

Legislative Environment Makes Compliance Crucial for Corporate Social Responsibility Programs

Gwendolyn W. Jaramillo

One of the challenges of working in the field of corporate social responsibility (CSR) is that there are such varied ideas of what the term means. Some view CSR as an umbrella term for philanthropic endeavors, others as a guideline for legal risk management, and others as a public relations exercise. Whatever else CSR may be, it is a powerful tool for change both within a corporation and in its operating environment. However, leveraging the potential of CSR for maximum impact within an organization requires a thoughtful and thorough approach to implementation.

Why is CSR, and a comprehensive implementation approach, important in the oil and gas industry? The global impact of energy industry participants today is extraordinary, and the perception of their impact may be even more so. There is even a web tool at Revenue-Watch.org¹ that allows one to compare the annual revenues of the oil majors with the GDP of the major oil-producing countries. Not surprisingly, in the majority of cases, the annual revenues outstrip countries' gross domestic product by a wide margin.

These statistics are relevant to thinking about CSR because they underscore the global economic impact of multinational companies. Perceived asymmetry of bargaining power establishes a challenging political context facing today's business leaders as they seek to operate

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Concerns regarding such inequalities, combined with questions regarding the social and environmental impact of globalization, make multinationals subject to continual scrutiny from civil society, shareholders, and home and host governments. Pressure from these stakeholders holds members of the energy industry to higher and broader social standards than in the past. Industry participants are judged not only on the basis of their own behavior, but also on the basis of the behavior of those with whom they associate—including host governments, partners, and contractors. Moreover, companies are no longer viewed as simply accountable under local law, but also with respect to international normative standards and best industry practices.

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Multinationals that have failed to respond effectively and timely to these developments have faced an array of lawsuits as well as reputational damage through protests, boycotts, attacks on

Gwendolyn W. Jaramillo (gjaramillo@foleyhoag.com) is counsel in the law firm of Foley Hoag LLP.

corporate property, divestment campaigns, hostile shareholder resolutions, and the enactment of targeted sanctions laws. In an effort to respond to these concerns and pressures of operating in environments in which human rights and the rule of law are not always respected, extractive industry members have undertaken social risk management assessments and adopted programs and policies that reflect support for international norms. Such programs are of course now known as CSR, and focus on a wide range of issues, including human rights, worker rights, health and safety issues, security arrangements, community engagement, ethical conduct, good governance, and rule of law.

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Many early CSR initiatives were premised on the avoidance of negative drivers. The concept of CSR has evolved over time, though, and today there is increasing momentum to embrace CSR for positive, forward-leaning reasons. Such considerations include brand image and safeguarding brand equity; customer loyalty; positive impact on financial performance; the growth of socially responsible investment funds; good community relations; and enhanced employee recruitment and retention.

CSR EVOLUTION

In 2012 we find ourselves in the midst of a continuing proliferation of voluntary codes of conduct and multistakeholder initiatives, as well as increasingly serious efforts by home and host governments to impose regulatory requirements that are designed to bolster awareness of and support for human rights, labor rights, and the environment by multinationals in their global operations.

A few of the many voluntary initiatives or standards to which many industry suppliers, customers, home or host governments, or joint venture partners may belong to or support include the following:

- The Universal Declaration of Human Rights,

- UN Global Compact,
- Extractive Industries Transparency Initiative,
- The Voluntary Principles on Security and Human Rights,
- International Labor Organization Declaration on Fundamental Rights at Work, and
- International Finance Corporation Performance Standards.

In addition, numerous state and federal legislative efforts have been either enacted or proposed with the goal of increasing accountability and transparency of multinationals, including in the extractive industry, with respect to operations in challenging geographies. These include the following:

- *Dodd-Frank Conflict Minerals Reporting Requirement*. Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act² requires companies that use tin, tungsten, tantalum, and gold to conduct and disclose due diligence on their supply chains in order to identify whether those minerals originated in the Democratic Republic of Congo (DRC) or adjoining countries. If an issuer either determines that its conflict minerals originated in the DRC countries or cannot conclude that the conflict minerals did not originate in the DRC countries, the issuer will be required to disclose this information in its annual report. The issuer must then furnish a Conflict Minerals Report as an exhibit to the annual report, and must disclose the Internet address at which this exhibit is available. As of this writing, issuers are still awaiting a final rule on implementation of this provision from the Securities and Exchange Commission (SEC).
- *Dodd-Frank Transparency (Cardin-Lugar) Amendment*. Section 1504 of the Dodd-Frank Act³ requires reporting of payments made by extractive industry participants to host governments. Issuers that engage in the commercial development of oil, natural gas, or minerals must report the type and total amount of payments made for each project and the type and total amounts of payments made to each government. These payments cover report taxes, royalties, fees (including license fees), production entitlements, and

bonuses. After issuance of a proposed rule in December 2010 and a great number of industry, nongovernmental organization, and stakeholder comments, the SEC was due to issue a final rule in April 2011. The proposed rule has been controversial with industry, in particular, due to the proposed requirement that companies provide disaggregated payment information, and the final rule is still forthcoming.

