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Human Rights and Compliance: Organization for Economic Co-operation & Development

International Employer Issues & Guidelines for Due Diligence

** By: Sarah Casteel*



Efforts to tackle corporate corruption and money laundering have increased exponentially in recent decades. In the United States, the USA PATRIOT Act passed in 2001,[1] followed by the Dodd-Frank Act in 2008,[2] have led to a significant uptick in anti-money laundering regulations and enforcement. Internationally, several entities have been created with the goal of setting global standards in compliance. For

example, the Basel Committee on Banking Supervision, to which several US institutions such as the FDIC and the Board of Governors of the Federal Reserve System belong, is the “primary global standard setter for prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters.”[3] While anti-corruption practices and compliance programs have become increasingly prevalent and thorough, a question has recently been raised as to the relationship between anti-corruption and human rights.

Last month, Business at the Organisation for Economic Co-Operation and Development (BIAAC) and the International Organization of Employers (IOE) came together to create a guide focusing on the overlaps between the human rights and anti-corruption agendas. The guide, entitled *Connecting the anti-corruption and human rights agendas: A guide for business and employers' organizations*, asserts that the anti-corruption and human rights agendas are similar in that “Corrupt practices and human rights abuses share many of the same root causes, frequently occur in areas in which there is weak governance and pose similar risks to companies...”[4] However, the guide also asserts that, “while the two agendas exist in parallel, they also have important differences,” such as “involv[ing] different actors, laws, regulatory considerations, business standards and practices.”[5] Moreover, the guide intends to evaluate the similarities and differences between these two agendas, and to consider ways in which companies can establish “a more coordinated approach to anti-corruption and human rights where appropriate.” [6]

The guide demonstrates a correlation between corruption and human rights. For example, “corruption damages economies and the provision of essential public services, hampers the fight against poverty, undermines the rule of law and erodes peoples’ trust in institutions.”[7] Further, corruption “distorts markets and creates an uncondusive business environment.”[8] While corruption and human rights abuses are unique in some ways, they often “share similar root causes and thrive in similar environments,” making it important to address the two together.

The guide is unique in its attempt to assist employers and corporate entities with the due diligence practices necessary to address corruption and human rights violations. However, the connection between the two has been addressed in the context of corrupt government action before. In her article entitled *Corruption as a Violation of International Human Rights*, Anne Peters addresses how various types of corrupt action, or omission of action, may qualify as human rights violations under the ICESCR and ICCPR.[9] Peters considers whether addressing corruption under a human-rights based approach, rather than a criminal law-based approach, is valuable. One notable difficulty in addressing corruption is that “[c]orruption... is typically not considered a criminal offence in criminal codes around the world, and it also does not have a legal definition in international treaties.”[10] Thus, there may be limitations in tackling a country’s corrupt practices, which could be partially resolved by a human rights-based approach. Peters concludes that “The framing of corruption not only as a human rights issue but even as a potential human rights violation can contribute to closing the implementation gap of the international anti-corruption instruments and can usefully complement the predominant criminal law-based approach.”[11]

The new guide goes one step further by providing “broad principles” and “questions for self-assessment,” which may serve as guidance to any company considering ways to improve its compliance programs to better address human rights issues and corruption.[12] While many assertions in the guide are rooted in the already “changing landscape putting the spotlight on human rights compliance and causing companies to rethink their compliance and sustainability functions,” the practical information and self-evaluation tools are an important way for companies to actualize these increasingly popular approaches to long-established problems.[13]

The first step offered by the guide is for the company to make an initial risk assessment, considering both the corruption and human rights risks of a potential venture.[14] Second, the guide suggests “embedding human rights and anti-corruption in corporate culture” by implementing a common compliance principle known as “tone at the top.”[15] In her speech about the Sarbanes-Oxley Act of 2002, SEC Commissioner Cynthia A. Glassman explained that “a company’s senior officers are responsible for the culture they create,” and that “one goal of the Commission’s recent rules ... is to ensure that ‘tone at the top’ has real meaning.”[16] When the leadership of a company sets a tone focusing on the agendas of human rights and anti-corruption in its corporate culture, the likelihood of those agendas being perpetuated throughout the company likely increases.

While the guide offers a way to “foster a coordinated approach” to these two agendas, it asserts that such an approach “does not mean that corruption and human rights risk assessments should be merged into one, but rather that specific elements of corruption and human rights risk management approaches can in certain instances be linked where feasible and desirable,” by “build[ing] on existing synergies that prevent redundancies.”[17] The goal of recognizing the two agendas as unique, while also evaluating overlaps, is to increase productivity in addressing the two issues while reducing redundant practices. One of the potential coordinated approaches the guide suggests focuses on due-diligence assessments. The guide offers a self-assessment question, “Which human rights questions could be added to our anti-corruption due diligence questionnaires and checklists and vice versa?”[18] This self-assessment question offers companies a specific way to implement these ideas into due-diligence practices.

In addition to further principles and self-assessment questions, the guide also offers an extensive list of resources and guidance from other entities. The table shows which of these other standards address anti-corruption, human rights, or both.[19]

Overall, this new guide perpetuates an increasingly popular approach to tackling human rights and anti-corruption by giving companies specific guidance and resources for implementing these approaches in their own compliance programs. While the guide reiterates that the two agendas need to be addressed separately as well, it reinforces the idea that both companies and political and policy entities may have a new way to increase efficiency in tackling two major issues.

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[1]Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

[2]Dodd-Frank Act, 15 U.S.C. §8201(2010).

[3]*The Basel Committee - Overview*, Bank for International Settlements, <https://www.bis.org/bcbs/> (last visited Oct. 2, 2020).

[4]BIAC and IOE, *Connecting the Anti-Corruption and Human Rights Agendas: A Guide for Business and Employers’*

Organisations(2020), <http://biac.org/wp-content/uploads/2020/09/2020-08-31-Business-at-OECD-IOE-AC-HR-guide.pdf>.

[5]*Id.*

[6]*Id.*

[7]*Id.* at 3.

[8]*Id.*

[9]Anne Peters, *Corruption as a Violation of International Human Rights*, 29 Eur. J. Int’l L.1251 (2019),

<https://academic.oup.com/ejil/article/29/4/1251/5320164>.

[10]*Id.* at 1254.

[11]*Id.* at 1251.

[12]*Supra* note 4, at 10.

[13]Vanessa Hans, *New Due Diligence Laws Force Companies to Rethink Human Rights and Anti-Corruption Compliance*, The FCPA Blog (Sept. 15, 2020, 7:58 AM), <https://fcpublog.com/2020/09/15/new-due-diligence-laws-force-companies-to-rethink-human-rights-and-anti-corruption-compliance/>.

[14]*Supra* note 4, at 12.

[15]*Id.* at 13.

[16]Cynthia A. Glassman, Commissioner, SEC, Sarbanes-Oxley and the Idea of “Good” Governance (Sept. 27, 2002), <https://www.sec.gov/news/speech/spch586.htm>.

[17]*Supra* note 4, at 10.

[18]*Id.* at 15.

[19]*Id.* at 20.