

Bribery Act 2010

Guidance on compliance

Practical implementation issues for the banking sector



The voice of banking
& financial services

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Foreword

The UK now has the most comprehensive anti-bribery legislation in the world, enhancing its reputation as a safe commercial environment in which to do business. The British Bankers' Association (BBA) is delighted to publish this guidance, which sets out the key issues for the UK banking sector to consider regarding the implementation of the UK Bribery Act 2010. I am grateful to the BBA Bribery Act Working Party, which has advised on the production of the guidance, and I would also like to thank the Serious Fraud Office, the Crown Prosecution Service, the Financial Services Authority and the Ministry of Justice, which have helped develop our thinking in this area.

The Bribery Act 2010, the Ministry of Justice guidance and the publication of this guidance form the beginning of a collaborative process; there will be a continuing need for our sector to collaborate closely and share best practice and experiences as the legislation is tested in a legal and practical sense. The BBA remains committed to supporting its members in their ongoing efforts to comply with the Act and is mindful that the anti-bribery responsibilities of banks do not stop with the implementation of the UK Bribery Act alone. This guidance focuses on the very important area of helping banks assess the policies and procedures they need to put in place to meet the requirements of the Act, and also considers the links with other requirements such as FSA regulations.

The guidance does not seek to provide a detailed analysis of pre-existing regulatory obligations to identify and assess bribery and corruption risks, but we are nonetheless active in this area. During 2012 the BBA will be undertaking separate work in relation to wider bribery and corruption risks, including the issue surrounding corrupt Politically Exposed Persons (PEPs).

In order to ensure the UK's anti-bribery system is proportionate and effective, an ongoing and frank dialogue between the government, regulators and the private sector will be essential. The BBA was pleased to contribute to the Ministry of Justice consultation on the Act and the accompanying guidance and 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 policy making.

Angela Knight
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 the previous offences were 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 FSA 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 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 requirements of the Bribery Act 2010. **The BBA guidance should not be regarded as law or as a substitute for the MoJ guidance: it should be read in conjunction with the Act and other relevant guidance issued by government, the prosecutorial bodies and the financial services sector regulator.**

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 Financial Services Authority (FSA) 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 FSA 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.

This BBA guidance is 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. In addition, it cross-refers to banks' pre-existing obligations under the FSA's rules and Principles. It does not, however, provide a detailed assessment on these regulatory requirements, nor set out the requirements that banks face in relation to compliance with the 2007 Money Laundering Regulations.

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 in order to contribute to the continued sharing of good practice and experiences.

In addition, the BBA will seek to proactively engage with other relevant bodies, such as UK and foreign regulators, in order to support members in the implementation of the wider regulatory responsibilities concerning anti-bribery and corruption.

As a clearer picture of the regulatory and legal requirements emerges, the BBA will react accordingly. In the meantime the BBA is planning its 2012 work programme and will be actively supporting members on issues surrounding the management of Politically Exposed Persons; undertaking corruption and bribery risk assessments; and managing third-party bribery risks.

Further information on the BBA's work programme in the field of anti-bribery and corruption may be obtained from Justine Walker, Director Financial Crime (Sanctions and Bribery), justine.walker@bba.org.uk

British Bankers' Association

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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:

(i) **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 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.

(ii) **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 an 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 have a full defence 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.

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:

(i) all functions of a public nature

(ii) all activities connected with a business, trade or profession

(iii) 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.

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.

Improper performance to which a briber relates (Section 4)

1.2.4 An improper performance can be defined as one that breaches a relevant expectation, as mentioned in Condition A or 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 are to be treated as done in performance of the function or activity in question.

Expectation test (Section 5)

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.

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

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 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 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 Meaning of 'associated person' (Section 8)

1.5.1 A person is an 'associated person' if he or she performs services for, or on behalf of the organisation. Associated people could be:

- employees
- agents
- consultants
- contractors
- suppliers
- joint venture partners
- subsidiaries
- other professionals engaged to retain, win or expedite banking business.

1.5.2 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).

1.6 Important considerations for companies

Consent and connivance of senior officers (Section 14)

1.6.1 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.

1.6.2 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.

1.6.3 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).

1.6.4 '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.

