

Expert Q&A on the UK Modern Slavery Act 2015

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An expert Q&A with Michael R. Littenberg and Mark C. Hunting of Ropes & Gray LLP on the UK Modern Slavery Act 2015.

In recent years, a new wave of regulation aimed at ameliorating human rights violations has required many companies to take hard looks at their supply chains. Transparency (disclosure) provisions of the UK Modern Slavery Act 2015 (MSA) requiring disclosure of activities companies are undertaking to eliminate slavery and human trafficking from their supply chains and businesses continue this trend. The MSA's transparency provisions apply to a significant number of multinational companies, including certain US companies with UK operations.

Practical Law spoke with Michael Littenberg and Mark Hunting of Ropes & Gray LLP on what US companies need to know about the MSA and steps they should consider taking now to ensure their company is on track to comply.

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Mark is an English-qualified associate in the firm's government enforcement practice in London. He regularly advises a wide range of organisations on issues relating to bribery and corruption, sanctions, and money laundering, as well as on MSA related issues. Mark also works with the business and securities litigation team and has experience conducting commercial and regulatory litigation.

WHICH US COMPANIES MAY BE REQUIRED TO COMPLY WITH THE MSA'S TRANSPARENCY PROVISIONS?

All US companies with operations in the UK should determine whether they are covered by the MSA's transparency provisions, which require covered companies to prepare, and under certain

circumstances publish, a slavery and human trafficking statement for each fiscal year ending on or after March 31, 2016. The transparency provisions apply to any "commercial organisation" supplying either goods or services that both:

- Carries on a business or part of a business in the UK.
- Has an annual turnover of at least £36 million (approximately \$53 million).

Companies should refer to guidance issued in October 2015 by the UK Home Office that clarifies, among other things, the coverage of the MSA's transparency provisions (see Transparency in Supply Chains etc.: A practical guide, available at www.gov.uk).

The MSA does not contain a bright-line test for determining whether a company is carrying on a business or part of a business in the UK. The UK Home Office guidance indicates that the UK courts, taking into account the particular facts in individual cases, are the final arbiter of whether an organization is deemed to be carrying on a business in the UK. The guidance indicates that companies should use "a common sense approach" in determining whether they carry on a UK business, noting that companies with no "demonstrable business presence" in the UK should not be subject to the transparency provisions.

Turnover is defined as the amount a company derives from the provision of goods and services falling within ordinary activities, after deducting trade discounts, value-added tax and any other taxes based on the amounts derived. According to the guidance, in calculating its turnover, a company must include its own turnover and that of any of its "subsidiary undertakings," regardless of where those subsidiaries are based or carry on their business. The turnover threshold includes the global turnover of the commercial organisation and its subsidiary undertakings, not just their turnover in the UK.

Under the MSA, a company must analyze whether each of its parent company and any subsidiary independently triggers the requirement to prepare an annual slavery and human trafficking statement. In other words, both a corporate parent itself and one or more subsidiaries may be required to prepare a statement. However, as discussed below, companies may choose to prepare one statement satisfying the reporting requirements of multiple entities in a corporate group.

Many multinational companies have franchised operations in the UK. 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 need not be included when calculating the franchiser's turnover.

WHAT INFORMATION MUST A SLAVERY AND HUMAN TRAFFICKING STATEMENT INCLUDE?

A slavery and human trafficking statement must include the steps a covered company, including its subsidiaries, has taken during the fiscal year to ensure that slavery and human trafficking is not taking place in its supply chains or in its own business, or a statement that no such steps have been taken. The MSA does not define the term supply chain, but the UK Home Office guidance indicates that the term is intended to have its "everyday meaning."

Where a parent company and one or more of its subsidiaries are each required to prepare a statement, the parent may produce one statement to satisfy the reporting requirements of all covered entities. The statement would need to cover the steps taken in the relevant fiscal year by each covered entity.

