

An aerial photograph of a large-scale mining operation. The image shows a complex network of conveyor belts, heavy machinery, and large piles of dark material, likely coal or ore. The machinery is primarily yellow and orange, contrasting with the dark ground. The overall scene is industrial and shows the scale of modern mining.

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McKenzie.**

**Introduction to
Environmental, Social
and Governance (ESG)
considerations for the
mining sector: reporting
obligations and investor
expectations**

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The metals and mining sector is increasingly exposed to ESG risks, including concerns around emissions, water use, deforestation and community relations!¹ At the same time, ESG reporting obligations, and institutional and other investor interest in what resource companies are doing in this space, are rapidly multiplying across the globe. Alongside these developments, actual and perceived non-compliance with ESG regulations and best practices have engendered activist shareholder protests and class action litigation against the parent companies of global mining groups. This article aims to provide an introduction to the key considerations for miners in this area, as well as exploring certain important recent developments.

What is ESG?

ESG encompasses a broad range of topics, including:

- Environment: climate change, biodiversity, waste, water and resource use, pollution
- Social: human rights, labour practices, safety, health, community, diversity
- Governance: corporate governance, ethics, compliance, executive pay, diversity, lobbying, approach to taxation

What has caused the heightened focus on ESG?

Not only are companies required to be compliant with a growing number of regulations in this area, but also practicing good ESG is increasingly critical from strategic and marketing perspectives. Indeed, various factors can be identified as shifting strategic focus to ESG, including:

- Push factors, such as:
 - compliance with mandatory and/or voluntary reporting and legal obligations relating to ESG procedures and standards; and
- Pull factors, such as:
 - competitive advantages in differentiating from peers and securing investment amidst the rising influence of specialist ESG rating agencies;
 - corporate values, commitments to deliver on ESG elements of corporate strategy, and a drive to operate ethically and promote more responsible mining practices; and
 - technical (including from a health and safety perspective), social, political and reputational risk management by enhancing community engagement.

¹ In its 2019 ESG Sector Risk Atlas, which looks at ESG risks in over 30 diverse sectors, S&P Global Ratings ranked the Metals and Mining Sector as being the sector which is most exposed to ESG risks: https://www.spglobal.com/_media/documents/spglobalratings_esgindustryreportcardmetalsandmining_jun_03_2019-003-.pdf

Compliance and reporting obligations and codes

Key consideration - mandatory obligations

ESG requirements are increasingly evolving from loose guidelines to mandatory country-specific obligations, such as:

ESG - Mandatory obligations Overview

The Bribery Act 2010 (UK)

Provides visibility in the UK on how assets and licences are awarded to extractive companies by incorporating into statute the requirements set out in the OECD Anti-Bribery Convention and the Extractive Industries Transparency Initiative (EITI). While UK legislation in this area is arguably the strictest, similar legislation in other countries includes the Foreign Corrupt Practice Act (FCPA) in the United States of America, the German Criminal Code in Germany and the Prevention and Combating of Corrupt Activities Act, 2004 (PCCAA) in South Africa;

The Companies (Miscellaneous Reporting) Regulations 2018 (UK)

"Very large" UK companies must include a corporate governance statement in the annual directors' report stating either:

- which corporate governance code was applied during the preceding year ("comply"); or
- why no code was applied and what corporate governance arrangements were in place ("explain") that given the increasing public attention from investors, regulators and public opinion more generally and a focus on sustainability, explaining why energy efficiency actions have not been taken is unlikely to be sufficient from an investor perspective).

Another similar example is the JSE Listing Requirements and Code of Corporate Practices and Conduct (the Code) in South Africa (although listed companies *must* comply with the JSE Listing Requirements, in contrast with the "comply or explain" regime in the UK);

The Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 (UK)

Under this regulation the *Streamlined energy and carbon reporting* (SECR) framework is being implemented via amendments to existing regulations (the *Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations*), which currently requires quoted companies to provide certain disclosures on greenhouse gas emissions in their director's reports. Similar legislation includes Mandatory Greenhouse Gas Reporting which is required by law in North America, Australia and Japan as well as many EU member states;

Community Development Agreements (CDAs)

Required by law in some countries (including Australia, China, Nigeria and South Africa), CDAs are contracts between investors and communities through which the benefits of a mining project are shared with communities and other stakeholders. By way of example, in Australia, the Australian Native Title Act requires companies with mining licenses to negotiate and enter into CDAs with Aboriginal communities that have a legal interest in the land as native title holders.

Recommendation - mandatory obligations

We recommend that mining companies consider the mandatory obligations in each jurisdiction in which they operate or have entities incorporated, and prepare a group-wide strategy for complying with the various requirements.

