

Message

From: Stephen Oke [stephen.oke@btinternet.com]
Sent: 06/12/2010 09:39:01
To: David Clark [/O=BSG RESOURCES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Davidc]; 'Kevin McAuliffe' [kevin.mcauliffe@careygroup.gg]; Dag Cramer [dag@bsgms.com]; 'Sandra Merloni' [sandra@onyx-suisse.com]
CC: Sarah Bryce [/O=BSG RESOURCES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Sarah]
Subject: Re: BSGR Meeting 8 December 2010
Attachments: UK Bribery Act_Mining & Metals Nov10.pdf; Bribery and corruption in the mining sector.pdf

Hi David

Many thanks for the board pack. As you are probably aware the new UK bribery act comes into full force from 1 April 2011 and it has taken the US Foreign Corrupt Practices Act and turned it into an art form. Can we please add the attached notes from E&Y regarding the new Bribery Act to the agenda.

Many thanks
Best wishes
Steve

----- Original Message -----

From: "David Clark" <David.Clark@bsgresources.gg>
To: "'Stephen Oke'" <stephen.oke@btinternet.com>; "'Kevin McAuliffe'" <kevin.mcauliffe@careygroup.gg>; "Dag Cramer" <dag@bsgms.com>; "'Sandra Merloni'" <sandra@onyx-suisse.com>
Cc: "Sarah Bryce" <Sarah.Bryce@bsgresources.gg>
Sent: Friday, December 03, 2010 3:08 PM
Subject: BSGR Meeting 8 December 2010

Dear Fellow Directors

I enclose the agenda and papers for our Board meeting next week.

I have not sent out hard copies (due to postal delays) but they will be available at the meeting.

Further update papers will also be available on Wednesday on various new opportunities.

Best regards and looking forward to seeing you all.

Dave

Bribery Act and the mining sector

3 September 2010

Bribery Act and the mining sector – background to the Bribery Act

Introduction

- ▶ The global nature and scale of the mining industry and the complexity of the contractual relationships with governments, venture partners, suppliers and other contractors, makes compliance with new regulation an undertaking that requires considerable management focus.
- ▶ The fact that 20% of all prosecutions since the enactment of the US Foreign Corrupt Practices Act (FCPA)¹ relate to extractive industries should ensure that changes in the UK anti-corruption landscape attract the attention of not only Compliance Officers but of the broader C-Suite across the mining sector.

Development of the Bribery Act

- ▶ Major developments in global bribery and corruption legislation have occurred in recent years. For the UK, this has seen the development and passing into law of the Bribery Act ('the Act'), which is expected to come into force from April 2011. The Act signals a fundamental change in the UK's approach to prosecuting corruption, underlined by a growing number of high-profile actions taken against corporates recently.
- ▶ The introduction of the Act coincides with the emergence of the major markets from the global financial crisis. The recovery in metal prices and other commodities has encouraged mining and metals companies to reactivate capital projects and exploration activities. This increased level of activity, however, is being undertaken with slimmed down controls environments by virtue of the cost reductions of the recent recession.

The Act versus the FCPA

- ▶ The Act goes further than the FCPA in many important aspects. Even businesses that regard themselves as FCPA compliant need to consider its implications. In particular, the Act:
 - ▶ Covers all bribery, whether or not it involves a public official
 - ▶ Is targeted at the bribe payer and the recipient
 - ▶ Has adequate procedures requirements for all business within scope, not just publicly traded entities
 - ▶ Reflects a broader basis for bribery of breach of good faith, impartiality of trust, versus award/retention of business
 - ▶ Does not provide exceptions, e.g., for facilitation payments and/or promotional expenses

¹ TRACE Global Enforcement Report 2010

Bribery Act and the mining sector – background to the Bribery Act (cont'd)

Failure to prevent

It introduces a new corporate offence of failing to prevent bribery: this is based on a broad definition of associated persons of the business and is likely to include anyone performing services for the company, whether employees or third parties, including those performing services for or through intermediaries, joint ventures and subsidiaries. The only defence is that the company had in place adequate procedures designed to prevent persons associated with it from undertaking bribery.

