Regulation of Forced Labor in Supply Chains: Why It Matters and How Companies Can Comply

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I. Corporate Obligations to Address Forced Labor in Supply Chains – Relevant to You?

International organizations like the International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD) and the United Nations (UN) have long been engaged in efforts to prevent and remediate human rights violations resulting from corporate activity, including the use of forced labor in supply chains that provide goods and services. They have developed standards for responsible business conduct on environment, social, and governance (ESG) metrics and then encouraged companies, through voluntary participation and information sharing, to adhere to them.

More recently, the United Kingdom, Germany, France, the Netherlands, Switzerland, the European Union, and Australia have proposed or passed legislation requiring companies, depending on the jurisdiction, to assess their human rights risk exposure, to report on the outcome of these assessments, and to remediate ongoing violations. The United States has revived dormant legislation and stepped up enforcement to combat forced labor; one state, California, requires reporting on forced labor risks.

In general, these initiatives require (or will require) companies to assess and combat the risk of forced labor in their supply chains. In some jurisdictions, companies are required to provide regulatory bodies, consumers, and investors with various degrees of detailed information about these efforts, including who is responsible for compliance, how risks are identified and mitigated, and how the companies respond to suspected forced labor violations. In others, companies must only certify to compliance. The range of companies (soon to be) subject to these laws varies across countries, but all regulations apply in some manner to both domestic and foreign companies who

avail themselves of a given market. While regulators have given companies some time to transition into compliance, penalties for noncompliance in some jurisdictions may be steep, assessed at a percentage of worldwide turnover for larger corporations. In short, companies (and their advisers) domiciled or operating in any of these jurisdictions, particularly those operating across multiple countries, should educate themselves on the contours of these law(s) and start building an appropriate internal compliance framework.

In the paragraphs below, we provide a more detailed overview of applicable or pending legislation related to forced labor in supply chains, followed by practical suggestions to move companies to timely compliance with these requirements.

II. Overview of ESG-Focused Regulations

A. United States

At the federal level, forced labor is generally regulated by the Tariff Act of 1930 (Tariff Act),[1] the Federal Acquisition Regulation (FAR),[2] and the Trafficking Victims Protection Reauthorization Act (TVPRA).[3] The Tariff Act prohibits the importation of goods made with forced labor; the FAR prohibits the use of forced labor in the production of materials (or provision of services) sold to the federal government; and the TVPRA bars companies from knowingly benefitting from the use of forced labor. California is the only state that mandates reporting on forced labor efforts, although some states prohibit forced labor, as defined in the Tariff Act, in state-level procurement activity and criminalize knowingly benefitting from labor trafficking.

1. Tariff Act of 1930

The Tariff Act prohibits the importation of merchandise mined, produced, or manufactured in any foreign country by forced labor, defined as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily."[4]

It applies to all companies importing goods into the U.S. and is enforced by U.S. Customs and Border Protection (CBP), through the issuance of Withholding Release Orders (WROs).[5] The CBP can issue a WRO on reasonable belief that goods produced with forced labor are being imported into the U.S. and detain the shipment.[6] Merchandise produced or manufactured by forced

[1] Tariff Act of 1930, 19 U.S.C. Ch. 4.
[2] Federal Acquisition Regulation, 48 C.F.R. § 1.
[3] Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Pub. L. No. 115-425, 132 Stat. 5472 (2019).
[4] 19 U.S.C. § 1307.
[5] 19 C.F.R. § 12.42(e). WROs are product-specific and may be limited by producer, country, or region.
[6] 19 C.F.R. § 12.42(e). Importers may export the detained merchandise (1) at any time prior to the seizure pursuant to CBP's finding, or (2) before it is deemed to have been abandoned. 19 C.F.R. § 12.44(a). Anyone who has reason to believe that merchandise being, or is likely to be, imported is mined, produced, or

labor is subject to exclusion and/or seizure upon importation.[7] After a review, if the CBP finds probable cause that the imported merchandise is produced by forced labor, it publishes a Finding in the Customs Bulletin and in the Federal Register in cooperation with the Department of the Treasury.[8] To obtain release of shipments subject to a WRO or finding, importers must submit a certificate of origin and evidence that the goods were not produced with forced labor within three months following the importation.[9]

After decades of relatively little enforcement activity, the CBP has started to use WROs to prevent the importation of goods made with forced labor, issuing seven WROs in 2019, 14 in 2020, and 18 in 2021.[10] In August 2020, the CBP issued its first Finding (after an investigation prompted by the issuance of a WRO) in 20 years on Inner Mongolia Hengzheng Group Baoanzhao Agricultural and Trade LLC for forced labor used in the production of stevia.[11] It levied likely its first-

manufactured using forced and/or indentured labor, can file a report to CBP. 19 C.F.R. § 12.42(a)-(b). The CBP Commissioner is then required to initiate an investigation as appears to be warranted by the amount and reliability of the submitted information. 19 C.F.R. § 12.42(d).

[7] CBP's website indicates that attempted importation of such merchandise "may lead to criminal investigation of the importer(s)," but CBP statutes do not provide for criminal liability. U.S. CUSTOMS & BORDER PROT., CBP PUB. NO.1167-0620, FACT SHEET: TRADE FACILITATION & TRADE ENFORCEMENT ACT OF 2015 (2020), https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Trade%20Facilitation-508comp.pdf. However, "other civil and criminal penalties . . . can be pursued in tandem with the submission of a Section 307 petition to CBP." THE HUMAN TRAFFICKING LEGAL CENTER, IMPORTING FREEDOM: USING THE U.S. TARIFF ACT TO COMBAT FORCED LABOR IN SUPPLY CHAINS (2020), https://htlegalcenter.org/wp-content/uploads/Importing-Freedom-Using-the-U.S.-Tariff-Act-to-Combat-Forced-Labor-in-Supply-Chains_FINAL.pdf.

[8] 19 C.F.R. § 12.42(f). Any imported merchandise specified in the finding that has not been released from CBP custody before publication will be excluded or seized, unless the importer provides satisfactory evidence that the merchandise was not produced by forced labor. 19 C.F.R. §§ 12.42(g), 12.44(b).

[9] Forms of documentation include: 1) a certificate of origin signed by the foreign seller or owner of the merchandise; and 2) a detailed statement demonstrating that the subject merchandise was not produced with forced labor (*e.g.*, a supply chain audit report conducted by an independent or third-party auditor). Evidence will be evaluated on a case-by-case basis. If the proof submitted by the importer is deemed satisfactory, CBP will release the goods. 19 C.F.R. § 12.43(a)-(c).

