

# THE UK MODERN SLAVERY ACT: UNPACKING THE REQUIREMENTS FOR U.S.-BASED MULTINATIONALS

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## THE MSA

In 2015, the United Kingdom enacted the Modern Slavery Act “MSA” to, among other things, consolidate and clarify the existing UK offenses of slavery and human trafficking; increase penalties; provide for new civil preventative orders; provide for new maritime enforcement powers; establish the office of an Independent Anti-Slavery Commissioner; and adopt measures focused on supporting and protecting victims.

### WHO IS AFFECTED?

Under the MSA, a commercial organization must prepare a slavery and human trafficking statement (a “Statement”) for each financial year if it supplies goods or services and has a total turnover of at least £36 million. A commercial organization is a corporation or partnership, wherever incorporated or formed, that carries on a business (including a trade or profession) or part of a business in any part of the United Kingdom. The turnover calculation includes the turnover of the subject commercial organization and its subsidiary undertakings, including those subsidiary undertakings carrying on business entirely outside of the United Kingdom.

The MSA does not contain a bright-line test for determining whether a commercial organization based outside of the United Kingdom is carrying on a business or part of a business in any part of the United Kingdom. According to the UK Home Office’s October 29, 2015 Guidance on the transparency provisions of the MSA (the “Guidance”), organizations should apply “a common sense approach,” noting that those that do not have a demonstrable business presence in the United Kingdom should not be subject to the transparency provisions.

### SUBSIDIARIES

For many U.S. multinationals, the transparency provisions only will apply to a portion of their business activities and operations, since U.S. multinationals often conduct their UK business through one or more discrete subsidiaries. Having a UK-focused subsidiary does not subject entities that are above that subsidiary in the corporate

chain, or sister companies that are under common control, to the transparency provisions. According to the Guidance, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the United Kingdom, since a subsidiary may act completely independently of its parent or other group companies. However, depending on their business activities in the United Kingdom, multiple entities in the consolidated group, even those that are not primarily engaged in carrying on a business in the United Kingdom, may be required to prepare a Statement.

The Guidance indicates that a parent organization that is subject to the transparency provisions must include in its Statement the activities of its subsidiaries, even if a subsidiary does not independently meet all of the jurisdictional requirements of the MSA, if the activities of the subsidiary form part of the supply chain or business of the parent.

### FRANCHISES

In terms of franchised operations, the Guidance notes that, in determining the total turnover of a business operating a franchise model, only the turnover of the franchiser and not that of any franchisees must be included. However, franchisers who meet the turnover threshold may wish to consider the impact on their brand of the activities of franchisees in relation to modern slavery, and in so doing report on the steps taken to ensure the franchise as a whole is free from modern slavery.

### STATEMENTS: A CLOSER LOOK

The Statement is required to indicate the steps that the commercial organization has taken during the applicable financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains nor in any part of its own business. Alternatively, if the organization has not taken any steps to eradicate slavery and human trafficking, it is required to indicate the steps taken.

### WHAT TO INCLUDE

Organizations have flexibility to tailor their statements. There are no mandatory disclosure topics, although the recommended disclosure topics include:

- The organization’s structure, its business model and its supply chain relationships.
- The organization’s policies in relation to slavery and human trafficking.
- Its due diligence and auditing processes in relation to slavery and human trafficking in its business and supply chains.
- The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk.

- Its effectiveness in ensuring that slavery and human trafficking are not taking place in its business or supply chains, measured against such key performance indicators as it considers appropriate.
- The training regarding slavery and human trafficking available to its staff.

The MSA does not require subject commercial organizations to adopt a human trafficking policy, conduct supply chain due diligence or put in place a compliance program. It is a disclosure-only rule.

### COMBINED STATEMENTS

Many U.S. multinationals will have more than one entity in their corporate structure with an independent disclosure obligation under the MSA. The Guidance indicates that, if a parent organization and one or more subsidiaries in the same group are each required to produce a Statement, the parent may produce one Statement that the subsidiaries can use, provided that the Statement fully covers the steps that each of the organizations has taken in the relevant fiscal year.

## DISSEMINATION

The Statement must be published on the commercial organization's website if it has one. If the organization does not have a website, it must provide a copy of the Statement upon written request, within 30 days after the request is received.

For organizations with more than one website, the Guidance recommends placing the Statement on the most appropriate website relating to the organization's business in the United Kingdom. Where there is more than one relevant website, the Guidance recommends placing a copy of the Statement or a link to the Statement on each relevant website.