Extra-territorial reach

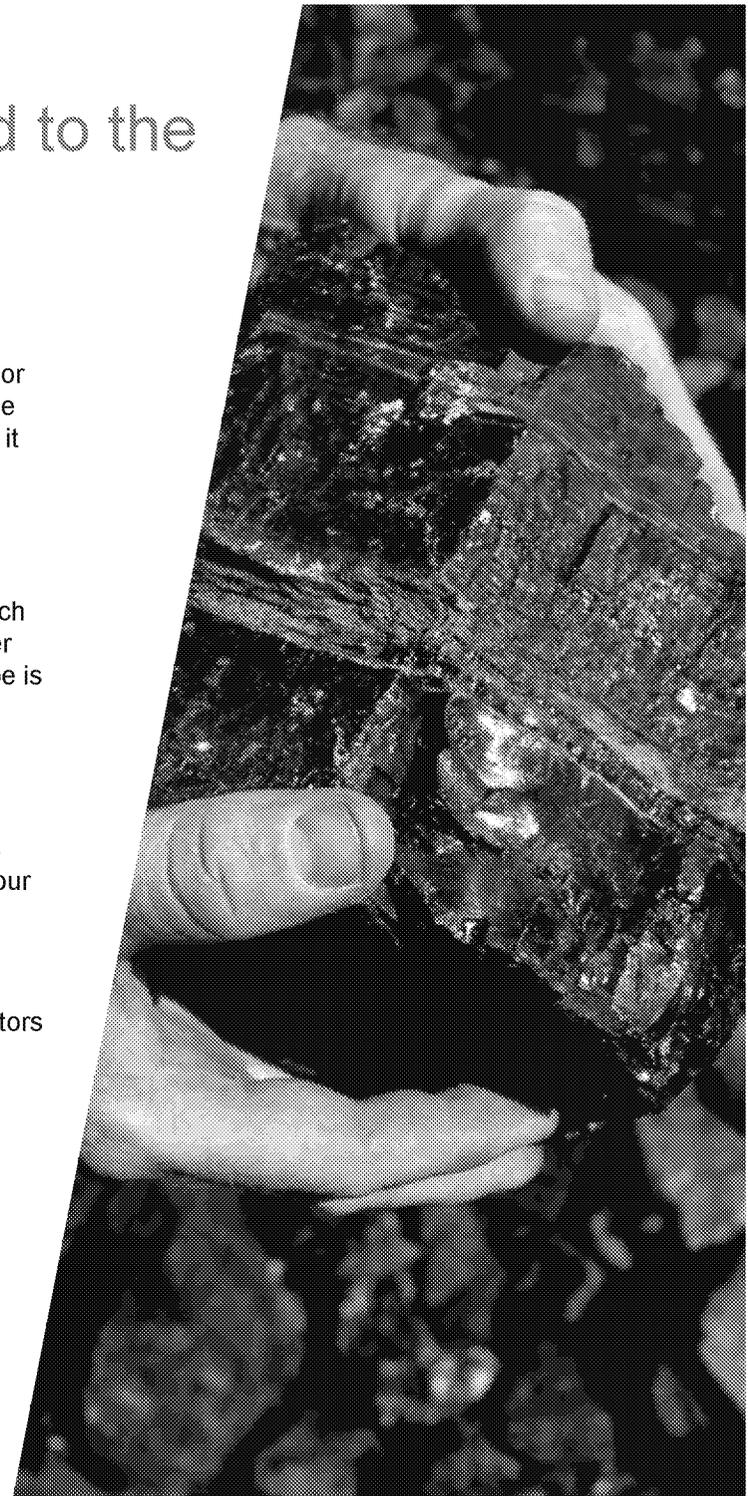
The Act affects not just UK based businesses, including in some circumstances the global operations of UK business, but, potentially, the global operations of a foreign business with a UK presence. The extra-territorial reach of the Act means that a foreign company that carries on a part of its business in the UK could be prosecuted under the Act for failure to prevent bribery even where the bribery takes place outside the UK, and the benefit of the bribe is intended to accrue outside the UK.

Delay to enforcement date

The UK government recently announced that the enforcement date will be delayed six months to April 2011. Our view is that this gives welcome time for business to respond. The government's adequate procedures guidance is unlikely to be different or more detailed than the various guidance already in existence and we are suggesting to our clients that they start taking compliance steps immediately.

