

MARKET BULLETIN

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Title	BRIBERY AND CORRUPTION
Purpose	To inform on implementation of the Bribery Act 2010 and related Government guidance
Type	Event
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INTRODUCTION

This bulletin, which should be read in conjunction with Market Bulletin [Y4278](#), is to update managing agents on the implementation of the Bribery Act 2010 ("The Act") and the issuance of the Ministry of Justice's ("MOJ") guidance ("The Guidance"). [The Guidance](#) is designed to assist companies to put in place risk based anti-bribery measures around six guiding principles:

- Proportionate Procedures
- Top Level Commitment
- Risk Assessment
- Due Diligence
- Communication (including training)
- Monitoring and Review

The purpose of this bulletin is to focus on key points which managing agents may need to review and, where appropriate, on which they may wish to take legal advice to ensure compliance with the Act. Information sources are listed at Appendix 1. Consultation has been held with the Market in putting together this guidance.

OFFENCES

The Act which comes into force on 1 July 2011 can be accessed at:

www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1.

The offences under the Act are:

- Bribing another person; (Section 1)
- Being bribed; (Section 2)
- Bribing a foreign public official (“FPO”)¹; (Section 6)
- Failure by a commercial organisation to prevent bribery by associated persons. If a commercial organisation has “adequate procedures” in place, designed to prevent bribery on its behalf, this is a defence. (Section 7)

The offences under sections 6 and 7 of the Act specifically relate to commercial bribery. These will be of most relevance to managing agents. To trigger these offences, the conduct can take place anywhere in the World, and not just the UK. Therefore corrupt actions by managing agents’ associated parties no matter where located would be caught by the Act and local business practices, unless expressly permitted by law, would not be a defence.

There is also an offence of consent or connivance by a senior officer in committing any of the general offences of bribery under section 14 of the Act.

The Act increases the penalties for failure to comply to a maximum 10 years imprisonment, unlimited fine or both for an individual, and an unlimited fine for a commercial organisation in respect of section 7. The Government recently announced that a conviction under Section 7 will now attract discretionary rather than mandatory debarment from public procurement contracts under EU legislation.

For the purposes of the Act, commercial organisations are UK companies, partnerships and other incorporated bodies wherever they carry on business and foreign companies, partnerships and other incorporated bodies who carry on a business in the UK.

KEY POINTS

ASSOCIATED PARTIES

A commercial organisation will be liable to prosecution under Section 7 of the Act if an associated person bribes another person, intending to obtain or retain business or a business advantage for that commercial organisation. An associated person is broadly defined in the Act as a person who “performs services” for or on behalf of an organisation and can be an individual or a company.

¹ A FPO is an individual holding a legislative, administrative or judicial position of any kind, or who exercises a public function for or on behalf of a country/territory outside the UK or for any public agency/enterprise of that country or territory, or is an official or agent of a public international organisation such as the UN or the World Bank. Unlike the FCPA the term FPO does not include foreign political parties or candidates for foreign political office.

The Act specifically references employees, agents and subsidiaries as examples of associated persons but makes clear that whether a person is performing services for or on behalf of a commercial organisation is established by taking into account all relevant circumstances not just the nature of the relationship. The Guidance states that the concept of a person who performs services for or on behalf of a commercial organisation is intentionally broad so that it includes all the categories of persons connected to a commercial organisation, who might be capable of committing bribery on its behalf.

Managing agents will need to review their relationships to determine who may be associated persons performing services for or on their behalf. Associated persons could include but are not limited to:

- Employees
- Subsidiaries
- Coverholders
- Brokers (see section below - depending on whether it is performing services for the managing agent)
- Third party loss adjusters
- Third party claims handlers
- External legal, accounting, auditing, actuarial advisers
- Joint venture partners
- Other third party service providers

In determining their associated persons, particularly where there is an extended insurance chain, managing agents should have regard to the Guidance which clarifies that a commercial organisation is likely only to exercise control over its immediate contractual counterparty in a supply chain. It therefore suggests that an organisation will be regarded as performing services for or on behalf of only those organisations with which it has a direct contractual relationship. Managing agents should also have regard to the recommendation in the Guidance that commercial organisations request their counterparties to ensure appropriate anti-bribery provisions are included in their contractual arrangements with the next counterparty in the chain.

The Guidance also considers joint ventures, subsidiaries and agents. Members of joint ventures or subsidiaries or agents performing services for an organisation will only open that organisation to a potential liability if, in committing a bribe, the joint venture member, agent or subsidiary intended to obtain or retain business or a business advantage for the organisation. Such a party will not automatically involve their parent, sister subsidiary companies, joint venture members or principals in an offence if it cannot be shown there was an intention to obtain/retain business for the relevant organisation, even if there was an indirect benefit to the relevant organisation from the bribe.

