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# Corporate Liability and Human Trafficking

December 2015



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*Human Rights First is a nonprofit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.*

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**This report is available online at [humanrightsfirst.org](http://humanrightsfirst.org)**

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# Contents

<b>I. Executive Summary</b>	<b>1</b>
A. Background	1
<b>II. Federal Laws Targeting Trafficking</b>	<b>2</b>
A. Trafficking Victims Protection Act	2
B. Racketeering Influenced Corrupt Organizations Act	2
1. Criminal Prosecutions	4
2. Civil Lawsuits	5
C. Additional Federal Statutes Expressly Targeting Human Trafficking	6
<b>III. Federal Statutes Potentially Applicable to Trafficking</b>	<b>7</b>
A. Alien Tort Statute	7
B. Foreign Corrupt Practices Act	9
1. Actions in the Supply Chain	10
Criminal Enforcement	10
Civil Enforcement	10
2. “Conscious Disregard” or “Willful Blindness”	10
Criminal Enforcement	10
Civil Enforcement	11
<b>IV. Federal Regulations Targeting Human Trafficking</b>	<b>11</b>
A. Federal Acquisition Regulations	11
B. Defense Federal Acquisition Regulation Supplement	13
<b>V. Additional Federal Regulations Potentially Applicable to Trafficking</b>	<b>13</b>
A. Federal SEC Requirements	13
<b>VI. Proposed Federal Law Targeting Trafficking</b>	<b>14</b>
A. Business Supply Chain Transparency on Trafficking and Slavery Act of 2015	14
<b>VII. State Laws Pertinent to Trafficking</b>	<b>15</b>
A. California Transparency in Supply Chains Act	15
B. State Consumer Protection Law	16
C. Fiduciary Duty of Directors to Monitor	18
<b>VIII. Other Sources of Concern for Global Companies Relating to Trafficking ...</b>	<b>18</b>
A. Socially Responsible Investment Requirements	18
B. United Kingdom Legislation	19

## CORPORATE LIABILITY AND HUMAN TRAFFICKING

1.	Modern Slavery Act of 2015 .....	19
2.	Bribery Act of 2010 .....	20
3.	Proceeds of Crime Act of 2002 .....	22
4.	Other U.K. Anti-Trafficking Legislation.....	22
	Coroners & Justice Act of 2009.....	22
	Asylum and Immigration Act of 2004 .....	22
	Immigration Asylum, and Nationality Act 2006.....	22
C.	European Union Anti-Trafficking Directive .....	23
<b>IX.</b>	<b>Guidelines for Voluntary Action .....</b>	<b>23</b>
A.	American Bar Association Model Principles and Policies .....	23
B.	Other Guidelines .....	24
C.	Conclusion and Resources .....	24

## I. Executive Summary

In our world of increased globalization and worldwide movement of goods and capital, companies can face legal liability if they fail to guard against human trafficking not just in their direct operations but also in their supply chains. Legal liability can, in turn, hurt the reputation of companies and the interests of their investors. This paper examines how human trafficking can expose companies to legal liabilities and briefly describes actions they can take to protect themselves. It separates statutes into two groups: those written to target human trafficking specifically and those written to target other criminal activities that can be applied to human trafficking.

The legal and regulatory environment related to human trafficking is evolving as global focus on accountability for human rights violations increases. Federal and state governments in the United States have recently adopted—and continue to consider—laws and regulations designed to strengthen governmental capacity to combat human trafficking and prosecute those directly or indirectly involved. While many such laws and regulations are focused on civil sanctions against direct perpetrators, more recent efforts seek accountability for individuals and entities indirectly culpable for, among other things, failing to halt trafficking within their businesses' supply chains.

Longstanding federal statutes and regulations also offer opportunities to crack down on human trafficking. Government regulations and strong enforcement should serve to ensure that responsible businesses are able to operate on a level playing field. Additionally, rules and regulations applied to U.S.-based companies operating globally by non-U.S. and/or non-governmental entities present grounds for caution in the face of potential enterprise-related trafficking activity. Preventing forced labor in supply chains will both protect companies from potential liability and promote their status as good global citizens.

### A. Background

2015 marks the 150<sup>th</sup> anniversary of the ratification of the 13<sup>th</sup> Amendment, which abolished slavery in the United States. Yet in the world today there are an estimated 20.9 million people enslaved,<sup>1</sup> and the United States is both a source and destination of victims.<sup>2</sup> U.S. corporations frequently support forced labor, often indirectly and unknowingly, as enslaved workers toil at the lower rungs of their supply chains. Sadly, this is a very lucrative business: human trafficking is estimated to generate \$150 billion annually in profits worldwide.<sup>3</sup>

The growth of the problem has not gone unnoticed. Governments are increasingly attempting to prevent and punish human trafficking by enacting laws to proscribe all of its various manifestations. Civil society and victims' rights groups are also finding new ways to hold accountable not only the perpetrators, but the beneficiaries of this crime, increasingly targeting supply chains, even if trafficked workers were recruited by subcontractors or their agents. All of this means that companies engaged in businesses where

<sup>1</sup> ILO, "ILO Global Estimate of Forced Labour," June 1, 2012, available at: [http://www.ilo.org/global/topics/forced-labour/news/WCMS\\_182109/lang--en/index.htm](http://www.ilo.org/global/topics/forced-labour/news/WCMS_182109/lang--en/index.htm).

<sup>2</sup> U.S. Department of State, "Trafficking in Persons Report," annual, available at: <http://www.state.gov/j/tip/rls/tiprpt/>.

<sup>3</sup> ILO, "Profits and Poverty: The Economics of Forced Labour," May 20, 2014, available at: [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_243391/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang--en/index.htm).

trafficking is known to occur should be vigilant in investigating their suppliers, rooting out the problem at its source, and establishing solid prevention policies and practices.

Since passage of the Trafficking Victims Protection Act (TVPA) of 2000 and its subsequent reauthorizations, the U.S. Government has undertaken significant steps to build an anti-human trafficking infrastructure. Through annual publication of the Department of State's (DOS) Trafficking in Persons report (TIP report), it has called worldwide attention to this blight and made it difficult for individuals and organizations engaged in businesses plagued by trafficking to claim ignorance about the problem.

## II. Federal Laws Targeting Trafficking

### A. Trafficking Victims Protection Act

Enacted in 2000, the Trafficking Victims Protection Act (as reauthorized, 22 U.S.C. chapter 78) (the TVPA), seeks to combat human trafficking by promoting a policy of the “3Ps”: Prosecuting traffickers, Preventing trafficking, and Protecting victims and survivors of trafficking. The TVPA established as federal crimes human trafficking and related activities—including forced labor and sex trafficking—with severe penalties for those convicted, and mandatory restitution for victims.

The forced labor statute prohibits obtaining labor or services by means of (1) force, threats of force, physical restraint or threats of physical restraint, (2) serious harm or threats of serious harm, (3) a scheme, plan, or pattern intended to cause the person to believe that he or another (such as a victim's family member) would suffer serious harm (physical or non-physical) or physical restraint if he did not perform such services, or (4) the abuse or threatened abuse of law or legal process. A defendant can be convicted of forced labor under the statute if the government proves that the defendant knowingly used one or more of the aforementioned means to provide or obtain the labor or services of another person.

From 2001 to 2008, the Department of Justice (DOJ) and the U.S. Attorneys' Offices prosecuted 531 defendants under the TVPA, secured 518 convictions and guilty pleas, and opened 1,005 new investigations. In 2010 and 2011, the U.S. Government pursued 103 and 125 human trafficking cases, respectively, obtaining 141 and 151 convictions.<sup>4</sup> In 2012 and 2013, the U.S. Government pursued 128 cases and 161 cases respectively, obtaining 138 and 174 convictions. In 2014, the U.S. Government pursued 208 cases and obtained 184 convictions. The penalties for convictions are severe, with trafficking resulting in death, attempted killing, kidnapping, attempted kidnapping, or aggravated or attempted sexual abuse meriting life sentences.

### B. Racketeering Influenced Corrupt Organizations Act

The Racketeering Influenced and Corrupt Organizations Act (RICO) was enacted in 1970 as part of the Organized Crime Control Act. See 18 U.S.C. §§ 1961-1968. The Act criminalizes four types of actions: (1)

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<sup>4</sup> Notable cases brought under the TVPA include *United States v. Navarrete*, 333 Fed. App'x. 488 (11th Cir. 2009) (a highly publicized case involving a scheme to transport and to force undocumented laborers to work on tomato farms in Immokalee, FL) and *United States v. Soto*, 242 Fed. App'x. 984 (5th Cir. 2007) (involving an alien-smuggling operation in which more than 100 female victims from Mexico and Central America were confined and forced to perform domestic work without pay. At the time, defendants' 23-year sentence was the longest sentence received under the TVPA.).

investing income derived from a pattern of racketeering activity or collecting an unlawful debt to obtain an interest in an enterprise affecting interstate or foreign commerce; (2) controlling through a pattern of racketeering activity or through collection of an unlawful debt any interest that affects interstate or foreign commerce; (3) associating with an enterprise that affects interstate or foreign commerce through a pattern of racketeering activity or through the collection of an illegal debt to manage the enterprise; and (4) conspiracy to violate any of the other RICO provisions. 18 U.S.C. §§ 1962(a)-(d). Knowingly engaging in human trafficking has been expressly subject to criminal prosecution under RICO since 2003.

