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Bipartisan Slave-Free Business Certification Act Reintroduced in the U.S. Senate

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In a bipartisan move, U.S. Senators Josh Hawley (R-MO) and Kirsten Gillibrand (D-NY) introduced earlier this month a bill calling for the adoption of the Slave-Free Business Certification Act. For many businesses with annual gross receipts greater than $500 million, the Act would require an annual supply chain audit that meets detailed specified requirements, as well as related reporting. Even for those subject companies that already conduct supply chain audits or are required to comply with the increasing body of supply chain-focused human rights legislation, the Act would result in significant additional compliance and disclosure requirements. This Alert provides an overview of the proposed Act.

A Second Bite at the Apple

The Act is based on a bill that Senator Hawley introduced in July 2020 (S.4241), but which never reached a committee vote. The current bill (S.3578) is largely the same as the prior bill.

The 2020 bill also was introduced in the House of Representatives (H.R.7824) by Representative Ken Buck (R-CO). That bill also did not advance to a committee vote. To date, a related bill has not been reintroduced in the House.

The 2020 bill is discussed in our earlier Alert here.

The Act in Context

The adoption of additional legislation to address forced labor in supply chains has been a growing focus across many jurisdictions for more than ten years.

Until recently, the primary impact of forced labor legislation on U.S.-based businesses has been enhanced disclosure, by requiring subject companies to disclose the actions they are taking (or not taking) to address modern slavery in their businesses and/or supply chains. The California Transparency in Supply Chains Act (2010), U.K. Modern Slavery Act (2015) and Australian Commonwealth Modern Slavery Act (2019) all fall into this category. The intent behind disclosure-only modern slavery legislation is to create a race to the top through transparency.

The trend has been evolving towards mandatory human rights due diligence legislation that requires a more robust response to human rights risks and adverse impacts, including those involving forced labor. For example, recently adopted legislation in Norway and Germany requires subject companies to assess human rights risks and adverse impacts, take steps to address the risks and impacts and publish annual disclosures regarding their risk assessments and the remedial actions taken. The Norwegian and German acts are discussed in our earlier Alerts here and here. Mandatory human rights due diligence legislation to be released this week by the European Commission also is expected to broadly track the approaches taken by Germany and Norway (and other jurisdictions).

Trade-based legislation to address forced labor in supply chains also is increasing. In the United States, legislation restricting imports produced using forced labor goes back more than 100 years. Section 307 of the U.S. Tariff Act – which supplanted earlier legislation and is still in effect in amended form – was originally adopted in 1930. Enforcement of Section 307 has exponentially increased in the last few years. In addition, Section 307 has been leveraged in additional legislation addressing North Korean labor in supply chains (2017) and, more recently in December 2021, Xinjiang labor. These instruments – the Countering America's Adversaries Through Sanctions Act and Uyghur Forced Labor Prevention Act – are discussed in our earlier Alerts here and here.

The Slave-Free Business Certification Act appears to seek to occupy a middle ground between disclosure-only and mandatory human rights due diligence legislation. It would require covered business entities to take steps to assess forced

labor risks and identify occurrences and prepare annual disclosures. It would not by its terms expressly require covered business entities to address identified forced labor risks or issues, although through guidance and/or rulemaking due diligence under the Act may be required to align with the expansive meaning due diligence is given in foundational human rights instruments. In any case, as a practical matter, the Act would further the race to the top by companies, whether they do so to address Section 307 of the Tariff Act and its progeny, other U.S. or foreign legislation pertaining to forced labor in supply chains, their vendor codes of conduct or commercial requirements, or to mitigate reputational, investor-focused and/or other risks.

Subject Companies

"Covered business entities" would be required to comply with the Act. These would be issuers within the meaning of Section 2(a) of the Securities Act that have annual worldwide gross receipts of more than $500 million and are involved in the mining, production or manufacture of goods for sale.

The proposed definition of covered business entity has been narrowed from the prior bill. The prior bill was not limited to issuers involved in the mining, production or manufacture of goods or other specific activities and therefore would have also as proposed included service businesses within its scope, although portions of that bill were specific to product supply chains.

"Issuer" is broadly defined in Section 2(a) of the Securities Act to include every person who issues or proposes to issue any security, with certain exceptions and differences for certificates of deposit, voting-trust certificates, collateral-trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment-trust certificates or like securities and fractional undivided interests in oil, gas or other mineral rights.

