



**Futures & Options Association  
Bribery Act Checklist**

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## FOREWORD

On 1<sup>st</sup> July 2011, following a period of extensive consultation, the Bribery Act came into force. Essentially, it establishes a set of new bribery offences and requires firms to have adequate risk-based procedures in place in order to manage bribery risk.

On 31 March 2011, the Ministry of Justice issued a set of guidelines on implementing the new requirements and put forward six principles which are intended to strike a balance between, on the one hand, accommodating genuine hospitality and proportionate expenditure to profile commercial organisations or establish “cordial relations” with their stakeholders and, on the other hand, encouraging the widespread adoption within firms of an anti-bribery culture.

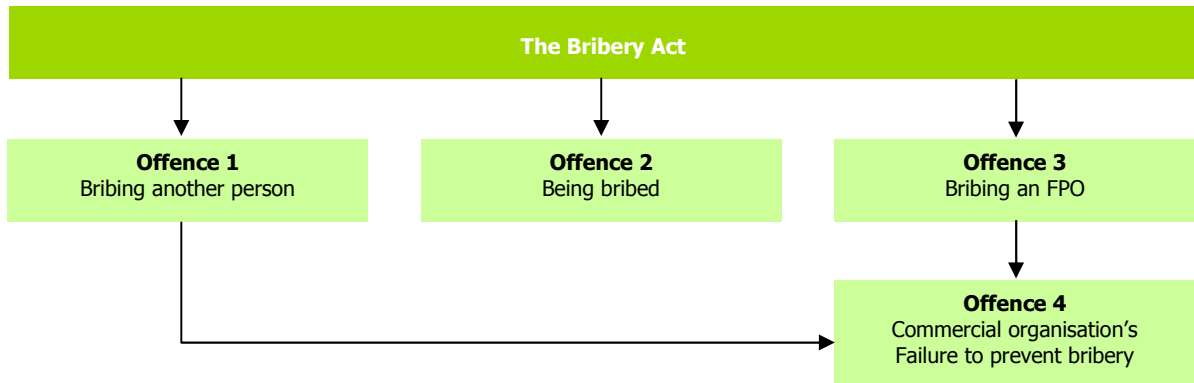
This checklist, produced by the FOA in association with Berwin Leighton Paisner, is designed to assist members of the FOA to comply with the new requirements and give effect to the six guiding principles set out in the Ministry of Justice Guidance. It does not seek to cover every aspect of the legislation or to identify every means or methodology of fulfilling the new requirements. The relevance of its approach will depend upon the precise circumstances of each firm, its business profile and the markets and jurisdictions in which it trades. Further, the checklist takes into account the fact that it is not the intention of the Act to criminalise the kind of hospitality that is “commensurate with the reasonable and proportionate norms of [a] particular industry”.

Each individual firm will need to undertake its own in-depth assessment of the risk of a possible breach of the Bribery Act and should consider taking legal, technical or other professional advice on the kind of systems and controls necessary to meet the statutory obligations placed upon it under the Bribery Act and pursuant to the Guidance issued by the Ministry of Justice.

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# 1 THE OFFENCES UNDER THE BRIBERY ACT

1.1 The Bribery Act 2010 (“the Act”) came into force on 1 July 2011. The 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.



1.2 The act describes a bribe as something of value which either induces improper performance or, in the case of a public official is intended to influence the official and sets out 4 key offences:

- Offering a bribe to another person and intending to induce that person into acting improperly or offering a bribe knowing or believing that acceptance would constitute improper performance of a relevance function or activity (section 1);
- Accepting a bribe and intending that, in consequence, a relevant function will be performed improperly (section 2);
- Bribery of a foreign public official and intending to influence that official in his or her official capacity in order to obtain/retain business or an advantage in the conduct of business (section 6);
- Failure by commercial organisations to prevent bribery.

1.3 “**Improper performance**” means performance which breaches a ‘relevant expectation’ that in carrying out a function or activity a person is expected to act in good faith, is expected to act impartially or is in a position of trust by virtue of performing it.

