General Contract Clauses: Corporate Social Responsibility Representations and Warranties

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These Standard Clauses provide general corporate social responsibility (CSR) representations and warranties for use in a commercial sale of goods or services transaction. Under these Standard Clauses, the seller represents and warrants to the buyer that it has implemented and conducts its business in accordance with CSR values and policies. In addition, the seller represents and warrants that it is in compliance with and has required its subcontractors and suppliers to comply with CSR laws, rules and regulations. These Standard Clauses have integrated notes with important explanations and drafting and negotiating tips.

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Read This Before Using Document

Corporate social responsibility (CSR) *representations and warranties* serve the same purpose as any other representations and warranties in that they:

- Are assertions of fact by one party (in this case, the seller or supplier (seller)) designed to induce another party (in this case, the buyer or customer (buyer)) to enter into a contract.
- Allocate risk between the parties.

In the case of CSR representations and warranties, the assertions of fact and the bases on which the seller induces the buyer to enter into the contract concern the seller's:

- Adoption of corporate values.
- Commitment to CSR-related principles.
- Compliance with applicable CSR-related laws and regulations.

For information about CSR generally, see *Practice Note, Corporate Social Responsibility and the Supply Chain (http://us.practicallaw.com/2-520-6599)*. For more information about representations and warranties generally, see:

- *Standard Clauses, General Contract Clauses: Representations and Warranties (http://us.practicallaw.com/2-520-6599)*.
- *Practice Note, Relationship between Representations, Warranties, Covenants, Rights and Conditions (http://us.practicallaw.com/7-519-8870)*.
- *Practice Note, Representations, Warranties, Covenants, Rights and Conditions (http://us.practicallaw.com/9-519-8869)*.

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Buyer's Benefits of Using CSR Representations and Warranties

These Standard Clauses are typical CSR representations and warranties that buyers in a variety of commercial transactions can use to:

- Gauge:
  - the strength of the seller's commitment to CSR;
  - the extent to which the seller requires its subcontractors to adhere to CSR laws, rules and regulations; and
  - the buyer's and the seller's compatibility as business partners.
- Facilitate an exchange of CSR policy information between the parties.
- Enhance reputational capital and increase competitive advantages. A buyer can leverage its use of CSR representations and warranties to differentiate its brand, culture and corporate identity and positively influence important stakeholders, including consumers, partners, investors and talent.
- Influence consumer sentiment. Consumers and industry and advocacy groups can generate adverse publicity (often referred to as shaming) regarding a company's supply chain practices and ultimately force a company to incur significant costs to drastically change its behavior. By using CSR representations and warranties, the buyer may be able to mitigate the risk that it will be subject to CSR shaming.
- Reduce compliance costs, litigation risk and reputational damage by:
  - helping to foster a consistent culture of ethical conduct in its supply chain;
  - obtaining the seller's assurances that it has complied with applicable CSR-related laws and regulations;
  - forming the basis of an indemnification claim if the seller has made an inaccurate representation and warranty claim; and
  - improving relations between the buyer and regulators and government authorities.

CSR Representations and Warranties versus Covenants

As in standard commercial contracts, the seller makes the representations and warranties in these Standard Clauses on or "as of" the date on which the parties execute the agreement. The representations and warranties relate to facts and circumstances occurring:

- At the time the representations and warranties are made.
- In the past.

The parties must include a *covenant* in the agreement if the buyer wants:

- To address the seller's ongoing CSR compliance.
- The seller to agree that certain assertions of fact will be true in the future.

For more information on the differences between representations and warranties and covenants, see *Practice Note, Relationship between Representations, Warranties, Covenants, Rights and Conditions (http://us.practicallaw.com/7-519-8870)*.

Assumptions

These Standard Clauses assume that:

- **There are only two parties to the agreement.** The parties should revise the language as necessary if there are additional parties to the agreement.

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- **The buyer has a written CSR policy that articulates its corporate values.** If the buyer does not have a written CSR policy, then the parties must revise these Standard Clauses.
- **The buyer adopted or adheres to one or more model voluntary CSR policies developed by an international organization, non-governmental organization or industry group.** These Standard Clauses contain a bracketed reference to model voluntary CSR policies that must be customized based on the buyer's policies.
- **These terms are being used in a business-to-business agreement.** These Standard Clauses should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **The agreement is governed by US law.** Other jurisdictions have different, and often more robust, CSR requirements and standards. Therefore, if the parties include these Standard Clauses in an agreement that is governed by law other than US law, the parties may need to revise these Standard Clauses.
- **These terms are not industry-specific.** These provisions do not account for any industry-specific federal or state laws, rules or regulations that may apply to certain transactions.
- **Capitalized terms are referenced elsewhere in the agreement.** Certain terms are capitalized but not defined in these provisions because they are defined elsewhere in the agreement (for example, Buyer, Customer, Seller and Supplier).