1.7 Liability of parent companies

- 1.7.1 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.
- 1.7.2 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, which is defined to include 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.
- 1.7.3 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].'

1.8 Penalties

Individuals:

- 1.8.1 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).
- 1.8.2 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:

- 1.8.3 An offence committed by a person other than an individual is punishable by a fine.
- 1.8.4 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.
- 1.8.5 The Section 7 offence can only be tried upon indictment.

1.9 Debarment risk

- 1.9.1 It is also important to remember that a conviction for corruption offences has 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.
- 1.9.2 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).

1.10 Jurisdiction

- 1.10.1 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.
- 1.10.2 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).
- 1.10.3 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.
- 1.10.4 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.
- 1.10.5 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:

- a) a British citizen
- b) a British overseas territories citizen
- c) a British National (Overseas)
- d) a British Overseas citizen
- e) a person who under the British Nationality Act 1981 was a British subject
- f) a British protected person within the meaning of that Act
- g) an individual ordinarily resident in the United Kingdom
- h) a body incorporated under the law of any part of the United Kingdom
- i) a Scottish partnership.'

1.11 Facilitation payments

- 1.11.1 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.
- 1.11.2 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.
- 1.11.3 The Director of the Serious Fraud Office publicly stated in his response to Q2 of the Joint Committee Questions on the Draft Bribery Bill (as it was then known) in June 2009:

'Facilitation payments are unlawful. In some cases the mere offer (and/or acceptance) of the advantage itself may amount to improper conduct. Most countries outlaw such payments since it is very difficult to remove bribery if they remain legal ... small facilitation payments are unlikely to concern the SFO unless they are part of a larger pattern (when, by definition, they would no longer be small facilitation payments) where their nature and scale has to be evaluated. The SFO considers, like Lord Woolf and a number of UK corporates, that any facilitation is unjustifiable and should be removed because these payments cut across transparency and openness. They also render a corporate (and other corporates) more vulnerable to demands for larger bribes. They are a major contributor to the belief that bribery is a necessary part of business culture.'

Chapter 2: Comparison of obligations

2.1 US Foreign Corrupt Practices Act (FCPA) – How does the Bribery Act compare?

2.1.1 For many years 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. US enforcement has increased dramatically over the past five years and there have been notable actions against both US and non-US individuals and companies.

2.1.2 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 whereas the FCPA requires evidence of corrupt intent.
- (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.
- (vii) **No express affirmative evidence for reasonable and bona fide business expense or lawful payments** – The FCPA contains a defence that payments represent 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. The Bribery Act does not.

2.1.3 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.

2.2 FSA obligations – How does the Bribery Act compare?

2.2.1 It is important to note that FSMA-authorized 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.

2.2.2 The obligations of the FSA's rules and Principles in relation to the Bribery Act are not identical; banks will need to bear this in mind when reviewing the adequacy of their anti-bribery policies and procedures. The FSA has 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.¹

2.2.3 Banks need to be mindful that the FSA can take regulatory action against an entity – and/or relevant persons performing controlled functions – that fails to adequately address the risk of corruption or bribery (i.e. has inadequate systems and controls). The FSA's rules and Principles in SYSC 6.1.1R and PRIN 1, 2 and 3 apply to banks in relation to regulated activities carried on by a bank from an establishment in the UK. 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.

2.2.4 Unlike the Bribery Act, the FSA does not need to find evidence of corruption or bribery to take action. This is most clearly demonstrated by the July 2011 FSA regulatory action against a firm regarding breaches of Principle 3 of the FSA's Principles for Businesses and Rule SYSC 3.2.6R of the FSA's 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'.

¹Financial 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

Chapter 3: The MoJ's six Principles

3.1 Introduction

3.1.1 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.

3.2 The six Principles

3.2.1 The Ministry of Justice ('MoJ') has issued 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 being 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.

3.2.2 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.

3.2.3 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.

3.3 Adequate policies and procedures

3.3.1 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.'

3.3.2 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.

3.4 Adequate procedures: firms should reflect MoJ's six Principles

- 3.4.1 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.
- 3.4.2 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 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.