The statement of a corporation must be approved by the board of directors or equivalent management body and signed by a director or the equivalent. The MSA also specifies approval and signature requirements for various kinds of partnerships.

A company must publish its statement on its website and include a link to the statement in a prominent place on the homepage. If the company does not have a website, it must provide a copy of the statement to anyone who makes a written request.

The MSA does not mandate any particular content or structure for the required disclosure. The MSA and the guidance include examples of topics that a statement may address. However, the guidance indicates that these are just suggestions and all that is required is an accurate description of the steps taken during the fiscal year. These example topics include:

- The company's structure, business and supply chains.
- The company's policies and due diligence processes relating to slavery and human trafficking in its business and supply chains.
- A discussion of the portions of the company's business and supply chains posing a risk of slavery and human trafficking and the steps the company has taken to assess and manage that risk.
- How effective the company's efforts to ensure slavery and human trafficking are not present have been, measured against appropriate performance indicators.
- A discussion of company staff training and capacity building efforts relating to slavery and human trafficking.

WHEN IS THE FIRST SLAVERY AND HUMAN TRAFFICKING STATEMENT DUE?

The transparency provisions became effective in October 2015, but include a transition period designed to give covered companies time to prepare to comply. Under that transition period, a covered company must publish its first slavery and human trafficking statement for its first fiscal year that ends on or after March 31, 2016.

This means that calendar fiscal year-end companies must produce their first statement in 2017, covering the 2016 fiscal year.

Companies are expected to prepare and, if applicable, post their statement as soon as reasonably practicable after the end of the relevant fiscal year. The UK Home Office guidance encourages companies to report within six months of the relevant fiscal year end. The guidance contemplates that companies may want to publish their statement alongside their annual financial reports or other non-financial reports.

A NUMBER OF US RETAILERS AND MANUFACTURERS DOING BUSINESS IN CALIFORNIA HAVE FOR THE PAST SEVERAL YEARS BEEN COMPLYING WITH THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT OF 2010. HOW DO THE MSA'S REQUIREMENTS COMPARE?

The MSA's transparency provisions are in part modeled on the California Transparency in Supply Chains Act of 2010 (Supply Chains Act). However, the business activities picked up by the MSA are broader than those that are within the scope of the Supply Chains Act, which is limited to larger retailers and manufacturers. The MSA also has a lower turnover threshold. In addition, the disclosure topics indicated in the MSA are not mandatory.

That said, many companies covered by the MSA have already been preparing disclosure under the Supply Chains Act. Although the disclosure contemplated by the two acts is somewhat different, there is overlap. At a minimum, companies should coordinate their disclosure and consider whether to prepare a single statement that satisfies both the MSA and the Supply Chains Act. If multiple entities within a company's corporate group are subject to one or both of the MSA and the Supply Chains Act, the company should consider coordinating and harmonizing compliance processes and procedures among covered entities.

For more information on the California Transparency in Supply Chains Act, see Practice Note, Corporate Social Responsibility and the Supply Chain: California Legislation ([2-520-6599](#)).

WHAT STEPS SHOULD COMPANIES TAKE NOW TO COMPLY WITH THE MSA?

As an initial matter, a company should assess whether any of the entities in its corporate group are required to prepare a slavery and human trafficking statement. Many mid-sized and larger US and multinational companies that derive a relatively small proportion of their revenue from the UK will be required to prepare a statement because of the way total turnover is calculated and UK nexus is determined.

To reduce costs and increase efficiency, companies that are just starting to build out their MSA supply chain compliance programs should leverage other existing complementary supply chain compliance initiatives, including those relating to the US conflict minerals rule (Rule 13p-1 under the Securities Exchange Act of 1934). For more information on the conflict minerals rule, see Practice Note, Conflict Minerals Diligence ([0-510-6930](#)).