RICO also provides a civil cause of action—with a compulsory award of treble damages, costs, and attorney’s fees—to any person who can show that a defendant’s racketeering activity proximately caused injury to his business or property. 18 U.S.C. §§ 1962(c), 1964(c); *Sedima, SPRL v. Imrex Co.*, 473 U.S. 479, 496 (1985). A plaintiff must satisfy four elements to succeed in a civil RICO suit: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Id.* The defendant must be legally distinct from the RICO “enterprise” used to conduct the pattern of racketeering activity. *See, e.g., St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009). The enterprise can be an association-in-fact enterprise, which is merely a group of persons associated together for the common purpose of engaging in a course of conduct. *Boyle v. United States*, 556 U.S. 938, 941-42 (2009). The defendant need not be convicted of any crime before a civil plaintiff can sue under RICO. *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998).

The Act lists over thirty crimes that qualify as predicate acts, including “trafficking in persons,” which Congress added by amendment when it passed the Trafficking Victims Protection Reauthorization Act in 2003. 18 U.S.C. § 1961(1) (2006). A victim injured by human trafficking has standing to pursue a civil claim under RICO, as might business partners, customers, or employees. *See Abraham v. Singh*, 480 F.3d 351 (5th Cir. 2007) (finding that the alleged victims of human trafficking have RICO standing). The surviving relatives of deceased victims would similarly have standing. *See Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 691 (S.D. Tex. 2009).<sup>5</sup>

Even persons who did not commit any predicate acts or agree to commit any predicate acts could face civil liability under RICO. *See* 18 U.S.C. § 1962(d). Under RICO’s specific conspiracy provision, a conspiracy charge does not require proof of an overt act “to effect the object of the conspiracy,” but only that the defendant agreed to the overall objective of the conspiracy. *Salinas v. United States*, 522 U.S. 52, 63 (1977). Further, the existence of a conspiracy may be inferred from the conduct of the participants; direct evidence is not needed.<sup>6</sup>

Similarly, allegations that a company actively associated itself with a RICO enterprise can be sufficient, even without allegations of actual communications between the two.<sup>7</sup> There is also the possibility of

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<sup>5</sup> In 2009, a federal grand jury indicted 11 defendants in Missouri on RICO charges related to human trafficking. The “Giant Labor” indictment marked the first time that RICO has been used to charge a human trafficking case criminally.

<sup>6</sup> *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1230 (S.D. Fla. 2011) (internal citation and quotation marks omitted). In *Magnifico*, workers, who were citizens of the Philippines, brought a civil RICO action against company that allegedly recruited them to come and work in the United States. The plaintiffs survived a motion to dismiss because they alleged facts that allowed the court “to infer the existence of a conspiracy” designed to increase profits by recruiting and exploiting low-cost laborers. *Id.* at 1230.

<sup>7</sup> In *Adhikari*, Nepali citizens brought a civil RICO action alleging that a military contractor and its subsidiaries knowingly used a Jordanian personnel staffing company that mistreated and failed to protect plaintiffs and their decedents. *Adhikari*, 697 F. Supp. 2d 674 at 679-804. The court reasoned that by alleging that the RICO enterprise acted to fulfill government contracts through a pattern of racketeering for the common illegal purpose of providing trafficked labor at low cost, plaintiffs had sufficiently alleged

vicarious liability for trafficking in persons under RICO. See *Adhikari* at 694.<sup>8</sup> RICO can also reach an individual or company who conducts or participates in the conduct of an enterprise by merely performing acts that are helpful to its operation.<sup>9</sup> It can encompass persons or entities beyond upper management who exert control over an enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993).

RICO increases the risks associated with human-trafficking in at least five ways. First, RICO increases the odds that a company may face liability for activities of individuals or companies in its supply chain under theories of vicarious liability,<sup>10</sup> inferred agreement,<sup>11</sup> or control.<sup>12</sup> Second, RICO offers plaintiffs a less burdensome standard for showing conspiracy, thus increasing the likelihood of such a claim surviving a motion to dismiss.<sup>13</sup> Third, companies could be liable for extraterritorial conduct under RICO.<sup>14</sup> Fourth, RICO liability could be predicated on acts other than the trafficking itself, such as related mail or wire fraud.<sup>15</sup> Finally, the treble damages and attorneys' fees available in civil RICO suits have made RICO a particularly attractive option for large classes of plaintiffs.<sup>16</sup>

The RICO statute has been applied both criminally and civilly to human trafficking. Application of the statute to corporations in the criminal and civil contexts is described below.

## 1. Criminal Prosecutions

The first criminal prosecution for human trafficking under RICO was *United States v. Askarkhodjaev, et al.*, No. 4:09-CV-143 (indictment, W.D. Mo. May 6, 2009), the so-called "Giant Labor" case, in which 10 defendants pleaded guilty to racketeering conspiracy, among other charges. Askarkhodjaev was the

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that the contractor, KBR, was "part of a unit that worked cooperatively and illegally to achieve that goal." *Id.* at 692. The court clarified that it did not matter that plaintiffs had not alleged "that KBR had any actual contact" with other conspirators because "the allegations that KBR actively associated themselves" with a conspirator company was enough to establish an association-in-fact enterprise. *Id.*

<sup>8</sup> A plaintiff must allege facts that establish an agency relationship between the defendant and a conspirator. *Id.* at 694. In *Adhikari*, the court found allegations that KBR and a conspirator company had a contractual relationship and that KBR had authority to supervise that company's employees sufficient to plead an agency relationship that could establish RICO liability. *Id.*

<sup>9</sup> See *United States v. Darden*, 70 F.3d 1507, 1542-43 (8th Cir. 1995).

<sup>10</sup> *Adhikari* shows that if a company has a contractual relationship with another company and supervisory authority over that company's employees, the company can face RICO liability under principles of vicarious liability.

<sup>11</sup> A court can infer the existence of an agreement through the conduct of the parties. See *Magnifico*, 783 F. Supp. 2d at 1230.

<sup>12</sup> RICO can also reach any entity that exerts control over a RICO enterprise by merely performing acts that are helpful to the enterprise's operation. See *Darden*, 70 F.3d at 1542-43.

<sup>13</sup> Unlike the general conspiracy statute, the RICO conspiracy provision does not require that the defendant commit an overt act in furtherance of the conspiracy. It requires only an agreement effectuating a common purpose, whether or not the conspirator agreed to the commission of all parts of the offense. *Salinas v. United States*, 522 U.S. 52, 62-64 (1997).

<sup>14</sup> Although a majority of cases have held that RICO does not apply to conduct that occurs outside of the United States, one court has held that it applies extraterritorially to the extent that the applicable predicate statute applies extraterritorially. *European Community Cm. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014), cert. granted, No. 15-138 (U.S. Oct. 1, 2015). The text of the TVPRA explicitly states that it provides extraterritorial jurisdiction over trafficking in persons offenses. See TVPRA at § 103. Additionally, if the alleged human trafficking scheme has other connections to the United States, such as U.S. actors, victims, co-conspirators, or even the use of U.S. bank accounts or e-mail accounts, it may be deemed "domestic" and thus subject to U.S. laws.

<sup>15</sup> For example, fraud requires only a "scheme to defraud" using the mail or wires. The use of a telephone or the Internet two times within a ten-year period, in furtherance of a vague scheme to defraud, would satisfy RICO requirements. Furthermore, a civil plaintiff would only have to prove these elements by a preponderance of the evidence rather than beyond a reasonable doubt.

<sup>16</sup> Section 1964(c) guarantees treble damages and attorney's fees.



leader of a criminal enterprise involving the company Giant Labor Solutions, LLC, among others, that recruited hundreds of foreign workers from the Dominican Republic, the Philippines, Eastern Europe, Central Asia, and elsewhere through false promises of good employment. When the workers arrived, Askarkhodjaev and his co-defendants compelled them into service in various jobs in 14 different states. The defendants forced the workers to live in greatly overcrowded apartments with exorbitant rents and coerced their labor by threatening deportation and withholding their wages.

