bribery legislation is the most comprehensive in the world, enhancing our reputation as one of the safest commercial environments in which to do business, so the British Bankers' Association (BBA) is delighted to be publishing this updated guidance which we hope will act as an invaluable tool for helping our banking sector members navigate this complex area. The following document sets out the key issues for the UK industry to consider when it comes to meeting legal and regulatory requirements for preventing bribery and corruption.



It is vital that we continue to collaborate and share our experiences as legislation is tested in both a practical and legal sense. However, the BBA is also conscious that the anti-bribery responsibilities of banks do not end with the UK Bribery Act. Understanding regulatory expectations has also become of paramount importance. As an industry body, we remain committed to supporting members in their efforts to comply with both obligations.

The BBA recognises that in order to ensure the UK's anti-bribery system is proportionate and effective, an on-going dialogue between the Government, regulators and the private sector will be essential. We will continue to proactively engage with the authorities on behalf of our members so that the views of the banking sector can inform future policymaking. I am grateful to the BBA Working Party on Anti-Bribery and Corruption, which has advised on the production of this updated document.

**Anthony Browne**  
**BBA Chief Executive**

# Introduction

The Bribery Act 2010 represents arguably the toughest legal regime against bribery anywhere in the world. Unlike the US Foreign Corrupt Practices Act of 1977 (as amended) the UK requirements cover both domestic and foreign bribery acts. There was good reason for bringing in the new Act, as previous UK law in this area was fragmented and complex and the UK had been criticised by the Organisation for Economic Cooperation and Development for failing to meet international standards.

The Act adds an accompanying layer to the existing regulatory and ethical compliance considerations faced by banks operating in the UK. Existing considerations include Financial Conduct Authority (FCA) regulation, competition law, health and safety rules and corporate social responsibility.

The Act replaces previous offences with two general offences, covering active and passive bribery and a specific offence relating to the bribery of foreign public officials (all of which are applicable to individuals and UK-registered companies). It also introduces a specific corporate offence of failing to prevent bribery from occurring. The specific corporate offence is designed to make banks and other businesses responsible for bribery committed on their behalf. The liability relates to failure to prevent active bribery or bribery of a foreign public official for or on behalf of a corporate body by, for example, its employees, agents or subsidiaries.

Companies can defend against the allegation that they failed to prevent bribery from happening by showing that 'adequate procedures' were in place. The Act does not define 'adequate procedures' but it does require the Secretary of State for Justice to publish 'guidance about commercial organisations preventing bribery', which he duly did in March 2011. The Ministry of Justice (MoJ) guidance sets out six principles (the 'Principles') and illustrates good practice examples rather than prescriptive standards.

Importantly, there is a clear message from the Government that its guidance is not intended to provide a safe harbour. Whether adequate procedures are in place or not will ultimately be a matter for the courts to determine based on the facts of a given case.

This BBA guidance is intended principally to advise the banking sector (and its legal advisors or representatives) about taking the necessary actions that are relevant and proportionate to their individual circumstances and risk profile to meet the legal and regulatory requirements arising from the Bribery Act 2010 and subsequent FCA guidance. The BBA guidance should not be regarded as law or as a substitute for either the MoJ or FCA guidance: it should be read in conjunction with the Act and other relevant guidance issued by government, the prosecutorial bodies and the Financial Conduct Authority.

In general the BBA guidance refers to the concept of 'bribery'. This reflects the legal requirements as defined in the UK Bribery Act 2010. Use of the words 'bribery and corruption' simultaneously reflect FCA regulatory obligations, which require banks to have in place adequate systems and controls to prevent both bribery and corruption. There is, however, no universal or comprehensive definition as to what constitutes corrupt behaviour. The FCA financial crime guide describes corruption as 'the abuse of public or private office to obtain an undue advantage'. In practice, the term corruption is best thought of as a shorthand reference for a larger range of activities that encompass bribery as an important subset.

The original 2011 BBA guidance was primarily intended to support banks in considering how to approach the establishment of adequate policies and procedures in relation to the UK Bribery Act 2010. It also cross-referred to banks' pre-existing obligations under the then FSA's rules and Principles. It did not, however, provide a detailed assessment as to these regulatory requirements, nor set out the requirements that banks face in relation to compliance with the 2007 Money Laundering Regulations. This revised guidance gives more

weighting to regulatory considerations and recognises the importance of recent FCA thematic reviews, enforcement actions and policy statements.

The implementation of the Bribery Act, and publication of the MoJ Adequate Procedures guidance, is merely the starting point. As legislation is tested, a clearer understanding of the precise requirements will become apparent. The BBA will therefore monitor the approach taken by the Courts – and indeed the FCA – in order to contribute to the continued sharing of good practice and experiences.

As a clearer picture of the regulatory and legal requirements emerges, the BBA will react accordingly. In the meantime, the BBA will continue to proactively engage with other relevant bodies, such as UK and foreign regulators, United Nations Office on Drugs and Crime, World Economic Forum, civil society and government in order to support members in the implementation of the wider responsibilities concerning anti-bribery and corruption. For the remainder of 2014 the BBA has an active work programme in the field of anti-bribery and corruption. More information may be obtained from Justine Walker, Director Financial Crime (Sanctions and Bribery) – [justine.walker@bba.org.uk](mailto:justine.walker@bba.org.uk).

**BBA**

**April 2014**

# Chapter 1: The Bribery Act – an overview

## 1.1 Introduction

1.1.1 The UK Bribery Act reforms the criminal law to provide a new, modern and comprehensive scheme of bribery offences that will enable courts and prosecutors in the UK to respond more effectively to bribery at home and overseas.

1.1.2 This overview is only a summary of the provisions of the Act – it is not a substitute for reading and considering the Act itself. This overview discusses:

- the bribery offences
- bribery of foreign public officials
- the failure of commercial organisations to prevent bribery
- the meaning of ‘associated persons’
- consent and connivance of senior officers
- liability of parent companies
- penalties
- debarment risk
- jurisdiction
- facilitation payments.

## 1.2 The bribery offences

1.2.1 The Bribery Act establishes four key offences:

- Bribing another person** (section 1) – it is an offence to offer, promise or give a financial or other advantage to induce another person where (1) the briber intends the advantage to bring about an *improper performance* by another person of a *relevant function or activity*, or to reward improper performance of such a function or (2) the briber knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the *improper performance* of a *relevant function or activity*. The offence is not committed if it is permitted (or required) by the applicable written law. The advantage can be offered, promised or given by the briber directly or through someone else.
- Being bribed** (section 2) – It is an offence to request, agree to receive or accept a financial or other advantage with the intention that, as a consequence, a *relevant function or activity* should be *performed improperly*. It does not matter if the bribe is received directly or through someone else. It is immaterial whether or not the recipient – or the person acting as a conduit to receive the bribe – knows or believes the performance of the function or activity is improper. The offence is not committed if it is permitted (or required) by the applicable written law.

- iii. **Bribing a foreign public official** (section 3) – It is an offence if a person offers, promises or gives any advantage to a foreign public official (FPO) with the requisite intention to influence the FPO in his or her official capacity and to obtain or retain business or an advantage in the conduct of business. An offence is not committed where the FPO is permitted or required by the applicable written law to be influenced by the advantage.
- iv. **Failure of a relevant commercial organisation to prevent bribery** (section 7) – It is a strict liability offence if a commercial organisation fails to prevent someone associated with it from bribing another person with the intention to obtain or retain business or an advantage in the conduct of business for the organisation. The commercial organisation will only have a full defence to this offence if it can show that, despite a particular case of bribery, it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.

*Relevant function or activity to which the bribe relates (Section 3)*

1.2.2 The types of function or activity that can be improperly performed for the purposes of Sections 1 and 2 offences include:

- all functions of a public nature
- all activities connected with a business, trade or profession
- all activities performed either in the course of employment or on behalf of any body of persons.

This means that bribery in both the public and private sectors are covered.

*Improper performance to which a bribe relates (Section 4)*

1.2.3 Not every defective performance of one of these functions for reward or in the hope of advantage engages the law of bribery. The Bribery Act makes it clear that the function is only relevant if the person carrying out the function:

- is expected to perform it in good faith (Condition A) [Section 3(3)], or
- is expected to perform it impartially (Condition B) [Section 3(4)], or
- is in a position of trust by virtue of performing the function (Condition C) [Section 3(5)].

The functions or activities in question may be carried out either in the UK or abroad, and need have no connection with the UK.

*Expectation test (Section 5)*

1.2.4 An improper performance can be defined as one that breaches a relevant expectation, as mentioned in Condition A, B or C referred to above. An omission can in some circumstances amount to improper 'performance'. In cases where a person is no longer engaged in a given function or activity but still carries out acts related to his or her former function or activity, these are to be treated as done in performance of the function or activity in question.

1.2.5 When deciding what is expected of a person performing a relevant function or activity for the purposes of Sections 3 and 4, the test is what a reasonable person in the UK would expect of a

person performing the relevant function or activity. This test is referred to as the 'Expectation Test'.

1.2.6 When deciding what a reasonable person in the UK would expect where the performance of a function or activity is not subject to UK laws, local practice and custom must not be taken into account unless such practice or custom is permitted or required by written law.

1.2.7 Section 5 (3) of the Bribery Act defines what is meant by 'written law':

- any written constitution, or provision made by or under legislation, applicable to the country or territory concerned; or
- any judicial decision that is so applicable and is evidenced in published written sources.

### 1.3 Bribery of foreign public officials (Section 6)

1.3.1 Unlike the general bribery offences in Sections 1 and 2 of the Bribery Act, the offence of bribing a foreign public official (FPO) only covers the offering, promising and giving of bribes and not the acceptance of them.

1.3.2 The person giving the bribe must intend to influence the FPO in the performance of his or her functions as a public official, and must intend to obtain or retain business or a business advantage. However, unlike the general bribery offences in Sections 1 and 2, there is no requirement to show that there has been 'improper performance'.

1.3.3 Foreign public officials are defined in *subsection (5)* as both government officials and those working for international organisations.

### 1.4 Failure of commercial organisations to prevent bribery (Section 7)

1.4.1 A 'relevant commercial organisation' for the purposes of the Bribery Act is defined as:

- a body incorporated under the law of any part of the UK and that carries on a business whether there or elsewhere; or
- a partnership that is formed under the law of any part of the UK and that carries on a business there or elsewhere; or
- any other body corporate or partnership wherever incorporated or formed that carries on a business, or part of a business, in any part of the UK.

1.4.2 'Business' includes a trade or profession and what is done in the course of a trade or profession. No definition is provided under the Act of 'carrying on a business, or part of a business' in the UK. However, foreign banks with UK operations (for example a UK branch) will need to consider their potential exposure to the Bribery Act in this regard.

1.4.3 'Bribery' in the context of this offence relates only to the offering, promising or giving of a bribe by an 'associated person' contrary to sections 1 and 6. There is no corresponding offence of failure to prevent the taking of bribes (the offence under section 2).

