



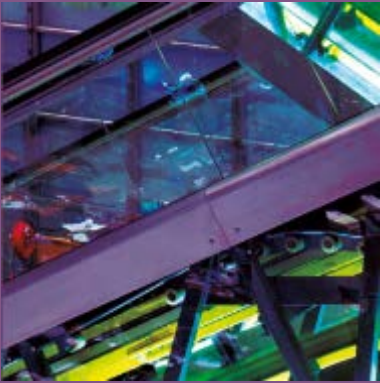
# LMA Market Model Agreements

5th March 2018



# Market model agreements: GDPR and CFA amendments

**GDPR: Isabel Ost and Mark Williamson, Clyde & Co LLP**  
**CFA: Christopher Hill and Ray Smith, Clyde & Co LLP**



# GDPR

# Market model agreement introduction

- ❑ 4 market model agreements we have amended:
  - ❑ Binding Authority Agreement and guidance
  - ❑ Consortium Agreement and guidance
  - ❑ Third Party Administrator Agreement
  - ❑ Terms of Business Agreement (Risk transfer and non risk transfer)  
(this is not being covered today)

# Considerations in drafting the market model agreements

- Consistency of language and approach
- Allow for controller to controller transfers and controller to processor transfers where there is evidence in the market of different positions in one kind of arrangement e.g. TPA and BAA
- No joint controller wording
- Jurisdiction

# Binding Authority Agreement and guidance

## Underwriters

- They are always data controllers

## Coverholder default position

- Coverholder will act as a data controller
  - Always the case in relation to arranging cover
  - Usually the case in relation to other core services

## Coverholder rare position

- Coverholder may act as a data processor in respect of certain services it performs under the BAA
  - Core
  - Non-core

# Binding Authority Agreement Schedule example

ACTIVITIES OF THE COVERHOLDER IN RESPECT OF WHICH THE COVERHOLDER PROCESSES PERSONAL DATA AS A PROCESSOR ON BEHALF OF THE UNDERWRITERS:

Claims handling on behalf of the Underwriters

DATA PROTECTION PARTICULARS FOR SUCH ACTIVITIES:

**The subject matter and duration of the processing:**

Handling of claims on behalf of the Underwriters in respect of insurances bound during the term of the BA. Subject to the terms and conditions of the BA, the Coverholder will carry out this activity during the term of the BA and thereafter until (i) every insurance bound has expired or has otherwise been cancelled or terminated; and (ii) in respect of claims arising under such insurances, all such claims have been paid or otherwise resolved unless otherwise instructed in writing by the Underwriters

**The nature and purpose of the processing:**

Claims handling on behalf of the Underwriters in accordance with the terms of the BA

**The type of personal data being processed:**

Names and contact details (such as postal and email addresses and telephone numbers); details of the nature of each claim

**The categories of data subjects:**

Claimants; insureds; witnesses; professional advisers such as loss adjusters, experts and lawyers

# Third Party Administration Agreement

- Default position: insurer is always a data controller
- Default position: TPA will normally as a data processor
- TPA acts on behalf of the insurer
- Claims handling and the other administrative duties carried out by the TPA are not regulated activities
- From time to time TPA may act as a data controller- unusual
- TPA Declaration will look very similar to the example in the BAA schedule where a TPA is carrying out claims handling



# Consortium Agreement and guidance

- ❑ Both consortium managers and following underwriters will be data controllers on their receipt and use of personal data
- ❑ Where following underwriters do not receive any personal data the consortium manager will remain a data controller responsible for their own compliance under GDPR

# Practical tips for compliance

- Always consider if you are acting as a data controller or a data processor.  
Who decides
  - to collect the personal data in the first place
  - which individuals' personal data to collect
  - the categories of personal data to collect
  - the purpose for which the data is used
  - whether and to whom to disclose the data
  - how long it should be retained
  - Is personal data collected and used pursuant to a specific legal or professional obligation
- Remember that if there is a data processor relationship the schedule (BAA) or the declation (TPA) must be filled out!

# Contact Details



**Mark Williamson**

Partner, London

T: +44 20 7876 5341

E: [mark.williamson@clydeco.com](mailto:mark.williamson@clydeco.com)



**Isabel Ost**

Senior Associate, London

T: +44 20 7876 5313

E: [isabel.ost@clydeco.com](mailto:isabel.ost@clydeco.com)



# Criminal Finances Act 2017

# Criminal Finances Act 2017: Why it matters

- Part 3 of the CFA came into force 30 September 2017
- Introduced two new corporate offences:
  - Failure to prevent facilitation of UK tax evasion
  - Failure to prevent facilitation of foreign tax evasion
- **Impact on corporates:**
  - Criminal law on tax evasion by a taxpayer not radically changed
  - New offences focus on who is held accountable for such acts
  - Targets the failure to prevent such crimes by a corporation
  - Applies to “*associated person*” of a body corporate, which would include coverholders, TPAs, consortium leaders and a broker in certain instances
- **Strict liability** – penalties apply unless “*reasonable prevention procedures*” defence can be established
- Updating LMA wordings part of showing taking steps to prevent tax evasion

# Terminology: Tax Evasion and Facilitation

- **Tax evasion** means the offence of cheating the public revenue or fraudulently evading UK tax, and is a criminal offence. The offence requires an element of fraud, which means there must be deliberate action, or omission with dishonest intent;
- **Foreign tax evasion** means evading tax in a foreign country, provided that conduct is an offence in that country and would be a criminal offence if committed in the UK. As with tax evasion, the element of fraud means there must be deliberate action, or omission with dishonest intent; and
- **Tax evasion facilitation** means being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax (whether UK tax or tax in a foreign country) by another person, or aiding, abetting, counselling or procuring the commission of that offence. Tax evasion facilitation is a criminal offence, where it is done deliberately and dishonestly.
- Note that tax evasion is illegal, while tax avoidance is not – there are grey areas!