More recently, in October 2011, in *U.S. v. Botsvynuk, et al.*, the government convicted Omelyan and Stepan Botsvynuk of conspiracy to violate RICO (with Forced Labor as a “specified unlawful activity”). Between 2000 and 2007, the brothers operated cleaning services with workers smuggled into the United States and kept in conditions of peonage and forced labor through physical violence and threats of physical violence. Evidence presented at trial showed the brothers recruited workers from Ukraine, promising them good jobs making \$500 per month and another \$200 or \$300 extra for expenses, with each worker expected to earn \$10,000 after two or three years of working in the United States. Throughout their employment with the brothers, the workers lived with up to five people in one room, slept on dirty mattresses on the floor, and were never paid. They were told that they had to work until their debts, ranging from \$10,000 to \$50,000, were paid. Omelyan was sentenced to life plus 20 years in prison, and Stepan was sentenced to 20 years in prison.

For additional examples of successful federal prosecutions for human trafficking, see <http://www.justice.gov/crt/criminal-section-selected-case-summaries#humantrafficking>.

## 2. Civil Lawsuits

Civil RICO claims have been used on several occasions to reach corporate entities associated with individuals who later engaged in human trafficking. Civil lawsuits of this nature are becoming more common and, in a climate of heightened attention to the scale and scope of international human trafficking, could be used more frequently in the future. Companies operating in overseas markets should be cognizant of this risk, especially if they use third-party recruiting and staffing companies to hire workers for them or manage work or workers in economically depressed countries.

Perhaps the most publicized civil RICO human trafficking case is a lawsuit filed in 2009 against Kellogg Brown & Root and various related entities. *Adhikari v. Daoud & Partners, et al.*, 09-CV-1237 (S.D. Tex. Apr. 24, 2009). That case involved claims by Nepali citizens (one worker and the families of twelve deceased workers) who had been subjected to human trafficking in Iraq. While the workers were living in Nepal, they were recruited to work overseas, and they believed they would be assigned to work in the United States or Jordan. Instead they were placed in the Iraqi war zone against their will. Tragically, twelve of the workers were killed by insurgents soon after entering Iraq. Although the district court dismissed most of the claims in *Adhikari* because the alleged conduct occurred outside the United States and it is not clear if the Trafficking Victims Protection Act at the time created extraterritorial jurisdiction, that issue is on appeal to the Fifth Circuit. In 2008, Congress amended the TVPA to make clear that it applies on an extraterritorial basis to all crimes covered under the Act.

The following are summaries of three judgments issued by United States courts in the last several years in which corporate entities were held liable for human trafficking:

- In *Nunag-Tanedo v. East Baton Rouge Parish School Board*, No. 10-01172-AG-MLG, 2010 WL 4771448 (C.D. Cal. Oct. 27, 2010), the district court ordered a \$4.5 million fine in favor of 350 recruited Filipino guest-working teachers. Although the case initially involved civil RICO claims, the judgment was based on violations of the Trafficking Victims Protection Act (TVPA, see above) by Universal Placement International, the company that administered the workers' placement on behalf of the school board.
- In *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008), the district court entered a judgment in favor of three Cuban nationals who alleged that the Curacao Drydock Company had conspired with the Cuban government to traffic them. The workers were subjected to forced labor (16-hour days in dangerous conditions) and were unpaid. Their compensation was deducted from Cuba's debt to Curacao. Initially, Curacao filed a motion to dismiss on *forum non conveniens* grounds, but the court denied the motion and held that it had jurisdiction under the Alien Tort Claims Act. Curacao later discharged its lawyers and subsequently failed to communicate with the court. The court entered a default judgment in favor of the plaintiffs on the issue of liability because the defendant abandoned the proceedings. The case went to trial only on the issue of damages and the court awarded \$80 million to the plaintiffs, concluding there was "overwhelming and uncontroverted evidence" to support their claims.
- In *David v. Signal Int'l, LLC*, No. 08-CV-1220, 2015 WL1281018 (E.D. La. Mar. 20, 2015), the district court entered a judgment in favor of Indian migrant workers who had been brought to the United States to make repairs in the aftermath of Hurricane Katrina. The Southern Poverty Law Center, ACLU, and others filed suit on behalf of the migrant workers claiming that their treatment violated the TVPA and RICO. The workers had been paid between \$10,000 and \$20,000 to travel to Gulf Coast shipyards. While they were lured by false promises of good jobs, green cards, and permanent U.S. residency, they were given temporary jobs, forced into involuntary servitude, and housed in overcrowded labor camps. After seven years of litigation, which culminated in a four-week trial, a jury awarded \$14.1 million in compensatory and punitive damages to five guest workers.

### C. Additional Federal Statutes Expressly Targeting Human Trafficking

A number of federal statutes other than the TVPA and RICO also expressly prohibit human trafficking, but have been used in this context sparingly, if at all, against corporate violators. Given the increased attention to human trafficking, however, such statutes could be utilized more vigorously in the future. The statutes include:

- the Tariff Act of 1930 (see 19 U.S.C. § 1307) , which prohibits the importation of goods made with forced or indentured labor,

- the Mann Act of 1910 (as amended in 1978 and 1986, see 18 U.S.C. § 2421), which criminalizes the transportation of minors and the coercion of adults to travel across state lines or to foreign countries for the purposes of engaging in commercial sex,<sup>17</sup>
- the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (Pub.L. 108-21, 117 Stat. 650), which enhances penalties for individuals engaging in sex tourism with children, and
- the National Defense Authorization Act of 2013 (Pub.L. 112-239), which authorizes governmental agencies to terminate any contract or grant with any organization or individual that engages in human trafficking. This law also requires that all grants and contracts with a value of more than \$500,000 contain a written certification that no party in the transaction will engage in or support human trafficking practices, and establishes methods of reporting and investigating possible instances of human trafficking associated with government contracts and grants.

### III. Federal Statutes Potentially Applicable to Trafficking

#### A. Alien Tort Statute

Enacted in 1798, the Alien Tort Claims Act, also called the Alien Tort Statute (as currently amended, the ATS), provides the federal district courts with “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The ATS does not create an independent cause of action, but permits federal courts to hear cases involving tortious conduct in violation of international law or treaty. Since 1980, and more frequently since the mid-1990s, plaintiffs have used the ATS to bring suits against multinational companies for their direct and indirect involvement in egregious conduct that violates international law in a developing country, including for human rights violations occurring abroad.

However, a court’s authority to adjudicate claims under the ATS is subject to certain restrictions. The Supreme Court’s ruling in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), held that ATS claims must “touch and concern” the territory of the United States, and that a “mere corporate presence” is not sufficient nexus for plaintiffs to bring ATS claims against foreign multinational companies for human rights violations committed in foreign countries. This has made it more difficult for human rights activists to sue foreign companies in the U.S. based on their international activities.

The ruling did leave open the question of what set of facts does sufficiently “touch and concern” the United States to support a viable ATS claim, including the possibility that U.S. corporations and individuals may continue to be sued under the ATS for human rights violations abroad. While the Supreme Court has not set a standard for meeting the touch and concern requirement, the Circuit courts

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<sup>17</sup> Cases brought under the Mann Act include *United States v. Jimenez-Calderon*, 183 Fed. App’x. 274 (3d Cir. 2006) (where at least four juveniles were transported across state lines for the purpose of commercial sexual exploitation) and *United States v. Jones*, 2007 U.S. Dist. LEXIS 51858 (N.D. Ga. June 18, 2007) (where both adults and juveniles were transported).

currently agree that mere citizenship, incorporation, or the maintenance of a headquarters in the United States cannot overcome the presumption against extraterritoriality established by *Kiobel*.<sup>18</sup> Yet they also have found that ATS claims alleging specific conduct—such as making domestic purchases, entering into financing agreements, or facilitating illegal payments through U.S. banks—do meet the touch and concern requirement and rebut the presumption against extraterritoriality.<sup>19</sup>

The “touch and concern” requirement is currently at issue in *Adhikari v. Daoud & Partners*, 15-20225 (5th Cir.). In that case, the plaintiffs, Nepalese victims of human trafficking from Nepal to Iraq, via Jordan, brought suit against the U.S. parent company of a military contractor in Iraq alleged to have participated in the trafficking. The district court dismissed the ATS claims because all alleged conduct occurred outside of the United States. See *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013, 1020 (S.D. Tex. 2015). Plaintiffs have appealed this decision, contending, *inter alia*, that *Kiobel* only precluded so-called “foreign cubed” cases, which involve foreign plaintiffs, foreign defendants, and foreign conduct. Although the final ruling in *Adhikari* will only have precedential value in the Fifth Circuit, the decision is likely to help further define the scope of ATS liability for U.S. corporations in future cases.

The ATS permits courts to exercise jurisdiction over claims arising out of “a narrow class of international norms,” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), most of which apply to states. Courts have found, however, that corporations can be held liable under the ATS for slavery, human trafficking, and forced labor when these crimes are committed in the course of war crimes. See, e.g., *Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002), *vacated on rehearing en banc*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).

Where trafficking-related activity takes place outside the context of war crimes, courts will assess on a case-by-case basis whether the alleged misconduct constitutes either an act of genocide (which would be prohibited against private actors) or a crime against humanity that is specifically exempted from the state action requirement. See *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209 at \*19 (N.D. Cal. Aug. 21, 2006); *In re South African Apartheid Litigation*, 617 F.Supp.2d 228, 248 (S.D.N.Y. 2009); *Presbyterian Church v. Talisman Energy*, 582 F.3d 244, 257 (2d Cir. 2009).