Impact for the mining sector

Because of its very nature, the risks of bribery and corruption are prevalent throughout the mining sector, with factors including the high levels of government regulation and participation, and procurement and expenditure in remote locations, including local compensation and contract awards.



Bribery Act and the mining sector – adequate procedures

Adequate procedures

The Act provides an important defence against prosecution for failing to prevent bribery, where business can prove it had adequate procedures in place. The Bribery Act provides that the government must publish guidance about what constitutes adequate procedures, though it seems likely that the guidance will not be prescriptive and the emphasis will be on businesses developing procedures appropriate to their own circumstances.

The below is a non-exhaustive overview of what we consider adequate procedures to include, based on existing guidance and our past experience in the anti-fraud, corruption and governance arena.

Tone at the top

- ▶ The Board should provide a clear statement regarding anti-corruption and be able to demonstrate ownership and responsibility of the issue at Board level.
- ▶ The company should operate a zero tolerance approach to bribery and communicate to its employees, agents, contractors and suppliers that it does so.
- ▶ The Board must be seen to be driving consistent behaviours around a set of values and principles applicable to all, including themselves.

Policies and procedures

- ▶ Introduce or enhance code of ethics, committing to the zero tolerance stance. Policy should make clear the behaviours that are seen as being inappropriate, providing relevant examples.
- ▶ Principles should be applicable regardless of local laws and culture.
- ▶ Policies on: gifts, hospitality, facilitation payments, outside advisors, political contributions, procurement and the supply chain.
- ▶ The enterprise should prohibit the offer or receipt of gifts, hospitality or expenses whenever they could affect or be perceived to affect the outcome of business transactions and are not reasonable and bona fide. Guidelines for hospitality should state when it is appropriate and provide financial limits.
- ▶ Guidelines for how and when to report concerns should also be put in place, e.g., telephone hotlines for reporting suspicious activity, or for employees to use when they are faced with a demand for illegal payments such as bribes and facilitation payments.

Implementation

- ▶ Training should be developed to disseminate anti-corruption policies and culture to all staff at all levels. Where appropriate, agents, contractors and suppliers should also receive training on the anti-corruption programme.
- ▶ The company should provide secure and accessible channels through which employees and others are able, and willing, to raise concerns and report violations in confidence and without risk of reprisal ('whistle blowing').

Bribery Act and the mining sector – adequate procedures (cont'd)

Risk assessment

- ▶ Risk assessments give the company a systematic view of where bribery risks lie and allow the design and implementation of controls accordingly.
- ▶ It is essential that the company consults employees operating in high risk environments about the 'real' as opposed to the perceived risks.
- ▶ The board should be responsible for oversight of the risk assessment process and should require regular reports. The CEO or a senior manager will have responsibility for leading the risk assessment process.

Anti-bribery due diligence

- ▶ Anti-bribery due diligence is the research, investigation, assessment and monitoring that the company should carry out on business relationships to ensure that it is associated with companies and personnel that will behave in a manner consistent with its policies and values.
- ▶ Anti-bribery due diligence procedures should be carried out on contractors, suppliers, agents, joint venture partners, and acquisition targets.
- ▶ Can help to avoid potential liabilities and/or criminal/civil actions that may be brought in relation to pre-deal bribery that would otherwise not have been discovered.

Monitoring and review

- ▶ An effective system of internal controls, particularly over financial systems and record keeping practices, should be developed to counter identified bribery risks.
- ▶ A dedicated compliance function should have responsibilities including the regular review and audit of internal controls, in a manner proportionate to the risks, to provide assurance on their design, implementation and effectiveness. Reviews should be carried out on site.
- ▶ The company, and each reporting location, should maintain available for inspection accurate books and records that properly and fairly document all financial transactions. Companies should not maintain off-the-books accounts.



Bribery Act and the mining sector – adequate procedures (cont'd)

Practical considerations for the mining industry

Culture and values

The communication of the company's stance on bribery is as important as the stance itself. This is particularly relevant for mining companies, where operations are often spread across multiple geographies and staff have different cultures and languages. Adopting a consistent set of values will help to drive consistent behaviours across these natural barriers.

