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Corporate Social Responsibility Compliance in 2018, and Beyond – An Overview for In-House Legal Counsel

After years of looming on the fringes, 2018 is likely to go down as the year that corporate social responsibility compliance became a core responsibility of in-house legal departments.

The velocity of change has been accelerating and shows no signs of letting up any time soon. Some of the developments in CSR that are driving legal department engagement include: (1) more regulation globally; (2) the mainstreaming of CSR in the investment community, especially around environmental issues; (3) an increasing focus on CSR at the board level; (4) more CSR disclosure and new disclosure frameworks; (5) scrutiny by commercial customers, consumers and other stakeholders; (6) high profile CSR issues in the press; and (7) an increasing willingness by CEOs to engage on social issues.

This Article discusses many of the recent and emerging developments and trends that should be on the radar screen of in-house counsel. It also provides suggestions for legal departments that are building out their CSR compliance function.

Legal Requirements Have Proliferated

Corporate social responsibility has gone from a “nice to have” to a compliance requirement in the last several years. Most regulations have been adopted in the last few years, and these more recent regulations are described below. Regulations broadly (with some overlap) fall into three buckets: (1) disclosure-only, which require companies to discuss whether and how they address a particular issue; (2) those that require companies to put in place compliance programs to address particular CSR issues; and (3) trade-based regulations.

2015

U.S. Federal Acquisition Regulation anti-human trafficking provisions: Prohibits specified human trafficking conduct in connection with U.S. federal contracts and, under certain circumstances, requires a compliance plan to be adopted and certifications to be provided. For more information on the FAR anti-human trafficking provisions, see our Alert [here](#).

U.K. Modern Slavery Act: Requires subject companies to annually prepare a slavery and human trafficking statement that indicates the steps taken to ensure that modern slavery is not occurring in the supply chain or business. See [here](#) for some of our resources on the U.K. Modern Slavery Act.

2016

U.S. Trade Facilitation and Trade Enforcement Act: Repealed the “consumptive demand exception” to the Tariff Act. This exception allowed the importation into the United States of goods made using forced labor.

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Welsh Code of Practice for Ethical Employment in Supply Chains: The goal of the Code – which covers procurement, supplier selection, tendering and contract and supplier management – is to ensure that workers in public sector supply chains are employed ethically and in compliance with both the letter and the spirit of U.K., EU and international laws. Although not binding legislation, the Welsh government has indicated that it expects businesses involved in Welsh public sector supply chains to adhere to the Code.

2017

French Duty of Vigilance Law: Requires subject companies to establish a vigilance plan to allow for the identification and prevention of severe violations of human rights in its business and at certain subcontractors and suppliers.

EU Conflict Minerals Regulation: Requires EU importers of tin, tantalum, tungsten and gold in mineral or metallic form to conduct due diligence and make certain disclosures concerning the 3TG that they import into the European Union. The regulation also creates a voluntary reporting mechanism for downstream companies to encourage them to responsibly source 3TG. See [here](#) and [here](#) for some of our Alerts on the EU Conflict Minerals Regulation.

U.S. Countering America's Adversaries Through Sanctions Act: Creates a presumption that goods, wares, articles and merchandise mined, produced or manufactured wholly or in part by the labor of North Korean nationals or citizens, wherever located, is forced labor. As a result, under the Tariff Act, the goods will be denied U.S. entry absent clear and convincing evidence that they were not produced using forced labor. For our Alert on the CAATSA, see [here](#).

... And New Disclosures and More Regulation Are on the Horizon

Australia. During 2018, Australia is expected to propose modern slavery legislation that is modeled on the U.K. Modern Slavery Act. For more information on the proposed Australian modern slavery legislation, see our Alert [here](#).

China. There is speculation that in 2018 China will introduce mandatory conflict minerals legislation that builds on the U.S. Conflict Minerals Rule, which has been in effect for more than four years, and the more recently adopted EU Conflict Minerals Regulation. In 2015, the China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters published voluntary conflict minerals guidance.

European Union. The EU Non-Financial Reporting Directive will require an estimated 6,000 subject companies to disclose material information relating to environmental matters, social and employee matters, respect for human rights, anti-corruption and bribery matters and diversity. The first disclosures will be required to be made in 2018.

Hong Kong. A member of Hong Kong's Legislative Council has sent a draft modern slavery bill to the Hong Kong Chief Executive for his consideration. The draft bill includes reporting provisions similar to those contained in the U.K. Modern Slavery Act. The threshold for reporting is not specified in the bill. At present, adoption of the draft bill is considered unlikely, and, in any event, is not imminent. However, it underscores the momentum that is building for mandatory modern slavery reporting in additional jurisdictions.

