

# IVANHOE MINES

NEW HORIZONS



## Companion Booklet to the Code of Business Conduct and Ethics



## GENERAL

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This companion booklet to the Code of Business Conduct and Ethics (the Code) has been prepared to provide general information about anti-bribery laws in Canada, the United Kingdom, South Africa, the Democratic Republic of Congo, and the United States to all directors, officers, employees and designated/authorized spokespersons of the Company and its subsidiaries, and also to all consultants, contractors, advisors and other persons involved in business with the Company and its subsidiaries who, by virtue of such relationships, have access to material non-public information and who have agreed to comply with the terms of the Code (collectively, Covered Persons).

Violations of Canadian, United Kingdom (U.K.), South African, Democratic Republic of Congo, or United States anti-bribery laws could subject both Ivanhoe Mines Ltd. (the Company) and the relevant individuals to substantial criminal and civil penalties. The Company takes any violation of these laws very seriously and any Covered Person who violates these laws will be subject to disciplinary measures up to and including termination of employment or engagement.

The Code provides information as to persons who may be contacted if Covered Persons have any questions with respect to the content of this companion booklet as well as methods for reporting violations or suspected violations (including confidential reporting).

## 1. CANADA – CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT (the Act)

### BACKGROUND

Within Canada, the federal government seeks to prevent and prohibit potential domestic corruption by a combination of federal statutes, parliamentary rules and administrative provisions. The Criminal Code includes offences that prohibit bribery; frauds on the government and influence peddling; fraud or a breach of trust in connection with duties of office; municipal corruption; selling or purchasing office; influencing or negotiating appointments or dealing in offices; possession of property or proceeds obtained by crime; fraud; laundering proceeds of crime; and secret commissions. Internationally, Canada has actively participated in anti-corruption initiatives in various international forums, including the Organization for Economic Co-operation and Development (OECD), the Organization of American States, the Council of Europe, the United Nations, the Commonwealth and within the G-8.

The Act came into force on February 14, 1999, in response to Canada's obligations under the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention). The Act was designed to simultaneously satisfy the requirements of the Convention and be fully integrated with the requirements of the United States FCPA. The Act has been amended significantly since 1999 in response to developments in Canadian national security law. The most recent amendments to the Act came into force on June 19, 2013 (with the exception of the repeal of the facilitation payment defence, which came into force on October 31, 2017).

## PROVISIONS

### BRIBING A FOREIGN PUBLIC OFFICIAL

#### The offence

The offence of bribing a foreign public official is the centrepiece of the Act and represents Canada's legislative contribution to the international effort to criminalize this conduct.

The offence reads as follows:

Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official:

- a. as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
- b. to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

Some of the specific wording used here deserves more detailed explanation.

#### **every person commits an offence who...**

Until the most recent amendments to the Act came into force, some portion of the activities constituting the offence must have taken place in Canada as there had to be a "real and substantial link" to Canada. The Act, unlike the FCPA and similar legislation in the United Kingdom, did not clearly indicate that Canadian authorities had jurisdiction to prosecute Canadian individuals and businesses in connection with allegedly corrupt activities that took place in foreign countries.

Following the most recent amendments, the Act now allows Canadian authorities to prosecute Canadian businesses, Canadian citizens, and permanent residents present in Canada after they have committed the offence of bribing a foreign public official, without having to provide evidence of a link between Canada and the offence. Thus, the Government of Canada now has jurisdiction over all persons or businesses that have Canadian nationality, regardless of where the bribery has taken place.

Non-Canadian businesses and individuals who take action in furtherance of an offence while in Canada also remain liable to prosecution in Canada under the Act.

#### **in order to obtain or retain an advantage in the course of business...**

The Act prohibits payments made to obtain or retain business or any other advantage in the course of business.

Until the most recent amendments to the Act came into force, the Act targeted the bribery by any person of a foreign public official but only when the transaction was for profit. The most recent amendments ensure that the Act applies to all businesses, charities and not-for-profit organizations. The "advantage" need not be monetary in nature.