Likewise, a common pitfall of many organisations is the failure to properly engage and inform staff of the policies that do exist. Many corporates spend time and resource on developing sophisticated policies that would be considered to be 'best practice' but then fail in adequately training staff on the policies and embedding the practices that the policies entail within the business.

Procurement

A strong policy on procurement is essential for mining companies due to the large proportion of operating costs and capital project expenditure that procurement makes up.

There is a requirement in many countries that contracts should be awarded to nationals where possible, e.g., for canteen facilities, transport, security etc. This represents an area vulnerable to fraud and corruption, especially through remote employees awarding contracts to themselves, friends or associates. Particular consideration should be given to the extent to which local employees are able to enter into contracts and the relevant approvals that would be needed in such cases.

Public officials

One particular area of concern to the mining sector is the provision of licences. From public officials in many parts of the world where mining companies operate it is common for licences to be required either for the business itself, for permits to work or to operate its machinery. An area of corruption we have commonly seen is in paying 'soft' bribes to secure these licences – flying government officials first class to locations to carry out their work together with their families for extended periods of time, etc., or using agents to secure the licences with little visibility or traceability of how monies paid to them are spent.

Tackling this is not straightforward but leading businesses have put in place hotlines to combat bribes on the spot by requiring employees to call an appointed person or team to discuss the circumstances at the time at which it is happening and, if required, speak to the person asking for the bribe.



Bribery Act and the mining sector – adequate procedures (cont'd)

Facilitation payments

Under the Act, facilitation payments are illegal and companies should prohibit them and work to identify and eliminate them. Policies should include guidance for employees on how to deal with demands for such payments, which in some markets may be seen as the normal way to do business. Policies should include processes for recording and consulting on all such demands that are made. In circumstances where demands are made with personal threats to the employee, e.g., the threat of physical violence, payment should be made to ensure employee safety, but should be reported as soon as possible to senior management.

Identifying risks

Mining and metals companies are increasingly exploring, developing and operating in more remote 'frontier countries' where there is a perceived high risk of corruption. Many of these countries are inherently risky due to their political or socio-economic situation, and also as they often represent new business environments. By explicitly identifying the risks that a company may face and planning mitigation measures, it will be better equipped to secure business ethically and operate in markets where risks of corruption exist.

Controls monitoring

A constant problem for mining companies operating in different countries is what has been described as the cultural divide. In-country employees often operate on the premise that 'this is the way we need to do business here' and, as a consequence, override or modify existing controls to enable the procurement of goods and services to proceed, explaining the need to adapt business operations to the prevailing culture. This in itself creates an opportunity for bribery and corruption. As well as the key messages on culture and values and the zero tolerance to bribery, regular on-site reviews of processes and procedures in operation is essential to understand such overriding/modification of controls and will help eliminate it as far as possible.

Anti-bribery due diligence

Identifying fraud and corruption risk in a potential deal is not an automatic 'deal breaker' and in many cases, particularly in an industry such as mining, it would be likely that some 'red flag' risks would be identified. However, it is always preferable to know as much as you can about exposure prior to closing business deals. Effective due diligence procedures can provide management with information that will assist in, e.g., determining the structure of deals (i.e., shares or asset purchases?), negotiating price, identifying potentially corrupt people in the target, negotiating warranties and assessing post-acquisition exposure.

Contacts

Jonathan Middup	Partner	+44 121 535 2104 jmiddup@uk.ey.com
Steve Caine	Director	+44 20 7951 4433 scaine@uk.ey.com
Rob Sinclair	Assistant Director	+44 121 535 2178 rsinclair2@uk.ey.com

Ernst & Young LLP

Assurance | Tax | Transactions | Advisory

www.ey.com/uk

The UK firm Ernst & Young LLP is a limited liability partnership registered in England and Wales with registered number OC300001 and is a member firm of Ernst & Young Global Limited.

Ernst & Young LLP, 1 More London Place, London SE1 2AF

© Ernst & Young LLP 2010. Published in the UK.
All rights reserved.

Mining and metals

Market alert



Impact of the new UK Bribery Act extends beyond UK operations

The changing UK landscape of anti-bribery enforcement

Since the first prosecution in 2008, UK enforcement of anti-bribery laws has become a reality, and the rate of prosecution appears to be accelerating. The Act should make enforcement easier by removing the technical difficulties caused by the complicated laws it replaces.

