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Foreign bribery update: A harsh lesson for a global miner

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The facts in brief

The United States (US) Securities and Exchange Commission (SEC) has charged the multinational resources company BHP Billiton (BHPB) with violating the US Foreign Corrupt Practices Act 1977 (FCPA) for its conduct in sponsoring the attendance of foreign government officials at the 2008 Beijing Olympic Games (Beijing Olympics).¹

BHPB has agreed to pay a fine of US\$25 million (AUD\$31.8 million) to settle the charges.

The SEC found that BHPB failed to devise and maintain sufficient internal controls over its global hospitality program connected to the company's sponsorship of the Beijing Olympics.

For a one year period, BHPB must report to the SEC on the operation of its FCPA and anti-corruption compliance program.

What can be learnt from this case?

The case highlights aspects of what is required of companies in order to establish and ensure effective

internal controls and compliance measures to prevent (as much as possible) violations of anti-corruption laws. Key learnings pertaining to internal compliance measures, hospitality and training can be gleaned from the case.

Gifts, hospitality, entertainment and travel

A company must have policies in place to ensure that all gifts, hospitality, entertainment, and travel expenses are bona fide. A company should prohibit the offer, giving or receipt of gifts, hospitality or expenses whenever they could influence or reasonably be perceived to influence the outcome of business transactions.

Internal compliance and controls

A 'tick the box' compliance approach of *form over substance* is not enough to comply with the US FCPA or the anti-bribery laws of jurisdictions such as the UK, Canada and Australia. Companies must be able to demonstrate to authorities that they have a robust

compliance system in place, and that the company takes its anti-corruption obligations seriously.

Company policy should require that all gifts, hospitality, entertainment, travel expenses and facilitation payments to foreign government officials be approved at a reasonably senior level (from outside the business unit from which the request is being made), and that legal advice be sought if any doubt arises regarding the legality of such expenditures. There must be an ability to audit compliance with this requirement. For example, use of an electronic approval form will help ensure that management is properly involved in approvals of all gifts, hospitality, entertainment, travel expenses and facilitation payments, and it provides an audit trail. Any electronic approval system should contain controls to prevent personnel from being able to 'side-step' its requirements. However, complex proposals should still require separate assessment and approval as they are likely to go beyond the scope of a standard approval form.

For larger organisations, it is advisable to establish an independent compliance function that reports to the risk and audit committee of the company's board of directors. This function should comprise of a number of senior corporate officers with oversight of the company's ethics and compliance program and an adequate level of autonomy from management and the business lines. They can be responsible for advising on complex proposals, assessing potential violations of company policy and laws, and adopting pertinent actions. Further, companies with multiple business lines may wish to embed an independent anti-corruption manager or an ethics committee within each business segment.

Training

Training on the company's ethics and anti-bribery compliance program, including the approval process required for gifts, hospitality, entertainment, travel expenses and facilitation payments is important for personnel at all levels of a company (including business partners, where appropriate). For personnel working on projects in jurisdictions where corruption risks are high, such as Africa and parts of Asia, a more focussed country-specific training program is required.

Background to the case

BHPB was an official sponsor of the Beijing Olympics. An objective for the sponsorship was *'to reinforce and develop relationships with key stakeholders' in China and in "product and investor markets, and regions where we have or would like to have operations"*.²

One of the company's sponsorship-related initiatives was a global hospitality program under which BHPB invited guests from all around the world, including foreign government officials, to attend the Beijing

Olympics at the company's expense (**Olympic hospitality program**).

BHPB invited 176 government officials and employees of state owned enterprises to attend the Beijing Olympics. Ultimately 60 officials attended (24 of them with their spouses or entourage) primarily from countries in Asia and Africa to enjoy the 3-4 day hospitality packages that included event tickets, luxury hotel accommodation, and sight-seeing excursions valued at \$12,000 to \$16,000 per package. BHPB executives also approved the offer of round trip business class airfares to approximately 51 government officials (as well as for 35 of these government officials' spouses or guests).

Apart from the desire to enhance business opportunities by strengthening relationships with its guests, the trips offered to the foreign officials had no other business purpose.

BHPB's insufficient internal controls

BHPB was aware that the operation of the Olympic hospitality program posed a compliance risk for the company. Inviting foreign government officials to the Olympics on an *'all expenses'* paid package could potentially violate anti-corruption laws and the company's own Guide to Business Conduct. However, BHPB was of the belief that its internal approvals process adequately addressed the risks.

BHPB developed a hospitality application which business managers were required to complete for any individuals, including foreign government officials, they wished to invite to the Beijing Olympics. The application required the employee to provide certain information, which included the following:

- whether any business exists or was expected to develop between the proposed invitee and BHPB;
- whether BHPB was negotiating or considering entering into contracts, licences or seeking access rights with a third party where the proposed invitee was in a position to influence the outcome of the negotiation; and
- whether the employee believed that the offer of proposed hospitality is likely to create the impression of an improper connection between the provision of the hospitality and the company business being negotiated or considered etc.

The applications were to be approved by the president of the relevant business division or the BHPB country president. The SEC concluded that the controls placed on the process did not adequately address the anti-bribery risks associated with offering expensive travel and entertainment packages to government officials.



