Morgan Lewis

white paper

communicate

The New UK Regime on Bribery: An Introduction

May 2010

Introduction

A fundamental change in the UK law on bribery will occur later this year, when the Bribery Act 2010 (the Act) is expected to come into effect. The Act has far-reaching implications, not just for UK-based entities, but also for many international corporations, given its potentially wide territorial application.

While such corporations will need to be generally aware of the new regime, they should in particular take notice of the new offence created by section 7 of the Act. Under this section, a commercial organisation will commit a criminal offence if a person associated with such an organisation bribes another person with the intention of benefiting the organisation. *This is a strict liability offence*. However, the Act provides a defence for an organisation if it can show that it had in place "adequate procedures" to prevent such bribery taking place. In essence, the UK is now mandating the kinds of FCPA compliance programs that U.S. corporations have implemented over the last decade.

Given the wide scope of the offences as set out in the Act and its extensive territorial reach, corporations need to take steps now to ensure that they are fully prepared for the new regime.

Background

Pre-existing law on bribery in the UK, based on common law and 100-year-old statutes, has been criticised generally as not fit for purpose in the modern commercial world. In particular, the existing UK regime has been criticised for its failure to meet the standards of the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention (which the UK ratified in 1998), and its inability to deal with a number of high-profile investigations relating to multinationals. In essence, all of the old law on bribery in the UK is being swept away by the Act, and a much tougher and more extensive new regime put in its place.

The Act creates four types of bribery-related offences. The offences contain a number of permutations and are deliberately broadly drafted. The offences can be split into three categories: the two general bribery offences, the offence relating specifically to the UK's OECD obligations, and the new section 7 offence referred to above.

The two general offences are, in essence, the making or accepting of bribes.

A person is guilty of an offence where:

(a) Such person offers, promises or gives a financial advantage to another person (the "recipient") if the briber does so intending to bring about an improper performance (by the recipient or another person) of a "relevant function or activity" or to reward such improper performance or

(b) Such person requires or accepts a financial or other advantage with the intention that a relevant function or activity will be performed improperly (by such person or a third party) as a result, or as a reward for such improper performance.

Neither the briber nor the recipient need be the person obtaining the advantage or performing the function or activity.

These general offences differ from the FCPA in breadth and reach. Most important, they are not limited to bribes paid to foreign officials, but instead apply to *all* bribes, including purely commercial bribes.[1] In addition, they apply not only to the person offering the bribe, but to the person accepting the bribe. In that sense, they give the UK authorities a much more powerful tool to combat bribery than the ones available to the U.S. authorities. Moreover, unlike the FCPA, there are no carve-outs for small amounts or customary facilitation payments.

The offences have a wide territorial scope. An offence may be committed if either:

(a) Any act or omission forming part of it occurs in the UK, or

(b) Any such act or omission is carried out by a person with a "close connection" with the UK. This includes, among others, British citizens or residents or entities incorporated in the UK.

Bribery of a foreign public official (Section 6)

Section 6 of the Act creates a separate offence of bribery of a foreign public official. This offence is committed if a person offers or gives a financial or other advantage to a foreign public official with the intention of influencing the official to assist in obtaining or retaining business. There is an exception to the offence where the foreign official is permitted or required by written law to be so influenced. However, it is generally accepted that this will be a tough test to satisfy and that, for example, custom and practice will not be sufficient.

The offence has the same territorial scope as the general offences, and again does not exclude facilitation payments.

It seems that this separate offence has been included specifically to ensure that the UK will satisfy its

[1] The definition of "relevant function or activity" extends not only to functions of a public nature, but also includes activities connected with a business or profession, and functions performed in the course of a person's employment or on behalf of a body of people. In other words, the Act covers, for example, the bribery by one company of a key decision-maker in another company in order to win a major contract. Given the very wide definition, the Act seeks to qualify this by requiring that there must be an expectation that the relevant function or activity will be performed in good faith or impartially, or that the function or activity must involve a position of trust. However, when looking at this qualification, local custom (for example, the fact that petty bribery may be commonplace in the relevant location) is to be ignored. As a result, it is unlikely that this qualification will prevent the general offences extending to most corporate decision-making processes.

obligations under the OECD Anti-Bribery Convention, and in practice it is difficult to see what activity would be covered by it which would not also be likely to be covered by the general offence of bribery.

