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UK Financial Conduct Authority Imposes Limited Fine on JLT Specialty

Introducers and Associated Risks

As in many other industries, commercial insurance broking and energy are sectors where the use of third party intermediaries to assist in the obtaining and/or retaining of customers ("Introducers") is prevalent. This is for legitimate reasons: it is rarely commercially viable to maintain a presence in all locations a company's goods or services are, or could be, consumed and Introducers enable businesses to penetrate a wide range of markets that they would otherwise be unable to access.

However, as is also well-known, the use of Introducers increases a company's risk-profile in terms of compliance with various anti-bribery laws, including the United Kingdom's Bribery Act and the U.S. Foreign Corrupt Practices Act. Given the ever-increasing focus of regulators across the globe on bribery and corruption issues, these risks must be carefully monitored and managed.

The need for effective anti-bribery procedures to prevent, or at least minimize, the risk of corruption is thus greater than ever. This was recently demonstrated by the nearly £1.9 million fine levied against JLT Specialty Limited ("JLTS") by the U.K. Financial Conduct Authority ("FCA") in December 2013 for failings in its anti-bribery and corruption procedures relating to its use of Introducers.[1]

JLTS's Fine

JLTS is the specialist insurance broking and risk management arm of Jardine Lloyd Thompson, a global business offering its diverse portfolio of services in 135 countries. The use of Introducers by JLTS formed a key part of its sales strategy; between February 2009 and May 2012 Introducers generated almost £20.7 million of commission for JLTS. Of that commission, almost 57%, or £11.7 million, was remitted to JLTS's Introducers in payment for their services.

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1. *See* FCA Press Rel., Firm Fined £1.8million for "Unacceptable" Approach to Bribery & Corruption Risks from Overseas Payments (Dec. 19, 2013), http://www.fca.org.uk/news/firm-fined-18million-for-unacceptable-approach-to-bribery-corruption-risks-from-overseas-payments; FCA Final Notice re: JLT Specialty Ltd. (Dec. 19, 2013), http://www.fca.org.uk/your-fca/documents/final-notices/2013/jlt-specialty-limited.

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JLTS's controls and risk management procedures were, however, found to be wanting by the FCA, which fined the business £1,876,000. The fine related to a breach of Principle 3 of the FCA's Principles for Businesses, which requires any business regulated by the FCA to take "reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."[2] In particular, significant inadequacies in due diligence processes gave rise to an unacceptable risk that payments made to JLTS's Introducers could be used for corrupt purposes, including the payment of bribes.

The case is a clear illustration of the regulatory pitfalls associated with the use of Introducers. It is also a salutary reminder of the robust approach the FCA will adopt should failings be found in a regulated entity's anti-bribery and anti-corruption procedures. The decision in relation to JLTS also provides concrete guidance to business in general, and in particular the insurance broking industry, on how to implement effective control systems.

Bribery and Corruption Risks in Commercial Insurance Broking

The need for robust anti-bribery procedures should be particularly well-known to the commercial insurance broking industry. In November 2007, the FCA's predecessor, the Financial Services Authority ("FSA"), issued an open letter in which it reminded commercial insurance brokers of the need to "establish and maintain effective systems and controls to counter the risk that they might be used to further financial crime." The FSA stressed that the purpose of such systems and controls included minimizing the risk that a broker "makes, or will make, illicit payments either directly or indirectly to, or on behalf of, third parties."[3]

In January 2009, Aon Limited was fined £5.25 million by the FSA for inadequate internal control systems relating to its use of Introducers between January 2005 and September 2007. Aon's deficient compliance regime was found to have allowed $2.5 million and €3.4 million in suspicious payments to be made to Introducers during the relevant period.[4]

On the back of the Aon fine, in May 2010 the FSA published guidance on reducing the risk of illicit payments or inducements to third parties in commercial insurance broking. The guidance noted that brokers' approaches to higher risk Intermediaries were often too informal and that there was a clear need to reduce the risk of illicit payments or inducements being paid to, or by, Introducers. The guidance made clear to commercial insurance brokers that proactive steps should be taken by firms to address these issues.[5]

