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Dear Mr Llewellyn

Control Risks is pleased to submit a response to the Consultation on Changes to ECGD's Anti-bribery and Corruption Procedures introduced in December 2004.

Our position on this matter is laid out in the attached brief document.

Yours sincerely

John Conyngham
**Group Legal Counsel and
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conqueror



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CONSULTATION ON CHANGES TO ECGD'S ANTI-BRIBERY AND CORRUPTION PROCEDURES INTRODUCED IN DECEMBER 2004

SUBMISSION BY CONTROL RISKS GROUP

This submission responds to the ECGD's consultation on changes to its anti-bribery and corruption procedures introduced in December 2004, and to the key questions in the consultation documents:

- Do the changes made to ECGD's anti-bribery and corruption procedures in December 2004 have the effect of ensuring that, so far as practicable, (1) taxpayers' money is not used to support transactions tainted with bribery and/or corruption; an (2) undue burden is not placed on exporters and/or banks.
- If you consider that the changes do not possess this balance, please indicate what changes you think would do so.

Our submission begins with an introduction to Control Risks Group, and our perspective on bribery in transnational business transactions. It then focuses specifically on the question of commercial agents, and their potential links with corruption.

Our overall argument is that the earlier changes introduced in the May 2004 ECGD provisions were more effective in combating bribery than the December 2004 amendments, and that the information on agents required by the May provisions did not place an undue burden on exporters and/or banks. This information should be readily available to the parties concerned. If it is not in fact available, we would expect them to make the appropriate due diligence enquiries. We regard this as good risk management practice, regardless of ECGD requirements.

Control Risks Group

Control Risks is an international business risk consultancy. Our services include political and security risk analysis, confidential investigations, pre-employment screening, security consultancy, crisis management and response, and information security and investigations. Our head offices are in London, and we have a total of 17 branch offices in continental Europe, the Asia/Pacific region, the Middle East, Latin America and North America. Since the company's foundation in 1975, it has worked with more than 5,300 clients (including 86 of the Fortune 100 companies) in over 130 countries. We work with both private sector clients and government and multilateral institutions.

Control Risks' perspective on bribery

Our consistent advice to clients is that bribery presents unacceptable business risks. Some of these risks are intrinsic: if companies pay a bribe, they have no recourse if they do not get what they pay for. Having broken the law, they make themselves subject to blackmail and, in the worst case, may expose themselves to an increased risk of violence. Bribery presents unacceptable extra costs to the company, the client, the tax-payer and the consumer. Legal reforms introduced since the 1997 OECD anti-

bribery convention have added to these risks, but are not the only driver: a business deal based on bribery is in any case intrinsically insecure.

Some commentators have presented tighter anti-corruption legislation as a burden on business: we take the reverse view. It is easier for companies to resist demands for bribes if they can say that legal requirements mean that they simply cannot pay. Competition by corrupt competitors is a significant concern, but the best way to address it is through international co-operation. We believe that it is in the UK's national interest to demonstrate its commitment to the 1997 OECD anti-bribery convention by implementing it effectively, and to work with its international partners to ensure that they do the same. The ECGD has an important part to play in this process.

We have expressed our views on the risks associated with bribery in our advice to individual clients and in two major reports: *Corruption and Integrity. Best Business Practice in an Imperfect World* (1998) and *Facing up to Corruption. A Practical Business Guide* (2002). In addition to our work with private-sector clients, we have also advised a number of multilateral institutions on the design and implementation of their integrity procedures.

The risks associated with the employment of agents

The employment of agents as commercial intermediaries is commonplace in many parts of the world, and in some cases mandatory. However, there is a risk that they could use part of their commissions to pass on bribes, with or without the direct knowledge of their employer. In a survey of 250 international companies that we commissioned in 2002, 70% of respondents thought that US companies used middlemen to circumvent anti-corruption laws 'occasionally', 'regularly' or 'nearly always'; 77% of respondents thought that companies from other OECD countries did so regularly or occasionally (the survey is available on www.crg.com).

Again, we believe that companies who tolerate such practices face both 'intrinsic' and 'legal' risks. Distancing themselves from the agents' behaviour is necessary if companies are to deny charges of complicity with any bribery that may take place. However, distancing also implies unacceptable loss of management control. At the same time, recent legal reforms have heightened the existing risk of prosecution. Most of the most prominent recent international legal cases on corruption involve intermediaries. Examples include the Lesotho Highlands Water Project case which has led to the successful prosecution of Canadian, German and French companies;¹ the 2003/2004 Statoil case in Norway (which concerned payments made to a consultancy);² and a series of cases in the US.³ Intermediaries featured prominently in

¹ Summaries of the key court judgements in the Lesotho case are published on www.odiousdebts.org.