The new corporate offence (Section 7)

Section 7 of the Act introduces a new concept into the UK bribery regime, in effect attaching vicarious criminal liability to commercial organisations for actions taken on their behalf. Under section 7, a commercial organisation will commit a criminal offence if a person "associated" with the organisation bribes another person (i.e., commits the general offence of bribery or the section 6 offence of bribing a public official) intending to obtain or retain a business advantage for that organisation. The offence is one of strict liability, i.e., it will be committed regardless of whether anyone in the company (not just the board of directors) was aware or should have been aware of the bribery.

The definition of what causes a person to be "associated" with a commercial organisation is again broadly defined. The Act does not set out a definitive list of the categories of persons who may be considered "associated," but instead states that an association will exist if a person performs services on behalf of that organisation, in whatever capacity. There has been much discussion as to how broadly this definition is likely to be interpreted. The Act provides some guidance, listing employees, agents and subsidiaries as (non-exclusive) examples of persons who may be associated with an organisation, and further specifies that an employee of a commercial organisation will normally be assumed to be associated with it. However, it is possible that a far wider category of persons may also be caught, such as subcontractors, suppliers and advisers, depending on the relevant circumstances.

The territorial scope of the offence is determined by the nature of the commercial organisation, not the underlying bribery, i.e., the underlying bribery may occur anywhere. To be covered by section 7, a commercial organisation must either be incorporated in the UK (or a partnership formed under the law of any part of the UK) or a corporation or partnership which carries on any business, or part of a business, in the UK.

As can be seen, the new section 7 offence may have a very wide remit. As yet, it is unclear how far the definition of "associate" will extend, but it seems likely that it will cover group companies, employees and commercial agents, and may also extend to other entities that have a close business relationship with a commercial organisation. As a result, it is possible that any group or organisation that has a subsidiary incorporated in, or otherwise conducts business in, the UK will need to consider the potential implications of section 7 across its entire business.

Although section 7 creates a strict liability offence for organisations covered by it, the Act also creates a potential defence for commercial organisations against this new offence. Section 7(2) of the Act provides that an organisation will not be guilty of the section 7 offence if it can prove that it had in place "adequate procedures" designed to prevent persons associated with the organisation from committing a bribery offence. Therefore the real effect of section 7 of the Act is to require companies and groups caught within its remit to put in place sufficiently robust anti-bribery policies, systems and procedures, which will likely need to extend to the establishment and monitoring of relationships with third parties (such as commercial agents), to ensure such companies and groups will not fall foul of vicarious criminal liability under section 7.

The Act does not define or otherwise qualify what may constitute "adequate procedures." Instead, to assist commercial organisations in identifying the types of systems and procedures which should be put in place, section 9 of the Act states that the UK Government will publish, and revise from time to time, guidance about what may constitute adequate procedures for these purposes. However, any such guidance will not constitute a "safe harbour," and accordingly organisations will need to tailor their approach to their specific circumstances.

As at the date of this White Paper, no such guidance has been published, nor any indication been given as to when this can be expected, and it may well be that the recent change of government in the UK may result in some delay in such guidance being published. Given the fact that the Act is expected to come

into force later in 2010, there is currently some concern that businesses may be given too little time to consider the guidelines in the context of the Act, and then to put new policies, procedures and systems in place. However, a number of general principles can probably be derived from similar guidelines issued by other bodies and statements made by those associated with the passing of the Act, and these could be used as a useful indication of the likely substance of the guidance likely to be issued.

Penalties

The maximum penalty for an individual (which may include senior officers of a company who connive in, or consent to the commission of, such an offence by such company) guilty of any of the general offences or the section 6 offence is 10 years' imprisonment or an unlimited fine. The maximum penalty for a company under such offences is an unlimited fine.

The maximum penalty under the new section 7 offence (which can only be committed by commercial organisations) is an unlimited fine.