[10] For example, in December 2020, CBP issued a WRO against Malaysian company Sime Darby Plantation over allegations of forced labor in its palm oil production, in response to which the company "appointed an independent ethical trade consultancy to undertake a full-scale, independent, assessment spanning its facilities across Malaysia." *Sime Darby Plantation Berhad Responds to USCBP General Notice of Forced Labour Filing*, SIME DARBY PLANTATIONS (Jan. 28, 2022), https://simedarbyplantation.com/sime-darby-plantation-berhad-responds-to-uscbp-general-notice-of-forced-labour-finding/. Nonetheless, in January 2022, CBP announced a finding that it had determined that "certain articles . . . manufactured or produced in whole or in part with the use of convict, forced, or indentured labor by Sime Darby Plantation and its subsidiaries are being, or are likely to be, imported into the United States." Palm Oil and Derivative Products Made Wholly or In Part With Palm Oil Produced by the Malaysian Company Sime Darby Plantation Berhard, 87 Fed. Reg. 4,635 (Jan. 28, 2022) (CBP Notice of Finding); *USA: Malaysian Company Sime Darby Plantation Issued With 'Withhold Release Order' Over Allegations of Forced Labour in Its Palm Oil Production*, BUS. & HUM. RTS. RES. CTR. (Dec. 30, 2020), https://www.business-humanrights.org/en/latest-news/usa-malaysian-company-sime-darby-plantation-issued-with-withhold-release-order-over-allegations-of-forced-labour-in-its-palm-oil-production-incl-co-response/; Seah Eu Hen, *Sime Darby Plantation to Cooperate With CBP on Forced Labour Findings*, THE EDGE MARKETS (Jan. 28, 2022), https://www.theedgemarkets.com/article/sime-darby-plantation-share-trade-suspended-pending-announcement.

[11] Stevia Extracts and Derivatives Produced in the People's Republic of China, 85 Fed. Reg. 66,574 (Oct. 20, 2020) (CBP Notice of Finding).

ever monetary civil penalty of $575,000 against Pure Circle, another stevia importer, in connection with this investigation.[12]

2. The FAR

Companies that sell directly or indirectly to the federal government must comply with the FAR.[13] The FAR 52.222-50, *Combating Trafficking in Persons*, prohibits federal contractors and subcontractors from using forced labor in the performance of a contract or subcontract and requires them to immediately disclose credible information indicating a violation.[14]

A contractor must immediately notify a Contracting Officer and the agency Inspector General of "any credible information" received "from any source" that alleges violative conduct. Failure to comply with the forced labor requirements may result in consequences ranging from the imposition of a fine, to contract termination, to suspension and debarment.[15] It could also expose the company to False Claims Act[16] violations for knowingly (or with reckless disregard) submitting material false claims for payment or approval to the federal government (or a failure to disclose such violations if whistleblowers report them).[17]

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[12] U.S. Customs & Border Prot., *CBP Collects $575,000 from Pure Circle U.S.A. for Stevia Imports Made with Forced Labor*, CBP NEWSROOM (Aug. 13, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-collects-575000-pure-circle-usa-stevia-imports-made-forced-labor. The Tariff Act allows for civil penalties, calculated on different scales depending on whether the conduct was disclosed. 19 C.F.R. § 162.73.

[13] FAR requirements and related federal regulations provide additional general guidance regarding what compliance programs and internal controls government contractors are required to have. FAR implementing regulations broadly note that contractors "should" have a compliance training and internal controls program "suitable to the size of the company and the extent of its involvement in Government contracting[.]" *See* FAR § 3.1002(b). Furthermore, for certain contracts exceeding $6 million, government contractors are required to establish business ethics awareness and compliance programs, as well as internal control systems to implement those programs. FAR § 3.1004(a); 48 C.F.R. § 52.203.13(c)(1)-(2) (2021). These compliance programs and internal controls must include—"at a minimum" and among other requirements—periodic reviews to ensure compliance with both the company's code of ethics and government contracting requirements. 48 C.F.R. § 52.203.13(c)(2)(ii)(C).

[14] Prohibited practices include, among others: destroying, concealing, confiscating, or denying access to employees' identity documents; the use of misleading or fraudulent practices during the recruitment of employees or offering of employment; the use of recruiters that do not comply with local labor laws of the country in which the recruiting takes place; charging employees or potential employees recruitment fees; failing to provide return transportation or pay the cost of return transportation at the end of employment for foreign employees; provision of employer housing that does not meet the host country's housing and safety standards; failure—where required by local law or contract—to provide an employment contract, recruitment agreement, or other required work document in writing. FAR § 52-222-50(b).

[15] FAR § 52.222-50(e). Officials at the relevant agency or agencies may refer the matter to the agency Suspension and Debarment Official (SDO) to determine whether suspension or debarment is in the government's interest. When a cause for suspension or debarment exists, the contractor has the burden of demonstrating evidence of remedial measures or mitigating factors and, in the case of proposed debarment, its present responsibility, such that suspension or debarment are not necessary.

[16] 31 U.S.C. §§ 3729, *et seq*.

[17] The FCA's *qui tam* provisions allow private citizens to file lawsuits on behalf of the U.S. Government if an individual or a company is defrauding the government, rewarding them with a minimum payment of 15% and a maximum payment of 30% of the proceeds collected by the government.

3. TVPRA

The TVPRA prohibits corporations "present"[18] in the U.S. from knowingly benefitting from participation in a venture while knowing or recklessly disregarding that the venture was engaged in human trafficking, including forced labor obtained through harm, threats, or abuse of the legal system.[19] The law also provides an individual civil remedy against a party that knew or should have known that the venture was engaged in human trafficking.[20] U.S. prosecutors and trafficking survivors can therefore pursue not only traffickers, but also third parties that knowingly benefit from the trafficking venture. Corporations risk potential liability if they do not diligently inspect suppliers, contractors, or subsidiaries to uncover forced labor and human trafficking. To date, this provision of the TVPRA has primarily been used against hotels or motels that know or should know that sex trafficking is occurring on their premises.[21] It applies, however, to any party that knowingly benefits from forced labor if they participated in a venture (such as a business relationship) which they knew or recklessly disregarded, or, in the civil context, should have known, was engaged in trafficking.[22] For example, this provision potentially provides a mechanism to sue labor recruiters.[23] Critically, the TVPRA provides an avenue for U.S. prosecutors to pursue forced labor found in supply chains, so long as they can show that the company's supply chain constituted participation in a labor trafficking "venture." Use of the TVPRA would allow the U.S. authorities to pursue such conduct without the need for new legislation like that being proposed or enacted in other countries.[24]

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[18] The TVPRA provides jurisdiction over international conduct if the corporation is "present" in the United States—even via presence of a corporate agent, alter ego, or joint venture. For instance, in the 2016 Cambodian laborers' Thai fishing case, *Ratha v. Phatthana Seafood Co.*, the court permitted TVPRA claims against Thai corporations because those entities founded and controlled the American corporations. *Ratha v. Phatthana Seafood Co.*, No. CV 16-4271-JFW (ASx), 2016 WL 11020222 (C.D. Cal. Nov. 9, 2016). The only exception is where the alleged extraterritorial conduct occurred prior to the 2008 amendment of the TVPRA, which added the provision on extraterritorial application. *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 200-206 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 134 (2017); *see* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223, 122 Stat. 5044, 5071 (codified as amended at 18 U.S.C. § 1596 (2015)).

[19] 18 U.S.C. §§ 1589, 1593A (2015). The Act further prohibits related conduct, including trafficking, sex trafficking, and withholding workers' identification documents. 18 U.S.C. §§ 1590-1592 (2015).

[20] 18 U.S.C. § 1595 (2015).

[21] *See, e.g., Ricchio v. McLean*, 853 F.3d 553, 557 (1st Cir. 2017); *S.Y. v. Naples Hotel Co*., 476 F. Supp. 3d 1251, 1258 (M.D. Fla. 2020); *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 965 (S.D. Ohio 2019).