1.4.4 There is no need for the prosecution to show that the associated person who committed the bribery offence has already been successfully prosecuted. The prosecution must, however, show that the person would be guilty of the offence if that person was prosecuted under the Bribery Act.

- 1.4.5 There is no need for the associated person to have a close connection to the UK as defined in Section 12. As long as the organisation falls within the definition of 'relevant commercial organisation' that should provide courts in the UK with jurisdiction.
- 1.4.6 For this offence it is immaterial where the conduct took place.
- 1.4.7 Commercial organisations can only offer a defence by showing they had adequate procedures in place to prevent persons associated with them from committing bribery offences. Although not explicit in the Bribery Act, in accordance with established case law, the standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities. Whether the procedures are adequate is ultimately for courts to decide on a case by case basis.

## 1.5 Important considerations for companies

### *Consent and connivance of senior officers (Section 14)*

- 1.5.1 Senior officers who consent or connive to commit bribery commit the same offence (i.e. there is no separate 'consent' and 'connivance' offence). This is in contrast to Sections 1, 2 or 6 offences committed by a body corporate (of any kind) or by a Scottish partnership. However, this distinction does not apply to the offence in Section 7.
- 1.5.2 The first step in proving the offence is to ascertain that the body corporate or Scottish partnership has been guilty of an offence under Sections 1, 2 or 6 of the Bribery Act.
- 1.5.3 If an offence has been committed, Section 14 provides that a senior officer (or a person purporting to act in that capacity) of the organisation is guilty of the same offence if: (1) he or she has consented to or connived in the commission of that offence and (2) he or she has a close connection to the UK as defined in Section 12(4).
- 1.5.4 'Director', in relation to a body corporate, the affairs of which are managed by its members, means a member of the body corporate. 'Senior officer' means:
  - a director, manager, secretary or other similar officer of a body corporate
  - in relation to a Scottish partnership, a partner in the partnership.

## 1.6 Liability of parent companies

- 1.6.1 The MoJ guidance makes it clear that it is ultimately a matter for the court to decide, bearing in mind the particular facts of a case, whether a parent organisation will be liable for offences committed by a subsidiary or joint venture.
- 1.6.2 The Bribery Act offence of failing to prevent bribery extends to failing to prevent bribery by those persons performing services for and on behalf of the organisation (associated persons), which potentially includes an 'employee, agent or subsidiary'. The MoJ guidance states that the liability of a parent organisation will depend on the final analysis of the facts of each case and will include matters such as: (1) the level of control over the activities of the associated persons; and (2) proof of the specific intention of the employee or agent to obtain or retain business or business advantage for the parent company or its subsidiaries.
- 1.6.3 According to the report prepared on 28 July 2009 by the Joint Committee of the House of Lords and the House of Commons on the Draft Bribery Bill, an official at the Ministry of Justice has stated, 'All the circumstances would need to be considered to determine whether a subsidiary was acting on behalf of its parent, but that ownership alone would not be viewed as sufficient to

mean that a subsidiary was performing services within the meaning within clause 5(1) [as it then was].’

## 1.7 Penalties

### *Individuals:*

- 1.7.1 Any offence under Sections 1, 2 or 6 is punishable by a fine and/or imprisonment for up to 10 years (12 months on summary conviction in England and Wales or Scotland or 6 months in Northern Ireland).
- 1.7.2 The fine may be up to the statutory maximum (currently £5,000 in England and Wales or Northern Ireland, £10,000 in Scotland) if the conviction is summary, and unlimited if it is on indictment.

### *Companies/Partnerships:*

- 1.7.3 An offence committed by a person other than an individual is punishable by a fine.
- 1.7.4 The fine may be up to the statutory maximum (currently £5,000 in England and Wales or Northern Ireland, £10,000 in Scotland) if the conviction is summary, and unlimited if it is on indictment.
- 1.7.5 The Section 7 offence can only be tried upon indictment.

## 1.8 Debarment risk

- 1.8.1 It is also important to remember that a conviction for bribery offences can have collateral consequences such as asset confiscation under the Proceeds of Crime Act 2002, director disqualifications, EU procurement bans and exclusion from projects funded by the World Bank and its cross-debarment partner development banks.
- 1.8.2 The Government has, however, decided that a conviction under Section 7 of the Act for a failure to prevent bribery will attract discretionary rather than mandatory exclusion from public procurement under the UK’s implementation of the EU procurement directive (directive 2004/18).

## 1.9 Jurisdiction

- 1.9.1 The Bribery Act creates a wide jurisdiction for the UK courts over individuals and corporates, even if they are foreign nationals or are incorporated outside the UK.
- 1.9.2 The relevant functions or activities in question may be carried out either in the UK or abroad, and need have no connection with the UK. This preserves the effect of Section 108(1) and (2) of the Anti-terrorism, Crime and Security Act 2001 (which is repealed by the Bribery Act).
- 1.9.3 The offences in Sections 1, 2 or 6 are committed in any part of the UK if any part of the conduct element takes place in that part of the UK.
- 1.9.4 The effect of the above provisions is that, even if all the actions in question take place overseas, they still constitute an offence under the Bribery Act if the person performing them is a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

1.9.5 When prosecuting an individual who has consented or connived in the commission of one of the general bribery offences, Section 12(4) of the Bribery Act makes it clear that for a 'senior officer' to be guilty he or she must have a 'close connection' to the UK:

'A person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made:

- i. a British citizen
- ii. a British overseas territories citizen
- iii. a British National (Overseas)
- iv. a British Overseas citizen
- v. a person who under the British Nationality Act 1981 was a British subject
- vi. a British protected person within the meaning of that Act
- vii. an individual ordinarily resident in the United Kingdom
- viii. a body incorporated under the law of any part of the United Kingdom
- ix. a Scottish partnership.'

## 1.10 Facilitation payments

1.10.1 As was the case under the old law, the Bribery Act does not make an exemption for facilitation or 'grease payments' within the Bribery Act. This is the practice of paying a small sum of money to a public official (or other person) as a way of ensuring that they perform their duty, either more promptly or at all.

1.10.2 The position is different in the United States and several other OECD member states where anti-corruption legislation includes a specific exception or defence for small facilitation payments in certain circumstances.

## 1.11 The Bribery Act in Practice

1.11.1 At the time of writing there have been three successful prosecutions under the Bribery Act, which have either involved the offering of or the acceptance of a bribe. The cases have made it apparent that Prosecutors will not be deterred from prosecuting small value bribes as the sums involved ranged from £300 to £5,000.

1.11.2 In August 2013 the Serious Fraud Office brought its first charges against individuals accused of violating the Bribery Act. Authorities have also implied that further Bribery Act investigations are underway and may lead to prosecutions in due course.

# Chapter 2: The Ministry of Justice's six Principles

## 2.1 Introduction

2.1.1 On 30 March 2011 the Secretary of State for Justice published 'The Bribery Act 2010 – Guidance' (MoJ guidance) with the intention of helping commercial organisations understand what sort of procedures they can put in place to prevent persons associated with them from bribing or being bribed.

## 2.2 The six Principles

2.2.1 The Ministry of Justice ('MoJ') has identified six key principles (the 'Principles') for bribery prevention and considers that organisations wishing to prevent bribery being committed on their behalf should be informed by these Principles. They are described as outcome-focused and flexible to allow each organisation to tailor its policies and procedures so they are proportionate to the nature, scale and complexity of the organisation and its activities.

2.2.2 The six Principles are:

- Principle 1 - proportionate procedures
- Principle 2 - top-level commitment
- Principle 3 - risk assessment
- Principle 4 - due diligence
- Principle 5 - communication and training
- Principle 6 - monitoring and review.

2.2.3 All six Principles are cornerstones of a successful anti-bribery framework. Each one should be considered by organisations to determine and implement the most suitable anti-bribery governance and culture framework.

## 2.3 Adequate policies and procedures

2.3.1 The MoJ guidance explains the policy behind the Section 7 corporate offence as 'not to bring the full force of criminal law to bear upon well-run commercial organisations that experience an isolated incident of bribery on their behalf.'

2.3.2 The guidance explicitly recognises that 'no bribery prevention programme will be capable of preventing bribery at all times.' Inclusion of the adequate procedures defence is intended to 'encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.' In addition the guidance identifies bribery prevention procedures as of significant interest both to the investigating authorities and to any organisation wishing to self-report as well as willingness to cooperate and to a make a full disclosure. Consideration of other sources, including prosecution guidance and case law (when available) will therefore be relevant to any assessment of the adequacy of policies and procedures.

## 2.4 Adequate procedures: firms should reflect MoJ's six Principles

- 2.4.1 The Bribery Act incorporates no definition of adequate systems that prevent bribery and the MoJ guidance in this area accepts that there is no single 'one size fits all' solution. It sets out that there will be a considerable variation in how the standard is applied depending on the size, nature and risk profile of the business concerned and the risks it faces.
- 2.4.2 Bribery prevention procedures adopted must be proportionate to and focused on the risks that a business faces (including those arising from its associates), as identified through its risk assessment procedures. In addition to these considerations, the organisational structure will determine the approach taken to the implementation of procedures and their level of sophistication. As a general rule, exclusively domestic operations are likely present a lower risk. What constitutes 'adequate procedures' will therefore be unique to each business.

## 2.5 The meaning of 'adequate'

- 2.5.1 Neither the Bribery Act nor the MoJ guidance offers any definition of the term 'adequate', and it is not clear whether it is a higher standard than 'reasonable', which is legally considered an objective test. It reflects wording in the former FSA Handbook.
- 2.5.2 The concept of a proportionate 'risk-based' approach appears to be central to an evaluation of whether the standard has been achieved. Relevant considerations will include the business sector involved, the geographical location and the scope of the relationship with external counterparties, the nature of that relationship, the strength of budgetary and fiscal controls and cultural norms, among other factors.
- 2.5.3 The MoJ guidance recognises that the anti-bribery procedures already in place may meet the necessary standard depending on the level of risk identified by the risk assessment. The box on p. 16 gives some examples of how the 'adequate' standard can be reached.

## 2.6 Proportionate procedures

- 2.6.1 A commercial organisation's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They should also be clear, practicable, accessible, effectively implemented and enforced.
- 2.6.2 Principle 1 covers both policies and implementation procedures (both are required for an effective bribery prevention programme). The requirement for proportionality in procedures means that a risk assessment is an essential prerequisite, informed by the size of the business, its structure, the scope and nature of its activities and its associated persons. Where no risk is identified procedures may not need to be enhanced but otherwise prevention procedures may be specifically developed or integrated into existing arrangements. The extent to which new arrangements will be required for associated persons will need to be determined by adopting a risk-based approach.
- 2.6.3 Policies for any organisation are likely to reflect at a minimum the following three elements:
- commitment to bribery prevention
  - approach to risk mitigation

- strategy for implementation.

The procedures will need to reflect the risks of the organisation (and associated persons), its business and those presented by external factors. The associated persons of a business will also need to be taken into consideration.

