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### Modern Slavery Compliance For U.S.-based (and Other) Multinationals: A Review of Recent Compliance and Disclosure Developments in the United States and Abroad

Modern slavery compliance is becoming a bigger focus at U.S.-based and other multinationals. Compliance continues to evolve at a rapid pace. Over the last several months, there have been a number of important compliance and disclosure developments, some of which require action now, and others which will play out over a longer time frame.

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For example, a federal Modern Slavery Act recently took effect in Australia, while the New South Wales Modern Slavery Act is expected to take effect mid-year. In the United Kingdom, the Home Office is putting additional compliance pressure on multinationals, has issued additional Modern Slavery Act guidance and is conducting a compliance review of Modern Slavery Act statements. In addition, the U.K. Modern Slavery Act is undergoing independent review, which may, over time, result in a strengthening of that Act.

Closer to home, the U.S. Federal Acquisition Regulation’s anti-human trafficking Rule was recently amended, modern slavery in supply chains is creating trade compliance risk and legislation that would require additional modern slavery disclosures has been proposed in Washington State. This year also has seen an uptick in modern slavery-related shareholder proposals. In addition, corporate modern slavery legislation has been proposed in Canada, and the Canadian government is taking other steps to strengthen corporate modern slavery compliance.

These and other recent developments, as well as selected take-aways and suggested action items, are discussed in this Alert.

#### The Australian Federal Modern Slavery Act Has Been Adopted

The Australian federal Modern Slavery Act (the “Australian MSA”) was signed into law on December 13, 2018 and took effect on January 1, 2019. See our earlier Alerts on the Australian MSA [here](#) and [here](#).

**Subject Entities.** The Australian MSA requires publication of a modern slavery statement by Australia-based entities (based on tax residence, jurisdiction of formation or central management and control) and other entities that carry on business in Australia, and in each case have annual consolidated revenue of at least A\$100 million.

An entity carries on business in Australia if it (1) has a place of business in Australia, (2) establishes or uses a share transfer office or share registration office in Australia or (3) administers, manages or otherwise deals with property situated in Australia as an agent, legal personal representative or trustee, whether by employees, agents or otherwise.

Consolidated revenue is determined in accordance with Australian Accounting Standards, even if those standards do not otherwise apply to the entity. However, unless an entity to which Australian Accounting Standards do not apply is close to the reporting threshold, it is likely to calculate consolidated revenue under the accounting standards used to prepare its financial statements. Control also is determined under Australian Accounting Standards.

**Modern Slavery Defined.** Among other things, modern slavery is defined in the Australian MSA to include forced labor, the worst forms of child labor, deceptive recruiting, debt bondage, trafficking in persons, slavery and servitude.

**Statement Content.** Subject entities are required to report annually on their actions to address modern slavery in both their operations and supply chains. Statements are required to, at a minimum, indicate or describe, as applicable:

- the reporting entity;
- the structure, operations and supply chains of the reporting entity;
- the modern slavery risks in the operations and supply chains of the reporting entity and any entities it owns or controls;
- the actions taken by the reporting entity and any entities it owns or controls to assess and address modern slavery risks, including its due diligence and remediation processes;
- how the reporting entity assesses the effectiveness of those actions;
- the process of consultation with any entities that the reporting entity owns or controls and, in the case of joint statements, between each reporting entity and the entity preparing the joint statement;
- any other information that the reporting entity, or the entity preparing the statement, considers relevant; and
- details of the approval of the statement.

**Joint Statements.** As alluded to above, joint statements covering multiple reporting entities are permitted. A joint statement is required to identify all reporting entities covered by the statement, be prepared in consultation with each reporting entity that is covered by the statement and address all mandatory criteria for each of the reporting entities.

**Approval and Signatory Requirements.** Statements must be approved by the principal governing body of the reporting entity, which is the body or group of members with primary responsibility for the governance of the entity. The statement also must be signed by a responsible member of the reporting entity, which generally must be an individual member of the principal governing body. For example, a director of a corporation is a responsible member of that entity.

A joint statement must be approved by the principal governing body of at least one reporting entity covered by the statement. Alternatively, it can be approved by the principal governing body of a higher entity that has direct or indirect influence or control over each reporting entity covered by the statement. The joint statement also must be signed by a responsible member of at least one of the reporting entities or by a responsible member of a higher entity. If a joint statement is approved and signed by only some of the entities required to publish the statement, the joint statement must explain why it was not practical to have the statement approved by a higher entity or each reporting entity.

**Submission Requirements.** Reporting entities must submit statements to the Minister for Home Affairs within six months after the end of the entity's fiscal year. Reporting is required beginning with the reporting entity's first fiscal year that starts after the commencement of the Australian MSA. This requirement is expanded upon in the discussion below of the draft guidance that was recently published.

**Voluntary statements.** Entities also may voluntarily submit modern slavery statements. Entities that wish to do so are required to give written notice to the Minister before the end of the reporting period in a manner and form approved by the Minister. Once an entity volunteers to report, it will be required to comply with all of the Australian MSA's reporting requirements, including discussion of the mandatory criteria and the statement due date. An entity that volunteers to report will be able to opt out of future reporting by notifying the Minister before the next reporting period begins. This approach is intended to prevent an entity that volunteers to report from withdrawing for a then-current reporting period to avoid reporting on modern slavery risks identified in respect of that period.

**Modern Slavery Statements Register.** The Minister for Home Affairs will be publishing submitted statements on an online Modern Slavery Statements Register. Statements on the Register will be accessible by the public free of charge. Although not required, reporting entities also may publish their statements on their websites.

The Minister may elect not to register a modern slavery statement if the reporting entity does not comply with the requirements of the Australian MSA. However, this is expected to occur only if there is egregious non-compliance after reasonable attempts are made to engage in dialogue and work with the affected entity to ensure that its statement meets the minimum requirements of the Australian MSA.

**Draft Guidance.** Draft guidance for reporting entities was published on March 29. The draft guidance is open for comment until May 19, after which final guidance will be issued. The aim of the guidance is to explain in plain language what reporting entities need to do to comply with the Australian MSA. Selected elements of the draft guidance that expand upon and/or clarify the text of the Australian MSA are described below. The final guidance is expected to be substantially similar to the draft guidance.

**Commencement of reporting.** For entities that operate on an Australian Financial Year (July 1 through June 30), the first reporting period under the Australian MSA will be from July 1, 2019 through June 30, 2020, with the first statement due on December 31, 2020. For a company with a calendar fiscal year, the first reporting period will be from January 1 through December 31, 2020.

**Explanation of key terms.** The guidance explains several key terms used in the Australian MSA. Some of these terms are described below, in the order they are explained in the guidance:

- “*Operations*” are described broadly as any activity or business relationship undertaken by the entity to pursue its business objectives and strategy, including research and development, construction, production, arrangements with suppliers, distribution, purchasing, marketing, sales, provision and delivery of products or services and financial lending and investments. This includes activities in Australia and overseas.
- “*Supply chains*” are described as the products and services (including labor) that contribute to the entity’s own products and services. This includes products and services sourced in Australia or overseas and extends beyond direct suppliers.
- The “*risks of modern slavery practices*” means the potential for the reporting entity to cause, contribute to or be directly linked to modern slavery through its operations and supply chains. The concepts of cause, contribution and direct linkage are set out in the UN Guiding Principles on Business and Human Rights and used in the same manner in the guidance. Consistent with the UN Guiding Principles, the guidance notes that the concept of risk in this context means risk to people rather than risk to the reporting entity. However, the guidance acknowledges that risks to people often will intersect with risks to the reporting entity.
- “*Due diligence*” refers to an ongoing management process to identify, prevent, mitigate and account for how the entity addresses actual and potential adverse human rights impacts in its operations and supply chains, including modern slavery. The four key parts to due diligence are (1) identifying and assessing actual and potential human rights impacts, (2) integrating findings across the entity and taking appropriate action to address impacts, (3) tracking performance to check whether impacts are being addressed and (4) publicly communicating what the entity is doing.