The Netherlands. In 2017, the Dutch Parliament adopted legislation that would require companies that sell or provide goods or services to consumers based in the Netherlands to engage in due diligence to mitigate the risk of child labor in their supply chains. The legislation is awaiting adoption by the Senate.

Switzerland. The Responsible Business Initiative, a coalition of Swiss civil society organizations, is seeking to amend the Swiss constitution to create a binding framework to protect human rights and the environment abroad. As proposed, the constitution would be amended to require companies that have their registered office, central

administration or principal place of business in Switzerland and their controlled companies to, among other things, carry out appropriate due diligence to identify impacts on human rights and the environment and take measures to prevent violations of human rights and environmental standards and account for the actions taken. Subject companies would be liable for damage caused by companies under their control where they have, in the course of business, committed violations of recognized human rights or environmental standards, unless they can show that they exercised due care.

Last year, the Swiss Federal Council recommended against the RBI's proposed constitutional amendment and the Council of States has issued a counterproposal. A constitutional amendment is required to be voted on and approved by Swiss voters. The earliest that a proposal is expected to be voted on is late 2018.

United Kingdom. U.K. employers with 250 or more employees are required to annually publish gender pay gap information on their websites. The Gender Pay Gap Information Regulations require subject companies to publish their first statements by early April 2018.

United States. U.S. public companies are required to comply with the pay ratio rule beginning this year. Covered registrants will be required to disclose in their 2018 proxy statements the median of the annual total compensation of all employees and the ratio of the median to the CEO's annual total compensation. Ropes & Gray client alerts on the pay ratio rule are available [here](#), [here](#), [here](#), and [here](#).

During June 2016, the Securities and Exchange Commission adopted a resource extraction issuer disclosure rule, as required by the Dodd-Frank Act. The rule required U.S. public companies to annually report on payments made to foreign governments and the U.S. federal government relating to the commercial development of oil, natural gas and minerals. Shortly after President Trump took office, the rule was disapproved pursuant to the Congressional Review Act, which allows a rule to be disapproved by Congress within a specified number of days after it receives the rule from the promulgating federal agency. However, the Dodd-Frank requirement to adopt a resource extraction issuer disclosure rule is still on the books, and the SEC has indicated that it is working on a new proposed rule. For more information on the Resource Extraction Issuer Disclosure Rule as adopted, see our Alerts [here](#) and [here](#).

Although Selective and Sporadic, Enforcement of CSR Regulations Is Increasing

A common refrain heard from companies is that they do not need to pay much attention to CSR regulations because they are not enforced. To date, this has largely been the case. However, we are starting to see a change, especially with respect to trade-based regulations where enforcement is aligned with policy goals.

Since the repeal in 2016 of the consumptive demand exception to the Tariff Act, U.S. Customs and Border Protection has issued several Withhold Release Orders involving a diverse range of products produced in China using forced labor. In addition, last November, CBP requested information from a significant number of U.S. importers concerning their efforts to ensure that their supply chains are free from forced labor generally, including child and convict labor, and North Korean labor specifically. Among other things, CBP requested information on companies' diligence findings, corrective actions and suppliers. For further information on these inquiries, see our Alert [here](#).

Enforcement of disclosure-based CSR regulations has been more limited and the penalties for non-compliance are not as severe. In 2015, the California Department of Justice conducted a compliance review of disclosures under the California Transparency in Supply Chains Act. In connection with the review, letters were sent to a significant number of retail sellers and manufacturers that were believed to potentially be non-compliant.

In the United Kingdom, the Independent Anti-Slavery Commissioner has sent letters to over 1,000 companies encouraging improvements in reporting. Most recently, the IASC sent letters to 25 FTSE 100 companies that were identified in a report by the Business & Human Rights Resource Centre as non-compliant with basic requirements of

the U.K. Modern Slavery Act and which had not corrected their omissions by December 2017. The letters encouraged the companies to take improved efforts in the coming year. At some point, the United Kingdom is likely to conduct a compliance sweep similar to that undertaken by California.

In addition, public statements pursuant to CSR disclosure regulations that are boilerplate in nature may increase shareholder proposal risk for U.S. public companies. Shareholder proposals are discussed in more detail later in this Article.

Mainstream Investor Focus on ESG Is Increasing

Corporate social responsibility has historically been a focus primarily of niche investors and a handful of large public pension funds. In the years to come, 2018 is likely to be viewed as the tipping point when corporate social responsibility definitively became a mainstream investor consideration. (Note that, in this section and the next, we generally use the terms “ESG” or “E&S,” rather than CSR, since those terms are more commonly used in the investment community.)