2.6.4 Any implementation programme will need to consider procedures in certain key areas such as:

- involvement of senior management
- risk assessment
- policy, procedures and internal governance
- communication and training
- implementation approach
- decision making including delegation of authority, separation of function and conflicts of interest
- financial controls
- due diligence for existing and prospective associated persons
- contracts and governance of business relationships
- gifts, hospitality, promotional expenditure and charitable and political donations
- employment
- disclosures and transparency
- reporting and whistle-blowing
- enforcement and sanctions
- monitoring and review, including management information.

## 2.7 Initial evaluation and implementation of adequate controls

2.7.1 In order to determine the adequacy of existing systems and controls and whether they will meet the relevant standards, it may be necessary to undertake some or all of the following:

- an audit or 'deep dive review' of the business to determine the scope and risk profile of the business in question, internal and external relationships, existing controls, etc.
- a risk assessment of the business (updated periodically) to identify high-risk areas (by reference to likelihood, impact and frequency)
- a gap analysis of the current standard of procedures, systems and controls against current corporate policy (incorporating ethical standards, zero tolerance, organisational risk appetite and transparency standards and governance arrangements and senior management responsibility)
- a root cause analysis in relation to past incidents and near misses (if known)

- enhancement of existing controls to meet requisite standards including post-implementation governance (Anti-Bribery Officer and Committee, Terms of Reference and management information)
- post-implementation stress testing and monitoring, including incident (and near-miss) analysis
- a staff training needs assessment
- an incident management policy and related training of senior management.

**2.7.2** Although the legal changes arising from the Bribery Act are new, the approach outlined above should be familiar to those with responsibility in the financial crime risk arena. Many good practices in the compliance, human resources, anti-money laundering and operational risk areas have equal relevance here.

## Box 1 - Meeting the standard

It is not possible to be entirely prescriptive regarding the characteristics of systems and controls that meet the requisite 'adequate' standard, but they may include some or all of the following:

- the active and ongoing sponsorship by senior managers
- adequate resourcing of anti-bribery work
- standardisation and consistency across the entire business
- risk assessment procedures and bribery prevention policies for different project or business areas
- budgetary, authorisation and audit controls in relation to all financial transactions, with a review of such requirements on a periodic basis and regular 'stress testing', including a procedure to govern the response to changes in both the internal and external environment
- a new business approvals process that incorporates anti-bribery and corruption considerations
- a clear, consistent and practical gifts and corporate hospitality controls system
- controls and processes for the authorisation and tracking of non-'business as usual', gratuitous or 'non-core business' payments such as sponsorships, corporate hospitality and expenses, and charitable and political donations
- due diligence on associated persons and controls over outsourcing with standard procurement and tendering processes
- governance over associates' relationships including pre- and post-contractual agreements
- enforcement and incident management policies and procedures
- whistle-blowing policies and procedures
- enhanced controls where 'cross border' activity is undertaken, with particular consideration to the risks arising from facilitation payments
- staff code of conduct and incorporation of standards into employment terms and remuneration policies that embed a zero tolerance policy
- staff training for all employees within an organisation, with enhanced training provided for those staff who have been assessed as holding higher-risk positions
- recruitment processes that screen staff based on a risk assessment of the role in question
- communication of policies and procedures
- monitoring, review and evaluation.

# Chapter 3: Regulatory obligations and other anti-corruption laws: a comparison with the Bribery Act

## 3.1 Financial Conduct Authority obligations – how does the Bribery Act compare?

- 3.1.1 It is important to note that FCA authorised firms are under a separate, regulatory obligation to identify and assess bribery and corruption risks and put in place and maintain policies and processes to mitigate such risks. In practice, where these obligations are implemented effectively, banks are likely to have a higher degree of readiness in their response to the Bribery Act than other sectors.
- 3.1.2 The obligations of the FCA's rules and Principles in relation to the Bribery Act are not identical to the Ministry of Justice's Guidance; banks will need to bear this in mind when reviewing the adequacy of their anti-bribery policies and procedures. The FCA focus is wider than the Bribery Act's scope and will cover behaviour falling within the definition of 'financial crime' referred to in SYSC 3.2.6R and SYSC 6.1.1R. The FCA Handbook of rules and guidance contains high level standards that apply, with some exceptions, to all FCA-regulated firms, (for example, the FCA Principles for Businesses, COND and SYSC) and to all approved persons (for example, the Statements of Principle and Code of Practice for Approved Persons). SYSC sets out particular rules relating to senior management responsibilities, and for systems and controls processes.

In 2010 the FSA stated that the risk of bribery and corruption is relevant to two of its statutory objectives:

- the reduction of the extent to which it is possible for regulated firms to be used for a purpose connected with financial crime, which includes corruption
- market confidence – because bribery and corruption distort natural competition and could affect the UK's reputation, making it a less attractive place for firms to conduct business.<sup>1</sup>

Although the FCA does not have the same statutory objectives as its predecessor the principles still apply via its overarching strategic objective of ensuring the relevant markets function well. To support this it has three operational objectives: to secure an appropriate degree of protection for consumers; to protect and enhance the integrity of the UK financial system; and to promote effective competition in the interests of consumers. The FCA states that its regulatory powers apply where firms fail to adequately address bribery and corruption risk, including, but not limited to, where these risks arise in relation to third parties acting on behalf of the firm.

- 3.1.3 Banks need to be mindful that the FCA can take regulatory action against an entity – and/or relevant persons performing controlled functions – for failing to adequately address the risk of corruption or bribery (i.e. it has, or had, inadequate systems and controls). Authorised FCA firms have regulatory obligations to put in place and maintain policies and processes to prevent

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<sup>1</sup> Financial Services Authority *Anti-bribery and corruption in commercial insurance broking: Reducing the risk of illicit payment or inducements to third parties*. Page 6, May 2010 [http://www.fsa.gov.uk/pubs/anti\\_bribery.pdf](http://www.fsa.gov.uk/pubs/anti_bribery.pdf)

corruption and bribery and to conduct their business with integrity. These are set out in SYSC 3.2.6R/SYSC 6.1.1R and Principle 1 of our Principles for Businesses (PRIN 2.1.1R). This includes corrupt transactions by anyone acting on the bank's behalf irrespective of where they are based. In relation to activities that might have a negative effect on confidence in the UK financial system, the fitness and propriety of the firm or its ability to meet financial resource requirements, SYSC 6.1.1 R and PRIN 1, 2 and 3 apply in relation to activities wherever they are carried on.

- 3.1.4 Unlike the Bribery Act, the FCA does not need to find evidence of corruption or bribery to take action. This is most clearly demonstrated by the July 2011 regulatory action of its predecessor, the FSA, against a firm regarding breaches of Principle 3 of Principles for Businesses and Rule SYSC 3.2.6R of Senior Management Arrangements, Systems and Controls Handbook. In this particular case, the firm had put in place anti-bribery and corruption systems and controls but was considered by the FSA to have failed to implement them effectively. The final notice statement clearly states 'the FSA did not seek to determine as part of its investigation whether any of this business was corrupt.' A similar 2013 FCA penalty was imposed in respect of breaches of Principle 3 of the Authority's Principles for Businesses. In this case the FCA found no evidence to suggest that the firm has permitted any illicit payment or inducement.

## 3.2 FCA Expectations

- 3.2.1 Over recent years the FCA, and its predecessor, the FSA, has given enhanced prominence to the need for banks to have effective anti-bribery and corruption controls in place. The FCA has indicated that they expect firms to assess the risks of becoming involved in, or facilitating, corruption and bribery. Reasonable steps have been articulated by the FCA, to include an anti-corruption policy, senior management oversight, staff training and, where applicable, due diligence on third parties acting on behalf of the firm. The FCA's 'Financial Crime: a guide for firms' has a chapter on bribery and corruption, and sets out a series of self-assessment questions plus good and poor practice examples to which firms should refer.
- 3.2.2 Banks need also to take account of relevant findings contained within the FCA's thematic reviews which are generally applicable to all FCA regulated firms, regardless of the industry or sector specific focus. For example, in addition to the 2010 review of commercial insurance broking, the FSA published a review of the anti-bribery systems and controls of 15 investment banks in March 2012 and another of 22 asset management firms in October 2013. Whilst identifying a range of good practice the regulator also highlighted a number of internal control deficiencies. The most common areas related to inadequate risk assessment; insufficient management information, insufficient or absent internal audit reviews; inadequate procedures for dealing with third parties used to win or retain business; and, an absence of controls over cumulative gifts, hospitality and expenses.
- 3.2.3 In December 2013, FCA's director of enforcement and financial crime Tracey McDermott said in the context of risk managing overseas payments: "*Bribery and corruption from overseas payments is an issue we expect all firms to do everything they can to tackle. Firms cannot be complacent about their controls – when we take enforcement action we expect the industry to sit up and take notice.*"

### 3.3 US Foreign Corrupt Practices Act (FCPA) and Global Legislation

- 3.3.1 Although not the primary focus of this guidance, other laws will also impact on how banks design their control environment. Enforcement of the US FCPA of 1977 (as amended) has been regarded by many companies as setting the benchmark standard for anti-corruption law around the world. In November 2012, the US Department for Justice and US Securities and Exchange Commission issued revised guidance on complying with the FCPA.<sup>2</sup>
- 3.3.2 US enforcement has increased dramatically over past years and there have been notable actions against both US and non-US individuals and companies. Whereas the FCPA is the best known enforcement tool other US domestic provisions, such as the Travel Act, have also been utilised.
- 3.3.3 Although the Bribery Act is similar in many respects to the existing anti-bribery provisions in the US, in several respects it is considered to be broader and more robust than the FCPA. There are some significant differences. In particular:
- i. No public/private sector distinction – The Bribery Act covers commercial/private bribery and bribery of UK and non-UK public officials whereas the FCPA only applies to bribery of foreign public officials outside the US.
  - ii. Bribe recipient is liable – Unlike the FCPA the Bribery Act makes it an offence to receive a bribe. The FCPA only covers offering, giving or promising a bribe.
  - iii. No ‘corrupt’ element required for liability – Under the Bribery Act evidence of ‘improper performance’ is required for Sections 1 and 2 offences and evidence of ‘intent to influence’ is required under Section 6. There is no requirement for the prosecution to show corrupt or dishonest intent under the Bribery Act, unlike the FCPA.
  - iv. Strict liability for failure to prevent bribery – The FCPA does not have a comparable offence to the strict liability offence contained in the Bribery Act for ‘commercial organisations’ that fail to prevent bribery by a person associated with the organisation.
  - v. Adequate procedures defence – Compliance programmes are not a full defence to FCPA liability but may be taken into account when considering whether to prosecute.
  - vi. No exception for ‘facilitation payments’ – The Bribery Act does not have an exemption for facilitation payments whereas the FCPA permits payments to facilitate routine governmental action by a foreign official in certain circumstances.
  - vii. No express affirmative evidence for reasonable and bona fide business expense or lawful payments – The FCPA contains a defence that payments representing reasonable and bona fide expenditure directly related to the promotion, demonstration or explanation of products or services or the execution of contracts with a foreign government or its agencies are not regarded as bribery. The Bribery Act does not.
- 3.3.4 Depending on geographical scope banks should also consider how the anti-bribery and corruption legislation of other jurisdictions, beyond the US, may be pertinent to their activities. It is worth noting there has been a significant change and strengthening of the global anti-corruption legislative landscape over recent years. An increasing number of countries have

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<sup>2</sup> A Resource Guide to the Foreign and Corrupt Practices Act, November 2012, <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>

signed up to international conventions, such as the OECD Convention and United Nations Convention against Corruption, which in practice have led to enhanced domestic provisions.<sup>3</sup> Of further relevance is the number of countries which have introduced extra-territorial elements to their anti-corruption legislation.

