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Sills Egsgard LLP Bulletin

Corporate Social Responsibility: Dealing with the Issues

1. What is Corporate Social Responsibility?

Corporate social responsibility ("CSR") once referred to a company's voluntary philanthropic efforts. It now refers broadly to obligations arising from various impacts a company's operations may have on its stakeholders in the economic, social and environmental spheres, including in the workplace, the marketplace, the supply chain and the community at large. CSR obligations often extend beyond formal corporate structures or contractual relationships that a company may have with its suppliers and other stakeholders.

Evolving CSR standards and norms reflect changing expectations for corporate behaviour, often exceeding the requirements of applicable legislation. Companies that don't meet these expectations may face a range of potentially adverse consequences.

2. What standards should guide corporate CSR efforts?

CSR standards derive from a number of sources including international treaties, voluntary principles, national legislation, and private contractual requirements and practices. The standards may also vary by industry or region in some cases. Companies need to be aware of and take into consideration the standards specifically applicable to their own operations.

Underlying many CSR standards are the concepts established in the UN *Guiding Principles on Business and Human Rights* ("Guiding Principles"). The Guiding Principles require companies to have policy commitments to respect human rights; human rights due diligence processes to identify, prevent, and mitigate adverse human rights impacts; and processes to remediate adverse human rights impacts caused or contributed to, by the company. While CSR standards, including the Guiding Principles, are not themselves binding, they incorporate certain inherently legal principles involving rights and duties and therefore potentially introduce new legal risk for companies with transnational operations.

National laws requiring companies to take CSR principles into account include foreign anti-bribery and corruption laws, which have proliferated in many jurisdictions in recent years. Such laws typically carry with massive penalties and/or possible imprisonment upon conviction. Other domestic laws incorporating CSR principles include so-called "conflict minerals" laws in the U.S. that require companies to conduct extensive due diligence on their supply chains. The EU is considering a similar law. As well, in California, companies of a certain size are required to publish audits respecting ethical supply chain practices, and similar US Federal legislation has also been introduced.

3. Risks of non-compliance with CSR standards:

Non-compliance with CSR standards can lead to the following:

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a. **Reputational Damage:** Decreased market share can result from consumer boycotts when rights abuses become public; this is particularly true in the mining, textile and clothing, consumer goods and telecommunications sectors;

b. **Loss of business opportunities:** Companies without adequate CSR systems may be disqualified from significant contracts with companies or governments that require business partners to meet certain CSR standards. Wal-Mart, for instance, recently terminated one of its major seafood suppliers following reports of poor working conditions at its processing facilities;

c. **Security risks/social unrest:** Failure to ensure compliance with adequate CSR standards can lead to conflict with populations living in the vicinity of a company's foreign operations. Aside from legal risks and actual harm resulting from these types of conflicts, protests and labour strikes stemming from concerns over lack of CSR can be extremely expensive. This can negatively impact a company's "social licence" to operate in that jurisdiction;

d. **Failing to meet financing conditions:** Proof of CSR compliance is increasingly required for various types of financing from banks and institutional investors. An example is the latest revision of the International Finance Corporation's Sustainability Framework to reflect the Guiding Principles, compliance with which is a condition for IFC financing; and

e. **Litigation**: Companies that have not adequately addressed CSR concerns may face increased litigation risk. Courts in a number of common-law jurisdictions have demonstrated an increased willingness to consider parent company responsibility for actions of related companies overseas.

4. Adequate CSR Risk Management and Compliance Strategies

A CSR program should ideally include policy commitments and significant due diligence to identify, prevent, mitigate and account for how a company addresses adverse impacts from its operations. The process should include a review of company operations to assess actual and potential impacts caused, or contributed to by the company through its own operations or business relationships, drawing on relevant expertise and consultations with affected groups. The Guiding Principles also require businesses to cooperate in legitimate processes and to remedy human rights grievances that they have caused or to which they have contributed.

5. Why Involve a Lawyer?

While local counsel and technical specialists play an important part in developing CSR strategies at a mine site, legal counsel at company headquarters also have an important role to play in advising on whether specific measures or policies meet evolving relevant international standards and whether there is significant litigation or other risk for the parent company in other jurisdictions.

Of significant importance, is the fact that information turned up in the due diligence process may be sensitive or highly confidential. The involvement of legal counsel can allow for protection of the information by virtue of the legal privilege arising out of a lawyer-client relationship.

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