Asset owners are increasingly expecting the managers with whom they invest – across a large number of asset classes – to take ESG factors and risks into account, and mainstream managers are increasingly viewing a focus on ESG as integral to the exercise of their fiduciary duties. Over the last few years, there has been a growing body of research asserting that companies that are strong on ESG factors have stronger financial performance over time and/or exhibit less financial risk. In addition, as discussed further below, the rise of index funds, which now represent more than 30% of global fund AUM according to Nasdaq, is changing how large asset managers view corporate engagement.

Underscoring these trends, Principles for Responsible Investment, an investor initiative in partnership with the UNEP Finance Initiative and the UN Global Compact, now has approximately 1,700 signatories. These signatories, which are mostly asset managers and asset owners, have more than \$60 trillion of AUM, compared to \$22 trillion of AUM in 2010. More than 400 PRI members are based in North America, dispelling the notion that ESG is just a “European thing.”

And asset managers are doing more than just signing on to aspirational responsible investment principles. Over the last couple of years, there has been a significant increase in managers adopting ESG guidelines and procedures for their investment professionals. There also has been an increase in demand for ESG tools and data to assist in evaluating companies on ESG metrics. For example, in 2017, PRI released an ESG due diligence checklist for hedge funds that was developed in conjunction with the asset management industry. This year, ISS has introduced a new E&S scoring methodology, which is discussed further below.

Further illustrating the mainstreaming of E&S, on January 6, Jana Partners and CalSTRS sent an open letter to Apple requesting it to offer parents more choices and tools to help them ensure that young consumers are using Apple’s products in an optimal manner, to enhance long-term value for all shareholders. Initial steps suggested in the open letter included convening a committee of experts, partnering with experts on research and making information resources available to assist additional research efforts, enhancing mobile device software, educational initiatives and periodic public reporting on this issue.

BlackRock’s 2018 Letter to CEOs

Thus far this year, BlackRock’s letter to CEOs has been one of the most widely reported on CSR developments. In his January 16 letter to CEOs, Larry Fink focused on evolving societal expectations of companies and the relationship between those expectations and long-term value creation. As the world’s largest asset manager, with more than \$6 trillion in assets under management, when BlackRock speaks, public companies need to take notice.

In the letter, Fink noted that society is demanding that companies serve a social purpose. Tying this to corporate sustainability, he expressed the view that, “[t]o prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.” A paragraph later, tying CSR to financial performance, he expressed the view that, without a social purpose, a company cannot achieve its full potential, will succumb to short-term pressures and ultimately provide subpar returns to longer-term investors.

Fink noted that the increasing use of index funds is driving a transformation of BlackRock’s fiduciary responsibility and the wider landscape of corporate governance. In managing index funds, it cannot express disapproval of a company by selling its stock as long as the company remains in the index, requiring it to invest the time and resources necessary to foster long-term value. To meet this responsibility, Fink’s letter noted that BlackRock intends to double the size of its investment stewardship team over the next three years. According to media reports, this would take the team to more than 60 people.

In his letter, Fink also discussed board involvement in and public articulation of long-term strategy, including around ESG. Fink noted that “[a] company’s ability to manage environmental, social, and governance matters demonstrates the leadership and good governance that is so essential to sustainable growth, which is why we are increasingly integrating these issues into our investment process.”

ISS’ New Environmental & Social QualityScore

On February 5, ISS announced the launch of its Environmental & Social QualityScore. E&S QualityScore measures the quality of corporate disclosures on environmental and social issues, including sustainability governance, and identifies key disclosure omissions. The launch covered an initial set of 1,500 companies across industries viewed as being the most exposed to environmental and social risks, including energy, materials, capital goods, transportation, automobiles and components, and consumer durables and apparel. An additional 3,500 companies spanning 18 industries will be added later in 2018.

E&S QualityScore incorporates more than 380 environmental and social factors, at least 240 of which apply to each industry group. A score is provided for each company that measures environmental and social governance disclosure risk, both overall and within eight broad categories. Broad topic areas under the E&S QualityScore methodology for environmental disclosures include Management of Environmental Risks and Opportunities, Carbon and Climate, Natural Resources and Waste and Toxicity. Social topic areas include Human Rights, Labor, Health, and Safety, Stakeholder and Society and Product Safety, Quality and Brand.

Stock Exchange Guidance and Requirements

Stock exchanges continue to introduce ESG reporting guidance and requirements. Over time, these will impact ESG reporting norms globally. Thus far, 20 of the 69 stock exchanges that are members of the Sustainable Stock Exchanges Initiative or the World Federation of Exchanges have published ESG guidance. Another 12 have committed to do so.

For example, in late 2015, the Hong Kong Stock Exchange introduced more robust ESG guidance for listed companies. The guidance consists of both mandatory “comply or explain” provisions and recommended disclosures. Portions of the Exchange’s guidance took effect beginning with fiscal years commencing on or after January 1, 2016. The upgrading of environmental key performance indicators from recommended to “comply or explain” is effective for fiscal years commencing on or after January 1, 2017.