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<sup>3</sup> There are a number of useful resource on global legislative developments, for example the [CMS 2013 Guide to Anti-Bribery and Corruption Laws](#)

# Chapter 4: Top Level Commitment and Governance

## 4.1 Top level commitment

- 4.1.1 In order to address the risks of breaching the Bribery Act or failing to meet FCA requirements a robust governance structure must be in place. The specific type of governance will depend on the type of organisation, its current structure and the type of bribery risks it faces. Any governance structure will also need to reflect the existing reporting lines and operating structures.
- 4.1.2 An important element of any anti-bribery and corruption programme is to ensure that the organisation and its staff operate in an environment that helps them to comply with anti-bribery legislation and regulatory expectations. This relates as much to behaviours and corporate culture as to written policies and procedures. Top-level commitment is therefore essential.
- 4.1.3 A key indication of top level commitment is the quantity and quality of dedicated resources committed to anti-bribery work.
- 4.1.4 The 'MoJ' defines 'top-level commitment' as:

'The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.'
- 4.1.5 The Bribery Act places a heavy focus on 'tone from the top', whereas the FCA has extended this concept to further down the organisation. In July 2013, the FCA's chairman stressed that 'tone from the top' will in itself be insufficient for improving ethical and behaviour standards, and instead the FCA will increasingly be looking towards 'tone in the middle' as a way of translating tone into observable, on the ground, actions.<sup>4</sup>
- 4.1.6 Whilst recognising that each organisation will need to adopt an approach that is appropriate to the size and risks of that organisation, the MoJ guidance states that the leadership procedures that may be effective include 'communication of the organisation's anti-bribery stance' and 'an appropriate degree of involvement in developing bribery prevention procedures'.

## 4.2 Corporate culture

- 4.2.1 The Board or equivalent should be fully engaged in managing the risk of bribery within the organisation. An integral element of this is to set out 'the tone from the top'. This should be done in writing and should set clear behavioural expectations and standards and include commitments to carrying out business fairly, honestly and openly. The tone should be clearly articulated and communicated throughout the organisation. As articulated by the World Economic Forum in the context of their partnership against corruption programme "*Taking a*

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<sup>4</sup> FCA chairman, John Griffith-Jones speaking at the annual meeting of the Chartered Institute for Securities and Investment, 3<sup>rd</sup> July 2013

*leadership role is not only a matter of ensuring organizational compliance. It is a strategic imperative for every CEO".*<sup>5</sup>

- 4.2.2 The Board should consider whether a top-level statement setting out the organisation's stance on bribery should be made public and communicated.
- 4.2.3 The Board should set a zero tolerance approach to bribery and clearly communicate the consequences of breaching the organisations Code, policies and procedures for employees, management and anyone else acting on the firm's behalf.
- 4.2.4 The zero tolerance approach should be consistently applied and communicated (e.g. a consistent application of disciplinary procedures for staff at all levels, internal publication of cases to embed lessons learned and public recognition of instances when bribery is successfully countered).

### 4.3 Governance structure

- 4.3.1 An organization should have clear accountability for the management of bribery risk within it. In practice to support the 'tone from the top' banks will need to consider how best to deploy their existing oversight structures, including committees and audit functions, so as to drive forward their anti-bribery programmes via appropriate, regular review.
- 4.3.2 A clearly defined governance structure should consider incorporating the following:
  - a code of ethics and a code of conduct
  - a risk assessment – for the organisation as a whole, its businesses, the jurisdictions in which it operates and the types of its associated persons (see Chapter 5 on Risk Assessment)
  - resourcing levels appropriate to the organisation's risk appetite
  - appropriate policies and procedures
  - recognition that management of bribery risks should be embedded in all activities of the business
  - the interaction of different support functions and how they are coordinated
  - an analysis of how the group should interact with UK and overseas businesses and how much autonomy is devolved
  - suspicious activity reporting, as bribery can give rise to money laundering
  - a system that encourages the transparency of transactions and interactions such as charitable and political donations, gifts and hospitality, sponsorship
  - a system for how incidents and risks are escalated, recorded, investigated, reported and managed

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<sup>5</sup> <http://www.weforum.org/issues/partnering-against-corruption-initiative#Anti-corruption>

- training, including targeted training where individuals are involved in sponsorship, event management, charitable giving, cross border activity, engaging with Public Officials, offering employment opportunities and other high risk activities
- speaking up/whistle-blowing
- review processes, including assurance, audit and management information.

## 4.4 Responsibilities of the Board

- 4.4.1 The Board is ultimately responsible for fostering an anti-bribery culture within an organisation and setting the prime example in terms of integrity, stewardship and establishing and embedding a zero tolerance culture to bribery.
- 4.4.2 The Board may wish to issue a statement of commitment or strategy to the countering of bribery within the organisation, if this is not categorically included within a policy.
- 4.4.3 Such a statement should clearly define and communicate the Board's zero tolerance to bribery; the culture and attitude; the penalties and disciplinary processes in place for non-compliance and the support mechanisms that the organisation will provide in order to achieve these objectives.
- 4.4.4 Consideration should be given to making these policies, statements and training resources available to business partners where applicable.
- 4.4.5 The responsibilities of all staff from senior management (including non-executive directors [NEDs]), to general staff and associated persons should be clearly explained and communicated.
- 4.4.6 In considering board anti-bribery and corruption responsibilities banks will need to keep abreast of related developments. For example, the Parliamentary Commission on Banking Standards made several recommendations on whistleblowing and the FCA has indicated its support to the principles and intends to consult on these during 2014. This includes a recommendation that a non-executive board member should be given specific responsibility under the Senior Managers Regime for the effective operation of the firm's whistleblowing regime. The Board member responsible for the institution's whistleblowing procedures should be held personally accountable for protecting whistleblowers against detrimental treatment.

## Box 2 – Practical examples of driving tone from the top

### 1. Have champions

In practice, the appointment of one person or putting reliance solely on the board may not be the most efficient way to drive tone from the top. This is particularly true for larger global institutions. To overcome these hurdles some banks have introduced business line champions, for example Nominated Senior Managers who are responsible for anti-bribery work in their business. Champions could be:

- individuals who are sponsored by Board members or Managing Directors
- individuals with sufficient seniority to carry out the role
- individuals formally nominated or appointed to the role.

### 2. Public messaging

Public online statements of anti-bribery principles could include:

- a commitment to adhere to relevant anti-bribery laws and regulation
- details of specific prohibitions relating to the Bank
- details of internal activities relating to interactions with public officials, sponsorship, political and charitable donations
- policy towards offering and accepting gifts and hospitality
- expectations of third parties.

### 3. Governance – equipping senior management

Consideration will need to be given to how senior management can be supported to fulfil their role, this may include:

- senior management face-to-face training
- documented roles and responsibilities of senior management
- board members and senior staff openly discussing the consequences of not taking appropriate action, using forums such as: annual conferences, training events, listening events i.e. breakfast meetings and listening lunches
- Induction sessions.

# Chapter 5: Risk Assessment

## 5.1 Risk Assessment

- 5.1.1 An understanding of the bribery risks that an organisation faces is the foundation of effective efforts to prevent bribery and will inform the development, implementation and maintenance of effective anti-bribery policies and procedures. This is particularly pertinent to both the implementation of adequate procedures to comply with the Bribery Act and ensuring adequate systems and controls to prevent bribery and corruption are in place and in line with FCA requirements.
- 5.1.2 The MoJ guidance defines Principle 3, risk assessment, as: 'The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented'. The FCA sets out similar expectations within their financial crime guide. A notable difference relates to scope, whereby the FCA will expect a risk assessment to cover all forms of bribery and corrupt behaviour falling within the definition of 'financial crime' referred to in SYSC 3.2.6R and SYSC 6.1.1R. An assessment purely limited to 'bribery' as defined by the Bribery Act definition is likely to be viewed as insufficient by the FCA.
- 5.1.3 What constitutes an adequate risk assessment procedure will vary enormously depending on the size of an organisation, its activities, customers and the markets in which it operates. The MoJ also acknowledges that bribery risks, and therefore an organisation's response to those risks, will evolve over time. This means that the assessment of risk and the response to those risks should be ongoing.
- 5.1.4 In determining the scope of risk assessment, consideration should be given to any areas where control weaknesses may give rise to an increased bribery risk. Examples include:
- the lack of a clear anti-bribery message from top-level management
  - insufficient resourcing to manage risk according to the organisations appetite
  - a bonus culture, or aggressive sales targets, that engender excessive risk taking
  - a lack of clarity in the organisation's policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
  - a lack of clear financial controls
  - inadequate, inconsistent or poorly documented due diligence procedures
  - deficiencies in employee training, skills and knowledge
  - insufficient assurance, management information or audit work.
- 5.1.5 The outcome of the risk assessment will determine the proportionality of the response in terms of resourcing, mitigating actions and anti-bribery procedures and controls implemented. Businesses will need to have in place a process for undertaking periodic reviews of their risk assessments as their business (and the environment in which it operates) evolves and changes. In particular, in the event of any bribery incident (or near miss) an analysis may be needed to re-evaluate the effectiveness of the relevant systems and controls.

## 5.2 Risk identification

5.2.1 A bribery risk assessment should be undertaken to consider all risks (both internal and external) appropriate to the organisation. The principal aim of a risk assessment is to lead to the determination of a cost effective and proportionate anti-bribery programme of work, which prioritises those areas of highest risk for management. Depending on the scope of the organisation a risk assessment may include some or all of the following broad categories:

### 5.2.1.1 Country risk

An organisation should consider the countries in which it operates and assess the following types of factors:

- a specific country's risk, based on perceived levels of corruption highlighted by country reports and corruption league tables published by reputable organisations;
- anti-bribery legislation and its implementation/enforcement in a specific country
- The organisation's footprint in that country, including size, product and customer type/industry.

### 5.2.1.2 Product and business opportunity

This might include an assessment of the bribery risks associated with:

- project finance, particularly where it involves the public sector, including real estate and construction
- mergers and acquisitions
- private equity, including extractive industries, pharmaceuticals and defence
- high-value projects or projects involving many contractors or intermediaries.