1.4 When deciding what is expected of a person performing a relevant function or activity for the purposes of the Act, the test is what a reasonable person in the UK would expect of a person performing a relevant function or activity.

1.5 A “**foreign public official**” for the purposes of section 6 is widely defined to include both overseas government officials and those working for international organisations (section 6(5)).

- 1.6 Senior management can also commit an offence if they consent to or connive with an act of bribery (section 14). The penalties include unlimited fines and up to 10 years imprisonment for individuals. .
- 1.7 The Financial Services Authority (“the FSA”) is not a designated prosecutor under the Act. Instead the FSA focuses on prevention rather than prosecution.
- 1.8 The FSA has made it clear that it expects firms to have in place systems and procedures to combat financial crime (including bribery) and has shown a willingness to fine firms who fail to comply with their obligations in this regard (see for example the Aon fine in January 2009 for £5.25m).
- 1.9 The FSA will expect firms to comply with the requirements of the FSA Handbook
- Principle 3 - “a firm must take reasonable care to organise its affairs responsibly and effectively, with adequate risk management systems”
  - SYSC 3.2.6R - “A firm must take reasonable care to establish and maintain systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime”
  - SYSC 6.1.1R - “ A common platform firm must establish, implement and maintain adequate procedures sufficient to ensure compliance of the firm including its managers, employees and appointed representatives (or where applicable tied agents) with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime”
- 1.10 The FSA will expect FOA members to consider the extent to which the jurisdictions they operate in, their customer base, products, delivery channels, dealings with third parties, etc expose them to the risk of bribery and to design policies and procedures to mitigate against the risks identified.

## 2 THE CORPORATE OFFENCE

- 2.1 FOA members will need to have in place systems and procedures to ensure that they do not commit the corporate offence of failing to prevent bribery.
- 2.2 The corporate offence can be committed by a “relevant commercial organisation” which is defined as:
- A body incorporated under the law of any part of the United Kingdom which carries on business whether there or elsewhere;
  - A partnership that is formed under the law of any part of the UK which carries on business there or elsewhere;

- Any other body, corporate or partnership, wherever incorporated or formed which carried on a business, or part of a business, in any part of the UK.
- 2.3 The offence for failing to prevent bribery is committed where a person who is associated with the commercial organisation bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for that commercial organisation.
- 2.4 “**Bribery**” in the context of this offence only relates to the offering, promising or giving of a bribe, contrary to sections 1 and 6. There is no corresponding offence or failure to prevent the taking of bribes.
- 2.5 An “**associated person**” is likely to be widely construed by the UK Courts and may include (to the extent that they are performing services for the commercial organisation):
- Employees;
  - Agents/consultants;
  - Joint venture partners;
  - Subsidiaries; or
  - Suppliers/contractors
- 2.6 The Act creates a wide jurisdiction and can include individuals and corporates even if they are foreign nationals or are incorporated outside the UK. As such, the UK prosecuting authorities may have jurisdiction in respect of conduct which occurs outside of the UK by, for example, parent companies or subsidiaries abroad.
- 2.7 It is unclear in what circumstances a person would be liable for either the actions of a subsidiary or a joint venture but it would appear to be the case that, in the event that there is significant control by the UK entity, the overseas person is likely to be regarded as an associated person.

### 3 **ADEQUATE PROCEDURES**

- 3.1 It is a defence for a commercial organisation to show that it had adequate procedures in place to prevent persons associated with it from committing bribery offences.
- 3.2 Section 9 of the Act refers to the provision of guidance on preventing bribery and requires The Secretary of State (Ministry of Justice) to publish guidance on procedures that relevant organisations can put in place to prevent bribery by persons associated with them. Guidance was produced by the Ministry of Justice on 31 March 2011.
- 3.3 The Ministry of Justice guidance recommends the adoption of a risk based approach to managing bribery risks and recognises that no policies and procedures are capable of detecting or preventing all bribery. FOA members will have adopted a risk based approach when putting in place anti-money laundering policies and procedures and a similar approach

should be adopted when devising systems or controls to combat bribery and corruption. There may however, be some risks which would not be picked up by existing anti-money laundering procedures and FOA members should undertake a review and if necessary prepare a “gap analysis” to identify where further systems and controls are required to effectively counter Bribery Act risks.

