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## United Kingdom Publishes Modern Slavery Act Guidance: An Overview, Selected Next Steps and Takeaways

Yesterday, the U.K. Home Office published its expected [Guidance](#) on the transparency provisions of the Modern Slavery Act, which was adopted earlier this year. The transparency provisions, which are in part modeled on the California Transparency in Supply Chains Act, require commercial organisations that carry on a business or part of a business in the United Kingdom, supply goods or services and have annual total turnover of at least £36 million to each year prepare a slavery and human trafficking statement that indicates the steps the organisation has taken during the year to ensure that slavery and human trafficking (collectively referred to as modern slavery) are not taking place in any of its supply chains and in any part of its own business. Because of their broad applicability, the transparency provisions will require disclosures by a significant number of multinationals based outside of the United Kingdom.

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This Alert discusses yesterday's Guidance concerning the transparency provisions of the Modern Slavery Act, as well as selected next steps and takeaways.

### Transparency Provisions Guidance

Yesterday's Guidance addresses the following aspects of the transparency provisions:

#### *Transitional Period for Compliance*

- The transparency provisions of the Modern Slavery Act were brought into force yesterday, at the time the Guidance was released. However, to give subject organisations sufficient time to consider the provisions and Guidance before producing their first statement, a transitional period for compliance has been provided. Under regulations issued by the U.K. government on Oct. 22, and as discussed in the Guidance, the first organisations required to produce a statement will be those whose fiscal year ends on or after March 31, 2016. By way of example, if an organisation has a Dec. 31 fiscal year end, because the transparency provisions do not take effect for fiscal years ending before March 31, 2016, the organisation's first statement will need to be produced for fiscal 2016; a statement will not be required for that organisation for fiscal 2015.

#### *Statement Publication Date*

- Statements are required to be prepared annually, for the trailing fiscal year. The Modern Slavery Act does not contain a date by which a statement must be prepared and posted on the commercial organisation's website. The Guidance indicates that organisations are expected to publish their statements as soon as reasonably practicable after the end of the applicable fiscal year, and they are encouraged to report within six months of the fiscal year end.

#### *Determination of U.K. Nexus*

- For the transparency provisions to apply, a commercial organisation must carry on a business or part of a business in the United Kingdom. The Guidance indicates that the courts will be the final arbiter as to

whether an organisation carries on a business in the United Kingdom, taking into account the particular facts in individual cases. However, the Guidance indicates that, to make the determination, organisations should apply “a common sense approach,” noting that organisations that do not have a demonstrable business presence in the United Kingdom should not be subject to the transparency provisions.

- Having a U.K. subsidiary does not subject a parent entity to the transparency provisions. The Guidance notes that having a U.K. subsidiary will not, in itself, mean that a parent company is carrying on a business in the United Kingdom, since a subsidiary may act completely independently of its parent or other group companies. The reverse situation, i.e., the applicability of the transparency provisions to a subsidiary where a parent entity is required to prepare a statement, is discussed below.

#### *Calculation of Total Turnover*

- As indicated above, the turnover threshold for the transparency provisions of the Modern Slavery Act is £36 million. Pursuant to regulations issued by the U.K. government on Oct. 28, and as discussed in the Guidance, turnover includes that of the filing organisation and any of its subsidiary undertakings, including those operating entirely outside of the United Kingdom.
- Pursuant to the Oct. 28 regulations, and as noted in the Guidance, turnover consists of the amount derived from the provision of goods and services falling within ordinary activities, after the deduction of trade discounts, value-added tax and any other taxes based on the amounts so derived.
- Many multinationals have franchised operations in the United Kingdom. The Guidance notes that in determining the total turnover of a business operating a franchise model, only the turnover of the franchiser is included. The turnover of any franchisee using the franchiser’s trademark and distributing goods or providing services is not required to be included when calculating the franchiser’s turnover.

#### *Meaning of the Term ‘Supply Chains’*

- The Modern Slavery Act does not define this term. The Guidance indicates that the term is intended to have its “everyday meaning.”

#### *Not-for-Profit Entities*

- An organisation can be subject to the transparency provisions even if it pursues primarily charitable or educational aims or purely public functions. The Guidance indicates that the purpose for which profits from a commercial activity are made is not determinative.

#### *Applicability to Subsidiaries*

- As noted above, an organisation’s turnover is calculated including the turnover of its subsidiaries. The Guidance indicates that a parent organisation that is subject to the transparency provisions must include in its statement the steps taken in relation to its subsidiaries to ensure that modern slavery is not taking place in any of its supply chains if the activities of the subsidiary form part of the supply chain or business of the parent. This will be the case even if the subsidiary does not independently meet all of the tests in the Modern Slavery Act (for example, if the subsidiary’s turnover is below £36 million).

#### *Applicability to Foreign Entities*

- The Guidance notes that if a foreign parent is carrying on a business or part of a business in the United Kingdom, it will be required to produce a statement.

- The Guidance also indicates that if a foreign subsidiary is part of the parent organisation's supply chain or own business, the parent company's statement should cover any actions taken in relation to that subsidiary to prevent modern slavery.

#### *Preparation of Combined Statements*

- If a parent organisation and one or more subsidiaries in the same group are each required to produce a statement, the parent may produce one statement that the subsidiaries can use to meet their disclosure requirement, provided that the statement fully covers the steps that each of the organisations required to produce a statement has taken in the relevant fiscal year.

