

VERY PLEASED TO MEET YOU: MARKET RATES FOR INTRODUCERS IN ASIA PACIFIC

Introducers have got themselves a bad name, particularly in Asia Pacific countries. Prominent and negative references to this type of third-party agent are *de rigueur* in anti-corruption enforcement actions. Yet, their necessary purpose in bringing potential business partners together is acknowledged by permissible inclusion even in the strictest anti-corruption compliance policies, laws, and regulations. The key is to ensure that it is legitimate business opportunities that are being introduced and not opportunities for bribery.

INTRODUCING INTRODUCERS

In Asia Pacific, the value of third parties who make referrals of potential customers or introductions to investment opportunities is well recognised, even though they do not handle actual sales or orders. Introducers can provide contacts, advice, and market research, enabling companies to develop business opportunities on an equal footing with local companies or more established competitors. Accordingly, unlike other practices of questionable validity, such as facilitation payments, introducers are generally permitted in compliance programmes, with some restrictions and caveats.

INTRODUCING RISK

The compliance risk arises because, if not carefully managed, payments to introducers can be used for corrupt purposes, including paying bribes. The term "introducer fees" has arisen in so many anti-bribery cases, that it seems to have taken on "code word" status such as "tea money", "cash desk" and "sons and daughters" hiring programmes.

Recently, the US Securities and Exchange Commission fined a US-based defence contractor for, among other things, its use of an agent who was tasked with increasing its China market. The SEC questioned the legitimacy of the agent's US\$2 million advance against his commission for "office expansion," dismissively stating that the agent had "mainly arranged introductions and meetings".

The agent, who had not provided documentation to support the need for the advance, was paid US\$55 million in commissions from 2009 to 2013, representing between 1.75% and 4% of sales to Chinese airlines. The amount paid was questioned in comparison to the value of the agent's actual services and his lack of background and expertise.

Key issues

- Third-party agents have a valuable role in making connections in unfamiliar markets.
- If handled poorly, organisations risk exposing themselves to accusations of bribery.
- Contractual provisions and ongoing due diligence represent the best way of mitigating the risk.

Similarly, in Australia, continuing payments to a customer's fleet manager by a vehicle leasing company were labelled "introducer fees" in court documents following his arrest. In Singapore, a director of a waterproofing company was sentenced to 30 months' imprisonment for giving corrupt payments to managing agents, contractors and property agents under the guise of referral fees, commissions, or tokens of appreciation. In the UK, insurance broking firms have been fined for failings in their anti-bribery and corruption procedures relating to their use of overseas introducers; charging one firm even where no actual suspicious payments were found.

INTRODUCING GUIDANCE

While failing to accurately record the provision and receipt of introducer fees and hiring introducers who lack relevant professional qualifications are often cited in these cases, harsh references are also made to the amount of fee or commission paid. Yet, there are no specific laws or practical guidelines offered that set out a permissible commission range or methodology.

Chinese authorities have struck down as commercial bribery commissions paid to introducers amounting to between 9% to 16% of the value of introduced transactions, where false accounting was used and the introducers did not have relevant professional qualifications. UK regulators, on the other hand, did not view introducer commissions that amounted to almost 57% of the revenue they generated as excessive, instead focusing on the lack of controls and risk management related to those payments.

Rather than a recommended range, companies are told to consider the reasonableness of the amount in the wider context of (i) the value of the overall introduced transaction, (ii) the percentage taken up by the commission, (iii) whether the amount of the commission is consistent with market practice, and (iv) whether it is proportionate to the services rendered by the introducer/intermediary. The oft-repeated formula - 5% for the first million and decreasing in percentage points per million to 1% for all amounts over US\$4 million - is not applicable to all types of contracts or in all countries.

INTRODUCING AGREEMENTS

Aside from undertaking robust due diligence of the introducer at the onset (and on an ongoing basis), to confirm the introducer's qualifications and to identify any connections to the potential customer, contractual provisions are the best way to mitigate the risk posed by introducers. A written agreement should clearly include the introducer's qualifications and scope of the service, including the nature of the work or transaction contemplated; the type, profile and number of clients/customers/opportunities expected; the methods to be used; and the duration of the service.

The contract should include the calculation methodology (fixed fee upon successful closing, percentage of the value of a contract or continuing payments over the life of the contract based on on-going payments), along with reimbursement for legitimate and documented expenses.

It is critical to include anti-bribery and corruption provisions so that the introducer is clearly aware that they are covered by the company's anti-bribery and corruption policies and that no portion of the fees or commissions may be used for bribes to obtain business advantages on behalf of the company.

Despite the opprobrium heaped on introducers who "step over the line," those who can make introductions legitimately can provide welcome and permissible support in unfamiliar markets.

CONTACTS

Tim Grave
Partner
Clifford Chance

T +61 2 8922 8028
E tim.grave
@cliffordchance.com

Jenni Hill
Partner
Clifford Chance

T +61 8 9262 5582
E jenni.hill
@cliffordchance.com

Nish Shetty
Partner
Clifford Chance

T +65 6410 2285
E nish.shetty
@cliffordchance.com

Kabir Singh
Partner
Clifford Chance

T +65 6410 2273
E kabir.singh
@cliffordchance.com

Wendy Wysong
Foreign Legal
Consultant (Hong Kong)
Partner (Washington,
DC)
Clifford Chance

T +852 2826 3460
+1 202 912 5030
E wendy.wysong
@cliffordchance.com

Ali Burney
Counsel
Clifford Chance

T +65 6506 1964
E ali.burney
@cliffordchance.com

Peter Coney
Counsel
Clifford Chance

T +81 3 6632 6646
E peter.coney
@cliffordchance.com

Janice Goh
Counsel
Cavenagh Law LLP*

T +65 6661 2021
E janice.goh
@cliffordchance.com

Kirsten Scott
Counsel
Clifford Chance

T +61 8 9262 5517
E kirsten.scott
@cliffordchance.com

Lei Shi
Consultant
Clifford Chance

T +852 2826 3547
E lei.shi
@cliffordchance.com

Tess Forge
Senior Associate
Clifford Chance

T +81 3 6632 6406
E tess.forge
@cliffordchance.com

Nicholas Turner
Registered Foreign
Lawyer
Clifford Chance

T +852 2825 8854
E nicholas.turner
@cliffordchance.com

Feifei Yu
Registered Foreign
Lawyer
Clifford Chance

T +852 2825 8091
E feifei.yu
@cliffordchance.com

Lara Gotti
Associate
Clifford Chance

T +61 8 9262 5518
E lara.gotti
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 27th Floor, Jardine House,
One Connaught Place, Hong Kong

© Clifford Chance 2018

Clifford Chance

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Dubai •
Düsseldorf • Frankfurt • Hong Kong • Istanbul •
London • Luxembourg • Madrid • Milan •
Moscow • Munich • Newcastle • New York •
Paris • Perth • Prague • Rome • São Paulo •
Seoul • Shanghai • Singapore • Sydney •
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement
with Abuhimed Alsheikh Alhagbani Law Firm
in Riyadh.

Clifford Chance has a best friends relationship
with Redcliffe Partners in Ukraine.

*Cavenagh Law LLP and Clifford Chance are
registered as a Formal Law Alliance in
Singapore under the name Clifford Chance
Asia.