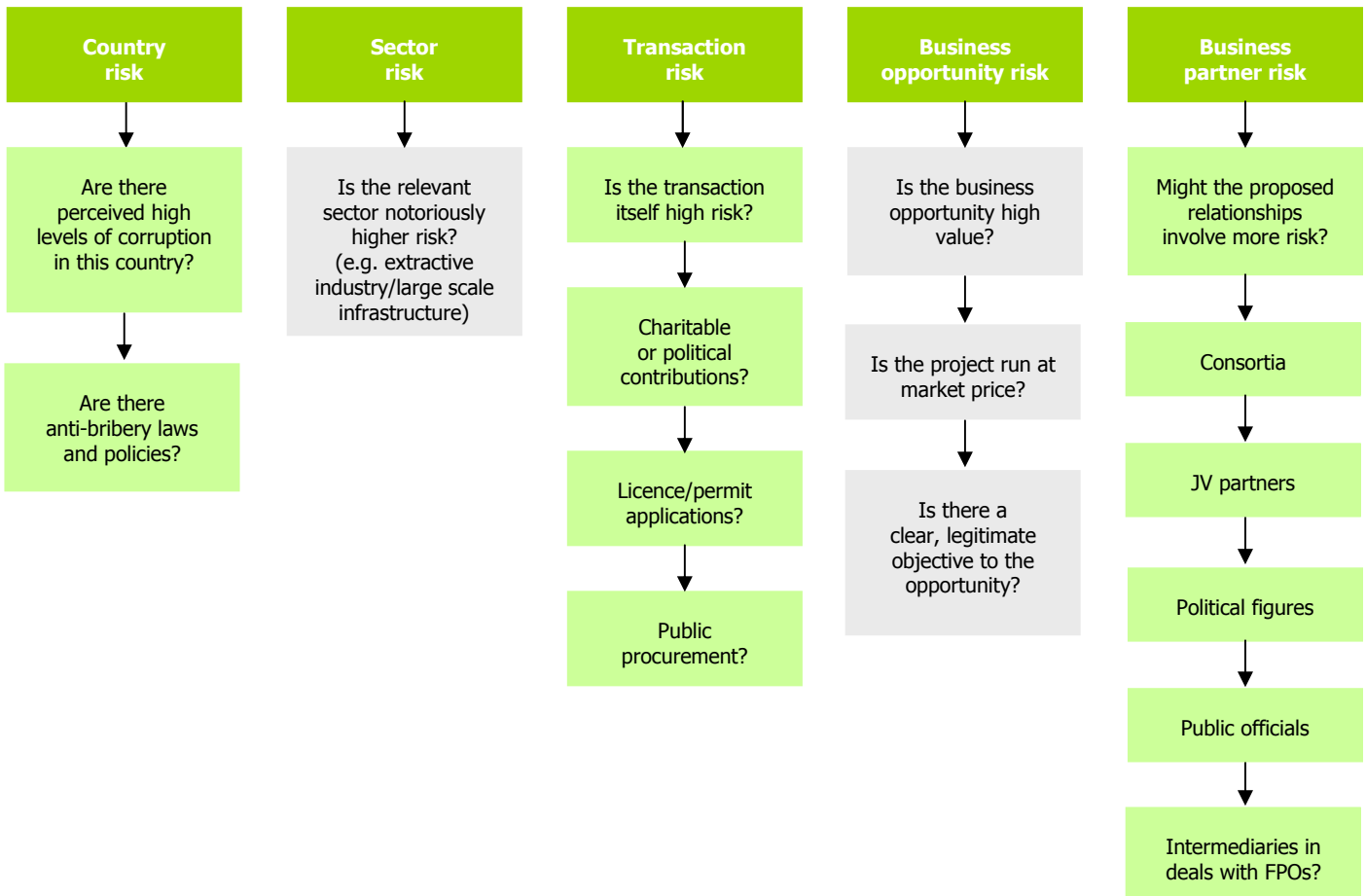
3.4 The Ministry of Justice guidance is intended to help all organisations of all sizes and in all industry sectors understand what sort of procedures they can put in place to prevent bribery. The guidance is not prescriptive but is instead formulated around 6 guiding principles with commentary and examples.