**Describing modern slavery risks (mandatory criterion three).** The statement does not need to exhaustively list specific risks in the required description of the risks of modern slavery practices in the operations and supply chains of the reporting entity. For example, particular factories that present a risk do not need to be listed. However, the description

must include sufficient detail to clearly show the types of products and services in the entity's operations and supply chains that may involve risks of modern slavery.

Describing actions taken to assess and address modern slavery risks (mandatory criterion four). The description should only cover actions taken during the twelve month reporting period for the reporting entity. Actions taken after the end of the reporting period should be described in the next statement.

Describing the assessment of the effectiveness of actions taken to assess and address modern slavery risks (mandatory criterion five). The Australian MSA only requires subject entities to explain how they assess the effectiveness of their actions. It does not require them to determine whether their actions are effective.

Providing other relevant information (mandatory criterion seven). Reporting entities do not need to include information for this criterion if they consider their responses to the other criteria to be sufficient. Information provided in response to this criterion should be relevant and the statement should explain how the additional information is relevant.

Incident reporting. Reporting entities are not required to report on specific individual risks or actual cases of modern slavery. However, this information may be voluntarily included, such as in an anonymized case study.

Statement approval. The statement must indicate that it has been approved by the principal governing body for the reporting entity, name that governing body and specify the date the governing body approved the statement. The approval process cannot be delegated to a subcommittee or another body. In addition, the statement should be approved by the principal governing body as a stand-alone document and not as part of a larger document, such as a sustainability report.

Signature requirement. The reporting entity may choose which responsible member signs the statement. However, the guidance indicates that it is best practice for the head of the principal governing body to sign the statement if the responsible member is a member of that body. More than one responsible member may sign the statement. The statement should specify the name and position of the signatory next to the signature. The signature can be electronic. The signature must be clear and easy to find in the statement.

Consultation with controlled entities. The reporting entity has discretion as to how best to consult with controlled entities for purposes of modern slavery reporting. The reporting entity also has discretion to decide at what level consultation should occur. However, the level of consultation should reflect the relationship with the other entity and the risk profile of that entity and be sufficient to ensure that modern slavery risks relating to the other entity have been appropriately identified, assessed and addressed and that the other entity is aware of what actions it needs to take.

Joint statements. A joint statement does not need to respond to each criterion separately for each entity. The level of consultation with each reporting entity should reflect the relationship with that entity and its risk profile. At a minimum, each reporting entity's senior management should be aware of the content of the statement.

Revising a statement. A statement may be revised at any time, such as if it includes false or misleading or market-sensitive information that needs to be corrected. Entities needing to revise a statement will need to contact the Modern Slavery Business Engagement Unit, which is part of the Trade and Customs Division in the Department of Home Affairs and is responsible for implementing the Australian MSA. The revised statement will need to clearly indicate the date of the revision and explain what changes have been made in sufficient detail to provide readers with an understanding of what content has changed and the reasons for the change, such as via a short note at the front page of the statement. The revised statement will need to be reapproved by the principal governing body of the reporting entity and signed by a responsible member of that entity.

***Voluntary reporting.*** An online form will be made available for entities to notify the Department of Home Affairs that they wish to voluntarily report.

***Global modern slavery statements.*** The same statement that is used to satisfy other similar modern slavery reporting requirements may be used for purposes of the Australian MSA, so long as the statement meets all of its requirements.

### **Commencement of the New South Wales Modern Slavery Act is Not Far Behind its Federal Counterpart**

On June 27, 2018, New South Wales adopted its own annual modern slavery reporting requirement, as part of its Modern Slavery Act (the “NSW MSA”). Adoption occurred the day before the federal Australian MSA was introduced in Parliament. However, recognizing that adoption of federal modern slavery legislation was likely, the commencement of the NSW MSA was delayed. See our earlier Alert on the NSW MSA [here](#).

New South Wales appointed an Interim Anti-Slavery Commissioner on December 21, 2018 to shepherd through the commencement of the NSW MSA. The New South Wales government has indicated that the NSW MSA is expected to commence on July 1, 2019. Accordingly, we expect implementing regulations to be published in the near future. As noted below, many important aspects of the NSW MSA are subject to further regulations.

***Subject Entities.*** The transparency provisions of the NSW MSA will apply to “commercial organisations,” which are entities (1) with employees in New South Wales, (2) that supply goods and services for profit or gain and (3) that have a total turnover for the applicable fiscal year of at least A\$50 million or such other amount as may be prescribed by regulation.

In anticipation of the federal Australian MSA, the NSW MSA provides that its transparency provisions will not apply to commercial organisations that are subject to obligations under a law of the Commonwealth or another State or a Territory that is prescribed as a corresponding law. Many multinationals doing business in Australia will be able to avail themselves of this pre-emption provision. However, since the compliance thresholds under the NSW MSA are lower than under the federal Australian MSA, it is expected that there will be a significant number of multinationals that are not subject to the federal Australian MSA that will be required to prepare a modern slavery statement under the NSW MSA.

***Modern Slavery Defined.*** The NSW MSA defines modern slavery to include any conduct constituting a modern slavery offense, as listed on a schedule to the NSW MSA, or that would constitute a modern slavery offense if committed in New South Wales. The schedule references 21 statutory offenses that, among other things, pertain to slavery, servitude, forced labor, deceptive recruiting, debt bondage and trafficking. The NSW MSA also has a second prong to the definition, consisting of any conduct involving the use of any form of slavery, servitude or forced labor to exploit children or other persons taking place in the supply chains of government agencies or non-government agencies. Non-government agencies include any commercial or non-commercial body or organization in New South Wales or any other jurisdiction.

***Statement Requirements.*** Modern slavery statements will be required to contain information pertaining to the steps taken by the commercial organisation during the applicable fiscal year to ensure that its goods and services are not a product of supply chains in which modern slavery is taking place. The statement content requirements will be specified in regulations that will be adopted before the NSW MSA takes effect. The NSW MSA provides that the regulations may, without limitation, require a modern slavery statement to include information about (1) the commercial organisation’s structure, business and supply chains, (2) its due diligence processes in relation to modern slavery in its business and supply chains, (3) the parts of its business and supply chains where there is a risk of modern slavery taking place, and the steps it has taken to assess and manage that risk, and (4) the training about modern slavery available to its employees.

***Approval, Signature and Timing Requirements.*** Regulations addressing the publication of the statement will be published before the NSW MSA takes effect.