**directly or indirectly gives, offers, or agrees to give or offer a loan, reward, advantage or benefit of any kind...**

The offence covers bribes given directly or indirectly, including bribes that were given through a third party (e.g. agents).

**to a foreign public official...**

A foreign public official would include, for example, an elected representative or a government official of a foreign state, as well as an official or agent of a public international organization, such as the United Nations. The definition of "foreign state" makes it clear that the official may work for all levels and subdivisions of government, from national to local, and including state-owned and controlled enterprises

**or to any person for the benefit of a foreign public official...**

This covers the situation where a foreign public official might not receive the benefit himself or herself, but instead direct that the benefit be given to a family member, to a political party association, or to any other person for the benefit of the official. The "benefit" need not necessarily be financial, but must be personal to the official in question (e.g., agreeing to build a new community centre in the home-town of a politician who is up for re-election, during an election campaign, could be said to be a personal "benefit" to that official).

**as consideration for an act or omission by the official in connection with the performance of the official's duties or functions...**

These words address Article 1.1 of the OECD Convention, which requires Member States, which includes Canada, (and other States Party to the Convention) to make it a criminal offence to bribe a foreign public official "in order that the official act or refrain from acting in relation to the performance of official duties."

**or to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.**

These words reflect the sense of Article 1.4.c of the OECD Convention, which indicates that to act or refrain from acting in relation to the performance of official duties "includes any use of the public official's position, whether or not within the official's authorized competence."

## **PENALTIES**

The 14-year maximum term of imprisonment for the offence of bribing a foreign public official ensures that this is an extraditable offence for individuals. Corporations, of course, cannot be subject to imprisonment, but they can be fined. The amount of any fine would be at the discretion of the judge, and there is no maximum. Recent fines have been in the \$10 million range in Canada, for relatively small companies. Moreover, because this is an indictable offence, no limitation period applies to prosecution under the Act. Individuals sentenced to imprisonment under the Act are not eligible to serve them conditionally (i.e., at home, subject to good behaviour), but must serve actual jail time.

## DEFENCES

There are two defences available:

1. The payment was lawful in the foreign state or public international organization for which the foreign public official performs duties or functions.
2. The loan, reward, advantage or benefit was:
  - a reasonable expense;
  - incurred in good faith;
  - made by or on behalf of the foreign public official; and
  - directly related to the promotion, demonstration or explanation of the person's products and services or to the execution or performance of a contract between the person and the foreign State for which the official performs duties or functions.

This defence is virtually identical to a similar defence in the U.S. FCPA.

Unlike the U.S. FCPA, the most recent amendments to the Act in Canada will repeal the exception for so-called "facilitation" (grease) payments. The repeal of this exception will come into force on a date to be determined by the Government of Canada. Thus, while facilitation payments remain a permitted exception under the FCPA, they will be illegal under the Act and already are illegal under similar legislation in the United Kingdom.

**NB:** No Covered Person may make any payment or otherwise take any action relying on one of these affirmative defences without advance review and written approval by executive management of the Company, with appropriate coordination with legal counsel. Sponsored travel, meals, and entertainment involving foreign officials all are areas that present risks under the Act. Any such activity that is approved and does in fact occur must be completely and accurately recorded in the Company's books and records.

## BOOKS AND RECORDS OFFENCE

The most recent amendments to the Act add a new books and records of account offence. This new offence prohibits certain book-keeping practices and types of transactions for the purposes of bribing foreign public officials or hiding such bribery.

The offence reads as follows:

Every person commits an offence who for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery:

- a. Established or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
- b. Makes transactions that are not recorded in those books and records or that are inadequately identified in them;
- c. Records non-existent expenditures in those books and records;
- d. Enters liabilities with incorrect identification of their object in those books and records;
- e. Knowingly uses false documents; or
- f. Intentionally destroys accounting books and records earlier than permitted by law.