#### *Website Disclosure*

- For organisations with more than one website, the Guidance recommends placing the statement on the most appropriate website relating to the organisation's business in the United Kingdom. Where there is more than one relevant website, the Guidance recommends placing a copy of the statement or a link to the statement on each relevant website.
- The Modern Slavery Act indicates that the link to the statement must be in a prominent place on the website's home page. According to the Guidance, a "prominent place" may mean a modern slavery link that is directly visible on the home page or part of an obvious drop-down menu on that page. The Guidance indicates that the link should be clearly marked so that the contents are apparent, and it recommends a link such as "Modern Slavery Act Transparency Statement."

In addition to addressing the foregoing interpretive items, the Guidance contains voluntary suggestions and recommended good practices for disclosure and compliance program elements.

### **Selected Next Steps and Takeaways**

#### *Start by Assessing Applicability.*

As an initial matter, assess whether any of the entities in your corporate group must prepare a statement. Due to the manner in which total turnover is calculated and U.K. nexus is determined, many mid-sized and larger U.S. and other multinational companies that derive a relatively small portion of their revenues from the United Kingdom will be required to prepare a statement.

Note that the business activities picked up by the Modern Slavery Act are broader than those that come within the scope of the California Transparency in Supply Chains Act, which is limited to manufacturers and retailers. In addition, the turnover threshold is lower. The California act has a turnover threshold of \$100 million, which is almost double that of the Modern Slavery Act based on current exchange rates.

#### *Remember, It's Ultimately About Responsible Labor Practices and Sourcing, Not Disclosure.*

The purpose of supply chain disclosure requirements generally is to shine a light on corporate procurement practices and related compliance procedures to drive responsible sourcing. The theory is that greater transparency will drive responsible sourcing, either from within the disclosing company or through engagement by NGOs, socially responsible investors, commercial customers and other stakeholders that read the disclosures. As articulated in the Guidance, "The provision seeks to create a race to the top by encouraging businesses to be transparent about what they are doing, thus increasing competition to drive up standards." With this in mind, the disclosures required by the transparency provisions of the Modern Slavery Act are deliberately open-ended.

Like its California counterpart, the Modern Slavery Act does not create an affirmative obligation to put in place a compliance program to eradicate modern slavery in the supply chain, nor does it require that supply chain due diligence be performed. A commercial organisation can comply with the transparency provisions of the Modern Slavery Act simply by disclosing in its annual statement that it has not taken any steps to eradicate slavery and human trafficking.

However, given the rapidly increasing focus on this issue by governments, NGOs, socially responsible investors, the press and commercial and retail customers, as well as the mandatory due diligence requirements under the recent U.S. Federal Acquisition Regulation rule, we are seeing a significant number of mid-sized and larger companies starting to put in place modern slavery compliance programs applicable to their supply chains, and we are seeing companies with existing programs making those programs more robust. Therefore, disclosing “we do not do anything” will not be the right approach for most companies.

And, in any case, as it relates to your own company’s internal activities, it is important to have in place appropriate policies and procedures to address human trafficking and slavery risk to comply with substantive modern slavery legislation, both in the United Kingdom and elsewhere.

#### *Take a Thoughtful, Measured Approach to Implementing a Compliance Program.*

Because the Modern Slavery Act does not require a specific compliance framework, companies have the flexibility to construct a compliance program that is tailored to their business, industry, risk profile, position in the supply chain, legal requirements, corporate social responsibility commitment and resources.

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

Once a company has moved up the learning curve, it is ready to begin developing and implementing a compliance program. Among other things, at a high-level, typical compliance program elements include: (1) a policy statement; (2) management systems to support compliance; (3) supplier and other third-party outreach and due diligence; (4) evaluation of internal and supplier compliance and risk; and (5) a risk mitigation framework.

Implementing an effective supply chain compliance program is usually a multi-year exercise, and modern slavery compliance is no different in this regard. Don’t try to eat the whole elephant in one bite. NGOs and other constituencies recognize that it takes time to develop and implement a supply chain compliance program. They do not expect perfection in the first year but are instead looking for a thoughtful, good faith effort and progressive improvement over time.

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

#### *Modern Slavery Disclosure Will Evolve.*

Many first-time statements are expected to indicate that during the first reporting year the organisations were focused on better understanding modern slavery risks and that they were in the initial stages of developing and implementing a compliance program. As noted above, this will generally be expected by the constituencies that will be reading the statements. The Guidance echoes this view and notes that organisations’ first statements may show how they are starting to act on the issue of modern slavery and their planned actions to investigate or collaborate with other

stakeholders to effect change. However, NGO and other stakeholder expectations are likely to be higher for first statements of organisations with fiscal years that end in late 2016 or thereafter.

As organisations continue to implement and enhance their compliance programs and address risk, and otherwise refine their statements, disclosures will evolve. Expect disclosures to take a few years to start to coalesce around a norm as compliance programs mature and NGOs and other constituencies publish expectations documents, advocate for best practices and rank compliance efforts.

### *Harmonize Disclosure and Compliance Procedures.*

Many companies that will be required to prepare a Modern Slavery Act statement already prepare disclosure under the California Transparency in Supply Chains Act. Although the disclosures contemplated by the two acts are somewhat different, there will be overlap. At a minimum, disclosures should be coordinated, and consideration should be given to whether to prepare a single statement that can be used to satisfy the requirements of both the U.K. and California acts. In addition, modern slavery disclosure should be coordinated with other CSR and supply chain disclosures. These disclosures are often out of sync.

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

## **For Further Information**

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