Instead, tell the court why this particular legislative history is indicative of the intent of the legislature as a whole. A compelling argument could be the difference between the court adopting your interpretation or your adversary’s.

From Business Initiative to Regulatory Imperative: What the New Era of Corporate Social Responsibility Means for Oregon Businesses

By Sarah Crooks and Nathan Christensen, Perkins Coie LLP

In 1953, economist Howard Bowen coined the phrase “corporate social responsibility” in his book, Social Responsibilities of the Businessman. Although Bowen gets credit for the phrase, most people agree that the concept underlying it—companies taking into account their impact on the environment and social welfare—has been around for much longer than that.

In the 60 years since the phrase was born, corporate social responsibility (“CSR,” for short) has become a significant part of business. Business schools now include courses on business ethics and corporate social responsibility. Watchdog groups have been organized to monitor companies’ adherence to principles of social responsibility. New companies have arrived offering as their primary value proposition a socially-responsible supply chain and product. And new institutes and associations—not to mention law firm practice groups—have formed to develop social responsibility guidelines, standards, strategies and investigations.

While the concept of corporate social responsibility has become an important organizing principle in business, it has rarely been the subject of law and litigation. In a search of every state and federal opinion available on Westlaw, we found only 17 that used the phrase “corporate social responsibility.” Most of those references are to titles of authorities or background facts. That may soon change.

Principles of corporate social responsibility are quickly transitioning from the realm of business initiative to the realm of regulatory imperative. In particular, state and federal lawmakers are drafting new regulations requiring businesses to disclose information
about their products, practices and supply chains, and enforcement agencies are reinvigorating existing legislation for similar purposes.\(^1\)

The United States is not alone in this shift. For instance, since 2009 Denmark has required companies to disclose their social responsibility policies and practices (not to mention a self-assessment) in their annual reports. As the government reports: “Danish businesses are free to choose whether or not they wish to work on CSR... [but] the aim is to inspire businesses to take an active position on social responsibility and communicate this.”\(^2\)

In this article, we’ll review three examples that we believe illustrate this trend in the U.S.—(1) a new federal law regarding conflict minerals, (2) a new state law regarding forced labor, and (3) increased federal enforcement of existing laws prohibiting foreign corruption. Each of these laws has the potential to affect Oregon business and, as discussed at the end of the article, to spark litigation.

### Stopping Atrocities Abroad: The SEC’s Final Conflict Minerals Rules

Last month, the Securities and Exchange Commission announced final rules requiring businesses to investigate the origins of certain minerals used in their manufacturing processes and products, and to publicly disclose the results of their findings.\(^3\) The rules were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act and focus on “conflict minerals,” or minerals that are mined under abusive and violent conditions, primarily in the Democratic Republic of the Congo. The final rules span over 350 pages, so we provide only a brief synopsis here.\(^4\)

Any company that meets the following three conditions must comply with the new investigation and disclosure requirements:

1. Files reports with the SEC under Section 13(a) or 15(d) of the Exchange Act;
2. “Manufactures” or “contracts to manufacture” a product; and
3. Conflict minerals, such as gold, tin, tantalum and tungsten, are “necessary to the functionality or production” of the product manufactured or contracted to be manufactured.

Any company that meets these three conditions is now required to investigate the origins of its non-scrap conflict minerals to determine whether they may originate from a covered country, including the Democratic Republic of the Congo, Angola, Rwanda, Tanzania and Uganda. If, after conducting a country of origin inquiry, a company determines (or should know) that its conflict minerals may originate from one of these countries, then the company is required to conduct due diligence on the source and chain of custody of these minerals and, in many cases, file a Conflict Minerals Report with the SEC. These reports must be audited by an independent private sector auditor. Even companies that determine that their minerals are not from a covered country must disclose to the SEC their efforts to determine the country of origin and the results of those efforts.