[22] Some district courts have applied the definition of "participation in a venture" from the criminal sex trafficking section of the TVPRA, § 1591, to a claim for civil liability under § 1595, and therefore have imported an actual knowledge requirement to § 1595. *See A.B. v. Hilton Worldwide Holdings Inc.*, 484 F. Supp. 3d 921, 937 (D. Or. 2020) (collecting cases). However, other courts have held that Section 1595(a) states that defendants are liable if they knew or *should have known* [that the venture] has engaged in violation" of the TVPRA, and civil defendants therefore "may be liable under the TVPRA if they have either actual or constructive knowledge that the venture in which they participated and from which they benefited violated the TVPRA." *See, e.g., Doe #1 v. Red Roof Inns, Inc*., 21 F.4th 714, 725 (11th Cir. 2021) (emphasis added).

[23] *See generally* Complaint, *Pattaiso v. Alahmad*, No. 1:14-cv-00041 (M.D. Pa. Jan 10, 2014), ECF No. 1.

[24] As discussed, some states similarly prohibit benefiting from participation in a labor trafficking venture, although there may be more difficult challenges for state prosecutors to the extent the forced labor occurs overseas.

4. The Uyghur Forced Labor Prevention Act

The Uyghur Forced Labor Prevention Act (UFLPA)[25] was signed into law in December 2021 and entered into force on June 21, 2022, creating a rebuttable presumption that all goods mined, produced, or manufactured in whole or in part in Xinjiang Uygur Autonomous Region (XUAR) are the product of forced labor and thus prohibited from importation under U.S. customs laws.[26] CBP will have discretion to grant exclusions from the rebuttable presumption but requires that importers provide evidence that they have complied with the due diligence requirements set out in the Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China issued by the Forced Labor Enforcement Task Force on June 17, 2022, requiring extensive documentation of the detained goods' associated supply chain and demonstration that each stage of production involves no forced labor.[27] The burden of proving exclusion will be on the importer of record. The legal standard will be demanding, and the process for granting exclusions will be cumbersome. Under these guidelines, U.S. and global companies will need to adopt due diligence measures, including risk assessments and supply chain mapping, in order to safeguard supply chain integrity for goods coming from China.

5. State-Specific Legislation

a. California Transparency in Supply Chains Act

Retail manufacturers and sellers with annual worldwide gross receipts in excess of $100 million that do business[28] in California must comply with the California Transparency in Supply Chains Act (Supply Chain Transparency Act).[29] The Supply Chain Transparency Act was

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[25] Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525 (2022).
[26] The UFLPA provides that importing such goods is presumptively prohibited under Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307), which bans the importation of goods using forced labor (as defined above). The UFLPA also includes several provisions to increase public reporting, enforcement, and sanctions targeting Chinese forced labor that will also take effect around June 2022. CHRISTOPHER A. CASEY & CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., IF 11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR (2022), https://crsreports.congress.gov/product/pdf/IF/IF11360.
[27] U.S. Dep't of Homeland Sec., *Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China: Report to Congress* 40 (June 17, 2022), https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf. The Forced Labor Enforcement Task Force's enforcement strategy provides guidance to importers with respect to the due diligence, investigation, and supply chain management that should be conducted by importers. An importer can rebut the presumption if it can show (1) it has fully complied with Task Force Guidance to importers in section 2(d)(6) of the Act; (2) it has completely and substantively responded to all inquiries for information submitted by the CBP Commissioner; and (3) by clear and convincing evidence, that the goods to be imported were not mined, produced, or manufactured wholly or in part with forced labor. CBP must issue a public report to Congress within 30 days after granting such an exception. Pub. L. No. 117-78, § 3(b)-(c), 135 Stat. 1525, 1529 (2022).
[28] A company is considered to be "doing business in the state" if it is actively engaging in any transaction for the purpose of financial or pecuniary gain or profit, as further defined in the California Revenue and Taxation Code. *See* KAMALA D. HARRIS, CAL. DEP'T OF JUST., THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE 3 (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.
[29] Cal. Civ. Code § 1714.43(a)(1). "Each year, the California Franchise Tax Board evaluates information from state tax returns to determine which companies must comply with the Act and provides a list of those

enacted to ensure that consumers have information about companies' efforts to abolish human trafficking and slavery from product supply chains for tangible goods offered for sale. Covered companies must post a disclosure on their website that is accessible via "a conspicuous and easily understood homepage link."[30] The disclosure must address the following five topics:

- **Verification.** The company must disclose to what extent, if any, it "engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery." The disclosure must also specify whether the verification is conducted by a third party.[31]
- **Audits.** The company must disclose to what extent, if any, it "conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains." The disclosure must state if it was not an "independent, unannounced audit."[32]
- **Certification.** The company must disclose to what extent, if any, it "requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business."[33]
- **Internal Accountability.** The company must disclose to what extent, if any, it "maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking."[34]
- **Training.** The company must disclose to what extent, if any, it "provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products."[35]

Notably, the Supply Chain Transparency Act "does not actually require covered retailers to do any of the five things listed above: they must simply say on their websites whether or not they do them."[36] The exclusive remedy for a violation is an action for an injunction by the

businesses to the Attorney General." *See* KAMALA D. HARRIS, CAL. DEP'T OF JUST., THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE 3 (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.

[30] Cal. Civ. Code § 1714.43(b).

[31] Cal. Civ. Code § 1714.43(c)(1).

[32] Cal. Civ. Code § 1714.43(c)(2).

[33] Cal. Civ. Code § 1714.43(c)(3).

[34] Cal. Civ. Code § 1714.43(c)(4).

[35] Cal. Civ. Code § 1714.43(c)(5). *See also* KAMALA D. HARRIS, CAL. DEP'T OF JUST., THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.

[36] *Barber v. Nestle USA, Inc.,* 154 F. Supp. 3d 954, 959 (C.D. Cal. 2015), *aff'd*, 730 F. App'x 464 (9th Cir. 2018).

Attorney General.[37] As of this writing, the Attorney General has not taken any known enforcement action against a company for violating the Act.[38]

b. State Laws Criminalizing Knowingly Benefitting from Forced Labor

Some states have legislation similar to 18 U.S.C. § 1593A, discussed above, that criminalizes receiving a benefit from participation in a labor trafficking venture. Alaska, for example, identifies anyone who benefits from trafficking in any way as being guilty of human trafficking in the 2nd degree.[39] Arizona makes it unlawful for a person to "[k]nowingly benefit, financially or by receiving anything of value, from participation in a venture that has engaged in an act in violation of" Arizona's statute prohibiting unlawfully obtaining labor or services.[40] In Texas, "[a] person commits an offense if the person knowingly: … receives a benefit from participating in a venture that involves … receiving labor or services the person knows are forced labor or services."[41] Massachusetts imposes a criminal fine of up to $1 million on businesses that engage in trafficking for forced labor purposes.[42] Vermont's trafficking definition includes "benefitting financially" from participation in a venture "knowing that force, fraud, or coercion was or will be used to compel any person to engage in a commercial sex act as part of the venture."[43] Alabama holds businesses criminally liable if an agent engaged in trafficking in the scope of their employment and the corporation knew about or recklessly disregarded the act.[44] South Carolina law imposes an additional penalty of up to ten years in prison for business owners who use their business to facilitate sex or labor trafficking crimes.[45] And both Hawaii and Minnesota laws have provisions that allow for the revocation of a business's license if it is found guilty under trafficking laws.[46]

B. United Kingdom

In the United Kingdom, the Modern Slavery Act 2015 (U.K. MSA) and the Companies Act 2006 (Companies Act) (as amended by the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013) impose reporting obligations related to forced labor on companies and their directors, respectively.