Where a state action requirement exists, courts employ a variety of tests to decide whether the defendant corporations were acting as agents of the state. See *Sinaltrainal*, 578 F.3d at 1266; *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 449 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887, at \*13-14 (S.D.N.Y. Feb. 28, 2002).

Another open issue is whether, and under what conditions, a corporation can be found secondarily liable for aiding and abetting slavery, human trafficking, or forced labor committed by a state actor. A recent case in the 9th Circuit, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014), addressed this issue. The plaintiffs, former child slaves who had been forced to harvest cocoa in the Ivory Coast, brought claims in federal court in California against various multinational companies that controlled the production

<sup>18</sup> The Eleventh Circuit found in *Doe v. Drummond Co.*, 782 F.3d 576, 596 (11<sup>th</sup> Cir. 2015) that U.S. citizenship, incorporation, and U.S. interests implicated by the defendant’s conduct are not sufficient to meet the touch and concern requirement. Rather, the dispositive factor was whether “enough relevant conduct occurred within the United States.” (emphasis in original).

<sup>19</sup> The Second Circuit concluded in *Mastafa v. Chevron Corp.*, 770 F.3d 170, 189 (2d Cir. 2014) that while the fact that Chevron was headquartered in the United States was immaterial, Plaintiff’s evidence of Chevron’s financial activity in the United States did allow the complaint to overcome *Kiobel*.

of Ivorian cocoa. The court found that plaintiffs had sufficiently pled their claim for aiding and abetting slavery because they alleged that the corporations had “placed increased revenues before basic human welfare, and intended to pursue all options available to reduce their cost,” with the knowledge that this could result in the use of child slave labor.<sup>20</sup> In contrast, the 2nd and 4th Circuits have required the plaintiff to show that the defendant had “the purpose of facilitating the alleged offenses” of the state, and not merely knowledge. See *Talisman*, 582 F.3d at 256 (citing *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir.2007)); see also *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399–400 (4th Cir.2011) and *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116, 1143 (C.D. Cal. 2002), *aff’d in part, rev’d in part, remanded by, vacated in part by* 456 F.3d 1069 (9th Cir. 2006), *aff’d in part, rev’d in part, remanded by* 671 F.3d 736 (9th Cir. 2011), *aff’d by* 2013 U.S. App. LEXIS 13312 (9th Cir., June 28, 2013).

## B. Foreign Corrupt Practices Act

Enacted in 1977, the Foreign Corrupt Practices Act (FCPA) imposes liability for payments made to officials of foreign governments or foreign state-owned companies to, directly or indirectly, gain an improper business advantage or to secure or maintain business, regardless of whether there was actual knowledge of wrongdoing or purposeful avoidance of such knowledge. Individuals and companies that violate the FCPA face civil penalties imposed by the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ),<sup>21</sup> as well as criminal prosecution by the DOJ.

The concept of an “improper business advantage” under the FCPA has been interpreted broadly, and in theory could include direct and indirect financial benefits such as labor and services provided by trafficked individuals. Under the FCPA, a U.S. parent company could be held liable for corrupt payments directly or indirectly made by its subsidiaries, agents, suppliers, and others acting on its behalf. Moreover, payment provided to private parties may constitute indirect bribery under the FCPA if the party is aware of circumstances indicating a high probability that such payments will be used for corrupt purposes.

Accordingly, even though it does not directly target human trafficking, the FCPA could be invoked to punish U.S. companies that benefit from cheap labor in connection with human trafficking. For example, a U.S. company could be held liable under the FCPA if it had a long-term supply contract with a foreign entity that relies on the labor of trafficked individuals and if the U.S. company was aware of a high probability that some of its payments to the foreign entity would be used to bribe foreign officials to facilitate human trafficking. A U.S. company could also be held liable under the FCPA if it directly engaged in bribery of foreign officials to conceal its business relationship with human traffickers and entities related to human traffickers.

Although cases of human trafficking have not yet been prosecuted under the FCPA, there have been cases under the FCPA that focus on a company’s liability further down the supply chain, and cases (which often involve criminal liability) applying the FCPA’s standards of “conscious disregard” or “willful

<sup>20</sup> *Nestle USA*, 766 F.3d at 1024. The defendant corporations have appealed the decision to the Supreme Court. In September 2015, the Supreme Court directed the plaintiffs to respond to the cert petition. Available at: <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-349.htm>.

<sup>21</sup> The SEC is responsible for civil enforcement of the FCPA over issuers and their officers, directors, employees, agents, and stockholders acting on the issuers’ behalf.

avoidance” that may signal a warning of the use of the FCPA in connection with human trafficking in the future. Examples of both types of enforcement actions are described below:

## 1. Actions in the Supply Chain

### Criminal Enforcement

- In 2013, Weatherford International pleaded guilty to violating the FCPA, among other laws, and agreed to pay \$87.2 million to the U.S. Government for permitting its subsidiary to use an agent who paid bribes to obtain and ensure the renewal of contracts in Angola and the Democratic Republic of Congo. *United States v. Weatherford International Ltd.*, Docket No. 13-cr-733, Deferred Prosecution Agreement (Nov. 26, 2013); see also *U.S. Securities and Exchange Commission v. Weatherford International Ltd.*, Case No. 4:13-cv-3500, Complaint (Nov. 26, 2013) (better explaining the facts of the case as they relate to the SEC’s civil enforcement action).
- In 2008, Siemens A.G. and its subsidiaries agreed to pay a total penalty of \$450 million to the U.S. government in criminal fines for charges of payments made to government officials by third-party agents and consultants, including to secure a \$1 billion contract with Argentina to create Argentine national identity cards. *United States v. Siemens A.G.*, Docket No. 08-cr-367-RJL, Plea Agreement (Dec. 15, 2008).

### Civil Enforcement

- In 2015, Mead Johnson Nutrition agreed to pay \$12 million to settle SEC charges under the FCPA based on payments to health care professionals by its Chinese subsidiary to recommend its products to expectant mothers. *In the Matter of Mead Johnson Nutrition Co.*, SEC Release No. 75532 (July 28, 2015).
- In 2014, Smith & Wesson agreed to pay \$107,852 in disgorgement, \$21,040 in prejudgment interest, and a \$1.906 million penalty to the SEC in part because it authorized a third-party agent in Pakistan to provide guns and cash payments to police officials to help the company obtain a deal to sell firearms to a Pakistani police department. *In the Matter of Smith and Wesson Holding Corp.*, Release Nos. 72678 & 3571 (July 28, 2014).

## 2. “Conscious Disregard” or “Willful Blindness”

### Criminal Enforcement

- A key case affirming that a defendant cannot avoid liability under the FCPA by “conscious avoidance” or “willful blindness” to corruption is *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011). In that case, the Second Circuit affirmed the criminal conviction of defendant Frederic Bourke for conspiring to violate the FCPA, finding no abuse of discretion in the trial court’s “conscious avoidance” jury instruction. The case arose out of the planned privatization of Azerbaijan’s state-owned oil company and attempts by a local agent and Bourke’s business partner to bribe government officials to facilitate acquisition of the company. The Court noted that Bourke knew corruption was pervasive in Azerbaijan, that he was aware of his partner’s reputation for corrupt practices (his partner was known as the “Pirate of

Prague”), that he had created two companies to shield himself and other U.S. investors from potential FCPA liability, and that he had even expressed his concerns about whether bribery was transpiring during a phone call with his attorney. With these facts in mind, the Court affirmed the conscious avoidance jury instruction, finding that “a rational juror could conclude that Bourke deliberately avoided confirming his suspicions that Kozeny [his business partner] and his cohorts may be paying bribes.” *Kozeny*, 667 F.3d 122, 132-35.

- Similarly, in an earlier criminal case, *United States v. King*, 351 F.3d 859 (8th Cir. 2003), defendant Richard King was convicted on several counts under the FCPA for agreeing to bribe government officials from Costa Rica in pursuit of land concessions. The Eighth Circuit affirmed the district court’s “deliberate ignorance” instruction, though it did note that the instruction was of limited utility given that the government’s case, which included witness testimony and tape recordings implicating King’s participation, was strong enough to show that King in fact “knew of the scheme and worked to perpetuate the bribe.” *King*, 351 F.3d at 859-62.

### Civil Enforcement

- The government may also seek FCPA liability under a “conscious avoidance” theory in enforcement actions. For example, in 2014, in a civil case involving the sale of medical diagnostic and life science equipment to government customers in Russia, Vietnam, and Thailand, the SEC charged Bio-Rad Laboratories with demonstrating “a conscious disregard for the high probability that [Russian third parties] were using at least a portion of [the] commission payments to bribe Russian government officials in exchange for awarding the company profitable government contracts.” In response to the SEC charges, Bio-Rad ultimately agreed to pay the government \$40.7 million in disgorgement and prejudgment interest. Order to Cease and Desist, Bio-Rad Laboratories, Inc., para. 2, No. 3-16231 (2014).

