

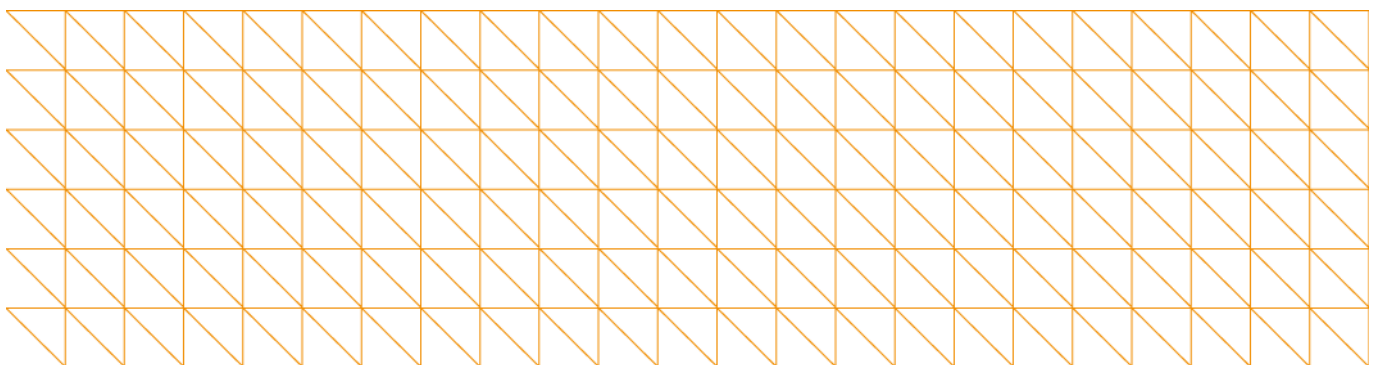


Guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010)

Response to Consultation CP 11/10

CP(R) 7/11

This response is published on 30 March 2011





Ministry of
JUSTICE

**Guidance about commercial organisations
preventing bribery (section 9 of the Bribery Act
2010)**

Response to consultation carried out by the Ministry of Justice.

About this consultation

To: Anyone with an interest in the guidance under section 9 of the Bribery Act

Duration: From 14/09/10 to 08/11/10

Enquiries (including requests for the paper in an alternative format) to: Bribery Act Implementation Team
Ministry of Justice
102 Petty France
London SW1H 9AJ

Tel: 020 3334 5023

Email: bribery.act@justice.gsi.gov.uk

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Introduction and contact details

This document is the post-consultation report for the consultation paper, Guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010):

It covers:

- the background to the report
- a summary of the responses to the consultation paper
- the responses to the questions in the consultation paper and other specific issues raised
- how the published guidance has been finalised following the consultation.

Further copies of this report and the consultation paper can be obtained by contacting The Bribery Act Implementation Team at the address below:

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Alternative format versions of this publication can be requested from the address above.

Background

The consultation paper 'Guidance about commercial organisations preventing bribery' was published on 14 September 2010. It invited comments on the form and content of guidance to be published by the Secretary of State under section 9 of the Bribery Act.

The objective of the guidance is to support businesses in determining the sorts of bribery prevention measures they can put in place to prevent persons associated with them from bribing. It is not intended to be prescriptive or standard setting, or impose any direct obligation on business.

The draft guidance which the Government consulted on was formulated around six general principles, designed to be of general application across all business sectors and all types and size of business. They were:

- Risk Assessment
- Top Level Commitment
- Due Diligence
- Clear, Practical and Accessible Policies & Procedures
- Effective Implementation
- Monitoring and Review

It also included further information about offences under the Act and some specific issues relating to the Act. A number of illustrative scenarios were also included in the consultation paper, focusing on areas which present risks of bribery for many commercial organisations.

The consultation paper sought views and comments on the form and content of the guidance, including whether there were additional principles or procedures relevant to the prevention of bribery, or to small and medium sized enterprises.

The Government also held seven open discussion events around the United Kingdom during the consultation period to allow anyone who was interested to discuss and share their views on what was being proposed.

Written responses to the consultation were required by 8 November 2010. This report summarises the responses, including how the consultation process influenced the final guidance which is being published alongside this report.

References in this document to “the Act” are references to the Bribery Act 2010 unless otherwise indicated.