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[37] Cal. Civ. Code § 1714.43(d).
[38] *Barber*, 154 F. Supp. 3d at 962. Multiple plaintiffs have attempted to use the Act as a basis upon which to sue under California's Unfair Competition Law, the False Advertising Law, and the Consumer Legal Remedies Act, claiming that misrepresentation of the Act's required disclosures constitutes a violation of these other consumer protection statutes. These cases have been unsuccessful, with courts ruling that such claims are barred by safe harbor doctrine because the California Transparency in Supply Chains Act already set forth what level of disclosure was required to adequately inform consumers.
[39] Alaska Stat. § 11.41.365.
[40] Ariz. Rev. Stat. Ann. § 13-1308.
[41] Tex. Penal Code Ann. § 20A.02(a)(6).
[42] Mass. Gen. Laws ch. 265, § 51(c).
[43] Vt. Stat. Ann. Tit. 13, § 2652(a)(4).
[44] Ala. Crim. Code 13A-6-153.
[45] S.C. Code § 16-3-2020(D).
[46] Haw. Rev. Stat. § 707-782(1)(b), (3); Minn. Stat. § 609.284.

1. Modern Slavery Act 2015

In October 2015, the U.K. MSA introduced a series of substantive offenses criminalizing forced labor, servitude, and human trafficking (together, modern slavery); outlining measures for the protection of victims of modern slavery; and appointing an independent anti-slavery commissioner.[47] The offenses of forced labor and servitude are committed if a person requires another person to perform forced labor, or holds another person in slavery or servitude, and knows or ought to know that the person is required to perform forced labor or held in slavery or servitude.[48] The human trafficking offense is committed if a person arranges or facilitates the travel of another person with a view to that person being exploited.[49] A person guilty of any of these offenses is liable to imprisonment for life.[50]

The U.K. MSA also aims to promote transparency in supply chains by imposing disclosure requirements on "commercial organizations."[51] Specifically, the MSA requires all commercial organizations with a total turnover above a certain threshold—currently £36 million—to publish a modern slavery statement for each financial year.

The extraterritorial reach of the U.K. MSA is intentionally broad. A commercial organization means a body corporate, wherever incorporated, or a partnership, wherever formed, which supplies goods or services, and carries on a business or part of a business in any part of the U.K.[52] An organization's modern slavery statement must set out the steps that the organization has taken during the financial year to ensure that slavery and human trafficking are not occurring in its supply chains and own business, including in any subsidiary companies wherever based.[53] An organization's supply chain includes both its direct and indirect suppliers. The U.K. MSA is not prescriptive about the format or content of the statement. It states that organizations "may" and "should aim to"[54] include in their statement information about the six topics below:[55]

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[47] *See* Modern Slavery Act 2015 c. 30 Pts 1, 4, 5.
[48] MSA 2015 c. 30 Pt 1 s. 1.
[49] MSA 2015 c. 30 Pt 1 s. 2.
[50] MSA 2015 c. 30 Pt 1 s. 5.
[51] *See* MSA 2015 c. 30 Pt 1 s. 6.
[52] Note that the MSA uses the same language as section 7 of the UK Bribery Act 2010, which criminalizes failures by "commercial organizations" to prevent bribery. Bribery Act 2010 c. 23 s. 7. Guidance issued by the U.K. Government suggests that a commercial organization "carries on business" in the UK if it has a "demonstrable business presence" there. U.K. HOME OFFICE, TRANSPARENCY IN SUPPLY CHAINS ETC.: A PRACTICAL GUIDE para. 3.8 (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040283/Transparency_in_Supply_Chains_A_Practical_Guide_2017_final.pdf (hereinafter "U.K. Supply Chain Guidance"). The requirement to publish a statement therefore applies, for instance, to foreign companies selling goods through a branch or sales office in the U.K., or designing or manufacturing such goods in the U.K. However, a foreign company with a U.K. subsidiary does not necessarily "carry on a business in the UK" for the purposes of the MSA. Whether it does will depend on whether the subsidiary acts jointly with, or independently of, its parent company.
[53] U.K. Supply Chain Guidance, para 3.11.
[54] U.K. Supply Chain Guidance, para. 5.2.
[55] The U.K. Supply Chain Guidance outlines information the organization could include in each of these categories. For instance, information on relevant policies could include details of the organization's policy

1. The organization's structure, its business and its supply chains;
2. Its relevant policies;
3. Its relevant due diligence processes;
4. Those parts of its business and supply chains where there is a risk of modern slavery and the steps it has taken to assess and manage that risk;
5. Its effectiveness in ensuring that modern slavery is not taking place in its business or supply chains; and
6. The training about modern slavery available to its staff.[56]

The U.K. Government already expects organizations to expand on the information in their statements each year;[57] an organization that starts to include these areas in its statement is viewed as sending a clear signal of its commitment to improve its statement. Companies that wish to future-proof their statements would also be well advised to cover each of these areas. In September 2020, the U.K. Government announced that it would require the inclusion of the six areas of information in the U.K.[58] In addition, increased enforcement of the transparency requirements in the U.K. MSA is on the horizon. In January 2021 in a statement to Parliament on human rights violations against the Uyghur community,[59] the U.K. Government announced plans to introduce fines for organizations that do not comply with these requirements.[60] In June 2021, in its response to a consultation on the establishment of a single enforcement body for employment rights, the U.K. Government announced that the body will have powers to impose fines on non-compliant organizations.[61] In the same month, a Private Member's Bill was introduced into Parliament which seeks, notably, to impose criminal consequences for a responsible person that supplies a false or incomplete modern slavery statement. Finally, in May 2022, the U.K. Government announced a Modern Slavery Bill (MSB), which will give shape to the measures announced in the past two years. Until the MSB comes into force, organizations can expect

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development process, business relationship policies (such as a Supplier Code of Conduct), recruitment and procurement policies, policies for the compensation of victims, and policies for the training on and awareness of slavery. *See* U.K. Supply Chain Guidance, Annex E.

[56] MSA 2015 c. 30 Pt. 6 s. 54(5).

[57] U.K. Supply Chain Guidance, para. 2.8.

[58] The announcement, formally published in September 2020, followed after a consultation on the transparency requirements and reporting process under the MSA. With close to 80% of respondents to the consultation in favor of mandating the contents of statements, organizations should consider the reputational risks of failing to cover these areas.

[59] Organizations operating, or with elements of their supply chains, in the Xinjiang region of China may wish to consult the U.K. Government guidance on *Overseas Business Risk: China*, which analyzes the challenges of doing business in Xinjiang. The guidance stresses the Government's serious concerns about the "widespread and systematic human rights violations" against Uyghurs and other ethnic minorities, including their use in forced labor. *Overseas Business Risk: China*, GOV.UK (Mar. 11, 2022), https://www.gov.uk/government/publications/overseas-business-risk-china/overseas-business-risk-china.