### 5.2.1.3 Business partnership risk

This might include an assessment of certain relationships perceived as higher risk, such as:

- route to market
- agents and third parties (particularly those located in higher risk jurisdictions who receive substantial remuneration)
- commission structures, e.g. considering whether commission percentages paid to introducers of new business are reasonable, proportionate and transparent
- the use of intermediaries in transactions with foreign public officials
- consortia or joint venture partners
- syndicated lending arrangements
- politically exposed persons – where the proposed business relationship involves or is linked to a prominent public official.

#### 5.2.2.4 Government and public official interactions

This might include an assessment of risks such as:

- interaction with public officials in government or government-owned entities i.e. is the public official acting in their formal capacity, or as a client/representative of the bank
- the nature and extent of government interaction (e.g. central government, local government) by the organisation or other public official interaction (e.g. quangos, quasi-government bodies including regulators, state owned enterprises including sovereign wealth funds, international bodies)
- licences and permits
- public procurement
- public business, including bond and equity issuance and underwriting or debt syndication
- political lobbying.

#### 5.2.1.5 The risk of missing data

Operational risks exist throughout the business and have the potential to impact on anti-bribery and corruption processes and controls, for example:

- Due Diligence – ineffective processes result in risk information not being identified when undertaking reviews, leading to inaccurate assessment of potential risk.
- Charitable Donations/Event Sponsorship – data is missing or incorrect leading to ineffective risk assessment
- Facilitation Payments/internal Reporting - escalation procedures are not followed leading to an increased risk of inadequate internal controls.

#### 5.2.1.6 Wider risks

The following list is not exhaustive, but wider risks include:

- charitable or political donations and sponsorship
- lobbying
- procurement and sourcing
- advisory and consulting activities
- payment (standing data, paying away to third parties)
- people/HR risks including:
  - existence and application of disciplinary policies
  - remuneration structures and incentives
  - ethics and conduct

- deficiencies in employee training, skills and knowledge
- gifts, entertainment and hospitality
- travel expenses
- nature of the organisation, i.e. size, structure and focus of the business.

5.2.2 What should be assessed will vary considerably between different types of organisations and activities. For example, wholesale banking is likely to focus greater attentions towards certain types of activities e.g. syndicated lending, soft dollar arrangements<sup>6</sup>, sovereign wealth funds, M&A, real estate brokerage etc., whereas domestic based retail operations may be more concerned with introducing mortgage brokers. Private wealth banks may focus in particular on risks associated with Political Exposed Persons.

## 5.3 Conducting a risk assessment

5.3.1 There is no exact science as to what a risk assessment should include or how to do it. A range of resources are available for organisations to draw upon, included within these is the 2013 Transparency International '*Diagnosing Bribery Risks – guidance for the conduct of effective risk assessment.*'<sup>7</sup> The Transparency International guide includes good practice principles for bribery risk assessment, a risk assessment template and bribery risk assessment process check list.

5.3.2 Organisations will need to decide the most appropriate methodology for undertaking the assessment, which may include:

- using existing information in the organisation (e.g. audit, compliance/operational risk reports)
- focus groups/workshops
- client/customer complaints
- using publicly available information on bribery issues in particular sectors or overseas markets and jurisdictions
- questionnaires
- utilisation of 'heat maps' to identify the types of activities to be assessed.

5.3.3 Whatever method is ultimately decided upon, the risk assessment should be fully documented and updated on a periodic basis to reflect the risks and risk appetite of the organisation. Devoting sufficient skilled resources and expertise to this task will be essential.

5.3.3 A periodic review of resource allocations should take into account business evolution and changes in external circumstances, business model or operating environment (e.g. change to the market or a product). Should a material incident be uncovered, consideration of the impact

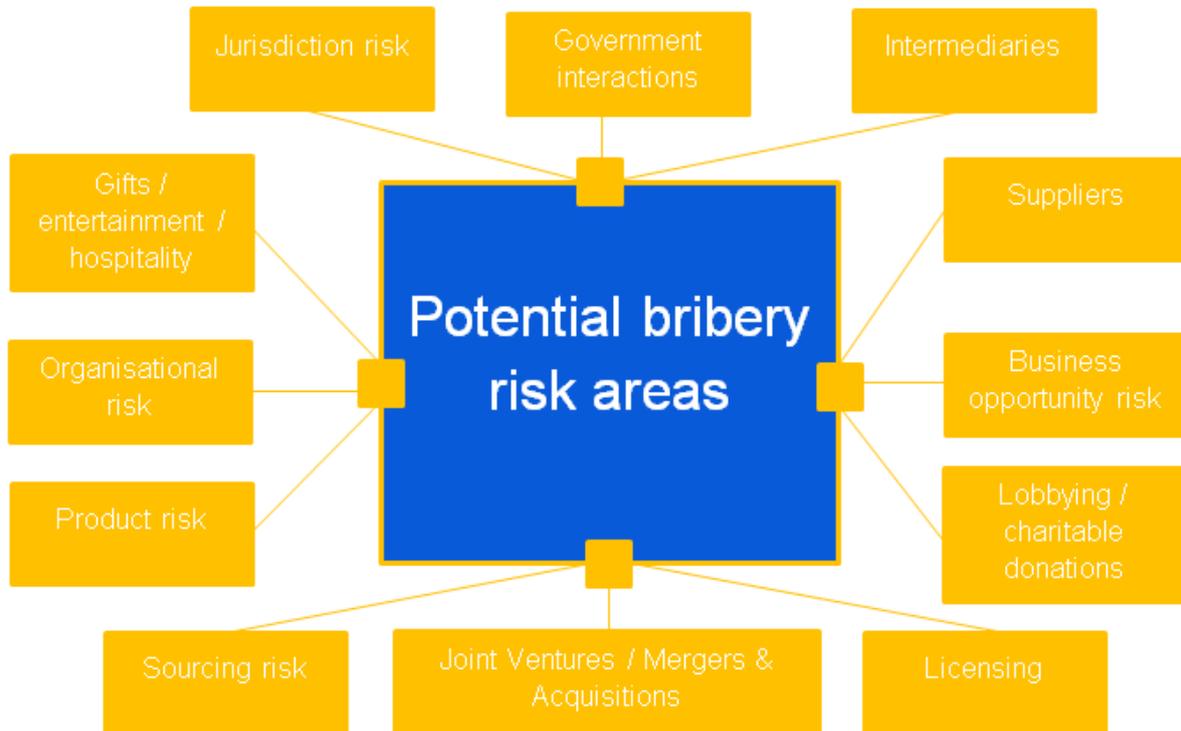
<sup>6</sup> Soft dollars refer to in-kind payments to third party service providers. For example, an asset manager may provide research which the asset manager typically sells for a fee to a third party service provider such as a broker-dealer. This is done without charging the broker-dealer any fee because the research is being provided in lieu of the asset manager paying cash for commission expenses with the broker-dealer.

<sup>7</sup> Transparency International Diagnosing Bribery Risks

<http://www.transparency.org.uk/our-work/publications/10-publications/678-diagnosing-bribery-risk-guidance-for-the-conduct-of-effective-bribery-risk-assessment>

of that incident on the control environment should be undertaken by reviewing the risk assessment.

5.3.4 It is most likely that an organisation's bribery risk assessment methodology will ultimately be incorporated into its existing risk assessment methodologies.



5.3.5 *The above diagram is a pictorial view of the risks your organisation could face. This type of diagram could be used as part of a risk assessment workshop to focus minds and draw out a range of risks pertinent to an organisation.*

## Box 3 - Risk Assessment: An working example of an end to end process

### Stage 1 – Firm Risk Assessment

Establish the basic mechanism to perform the RA to ensure it is practical, manageable, consistent and fit for purpose across the whole firm. Document this process, obtain Senior Management approval and communicate the requirements.

This may include: questionnaire/ template methodology, timescales, sign off levels, RAG ratings, scoring mechanism. The risk types listed in Section 5.2 above may be considered and included at this stage as appropriate.

### Stage 2 – Inherent Risk Assessment (Business Level)

Identify all bribery risks associated with the business area against the RA template.

Risks may be considered for the following categories:-

- **Internal to External** – colleagues, agents or persons acting on behalf of the Firm paying bribes to customers or other external parties;
- **External to Internal** – customers or other external parties paying bribes to colleagues, agents, or persons acting on behalf of the Firm;
- **Internal to Internal** – colleagues bribing other colleagues; and the Firms products / services being used to pay or receive bribes.

### Stage 3 – Control Identification

Identify all of the control(s) that are in place to manage / mitigate the inherent risk. Explain/ provide evidence of any key controls.

Are the controls working as designed (operating effectiveness) and is the design right to reduce the risk to an acceptable level (design effectiveness)?

### Stage 4 – Residual Risk and Control Assessment

Consider whether the control(s) are effective in mitigating the risk (design and operational effectiveness) to identify and assess the residual risk.

Once an assessment of the risk (after consideration of the design and operational effectiveness of the controls in place to mitigate the risk) is complete this determines the residual risk.

### Stage 5 – Documentation

Document the findings of the risk assessment exercise stating the Inherent and Residual risk of the business area.

Which may include:-

- Gaps Identified
- Activities required
- Priorities
- Available resource
- IT requirements
- Owner
- Delivery date

### Stage 6 - Action Planning

Develop action plan/s to mitigate all gaps identified.

### Stage 7 – Escalation

Escalate findings to Senior Management to ensure visibility and support.

### Stage 8 – Review

Timetable an appropriate date for Risk Assessment review based on Inherent and Residual risk rating.

# Chapter 6 – Due diligence on Associated Persons/Third Parties

- 6.1.1 The definition of an ‘associated person’ in the Bribery Act is very broad and is described as a person who ‘performs services’ for or on behalf of an organisation. This is therefore likely to include, but is not limited to, a combination of consultants, finders, introducers, intermediaries, lobbyists, lawyers, sales and marketing firms, contractors, members of joint ventures and suppliers where services are performed, either apart from or in addition to the selling of goods. The question as to whether a person is performing services for an organisation is to be determined by ‘...reference to all the relevant circumstances and not merely by reference to the nature of the relationship...’ (Section 8(4) of the Bribery Act).
- 6.1.2 Unlike the Bribery Act, FCA terminology is couched in terms of ‘third parties’. There is no precise definition of what types of entities and individuals are specifically covered but the FCA’s financial crime guide (parts 1 and 2) refer to third parties who ‘act on a banks behalf’, or ‘generate business’. It is feasible that under both the Bribery Act and FCA systems and controls a bank could be held responsible for corrupt payments made, offered, or promised by an associated person it retains, even if it did not know the associated person intended to pay or offer a bribe.
- 6.1.3 In general terms banks have adopted a pragmatic approach to identifying those associated persons who might be capable of committing bribery on their behalf to obtain or retain business or to create a business advantage. The sheer volume and complexity of associated person relationships and related payment flows has made it vital for banks to utilize a risk-based approach. This approach is in line with World Economic Forum guidelines on conducting due diligence on associated parties which states “*the key to effective third party due diligence is knowing which third parties pose the most risk to the organization and targeting them for thoughtful review*”.<sup>8</sup>
- 6.1.4 Overall levels of due diligence conducted on associated persons will necessarily vary according to certain risk factors. In some cases a ‘bucket’ approach of classifying third party relationships as high, medium or low risk has been viewed as a proportionate way forward. Employing a tiered approach is generally viewed by international bodies as more effective in terms of mitigating corruption risks. No matter what the approach the FCA has stressed the importance that decisions are documented and supported by an appropriate ‘*commercial rationale for using the services of third parties*’.<sup>9</sup>
- 6.1.5 The risk-based approach adopted should be informed by an awareness that legal liability from bribery may potentially extend to the entire supply chain. The degree of due diligence required will need to reflect the locality, the nature of the relationship and risks attached to the associated person (i.e. whether public sector or commercial, and applicable regulation) and the business opportunity in question. It should also reflect the structure of the relationship, its controls and the ease or difficulty of subsequent extrication from the relationship, i.e. in the context of an acquisition or where local practice requires the involvement of particular entities or individuals to act as associated persons. Employees are presumed to be associated persons by

<sup>8</sup> World Economic Forum ‘Good Practice Guidelines on Conducting Third Party Due Diligence’ 2013.