There were no comments on the detail of the Impact Assessment by those responding to the consultation. Therefore the consultation stage Impact Assessment remains valid.

Summary of responses

1. We received a total of 179 responses to the consultation paper. Of these, the majority of responses (80 per cent) were from commercial organisations, including law firms, and business or professional organisations or associations. Responses were also received from a number of non-governmental organisations, public sector organisations, academics and individuals.
2. The responses were analysed to see whether the principles-based approach and the overall format of the guidance was generally accepted; whether there were principles other than those set out in the guidance which may be relevant to the prevention of bribery on behalf of commercial organisations; and whether there were improvements which could be made to assist small and medium sized enterprises (SMEs). All additional issues raised were also taken into account.
3. The majority of respondents supported the principles-based approach of the draft guidance and recognised the flexibility it provided for commercial organisations to adopt procedures appropriate to their individual circumstances. However, the majority of respondents also considered that the guidance should provide further detail or examples of the sort of anti-bribery policies or procedures which it may be appropriate for commercial organisations to adopt.
4. There were a number of suggestions for revising or adding to the principles set out in the draft guidance. The most significant support was for including 'proportionality' or 'reasonableness' as a separate principle. This, it was suggested, would support a risk-based approach to bribery prevention, taking account of the size and nature of the commercial organisation concerned.
5. The majority of comments in relation to the implications of the Act and guidance for small and medium sized enterprises (SMEs) concerned the need for the guidance to be as practical as possible. Some respondents suggested that the guidance should go further than the draft guidance did by setting out specific minimum standards or checklists for SMEs to follow, but most respondents recognised that the principles were appropriate for SMEs as the methods used to implement the principles might differ from those adopted by larger organisations.
6. The majority of respondents suggested that the guidance should go further in clarifying the meaning of "associated person" or "carries on a business"

for the purposes of section 7 of the Act, as well as the implications of the Act for hospitality and promotional expenditure.

7. The majority of comments about the illustrative scenarios in the consultation paper suggested that they needed to be more realistic and should examine relevant procedures to address the risks identified. It was also suggested that it would be helpful to include scenarios involving smaller organisations and domestic bribery risks. Opinion was divided on whether the scenarios should be revised and incorporated in the published guidance or removed entirely.

Responses to specific questions

1. Questions 1 to 3 sought comments on the content and format of the guidance.

Question 1: Are there principles other than those set out in the draft guidance that are relevant and important to the formulation of bribery prevention in commercial organisations? If so what are they and why do you think they are important?

Question 2: Are there any procedures other than those set out in the draft guidance that are relevant and important to a wide range of commercial organisations? If so what are they and why do you think they are important?

2. The majority of respondents supported the principles-based approach of the draft guidance and agreed that this would offer commercial organisations the flexibility to identify bribery prevention procedures appropriate to their individual circumstances. They welcomed the fact that the guidance was not prescriptive and that it suggested that organisations adopt a risk-based approach, with risk assessed with reference to the organisation's type, size and areas of operation.
3. The six principles outlined in the draft guidance were generally considered to be clear, fair and to encompass the key commonly-recognised elements for effectively formulating, implementing and reviewing anti-bribery procedures. There were a number of detailed suggestions for revisions to the principles set out in the draft guidance or for additional principles. For example, it was suggested that training was key to any effective bribery prevention programme. It was also suggested that the importance of transparency, including record-keeping, would be given greater emphasis if it were to be a principle applicable across other procedures. The most significant support, however, was for adding 'proportionality' or 'reasonableness' as a separate principle. It was argued that more explicit recognition of proportionality in the guidance would underline that companies may design their procedures to reflect their size, structure and the risks to which they are exposed. It was argued that a clear reference to a risk based and proportionate approach would be more helpful to organisations in deciding which persons associated with the organisation should be subject to due diligence.
4. The majority of respondents also suggested that it would be helpful if the guidance were to provide more practical advice and examples of the application of the principles to organisations' bribery prevention

procedures. This, it was argued, would provide greater clarity as to the procedures which would be considered adequate for the purposes of the Act, and fulfil the expectations behind the requirement in section 9 the Act to publish the guidance. This was a concern particularly in relation to the principle of due diligence, where there were uncertainties about the scope and level of due diligence expected of different commercial organisations. A few respondents suggested that consideration should be given to developing minimum standards that all organisations, regardless of size, ought to have in place.

