

aerospace  
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# BUSINESS ETHICS A TOOLKIT

(A guide to implementing recommended aspects  
of best practice in business ethics compliance)

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2. This Ethics Toolkit was compiled and updated by Interchange Solutions Limited (see [www.interchange-solutions.co.uk](http://www.interchange-solutions.co.uk))

# FOREWORD

**PAUL EVERITT**  
Chief Executive, ADS



I am pleased to lend my support to the continuing work of my colleagues to strengthen and promote increased awareness of the AeroSpace Defence & Security's Common Industry Standards (CIS) through this updated toolkit. The CIS is a valuable contribution to the global drive to harmonise the improvement of corporate integrity and business ethics, and ADS encourages all UK aerospace, defence and security companies to participate in this welcome initiative.

The United Kingdom has long been recognised as being one of the least corrupt countries in the world. At the Corporate and the Government levels, it has long played a leading role in seeking to develop European-wide standards on business ethics, and its companies have a very strong record on anti-corruption.

This does not mean that UK companies are totally immune from the insidious commercial pressures of bribery and corruption, particularly when they are operating in new and emerging markets. A strong legal architecture and effective enforcement can help to reduce and minimise these pressures, but the primary and most effective response lies in clearly establishing the correct type of corporate culture which makes the seeking or payment of bribes an anathema. Whilst many companies have a board-level anti-corruption code of conduct, it is essential that these are more than statements of intent, and are properly, robustly and effectively implemented.

The CIS focus on implementation is meant to assist companies actively to manage the risks of international corruption, and to turn their good intentions into mainstream business practice. The rise of the emerging market economies brings new challenges and opportunities, and I believe that good corporate governance is critical to the UK's long-term sustainability and competitiveness. Looking ahead, I support efforts to extend this initiative towards a global industry standard, including through the transatlantic International Forum on Business Ethical Conduct (IFBEC).

I want to thank everyone involved in developing this important work, and especially our colleagues at Interchange Solutions (who have assisted us enormously in producing this Toolkit), and I commend these standards to you as a tool to ensure the long-term success of the UK aerospace, defence and security industries.

# PREFACE

**KATHERINE DIXON**  
International Development Programme,  
Transparency International



The legal and reputational imperative of taking business ethics seriously is now rarely disputed in Britain. As this excellent toolkit sets out, the consequences of "getting caught" just aren't worth it.

That's why it's great to see so many leading British companies thinking beyond compliance, with transparent and ethical business practices increasingly understood as an important driver of competitive advantage. Our experience working with major arms-purchasing nations supports this conclusion. Bidding companies should expect ever more scrutiny from increasingly professional procurement departments, themselves subject to ever greater oversight from an empowered and better-informed set of taxpayers.

Investment in robust anti-corruption and compliance programmes really is an investment for long term success. And the signs are that industry is already responding: the 2015 Defence Companies Anti-Corruption Index demonstrated that many companies in the industry are paying closer attention to the transparency and quality of their anti-corruption programmes; 60% of companies in the index had improved since the first edition was published in 2012.

Of course, underpinning both the legal and business case for taking ethics and compliance seriously is the important role aerospace and defence companies play in global security. Bribery and corruption within this sector degrade a nation's ability both to provide security and essential services for its citizens. It is not just about commissions on sales. It can mean soldiers operating with equipment that doesn't work, or with no equipment at all and, in the long term to the hollowing out of national defence institutions. We all have a shared interest in reducing this risk worldwide.

With such high stakes at play, there are still too many companies lagging behind, and even those with comprehensive programmes need to remain vigilant. So we welcome every step you are taking to improve the performance of your company and fully support the efforts of ADS to raise the standard of the global industry and show others how it can be done.

# Part 1: Introduction

**This booklet has been updated in the context of the Bribery Act 2010<sup>1</sup> which came into force on 1st July 2011. It contains updated materials and advice for UK organisations, in general, and ADS Members in particular. Should a company or individual have any concerns in relation to any legal or other professional matters, they are strongly advised to seek specialist advice. This booklet is not a substitute for legal or other professional advice and should not be relied on as such.**

## Why bother with the Bribery Act?

The UK aerospace, defence and security and space industries have a global reputation for first-class quality and innovation. It is this reputation that positions the UK as a worldwide leader. The industries support some 310,000 jobs across all regions of the United Kingdom, many in world-leading technologies. Through more than 2,000 companies, the industry has revenues of £56 billion and is one of Britain's major exporters. The UK is number one in Europe and second only to the United States globally in Aerospace and Defence. ADS also embraces the UK Security and Space Industry. Both these sectors are set to significantly grow over the next decade.

The sustainability of these industries and their supporting UK supply chain is vital to the economy and the jobs of many people, especially those young people in 11,500 apprenticeships. As established markets shrink for some companies, exporting is an increasingly necessary and important option. There is considerable opportunity for companies of all sizes in many new export markets; however, some of those markets are also prone to a greater risk of corruption, presenting a business challenge for primes and smaller companies, alike.

There is increasing public and state resistance to corruption –around the Globe. Many authorities are better informed today and the G20 countries more joined up in their efforts to investigate and prosecute. As a senior FBI Agent said at a 2015 ADS Ethics seminar “It is not if we will catch you – today, it is simply a matter of when”.

The cost of corruption is a heavy burden on both society and the economy of many countries where advantage is often taken by those in public office. “That’s the way of doing business in .....” or “it’s the culture of that country” are no excuse to break the law and such defence is specifically excluded in the Bribery Act<sup>2</sup>:

An allegation, or, worse still, a successful prosecution, under any jurisdiction, will be personally damaging for individuals and for the reputation and finances of any organisation. Smaller companies may not be able to withstand the financial costs of defending an allegation, let alone a prosecution. New Sentencing Guidelines on conviction, for bribery were published in the UK in October 2014<sup>3</sup>.

Alongside the Bribery Act 2010, the Ministry of Justice has provided principles-based Guidance<sup>4</sup>, (both explained later) that, besides explaining the Act, makes good business sense too. The six principles in the Guidance set out the expectation of what a company might put in place to prevent bribery. Demonstrating that a company has so called “adequate procedures” in place to mitigate bribery risk is its only legal defence for a commercial organization against a charge under Section 7, “failing to prevent bribery”.

This Guidance is not just about morality and the law; it is about organisations instituting good ethical practices, appropriately adapting their culture and leveraging those positive changes to create competitive advantage and underpin their corporate reputation.

## How does a company benefit from all of this?

- Good business ethics creates competitive advantage when working with primes and increasingly when bidding directly for overseas contracts;
- There is an increasing requirement for vendors to provide evidence to purchasers, be they public or private, of their anti-bribery compliance;
- Employees, particularly those who are younger, are more likely to be loyal to a “clean/ethical” business than a “tainted” one;
- Investors and stakeholders are more confident when they have a high degree of certainty that there will be no costly litigation surprises linked to bribery;
- Really knowing with whom you are doing business will help you to drive more value out of business partner channels (agents, advisers, distributors, etc.) and further mitigate the risk of bribery;
- With many more suppliers outside of Europe and the USA, knowing more about them and gaining their support for your business ethics stance, reduces the risk of unanticipated interruption in the supply chain;
- Incorporating business ethics into business strategy, making anti-bribery compliance a part of and not apart from the operations of the company will drive beneficial changes in market entry strategies, supplier acquisition, in mergers and acquisitions and other business ventures;
- A risk-based approach will enable companies to identify and better manage opportunities in those markets where the risk of corruption is higher.

<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2010/23/contents>

<sup>2</sup> See Bribery Act 2010 Section 5(2) Expectation test

<sup>3</sup> See [https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud\\_bribery\\_and\\_money\\_laundering\\_offences\\_-\\_Definitive\\_guideline.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf)

<sup>4</sup> <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

There are, therefore, sound business reasons why the Bribery Act 2010 presents an opportunity for companies to look at more than simply making choices about compliance. This Toolkit sets out to help companies to address both the Bribery Act 2010 and to take advantage from embedding good business ethics into their corporate DNA and to secure commercial and competitive advantage.

### What does ADS have in place now?

In April 2007 the AeroSpace and Defence Industries Association of Europe (ASD) issued the Common Industry Standards (the "CIS"), recognising the growing value of good ethical practices and their contribution to successful business. The CIS has been adopted by the national aerospace and defence trade associations in Europe and they are encouraging their Members to implement it.

In June 2009 the Aerospace Industries Association (AIA) and ASD jointly formed an International Forum on Business Ethical Conduct (IFBEC)<sup>5</sup>, and they have developed the Global Principles of Business Ethics for the Aerospace and Defense Industry<sup>6</sup>.

This Toolkit explains the background, the risks to business and includes brief scenarios based on real cases. The Bribery Act and its Guidance are explained in practical terms and reference made to the CIS. There are useful updated templates in the Appendices and advice on where to seek further information.

### Frequently Asked Questions

The thoughts set out in these questions are those anticipated to be in the minds of company directors, managers and other employees. It may be helpful to have the answers to these questions readily available as you embark on either your new anti-corruption programme or revisiting an existing programme.

### I have never bribed anyone – this is insulting!

It is not suggested that anyone inside your company has behaved improperly – quite the reverse. It is increasingly important that the high standards, which most people regard as normal, are reflected fully and visibly in the way a company does its business. "What any reasonable person might do in their job".

Directors and senior officers of a company need to be on their guard to ensure they are aware of a company's risk mitigation policy and procedures, and are bought into them, so they may not be held liable for the misdemeanours of any person associated with the company. Directors and senior officers have a major personal and corporate responsibility in this regard.

### Don't companies lose out on business when they say "No" to bribery?

The most tried and tested policy is zero tolerance of bribery. It is self-evident that companies that adopt a robust approach to mitigating bribery risk develop better internal processes and build trust with all stakeholders. There is also evidence that those who seek bribes are less likely to communicate their demands to companies which have published clear ethics policies.

Where successful prosecutions have occurred, some companies have been debarred from future business, particularly if the offence was related to a public official. The World Bank, the Asian Development Bank, European Bank for Reconstruction and Development, and others operate vendor blacklists. Under EU law, it is possible for a company convicted of bribery being debarred from all public EU and other international contracts. Examples of such blacklisting include Siemens and Macmillan Publishing.

Aside from any action on conviction, it is very likely that a company will have to bear the cost of a compliance monitor for a set period of time (often three years) to observe and have access to all the relevant parts of the business, to ensure good compliance in the future.

### So is there one law against corruption?

No. At the top level, there are international conventions (such as the OECD and UN Convention against Corruption). These conventions set out the requirements which individual signatory countries must implement in their laws. The UK has signed up to both these conventions, and its latest national legislation is the Bribery Act 2010, which came into force on 1st July 2011.

There are laws in other jurisdictions prohibiting bribes or illicit payments to public officials, as well as bribes or anti-competitive arrangements with other companies. Amongst these is the US Foreign Corrupt Practices Act 1997 – "FCPA". Under this law, the United States may have extra-territorial jurisdiction over foreign companies under certain circumstances.

Companies may be vulnerable to a FCPA action by the US authorities where: they are listed on a US stock exchange, or have offices in the USA; hold a relevant meeting on US territory; trade in US Dollars; or their e-traffic, relevant to the offence, has passed through US-based servers. There has been a recent increase in the prosecution of non-US companies under the FCPA, which can be an extraditable offence.