Once a managing agent has determined its associated persons, it should consider the level of due diligence it should carry out by assessing the risk factors presented by each category of associated person. This assessment should include the type of service being performed, business partnership risk, e.g. if it involves FPOs or other intermediaries; country risk; class of business risk. Due diligence may extend to but is not limited to:

- credit checks

- identity checks
- internet searches
- direct interrogative enquiries
- questionnaires
- reports by external parties
- references
- ensuring the payment and method of transaction are justifiable
- checks of bank account details
- applicable measures inserted into contracts

The sections below on Coverholders and Brokers discuss potential associated persons of managing agents in more detail.

COVERHOLDERS

In the context of managing agents' relationships, it is clear from the Guidance that a coverholder would be considered an "associated person". Managing agents may need to review the adequacy of their diligence processes for appointing new coverholders and monitoring them on an ongoing basis. As described above, the due diligence process may vary, according to the risks arising from the coverholder relationship and the level of control the managing agent exercises or intends to exercise over the coverholder. In addition, consideration may also be given to:

- The value of the business
- The jurisdiction
- How the business is retained and documented
- What systems, controls and training are in place in respect of anti-bribery
- What auditing processes are in place
- Whether the coverholder has acquired other business lines or changed its business profile which warrants further investigation

All managing agents will have formal due diligence processes in place in respect of approving and monitoring coverholders. Demonstrating that these processes are documented and overseen by verification and sign off procedures will clearly be important to evidence that adequate procedures are in place. In addition, it is recommended that managing agent's internal audits include scope to monitor its due diligence and validation processes.

Managing agents should consider the MOJ's recommendation that counterparties are requested to undertake risk based due diligence on their associated persons and "adopt a similar approach with the next party in the chain". Audits of coverholders should test that any such requests are being complied with and any discrepancies investigated and that appropriate action is taken.

Where audit rights are inserted within a binding authority agreement, it is important that these are exercised as failure to do so will discredit a managing agent's commitment to its anti-bribery programme and potentially be a red flag to a regulator/prosecutor.

The Guidance also recommends the use of anti-bribery terms and conditions in contracts with counterparties. It may therefore be appropriate to include anti-bribery clauses with appropriate termination provisions for non compliance in binding authority agreements. Please see below for further information.

Lloyd's is progressing a number of work streams in relation to the management of coverholders and anti-bribery compliance. It is hoped that action taken centrally by Lloyd's will support managing agents in fulfilling their responsibilities to ensure that coverholders operate in compliance with the Bribery Act. These are:

Work Streams	Estimated implementation
Extending the scope of the coverholder audit to include compliance with the Bribery Act.	September 2011
Inserting guidance on Crystal for coverholders regarding the Bribery Act and their responsibilities, to ensure their conduct does not impose liability on Managing agents.	July 2011
The development of an on line training tool which will include anti-money laundering, sanctions and anti-bribery guidance and which coverholders will be required to complete. Completion will be monitored and reported to managing agents.	December 2011
Reviewing the Delegated Underwriting Code of Practice and the Coverholder application process to consider amendments needed to ensure compliance with the Bribery Act	September 2011
Adding a Financial Crime Binding Authority Clause to the standard binding authority wording (LMA 3019) which will serve as, inter alia, an anti-bribery warranty that coverholders must comply with.	June 2011

BROKERS

Managing agents will also need to assess their relationships with brokers on a case by case basis to determine if they may be associated parties. In this assessment, it should be considered whether the broker is performing services for or on behalf of the managing agent, what these services are and whether the broker, in performing the services, interacts with external third parties or is simply providing administrative services to the managing agent.

In circumstances where the broker is simply placing risks with managing agents on behalf of its clients, the broker is engaged by the insured and not by the insurer. It is therefore not performing services for or on behalf of the managing agents and in this case would not ordinarily be considered to be an associated person. However, managing agents still have to consider whether any payment arrangements with a broker would constitute inducements under the Bribery Act. See the Commissions section below.

Where a broker has been appointed by a managing agent to underwrite on behalf of a syndicate under a binding authority arrangement, or where a broker arranges and administers a lineslip on behalf of underwriters, it is likely that the broker will be an associated person. Consideration of brokers as associated parties of insurers is also referenced in guidance issued by LIIBA. Contact details for LIIBA are shown under Appendix 1, if managing agents wish to obtain a copy.

As with coverholders, managing agents will need to ensure that appropriate due diligence is carried out in relation to brokers deemed to be associated persons.

The LMA and IUA are reviewing the model TOBA wordings and, if considered appropriate, intend to publish an addendum in relation to financial crime prevention (and new models incorporating this) by the time of the implementation of the Bribery Act on 1 July 2011.

In addition, Lloyd's will be writing to all Lloyd's accredited brokers asking them to confirm their compliance with the Bribery Act. This confirmation will be obtained on an annual basis and is intended to assist managing agents fulfil their responsibilities to ensure that brokers are compliant. The wording for this is currently being considered with the intention of obtaining initial confirmation before implementation of the Bribery Act. The questionnaire for the broker accreditation process is also being reviewed to identify if additional questions are required to confirm compliance with the Bribery Act. Lloyd's will liaise with the LMA Regulatory Committee and LIIBA on these work streams.