5. A minority of respondents took the view that, given that the guidance is based around high level principles, it would be inappropriate to be more precise about procedures and that there was a risk of engendering a “one size fits all” tick box mentality to preventing bribery.

Question 3: Are there any ways in which the format of the draft guidance could be improved in order to be of more assistance to commercial organisations in determining how to apply the guidance to their particular circumstances?

6. The majority of comments about the format of the guidance were broadly supportive of the overall structure, although some respondents suggested that it would be helpful to clarify the status of the guidance, both as a whole and its different parts. Some respondents also suggested that it would be useful to include guidance specific to particular sectors, such as the finance sector. Opinion was divided on whether the quick start guide was useful. Some respondents believed it was a useful starting point for organisations, but others considered it potentially a source of confusion and that it was unnecessary given the length of the overall guidance.
7. There were a number of comments about the illustrative scenarios in the consultation paper. The majority suggested that the illustrative scenarios were too complex and started from the position that a bribe may have been paid. These respondents suggested that the scenarios would be of greater practical value if they discussed more realistic dilemmas and examined relevant procedures to address the risks identified. For example, some said that it would be helpful to provide examples of the steps that might be taken in the face of demands for facilitation payments. Respondents also noted that the scenarios were all based around organisations conducting business in overseas markets and suggested that it would be useful to also have some scenarios involving small businesses and for those operating domestically. As a result, opinion was

divided on whether the scenarios should be revised and incorporated in the published guidance or removed entirely. It was suggested, for example, that industry groups and associations could produce more specific and relevant scenarios.

8. Questions 4 and 5 sought comments on the draft guidance with particular reference to small and medium sized enterprises (SMEs).

Question 4: Are there any principles or procedures that are particularly relevant and important to small and medium sized enterprises that are not covered by the draft guidance and which should be? If so what are they and why do you think they are important?

Question 5: In what ways, if any, could the principles in the draft guidance be improved in order to provide more assistance to small and medium sized enterprises in preventing bribery on their behalf?

9. While respondents generally considered that the principles remained valid for organisations of all sizes, the majority of comments in relation to SMEs concerned the need for the guidance to be as practical as possible. Further detailed examples of policies or procedures would, it was suggested, assist SMEs to apply the principles to their individual circumstances. It was noted, for example, that SMEs may lack experience in conducting risk assessments or due diligence and therefore would be assisted by further specific guidance on the types of procedures which would be considered appropriate. A few respondents suggested that the guidance might take the form of 'must have' minimum standards or check-lists. It was also noted that the illustrative scenarios were tailored more to larger organisations than SMEs.
10. Respondents generally considered it important for the guidance to recognise that implementation should be proportionate to the size and level of assessed risk of the organisation. For example, a micro-business with fewer than five staff and facing a relatively low risk of associated persons offering bribes should not require an overly sophisticated approach to bribery prevention. References in the guidance to written procedures and documentation, beyond a basic statement of anti-bribery policy, could prove onerous to smaller businesses when verbal communication might prove equally effective. However, a number of respondents also noted that even small organisations could face high bribery risks as a result of the sector and markets in which they operated. It was generally considered that a key consideration in implementation remained the organisation's overall assessment of risk, even where methods of implementation varied because of the size of the organisation.

Other issues raised

11. A number of respondents raised other specific issues, including on the section of the guidance titled 'Further Information about the Act'.

Clarification of terms used in the Act

12. Views were expressed about the approach in the consultation document to two particular concepts that appear in the Act, "associated" person and "carrying on a business".

13. Associated persons: many respondents commented that the guidance should clarify further which persons fall within the definition of an "associated" person and when such persons might be regarded as "performing services" for or on behalf of a commercial organisation for the purposes of the offence of failure to prevent bribery (section 7). They thought that the term was not sufficiently clear and no account was made in the guidance for the level of control or influence which a commercial organisation exercised over the person concerned. There was significant concern expressed about the extent to which the draft guidance expected commercial organisations to apply their bribery prevention procedures to third persons, for example, in a supply chain. Respondents suggested that the guidance should draw a distinction between those parties supplying goods and services to support an organisation's infrastructure and those directly involved in the development of that organisation's business. Concerns were also expressed that commercial organisations could incur liability from joint ventures because they could be "performing services" for the members of the venture, even where the UK member had no operational control of its activities.