***Liability for Statement Content or Failing to Prepare a Statement.*** Other existing disclosure-based modern slavery legislation does not expressly provide for liability for false or misleading statements. In a break from other similar legislation, the NSW MSA expressly provides that a person that provides information under the transparency provisions that the person knows, or ought reasonably to know, is false or misleading in a material particular may be fined up to 10,000 penalty units, or A\$1.1 million (a penalty unit currently is A\$110). This is in addition to potential liability under the Crimes Act 1900 for false and misleading information.

Other modern slavery act disclosure legislation also does not impose a monetary penalty for failing to prepare a statement. The penalties described above can be imposed if a commercial organisation fails to prepare a modern slavery statement.

***The Role of the Anti-slavery Commissioner.*** The NSW MSA contemplates an independent Anti-slavery Commissioner. The stated general functions of the Commissioner are to (1) advocate for and promote action to combat modern slavery, (2) identify and provide assistance and support for victims of modern slavery, (3) make recommendations and provide information, advice, education and training about action to prevent, detect, investigate and prosecute offenses involving modern slavery, (4) cooperate with or work jointly with government and non-government agencies and other bodies and persons to combat modern slavery and provide assistance and support to victims of modern slavery, (5) monitor reporting concerning risks of modern slavery occurring in supply chains of government agencies and commercial organisations, (6) monitor the effectiveness of legislation and governmental policies and action in combating modern slavery, (7) raise community awareness of modern slavery and (8) exercise such other functions as are conferred or imposed on the Commissioner by or under the NSW MSA or any other act.

The Commissioner will not have enforcement powers or the authority to investigate or deal directly with individual cases, although it may refer information to law enforcement or other investigative or government agencies.

***Public Register.*** The Commissioner also is required to keep a publicly available electronic register that identifies any commercial organisation that has disclosed in a modern slavery statement that its goods and services are, or may be, a product of supply chains in which modern slavery may be taking place, and whether the commercial organisation has taken steps to address the concern. The public register also is required to identify any other entity that has voluntarily disclosed to the Commissioner that its goods and services are, or may be, a product of supply chains in which modern slavery is taking place and whether the entity has taken steps to address the concern.

### **Compliance Expectations Under the U.K. Modern Slavery Act Are Increasing**

***October 2018 Home Office Letter.*** During October 2018, the U.K. Home Office sent letters to more than 17,000 companies – including many U.S.-based multinationals and their U.K. subsidiaries – that it believes are required to publish an annual statement under the U.K. Modern Slavery Act (the “UK MSA”). According to the U.K. government, only approximately 60% of in-scope companies had previously published a statement. The UK MSA’s transparency provisions, which require the publication of a modern slavery statement, apply to “commercial organisations” carrying on business in the United Kingdom that supply goods or services and have annual worldwide turnover of at least £36 million. For more information on who is required to publish a statement and statement content, see some of our earlier alerts, white papers, articles and webinars [here](#).

The Home Office letter requested that subject commercial organisations publish an up-to-date annual statement by March 31, 2019. The UK MSA itself does not contain a statement publication due date. However, the guidance under the UK MSA indicates that commercial organisations should publish their statements as soon as possible after the end of the applicable fiscal year, and that they are expected to do so within six months after fiscal year-end.

For a further discussion of the Home Office letter, see our earlier Alert [here](#). The earlier Alert discusses other requests and guidance in the Home Office letter, as well as some other U.K. developments not discussed in this Alert.

**March 2019 Guidance.** Last month, the Home Office published additional online modern slavery statement guidance. In addition, on March 28, the Home Office provided guidance in letters sent to commercial organisations, encouraging them to review their modern slavery statements in advance of the Home Office compliance audit discussed below. The online guidance and the March 28 letter largely restate portions of the UK MSA and prior guidance. However, there are some new items and other existing items that bear highlighting.

The most significant new item, in the online guidance, is a non-exhaustive list of factors to help foreign entities determine whether they are required to publish a statement. Prior Home Office guidance notes that whether an entity formed outside the United Kingdom is carrying on a business or part of a business in the United Kingdom is to be determined by applying a common sense approach. The prior guidance goes on to indicate that entities that do not have a demonstrable business presence in the United Kingdom will not be required to publish a statement and that having a U.K. subsidiary will not, in itself, mean that a parent company is carrying on a business in the United Kingdom.

The March 2019 guidance indicates that the following non-exhaustive list of factors should be considered in determining whether there is a demonstrable business presence in the United Kingdom: (1) registration at U.K. Companies House; (2) U.K. offices; (3) providing service or support functions in the United Kingdom; (4) receiving income in the United Kingdom; and (5) other visible U.K. business presence, such as a website.

From a compliance perspective, a few other granular items from the online guidance and letter (some of which are in prior guidance) are of particular note: (1) statements should indicate the date of the commercial organisation's fiscal year-end and the period the statement covers; (2) the statement should clearly indicate the approval date by the board or equivalent management body; (3) the statement should include the name (a physical signature is not required) and job title of the signatory and the date of signature; and (4) group statements should be published on the websites of the group and of the subject subsidiary commercial organisations.

**Home Office Compliance Audit.** The U.K. Home Office recently held a tender under which a vendor was retained to support an audit of compliance with the UK MSA's transparency provisions. The audit will look at whether each commercial organisation on the Home Office's in-scope list has published a statement or is clearly named as being covered by a group statement. In addition to looking at whether modern slavery statements of these entities satisfy the minimum legal requirements of the UK MSA, the review will consider whether statements meet the key standards set out in Home Office's guidance. The tender specifications specifically contemplate being within the scope of the audit whether the statement (1) is clearly identifiable as a statement pursuant to the UK MSA, (2) includes details of the steps taken to address modern slavery risks in operations and supply chains, (3) is published on the entity's U.K. website, (4) clearly states that it is approved by the board of directors or equivalent management body, (5) is signed by a director or the equivalent and (6) was published within six months after the end of the commercial organisation's fiscal year. The tender contemplates delivery of the vendor's work product before the end of May.

The tender specifications indicate that the primary use of the data will be for the Home Office to improve compliance with the UK MSA. The information provided by the audit will inform future targeted communications to businesses and may also be used to inform enforcement action against non-compliant commercial organisations, potentially including publishing a list of non-compliant commercial organisations, and/or the use of injunctions against non-compliant commercial organisations. The data may also inform the Home Office's future list of in-scope commercial organisations.

In its October 2018 letter, the Home Office indicated that it intends to publish a list of non-compliant commercial organisations. However, the tender specifications indicate that, prior to any publication of the names of non-compliant commercial organisations, the Home Office intends to write further letters to those organisations communicating that the

audit identified their statement as non-compliant and providing the opportunity to demonstrate compliance with the UK MSA or exemption from the requirement.

## The UK MSA May Get More Teeth

A frequent criticism of the UK MSA is that it does not do enough to drive robust and timely disclosure. Detractors point to that the disclosure topics listed in the UK MSA are voluntary, there is no mandatory statement due date and the UK MSA does not contain meaningful penalties for non-compliance with the transparency provisions.

An independent review of the UK MSA was launched during the summer of 2018. The aim of the review is to report on the operation and effectiveness, and potential improvements to provisions, of the UK MSA. Among other things, the review is looking at the UK MSA's transparency provisions, including how to ensure compliance and drive up the quality of statements produced by commercial organisations. The review is being led by Frank Field MP, Maria Miller MP and Baroness Butler-Sloss.