### Examples of recent successful bribery prosecutions include:-

- Prime: - Alstom pleaded guilty in the USA to bribing officials in Indonesia, Saudi Arabia,

<sup>5</sup> [www.ifbec.info/](http://www.ifbec.info/), <sup>6</sup> [www.ifbec.info/assets/globalprinciples.pdf](http://www.ifbec.info/assets/globalprinciples.pdf).

Egypt, and the Bahamas. In December 2014 it paid \$772 million in criminal penalties to settle the charges. The penalty was the biggest criminal fine ever levied for FCPA offenses and the second biggest FCPA enforcement action overall. In 2015 the UK's SFO charged both Alstom Network UK Ltd and three others, one of whom was a former compliance director, with corruption offences. Further details are at: <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery>

- SME:- In February 2015, two directors of Smith & Ouzman, a family owned security printer in Eastbourne, were sentenced to a total of 4.5 years imprisonment and a 6-year debarment each as directors in the UK for overseas corruption offences. In November 2015 a further hearing will deal with confiscation proceedings against the company itself and the two former directors. Further details are at: <http://sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/two-men-sentenced-following-corruption-trial.aspx>

### **The law prohibits bribery - isn't that enough?**

The law sets the minimum acceptable behaviour. Besides addressing bribery by individuals, the Bribery Act contains a "corporate" offence of a company failing to prevent bribery (Section 7). This offence requires illegal activity by a person (or persons) associated with the company (e.g. director, employee, agent, etc.). The offence creates a risk for those companies that leave their employees or agents unsupervised, with the result that a bribe is paid, while allowing a well-managed company to avoid conviction, provided it can show that it generally has good systems and methods in place to prevent bribery (the legal defence of having in place "adequate procedures").

### **Have there been numerous prosecutions under the Bribery Act?**

Only a few to date but the case load is building as it takes time to bring a case to court. Since the Bribery Act is not retrospective for offences committed before July 2011, offences committed before that date would be prosecuted under earlier legislation. However, it is unwise to believe that any current malfeasance will not eventually be investigated as UK prosecutors may delve far back into an allegation given there is no statute of limitations. There has been an increase in the number of cases being prosecuted under the old law and it is expected this trend to continue into cases prosecuted under the Bribery Act.

In a networked world, companies need to recognise that an allegation might arise from an entirely unexpected source, such as a competitor, a whistleblower or from an embassy

(whether UK or foreign). Additionally, the UK SFO encourages individuals to report incidents of corruption via a confidential hotline<sup>7</sup>. This completely bypasses a company's established reporting structures across all jurisdictions.

### **Is corruption prevention very costly?**

The cost of implementing an effective anti-bribery policy and business process is small compared with the cost of defending an allegation or, worse still, a prosecution. Much of the preparation needed for Bribery Act compliance puts a company in a good position in relation to other laws, for example the US FCPA, especially where that company also keeps good records of all transactions.

The Bribery Act provides companies with an opportunity to review and implement new market strategies. There is strong commercial upside of doing this; better understanding of and developing business opportunities (especially in those countries where there is a higher risk of corruption), upholding reputation, improved risk management and the confidence of knowing the company has evidence of "adequate procedures" in the event of it being prosecuted under the Section 7 offence of the Bribery Act 2010.

To address an organisation's concerns on the implementation of their anti-bribery compliance and their ability to evidence their "adequate procedures", the BS10500-2011 anti-bribery management system standard was launched in 2011. BS10500 has formed the basis for ISO 37001 which will be launched in 2016. Details are at: <http://shop.bsigroup.com/en/ProductDetail/?pid=00000000030238856>

What action should an individual take if concerned that a colleague may not be meeting these high standards?

If confident to do so, the individual should speak to the person concerned to clarify the situation. Alternatively, the individual should raise the concern with their management, in line with the company's internal policies which should ordinarily include guidance on disclosure ("whistleblowing" or "speak-up" etc.) Those who raise concerns of bribery in reasonable belief, have legal protection in the United Kingdom from detrimental treatment or victimization, under the Public Interest Disclosure Act 1998.

### **Isn't bribery "the way business is done" in some countries?**

Many countries have anti-corruption laws and strict public procurement procedures. However, some companies seemingly have an embedded view that "this is the way business is done in certain countries – and if we do not pay bribes we will lose out to others who do". In reality this may be true and they believe that if they change their approach, they will lose business. However, continuing paying bribes will almost certainly

put the company at risk and increasingly may cause the company to lose business reputation (e.g. GSK in China; see: <http://www.bbc.co.uk/news/business-29274822>).

Regardless of any other national laws, the Bribery Act 2010 succinctly deals with a perceived culture of bribery and corruption under Section 5, where it says "any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned". There are few, if any, countries that permit bribery under these circumstances and, therefore, local custom and practice may not constitute a legal defence.

### Scenario 1 ~ Grooming

*Sandra is a junior buyer employed by a SME defence manufacturing company. She is responsible for purchasing office supplies. Dave is sales manager of ACE Stationery Supplies and wants to secure the business as ACE is not a current supplier. Through Sandra's LinkedIn page, Dave sees that Sandra is keen on cars and has expressed a wish to buy a new Mazda MX5. He invites her along with other ACE customers to the Birmingham Motor Show.*

*Sandra has considered reporting the invitation to the Head of Procurement, a slightly distant manager in his early fifties. She falters and asks a colleague more her age. She responded, "Lucky you, there's no company rule against it – enjoy! And take it as a sickness day!" Sandra enjoys the Motor Show and the impromptu dinner afterwards.*

*A month later Tom calls Sandra to advise her of great value photocopier paper offer. If Sandra orders 100 boxes she will receive a personal loyalty bonus of £25 of Zara shopping vouchers. What is happening here?*

### Observations:

- Grooming involves identifying a human source of information or favourable influence who might be groomed into "improper behaviour" in relation to the performance of their job.
- Social media is frequently used to collect market and other commercial intelligence (LinkedIn, Twitter, etc.). Ethical risk is likely to occur from untoward disclosure, where employees blur the lines between work and leisure.
- The subject is then tested for their willingness to accept an incentive to perform their function improperly to provide further help to the vendor organisation - which may be illicit.

- Sandra and her colleague were seemingly unaware of any company policy on the giving or receiving of gifts and hospitality...if there was one!
- She is in the process of being groomed, through a hospitality incentive. First to provide information and Dave's intention, once she has been sufficiently "hooked" over time, is to test her through further incentives (bribes) to obtain an unfair supplier advantage.
- As the process develops and Sandra receives more bribes, she would find it difficult not to place further orders nor step back from or disclose her improper performance in her job.

# Part 2: Compliance and law

## United Kingdom Bribery Act 2010

While the FCPA relates to the bribery of foreign government officials, the UK's Bribery Act<sup>8</sup> goes further. Besides the general offences of bribing another person or receiving bribes, including through a third party, such as an agent, at Sections 1 and 2, the Act also introduces two new offences:-

### Section 6: Bribery of a foreign public official.

### Section 7: Failure of a commercial organisation to prevent bribery.

The Bribery Act also differs from FCPA in treating facilitation payments as illegal bribes. Of note, the Global Principles of Business Ethics for the Aerospace and Defense Industry also advises companies to seek to eliminate facilitation payments, even where not prohibited by law.

## Key elements of the Bribery Act

The Bribery Act<sup>9</sup> has been in force in England, Wales, Northern Ireland and Scotland since 1st July 2011.

### The key offences are (in summary):-

- **Section 1 - Bribing another person:** To offer, promise or give a financial or other advantage to another to induce or reward a person for the improper performance of their function or knowing that acceptance would be improper – [to offer or pay a bribe]
- **Section 2 - Being bribed:** To request, agree to receive or accept a financial or other advantage intending that in consequence a relevant function or activity should be performed improperly or where the request, agreement or acceptance is itself improper - [to request or receive a bribe].

It does not matter whether the bribe is paid directly or through a third party. These offences also address so called "private bribery" that is between individuals of two companies/ organisations. Of course it also applies to UK domestic public officials. The offences cover all forms of "one-to-one" bribery. In simple terms, "improper performance" means that behaviour which falls outside what a reasonable person in the UK would expect; in effect knowingly breaking the law.

- **Section 6 - Bribery of a foreign public official:** To influence such an official with the intention of obtaining or retaining a business advantage in the conduct of business. A foreign public official includes appointed or elected officials of a foreign government,

those working in a public agency or public enterprise of that country (e.g. state-owned company) and of international organisations, (e.g. United Nations). It should be noted that in many countries, key industries may be owned by the government (sic state-owned companies) although they may appear to be a normal commercial concern. If such allegations were made, the official(s) concerned would most likely be charged in the jurisdiction of their country.

- **Section - 7 Failure of a commercial organisation to prevent bribery:** A company would be guilty of this offence where a person associated<sup>10</sup> with the company bribes another person intending to obtain or retain a business advantage on behalf of the company. It is a defence for the company if it can prove it has adequate procedures designed to prevent the associated persons from bribing on its behalf. The Ministry of Justice Guidance to the Act, provides guidance as to what procedures a company might adopt to prevent bribery. However, adoption of a policy in line with the guidance does not guarantee a safe harbour from prosecution. The prosecution authorities (SFO, HMRC and DPP) would decide whether or not to pursue a Section 7 Offence and, if prosecuted, the decision to convict would rest with the court.
- **Section - 14 Offences by bodies corporate:** If an offence under section 1, 2 or 6 is committed by a body corporate or a Scottish partnership, and the offence is proved to have been committed with the consent or connivance of a senior officer or a person purporting to act in such capacity, the senior officer or person (as well as the body corporate or partnership) is guilty of the offence and liable to prosecution. This offence addresses the actions of company directors, managers and others who might be categorised as "director" or "senior person" or if in relation to a Scottish partnership, a partner in that partnership.

### Other important considerations:-

- **Section - 11 Penalties:** An individual found guilty of an offence under Sections 1, 2 and 6 could be imprisoned for up to 10 years, to pay a fine, or both. A commercial organisation found guilty under Section 7 will be fined and recoveries may also be sought under the Proceeds of Crime Act 2002 which could also include dividends paid to shareholders. Under current sentencing guidelines, fines may be up to 400% of the profit gained from a particular contract or other benefit gained from the bribery, depending on the culpability and harm. There may be large cases of fraud or bribery in which the true harm is to commerce or markets generally. That may justify adopting a harm figure beyond the normal measures.

<sup>8</sup> <http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm>

<sup>9</sup> <http://www.legislation.gov.uk/ukpga/2010/23/contents>

<sup>10</sup> "Associated person" is set out fully in Section 8 of the Act and relates to a person who performs services on behalf of the organisation, in whatever capacity and may, therefore, be an employee, agent or subsidiary, etc.

- **Section - 12 Territorial Application:** The Act has extra-territorial reach in that offences committed outside of the UK may be prosecuted. Additionally the Act covers a range of individuals who have varying degrees of UK citizenship and those ordinarily resident in the UK. An offence is committed under Section 7 (corporate) irrespective of whether the acts or omissions took place in the UK or overseas, as long as the commercial organisation carries on business, or part of a business, in the UK.

### Other relevant UK legislation & regulation

There are other key pieces of current UK legislation/regulation relating to criminal breaches of ethical behaviour; [but beware, defendants may also be charged under another jurisdiction's legislation, not just in the UK.]