- *California Transparency in Supply Chains Act.*⁴ This legislation, which went into effect on January 1, 2012, requires companies to disclose their efforts to ensure that their supply chains are free from slavery and human trafficking. It applies to retail sellers and manufacturers doing business in California that have annual gross receipts exceeding \$100 million. Companies are required to disclose on their websites what actions they are taking, if any, to evaluate, address, and mitigate the risks of human trafficking and slavery in their product supply chains, on a number of specific criteria.
- *Business Transparency on Trafficking and Slavery Act.*⁵ This was introduced in the House of Representatives in August 2011 and modeled after the California Transparency in Supply Chains Act. The bill would require companies to disclose efforts to identify and address the risks of human trafficking, forced labor, slavery, and the worst forms of child labor in their supply chains. The federal legislation, unlike the California statute, is not limited to retailers and manufacturers. If enacted, the legislation would be applicable to any publicly traded or private company currently required to submit annual reports to the SEC, as long as the company meets an established annual gross receipts threshold. Companies would be required to include the necessary disclosures in their annual reports to the SEC.

These legislative and regulatory proposals are being echoed in other nations as well. The European Union has now introduced draft legislation that would mirror Section 1504's requirements on disclosing payments to foreign governments, for example.⁶ In addition, there are a number of countries that mandate annual CSR/sustainability reporting. In this rapidly changing global environment, where a voluntary commitment

today can become a regulatory requirement tomorrow, it is crucial for companies to be agile and effective in their ability to comply with both mandatory and voluntary standards.

CSR AND THE COMPLIANCE FUNCTION

Each of the above-mentioned codes of conduct, standards, and legislative initiatives represents an important piece of the CSR landscape and can serve as a valuable tool for energy industry participants to bolster their internal policies and stakeholder relations. Most leading industry members have signed on to many or all of these initiatives, and have invested time, effort, and resources into incorporating such standards, as set forth in their CSR policies, into their operations.

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However, if the proliferation of standards is not carefully managed, it can lead to the phenomenon of "death by a thousand paper-cuts." Even a company that strives to live up to the social responsibility and sustainability standards it has articulated in either a business ethics or CSR policy can become overwhelmed by the task of implementation on a companywide scale. In other cases, a company may be wary of formally committing to support a worthy standard, due to a perceived absence of clarity as to what such a commitment will require of the company.

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In light of the extensive due diligence, auditing, and reporting already required of global energy industry participants, this concern is understandable. However, it is a mistake to confuse the aspirational nature of many CSR commitments for unattainable goals, and a mistake to believe that those commitments

cannot be broken down into concrete deliverables, procedures, and policies for use in achieving compliance. In fact, it is the process of converting a CSR standard into tangible goals with an aspirational context, and the dialogue and broad thinking that this process requires, that can be the driver of successful implementation of the standard.

In many cases, the “home” of the CSR group within an organization determines its function, its reach, and its focus. For example, if CSR has traditionally been viewed as philanthropy by the company, the CSR group may be in the public relations or community outreach department. If CSR efforts have been largely triggered by challenges specific to one or more challenging geographies, CSR efforts may be run by each country manager or business unit overseeing the affected area. This can lead to very effective hands-on management of issues of particular priority to the company or the relevant business unit but may not be more broadly communicated within the company. It may result in a failure to share knowledge and experience across business groups and the development of nonstandard practices between different geographies and operating areas.

On the other hand, as is very common in the energy industry, if CSR efforts and commitments have been the result of shareholder or legal action, or initiated from the top down by board or executive action, the CSR group may be placed in the legal department, with perhaps better ability to shape companywide policy but less ability to incorporate on-the-ground learning and address practical implementation issues. Also common in oil and gas companies is the location of key CSR functions and responsibility in the environment, health, and safety (EHS) group. EHS is in many ways an excellent fit for CSR, in that EHS personnel are accustomed to thinking through employee and community impacts of operations as well as tackling geography-specific challenges. On the other hand, the EHS group is often already tasked with very complex environmental and regulatory tasks, and may not have the resources or support to expand the CSR mandate beyond specific issues, such as project-based community relations and philanthropy.