## IV. Federal Regulations Targeting Human Trafficking

### A. Federal Acquisition Regulations

Enacted in 1984, the Federal Acquisition Regulation (FAR) is a set of rules that governs the acquisition process by which the federal government acquires goods and services. The FAR has been amended numerous times, including in 2006 to prohibit federal service contractors from engaging in certain forms of human trafficking and requiring them to immediately inform their contracting officer if they receive any information from any source (including host country law enforcement) alleging that a contractor employee, subcontractor, or subcontractor employee has engaged in severe forms of trafficking, procuring a commercial sex act, or using forced labor in the performance of a contract. In 2015, FAR was amended again to go well beyond these original human trafficking prohibitions.<sup>22</sup> The new rules will have far reaching consequences as they apply to all federal contracts, regardless of contract type or dollar amount. Failure to comply may render the contractor subject to, among other remedies, (i) suspension of

<sup>22</sup> Available at: <http://www.gpo.gov/fdsys/pkg/FR-2015-01-29/pdf/2015-01524.pdf>.

contractor payments, (ii) loss of payment for the period in which the government determines the contractor did not comply, (iii) termination of the contract, (iv) required subcontractor termination or removal of a contractor employee, and (v) suspension or debarment from doing business with the federal government. A violation of these regulations could also face liability under the False Claims Act.

In addition to the existing prohibitions against severe forms of human trafficking, procurement of commercial sex acts and the use of forced labor in the performance of government contracts, the new FAR rules prohibit federal contractors, subcontractors and their employees and agents from engaging in the following activities:

- destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity or immigration documents;
- using misleading or fraudulent recruitment practices during the recruitment of employees or offering of employment;
- using recruiters that do not comply with local labor laws of the country in which the recruiting takes place;
- charging employees recruitment fees;
- providing or arranging housing that fails to meet the host country housing and safety standards; and
- failing to provide an employment contract or other required work document in writing in a language that the employee understands five days prior to the employee relocating if a contract is required by law or contract.

Additionally, FAR requires federal contractors to:

- provide, or pay for the cost of, return transportation upon the end of employment for an employee who is not a national of the country where the work was performed and who was brought into that country for the purpose of working on a U.S. government contract, subcontract, or portions of such contracts;
- notify its employees and agents regarding the above listed prohibitions and any actions to be taken against them for violations of this conduct;
- protect employees suspected of being victims of or witnesses to prohibited activities prior to returning to the country from which the employee was recruited, and not prevent or hinder the ability of these employees from cooperating fully with government authorities; and
- cooperate with any government investigations and audits relating to the policy against human trafficking.

The 2015 amendment also requires federal contractors to implement a human trafficking compliance plan for contracts where all or a portion of the contract is for goods acquired or services provided outside the United States exceeding \$500,000. Each compliance plan must include (i) an awareness program informing employees of the U.S. government's zero tolerance policy on human trafficking activities and the consequences for violating this prohibition, (ii) a reporting process for employees to report possible violations of the policy prohibiting trafficking in persons, (iii) a recruiting and wage plan addressing the



restrictions on recruiting fees, (iv) a housing plan establishing minimum standards for employees if the contractor intends to provide housing, and (v) policies to prevent trafficking by agents and subcontractors. Each plan will be unique and should be appropriate to the “size and complexity of the contract” and the “nature and the scope of the activities to be performed.”

Federal contractors must certify on an annual basis that they have such compliance plan in place and (i) have procedures to prevent any prohibited activities and conducted due diligence to detect any subcontractor or agent engaging in the prohibited activities, and (ii) can certify that, to the best of the contractor’s knowledge, no subcontractor or agent has engaged in the prohibited activities or, if abuses have been found, the appropriate remedial actions have been taken.

## **B. Defense Federal Acquisition Regulation Supplement**

The Defense Federal Acquisition Regulation Supplement (DFARS) is a supplement to FAR that provides the Department of Defense (DOD) acquisition regulations and procurement processes for goods and services. Like FAR, the DFARS was amended in 2015 to address human trafficking.<sup>23</sup> These new rules aim to ensure that DOD employees and contractors understand the DOD’s policies on human trafficking. Hiring solicitations that exceed a certain threshold must include notification that contractors cannot engage in prohibited human trafficking activities and must inform their employees of the same. Additionally, any contract involving non-commercial items valued at over \$5 million requires the display of DOD hotline posters providing information to employees on how to report human trafficking concerns.

# **V. Additional Federal Regulations Potentially Applicable to Trafficking**

## **A. Federal SEC Requirements**

The Securities Exchange Act of 1934 (also called the 1934 Act), 15 U.S.C. § 78a et seq., and related statutes form the basis of regulation of the financial markets and their participants in the United States, and established the Securities and Exchange Commission (SEC), the agency primarily responsible for enforcement of United States federal securities law. While the SEC does not specifically mandate SEC reporting companies make disclosures with regards to human trafficking, a company may be required to make disclosures respecting human trafficking in its annual report on Form 10-K and other pertinent filings if such matters are material to the company’s business.

In February 2010, the SEC issued an interpretive release on disclosures related to the impact of climate change and related regulatory, legislative, and other developments (the 2010 Release).<sup>24</sup> While the SEC has not issued a similar interpretive release on disclosures regarding human trafficking, the 2010 Release indicates that social responsibility issues can have a direct or indirect material impact on a company’s business and operations.<sup>25</sup> The 2010 Release further states that in addition to the disclosures expressly

<sup>23</sup> Available at: <http://www.acq.osd.mil/dpap/dars/dfars/html/current/252222.htm#252.222-7007>.

<sup>24</sup> See SEC Release No. 33-9106 (February 8, 2010) (“2010 Release”).

<sup>25</sup> *Id.* at 12.

required by the SEC regulations, Rule 408 of the Securities Act of 1933 and Rule 12b-20 of the Securities Exchange Act of 1934 require companies to disclose “such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.”<sup>26</sup> Therefore, human trafficking matters may indirectly trigger disclosure obligations under the SEC rules and regulations if they are material to understanding the state of the company’s business.

These disclosure obligations are most likely to arise under Item 503(c) of Regulation S-K, which requires companies to disclose the most significant factors, if any, that make an investment in them speculative or risky.<sup>27</sup> If there are high risks that a company’s supply chain involves human trafficking and it increases the risk of investing in the company due to non-compliance with federal or state laws, for instance, the company would be required to disclose this risk in the Risk Factors section of any filings which require Item 503(c) disclosure. Similarly, disclosures related to human trafficking may be necessary under Item 103 of Regulation S-K, if a company becomes party to any material legal proceeding involving the issue or becomes aware of legal actions contemplated by governmental authorities.<sup>28</sup> Item 303 of Regulation S-K also may require disclosures if the company’s management concludes that consideration of human trafficking matters is material and necessary for investors to accurately assess the financial condition and results of operations of the company, particularly regarding the company’s future prospects.<sup>29</sup>

## VI. Proposed Federal Law Targeting Trafficking

### A. Business Supply Chain Transparency on Trafficking and Slavery Act of 2015

In 2015, Representatives Carolyn Maloney and Chris Smith reintroduced H.R. 3266, the “Business Supply Chain Transparency on Trafficking and Slavery Act of 2015.” Originally introduced in 2011, this bill is modeled on the California Transparency in Supply Chains Act of 2010, which requires companies to report on their specific actions to eradicate slavery and human trafficking in their supply chains, and is also similar in certain respects to the United Kingdom’s Modern Slavery Act of 2015. (The California and U.K. laws are discussed below.)

If enacted, the bill would amend Section 13 of the Securities Exchange Act of 1934 to require publicly traded companies with over \$100 million in annual worldwide gross receipts to disclose on their websites and report annually to the SEC on Form 10-K what policies they have in place to ensure that their supply chains are free from slavery, child labor, and human trafficking. More specifically, the bill requires these public companies to disclose the extent to which they conduct any of the following activities: (1) maintain a policy prohibiting their employees and the employees associated with their supply chain from engaging in commercial sex acts with a minor; (2) engage in third-party evaluations of the risks in their supply chains of forced labor, slavery, trafficking and the worst forms of child labor, including a description of the steps taken to eliminate such risks; (3) conduct audits of their suppliers to identify the aforementioned

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<sup>26</sup> *Id* (citations omitted).

<sup>27</sup> 17 CFR 229.503(c).

<sup>28</sup> 17 CFR 229.103.