14. Carries on a business or part of a business: a number of respondents commented that further clarity was required about which commercial organisations would fall within the scope of the section 7 offence. The definition of a "relevant commercial organisation" in section 7(5) refers to one which "carries on a business or part of a business" in the United Kingdom. It was noted by some respondents that this was a prerequisite for liability but there was no indication provided in the guidance of the degree of connectivity required with the UK. Respondents suggested that the guidance should provide further guidance on what level of presence or activity was likely to trigger the offence. This was relevant not only to commercial organisations incorporated outside the UK, but also, as some respondents noted, to organisations in the voluntary or public sector.

Corporate hospitality and promotional expenditure

15. Many respondents commented on the section in the guidance about hospitality and promotional expenditure (Further information about the Act), particularly with reference to the offence of bribery of a foreign public official (section 6). Several suggested that the section 6 offence itself does not define with sufficient precision when an advantage provided to a foreign public official constitutes a bribe and they were therefore concerned that good faith hospitality and promotional expenditure would be criminalised. This, they argued, could lead to businesses being placed in the position of either withdrawing from offering hospitality or condoning breaches of the Act by their staff and relying on prosecutors' discretion not to pursue the matter. These respondents argued it was unsatisfactory to have to rely on prosecutorial discretion to protect themselves from criminal action.
16. A number of respondents welcomed the recognition in the draft guidance that it was "for individual businesses or business representative bodies to fulfil any expectations as regards the establishment and dissemination of any appropriate standards for hospitality and promotional expenditure." They also welcomed the clarification in the draft guidance that corporate hospitality may not amount to an "advantage" if the cost would otherwise have been borne by the foreign government. However, many of those who commented suggested that it would be helpful to provide further guidance on what was considered reasonable and proportionate corporate hospitality or promotional expenditure.
17. A minority of respondents commented that the guidance was clear and effective in addressing concerns about hospitality, gifts and promotional expenditure. In the view of these respondents, no further clarification was required.

Facilitation payments

18. A number of respondents also commented on the information in the guidance about so called "facilitation payments" made in respect of routine official actions. This was a concern for organisations in the voluntary as well as commercial sectors who were concerned that they faced demands for payments in the course of their activities in certain parts of the world which could constitute breaches of the Act. Whilst recognising that there is no exception in the Act for facilitation payments, these respondents remained concerned that demands for such payments will continue and personal safety may be compromised or businesses suffer as a consequence. In their view, it would be helpful to provide further practical guidance about how businesses should handle incidents involving

facilitation payments and how they should be reported to the relevant authorities.

Issues related to the press

19. Four respondents representing press and media interests noted that the Act did not include a public interest defence designed to protect journalists who may have to pay sources for information. They suggested that the guidance should therefore acknowledge the role of the media as a vital public watchdog and make reference to the right to freedom of expression afforded by Article 10 of the European Convention on Human Rights, recognising that any interference with this protection must be necessary, proportionate and strictly justified.
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How the guidance has been finalised following the consultation and next steps

1. Following the consultation, all the representations received were carefully considered to inform the final guidance which is being published alongside this Government response. We also had follow-up discussions with, for example, leading business organisations including the CBI and International Chamber of Commerce UK, and non-governmental organisations to clarify issues raised by the consultation responses.
2. The guidance has been extensively revised to take account of the responses to the consultation. In recognition of the support for the general approach taken in the draft guidance, the published guidance is still principles-based. The main improvements are:
 - The principles have been updated, as follows:
 - Principle 1 - Proportionate procedures;
 - Principle 2 - Top level commitment;
 - Principle 3 - Risk Assessment;
 - Principle 4 - Due Diligence;
 - Principle 5 - Communication (including training); and
 - Principle 6 - Monitoring and review.
 - The guidance includes more examples of anti-bribery procedures and practical case studies; and
 - We have included much more background information in the guidance about the provisions of the Act and Government policy in relation to specific issues raised in the consultation.

Proportionality

3. There was significant support in the consultation for making ‘proportionality’ or ‘reasonableness’ a separate principle. We agree that proportionality underpins the whole guidance and this has now been reflected in the very first principle on “Proportionate procedures”:

“A commercial organisation’s procedures... are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities.”
4. The guidance makes clear that the vast majority of smaller businesses, with low risks of bribery being committed on their behalf, are unlikely to

require bribery prevention procedures of the same order as their multi-national counterparts or those operating in high risk sectors.