The second interim report, which was published on January 22, addressed the UK MSA's transparency provisions. At a high level, the report concluded that the impact of the UK MSA's transparency provisions has been limited to date, noting that there is general agreement between businesses and civil society that a lack of enforcement and penalties, as well as confusion surrounding reporting obligations, are core reasons for poor quality statements and the estimated lack of compliance from over a third of eligible firms. The report goes on to express the view that the current approach of the UK MSA, while a step forward, is not sufficient and it is time for the U.K. government to take tougher action to ensure companies are taking seriously their responsibilities to eradicate modern slavery from their supply chains. The report specifically noted that the Australian MSA goes much further in respect of transparency of supply chains than the UK MSA.

The 20+ recommendations in the second interim report included the following:

- Make reporting topics mandatory. If a topic is not applicable, the reporting commercial organisation should be required to explain why.
- Strengthen guidance to include a template of information expected to be provided on each of the six disclosure topics contemplated by the UK MSA.
- Amend the UK MSA to require reporting commercial organisations to consider the entirety of their supply chains. If a commercial organisation has not done so, it should be required to explain why and what steps it is going to take in the future.
- Require reporting commercial organisations to have a named, designated board member who is personally accountable for the production of the statement.
- Failure to fulfill UK MSA statement publication requirements or to act when slavery is found should be an offense under the Company Directors Disqualification Act.
- Establish a central government-run repository to which commercial organisations are required to upload their statements and which is easily accessible to the public for free.
- The Independent Anti-Slavery Commissioner should monitor compliance.
- The U.K. government should adopt legislation to strengthen its approach to tackling non-compliance, adopting a gradual approach consisting of initial warnings, fines (as a percentage of turnover), court summons and directors' disqualification. Sanctions should be introduced gradually over the next few years to give reporting entities time to adapt to changes in legislative requirements.

- The U.K. government should bring forward proposals to set up or assign an enforcement body to impose sanctions on non-compliant companies. Fines levied for non-compliance could be used to fund the enforcement body.

It remains to be seen which recommendations, if any, in the second interim report will be adopted and, if so, when adoption will occur. However, if even a portion of the report's recommendations are adopted, UK MSA compliance obligations of commercial organisations are likely to increase substantially.

## The FAR Anti-Human Trafficking Rule Has Been Amended to Broadly Define Recruitment Fees

In the United States, the Federal Acquisition Regulation Rule on Combating Trafficking in Persons took effect during March 2015. Under the Rule, U.S. federal government contractors, subcontractors, their respective employees and agents are prohibited from engaging in specified conduct in connection with contracts with the federal government. Prohibited conduct under the Rule includes charging recruitment fees to employees or potential employees. For a more extensive summary of the Rule, see our earlier Alert [here](#).

Even prior to the adoption of the Rule, during the rule-making phase, the Government Accountability Office issued a report recommending that agencies develop a more precise definition of recruitment fees, to reduce challenges in enforcing the prohibition and to create consistency and certainty for contracting parties. A proposed amendment to the Rule was published in May 2016. The amendments to the Rule described below were adopted in December 2018, following a comment period, and took effect on January 22.

The amendments add a definition of “recruitment fees” and provide illustrative examples of fees that are prohibited when payable by employees in connection with recruitment. The amendments broadly define “recruitment fees” to mean fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner or location of imposition or collection of the fee. A fee can be a recruitment fee regardless of whether paid in property or money, deducted from wages, paid back in wage or benefit concessions, paid back as a kickback, bribe, in-kind payment, free labor, tip or tribute or collected by an employer or third party.

Recruitment fees include, but are not limited to, fees for the following, when associated with the recruiting process:

- soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending or placing employees or potential employees;
- advertising;
- obtaining permanent or temporary labor certification, including any associated fees;
- processing applications and petitions;
- acquiring visas, including any associated fees;
- acquiring photographs and identity or immigration documents, such as passports, including any associated fees;
- accessing the job opportunity, including required medical examinations and immunizations, background, reference and security clearance checks and examinations and additional certifications;
- an employer's recruiters, agents or attorneys, or other notary or legal fees;
- language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;
- government-mandated fees, such as border crossing fees, levies or worker welfare funds;
- transportation and subsistence costs while in transit and from the airport or disembarkation point to the worksite;

- security deposits, bonds and insurance; and
- equipment charges.

## Canadian Modern Slavery Legislation Has Been Proposed, and Other Canadian Initiatives May Have an Impact on Modern Slavery Compliance and Disclosure

***The Proposed Modern Slavery Act.*** On December 13, 2018, John McKay, a Member of Parliament, introduced a private member’s Bill proposing a Canadian modern slavery act (the “Canadian MSA”). At present, it remains to be seen whether the Bill will gain traction and, if it does, what the final Canadian MSA will look like. As some readers of this Alert may remember, in 2012, another then-Member of Parliament introduced a private member’s bill calling for a Canadian conflict minerals rule, on the heels of the adoption of the U.S. Conflict Minerals Rule. That legislation was never adopted.

The Canadian MSA provides for an effective date of January 1, 2020, if the legislation is adopted.

***Subject entities.*** Subject to the jurisdictional thresholds described below, the Canadian MSA would apply broadly to any entity that (1) manufactures, produces, grows, extracts, processes or sells goods in Canada or elsewhere, (2) imports into Canada goods manufactured, produced, grown, extracted or processed outside Canada or (3) that controls an entity described above.

“Entity” is defined in the Canadian MSA as a corporation, trust, partnership or other unincorporated organization that (1) is listed on a Canadian stock exchange, (2) has a place of business in Canada, does business in Canada or has assets in Canada and meets at least two of the following conditions for at least one of its two most recent financial years: (a) has at least C\$20 million in assets, (b) has generated at least C\$40 million in revenue or (c) employs an average of at least 250 employees or (3) is prescribed by regulations.

***Reporting requirements.*** As proposed, every entity, as defined above, would be required to produce an annual modern slavery report. The report would be required to discuss:

- the steps taken during the previous year to prevent and reduce the risk that forced or child labor is used at any step of the manufacture, production, growing, extraction or processing of goods in Canada or elsewhere by the subject entity or of goods imported into Canada by the entity;
- the entity’s structure and the goods that it manufactures, produces, grows, extracts or processes in Canada or elsewhere or that it imports into Canada;
- the entity’s policies in relation to forced and child labor;
- the entity’s activities that carry a risk of forced or child labor being used and the steps it has taken to assess and manage that risk;
- any measures taken to remediate any forced or child labor; and
- the training provided to employees on forced and child labor.

***Reporting logistics.*** A report in respect of the prior year would be required to be submitted to the designated minister on or before May 31 of the subsequent year. The minister may specify in writing the form and manner in which a report is to be provided. In addition, the Canadian MSA provides that the report would be required to be posted in a prominent place on the subject entity’s website. The Canadian MSA also provides that the report would need to include an attestation by a director or officer that the information in the report is true, accurate and complete.

As proposed, the Canadian MSA would include monetary penalties for non-compliance. A person or entity that fails to provide a report to the minister or make the report available to the public could be fined up to C\$250,000. Fines of up to C\$250,000 also could be levied for knowingly making a false or misleading statement or knowingly providing false or misleading information to the minister.

***Customs Tariff amendment.*** In addition to modern slavery reporting, the Canadian MSA would amend the Customs Tariff to allow for a prohibition on importing goods manufactured or produced by forced or child labor.