Then, in July 2011, the FSA fined Willis Limited nearly £6.9 million for breaching Principle 3 (the same provision as would be at issue in relation to JLTS), as well as rules under the FSA Senior Management Arrangements, Systems and Controls Handbook, also

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2. FCA Final Notice re: JLT Specialty Ltd., note 1, *supra*, at Annex A, s. 2.2.
3. FSA "Dear CEO" Letter (Nov. 22, 2007), http://www.fsa.gov.uk/pubs/ceo/ttp_letter.pdf.
4. *See* FSA Final Notice re: Aon Ltd. (Jan. 6, 2009), http://www.fsa.gov.uk/pubs/final/aon.pdf.
5. *See* FSA, Anti-Bribery and Corruption in Commercial Insurance Broking (May 2010), http://www.fsa.gov.uk/pubs/anti_bribery.pdf.

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in relation to the company's engagement of Introducers.[6] The penalty was, at that time, the largest fine for financial offences ever imposed by the FSA.

Guidance for Companies

Strikingly similar to the fines levied against Aon and Willis, the JLTS fine is also a further example of the broad risks of inadequate oversight of bribery and corruption issues. Taken together, the three decisions contain important lessons for insurance brokers and other businesses that engage Introducers as part of their sales or business development activities.

First, it is clear that the FCA maintains a robust approach to combatting illicit payments and the risk of sanction by the FCA where failings occur is real. In contrast to the Aon and Willis cases, where actual suspicious payments were identified, no such payments were found in the review of JLTS but the mere fact that such payments *could* have occurred was sufficient to merit censure. The FCA adopts a risk based approach to regulatory oversight and regulated firms are expected to maintain systems designed to minimize the risk of illicit payments being made.

Second, businesses should be proactive and outward facing in their approach to compliance. JLTS was not only expected to heed the advice specifically given to it on two separate occasions following FCA inspections, but was also expected to learn the appropriate lessons from the Aon and Willis fines, as well as other materials published by the regulator. Businesses therefore need to keep their compliance procedures and performance under constant review in light of, and drawing appropriate lessons from, the experiences and failings of others. If a company fails to do so, it will result in more severe sanctions being handed down should issues arise, as was the case for JLTS.

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Third, rigorous and meaningful due diligence of Introducers must be performed on an on-going basis; one-off assessments, no matter how thorough, are not enough. A necessary element of a robust compliance program is an assessment of the risk of illicit payments being made for each piece of business procured by an Introducer. This will include a proactive investigation of whether the Introducer is connected to the underlying customer, or to any political office holder. In the case of JLTS, it was deemed insufficient solely to rely on a computer software program to identify relevant connections. Businesses must turn their collective mind to identifying connections and not treat the exercise as a tick-box formality.

Fourth, policies to combat compliance risks should contain meaningful, practical guidance that can be easily followed by those applying them. The efficacy of the policies must be monitored by, as well as reported on to, management who must assess them on a regular basis. Companies must show that their policies are implemented in an effective manner that involves ensuring that staff are given the guidance and training necessary to understand and implement them. At the same time, management must monitor their practical implementation on a rolling basis. Simply putting in place detailed and elaborate policies and procedures is insufficient to discharge a company's regulatory obligations. JLTS is illustrative of these issues: it had internal compliance policies and procedures that, on their face, combatted the bribery and corruption risks associated with the use of Introducers. These policies were, however, poorly implemented and staff were unaware of the extent of compliance required.

Fifth, and finally, firms should consider their internal procedures from the view

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6. *See* FSA Final Notice re: Willis Ltd. (July 21, 2011), http://www.fsa.gov.uk/pubs/final/willis_ltd.pdf.

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of the Bribery Act 2010 as well any other regulatory obligations to which they are subject. JLTS had obtained advice regarding bribery and corruption risks from the perspective of the Bribery Act 2010 but had failed to turn its mind to the FCA's Principles for Businesses, a violation for which it was fined. While consideration of the Bribery Act 2010 is undoubtedly a key element of any robust anti-bribery and corruption compliance framework, it is not a substitute for consideration of wider regulatory requirements.