- Proportionate procedures 2 Firms should design policies and procedures that combat the bribery risks identified
- Top level commitment - senior management are expected to be committed to fostering an anti-bribery culture within the firm
- Risk assessment - firms should undertake an assessment of potential bribery risks so that they are better able to design proportionate policies and procedures. This assessment should be documented and periodically reviewed.
- Due diligence - firms should consider undertaking due diligence on associated persons in order to identify issues that may arise
- Communication (including training) - Firms should ensure that anti-bribery policies and procedures are communicated to employees and any party that performs services for and on behalf of the organisation.
- Monitoring and review - Firms will need to monitor compliance with policies and procedures.

3.5 As indicated above the guidance provided by the Ministry of Justice is not prescriptive and firms will need to consider, adopting a risk based approach, what procedures are necessary in order to forestall bribery and corruption.

3.6 In devising policies and procedures organisations are encouraged to undertake a risk assessment to identify the real risks to the business. The risk assessment is likely to focus on the following areas



3.7 As firms should not apply a one size fits all approach when devising adequate procedures, this checklist does not provide an exhaustive list of the areas that firms may wish to consider. Instead, it is suggested that adequate procedures may involve the following:

- A clear statement from senior management that bribery and corruption will not be tolerated;
- A code of conduct which makes it clear that the organisation has a no- bribes policy.
- written policies and procedures, based on a risk assessment undertaken by the business, which provides clear guidance on



- Gifts, hospitality and promotional expenses, including any benefit to be provided to Foreign Public Officials
- Facilitation payments (also termed 'grease payments') which are typically paid to speed up a bureaucratic process
- Political contributions
- Charitable contributions
- Sponsorship
- Written Procedures which provide clear guidance in respect of third parties Including due diligence when entering into a business relationship
- Procedures around payment processes to identify unusual payments
- Details of the Disciplinary consequences that may flow from a breach of the firms anti bribery policies and procedures
- Procedures dealing with
- Pre-employment vetting
- Employees contracts
- Remuneration policies
- Expenses policy
- Reporting procedures/whistleblowing hotline to enable suspicious behaviour to be reported
- Training to ensure that staff are aware of their legal obligations and the firms policies and procedures
- A written crisis management plan to enable firms to take swift action in the event that an incident of bribery is discovered / reported.
- Investigation policies
- Procedures which ensure that management information concerning financial crime is provided to the board.

#### **4 KEY RISK AREAS AND HOW TO MINIMISE THEM**

##### **4.1 Third party representatives and associated persons**

4.2 Any party that performs services for and on behalf of the firm will be an associated person and therefore capable of engaging in conduct which might give rise to a liability under section 7.

4.3 In the event that associated persons are identified following a risk assessment firms may wish to consider the following

- Undertaking due diligence in respect of all third party representatives and associated persons including (but not limited to) establishing the third parties experience and/or qualifications
- Providing third parties with copies of the firms code of ethics and anti-bribery policies and procedures
- Inserting appropriate provisions into contracts that permit the firm to terminate the relationship in the event that the party is engaged in unethical behaviour
- Requiring the third party to have in place anti-bribery polices and procedures
- Requiring the third party to provide anti bribery training to employees and others associated with it
- Insisting on the right to audit the third party to ensure compliance with anti-bribery policies and procedures