<sup>9</sup> FCA Financial Crime Guide Part 2, Box 13.4 ‘Third Party Relationships and Due Diligence’ page 64.

the Bribery Act, and therefore relevant processes should meet proportionate due diligence requirements. In certain situations, these processes can be delegated to external agencies.

## 6.2 General requirements

6.2.1 Summarised below are the anti-bribery related requirements that may be considered when deciding whether it is appropriate to enter into an associated person relationship. The nature of this relationship, the relevant circumstances and the particular risk factors involved should drive the level and extent of any due diligence and approval. It may be appropriate to undertake additional steps where higher risk factors are present. Similarly, where the level of risk has been assessed as low, it may not be necessary to undertake such detailed due diligence and processes (as long as this is recognised within the documented approach).

### *Identifying Associated Persons/Third Parties*

6.2.2 The FCA's financial crime guide states that they expect banks to take '*adequate and risk-sensitive measures to address the risk that a third party acting on behalf of the firm may engage in corruption*'. As a first step this will involve identifying which third parties pose the greatest assessed risks.

### *Risk assessment and due diligence*

6.2.3 Before entering into any formal relationship, sufficient and appropriate risk-based due diligence should be undertaken in order to:

- identify the associated person and validate their credentials and background
- confirm the suitability of their specific skills and experience for the role they will be performing
- the business sector of the associated person or activity
- confirm the nature of the service to be performed and verify that such service is necessary and that any proposed payments or benefits are commensurate with those services
- ensure, as far as possible, that there are no legal restrictions from dealing with the associated person
- give reasonable assurance about past conduct
- identify potential or actual conflicts of interest and reputational risks in order that they can be appropriately addressed as part of the decision-making process
- identify networks and/or relationships with entities presenting enhanced risk, e.g. Foreign Public Officials or Politically Exposed Persons.

6.2.4 The level of due diligence to be applied when engaging an associated person will necessarily vary according to certain risk factors including but not limited to:

- the proposed role of the associated person and the nature of the service being provided
- the country or location of the associated person or transaction and whether or not cross-border activities are anticipated and in line with expectations

- whether it is anticipated that the associated person will have contact with public officials in the course of providing services
- existing knowledge of the associated person
- the amount of proposed consideration or payment to the associated person and whether it is proportionate to the tasks required and/or in line with market rates
- significant 'red flags' (see p.41 for examples)
- the transparency and reputation of the associated person
- the transparency and reputation of the actual or potential client, where a separate entity.

6.2.5 Where heightened risk factors are present it may be necessary to undertake additional due diligence. This might include:

- performing supplementary background and screening searches including, where appropriate commissioning an external report
- conducting direct interrogative enquiries with the third party on their management of bribery risks
- validate direct requests for information (i.e. references from other firms that the third party has worked for), verify information through official sources and obtain independent verification of information obtained
- ascertaining the financial standing and credibility of the associated person
- determining whether any public official has: a direct or indirect beneficial interest in, or a direct or indirect relationship with, the associated person.
- whether the associated party has a clear and proven track record in their area of service provision.

6.2.6 Consideration should also be given to periodic reviews of the associated person, depending on the risks identified. For example, it may be considered appropriate to review higher risk relationships annually to ensure that the relationship is being run as expected and in line with contractual obligations. Items to consider may include, but are not limited to:

- whether payments made/received are in line with expectations
- whether there has been any unexpected cross-border activity
- whether there has there been any adverse media relating to the associated party.

#### *Contractual arrangements*

6.2.7 To the extent possible written contracts should be entered into with relevant associated persons and where appropriate should contain provisions in respect of adherence to relevant anti-bribery laws, regulations and, in some cases, the organisation's policies and procedures. The contracts should warrant that the associated person has not and will not breach relevant anti-corruption laws. Additional contractual provisions to consider include:

- stating that the third party is not a public official, or working on behalf of one, and that the associated person will notify the organisation if this position changes during the course of the relationship
- a warranty that the associated person has not been convicted of, nor pleaded guilty to, an offence involving bribery or corruption, and is also not listed by any government agency as debarred or is otherwise ineligible for government procurement programmes
- a requirement that the third party will keep accurate books and records, including full records of all expenses incurred in connection with the arrangement, and that all payments to associated persons connected with the contract shall be supported by written, detailed invoices
- a requirement that the associated person will advise of any improper payments known by them in connection with the relationship and will assist in investigating any such allegations and remedying any violations
- a requirement that the third party will exercise due diligence in selecting employees or agents in connection with the assignment, will provide appropriate training for them and will monitor their activities
- a requirement that the third party will require anti-bribery compliance from any sub-contractors or other entities/individuals who might be regarded as associated persons to the organisation, using the same form outlined here
- the ability to withhold payment and/or terminate the contract if the organisation has reasonable grounds to believe that the third party has violated any anti-bribery provisions
- additional anti-corruption representations and warranties as deemed appropriate.

**6.2.8** It is important to recognise that the courts will prevent any party from relying upon contractual provisions to profit from criminal conduct. The fact that there is a contract where the associated person declares that they will neither bribe nor be bribed is not an absolute defence to criminal, regulatory and/or civil liability.

**6.2.9** An associated person should only be approved once due diligence has been completed and the outcome has been determined to be consistent with the company's risk-based approach. Approval should be subject to the associated person signing an appropriate agreement.

**6.2.10** In certain cases (e.g., for high risk-associated persons, where red flags have been identified or where a potential conflict or reputational issue exists), there should be a process of referral so that the engagement is referred to control functions outside the business line, i.e. compliance and/or legal, where appropriate, for approval. The FCA financial crime guide talks in terms of '*compliance functions having oversight of all third-party relationships and [monitoring] the lists to identifying such indicators*'.<sup>10</sup> Using a risk-based approach (a key element stressed within the guide) banks have focused 'direct' compliance engagement toward those relationships of highest risk.

**6.2.11** The approval process on whether or not to engage an associated person should be recorded and involve relevant and suitably senior staff. It should be expected that higher risk scenarios are subject to a more senior approval process. In essence, an audit trail setting out the

<sup>10</sup> FCA financial crime guide page 47 [http://media.fshandbook.info/Handbook/FC2\\_FCA\\_20130401.pdf](http://media.fshandbook.info/Handbook/FC2_FCA_20130401.pdf)

decision-making process will be critical in relation to both implementing adequate procedures as required by the Bribery Act and meeting regulatory requirements.

### *Risk Mitigation - payment controls*

6.2.12 Controls over payments to associated persons should be in place to mitigate the risk that such payments are used either directly or indirectly to facilitate bribes. Controls that should be considered include:

- ensuring the level of payment is reasonable and consistent with that agreed in the contract
- restrictions on any third-party payments
- prohibition on cash payments
- ensuring there is a clear connection between the payment details and the country of incorporation/domicile of the third party or the transaction.
- ensuring that the level of fees paid or received are justifiable to customers, shareholders, regulators, courts and other stakeholders.
- ensuring clear and transparent terms in respect of any commission and bonus to be paid.

6.2.13 Payment controls should also consider:

- whether there has been verification of relevant accounts
- payments to non-contractual third parties
- payments (including cash) to third parties by public officials.

## 6.3 Books, records and management information

6.3.1 The results of due diligence carried out and authorisation processes in relation to associated persons must be accurately recorded.

6.3.2 Management information may include a risk register recording new business proposals (to evidence why new business meets the organisation's risk appetite and transparency standards), a breaches log (to record procedural breaches), and exception reporting for authorised departures. This information should be reported to the appropriate governance committee regularly and summaries may be provided in the annual report and accounts.

6.3.3 Further examples of monitoring red flags could include:

- unexplained reasoning provided by business areas for changes to third-party/supplier/contractor/agent remuneration/ arrangements
- relocation of third party/supplier/contractor/agents to countries with higher bribery risk
- requests for one-off or unusually high commissions or fees on payments
- over-invoicing/use of non-standard invoices
- large/frequent fourth-quarter adjustments to contractual payments by associated persons

- reluctance or inability to provide information requested in full and in a timely manner
- exclusive dealings by an employee with a single supplier/contractor/agent (associated person).

6.3.4 In some cases banks may consider asking certain third parties (Broker, introducer, Intermediary, Distributor etc.) to complete a questionnaire. The types of information that may be reasonably sort could include:

- Regulatory details and regulatory reference numbers
- Details of executive directors, board members, shareholders with 25% plus holdings.
- Information of the third parties policies and procedures (including training)
- Whether the firm operates in, introduces customers from or are connected to high risk jurisdictions
- The extent of relationships/ connections with Public Officials, Political Exposed Persons and/or Government entities
- Whether the third party, its Directors or Major Shareholders (25%+) have been the subject of any investigation, inquiry, or regulatory/ enforcement action or proceedings involving actual or alleged fraud, bribery, corruption or money laundering?

6.3.5 If undertaking a questionnaire approach firms should consider risk ranking responses.

## Box 4 - Example of end to end risk assessment process for associated persons/third parties

Stage 1 - Engage with the relevant business area in the Firm to inform them of potential engagement with a new external to ensure that due diligence checks (including anti-bribery) are undertaken.

Each Firm may manage this process differently, but it is best practice for due diligence to be performed prior (or in the early stages) to engaging with third parties especially those deemed higher bribery risk such as associated parties.

Stage 2 - Complete an Anti-Bribery Risk Assessment before entering into the relationship. Consider the following:

- Nature of the relationship
- Information on bribery suspicions
- Information supporting positive stance towards bribery
- Existing relationship with the firm
- Interaction with public officials
- External party operates in higher risk sector / industry
- External party located in higher risk jurisdiction
- External party will be selecting and/or managing external parties our behalf.