During February 2017, the London Stock Exchange published recommendations for ESG reporting for listed issuers. The guidance has been sent to more than 2,700 companies with securities listed on the LSE's U.K. and Italian markets with a combined market capitalization of more than £5 trillion. The LSE's guidance builds on the report of the Financial Stability Board's Task Force on Climate-related Financial Disclosures and the United Nations' Sustainability Development Goals, both of which are discussed later in this Article.

For further information on this topic, we recommend our webinar, "The Sustainable Stock Exchanges Initiative - An Overview for Issuers and Investors," available [here](#).

Continue to Expect a Significant Number of Environmental and Social Shareholder Proposals

Last year's proxy season saw a record number of E&S proposals submitted, approximately 500 in total, although many were settled and withdrawn. There have been a significant number of E&S proposals this year as well.

Historical investor deference to company recommendations on E&S proposals is eroding where there is perceived to be a correlation between the subject matter of the proposal and financial performance. Last year, support from BlackRock, Fidelity, State Street and Vanguard resulted in 2 degrees Celsius proposals receiving majority support at ExxonMobil, Occidental Petroleum and PPL. These proposals requested that the companies publish reports assessing the long-term portfolio impacts of scenarios, including policies and technological advantages, to address climate change, including scenarios consistent with the Paris Agreement objective to limit global average temperature rise this century to below 2 degrees Celsius above pre-industrial levels. Even those climate change proposals that did not pass received on average substantially more support than in prior years.

Board diversity is another area where large asset managers are starting to break with companies. In 2017, board diversity proposals at Cognex and Hudson Pacific Properties received majority support. The proposal at Cognex requested that the company adopt a policy for improving board diversity requiring that the initial list of candidates from which new management-supported directors are chosen include qualified women and minority candidates. The Hudson Pacific Properties proposal requested that the board prepare a report on steps that the company is taking to foster greater board diversity.

Passage of the vast majority of E&S proposals continues to remain unlikely. However, when measured by whether they focus corporate attention on a particular issue and prod voluntary compliance, they are much more successful. For example, political spending disclosure has significantly increased over the last several years, even without majority support for these proposals.

This year has seen a significant number of climate change proposals, including proposals requesting companies to report on the impact of and strategies to address climate change, to set and report on carbon reduction targets and seeking action on renewable energy and recycling/waste reduction. According to *As You Sow's Proxy Preview 2018*, which was released last week, as of mid-February, 83 climate change proposals have been submitted for the 2018 proxy season.

Looking beyond climate change, as in prior years, E&S proposals this year have run the gamut, from broad-based to niche industry- and company-specific proposals, and have been submitted by a large number of proponents. In addition to climate change, other issues of broad applicability that have seen a significant number of shareholder proposals include board diversity, gender pay disparity and political contributions and lobbying.

Each year sees a new twist in E&S proposals, and 2018 is no different. For example, this year, a resolution on prison labor in supply chains already has come up for a vote, at Costco. The resolution called on Costco to adopt a policy committing the company to survey all suppliers to identify sources of prison labor in its supply chain, develop and

apply additional criteria or guidelines for suppliers regarding the use of prison labor and report to shareholders on its progress in implementing the policy. The resolution received support from less than 5% of the votes cast.

Other Shareholder Engagement. Formal proposals are only part of shareholder engagement on E&S matters. There has been a significant increase in one-on-one engagement between companies and investors around E&S issues outside of the shareholder proposal process. Most engagement still is due to inbound inquiries from investors. However, many companies are becoming proactive in their E&S outreach to investors and other stakeholders. This practice is likely to accelerate due to increasing investor focus on E&S issues.

The SEC's Recent Shareholder Proposal Guidance

In November 2017, the SEC's Division of Corporation Finance issued a Staff Legal Bulletin on shareholder proposals that provided guidance on the application of the "ordinary business" exception and the scope of the "economic relevance" exception. Both of these exceptions, when met, allow companies to exclude shareholder proposals from proxy statements. For a more detailed discussion of the Staff Legal Bulletin, see our Alert [here](#).

In the Staff Legal Bulletin, the SEC acknowledged that the exceptions require judgment calls that are, in the first instance, matters that the board of directors is generally in a better position to determine and encouraged companies to submit, as part of their no-action request to exclude the proposal, the board's analysis of the subject matter of the proposal. Some commentators predicted that the Staff Legal Bulletin would allow boards to run roughshod over the shareholder proposal process, enabling companies to exclude most E&S proposals. That prediction has, however, not come to pass.

