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Look to anti-corruption efforts for help in building human rights compliance programmes, say Covington lawyers

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Covington & Burling partner Ian Hargreaves and associates Sarah Crowder and Hannah Edmonds-Camara explain how a company's anti-corruption and human rights compliance teams can be more effective by working together.

Corruption and human rights abuses are often intertwined. Yet corporate programmes to address these risks have generally developed along separate tracks, with investment in anti-corruption compliance driven by substantial legal and enforcement risk (first under the Foreign Corrupt Practices Act in the US and, increasingly, under robust anti-corruption laws implemented by other countries) and the development of human rights programmes driven principally by reputational risk and voluntary adherence to standards such as the UN Guiding Principles on Business and Human Rights (UNGPs).

Although the legal risk associated with adverse effects on human rights remains considerably lower than that associated with violations of anti-corruption laws, a spate of recent legal and policy developments have begun to shift the human rights risk landscape. As a result, legal and compliance professionals who have historically focused on traditional compliance areas (such as corruption, money laundering, and sanctions and export control violations) are increasingly becoming concerned with and involved in the management of human rights issues. For organisations that have not yet focused on coordinating their efforts to manage anti-corruption and human rights risks, we argue in this article that the increasing convergence between the two risk areas represents an opportunity to achieve practical efficiencies and synergies that have the potential to improve upon both programmes.

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The shift from "soft law" to "hard law" human rights standards

Historically, international human rights treaties focused on the responsibility of states to protect human rights. However, an increased focus was placed on the role of business following the 2011 publication of the UNGPs, which detail the responsibility of businesses to respect human rights and mitigate the risk of causing or contributing to adverse human rights impacts, including through the implementation of human rights policies and due diligence, and ensuring access to remedies for victims.

Since the introduction of the UNGPs, several jurisdictions have introduced laws focused on corporate responsibility. Some of those laws have sought to incentivise corporate action through transparency requirements; for example, the California Transparency in Supply Chains Act 2010 and the UK Modern Slavery Act 2015 require companies that meet certain thresholds to publish annual reports detailing the steps they have taken (or not taken) to tackle modern slavery and human trafficking in their supply chains and global operations. Similar legislation is expected to be passed in Australia in 2018. Some large businesses are also caught by EU requirements to report annually on their approach to certain non-financial issues, including human rights, diversity, anti-corruption, and environmental issues.

Other governments have gone further (or have indicated that they may soon do so) by affirmatively requiring companies to take actions to mitigate the risk of adverse human rights impacts.

In 2015, the anti-trafficking provisions of the US Federal Acquisition Regulation were expanded to include a requirement for a contractor whose services include over $500,000 worth of supplies or services acquired or performed outside the US to develop a compliance plan and certify that none of its employees, subcontractors or agents have engaged in prohibited activities.

France introduced in 2017 a corporate duty of vigilance, which requires large French companies to establish, publish, and effectively implement "vigilance plans" to prevent adverse human rights impacts. A failure to comply with the new requirements could lead to injunctions or civil lawsuits by victims.

In the Netherlands, a Child Labour Due Diligence Bill awaiting approval by the Dutch Senate would, if passed, require any companies supplying goods or services to Dutch consumers to identify instances of child labour within their supply chains and develop plans to combat those practices.

In Switzerland, a proposal to introduce a human rights due diligence requirement is currently on hold in Parliament but is expected to be the subject of future parliamentary discussion.

The German National Action Plan adopted in 2017 stated that if fewer than 50% of German enterprises with more than 500 employees have not incorporated elements of human rights due diligence into their corporate processes by 2020, the federal government will consider the need for hard legislative measures.

In addition, the implementation of new Magnitsky-style laws in several countries, including the US and the UK, has underlined the need for companies to conduct due diligence to identify evidence of human rights abuses by potential counterparties or their beneficial owners. In December 2017, President Trump signed executive order 13818, which authorises sanctions against foreign persons involved in serious human rights abuses or corruption, as well as any US or foreign citizen who materially assists, sponsors or provides support, goods or services to, the designated parties. In the UK, the Criminal Finances Act 2017 added the concept of "gross human rights abuses" to the definition of unlawful conduct in the civil recovery section of the Proceeds of Crime Act, meaning that

assets held in the UK may be vulnerable to seizure if found to be the direct or indirect product of gross human rights abuses. A bill to introduce broader Magnitsky sanctions in the UK is expected to have its second reading in Parliament in June 2018.

These developments, combined with the ever-present reputational risk associated with human rights violations, fast-evolving civil litigation risk (recent claims asserting parent company liability for the negligent operations of foreign subsidiaries have been allowed to proceed in Canada and the UK), and increasing commercial pressure, have caused many corporations to prioritise the development of human rights programmes.

Alignment of human rights and anti-corruption compliance programmes

Governments and international organisations – and a small but growing number of companies – have begun to recognise the potential benefits of such coordination. In December 2016, for example, the UN Global Compact published a good practice note on linking human rights and anti-corruption compliance, which provided practical guidance on doing so and argued that recognising "the linkages between human rights and anti-corruption compliance can help companies meet their responsibility to respect human rights in a systematic and structured way, and ultimately embed respect for human rights in corporate culture." In a similar vein, the UK government's 2017 anti-corruption strategy emphasised that businesses have a crucial role to play in reducing modern slavery by eliminating corruption from their business relationships and transactions and noted that "progressive businesses are considering modern slavery and anti-corruption requirements together."

We would not suggest that companies fully merge their anti-corruption compliance and human rights programmes. Managing human rights issues requires unique subject matter expertise and a toolkit that differs in many respects from the tools commonly used to manage corruption risk. However, an appropriate degree of integration between corporate functions responsible for managing corruption and human rights risks can help to avoid duplicated effort and missed opportunities in several areas.