“Conflict minerals” (e.g., gold, tin, tantalum and tungsten) are widely-used, and these rules are likely to affect a number of Oregon businesses. Further, between the wide range of companies and products that use “conflict minerals” and the complex process of retracing the origins of these minerals—perhaps through layers of suppliers—the final rules are expected to have a major impact on U.S. companies, not to mention their suppliers, whether located in the U.S. or elsewhere. The SEC estimated that the initial cost of compliance will be between $3 billion and $4 billion, with ongoing compliance costs of between $207 million and $609 million annually. Companies must begin complying with these rules on January 1, 2013, and the required disclosures for calendar year 2013 will be due on May 31, 2014 (and every May 31 thereafter).

### Preventing Human Trafficking and Child Labor: California’s Transparency in Supply Chains Act

State governments have also begun to regulate issues traditionally considered part of voluntary corporate social responsibility. In 2010, for example, the California legislature passed the Transparency in Supply Chains Act.\(^5\) The landmark law, which became effective on January 1 of this year, requires every manufacturer or retailer that (1) has annual gross worldwide sales of more than $100 million and (2) is “doing business” in California to make new disclosures regarding the labor used in its global supply chain.

This law is likely to affect numerous Oregon companies. Even if a company is not organized or domiciled in California, a company is considered to be doing business there if it (1) generates more than $500,000 in sales from California; (2) owns more than $50,000 in real or tangible property in California; (3) has a California payroll of more than $50,000; or (4) has any California-based sales, property or payroll that account for more than 25% of the company’s overall

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\(^1\) For an interesting argument that government regulation is the key to institutionalizing socially responsible practices, see Aneel Karnani, “The Case Against Corporate Social Responsibility,” The Wall Street Journal, June 14, 2012, available at [http://online.wsj.com/article/SB100014240527487033380045752301172664504890.html](http://online.wsj.com/article/SB100014240527487033380045752301172664504890.html).

\(^2\) See [www.csrgov.dk/sw51190.asp](http://www.csrgov.dk/sw51190.asp).


Shareholder suits alleging that directors and officers breached their fiduciary duties by failing to adequately monitor their companies’ supply chains for use of forced labor or conflict minerals. (We refer to these suits as “FCPA enforcement actions.”) The trend is hard to miss—lawmakers and regulators are taking up the mantle of corporate social responsibility. And when they do, whether at the state or federal level, their actions will impact Oregon businesses.

In addition to being aware of the new regulations, Oregon lawyers should anticipate the litigation that may be prompted by the new CSR regulations, including:

- Shareholder suits alleging that directors and officers breached their fiduciary duties by failing to adequately monitor their companies’ supply chains for use of forced labor or conflict minerals. (We refer to these suits as “FCPA enforcement actions.”)
- Claims of fraud, misrepresentation or unfair trade practices relating to inaccuracies in the CSR disclosures now required on company websites or in SEC filings.
- Claims of malpractice or negligence against independent auditors reviewing company CSR reports or disclosures.
- Business tort claims, such as for intentional interference with economic relations, or claims of defamation by suppliers identified as using conflicts minerals, forced labor, or corrupt practices.

Fighting Public Corruption Abroad: The Reinvigorated Foreign Corrupt Practices Act

At its core, the Foreign Corrupt Practices Act ("FCPA") makes it illegal to offer or provide anything of value to foreign officials or candidates for office in exchange for business. Importantly, the prohibition extends not just to offers made directly, but also to offers made by a third party agent, assuming the principal knew about the offer or ignored red flags that should have put it on notice. The Act also requires companies to keep detailed records of their transactions and to implement internal controls to prevent and detect violations.

Unlike the SEC's rules on conflicts minerals and California's Transparency in Supply Chain Act, the FCPA is not new. It was signed into law by President Carter 35 years ago. But it illustrates the trend towards regulating issues traditionally considered to be the domain of "socially responsible business" because, according to the U.S. Department of Justice, "we are in a new era of FCPA enforcement; and we are here to stay."9

For many years, the Foreign Corrupt Practices Act was relatively obscure and rarely-enforced. As recently as 2004, there were only 5 FCPA enforcement actions brought by the SEC or DOJ. Compare that total with the totals for the last 3 years—2009: 40, 2010: 74, 2011: 48.10

What the “New Era” of Corporate Social Responsibility Means for Oregon Businesses and Litigators

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• Legal challenges to the scope and enforceability of the CSR regulations themselves.