***Transparency in Supply Chains Act to be Introduced.*** On April 4, Member of Parliament Arnold Viersen and Senator Dan Christmas, co-chairs of the All-Party Parliamentary Group to End Modern Slavery and Human Trafficking, held a news conference at which they previewed additional modern slavery legislation that the Group intends to introduce in the Senate of Canada. The All-Party Parliamentary Group was founded last year, in partnership with the Allard School of Law at the University of British Columbia.

A high-level overview of the Group's proposed Transparency in Supply Chains Act was provided at the news conference. The key elements of the Act provided at the news conference are discussed below. More details will be available when the bill is tabled.

***Reporting.*** Entities that exceed an annual turnover threshold would be required to report annually on supply chain matters, the reporting requirements to come. The turnover threshold would be set by the Minister of International Trade. However, the Act would recommend that compliance be mandatory for all businesses in Canada with a turnover threshold of C\$35 million or more per year. Reports would be made publicly available.

***Statutory duty of care.*** Entities that meet the turnover threshold would be required to take reasonable steps to avoid the use of forced labor, child labor and human trafficking in their operations abroad.

***Ombudsperson and Compliance Committee.*** These would be established to oversee the administration of the Act. The ombudsperson would be empowered to investigate claims of human rights abuse relating to Canadian businesses. It also would develop a supply chain questionnaire that specified businesses would be required to respond to annually. In addition, the ombudsperson would issue guidelines to establish expected corporate practice for compliance with international human rights standards. The Group believes that the ombudsperson function could be satisfied by the Canadian Ombudsperson for Responsible Enterprise (which is discussed below) and does not foresee the need to create a new position.

***Investigatory mechanism.*** The Act would establish a mechanism to receive and investigate forced labor and child labor allegations by whistleblowers. The Act also will include protections for whistleblowers.

***Other Canadian Developments.*** Other recent developments in Canada underscore the increasing global focus on modern slavery compliance and disclosure.

***Canadian Ombudsperson for Responsible Enterprise.*** As we reported in an [Alert](#) last year, during January 2018, the Canadian government announced that it would be establishing an independent Canadian Ombudsperson for Responsible Enterprise, or CORE, to replace the position of Extractive Sector Corporate Social Responsibility Counsellor. The new position is intended to provide a strengthened approach to address alleged human rights abuses arising from Canadian companies' operations abroad. The first Ombudsperson – Sheri Meyerhoffer – was appointed on April 8.

The Ombudsperson's mandate is to review complaints relating to allegations of human rights abuses – including, but not limited to, modern slavery – arising from Canadian companies' activities abroad. The Ombudsperson is empowered to (1) undertake joint or independent fact-finding, (2) initiate a review on its own initiative, even without the submission of

a complaint, (3) report publicly throughout a review and (4) make recommendations to parties involved in the complaint, as well as to the Canadian government.

The Ombudsperson's initial focus will be the extractives (oil, gas and mining) and garment industries. Its focus is expected to be expanded to other sectors.

Consultation on child and forced labor legislation. On February 8, the Canadian government announced that it will begin a process this year to consult on possible legislation to address child and forced labor. The consultation is expected to involve the participation of the provinces and territories, industry and civil society and a number of government departments. This process is separate from the private member's Bill proposing the Canadian MSA.

The announcement was made in the context of the government's response to the Report of the Standing Committee on Foreign Affairs and International Development entitled "A Call to Action: Ending the Use of all Forms of Child Labour in Supply Chains," which was tabled on October 15, 2018. The response notes that the government recognizes the work being done in other jurisdictions through legislative reforms and that it is actively studying their effectiveness and feasibility for Canadian contexts.

The Report focuses on the fight against child labor and its eradication from global supply chains, particularly those entering Canada. The Report also touches upon the worst forms of child labor, calling for the elimination of forced labor, human trafficking and slavery-like practices in its various forms. The Report includes seven broad recommendations on how the Canadian federal government can contribute to eliminating child and forced labor through a government-wide approach, including by (1) prioritizing the elimination of child and forced labor in Canada's international assistance, (2) improving access to quality education for children and adults, (3) supporting law enforcement and judicial systems, (4) including discussion of child and forced labor in all free trade negotiations, (5) building capacity of Canadian businesses to monitor their supply chains, (6) advancing initiatives to motivate businesses to eliminate child and forced labor in their supply chains and (7) examining Canada's import regime and procurement policies as levers to eliminate the use of child labor.

Certifications by government contractors. In September 2018, Public Services and Procurement Canada launched new requirements for the ethical procurement of apparel for clothing and textile suppliers contracting with the government. Among other things, PSPC serves federal departments and agencies as their central purchasing agent.

Suppliers selling apparel to the government are required to self-certify that they and their first-tier subcontractors comply with local laws and international standards on labor and human rights. These rights include freedom from child labor, forced labor, discrimination and abuse and access to fair wages and safe working conditions.

Quebec guidance for listed companies. On September 4, 2018, the Autorité des marchés financiers, which is the regulatory and oversight body for Quebec's financial sector, published a notice relating to modern slavery disclosure requirements. The notice provides guidance to reporting issuers on existing disclosure requirements relating to modern slavery and shares the expectations of the AMF staff in this regard. The notice did not modify existing legal requirements or create new requirements. Although generally not applicable to U.S.-based multinationals, portions of the notice provide a useful framework for all public companies for thinking about modern slavery disclosure in public filings.

Among other things, the notice indicates an issuer's Annual Information Form would need to disclose material modern slavery risks. This requires a materiality analysis analogous to that U.S. public companies make in determining what information to disclose in their public filings. The notice indicates that issuers should ask themselves the following questions in order to define the material modern slavery risks to which they may be exposed:

- Is the issuer a party to litigation involving issues of modern slavery? What is the probability that the plaintiffs will win?

- What are the real and expected consequences of regulations relating to modern slavery on the issuer’s business and strategy?
- How does the issuer handle issues related to modern slavery? The manner in which these are handled can have a positive or negative impact on fundamental intangible assets such as brand value, consumer confidence, employee loyalty and the ability to raise funds.
- What impact will the issuer’s relationship with local communities and other parties affected by its activities as regards its workforce have on its performance and operations? The relationship between an issuer and local communities can impact its ability to operate and its operating costs.

## Another U.S. State has Proposed Modern Slavery Disclosure Legislation

On January 28, an Act relating to transparency in agricultural supply chains – to be known as the Washington Transparency in Agricultural Supply Chains Act – was introduced in the Washington State senate. A scaled back substitute Bill was introduced on February 22. The substitute Bill is discussed below.

At present, passage of the Act appears unlikely. The Bill was placed in the Senate Rules “X” file on March 18. This occurs after certain cut-off dates when a bill appears unlikely for floor consideration. However, the act of placing a bill in the “X” file does not, in itself, have any legal or parliamentary effect. A determination can still be made later that it is appropriate to run the bill, and, once such a determination is made, the bill can still be pulled to the floor.

As proposed in the substitute Bill, the Act would require every retail seller of agricultural products doing business in Washington State and having annual worldwide gross receipts of \$200 million or more to publish an annual disclosure statement. “Agricultural products” are defined as cocoa, dairy, coffee, sugar and fruit products, but exclude wheat, potato, onions, asparagus or other vegetable products.