Principle 1: Proportionate procedures

- 3.4.3 A commercial organisation's procedures to prevent bribery by persons associated with it are 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.
- 3.4.4 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.
- 3.4.5 Policies for any organisation are likely to reflect as 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 associates of a business will also need to be taken into consideration.

- 3.4.6 Any implementation programme will need to consider procedures in certain key areas such as:
- involvement of senior management
 - risk assessment
 - due diligence for existing and prospective associated persons
 - gifts, hospitality, promotional expenditure, charitable and political donations and demands for facilitation payments
 - employment

- contracts and governance of business relationships
- financial controls
- disclosures and transparency
- decision making including delegation of authority, separation of function and conflicts of interest
- enforcement and sanctions
- reporting and whistle-blowing
- implementation approach
- communication and training
- monitoring and review.

Principle 2: Top-level commitment

- 3.4.7 This requires senior management to demonstrate integrity and a zero tolerance for corruption; that they establish such a culture within their organisation which is evidenced publicly as well as internally; and that the culture is sufficiently robust that they are willing to forego unacceptably risky business opportunities. Sufficient resources should be devoted to anti-bribery work.
- 3.4.8 Evidencing this standard may require the creation of a dedicated Bribery Officer in addition to communicating the standard from the top and involving senior management in developing bribery prevention procedures. Details of the possible content for any communication and the behaviours that would evidence top-level involvement are given in the MoJ guidance, which specifically mentions the possible inclusion of a generally available statement on the intranet. Communication should be renewed regularly.

Principle 3: Risk assessment

- 3.4.9 In addition to being necessary for the development and implementation of bribery prevention procedures, a periodic, informed and documented risk assessment will be integral to any 'adequate procedures'. The process may be part of a more general risk assessment or specifically devised to identify bribery risk. In determining the scope of any periodic risk assessment to conduct, consideration should be given to any areas where control weaknesses may give rise to an increased bribery risk. Examples include:
- deficiencies in employee training, skills and knowledge
 - a bonus culture that rewards 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
 - the lack of a clear anti-bribery message from the top-level management.
- 3.4.10 The outcome of the risk assessment will determine the proportionality of the response in terms of remedial actions and bribery prevention procedures implemented. Businesses will need to

have in place a procedure for undertaking periodic reviews of their risk assessments as their business (and the environment in which it operates) constantly evolves and changes. In particular, in the event of any incident (or near miss) an analysis may be needed to evaluate the effectiveness of the relevant systems and controls.

Principle 4: Due diligence on associated persons

- 3.4.11 Due diligence – to mitigate counter-party risk and be a principle of good corporate governance – should be part of the existing controls framework. The due diligence arrangement in place for existing associated persons will need to be considered as part of the risk assessment processes both for implementation and periodically and thereafter.
- 3.4.12 The risk-based approach adopted should be informed by an awareness that the bribery risk 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 counterparty (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 an acquisition situation. Employees are associated persons and therefore relevant processes should meet proportionate due diligence requirements. If appropriate the process may be delegated to external agencies.

Principle 5: Communication (including training)

- 3.4.13 Communication across the organisation will be required to ensure the policies and procedures implemented are relevant, practical and effective; that there is a consistently good level of understanding and commitment in the workforce; and that employees are sensitive to risks and indicators and therefore monitor them effectively, and can invoke the relevant incident management procedures when appropriate.
- 3.4.14 Training procedures form part of the communication and arrangements will need to be proportionate to the risks identified in the area in question but basic training should be mandatory for all staff and new joiners. 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 associated persons or encourage them to ensure their own arrangements are in place. More details are provided later in this chapter.

Principle 6: Monitoring and review

- 3.4.15 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.
- 3.4.16 As part of any implementation programme, consideration will need to be given to the appropriate management information and the allocation of responsibility for its monitoring and review. Indicators for consideration include (note this list is not exhaustive) financial controls, staff surveys and feedback from training. Monitoring will include a formal periodic review and take account of any good or bad practice identified in relevant sectors by industry bodies or regulators. Consideration may be given to obtaining external certification for any bribery prevention monitoring programme.

3.5 The meaning of 'adequate'

- 3.5.1 Neither the Bribery Act nor the MoJ guidance offers any definition of this term, 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 FSA Handbook.
- 3.5.2 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.
- 3.5.3 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. 20 gives some examples of how the 'adequate' standard can be reached.

