



Anti-Bribery Compliance

There are many laws and rules related to bribery. Compliance with these rules is critical for a variety of reasons.

- First and foremost, good ethical conduct is essential in building and maintaining strong international relationships
- Compliance is critical in building broad public support for aid and development, and influencing policy makers
- Bribery and corruption hurt the poor disproportionately in all countries and can aggravate conflict and insecurity
- When corruption is present, resources for development and humanitarian assistance are often diverted and the cost of public services increases
- Finally, bribery undermines economic growth and is a barrier to poverty alleviation and good governance

This practice note is designed to educate and prepare you to be in compliance with the U.K. Bribery Act, currently the most comprehensive Act on this topic. Presently 38 countries are committed to similar legislation. In the U.S. for example the U.S. Foreign Corrupt Practices Act or FCPA is the governing legislation. But the U.K. Bribery Act is the most comprehensive and currently sets the highest bar.

By the end of this practice note, you should:

1. Be able to identify a bribe and a facilitation payment.
2. You should know how to resist bribery solicitations, most notably facilitation payments.
3. You should understand the loss of life, limb, or liberty exception to facilitation payments.
4. You should also understand what constitutes acceptable gifts and hospitality.
5. You should know how to prevent bribery by third parties.
6. And finally, you should know the penalties for non-compliance, and whom to contact for help if you need it.

Let's take a look at the UK Bribery Act of 2010. This legislation became effective in July 2011, and it prohibits companies and their employees from accepting, receiving, and/or failing to prevent bribery anywhere in the world regardless of intent.

Criminal Prosecution can be brought against:

- UK citizens and residents,
- non-UK citizens and residents (if the bribe occurs in the UK),
- UK Headquartered companies, and
- companies that operate in the UK even if the action did not occur in the UK

Now let's take a quick look at the US Foreign Corrupt Practices Act otherwise referred to as the "FCPA".

Despite its less restrictive language relative to the UK Bribery Act, the FCPA remains relevant because of its high level of enforcement. This legislation has been around for many years. Like the UK Bribery Act, it prohibits companies and their employees from accepting, receiving, and/or failing to prevent bribery anywhere in the world. However, there is a required element of intent. Since the UK Bribery Act is currently more comprehensive in scope, our focus will be predominately on this act.

US and UK authorities now expect that companies doing business internationally have a formal anti-bribery compliance program.

1.1.1. Bribery

The act of directly or indirectly offering, giving, or receiving anything of value with the intent to influence someone's behaviour. Specifically, behaviour that is illegal, or that would help secure an improper advantage. Remember – even a charitable donation constitutes something of value. A bribe is still a bribe even if masked by another name, such as a gift, consulting services, or a "special fee".

1.1.2. Facilitation payments

Small payments or fees requested by government officials to speed up or facilitate the performance of routine government actions such as the provision of a visa, customs clearance, permit, license, work order, police protection, utility services, mail service, contract performance and actions of a similar nature.

In many countries these types of payments are considered normal and customary. However, under the UK Bribery Act, even facilitation payments are illegal!

Being prepared is one of the best ways to deal with bribes, should you ever be confronted with one. There are many ways we can prepare ourselves for dealing with bribes, including participating in training and being familiar with Anti-Bribery laws; performing risk assessments and careful due diligence on third parties; drafting contracts with anti-bribery provisions; educating partners about these laws and sharing this training; following contract payment procedures, using wire transfers for payments, and not paying in cash; talking to your legal team before beginning operations in certain countries where you may not be familiar with the relevant laws and practices; monitoring or being alert for possible violations and not ignoring "Red Flags"; and, planning ahead to avoid payments under duress, using security when necessary, as well as building in time for delays caused by your refusal to pay bribes and stay in compliance with these laws.

Remember - you will NOT be disciplined for compliance!

If you think you have been asked to pay a bribe or a facilitation payment, take time to think before responding and do not act alone.

- Say "No." Sometimes a direct refusal is enough
- Request in writing: Answer that the solicitation must be made in writing and reviewed by your manager/your legal team. Let the solicitor know that the writing should include the official/demanding party's name.
- Refuse: Refuse the solicitation on the grounds that it violates your organization's principles, violates the law, and could lead to your dismissal, as well as criminal prosecution for you and the soliciting party,
- Contact: Contact your legal team immediately to provide details of the incident and to develop a plan to respond, and/or
- Record: Record the details of the incident as soon as possible after the event
- In addition, never act alone, whenever possible operate as a team of at least two employees.