Apple was the first company to seek to use the new guidance on the ordinary business exception, in response to a shareholder proposal requesting that Apple include in its proxy statement a proposal that it establish a human rights committee to review, assess, disclose and make recommendations to enhance its policy and practice on human rights. The proponent has made similar proposals at other companies. With respect to the Apple proposal, the proponent expressed concern about whether Apple's operations in China sufficiently promote human rights by offering products designed to help internet users evade censorship by the Chinese government. Apple's no-action request to exclude the proposal under the ordinary business exception was denied by the SEC staff.

The first post-SLB no-action letter was issued under the economic relevance exception in late February. In that instance, the SEC staff issued a favorable no-action response to Dunkin' Brands Group, allowing it to exclude a shareholder proposal requesting that its board issue a report assessing the environmental impacts of continuing to use K-Cup Pods brand packaging. For a more detailed discussion of that no-action request, see our Alert [here](#). (Ropes & Gray assisted Dunkin' Brands in the preparation of its no-action request.)

The Quantity and Quality of CSR Disclosure Is Increasing, and There Is Movement Toward Greater Comparability

CSR disclosures are being driven by internal and external forces beyond just regulation and shareholder proposals (both of which are discussed above). Many companies are enhancing their disclosures to boost or at least maintain brand equity and to help them remain competitive in the labor market. Other external pressures to enhance CSR disclosures include one-on-one engagement, open letters and "name and shame" campaigns, public guidelines and expectations documents, multi-stakeholder initiatives and rankings and other reports.

In particular, pressure is increasing on companies to get more granular in their disclosures relating to risk assessments and strategies for addressing risk, and to provide relevant quantitative information. Pressure also is increasing for more consistent disclosures that allow investors, lenders, insurers and other stakeholders to better assess risk. For example, in BlackRock's 2018 proxy voting guidelines published in February, it indicated that it

expects companies to identify and report on their material, business-specific environmental and social risks and opportunities and explain how these are managed. The explanation should make clear how the approach taken by the company best serves the interests of shareholders and protects and enhances the long-term economic value of the company. In addition, key performance indicators in relation to environmental and social matters should be disclosed and performance against the KPIs discussed, along with any peer group benchmarking and verification processes in place. Any global standards adopted also should be disclosed and discussed.

As CSR disclosures – both mandatory and voluntary – increase across many non-U.S. jurisdictions, larger companies should benchmark their disclosures against global peers and evolving global standards. Over time, enhancements in foreign disclosure practices are likely to drive disclosures by many U.S. companies.

Climate Change Disclosures

Not surprisingly, there is significant momentum behind enhancing climate change disclosures. According to a 2017 survey by KPMG, a majority of companies do not acknowledge climate change as a financial risk in their annual reports and, of those that do, very few quantify or model that risk using scenario analysis or other methodologies. And, according to a December 2017 report by The Conference Board, only 16% of the Standard & Poor's Global 1200 publicly disclose climate change risks.

In 2017, BlackRock, State Street and Vanguard all had something to say on this topic. In its December 2017 open letter to approximately 120 energy, transportation and industrial companies, BlackRock urged them to improve their disclosure relating to material climate risk inherent in their business operations. In August 2017, State Street published guidance on climate change disclosure focused on companies in the oil and gas, utilities and mining sectors. Earlier in 2017, State Street provided high level guidance on communicating the influence of sustainability factors on strategy. In its 2017 Investment Stewardship Annual Report, Vanguard indicated that it will be focusing on companies' public disclosures concerning climate risk and board and management oversight of that risk. It also indicated that it will be evaluating disclosures against both leading peers and evolving market standards.

Many other investors are of course also focused on climate change, including related disclosures, and have expressed views that are consistent with those of BlackRock, State Street and Vanguard. In addition, asset owners and managers are collaborating on climate change through multi-stakeholder initiatives, such as the U.S.-based Ceres Investor Network on Climate Risk and Sustainability and the London-based Institutional Investors Group on Climate Change. And new initiatives continue to be formed. For example, during December 2017, more than 250 investors and partner organizations with more than \$30 trillion in assets under management launched Climate Action 100+, a five-year initiative to engage with large corporate greenhouse gas emitters to act on climate change. As part of the initiative, supporting investors will engage with target companies to improve climate change governance and strengthen climate-related financial disclosures. The first 100 companies targeted for engagement come largely from the oil and gas, electric power and transportation sectors. Additional companies that are considered by investors to be potentially exposed to climate-related financial risks are expected to be added to the focus list in 2018.