- The Civil Service Code of Conduct (Duty to disclose)
- Theft Act 1968 (false accounting)
- Company Directors Disqualification Act 1986
- Proceeds of Crime Act 2002
- Fraud Act 2006
- Companies Act 2006

### United States Foreign Corrupt Practices Act 1997 (FCPA)

While bribery is a crime in many other jurisdictions worldwide, of particular significance is the US Foreign Corrupt Practices Act 1997<sup>11</sup> (FCPA). It has extra-territorial reach for those non-US companies doing business in the USA and/or with US subsidiaries. In certain circumstances, the US may seek extradition of UK nationals (under the UK's Extradition Act 2003) and/or a company's third party representatives, to stand trial in the USA.

The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides "affirmative defenses" which can be used to defend against alleged violations of the FCPA. The statute lists examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

However, as evidenced in the 2010 US conviction of Swiss freight forwarder Panalpina, the regular use of facilitation payments cannot be assumed to be free from prosecution.

Further details are at: <http://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>

Bribing on a larger scale ("grand" bribery) to secure a contract is certainly not a "facilitating payment" ("petty" bribery"). It is likely to be prosecuted under the FCPA, if the US can establish its jurisdiction. All companies need to be mindful that any improper electronic communication from outside the USA to/from US companies, subsidiaries or individuals may be intercepted under the FISA Amendments Act of 2008<sup>12</sup>, thereby providing incriminating evidence for a criminal indictment. Other areas to be mindful of are overseas financial transactions involving US dollars or other clearly territorial acts such as meetings, use of US e-mail servers or the US Mail.

For the purposes of clarity, the domestic bribery of a United States public official would generally be prosecuted under the Anti-Kickback Act of 1986.

### Broad differences between the Bribery Act and FCPA

Provisions	Bribery Act	FCPA
<b>Bribery of foreign public officials</b>	Yes	Yes
<b>Private-to-private bribery</b>	Yes	No
<b>Facilitations payments</b>	No	Yes – under limited circumstances
<b>Extra territorial application</b>	Yes	Yes
<b>Liability for third parties</b>	Yes	Yes
<b>Failure to keep books and records</b>	No – Companies Act	Yes
<b>Criminal penalties</b>	Up to 10 years plus fines Companies – unlimited fines	Up to 5 years plus fines Companies – fines
<b>Statute of limitations</b>	No	Yes 5 years

# Part 3: Risks

**Note**, that where there is weak bribery and corruption compliance within an organisation, other crimes such as money laundering, fraud and cybercrime (including data and intellectual property theft) may also occur. All of these are increasingly likely to have unseen connections to organised crime and, worse still, terrorism.

Bribery and other unethical behaviour can develop from any part of a company. Externally it may occur in the supply chain, via intermediaries such as sales advisors, agents, consultants, distributors and through joint venture and offset partners.

Companies engaging in offset arrangements should proceed with care and apply their risk management principles from the outset in the same manner as they would in other projects/parts of their business. The same approach should be adopted in mergers or acquisitions, with particular attention paid to the integrity of key individuals and especially identifying the ultimate beneficial owner(s) during the commercial due diligence processes.

This section sets out the main areas of bribery risk; a summary of the most common ways to mitigate such risk and specific areas of concern including corruption risk in offset projects, which are increasingly common in international defence procurement.

## How can a bribe be contrived or concealed?

Whilst many view bribery as a primarily sales initiated activity, it will also occur in procurement. In some cases it takes place with the connivance or involvement of the senior management of a company, especially if there is a long-standing personal relationships with a particular customer.

Bribes may be contrived or concealed in a number of imaginative ways, beyond the offering and receiving of a “brown envelope” or an expensive gift. Some examples are:-

- Giver/recipient sharing the proceeds of fixed price but under-budget contracts
- Overstated bills of quantity (deliver five loads but invoice for six - common in the construction industry) or the supply of consultancy services (often difficult to quantify exactly what was delivered)
- Collusion between vendor and buyer in over-invoicing of services and labour such that the excess amount can be skimmed off and shared by the colluding parties
- Overcharging for raw materials and commodities; skimming off the additional amounts
- Financially engineering surpluses on agency commission ledgers then transferring them to less visible accounts for payment of bribes through commissions (“slush funds”)
- Transferring licit intermediary commission provisions (where not required) to increase the commission level on another intermediary account to pay a bribe
- Rental of property or other services from a government official or his/her closely-related parties/company at above market rates to conceal illicit payments
- Payments/arrangements through wholly unconnected agencies, professional advisors (including lawyers and accountants), travel agents, bogus charities and may be layered through several offshore accounts.

## Company risk

As corruption is increasingly investigated and prosecuted, it raises the likelihood of discovery. The risks, if only of a bribery allegation, are serious and may put a company into financial jeopardy in trying to defend itself. Reputation is likely to be affected, as will trust between all the stakeholders, especially customers and suppliers. Evidence shows that for

listed companies, share price volatility may be an unwelcome consequence. This may cause investors to exit or instigate a class action or similar litigation against the directors of the company for loss of profits from dividends. Examples include the proposed shareholder class action against Tesco and some UK banks following various regulatory actions both in the USA and UK.

The effect of a law-enforcement "dawn raid" will be devastating both for the individuals directly concerned and other employees. Enforcement raids may be simultaneously conducted at company offices and employees' homes. Personal and business papers, smartphones, mobiles, computers, servers etc. may be temporarily removed as evidence. The logs of faxes and printers will be checked. Shredding or deleting soft and hard copy files is a serious criminal offence.

Few companies have either contingency plans or procedures to deal with such a raid (however caused) or are prepared for the level of disruption, costs and potential media attention. A raid can be for a number of reasons, including from the EU Competition Commission, regulatory or due to alleged breaches of export regulations.

There are a number of risks to a company associated with an allegation of bribery, proven or not:-

- Damage to reputation and industry sector
- Diversion of management resources and pressure on those being investigated
- Psychological effect on directors, employees and their families, particularly of those directly under investigation
- Share volatility for listed companies and shareholder class action against directors for negligence in protection of investor interests
- Adverse credit ratings, breach of banking covenants and potential loss of export credit and insurance cover from UK Export Finance (ECGD), and others
- International contract blacklisting
- Uncertainty for customers, partners and suppliers
- Potential disruption of critical supply chains
- Cost of legal defence and other professional support (accountancy & IT, etc.) and, if charged, individual defence costs (employees, officers and directors)
- Uninsured losses
- Imprisonment, fines, criminal record, disbarment from remaining a company director and impact on professional life, family and friends

## Scenario 2 ~ Critical supplier fails

*ABC is a small UK niche supplier of specialist software encryption products for defence and security customers. A key customer is Grantham plc, a company funded by a private equity firm and key supplier of communications equipment to the UK Ministry of Defence (MoD).*

*ABC is investigated by the Serious Fraud Office (SFO) and MoD Police after a tip off by a disgruntled employee about paying bribes to an overseas public official to secure a contract to supply a state-owned military electronics plant: ABC's offices and the homes of its directors are raided by the SFO.*

*The R&D Director of ABC has a serious nervous breakdown after his home is searched at 05:00. He goes on immediate sick leave. The investigation completely disrupts ABC's software development schedule; the legal and other defence costs quickly escalate. The ABC directors discover that their legal costs insurance is invalid as, due to an oversight, the Director and Officer Liability (D&O) and legal costs insurance renewal premiums were not paid when due for renewal two months before the raid.*

*A cash crisis quickly develops; ABC is unable to meet its commitments to its unsympathetic bankers and fails to deliver updated software modules to Grantham, which, in turn, fails to meet its UK MoD deliveries; the alternative suppliers to Grantham cannot meet the urgent delivery demand as it will take some months to replicate ABC's software.*

*Within two months of the bribery allegation, ABC is forced into bankruptcy and Grantham's relationship with the UK MoD has deteriorated to such an extent that the MoD is tendering early for new suppliers.*

### Observations:

- How secure was Grantham's supply chain from disruption due to ethical risk? Did they really know ABC, its markets and its business?
- Was the non-payment of ABC's risk insurance an oversight or a cost reduction exercise and could this have occurred in other aspects of risk management.
- What would be the personal financial implications for ABC's directors having to fund their own legal costs?
- If the UK MoD was the major customer of Grantham, what urgent steps will Grantham need to take to shore up its own business and recover its relationship with the MoD?
- How might Grantham's private equity shareholders react to this predicament and how well did they know the risks to the sustainability of Grantham's business?

## Employee/director risk

Whilst employees are the key assets of any business, a few may present a risk (in terms of business ethics). Dishonest actors typically have one or more of the following attributes, prior to committing an offence:

### Opportunity...*To engage in and gain from bribery, corruption, fraud or other unethical behaviour*

- In a position of authority to take advantage while overruling others, for personal gain
- Weak company compliance regime and/or inadequate checks and balances open to exploitation
- Regular (uninhibited) access to accounts, cash, computer systems, sensitive information
- Too long in same job, well respected – does not take holidays – covers for others
- Unhealthy/secretive business relationship with influential Politically Exposed Persons (PEPs)
- In “the right place at the right time”, working as temporary staff (perhaps extorted/bribed by others to obtain information, IP etc.)
- Weak controls; individual limits of financial authorisation unreasonably high; poor financial and governance oversight leading to expense claim fraud and concealing bribes.

### Motive...*That drives their personal actions*

- Financial pressures; at home, high lifestyle demands, company issues - not making their numbers, bonus- driven.
- Feels under-rewarded, therefore illicit gains seen as a justifiable “perk” or “payback”
- Personal reasons, a grudge or feeling undervalued/resentful against a manager/director
- Professional and peer pressure; needs to be seen to succeed
- Reward from a deal, incentive from an agent, a supplier - perceived to be larger than risk of being caught

### Rationale...*Their personal justification*

- “Others would do the same in my situation”

- “Not likely to be found out”
- “I can justify my actions if caught” - crime blamed on company culture and/or a lack of direction or policy
- “I work all hours” -“have to travel to risky places” -“I’m entitled to take some additional compensation”

Through either unawareness or naivety, an otherwise honest person can become complicit in corrupt or fraudulent activities. They may be asked to perform a task, (which is breaking the law), due to their “following instructions”. A personal moral test under these circumstances might be “would I do this normally?” - “what would my family and colleagues think if this was in the newspaper?” or “what would this look like all over Twitter?”

