

# THE BRIBERY ACT 2016

## Guidance

**about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing**  
(section 11 of the Bribery Act 2016)



**Ministry of Legal Affairs**

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Government of Bermuda

## Ministerial foreword

*The twin scourges of bribery and corruption must be stamped out. In addition to individuals and businesses who suffer directly, there is a well-documented, corrosive effect on democracy and the rule of law. Taxpayers are defrauded, honest businesses suffer from unfair competition and a society's economic and social development is undermined. That bribery and corruption are morally repugnant should be self-evident to any right-thinking member of society.*

The International Monetary Fund estimates that public sector corruption siphons \$1.5 trillion to \$2 trillion annually from the global economy in bribes and costs far more in stunted economic growth, lost tax revenues and sustained poverty. The indirect costs of corruption are too numerous to estimate but are thought to include increased income inequality, skewed public infrastructure investment and decreased social spending on healthcare and education.

Bermuda may be an island; it nonetheless plays a fully integrated role in the international community.

The Bribery Act 2016 represents a major step towards Bermuda meeting an international gold standard in the fight against bribery and corruption. It also paves the way for Bermuda to join the international community under the auspices of the United Nations Convention Against Corruption and OECD Anti-Bribery Convention.

In recent years, much progress has been made to combat economic crime of all kinds, particularly in the field of money-laundering and terrorist financing. This is part of a multi-agency and multi-

partner strategy to maintain the island's status as a clean and reputable business jurisdiction.

The previous law on corruption was unsatisfactory. The new Act will provide a modern and comprehensive scheme of bribery offences, in order to allow investigators, prosecutors and the courts to tackle bribery effectively whether committed at home or overseas. The offences created will address both sides of the bribery equation, instead of the one-sided approach adopted by current corruption offences, which focus only on the recipients of the bribes. The Act will help to enhance Bermuda's international reputation for the highest ethical standards.

Enacting legislation, while necessary, is only a first step. Bermuda as a society must be prepared to take action when and where we see corruption.

It requires the Government to protect taxpayers by designing improved public procurement procedures and by recovering the proceeds of crime through the courts. It requires community leaders to match anti-corruption rhetoric with deeds and robust support. It requires public servants and businesses to take timely action when relevant information comes to their attention. It requires us to overcome a reluctance

in the community to deal with these difficult issues.

It is not enough to say that we are against corruption. We need to take action – to improve things going forward, to punish past wrong-doing and to ensure that victims of corruption can seek recompense through established procedures.

The Act creates offences of offering or receiving bribes, of bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation's behalf. These are certainly tough rules. But readers should understand too that they are directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms.

In line with the Bribery Act's statutory requirements, I am publishing this guidance to help organisations understand the legislation and deal with the risks of bribery. My aim is that it offers clarity on how the law will operate.

I have also listened carefully to stakeholder representations to ensure the Act is implemented in a workable way – especially for small firms that have limited resources. And, as I hope this guidance shows, combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is

proportionality. It also offers case study examples that help illuminate the application of the Act.

Ultimately, the Bribery Act matters for Bermuda because our existing legislation is out of date. In updating our rules, I say to our international partners that Bermuda is ready, willing and able to play a leading role in stamping out corruption.

**Hon. Trevor G Moniz, JP, MP**

Attorney General & Minister of Legal Affairs

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## Introduction

1. The Bribery Act 2016 (“the Act”) received the Assent of the Governor on 6 December 2016 and comes into effect on 1 September 2017. A copy of the Act can be accessed at **[www.bermudalaws.bm](http://www.bermudalaws.bm)**.
2. The Act has modernized Bermuda’s anti-corruption laws by introducing a new, simplified and comprehensive regime prohibiting bribery. The Act was also drafted and enacted as a significant step towards extending to Bermuda the United Nations Convention Against Corruption (“UNCAC”) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“Bribery Convention”).
3. By way of overview, new general offences of bribery, based on the UK’s Bribery Act 2010, have replaced previous offences relating to bribery and corruption. Additionally, the Act imposes a duty on public officials to report an offer of a bribe, or circumstances relating to collusion in the awarding of contracts. There are corresponding offences of failing to comply with that duty, or interfering with that duty. These provisions derive from the Isle of Man’s Bribery Act 2013.
4. The Bill also establishes the National Anti-Corruption and Bribery Committee to advise the Minister regarding the effectiveness of legislation and policy in accordance with the requirements of Article 6 of the UNCAC, which provides for the establishment of a body to oversee, co-ordinate and review the implementation of anti-corruption procedures and policies.
5. The Act creates a new offence under section 9 which can be committed by commercial organisations that fail to prevent persons associated with them from committing bribery on their behalf. It is a defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. Section 11 of the Act requires the Minister of Legal Affairs to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing.
6. Section 11(3) of the Act states that in determining whether a relevant commercial organisation has committed an offence under section 9 a court shall consider whether the organisation followed this guidance.
7. The statutory guidance explains the policy behind section 9 and is intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery as mentioned in section 9(1).
8. The statutory guidance is designed to be of general application and is formulated around six guiding principles, each followed by commentary and examples. The guidance is not prescriptive and is not a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case. The onus will remain on the organisation, in any case where it seeks to rely on the

defence, to prove that it had adequate procedures in place to prevent bribery. However, departures from the suggested procedures contained within the guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures.

9. If an organisation is small or medium sized the application of the principles is likely to suggest procedures that are different from those that may be right for a large multinational organisation. The guidance suggests certain procedures, but they may not all be applicable in these circumstances. Sometimes, you may have alternatives in place that are also adequate.
10. As the principles make clear commercial organisations should adopt a risk-based approach to managing bribery risks. Procedures should be proportionate to the risks faced by an organisation. No policies or procedures are capable of detecting and preventing all bribery. A risk-based approach will, however, serve to focus the effort where it is needed and will have most impact. A risk-based approach recognises that the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions.
11. The language used in this guidance reflects its non-prescriptive nature. The six principles in Part II are intended to be of general application. The commentary following each of the principles is expressed more broadly.
12. All terms used in this guidance have the same meaning as in the Act. Any examples of particular types of conduct are provided for illustrative purposes only and do not constitute exhaustive lists of relevant conduct.
13. Readers should note that this document only constitutes guidance. The Act is paramount, and will ultimately be construed and interpreted by the courts. In the event of any conflict between this document and the Act, the latter will prevail.