5. We are also publishing a separate quick start guide to the Act to provide a concise and accessible introduction to the guidance. This is likely to assist smaller commercial organisations in particular and has been developed in collaboration with the British Chamber of Commerce and Federation of Small Businesses. It addresses the key points commercial organisations need to know about the Act and outlines the bribery prevention principles.

Training and transparency

6. There were also suggestions that training and transparency should be made principles in their own right. Much greater prominence has been given to training in Principle 5 of the guidance. This is now headed “Communication (including training)” and, for example, emphasises that while “training should be proportionate to risk, some training is likely to be effective in firmly establishing an anti-bribery culture”.
7. The concept of transparency was interpreted in different ways in responses to the consultation and, while transparency is important, we concluded that it should not be a principle in its own right. The extent to which commercial organisations maintain and disclose information about their activities will necessarily vary according to the size and nature of the organisation and the regulatory framework in which they operate. The transparency of procedures, activities and relationships may, however, still be a relevant consideration where an organisation wishes to demonstrate that it has adequate procedures for the purposes of the defence to the section 7 offence.

Government policy

8. The section of the draft guidance on “Further Information about the Act” has now been considerably expanded as a separate “Government policy and section 7 of the Bribery Act” section. This section addresses the following issues that were raised in consultation:

An “associated” person

9. Many responses to the consultation sought further clarification of the meaning of an “associated” person for the purposes of the section 7 offence. The new section now provides a clearer explanation of the Government’s intentions as regards the circumstances in which a commercial organisation will be liable for bribery committed on its behalf by those performing services for it, such as a subsidiary, an agent or a joint venture partner, and therefore the extent to which it may decide to address the risk by putting in place anti-bribery procedures.

Commercial organisations

10. A new section of the guidance also now addresses the circumstances in which, in the Government's view, commercial organisations may be subject to the Act because they carry on a business or part of a business in the UK. This includes clarification that the Government expects a commonsense approach to the interpretation of the relevant provisions, so that the section will apply to foreign organisations that have a demonstrable business presence in the UK. It also provides some illustrative examples.

Hospitality or promotional expenditure

11. The guidance on hospitality and promotional expenditure has been clarified and expanded. Reasonable and proportionate expenditure to improve the image of a commercial organisation, to better to present products and services or to establish cordial relations is recognised as an established and important part of doing business. The guidance makes clear that bona fide hospitality and promotional expenditure will not be caught by the Act and provides a number of illustrative examples.

Facilitation payments

12. There has never been an exemption under the law for so called facilitation payments and the Act does not change that position. The guidance, however, now addresses circumstances in which individuals are left with no alternative but to make payments to protect against loss of life, limb or liberty. The guidance notes that the common law defence of duress may also be available in such circumstances.

Case studies

13. We have taken account of comments that the illustrative scenarios in the consultation paper were insufficiently realistic and only addressed scenarios faced by larger companies operating overseas. We have now provided 11 practical case studies to complement the guidance which detail how the bribery prevention principles might relate to typical scenarios which commercial organisations, including small businesses, may encounter. The case studies illustrate the considerations for a commercial organisation, for example, when assessing the risks of a new venture or facing demands for facilitation payments. We have also included a purely domestic case study.

Issues related to the press

14. The Government recognises the important role of the media in our society and it is not the intention of the Act to curtail legitimate and responsible

journalism. The public interest already forms an essential part of the Code for Crown Prosecutors to be applied in considering prosecution in any individual case. Any prosecution for offences under the Act will also require the personal consent of the Director of the relevant prosecuting authority. We are not therefore persuaded that there is a need for the section 9 guidance to make reference to the role of the media and Article 10 of the European Convention on Human Rights.

Commencement of the Act

15. The Act will come into force on 1 July 2011. This will allow a three month notice period for familiarisation with the guidance.