## Penalties

The penalties for the books and records offence are the same as those for the offence of bribing a foreign public official.

## Defences

The Act does not provide any statutory defences for the books and records offence.

## 2. UNITED KINGDOM – THE BRIBERY ACT

### BACKGROUND

The U.K. Bribery Act was passed in April 2010 and came into effect on July 1, 2011. It repeals previous statutes in relation to bribery, including the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. The Bribery Act's aim is to modernise and simplify the law on bribery to allow prosecutors and the courts to deal with it more effectively.

Because of its extensive extra-territorial application, many international companies fall within the scope of the FCPA and have policies and procedures in place to ensure they comply with it. The Bribery Act has a similarly broad extra-territorial application and is widely considered to be more far reaching than the FCPA in a number of respects.

One of the most important differences between the FCPA and the Bribery Act is that the Bribery Act covers corruption in a private-to-private commercial context and not just where a public official is involved. The Bribery Act also covers both "active bribery" (that is, the giving of bribes or the "supply-side of bribery") and "passive bribery" (that is, the taking of bribes or the "demand-side of bribery"). The FCPA only covers active bribery involving foreign officials. Finally, the most notable aspect of the Bribery Act is that it makes companies strictly criminally liable for bribes made by its employees or third parties acting for it, even if no one else in the company knew about the bribe.

### PROVISIONS

The Bribery Act broadly prohibits offering, promising, or payment of bribes, directly or indirectly through a third party, to a Government Official or a private commercial party. The Bribery Act also prohibits the request, agreement to receive or receipt of a bribe. The term "Government Official" (including "U.S. Official" and "non-U.S. or Foreign Official") should be given the broadest possible interpretation and includes all officers, employees, or persons acting on behalf of a Government, regardless of rank. The terms include officials at the local, state and federal levels, in addition to government employees, and also include employees of state-owned businesses, political parties and their officials, candidates for political office or a representative or agent of such candidate, or employees of public international organizations.

Specific offences under the Bribery Act include:

An offence of **active bribery**, which prohibits the (direct or indirect) offering, promising or giving of a financial or other advantage to another person as an intentional inducement or reward for performing a function or activity improperly or where the acceptance or receipt of the advantage would itself be improper (and the offender knows or believes this to be the case).



An offence of **passive bribery**, which prohibits (directly or indirectly) requesting, agreeing to receive or accepting a financial or other advantage from another person for performing a function or activity improperly where the request, agreement or acceptance would itself constitute improper performance of the relevant function or activity.

An offence of **bribing a foreign public official**, which prohibits (directly or indirectly) offering, promising or giving a financial or other advantage to a Government Official with the intention of influencing the Government Official in the performance of his or her official functions to obtain or retain business or to obtain an advantage in the conduct of business.

The three offences described above apply to acts or omissions anywhere in the world by British citizens, individuals ordinarily resident in the United Kingdom (which could include, for example, U.S. or Canadian citizens seconded to London) or companies incorporated under English law. These offences also would apply to acts or omissions in the U.K. by any other person.

In addition to individual offences, the Bribery Act also includes a “strict liability” **corporate offence** of failure to prevent bribery. The formulation of this separate offence was intended to address the practical difficulties of prosecuting companies in England for corruption. An offence committed by a company occurs where a person performing services on the company’s behalf pays a bribe intending to obtain or retain business or a business advantage for the company. The **only defence** to the corporate offence is for the company to demonstrate that it had in place adequate procedures designed to prevent such acts of bribery by those performing services on its behalf. The corporate offence may apply to bribes anywhere in the world and irrespective of whether the Company knows about the bribes.

The scope of the phrase, “person performing services on the company’s behalf” is potentially very wide and includes employees and agents, and also may include suppliers, contractors, joint-venture vehicles and partners and even other group companies. It is a question of fact whether a person is “performing services” for a company.