² In October 2004 Statoil agreed to pay a NOK 20 million imposed by the National Authority for Investigation and Prosecution of Economic and Environmental crime in Norway (Økokrim). Statoil accepted the penalty without admitting or denying the charges by Økokrim. The case involved a consultancy agreement with Horton Investments Ltd in relation to Statoil's activities in Iran. See: "Statoil accepts Økokrim penalty in the Horton case Stock market announcement", Press Release, 10 October 2004. Available on www.statoil.com/ir.

³ For a summary of US cases see: Danforth Newcomb. 2004. *Digests of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977 (As of November 4, 2004)*. New York: Shearman & Sterling LLP. http://www.shearman.com/documents/LT_digest2004.pdf

several US Foreign Corrupt Practices Act investigations that were still under way in late 2004 in countries ranging from Indonesia to Kazakhstan.⁴

Well-managed companies have responded to these risks by introducing appropriate management controls. In our 2002 survey, 80% of UK respondents had procedures to vet agents or representatives, and 72% had formal agreements with agents and representatives that they would not pay bribes on the company's behalf. Much of our own recent work for international companies has involved due diligence integrity checks into the background of potential agents or representatives in a variety of jurisdictions. Well-run companies should have no difficulty explaining their anti-corruption procedures, and justifying their appointment of particular agents. If they do not have this information available internally, their risk management is defective. If they are unwilling to disclose the information – even on a confidential basis – to a government agency, the suspicion inevitably arises that they have something to hide.

In the ECGD's case there are two further considerations. First, as a government institution backed by public money, it will naturally and rightly be held to the highest standards of accountability. Secondly, projects that are apparently associated with corruption are more likely to encounter the kinds of political risks that will lead to claims. In practice, it is hard to provide watertight evidence of foreign bribery after the event, even if there is strong circumstantial evidence. The lack of clear legal evidence may result in the ECGD paying out claims which – if full information were available – would be declared invalid because of corruption. It is therefore in the ECGD's institutional interests to put a strong emphasis on prevention rather than post-claim investigations. That means – among other things - having tightly worded forms which provide the ECGD with a sound basis on which to assess applications.

The revised wording in ECGD application documents

Against that background, we welcomed the tighter wording on agents introduced in May 2004: we did not think that it posed an unacceptable burden on ECGD clients because it referred to information that they should have gathered in any case. For the same reasons, we were disappointed with the weaker wording introduced in December.

Below we cite the key differences between the May and December wordings (as summarised in Section 8.6 of the ECGD consultation document) together with our comments:

- *The December provisions provided instead that details [concerning the Applicant's use of agents] were only required if either the agent's commission was included in the price charged by the Applicant to the overseas purchaser and thereby part of the latter's obligation covered by the ECGD...*

As discussed, the provision of information about the employment of agents and payment of commissions is intrinsic to any anti-corruption compliance programme. If the ECGD is to protect itself against allegations of complicity

⁴ Newcomb (2004:46, 115 ff.)

with bribery on the part of its clients, this information is essential in all cases. The original wording should stand.

- *... or was above 5% of the contract price...*

If the contract price is measured in tens or hundreds of millions of pounds, 5% will amount to a very substantial amount of money and could easily be used to finance bribes. The price of all commissions should be declared, regardless of its percentage of the contract price.

- *Under the December provisions the name and address of the agent continued to be requested in those circumstances, but an applicant who felt unable to provide such details was allowed to explain why.*

Refusal to provide the name and address of an agent – even on a confidential basis to a government agency – is an obvious ‘red flag’. We do not think that applicants should have this option.

- *A further question was asked in the December provisions whereby the applicant was asked to confirm that, to the best of its knowledge and belief, no improper relationship existed between the agent and the buyer.*

The principle behind this question is good, but the ECGD’s definition of ‘to the best of its knowledge and belief’ is too weak. The definition states:

“...The best of” requires the maker of the statement to review his or her then state of knowledge and report all that that review tells him or her. It does not require the person to make any enquiries or in any way to seek to improve or augment his or her knowledge before making the statement.

“...The “best of” belief means that the person is uttering what he or she genuinely believes to be true, as opposed to matters on which he or she entertains doubts. Again, since belief is unqualified, there is no requirement to seek or verify or bolster a belief by enquiry, other than by a diligent search of the person’s own conscience.”

We recommend that the definition of ‘knowledge and belief’ be reworded to reflect the need for pro-active enquiries. This applies particularly to large transactions in high-risk sectors or jurisdictions where there is an existing pattern of corruption. We do not believe that this would pose an acceptable burden on companies: we regard pro-active risk assessment as an essential part of sound risk management.