Consultation Co-ordinator contact details

If you have any comments about the way this consultation was conducted you should contact the Ministry of Justice Consultation Co-ordinator at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Consultation Co-ordinator
Legal Policy Team, Legal Directorate
6.37, 6th Floor
102 Petty France
London SW1H 9AJ**

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

ACCA	Clyde & Co Solicitors
Acergy MS Ltd	Confederation of British Industry
A-D-S	Control Risks
Airborne Systems	Cresco Legal Ltd
Allen & Overy LLP	Criminal Bar Assoc
Allianz SE	Deloitte LLP
Anglo American	DLA Piper UK LLP
Association of British Insurers	DTZ
Association of Residential Managing Agents	Duane Morris
Aston Villa FC	E-A-D-S
AXA UK	EDF Energy plc
Baker & McKenzie LLP	Employment Lawyers Assoc
Balfour Beatty	Ernst & Young
Barnett Alexander Conway Ingram LLP	Ethic Intelligence
BDO LLP	Ethisphere
Berwin Leighton Paisner LLP	Euroclear SA/NV
BG Group	Europa Oil & Gas
Bircham Dyson Bell LLP	Eversheds LLP
Birmingham Council	F&C Investments; Cooperative Asset Management; Newton Asset Management; Railpen Investments
BMR Advisors	Fair Pensions
Bond Governance Group	Field Fisher Waterhouse LLP
Boyes Turner	Finance & Leasing Assoc
British Bankers Association	Financial Markets Law Committee
British Chamber of Commerce	Freshfield Bruckhaus Deringer LLP
British Exporters Association	Federation of Small Businesses
British Venture Capital and Private Equity Association	GAMBICA
BT Group	GC100
Cable & Wireless	George Rosenberg
Capital Group plc	Global Compliance
Cass Business School	GoodCorporation
CDC Group plc	Lord Goodhart
Centre for Synchronous Leadership	Grant Thornton UK LLP
Centrica	Herbert Smith LLP
Charity Commission	HR Consultant
Charity Finance Directors' Group	HVCA
Charity Law Association	Institute of Chartered Accountants of England & Wales
Chartered Institute of Taxation & Assoc of Taxation Technicians	ICC UK
CIFAS	IFIA
CIMA	Institute of Business Ethics
City of London Law Society	Institute of Chartered Accountants of Scotland
Clifford Chance	Institute of Directors

Interchange Solutions Ltd	Police Service of Northern Ireland
Interim Management & Training Ltd	PPPILA
International Bar Association	Press Association
International Corporate Governance Network	PricewaterhouseCoopers LLP
International Underwriting Association	Prudential plc
Jones Day	Public Concern at Work
Jonhson& Johnson Medical Ltd	QEB Hollis Whiteman
Justices' Clerks' Society	RAND Corp
Kazaz & Co	Renewable Energy Systems Ltd
Kelvin Hughes Ltd	Reynolds Porter Chamberlain LLP
Kinsley Napley LLP	RICS
KPMG LLP	Risk Advisory Group plc
Laird plc	Robert Walters plc
Latham & Watkins	Ruth Steinholtz
Laurence Graham LLP	SABMiller
Law Enforcement Agents UK plc	Sampo Japan Insurance Company of Europe Ltd
Law Office of Stephen Clayton	SGS UK Ltd
LexisNexis	Shoosmiths
Liverpool Victoria	Siemens AG
Lloyds Market Assoc	Simmons & Simmons LLP
Lloyd's of London	Slaughter & May
LTE Scientific Ltd	Smith & Nephew
Mabey Bridge	Society of Corporate Compliance & Ethics
MacRoberts LLP	Society of Editors
MANGO	STEELE
Maplecroft	Tearfund
Martineau	Thames Water
Mathew Arnold & Baldwin LLP	The Hundred Group
Met Office	The Law Society
Mischon de Reya	The Law Society of Scotland
MonyGram International Ltd	The Newspaper Society
Nabarro LLP	The Publishers Assoc
National Federation of Property Professionals	The Quoted Companies Alliance
National Grid	The Wolfsberg Group
Nationwide BS	TheBriberyAct.com
News International	Thinking About Crime Ltd
NHS BSA Security Management Service	Tods Murray LLP
NHS Business Services Authority	TRACE
Northern Ireland Public Prosecution Service	Transparency International UK
Norton Rose	Transparency International USA
Nuclear Decommissioning Authority	Trowers & Hamlins LLP
Optical Confederation	UK Anti-Corruption Forum
Oxfam	UK India Business Council
PACT	University of Ulster
Paul Woodman	West Yorkshire Police
Pinsent Masons LLP	World Economic Forum
	Xstrata plc
	Zurich Insurance plc

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bribery.act@justice.gsi.gov.uk