"Security" also is defined broadly in Section 2(a) to include any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, any put, call, straddle, option or privilege on any security, certificate of deposit or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option or privilege entered into on a national securities exchange relating to foreign currency or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Calculating Gross Receipts

Under the Act, ***"gross receipts"*** would have the meaning given to that term in section 993(f) of the Internal Revenue Code. This is defined in the Code as the total receipts from the sale, lease or rental of property held primarily for sale, lease or rental in the ordinary course of trade of business, and gross income from all other sources.

Annual Audit Requirement

The centerpiece of the Act would be the annual audit. Under the Act, covered business entities would be required annually to conduct an audit of their supply chain to investigate the presence or use of forced labor by the covered business entity or its suppliers, including its direct suppliers, secondary suppliers and on-site service providers.

Under the Act, the ***"supply chain"*** would be expansive, consisting of the end-to-end process for producing and transporting goods, beginning at the point of origin through a point of distribution to the destination, and would include suppliers, manufacturers and vendors.

"Forced labor" would mean any labor practice or human trafficking activity in violation of national and international standards, including (1) International Labour Organization Convention No. 182, (2) the Trafficking Victims Protection

Act and (3) any act that would violate the criminal provisions related to slavery and human trafficking under chapter 77 of title 18 of the U.S. Code if the act had been committed within the jurisdiction of the United States.

An ***"on-site service provider"*** would be any entity that provides workers who perform, collectively, a total of not less than 30 hours per week of on-site services for a covered business entity. An ***"on-site service"*** would consist of any service work provided on the site of a covered business entity, explicitly including food service work and catering services. The Act does not propose to define direct suppliers or secondary suppliers, presumably because there is a common understanding of what these terms mean.

Components of the Audit

Audits conducted pursuant to the Act would be required to meet specified requirements, as described below. Even for businesses that already conduct supply chain audits, the Act would in most cases impose additional requirements that go beyond audit processes and procedures currently in place.

Worker interviews. The auditor would be required to select a cross-section of workers to interview that represents the full diversity of the workplace. If applicable, this would be required to include men and women, migrant workers and local workers, workers on different shifts, workers performing different tasks and members of various production teams. If individuals under the age of 18 are employed at the facility of the direct supplier or on-site service provider, the auditor would be required to interview a representative group using age-sensitive interview techniques. The auditor would be required to use audit tools to ensure that each worker is asked a comprehensive set of questions. In addition, the auditor would be required to collect from interviewed workers copies of the workers' pay stubs, in order to compare the pay stubs with payment records provided by the direct supplier.

Worker interviews would be required to be conducted off-site outside of working hours. This is different from the prior bill, which also allowed for on-site interviews. Under the Act, interviews could be conducted individually or generally in groups. In conducting interviews, the Act would require auditors to use methods of communication that limit, to the greatest practicable extent, any reliance on devices or services provided to the worker by the covered business entity, supplier or on-site service provider. All worker responses would be required to be confidential and not shared with management.

The auditor also would be required to interview a representative of the labor organization or other worker representative organization that represents workers at the facility or, if no such organization is present, attempt to interview a representative from a local worker advocacy group.

The Act would prohibit a covered business entity, supplier or on-site service provider from retaliating against any worker for participating in interviews or providing information necessary for the audit.

Management interviews. The auditor also would be required to interview a cross-section of the management of the supplier, including human resources personnel, production supervisors and others. The auditor would be required to use audit tools to ensure that managers are asked a comprehensive set of questions.

Review of corroborating information. The auditor would be required to conduct a thorough review of information regarding the supplier or on-site service provider to provide tangible proof of compliance and to corroborate or find discrepancies in the information gathered through interviews. At a minimum, the auditor would be required to review the following information related to the supplier or on-site service provider:

- Age verification procedures and documents.
- A master list of juvenile workers or information related to juvenile workers.
- Selection and recruitment procedures.

- Contracts with labor brokers, if any.
- Worker contracts and employment agreements.
- Introduction program materials.
- Personnel files.
- Employee communication and training plans, including certifications provided to workers, including skills training, worker preparedness, government certification programs and systems or policy orientations.
- Collective bargaining agreements, including collective bargaining representative certification, descriptions of the role of the labor organization and minutes of the labor organization's meetings.
- Contracts with any security agency, and descriptions of the scope of responsibilities of the security agency.
- Payroll and time records.
- Production capacity reports.
- Written human resources policies and procedures.
- Occupational health and safety plans and records, including legal permits, maintenance and monitoring records, injury and accident reports, investigation procedures, chemical inventories, personal protective equipment inventories, training certificates and evacuation plans.
- Disciplinary notices.
- Grievance reports.
- Performance evaluations.
- Promotion or merit increase records.
- Dismissal and suspension records of workers.
- Records of employees who have resigned.
- Worker pay stubs.