- Completing an Anti-Bribery Risk Assessment will enable the identification of significant adverse material at an early stage. It will also allow you to assess the level of bribery risk associated with the new third party and identify whether further due diligence checks are required.
- Any material warning signs or red flags identified at any stage of the due diligence process must be addressed before proceeding with any proposed arrangement.

Stage 3 - Assess the level of due diligence required.

A risk based approach may be applied.

A Firm may outline and document in local guidance the required due diligence for different levels of perceived risk i.e. low, medium, high, ultra high.

Best practice is to document the rationale for the level of due diligence completed for each case.

Stage 4 - Carry out basic or enhanced due diligence checks.

Basic (example only):

- Internet searches e.g. Google / FT.com for adverse media,
- Business registry checks
- Review of Contract Clauses

Enhanced (as above plus- example only):

- Direct interrogative enquiries
- Obtaining and following up references
- Verifying information through independent sources.

If the external party undertakes any activity which would allow them to obtain or retain business or an advantage for the Firm in the conduct of its business it is suggested that basic anti-bribery due diligence is performed as a minimum.

If search results reveal anything adverse, the external party is likely to be high risk and you may consider enhanced due diligence and/or referring the case to an appropriate Senior Manager, Compliance Team or Legal Team for final decision.

Stage 5 – Ensure appropriate anti-bribery clauses are inserted into the third party contract and that external parties are provided with documentation reinforcing the banks stance against bribery.

The outcome of the risk assessment and results of the due diligence checks you undertake will prompt you to consider whether any additional anti-bribery contractual clauses should be included in the external party contract. Engage legal teams to identify appropriate clauses.

Documentation should be up to date, your final decision/ rationale is recorded clearly and if deemed appropriate (e.g. higher risk cases, rolling contracts) schedule a date for review.

## Box 5 - Associated Persons - Red flags

Any material warning signs or red flags identified throughout the due diligence process should be addressed before proceeding with any proposed engagement. Where a red flag is identified it should be documented and there should be a clear audit trail detailing any further investigation undertaken, how any issues have been resolved and the decision of whether to proceed.

Examples of red flags when dealing with associated persons include:

- the associated person insists on operating in anonymity
- inappropriate payment requests, e.g. requests for indirect payments made payable in a country other than one where the associated person operates, or to a separate entity
- due diligence identifies significant past allegations or incidents of corruption or illegality
- a public official recommended the associated person, particularly one with discretionary authority over the business at issue
- there are persons involved in the transaction who have no substantive commercial role
- the associated person objects to reasonable clauses in the contract regarding compliance with anti-bribery laws or other applicable laws
- the associated person does not reside or have a significant business presence in the country where the customer or project is located
- due diligence reveals the associated party is a shell company or has some other unorthodox corporate structure (e.g. a trust without information about the economic beneficiary)
- the associated person will not reveal its beneficial ownership, or is unwilling to provide documentary proof of ownership if asked
- the only qualification the associated person brings to the venture is influence over public officials, or the associated person claims that he can help secure a contract because he knows 'the right people'
- the associated person requests an increase in an agreed commission in order for the third party to:  
1) 'take care' of some people; 2) circumvent a known requirement or cut some red tape; and 3) to account for expenditure they must incur to obtain or retain business or a business advantage.

# Chapter 7: Gifts, corporate hospitality and promotional expenditure

## 7.1 Context

- 7.1.1 When considering bribery risks, and an appropriate response to those risks, the intent behind an action or activity is a key consideration.
- 7.1.2 This is especially relevant in the area of gifts, hospitality and entertainment where it is important to consider the context of a particular action or activity and make an assessment of that action or activity in terms of whether it is 'lavish or extravagant'. A key question is whether the intent is to induce or reward someone to improperly perform their duties with a view to obtaining a business advantage.
- 7.1.3 The answer to this question will be dependent on the circumstances of the action or activity and could include:
- intent behind the action or activity
  - country or cultural norms
  - the value
  - the industry
  - what the action or activity is.
- 7.1.4 The Bribery Act gives no specific guidance, monetary limits, exemptions or defences in relation to gifts or any other kind of hospitality. The guidance issued by the Ministry of Justice on 30 March 2011 states:
- 'Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.'*
- 7.1.5 The general bribery offences are based on a test of improper performance (the 'improper performance test'). Corporate hospitality would therefore trigger the offence where it is considered that the person offering the hospitality intended the recipient to be influenced to act improperly.
- 7.1.6 In 2012 the Serious Fraud Office reviewed its policy towards business expenditure. The new statement of policy expressly reaffirms the important point that bona fide hospitality or

promotional or other legitimate business expenditure is recognised as an established and important part of doing business.<sup>11</sup>

## 7.2 What is 'reasonable' under the Bribery Act?

7.2.1 Deciding whether corporate gifts and hospitality are reasonable and proportionate is to be left to prosecutorial discretion. Prosecutors will decide:

- what is legitimate and illegitimate corporate hospitality within the scope of the Bribery Act
- whether there is sufficient evidence for a realistic prospect of a conviction
- whether or not it would be in the public interest to prosecute.

7.2.2 The intention of the legislation is to criminalise hospitality and promotional expenditure which is actually a cover for bribing someone. As the Government has made clear, it is not the intention that genuine hospitality or reasonable and proportionate business expenditure should infringe the legislation.

7.2.3 A bank is therefore unlikely to face prosecution for providing reasonable and proportionate levels of hospitality as part of competing fairly in the international arena.

## 7.3 Policies and procedures to determine 'reasonable and proportionate'

7.3.1 The best protection for banks, to ensure they do not infringe their legal and regulatory obligations, is to have in place clear written policies detailing the principles for giving and or receiving gifts, entertainment and hospitality. Adequate records of activity also need to be maintained.

7.3.2 In undertaking this task banks may wish to consider some or all of the following:

- the establishment of a clearly defined policy (which may include marketing procedures) on the giving or receiving of gifts and hospitality
- the setting of personal / annual limits where these are considered to be appropriate
- a clear articulation of any circumstances deemed to be an outright prohibition
- a statement on what is considered acceptable in terms of expense
- escalation procedures to address the risks associated with particularly sensitive circumstances (e.g. engaging with foreign public officials)
- the introduction of a gifts register
- a system for monitoring the gifts or hospitality register or other approved recording systems

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<sup>11</sup> <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/questions-and-answers.aspx>

- the establishment of pre-approval and sign-off regimes to include clear timescales for approval
- a clear statement outlining potential sanctions for non-compliance.

7.3.3 Policies and procedures in this area will require a degree of common sense and flexibility so as to take account of the particular local and cultural circumstances and situations that may arise in an ad-hoc manner. In addition, banks with a global footprint will need to ensure that gifts and entertainment policies and procedures are fully compatible with local anti-corruption laws in the countries in which they operate.

7.3.4 In instances where an excessive gift or hospitality has been unintentionally accepted, or to refuse a gift in a particular situation would cause offence, procedures should also be in place to address such potential scenarios, i.e. a gift can be later returned or donated to charity, raffled to staff or lodged as an asset of the organisation rather than the individual.

7.3.5 Expense policies and approval requirements will vary from firm to firm, however consideration may be given to checking that expense claims for gifts and hospitality hold sufficient information about the recipient and where a separate gift or hospitality register is maintained that this has been completed prior to the approval.

## 7.4 Management information (MI)

7.4.1 Designated owners of gifts and hospitality registers and expense controls should periodically review and report MI and trend information to business area senior management. Tools to demonstrate effective implementation may include:

- Reporting of unusual or unauthorised gifts or hospitality
- Numbers of staff trained on gift and hospitality policies
- Noted absences of G&H, particularly when mapped against notable external events, e.g. Chinese New Year number of instances involving Public Officials
- Spend by business unit or relationship
- Number of political and charitable donations approved and which have been subject to compliance input.

### Box 6 - G&H Log - types of information that may be collected:

- Dates of offer made, recording entry and acceptance
- Details of the colleague giving or receiving the gift, entertainment or hospitality - name, employee number, business unit, role
- Details of the third party individual / organisation giving or receiving the gift, entertainment or hospitality - name, company name, role, relationship to colleague
- Risk assessment questions e.g. timing around contract negotiations, exposure to public officials etc.
- Details of the gift, entertainment or hospitality – what it is, estimated value, other colleagues involved, authorisation details
- Rationale for accepting / declining the gift, entertainment or hospitality
- Evidence of any approval given.

# Chapter 8 – Training and communication

## 8.1 Training

- 8.1.1 Communication across the organisation will be required to ensure the policies and procedures implemented are relevant, practical and effective. A demonstrable output can be seen to include a good level of understanding and commitment; employees are sensitive to risks and therefore monitor them effectively; and can invoke the relevant incident management procedures when appropriate.
- 8.1.2 Training procedures form part of communication and arrangements will need to be proportionate to the identified risks. Procedures will need to ensure that training is ongoing, regularly updated and completion rates monitored; it will also need to address how policies and procedures are practically implemented. Organisations may choose either to train certain categories of associated persons or encourage them to ensure their own arrangements are in place.
- 8.1.3 The MoJ guidance states: ‘Financial Institutions should seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces’. The FCA has described best practice in relation to the implementation of its regulatory requirements as:
- providing good quality, standard training on anti-bribery and corruption for all staff
  - providing additional anti-bribery and corruption training for staff in higher-risk positions
  - ensuring staff responsible for training others have adequate training themselves
  - ensuring training covers practical examples of risk and how to comply with policies
  - testing staff understanding and using the results to assess individual training needs and the overall quality of the training
  - keeping staff records setting out what training was completed and when
  - providing refresher training and ensuring it is kept up-to-date.
- 8.1.4 There should be a risk-based approach to all anti-bribery training, including relevant case studies or practical examples/scenarios that staff may encounter in their line of business or within the financial institution.
- 8.1.5 All relevant staff should be given a post-training assessment or complete an attestation of understanding.
- 8.1.6 General anti-bribery awareness training in an institution may be reinforced with a ‘tone from the top’ opening course message from senior management.

- 8.1.7 Anti-bribery general training – which can either be standalone or incorporated within other financial crime/code of conduct-related training – should be provided to all staff; the frequency will be determined by the anti-bribery risk assessment of the financial institution.
- 8.1.8 Anti-bribery general training should form part of induction training for all staff but should also be tailored to specific risks associated with specific posts. Consideration should also be given to tailoring training to the special needs of those involved in functions within the financial institution that have a higher degree of exposure to bribery and corruption risks and those who work in countries with increased levels of bribery and corruption.
- 8.1.9 Suggested minimum content for anti-bribery and corruption general training would include:
- the financial institution’s policies and procedures, which include provisions of the Bribery Act and FCA rules and Principles
  - definition and explanation of the term ‘bribe’
  - explanation of an employee’s duty under the law and the financial institution’s policy
  - penalties, relating to the person and corporate entity, for committing an offence under the act
  - social and economic effects of failing to prevent bribery
  - explanation of when and how to seek advice and report any concerns or suspicions of bribery.
- 8.1.10 When delivering basic training global banks will need to decide whether anti-bribery and corruption training should be translated into other local languages. For example, in one case a major global bank employing over 85000 staff delivered mandatory training for all new joiners in 8 local languages (Korean, Arabic, German, Indonesia, Japanese, Simplified Chinese, Traditional Chinese and Thai). For the majority of firms this level of language translation will not be necessary or proportionate: however, for those with large scale overseas operations it may be a factor that requires consideration.
- 8.1.11 Alongside the organisation's general anti-bribery and corruption training for all employees, tailored training should be considered for individuals that may be more exposed to an elevated risk of bribery and corruption. Suggested content for targeted training would include:
- Associated Parties
  - Facilitation payments
  - Sponsorship and Events
  - Advisory - for those staff members providing guidance on ABC related matters
  - Interns/Unpaid Work Experience
  - Charitable & Political Donations
- 8.1.12 The content of anti-bribery training should be regularly monitored and evaluated.

