

MARKET BULLETIN

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Title	Disclosure of the remuneration of intermediaries in Hong Kong
Purpose	To advise the market of the law with respect to the disclosure of brokers' remuneration in Hong Kong
Type	Event
From	Cameron Murray, Senior Manager, International Regulatory Affairs
Date	16 December 2011
Related links	Prevention of Bribery Ordinance

Purpose

To inform managing agents and coverholders of recent guidance relating to the Prevention of Bribery Ordinance (PBO) in respect of the disclosure of brokers' commissions.

This bulletin should be read by managing agents and brokers writing or handling Hong Kong business.

Background

In recent years there have been a number of queries in relation to broker remuneration in Hong Kong, which have highlighted the importance of compliance with the rules set out in the Prevention of Bribery Ordinance (PBO). Under Section 9, Subsections (1) and (2), of the PBO, any agent who solicits or accepts an advantage in relation to the affairs or business of his principal without obtaining his principal's authorisation or permission, is guilty of an offence. According to the law, both accepting *and* offering an advantage constitute an offence, i.e. brokers *and* insurers are both implicated.

The Hong Kong Federation of Insurers ("HKFI") has recently released some information and guidance on this matter, along with legal advice, which includes requirements under the PBO, advice on what can be done to protect insurers' interests and to what extent disclosure is required by brokers. We would strongly recommend that managing agents, coverholders and Lloyd's brokers who accept or place Hong Kong risks should consider the HKFI guidance. This document is available to all managing agents and Lloyd's brokers upon request; please contact Lloyd's International Trading Advice on +44 (0)20 7327 6677 or at LITA@lloyds.com.

Summary

As its agent, an insurance broker owes fiduciary duties to the assured and must avoid circumstances that may constitute a conflict of interest. As such, the broker must not put himself into a position in which his personal interest may conflict with his duty to the customer, *unless* the customer consents. If an insurance broker solicits or accepts commissions *with the permission of his customer*, then neither the broker nor the insurer will be guilty of an offence.

In light of the longstanding and recognised practice of the insurance industry, the customer is generally taken to (i) know that the broker will be paid for his services by the insurer and (ii) have consented to a market rate. However, if the broker is paid above the market rate, this may be treated as a secret profit, which the broker is not entitled to retain.

Given that there has been no judicial consideration in Hong Kong as to the scope of the PBO on this matter, it is difficult to say how the courts would consider specific arrangements and accordingly Lloyd's would suggest that managing agents or brokers obtain their own legal advice where appropriate. However, suitable risk mitigation steps, as suggested by the HKFI, may include the following:

For Insurers

In order to protect insurers' interests, it is suggested that as a precondition to the paying of commission to Hong Kong brokers, the broker should be asked to provide a declaration to the insurer (i.e. to the managing agent for these purposes) that he has advised his customer where he is to receive a commission if the customer takes up the insurance policy. This measure would also be applicable to Lloyd's coverholders and service companies, in their capacity as agents for underwriters when they are dealing with producing brokers. A similar approach should be taken with regard to open market business to London where there is a Hong Kong broker advising a client.

For Insurance Agents acting as Brokers

Generally a coverholder acts as agent for underwriters (rather than the policyholder) and accordingly commissions the coverholder receives from underwriters in that capacity would not be appear to be subject to the PBO requirements.

However, where an agent acts for more than one insurer or, if an insurance agent solicits business from a customer on its own initiative, and not on the instructions, express or implied of the insurer, and acts only on the instructions of the customer, then there is a risk that the insurance agent would be considered as an agent of the customer. In these circumstances, the PBO may apply, and so it would seem that agents in this position should consider what disclosures need to be made (and the HKFI guidance may assist in that regard).

Next steps

Managing agents, coverholders and service companies, in order to comply with the PBO and protect their own interests, should request that Hong Kong brokers provide a declaration that the broker has advised its customers where it is to receive a commission if the customer takes up the insurance policy.

Managing agents are also advised to disclose and obtain consent for any payments surrounding the conducting of surveys, risk management and claims handling. On policy issuing, consent from customers is not required.

Further contacts

If you have any queries relating to this bulletin please contact:-

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