Closing meeting with management. The auditor would be required to hold a closing meeting with the management of the covered business entity to report any violations and nonconformities found in the facility and determine the steps forward to address and remediate any problems.

Covered Business Entity Reporting Requirements

Each year, covered business entities would be required to prepare a report describing the results of the audit required by the Act and the efforts of the covered business entity to eradicate forced labor from its supply chain and on-site services.

At a minimum, the report would be required to describe or include, as applicable, the following:

- The policies to prevent the use of forced labor by the covered business entity, its direct suppliers and its on-site service providers.

- What policies or procedures, if any, the covered business entity uses (1) for the verification of product supply chains and on-site service provider practices to evaluate and address risks of forced labor and whether the verification was conducted by a third party, (2) to require direct suppliers and on-site service providers to provide written certification that materials incorporated into the product supplied or on-site services, respectively, comply with the laws regarding forced labor of each country in which the supplier or on-site service provider is engaged in business, (3) to maintain internal accountability standards and procedures for employees or contractors of the covered business entity failing to meet requirements regarding forced labor and (4) to provide training on recognizing and preventing forced labor, particularly with respect to mitigating risks within the supply chains of products and on-site services of the covered business entity, to employees, including management personnel, of the covered business entity who have direct responsibility for supply chain management or on-site services.

- The findings of each audit required under the Act, including the details of any instances of found or suspected forced labor.

- A written certification, signed by the chief executive officer of the covered business entity, that (1) the covered business entity has complied with the requirements of the Act and exercised due diligence in order to eradicate forced labor from the supply chain and on-site services of the covered business entity, (2) to the best of the chief executive officer's knowledge, the covered business entity has found no instances of the use of forced labor by the covered business entity or has disclosed every known instance of the use of forced labor and (3) the chief executive officer and any other officers submitting the report or certification understand that the False Statements Act applies to the information contained in the report.

The report would be required to be submitted to the Secretary of Labor. The report also would be required to be published on the covered business entity's public website, with a conspicuous and easily understood link on the homepage of the website that leads to the report. If the covered business entity does not have a public website, the report would be required to be provided to any consumer within 30 days after requesting the report.

The Secretary of Labor would in turn each year be required to submit a report to Congress regarding the covered business entities that (1) have failed to conduct audits required under the Act for the preceding year or have been adjudicated in violation of any other provision of the Act or (2) have been found to have used forced labor, including the use of forced labor in their supply chain or by their on-site service providers.

Audit Report Content

The auditor would be required to prepare an audit report that includes the following:

- The direct supplier's or on-site service provider's (1) documented processes and procedures that relate to eradicating forced labor and (2) documented risk assessment and prioritization policies as such policies relate to eradicating forced labor.

- A description of the worker interviews, manager interviews and documentation review required by the Act.

- A description of all violations or suspected violations by the direct supplier or on-site service provider of any U.S. forced labor laws or, if applicable, the laws of another country.

- For each violation described in the report, a description of any corrective and protective actions recommended for the direct supplier consisting of, at a minimum, (1) the issues relating to the violation and any root causes of the violation, (2) the implementation of a solution and (3) a method to check the effectiveness of the solution.

Contract Requirements

Covered business entities would be required to include in contracts with direct suppliers and on-site service providers a requirement that (1) the supplier or provider not retaliate against any worker for participating in an audit relating to forced labor and (2) worker participation in an audit will be protected through the same grievance mechanisms available to the worker for any other type of workplace grievance.

Enforcement

Relative to other corporate social responsibility legislation, the proposed maximum damages for non-compliance with the Act are staggering.

Under the Act, the Secretary of Labor could assess civil damages up to $100 million if a covered business entity violates the audit or reporting requirements of the Act. The covered business entity would first have the opportunity for a hearing.

In addition, the Secretary of Labor would be able to assess punitive damages of up to $500 million against a covered business entity, supplier or on-site service provider for willful violations of the Act. In this context, the covered business entity, supplier or on-site service provider also would first have the opportunity for a hearing.

The Secretary of Labor also would be able to request the Attorney General institute a civil action for relief, including a permanent or temporary injunction, restraining order or any other appropriate order, if the Secretary believes that a violation of the Act constitutes a hazard to workers.

Next Steps for the Act

The bill has been referred to the Senate Committee on Health, Education, Labor, and Pensions. As of the date of this Alert, a committee hearing has not yet been held. As earlier noted, the prior version of the bill never made it out of committee. Passage of the current bill also is unlikely, although it should be included as part of the growing body of proposed supply chain-focused laws and regulations that large companies are monitoring.

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