The TCFD Recommendations. During June 2017, the Financial Stability Board's Task Force on Climate-related Financial Disclosures released its final recommendations. The Task Force's objective is to encourage companies to evaluate and disclose, as part of their financial filing preparation and reporting processes, the material climate-related risks and opportunities pertinent to their business activities. This is intended to help investors and other financial market participants, such as lenders and insurance underwriters, to assess and price climate-related risks and opportunities. The TCFD's high level recommendations for all sectors center around four elements: (1) governance; (2) strategy; (3) risk management; and (4) metrics and targets. The TCFD recommendations also include supplemental guidance for the financial sector (banks, insurance companies, asset owners and asset managers) and non-financial groups (energy, transportation, materials and buildings and agriculture, food and forest products),

including suggested metrics. Although the TCFD's recommendations are voluntary, more than 240 institutional investors and corporates have thus far expressed support for the TCFD.

Emerging Broad-based Disclosure Standards and Guidance

The SASB Standards. Like the TCFD, the Sustainability Accounting Standards Board seeks to improve the effectiveness of public company reports filed with the SEC with standardized sustainability disclosure. Its standards, which are complementary with the TCFD recommendations, are more granular and go beyond climate-related factors.

The SASB framework covers approximately 30 different sustainability activities organized under five pillars: (1) environment; (2) human capital; (3) social capital; (4) business model and innovation; and (5) leadership and governance. The SASB has developed standards for 79 industries that identify material sustainability factors that are likely to impact financial performance. The standards for 72 of the 79 industries provide guidance on metrics and targets.

The SASB released its draft standards during October 2017. The public comment period on the draft standards ended on January 31, 2018. The final standards are expected to be released in mid-2018.

Please see [here](#) to view our webinar "An Overview of the SASB Sustainability Disclosure Standards for Issuers and Investors."

The GRI Standards. The GRI Standards provide a voluntary framework for reporting on economic, environmental and social impacts to a wide variety of global stakeholders, ranging from civil society to investors. They can be used for comprehensive sustainability reporting or more narrowly for issue-specific disclosures.

The Standards came out in 2016. They take a modular approach, consisting of three universal standards – Foundation (101), General Disclosures (102) and Management Approach (103) – and 33 topic-specific standards organized into Economic (200), Environmental (300) and Social (400) topics.

The GRI Standards update in a new structure and format the widely used G4 Sustainability Reporting Guidelines. The Standards are required to be used instead of the G4 Guidelines for reports and other materials published on or after July 1, 2018. However, early adoption of the GRI Standards has been encouraged and many companies already have migrated to the Standards.

UN Sustainable Development Goals. The Sustainable Development Goals were adopted by the UN member states in late 2015. They include 17 economic, social and environmental goals with 169 associated targets. Many companies already are indicating support for the SDGs in their sustainability reports, although incorporation of the SDGs into CSR programs and related reporting are in the early stages. Multi-stakeholder efforts, such as that launched by the GRI and the UN Global Compact, are underway to harmonize corporate reporting on the SDGs.

Board Engagement Is Increasing

For all of the reasons discussed in this Article, there is more discussion of CSR at the board level. Boards are increasingly talking about CSR as part of their discussion of business strategy and risk management. There also is more event-driven board engagement around CSR. For example, at many companies, recent events such as the Parkland, Florida school shooting and changes in U.S. immigration policy have been discussed at the board level prior to companies making public statements and taking actions in response to these events. Additionally, there is more of a focus on CSR in audit and risk committees.

Furthermore, larger asset managers expect boards to be involved with material CSR issues. For example, in its 2018 proxy voting guidelines for U.S. securities, BlackRock indicates that, for companies in sectors that are significantly exposed to climate-related risk, it expects the whole board to have demonstrable fluency in how climate risk affects the business, and how management approaches adapting to and mitigating that risk.

Expect More Benefit Corporations

With the increasing focus on CSR, the time may finally have arrived for benefit corporations.

Thirty-four states have now adopted benefit corporation legislation. Under the Delaware statute, a public benefit corporation is a for-profit corporation that is intended to produce a public benefit and to operate in a responsible and sustainable manner. To that end, a public benefit corporation is managed in a manner that balances stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct and the public benefits identified in its certificate of incorporation.

Laureate Education became the first public benefit corporation to go public, during February 2017. It redomiciled as a Delaware public benefit corporation in October 2015.

There also are now more than 2,000 privately held companies that are Certified B Corporations. Certifications are provided by B Lab, a not-for-profit organization. To become a Certified B Corporation, a company must satisfy certain social and environmental performance, public transparency and legal accountability requirements. It also must convert to a benefit corporation within a specified time frame if its jurisdiction of incorporation has benefit corporation legislation. Privately held Certified B Corporations include Patagonia, as well as subsidiaries of Campbell Soup Co. (Plum Organics), Danone (Happy Family Brands) and Unilever (Ben & Jerry's and Seventh Generation).