Bracketed Items

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added or deleted at the discretion of the drafting party.

CORPORATE SOCIAL RESPONSIBILITY REPRESENTATIONS AND WARRANTIES

1. [Seller/Supplier] Corporate Social Responsibility Conduct and Compliance Acknowledgment, Representations and Warranties.

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Seller Corporate Social Responsibility Conduct and Compliance Acknowledgment, Representations and Warranties

These Standard Clauses use three categories of commitments:

- **Values commitments.** Values are high-level commitments to ethical behaviors. Because values are intentionally broad and abstract, these Standard Clauses only require the seller to represent and warrant that its own corporate values, as memorialized in a written instrument, are consistent with the buyer's values.
- **Principles commitments.** Principles articulate values in the form of standards that contain an intermediate level of detail. For the purposes of these Standard Clauses, principles refer only to widely recognized and voluntary standards (see *Drafting Note, Model International CSR-related Standards (http://us.practicallaw.com/6-525-8652#a198082)*).
- **Rules commitments.** Rules refer to CSR-related laws, rules and regulations (see *Drafting Note, Seller's Compliance with the Rules (http://us.practicallaw.com/6-525-8652#a834653)*).

Companies often structure and organize their CSR policies or programs with reference to these categories, although they do not always employ the same terminology. If the buyer's or the seller's CSR policy or program does not incorporate these categories or use these terms, the parties should revise these Standard Clauses as appropriate.

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1.1 Acknowledgment of [Buyer/Customer] Values.[Seller/Supplier] acknowledges that [Buyer/Customer] conducts its business based on a set of values and guidelines for action and behavior regarding people (including, without limitation, clients, employees, communities impacted by [Buyer/Customer]'s business activities, and shareholders) and the environment, as set forth in Exhibit 1 (the "[**Buyer/Customer]'s Values**"), and that these values and guidelines are consistent with a more general framework of fundamental principles to which [Buyer/Customer] adheres, as set forth in the [MODEL INTERNATIONAL CSR-RELATED STANDARDS] (collectively, the "**Principles**").

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Acknowledgment of Buyer's Values

Under *Section 1.1*, by requiring the seller to acknowledge the buyer's values, the buyer:

- Makes explicit the strength of its commitment to CSR.
- Holds its CSR policy up as the ideal standard and therefore positions itself as a leader in this emerging area of US law.

Model International CSR-related Standards

In the last set of brackets under *Section 1.1*, the buyer must reference the international CSR-related standards to which it adheres. Under *Section 1.2(b)*, the seller represents and warrants that it conducts its business consistently with these same standards.

Many companies favor widely used model voluntary CSR policies that incorporate and address all of the traditional CSR compliance categories (for example, labor, human rights and environmental sustainability) like those in many international CSR-related standards, for example:

- The International Labour Organization's International Labour Standards.
- The OECD Guidelines for Multinational Enterprises.
- The Universal Declaration of Human Rights.
- The United Nations Global Compact.

For more information on model voluntary CSR policies and related international standards, see *Practice Note, Corporate Social Responsibility and the Supply Chain, Box: Model Voluntary CSR Policies (http://us.practicallaw.com/2-520-6599#a374686)*.

The parties must revise Section 1.1 if:

- The buyer does not have a written CSR policy.
- Adherence to certain model CSR-related standards is impractical or inappropriate. For example, if a party does not have or anticipate having international dealings or operations, then it may not have adopted a model voluntary CSR policy under a set of international CSR-related standards.

1.2 [Seller/Supplier]'s Values. [Seller/Supplier] represents and warrants that it:

(a) has adopted a written policy [set forth in Exhibit 2] that sets out its values and guidelines for action and behavior regarding people (including, without limitation, clients, employees, communities impacted by [Seller/Supplier]'s business activities, and shareholders) and the environment (the "[Seller/Supplier]'s Values"), and such values and guidelines are consistent with the [Buyer/Customer]'s Values.

(b) conducts its business in a manner that is consistent with the Principles.

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DRAFTING NOTE

Seller's Values

Unde *Section 1.2(a)*, the seller represents and warrants only that its values are consistent with the buyer's values because buyers typically do not successfully negotiate the right to dictate the sellers' specific values (for example, by requiring the seller to have values that are substantially similar to the buyer's values), especially when the seller has many purchasers that impose CSR representations and warranties.