Extortion is a further risk, yet many companies do little to prepare their employees for this. The most likely area of employee extortion is in a facilitation payment being demanded in circumstances such as by an errant customs or police officer. People and companies can become victims of extortion too through:-

- Not properly knowing their customers, intermediaries, suppliers or business partners; poor due diligence, especially when outsourcing manufacturing to some overseas countries
- Being duped into donations to dubious causes
- Inappropriate relationships, flattered by powerful business or government “sponsors”
- Personal risk engendered through compromising and inappropriate recreational activities
- Conceding to threats and making payment to prevent an IT denial of services attack (e.g. on a company’s website)

## Scenario 3 ~ Time, motive and place

*Field Marshall (FM) is a small IT consultancy. Some of FM’s security customers have been forced by MoD cuts to reduce their expenditure on external consultants. This adverse financial impact arrived just as Managing Director John Field had purchased a holiday home in Spain.*

*Bill Brock is a new procurement manager at Grantham plc and amenable to good hospitality. At a meeting with John he said “there must be a way for us to get closer in our business relationship to mutual benefit” and “anyway, I normally change jobs every few months, so you had better make the most of it!”.*

*At a lavish lunch at the Dorchester, seeing an option to improve his depleted personal*

*financial position, John liked Bill's suggestion that FM would inflate the invoices to Grantham by 20%, and the overpricing would be split 50/50. John transferred Bill's portion of the overpayments to the bank account of his wife. FM continued to receive contract work from Grantham.*

*The police were tipped off by a suspicious activity report (SAR) from Mrs Brock's bank, due to an unusual pattern of "out of the norm" deposits. The homes of both John and Bill were searched, as were the offices of both FM and Grantham. John and Bill were convicted under the Bribery Act 2010, receiving prison sentences of two and five years respectively. Both companies have been charged under Section 7 of failing to prevent bribery.*

*Mrs Brock was found to be complicit and she was given a 6 month suspended sentence since the Brocks had two young children. Under the Proceeds of Crime Act she was also ordered to pay £80,000 from her personal bank account, leaving a balance of £20.*

### Observations:

- ▶ What pre-employment screening was conducted on Brock by Grantham?
- ▶ Was the level of financial oversight and contract management in Grantham up to the job and what might they have done differently?
- ▶ Field was vulnerable due to his personal financial position and being invited to participate in a bribery scheme. How could a company reduce this sort of risk?

### Third party risk

Some 80% of worldwide bribery cases involve a third party intermediary. Therefore agents, advisors, consultants and distributors, in effect all intermediaries (regardless in what capacity), when performing services on behalf of a company are "associated persons" with that company under the terms of Section 8 of the Bribery Act. The commercial benefits of intermediaries has long been recognised as an effective means of developing, expanding and maintaining a company's business, especially in exporting and increasingly in the supply chain (e.g. purchasing agents). If not carefully selected or if inappropriately managed, these third parties may create considerable harm to a company's reputation and trigger judicial proceedings, even if the company is totally unaware of any impropriety.

As set out in the Guidance to the Bribery Act in Part 3 of this Toolkit and the CIS there

are a number of key steps where the risk of the appointment of an intermediary might be assessed and mitigated; the key areas are:-

### Due diligence

An appropriate level of due diligence should be conducted, consistent with the perceived level of bribery risk. For example the level of due diligence for an intermediary only working in the UK might be less intense than that of a party in a highly corrupt country. A specimen application form for intermediaries is in the Appendices. Experience has shown that is always easier to extract the level of information set out in the application form when the prospective intermediary is keen to represent a company.

Due diligence should be conducted before concluding any agreement or dealing in any way with the intermediary (and certainly before any sale or tender). Companies should conduct a thorough due diligence examination, using various information sources and records to assess a candidate's business and available personal standing; this may include company and personal history, education, ethical behaviour, technical and financial background and the intermediary company's knowledge of the principal company's environment and products. Such assessment should be periodically renewed, such as at the time of a major tender, a large intermediary payment or the renewal of their agreement.

The process, due diligence and the authorisation to appoint or otherwise, should be fully documented; the intermediary's records comprehensively maintained, including those relating to payments.

### Contract and legal provisions

The third party should be made aware of and sign up to (i) the anti-bribery policies of the company, (ii) the legal provisions containing the incrimination of the bribery of foreign public officials in the 1997 OECD Convention and UNCAC, (iii) the Bribery Act 2010 and Foreign and Corrupt Practices Act (iv) the laws of their own jurisdiction and those relevant to their proposed territories.

### The agreement

To appoint an intermediary by a simple letter of appointment to solicit business on behalf of the principal stores up both commercial and bribery risk for the future and leaves a company open to having not contractually managed the relationship properly. After due process, a legal agreement should be concluded between the company and the third party. The agreement should contain a provision whereby the latter commits to comply at all times

with the provisions mentioned in the previous paragraph and specifically, that no part of any payment originating from the company will be promised or paid as a bribe. Breach of this commitment would entitle the company to terminate the agreement.

The agreement should also incorporate, where appropriate, sales targets/business objectives (the bona fide commercial justification for the appointment) and a process for regular reporting to the company on the accomplishment of those targets, tasks and duties.

### The remuneration

Whatever the form of remuneration, be it a fee, commission, discount against volume of product sold etc. it should be pitched at an appropriate level for the rendering of legitimate services on behalf of the organisation. Often, percentage-based commissions are written into agreements without any consideration of the actual monetary sum which might be paid out against success. Potential intermediaries may also try to persuade the company “that is the going rate in...” The risk where not thought through and the sum that could become due is disproportionate with the services rendered, is the amount available to the intermediary promised or committed to for the payment of bribes to win the deal.

Payments should always be made to a bank (save exceptional and documented circumstances) in the country where the third party is active or registered. All such payments must be properly recorded in the organisation's books and records. Payments offshore provide latitude for the transfer of funds for illicit purposes and may also create an offence of tax violation.

Whichever form or method used for payment, it should be based on the most objective elements possible.

### Scenario 4 ~ Intermediary risk

*Tom is the Export Sales Director of a UK company which has a US manufacturing subsidiary. Tom meets Jakarta Services (JS) at a trade exhibition and appoints JS as agent in Indonesia as he gets on well with the owner, Mr Saddiqi. No due diligence was conducted. JS is signed up for two years on a 20% of sales commission, recommended as the “norm” by Saddiqi. TPS has weak anti-bribery rules and no formal policy and process for the appointment and management of intermediaries.*

*Three months later, Saddiqi advises Tom by e mail of a forthcoming tender at the Ministry of Health, but “the commission will need to be increased to 25%.” Tom reluctantly accepts and puts in a bid priced in US\$ dollars.*

*The US-based TPS Operations Director advises Tom there is less than two months’*

*order book in the Milwaukee plant and winning the Indonesian contract is crucial. Tom discusses the prospects for winning with Saddiqi and is assured that if the commission is raised to 30% and an advance commission payment of 10% made to a director, TPS will win the contract. In a meeting in New York, between Tom, Saddiqi and the Milwaukee Ops Director, the arrangement was agreed. The UK Finance Director, a board director, is instructed by the UK Managing Director (also a director) to sort out the commission ledger to find the additional 10%. TPS won the contract, but the award was contested by another bidder, a large US corporation, alleging that TPS had won the contract through their agent bribing a senior Indonesian government official. An investigation by the US, UK and Indonesian authorities ensued.*

### Observations:

- No process, with oversight, for appointment and due diligence of agents and intermediaries
- No attention paid to Red Flags, the actions of both the agents and the reported customer request
- Communication to the USA, a meeting in New York and a \$US contract has exposed TPS to prosecution under FCPA.
- Tom and the UK directors complicit in the arrangements are UK nationals and TPS is a UK company, therefore subject to the Bribery Act.
- Knowledge by directors of TPS that bribes may have been paid. Did the non-executive directors know?

### Offset risk

While there is no universal definition of offsets, defence offsets are broadly understood to be a mechanism used by purchasing governments that requires supplying companies to reinvest in the economy of the purchasing country as a condition of undertaking a defence contract awarded by the purchasing government. They are frequently used as industrial (sometimes even economic or social) policy tools and can take different forms, for example requiring companies to transfer technology/knowhow, provide education and training, provide investment, develop infrastructure and facilities, subcontract work or licence production. The value of offsets obligations varies from country to country but is typically expressed as a percentage of the value of the main contract.

Offsets are often categorised as “direct” and “indirect”. The definition of these categories varies from country to country, but, in general, companies refer to direct offsets as being

directly related to the subject of the defence acquisition or the products that they make and indirect offsets are likely to be something unrelated, such as the building of a road or school, etc.

The approaches to offsets vary from country to country, in particular regarding the choice between direct or indirect offsets and the amount (percentage of the total offsets package) of direct offsets that a country requires. It is important to note that the offsets value is denominated not in actual currency but in offset credits. Multipliers can also be used to reflect the degree of importance assigned by the purchasing government to the offset project, and can refer to the potential impact of the offsets in the purchasing country or even be unrelated to any type of economic indicator.

An example might be a country's procurement of a fleet of aircraft from a foreign contractor in relation to which an offset obligation is placed on the contractor. The offset authority of the purchasing country may agree that offset credits may be awarded to the contractor in order to satisfy the obligation if it sets up local production/assembly under license.

## Risks

Offset transactions carry potential risks of corruption which will vary depending on the territory, the nature and value of the project being proposed and the identity of any local industrial partners. It is important that such risks can be identified and mitigated before setting up and running a project.

## Risk Mitigation

In order to identify and mitigate potential risks, companies subject to an offsets obligation should carry out due diligence to understand 1) the nature of projects that are proposed and, in particular, to ensure that there is a legitimate business case for the project and 2) the third parties that will be involved in the projects, in particular proposed local partners. With regards to due diligence on third parties, it is particularly important to understand the ownership structure of and beneficial interests in the entity in order to identify potential conflicts of interest. As with any other project or business venture, the arrangements in the framing of an offset deal need to comply with the legislation in all the relevant jurisdictions.

## Useful links:-

The Transparency International website contains some useful information including articles on the corruption risks associated with offset. For example, see:

<http://www.ti-defence.org/publications/20-category-publications/publications-dsp/76-dsp-pubs-due-diligence-offsets.html>

[http://archive.transparency.org/publications/publications/subject/\(topic\)/21](http://archive.transparency.org/publications/publications/subject/(topic)/21)

and

The Global Offset and Countertrade Association website provides some useful information

<http://www.globaloffset.org/>

As does the ADS website: <https://www.adsgroup.org.uk/>

## Red flags

This section provides a risk overview summarised as “Red Flags”, and the most common steps to mitigate them.

Activity	Red Flag	Risk Mitigation
<b>Intermediaries</b>	Request for payment in cash or to offshore account	Contract – payment directly into bank account in country of domicile
	Request for payments by other financial instruments	Contract – payment directly into bank account in country of domicile
	Requests for unjustified increases in commission or payment	Contract sets out fixed rate and mechanism for justified changes
<b>Customers</b>	Requests for direct payments (of whatever kind) to individuals within customer organisation, including state-owned companies	Anti-bribery policy Terms and conditions of sale
	Intermediary proposed by customer	Due diligence as to why and connection with customer
	Request for bribe	Anti-bribery policy Terms and conditions of sale
	Requests to make donations to “nominated charity” – to award order	Anti-Bribery policy Charity and Sponsorship policy
	Request to employ close relative/friend	Employment policy - determine whether this is a request for an illicit incentive
<b>Sales</b>	Inappropriate level of gifts and hospitality for customers – holidays, “business and personal tourism”, education fees, cars, property	Anti-Bribery policy Gifts and Hospitality policy and register (G&H) Employee contracts
	Request to provide store cards or pre-paid cash cards for customers	Anti-bribery policy Gifts and Hospitality policy
	Irregular or unjustified customer-related expenses	Anti-bribery policy Expenses and G&H policy
<b>Procurement</b>	Extravagant lifestyle inconsistent with role or known circumstances	Management and HR investigation Employee contracts
	Unanticipated offers/discounts/incentives made personally to buyers	Procurement and anti-bribery policies T&Cs of purchase orders
	Invoices for services from company with same address as home address of an employee	Random purchase invoice address checks against employee address records

To eliminate **Red Flags**, organisations should ensure wherever possible, their compliance policies and procedures are fully adopted by all third parties, including their key/critical suppliers<sup>13</sup>. Conformance and actions should be regularly reviewed, updated, where necessary, and documented. According to the nature of the organisation and where it operates, bribery risk should be an item on the board agenda and risk register. Responsible persons should be appointed to oversee and manage the processes and, risk and audit reports presented to the board on a regular basis. It should be noted that companies that are sub-contractors to primes might also be subjected to that prime’s compliance regime.