But the benefit corporation progression has not been linear. When Etsy went public in 2015, it was a Certified B Corporation. The company ultimately decided to let its certification lapse. And, some commentators have expressed concern that publicly traded companies organized as benefit corporations may face increased shareholder litigation risk. Although it is likely that there will over time be more benefit corporations and Certified B Corporations that are publicly traded, expect growth to be incremental rather exponential. Growth will however likely continue to be robust on the private side.

CSR-focused Litigation and Investigations Have Been on the Uptick and Will Continue to Increase

Over the last few years, there has been a significant increase in CSR-related litigation and investigations. Activity has increased not only in the United States at the federal, state and local level, but also in several other countries. Proceedings and investigations have involved many different statutes and theories of liability. Some of the more significant recent developments are summarized below.

In addition, globally, the focus on access to remedy for human rights abuses is increasing. For example, access to remedy was the central theme of the United Nations Forum on Business and Human Rights held in Geneva in November 2017.

Climate Change Investigations and Litigation. Energy companies have been targeted by states attorneys general in Massachusetts and New York, which are seeking information concerning whether consumers and/or investors may have been misled with respect to the impact of fossil fuels on climate change and climate change-driven business risks. More recently, in mid-January, New York City filed suit against five oil companies, seeking damages for alleged contributions to global warming.

During July 2017, three coastal California communities sued 37 oil, natural gas and coal companies for damages arising out of rising sea levels brought on by climate change that threaten to flood portions of the communities. For further details, see our Alert [here](#). This lawsuit was followed by lawsuits filed by San Francisco and Oakland in September 2017 against five producers of fossil fuels.

Litigation has not been limited to energy companies. In August 2017, Commonwealth Bank of Australia was sued by shareholders alleging that it did not adequately disclose the risk that climate change could pose to its financial stability.

Claims and Investigations Based on CSR Disclosures. Companies are increasingly being targeted for alleged inaccuracies in their public CSR disclosures. For example, class action lawsuits have been filed in California under state consumer protection laws in connection with alleged false and misleading statements in statements published under the California Transparency in Supply Chains Act. The CTSCA itself has no private right of action. These lawsuits illustrate how plaintiffs are seeking to tie mandatory CSR disclosures to other statutes and theories of liability.

Lawsuits have not been limited to the CTSCA and other mandatory CSR disclosures. They have involved voluntary CSR disclosures as well. Most recently, last month, two NGOs filed a lawsuit in France against a foreign global electronics company alleging misleading advertising practices. The plaintiffs are alleging that the ethical commitments published by the company are not consistent with its labor practices.

Inaccuracies in CSR disclosures do not only create litigation risk. Across several jurisdictions, companies also are receiving questions about CSR claims and other disclosures from regulators with increasing frequency.

This is an area where many companies could reduce their litigation and enforcement risk through better preventive compliance on the front end.

Other Civil Claims. During October 2017, the U.S. Supreme Court heard oral arguments in *Jesner vs. Arab Bank*. In that case, the Court has been asked to decide whether there can be corporate liability for violations of the Alien Tort Statute. The Alien Tort Statute provides U.S. federal district courts with original jurisdiction of civil actions by aliens for torts committed in violation of the law of nations, which has been interpreted to include certain human rights violations. A decision is expected in 2018.

During October, a lawsuit was filed in the United States against several drug and medical device companies on behalf of veterans who were killed or wounded in Iraq and their family members. The lawsuit was filed under the U.S. federal Anti-terrorism Act. The plaintiffs are alleging that they were attacked by a terrorist group funded in part by payments made by the defendants to the Iraqi Ministry of Health and other sales practices engaged in by the defendants. The plaintiffs have alleged that, at the time, the Iraqi MOH was under the control of a Shiite terrorist group.

In many jurisdictions, corporate civil liability for extraterritorial human rights abuses remains an open question and continues to evolve. Courts in both the United Kingdom and Canada have recently allowed suits to proceed against parent entities in those jurisdictions arising out of actions by subsidiaries in other parts of the world.

Criminal Cases. During December 2017, former executives of a large French company were indicted for alleged complicity in human rights violations in Syria. The charges arose out of payments allegedly made by a supplier of a subsidiary to ISIS to ensure that a Syrian plant could continue to operate. Also in France, in November, NGOs filed a criminal complaint with French prosecutors in connection with the sale by a French company of surveillance technology to Egypt, requesting that prosecutors launch a criminal investigation. The NGOs are alleging complicity in various human rights abuses.

Canadian Responsible Enterprise Ombudsperson. On January 17, Canada announced the establishment of an independent Canadian Ombudsperson for Responsible Enterprise (CORE). The CORE is mandated to investigate allegations of human rights abuses linked to Canadian corporate activity abroad. The Ombudsperson has a broader mandate than the Extractive Sector Corporate Social Responsibility Counsellor that it replaces. The CORE is empowered to start its own investigations, compel evidence, mediate disputes, make recommendations to the government for further action and monitor the implementation of remedies and recommendations. The Ombudsperson's initial focus is the extractives (oil, gas and mining) and garment industries, although its jurisdiction is expected to be expanded to other sectors within a year.