COMMISSIONS

Having reviewed the implications of the Bribery Act on the payment of commissions (including contingent commissions) to brokers (including in their capacity as coverholders), Lloyd's is of the view that payment of normal commission, which is generally paid to the insurance intermediary out of the premium payable to it by the insurance intermediary's client, should not constitute an offence under the Act provided that it is reasonable and commensurate with such things as the work involved (including the obligation to advise on policyholder needs, coverage, policy wording and claims handling activities). Lloyd's is aware that there are other forms of remuneration which may be paid by insurers to insurance intermediaries (for example, contingent commissions based on volume or profit and volume over-riders and additional insurer charges). Analysis on whether such forms of remuneration would fall foul of the Bribery Act need clearly to be considered on a case by case basis by both the insurer and the broker.

CORPORATE HOSPITALITY

The Guidance states that the Act does not intend to criminalise reasonable and proportionate corporate hospitality, promotional or other business expenditure which is intended for legitimate commercial purposes. However, it recognises that such expenditure

can be used to bribe but that there must be an intention to influence its recipient to act improperly or to influence a FPO.

The Guidance provides examples of the types of corporate hospitality viewed as acceptable such as reasonable travel and accommodation allowances for a FPO to inspect a company's operations and also describes some scenarios where hospitality would be considered unreasonably lavish.

It also recommends that companies review their hospitality and expense policies in light of the section 7 commercial bribery offence to ensure that they are "seen to be acting both competitively and fairly" and that it is for individual companies to establish what they consider to be appropriate standards and limits.

FACILITATION PAYMENTS

The Act prohibits facilitation payments² and the Guidance states that such payments could trigger a section 1 or 6 offence leading to potential liability under the failure to prevent commercial bribery offence. Nevertheless there is recognition by the Government within the Guidance that eradication of facilitation payments is a long term objective. It suggests that companies should seek to address their elimination by applying anti-bribery measures such as communicating a company's policy of non payment of facilitation payments to agents and staff. Case Study 1 within the Guidance lists a number of additional actions that can be taken.

REPORTING

SFO - The Serious Fraud Office ("SFO") is the national reporting point for corruption. It operates a hotline: 020 7239 7388 or reports can be submitted anonymously via a link on the SFO website:

<https://report.sfo.gov.uk/providing-information-to-the-sfo.aspx>.

The SFO strongly encourages companies who uncover an incident of bribery within their organisation to self-report the matter to them. There has been much commentary on the benefits of self-reporting. By doing so firms may be subject to civil remedies rather than criminal, provided that no senior executives are involved. It may also ensure that where multi jurisdictions are involved, a single resolution can be reached with other regulators. At the same time, the SFO would expect to be advised of any notifications to the Department of Justice and the Securities Exchange Commission in the US.

SOCA - Profits gained from an act of bribery would constitute criminal proceeds under money laundering legislation and be subject to confiscation by the authorities in addition to penalties specified under the Bribery Act. In addition, suspicious transactions involving potential bribery should be reported to SOCA (www.soca.gov.uk) via the managing agent's MLRO or via Lloyd's per the contacts below.

FSA - The FSA supervisory contact should be notified of any bribery matters a firm uncovers.

² A facilitation payment refers to the practice of paying a small sum of money to induce foreign officials to perform routine functions they are otherwise obligated to perform. Examples of such routine functions include issuing licenses or permits and installing telephone lines and other basic services.

Lloyd's - Lloyd's requests that any reports made to the SFO/SOCA are brought to its attention. Additionally, if there are any questions about this bulletin, please contact:

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CONCLUSION

Whilst the purpose of this guidance is to highlight key points of the Bribery Act, in order to make certain that managing agents' actions do not fall foul of the legislation, it is recommended that where there are any uncertainties arising from, inter alia, risk reviews, new business arrangements or relationships or remuneration payments to third parties, managing agents should seek independent legal advice.

APPENDIX 1

There are a number of different organisations and web sites offering information about anti-bribery and corruption practices. A number are listed below.

- LIIBA - contact: Geraldine.Wright@liiba.co.uk
- Transparency International Corruption Perceptions Index
http://www.transparency.org/policy_research/surveys_indices/cpi/2010/in_detail
- Transparency International – Business Principles for Countering Bribery
<http://www.transparency.org.uk/working-with-companies/adequate-procedures>
- A Reference Guide and Information Note on the use of the FATF Recommendations to support the fight against Corruption
<http://www.fatf-gafi.org/dataoecd/59/44/46252454.pdf>
- HMT notice of 10 November 2010 on Statement of Money Laundering Controls in Overseas Jurisdictions.
http://www.hm-treasury.gov.uk/d/financial_sector_advisory_notice_october_2010.pdf
- The FATF 40 Recommendations.
<http://www.fatf-gafi.org/document/28/0,3746,en_32250379_32236920_33658140_1_1_1_1,00.html>
- FSA Report into Anti-Bribery and Corruption in Commercial Insurance Broking
http://www.fsa.gov.uk/pubs/anti_bribery.pdf