Companies should keep in mind that, ultimately, the MSA is aimed at fostering responsible labor practices and sourcing. The disclosure requirement is intended to shine a light on corporate procurement

practices and related compliance procedures to drive responsible sourcing, either from within the disclosing company or through engagement by non-governmental organizations (NGOs), socially responsible investors, customers, and other stakeholders that read the disclosure. As articulated in the UK Home Office guidance, the MSA attempts to create a “race to the top” by fostering competition between companies to drive up standards. This is why the required disclosure is open-ended.

Like the Supply Chains Act, the MSA does not require companies to implement a modern slavery compliance program or perform supply chain due diligence. A company can comply with the MSA’s transparency provisions merely by indicating in its slavery and human trafficking statement that it has not taken any steps to ensure that no slavery or human trafficking is present in its supply chain.

However, as a result of the rapidly increasing focus on this issue by, among others, governments, NGOs, socially responsible investors, plaintiffs’ attorneys, the press, and commercial and retail customers, as well as the mandatory due diligence requirements under last year’s human trafficking-related amendments to the US Federal Acquisition Regulation, a significant number of mid-sized and larger companies are starting to put in place modern slavery compliance programs applicable to their supply chains. Many companies with existing compliance programs are making those compliance programs more robust.

Accordingly, disclosing “we do not do anything” will not be the right approach for most companies. In any case, it is important for a company to have appropriate policies and procedure in place regarding its own internal activities to ensure the company is complying with substantive modern slavery legislation in the UK and elsewhere.

WHAT EXPECTATIONS DO YOU HAVE FOR COMPANIES’ FIRST DISCLOSURES UNDER THE MSA?

We expect many first-time slavery and human trafficking statements to indicate that, in the first reporting year, companies primarily were focused on better understanding modern slavery risks and were therefore in the initial stages of developing and implementing their compliance programs. The constituencies that will be reading the statements generally expect this response as well. The UK Home Office guidance similarly notes that companies’ first statements may address how companies are starting to act on the issue of modern slavery and how they are planning to investigate or collaborate with other stakeholders to effect change.

That said, NGO and other stakeholder expectations for the first reporting period are likely to be higher for companies with fiscal years that end in late 2016. Disclosure expectations will be higher for all companies in subsequent reporting years as companies continue to implement and enhance their compliance programs, address risk, and refine their statements.

We expect it to take a few years for disclosure to start to coalesce around a norm. During this time, compliance programs will continue to mature. We also anticipate that NGOs and other constituencies will publish their expectations, advocate for best practices, and begin ranking companies’ compliance efforts.

WHAT ARE THE TYPES OF PRACTICES THAT THE MSA IS AIMED AT REDUCING?

The MSA is aimed at reducing “modern slavery,” a term describing:

- **Slavery.** This is an offense characterized by behavior on the part of the offender as if that party owned another person, which deprives the victim of his or her freedom.
- **Servitude.** This is the obligation to provide services imposed by the use of coercion. It includes the obligation to live on another party’s property and the impossibility of changing that condition.
- **Forced or compulsory labor.** Generally, this is the practice of exacting from a person work or service not offered voluntarily under threat of penalty.
- **Human trafficking.** Generally, this means arranging or facilitating the travel of another person with a view to that person being exploited, even if the victim consents to the travel.

The UK Home Office guidance includes a further discussion of these practices.

A compliance program should take into account the modern slavery risks that are particular to the company’s business. Certain geographies and business activities present greater modern slavery risks than others.

WHAT RESOURCES WOULD YOU RECOMMEND TO COMPANIES BEGINNING THEIR COMPLIANCE ANALYSIS?

Because human trafficking compliance is a relatively new area of compliance, many companies have at best an incomplete, and more often a cursory, understanding of the modern slavery risks presented by their supply chains. To gain a better understanding of their supply chain risks as a first step in developing a compliance program, companies sometimes can leverage the work product prepared by government agencies and NGOs that assesses industry and geographic risk. Industry groups and specialized consulting firms also can be helpful.

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