## ADEQUATE PROCEDURES DEFENCE

There is no definition in the Act of what constitutes “adequate procedures”. However, the government has issued some Guidance as to what is meant by this concept. The Guidance is not intended to be prescriptive and simply sets out a number of principles to help an organization determine what procedures are appropriate for it. This flexibility is intended to address the unfairness and impracticality of having “one size fits all” requirements for all sizes and types of business. The Guidance focuses on practical implementation of policies to ensure that ethical compliance is embedded in an organization’s culture and monitored effectively and outlines six core principles which should inform the anti-corruption procedures put in place by a company. These are:

- Proportionate procedures – the procedures should be proportionate to the bribery risks faced by the company and to the nature, scale and complexity of the company’s activities.
- Top level commitment – the senior directors and managers of the company should be committed to preventing bribery by all persons performing services for the company and to fostering a culture within the company in which bribery is never acceptable.
- Risk assessment – the company should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons performing services for it on a regular basis and should document that process.
- Due diligence – the company should apply due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform services for it in order to mitigate identified bribery risks.

- Communication (including training) – the company should seek to ensure that its anti-corruption policies and procedures are embedded and understood throughout the company through internal and external communication, including training that is proportionate to the risks it faces.
- Monitoring and review – the company should monitor and review its anti-corruption procedures and make improvements where necessary.

## PENALTIES

The offences of active and passive bribery and bribing a foreign public official attract a maximum prison sentence of 10 years or unlimited fines. The corporate offence also attracts unlimited fines and could have other consequences for the company including an automatic ban on tendering for public procurement contracts and a recovery or confiscation order under the proceeds of crime legislation.

## 3. SOUTH AFRICA – PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT, 2004 (the PCCA)

### INTRODUCTION

The PCCA codifies the offences of corruption and bribery in South Africa, and aims to provide for the “strengthening of measures to prevent and combat corruption and corrupt activities”. The PCCA came into effect on April 27, 2004.

### GENERAL OFFENCE OF CORRUPTION

The PCCA creates the general offence of corruption which provides that any person who:

- directly or indirectly, accepts or agrees to accept any “gratification” from another person; or
- gives or agrees to give any person any “gratification”,

in order to act personally or by influencing another person so to act in a manner that amounts to the:

- illegal exercise or performance of any powers, duties or functions arising out of any legal obligation;
- abuse of a position of authority or trust; or
- unauthorized or improper inducement to do or not to do anything,

is guilty of the offence of corruption.<sup>1</sup>

The PCCA creates a very broad definition of the term “gratification” which includes the provision of an “advantage of any description” along with a list of specific categories of benefit, including money, whether in cash or otherwise.

<sup>1</sup> Although “unlawfulness” is not expressly mentioned in the definition of the general offence of corruption (or any of the specific offences provided for thereunder) commentators are of the view that it must nevertheless be read into it. Unlawfulness connotes that the act should be unjustified as this is a requirement of every offence. In general, unlawfulness refers to conduct which is “contrary to the good morals or the legal convictions of society”, “is of a nature not sanctioned by society’s perception of what is just or acceptably proper”, and is also referred to as being *contra boni mores*.



## GENERAL PRINCIPLES RELATING TO LIABILITY UNDER THE PCCA

The definitions and offences in the PCCA all are fairly wide and open-ended, but the underlying principle of most offences is that where any person, directly or indirectly, offers any benefit to any other person improperly to influence that person in the performance of his or her duties or functions or improperly to induce that person to do or not do anything, an offence is committed.

The intention of the parties will determine whether the giving and receiving of benefits constitute the crime of corruption. It is a subjective test based on inferential reasoning which takes into account the parties' actions and the surrounding circumstances. Great care must therefore be taken to avoid any suggestion that the giving of a particular gift or benefit was done with an improper motive.