<sup>29</sup> See 2010 Release at 15.

matters; (4) require suppliers to attest that the materials they manufacture comply with, and require and ensure that their recruitment of labor complies with, laws concerning forced labor, slavery, trafficking and certain child labor; (5) maintain internal accountability standards, supply chain management, procurement systems and reporting procedures for employees, suppliers, contractors or other entities in their supply chains who fail to meet the company's standards on forced labor, slavery, trafficking and the worst forms of child labor; (6) train employees who have direct responsibility for supply chain management on issues related to forced labor, slavery, trafficking and the worst forms of child labor; and (7) ensure that remedial action is taken where any of these matters are identified in the supply chain.

## VII. State Laws Pertinent to Trafficking

### A. California Transparency in Supply Chains Act

Pursuant to the California Transparency in Supply Chains Act (the Act), large retail sellers and manufacturers are required to make website disclosures regarding their “efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale” beginning in January of 2012.<sup>30</sup> The Act applies to any company doing business in California that is identified as a manufacturer or a retail seller on its California state tax return and that has annual worldwide gross receipts that exceed \$100,000,000.<sup>31</sup> The companies that fall within the scope of the legislation must make the following five categories of disclosures on their websites:

- **Verification:** The companies must confirm whether they engage in verification activities to identify and address risks of human trafficking in their product supply chains and whether the verification is conducted by a third party.<sup>32</sup> The Resource Guide published in May 2015 by the Attorney General of California regarding the Act recommends that the companies explain the extent to which they engage in verification, including describing the general methodology used and the frequency of verifications.<sup>33</sup>
- **Audit:** The companies must state whether they audit their suppliers to determine compliance with company standards for human trafficking and whether the audits are independent and unannounced.<sup>34</sup> In addition, the Resource Guide recommends that the companies describe the general methodology used and the frequency of audits.<sup>35</sup>
- **Certification:** The companies must state whether their suppliers are required to certify that materials incorporated into a product comply with human trafficking laws in the country or countries in which they do business.<sup>36</sup> The Resource Guide recommends that the companies

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<sup>30</sup> Cal. Civ. Code, § 1714.43.

<sup>31</sup> *Id.* at subd. (a)(1).

<sup>32</sup> *Id.* at subd. (c)(1).

<sup>33</sup> See Cal. Attny. Gen., The California Transparency in Supply Chains Act: A Resource Guide (2015) (“Cal. Attny. Gen.”) 11, available at <http://www.state.gov/documents/organization/164934.pdf>.

<sup>34</sup> See Cal. Civ. Code, § 1714.43, subd. (c)(2).

<sup>35</sup> See Cal. Attny. Gen. at 14.

<sup>36</sup> Cal. Civ. Code, § 1714.43 subd. (c)(3).

describe the general certification requirement and the consequences for violating the requirement.<sup>37</sup>

- **Internal Accountability:** The companies must disclose whether they have internal procedures to determine whether employees and contractors comply with company standards for human trafficking and describe those procedures.<sup>38</sup> The Resource Guide further recommends that the companies explain the procedures and the way they monitor compliance.<sup>39</sup>
- **Training:** The companies must confirm whether they provide training on mitigating human trafficking for employees and management responsible for supply chains and provide a general description of the relevant training.<sup>40</sup> The Resource Guide states that the companies are recommended to identify the categories of employees being trained and the topics covered.<sup>41</sup>

All manufacturers and retail sellers that have annual worldwide gross receipts higher than the threshold amount are subject to the Act, even those who do not take action related to the five categories. In such case, a company would state that it does not take any actions for each category. The required disclosures must be posted on the companies' websites with a conspicuous link on the companies' homepages that easily directs visitors to the information. If a company does not have a website, it must provide a written disclosure within 30 days of receiving a written consumer request.<sup>42</sup>

The Resource Guide makes clear that the Act does not direct companies to implement any "new measures to ensure that their product supply chains are free from human trafficking and slavery," but is only intended to require disclosure of information in order to help consumers make better choices.<sup>43</sup> While the only remedy under the Act for a violation of the disclosure requirements is an action by the Attorney General of California for injunctive relief, the Act states that it shall not limit the remedies available for a violation of any other state or federal law.<sup>44</sup>

As of the date of this memorandum, no other U.S. state has adopted similar laws regarding human trafficking, although some appear to be moving in that direction.

## B. State Consumer Protection Law

A number of class action lawsuits have recently been filed against companies regarding labor conditions in their supply chains under state consumer protection statutes.<sup>45</sup> In California, plaintiffs have asserted

<sup>37</sup> See Cal. Attny. Gen. at 16.

<sup>38</sup> Cal. Civ. Code, § 1714.43 subd. (c)(4).

<sup>39</sup> See Cal. Attny. Gen. at 18.

<sup>40</sup> Cal. Civ. Code, § 1714.43 subd. (c)(5).

<sup>41</sup> See Cal. Attny. Gen. at 20.

<sup>42</sup> Cal. Civ. Code, § 1714.43 subd. (b).

<sup>43</sup> See Cal. Attny. Gen. at i.

<sup>44</sup> Cal. Civ. Code, § 1714.43(d).

<sup>45</sup> See, e.g., *Sud v. Costco Wholesale Corp.*, 15-cv-03783, U.S. District Court, Northern District of California (San Francisco); *Barber v. Nestle USA Inc.*, 15-cv-01364, U.S. District Court, Central District of California (Los Angeles). The Alien Tort Statute

such claims under California's Unfair Competition Law (UCL),<sup>46</sup> Consumers Legal Remedies Act (CLRA),<sup>47</sup> and False Advertising Law (FAL).<sup>48</sup> Remedies available under these statutes include restitution, injunctive relief, damages, and attorney's fees for the prevailing party.

For purposes of class certification, reliance on a company's misleading statement or failure to disclose may be presumed if it would have been material to a reasonable consumer. Plaintiffs have charged that companies' reports on risks of human trafficking and slavery in supply chains—which are mandated for companies doing business in California under California's Transparency in Supply Chains Act—are material, i.e. that if the company had disclosed accurate information on supply chain labor, consumers would not have bought such products or paid as much for them.<sup>49</sup> If a class is certified, damages estimates for a multi-year class period can be many millions of dollars.

Litigation has included claims against companies regarding labor conditions in their supply chains,<sup>50</sup> and claims relating to the purchase of "blood diamonds" (obtained using slave labor) as part of an antitrust class action.<sup>51</sup>

Most of the recent trafficking-related class actions bring claims under the UCL, which defines "unfair competition" to include any unlawful, unfair, or fraudulent business act or practice; unfair, deceptive, untrue, or misleading advertising; and any act prohibited by the false advertising law. See *McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174, 187 (Cal. Ct. App. 2010) (citing § 17200); *Herremans v. BMW of N. Am., LLC*, 2014 U.S. Dist. LEXIS 145957 at \*22 (C.D. Cal. Oct. 3, 2014).<sup>52</sup> While the UCL proscribes any "unlawful" business practice, and defines unlawful practices as all "civil or criminal, federal, state, or municipal, statutory, regulatory or court-made" law,<sup>53</sup> courts have thus far not allowed statutes or legal precedent from other states or international law to form the basis for UCL claims. See *Hilton v. Apple Inc.*,

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claim against Nestle is currently pending in the Supreme Court. The Ninth Circuit previously reversed the district court dismissal and remanded to allow plaintiffs to amend their complaint.

<sup>46</sup> Cal. Bus. & Prof. Code § 17200, et seq.

<sup>47</sup> Cal. Civ. Code § 1750, et seq.

<sup>48</sup> Cal. Bus. & Prof. Code § 17500, et seq.

<sup>49</sup> Additionally, a company's competitor could have a Lanham Act claim if it was injured due to the company making representations that were rendered false by the use of forced labor in the manufacturing of a product. *Mugworld, Inc. v. G.G. Marck & Associates, Inc.*, 563 F. Supp. 2d 659, 665-66 (E.D. Tex. 2007) *aff'd sub nom. Mugworld Inc. v. G.G. Marck & Associates Inc.*, 351 F. App'x 885 (5th Cir. 2009).

<sup>50</sup> See *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002) (involving California consumer protection laws). The matter was settled.

<sup>51</sup> See *Leider v. Ralfe*, 387 F. Supp. 2d 283, 297-98 (S.D.N.Y. 2005) (involving New York consumer protection laws). Class certification was denied ("plaintiffs have not proffered a feasible method of damage calculation that is based on something more than conjecture and would have uniform application so that individual issues with respect to damages do not predominate."). Thereafter, the *Leider* plaintiffs transferred their case and agreed to become part of a settlement of various consumer and antitrust claims against the same defendants in *Sullivan v. DB Investments, Inc.*, No. CIV.A. 04-2819 SRC, 2008 WL 8747721, at 4 (D.N.J. May 22, 2008) (Forced labor is not mentioned in the order approving the settlement).

<sup>52</sup> The *Herremans* court found that:

Section 17200 defines unfair competition to include any unlawful, unfair or fraudulent business act or practice. Its coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. By proscribing any unlawful business practice, § 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. . . . Because Cal. Bus. Prof. Code § 17200 is written in the disjunctive, it establishes three varieties of unfair competition — acts or practices which are unlawful, or unfair, or fraudulent. The scope of the UCL is broad. It covers a wide range of conduct.