## Government policy and Section 9 of the Bribery Act

14. Bribery undermines democracy and the rule of law and poses very serious threats to sustained economic progress in developing and emerging economies and to the proper operation of free markets more generally. The Bribery Act 2016 is intended to respond to these threats and to the extremely broad range of ways that bribery can be committed. It does this by providing robust offences, enhanced sentencing powers for the courts and wide jurisdictional powers.
15. The Act contains two general offences covering the offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery) at sections 3 and 4 respectively. It also sets out two further offences which specifically address commercial bribery. Section 8 of the Act creates an offence relating to bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business<sup>1</sup>, and section 9 creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organisation. More detail about the sections 3, 8 and 9 offences is provided under the separate headings below.
16. The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 9 provides a defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.
17. The application of bribery prevention procedures by commercial organisations is of significant interest to those investigating bribery and is relevant if an organisation wishes to report an incident of bribery to the authorities.
18. Liability arises under section 9 of the Act if a person associated with a commercial organization bribes someone (amounting to an offence under sections 3 or 8, whether or not the associate is convicted), and the organization does not have adequate procedures aimed at preventing bribery. Where the prosecution cannot prove beyond reasonable doubt that a section 3 or 8 offence has been committed, the section 9 offence will not be triggered.
19. The section 9 offence is in addition to, and does not displace, liability which might arise under sections 3 or 8 of the Act where the commercial organisation itself commits an offence by virtue of the common law ‘identification’ principle.<sup>2</sup>

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<sup>1</sup> Conduct amounting to bribery of a foreign public official could also be charged under section 3 of the Act. It will be for prosecutors to select the most appropriate charge.

<sup>2</sup> See section 7(1) of the Interpretation Act 1951 which provides that the word ‘person’ where used in an Act includes bodies corporate and unincorporate. Note also the common law ‘identification principle’ as defined by cases such as *Tesco Supermarkets v Natrass* [1972] AC 153 which provides that corporate liability arises only where the offence is committed by a natural person who is the directing mind or will of the organisation.



## Jurisdiction

20. Section 18 of the Act provides that the courts will have jurisdiction over the sections 3, 4<sup>3</sup> or 8 offences committed in Bermuda, but they will also have jurisdiction over offences committed outside Bermuda where the person committing them has a close connection with Bermuda by virtue of being a British national or ordinarily resident in Bermuda, a body incorporated in Bermuda.
21. However, as regards section 9, the requirement of a close connection with Bermuda does not apply. Section 9(3) makes clear that a commercial organisation can be liable for conduct amounting to a section 3 or 8 offence on the part of a person who is neither a Bermuda national or resident in Bermuda, nor a body incorporated or formed in Bermuda. In addition, section 18(5) provides that an offence irrespective of whether the acts or omissions which form part of the section 9 offence take part in Bermuda or elsewhere. If the organisation is incorporated or formed in Bermuda, or it carries on a business or part of a business in Bermuda (wherever in the world it may be incorporated or formed), Bermuda courts will have jurisdiction.

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<sup>3</sup> Although this particular offence is not relevant for the purposes of section 9.

## Sections 3: Offence of bribing someone

22. Section 3 makes it an offence for a person ('P') to offer, promise or give a financial or other advantage to another person in one of two cases:
  - a. **Case 1** applies where P intends the advantage to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance.
  - b. **Case 2** applies where P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.
23. 'Improper performance' is defined in sections 5, 6 and 7. In summary, this means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. The offence applies to bribery relating to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons. Therefore, bribery in both the public and private sectors is covered.
24. For the purposes of deciding whether a function or activity has been performed improperly the test of what is expected is a test of what a reasonable person in Bermuda would expect in relation to the performance of that function or activity. Where the performance of the function or activity is not subject to Bermuda law (for example, it takes place in a country other than Bermuda) then any local custom or practice must be disregarded – unless permitted or required by the written law applicable to that particular country. Written law means any written constitution, provision made by or under legislation applicable to the country concerned or any judicial decision evidenced in published written sources.
25. By way of illustration, in order to proceed with a case under section 3 based on an allegation that hospitality was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in Bermuda thought. So, for example, an invitation to foreign clients to attend the Annual Cup Match Classic as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field is unlikely to engage section 3 unless there is evidence of an intention to induce improper performance of a relevant function.

## Section 8: Bribery of a foreign public official

26. Section 8 creates a new offence of bribery of a foreign public official. The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.
27. A 'foreign public official' includes officials, whether elected or appointed, who hold a legislative, administrative or judicial position of any kind of a country or territory outside Bermuda. It also includes any person who performs public functions in any branch of the national, local or municipal government of such a country or territory or who exercises a public function for any public agency or public enterprise of such a country or territory, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises. Foreign public officials can also be an official or agent of a public international organisation, such as the UN, CARICOM, the EU or the World Bank.
28. Sections 3 and 8 may capture the same conduct but will do so in different ways. The policy that founds the offence at section 8 is the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official's request, assent or acquiescence. Such activity is very likely to involve conduct which amounts to 'improper performance' of a relevant function or activity to which section 3 applies, but, unlike section 3, section 8 does not require proof of it or an intention to induce it. This is because the exact nature of the functions of persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve. To require the prosecution to rely entirely on section 3 would amount to a very significant deficiency in the ability of the legislation to address this particular mischief. That said, it is not the Government's intention to criminalise behaviour where no such mischief occurs, but merely to formulate the offence to take account of the evidential difficulties referred to above. In view of its wide scope, and its role in the new form of corporate liability at section 9, the Government offers the following further explanation of issues arising from the formulation of section 8.

## Local law

29. For the purposes of section 8 prosecutors will be required to show not only that an ‘advantage’ was offered, promised or given to the official or to another person at the official’s request, assent or acquiescence, but that the advantage was one that the official was not permitted or required to be influenced by as determined by the written law applicable to the foreign official.
30. In seeking tenders for publicly funded contracts Governments often permit or require those tendering for the contract to offer, in addition to the principal tender, some kind of additional investment in the local economy or benefit to the local community. Such arrangements could in certain circumstances amount to a financial or other ‘advantage’ to a public official or to another person at the official’s request, assent or acquiescence. Where, however, relevant ‘written law’ permits or requires the official to be influenced by such arrangements they will fall outside the scope of the offence. So, for example, where local planning law permits community investment or requires a foreign public official to minimise the cost of public procurement administration through cost sharing with contractors, a prospective contractor’s offer of free training is **very** unlikely to engage section 8. In circumstances where the additional investment would amount to an advantage to a foreign public official and the local law is silent as to whether the official is permitted or required to be influenced by it, prosecutors will consider the public interest in prosecuting. This will provide an appropriate backstop in circumstances where the evidence suggests that the offer of additional investment is a legitimate part of a tender exercise.