In addition, subject retail sellers would be required to have their suppliers report to them annually any violations of employment-related laws and incidents of slavery, peonage and human trafficking. This would include, without limitation, any (1) court or arbitration rulings, (2) citations or other rulings by governmental agencies and (3) criminal convictions.

At a minimum, the annual disclosure statement would be required to state (1) the retail seller’s specific actions taken with respect to its product supply chains to evaluate and address risks of slavery, peonage and human trafficking, comply with employment law obligations and respect workers’ human rights and (2) any violations information reported by suppliers. The statement would be required to be posted on the retail seller’s website with a conspicuous and easily understood homepage link to the required information. If the retail seller does not have a website, it would be required to provide consumers with a written disclosure within 30 days of receiving a written request.

Retail sellers and their suppliers could be held liable for violations of the Act. The attorney general would be able to commence a civil action in a Washington State court against a subject retail seller or a supplier for a violation of the Act. If a court finds that a retail seller or supplier has violated the Act, the court would be able to award statutory damages of between \$500 and \$7,000 for each violation, punitive damages for willful violations, reasonable costs and attorneys’ fees and declaratory or injunctive relief as the court deems appropriate.

For purposes of establishing personal jurisdiction over a supplier, the supplier would be deemed to be doing business in Washington State and would be subject to the jurisdiction of its courts if the supplier contracts for the sale of goods with a retail seller doing business in Washington State or is considered to be doing business in Washington State under any other provision or rule of law.

## Supply Chains May be Putting Companies at Risk of Violating U.S. Sanctions

On January 31, the U.S. Office of Foreign Assets Control announced that e.l.f. Cosmetics, Inc. had agreed to pay \$996,080 to settle its potential civil liability for 156 apparent violations of the North Korea Sanctions Regulations. Among other things, the NKSR generally prohibits the importation into the United States of North Korean goods. This broad prohibition applies to goods used as components of finished products of, or substantially transformed in, a third country.

According to the announcement, e.l.f. appears to have violated the NKSR by importing 156 shipments of false eyelash kits from two suppliers located in China that contained materials sourced by those suppliers from North Korea. The imports occurred over a period of almost five years, from about April 2012 through about January 2017. The total value of the shipments was approximately \$4.4 million. Also, according to OFAC's settlement announcement, throughout the time period during which the apparent violations occurred, e.l.f.'s OFAC compliance program "was either non-existent or inadequate." The company's production review efforts focused on quality assurance issues pertaining to the production process, raw materials and end products of the goods it purchased and/or imported.

Although the enforcement action was not specific to modern slavery in the supply chain, subsequent to the conduct discussed in the enforcement action, the Countering America's Adversaries Through Sanctions Act was adopted. The CAATSA creates a presumption that goods, wares, articles and merchandise mined, produced or manufactured wholly or in part by the labor of North Korean nationals or citizens, wherever located, is forced labor. Under the U.S. Tariff Act, these goods will be denied U.S. entry absent clear and convincing evidence that they were not produced using forced labor. For our earlier Alert on the CAATSA, see [here](#).

***Factors Taken Into Account in the Settlement.*** In connection with the settlement, OFAC took into account the following aggravating and mitigating factors:

### Aggravating factors:

- the apparent violations may have resulted in U.S.-origin funds coming under the control of the North Korean government, in direct conflict with the program objectives of the NKSR;
- e.l.f. is a large and commercially sophisticated company that engages in a substantial volume of international trade; and
- e.l.f.'s OFAC compliance program was either non-existent or inadequate throughout the time period in which the apparent violations occurred, and it appeared not to have exercised sufficient supply chain due diligence while sourcing products from a region that poses a high risk to the effectiveness of the NKSR.

### Mitigating factors:

- e.l.f.'s personnel did not appear to have had actual knowledge of the conduct that led to the apparent violations in the investigation;
- e.l.f. had not received a Penalty Notice or Finding of Violation from OFAC in the five years preceding the earliest date of the transactions giving rise to the apparent violations;
- the apparent violations did not appear to constitute a significant part of e.l.f.'s business activities; and
- e.l.f. cooperated with OFAC by immediately disclosing the apparent violations, signing a tolling agreement and submitting a complete and satisfactory response to OFAC's request for additional information.

OFAC noted in its announcement that the statutory maximum civil monetary penalty amount for the apparent violations was \$40,833,633, and the base civil monetary penalty amount for the apparent violations was \$2,213,510.

**Remedial Steps Taken.** OFAC noted in the settlement announcement that, in addition to terminating the conduct that led to the apparent violations, e.l.f. indicated that it had taken the following steps to minimize the risk of similar conduct in the future:

- implemented supply chain audits that verify the country of origin of goods and services used in e.l.f.'s products;
- adopted new procedures to require suppliers to sign certificates of compliance stating that they will comply with all U.S. export controls and trade sanctions;
- conducted an enhanced supplier audit that included verification of payment information related to production materials and the review of supplier bank statements;
- engaged outside counsel to provide additional training for key employees in the United States and China regarding U.S. sanctions regulations and other relevant U.S. laws and regulations; and
- held mandatory training on U.S. sanctions regulations for employees and suppliers in China, and implemented additional mandatory trainings for new employees as well as regular refresher training for current employees and suppliers based in China.

**Other Compliance Resources.** The following resources provide guidance for complying with the NKSR and, more generally, the prohibition on importing into the United States goods produced using forced labor:

- the July 2018 North Korea Sanctions & Enforcement Actions Advisory, which was issued by the State Department, with OFAC and Homeland Security's Customs and Border Protection and Immigration and Customs Enforcement; our earlier Alert on the Advisory is available [here](#);
- the March 2018 Homeland Security FAQs published in connection with the Countering America's Adversaries Through Sanctions Act, which, among other things, addresses North Korean state-sponsored labor in supply chains; our earlier Alert on the FAQs is available [here](#); and
- Customs and Border Protection's updated Informed Compliance Publication on reasonable care, as it relates to forced labor in supply chains; CBP's reasonable care guidance is discussed in our earlier Alert available [here](#).

## Customs and Border Protection Continues to Detain and Deny U.S. Entry of Goods Produced With Forced Labor

Section 307 of the U.S. Tariff Act prohibits the importation into the United States of goods, wares, articles and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor, forced labor or indentured labor under penal sanctions. For decades, the effect of this Section was largely negated by what was known as the "consumptive demand exception." That exception was repealed in early 2016 as part of the U.S. Trade Facilitation and Trade Enforcement Act.

Since the repeal of the consumptive demand exception, CBP has issued seven withhold release orders denying importation of goods into the United States. This compares to 32 WROs in approximately the 60 prior years. Of the seven WROs issued since the repeal of the consumptive demand exception, three have been issued since last March.

Most recently, on February 9, CBP announced that it had issued a WRO against tuna and tuna products from Tunago No. 61, based on information obtained by CBP indicating tuna was harvested with the use of forced labor. Other WROs issued since the repeal of the consumptive demand exception have involved a diverse range of products and commodities

produced with forced labor: from China, soda ash, calcium chloride, caustic soda, potassium, potassium hydroxide, potassium nitrate, stevia and its derivatives, peeled garlic and toys; and from Turkmenistan, cotton and cotton products.