3.6 Initial evaluation and implementation of adequate controls

- 3.6.1 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 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 the pre-determined corporate policy (incorporating ethical standards, zero tolerance, organisational risk appetite and transparency standards and recording 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 MI)
 - 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.
- 3.6.2 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 arena and many good practices in the compliance, HR, AML and operational risk areas may have equal relevance here.

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 involvement of senior managers
- 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
- 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 4: BBA guidance: Principles 2 - 6

4.1 Principle 2 – Top level commitment

- 4.1.1 In order to address the risks of breaching the Bribery Act a robust governance structure must be in place. This requirement similarly applies to meeting FSA obligations. 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 There are a number of areas of governance that should be considered when deciding an approach to the implementation and monitoring of compliance with the Bribery Act.
- 4.1.3 An important element of any anti-bribery programme is to ensure that the organisation and its staff operate in an environment that helps them to comply with anti-bribery legislation. This relates as much to behaviours as to written policies and procedures. Top-level commitment is therefore essential.
- 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 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 and an integral element 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.
- 4.2.2 The Board should consider whether a top-level statement setting out the organisation's stance on bribery – in particular – 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 provisions of the regime 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. consistent application of disciplinary procedures for staff at all levels, internal publication of disciplinary actions and public recognition of instances when bribery is successfully countered).

4.3 Governance structure

4.3.1 An organisation should have clear accountability for the risk of bribery within it. A clear top-level commitment to an anti-bribery culture is necessary for the development of an anti-bribery programme in order to ensure its effective implementation throughout the organisation.

4.3.2 A 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 3 on Risk Assessment)
- 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 donations, gifts and hospitality
- a system for how incidents and risks are escalated, recorded, investigated, reported and managed
- training and change management
- a whistle-blowing hotline.

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.

4.5 Principle 3 – Risk assessment

- 4.5.1 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.’
- 4.5.2 An understanding of the bribery risks that an organisation faces is the foundation of any 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 in relation to the Bribery Act and ensuring adequate systems and controls to prevent bribery and corruption are in place in and in line with FSA requirements.
- 4.5.3 What constitutes adequate risk assessment procedures 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.
- 4.5.4 It is expected that the approach adopted by an organisation to address its identified risks will be risk based, reasonable and proportionate considering its activities and the risks it faces.

4.6 Risk identification

- 4.6.1 A bribery risk assessment should be undertaken to consider all risks (both internal and external) appropriate to the organisation. The risk assessment may have six broad categories:

Country risk

This could include assessment of:

- 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 in a specific country.

Route to market

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

- agents and third parties (particularly those located in higher risk jurisdictions)
- commission structures, e.g. considering whether commission percentages paid to introducers of new business are reasonable, proportionate and transparent
- interaction with public officials in government or government-owned entities where they are partners or customers.

Product and business opportunity

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

- project finance, particularly where it involves the public sector
- mergers and acquisitions
- high-value projects or projects involving many contractors or intermediaries.

Business partnership risk

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

- the use of intermediaries in transactions with foreign public officials
- consortia or joint venture partners
- political exposed persons – where the proposed business relationship involves or is linked to a prominent public official.

Government and public official interactions

This might include an assessment of risks such as:

- the nature of the government interaction (e.g. central government, local government) or other stakeholder interaction (e.g. quangos, quasi-government bodies, international bodies)
- licences and permits
- public procurement
- lobbying.

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
- remuneration structures and incentives
- payment (standing data, paying away to third parties)
- people/HR risks including:
 - existence and application of disciplinary policies
 - 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
- lack of clear anti-bribery message from top-level management.

4.6.2 The risk assessment should be fully documented and updated on a periodic basis to reflect the risks and risk appetite of the organisation.

4.6.3 Should an incident be uncovered, a consideration of the impact of that incident on the risk assessment framework should be undertaken.

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

4.7 Adequately skilled

4.7.1 An organisation should ensure that those undertaking the risk assessment are adequately skilled and equipped to do so.

4.8 Methodology of assessment

4.8.1 An organisation should also consider the most appropriate methodology for undertaking a risk assessment, which could 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.