## Hospitality, promotional, and other business expenditure

31. Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.
32. In order to amount to a bribe under section 8 there must be an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage. In this regard, it may be in some circumstances that hospitality or promotional expenditure in the form of travel and accommodation costs does not even amount to ‘a financial or other advantage’ to the relevant official because it is a cost that would otherwise be borne by the relevant foreign Government rather than the official him or herself.
33. Where the prosecution is able to establish a financial or other advantage has been offered, promised or given, it must then show that there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage. Where

the prosecution cannot prove this to the requisite standard then no offence under section 8 will be committed. There may be direct evidence to support the existence of this connection and such evidence may indeed relate to relatively modest expenditure. In many cases, however, the question as to whether such a connection can be established will depend on the totality of the evidence which takes into account all of the surrounding circumstances. It would include matters such as the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business. In this circumstantial context, the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return.

34. The standards or norms applying in a particular sector may also be relevant here. However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant.
35. Levels of expenditure will not, therefore, be the only consideration in determining whether a section 8 offence has been committed. But in the absence of any further evidence demonstrating the required connection, it is unlikely, for example, that incidental provision of a routine business courtesy will raise the inference that it was intended to have a direct impact on decision making, particularly where such hospitality is commensurate with the reasonable and proportionate norms for the particular industry; e.g. the provision of airport to hotel transfer services to facilitate an on-site visit, or dining and tickets to an event.
36. It may be that, as a result of the introduction of the section 9 offence, commercial organisations will review their policies on hospitality and promotional or other similar business expenditure as part of the selection and implementation of bribery prevention procedures, so as to ensure that they are seen to be acting both competitively and fairly. It is, however, for individual organisations, or business representative bodies, to establish and disseminate appropriate standards for hospitality and promotional or other similar expenditure.

## Section 9: Failure of commercial organisations to prevent bribery

37. A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. As set out above, the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities.

### Commercial organisation

38. Only a ‘relevant commercial organisation’ can commit an offence under section 9 of the Bribery Act. A ‘relevant commercial organisation’ is defined at section 9(5) as a body or partnership incorporated or formed in Bermuda irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in Bermuda irrespective of the place of incorporation or formation. The key concept here is that of an organisation which ‘carries on a business’. The courts will be the final arbiter as to whether an organisation ‘carries on a business’ in Bermuda taking into account the particular facts in individual cases.

### Associated person

39. A commercial organisation is liable under section 9 if a person ‘associated’ with it bribes another person intending to obtain or retain business or a business advantage for the organisation. A person associated with a commercial organisation is defined at section 10 as a person who ‘performs services’ for or on behalf of the organisation. This person can be an individual or an incorporated or unincorporated body. Section 10 provides that the capacity in which a person performs services for or on behalf of the organisation does not matter, so employees (who are presumed to be performing services for their employer), agents and subsidiaries are included. Section 10(4), however, makes it clear that the question as to whether a person is performing services for an organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The concept of a person who ‘performs services for or on behalf of’ the organisation is intended to give section 9 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation’s behalf.

40. This broad scope means that contractors could be ‘associated’ persons to the extent that they are performing services for or on behalf of a commercial organisation. Also, where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an ‘associated’ person.
41. Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of subcontractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Indeed, the organisation may only know the identity of its contractual counterparty. It is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain. The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of a supply chain is by employing the types of anti-bribery procedures referred to elsewhere in this guidance (e.g. risk-based due diligence and the use of anti-bribery terms and conditions) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain.
42. As for joint ventures, these come in many different forms, sometimes operating through a separate legal entity, but at other times through contractual arrangements. In the case of a joint venture operating through a separate legal entity, a bribe paid by the joint venture entity may lead to liability for a member of the joint venture if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member. However, the existence of a joint venture entity will not of itself mean that it is ‘associated’ with any of its members. A bribe paid on behalf of the joint venture entity by one of its employees or agents will therefore not trigger liability for members of the joint venture simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture.
43. The situation will be different where the joint venture is conducted through a contractual arrangement. The degree of control that a participant has over that arrangement is likely to be one of the ‘relevant circumstances’ that would be taken into account in deciding whether a person who paid a bribe in the conduct of the joint venture business was ‘performing services for or on behalf of’ a participant in that arrangement. It may be, for example, that an employee of such a participant who has paid a bribe in order to benefit his employer is not to be regarded as a person ‘associated’ with all the other participants in the joint venture. Ordinarily, the employee of a participant will be presumed to be a person performing services for and on behalf of his employer. Likewise, an agent engaged by a participant in a contractual joint venture is likely to be regarded as a person associated with that participant in the absence of evidence that the agent is acting on behalf of the contractual joint venture as a whole.
44. Even if it can properly be said that an agent, a subsidiary, or another person acting for a member of a joint venture, was performing services for the organisation, an offence will be committed only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation. The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple

corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe. By the same token, liability for a parent company could arise where a subsidiary is the ‘person’ which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa.

45. The question of adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person and the degree of risk that requires mitigation. The scope of the definition at section 10 needs to be appreciated within this context. This point is developed in more detail under the six principles set out in Part II.

## Facilitation payments

46. Small bribes paid to facilitate routine Government action – otherwise called ‘facilitation payments’ – could trigger either the section 8 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 3 offence and therefore potential liability under section 9.
47. As was the case under the old law, the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development<sup>4</sup> recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate antibribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing ‘culture’ of bribery and have the potential to be abused.
48. The Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play and the guidance below

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<sup>4</sup> Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.



offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.

### **Additional defences**

49. Section 19 of the Act provides statutory defences for actions taken which are necessary for the proper exercise of any function relating to the defence or security of Bermuda, or to the armed forces (Royal Bermuda Regiment or Her Majesty's armed forces) when engaged on active service.
50. It is also recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defence of duress is very likely to be available in such circumstances.

## What commercial organizations are expected at a minimum to do

Commercial organisations are expected to take a risk-based approach to combating bribery. The remainder of this Part sets out the six principles which commercial organizations should abide by in order to ensure that they have ‘adequate procedures’ for preventing bribery by persons associated with them.

However, in this section, the following represent a baseline of actions which can be undertaken by a commercial organisation, subject to what is proportionate to the risks which the organisation faces.