## Discovery risk

“They won’t catch me - it’s the big companies they are after, not the small ones!”

Not so, given recent cases both in the USA and UK. For many companies, particularly the smaller ones, whilst there is an awareness of anti-bribery legislation, business ethics compliance is dangerously low on or even totally off the agenda. If there, it can be disparate in its application and implementation, especially where there is a legacy of merger and acquisition activity. This situation is typified by comments such as “we have a compliance policy, so we are all right” or “anyway we don’t bribe [we leave that to our agents]”. This false sense of security underestimates the dangers posed to employees, directors and the sustainability of the company itself. Implementing an appropriate and proportionate level of adequate procedures to mitigate corruption risk may compete for limited resources, but the risk of discovery and prosecution is growing in an internet/smartphone joined-up world.

In an escalating anti-corruption environment, organisations would be well advised to increase their integrity knowledge of business partners, customers and suppliers. For assessing corruption risk in markets a useful source of information is the Transparency International Perceptions of Corruption Indices<sup>14</sup>.

Companies may be drawn to the attention of the authorities in a number of ways:-

## Third Party Information

- “Whistle-blowers”; via hotlines, tip offs, disgruntled employees
- Links to other investigations, be they domestic or overseas
- Embassies, national and foreign competitors
- Regulatory or financial audit and anti-money laundering processes
- Previous regulatory or trade compliance breaches, such as EAR or ITAR
- NGOs and/or investigative journalism, social media (Twitter, Instagram etc.)

<sup>13</sup> Or minimally require and record evidence of an equivalence to your own company policies and procedures.

<sup>14</sup> <https://www.transparency.org/cpi2014/results>

## Intelligence Gathering

- Electronic (e-mails, SMS, etc.) and increasingly through key word digital detection, behaviour pattern and psychological profiling software
- Information from social media and other sites and the use of Big Data
- Travel and financial transaction patterns (Banking - Suspicious Activity Reports - SARs)

## Research and Profiling

- Type of company, industry sector, markets, outsourcing, JVs and Offsets
- Associations with other companies in projects, the supply chain and transaction history
- Unhealthy associations with Politically Exposed Persons (PEPs) and other influencers (such as foreign board members)
- Association with state-owned enterprises in higher risk of corruption countries

## International Co-operation

- Between national enforcement/judicial authorities (especially USA, UK, Canada, Australia and EU)
- International agencies (especially World Bank and UN agencies), banks and other financial institutions

## By “Happenstance”

- Talk of illicit activity at the golf game, the trade fair, the diaries (written and electronic)
- Lost/stolen smartphone, tablet, laptop, briefcase
- Investigation of unrelated offence in the supply/sales channels

## Scenario 5 ~ Discovery

*Pipe-O-Mat (POM) is a UK-based international manufacturer of steel pipes for the oil industry. Benzene is a state-owned national oil company that operates in South America and is a key customer of POM.*

*Through their local agent, POM routinely bribed a Benzene tender administrator to obtain competitors' bid information a few minutes before the official close of each tender.*

*This gave POM a chance to revise their bids at the last minute and secure a large number of contracts. POM paid a commission of 3.5% of the value of each contract to its agent, knowing a portion of that commission was paid to a person in Benzene, who as an employee of a state-owned entity, would under the Bribery Act and FCPA be a “foreign public official”. The value of the bribe (per order) was equivalent to one year’s salary for the Benzene employee.*

*Competitors of POM (including US) realised there was a pattern to this winning streak and reported their concerns to Benzene S.A., the British Embassy, and their own embassies.*

*POM was investigated. Three senior UK-based sales employees were convicted under Section 6 of the Bribery Act 2010 of bribing a foreign public official. POM was not charged under Section 7 of the Bribery Act as the SFO determined the company had adequate procedures to prevent bribery and that the convicted employees had entirely acted alone, driven by their desire to increase their personal bonuses.*

## Observations:

- If POM's competitors could detect a pattern of winning, how could POM's board and management have better identified the illicit behaviour of a few individuals that nearly brought down the company and its directors?
- The agent may still be liable to prosecution and out-come of the prosecution may lead to further investigations by the authorities, and possibly by the US Department of Justice. That may lead to renewed investigation into POM and detention in the UK/USA of the POM agent.
- Companies rarely consider the monetary value of the percentage commissions when setting out an agency agreement, and often align the amount to what might be reasonable in their own country or what they are told is the “norm” in the market.
- In this case how much largesse was there in the deal to pay bribes – clearly enough?
- POM had a close escape. What might they consider doing now to mitigate further isolated incidents of illicit behaviour in the future?

# Part 4: Bribery Act Guidance

The UK Ministry of Justice Guidance on the Bribery Act can be found at:-

<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

The Guidance should be *read carefully* as it directly relates to the anti-bribery prevention procedures summed up in Section 7 of the Act as “adequate procedures”, i.e. the legal defence against the “corporate” offence of failing to prevent bribery. Since the Guidance has been issued in accordance with Section 9 of the Bribery Act, it should be assumed that in the event of a Section 7 bribery allegation or prosecution, the veracity of a company’s adequate procedures to prevent bribery will be assessed/adjudged against the Guidance. That said, the Guidance is also business-oriented and practical, but it needs to be interpreted, adapted and implemented to suit the company, its sector, business activities and markets.

An underlying theme in the Guidance, is bribery risk assessment. Organisations, therefore, need to develop a “risk-based” approach to assessing bribery diligently and managing the potential for bribery in an informed way, proportional to the likely risk.

The six principles set out in the Guidance embody the thinking behind the concept of adequate procedures to prevent bribery. However, they are *principles* and *not rules or regulations*, and it is, therefore, the prosecuting authorities who will decide whether the defendant [organisation] had in good faith and reasonable belief, embraced and instituted adequate procedures. As currently set out in the Bribery Act, the defendant [organisation], not the prosecution, is obliged to satisfy the prosecuting authority or ultimately the court, that it had adequate procedures in place to prevent bribery.

Firms authorised by the Financial Services Conduct Authority (FCA) are required to put adequate procedures in place to prevent bribery. The FCA does not enforce the Bribery Act 2010 but will act where authorised firms fail to address corruption and bribery risk, including where those risks arise in relation to third parties acting on behalf of the firm. The FCA does not need to obtain evidence of corrupt conduct to take regulatory action against an organisation, simply the absence of adequate procedures within their compliance regime<sup>15</sup>.

Guidance from the SFO and Director of Public Prosecutions makes it clear that the existence (or not) of adequate procedures will be a key factor in the decision to prosecute a company under Section 7 of the Act.

The six principles set out in the Guidance are:-



## Principal 1 - Proportionate Procedures

“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 are also clear, practical, accessible, effectively implemented and enforced.”

### Key points:

- Develop bribery prevention policies and procedures which articulate the company’s anti-bribery stance and are implemented throughout the organisation
- They should be proportionate to the risks faced, not just the size of the company and attention should be paid to operating in high risk of corruption environments or where agents and other third parties are employed to act on behalf of the organisation
- The procedures should include the selection, appointment and management of third parties and be communicated to them
- They should cover all other areas of risk including, but not limited to, hospitality and entertainment, promotional expenditure, political and facilitation payments, separation of

<sup>15</sup> See - <http://www.fca.org.uk/firms/being-regulated/meeting-your-obligations/firm-guides/systems/anti-bribery>

functions and conflicts of interest

- How the policies and procedures are to be implemented, including for associated persons
- Reporting, whistleblowing and sanctions for wrongful behaviour by an employee

### **Principal 2 – Top-level Commitment**

“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”

#### **Key points:**

- The purpose of this principle is to encourage the top-level management to get involved in the determination of bribery prevention procedures, and
- To encourage top level involvement in any key decision-making relating to bribery risk where appropriate for the organisation's management structure
- Internal and external communication of a commitment to the zero tolerance of bribery
- Engagement with relevant associated persons, trade bodies and the media, to help to articulate the organisation's policies

### **Principal 3 - Risk Assessment**

“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”

#### **Key points:**

- Should be a part of the normal risk assessment of the activities of the organisation and, therefore, proportionate to the nature of the business, its scale and markets
- Commonly encountered external risks can be categorised into country, sector, specific transactions, projects (including JVs, M&A and Offset) business opportunity and business partnership risks

- Internal structures and procedures may either compound or mitigate the level of bribery risk, especially in the areas of employee training and skills, the bonus culture, lack of clarity and implementation of relevant policies and financial controls
- Risk assessment should be a continuous process which is fully documented
- Supported by a clear anti-bribery message from top-level management

### **Principal 4 – Due Diligence**

“The commercial organisation applies due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation in order to mitigate identified bribery risks.”

#### **Key points:**

- Really know with whom you are doing business or associating, and properly understand their business activities
- Use a risk-based approach, proportional to the perceived nature of the risk, market, etc.
- It is likely that more information is available and, therefore, enhanced due diligence may be required on companies rather than individuals.
- It is important for organisations, to know the Ultimate Beneficial Owner (UBO) and the shareholders of a potential business partner. Also required by banks under anti-money laundering rules in some jurisdictions
- A commercial organisation's employees, agents and subsidiaries are presumed to be associated persons for the purposes of the Bribery Act.
- Due diligence can be undertaken internally or externally, dependant on the perception of the level of risk
- Where local law mandates the use of agents, being aware that the nature that potential relationship assumes even greater importance. Exiting such a relationship may be very difficult and costly

### **Principle 5 – Communication (including training)**

“The commercial organisation seeks 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 proportional to the risks it faces”

# Part 5: Anti-bribery standards and tools

## Key Points:

- Communication and training increases the awareness by associated persons of the organisation's procedures and anti-bribery stance, externally and internally
- Training provides the knowledge to identify and address bribery situations
- Communicating the message will differ according to language, the nature and geographic spread of the organisation
- Must convey the "tone from the top"
- Training may be face-to-face and/or using web-based e-learning tools
- Especially important to explain the speak-up procedures ("whistle blowing")

## Principle 6 – Monitoring and Review

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

## Key Points:

- The bribery risks may change over time and the procedures need to be updated and amended, accordingly
- Monitoring and review necessary as circumstances might change in markets (e.g. the law); the nature of risk may also change depending on the commercial landscape such as new business, geographical expansion, etc.
- Provide periodic reviews and reports to top management
- Staying abreast of best practices and advice, for example from trade organisations
- Considering external verification or assurance of the effectiveness of anti-bribery procedures (e.g. BS 10500)

## ASD Common Industry Standards (CIS)

In July 2006 the AeroSpace and Defence Industries Association of Europe (ASD) established an Ethics and Anti-Corruption Working Group, having recognised the growing value of good practice in ethical issues. After consultations involving independent advice from experts of the International Chamber of Commerce Anti-Corruption Commission, ASD developed the Common Industry Standards (the "CIS").