> "While consideration of the Bribery Act 2010 is undoubtedly a key element of any robust anti-bribery and corruption compliance framework, it is not a substitute for consideration of wider regulatory requirements."

In summary, businesses must take proactive steps to address the risks of bribery and corruption from the perspective of all relevant regulatory bodies. Firms should undertake continuous and robust reviews of their internal control systems, not only where they engage Introducers but in all aspects of their business where regulatory risks arise. Only where companies do this, will they be able to maximize the benefit of engaging Introducers while minimizing the associated compliance risks.

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No More Waiting: India Finally Gets Its Own Independent Ombudsman to Deal with Corruption

India is often rated poorly in corruption perception indexes, particularly in relation to government dealings, with recent corruption and bribery scandals raising questions about India's status as a leading developing economy. It is generally accepted that the principal reasons for the level of corruption and bribery in India include the lack of transparency in dealings with government entities, the slow paced judiciary and, significantly, a lack of any independent mechanism to investigate and try graft cases.

A newly formed political party recently surprised pundits by coming to power in the state of Delhi solely on an anti-corruption agenda. Forced by this upsurge in public opinion, on January 1, 2014, India's Parliament enacted the Lokpal and Lokayuktas Act, 2013[1] (the "Act"), which establishes an independent Lokpal (meaning "protector of the people" in Sanskrit) or anti-corruption ombudsman to investigate and try corrupt government officials at the federal level. The Act also envisages appointment of *Lokayuktas* (meaning "appointed by the people" in Sanskrit) by the states for investigating and trying complaints of corruption at the state level.

For multinational firms operating in India, the passage of this new law will give rise to yet another local authority – in one of the largest markets in the world – for the investigation and prosecution of corruption offenses, providing additional enforcement resources that also could lead to parallel proceedings in the United States, the United Kingdom, or other countries with trans-national anti-bribery regimes. Compliance personnel and in-house legal staff at companies doing or planning to do significant business in India therefore have an acute interest in this legislation, the main features of which are set out below.

Independence – Composition and Appointment of Members

The Lokpal will consist of up to eight members, half of whom shall be from the judiciary.[2] The Lokpal cannot have members from Parliament, the Legislatures of any Indian state or union territory, or Indian local government bodies, or members with any connection to a political party.[3] The chairperson either must be: (a) a present or former chief justice or judge of the Supreme Court of India, or (b) an eminent person of impeccable integrity having special knowledge and expertise of not less than 25 years in matters relating to anti-corruption policy, public administration, vigilance, finance including insurance, banking, law, and management.[4] The other judicial members can be present or former judges of the Supreme Court of India or chief justices of the various High Courts.[5]

The chairperson and members of the Lokpal will be appointed by the President of India on the recommendation of a selection committee consisting of the Prime Minister, the Speaker of the lower house of Parliament, the Leader of the Opposition in the lower house, the Chief Justice of India, and an eminent jurist.[6] Such a diversely constituted appointment panel seeks to ensure that there is no favoritism, bias, or undue influence by the government. However, there is already controversy over the selection of the eminent jurist to the Lokpal, with disagreement over the right candidate between the Prime Minister and the Leader of the Opposition.

Until now, the general practice has been for the courts or the government to refer complaints/matters of corruption to investigative agencies like the Central Bureau of Investigation, which were under the direct control of the government. As a result of the Lokpal's independence, it is expected that the government will have limited ability to influence or interfere in its investigations.

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1. Notified as Act No. 1 of 2014 in the Gazette of India, Extraordinary, Part II, Section 1, dated January 1, 2014, http://www.egazette.nic.in/WriteReadData/2014/157689.pdf.
2. Section 3(2)(b) of the Act.
3. Section 3(4) of the Act.
4. Section 3(2)(a) of the Act.
5. Section 3(3) of the Act.
6. Section 4(1) of the Act.

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Jurisdiction

The Lokpal has been given extremely broad jurisdiction, including over allegations of corruption against the Prime Minister. In particular, the Lokpal has the authority to investigate ministers of the state and central governments, current and former members of Parliament, and various officials of the government, as well as any employee or board member of any company, society, or trust established by an act of Parliament or wholly or partly financed by the central government.[7] This brings all officers and directors of state owned enterprises under the Lokpal's jurisdiction.