The location of CSR within any one unit can hamper even the best intended rollouts of a

CSR policy or adoption of a new standard. The perception that CSR is the function of some other department, or that implementation of CSR standards is not a companywide project, is contrary to the very goals set forth in most such standards. Goals such as supporting universal human and labor rights and improving company transparency and sustainability efforts can only be achieved if all people at the company are aware of what role they can play in moving the company forward, and what concretely they can do or avoid doing on a daily basis to that end.

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Building on the organization’s existing internal compliance structures is therefore key to ensuring that the CSR message is not only communicated, but also acted upon, companywide. Successful CSR programs cannot be implemented and complied with only in the field, or by the public relations team, or even by a board-level committee or a few contracts or legal department personnel. CSR should be integrated into training, learning, reporting, and auditing vertically and horizontally across the company.

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Integrating CSR implementation into the compliance structure is crucial to reaping the intended benefits of a voluntary commitment for the company and its stakeholders. Achieving and documenting compliance with a CSR policy or standard will parallel many other compliance tasks that the company already faces daily (Foreign Corrupt Practices Act [FCPA], Sarbanes-Oxley, trade sanctions and export controls, to name a few examples). Due to the unique nature of CSR, however, in order to establish a compliance regime, the company must itself establish what the aspirational commitment will require on a daily basis for the various business units and departments.

CSR does differ from more traditional compliance responsibilities in that there is no single governing law to refer to, only a few hard and fast rules are available, and there is nowhere to go to get an advisory opinion on whether appropriate steps are being taken to implement the commitment. CSR is inherently a self-driven area of compliance. CSR implementation is nonetheless a natural fit for a compliance department, once the company can overcome the challenge of definition.

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Leveraging the capacity, resources, and expertise of the compliance department can enable other groups, such as EHS or legal, to approach CSR implementation in a more granular fashion, and also take advantage of the compliance group's experience in tackling broad-based oversight challenges. In an ideal scenario, CSR responsibilities and standards should be as broadly disseminated and understood within the organization, and have as clearly delineated avenues for internal communication and upward escalation, as do FCPA or export controls compliance.

Is there a roadmap for turning an aspirational commitment into a concrete compliance reality? Yes, there can be, although in no two companies will the end result look the same for any given commitment or standard. A clear list of key questions should be prepared and be used to set the agenda for implementing or expanding implementation of a standard. One such list might include the following:

1. Articulate the standard.
2. Articulate the company commitment.
3. Identify existing complementary commitments or standards that may impact implementation.
4. Create a working group to identify operational goals.
5. Identify relationships (e.g., contractor, supplier, JV partner, host government) potentially impacted by implementation of standard.
6. Articulate operational goals for each commitment.

7. Identify sources of information regarding risks and sources of standards.
8. Identify key implementation steps for each standard.
9. Identify training, reporting, and auditing requirements.
10. Identify Key Performance Indicators for each standard (group by group as appropriate).

CONCLUSION

It is certainly true that a company that takes on the worthwhile task of fully implementing a CSR commitment has many challenges ahead. Nonetheless, bringing to bear the existing resources, expertise, and prior experience of the involved business units and housing day-to-day implementation and oversight responsibility within the compliance group can make this process much more manageable and effective. Most important, the process of dialogue, analysis, and preparation for implementation of a CSR policy or a specific standard is of value in itself. A fully articulated implementation process will propel the company and participants in the process toward a fuller understanding of the goals and challenges involved in implementation, and will increase capacity to comply.

In the final analysis, making a CSR commitment is an important step, but the ability to build on that aspiration to concretely improve the impact of the company's operations on stakeholders and communities is where the real value and benefit of the commitment to the company lies. 

NOTES

1. <http://www.revenuewatch.org/issues/dodd-frank/oil-vsworld>.
2. Pub. L. No. 111-203, 124 Stat. 1376 (2010).
3. Ibid.
4. California Civil Code Section 1714.43.
5. H.R. 2759, 112th Cong. (2011).
6. European Union: European Commission, Proposal for a Council Directive on the annual financial statements, consolidated financial statements and related reports, 25 October 2011, COM(2011) 684/2 ; European Union: European Commission, Proposal for a Council Directive amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, 25 October 2011, COM(2011) 683/2.