Client Alert.

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Ministry of Justice Publishes Consultation Paper on the UK Bribery Act 2010

By Kevin Roberts and Keily Beirne

The Ministry of Justice published its highly anticipated Consultation Paper on the UK Bribery Act 2010 on 14 September 2010. The Consultation Period is now open and the Ministry of Justice invites responses on proposed non-statutory guidance from the wider business community (including non-UK-based entities). The draft guidance provides some colour to a grey area of the Act, the definition of "adequate procedures." This definition is of crucial importance to both UK-domiciled and non-UK domiciled companies because under section 7 of the Act, there is an absolute defence for commercial organisations if they have "adequate procedures" in place to prevent bribery. As the consultation process is open to all interested persons, non-UK companies may wish to provide feedback on the relevance and appropriateness of the draft non-statutory guidance provided thus far.

As many commercial organisations are aware, the UK Bribery Act 2010 has certain, widely commented on, extra-territorial provisions. As the Act is due to come into force in April 2011, implementation of the Act is fast approaching, so this draft non-statutory guidance will be welcomed by organisations of all sizes worldwide who will want and need to ensure that an adequate anti-bribery programme is developed and embedded within the existing internal procedures and policies that they have in place.

This alert provides an explanation of why multinational companies that have any business presence in the UK should be aware of the ways in which the new Act applies to them. This alert also provides a summary of the valuable draft non-statutory guidance contained in the Consultation Paper and the questions on which the Ministry of Justice is seeking to consult.

If you have any queries regarding the matters set out below, please contact Kevin Roberts or Keily Beirne of Morrison & Foerster's London litigation practice for further advice.

THE UK BRIBERY ACT 2010

In the light of serious domestic and international criticism levelled at the UK's previous anti-bribery regime, the outgoing government drafted an Act that has been described as "*some of the most draconian and far-reaching anti-corruption legislation in the world*."

What constitutes bribery?

The Act repeals the existing common law and statutory bribery offences and replaces them with **four** new offences that cover:

1. **Bribing (§ 1)**

   Individuals, companies or partnerships giving, promising or offering bribes.

2. **Being bribed (§ 2)**

   Individuals, companies or partnerships requesting, agreeing to receive or accepting bribes.

3. **Bribing a foreign public official (§ 6)**

   Individuals, companies or partnerships bribing foreign public officials.

4. **Failing to prevent bribery (§ 7)**

   Companies or partnerships (not individuals) failing to prevent persons acting on their behalf from paying bribes.

The fourth offence, contained in section 7 of the Act, is the one that will be of most interest to foreign businesses because its extra-territorial application means that it applies to international businesses even if they have only a minimal presence in the UK.

The provisions of the Act are set out in the table below.

Offence under the Bribery Act 2010	Individual	Corporate	Location of Bribe
1. Bribing (§ 2)	"Closely connected" to a British citizen / ordinary resident	Incorporated in the UK	Anywhere (even if operating through an agent or a subsidiary)
2. Being bribed (§ 2)	"Closely connected" to a British citizen / ordinary resident	Incorporated in the UK	Anywhere (even if operating through an agent or a subsidiary)
3. Bribing a foreign public official (§ 6)	"Closely connected" to a British citizen / ordinary resident	Incorporated in the UK	Anywhere (even if operating through an agent or a subsidiary)
4. Failing to prevent bribery (§ 7)	N/A	Incorporated or carry on all or part of business in the UK	Anywhere (even if operating through an agent or a subsidiary)

THE EXTRA-TERRITORIAL APPLICATION OF SECTION 7

The fourth offence, failing to prevent bribery, imposes liability on companies and partnerships for the acts of their employees and other third parties, such as agents and subsidiaries. The scope of the Act is extremely wide because it applies to almost all commercial organisations with a presence in the UK, whether limited companies or partnerships. Prosecutors will need to prove only that the bribe was committed by an individual connected to a relevant organisation regardless of that individual's seniority or role within the organisation. It is irrelevant for the purposes of the Act whether the acts or omissions which form part of the offence take place outside of the UK. It is sufficient that the organisation is incorporated in the UK or carries on part of its business in the UK, even if incorporated elsewhere.

In theory therefore and by way of example, a Japanese technology company, with all of its manufacturing and administrative functions based in Japan, and with a solely Japanese corporate presence, operates a retail outlet in London. If an employee of this Japanese technology company pays a bribe to an individual in China it could still face prosecution in the UK.

THE DEFENCE OF "ADEQUATE PROCEDURES"

There is a defence to a prosecution available to commercial organisations under the Act, namely that they have "adequate procedures" in place to prevent bribery at the time that any alleged bribery offence took place (section 7). It will be the responsibility of each defendant organisation to show, on the balance of probabilities, that adequate procedures were in place and in use. The extent to which the senior management of an organisation were involved in the corporate failure will be given consideration in assessing the adequacy of the procedures in place. The term "adequate procedures" is not defined within the Act; it is envisaged that the extent of "adequate procedures" will be determined on a case-by-case basis in line with non-statutory guidelines published by the Ministry of Justice.

The draft non-statutory guidance published by the Ministry of Justice in the Consultation Paper does not set out detailed and prescriptive standards. It instead seeks to set out a "flexible guide" containing examples of good practice and adequate procedures. The rationale for this approach is that the guidance can apply to organisations of different sizes operating in diverse sectors. The deficiency is that it leaves organisations uncertain as to whether they are in full compliance.

The draft non-statutory guidance contained in Annex A of the Consultation Paper sets out six principles for bribery prevention.

1. **Risk Assessment** – The commercial organisation should regularly and comprehensively assess the nature and extent of the bribery risks to which it is exposed.

2. **Top Level Commitment** – The top level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) should be committed to preventing bribery. They should establish a culture within the organisation in which bribery is never acceptable. They should also take 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, such as agents, consultants or distributors.

3. **Due Diligence** – The commercial organisation should have due diligence polices 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.

4. **Clear, Practical and Accessible Policies and Procedures** – The commercial organisation's policies and procedures to prevent bribery being committed on its behalf should be clear, practical, accessible and enforceable. Policies and procedures should take into account the roles of the whole work force from the owners and board of directors to all employees, people and entities over which the commercial organisation has control.

5. **Effective Implementation** – The commercial organisation should effectively implement its anti-bribery policies and procedures and ensure they are embedded throughout the organisation.

6. **Monitoring and Review** – The commercial organisation should institute monitoring and review mechanisms to ensure compliance with relevant policies and procedures and identify any issues as they arise and make improvements where appropriate.

Organisations may find that they already have policies and procedures firmly in place that satisfy the six principles set forth by the Ministry of Justice. If not, organisations should consider putting additional measures in place by April 2011.

Morrison & Foerster has a strong team in London with extensive experience advising on regulatory compliance issues. As a global firm with more than 1,000 lawyers, Morrison & Foerster has vast expertise in anti-bribery matters, including counseling companies on compliance, conducting internal investigations, and representing companies and individuals in investigations by the US Department of Justice and US Securities & Exchange Commission. In the London office, Kevin Roberts and Keily Beirne will be delighted to assist with any queries arising out of the consultation process, the implementation of the UK Bribery Act 2010 or any other corruption or bribery related matter.

QUESTIONS FOR CONSULTEES

The Ministry of Justice has invited responses to the questions set out on page 6 of the Consultation Paper, which may be viewed at the PDF link below. The Consultation Period ends on 8 November 2010. This offers interested parties an opportunity to provide input into the content of the final form non-statutory guidance. The London litigation team of Morrison & Foerster can gladly provide assistance with drafting responses, if required.

http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf

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