4.8.2 The risk assessment should be refreshed on a regular basis, and in particular when significant change occurs to the business model or operating environment (e.g. change to the market or a product).

4.9 Resourcing

4.9.1 An organisation should ensure that it is devoting sufficient resources to the identification, assessment and mitigation of bribery risks. A periodic review of resource allocations should take into account business evolution and changes in external circumstances. In sum, an organisation will need to ensure that it is devoting sufficient resources to the identification, assessment and mitigation of bribery risks as they emerge.

4.10 Assessment of controls and monitoring to manage bribery tasks

4.10.1 An organisation should identify and assess its risks and the controls that exist to mitigate those risks. This should be in the context of its risk appetite and governance structure as considered in chapters 4.2 and 4.3 of this guidance.

4.10.2 The controls should be tested periodically and remediated as appropriate. They should also be stress tested.

4.10.3 An organisation should take a risk-based approach to its control environment and should consider:

- setting out a set of high-level controls it expects to see within the organisation
- documenting the controls it is seeking to rely on to address bribery risk
- 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.

4.11 Policies

4.11.1 Each company should have risk-based policies that could include:

- gifts and entertainment
- intermediaries and lobbyists
- procurement outsourcing and vendor management
- permanent employee contracts and internships
- financial reporting and payment controls
- sponsorship, donations and political contributions
- speaking up/whistle-blowing
- investigations.

4.12 Principle 4 – Due diligence on associated persons

4.12.1 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 consultants, finders, introducers, intermediaries, lobbyists, lawyers, sales and marketing firms, contractors, members of joint ventures and suppliers where services are performed in addition to the selling of goods.

4.12.2 A company 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.² It is vital, therefore, that appropriate due diligence is undertaken and fully documented on any associated person.

4.13 General requirements

4.13.1 Summarised below are the anti-bribery related requirements that should be considered when deciding whether it is appropriate to enter into a third-party relationship. The nature of any third-party 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.

Risk assessment and due diligence

4.13.2 Before entering into any 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
- confirm an actual service will be performed and 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 any reputational risks in order that they can be appropriately addressed as part of the decision-making process
- identify networks and/or relationships for example with FPOs or PEPs.

4.13.3 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
- 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

² It is worth noting that under FSA rules, a bank's failure to adequately address the risk of persons associated with the bank receiving and/or offering corrupt advantage can constitute a systems and controls failing.

- significant 'red flags' (see p.30 for some examples)
- the transparency and reputation of the associated person.

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

- conducting additional background searches including, where appropriate, commissioning an external report
- 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.

Contractual arrangements

4.13.5 Written contracts should be entered into with all associated persons and should contain provisions in respect of adherence to relevant anti-bribery laws and regulations. The contracts should warrant that the third party will not do anything to breach relevant anti-corruption laws. Additional contract provisions to consider include:

- stating that the third party is not a public official or working on behalf of one and that the third party will notify us if this position changes during the course of the relationship
- a warrant that the third party has not been convicted of nor pleaded guilty to an offence involving fraud, corruption, and is also not listed by any government agency as debarred, suspended, or is proposed for debarment or suspension, 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 third parties shall be supported by written, detailed invoices
- a requirement that the third party will advise of any improper payments 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
- the ability to withhold payment 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.

4.13.6 It is important to recognise that the courts will prevent any party from relying upon contractual provisions to profit from fraudulent or at least seriously dishonest conduct. The fact that there is a contract where the associated person declares that they will not bribe or be bribed is not an absolute defence to criminal, regulatory and/or civil liability.

- 4.13.7 An associated person should only be approved once due diligence has been completed and the outcome has been determined to be consistent with the associated person's risk profile and the company's risk-based approach.
- 4.13.8 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.
- 4.13.9 Approval should be subject to the associated person signing an appropriate agreement.
- 4.13.10 The decision to engage an associated person should be recorded, particularly for those deemed higher risk, and involve relevant and suitably senior staff, as appropriate. In essence, an audit trail setting out the decision-making process will be important in relation to both implementing the Bribery Act and meeting regulatory requirements.

Payment controls

- 4.13.11 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.
- 4.13.12 Payment controls should also consider:
- whether there has been verification of third-party accounts
 - payments to non-contracted third parties
 - payments (including cash) to third parties by public officials.