ADS in its representation of the UK aerospace and defence sectors, signed up to the CIS as have the other European A&D trade associations. They in turn, have communicated with their Members encouraging them to adopt the standards. It is recognised that the standards may be below those already adopted by some companies, but are likely to be higher than those in place in many others, particularly the smaller companies.

The essence of these and other anti-bribery initiatives, especially those of the NGOs, including Transparency International, is the drive to improve the standard of ethics and its implementation in the defence and security sectors to ensure the long-term success and sustainability of the industry.

Since the CIS was introduced in 2006, of which a number of ADS Members have signed up to, the Bribery Act 2010 has come into force. The Guidance to the Act is more wide-ranging than the CIS, especially in the area of adequate procedures to prevent bribery. However, there are some useful templates derived from the CIS which are attached in the Appendices.

ADS continues to support the CIS, but recognises that since the introduction of the Bribery Act and the accompanying Guidance, a higher standard of anti-bribery compliance is necessary for UK registered companies and for those associated with those companies.

The CIS can be found at: - [www.asd-europe.org/about-us/ethics/](http://www.asd-europe.org/about-us/ethics/)

## Anti-bribery management system standards

There are several internationally-recognised standards setting and accredited certification authorities. Amongst the most well-known are the American National Standards Institution (ANSI), BSI (UK) and the International Standards Organisation (ISO). Many organisations have implemented and obtained benefit from standards such as ISO9001 Quality Management. In addition, a number of standards have been set up by commercial organisations, but these may not necessarily be recognised globally.

The Bribery Act raised significant concerns from commercial organisations of what had to be put in place to provide evidence of "adequate procedures" to prevent bribery. The BS10500-2011 anti-bribery management system (BS10500) was published in November 2011 to meet the increasing demand from large and small companies, to articulate the

Guidance better; to ensure they had a robust anti-bribery system (“adequate procedures”); and to evidence those procedures to their external stakeholders and the world at large through external certification. ISO is now in the process of migrating BS10500 into the ISO37001 anti-bribery management system, which is due to be published in 2016.

In addition to BS10500, BSI has also published BS 10501-2014, a guide on procurement fraud that can be used in conjunction with BS10500 and, PAS 7000, a guide to supplier selection. These standards and guidance provide a complete suite to address the integrity needs of companies, their customers and supply chains.

These certifiable anti-bribery management system standards/guides are intended to help an organisation to implement/consolidate an effective anti-bribery management system which meets a commonly-recognised global standard of business integrity. They can be implemented across an international organisation as they are not jurisdiction specific but require the organisation and its overseas subsidiaries to comply with relevant national anti-bribery legislation.

Commercial organisations have a significant role to play in reducing bribery and the bribing of public officials; these organisations are commonly a primary source of the funds to pay bribes and, in such circumstances, are often the instigator or party engendering an environment for bribery to occur. It is, therefore, likely over time that governments will encourage (or possibly require in tender situations), bidders to hold internationally-recognised anti-bribery accreditation/certification, to reduce harm and cost to the state.

Compliance with anti-bribery standards cannot provide legal assurance that bribery will not occur, such as an isolated deliberate incident. However, the standard will help the organisation properly embed its policies and procedures to prevent bribery. It also provides strong evidence to third parties, especially law enforcers, that the organisation has taken robust action to implement reasonable and proportionate measures designed to prevent bribery. It is worth noting what the City of London Police stated at the launch of BS10500:-

“when using its discretion over whether to investigate and seek to prosecute an organization, City of London Police will “take BS 10500 into account” in assessing a company’s efforts to have properly implemented adequate procedures to prevent bribery.”

### Other useful anti-bribery tools

In May 2008, the Woolf Committee published its report following a review of the ethical policies and processes of BAE Systems plc; some 23 recommendations were made which can be viewed at [www.woolfcommittee.com](http://www.woolfcommittee.com).

Transparency International’s Business Principles for Countering Bribery also provides a framework for companies to develop comprehensive anti-bribery programmes. These tools are useful for both large and small companies and can be found at:

[http://www.transparency.org/whatwedo/tools/business\\_principles\\_for\\_countersing\\_bribery](http://www.transparency.org/whatwedo/tools/business_principles_for_countersing_bribery)

### Scenario 6 ~ No adequate procedures.

*ABI Components is a privately owned SME employing 50 people. Whilst it has a number of overseas customers and a handful of agents, ABI had never considered the need to implement an anti-bribery programme.*

*Julie is a sales ledger clerk with five years’ service. While processing an invoice for a longstanding overseas customer, she noticed in the payment details an unusually large amount payable to a personal UK bank account which seemed irregular. Querying it as over-invoicing and with unfamiliar payee account details, her manager told Julie to “Never mind – process the payment anyway, as Mr Biggs the MD has instructed this just to save time”.*

*She is uncomfortable with this direction and has no policy process or other point of reference. If she reports it, she may cause embarrassment or be seen as subversive. Julie justifies her actions by weighing up the personal risks as:*

- *What if I am wrong – will I lose my job? - Possibly*
- *What if I am right – will I lose my job? - Possibly*
- *Has Mr Biggs ever said anything about ethics fraud or this sort of thing? - No*
- *Are there any codes, policies or procedures to tell me what I should do in this case? – Not that I know of!*
- *Who could I inform in confidence? – No one!*
- *If it is criminal, is it likely to be discovered? - Probably not*

*Uncertain who to confide in, Julie processes the invoice and tries to forget about it.*

### Observations:

- *Julie is taking personal risk and putting her work colleagues at risk - by “turning a blind eye” to what may be a criminal act.*
- *Companies must consider what proportionate measures they should take, appropriate to the nature of their business and the bribery risks they face and clearly articulate and communicate their approach to employees.*



# Appendix 2

## Intermediary process, application form and integrity statement

Companies should take all reasonable efforts to investigate the background of a potential intermediary to ensure that the candidate (including key employees, directors, shareholders) is of evident good character and is not excluded from being, or inappropriate for appointment as an intermediary. It may be advisable in some jurisdictions to make deeper enquiries than those outlined in this section, and companies should take their own legal advice on the specific case. Companies may wish to have such integrity due diligence provided by independent specialist providers.

## Tips for appointing intermediaries

It is not uncommon for intermediaries to be appointed as follows:-

- Previously known to a new employee or an ex-employee
- Met at a trade show and created a very good impression
- Urgent need due to tender, little time to evaluate alternatives
- Recommendation of another company (beware of persuasion)

It is better to plan for the appointment of intermediaries as a part of the sales/marketing strategy and business need. Here is a start to your appointment checklist and to use in your preliminary meeting with the prospective intermediary:-

### DO:

- Appoint in accordance with your company procedures and use the Appointment Form to find out more about them
- Conduct an appropriate level of integrity due diligence before making an appointment. If the risk is slight this may be done internally (see steps below), but, if the risk of corruption is high in your market (see TI Perceptions of Corruption Indices<sup>16</sup>), consider an external independent specialist. Really know with whom you are doing business
- Consider the level of business the intermediary might conduct and the potential remuneration; adjust the level of due diligence accordingly in line with the perceived risk
- Obtain an independent financial report on the company [Dunn and Bradstreet or similar] and/or up-to-date audited accounts for the past three years

- Take up references from other companies; from the British Embassy or High Commission [which has un-vetted lists of potential intermediaries]; if he/she has represented another business within your group, check out their performance
- Obtain a business plan and market information. Understand what expenses the intermediary may incur (e.g. telephone and communications expenses may be expensive in certain territories; likewise the intermediary may employ staff specifically to assist you) since this is relevant to the level of commission which he/she may require
- An unreasonable level of expenses may mask a slush fund for bribes
- Establish, if possible from other companies, whom the intermediary already represents; whether the proposed rate of commission is comparable; do not accept "it is the norm in this country". Consider the monetary value that might be paid, not the percentage
- Make clear to the intermediary the nature of the Bribery Act 2010, [especially the bribery of a foreign public official through a third party and any other relevant law (e.g. FCPA)]; the necessity for your organisation to be able to demonstrate that it is completely abiding by the Act, and is he/she aware of their own jurisdiction's laws and that you and your employees must comply with the Act

Get them to sign a letter of integrity and to sign up to your own ethics/anti-bribery code

- Set performance targets in the agreement to measure the intermediary's achievement during the term of the agreement and review progress with them
- Require the submission of monthly or quarterly progress reports to enable you to monitor performance
- Make clear that the intermediary only receives the payment of the agreed commission on receipt of funds from your customer and submission of an invoice
- Advise that if he/she indicates doing something which is improper or illegal, you will be obliged to report the matter to your organisation and is likely to be grounds for terminating the agreement.
- Keep proper books and records of your relationship with the intermediary and especially if you think that the intermediary has suggested something improper or illegal or if the intermediary reports that the customer has made an improper or illegal suggestion; this is for the protection of both you and the organisation
- Ensure there is a formal agreement put in place and that it includes performance targets and objectives.

<sup>16</sup> <http://www.transparency.org/cpi2014>

## DO NOT:

- Appoint an intermediary in breach of your organisation's procedures
- Make any payment of commission/expenses in cash; payment should be made to a recognised bank and account in the domicile country of the intermediary; [The intermediary may be insisting on payment elsewhere for the purposes of tax evasion which may lead to an unwelcome investigation.]
- Make any payment without an invoice from the intermediary
- Make any payment which cannot be linked to a commission or expenses due under a signed and extant agreement
- Engage in discussions with the intermediary of an unethical nature which may compromise you and/or the organisation
- Accept or agree to accept any incentive, financial, gift or otherwise that potentially exposes yourself, without seeking permission from your organisation

## What preliminary integrity due diligence steps should be taken on an intermediary?

Useful open source information can be obtained from the following but this is not exhaustive:

- Country perception of corruption indices indicate the risk level
- Press, media and NGO reports
- Local business organisations
- Community and civil society notices, including courts
- Company registration documents
- Embassy (use all relevant to the different nationalities of your business)
- References from bank, accountants, lawyers, other principals
- Credit agencies, last three years' financial reports
- Shareholder and ultimate beneficial owner's information, especially where former government employees/officials are involved
- Intermediary's website, and their partner/principle connections
- Google, other search engines, maps, satellite to see offices.
- Chambers of commerce

- Trade journals and associations
- Reputable professional firms
- Trade unions
- Customer references and industry contacts

In addition to seeking answers to these questions, obtain confirmation from the intermediary specifically upon the issue of the integrity of its business practices – an 'integrity statement'.

# Business representative application form

## Authorisation and Consent

### Important Information: (please read the following before completing this form)

Thank you for applying to represent/distribute ABC Company Ltd products. It is in the interests of all our stakeholders and business partners that ABC Company Ltd maintains a high standard of corporate governance, business ethics and compliance with the appropriate regulations and licenses in relation to the sale of pharmaceutical products. This Application Form is a key element of our business process. You are under no legal obligation whatsoever to provide the information requested, however, your application will be rejected if you fail to complete this form.

