

UK Bribery Act: Commencement of Consultation Process on Proposed Guidance on Anti-Bribery Procedures to Be Adopted by Relevant Commercial Organisations

16 September 2010

The United Kingdom Ministry of Justice has commenced the consultation process on the nature and substance of the guidance that it is to issue with regards to the policies and procedures that commercial organisations can use to prevent persons associated with them from engaging in bribery.

The guidance is particularly relevant now, given the new strict liability corporate offence created by Section 7 of the UK Bribery Act. Under Section 7, a relevant commercial organisation commits an offence if a person associated with it engages in bribery, unless it can show that it had in place “adequate procedures” designed to prevent the offence. The consultation period will end on 8 November 2010, and the Ministry of Justice expects final guidance to be issued early in 2011. The Act is expected to come into force in April 2011.

Earlier this year, the United Kingdom passed into law the UK Bribery Act 2010 (the Act), which significantly extends the existing UK law on bribery and may have significant implications for UK and multinational businesses. Perhaps the most significant aspect of the Act is the creation of a new strict liability corporate offence of failure to prevent bribery. Under the new offence, a commercial organisation caught by the Act (which may include non-UK companies if they carry on business in the UK) will commit a criminal offence if a person “associated” with the organisation bribes another person (within the meaning of the Act) with the intention of obtaining or retaining a business advantage for that organisation. The Act also creates a potential defence for the commercial organisation if it can prove that it had in place “adequate procedures” designed to prevent persons associated with it from committing a bribery offence.

At the time of the passing of the Act into law, it was announced that the UK government would issue guidance in relation to what was meant by “adequate procedures” before the Act came into effect, and in July the Ministry of Justice announced that it would implement a brief consultation process on this guidance before publishing final guidance.

On 14 September, the Ministry of Justice published draft guidance to initiate the consultation process, which is to run until 8 November 2010. The Ministry of Justice will be holding a number of open discussion forums throughout the UK, and will also welcome written responses to a series of questions on the guidance, which can be found on its website:

<http://www.justice.gov.uk/consultations/briberyactconsultation.htm>.

As expected, the draft guidance is based on principles rather than rules, and is not designed to prescribe a specific, one-size-fits-all approach to anti-bribery policies and procedures. Instead, different organisations will be expected to consider these overriding principles, and take them as a starting point when developing their own specific policies and procedures, which should be tailored to reflect the particular size and nature of the organisation and its business, as well as the specific challenges the organisation is likely to face.

The guidance makes it clear that policies and procedures will need to be continually assessed and reviewed to reflect changes to the organisation's circumstances and the risks it is likely to face, and that assessment of these risks (both internal and external) will be a key part of any anti-bribery procedures. The guidance also makes it clear that ultimately, the question of whether a particular organisation's procedures are "adequate" for the purposes of the defence to the corporate offence will be for the courts to decide, taking into account the circumstances of the particular case.

The six principles set out in the draft guidance are as follows:

Principle 1 – Risk Assessment:

The commercial organisation regularly and comprehensively assesses the nature and extent of the risks relating to bribery to which it is exposed.

Principle 2 – Top-Level Commitment

The top-level management of a commercial organisation is committed to preventing bribery. It establishes a culture within the organisation in which bribery is never acceptable. It takes steps to ensure that the organisation's policy to operate without bribery is clearly communicated to all levels of management, the workforce, and any relevant external actors.

Principle 3 – Due Diligence

The commercial organisation has due diligence policies and procedures, which cover all parties to a business relationship, including the organisation's supply chain, agents, and intermediaries, all forms of joint venture and similar relationships, and all markets in which the commercial organisation does business.

Principle 4 – Clear, Practical, Accessible, and Enforceable Policies and Procedures

The commercial organisation's policies and procedures to prevent bribery being committed on its behalf are clear, practical, accessible, and enforceable. Policies and procedures take account of the roles of the whole work force, from the owners or board of directors to all employees, and all people and entities over which the commercial organisation has control.

Principle 5 – Effective Implementation

The commercial organisation effectively implements its anti-bribery policies and procedures and ensures that they are embedded throughout the organisation. This process ensures that the development of policies and procedures reflects the practical business issues that an organisation's management and workforce face when seeking to conduct business without bribery.

Principle 6 – Monitoring and Review

The commercial organisation institutes monitoring and review mechanisms to ensure compliance with relevant policies and procedures and identifies any issues as they arise. The organisation implements improvements where appropriate.

Underneath each of these general principles, the draft guidance provides further commentary and explanation as to what is meant by the principle (for example, examples of types of risk that should be considered, areas that might be covered by a due diligence review, suggestions for implementation strategy, etc.).

The consultation document also includes a number of scenarios intended to illustrate areas of business practice where real risks of bribery may exist. The scenarios then list a number of questions that a commercial organisation might wish to consider when applying the guiding principles in such circumstances. The scenarios cover such areas as the use of intermediaries and agents, hospitality, political and charitable donations, facilitation payments, and dealing with business partners. While not part of the official guidance, the published scenarios may be considered helpful to businesses seeking to apply anti-bribery policies in practice.

The consultation paper makes it clear that the new guidance is intended to supplement, and not replace or override, the many existing guidelines issued by regulatory, industry, and NGO bodies in the context of bribery prevention.

The draft guidance may be considered to be of less practical use for larger organisations which already have anti-bribery policies in place, as opposed to organisations with no or less-developed policies. However it will still be of relevance for those organisations, when reviewing their existing policies for compliance with the new UK regime, as it provides further useful guidance on the perceived scope and application of the Act—in particular, the “adequate procedures” defence.

Morgan Lewis’s May 2010 White Paper, “The New UK Regime on Bribery: An Introduction,” which gives further details on the Act, can be found at http://www.morganlewis.com/pubs/LIT_NewUKRegimeOnBriberyWP_May2010.pdf.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

London

Iain Wright + 44 (0)20 3201 5630 iwright@morganlewis.com

Washington, D.C.

Mark A. Srere 202.739.5049 msrere@morganlewis.com
Amy Conway-Hatcher 202.739.5953 aconwayhatcher@morganlewis.com
Fred F. Fielding 202.739.5560 ffielding@morganlewis.com

Philadelphia

Eric Kraeutler 215.963.4840 ekraeutler@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 23 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labour 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—nearly 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, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states.
Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2010 Morgan, Lewis & Bockius LLP. All Rights Reserved.