4.14 Books, records and management information

- 4.14.1 The results of due diligence carried out in relation to all associated persons must be accurately and timely recorded.
- 4.14.2 Management information (MI) may include a risk register including new business proposals (to evidence why new business meets the organisation's risk appetite and transparency standards), a breaches log (for breaches of procedures), and exception reporting for authorised departures.
- 4.14.3 MI should be reported to the appropriate governance committee regularly and summaries provided in the annual report and accounts.

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
- 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 party will not reveal its beneficial ownership, or is unwilling to provide documentary proof of ownership if asked
- the only qualification the business introducer brings to the venture is influence over public officials, or the third party 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 benefit for business or business advantage.

4.15 Principle 5 – Communication and training

4.15.1 Principle 5 of the MoJ guidance states:

‘A Financial Institution 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.’

4.15.2 The FSA 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.

4.15.3 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.

4.15.4 All relevant staff should be given a post-training assessment or complete an attestation of understanding.

4.15.5 General anti-bribery awareness training in an institution should be reinforced with a ‘tone from the top’ opening course message from senior management.

4.15.6 Anti-bribery general training should be provided to all staff regularly; the frequency will be determined by the anti-bribery risk assessment of the financial institution.

4.15.7 Anti-bribery general training may be incorporated within other financial crime code of conduct-related training.

4.15.8 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.

4.15.9 Financial institutions should ensure all anti-bribery general training is recorded.

4.15.10 Suggested minimum content for anti-bribery general training would include:

- the financial institution’s policies and procedures, which include provisions of the Bribery Act and other relevant requirements, i.e. FSA 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
- explanation of when and how to seek advice and report any concerns or suspicions of bribery.

4.15.11 The content of anti-bribery training should be regularly monitored and evaluated.

4.15.12 Compliance/fraud and HR areas should liaise to discuss trends and review regularly and update training requirements based on legislative changes and internal and external case law.

4.16 Principle 6 – Monitoring and review

4.16.1 Principle 6 of the MoJ guidance states:

'The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.'

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

- compliance and internal audit staff receiving specialist training to achieve a very good knowledge of bribery and corruption risks
- 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 processes themselves
- independent checking of compliance's operational role in approving third-party relationships and accounts, where relevant
- 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.

4.17 Combined controls

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

4.18 Committee oversight

4.18.1 Banks should consider the design and structure of their existing financial crime committees to review and develop their anti-bribery programmes. The committee might retain oversight of anti-bribery risks and controls within current activities.

4.18.2 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.

4.18.3 The committee might consider within their discussions:

- the effectiveness of their anti-bribery and associated policies in countering bribery and corruption

- reported breaches of any fraud, conflict of interests, insider dealing, market abuse or bribery and corruption and associated policies such as any policy governing gifts and hospitality
- the content of internal risks reports in relation to anti-bribery and corruption
- internal audit findings in relation to anti-bribery or corruption policy or control weaknesses
- anti-bribery and corruption whistle-blowing trend analysis
- management information (MI) in respect of associated person relationships
- MI in respect of gifts and hospitality register and expenses controls
- legislative developments, regulatory enforcement actions and industry news or adverse media publications in relation to anti-bribery or corruption.

4.19 Business area compliance

- 4.19.1 Gifts, hospitality and expenses: designated owners of gifts and hospitality registers and expense controls should periodically review and report MI and trend information to business area senior management.
- 4.19.2 Business areas should regularly review and report unusual supplier/contractor/agent payment trends, i.e. excessive payments, fluctuations or payments to non-contracted third parties.
- 4.19.3 Audit controls of transactions between treasury, investment and trading arms and agents should be tested regularly for signs of irregularities.
- 4.19.4 Lobbying and payment transactions to charities should be controlled and transparent to the audit function.

4.20 Internal audit

- 4.20.1 Anti-bribery policy controls testing should be included within audit planning.

4.21 Internal investigation

- 4.21.1 Persons overseeing and/or directing investigations into allegations of bribery and corruption or related malpractice should be suitably qualified and trained.
- 4.21.2 Procedures for the investigation of bribery and corruption should be incorporated into fraud or incident management reporting frameworks.
- 4.21.3 Escalation criteria for reporting to external law enforcement/regulator (including self-reporting) should be agreed at an appropriately senior level and considered in line with the guidance outlined in the following chapter.