The stated approach of the Serious Fraud Office is to require businesses to investigate suspect situations and self-report potential breaches of the Act; failure to do so will be seen as a negative factor increasing the likelihood of criminal prosecution. The new corporate offense of failing to prevent bribery and its imperative that businesses have adequate procedures to manage the risk goes hand-in-hand with this style of enforcement.

Some commentators have described this as the Americanization of UK enforcement. A further aspect of this is the increasing co-operation between national enforcement agencies. This might result in an increase in prosecutions; it might also facilitate global settlements.

The global nature and scale of the mining and metals industry and the complexity of the contractual relationships with governments, venture partners, suppliers and other contractors make compliance with new regulation in this area an undertaking that requires considerable management focus.

The fact that the extractive industries have historically featured significantly in bribery prosecutions (20% of all prosecutions since the enactment of the Foreign Corrupt Practices Act (FCPA)¹ relate to extractive industries²) should ensure that the changes in the UK anti-corruption landscape (see box to the left) should attract the attention of Boards of Directors across the mining and metals sector. Guidance issued in the UK (see below) emphasises the Board level responsibility for this issue.

The UK Bribery Act (the Act), which was passed by Parliament in April 2010 and will take effect in April 2011, is notable for several reasons:

- ▶ It goes further than the FCPA in several important respects: even businesses that regard themselves as FCPA compliant need to consider its implications
- ▶ It is not just another new law but rather an element in a surge of anti-bribery enforcement and a new approach to enforcement in the UK: this affects not just UK-based businesses but, potentially, the global operations of foreign businesses with a UK presence
- ▶ It introduces a new corporate offense, failing to prevent bribery: this includes a broad definition of associated persons of the business
- ▶ It pays close attention to the role of individuals in bribery and in failing to prevent bribery: prison terms of up to 10 years can apply

FCPA and UK Bribery Act compared

FCPA	UK Bribery Act
<ul style="list-style-type: none"> ▶ Concerns foreign bribery of public officials only ▶ Concerns the bribe payer only ▶ Based on business nexus for bribery i.e., award/retention/terms of business ▶ "Adequate procedures" requirements for publicly traded entities only ▶ Explicit exceptions for facilitating payments and reasonable marketing expenses 	<ul style="list-style-type: none"> ▶ Concerns domestic and foreign bribery of public officials and the private sector ▶ Concerns the bribe payer and recipient ▶ Reflects a broader basis for bribery and breach of good faith, impartiality or trust ▶ "Adequate procedures" requirements for all businesses within scope ▶ No exceptions - it will depend on prosecutorial discretion and factual matrix

¹ Foreign Corrupt Practices Act - the US statute of dealing with bribery outside the borders of the US, which is enforced by the Department of Justice and the Securities and Exchange Commission

² *Global Enforcement Report*, TRACE International 2010

Failing to prevent bribery

This new offense is that of failing to prevent bribery committed by a person associated with the business. This broadly parallels the formidable accounting and control requirements of the FCPA.

The offense may be committed by any UK-incorporated business and any business with UK presence with respect to worldwide activities. This is potentially a very broad scope.

The definition of associated person in the Act is broadly drawn and embraces any person or third party who performs services for or on behalf of the business - determined by what they actually do and not the capacity in which they do it. Many third parties are likely to fall under this definition. Again, this should be of concern to the mining and metals sector, which commonly uses numerous business partnering arrangements.

The Act provides an important defense against prosecution where the business can prove it had adequate procedures in place. The Act requires the UK Government to issue guidance on what comprises adequate procedures. This guidance will be published in 2011 after a short consultation period. It seems likely the emphasis will be on businesses developing procedures appropriate to their own circumstances. Some official guidance has already been made available³ and this is summarized in the box below.