Risk assessment

Meaningful risk assessments are fundamental to achieving an effective compliance programme. They are, however, also costly and time-consuming. The effective coordination of assessments of corruption and human rights risks, which often co-exist in the same jurisdictions and business units, can help limited compliance budgets and personnel resources go further.

A number of the same areas need to be explored to lay the groundwork for an anti-corruption risk assessment or a human rights impact assessment. For example, the former generally involves obtaining an understanding of, among other things, the local operation's core activities (and any expected changes to those activities), the extent to which the business comes into contact with government (and the reputations of the government agencies with which it interacts), and its procurement processes and use of third parties. Although the focal areas of a human rights impact assessment will to some extent diverge from those topics, a substantial portion of the groundwork will overlap and involve discussions with the same personnel. Moreover, the risks themselves may overlap, making it potentially more effective to explore them in the context of the same exercise.

Even if risk assessments are not fully integrated, resources can be leveraged by ensuring that the two functions are in communication regarding their risk assessment plans; for example, if a human rights team is expected to conduct a site visit and interview key personnel in a jurisdiction not included in the anti-corruption risk assessment plan, the anti-corruption team can provide a list of additional questions to raise during interviews and use the responses to form a baseline view of corruption risk, which in turn can serve to inform a decision whether to

conduct a more in-depth assessment. At a minimum, maintaining open lines of communication across functions can help to ensure that neither function fails to recognise issues relevant to the other function in conducting their work and to escalate those issues for appropriate remediation.

Training and communication

Effective messaging to personnel, including through training and the tone set by senior and middle management, is fundamental to both anti-corruption compliance and human rights programmes, which often depend on obtaining buy-in from employees in jurisdictions where cultural norms or accepted practices may diverge from the company's standards, and monitoring can be challenging in light of the distance between the local operation and the company's central oversight functions.

As a practical matter, combining anti-corruption and human rights training can help maximise the value of training sessions (which often involve substantial costs associated with country site visits) and reduce the risk of compliance fatigue that can result from holding multiple compliance trainings in a short span of time. Moreover, by combining the topics, the company can present – and help employees develop – a holistic view of its core ethical values and how its activities affect the areas in which it operates, which in turn can help to foster values-based compliance. Employees who recognise that the bribery of government officials can contribute to human rights abuses may be more likely to take anti-corruption compliance to heart than employees who are merely presented with a set of checklists and procedures. On the other side of the equation, an employee who identifies a human rights issue and has been trained on how such issues may intersect with corruption risk will be more likely to recognise and escalate associated corruption red flags, such as indications that bribes were paid to a labour inspector to overlook illegal working conditions.

Third-party risk management

Anti-corruption and human rights teams will to a large extent have different priorities when it comes to managing risks associated with third parties. The former will be principally concerned with government-facing intermediaries and sales agents, whereas the latter will be principally focused on suppliers involved in labour-intensive aspects of the company's global operations and supply chain. However, there are various ways in which risks may overlap.

For example, suppliers engaged in labour-intensive activities present a host of potential modern slavery, human trafficking, and other labour and health and safety risks, as well as an associated risk of bribery to public officials willing to overlook or facilitate problematic working conditions in exchange for improper payments.

Intermediaries engaged to assist with land acquisitions and associated community relations issues can present both human rights risks, by helping to secure land rights without adequately consulting or compensating local landowners, and corruption risks, such as bribery of government officials in exchange for granting legal title to land over which conflicting claims are held by local stakeholders.

In the context of police or military security arrangements, corruption risks can arise from requests by individual members of military or police forces for payments or other benefits and human rights risks can arise from the inappropriate or excessive use of force by members of public security forces tasked with protecting the company's assets or personnel.

Companies should assess the extent to which human rights-focused third-party due diligence processes can be coordinated with existing processes, both to ensure that any overlapping risks are identified and to avoid dupli-

cating internal efforts or subjecting suppliers to unnecessarily complex on-boarding processes. For example, an initial supplier risk assessment could consider both potential human rights and corruption risks and ensure that higher-risk engagements are referred to internal or external specialists in corruption, human rights, or both, as appropriate. For suppliers that present both types of risk, enhanced due diligence and monitoring measures can be streamlined through the use of combined questionnaires, interviews, training sessions, contract provisions and audits.

M&A Due Diligence

Anti-corruption due diligence is now a common feature of M&A transactions in light of regulatory expectations and the significant legal and commercial risks associated with acquiring tainted assets or entities engaged in corrupt practices. Although human rights due diligence is a less common component of M&A transactions, some companies are beginning to make efforts to incorporate human rights elements into their M&A processes. There are a number of arguments in favour of doing so, many of which echo the rationale for conducting anti-corruption due diligence. In particular, human rights due diligence can help an acquirer identify known issues and evaluate their potential impact from a legal and operational perspective, shift liability to the seller for legacy violations (or, where appropriate, the costs of remediation, which in the human rights context might include setting aside funds to provide remedies to victims) and prepare to promptly integrate the target entity or asset into the acquirer's compliance programme to mitigate the risk of any continuing issues.

Companies seeking to incorporate human rights due diligence into their M&A processes may encounter challenges persuading key stakeholders of the value of the time, resources, and negotiations the process may require – particularly since human rights issues often do not fit neatly within the legal risk framework with which M&A lawyers are most familiar. From a practical standpoint, it may be easier to obtain buy-in for human rights due diligence by leveraging existing acceptance of stand-alone anti-corruption due diligence processes. In turn, a joint human rights and anti-corruption due diligence team can present the business with a more holistic assessment of the legal, operational, and reputational risks associated with a business opportunity, which can be particularly valuable for companies considering entering high-risk jurisdictions with which they are unfamiliar.

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