As the U.S. Department of Justice is fond of pointing out, we are in a new era of regulation. Business practices once thought to be a matter of “good business” are now becoming regulatory imperatives, motivated by noble and important causes, such as protecting human rights and fighting foreign corruption. It is therefore important for Oregon lawyers to be sensitive to these new regulations, to stay informed about the increasing constellation of requirements, and to anticipate both the legal risks and opportunities they carry.

Presenting and Challenging Expert Testimony: Winning the Battle and the War
by Janet Hoffman and Sara F. Werboff

Trials are at times won or lost based on experts and the lawyer’s ability to make the most of the rules governing the admissibility of expert testimony. This article provides tips to ensure that your expert’s opinion reaches the jury, or conversely, that your opponent’s expert opinion does not.

There is no question that an expert can provide valuable—even case-ending—testimony. For example, the expert’s well-reasoned opinion can lend credibility to counsel’s arguments made to the jury by narrating and reinforcing the major themes of your case. Moreover, through the expert, counsel can often introduce helpful evidence that is otherwise inadmissible. Importantly, the expert can tie together counsel’s theories into a final opinion that proves the ultimate issue of the case.

A good expert is a competent narrator who helps to advance the theme of your case. In a federal criminal case I tried, over strenuous objection I called a psychologist who had diagnosed the government’s informant as a pathological liar. In support of my client's hearing loss and knowing the potential numbing effect of technical jargon, I used an expert audiologist to highlight my client's profound hearing loss. The government had not be believed if he simply testified that he did not accept our theory of the case. Consequently, the jury acquitted my client.

The range of subject matter of relevant permissible expert testimony is only limited by the trial lawyer’s creativity. Experts can take the lawyer and jurors into areas they previously knew little about. Experts can recreate for the jury experiences about which they could otherwise only guess—experiences that are far removed from the juror’s own life experience. In another case I tried, the court allowed me to call a retired Rand Corporation research expert to testify as to the traumatic impact that specific events of the Vietnam War had on Vietnamese immigrants in general and on my clients in particular.

Recreation of events occurs regularly in courtrooms through the use of scientific techniques, experts can vividly recreate for jurors accident scenes or other relevant conditions. The only requirement is that the demonstration or experiment must be sufficiently similar so that it fairly replicates the conditions it purports to represent. In another case I tried, my client had a profound hearing loss. The government had a tape-recorded telephone conversation of my client purportedly expressing joy that the alleged crime had been carried out. Recognizing that my client might not be believed if he simply testified that he did not comprehend what was said during the conversation, and knowing the potential numbing effect of technical evidence, I used an expert audiologist to highlight my client’s hearing deficits.

The audiologist demonstrated what my client actually heard during the critical tape-recorded phone call. He accomplished this by removing certain sounds from the government’s recording to replicate the limitations of my client’s hearing, thereby illustrating precisely what my client could and could not hear during the telephone conversation. By recreating the conversation as my client experienced it, and by allowing the jurors to hear the conversation just as my client heard it, we had evidence that engaged the jury and made a far greater impact. The jurors became experts on my client’s profound hearing loss and accepted our theory of the case. Consequently, the jury acquitted my client.

Because expert testimony is so significant, counsel must ensure that the testimony will withstand an

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1 See e.g., Dyer v. R.E. Christiansen Trucking, Inc., 318 Or 391, 400 (1994) (trial court did not err in excluding videotape demonstration of “trailer sweep” when it was not sufficiently similar to facts of case to be relevant); Myers v. Cessna Aircraft Corp., 275 Or 501, 509-10 (1976) (admitting expert testimony and lab results where experiment conditions were the same as the conditions under which the evidence indicates the plane was operating).