4.4 FOA members will of course have a number of existing relationships and it may not be appropriate or practicable to achieve some of the points referred to in paragraph 4.3 above. This is recognised in the Ministry of Justice Guidance which states:

*“The government recognises that applying these procedures retrospectively to existing associated persons is more difficult, but this should be done over time, adopting a risk based approach and with due allowance for what is practicable and the level of control over existing arrangements.”*

4.5 In view of the guidance provided by The Ministry of Justice FOA members may wish, when undertaking a risk assessment, to initially identify those third parties that carry the highest risk from a bribery prospective and seek to take steps (insofar as they are able) to mitigate that risk.

#### 4.6 **Corporate hospitality and promotional expenses**

4.7 The Ministry of Justice Guidance states that:

*“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”.*

4.8 It follows that bona fide corporate hospitality and promotional expenditure, without more, would be unlikely to contravene the Bribery Act.

4.9 Firms will need to consider what procedures should apply to corporate hospitality and promotional expenditure. In relation to the provision of hospitality or promotional and other business expenditure to foreign public officials there must be intention to influence the official in his or her official role. The Ministry of Justice provides examples of appropriate expenditure:

*“It may be in some circumstances that hospitality or promotional expenditure in the form of travel or accommodation costs does not even amount to “a financial or other advantage” to the relevant official because it is a cost that would otherwise be borne by the relevant foreign government official because it is a cost that would otherwise be borne by the relevant foreign government rather than the official him or herself.”*

*“It is unlikely ... that incidental provision of a routine business courtesy will raise the inference that it was intended to have a direct impact on decision making, particularly where such hospitality is commensurate with the reasonable and proportionate norms for the particular industry; e.g. the provision of airport to hotel transfer services to facilitate and on site visit, or dining and tickets to an event”.*

4.10 Firms will want to ensure that they are able to spot unusual occurrences, for example:

- Cash payments
- No rationale for the corporate hospitality
- the extent to which acceptance of hospitality may give rise to a feeling of obligation on the part of the recipient, and so on

4.11 Appropriate procedures may include

- Recording details of the kind of hospitality permitted and the type of activity which is not
- An authorisation process which considers the extent to which such hospitality is appropriate having regard to all of the circumstances
  - Is the level of hospitality appropriate?
  - Is the hospitality linked to the award of a contract?
  - Will the provision of hospitality make the recipient feel obligated to perform his or her function improperly?
  - Is the level of hospitality linked to the award of a contract?
  - Is the hospitality clearly unconnected with legitimate business activity?
  - Does the level of hospitality exceed the threshold limits set out in the firms policies and procedures. If so why ?
  - Is hospitality being provided to a Foreign Public Official ? If so what is the justification. Is the firm certain that the payment is not intended to influence the Foreign Public Official in his capacity as a Foreign Public Official to obtain or retain business or an advantage in the conduct of business?

#### 4.12 **Extra-territoriality**

The territorial scope of the Act is very wide and can apply to conduct undertaken by a commercial organisation (or by associated persons) outside of the UK. Thus

- A foreign subsidiary or branch could cause the UK parent to become liable
- An agent, intermediary, business partner could cause the UK firm to be liable

#### 4.13 **Facilitation payments**

4.14 Facilitation payments are typically small payments to facilitate routine government action.

4.15 In some jurisdictions, facilitation payments are seen as a normal part of doing business in that jurisdiction. The US Foreign Corrupt Practices Act, for example, has a facilitation payments exemption. However, the Bribery Act includes no such exemption.

4.16 The guidance given by the Ministry of Justice, however, recognise:

*“The problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play...”*

4.17 Firms will need to establish

- whether facilitation payments are being made, and if so
- to whom
- why they are being made
- the context of the relationship in which they are made
- whether any form of duress was involved

and to implement a policy of not making such payments unless required to do so under duress. Policies should also include clear guidance for employees on what steps they should take if they are asked to make a facilitation payment.