**NB:** It is important to be aware of the fact that, generally speaking, under South African anti-corruption legislation, the issue of whether a particular action constitutes corruption cannot be determined solely by reference to a specific pecuniary threshold. Instead, whether a particular action amounts to corruption is determined with reference to the intention of the parties as well as whether the giving and receiving of gratification was done with an improper motive.

## DUTY TO REPORT

The PCCA imposes a general reporting duty on any person who holds a "position of authority" and who knows or ought reasonably to have known or suspected that any other person has committed an offence under the PCCA (or certain common law offences) involving an amount of R100,000 or more. The PCCA widely defines a "position of authority" to include, among others, *"the manager, secretary or a director of a company"*, *"any person who has been appointed as chief executive officer or an equivalent officer"*, *"any other person who is responsible for the overall management and control of the business of an employer"* and any such person *"who has been appointed in an acting or temporary capacity"*.

A person who fails to comply with their reporting duty under the PCCA is guilty of an offence. Upon conviction, the following penalties may be imposed: (i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine or to imprisonment for a period not exceeding 10 years; or (ii) in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding three years.

## EXTRA-TERRITORIAL APPLICATION OF THE PCCA

The PCCA has extensive extra-territorial application. The PCCA provides that even if the act alleged to constitute an offence under the PCCA occurred outside of the Republic of South Africa, a South African court shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged: (i) is a citizen or ordinarily resident in South Africa; (ii) was arrested in South Africa or in its territorial waters or on board a ship or aircraft registered or required to be registered within South Africa at the time the offence was committed; (iii) is a company, incorporated or registered as such under any law in South Africa; or (iv) any body of persons, corporate or unincorporated in South Africa.

The PCCA provides that any act alleged to constitute an offence under the Act which is committed outside the Republic of South Africa, shall regardless of whether or not the act constitutes an offence at the place of its commission, be deemed to have been committed also in South Africa if that: (i) act affects or is intended to affect a public body, a business or any other person in South Africa; (ii) person is found to be in South Africa; and (iii) person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.

## PENALTIES

The PCCA prescribes heavy penalties in relation to conviction for the offence of corruption. These penalties may include:

- imprisonment up to a period of imprisonment for life; or
- a fine determined by the court, in its discretion (the legislation prescribes no upper limit for such a fine); and
- an additional fine equal to five times the value of the gratification involved in the offence.

## 4. DEMOCRATIC REPUBLIC OF CONGO

### BACKGROUND

The most important anti-corruption and anti-influence peddling (traffic d'influence) legislation in the Democratic Republic of Congo (the DRC) is found in Articles 147 to 150 and Articles 150 E to 150 G of the Congolese Criminal Code, enacted on January 30, 1940 and subsequently amended afterwards. The Criminal Code criminalizes most forms of corruption by and of public officials, which is punishable by up to 15 years' imprisonment, together with a significant fine.

In addition, the DRC adopted the following measures to further bolster the fight against corruption, including notably:

- Decree-Law No. 017-2002, dated October 3, 2002 on the Code of Conduct of public officials (singular: agent public) of the State, aimed at promoting integrity and transparency in the execution of the duties of the State's public officials; and
- Decree No. 17/007, dated August 16, 2017, prohibiting the collection of illegal taxes or intervention or administrative fees at borders or within the whole national territory.
- The DRC is also party to various international treaties aimed at combating corruption.

### PROVISIONS OF THE CRIMINAL CODE

From the point of view of individuals and private entities dealing with Congolese public officials, the following conduct is, in particular, criminalized in terms of the Criminal Code:

- Offering or granting, directly or indirectly, to a public official or any other person sums of money, any valuable asset or any other advantage, such as a donation, a favour, a promise or a profit, whether for himself/herself or any other natural or legal person, in view of the accomplishment or omission of an act in the performance of his/her duties;
- Offering, giving or promising, directly or indirectly, an undue advantage to any person that manages a private-sector organization, or is employed by this organization in any position whatsoever so that this person acts in breach of its duties or refrain from acting;
- Using, concealing or fraudulently disposing of the proceeds or assets obtained as a result of one of the acts mentioned above;
- Using fraud to avoid, or make others avoid, fiscal, customs or administrative obligations;

- Illicit enrichment; and
- Influence peddling, which consists in particular of promising, offering or giving an undue advantage to a public official or any other person in order for this public official or other person to abuse his/her actual or supposed influence, with a view to obtain from a public authority or administration an undue advantage for the initial instigator or for any other person.

