

‘Though the bribe be small, yet the fault is great’¹

The Bribery Act 2010 and the importance of training

(Following the announcement by the Ministry of Justice on 20 July 2010, this article, which first appeared in The Compliance Institute Gazette, Issue 179, July 2010 has been updated to reflect the new time-frames for enforcement).

The Bribery Act 2010 received Royal Assent in April and is now expected to come into force in April 2011. Representing the most significant change to corruption laws in the UK since 1916, the new Act covers bribery not only in the UK but also abroad.

Key features of the act:

- It will be an offence to ‘offer, promise, or give an advantage’, and to ‘request, agree to receive or accept an advantage), (ie to bribe another person or to take a bribe);
- Bribing a foreign public official will also be an offence;
- Commercial organisations will be committing an offence if they ‘fail to prevent bribery’ committed by a person associated with the organisation in connection with its business. (A person associated with the organisation may be the ‘commercial organisation’s employee, agent or subsidiary’²);
- A maximum penalty of 10 years imprisonment will apply with the exception of the offence relating to commercial organisations, which will carry an unlimited fine.
- The Act defines only one defence to the corporate offence; the organisation must prove that it had in place ‘adequate procedures’ designed to prevent persons associated with it from committing bribery offences. The Act states that The Secretary of State must publish guidance on what constitutes ‘adequate procedures’, and the announcement from the Ministry of Justice on 20th July 2010 now indicates that this guidance will be published in the new year, following a short consultation exercise that will commence in September 2010.

Whilst this delay may offer firms some breathing space, many commentators continue to anticipate that the guidance, when it is published, will be principles-based. Organisations that wait for this guidance before doing anything, face two major risks; principles-based guidance is unlikely to be the golden egg that provides them with a polished set of ‘adequate procedures’ fit for their own specific organisations; and though the guidance is now expected in the new year, this still leaves a maximum of three months for organisations to conduct a risk-based strategic review and remediation programme to assure themselves that their procedures are, indeed, adequate, to design new, or re-fresh existing training, and to train their staff in the revised procedures.

This is why it is so important that organisations assess their exposure now, and undertake systematic reviews, for example, (but not exclusively), of their systems and controls, their codes of conduct, their employment and employment-related procedures, their due diligence processes, how they deal with third parties, formal whistle-blowing procedures, and ongoing

monitoring and assurance, as well as ensuring that their policies and guidance to their people in terms of anti-bribery and corruption are fully documented.

But any review and update of the above, no matter how rigorously or coherently it is conducted, is unlikely to be enough. If an organisation was required to demonstrate that it had 'adequate procedures' it would need to go further than to point to well thought-out documents, systems and controls. It would have to demonstrate that those 'associated' with the organisation know what the policies are, what to do, how they must behave / not behave and what is expected of them as they go about their business.

Anti-bribery and corruption training

Somewhere within the mix, then, organisations need to review not just their provision for training in anti-bribery and corruption for their people, but also its effectiveness, so that exposure to the corporate offence is virtually erased. Unfortunately, whilst most commentators, acknowledge that training and guidance is likely to be required, few expand on this aspect!

But in a sense, how can they, if the government has yet to issue guidance on what constitutes 'adequate procedures'?

The Financial Services Authority, (FSA), may offer some steer. Whilst their May 2010 report focused only on the commercial insurance broking sector, the FSA³ was concerned that of the firms they visited, 'very little or no specific training was provided on anti-bribery and corruption, even for staff in higher risk positions' (p4).

Moreover, they were critical that 'there were very few examples of training that gave **practical examples** of how to comply with policies and procedures, situations which might increase bribery and corruption risk and appropriate due diligence on third party relationships. Instead, it tended to focus on **legislative and regulatory requirements**, which front-line staff would find difficult to understand without further guidance.' (p37).

It is, perhaps, not too big a leap to surmise that they would find much the same situation across financial services and that the situation is probably reflected in other sectors too; that much anti-bribery and corruption training emphasises the 'legislative' and the 'regulatory' rather than the 'practical' and 'situational'.

So, in the absence of guidance from the government as to what constitutes 'adequate procedures', what can organisations do to ensure their anti-bribery training really minimises risk?

