
Editors' Note

Corporate social responsibility (CSR) was once a voluntary exercise taken up by companies for business reasons ranging from reduced energy costs, to increased competitiveness in the market for talent, to improved corporate morale. With the recent advent of CSR laws and regulations, legal practitioners have been confronted by unique and burdensome CSR-related legal requirements, and CSR initiatives that were previously entirely voluntary have become inherently legal. Companies now face significant legal penalties, measurable litigation risk, and meaningful public relations fallout if they fail to address these requirements. In-house counsel face the prospect of having to “cut twice” if CSR programs are not designed and implemented with reference to existing, pending, and proposed CSR-related legal requirements.

One could reasonably make the case that the increasing frequency with which in-house and outside counsel have been confronted with legal issues that in one way or another implicate CSR concerns is one of the most notable legal trends of the past decade. Such issues can arise in disparate contexts ranging from supply chain compliance requirements related to minerals sourcing or anti-trafficking, to investor inquiries regarding environmental, social, and governance performance, to board governance regarding sustainability issues. The issues typically span various legal practices areas such as securities law, corporate governance, compliance, commercial law, labor law, and trade law, among others; indeed, it is difficult to find an area of the law or legal practice that is not in some way impacted by CSR considerations. Moreover, the issues are frequently fairly unique when compared to the matters typically addressed by corporate practitioners and require unique expertise; there is little in a business attorney's repertoire that lends itself to reporting on the tracing of minerals back to their sources in the Great Lakes region of Africa, or assessing whether a company should consider transitioning to one of a variety of alternative corporate forms that incorporate social goals. While there may be similarities among CSR issues in terms of the substantive concepts involved and the legal expertise required, it has historically been the case and continues to be the case today that it is difficult for a lawyer to acquire the knowledge and gain the experience required to effectively address them. As a result, in-house attorneys often manage these issues by involving operational teams within the business (e.g., supply chain, procurement, social responsibility), analogizing from their own legal backgrounds, and/or seeking input from outside counsel (even if such legal counsel has no specific expertise itself).

The need for guidance is rendered even more acute by the fact that although the number of CSR-specific legal positions is increasing, and although the number of law firms with dedicated CSR practice groups continues to grow, in many if not most cases, CSR law has no clear home within a business or law firm. CSR-related legal issues are too often handed off to the in-house corporate, compliance, or commercial attorney who draws the short straw, and law firm management too frequently fails to recognize the business case for a CSR practice. Clear and concise guidance is even more critical in the absence of institutional structure, as in-house and outside counsel will not receive the full benefit of repetition, precedent, peer benchmarking, market norms, and organizational knowledge. Furthermore, if any front-runner has begun to emerge, it is the legal department that is frequently being identified as the most appropriate home for CSR risk management and compliance, given lawyers' key role in enterprise risk management generally and their involvement in many of the work streams impacted by CSR developments, such as disclosure, governance, and contracting, to name a few.

Despite this need, there has yet to be a text published with the goal of providing an informed, sophisticated, but above all, eminently *useful* overview/survey of the various CSR-related legal issues that confront in-house and outside counsel on a regular basis. This text, which contains the distillation of the expertise and experience of many skilled attorneys, aims to fill this void in existing practitioner-focused legal guidance, particularly where institutional resources may be limited. This project presented many challenges, chief among them: (i) the small number of experts nationwide; (ii) the constantly changing legal landscape, with the consequence that content can quickly become stale or superseded; and (iii) the vast diversity of issues and related legal regimes that may reasonably be included within the bounds of CSR and CSR law, with some disagreement regarding where to draw the line.

The editors have attempted to overcome these challenges by (i) seeking out and soliciting contributions from the "short list" of experts, with a great deal of success, (ii) considering CSR's trends and trajectory in selecting topics that are relevant today and that the editors believe will continue to be relevant for years to come, with subsequent editions and online updates planned to address new legal and business issues that arise, and (iii) adopting an extremely broad and inclusive definition of CSR in an effort to provide a text that can serve as a practitioner's sole and comprehensive reference material on the topics addressed herein.

Indeed, in some cases—for example, the content relating to board governance, community relations, stakeholder engagement, and aboriginal rights—the chapters contained herein may be the first fulsome practice-oriented resources published on a particular topic. The editors are pleased to be able to offer such rare and specialized expertise regarding topics that are garnering an increasing amount of attention from corporate boards, corporate managers, and in-house counsel, and are immensely grateful for the efforts of the authors in preparing such contributions; the expertise may be niche in the sense that there are few who possess it, but it is by no means niche in terms of its applicability or relevance—these issues now impact a broad range of businesses, and in many ways.

As noted above, there will undoubtedly be some discussion and debate regarding the concept of CSR adopted by the editors and the authors, the nomenclature used throughout

the book, and the decisions regarding what subject matter to include and what subject matter to exclude. Various labels abound—CSR, ESG, sustainability, human rights, business integrity, corporate/environmental stewardship—each reflecting a specific perspective and interpretation. Corporate adoption of one or the other descriptor may be a function of industry/peer practice, geographic location, institutional inertia, “tone at the top,” strategic objectives, or any combination of the foregoing. Furthermore, there is as much if not more variety in opinions regarding the taxonomy of topics or issues that should be properly included under the heading of CSR law, and so here, too, there will likely be disagreement. Certain topics are clearly squarely within the province of CSR law (e.g., nonfinancial reporting, conflict minerals sourcing, combating trafficking in persons, alternative corporate forms) and others clearly implicate CSR issues (e.g., environment, health and safety, board governance, stakeholder engagement); for topics outside of these categories, the litmus test used by the editors in assessing whether appropriate for inclusion was whether such topic had substantive or practice-related themes in common with CSR law. Thus, the Foreign Corrupt Practices Act is included due to the common substantive theme of corruption and the similarity in the due diligence measures employed. The editors do not believe themselves to have been overly inclusive in this regard, as there exist other well-regarded taxonomies of CSR issues that include topics the editors opted not to address here, such as tax policy and technology transfer.

One topic that was not given its own chapter but that deserves attention here is the recent elevation of corporate social *purpose*. An increasing number of investors, companies, and thought leaders are taking the position that (i) companies must have a social purpose, (ii) companies must articulate and execute on this social purpose, and (iii) companies must measure and report on their achievement of/performance against this social purpose; and while this exercise involves CSR, it is not the same as CSR. Various versions of this thesis have been articulated recently by Larry Fink, CEO of BlackRock; Bill McNabb, chairman of Vanguard; Jana Partners and CalSTRS; the law firm Wachtell Lipton; Deloitte; and the British Academy’s Future of the Corporation project, led by Colin Mayer, the Peter Moores Professor of Management Studies at Oxford University’s Saïd Business School. This trend captures both the challenge and the opportunity afforded lawyers as a result of the emergence of CSR law: on the one hand, lawyers are left to wrestle with how to integrate these considerations into existing corporate governance and compliance structures; but on the other, they are also uniquely qualified to serve as invaluable advisors in helping clients navigate these issues and well positioned to play a significant role in the ongoing articulation and implementation of social purpose within corporations.

In the editors’ view, this is the lawyer’s charge when it comes to CSR and its impact on business—to help clients successfully traverse this brave new world. It is our hope that this book can support you in this effort by filling a major void in existing legal literature and providing a powerful tool for engaging in this important enterprise.