<sup>53</sup> *Beaver v. Tarsadia Hotels*, 29 F. Supp. 3d 1294, 1303 (S.D. Cal. 2014).

2014 U.S. Dist. LEXIS 184769 at \*8-9 (C.D. Cal. Apr. 18, 2014). The UCL may, however, be invoked outside of California.

The CLRA is similar to the UCL in that it enumerates 23 “unlawful” activities, such as false advertising and misrepresentation, and a company can be found liable for violation of the CLRA if it engages in a prohibited activity during a transaction with a consumer for the sale of goods or services.<sup>54</sup> Notably, the CLRA prohibits courts from granting motions for summary judgment in class actions brought under the CLRA.<sup>55</sup> The CLRA allows for actual damages, punitive damages, injunctive relief, restitution, ancillary relief, and attorney’s fees.<sup>56</sup>

### C. Fiduciary Duty of Directors to Monitor

In certain circumstances, directors may have a duty under pertinent state law to implement and monitor a reporting or information system or controls to detect and prevent human trafficking. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, where the Delaware Supreme Court articulated “the necessary conditions predicate for director oversight liability” as:

(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.

911 A.2d 362, 370 (Del. 2006) (emphasis by Court, footnotes omitted). Although the standard accords some leeway to directors, liability can be costly because breaches of the duty of loyalty are not subject to the provision of Delaware law that permits a corporation to exempt its directors from monetary liability for breach of the duty of care.

## VIII. Other Sources of Concern for Global Companies Relating to Trafficking

### A. Socially Responsible Investment Requirements

Companies that borrow or obtain investments from the World Bank Group, and notably from the International Finance Corporation (IFC), are required to agree to comply with environmental and social policies that contain restrictions on human trafficking. These policies appear in the Performance Standards on Social and Environmental Sustainability and Industry Sector Guidelines, which are available

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<sup>54</sup> Cal. Civ. Code § 1770(a).

<sup>55</sup> Cal. Civ. Code § 1781(c)(3).

<sup>56</sup> Cal. Civ. Code § 1780(a)(1)-(5).

on IFC's website. Other multinational, governmental and even some private sector lenders are beginning to follow that example.

As an illustration, the Overseas Private Investment Corporation (OPIC), which is owned by the United States government, adopts, as a standard for the environmental and social review process, the IFC's standards and guidelines, and applies them to the evaluation of prospective projects seeking OPIC support. According to OPIC's published information, OPIC categorizes all projects as Category A, B, C or D based on environmental and social factors, with Category A representing the highest risk. "Special Consideration" projects are considered higher risk to workers because of the heightened potential to violate labor rights. Factors that OPIC specifically considers are "industries or sectors in countries with a clear history of labor rights issues (e.g., use of child or forced labor, or discrimination against migrant workers and workers who exercise trade union rights)" and "supply chain sector considerations in which the supply of raw materials and primary goods constitutes a particularly high risk for the use of both forced labor and harmful child labor...." Consistent with performance standards, applicants to OPIC are required to provide an overarching policy statement of principles that will be used to guide the project, identify individuals who will be responsible for execution of the policy statement, and the means by which the policy statement will be communicated throughout the applicant's organization. The terms of financing from OPIC require reporting and monitoring of compliance with applicable policies.

## B. United Kingdom Legislation

### 1. Modern Slavery Act of 2015

The United Kingdom adopted the Modern Slavery Act (the Act), modeled partly on the California Transparency in Supply Chains Act discussed above, earlier in 2015. Effective October 2015, it imposes disclosure requirements similar to those under the California Act.<sup>57</sup> The Act applies to any "commercial organization" that carries on any part of its business in the United Kingdom. A commercial organization is defined as a corporation or partnership that supplies goods or services and has a turnover of at least £36 million.<sup>58</sup>

Under the Act, a covered company must prepare a slavery and human trafficking statement for each financial year, setting forth the steps it has taken to ensure that human trafficking is not taking place in its supply chains or any part of its own businesses.<sup>59</sup> Similar to the California Act, any company that has not taken any steps must still provide a statement noting that fact.<sup>60</sup> A company may also provide additional information regarding its efforts to prevent human trafficking in its supply chains and businesses, such as its policies, due diligence processes, risk management efforts and training.<sup>61</sup> This required statement must be posted on the company's website with a prominent link, or if the company does not have a

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<sup>57</sup> See Home Office, Modern Slavery and Supply Chains Government Response: Summary of Consultation Responses and Next Steps (2015) 17, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/448200/Consultation\\_Government\\_Response\\_final\\_2\\_pdf.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448200/Consultation_Government_Response_final_2_pdf.pdf).

<sup>58</sup> Modern Slavery Act 2015, c. 30, § 54.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

website, be provided to anyone who makes a written request for one within 30 days of receiving the request.<sup>62</sup>

Failure to comply with the reporting requirement risks the Secretary of State commencing a civil action against the commercial organization in question that can lead to an injunction.<sup>63</sup> This means that the compliance can only be enforced by means of civil injunctions. However, reputational risks and the consequences of any direct or supply chain breaches are arguably the greater sanction.

## 2. Bribery Act of 2010

Section 7 of the United Kingdom Bribery Act of 2010 (UKBA) imposes strict liability on companies that fail to prevent their employees, subcontractors or third party service providers from paying or accepting bribes. The UKBA came into force in 2011 and as a result the provisions have not yet been fully considered by U.K. courts. Nonetheless, depending on the facts of the case, where: (i) a commercial organization<sup>64</sup> has a supplier that employs trafficked labor; and (ii) the supplier has paid bribes to facilitate the use of such labor, it seems likely that the commercial organization could be liable for an offense under S.7 UKBA if it has benefited from the payment of the bribe (i.e. from a reduced cost base). Whether a commercial organization would, in fact, be liable for bribery committed by a supplier depends on:

1. whether the supplier is considered an associated person of the organization;
2. whether the commercial organization is within the jurisdiction of the UKBA; and
3. whether the commercial organization can rely on an “adequate procedures” defense.

A commercial organization is liable under S.7 UKBA if a “person associated” with it bribes another person intending to obtain or retain an advantage for the commercial organization. The UKBA and guidance produced by the Ministry of Justice<sup>65</sup> state that whether a person is an “associated person” is to be determined by reference to all the relevant circumstances and by applying a common sense approach. As a result, it is generally accepted that suppliers, distributors and licensees can be considered associated persons, depending on the facts of the case.<sup>66</sup> The Ministry of Justice has made it clear, however, that “*where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of sub-contractors, an organization is likely only to exercise control over its relationship with its contractual counterparty.*”<sup>67</sup> So it seems likely that, in practice, commercial organizations will not be liable for bribery committed by suppliers further down the supply chain than their direct contractual counterparty (although this will depend on the facts of the case).

Nevertheless, commercial organizations are expected to have compliance policies and procedures that are proportionate to the risks faced by the business. This may include risk-based due diligence of a

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<sup>62</sup> *Id.*

<sup>63</sup> Modern Slavery Act 2015, c. 30, § 54.

<sup>64</sup> S.7 UKBA applies to any commercial organization, whether that organization is a partnership or an incorporated body. Ministry of Justice guidelines on the UKBA suggest that commercial organizations include charitable and educational organizations pursuing commercial activities.

<sup>65</sup> See Ministry of Justice Guidance on the Bribery Act 2010 (“MoJ Guidance”), published in March 2011.

<sup>66</sup> R.Lissack, F.Horlick, *Lissack and Horlick on Bribery*, 2<sup>nd</sup> Eds, Lexis Nexis (London: 2014).

<sup>67</sup> See MoJ Guidance.



supply chain. Where commercial organizations or their suppliers operate in high risk jurisdictions or industries, prosecutors may consider it proportionate for organizations to require their suppliers to include anti-bribery terms and conditions in any contracts the suppliers enter into with other suppliers further down the supply chain. It may also be proportionate for a commercial organization to require audit rights over its entire supply chain (or at least part of it), rather than just its contractual counterparty.

Section 7 applies to (i) any company or partnership which is incorporated/formed within the U.K.; and (ii) any other company or partnership (wherever incorporated) which carries on a business, or part of a business, in any part of the U.K. The UKBA does not define the phrase “carries on a business.” Guidance provided by the Ministry of Justice advises that this phrase should be interpreted in a “common sense manner” and that a company will not be carrying on a business in the U.K. unless it has a “demonstrable business presence” in the U.K.<sup>68</sup> The MoJ Guidance further states: “having a U.K. subsidiary will not, in itself, mean that a parent company is carrying on a business in the U.K., since a subsidiary may act independently of its parent or other group companies.” The MoJ Guidance is not legally binding, however, and it will be for the courts to determine the precise meaning of “carrying on a business.”