- **A strategic approach:** Much of the advice offered by law firms and others is that firms should take a strategic approach to assuring themselves they have adequate procedures in place. They recommend a top-down, risk-based approach which reflects the industry in which they operate, the kind of business they are in and the 'transactions', (ie not only financial), in which they are engaged. What they don't say is that when firms review the adequacy of their anti-bribery and corruption procedures, it is vital to consider training at the **start** of the process rather than at the end. 'What industry / business we are in', 'and 'what is the nature of our various transactions' are as core to the design and delivery of realistic, practical and situational training as are documented policies, guidance, procedures, systems and controls. Indeed they are fundamental to bringing the training to life.

- Exploit the wider training opportunity:** Many law firms and others are now advising that anti-bribery and corruption procedures need to be fundamentally linked to an organisation's culture and values. According to Transparency International, for example, 'enterprises should implement anti-bribery programmes both as an expression of core values of integrity and responsibility.'¹⁴ But what does this mean in practice? Anti-bribery procedures need to align with what the organisation states (and fundamentally believes) is acceptable / unacceptable behaviour around here; the organisation's code of ethics, its way of doing business; how it expects its people to operate not just internally, but throughout its supply chain; and how well this is communicated, understood, and most importantly adopted into the attitudes and behaviours of people throughout the supply chain; and it should align with the organisation's corporate responsibility standpoints. When these links are made, anti-bribery and corruption training becomes something more than another regulatory training module; another box to be ticked. It reinforces, for people 'associated' with the organisation, why it exists; it becomes a powerful means of re-refreshing the principles by which the organisation lives, why it is unique and distinguishable from its competition, (so enhancing brand reputation), why customers should trust it and buy its services, and why suppliers should do business with it.
- Make training practical and relevant to the work they do and to their experience:** Arguably, most people in organisations do not need to know the 'technicalities' of the Bribery Act; few will need either to further define or argue what is meant by 'a person associated with the organisation', or to list the 'three forms' which the 'link between the request, agreement to receive or accept'¹⁵ the bribe may take. Whilst there are some dishonest people about, (and firms that conduct robust pre-employment checks will minimise the risk of employing such people in the first place), most people do not think of themselves as either willing to offer or receive bribes or consider themselves to be corruptible. Yet the risks associated with such people are high if they are unable, for example, to distinguish between what constitutes legitimate 'hospitality' and what constitutes bribery, or between what is a legitimate commission and what is a 'kick-back'. Training needs to enlighten the honest as well as the potentially dishonest. But presenting anti-bribery and corruption content in a clinical, technical and legalistic way will leave most people finding it 'difficult to understand [what they must do] without further guidance.'¹⁶ Training content is far better developed in relation to 'why we are in business', 'what industry we are in', 'what transactions are we engaged in', as outlined earlier since these provide the context that people need to make sense of the 'do's' and 'don'ts'.
- Consider who needs to know what:** targeting appropriate training at appropriate people is crucial. Does everyone need to know everything? Do some people need to have some general awareness and others need to have more specialist knowledge? What will an employee in a strategic sourcing function of a large corporate need to know about the firm's procedures when s/he negotiates and awards contracts so that s/he, (or indeed an agent), does not become individually responsible and leave the organisation liable to having committed a corporate offence, that a customer complaints handler might not need to know?

In law, generally, ignorance is no defence. It is certainly not a defence recognised by the Bribery Act. When assuring themselves that their anti-bribery and corruption procedures are

adequate, organisations need also to satisfy themselves that after training, individuals will not claim they 'didn't know' If individuals can make such claims, however robustly documented are the procedures, 'I don't know ...' may serve to condemn an organisation because it is unable to demonstrate it had 'adequate procedures' in place that its people not only understood but actively lived by and integrated into their day to day work.

¹ Attributed to Lord Edward Coke, 17th century judge and Member of Parliament

² 'Bribery Act 2010, Explanatory notes', Crown copyright 2010,
http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100023_en.pdf

³ 'Anti-bribery and corruption in commercial insurance broking - Reducing the risk of illicit payments or inducements to third parties', Financial Services Authority, May 2010

⁴ 'Business Principles for Countering Bribery', Transparency International, 2009

⁵ 'Bribery Act 2010, Explanatory notes', Crown copyright 2010,
http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100023_en.pdf

⁶ 'Anti-bribery and corruption in commercial insurance broking - Reducing the risk of illicit payments or inducements to third parties', Financial Services Authority, May 2010