

2011/2012 - The Bribery Act 2010

July

Translations: Chinese  Vietnamese 

Dear Sirs

The Bribery Act 2010

The following information is addressed to all West of England Correspondents but it applies equally to our relationship with all other contractors who undertake work for or provide goods or services to the West of England. If you are such a contractor we request that you read this notice.

West of England information on its Bribery Prevention Policy following the entry into force of the United Kingdom's Bribery Act 2010

Introduction

1. Correspondents should already be aware of the guidance on anti-bribery measures issued by International Group of P&I Clubs in their Guidelines for Correspondents (available here).
2. This information sheet complements and expands upon that guidance and outlines what we and our members require of you, as one of our correspondents.

The bribery threat and your obligations

3. Recent years have seen increasing international efforts to combat bribery in all its forms, with international commitments being entered into by various countries. The United States Foreign Corrupt Practices Act was an example of this but, with its entry into force on 1 July 2011, the United Kingdom's Bribery Act 2010 ("the Act") represents probably the most extensive anti-bribery law in the world. Because the Act has a potentially worldwide impact (as will be discussed below) it is our policy that all providers of services to us and our members comply strictly with the extensive anti-bribery regime that it requires.
4. This policy extends to any service providers that you engage to assist in representing the interests of any of our members and us. Such service providers obviously include you (including all your staff), lawyers, experts, surveyors and any other form of agent, both those engaged directly by us and those engaged by you.
5. You are to ensure that any service providers engaged by you in relation to any matter in which you are acting as our club's correspondent are aware of and understand our policy (as stated in this information sheet and any future information provided to you in relation to our Bribery Prevention Policy) and the effect of the Act, and confirm to you that they will comply with it.
6. You will probably be affected by other anti-bribery laws, whether in your own country or another, which may, in some

respects, be stricter than the requirements of the Act. You must therefore consider carefully the need to take your own additional measures to ensure that your actions (and those of individual persons and companies that you engage on your and/or others' behalf) comply not only with our Bribery Prevention Policy and the principles of the Act, but also those other laws.

The Act

7. What follows is a brief summary of the provisions of the Act and how they affect you but, as with any summary, not all possible issues that might arise are covered. We appreciate that written laws (particularly those from foreign countries and/or in another language) may be difficult to fully understand but if you have any questions as to the applicability of the Act in any given circumstances, it may help you to refer to the Act itself (available at Bribery Act 2010). If that does not resolve your query, you are to consult with us.

8. The three offences of which you most need to be aware are those under sections 1, 2 and 6 of the Act.

Section 1: Bribing another person

9. It is an offence for a person to offer, promise or give a financial advantage to another person intending the advantage to induce a person, or reward a person for, the improper performance of a relevant function or activity. It does not matter whether the person being offered, promised or given the advantage is the same person who performs the relevant function or activity.

10. It is also an offence to offer, promise or give a financial or other advantage to another person, knowing or believing that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

11. In both cases it does not matter whether the advantage is offered, promised or given directly or through a third party.

Section 2: Being bribed

12. This section creates offences that generally mirror those under section 1, but criminalise the behaviour of the person receiving the bribe. In addition, it is an offence where, in anticipation of or in consequence of a person requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or another person at their request or with their agreement. This means that a person can be guilty of the offence even before they have asked for a bribe, if they intend to do so and improperly perform a relevant function or activity. As before, it does not matter whether the bribed person requests, agrees to receive or accepts the advantage directly or through a third party.

Issues relevant to the offences under sections 1 and 2

13. "Advantage" is not defined in the Act: in principle, any payment, gift or any other form of benefit could be included.

14. The relevant function or activity can, amongst other things, be of a public nature, connected with a business or performed in the course of a person's employment, so it can arise in the public and private sectors.

15. As to "improper performance", conduct will be considered "improper" if it amounts to a breach of an expectation that a person will act in good faith, impartially or in accordance with a position of trust. These expectations must be assessed in accordance with UK standards, even if the activity occurs outside the UK. If the conduct in question occurs outside the UK, any local custom or practice is to be disregarded unless it is specifically permitted by the written law of that country.

Section 6: Bribing foreign public officials

16. It is an offence to bribe a person who holds a legislative, administrative or judicial position of any kind (whether appointed or elected) in a country or territory outside the UK, or who exercises a public function for and on behalf of a territory outside the UK, or for any public agency or enterprise of that country or territory, or is an official agent of a public

international organisation.

17. The offence is committed if a person offers, promises or gives any advantage to such a foreign public official or to another person at the foreign public official's request or with their consent, in circumstances where the local written law neither permits nor requires the foreign public official to be influenced in their capacity as a foreign public official by the offer, promise or gift. The bribe must be made with intent to:

- a. influence the foreign public official in their capacity as a foreign public official; and
- b. obtain or retain some business, or an advantage in the conduct of business.

Issues relevant to the offences under sections 1, 2 and 6

18. The three types of offences outlined above apply to individual persons and may also apply to companies (under English law, where the acts are committed by individual persons who are the "directing mind or will of the organisation"). They apply to acts of bribery both:

- a. committed within the UK; and
- b. committed outside the UK, where the individual person or the company has a close connection to the UK (for example UK companies, UK partnerships, UK citizens or individuals ordinarily resident in the UK).