For purposes of these prohibitions, a “public official” includes any civil servant or any employee of the State or one of its institutions, including those that have been selected, appointed or elected to undertake activities or perform duties in the name or at the service of the State, at any level of its hierarchy. This definition is very broad, and could include traditional chiefs receiving payments from governments, such as chiefs of chiefdoms and chiefs of groupings in DRC. This definition could also include officials and employees of state-owned entities, although a nuanced distinction must be made between circumstances in which these officials and employees engage in commercial activities and circumstances in which they represent the interests of the State. Members of political parties and politically exposed persons could also be considered as being part of “other persons”.

“Illicit enrichment” is defined as a substantial increase in the assets of a public official or any other person, for which that public official or person cannot provide a reasonable justification with regard to his/her legitimate revenue.

It is clear therefore that DRC legislation criminalizes a broad range of conduct that is internationally accepted to constitute forms of corruption, including dealings with private-sector organizations where persons are unlawfully induced to act contrary to their obligations.

## PENALTIES

The Criminal Code imposes severe penalties upon conviction of corruption and influence peddling, especially in instances where the corruption was aimed at specific outcomes considered to be particularly egregious. These include without limitation:

- Obtaining public contracts in violation of the tendering procedure and the thresholds set out by legislation for private contracting;
- Obtaining, by a private transaction, mining or quarrying rights in violation of the tendering procedure set out by Mining Regulations;
- Obtaining, by a private transaction, forestry concessions in violation of the procedure set out by the Forest Code;
- Breaching the rules of procedure relating to privatisation or State divestiture from public businesses;
- Protecting taxpayers from obligations imposed by tax, parafiscal or customs legislation;
- Facilitating or concealing the laundering of the proceeds of the crime;
- Obtaining tax benefits in violation of the Investments Code;
- Financing the activities of political parties; and
- Acts of corruption committed in the context of a criminal organization.

In the special circumstances listed above, the penalties imposed could include up to 15 years imprisonment and a fine of up to constant CDF 1,000,000 (which is likely to be, in our understanding and subject to DRC Court’s interpretation, between approximately USD 2,307 and 3,055).

In addition to imprisonment and a fine, upon conviction the Court must impose in favour of the State confiscation of the proceeds or the means of the corruption, as well as the received remuneration. The Court may also require the freezing, seizure, confiscation and/or repatriation of the proceeds of corruption.

The person recognized as being guilty of active or passive corruption will also be condemned to:

- A prohibition from the right to vote and to be eligible for public office for a period of up to 10 years after the execution of the penalty;
- A prohibition to access, during the same period, to the civil service and parastatal service and to engage, directly or indirectly, some activities and professions;
- A prohibition from bidding for any public contract for a period of five (05) years;
- A prohibition from benefitting from conditional sentence or release on parole;
- In the case of a foreigner, irrevocable expulsion from the territory of the DRC, after serving the term of imprisonment.

NB: No Covered Person may voluntarily make any payment or otherwise take any action relying on any supposed defences without advance review and written approval by executive management of the Company, with appropriate coordination with legal counsel. Sponsored travel, accommodation, meals, and entertainment involving DRC public officials are all areas that present risks under the Criminal Code. Any such activity that is approved and does in fact occur must be completely and accurately recorded in the Company's books and records.