In the competition case *Akzo Nobel N.V. v Competition Commission* [2013] CAT 13, the Court of Appeal found that because Akzo Nobel exercised strategic and operational management and control over a subsidiary company in the U.K., it did carry on business in the U.K. This case concerned the interpretation of the Enterprise Act (which includes the phrase “a person carrying on business in the United Kingdom”), not the Bribery Act; however, it is possible that the court would interpret S.7 UKBA in the same way. Prosecuting agencies such as the Serious Fraud Office are likely to take *Akzo Nobel* into account when deciding whether or not to prosecute as they may regard the decision as supporting the expansive interpretation of S.7 UKBA that people like the former SFO director Richard Alderman have advocated in the past. If the UKBA were interpreted in the same way as the Enterprise Act, a commercial organization would likely be carrying on a business in the U.K. if:

1. it owns business premises in the U.K.; or
2. it has employees or agents in the U.K. who are conducting its business on a more or less permanent basis.

It is a defense to the offenses under S.7 UKBA to show that “adequate procedures” were in place to prevent bribery by associated persons. Adequate procedures require commercial organizations to take a risk-based approach to corruption and bribery. In order to demonstrate that adequate procedures are in place, a business could:

1. have a detailed anti-bribery and corruption policy and should carry out a risk assessment to ensure that the policy deals with the risks to the business;
2. require relevant employees and contractors to undertake anti-bribery training;
3. depending on the level of risk to the business, require audit rights over immediate suppliers and those further down the supply chain; and

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<sup>68</sup> See MoJ Guidance.

4. depending on the level of risk to the business, carry out due diligence on suppliers and other third parties it contracts with.

### 3. Proceeds of Crime Act of 2002

The United Kingdom's Proceeds of Crime Act of 2002 allows the High Court to order the forfeiture of property in the absence of any conviction for a criminal offense if the property is, or represents, property obtained through unlawful conduct. The burden of proof in this context is the balance of probabilities. It is possible that where a commercial organization contracts with a supplier that employs trafficked labor and the commercial organization has benefited from a reduced cost base as a result, the commercial organization could be liable to have the proceeds that it has achieved from the lower cost base confiscated by a U.K. prosecuting authority.

### 4. Other U.K. Anti-Trafficking Legislation

A number of other United Kingdom laws that address trafficking are noted briefly below. None seems likely to be of serious concern to non-U.K.-based companies with supply chain trafficking issues because they do not provide for corporate criminal liability, or because of the territorial scope of the acts, or both.

#### Coroners & Justice Act of 2009

- A person commits an offense under Section 71 of the Coroners & Justice Act 2009 if he or she holds another person in slavery or servitude (as defined by the Article 4 of the European Convention on Human Rights) or requires another person to perform forced or compulsory labor. There is a knowledge requirement on the part of the defendant – the circumstances must be of a kind that the defendant knows or ought to know that the person is being so held or required to perform such labor. The provisions of the Act do not extend outside the United Kingdom and do not provide for criminal liability of corporate bodies.

#### Asylum and Immigration Act of 2004

- Under Section 4 of the Asylum and Immigration Act 2004, a person is penalized for arranging or facilitating the arrival to, travel within or departure from the United Kingdom of an individual with the intention of or knowledge that the individual will be exploited in the United Kingdom or elsewhere. Again, however, the provisions of the Act do not extend outside the U.K. and do not provide for criminal liability of corporate bodies.

#### Immigration Asylum, and Nationality Act 2006

- Under Section 22 of the Immigration Asylum, and Nationality Act 2006, an employer, corporate or not, who employs illegal migrants is subject to a civil penalty. If an offense is committed by a body corporate with the consent or connivance of an officer of the body, the officer, as well as the body, shall be treated as having committed the offense. The term officer includes directors, managers, secretaries, partners and persons purporting to act as such. However, the provisions of the Act do not extend outside the UK.

## C. European Union Anti-Trafficking Directive

The European Union Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (the E.U. Trafficking Directive) lays down minimum common rules for determining offenses of trafficking in human beings and punishing offenders. E.U. directives normally do not directly create liabilities, but E.U. Member States have an obligation to establish laws implementing the E.U. Trafficking Directive into the national legal order as the basis for individual liability. For example, the United Kingdom has initially implemented it by amending relevant provisions of its existing laws, such as the Sexual Offenses Act 2003 and the Asylum and Immigration Act 2004.

The E.U. Trafficking Directive requires the E.U. Member States to penalize intentional acts of: recruitment, transportation, transfer, harboring or reception of persons by force for the purpose of exploitation. Exploitation includes: (i) sexual exploitation or prostitution; and (ii) forced labor or services (including begging, slavery, exploitation of criminal activities, or the removal of organs). Member States are to ensure that legal entities can be held liable for offenses committed for their benefit by any person, acting either individually or as part of an organ of the legal entity, who has a leading position within the legal entity. Also, the Directive requires that the lack of supervision or control should be punishable if it has made the commission of the offenses possible.

Member States are to take the necessary measures to ensure that a legal entity held liable for the offenses is subject to effective, proportionate, and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; judicial winding-up; and temporary or permanent closure of establishments which have been used for committing the offense.

The E.U. Member States are to establish their jurisdiction over the offenses where the offense is committed in whole or in part within their territory, or the offender is one of their nationals. The Member States may establish further jurisdiction outside their territory, for example, where the offense is committed against one of its nationals or a person who is a habitual resident in its territory.

## IX. Guidelines for Voluntary Action

### A. American Bar Association Model Principles and Policies

In 2014, the ABA House of Delegates adopted Model Principles and Model Policies on Labor Trafficking and Child Labor. While they do not have the force of law, they may increasingly serve as guidelines for businesses and their lawyers. The Model Principles are:

Principle 1—The Business/Supplier will Prohibit Labor Trafficking and Child Labor in its Operations.

Principle 2—The Business/Supplier will Conduct a Risk Assessment of the Risk of Labor Trafficking and Child Labor and Continually Monitor Implementation of this Policy.

Principle 3—The Business/Supplier should: (i) Train Relevant Employees, (ii) Engage in Continuous Improvement, and (iii) Maintain Effective Communications Mechanisms with its Suppliers.

Principle 4—The Business/Supplier will Devise a Remediation Policy and Plan that Addresses Remediation for Labor Trafficking or Child Labor in its Operation.

## B. Other Guidelines

The [U.N. Guiding Principles on Business and Human Rights](#) provide guidance for businesses that want to adopt policies and standards to combat human trafficking. Other international standards include the [OECD Guidelines for Multinational Enterprises](#), the [IFC Performance Standards](#) and the [Equator Principles](#). While policies and practices should be tailored to address particular risk scenarios, common initiatives might include:

1. Risk Assessment
2. Transparent Policies and Codes of Conduct
3. Supply Chain Diligence
4. Training and Education

## C. Conclusion and Resources

As outlined above, there are a myriad of laws directed at curbing human trafficking, and others that could be applied in human trafficking cases. Human trafficking is the fastest growing criminal enterprise in the world, victimizing 20.9 million people globally, earning perpetrators an estimated 150 billion dollars annually. Labor traffickers continue to invade legitimate business operations at various levels within supply chains. Companies operating overseas, especially those relying on workers in economically depressed countries or those using third-party recruiting and staffing organizations, are especially at risk of having forced labor in their supply chains. Taking steps to prevent forced labor and protect companies' supply chains will help companies avoid liability.

The U.S. government publishes a few resources annually that can help companies identify specific risks: the [U.S. Department of Labor publishes a list of goods](#) from particular countries known to be at high risk for being made with forced or child labor; the State Department (DOS) publishes an annual [Trafficking in Persons report](#) that details over 180 countries' human trafficking concerns and efforts to combat the crime. Additionally, Verité, an NGO that helps companies deal with forced labor risks and challenges, [published a report supported by DOS](#) that details risks of human trafficking in eleven different sectors in specific regions. The International Labor Organization [provides guidance material](#) to employers and businesses to help companies understand and better tackle human trafficking and forced labor issues. Also, governments adhering to the OECD Guidelines for Multinational Enterprises mentioned above are required to set up [national contact points](#) in country that are available for inquiry.

For additional support in developing policies and practices to prevent forced labor, [Verité](#) works with companies to create compliance plans and trainings. There are also industry specific initiatives such as the [Fair Labor Association](#) that provides resources to manufacturers regarding suppliers, and the

Electronics Industry Citizenship Coalition, which has adopted a code of conduct for technology companies in its membership that includes best practices to prevent forced labor in their supply chains. Lastly, the U.S. government is expected to publish a model compliance plan to help government contractors implement the requirements of the new FAR regulations that went into effect in March 2015.

Awareness of this rapidly-developing area of law, and the resources available to help companies take proactive measures to prevent human trafficking in their supply chains, offers an opportunity not only to avoid costly liability, but also to play a critical role—and to act as global role models—in the elimination of modern slavery worldwide.



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WHERE TO FIND US

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