[60] *See* Rt Hon Dominic Raab MP, U.K. Foreign Secretary, Oral Statement to Parliament: Human Rights Violations in Xinjiang and the Government's Response (Jan. 12, 2021), https://www.gov.uk/government/speeches/foreign-secretary-on-the-situation-in-xinjiang-and-the-governments-response.

[61] *See* U.K. DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, ESTABLISHING A NEW SINGLE ENFORCEMENT BODY FOR EMPLOYMENT RIGHTS 14 (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991751/single-enforcement-body-consultation-govt-response.pdf.

continued pressure from the press, non-governmental organizations, and consumers if they fail to comply.

2. Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013

The Companies Act requires the directors of U.K. companies to prepare a strategic report for each financial year.[62] A director who fails to take steps to comply with this requirement commits a criminal offense and may face an unlimited fine. A company's strategic report must contain a fair review of the company's business and a description of the principal risks and uncertainties facing the company.[63] In the case of a U.K.-listed company, the strategic report must, among other things, include information about social, community and human rights issues.[64] For certain traded, banking, and insurance companies, the strategic report must include a non-financial and sustainability information statement, which provides information about the company's impact on, at least, environmental matters, the company's employees, social matters, human rights, and anti-corruption.[65] This information must include a brief description of the company's business model, a description of relevant risks and key performance indicators, and details of the company's policies in relation to these areas, as well as their effectiveness.

C. France

The Law relating to the Duty of Vigilance (LDV) was adopted by France in March 2017. The LDV applies to companies directly or indirectly employing, for over two consecutive years, at least 5,000 employees in France, or at least 10,000 employees in France and abroad, to establish and implement an effective vigilance plan.[66]

Under the LDV, a company's duty of vigilance extends to broad categories of human and environmental harm, including slavery, human trafficking, and other violations of human and workers' rights. The company's vigilance plan must include reasonable measures to identify and prevent such risks resulting directly or indirectly from the operations of the company, its subsidiaries, its subcontractors, or its suppliers. The LDV specifies that these companies' vigilance plan[67] must include:

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[62] Companies Act 2006 c. 46 Pt 15 c. 4A s. 414A. Small companies are exempt from the requirement. *See* section 414B.
[63] CA 2006 c. 46 Pt 15 c. 4A s. 414C(2).
[64] CA 2006 c. 46 Pt 15 c. 4A s. 414C(7).
[65] CA 2006 c. 46 Pt 15 c. 4A s. 414CA, 414CB.
[66] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the duty of vigilance for parent and instructing companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, art. 1 [hereinafter "LDV"], inserting this duty in France's Trade and Industry Code, Code de commerce [C. com.] [Commercial Code] art. L. 225-102-4.
[67] Companies covered by the LDV must develop their vigilance plans in collaboration with their stakeholders and, where appropriate, as part of multiparty initiatives within their subsidiaries or at the national level. They also have an obligation to develop their alert mechanism in consultation with their representative trade

- A mapping identifying, analyzing, and ranking risks;
- Procedures to regularly assess subsidiaries, subcontractors, and suppliers with whom the company maintains an established commercial relationship, having regard to the risk mapping;
- Appropriate actions to mitigate risks or prevent serious violations;
- An alert mechanism to collect reports of the existence or actualization of risks;
- A monitoring mechanism to track the measures implemented by the company and assess their efficiency.

The LDV relies on "persons with a legitimate interest," such as NGOs and trade unions, as well as civil courts, to enforce the obligations it imposes on large companies. Any person with a legitimate interest in a company's compliance with the LDV may put that company on formal notice to comply with its obligations. If the company fails to do so within three months of receiving the notice, a court may, upon application by a person with a legitimate interest, enjoin the company to comply (if appropriate with conditional financial sanctions). The court may also, in an action filed by a person with a legitimate interest, order a company that failed to comply with its obligations to pay compensation for the harm that compliance could have prevented.[68] Companies that fail to comply with the LDV, and whose operations involve forced labor in their supply chains, could therefore be ordered to pay large compensation payments.

To date, at least eight companies have been sued or put on formal notice under the LDV. Of those eight companies, two have received formal notices in relation to risks of violations of workers' rights.[69] For example, French NGO Sherpa and global trade union UNI Global Union (UNI)[70] gave formal notice in July 2019 to Teleperformance, a global support services company, of its failure to identify risks of violations of workers' rights in Colombia, Mexico, the Philippines, and other

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unions. Thus, the LDV does not only detail the required contents of vigilance plans but specifies the way in which these plans should be developed. Vigilance plans must be published in the companies' annual reports.

[68] LDV art. 2, or C. com., art. L. 225-102-5.

[69] In October 2019, global transport company XPO Logistics Europe (XPO), a French subsidiary of US Group XPO Logistics, was put on formal notice by Logistics International Transport Workers' Federation (ITF), the European Transport Workers' Federation (ETF) and the trade unions forming the XPO Global Union Family (XPO GUF). ITF, ETF and XPO GUF alleged that XPO's Vigilance Plan – a two-page section in its Corporate Social Responsibility Report – failed to meet any of the five content-requirements in the LDV. They "call[ed] on XPO to fulfil its obligations to establish and implement a full and adequate Vigilance Plan." An evaluation of XPO's vigilance plan, based on Sherpa's Guidance on the LDV, is annexed to the notice. *See* Letter from Stephen Cotton, Gen. Secretary, Int'l Transp. Workers' Fed'n, to Malcolm Wilson, Chief Exec. Off., XPO Logistics Eue (Oct. 1, 2019), https://www.itfglobal.org/sites/default/files/node/news/files/Letter%20XPO%20Devoir%20de%20Vigilance%20EN%20final.pdf; XPO GLOBAL UNION FAMILY, FORMAL NOTICE TO XPO LOGISTICS EUROPE UNDER THE FRENCH CORPORATE DUTY OF VIGILANCE LAW (2019), https://www.itfglobal.org/sites/default/files/node/news/files/XPO%20letter%202%20page%20summary%20in%20English.pdf [hereinafter "ITF Formal Notice to XPO"]; XPO LOGISTICS, CORPORATE SOCIAL RESPONSIBILITY REPORT – 2018 11-12 (2018), https://xpodotcom.azureedge.net/xpo/files/XPO_Logistics_2018_CSR_Report.pdf.

[70] *See* Press Release, RSE et PED, Droits des travailleurs et devoir de vigilance: le leader mondial des call centers Teleperformance mis en demeure (July 18, 2019), https://www.rse-et-ped.info/communique-de-presse-droits-des-travailleurs-et-devoir-de-vigilance-le-leader-mondial-des-call-centers-teleperformance-mis-en-demeure/.

countries in its vigilance plan.[71] Teleperformance asserted that its vigilance plan was published in December 2018 in compliance with the law[72] and noted that it was working closely with stakeholders to publish an enriched and detailed vigilance plan in September 2019. Teleperformance's original vigilance plan, which is described as a two-page document in contemporaneous reports and no longer available online,[73] appears to have been extensively developed or replaced with a comprehensive vigilance plan, last updated in March 2021.[74]

Concerned about limited compliance with the LDV, France's Economic Council (CGE)[75] recommended in January 2020 the designation of a public body to promote compliance with the duty of vigilance by notifying non-compliant companies of the sanctions they might face.[76] Such public body would be granted access to non-publicly available information held by other public bodies. Companies based or operating in France should consider, at least annually, whether they fall within the remit of the LDV. Those that conclude (or suspect)[77] that they do (or will do so if they continue to employ the required number of employees) should swiftly commit to prevent trafficking, severe human rights violations, and environmental damage in their supply chains.