#### 4.18 **Procurement**

4.19 FOA members will may wish to consider having policies and procedures in connection with the procurement of goods and services. It is not uncommon for third party providers to provide gifts and/or hospitality to clients. Firms will wish to consider having an established procurement policy and procedure in place to ensure that relationships are suitably

managed and that employees do not commit the offence of accepting a bribe.

## 5 INVESTIGATING BRIBERY

5.1 In the event that a FOA member becomes aware of circumstances that suggest that the firm and/or an associated person may have been engaged in bribery it is imperative that it is investigated as a matter of urgency in order to:

- Ascertain the nature of the issue
- Establish what action should be taken to remedy the situation
- Decide whether the regulator should be notified
- To prevent further activity
- To refine policies and procedures to prevent further issues arising

5.2 The following (non-exhaustive) checklist outlines the questions/points FOA members may wish to consider:-

- Is the identity of the wrongdoer known?
- If employees are involved consideration should be given to whether they should be denied access to company systems, IT controls, funds or authority to execute contracts on the company's behalf. Consideration should also be given to suspending/terminating the employee/removing them from their duties.
- Is there a need to make a preliminary notification to
  - regulators
  - the Police;
  - the Market;
  - external auditors;
  - insurers;
  - other transacting parties;
  - lenders
- Did the Trigger Event result from a report made by a Whistleblower. If so is there a need to adhere to local whistleblowing laws.
- Consider constructing the investigation so that legal professional privilege is secured over communications and work product.
- Determine the scope of the investigation. Consider whether this needs to be done in conjunction with a regulator.

- Draw up an investigation plan.
- Secure assets which may have been misappropriated/at risk - consider injunctive relief.
- Secure electronic/hard copy evidence. In this regard, consider:
  - the scope of evidence required;
  - the retrieval of electronic material, including instant messaging/e-mail/hard-drives etc;
  - data protection and privacy issues;
  - security system logs;
  - telephone/blackberry calls and logs;
  - deactivating devices and ceasing routine destruction;
  - (sending out a document retention memorandum to staff.
- Does the matter involve:
  - complex financial or accounting issues;
  - matters requiring investigation outside the company; an area of specialist expertise; and/or
  - stock exchange implications?

If so consider engaging an appropriate expert.

- Conclude preliminary interviews to assist with early fact finding and scoping
- Review electronic/hard copy material retrieved. Maintain an accurate record of the source of all data so identifiable when reconfigured.
- If appropriate, interview key individuals. Consider:
  - whether legal representation should be made available to the interviewee,
  - whether ongoing monitoring of employee activities is appropriate,
  - how the content of the interview is to be recorded.
- Report of findings. Consider:
  - whether the report is to be written or delivered orally;
  - the risk of actions for defamation and/or other employment claims; and

- the dissemination of the report.
- Implementation of recommendations

### **Key legislative and regulatory sources**

- [The Bribery Act 2010](http://www.legislation.gov.uk/ukpga/2010/23/data.pdf)  
<http://www.legislation.gov.uk/ukpga/2010/23/data.pdf>
- [The Ministry of Justice Bribery Act 2010 Guidance](http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf)  
<http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf>
- [Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions: Bribery Act 2010](http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf)  
<http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>
- [Transparency International/Adequate procedures - Guidance to the UK Bribery Act 2010](http://www.transparency.org.uk/working-with-companies/adequate-procedures) <http://www.transparency.org.uk/working-with-companies/adequate-procedures>
- [FSA's Final Notice against Aon Limited issued on the 6 January 2009](http://www.fsa.gov.uk/pubs/final/aon.pdf) <http://www.fsa.gov.uk/pubs/final/aon.pdf>
- [Chapter 7 of the FSA's draft Financial Crime Guide published in June 2011](http://www.fsa.gov.uk/pubs/cp/cp11_12.pdf) [http://www.fsa.gov.uk/pubs/cp/cp11\\_12.pdf](http://www.fsa.gov.uk/pubs/cp/cp11_12.pdf)