The MSA indicates that the link to the Statement must be in a prominent place on the website's homepage and should be clearly marked so that the contents are apparent. For example, the link should be directly visible on the homepage or part of an obvious dropdown menu on that page.

## A PERIOD OF TRANSITION

The transparency provisions came into force on October 29, 2015, but there is a transitional period for compliance to give subject organizations sufficient time to consider the provisions and Guidance before producing their first Statement. Under regulations

## TIMING

Statements must be prepared annually, for the previous fiscal year. The MSA does not contain a date by which a Statement must be prepared and posted, but the Guidance indicates that organizations are expected to publish their Statements as soon as reasonably practicable after the end of the applicable fiscal year, and they are encouraged to report within six months of their fiscal year-end.

## SIGNATURES

The Statement must be approved by the board of directors (or equivalent) and signed by a director or the equivalent if the organization is a body corporate. If the entity is a limited liability partnership, the Statement must be approved by the members and signed by a designated member. If the organization is a limited partnership registered under the UK Limited Partnerships Act, it must be signed by a general partner. For any other kind of partnership, the Statement must be signed by a partner.

issued by the UK government on October 22, 2015 and as discussed in the Guidance, the first organizations required to produce a Statement will be those whose fiscal years end on or after March 31, 2016.

## SIMILAR LEGISLATION ALREADY IN PLACE: THE CTSCA

The California Transparency in Supply Chains Act (CTSCA) took effect on January 1, 2012. Under the CTSCA, retail sellers and manufacturers conducting business in California and that have annual worldwide gross receipts of more than \$100 million are required to disclose their efforts to eradicate slavery and human trafficking from their direct supply chain for tangible goods offered for sale.

Several of the concepts in the CTSCA mirror those in the California Revenue and Taxation Code. For example, "doing business in the state" and "worldwide gross receipts" have the same meanings in the Code. Similarly, whether a company is a retail seller or manufacturer within the meaning of the CTSCA is determined by whether it reports under one of those two principal business activity codes on its California tax return.

The CTSCA requires a subject retail seller or manufacturer to, at a minimum, disclose to what extent it:

- Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure is required to specify if the verification was not conducted by a third party.

- Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure is required to specify if the verification was not an independent, unannounced audit.
- Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
- Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
- Provides company employees and management, who have direct responsibility for supply chain management, with training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

CTSCA disclosure must be posted on the retail seller's or manufacturer's website with a conspicuous and easily understood homepage link to the disclosure. If the retail seller or manufacturer does not have a website, the company must provide the written disclosure within 30 days of receipt of a customer's written request.

**AT A GLANCE: THE MSA AND THE CTSCA**

The table below compares the most pertinent aspects affecting subject companies under the MSA and CTSCA:

	<b>MSA</b>	<b>CTSCA</b>
Subject Companies	Supplier of goods or services, including a trade or profession	Manufacturer or retailer
Annual Turnover Threshold	£36 million	\$100 million
Jurisdictional Nexus	“Common sense approach”	California Revenue and Taxation Code
Supply Chain	Any of the subject company’s supply chains, and any part of its own business	Direct supply chain for tangible goods offered for sale
Statement Content	Suggested topics	Required topics
Publication	Website, with a prominent homepage link, or upon written request	Website, with a conspicuous and easily understood homepage link, or upon written request
Signature	Required	None
Frequency	Annual	Not specified; on an as-needed basis

**GETTING STARTED: RECOMMENDATIONS**

**ASSESS APPLICABILITY**

Initially, U.S. multinationals should assess whether any of the entities in their corporate group must prepare a Statement and, if so, by when (based on their fiscal year-end). Due to the manner in which total turnover is calculated and UK nexus is determined, many midsized and larger U.S. multinationals that derive a relatively small portion of their revenues from the United Kingdom will be required to prepare a Statement for at least a portion of their business.

Keep in mind that the business activities picked up by the MSA’s transparency provisions are broader than those within the scope of the CTSCA. In addition, the turnover threshold under the MSA is significantly lower. Therefore, many U.S. multinationals that do not come under the CTSCA will still be required to prepare a Statement under the MSA.

**TAKE A THOUGHTFUL, MEASURED APPROACH**

Because the MSA’s transparency provisions are structured as a disclosure-only rule, companies have the flexibility to construct a compliance program that is tailored to their business, industry, risk profile, position in the supply chain, other legal requirements, corporate social responsibility commitment and resources.