D. Germany

[71] *See* Press Release, Sherpa, Droits des travailleurs et devoir de vigilance: le leader mondial des call centers Teleperformance mis en demeure (July 18, 2019), https://www.asso-sherpa.org/sherpa-and-uni-global-union-send-formal-notice-to-teleperformance-calling-on-the-world-leader-in-call-centers-to-strengthen-workers-rights. Sherpa's press statement on the notice referenced a report recently published by UNI on working conditions in Teleperformance's Colombian operations. The report highlights various workers' rights violations including underpayment of wages, gender-based discrimination and violations of women's privacy, disregard for employees' safety, and repression of workers' right to join a union. Sherpa and UNI also alleged that Teleperformance had failed to engage with stakeholders in the development of its plan, in breach of the LDV. UNI GLOBAL UNION, OUTSOURCING INJUSTICE: HOLDING TELEPERFORMANCE ACCOUNTABLE FOR ABUSES OF ITS COLOMBIAN WORKERS (2019), https://media.business-humanrights.org/media/documents/files/documents/uni_tp_colombiareport_english.pdf.

[72] Teleperformance, Réponse de Teleperformance sur sa mise en demeure pour non-respect de la loi française sur le devoir de vigilance, https://media.business-humanrights.org/media/documents/files/documents/R%C3%A9ponse_de_Teleperformance-devoir_vigilance_2019.pdf.

[73] *See* https://www.teleperformanceinvestorrelations.com/media/4350826/Teleperformance-Plan-de-vigilance-ENGrv.pdf, a link to Teleperformance's Vigilance Plan, provided in contemporaneous reports about the notice.

[74] TELEPERFORMANCE, VIGILANCE PLAN 2021 (2021), https://teleperformance.com/media/kgspeltk/teleperformance-vigilance-plan-2021.pdf.

[75] *Conseil général de l'Economie.*

[76] In January 2020, France's Economic Council published an assessment of the implementation of the LDV. *See* https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf.

[77] The application of the law is not clearly delineated, and France's Economic Council has recognized that it may be complicated for public bodies to ascertain which companies are captured by the law. *See* ANNE DUTHILLEUL & MATTHIAS DE JOUVENEL, EVALUATION DE LA MISE EN ŒUVRE DE LA LOI N° 2017-399 DU 27 MARS 2017 RELATIVE AU DEVOIR DE VIGILANCE DES SOCIÉTÉS MÈRES ET DES ENTREPRISES DONNEUSES D'ORDRE 18-19 (2020), https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf.

Germany's Act on Corporate Due Diligence Obligations in Supply Chains[78] (the Corporate Due Diligence Act) will enter into force on January 1, 2023[79] and requires covered companies to: assess the human rights[80] and environmental[81] risks in their supply chains;[82] establish suitable risk management tools as part of their compliance and governance systems; and take appropriate remedial action if required. It applies to domestic companies with a head office, principal place of business, administrative headquarters, or registered seat in Germany, as well as non-domestic companies with a branch office in Germany. Companies must make "best efforts"[83] to comply with the human rights and environmental due diligence requirements outlined below before January 1, 2023 or risk the imposition of administrative fines. These efforts must include:

- **Risk management.** Companies must establish an appropriate and effective human rights and environmental risk management system with clear internal reporting lines and under the control of a human rights officer.[84]
- **Risk analysis.** Companies must annually assess human rights and environmental risks, supplementing this practice with *ad hoc* reviews as needed.[85] This risk assessment must be presented to executive leadership and must consider the nature and scope of the company's business activities, the ability to influence parties responsible for a potential violation, and the severity of the violation and nature of the company's contribution to the risk or violation.

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[78] Lieferkettensorgfaltspflichtengesetz [LkSG] [Supply Chain Due Diligence Act], July 16, 2021, BUNDESGESETZBLATT, Teil I [BGBL I] at 2959 (Ger.) [hereinafter "the Corporate Due Diligence Act" or "LkSG"].

[79] It will initially apply only to companies with more than 3,000 employees; on January 1, 2024, companies with more than 1,000 employees will also have to comply. Temporary staff and employees at subsidiaries must be included in the total. With regard to affiliated companies (*verbundene Unternehmen*), the employees of all companies belonging to the group who are employed in Germany must be taken into account regarding the threshold calculation of the parent company.

[80] A human rights risk under the Corporate Due Diligence Act is a condition in which, based on factual circumstances, there is a probability of a violation of certain prohibitions, e.g., on child labor, forced labor, or slavery. These prohibitions are legally enumerated in § 2 Abs. 2 s. 1-12 and include, inter alia, all forms of slavery, practices akin to slavery, serfdom or other forms of domination or oppression in the workplace, such as extreme economic or sexual exploitation and humiliation (§ 2 Abs. 2s. 4 LkSG); and of withholding a reasonable wage which is the respective minimum wage in the jurisdiction of employment according to local law (§ 2 Abs. 2 s. 8 LkSG).

[81] Environment-related risks under the Corporate Due Diligence Act focus on the violation of certain provisions of the Minamata Convention on Mercury, the Stockholm Convention on Persistent Organic Pollutants (POPs Convention) and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) (§ 2 Abs. 3 LkSG).

[82] Under the Corporate Due Diligence Act, "supply chain" refers to all steps taken—domestically, abroad, at its operations and those of indirect and direct suppliers—to manufacture any product or render a service provided by the company (§ 2 Abs. 5 LkSG). This applies to domestic and foreign operations, as well as to national and international affiliated companies in the case of decisive influence by the parent company (§ 2 Abs. 6 LkSG).

[83] Some of the obligations will likely go beyond best efforts and require a specific result (*Erfolgspflichten*); these will be further specified by the Federal Office of Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*, *BAFA*) before entering into force in 2023 (§ 20 LkSG).

[84] While formal responsibility for the risk management function lies with the human rights office, legal responsibility rests with all hierarchy levels within the company. Senior management is to be informed annually and – if needed – at any time on an ad hoc basis (§ 4 LkSG).

[85] The obligation to conduct an ad hoc review might, for example, be triggered by a change or expansion in the company's risk in the supply chain, e.g., the introduction of new products or business fields.

- **Prevention and remediation.** Preventative measures under the Corporate Due Diligence Act include policy development, training, and control measures that are tailored to the company's risks and those of its direct suppliers.[86] The company must remediate any human rights and environmental violations identified in its own operations or at those of its direct suppliers during the risk assessment.[87] Remedial measures are only compulsory for indirect suppliers with substantiated knowledge of a possible violation.[88]
- **Procedural duties.** Covered companies must establish a grievance procedure, as well as a system for documenting compliance and adhering to reporting obligations.[89]

The Federal Office for Economic Affairs and Export Control (BAFA)[90] will monitor compliance with the Act, aided by far-reaching investigative powers,[91] which can be triggered internally or at the request of individuals (likely supported by human rights organizations or, in the case of employee rights, by trade unions) who can substantiate a claimed violation. Companies that violate the Corporate Due Diligence Act may face administrative fines[92] of up to EUR 800,000 for an individual and EUR eight million for companies (unless they exceed EUR 400 million average annual turnover in the last three financial years, in which case the fine is capped at two percent of the company's worldwide annual group turnover). Fined companies may also be barred from public procurement for up to three years. Significantly, a company can violate the Corporate Due Diligence Act, and therefore be fined, for failing to adhere to its compliance and diligence requirements, regardless of whether there is any evidence that an actual human rights violation has occurred.