### **The Volume of U.S. Shareholder Proposals Relating to Forced Labor, Human Trafficking and the Supply Chain Continues to Increase**

Shareholder proposals submitted at U.S. public companies relating to forced labor, human trafficking and human rights and the supply chain have increased in 2019 relative to the prior year, reflecting broader trends involving human rights proposals. The 2019 proposals are discussed in more detail below.

***Prison Labor Proposals.*** Five proposals relating to prison labor were submitted this year, the majority by NorthStar Asset Management.

NorthStar asked Costco Wholesale to produce an annual report to shareholders regarding information known to the company regarding supplier compliance with Costco's Global Policy on Prison Labor, which was adopted during mid-2018. This proposal came up for a vote in January and received 28.7% of the votes cast. NorthStar had submitted a prison labor proposal to TJX in 2018, which was substantially similar to the 2019 proposal submitted to Costco. That proposal received the support of 7.8% of the votes cast. In 2018, a prison labor proposal was put to a vote at Costco urging the Costco board to adopt a policy committing Costco to (1) surveying its suppliers to address prison labor in the supply chain, (2) developing and applying additional criteria or guidelines for suppliers regarding the use of prison labor and (3) reporting to shareholders on the implementation of the policy. That proposal received support from 4.8% of the votes cast.

For 2019, NorthStar also submitted proposals to each of Home Depot and IBM, requesting that they produce annual reports summarizing the extent of known usage of prison labor in the company's supply chain. The supporting statement recommends that the report (1) include annual quantitative metrics on the number of supplier audits that evaluated whether prison labor is present in the supply chain and a summary of those results and (2) evaluate any risks to finances, operations and reputation relating to prison labor in the supply chain. A substantially similar proposal was submitted by Priests of the Sacred Heart, US Province to TJX.

The proposal submitted to IBM was withdrawn after IBM described its existing procedures to monitor for prison labor in its supply chain. According to third party reports, IBM also agreed to further collaboration on this issue in 2019.

Finally, the Nathan Cummings Foundation submitted a proposal to Walmart urging the board to adopt a policy on the use of prison and unpaid diversion program labor by suppliers, including a policy that commits Walmart to (1) developing and applying additional criteria or guidelines for suppliers regarding the use of prison and diversion program labor and (2) report to shareholders on Walmart's progress in implementing the policy. The supporting statement indicates that the progress report might include (1) a summary of the results of the supplier survey, including actual and potential sources of prison and diversion labor identified and any use of suppliers who employ prison labor with uncompensated or severely undercompensated work programs and suppliers who employ unpaid diversion program labor, (2) a summary of any new criteria and guidelines for the use of prison and diversion program labor and (3) the nature and extent of consultation with relevant stakeholders in connection with policy development and implementation. Examples cited in the supporting statement of topics for possible guidelines or criteria include safety/health conditions and supplier-provided job-matching programs for inmates upon release.

***Human Trafficking and Child Sexual Exploitation Proposals.*** Two proposals specific to human trafficking and three specific to child sexual exploitation have been submitted during the 2019 annual meeting season.

The Presbyterian Church (USA) submitted a proposal to Hub Group asking it to report on the implementation of a program to address human trafficking internally and in its supply chain. The supporting statement requested that the report include (1) a statement of company policy on human trafficking, (2) an overview of employee and customer awareness, education and training on the issue of human trafficking, (3) a plan for communicating information to customers, (4) methods of informing truckers of “key persons” at any destination who can address the issue and (5) annually publishing a progress report. The proposal was withdrawn following discussions with the company.

As You Sow Foundation resubmitted a resolution to Monster Beverage, asking it to issue a report by November 2019 containing the criteria and analytical methodology used to determine its conclusion of minimal risk of slavery and human trafficking in its sugarcane supply chain. Last year’s resolution received support from 19.9% of the votes cast.

Christian Brothers Investment Services and co-sponsors submitted proposals at three companies – Apple, Sprint and Verizon – asking them to report on online child sexual exploitation. The proposal at Apple was withdrawn. The other two proposals are requesting a report on the potential sexual exploitation of children through each company’s products and services, including a risk evaluation, assessing whether the company’s oversight, policies and practices are sufficient to prevent material impacts to the company’s brand reputation, product demand or social license. CBIS has indicated that additional resolutions and letters to companies will be launched this year.

CBIS also has indicated that it will release guidance in 2019 – Tech Expectations for Combating Child Sex Exploitation Online. The guidance will be used to benchmark information and communications technology companies globally on their performance and policies to protect children online from sexual harm, and to identify leading practices that other investors can use in engagements with their technology holdings.

***Other Proposals Relating to Human Rights and the Supply Chain.*** In addition to the foregoing proposals, several other proposals relating to human rights risks in supply chains were submitted. Many of the supporting statements specifically reference modern slavery and modern slavery legislation.

Oxfam America submitted a proposal to Amazon urging the board to commit to conducting and making available to shareholders human rights impact assessments for at least three food products Amazon sells that present a high risk of adverse human rights impacts. The resolution provides that the assessment should specify the standards used, identify and assess actual and potential adverse impacts associated with the product and describe how the findings will be integrated in order to prevent and/or remedy impacts. Amazon was able to omit the proposal under the Securities Exchange Act.

Several shareholders, including faith-based investors, an index fund and As You Sow, submitted proposals to Hanesbrands, Kraft Heinz, Macy’s, Texas Instruments, TJX and Wendy’s requesting their respective boards to report on each company’s process for identifying and analyzing potential and actual human rights risks of operations and its supply chain, addressing in the report (1) the human rights principles used to frame the assessment, (2) the frequency of the assessment, (3) the methodology used to track and measure performance on forced labor risks and (4) how the results of the assessment are incorporated into company policies and decision-making. The proposal submitted to Texas Instruments was withdrawn. Hanesbrands and Wendy’s were able to omit the proposal under the Securities Exchange Act.

Oxfam America and American Baptist Home Mission Society submitted substantially similar proposals to Pilgrim’s Pride and Tyson Foods, respectively. The proposals request that the respective boards prepare a report on each company’s human rights due diligence process to assess, identify, prevent and mitigate actual and potential adverse human rights impacts. The supporting statement indicates that the report should (1) include the human rights principles used to frame the company’s risk assessments, (2) outline the human rights impacts of its business activities, including company-owned operations, contract growers and supply chain, and plans to mitigate any adverse impacts, (3) explain

the types and extent of stakeholder consultation and (4) address plans to track effectiveness of measures to assess, prevent, mitigate and remedy adverse human rights impacts. The proposal received the support of 5.5% of the votes cast at Tyson Foods' 2019 annual meeting.

### **Many of the Recently Adopted SASB Standards Include Recommended Disclosures Relating to Modern Slavery**

The Sustainability Accounting Standards Board's stated mission is to help businesses around the world identify, manage and report on the sustainability topics that matter most to their investors. SASB has developed standards for 77 industries, which were codified in November 2018. Although still in the early stages of adoption, we are seeing U.S.-based and other public companies starting to disclose and/or map against their SASB industry standard, and many more companies internally evaluating whether to do so.

The standards contain an average of six disclosure topics and thirteen associated metrics. Fifteen standards across five sectors address modern slavery. Since each standard is industry-specific, this Alert does not go into a detailed discussion of how each of the 15 standards addresses this subject area. However, a brief overview of the approach taken in the standards is provided below.