The SEC identified five key inadequacies with the Olympic hospitality program approval process:

- BHPB did not require independent legal or compliance review of hospitality applications by someone outside the business unit which submitted the application. It did not clearly communicate to staff that the BHPB Ethics Panel was not reviewing and approving each invitation to a foreign government official. This was contrary to information provided on the company's intranet and by email (to business managers). As a consequence, it was the business managers who had sole responsibility for reconciling the competing goals of inviting guests, including officials who would '*maximise BHPB's commercial investment in the Beijing Olympics*' without violating anti-bribery laws.
- Many of the Olympic hospitality program applications were filled out incorrectly or were incomplete.
- BHPB did not provide its staff with specific training on how to fill out the Olympic hospitality program applications, or how to evaluate whether an invitation to a government official complied with its Guide to Business Conduct (**Guide**). The Guide gave examples of hospitality which could fall foul of anti-corruption laws. However, no guidance was given to senior managers on how they should apply the relevant sections of the Guide when determining whether to approve invites and airfares for government official's spouses.
- In completing the applications, personnel were asked whether any business between BHPB and the proposed invitee was '*expected to develop*', however there was no ability to update or reassess the information if conditions changed. For example, if a situation subsequently developed where a government official became involved in negotiations or arrangements involving BHPB's interests.

- Olympic hospitality program applications were submitted by individual business divisions and mainly reflected negotiations between an invited government official and that particular business division. BHPB had no process in place by which to capture whether that invited government official was involved in any interactions with other BHPB business units.

The above noted inadequacies in BHPB's Olympic hospitality program approval process resulted in BHPB inviting a number of foreign government officials who were directly involved with, or in a position to influence, pending negotiations or efforts by BHPB to obtain access rights, or other pending matters.

Cases examined by the SEC

The SEC gave four examples of hospitality offerings to influential government officials from the Congo, Guinea, the Philippines and Burundi.

In the Republic of Burundi case, BHPB's MinEx group submitted (in mid 2007) an Olympic hospitality program application to invite a (yet to be identified) Burundi Minister of Mines and their spouse to the Beijing Olympics, with airfare included. BHPB were not currently involved in any negotiations with the Minister at the time and this was indicated on the completed form. However, BHPB had a joint venture in Burundi with an entity that was in danger of losing a nickel exploration permit unless it made a substantial near-term financial investment in the project or negotiated a renewal or amendment of the permit. A few months after BHPB had identified the Minister of Mines as a desirable invitee, Mr Samuel Ndayiragije was appointed to the vacant mines portfolio.

Under Burundi law, the Minister of Mines was responsible for renewing or amending a mining permit and presenting the application to the country's Council of Ministers for final approval. In late 2007 and early 2008, BHPB began to negotiate directly with the newly appointed Minister of Mines to extend and modify the joint venture's nickel exploration permit. However, the Olympic hospitality program application and the appropriateness of inviting the Minister of Mines were not reassessed in light of this interaction. No reassessment or review was in fact required by the internal controls under which BHPB relied. The Minister of Mines and his wife subsequently attended the Olympics as BHPB's guests for four days.

BHPB's Cooperation and Remedial Efforts

BHPB co-operated significantly with the SEC's investigation by retaining outside counsel to assist it with conducting an extensive internal investigation and by voluntarily producing large volumes of business

and financial material as well as translations of key documents. BHPB counsel also conducted extensive interviews of staff, and provided the SEC with regular reports on the progress of its internal investigations.

BHPB has undertaken a range of remedial efforts which include the following:

- creating a compliance group within its legal department that is independent from the business units. This group is responsible for FCPA compliance and reports directly to the General Counsel and audit committee;
- embedding independent anti-corruption managers into its business units;
- enhancing its procedures regarding hospitality, gift-giving, use of third party agents, business partners and other high risk compliance areas;
- enhancing audit control policy where it operates in high risk markets;
- conducting extensive training on anti-corruption issues and overhauling its processes for conducting internal investigations.

It is likely that BHPB may have faced serious criminal sanctions under the FCPA (relating to bribery) if it had not cooperated with the SEC so extensively and undertaken the said remedial actions.

An investigation by the Australian Federal Police into BHPB's conduct is currently on foot.

¹ BHP Billiton Ltd and BHP Billiton Plc. (Securities and Exchange Commission Administrative Proceeding File No. 3-16546, 20 May 2015).

² BHP Billiton Ltd and BHP Billiton Plc. (Securities and Exchange Commission Administrative Proceeding File No. 3-16546, 20 May 2015), paragraph 10.

³ John Kehoe, How BHP Billiton courted foreign governments, (22 May 2015) *Australian Financial Review*, 36.

*Image source - Official website of the Olympic Movement, Beijing 2008 (accessed 3 June, 2015) <http://www.olympic.org/photos/beijing-2008>

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Update on Mining Safety Legislation

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The *Work Health and Safety (Mines) Act 2013* (NSW) and *Work Health and Safety (Mines) Regulation 2014* (NSW) commenced operation on 1 February 2015, and apply to all mines in New South Wales. The legislation was drafted based on the national model WHS Regulations for mining and the additional tri-State mining provisions agreed by NSW, Queensland and Western Australia. The new legislation replaced the *Coal Mine Health and Safety Act 2002* (NSW), *Coal Mine Health and Safety Regulation 2006* (NSW), *Mine Health and Safety Act 2004* (NSW) and *Mine Health and Safety Regulation 2007* (NSW).

Queensland continues to review the preferred path forward following the issue of a regulatory impact statement and consultation process in 2013. At this time it retains the two regimes under *Coal Mining Safety and Health Act 2002* (NSW) and the *Mining and Quarrying Safety and Health Act 1999* (NSW) and respective regulations.

Western Australia released a decision regulatory impact statement in February 2015 recommending pursuit of a new single Act covering safety in the mining, petroleum and geothermal industries. At present safety obligations can be found across six Acts, although for the mining industry the main legislation remains the *Mines Safety and Inspection Act 1994* (WA).

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