1.1.3. Loss of life, limb or liberty exception

There may be exceptional situations where it is necessary to make a facilitation payment to ensure the safety of an individual. Where there is NO ALTERNATIVE to protect against loss of life, limb, or liberty, the common law defense of duress is available. If you encounter this, contact your legal team as soon as practical to report the incident.

Comply with your organisation's policy requirements. It is especially important to document the details off the incident as soon as possible after an event and report such an incident to the appropriate persons within your organization.

1.1.4. Gifts and/or hospitality (reasonableness)

There are several guidelines you should follow regarding gifts and/or hospitality:

You should keep in mind that the value of all gifts, entertainment and corporate hospitality, both given and received, must be of nominal or insubstantial value and reasonable in light of the particular circumstances of the encounter. Otherwise, it may be interpreted as bribery!

There is legally no definitive threshold but gifts should be limited to \$100 (or less) per individual, per year, or as proscribed by your organization's policy. Cash or cash-equivalent gifts are prohibited.

For more information, contact your direct report, COO or SG.

There is always some risk involved for indirect bribery to take place when working with third parties. An organisation could be found guilty of bribery for actions taken by "associated persons" acting for or on its behalf - even actions that are unauthorized or unknown. Third parties might include:

- Employees
- Agents
- Consultants or Contractors
- Employees of service providers
- Joint venture partners, and
- Grantees

1.1.5. Working with third parties (indirect bribery)

Should indirect bribery occur with a third party, the only available defense is establishing that your organisation had "adequate procedures" to prevent bribery by the associated person.

"Adequate procedures" may include:

- Procedures related to due diligence
- Safeguards
- Monitoring

For more information, contact your direct report, COO or SG.

1.1.6. Penalties for non-compliance

There are penalties involved as a result of not complying with the Anti-Corruption Act.

- For instance, companies can face unlimited fines unless they have "adequate procedures" in place
- Individuals can face unlimited fines and prison sentences up to 10 years
- Senior Executives may face personal liability if an offense is committed with their consent or passive consent. Passive consent is when a person has knowledge of, or should have known
- Liability can attach to third-party actions, such as agents, consortia members, and partners
- There are also Operational costs and Reputational risks to consider
- There are comparable penalties under the FCPA.

Remember – if you need more information about this topic, or need help with a specific situation you have encountered, contact your direct report!

1.1.7. Bribery/facilitation red flags

There are many potential indicators of bribery or corruption.

- Abnormal cash payments
- Pressure exerted for payments to be made urgently or ahead of schedule
- Payments being made through a third country, usually via a shell company.
- Abnormally high commission percentage being paid to a particular agent (this may be split into two accounts for the same agent, often in different jurisdictions)
- Private meetings with public contractors or companies hoping to win a contract
- Lavish gifts being received
- Agreeing to contracts with terms or timing unfavorable to the organization
- Abusing decision process or delegated powers in specific area
- Company procedures or guidelines not being followed
- Invoices being accepted in excess of contract amount without reasonable cause

1.1.8. Key risk areas

There are several key risk areas when it comes to bribery or facilitation payments. Take some time to learn more about these key areas by clicking on each heading in the chart.

<Cultural> – in certain cultures and work environments, bribes may be seen as "business as usual."

<Emergency relief> – emergency time pressure and security context may increase risk.

<Sector > – the nature of the sector in which your organization works may pose specific risks.

<Partners> – factors that may impact bribery risk include: the size, structure and/or governance of partners; the adequacy of partners' control systems; the partner selection processes; the partnership contracts and agreements; the partners' monitoring and support processes; and, the political involvement or connections of partners.

<Procurement> – where procurement processes are not fair or transparent there is increased risk. Procurement is a high risk area for bribery.

<Transactions> – certain transactions may carry higher risk. Some examples include payments to government officials, major contracts, and payments through third parties.

<Recruitment> – bribes can be offered or sought as part of recruitment processes.

<New activities> – there may be increased risk when your organisation starts new activities in which we have limited experience, or activities in a new country.

<Geographical> – risks may be higher in certain countries or regions within countries. Activities in urban areas may pose different risks than activities in rural areas.

Educate yourself before you visit an area that is considered highly corrupt, or where you may be unfamiliar with the laws and regulations applicable. Transparency International provides a Corruption Perception Index that is frequently updated.