Key consideration - voluntary codes

Many (often overlapping) voluntary codes and principles also exist, which can make it difficult, particularly for smaller companies, to determine exactly which principles to follow. Some examples of these voluntary standards include:

ESG - Voluntary codes	Overview
The Extractive Industries Transparency Initiative (EITI)	This is an international set of Standards which acts as a tool for countries to improve the management of their oil, gas and mining resources;
The Responsible Gold Mining Principles	Intended to recognise and consolidate existing standards and instruments under a single framework, these principles set out clear expectations for consumers, investors and the downstream gold supply chain as to what constitutes responsible gold mining;
The UN Guiding Principles on Business and the Human Rights and UN Guiding Principles Reporting Framework	Among other things, these principles aim to engage extractive companies and help them to understand and manage the impact their activities have on workers and communities located close to their operations;
The EU Emissions Trading Scheme (EU ETS)	Operates on a "cap & trade" basis, so there is a limit set on the total greenhouse gas emissions that participants (mainly power stations and industrial plants) emit. Participants receive tradeable emissions allowances each year to cover their annual emissions. Those exceeding their quota need to top up their allowances, or reduce their emissions;
The International Council on Mining & Metals (ICCM) 10 Sustainable Development Principles	Act as a best-practice framework for sustainable development within the mining and metals industry;
Voluntary Schemes in respect of emissions	There are a number of voluntary schemes, such as the Carbon Trust Standards, the Greenhouse Gas Protocol and CDP (formerly the Carbon Disclosure Project) all aimed at businesses voluntarily disclosing more on their emissions and environmental impact; and
Other ESG reporting standards that a business may adopt voluntarily include those published by:	<ul style="list-style-type: none">• the Task Force on Climate-related Financial Disclosures (TCFD);• the Sustainability Accounting Standards Board (SASB); and• the Global Reporting Initiative (GRI).

Recommendation - voluntary codes

We recommend that mining companies consider the voluntary codes applicable in each sector and jurisdiction in which they operate (or have entities incorporated), and prepare a group-wide strategy for complying with the various requirements. When considering which voluntary codes to subscribe to, it is worth bearing in mind that:

- Certain voluntary codes may become hard obligations in the future, and so may be worth considering now. For example, the EITI principles are being implemented into domestic law in a number of countries;
- Your company may already be complying with certain of the voluntary codes by way of compliance with applicable mandatory codes, in which case it would be possible to sign up to such codes without increasing the overall existing scope of your company's ESG strategy; and
- Different investor groups may be more focused on certain codes than on others - companies may wish to discuss priorities with key investors.

Investor expectations

Key consideration - investors

Investors and lenders are increasingly focussed on ESG factors when making investment decisions, which means that in many cases, in order to access capital, miners will need to demonstrate commitment to ESG concerns. Investors concerned about ESG can obtain information from a number of sources in addition to disclosures made under the regulations and codes discussed above. Many larger investors will have in-house specialists in this area, but there are also indices and ratings agencies (such as FTSE4Good, DJSI, Sustainalytics, MSCI) which rank companies according to their actual or perceived ESG strengths. In addition, a number of institutional investors have publicly committed to taking ESG into account when making investment decisions - for example, the Dutch pension fund ABP has stated that "responsible investment is central to our investment philosophy" and similarly Blackrock has stated that "we have integrated ESG considerations across our investment research, portfolio construction and stewardship processes". Further, Andreas Utermann, CEO of Allianz Global Investors has stated that "a more holistic approach to 'growth' needs to evolve, looking to capture societal and environmental benefits and costs".

Additionally, in certain markets such as the UK, as well as technical, financial and legal due diligence, the increasing influence of ESG rating agencies has resulted in ESG becoming a key focus in relation to larger mining IPOs. Investor roadshows are fast becoming a platform at which investors can ask ESG related questions, including how a company's initiatives align with relevant laws and ESG codes.

In addition to informing how investors deploy their capital in the first place, ESG factors have also led to a rise in shareholder activism, whereby existing investors use their shareholding to seek to influence the relevant company's ESG performance. In the oil and gas industry, groups such as Follow This have been making themselves known at annual general meetings, often diverting attention from other key strategic messages which boards wish to communicate. We anticipate that the mining industry will soon follow as a target.

Key consideration - other key actors

Alongside the increased investor focus on ESG, some lenders are also prescribing particular ESG principles that a company must meet in order to receive funding. This places scrutiny on miners' management plans and how these will assist the company in meeting its key performance indicators (and indeed, the ESG requirements set out by lenders).

Other bodies, including the World Gold Council, are lobbying for insurance providers to become more involved in the ESG movement, in particular by requiring mining companies to uphold ESG principles in order to be eligible for insurance policies.


Recommendation - investors

In our experience, preparing (and in some cases, publishing) a clear and robust ESG strategy will help to assuage investor concerns regarding the mining industry, and to promote continued investment into the same. Such strategy should carefully consider both the mandatory and voluntary codes set out above, as well as your company's specific corporate values and overall strategic priorities.

Conclusion

A drive to meet ESG investment targets should in theory have a positive impact on the mining industry. However, as evidenced by the ongoing Exxon security fraud case in the US, as ESG targets rise, so does accountability. While this case hinges on the price of carbon emissions, climate costs and the forecasting of future policy impacts, it acts as a reminder that with growing pressure for the mining industry to be responsible ESG players, companies need to be both ambitious and realistic about what they can deliver and build an ESG strategy that works for their individual business.

In any case, with various factors pushing and pulling mining companies to be more engaged in ESG, in order to stay competitive in the market mining companies will have to pay more attention to this going forward and ensure that they have a sufficient strategy in place to meet relevant laws, comply with codes and indeed satisfy stakeholders.

An aerial photograph of a massive open-pit mine. The image shows a complex network of conveyor belts, roads, and heavy machinery. A large yellow haul truck is visible in the lower right quadrant, and a smaller white vehicle is nearby. The terrain is rugged and dark, with various structures and equipment scattered throughout the site.

About Baker McKenzie

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