For most companies, the first step in developing an effective and efficient compliance program should be gaining a better understanding of modern slavery risks in their business and supply chains. Because this is a newer area of focus for most companies, especially as it relates to their supply chains, companies are generally starting from a fairly low knowledge base.

At a high-level, typical compliance program elements include, among others:

- A policy statement
- Management systems to support compliance
- Supplier outreach and due diligence
- Evaluation of internal and supplier compliance and risk
- A risk mitigation framework

Implementing an effective supply chain compliance program can take years and modern slavery compliance is no exception. Don’t try to “eat the whole elephant in one bite.” NGOs and other constituencies recognize that it takes time to develop and implement a modern slavery compliance program. What they are looking for is a thoughtful, good faith effort and progressive improvement over time.

For companies that already have a modern slavery compliance program, the program should be reviewed with public disclosure in mind. Put another way, will the program be viewed as sufficiently robust by relevant external constituencies when described in a Statement?

**HARMONIZE YOUR DISCLOSURE AND COMPLIANCE PROCEDURES**

Many companies that will be required to prepare a Statement already publish disclosure under the CTSCA. Although the disclosures contemplated by the two acts are somewhat different, there will be significant overlap. Consideration should be given to whether to prepare a single statement to satisfy the requirements of both acts and, at a minimum, disclosures should be coordinated. In addition, modern slavery disclosure should be coordinated with other CSR and supply chain disclosures.

Consideration also should be given to coordinating and harmonizing modern slavery compliance processes and procedures among reporting entities if different entities within the consolidated group are subject to each of the MSA and CTSCA. In addition, to reduce cost and increase efficiency, companies that are starting to build their modern slavery supply chain compliance program should leverage other complementary supply chain compliance initiatives, such as those relating to conflict minerals and other commodities.

**EMBED RESPONSIBLE PRACTICES**

The fundamental purpose of supply chain disclosure requirements is to shine a light on corporate procurement practices and related compliance procedures to drive responsible sourcing. The theory is that greater transparency will drive responsible sourcing, either from within the disclosing company or through engagement by

NGOs, socially responsible investors, commercial customers, consumers and other stakeholders who read the disclosures. As articulated in the Guidance, “The provision seeks to create a race to the top by encouraging businesses to be transparent about what they are doing, thus increasing competition to drive up standards.”

The MSA, like the CTSCA, does not require a company to put in place a compliance program to eradicate modern slavery in its supply chain, nor does it require that supply chain due diligence be performed. However, several factors are driving a significant number of U.S. companies to address modern slavery as part of their supply chain compliance, as well as driving companies that already have programs to make those programs more robust.

*As articulated in the Guidance, “The provision seeks to create a race to the top by encouraging businesses to be transparent about what they are doing, thus increasing competition to drive up standards.”*

## THE FUTURE OF MODERN SLAVERY DISCLOSURE

First-time Statements are generally expected to indicate that the organization was focused on better understanding modern slavery risks and that it was in the initial stages of developing and implementing a compliance program. The Guidance echoes this view and notes that organizations’ first Statements may show how they are starting to act on the issue of modern slavery and their planned actions to investigate or collaborate with other stakeholders to effect change. However, NGO and other stakeholder expectations are likely to be higher for the first Statements of organizations with fiscal years that end in late 2016 or early 2017.

Disclosures will evolve as organizations continue to implement and enhance their modern slavery compliance programs and address risk, and otherwise refine their Statements under both the MSA and the CTSCA. Expect disclosures to take a few years to start to coalesce around a norm as compliance programs start to mature and NGOs and other constituencies publish expectations documents, advocate for specific practices and rank compliance efforts.

These factors include:

- Increased awareness, which is driving proactive change.
- Legislation: For example, many companies that supply goods and services to the U.S. federal government are now required to conduct anti-human trafficking due diligence and put in place a related compliance program under a U.S. Federal Acquisition Regulation rule that took effect in March 2015. Even more recently, in February 2016, The Trade Facilitation and Trade Enforcement Act became law in the United States. This Act allows U.S. authorities to seize shipments of products produced using forced labor and prohibit further imports of those products.
- The rapidly increasing focus on this issue by governments, NGOs, socially responsible investors, the press, commercial customers and consumers.
- An increase over the last year in litigation relating to human trafficking and child labor in the supply chain, including litigation involving disclosures under the CTSCA.

For all of these reasons, disclosing “we do not do anything” or making platitudinous public statements will not be the right approach for most companies.

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