# Corporate Tax Evasion/Facilitation Offences

- The two new corporate offences:
  - Failure to prevent facilitation of UK tax evasion (s.45)
  - Failure to prevent facilitation of foreign tax evasion (s.46)

Specifically, the CFA provides that:

- A body corporate / a partnership (a "*relevant body*") is guilty of an offence if an "*associated person*", defined as an employee or agent or any other person who performs services for or on behalf of the company, commits a UK tax evasion facilitation offence while acting in their capacity as an associated person (s.45(1)); and
- A body corporate is guilty of an offence if an associated person commits a foreign tax evasion facility offence while acting in their capacity as an associated person (s.46(1)).

# Corporate Tax Evasion/Facilitation Offences

To be found liable for these corporate offences, it must be shown beyond reasonable doubt that there has been a:

<b><u>Stage one:</u></b>	Criminal tax evasion by a taxpayer (either an individual or a legal entity) under existing law.
	= offence amounting to a <u>cheat</u> of the public revenue or any offence consisting of being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax.
<b><u>Stage two:</u></b>	Criminal facilitation of tax evasion by an associated person of a relevant body. Facilitation reasonably widely defined under the CFA – includes aiding, abetting, counselling or procuring tax evasion, as well as being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of a tax by another person.
<b><u>Stage three:</u></b>	Failure by the relevant body to prevent its representative from committing the criminal facilitation act.

Plus sufficient nexus with the UK and criminality of the relevant conduct under UK law and the law of the jurisdiction where tax evasion occurs.



# Corporate Tax Evasion/Facilitation Offences

- Strict liability
- Penalties – unlimited fines, confiscation of assets, reputational risk
- Only defence to show:
  - The body corporate had in place reasonable prevention procedures; or
  - It was not reasonable to have had such procedures in place
- Guidance on Reasonable Prevention Procedures
  - HMRC Guidance
    - *Mitigation factor: “UKCO had a clear policy against tax evasion, including terms and conditions within contracts with all third parties”*
  - Lloyd’s Market Bulletin Y5117
  - Awaiting guidance from ABI

# Amendments to LMA Wordings

- Revisions to the following:
  - ❑ Binding Authority Agreement
  - ❑ Consortium Agreement and guidance
  - ❑ Third Party Administrator Agreement
  - ❑ Terms of Business Agreement (Risk Transfer and Non Risk Transfer)
- Approach: adapt existing provisions and ensure consistency across suite of documents as far as possible

# CFA-Related Amendments: LMA3113: Binding Authority Agreement

## SECTION 34: COMPLIANCE WITH THE LAW AND FINANCIAL CRIME

34.1	<p><i>Without prejudice to any of the rights or obligations otherwise specified in the Agreement, the Coverholder shall comply with all applicable laws for the legal and proper solicitation and handling of all insurances bound or intended to be bound, and shall use its best endeavours to ensure that any other parties with whom it deals in carrying out its duties under the Agreement comply with such laws where applicable;</i></p>
34.2	<p><i>The Coverholder shall not undertake any activity <b><u>which facilitates the evasion of taxes anywhere in the world or which</u></b> would constitute a criminal act in the jurisdiction in which it is located or doing business, or which would expose the Underwriters to any criminal sanction;</i></p>
34.3	<p><i>The Coverholder shall conduct its business in accordance with all relevant <del>anti-money laundering</del> <b><u>financial crime</u></b> and international economic, financial or trade sanctions laws and regulations. In addition, the Coverholder shall not act contrary to any additional <del>anti-money laundering</del> or <b><u>requirements concerning: (i) international economic, financial or trade sanctions; (ii) the prevention of the facilitation of tax evasion; or (iii) financial crime</u></b> set by the Underwriters and/or Lloyd's other than where compliance with those requirements would be contrary to local law;</i></p>
....	
34.6	<p><b><u>The Coverholder shall maintain on an ongoing basis appropriate systems, procedures and controls designed to prevent any breach of this Section 34.</u></b></p>

# Contact Details



**Chris Hill**

Partner, London

T: +44 20 7876 4557

E: [christopher.hill@clydeco.com](mailto:christopher.hill@clydeco.com)



**Ray Smith**

Partner, London

T: +44 20 7876 6145

E: [ray.smith@clydeco.com](mailto:ray.smith@clydeco.com)

## Criminal Finances Act 2017 Seminar

- When: 23 April 2018
- Where: Deloitte, 2 New St Square, London EC4A 3BZ
- Speakers include: Clyde & Co, Deloitte and Chris Po-Ba, Lloyd's

**375**

Partners

**2000**

Legal  
professionals

**3300**

Total staff

**46**

Offices and associated  
offices in 18 countries