Establishing a clear framework for managing the risk of corruption:

- ▶ Clear statement of anti-corruption culture, with responsibility at board level
- ▶ Principles applicable regardless of local laws and culture
- ▶ A compliance function
- ▶ Risk assessment procedures
- ▶ Formalized decision-making
- ▶ Individual accountability

Developing appropriate codes, policies and training:

- ▶ A code of ethics
- ▶ Policies on gifts; hospitality; facilitation payments; outside advisors; political contributions and lobbying
- ▶ Training to disseminate anti-corruption culture to all staff at all levels

Facilitation payments and entertaining

The difficulties businesses have faced with these two areas of corruption risk management will not be made any easier by the differing approaches taken in the FCPA and the Bribery Act.

How can we help

Ernst & Young is well placed to support you addressing the risks associated with bribery and corruption. Companies benefit by minimizing regulatory risk and minimizing the cost of regulatory action. We have delivered the following services regarding these risks to extractive industry businesses globally:

- ▶ **Corruption risk assessments** - including suppliers, distributors, joint venture partners and other third parties
- ▶ **Advice and support in building and improving governance** and reporting mechanisms for ethical risks and anti-corruption programs
- ▶ **Investigation** of suspected unethical activity, bribery or corruption
- ▶ **Independent investigation** in response to regulatory investigation
- ▶ **E-data and discovery tools**, methodologies and analytics in support of investigation, document management and continuous transaction monitoring
- ▶ **Forensic due diligence** during transactions - including adequacy of target's anti-corruption program and investigation of specific suspicions

Implementing controls and monitoring:

- ▶ Financial controls to minimize risk
- ▶ Regular checks and auditing in a proportionate manner

Supply chain management:

- ▶ Commitment to making anti-bribery measures apply to business partners
- ▶ Due diligence over business relationships and projects

Reporting and investigation:

- ▶ A helpline for the reporting of concerns ("whistle-blowing")
- ▶ Proper investigation of all allegations
- ▶ Appropriate and consistent disciplinary procedures

Ernst & Young

Assurance | Tax | Transactions | Advisory

About Ernst & Young

Ernst & Young is a global leader in assurance, tax, transaction and advisory services. Worldwide, our 141,000 people are united by our shared values and an unwavering commitment to quality. We make a difference by helping our people, our clients and our wider communities achieve their potential.

Ernst & Young refers to the global organisation of member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organisation, please visit www.ey.com

Ernst & Young's Global Mining & Metals Centre

With a strong outlook in the sector, the global mining and metals industry is focused on future growth through expanded production, without losing sight of operational efficiency and cost optimisation. The sector is also faced with the increased challenge of changing expectations in the maintenance of its social license to operate and meeting government revenue expectations.

Ernst & Young's Global Mining & Metals Centre brings together a worldwide team of professionals to help you achieve your potential - a team with deep technical experience in providing assurance, tax, transactions and advisory services to the mining and metals sector.

The Centre is where people and ideas come together to help mining and metals companies meet the issues of today and anticipate those of tomorrow. Ultimately it enables us to help you meet your goals and compete more effectively. It's how Ernst & Young makes a difference.

© 2010 EYGM Limited.
All Rights Reserved.
SCORE No. AUNZXXXXXXXXXX

This communication provides general information which is current as at the time of production. The information contained in this communication does not constitute advice and should not be relied on as such. Professional advice should be sought prior to any action being taken in reliance on any of the information. Ernst & Young disclaims all responsibility and liability (including, without limitation, for any direct or indirect or consequential costs, loss or damage or loss of profits) arising from anything done or omitted to be done by any party in reliance, whether wholly or partially, on any of the information. Any party that relies on the information does so at its own risk.

Liability limited by a scheme approved under Professional Standards Legislation.

³ *Approach of the Serious Fraud Office To Dealing With Overseas Corruption*, UK Serious Fraud Office, 21 July 2009; *Anti-corruption compliance: Guidance for assessing whether adequate procedures are in place to combat bribery and corruption*, Ministry of Justice, December 2009; *Ministry of Justice Consultation on guidance about commercial organizations preventing bribery, Section 9 of the Bribery Act 2010*, September 2010.

For further information, please contact:

Paul Fontanot	Partner, Fraud Investigation & Dispute Services	Tel: +61 2 8295 6819
Mike Savage	Partner, Fraud Investigation & Dispute Services	Tel: +1 416 943 2076
John Smart	Partner, Fraud Investigation & Dispute Services	Tel: +44 20 7951 3401