1. **Introduce a zero-tolerance policy for bribery:** put in place a headline policy that notes the corrosive effect that bribery can have on an organisation’s goals and mission, the importance of strong internal anti-bribery systems and makes it clear that the organisation does not tolerate bribery in any form.
2. **Communicate the policy to key stakeholders:** details of the commercial organisation’s headline policy in respect of combating bribery should be communicated to employees, agents and partners.
3. **Conduct a documented risk assessment exercise:** where is your organisation exposed to a high risk of bribery – and how effective are its anti-corruption policy and management systems? This also requires robust information gathering as to an organization’s vulnerabilities vis-a-vis its employees, agents or partners.
4. **Ensure adequate training and support for employees:** personnel within the organisation should be made aware of the requirements of the Bribery Act, this guidance and of the organisation’s anti-bribery compliance procedures. Adherence to these standards should form part of the performance review process for relevant and key employees.
5. **Settle procedures for overseas third parties:** put in place a written procedure governing the appointment of third parties who are to perform services for or on behalf of the commercial organization in, or in relation to, overseas countries. This procedure should distinguish between different countries depending on the perceived prevalence of bribery in the country in question.
6. **Put in place procedures for the investigation of incidents of bribery:** clear, accessible, written procedures for the escalation of concerns to appropriate levels within the organisation and prescribing how (and by whom) potential incidents are to be investigated.

N.B. Any such procedures must be subject to section 29A of the Employment Act 2000, which gives whistle blowing protections to employees.

A person may make a ‘protected disclosure’ to, *inter alia*, a police officer if he has reasonable grounds to believe—

- (a) that his employer or any other employee has committed, is committing, or is about to

commit, a criminal offence (including an offence contrary to the Bribery Act 2016) or breach of any statutory obligation;

(b) that he himself has been directed, either by his employer or by one of his supervisors, to commit such a criminal offence or breach of statutory obligation; or

(c) that information tending to show any matter within paragraph (a) or (b) has been, is being, or is likely to be, altered, erased, destroyed or concealed by any person.

7. **Perform a periodic review of anti-bribery procedures:** a periodic review should be performed to assess whether the procedures of the organisation continue to be 'adequate' for the purposes of section 9 of the Act. For larger organisations, this should be on an annual basis. The results of the review should be communicated to the organisation's directors and senior management.

## The six principles

The Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles. These are set out below. Commentary and guidance on what procedures the application of the principles may produce accompanies each principle.

These principles are not prescriptive. They are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in. Small organisations will, for example, face different challenges to those faced by large multi-national enterprises. Accordingly, the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.

As set out in more detail below, bribery prevention procedures should be proportionate to risk. Although commercial organisations with entirely domestic operations may require bribery prevention procedures, we believe that as a general proposition they will face lower risks of bribery on their behalf by associated persons than the risks that operate in foreign markets. In any event procedures put in place to mitigate domestic bribery risks are likely to be similar if not the same as those designed to mitigate those associated with foreign markets. A series of case studies based on hypothetical scenarios is provided at Appendix A.

These are designed to illustrate the application of the principles for small, medium and large organisations.

Section 11(3) of the Act states that in determining whether a relevant commercial organisation has committed an offence under section 9 a court shall consider whether the organisation followed this guidance.

## **Principle 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.

### **Commentary**

- 1.1 The term 'procedures' is used in this guidance to embrace both bribery prevention policies and the procedures which implement them. Policies articulate a commercial organisation's anti-bribery stance, show how it will be maintained and help to create an anti-bribery culture. They are therefore a necessary measure in the prevention of bribery, but they will not achieve that objective unless they are properly implemented.
- 1.2 Adequate bribery prevention procedures ought to be proportionate to the bribery risks that the organisation faces. An initial assessment of risk across the organisation is therefore a necessary first step. To a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor. Some small organisations can face quite significant risks, and will need more extensive procedures than their counterparts facing limited risks. However, small organisations are unlikely to need procedures that are as extensive as those of a large multi-national organisation. For example, a very small business may be able to rely heavily on periodic oral briefings to communicate its policies while a large one may need to rely on extensive written communication.
- 1.3 The level of risk that organisations face will also vary with the type and nature of the persons associated with it. For example, a commercial organisation that properly assesses that there is no risk of bribery on the part of one of its associated persons will accordingly require nothing in the way of procedures to prevent bribery in the context of that relationship. By the same token the bribery risks associated with reliance on a third party agent representing a commercial organisation in negotiations with foreign public officials may be assessed as significant and accordingly require much more in the way of procedures to mitigate those risks. Organisations are likely to need to select procedures to cover a broad range of risks but any consideration by a court in an individual case of the adequacy of procedures is likely necessarily to focus on those procedures designed to prevent bribery on the part of the associated person committing the offence in question.

- 1.4 Bribery prevention procedures may be stand alone or form part of wider guidance, for example on recruitment or on managing a tender process in public procurement. Whatever the chosen model, the procedures should seek to ensure there is a practical and realistic means of achieving the organisation's stated anti-bribery policy objectives across all of the organisation's functions.
- 1.5 The Government recognises that applying these procedures retrospectively to existing associated persons is more difficult, but this should be done over time, adopting a risk-based approach and with due allowance for what is practicable and the level of control over existing arrangements.

## Procedures

- 1.6 Commercial organisations' bribery prevention policies are likely to include certain common elements. As an indicative and not exhaustive list, an organisation may wish to cover in its policies:
- its commitment to bribery prevention (see Principle 2)
  - its general approach to mitigation of specific bribery risks, such as those arising from the conduct of intermediaries and agents, or those associated with hospitality and promotional expenditure, facilitation payments or political and charitable donations or contributions; (see Principle 3 on risk assessment)
  - an overview of its strategy to implement its bribery prevention policies.
- 1.7 The procedures put in place to implement an organisation's bribery prevention policies should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons. The following is an indicative and not exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced:
- The involvement of the organisation's toplevel management (see Principle 2).
  - Risk assessment procedures (see Principle 3).
  - Due diligence of existing or prospective associated persons (see Principle 4).
  - The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments.
  - Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration.
  - Governance of business relationships with all other associated persons including pre and post contractual agreements.

- Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure.
- Transparency of transactions and disclosure of information.
- Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.
- Enforcement, detailing discipline processes and sanctions for breaches of the organisation’s anti-bribery rules.
- The reporting of bribery including ‘speak up’ or ‘whistle blowing’ procedures.
- The detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation.
- The communication of the organisation’s policies and procedures, and training in their application (see Principle 5).
- The monitoring, review and evaluation of bribery prevention procedures (see Principle 6).

## **Principle 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.

### **Commentary**

- 2.1. Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable. The purpose of this principle is to encourage the involvement of top-level management in the determination of bribery prevention procedures. It is also to encourage top-level involvement in any key decision making relating to bribery risk where that is appropriate for the organisation's management structure.