E. The Netherlands

The Child Labour Due Diligence Act (Child Due Diligence Act) was passed in the Netherlands in 2019; it is not yet clear when it will enter into force.[93] When it does, the Act will apply to all multinational enterprises registered in the Netherlands, as well as to any entity that provides goods or services to Dutch consumers more than twice in a calendar year. Companies will be required to undertake reasonable due diligence efforts to prevent the provision of goods or services created with the use of child labor[94] and to address any known child labor (or child labor about which they

[86] For the directly responsible companies under the Corporate Due Diligence Act, the latter means that they are forced to not only contractually require suppliers to also adhere to the obligations of the LkSG but also to provide trainings to direct suppliers on the implementation of contractual assurances.
[87] § 7 LkSG. Companies must fully remedy the violation in their own operations; they must have a plan to ultimately resolve (and in the interim minimize the ongoing impact of) any violations at a direct supplier that cannot be immediately remedied (§ 9 LkSG).
[88] § 9 LkSG.
[89] § 8 und § 10 Abs. 1 bis 2 LkSG.
[90] *Bundesministerium für Wirtschaft und Ausfuhrkontrolle.*
[91] §§ 15 bis 18 LkSG. There is no private enforcement of the LkSG. In particular, the LkSG expressly excludes stand-alone civil liability for violations of the LkSG (§ 3 Abs. 3 LkSG). Civil liability based on other grounds – e.g., contractual agreements with third parties – remains unaffected though.
[92] *Ordnungswidrigkeiten*, § 24 LkSG.
[93] Wet van 24 oktober 2019, Stb. 2019, 401 (Wet Zorgpflicht Kinderarbeid), https://zoek.officielebekendmakingen.nl/stb-2019-401.html.
[94] Child Labor is defined as any form of labor that is performed by someone under the age of 18 and that is included in Article 3 of the ILO's Worst Forms of Child Labour Convention, 1999. *See* Convention

have reason to know) in their supply chains, imposing both criminal and administrative fines for non-compliance. Due diligence efforts will generally require companies to ask direct suppliers about their efforts to prevent child labor in their own supply chains and to remediate any known (or reasonably knowable) violations. Companies covered by the Child Due Diligence Act will be required to certify to the Authority for Consumers and Markets (ACM)[95] (and post on their websites) that they have undertaken reasonable due diligence.[96]

Complaints can be submitted by legal persons affected by a company's non-compliance, after which the company will have six months to remedy any violations. If it does not, the ACM will act as a mediator and can impose a legally mandated remediation plan. Failure to follow the plan can result in fines starting at EUR 4,000 and going as high as EUR 870,000 or ten percent of total worldwide revenue. Directors of companies receiving two fines within five years can be imprisoned for up to two years.[97]

F. Switzerland

On January 1, 2022, Switzerland adopted new ESG reporting and due diligence requirements in its Code of Obligations[98] (CO) and Criminal Code[99] (CP).[100]

1. Transparency in "Non-Financial" Matters

Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), *opened for signature* June 17, 1999, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182. Signatories to the ILO's Minimum Age Convention, 1973 must also apply the forms of child labor in that Convention. Convention Concerning Minimum Age for Admission to Employment (ILO No. 138), *opened for signature* June 26, 1973, 1015 U.N.T.S. 297 (entered into force June 19, 1976), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138. Those that have not signed the 1973 Convention should understand child labor to mean any work carried out by school age children or those who are under 15 and any work performed by those under 18 that could endanger their health, security, and bodily integrity. Wet Zorgpflicht Kinderarbeid van 24 oktober 2019, art. 2(1)(c).

[95] *Autoriteit Consument & Markt.*

[96] The Act currently requires companies to submit this statement once, but implementing regulations may increase the frequency and also likely exempt certain sectors that are considered low risk with regard to the harms of concern under the Act. Companies already registered will have six months from entry into force of the Act to submit this statement; those registering after the passage of the Act must submit it upon registration. Companies that are not registered in the Netherlands but provide goods or services twice a year must submit a statement six months from the second interaction with the Dutch market.

[97] Additional details are expected when the General Administrative Order accompanying the Act is published. Note also that a draft bill was introduced in March 2021, titled Bill for Responsible and Sustainable International Business Conduct, with the intent of establishing broader legislation on business and human rights. This legislation will also have to be harmonized eventually with the EU Directive discussed below. *See* Wet verantwoord en duurzaam internationaal ondernemen, Tweede Kamer, vergaderjaar 2020-2021, 35 761, nr. 2, https://www.tweede kamer.nl/kamerstukken/wetsvoorstellen/detail?id=2021Z04465&dossier=35761.

[98] *Obligationenrecht* (OR) Ger., *Code des obligations* (CO) Fr., *Codice delle obbligazioni* (CO) It.

[99] *Schweizerisches Strafgesetzbuch* (StGB) Ger., *Code pénal Suisse* (CP) Fr., *Codice penale svizzero* (CP) It.

[100] This is consistent with a complementary Ordinance previously issued by the Federal Council (the Swiss Federal Executive branch) on December 3, 2021.

The new provisions at Article 964a-964c of the CO impose "non-financial" ESG transparency and disclosure requirements on publicly traded and other large Swiss entities which, for two consecutive financial years, have had:[101]

- At least 500 full-time employees; and
- Total assets of 20 million Swiss francs or revenue of 40 million Swiss francs.[102]

Entities covered by the new provisions include companies with a registered office, central administration, or principal place of business in Switzerland, which would include Swiss subsidiaries and branches of foreign companies.[103] Such entities are required to submit an annual report containing a description of policies adopted about non-financial topics such as "CO2 goals, social issues, employee-related issues, respect for human rights, and combating corruption."[104] These reports must, among other requirements, detail any policies and due diligence procedures for the specified ESG topics, provide an evaluation of diligence effectiveness, and describe related risks and mitigation strategies.[105] The report must be approved and signed by the entity's ultimate management or governing body, e.g., the board of directors. It must also be made publicly available for at least 10 years.[106]

2. Supply Chain Diligence and Transparency

Under the new provisions at Article 964j-964l of the CO and the corresponding "Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour," certain Swiss entities must adopt supply chain due diligence and related transparency reporting regarding child labor and minerals/metals from conflict-affected and high-risk areas (e.g., tin, tantalum, tungsten, and gold). These new regulations apply to Swiss entities[107] that (a) process the specified minerals/metals in Switzerland or release them in the Swiss market;

