

## Key aspects of the Bribery Act 2010 for Underwriters

The Bribery Act 2010 represents a significant change in existing anti-bribery laws and makes bribery offences much easier to prosecute. It could very well impact on your D&O underwriting portfolio, for financial institutions as well as other commercial organisations.

The Act is expected to come into force in the coming months. We highlight below the key exposures faced by directors, the impact on D&O coverage, and questions you might wish to ask of insureds during placement. We hope you find this helpful.

For full details of the offences contained in the Act and its worldwide application, please see our article: [The Bribery Act 2010 - a new beginning](#).

### Directors' exposure

- It is a criminal offence for the senior officer of any kind of commercial organisation to offer bribes to foreign officials, as well as private citizens, or to receive bribes from third parties. These offences are punishable by an unlimited fine and/or up to ten years' imprisonment.
- These offences are committed if a financial or other sort of advantage is offered or given to a person, with the intention of inducing that person to perform improperly a particular activity, or where the senior officer knows or believes that the acceptance by the other person of the advantage would itself constitute improper performance. So, intention or knowledge by the senior officer must be proven.
- The Act introduces a new strict liability offence of a failure by commercial organisations to prevent bribery offences being committed by associated persons (including employees, agents, subsidiaries or joint venture partners). This offence is punishable by an unlimited fine on the company or partnership. Prosecution for this offence is likely to be preceded by a regulatory investigation in which senior officers can expect to be interviewed as witnesses. The only defence to this offence will be for the commercial organisation to demonstrate that it has in place "adequate procedures" to prevent bribery and that these procedures were effectively operated.
- Senior officers can also be prosecuted if they consent to or connive in the commission of any bribery offences as described above.

### D&O coverage implications

- No coverage can be granted for any fine imposed on the insured: this would contravene the English law principle that a person may not benefit from their own wrongful act. Standard exclusions "for fines" should be sufficient to exclude coverage for any fine imposed on the senior officer.
- Defence costs usually will need to be advanced, pending intention or knowledge of the crime being proven or formally admitted. A carefully drafted fraud and dishonesty exclusion should ensure that, as soon as the crime is proven or the wrongful conduct is admitted, coverage ceases immediately for all defence costs, including those incurred to date (but not yet indemnified). Underwriters should provide expressly for the recovery of defence costs previously advanced to the insured in circumstances where the fraud and dishonesty exclusion is triggered.
- A prosecution under the Act is very likely to involve an investigation by the SFO or similar regulatory authority and the consequent investigation/defence costs will usually be covered under a D&O policy. Underwriters could also offer defence costs coverage to insureds if they face internal bribery investigations by the commercial organisation itself.
- In view of the adverse implications of bribery allegations, insureds may be motivated to enter into a plea bargain with the authorities, for example by way of a civil recovery order (see, for example, the orders made against AMEC plc and Balfour Beatty by the SFO in recent years). Underwriters should review whether they wish to cover the consequences of a civil recovery order.

- As discussed above, the company can also commit a criminal offence if it fails to prevent bribery. As seen elsewhere (see Morrisons' pursuit of the former directors of subsidiary Safeway), a commercial organisation which is fined for bribery could seek to pursue claims against its senior officers for corporate governance failures. The corporate governance claim would be for damages, so the D&O fine exclusion (typically) would not apply.
- The Act will also apply to acts of bribery committed anywhere in the world by UK organisations or individuals, as well as foreign companies who do business in the UK. In view of this and the wide definition of "associated persons" in the strict liability offence, the Act has the potential to impact on senior officials around the globe.
- It would be reasonable to ask companies and directors what steps have been taken to review their procedures in the light of the Bribery Act 2010 and where improvements are needed. Companies should also be asked to explain how such procedures will operate in practice and whether or not there is a mechanism in place to update or modify the procedures in the event that the company's level of risk should change.

For further information, please get in touch with the authors Jane Childs and Mandip Sagoo, or one of our other D&O lawyers within our Insurance & Reinsurance practice.

***Jane Childs***

Partner

Tel: +44 20 7398 4622

***Mandip Sagoo***

Senior Associate

Tel: +44 20 7398 4637

## Points to raise during placement

- The Government is due to publish guidance on what it considers will be "adequate procedures" designed to present bribery conduct.
- Meanwhile, companies should be giving consideration to the particular risks that might arise in the course of their operations so that procedures can be introduced (if not already in place to combat common law bribery offences) to minimise the risk of bribery occurring.

---

Mayer Brown is a leading global law firm with approximately 1000 lawyers in the Americas, 300 in Asia and 450 in Europe. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, Rio de Janeiro, São Paulo, Washington  
 ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai  
 EUROPE: Berlin, Brussels, Cologne, Frankfurt, London, Paris

ALLIANCE LAW FIRMS Spain, Ramón & Cajal; Italy and Eastern Europe, Tonucci & Partners  
 Please visit our web site for comprehensive contact information for all Mayer Brown offices.  
[www.mayerbrown.com](http://www.mayerbrown.com)

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The material is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed in this publication.

© Copyright 2010. Mayer Brown LLP, Mayer Brown International LLP, Mayer Brown JSM and/or Taül & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. All rights reserved.

Mayer Brown is a global legal services organisation comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership (regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown JSM, a Hong Kong partnership, and its associated entities in Asia; and Taül & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the individual Mayer Brown Practices in their respective jurisdictions.