8.1.13 Compliance and human resource areas should liaise to discuss trends, review the course at an appropriate interval and update training requirements as a result of legislative changes and internal or external case law.

## 8.2 External Communication

8.2.1 Recognising the importance placed on adequately communicating policies and procedures banks should consider the types of anti-bribery and corruption material that could be usefully communicated to stakeholders such as:

- External parties who carry out or promote business on the bank's behalf
- External parties who place reliance on the bank to carry out or promote business on their behalf
- Customers and wider civil society/interest groups

8.2.2 In such circumstances banks may wish to consider providing the following information:

- Information on external websites setting out the bank's stance and progress on bribery and corruption matters
- Codes of Conduct for staff
- Statements of compliance with the Bribery Act
- External statement documents, for example summary requirements of associated persons.

# Chapter 9 - Monitoring, review and management information

## 9.1 Assessment of controls and monitoring

9.1.1 Monitoring and review is required to ensure policies and procedures are and continue to be appropriate and effective as the environment and organisation develops. Internal audit may be able to integrate this with their existing role. It should include stress testing of procedures and challenge processes – this could even extend to commissioning external reviews of the proposed processes and monitoring external indicators including media coverage. At the minimum banks will need to consider:

- describing the set of high-level controls it expects to see within the organisation
- documenting those controls and how they operate
- specifying the management information (MI) it seeks to obtain to ensure its anti-bribery programme is operating effectively
- defining its compliance/internal audit/operational risk monitoring programme and the potential gaps and identifying and resolving any overlap of responsibilities between different functions
- having a new business/third-party acquisition approval and review process
- having an approach to addressing bribery risks as part of the acquisition strategy.

9.1.2 Compliance monitoring and internal audit reviews should challenge not only whether the processes to mitigate bribery and corruption have been followed but also the effectiveness of the processes themselves.

9.1.3 It is recognised that some banks treat financial crime risks as a combined function and leverage similar procedures and controls to mitigate these risks (e.g. anti-money laundering, sanctions and anti-bribery).

9.1.4 With regards to regulatory requirements, the FCA's best practice on bribery and corruption prevention includes:

- effective compliance monitoring and internal audit reviews that challenge not only whether processes to mitigate bribery and corruption have been followed but also the effectiveness of those processes themselves
- independent checking of compliance's role in approving associated person relationships and accounts, where performed
- routine compliance and/or internal audit checks of higher-risk third-party payments to ensure there is appropriate supporting documentation and adequate justification to pay.

## 9.2 Business area compliance

- 9.2.1 Designated owners of gifts and hospitality registers and expense controls should periodically review and report MI and trend information to business area senior management.
- 9.2.2 Business areas should regularly review and report unusual supplier/contractor/agent payment trends, i.e. excessive payments, fluctuations or payments to non-contractual third parties.
- 9.2.3 Audit controls of transactions between treasury, investment and trading arms and agents may be tested regularly for signs of irregularities.
- 9.2.4 Lobbying and payment transactions to charities should be controlled and transparent.

## 9.3 Monitoring of staff and conflicts of interest

- 9.3.1 A conflict of interest may arise where bank staff have a direct or indirect interest in a transaction, contract or proposed contract. This could occur as a result of private business dealings, personal relationships or other activities outside the course of employment. This includes the risks that are posed by staff who are themselves Politically Exposed Persons (PEPS) or Foreign Public Officials (FPO) or who are closely linked to someone who is. The bank should consider how to identify staff connections which could, or could be seen to have, the effect of compromising a decision.
- 9.3.2 Using a risk-based approach, banks should consider whether they need to check their staff for bribery and corruption risks as part of the recruitment process and whether staff identified in roles presenting an increased risk of bribery and corruption need to be checked more regularly. For example this could be performed by including a requirement for self disclosure, periodic attestation and/or screening (for PEPs/FPOs).
- 9.3.3 Using a risk-based approach, banks should consider whether they need to screen their staff at initial on-boarding for whether they are either a PEP or a FPO. Depending on the circumstances, data protection considerations on whether staff can be screened against PEP lists may be pertinent.
- 9.3.4 Not all connections identified will result in a possible conflict of interest, so the bank needs to consider the connection in respect of the role the staff member is performing.
- 9.3.5 Where any conflict of interest is identified additional controls should be put in place to manage and mitigate that risk.

## 9.4 Management Information

9.4.1 As part of any implementation programme, consideration will need to be given to appropriate management information and the allocation of responsibility for its monitoring and review. Practical examples of the type of management information and key performance indicators that banks could draw upon include:

- volumes of Internal Staff Bribery investigations
- hiring practices
- update of recommendations from monitoring visits
- ABC Champion (or equivalent) appointed
- training completion rates (New Joiner & Refresher)
- New Associated Persons (Volume accepted & declined, red flags raised, due diligence process followed)
- gift & hospitality (Value, volume, % tested for compliance, results from such testing)
- charitable donations/ corporate sponsorship (Value, volume, % tested for compliance, results from such testing)
- public official engagement (volume and range of topics e.g. G&H, Associated Parties, Internships)
- payments (Staff bonus, Associated person commissions)
- policy exemptions, breaches, incidents
- reported breaches of any anti-bribery and corruption policies or associated policies, such as gifts and hospitality
- anti-bribery and corruption whistle-blowing trend analysis
- internal audit findings in relation to anti-bribery or corruption policy or control weaknesses.

# Chapter 10: Incident management and reporting

## 10.1 Incident Management

- 10.1.1** There is no prescribed requirement under the Bribery Act for organisations to have an incident management policy in order to establish that they meet the 'adequate procedures' standard. However, for a number of reasons, not least FCA expectations, a bribery-specific policy may be helpful.
- 10.1.2** By their nature, bribery incidents are difficult to predict so any procedure will need to avoid being overly prescriptive. However, specifying structure and governance for investigation resource can help to ensure: rapid mobilization; organisation-specific know-how; best practice is already recorded and readily accessible; and having policy/procedures in place can improve training and help support the investigation. Having in place agreed media handling arrangements is also advisable.
- 10.1.3** All organisations will have in place policies and procedures for responding to staff suspected of misconduct. Consideration will therefore need to be given as to whether existing procedures are sufficient to deal with situations where there is potential liability arising to the corporate from an individual bribery-related offence.
- 10.1.4** Where a policy is considered appropriate, it will need to distinguish between the following situations:
- where a suspected offence under Section 7 of the Bribery Act has been committed and there is evidence that it was committed in order to procure or attempt to procure a business advantage for the organisation
  - where senior individuals are implicated in the suspected offences (other than Section 7) such that there is evidence of possible collusion (and commission of a Section 14 offence)
  - where senior individuals are involved and there is a possibility of corporate criminal liability because the 'directing will and mind' test has been met.
- 10.1.5** Consideration may need to be given to resourcing, including arranging external support or expertise. In particular, given the risks to the organisation involved in the investigation process, banks should seek expert legal advice at an early stage of the investigation. It is worth noting that such legal advice may be privileged from disclosure to competent authorities.

## 10.2 Self-reporting instances of bribery

- 10.2.1** The SFO has made it clear in a number of public statements that it wishes to encourage firms to self-report. The SFO's restatement of policy issued in 2012 on corporate self-reporting explains that, in determining whether or not to prosecute, the fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions. According to the guidance:

*“for a self-report to be taken into account as a public interest factor tending against prosecution it must form part of a genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims. The guidance also explains that, in considering whether a self-reporting corporate body has been genuinely proactive, prosecutors will consider whether it has provided sufficient information, including making witnesses available and disclosing the details of any internal investigation, about the operation of the corporate body in its entirety.”*

- 10.2.2 Self-reporting poses a number of possible risks and this is an area where banks should seek expert legal advice from the outset. In deciding the appropriate course of action, banks will also need to consider whether there may be an interest from other relevant authorities such as the US Department of Justice, US regulators or FCA.
- 10.2.3 The SFO has no legal power to offer immunity in relation to firms that self-report – but it may be relevant for consideration on whether a Deferred Prosecution Agreement is pursued. The question of penalty will be entirely for the courts and, although self-reporting may be relevant to the sentencing decision, many other factors may be taken into consideration in the decision. For this reason it cannot be assumed that self-reporting will result in a lesser penalty for the firm.
- 10.2.4 In any situation where self-reporting is under consideration, other obligations to regulators should also be considered, for example the application of Principle 11 in the context of the FCA and obligations arising from POCA, for example suspicious activity reports (SARs). As regulatory and criminal authorities share information, these notification obligations will need to be considered concurrently.
- 10.2.5 In conjunction with the Bribery Act coming into force, the Scottish Crown Office has also issued guidance on the approach that should be undertaken by businesses in Scotland to the reporting of bribery offences. This initiative is distinct from the self-reporting scheme operated by the SFO in England, Wales and Northern Ireland and will be particularly relevant for banks headquartered in Scotland.

## Box 7 - Tips for Dealing with US and other Prosecutors

In 2013 a former US prosecutor<sup>1</sup> summarised to a BBA audience the issues to consider when engaging with US prosecutors as being:

- Assess your opportunity to explain and forestall further investigation
- Don't assume prosecutors understands your business. Educate them
- Go in prepared with the correct team and have escalated to the right level
- In a criminal investigation, you must have outside counsel
- If outside counsel has been involved in advice relating to the subject of the investigation consider a change
- Know your facts and don't oversell
- Subpoenas and conversations with agents and prosecutors can provide vital intelligence about risks and weaknesses

Prosecutors and Regulators talk to each other. Make sure you have a consistent communications strategy.

# Resources and reference material

1. The Bribery Act 2010 (c.23) <http://www.legislation.gov.uk/ukpga/2010/23/contents>
2. The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing: *Ministry of Justice* <http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm>
3. The Bribery 2010: Quick Start Guide: *Ministry of Justice* <http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm>
4. Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions: *Serious Fraud Office* <http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>
5. FSA Anti-bribery and corruption in commercial insurance broking: Reducing the risk of illicit payment or inducements to third parties [http://www.fsa.gov.uk/pubs/anti\\_bribery.pdf](http://www.fsa.gov.uk/pubs/anti_bribery.pdf)
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