### **Procedures**

- 2.2. Whatever the size, structure or market of a commercial organisation, toplevel management commitment to bribery prevention is likely to include (1) communication of the organisation's anti-bribery stance, and (2) an appropriate degree of involvement in developing bribery prevention procedures.

### **Internal and external communication of the commitment to zero tolerance to bribery**

- 2.3. This could take a variety of forms. A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might be tailored to different audiences. The statement would probably need to be drawn to people's attention on a periodic basis and could be generally available, for example on an organisation's intranet and/or internet site. Effective formal statements that demonstrate top level commitment are likely to include:
  - a commitment to carry out business fairly, honestly and openly



- a commitment to zero tolerance towards bribery
- the consequences of breaching the policy for employees and managers
- for other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a ‘best practice’ objective)
- articulation of the business benefits of rejecting bribery (reputational, customer and business partner confidence)
- reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing)
- key individuals and departments involved in the development and implementation of the organisation’s bribery prevention procedures
- reference to the organisation’s involvement in any collective action against bribery in, for example, the same business sector.

### Top-level involvement in bribery prevention

2.4. Effective leadership in bribery prevention will take a variety of forms appropriate for and proportionate to the organisation’s size, management structure and circumstances. In smaller organisations a proportionate response may require top-level managers to be personally involved in initiating, developing and implementing bribery prevention procedures and bribery critical decision making. In a large multinational organisation the board should be responsible for setting bribery prevention policies, tasking management to design, operate and monitor bribery prevention procedures, and keeping these policies and procedures under regular review. But whatever the appropriate model, toplevel engagement is likely to reflect the following elements:

- Selection and training of senior managers to lead anti-bribery work where appropriate.
- Leadership on key measures such as a code of conduct.
- Endorsement of all bribery prevention related publications.
- Leadership in awareness raising and encouraging transparent dialogue throughout the organisation so as to seek to ensure effective dissemination of anti-bribery policies and procedures to employees, subsidiaries, and associated persons, etc.
- Engagement with relevant associated persons and external bodies, such as sectoral organisations and the media, to help articulate the organisation’s policies.
- Specific involvement in high profile and critical decision making where appropriate.

- Assurance of risk assessment.
- General oversight of breaches of procedures and the provision of feedback to the board or equivalent, where appropriate, on levels of compliance.

## **Principle 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.

### **Commentary**

- 3.1. For many commercial organisations this principle will manifest itself as part of a more general risk assessment carried out in relation to business objectives. For others, its application may produce a more specific stand alone bribery risk assessment. The purpose of this principle is to promote the adoption of risk assessment procedures that are proportionate to the organisation's size and structure and to the nature, scale and location of its activities. But whatever approach is adopted the fuller the understanding of the bribery risks an organisation faces the more effective its efforts to prevent bribery are likely to be.
- 3.2. Some aspects of risk assessment involve procedures that fall within the generally accepted meaning of the term 'due diligence'. The role of due diligence as a risk mitigation tool is separately dealt with under Principle 4.

### **Procedures**

- 3.3. Risk assessment procedures that enable the commercial organisation accurately to identify and prioritise the risks it faces will, whatever its size, activities, customers or markets, usually reflect a few basic characteristics. These are:
  - Oversight of the risk assessment by top level management.
  - Appropriate resourcing – this should reflect the scale of the organisation's business and the need to identify and prioritise all relevant risks.
  - Identification of the internal and external information sources that will enable risk to be assessed and reviewed.
  - Due diligence enquiries (see Principle 4).

- Accurate and appropriate documentation of the risk assessment and its conclusions.
- 3.4. As a commercial organisation’s business evolves, so will the bribery risks it faces and hence so should its risk assessment. For example, the risk assessment that applies to a commercial organisation’s domestic operations might not apply when it enters a new market in a part of the world in which it has not done business before (see Principle 6 for more on this).

### Commonly encountered risks

- 3.5. Commonly encountered external risks can be categorised into five broad groups – country, sectoral, transaction, business opportunity and business partnership:
- **Country risk:** this is evidenced by perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation and a failure of the foreign government, media, local business community and civil society effectively to promote transparent procurement and investment policies.
  - **Sectoral risk:** some sectors are higher risk than others. Higher risk sectors include the extractive industries and the large scale infrastructure sector.
  - **Transaction risk:** certain types of transaction give rise to higher risks, for example, charitable or political contributions, licences and permits, and transactions relating to public procurement.
  - **Business opportunity risk:** such risks might arise in high value projects or with projects involving many contractors or intermediaries; or with projects which are not apparently undertaken at market prices, or which do not have a clear legitimate objective.
  - **Business partnership risk:** certain relationships may involve higher risk, for example, the use of intermediaries in transactions with foreign public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.
- 3.6. An assessment of external bribery risks is intended to help decide how those risks can be mitigated by procedures governing the relevant operations or business relationships; but a bribery risk assessment should also examine the extent to which internal structures or procedures may themselves add to the level of risk. Commonly encountered internal factors may include:
- deficiencies in employee training, skills and knowledge
  - bonus culture that rewards excessive risk taking

- lack of clarity in the organisation’s policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
- lack of clear financial controls
- lack of a clear anti-bribery message from the top-level management.

## Principle 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.

### Commentary

- 4.1. Due diligence is firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework. Due diligence procedures are both a form of bribery risk assessment (see Principle 3) and a means of mitigating a risk. By way of illustration, a commercial organisation may identify risks that as a general proposition attach to doing business in reliance upon local third party intermediaries. Due diligence of specific prospective third party intermediaries could significantly mitigate these risks. The significance of the role of due diligence in bribery risk mitigation justifies its inclusion here as a Principle in its own right.
- 4.2. The purpose of this Principle is to encourage commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.

### Procedures

- 4.3. As this guidance emphasises throughout, due diligence procedures should be proportionate to the identified risk. They can also be undertaken internally or by external consultants. A person 'associated' with a commercial organisation as set out at section 10 of the Bribery Act includes any person performing services for a commercial organisation. The scope of this definition is broad and can embrace a wide range of business relationships. But the appropriate level of due diligence to prevent bribery will vary enormously depending on the risks arising from the particular relationship. So, for example, the appropriate level of due diligence required by a commercial organisation when contracting for the performance of information technology services may be low, to reflect low risks of bribery on its behalf. In contrast, an organisation that is selecting an intermediary to assist in establishing a business in foreign markets will typically require a much higher level of due diligence to mitigate the risks of bribery on its behalf.