Managing CSR Compliance – What Should the Proactive Legal Department Be Doing Now?

The involvement of in-house legal departments in CSR matters has been increasing due to the factors discussed in this Article. However, most legal departments still are playing catch-up.

We frequently are asked by legal departments “Where should we start?” or “What should we be doing now?” We offer below some suggestions on approach for legal departments that still are wading into CSR compliance. Although these suggestions are geared toward legal departments, they broadly apply to any corporate function with an evolving role in CSR.

Define the Role of the Legal Department in CSR

As a threshold matter, the legal department should, in conjunction with other relevant internal stakeholders, seek to define its role in the company's CSR program. To date, the legal department's involvement in CSR at many companies largely has been ad hoc, usually in response to a particular business unit's request, regulation or crisis situation.

In connection with defining its role in CSR, if the legal department has not already done so, it should familiarize itself with the CSR risks and opportunities specific to the company and internal and external stakeholder expectations around CSR. It also should take inventory of current, pending and proposed CSR regulations facing the company, its CSR disclosures and commitments and relevant policies and procedures. In addition, the legal department should become familiar with internal coverage and expertise around CSR matters. Given the rapid evolution in regulation, disclosure and new substantive CSR issues, we often see gaps in coverage and expertise around CSR compliance.

At many companies, there are specific areas of CSR for which the legal department should have primary or shared responsibility. And, in any event, legal should be an active member of the core CSR team or working group, so that it can be proactive on relevant CSR matters.

Designate a CSR Point Person

Once the legal department's role in the CSR program has been defined, a member of the department should be assigned overall responsibility for CSR matters in which the department is involved. At many companies, CSR compliance currently is dispersed throughout the legal department based on the particular issue, business unit or geography, often with limited coordination. This frequently results in inefficiency, which increases compliance costs, and inconsistencies in approach and gaps in coverage, which may increase risk.

The goal should be for a designated member of the legal department to, over time, become its CSR subject matter expert. In a smaller department, he or she may directly handle all CSR matters that touch the legal department. In a larger department, he or she may act in a coordinating role for lawyers in different legal disciplines, business units and geographies, manage legal's involvement in more significant CSR matters, sit on internal CSR steering committees and interface on CSR matters with other departments.

Help Define the Scope of the CSR Compliance Program

CSR compliance programs at many companies suffer from a lack of clarity and common purpose. There is no single term used when describing this subject area. In addition, the terms used mean different things to different people.

In this Article, the term “corporate social responsibility” generally is used, since it encapsulates most of the topics discussed and is probably most familiar to readers. Many companies use that term, but some instead refer to “ESG” or “E&S.” Alternatively, companies are increasingly discussing “sustainability,” which has moved beyond just referring to environmental matters. Other companies talk about “business and human rights” or “responsible business.” Although there is significant overlap among all of these terms, they are not synonymous. Adding complexity, company personnel often use different terms than their colleagues. And, even when personnel use the same terminology, there often is not agreement as to what it means. The legal department can be helpful in focusing and guiding discussions around compliance nomenclature and its meaning and ensuring that compliance is tailored to how the company thinks about this subject area, whatever it is called and however it is defined, as well as the company’s risk profile.

Many companies also are grappling with how to determine the materiality and salience of particular CSR issues, the ramifications of those determinations and how to integrate materiality and salience into compliance. Legal departments are increasingly part of that dialogue as well.

Develop a CSR Compliance Action Plan

Once the framework for managing CSR compliance has been established, the legal department should develop near-, mid- and longer-term CSR compliance goals. Beyond the customary day-to-day blocking and tackling, some of the other areas of CSR compliance that we see legal departments proactively helping to address with increasing frequency include: (1) monitoring proposed CSR regulations and assessing their impact on the company; (2) following developments in voluntary third-party standards, guidance and initiatives; (3) board engagement; (4) assessing the adequacy and consistency of compliance policies and procedures, to address both existing and emerging CSR considerations; (5) developing an integrated CSR disclosure strategy; (6) benchmarking CSR policies, procedures and disclosures against peers, competitors, NGO and other third-party guidance and criteria of data analytics providers; and (7) anticipating new CSR risks.

About Our Supply Chain Compliance and Corporate Social Responsibility Practice

Ropes & Gray has a leading Supply Chain Compliance and Corporate Social Responsibility (business and human rights) practice. With team members in the United States, Europe and Asia, we are able to take a holistic, global approach to supply chain compliance and CSR. Senior members of the practice have advised on these matters for almost 30 years, enabling us to provide a long-term perspective that few firms can match.

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