Preliminary Inquiry

Upon receipt of a complaint, the Lokpal has the discretion to have its inquiry wing conduct a preliminary inquiry or to refer the matter to a police agency to ascertain whether there is any prima facie case for proceeding in the matter.[8]

Speedy Investigations

The inquiry wing of the Lokpal or any other agency that the Lokpal asks to investigate a matter shall submit its report relating to the preliminary inquiry within 60 days,[9] but in no event later than 90 days.[10] On the basis of this report, if the Lokpal decides to investigate further, it shall direct any agency to carry out additional investigation and submit another report within six months from the date of that order.[11]

Prosecution

Upon examining the preliminary investigation report, the Lokpal has the power to grant approval to initiate prosecution against the alleged wrongdoer or to direct closure of the proceedings, as appropriate.[12]

Powers

The Lokpal has other wide ranging powers, including: supervision of certain investigating agencies;[13] the authority to order search and seizures;[14] powers akin to a civil court, such as issuing summons, discovery and production of documents, requisitioning public records, etc.;[15] the power to provisionally attach assets for a maximum of 90 days;[16] and the authority to recommend the transfer or suspension of a public servant in connection with alleged corruption.[17]

Special Courts

Special courts are to be set up to try cases under the Act. These courts are required to ensure completion of trial within a period of one year from the date of filing the case.[18] This is seen as a major step in expediting the process as going through the regular court system is often time consuming.

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Punishment

Violations of the Act could invite imprisonment of up to seven years, which could increase to up to 10 years for criminal misconduct and habitually abetting corruption.

Penalty for False Complaints

Frivolous and false complaints may be punished criminally with imprisonment of up to one year and a fine of up to INR

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7. Section 14 of the Act.
8. Section 20(1) of the Act.
9. Section 20(2) of the Act.
10. Section 20(4) of the Act.
11. Section 20(5) of the Act.
12. Sections 20(7) and (8) of the Act.
13. Section 25 of the Act.
14. Section 26 of the Act.
15. Section 27 of the Act.
16. Section 29 of the Act.
17. Section 32 of the Act.
18. Section 35 of the Act.

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100,000 (approximately US$ 1,700). Additionally, the public servant who has been targeted by such wrongful complaints may be entitled to receive compensation.[19]

> "Given political sensitivities around this Act, and the strong views of political parties regarding the measure, it remains to be seen how effectively the Act will be implemented and enforced."

Establishment of Lokyuktas

The Act mandates Indian states to set up Lokayuktas within a period of one year to deal with complaints of corruption against state officials.[20] Although the Act broadly envisages the Lokpal at the federal level and the Lokayuktas at the state level, there potentially could be overlap or even conflict in practice, unless more detailed rules ultimately are framed.

Implications and Related Efforts to Fight Graft

While the Lokpal is a revolutionary step to bring greater accountability and transparency in government dealings in India, some have raised concerns that the Lokpal's considerable authority could be used to harass honest government officials. Also, the precise interplay between the Act and other anti-graft laws in India like the Prevention of Corruption Act, 1988 (the "PCA") remain to be seen. It is vital that the government adopts relevant regulations and rules so that there is synchronization and synergy in the enforcement of relevant Indian laws. Further, given political sensitivities around this Act, and the strong views of political parties regarding the measure, it remains to be seen how effectively the Act will be implemented and enforced.

It is also noteworthy that, in order to complete the anti-graft reform process, a bill was introduced in the upper house of Parliament in August 2013 to amend the PCA, India's main anti-graft law. This still-pending bill seeks to bring the PCA in line with other international anti-bribery legislation, including the UK Bribery Act. Additionally, Parliament recently has cleared the Whistle Blowers Protection Bill, 2011, a law that seeks to offer protection to anyone who exposes corruption or willful misuse of discretion causing demonstrable loss to the government or commission of a criminal offense by a public servant. The bill now awaits presidential assent and may turn out to be an effective tool in India's fight against corruption.

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19. Section 46 of the Act.
20. Section 63 of the Act.