19. Individual persons found guilty of any offences under sections 1, 2 and 6 can be **imprisoned for up to 10 years** and/or receive an **unlimited fine**. Companies can receive an **unlimited fine**. If a company is found guilty, a senior corporate officer (such as a director, manager, secretary or similar officer) can be imprisoned for up to 10 years and/or receive an unlimited fine if the court decides they have given their "consent or connivance" to the offence. **This means that directors cannot choose to ignore bribery taking place within their organisations.**

Section 7: Failure of commercial organisations to prevent bribery

20. A relevant commercial organisation is guilty of an offence if a person associated with it bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for that organisation. Put briefly, this is failure by the commercial organisation to prevent an offence under sections 1 (bribing a person) or 6 (bribing foreign public officials).

21. A "relevant commercial organisation" is a company or partnership established under the law of the UK which carries on business in the UK or elsewhere, and any other company or partnership (wherever established) that carries on business, or part of a business, in the UK. "Part of a business" might include:

- a. a representative or branch office in the UK;
- b. a UK agent carrying out ordinary business on the company's behalf;
- c. a UK subsidiary; or
- d. any other form of demonstrable business presence.

The above definitions **may include you**, and **will include many of our members and us**.

22. It is not necessary for there to be a conviction under either section 1 (bribing a person) or 6 (bribing foreign public officials) in order for the section 7 offence to be established, nor does it matter that the act in question is lawful in the country where it occurred. All that is required is that the act would have been an offence under sections 1 or 6 if it had been performed in the UK.

23. A person is "associated" with an organisation if they "perform services" on behalf of the organisation. This may include:

- a. employees;
- b. agents;
- c. subsidiaries;
- d. contractors;
- e. joint venture partners; and
- f. third party service providers/suppliers.

The offence is one of strict liability, meaning that the prosecution will not have to prove intention or negligence by the commercial organisation, merely that the bribery has taken place, **even where the bribe occurred without its knowledge**.

24. There is a defence that the commercial organisation had in place “adequate procedures” designed to prevent persons associated with it from committing bribery. Those adequate procedures form part of our Bribery Prevention Policy but it is important to note that it is not sufficient only for the policy to be created and communicated: **it needs to be shown to be working**.

25. This offence only applies to commercial organisations, and cannot be committed by individual persons but could lead to an **unlimited fine**.

What this means to you

26. All this means that if you have sufficient connection with the UK, and engage in bribery or fail to prevent bribery being committed on your behalf, you (the individual, the company and your directors) may be criminally charged under the Act. Even if you have no such connection with the UK, if you are involved in the giving of a bribe, you could expose the member or us to conviction under the Act.

27. Most people can recognise when a bribe is taking place: if the action feels morally wrong, it is likely to be wrong as a matter of law. For example, in relation to securing evidence: one should not pay a witness more than reasonable expenses for his or her co-operation, or make a payment to a public or private employee to make available documents or information that they should not provide. We comment below on two particular issues where the UK Government has considered it necessary to provide specific guidance.

Facilitation payments

28. Facilitation payments, otherwise known as “grease payments” can be summarised as small bribes paid to facilitate routine Government action. They might include payments to secure early release of cargo; to lift a port state detention; to mitigate customs or other fines; or even to be permitted to transit a canal. Some may view them as “the price of doing business” and not recognise them as being a serious form of bribery. **They are clearly prohibited under the Act and, no matter how small, or how well-established the practice is in any jurisdiction, such activities cannot be allowed to happen.**

Corporate hospitality

29. The Act does not make corporate hospitality illegal, but care must be exercised to ensure that such hospitality is not disproportionate. Genuine hospitality and promotional or other business expenditure which seeks to improve the image of a commercial organisation, or to establish friendly relations, is acceptable and reasonable expenditure will not be viewed as bribery. On the other hand, hospitality that is too “lavish” according to the usual standards of the industry may be. The test should be: “*would my competitors, in my own country and/or other countries, consider the hospitality to be excessive or suspicious?*” If so, it should be reduced.

What you must do now

30. If any aspect of the above information is unclear, contact us and we will provide clarification.

31. Ensure that all members of your organisation have read this information sheet (and been provided with a copy of the Act) and understand the requirements it sets out.

32. If you engage a third party to provide services in any matter in which you are instructed on behalf of our member through their entry with us and/or we have an insured interest, provide them with a copy of this information sheet and ensure that it is a term of the contract with them that they will abide by the requirements of our Bribery Prevention Policy. Where a service provider is, or is likely to be, engaged on multiple occasions, this might be made a standard term of engagement, in order to avoid the need to send the information sheet to them on each occasion.

33. Report any suspected instances of bribery or attempted bribery in any matter in which you are instructed on behalf of our member through their entry with us and/or we have an insured interest, so that we can direct you as to the appropriate response.

34. Ensure that all claims for disbursements are fully supported by vouchers and explained. Any unsupported claims will not be reimbursed.

Finally

35. As will be clear from the above, we have a zero-tolerance approach to bribery in all its forms and expect and require the same of those with whom we and our members work. We recognise that it is in the nature of the work performed by many correspondents that they come into contact with people who do not maintain those standards. When such situations arise and a bribe is offered or requested, or such activity is suspected, a correspondent should not hesitate to contact us.

36. We are continually reviewing and updating our Bribery Prevention procedures and will provide further information and guidance as those procedures develop.

Yours faithfully

For: **West of England Insurance Services (Luxembourg) S.A.**
(As Managers)

R J B Searle
Director