## 5. UNITED STATES OF AMERICA – FOREIGN CORRUPT PRACTICES ACT (the FCPA)

### INTRODUCTION

U.S. firms and non-U.S. firms with securities listed in the United States that seek to do business in foreign countries must be familiar with the FCPA. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. In addition, other statutes such as the mail and wire fraud statutes, which provide for federal prosecution of violations of state commercial bribery statutes, also may apply to such conduct.

FCPA enforcement is handled by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). The SEC handles civil enforcement against issuers (like our Company) and their directors, officers, employees, and agents. The DOJ has civil enforcement authority with respect to other entities and individuals, and handles all criminal enforcement matters.

### BACKGROUND

As a result of SEC investigations in the mid-1970s, over 400 U.S. companies admitted making questionable or illegal payments in excess of US\$300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Co-operation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost 10 years later, the United States and 33 other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation in 1998.

The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls.

## ANTI-BRIBERY PROVISIONS

### BASIC PROHIBITION

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements that must be met to constitute a violation of the Act:

**A. Persons Subject to FCPA** – The FCPA potentially applies to any individual, firm, officer, director, employee, or agent of an "issuer" or "domestic concern" and any stockholder acting on behalf of such a firm. Individuals and firms also may be penalized if they order, authorize, or assist someone else to violate the anti-bribery provisions or if they conspire to violate those provisions.

An "issuer" is a corporation that has issued securities registered in the United States or that is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the United States, or that is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States. As noted above, our Company is an "issuer" however because it is a Canadian company, it is not a "domestic concern" under the FCPA.

Issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the U.S. mails or other means or instrumentalities of interstate commerce. Such means or instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, U.S. companies and citizens may be held liable for any act in furtherance of a corrupt payment taken outside the United States regardless of any link to U.S. territory. Thus, a U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States. Virtually all wire transfers made in U.S. Dollars will be handled by an international clearinghouse for such transfers that is based in New York City, so almost every U.S. Dollar payment made internationally through conventional banking channels will provide a basis for assertion of U.S. jurisdiction.

An “issuer” is a corporation that has issued securities registered in the United States or that is required to file periodic reports with the SEC. A “domestic concern” is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the United States, or that is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States. As noted above, our Company is an “issuer” however because it is a Canadian company, it is not a “domestic concern” under the FCPA.

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Prior to 1998, foreign companies, with the exception of those who qualified as “issuers,” and foreign nationals were not covered by the FCPA. A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States.

Finally, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves “domestic concerns,” who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

**B. Corrupt intent** – There must be evidence that the person making or authorizing the payment did so with a corrupt intent. The FCPA prohibits any corrupt payment intended to influence any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to obtain any improper advantage, or to induce a foreign official to use his or her influence improperly to affect or influence any act or decision.

**C. Payment** – The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value. The FCPA does not require that a corrupt act succeed in its purpose. The mere offer or promise of a corrupt payment, even without any payment actually being made or received, can constitute a violation of the FCPA. Moreover, the offer may relate to anything of value and not merely to cash. Thus, an illegal offer could involve many non-cash things such as paid vacations or other travel expenses, lavish meals or other entertainment, personal gifts such as jewelry or vehicles, scholarships for secondary school or university educational expenses of family members, provision of desirable and lucrative jobs or internships to family members, gifts to family foundations, and so on.

**D. Recipient** – The prohibition extends only to corrupt payments to a foreign official, a foreign political party or party official, or any candidate for foreign political office. A “foreign official” means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. A member of a royal family and a member of a legislative body each are likely to be viewed as “foreign officials.” In addition, the FCPA definition of “foreign official” includes an employee of any “instrumentality” of a foreign government. The DOJ and the SEC interpret this very broadly, viewing employees of state-owned and state-controlled enterprises as “foreign officials” even if they do not perform traditional government functions.

The FCPA applies to payments to any foreign official, regardless of rank or position. The FCPA focuses on the purpose of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the anti-bribery provision for “facilitating payments for routine governmental action” (see below).