4.22 Monitoring of staff

- 4.22.1 Noting FSA expectations in compliance with FSA rules and Principles PS11/15 Chapter 2, best practice includes:
- vetting staff on a risk-based approach, taking into account financial crime risk

- enhanced vetting – including checks of credit records, criminal records, financial sanctions lists, commercially available intelligence databases and the CIFAS Staff Fraud Database – for staff in roles with higher bribery and corruption risk
- a risk-based approach to dealing with adverse information raised by vetting checks, taking into account its seriousness and relevance in the context of the individual's role or proposed role
- where employment agencies are used to recruit staff in higher-risk positions, having a clear understanding of the checks they carry out on prospective staff
- conducting periodic checks to ensure that agencies are complying with agreed vetting standards
- a formal process for identifying changes in existing employees' financial soundness which might make them more vulnerable to becoming involved in, or committing, corrupt practices.

4.22.2 Using a risk-based approach, banks should consider screening their staff for bribery and corruption risks. Staff in roles presenting an increased risk of bribery and corruption should be screened more regularly.

4.22.3 Banks should, using a risk-based approach, consider screening their staff (at a minimum of initial on-boarding for whether they are either a PEP [politically exposed person] or a (foreign) public official [PO]).

Red flags

Monitoring and review red flag examples include:

- excessive or disproportionate gifts and hospitality, offered, received and declined
- unexplained reasoning provided by business areas for changes to third-party/supplier/contractor/agent remuneration/retrocession 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 may instigate further investigation of payments
- over-invoicing/use of non-standard invoices within monitoring of current payment controls
- large/frequent fourth-quarter adjustments to contractual payments by associated persons
- exclusive dealings by an employee with a single supplier/contractor/agent (associated person).

Chapter 5: Additional guidance - Gifts, corporate hospitality and promotional expenditure

5.1 Context

- 5.1.1 When considering bribery risks, and an appropriate response to those risks, the intent behind an action or activity is a key consideration.
- 5.1.2 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' and whether the intent is to induce someone to improperly perform their duties with a view to obtaining a business advantage.
- 5.1.3 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.
- 5.1.4 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.'
- 5.1.5 The general bribery offences are based on a test of improper performance (the 'improper performance test'). Corporate hospitality would therefore trigger the offence in those cases where the 'improper performance test' is satisfied, i.e. where it is considered that the person offering the hospitality intended the recipient to be influenced to act improperly.
- 5.1.6 Obviously lavish or extraordinary hospitality may lead a jury to reach such a conclusion but, as the Director of the Serious Fraud Office has publicly said, '... most routine and inexpensive hospitality would be unlikely to lead to a reasonable expectation of improper conduct' and 'There is a quite clear distinction that I am sure juries will be able to make between inexpensive,

modest hospitality offered to many and lavish hospitality that might be offered to a very small number of people in the hope of getting a contract’.

5.2 What is ‘reasonable’?

5.2.1 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.

5.2.2 The intention of the legislation is to catch hospitality and promotional expenditure which is really 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. As the Director of the Serious Fraud Office has publicly said:

‘Normal corporate hospitality is a part of business and is a part of building up the relationships that are needed in order to make business work. This is not a problem. Buying meals and putting foreign public officials up for reasonable accommodation again is not a problem. Nor is flying a group of foreign public officials across the world to see one of your sites so that they can get the best possible view of what you are doing and whether they should offer you a contract. Normal business. This is to be encouraged.’

5.2.3 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.

5.3 Policies and procedures to determine ‘reasonable and proportionate’

5.3.1 The best protection for banks, to ensure they do not infringe the Bribery Act, is to have in place clear written policies detailing the principles for giving and or receiving gifts, entertainment and hospitality.

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

- the establishment of a clearly defined policy (which includes marketing procedures) on the giving or receiving of gifts and hospitality
- the setting of triggers or threshold limits where management authorisation is required
- 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

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

5.3.3 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.