Please be aware, that after receipt of your application, we will conduct a proportionate and appropriate level of due diligence on your company, as set out in Principle 4 page 27 of the UK Ministry of Justice Guidance to the Bribery Act 2010. This due diligence may be carried out by ABC Company Ltd or using an independent due diligence provider, in which case they will contact you directly. If you wish to proceed with this Application we, therefore, ask you to complete the undertaking below:

**I, [full name] as [title] of [Intermediary name] in [Country] hereby authorize ABC Company Ltd and any agent it authorizes, to perform a pre-appointment due diligence check, unless revoked by me in writing:**

**I understand and agree to the following:**

- 1. That ABC Company Ltd may obtain information about me/our company and may include information from public and private sources, and public records.**
- 2. I authorise and release people, companies, referees, credit bureaus, government agencies, and courts to provide all information that is requested by ABC Company Ltd or its authorised due diligence provider. I further release and hold harmless all of the above, including ABC Company Ltd to the full extent permitted by law, from any liability or claims arising from the use for due diligence purposes, of any information concerning our Company, its officers, employees and shareholders.**
- 3. I agree that a signed and dated copy or fax (including transmission by email) of this document shall be as valid as the original.**
- 4. I agree that ABC Company Ltd and the due diligence provider may retain any information provided by me during the course of the due diligence process for the duration of any business relationship into which I enter with ABC Company Ltd and for a period of up to 36 months thereafter.1.**

Name	Title/Role	Signature	Date
<b>Company Name</b>			

## Your Company – Contact details and ownership

### 1.1 Registered Address

Company Name .....

Full Address: .....

.....

Country .....

### 1.2 Company Address (if different from Registered Address above)

Company Name .....

Full Address: .....

.....

Country .....

Website www. ....

### 1.3 Contact Name/Titles (as set out in passport/ID documents with family name in block capitals)

Primary Contact Name .....

Job Title .....

Tel Direct .....

Tel Mobile .....

Fax .....

E Mail .....

Second Contact Name .....  
 Job Title/Role .....  
 Tel Direct: .....  
 Tel Office .....  
 Tel Mobile .....  
 Fax .....  
 E Mail .....

**1.4 Legal Status of Your Company**

Type (Limited, PLC, LLP, S.A. Inc. etc.) .....  
 Country & State of registration .....  
 Number of Company Registration .....  
 Date of Registration .....

**1.5 Owners, Directors and Senior Managers**

**Name/Titles** (as set out in passport/ID documents with family name in block capitals)

Please attach a scanned copy of a government issued photo ID document (ID card, passport)

Names owner(s) & senior managers	Nationality	% Share Ownership

**Is there a separate ultimate beneficial owner of the business? If so please give the details below (right):**

1.6 Is any owner, director or employee of your company or any of those above, an elected or appointed official/manager of a government department, state-owned company, international institution or government agency including a health service?

Yes       No.

If "Yes" please list names, titles and positions held

1.7 Does any director or other employee receive an official payment from a government organisation?

Yes       No

If Yes – please specify the type of payment, payer, and names and titles of the recipient(s)

1.8 Is any owner, present or former principal officer, or employee (name of person) of your company been a government official or an official of any political party or candidate for political office or do they or any of their family have a relationship with any government official or official of a political party or candidate for political office?

Yes       No

If Yes – please provide complete details of each individual and their affiliation.

Full name of person	Connection (name of political party etc.)	Full name of connection

1.9 Have any of your company's directors or employees been put on a banking/government blacklist or embargoed from trading; declared bankrupt, accused, prosecuted and/or convicted as a result of business operations or the actions of other directors/employees?

Yes  No

If Yes please provide details of the allegation, conviction, penalty or blacklisting including the ..... jurisdiction and authority which enforced the action.

1.10 Does the applicant hold or have any commercial interest (shareholding) in other local and/or subsidiaries of foreign companies including offshore companies?

Yes  No

If Yes please provide details of the interest held together with the name, country, registered address and the type of business of the subsidiaries

Company Name	Registered Address	Type of Business	% Share Ownership

1.11 Please provide the last 3 years of audited annual financial accounts.

Yes  No

## 2. Nature of Business

2.1 What is the nature of your business? – (Briefly what do you do, your products, services, markets and major customers. Please attach relevant brochures)

2.2 Please provide a brief history of your company to include any relevant professional or industry accreditation/certification (e.g. ISO 9001) or membership to local trade/commercial bodies.

2.3 What type of products and services, as might be supplied by ABC Company Ltd is your company qualified to represent or distribute:-

.....

2.4 In which countries/states/territories does your company propose to represent ABC Company Ltd?

2.5 And in which other countries/states does your company operate/sell products (your own or on behalf of other companies)

2.6 Provide details of any other company/organisation for which you/your company has acted as agent/consultant/distributor or any other representation role and, the types of products and services that are/were supported on behalf of the principal.

Company/Organisation	Type of representation	Products and Services

2.7 How would your company support ABC Company Ltd in the market, and for which products?

2.8 Has your company or an individual had any previous business relationship with ABC Company Ltd?

Yes  No If Yes - what was the nature of that previous relationship and with whom?

2.9 What business partner relationship are you seeking to form with ABC Company Ltd?

Commission based sales agent  [ ]

Distributor (purchases/stocks/sells)  [ ]

Reseller (as a part of a package of other items)  [ ]

Other, please explain

.....

### 3. Referees & Additional Information

3.4 Are the directors and senior managers of your company, (who will work with/represent ABC Company Ltd) aware of the United Kingdom Bribery Act 2010 and/or the United States Foreign Corrupt Practices Act?

[ ] Yes  [ ] No

3.5 What anti-bribery compliance procedures and training do you have in your company?

3.6 Please provide the contact details of 2 business referees and their relationships with your company (e.g. supplier/customer, etc.). These should preferably be from an organisation/company based in the United Kingdom, European Union or the United States.

Company & Relationship	Contact Name	Direct Tel/ Mobile	E Mail	Website www.

3.7 Please provide details of any additional and relevant information to support this application to represent ABC Company Limited

### 4. Your Details

Full Name .....

Position/Role .....

Company .....

Contact Tel .....

E Mail .....

Signature.....

Date.....

Checklist - supporting documentation				
Please ensure you have signed the "Authorisation and Consent" on page 1, "Your Details" on page 7 and the Integrity Statement page 9. Please enclose all relevant documentation before sending this form				
	Please tick box	Yes	No	To follow
1	Copy/scan of Photo identification (Passport) (National ID or Driving Licenses acceptable if an individual does not have a passport)			
2	Report and Accounts for previous three years			
3	Copies – relevant certificates			

Once completed and signed, please return this Application Form and any accompanying papers by post or as a scanned pdf file by e mail to:

**Director  
ABC Company Ltd.  
P.O. Box 000  
London  
AB1 23C  
United Kingdom**

If you have any queries regarding the purpose of this form or how to complete it, please contact;

**Director at T: + 44 (0) 1234 08765 or E: director@ABC.no.email.com**

*This Application Form and the information herein will be treated in confidence and securely stored. Completion of this form does not imply that you or your company will be appointed to represent the ABC Company. Thank you for your interest in working with ABC Company Ltd.*

# Statement of Integrity

To:-

**ABC Company Ltd**  
**P.O. Box 000**  
**London**  
**AB1 23C**  
**United Kingdom**

On behalf of [Company Name] \_\_\_\_\_ I/we agree to abide by the ethics policies of ABC Company Ltd (as amended from time to time) and the provisions of the United Kingdom Bribery Act 2010 in relation to the bribery of foreign public officials relevant to our being considered to be appointed as a business partner

Our directors, managers, employees and I/(us), undertake to conform to international good ethical practices and norms and, to abide by all applicable laws, including those in [country of representation] \_\_\_\_\_ relating to bribery, corruption, tax evasion, human rights and recognised unethical practices.

If [Company Name] \_\_\_\_\_ is appointed as a Business Partner by ABC Company Ltd, I/we will take such steps as advised by ABC Company Ltd to ensure that our ethics and regulatory compliance is aligned to that of ABC Company Ltd

Signature(s) .....

Name(s) .....

Position(s) .....

Company .....

Dated .....

Company seal/stamp:

# Appendix 3

## Examples clauses for intermediary agreements

The intermediary will normally seek to have an agreement which is subject to the laws of his/her jurisdiction. In some countries it is mandatory for agreements to be subject to local law and possibly registered with the appropriate government department. However, it may prudent, subject to local legal advice, to make the agreement subject to the law in the country of domicile of the principal.

The company should ensure that the terms of its agreement, and, in particular, the terms relating to mitigating bribery are in accordance with the laws of all relevant jurisdictions. Such agreement should be consistent with the way the company operates, sets out agreed targets and objectives consistent with the business strategy for that market, budget and sales plans.

The following examples of clauses indicate the types of provision which should be considered for possible inclusion, but must not be regarded as being effective or sufficient 'as written' for use in all jurisdictions. Some jurisdictions may prohibit types of behaviour which would not be unlawful in others; and some jurisdictions may seek to apply their laws to foreign companies operating elsewhere in the world if they have a sufficient connection to that jurisdiction. It is essential that companies take appropriate legal advice to ensure that the contractual provisions they use meet the needs of their own and any other relevant jurisdiction.

### Example 1

*The Intermediary hereby certifies that no portion of the remuneration provided for herein has been or will be paid to any official of any government, any political party or candidate, any officer, director, employee or representative of the Customer. It is agreed that no payment shall be made for the purpose or with the effect of public or commercial bribery or kickback. It is agreed that all books and records will reflect the true nature of all transactions.*

### Example 2

*1. The Intermediary understands that the Company will not tolerate unethical behaviour, and in particular bribery, in the conduct of its business. Accordingly, the Intermediary represents and warrants:*

- that everyone involved in the performance of the Services on behalf of the Intermediary has read and understands the Statement of Integrity attached to and forming part of the application form; and*
- that the intermediary has taken all steps which it considers necessary to inform itself about the provisions of the OECD Convention, the US Foreign Corrupt Practices Act, the Bribery Act 2010 and any other legislation of the Territory or elsewhere concerning corrupt practices and which may be relevant to the performance of this Agreement.*

# Appendix 4

2. *The Intermediary represents and warrants that:*

- *neither it nor any of its directors, agents or employees have, whether acting alone or in conjunction with any other person, has given, offered, promised or authorised, and will not give, promise, offer or authorise any bribe to any person directly or indirectly; and*
- *neither it nor any of its directors, agents or employees have, whether acting alone or in conjunction with any other person, solicited or accepted, and will not solicit or accept directly or indirectly any bribe from any person;*
- *neither it nor any of its directors, agents or employees have falsified or will falsify any record or document or account, and will maintain proper books and records in relation to all its business according to applicable accounting standards.*

3. *For the purposes of this Clause, a "bribe" shall include any payment, gift, fee, loan, consideration, benefit or advantage of any nature whatsoever conferred on a person, whether for the benefit of that person or another person, as a reward for, or for the purposes of, or which might in the reasonable opinion of the Company give the appearance of being for the purposes of influencing improperly any action, inaction or decision;*

- *inducing any person to act or omit to act in violation of his/her lawful duty;*
- *inducing any person to influence improperly an act or decision of any other person; or*
- *securing an improper advantage.*

## Anti-bribery policy and codes of business ethics

There are many examples of defence and other industry codes of ethics/business principles/conduct etc. on the web. Further advice is given in the Guidance to the Bribery Act under Principle 1 – Proportionate Procedures, para 1.7. Some companies may wish to have a specific anti-bribery policy while others may combine their anti-bribery policy with other areas of business ethics, relevant to the nature and organisation of their business and the markets in which they operate.

