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Briefing note November 2012

Minimising corruption risk from counterparties in the natural resources sector

As regulators and prosecutors around the world increase their efforts to combat corruption and bribery, companies need to monitor the actions of third parties as closely as those of their own employees.

Natural resources companies are used to operating in difficult territories – indeed they often have little choice. This makes them natural targets for regulators and prosecutors who are increasingly looking beyond acts committed in their territory, or even acts committed by companies registered in their jurisdiction. Enforcement of the UK Bribery Act and the US Foreign Corrupt Practices Act (FCPA) reaches far beyond UK and US borders.

Key issues

- Natural resources companies are likely to be subject to far-reaching international anti-bribery laws
- They may be liable for the criminal acts of third parties
- Companies need robust strategies to minimise their counterparty corruption and bribery risks

Corruption investigations and prosecutions can inflict serious damage on a company's profits and reputation. In this briefing, we explain what natural resources companies should be doing to minimise the risks posed by bribery by counterparties.

What laws apply to natural resources companies?

Natural resources companies are of course subject to the anti-bribery legislation of the countries in which they operate. They will also be subject to anti-bribery laws of other countries if conduct forming part of a bribery offence occurs within these jurisdictions.

Additionally, some countries, such as the UK and the US, have anti-bribery laws with very "long reach" that apply to a company even where the conduct in question occurs wholly outside their borders.

The UK Bribery Act's corporate offence of failing to prevent bribery by an "associated person"[1] applies to a company which "carries on a business, or part of a business, in any part of the United Kingdom"[2] and it is not a requirement of the offence that the offending conduct take place in the UK, or that it be committed by a person connected with the UK. Accordingly, natural resources companies which have an office in the UK, or sell into the UK market, may find themselves liable for bribery by their counterparties that occurs wholly outside the UK.

The anti-bribery provisions of the US FCPA apply not only to US companies but also to non-US

companies that are issuers of securities on a US stock exchange, that are required to file SEC reports, that are registered in the US or that cause, directly or through agents, any act in furtherance of a bribe to a foreign official to take place within the US. "In the US" is interpreted broadly and, for example, use of the US financial system (most US dollar payments are cleared through a US correspondent bank) in the commission of a bribe will be sufficient to bring a non-US company within the reach of US prosecutors. Furthermore, the US is now regularly pursuing non-US companies for aiding and abetting US persons and businesses in violating the FCPA for bribery that has occurred wholly outside the US.

Another matter to be aware of with respect to these "long-reach" jurisdictions is the relative likelihood that a company will be liable for the bribery of third parties.

The UK Bribery Act's corporate offence makes a company strictly liable for the bribes of its "associated persons" that are intended to win business or a business advantage for that company. The only defence is that the company had in place adequate procedures to prevent such bribery. Under the FCPA, companies are responsible for bribery committed on its behalf by officers and employees as well as by third parties if an officer or employee (regardless of level) had "knowledge"[3] that the third party would engage in the bribery. Although having policies and procedures in place is not a defence under the FCPA (as under the UK Bribery Act), it is a mitigating factor in determining the sanction to be imposed.

Given the broad reach of the UK Bribery Act and the FCPA, and the relative likelihood that a company could be held responsible for the actions of third parties, it makes sense for natural resources companies to have robust anti-bribery policies and procedures to prevent bribery by third parties that are involved in their business, in addition to policies and procedures for their own officers and employees.

If a natural resources company has exposure to the UK Bribery Act, it needs to ensure that these policies and procedures cover the UK Bribery Act's prohibitions on facilitation payments and private sector bribery (not prohibited by the FCPA).

What should natural resources companies be doing to minimise this risk?

Step 1: Risk assessment

A concept more familiar in the UK Bribery Act context than in an FCPA context, this term indicates a broad information-gathering exercise. A bribery risk assessment seeks to look at all aspects of a company's business worldwide, including the risks that arise as a result of the jurisdictions in which the company operates, the nature of the company's various operations, its business partners, including counterparties, its reliance on government licences or approvals, and the strengths and weaknesses of its own internal policies and procedures.

While the natural resources sector is considered to be high risk, there are other factors which will indicate whether particular aspects of a company's business require additional anti-bribery measures.

A properly executed and documented bribery risk assessment will provide the basis for the company's anti-bribery policies and procedures, since it will identify the risks that such policies and procedures require to address.

Bribery risk assessments should be regularly refreshed and updated. Companies may find it practicable for these purposes to embed this exercise into the company's existing risk assessment processes.

Step 2: Due diligence

Anti-bribery due diligence enables a party to obtain a better understanding of bribery risks associated with a particular counterparty. The results will enable the company to take steps to mitigate such risks. In extreme cases, the results of anti-bribery due diligence will warn the company that it is not safe to proceed. Anti-corruption due diligence should be:

- incorporated into the traditional financial and legal due diligence process;
- proportionate to a company's assessment of the corruption and bribery risks associated with the business; and
- conducted as early as possible to provide for sufficient time to

[1] The UK Bribery Act, which came into effect on 1 July 2011, provides that companies may be liable for the actions of "associated persons" in the context of the corporate offence of failing to prevent bribery. "*Associated persons*" are defined in the UK Bribery Act as persons (individuals or corporate bodies) "*who perform services for or on behalf*" of the company. Employees are presumed to be associated persons of their employer. Other examples of possible associated persons include, but are not limited to, agents, consultants, lobbyists, subsidiaries, franchisees, joint venture partners and members of consortia. Associated persons may be of any nationality.