To supplement its protection against liability under Section 1.2(a), the buyer can require the seller to:

- Represent and warrant that it:
  - conducts its business in a manner that is consistent with selected international CSR-related standards; and
  - has either taken reasonable steps to comply or has complied with applicable laws and standards.
- Attach as exhibits:
  - the seller's CSR policy or policies under Section 1.2(a); and
  - the seller's policies regarding compliance with CSR-related laws and regulations under *Section 1.3*, so that the buyer can review and understand the contents of those values. To avoid surprises and potential liability, the buyer should review these policies before it enters into the agreement with the seller.

1.3 Compliance with CSR Laws. [Seller/Supplier] is in [material] compliance with, and requires its subcontractors and any person under its [Control/control] to [materially] comply with, all applicable state, national, and international laws, rules and regulations relating to ethical and responsible standards of behavior, including, without limitation, those dealing with human rights (including, without limitation, human trafficking and slavery and conflict mineral sourcing), environmental protection, sustainable development and bribery and corruption, including any legislation or regulation implementing the Principles (the "Rules"). [Seller/Supplier] has adopted and implemented appropriate and effective policies to ensure compliance with these Rules, including:

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Compliance with CSR Laws

The seller should insist on qualifying these representations and warranties (see *Practice Note, Representations, Warranties, Covenants, Rights and Conditions (http://us.practicallaw.com/9-519-8869)*) so that immaterial breaches and violations do not result in inaccuracy and breach of the agreement.

The seller could include the bracketed words "material" and "materially" or instead add the following language to the end of the first sentence of *Section 1.3*:

", except to the extent that any failure to be in compliance, individually or in the aggregate, [would/could] not [reasonably] [be expected to] have a material adverse effect on [Seller/Supplier]'s ability to perform its obligations under this Agreement."

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(a) the implementation of due diligence and data collection procedures reasonably designed to monitor compliance with the Rules;

(b) the establishment of internal review and accountability structures to oversee internal compliance with the Rules;

(c) the coordination of [ongoing/annual/[TIME]] training and instruction for its employees [[and offering training and instruction to its/,] suppliers and subcontractors] regarding compliance with the Rules;

(d) the requirement that its subcontractors certify their compliance with the Rules; and

(e) the implementation of regular subcontractor audits, either directly or through a third-party auditor, to monitor compliance efforts.

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Suppliers and Subcontractors

Training

Depending on the nature of the transaction and the parties' negotiating power, under *Section 1.3(c)* the buyer may require the seller to either provide or offer training and instruction to the seller's suppliers and subcontractors.

The seller should be aware that if it trains its suppliers or subcontractors, it may be at greater risk of third-party liability for the supplier's or the subcontractor's acts or omissions.

Supplier Conduct and Compliance

Section 1.3 requires the seller to represent and warrant that it:

- Is in compliance with laws, rules and regulations (rules) applicable to:
  - its own operations; and
  - its supplier's operations.
- Has adopted and implemented appropriate and effective policies (described in Section 1.3) to ensure compliance with these rules. In addition to providing the buyer with significant supply chain liability coverage, the five elements of the policies included in Section 1.3 (sometimes collectively referred to as a CSR due diligence or human rights due diligence framework) are:
  - commonly used by suppliers to assess CSR compliance in their supply chains; and
  - consistent with the policies in existing and proposed CSR-related legislation, and therefore better position the buyer to comply with emerging and future CSR-related legal requirements.

For example, Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* contains conflict minerals rules, which are the most recent and significant federal CSR-related rules. These conflict minerals rules require certain *Securities and Exchange Commissionreporting companies* (affected companies) to make a specialized disclosure and conduct-related diligence concerning specified minerals and their derivative metals contained in the companies' products. Affected companies can meet these obligations by obtaining representations either:

- Directly from processing facilities.
- Indirectly from immediate suppliers.

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Therefore, Section 1.3 can give the buyer:

- Enhanced access to the supplier's operations.
- Some protection against liability arising from the supplier's noncompliance with the buyer's policies regarding conflict minerals and the conflict minerals rules. For more information about complying with conflict minerals rules, see *PLC Corporate & Securities, Practice Notes, Conflict Minerals Diligence (http://us.practicallaw.com/0-510-6930)* and *Conflict Minerals Rule Compliance Resources (http://us.practicallaw.com/5-523-8315)*.

Depending on the buyer's bargaining power and the nature of the transaction, the buyer should require the seller to flow down the representations and warranties in *Section 1.1* and *Section 1.2* to its suppliers and subcontractors.

For the links to the documents referenced in this note, please visit our online version at http://us.practicallaw.com/6-525-8652

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