Now the Bribery Act is in force, these policies have become a key element of a company's "adequate procedures" and are normally flowed down and signed up to by all employees and, where possible, given to all other third parties, especially intermediaries and similar. It is good practice to place the policy on a company's website to ensure suppliers and others are aware of a company's ethical stance. Where there are overseas operations they may be translated into other languages and adapted to meet local needs. However, best international practices in such policies would indicate that for a UK-based organisation (therefore subject to the Bribery Act) there is a universal policy mindful of the Section 7 offence.

The anti-bribery/ethics code/policy should be approved by the board of directors and recorded as such in the minutes of board meetings. It should ideally be prefaced by the Chairman or CEO/MD in a way which makes clear the Top Level Commitment as set out in Principle 2 of the Guidance.

In terms of giving ethical guidance, these policies provide what some might term a "moral compass" governing ethical behaviour and standards within an organisation. Experience would indicate that such codes should be short, to the point and can be brought alive by simple examples and in anti-bribery training. (Principle 5 Communication – including Training). A simple code of ethics from which companies can "pick and mix" sections is shown below and can be adapted according to requirements.

## Signed Preface by Chairman/CEO/MD

### Specimen Code of Ethics [for Company XXX]

#### 1 Honesty & Integrity in Business

XXX is committed to the highest standards of ethical conduct in accordance with our corporate values. The Company complies with all applicable legal and regulatory requirements governing business relationships and international trade, including relevant export and import control regulations. XXX believes that honesty and integrity engender trust and it conducts its business in accordance with all the applicable laws and regulations of the countries in which it does business and requires that its employees, intermediaries and all persons associated with its business also comply with such laws.

#### 2 Prohibition of Bribery, Corruption and Extortion

XXX does not offer, promise, give, demand or accept bribes or other unethical inducements, including

facilitation payments, in order to obtain, retain or give business or other advantage and takes all reasonable measures within its power to ensure that its employees, intermediaries and persons associated with its business follow the same practice.

### **3 Competition**

XXX competes fairly and vigorously in its market sector and it does not engage in, nor is it a party to, any agreements, business practices or conduct that, as a matter of law, are anti-competitive or may be construed as participation in trade (or associated) cartels.

### **4 Integrity in Business Behaviour**

XXX expects its employees to act with integrity at all times. XXX employees who have access to privileged information must not use it to achieve personal gain for themselves or others and no employee shall engage in personal activities or pursue financial or business interests which might give rise to, or give the appearance of, conflicts of interest with XXX, or which might compromise their personal ability to meet the responsibilities of their job.

### **5 Conflicts of Interest**

XXX expects its directors and employees to report any potential conflicts of interest whether personally or through a family relationship, which may not be in the interests of XXX. A conflict of interest may also occur where there is an inappropriate relationship with a supplier or customer either directly or through a third party, including a financial interest. In all cases where a conflict of interest might arise, these should be reported to a line and/or HR manager.

### **6 Customer, Supplier and Sub Contractor Relationships**

XXX seeks to provide its customers with products and services which meet or exceed their requirement, to respond quickly to changing customer demand and to seek continuously to improve product quality, value and delivery times.

XXX believes in working in partnership with suppliers and subcontractors to meet its customers' expectations and ensure quality, value and timeliness of delivery. Payment to suppliers and subcontractors will be made promptly within the agreed terms of business.

### **7 Employees**

XXX is an equal opportunities employer and recruits, selects and promotes employees on the basis of their qualifications, skills, aptitude and attitude, and treats all its employees with respect and dignity. Harassment or bullying of any kind is unacceptable and will not be tolerated.

XXX complies with all relevant anti-discrimination legislation and regulations in the countries in which it does business in respect of its employment-related decisions.

### **8 Health and Safety**

XXX is committed to conducting all its activities in a manner which achieves the highest practicable standards of health and safety.

### **9 Environment**

XXX is committed to a proactive policy on environmental issues. Compliance with legislation is a primary goal. A priority objective is the reduction and management of waste through better utilization of raw materials, energy resources and water supplies, as well as minimizing waste at source, and employing re-use or recycling techniques.

XXX is committed to providing adequate resources, both human and financial, to maintain the company's Environmental Management System. Employees will be educated and trained to carry out tasks in an environmentally responsible manner and are expected to act in accordance with the policy and training provided.

### **10 Human Rights**

XXX adheres to all relevant government guidelines designed to ensure that products are not incorporated into weapons or other equipment used for the purposes of terrorism, internal repression or abuse of human rights.

XXX seeks to uphold all internationally recognized human rights wherever its operations are based (and as appropriate for size of organisation 'the UK Modern Slavery Act 2015').

### **11 Reporting and Internal Controls**

XXX records all business transactions accurately, prudently and transparently in compliance with its accounting standards and has appropriate internal controls to ensure that it is managed effectively and that the reported results are accurate.

XXX will retain and review all records of instances of initial and continuance training, annual employee records of compliance and records of gifts and benefits, whether accepted or not.

### **12 Application and Compliance**

This Code of Ethics applies throughout XXX and to all its employees, temporary contractors, intermediaries [advisors, agents, consultants and distributors] worldwide. Blatant disregard or a material breach of this Code will result in disciplinary action against an employee and sanctions and/or immediate dismissal of third parties representing the company.

XXX seeks, wherever possible, to ensure that its key suppliers, business partners and any joint venture or offset project in which it participates, complies with the XXX code of ethics or has in place a similar code and business process of its own.

# Appendix 5

## 13 Disclosure

In the event of a breach of this Code of Ethics, the incident should, in the first instance, be reported to a line manager or, in the case of an intermediary or other associated person, to the XXX relationship manager. In the event that no further action appears to have been taken after a reasonable time, the incident may be reported on XXX Confidential Hotline T: [+44 1234 567890.]

XXX expects employees and any others acting on its behalf or in a business relationship with XXX to bring any suspected or actual breach of the Code promptly to management attention. Any employee making such information known to management in reasonable belief, through the appropriate procedures will not face any adverse or unfavourable treatment for such disclosure.

## Specimen advisory letter to intermediaries

Should it be necessary to issue new agreements/contracts (supply and sales side) reflecting the need for compliance with the company policies, below is an example draft letter that might accompany such documents to reinforce a company's (the Principal's) ethical stance and, in particular, in relation to anti-bribery.

### Example

Dear

I have pleasure enclosing an agreement between [the ORGANISATION] and you.

You will, of course, fully appreciate that, as a British company, we are subject to and must comply with the Bribery Act 2010, which is similar to the US Foreign Corrupt Practices Act. We are, therefore, bound to adopt procedures to ensure that we are compliant.

Clause [XX] of the enclosed agreement makes clear that any payment or commission must not be used in violation of any laws whatsoever. Breach of such a condition would be grounds for termination of this agreement.

In addition, you will notice that as agreed with [Mr/Ms/Miss XXX] our relationship manager, the list of Products and Services are shown in Schedule A and the Sales and Market Objectives in Schedule 2. This forms an integral part of the agreement and describes more accurately and comprehensively the services which you have agreed to provide us currently within the timescale of this agreement.

I [would be happy to meet you in person in order to explain this in more detail and] look forward to meeting you shortly in order to explain this in more detail.

Yours sincerely

# Appendix 6

## Other sources of information

### Intergovernmental Anti-Corruption Instruments

#### United Nations

UN Convention against Corruption

<http://www.unodc.org/unodc/en/treaties/CAC/index.html>

#### OECD

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1999

<http://www.oecd.org/dataoecd/4/18/38028044.pdf>

OECD Risk Analysis Tool for Multinational Enterprises in Weak Governance Zones: <http://www.oecd.org/dataoecd/26/21/36885821.pdf>

#### Council of Europe

Council of Europe Criminal Law Convention on Corruption, November 1999

Council of Europe Civil Law Convention on Corruption, 1999

<http://www.coe.int/>

#### European Union

1995 Convention on the Protection of the European Communities Financial Interests

1997 Convention on the Fight against Corruption Involving Public Officials of the European Communities or Officials of Member States of the European Union

2003 EU Council Framework Decision on Combating Corruption in the Private Sector

<http://europa.eu/>

#### United Kingdom Bribery Act 2010

<http://www.legislation.gov.uk/ukpga/2010/23/contents>

#### Guidance to the Bribery Act

<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

#### United States

US Foreign Corrupt Practices Act

<http://www.usdoj.gov/criminal/fraud/fcpa/>

#### Organisation of American States

Inter-American Convention Against Corruption (IACC), June 1996

[http://www.oas.org/juridico/english/mec\\_ron1\\_inf\\_hemis\\_en.doc](http://www.oas.org/juridico/english/mec_ron1_inf_hemis_en.doc)

#### African Union

<http://www.africa-union.org/>

#### The Financial Action Task Force on Money Laundering (FATF)

The Forty Financial Action Task Force Recommendations, Revised 2003

<http://www.fatf-gafi.org>

### Other useful websites:

NGOs

[http://www.ethic-intelligence.com/?l=2&id\\_titre=](http://www.ethic-intelligence.com/?l=2&id_titre=)

<http://www.ibe.org.uk/>

<http://www.iccwbo.org/policy/anticorruption/>

<http://www.pcaw.co.uk/>

<http://www.transparency.org/>

<http://www.transparency.org/cpi2014>

Others

[http://www.lawcom.gov.uk/current\\_consultations.htm](http://www.lawcom.gov.uk/current_consultations.htm)

<http://www.interchange-solutions.co.uk/>

<http://www.traceinternational.org/>

<http://woolfcommittee.com>

<http://www.uktradeinvest.gov.uk/ukti/osib>

### Other sources of information

World Bank / EBRD / ECGD

### For further information and additional referrals please contact:-

#### ADS

Brinley Salzmänn

Director E: [Brinley.Salzmänn@adsgroup.org.uk](mailto:Brinley.Salzmänn@adsgroup.org.uk)

# Appendix 7

## Definitions of foreign bribery as required by major international treaties

### OECD Convention, Article 1.1

- Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

### UN Convention, Article 16

- Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official to act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

### Council of Europe, Criminal Law, Convention on Corruption. Article 5

- Each party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 (bribing domestic public officials) and 3 (acceptance of bribes by domestic public officials), when involving a public official of any other State.



### Why we can help your company

- ✓ **ADS member for 10 years** – understands challenges of the sector;
- ✓ **Customer focused** – business-oriented, risk management team with senior academic, business, government and international experience;
- ✓ **Value for money services** – from the smallest to largest global companies;
- ✓ **One size does not fit all** – we will understand your needs and work alongside you to develop and implement an effective risk mitigation programme;
- ✓ **BS10500-2011** – we support the certification of the anti-bribery management system and for ISO 37001 (when published in 2016)

### How?

**Advice and Risk Audit** – Anti-bribery compliance gap analysis, including for BS10500-2011

**Executive Education & Training** – All levels – face-to-face and e-learning

**Enhanced Due Diligence** – Risk-based integrity due diligence all associated persons

**Policy and Process** – tailored, practical business-oriented

**Monitoring and Review** – ensuring your anti-bribery compliance process is relevant

**Trade Compliance** – support for regulatory compliance (ITAR/EAR, etc.) and license issues.



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