[2] There is not yet a court decision which interprets the meaning of this phrase but UK prosecutors have indicated they will seek a broad interpretation of it.

[3] A person will be deemed to have knowledge if they are aware of a "high probability" that prohibited conduct will occur or if they demonstrate conscious disregard, wilful blindness or deliberate ignorance of prohibited conduct.

assess the impact of newly discovered risks.

When conducting anti-bribery due diligence on a counterparty, companies should focus on the following:

- whether the counterparty has an existing and current anti-corruption and anti-bribery policy;
- whether there has been any conduct by the counterparty or its directors and employees which may violate anti-bribery laws; and
- the terms of contracts the counterparty has in place with third parties (such as joint venture partners, suppliers or service providers).

More generally, companies should also consider:

- geopolitical factors of the countries to which the counterparty is exposed;
- the industry sector and key markets of the counterparty; and
- the people or parties with whom the counterparty may have to deal.

The outcomes of this due diligence will help the company determine what specific procedures need to be put in place to mitigate identified risks.

Whilst it will not always be possible for a company to discover everything relevant in its anti-bribery due diligence exercise, spending time in crafting carefully considered and focussed questions for the counterparty with respect to business areas where corruption risks might exist, and in analysing the responses, will assist in identifying where the risks lie.

In a mergers and acquisitions context, where acquiring companies may not be able to obtain a complete picture until after completion, it would be prudent to continue with post-completion due diligence to identify and assess risk areas.

Examples of contractual provisions to minimise corruption and bribery risk:

- **Warranties and representations**: that a party's respective directors, officers, employees and agents have not provided or offered, and will not provide or offer, benefits to public officials in order to influence them in their official capacity, or to any person, whether a public official or not, in order to induce or reward them in connection with the improper performance of a relevant function or activity.
- **Internal controls and policies**: requirements that the counterparty maintain necessary internal controls so as to satisfy any anti-bribery representations. This may extend to requiring the counterparty to put in place back-to-back arrangements with its contractors or suppliers requiring them to establish like controls and policies, where there are risks to the company from such contractors or suppliers.
- **Books and records**: counterparties being required to maintain books and records and properly record and report transactions in a manner that accurately and fairly reflects their assets and liabilities according to applicable accounting standards.
- **Notification**: requirements to notify (and keep informed) all parties of any investigations or proceedings in relation to alleged violation of applicable anti-bribery laws.
- **Indemnification**: an indemnity from the counterparty against all loss and damage caused by its breach of applicable anti-bribery laws.
- **Termination of contract**: right to terminate in the event that there is an admission by the counterparty of breaching, or there has been a finding of guilt in relation to a breach of, applicable anti-bribery laws.
- **Applicable laws**: provision for counterparties creating liability for company under laws applicable to the company, even where they do not apply to the counterparty.

Step 3: Risk minimisation in contractual terms: what provisions should a company include in its contracts?

Companies should look to include warranties as to past and representations of future compliance with anti-corruption laws in their contracts. It would be best practice for companies to contractually require counterparties to establish necessary controls, policies and procedures to address corruption and bribery risks. The benefits of including such clauses should be assessed by companies against their assessment of the risk of corrupt acts being committed by counterparties.

Earlier this year the Association of International Petroleum Negotiators updated its Joint Operating Agreement model contract to include similar provisions with respect to anti-corruption and anti-bribery. These amendments indicate increasing awareness in the natural resources sector of "white-collar" issues and the need to expressly recognise various obligations and policies to combat corruption and bribery.

Step 4: Addressing existing contractual arrangements

Whilst it might be difficult to amend contracts that are already in place to include anti-corruption and anti-bribery provisions, companies wishing to demonstrate positive action against bribery and corrupt conduct should consider entering into supplementary agreements or establishing joint anti-corruption and anti-bribery policies or action statements with existing counterparties.

Outside such contractual arrangements, companies should engage and discuss with counterparties their corruption and bribery risks and take steps to combat non-compliant behaviour at all levels of their businesses.

Step 5: Ongoing monitoring

As a company grows so too will its exposure to corruption and bribery risks. In this context, companies should:

- periodically monitor compliance and review their anti-corruption and anti-bribery policies and procedures and their interaction with counterparties;
- update bribery risk assessments when significant commercial events occur, such as the acquisition or development of a new business, or when there are changes in relevant legislation, or enforcement policies;
- review other policies and procedures, such as financial control mechanisms, which may provide supplementary measures to reduce corruption and bribery risks; and

  consider having their policies and procedures reviewed by an independent third party.

Conclusion

Natural resources companies operating in difficult territories need to be aware of the increasing appetite of US and other prosecutors for taking enforcement action even where acts of bribery have occurred outside their territory, or have been committed by agents or other counterparties not themselves subject to their jurisdiction.

Having policies and procedures in place to address the risks from counterparties, including the steps listed in this briefing, in the context of broader anti-corruption compliance policies and compliance training programmes, will assist a company to establish a defence, or mitigating factors, where contractors or agents are alleged to have bribed on the company's behalf.

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