5.3.4 In instances where an excessive gift or hospitality has been unintentionally accepted, procedures should also be in place to address such potential scenarios, i.e. a gift can be returned or steps can be taken to ensure that the acceptance of hospitality does not influence a decision or situation in favour of the giver.

5.4 Management information (MI)

5.4.1 Designated owners of gifts and hospitality registers and expense controls should periodically review and report MI and trend information to business area senior management.

Chapter 6: Additional guidance - Incident management and reporting

6.1 Context

- 6.1.1 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 FSA expectations, a bribery-specific policy may be considered a sensible precaution.
- 6.1.2 By their nature, bribery incidents are difficult to predict and avoid so any procedure will need to avoid being overly prescriptive. However, specifying structure and governance for investigation resource can help to ensure rapid mobilisation; organisation-specific know-how and best practice is best recorded and readily accessible; and having policy/procedure in place can improve training and help support the investigation.
- 6.1.3 In developing an anti-bribery policy, a key question will be the circumstances in which it will be applicable. All organisations will have in place policies and procedures for responding to staff misdemeanours. Consideration will therefore need to be given to whether existing procedures are sufficient to deal with situations where there is potential liability for an individual bribery-related offence – or whether circumstances may arise when existing procedures may be inappropriate and bribery-specific procedures need to be followed.
- 6.1.4 Where a policy is considered appropriate, it will need to distinguish the following situations:
- where a suspected offence under Section 7 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.
- 6.1.5 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, it may be worthwhile taking legal advice at an early stage of the investigation by instructing external lawyers.

6.2 Self-reporting instances of bribery

- 6.2.1 The SFO has made it clear in a number of public statements that, in addition to self-reporting instances of bribery, it wishes to encourage firms to engage in informal discussions in relation to any questions they may have on the application of the Bribery Act. With regard to self-reporting, there are a number of possible risks and pitfalls 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.

- 6.2.2 The SFO has no legal power to offer immunity in relation to firms that self-report. 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.
- 6.2.3 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 FSA and POCA/money laundering suspicious activity reports (SARs). As the regulatory and criminal authorities share information, these notification obligations will need to be considered concurrently.
- 6.2.4 Only offences that could potentially result in corporate liability need to be self-reported.³ Other offences under the Bribery Act, such as those committed by staff, would not need to be self-reported (but could be appropriate for referral to the police).
- 6.2.5 In any determination of whether a Section 7 offence has potentially been committed, it is necessary to evaluate whether evidence exists that suggests the offence of 'procuring or attempting to procure a business advantage' has been made. This may be a difficult question: it will not be uncommon for the facts to be such that, although initially the activity in question resulted in the introduction of business, in the long term the culprit's intention was to exploit the arrangement to the organisation's disadvantage.
- 6.2.6 In the absence of any judicial interpretation of the phrase, a cautious approach would be to apply the widest possible interpretation and to report even circumstances where it is arguable whether this requirement is met.
- 6.2.7 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. A twelve-month self-reporting trial mechanism commenced on 1 July 2011 – the initiative will be reviewed at the end of the twelve-month period.
- 6.2.8 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.

³ However it should be noted that the FSA may expect to be told in other cases, i.e. where events point towards systems and controls failures.

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
6. FSA one-minute guide for smaller firms on anti-bribery and corruption: www.fsa.gov.uk/smallfirms/resources/one_minute_guides/insurance_intermed/anti_bribery.shtml
7. FSA Financial Crime Guide: http://media.fsahandbook.info/Handbook/FC_20111209.pdf
8. Wolfsberg Anti-Corruption Guidelines, August 2011 <http://www.wolfsberg-principles.com/>
9. Guidance on the Approach of the Crown Office and Procurator Fiscal Service to reporting by Business of Bribery Offences <http://www.copfs.gov.uk/Publications/2011/07/Guidance-approach-Crown-Office-and-Procurator-Fiscal-Service-Reporting-Businesses-Bribery-Offences>
10. Organisation for Economic Cooperation and Development http://www.oecd.org/topic/0,3699,en_2649_37447_1_1_1_1_37447,00.html
11. Transparency International Guidance <http://www.transparency.org.uk/working-with-companies/adequate-procedures>. The Transparency International Guidance also provides a range of links to a number of other helpful resources to assist in the prevention of bribery.