- 4.4. Organisations will need to take considerable care in entering into certain business relationships, due to the particular circumstances in which the relationships come into existence. An example is where local law or convention dictates the use of local agents in circumstances where it may be difficult for a commercial organisation to extricate itself from a business relationship once established. The importance of thorough due diligence and risk mitigation prior to any commitment are paramount in such circumstances. Another relationship that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another.
- 4.5. 'Due diligence' for the purposes of Principle 4 should be conducted using a risk-based approach. For example, in lower risk situations, commercial organisations may decide that there is no need to conduct much in the way of due diligence. In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations, or general research on proposed associated persons. Appraisal and continued monitoring of recruited or engaged 'associated' persons may also be required, proportionate to the identified risks. Generally, more information is likely to be required from prospective and existing associated persons that are incorporated (e.g. companies) than from individuals. This is because on a basic level more individuals are likely to be involved in the performance of services by a company and the exact nature of the roles of such individuals or other connected bodies may not be immediately obvious. Accordingly, due diligence may involve direct requests for details on the background, expertise and business experience, of relevant individuals. This information can then be verified through research and the following up of references, etc.
- 4.6. A commercial organisation's employees are presumed to be persons 'associated' with the organisation for the purposes of the Bribery Act. The organisation may wish, therefore, to incorporate in its recruitment and human resources procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees which is proportionate to the risk associated with the post in question. Due diligence is unlikely to be needed in relation to lower risk posts.

## **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 proportionate to the risks it faces.

### **Commentary**

- 5.1. Communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation's procedures and to the organisation's commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge and skills needed to employ the organisation's procedures and deal with any bribery related problems or issues that may arise.

### **Procedures**

#### **Communication**

- 5.2. The content, language and tone of communications for internal consumption may vary from that for external use in response to the different relationship the audience has with the commercial organisation. The nature of communication will vary enormously between commercial organisations in accordance with the different bribery risks faced, the size of the organisation and the scale and nature of its activities.
- 5.3. Internal communications should convey the 'tone from the top' but are also likely to focus on the implementation of the organisation's policies and procedures and the implications for employees. Such communication includes policies on particular areas such as decision making, financial control, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations and penalties for breach of rules and the articulation of management roles at different levels. Another important aspect of internal communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice. These



so called ‘speak up’ procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.

- 5.4. External communication of bribery prevention policies through a statement or codes of conduct, for example, can reassure existing and prospective associated persons and can act as a deterrent to those intending to bribe on a commercial organisation’s behalf. Such communications can include information on bribery prevention procedures and controls, sanctions, results of internal surveys, rules governing recruitment, procurement and tendering. A commercial organisation may consider it proportionate and appropriate to communicate its anti-bribery policies and commitment to them to a wider audience, such as other organisations in its sector and to sectoral organisations that would fall outside the scope of the range of its associated persons, or to the general public.

## Training

- 5.5. Like all procedures training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk. Training may take the form of education and awareness raising about the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed.
- 5.6. General training could be mandatory for new employees or for agents (on a weighted risk basis) as part of an induction process, but it should also be tailored to the specific risks associated with specific posts. Consideration should also be given to tailoring training to the special needs of those involved in any ‘speak up’ procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. Effective training is continuous, and regularly monitored and evaluated.
- 5.7. It may be appropriate to require associated persons to undergo training. This will be particularly relevant for high risk associated persons. In any event, organisations may wish to encourage associated persons to adopt bribery prevention training.
- 5.8. Nowadays there are many different training formats available in addition to the traditional classroom or seminar formats, such as e-learning and other web-based tools. But whatever the format, the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them.

## **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.

### **Commentary**

- 6.1. The bribery risks that a commercial organisation faces may change over time, as may the nature and scale of its activities, so the procedures required to mitigate those risks are also likely to change. Commercial organisations will therefore wish to consider how to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary. In addition to regular monitoring, an organisation might want to review its processes in response to other stimuli, for example governmental changes in countries in which they operate, an incident of bribery or negative press reports.

### **Procedures**

- 6.2. There is a wide range of internal and external review mechanisms which commercial organisations could consider using. Systems set up to deter, detect and investigate bribery, and monitor the ethical quality of transactions, such as internal financial control mechanisms, will help provide insight into the effectiveness of procedures designed to prevent bribery. Staff surveys, questionnaires and feedback from training can also provide an important source of information on effectiveness and a means by which employees and other associated persons can inform continuing improvement of anti-bribery policies.
- 6.3. Organisations could also consider formal periodic reviews and reports for top-level management. Organisations could also draw on information on other organisations' practices, for example relevant trade bodies or regulators might highlight examples of good or bad practice in their publications.

## Appendix - Bribery Act 2016 case studies

### Introduction

These case studies (which do not form part of the guidance issued under section 11 of the Act) look at how the application of the six principles might relate to a number of hypothetical scenarios commercial organisations may encounter. The Government believes that this illustrative context can assist commercial organisations in deciding what procedures to prevent persons associated with them from bribing on their behalf might be most suitable to their needs.

These case studies are illustrative. They are intended to complement the guidance. They do not replace or supersede any of the principles. The considerations set out below merely show in some circumstances how the principles can be applied, and should not be seen as standard setting, establishing any presumption, reflecting a minimum baseline of action or being appropriate for all organisations whatever their size. Accordingly, the considerations set out below are not:

- comprehensive of all considerations in all circumstances
- conclusive of adequate procedures
- conclusive of inadequate procedures if not all of the considerations are considered and/or applied.

All but one of these case studies focus on bribery risks associated with foreign markets. This is because bribery risks associated with foreign markets are generally higher than those associated with domestic markets. Accordingly case studies focussing on foreign markets are better suited as vehicles for the illustration of bribery prevention procedures.

## Case study I – Principle I: Facilitation payments

A medium sized company ('A') has acquired a new customer in a foreign country ('B') where it operates through its agent company ('C'). Its bribery risk assessment has identified facilitation payments as a significant problem in securing reliable importation into B and transport to its new customer's manufacturing locations. These sometimes take the form of 'inspection fees' required before B's import inspectors will issue a certificate of inspection and thereby facilitate the clearance of goods.

A could consider any or a combination of the following:

- Communication of its policy of nonpayment of facilitation payments to C and its staff.
- Seeking advice on the law of B relating to certificates of inspection and fees for these to differentiate between properly payable fees and disguised requests for facilitation payments.
- Building realistic timescales into the planning of the project so that shipping, importation and delivery schedules allow where feasible for resisting and testing demands for facilitation payments.
- Requesting that C train its staff about resisting demands for facilitation payments and the relevant local law and provisions of the Bribery Act 2016.
- Proposing or including as part of any contractual arrangement certain procedures for C and its staff, which may include one or more of the following, if appropriate:
  - questioning of legitimacy of demands
  - requesting receipts and identification details of the official making the demand
  - requests to consult with superior officials
  - trying to avoid paying 'inspection fees' (if not properly due) in cash and directly to an official
  - informing those demanding payments that compliance with the demand may mean that A (and possibly C) will commit an offence under Bermuda law
  - informing those demanding payments that it will be necessary for C to inform Bermuda embassy of the demand.
- Maintaining close liaison with C so as to keep abreast of any local developments that may provide solutions and encouraging C to develop its own strategies based on local knowledge.