**E. Business Purpose Test** – The FCPA prohibits payments made to assist a company in obtaining or retaining business for or with, or directing business to, any person. The DOJ and the SEC interpret “obtaining or retaining business” very broadly, such that the term encompasses more than the mere award or renewal of a contract -- and would include, for example, avoiding or adjusting income taxes or import duties or evading or changing the results of government health or safety inspections.

### ***THIRD PARTY PAYMENTS***

The FCPA also prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term “knowing” includes conscious disregard and deliberate ignorance. The elements of an offence are essentially the same as described above, except that in this case the “recipient” is the intermediary who is making the payment to the requisite “foreign official.”

Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, companies subject to the FCPA are encouraged to exercise due diligence and to take all necessary precautions to ensure that they are doing business only with reputable and qualified partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the firm should take note of so-called “red flags,” i.e., unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the firm to be in violation of the FCPA; unusually high commissions; lack of transparency in expenses and accounting records; apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered; and whether the joint-venture partner or representative has been recommended by an official of the potential governmental customer.

### ***FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS***

There is an exception in the FCPA to the anti-bribery prohibition for payments to facilitate or expedite performance of a “routine governmental action.” The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

“Routine governmental action” does not include any decision by a foreign official to award new business to or to continue business with, a particular party; nor does it include any decision that involves the exercise of official discretion with respect to regulatory or law enforcement matters.

**NB:** No Covered Person may make what he or she believes is a permissible “facilitating payment” without advance review and written approval by executive management of the Company headquarters personnel, with appropriate coordination with legal counsel, and any such “facilitating payment” that is approved and then made must be completely and accurately recorded in the Company’s books and records.



## **AFFIRMATIVE DEFENCES**

A person charged with a violation of the FCPA's anti-bribery provisions may assert as an affirmative defence that the payment was lawful under the written laws of the relevant foreign country or that the money was spent as part of a legitimate demonstration of a product or service or legitimate performance of a contractual obligation.

**NB:** No Covered Person may make any payment or otherwise take any action relying on one of these affirmative defences without advance review and written approval by personnel at Company headquarters, with appropriate coordination with legal counsel. Sponsored travel, meals, and entertainment involving foreign officials are all areas that present risks under the FCPA. Any such activity that is approved and does in fact occur must be completely and accurately recorded in the Company's books and records.

## **SANCTIONS AGAINST BRIBERY**

### **CRIMINAL**

The following criminal penalties may be imposed for willful violations of the FCPA's anti-bribery provisions. Corporations and other business entities are subject to a fine of up to the greater of (a) US\$2,000,000 per violation, or (b) twice the gain to the violator, or twice the loss to another person, resulting from the improper payment. Individuals are subject to a fine of up to the greater of (a) US\$250,000 per violation or (b) twice the gain to the violator, or twice the loss to another person, and also may be imprisoned for up to five years. Under the FCPA, fines imposed on individuals may not be paid or reimbursed by their employer or principal, so such fines can only be paid by those individuals on their own.

### **CIVIL**

With respect to non-issuers, the DOJ rarely uses its civil penalty authority, and generally pursue only willful FCPA violations as criminal enforcement matters. With respect to issuers and their officers, directors, employees, and agents, the SEC can use its authority under the FCPA to impose a civil penalty of up to US\$21,039 per violation (as of January 1, 2019, subject to future upward adjustment for inflation); but it also can use its broader civil enforcement powers to impose cease-and-desist orders and seek injunctions and disgorgement of profits through court action. (The SEC also could seek additional civil penalties for other violations of securities law that arise from the same conduct as the FCPA violations.)

## **OTHER GOVERNMENTAL ACTION**

A person or firm found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the government.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive U.S. export licences; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Export-Import Bank of the United States, the Overseas Private Investment Corporation and the Agency for International Development provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

## **PRIVATE CAUSE OF ACTION**

Conduct that violates the anti-bribery provisions of the FCPA also may give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

**IVANHOE**MINES