In most cases, the standards that address modern slavery specifically refer to forced labor, and, in some cases, also child labor. A few of these standards refer more generally to supply chain labor practices or conditions. Most of the standards call for qualitative disclosure, such as concerning policies, due diligence practices and procedures and the strategy for managing social risks within the supply chain. A portion also call for quantitative information, for example, concerning the number of tier 1 or tier 2 supplier facilities that have been audited to a labor code of conduct or third-party standard, non-conformance and corrective action rates and the percentage of purchases that meet social sourcing standards.

### **Selected Take-aways and Suggested Action Items**

#### ***Determine the Applicability of New Australian Modern Slavery Legislation***

With the recent adoption of the Australian MSA and the imminent commencement of the NSW MSA, multinationals that have not already done so should determine if entities in their consolidated group meet the compliance thresholds under one or both of these Acts. The compliance thresholds under the Australian MSA and the NSW MSA are discussed earlier in this Alert.

If a compliance threshold is met, the approach to disclosure and management of compliance with the requirements of the applicable Act should be determined. Both of these considerations are further discussed below. In addition, the approach should take into account whether group entities that are subject to the Australian MSA or the NSW MSA present modern slavery risks that require different disclosures and/or compliance procedures than other group entities.

#### ***The Trend Toward Joint and Group-wide Modern Slavery Statements Continues***

Many multinationals are required to publish a modern slavery statement under both the California Transparency in Supply Chains Act (the "CTSCA") and the UK MSA. In some cases, statements are required for the same entity, while in other cases statements are required for different entities within the consolidated group (such as for a parent and subsidiary entity or sister entities). This has required legal and compliance professionals to decide whether to recommend separate statements to satisfy each requirement or a single combined statement that is responsive to the requirements of both the CTSCA and the UK MSA.

Many multinationals opted out of the gate to publish a combined statement. Others did so in subsequent years. We generally recommend that multinationals subject to both Acts publish a combined statement. The disclosures under the CTSCA and the UK MSA are substantially similar, which is not surprising since the drafters of the UK MSA took the

CTSCA into account. In addition, a combined statement ensures consistent messaging and often is more efficient to prepare and have approved.

The Australian MSA and the NSW MSA are likely to further tip the balance in favor of combined statements, since both of these Acts, as well as the proposed Canadian MSA, require substantially similar disclosures to the CTSCA and the UK MSA.

### ***Voluntary Modern Slavery Disclosures Are Increasing***

Many modern slavery statements go beyond the requirements of the CTSCA and the topics recommended by the UK MSA. Companies do so in part to receive credit for additional items that are taken into account in NGO rankings. Companies with robust modern slavery compliance programs also often take a more expansive approach to disclosure to highlight the work they are doing. This is analogous to disclosure practices under the U.S. Conflict Minerals Rule.

Other modern slavery disclosures – meaning those outside the four corners of required modern slavery statements – also are increasing. Many companies are enhancing website and corporate responsibility report disclosures relating to modern slavery. This is due in large part to the increasing focus on ESG (Environmental, Social and Governance) factors by mainstream investors. Many investors look to the ESG analyses prepared by third-party analytics firms to help them assess ESG risk and performance. Since these analyses are based on public disclosure, companies only receive credit for what they disclose. For a further discussion of ESG integration by mainstream investors, see our earlier Article [here](#).

Over time, many companies also are expected to make modern slavery disclosures that are responsive to at least some of the SASB metrics. These metrics already are starting to be taken into account in ESG scoring, which will put additional pressure on disclosure.

### ***Modern Slavery Compliance Is Becoming More Centralized***

Multinationals are moving toward more centralized modern slavery compliance. Increasingly, policies, procedures and disclosures are being developed and coordinated by a centralized, group-wide steering committee comprising representatives from relevant corporate functions, business units and geographies. This approach is being taken both to increase compliance efficiency and reduce risk.

The rapid increase in corporate modern slavery related-legislation is the principal driver of more centralized compliance. However, there are other contributing factors. Centralization also is being driven by the increasing focus on modern slavery compliance in both public and private sector procurement, as well as by more board and senior management attention, shareholder proposals, litigation risk, rankings and ratings and other stakeholder engagement relating to modern slavery.

As part of the move toward more centralized modern slavery compliance, and in recognition of the rapid and continuing evolution of this subject area, many multinationals are tasking personnel with staying abreast of developments in modern slavery legislation and compliance. The legal and compliance groups typically have primary responsibility for monitoring these developments and communicating them within the organization.

### ***Assess the Adequacy of Supply Chain Policies, Procedures and Due Diligence Practices***

Modern slavery disclosure legislation is just one part of the compliance equation. Section 307 of the U.S. Tariff Act, the CAATSA, the FAR anti-human trafficking Rule and enforcement actions taken by OFAC and CBP underscore the importance of adequate, tailored compliance programs. Violations of substantive corporate modern slavery legislation can be costly.

Modern slavery policies, procedures and due diligence practices should draw on existing compliance guidance. Several important U.S. government resources are noted earlier in this Alert. Many other modern slavery compliance guidance documents, too numerous to list out here, have been published by other governments, NGOs, industry groups, consultants and other stakeholders.

However, one fairly recent guidance document that many in-house legal and compliance professionals are unfamiliar with bears mentioning. The OECD Due Diligence Guidance for Responsible Business Conduct (the “RBC Guidance”) was published in May 2018. It is intended to provide practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises. The RBC Guidance contains plain language explanations of the MNE Guidelines’ due diligence recommendations and associated provisions, as well as additional explanations, tips and illustrative examples of due diligence. The RBC Guidance addresses adverse impacts relating to (1) human rights, (2) the environment, (3) bribery and corruption, (4) disclosure and (5) consumer interests. Among other things, this encompasses adverse impacts relating to forced labor and child labor, including the worst forms of child labor.

### ***Think Holistically – Keep Other Modern Slavery Compliance and Disclosure Considerations in Mind***

This Alert is focused primarily on recent regulatory and related developments. Although regulation is an increasingly important driver of modern slavery compliance and disclosure, other factors also should be taken into account.

Modern slavery compliance policies and procedures should be aligned with corporate values and culture and designed to mitigate other risks, including reputational and commercial risks. For many companies, especially retail consumer-focused businesses, allegations of modern slavery in the supply chain can damage the brand. Studies also show that many employees, especially younger employees, place a premium on working for companies that reflect their personal values.

Modern slavery compliance and disclosure also should take into account the continuing evolution of both leading and mainstream practices by U.S. and foreign-based multinationals, especially those of peers and competitors. The increasing multitude of NGO guidance, surveys and rankings also should be considered.

Finally, it is important to keep in mind that modern slavery risks in supply chains are not static. With the increasing focus on this subject area, previously unreported modern slavery risks are coming to light. In addition, new risks regularly emerge. Modern slavery compliance programs should be flexible enough to meet these, and other, emerging challenges.

## **About our Practice**

Ropes & Gray has a leading ESG, CSR and supply chain compliance practice. We offer clients a comprehensive approach to ESG, CSR and supply chain compliance through a global team with members in the United States, Europe and Asia. In addition, senior members of the practice have advised on ESG, CSR and supply chain compliance matters for almost 30 years, enabling us to provide a long-term perspective that few firms can match.

For further information on the practice, click [here](#).

Please click [here](#) to visit our CSR and Supply Chain Compliance website.