In accordance with usual UK practice, guidelines are expected to be issued in due course as to an appropriate level for fines for offences under the Act. However, as at the date of this note, these guidelines have yet to be issued. In addition, it should be noted that, although plea bargaining is gaining recognition in the UK as a useful tool in investigating corporate crime and other malfeasance, it is not recognised by UK courts, and there have been some recent signs of resistance by UK courts to being constrained by pre-agreed settlements.

Implications

The new UK regime is wide-ranging, both in the activities covered by it and in territorial scope. In many ways it is more extensive than many existing regimes in other jurisdictions, including the U.S. Foreign Corrupt Practices Act. For example, it does not limit bribery offences to public functions or activities, but also extends them to the commercial sector, with potential implications for, for example, corporate hospitality. Similarly, there is no carve-out permitting the payment of customary facilitation payments. Finally, the potentially broad definition of "associated" in the context of the new section 7 offence may lead to businesses being responsible for supervising and establishing policies for not just the actions of their own companies and employees, but potentially also those of third parties.

As a result, any commercial organisation or group that believes it has the potential to be caught by the new UK regime, and in particular the new section 7 offence, should review its existing anti-corruption policies, systems and procedures and consider what changes may need to be made to take into account this new regime. It is no secret that the Serious Fraud Office, in helping to develop a more effective regime for combating bribery in the corporate world, has looked closely at how the U.S. Department of Justice has evaluated FCPA compliance programmes for U.S. entities.

Morgan Lewis has the experience and knowledge to evaluate existing compliance programmes and procedures, as well as to build new ones from the ground up. We can also help with designing and implementing anti-corruption training programmes.

Morgan Lewis will continue to monitor developments in relation to the Act, and will issue further bulletins once further details emerge, in particular following the publication of the UK Government guidance.

If you have any questions or would like more information on any of the issues discussed in this White Paper or the Bribery Act generally, please contact **Iain Wright** (+ 44 (0)20 3201 5630; iwright@morganlewis.com), **Mark Srere** (202.739.5049; msrere@morganlewis.com), or **Eric Kraeutler** (215.963.4840; ekraeutler@morganlewis.com), or any of our Morgan Lewis White Collar attorneys:

Philadelphia

Eric W. Sitarchuk	215.963.5840	esitarchuk@morganlewis.com
Nathan J. Andrisani	215.963.5362	nandrisani@morganlewis.com
Jack C. Dodds	215.963.4942	jdodds@morganlewis.com
Eric Kraeutler	215.963.4840	ekraeutler@morganlewis.com
Matthew J. Siembieda	215.963.4854	msiembieda@morganlewis.com
Colm F. Connolly	215.963.4841	cconnolly@morganlewis.com
Lisa C. Dykstra	215.963.5699	ldykstra@morganlewis.com
Meredith S. Auten	215.963.5860	mauten@morganlewis.com

Washington, D.C.

Fred F. Fielding	202.739.5560	ffielding@morganlewis.com
Mark E. Matthews	202.739.5655	mark.matthews@morganlewis.com
Barbara “Biz” Van Gelder	202.739.5256	bvangelder@morganlewis.com
Mark A. Srere	202.739.5049	msrere@morganlewis.com
Amy Conway-Hatcher	202.739.5953	aconway-hatcher@morganlewis.com
Ronald J. Tenpas	202.739.5435	rtenpas@morganlewis.com
Kathleen McDermott	202.739.5458	kmcdermott@morganlewis.com

New York

Leslie R. Caldwell	212.309.6260	lcaldwell@morganlewis.com
Kelly A. Moore	212.309.6612	kelly.moore@morganlewis.com
Joanna C. Hendon	212.309.6377	jhendon@morganlewis.com

San Francisco

John H. Hemann	415.442.1355	jhemann@morganlewis.com
William H. Kimball	415.442.1277	wkimball@morganlewis.com
Lisa Tenorio-Kutzkey	415.442.1309	ltenorio-kutzkey@morganlewis.com

Frankfurt

Dr. Jürgen Beninca	+49.69.714.007.19	jbeninca@morganlewis.com

London

Iain Wright	(0)20 3201 5630	iwright@morganlewis.com

Paris

Thierry Dalmasso	+33 1 53 30 44 39	tdalmasso@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—more than 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.