## Case study 2 – Principle 1: Proportionate Procedures

A small to medium sized installation company is operating entirely within the Bermuda domestic market. It relies to varying degrees on independent consultants to facilitate business opportunities and to assist in the preparation of both pre-qualification submissions and formal tenders in seeking new business. Such consultants work on an arms-length-fee-plus-expenses basis. They are engaged by sales staff and selected because of their extensive network of business contacts and the specialist information they have. The reason for engaging them is to enhance the company's prospects of being included in tender and pre-qualification lists and of being selected as main or sub-contractors. The reliance on consultants and, in particular, difficulties in monitoring expenditure which sometimes involves cash transactions has been identified by the company as a source of medium to high risk of bribery being undertaken on the company's behalf.

In seeking to mitigate these risks the company could consider any or a combination of the following:

- Communication of a policy statement committing it to transparency and zero tolerance of bribery in pursuit of its business objectives. The statement could be communicated to the company's employees, known consultants and external contacts, such as sectoral bodies and local chambers of commerce.
- Firming up its due diligence before engaging consultants. This could include making enquiries through business contacts, local chambers of commerce, business associations, or internet searches and following up any business references and financial statements.
- Considering firming up the terms of the consultants' contracts so that they reflect a commitment to zero tolerance of bribery, set clear criteria for provision of bona fide hospitality on the company's behalf and define in detail the basis of remuneration, including expenses.
- Consider making consultants' contracts subject to periodic review and renewal.
- Drawing up key points guidance on preventing bribery for its sales staff and all other staff involved in bidding for business and when engaging consultants
- Periodically emphasising these policies and procedures at meetings – for example, this might form a standing item on meeting agendas every few months.
- Providing a confidential means for staff and external business contacts to air any suspicions of the use of bribery on the company's behalf.

### Case study 3 – Principles 1 and 6: Joint venture

A local hotelier ('D') wishes to enter into a joint venture with an overseas partner ('E'). It is proposed that D and E would have an equal holding in the joint venture company ('DE'). D identifies the necessary interaction between DE and local public officials as a source of significant risks of bribery.

D could consider negotiating for the inclusion of any or a combination of the following bribery prevention procedures into the agreement setting up DE:

- Parity of representation on the board of DE.
- That DE put in place measures designed to ensure compliance with all applicable bribery and corruption laws. These measures might cover such issues as:
  - gifts and hospitality
  - agreed decision making rules
  - procurement
  - engagement of third parties, including due diligence requirements
  - conduct of relations with public officials
  - training for staff in high risk positions
  - record keeping and accounting.
- The establishment of an audit committee with at least one representative of each of D and E that has the power to view accounts and certain expenditure and prepare regular reports.
- Binding commitments by D and E to comply with all applicable bribery laws in relation to the operation of DE, with a breach by either D or E being a breach of the agreement between them. Where such a breach is a material breach this could lead to termination or other similarly significant consequences.

## Case study 4 – Principles 1 and 5: Hospitality and Promotional expenditure

A firm of architects ('F') maintains a programme of annual events providing entertainment, quality dining and attendance at various sporting occasions, as an expression of appreciation of its long association with its business partners. Private bodies and individuals are happy to meet their own travel and accommodation costs associated with attending these events. The costs of the travel and accommodation of any foreign public officials attending are, however, met by F.

F could consider any or a combination of the following:

- Conducting a bribery risk assessment relating to its dealings with business partners and foreign public officials and in particular the provision of hospitality and promotional expenditure.
- Publication of a policy statement committing it to transparent, proportionate, reasonable and bona fide hospitality and promotional expenditure.
- The issue of internal guidance on procedures that apply to the provision of hospitality and/or promotional expenditure providing:
  - that any procedures are designed to seek to ensure transparency and conformity with any relevant laws and codes applying to F
  - that any procedures are designed to seek to ensure transparency and conformity with the relevant laws and codes applying to foreign public officials
  - that any hospitality should reflect a desire to cement good relations and show appreciation, and that promotional expenditure should seek to improve the image of F as a commercial organisation, to better present its products or services, or establish cordial relations
  - that the recipient should not be given the impression that they are under an obligation to confer any business advantage or that the recipient's independence will be affected
  - criteria to be applied when deciding the appropriate levels of hospitality for both private and public business partners, clients, suppliers and foreign public officials and the type of hospitality that is appropriate in different sets of circumstances
  - that provision of hospitality for public officials be cleared with the relevant public body so that it is clear who and what the hospitality is for
  - for expenditure over certain limits, approval by an appropriately senior level of management may be a relevant consideration
  - accounting (book-keeping, orders, invoices, delivery notes, etc).
- Regular monitoring, review and evaluation of internal procedures and compliance with them.

- Appropriate training and supervision provided to staff.



### **Case study 5 – Principle 3: Assessing risks**

A small specialist manufacturer is seeking to expand its business in one of several emerging markets, all of which offer comparable opportunities. It has no specialist risk assessment expertise and is unsure how to go about assessing the risks of entering a new market. The small manufacturer could consider any or a combination of the following:

- Incorporating an assessment of bribery risk into research to identify the optimum market for expansion.
- Consulting general country assessments undertaken by local chambers of commerce, relevant non-governmental organisations and sectoral organisations.
- Seeking advice from industry representatives.
- Following up any general or specialist advice with further independent research.

## Case study 6 – Principle 4: Due diligence of agents

A medium to large sized insurance brokerage firm ('G') has an opportunity to assist the Government of an emerging market in a foreign country ('H') in navigating international financial markets. Local convention requires any foreign commercial organisations to operate through a local agent. G is concerned to appoint a reputable agent and ensure that the risk of bribery being used to develop its business in the market is minimised.

G could consider any or a combination of the following:

- Compiling a suitable questionnaire for potential agents requiring for example, details of ownership if not an individual; CVs and references for those involved in performing the proposed service; details of any directorships held, existing partnerships and third party relationships and any relevant judicial or regulatory findings.
- Having a clear statement of the precise nature of the services offered, costs, commissions, fees and the preferred means of remuneration.
- Undertaking research, including internet searches, of the prospective agents and, if a corporate body, of every person identified as having a degree of control over its affairs.
- Making enquiries with the relevant authorities in H to verify the information received in response to the questionnaire.
- Following up references and clarifying any matters arising from the questionnaire or any other information received with the agents, arranging face to face meetings where appropriate.
- Requesting sight or evidence of any potential agent's own anti-bribery policies and, where a corporate body, reporting procedures and records.
- Being alert to key commercial questions such as:
  - Is the agent really required?
  - Does the agent have the required expertise?
  - Is the agent interacting with or closely connected to public officials?
  - Is what you are proposing to pay reasonable and commercial?
- Renewing due diligence enquiries on a periodic basis if an agent is appointed.

## Case study 7 – Principle 5: Communicating and training

A Bermuda-based accounting firm ('J') has engaged an individual as a local agent and adviser ('K') to assist with winning a contract and developing its business in a foreign country where the risk of bribery is assessed as high. J could consider any or a combination of the following:

- Making employees of J engaged in bidding for business fully aware of J's anti-bribery statement, code of conduct and, where appropriate, that details of its anti-bribery policies are included in its tender.
- Including suitable contractual terms on bribery prevention measures in the agreement between J and K, for example: requiring K not to offer or pay bribes; giving J the ability to audit K's activities and expenditure; requiring K to report any requests for bribes by officials to J; and, in the event of suspicion arising as to K's activities, giving J the right to terminate the arrangement.
- Making employees of J fully aware of policies and procedures applying to relevant issues such as hospitality and facilitation payments, including all financial control mechanisms, sanctions for any breaches of the rules and instructions on how to report any suspicious conduct.
- Supplementing the information, where appropriate, with specially prepared training to J's staff involved with the foreign country.

## Case study 8 – Principle 1, 4 and 6: Community benefits and charitable donations

A local charitable company ('L') organizes missions overseas to help build homes in least developed countries. Its representative travels to a foreign country ('M') to discuss with local partners the possible construction of a school which was damaged in a recent natural disaster.

In a subsequent meeting with an official of M to discuss the issue of a construction permit for the school, the official suggests that L could additionally pay for supplies for local area schools and that this will be a very positive factor in the Government's consideration of the application for a permit. In a further meeting, the same official states that L should donate money to a certain charity suggested by the official which, the official assures, will then take the necessary steps to purchase and distribute the supplies. L identifies this as raising potential bribery risks.

L could consider any or a combination of the following:

- Making reasonable efforts to conduct due diligence, including consultation with staff members and any business partners it has in country M in order to satisfy itself that the suggested arrangement is legitimate and in conformity with any relevant laws and codes applying to the foreign public official responsible for approving the product. It could do this by obtaining information on:
  - the particular charity in question including its legal status, its reputation in M, and whether it has conducted similar projects, and
  - any connections the charity might have with the foreign official in question, if possible.
- Adopting an internal communication plan designed to ensure that any relationships with charitable organisations are conducted in a transparent and open manner and do not raise any expectation of the award of a contract or licence.
- Adopting company-wide policies and procedures about the selection of charitable projects or initiatives which are informed by appropriate risk assessments.
- Training and support for staff in implementing the relevant policies and procedures of communication which allow issues to be reported and compliance to be monitored.
- If charitable donations made in country M are routinely channelled through government officials or to others at the official's request, a red flag should be raised and L may seek to monitor the way its contributions are ultimately applied, or investigate alternative methods of donation such as official 'off-set' or 'community gain' arrangements with the government of M.
- Evaluation of its policies relating to charitable donations as part of its next periodic review of its anti-bribery procedures.

## Case study 9 – Principle 4: Due diligence of agents

A small Bermuda company ('N') relies on agents in country ('P') from which it imports automotive parts. The bribery risks it faces arise entirely as a result of its reliance on agents and their relationship with local businessmen and officials. N is offered a new business opportunity in P through a new agent ('Q'). An agreement with Q needs to be concluded quickly.

N could consider any or a combination of the following:

- Conducting due diligence and background checks on Q that are proportionate to the risk before engaging Q; which could include:
  - making enquiries through N's business contacts, local chambers of commerce or business associations, or internet searches
  - seeking business references and a financial statement from Q and reviewing Q's CV to ensure Q has suitable experience.
- Considering how best to structure the relationship with Q, including how Q should be remunerated for its services and how to seek to ensure Q's compliance with relevant laws and codes applying to foreign public officials.
- Making the contract with Q renewable annually or periodically.
- Travelling to P periodically to review the agency situation.

## Case study 10 – Principle 2: Top level commitment

A medium sized Information Communications Technology consultancy is seeking contracts in markets abroad where there is a risk of bribery. As part of its preparation, a senior manager has devoted some time to participation in the development of a sector wide anti-bribery initiative. The top level management of the consultancy could consider any or a combination of the following:

- The making of a clear statement disseminated to its staff and key business partners of its commitment to carry out business fairly, honestly and openly, referencing its key bribery prevention procedures and its involvement in the sectoral initiative.
- Establishing a code of conduct that includes suitable anti-bribery provisions and making it accessible to staff and third parties on its website.
- Considering an internal launch of a code of conduct, with a message of commitment to it from senior management.
- Senior management emphasising among the workforce and other associated persons the importance of understanding and applying the code of conduct and the consequences of breaching the policy or contractual provisions relating to bribery prevention for employees and managers and external associated persons.
- Identifying someone of a suitable level of seniority to be a point-person for queries and issues relating to bribery risks.

## Case study II – Proportionate procedures

A small export company operates through agents in a number of different foreign countries. Having identified bribery risks associated with its reliance on agents it is considering developing proportionate and risk based bribery prevention procedures. The company could consider any or a combination of the following:

- Using trade fairs and trade publications to communicate periodically its anti-bribery message and, where appropriate, some detail of its policies and procedures.
- Oral or written communication of its bribery prevention intentions to all of its agents.
- Adopting measures designed to address bribery on its behalf by associated persons, such as:
  - requesting relevant information and conducting background searches on the internet against information received
  - making sure references are in order and followed up
  - including anti-bribery commitments in any contract renewal
  - using existing internal arrangements such as periodic staff meetings to raise awareness of ‘red flags’ as regards agents’ conduct, for example evasive answers to straightforward requests for information, overly elaborate payment arrangements involving further third parties, ad hoc or unusual requests for expense reimbursement not properly covered by accounting procedures.
- Making use of any external sources of information (Bermuda, sectoral organisations) on bribery risks in particular markets and using the data to inform relationships with particular agents.
- Making sure staff have a confidential means to raise any concerns about bribery.