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[101] Such as banks, insurance companies, or securities firms regulated by the Swiss Financial Market Supervisory Authority (FINMA) (*Eidgenössische Finanzmarktaufsicht* (Ger.), *Autorité fédérale de surveillance des marchés financiers* (Fr.), *Autorità federale di vigilanza sui mercati finanziari* (It.)).
[102] Certain qualifying entities will be exempt from the new obligations if they are controlled by a parent company that complies with the new regulations or a foreign regulatory equivalent.
[103] CO art. 964a specifies that the regulation applies to "Companies of public interest as defined in Article 2 letter c of the Auditor Oversight Act of 16 December 2005 [SR 221.302]." OBLIGATIONENRECHT [OR], CODE DES OBLIGATIONS [CO], CODICE DELLE OBBLIGAZIONI [CO] [CODE OF OBLIGATIONS] June 19, 2020, SR 220, art. 964a, para. 1 (Switz.).
[104] CO art. 964b, https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en.
[105] While the report may be based on national, European, or international reporting standards (e.g., the Organization for Economic Cooperation and Development (OECD)), it must disclose any standard applied, and, where the standard does not fully satisfy all the requirements of Article 964a-964c, a supplemental report must be submitted.
[106] The non-financial reporting obligations are described as analogous to the "Non-Financial Reporting Directive" of the EU (Directive 2014/95/EU). Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards to Disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 J.O. (L330). The latter regulations may change as a result of the new Proposed Directive.
[107] This includes entities with a registered office, central administration, or principal place of business in Switzerland.

or (b) offer goods or services that have suspected links to child labor.[108] Covered entities are required to have or put in place a suitable management system containing their supply chain policy, a system of supply chain traceability, risk assessments, and mitigation measures.[109] Based on the risks identified, these entities must develop a written risk management plan consistent with the OECD Guidance and/or the ILO-IOE Child Labor Guidance Tool. After a one-year transition,[110] all covered entities must issue an annual report in 2023 detailing compliance with these regulations, to be published within six months of the financial year-end and made publicly available for at least 10 years.

Covered entities that fail to report or that intentionally submit a false statement in a report are subject to fines of up to 100,000 CHF; negligent behavior is punishable by a fine of up to 50,000 CHF.[111]

G. European Union

The European Commission submitted a draft of the Corporate Sustainability Due Diligence Directive[112] (Proposed EU Directive) in mid-February 2022, proposing new obligations to ensure that corporate supply chains comply with human rights and environmental sustainability criteria.[113] The Proposed EU Directive affects certain EU and non-EU[114] companies and requires covered entities to do the following:

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[108] Certain exemptions may be granted for entities that deal with ore/metals below a certain threshold; certain smaller/medium-sized companies or large companies demonstrating a low risk of child labor; or entities which comply with equivalent, internationally recognized frameworks (e.g., the UN Guiding Principles on Business and Human Rights).

[109] Information about these systems must be accessible to suppliers and the public, for example, through on-site controls, communications with authorities and civil society, or the application of certification systems.

[110] The new regulations provide for a transition period, with the first reports required for the fiscal year of 2023, due for publication in 2024.

[111] SCHWEIZERISCHES STRAFGESETZBUCH [StGB], CODE PÉNAL SUISSE [CP], CODICE PENALE SVIZZERO [CP] [CRIMINAL CODE] June 19, 2020, SR 311art. 325ter (Switz.).

[112] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022) [hereinafter "Proposed EU Directive" or "Proposed Directive"].

[113] The Proposed Directive will be presented to the European Parliament and the Council of the EU for approval. The legislative process could easily take more than a year due to the controversial nature of the proposal. The Proposed Directive does not automatically replace national laws already in place; instead, Member States will have to implement this EU standard within a transition period (presumably two years after the directive enters into force) into their national regulations. Until this implementation, current national laws (e.g., the German Act on Corporate Due Diligence Obligations in Supply Chains) continue to apply and are authoritative.

[114] EU companies are divided into two groups. Group 1 includes EU companies with more than 500 employees on average and more than EUR 150 million in net worldwide turnover in the last financial year, while Group 2 includes those EU companies with more than 250 employees and more than EUR 40 million in net worldwide turnover in the last financial year, and active in high-impact sectors, including textiles, agriculture, forestry, fisheries, manufacture of food products, trade in beverages, extraction of natural resources, and manufacture and trade of metal and non-metallic mineral products, including trade of construction materials, fuels, chemicals, and intermediate products. For Group 2 companies, rules will start to apply two years later than for Group 1. Non-EU companies are included if they meet the requirements of Group 1 or Group 2, although the number of employees is not relevant for them (i.e., they have either more than EUR 150 million turnover in the EU or more than EUR 40 million turnover in the EU *and* at least 50%

- **Develop due diligence policy and integrate it into corporate policies.** Develop a due diligence policy that includes a description of the company's approach to due diligence, a description of implementing processes, and a code of conduct describing the rules and principles to be followed. Ensure that this policy principle is applied and is integrated into other corporate policies, where applicable.
- **Identify adverse impacts.** Companies will have to take measures to identify adverse impacts[115] in their own operations, their subsidiaries' operations, and their respective supply chains (direct and indirect established business relationships).[116]
- **Prevent potential adverse impacts.** Companies need to take appropriate measures to prevent or, if it is not possible, adequately mitigate potential adverse impacts that (should)[117] have been identified in their due diligence efforts.[118]
- **Terminate actual adverse impacts.** Companies must take appropriate measures to bring an end to actual adverse impacts that they (should) have identified in their due diligence efforts. If this is not possible, the extent of such adverse impacts must be minimized.
- **Establish a complaints procedure.** Companies will be required to provide persons who are affected by an adverse impact, trade unions, and civil society organizations with the possibility to submit complaints regarding their value chains.
- **Monitor effectiveness.** Companies will need to assess the implementation of their due diligence measures on a yearly basis.
- **Public communications.** Covered companies that do not already have to prepare non-financial statements covering environmental and social matters and respect for human rights under EU law (e.g., under the Non-Financial Reporting Directive) will have to report on the due diligence matters covered by the Proposed EU Directive. They must publish an annual statement on their website by April 30th each year covering the previous calendar year.

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of this turnover comes from the mentioned specific sectors). Employee-based thresholds do not apply to non-EU companies.

[115] "Adverse environmental impact" means an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex to the Proposed Directive. "Adverse human rights impact" means an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex to the Proposed Directive.

[116] For regulated financial companies, this specific obligation arises only before providing credit, loans, or other financial services. Group 2 EU companies and non-EU companies meeting the Group 2 turnover thresholds are only required to identify adverse impacts relevant to the respective high-impact sector (e.g., textiles, agriculture etc. (see above)).

[117] Art. 7(1) of the Proposed Directive reads: "Member States shall ensure that companies take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts that have been, or should have been, identified pursuant to Article 6 [i.e., the *obligation to identify actual and potential adverse impacts*], in accordance with paragraphs 2, 3, 4 and 5 of this Article." The knowledge standard may change as the Directive is finalized.

[118] This may include (i) measuring improvement, (ii) seeking contractual assurances from direct business partners, (iii) making necessary investments to prevent the potential adverse impact, (iv) providing support for small and medium sized enterprises whose viability may be threatened by compliance with the company's code of conduct or its action plan, and (v) as a last resort, collaborating with other companies in compliance with competition law to bring a company's adverse impact to an end.

- **Adverse impact subject-matter areas.** Companies must carry out their due diligence with respect to adverse impacts on rights and obligations listed in the international conventions that are cited in the Annex of the Proposed EU Directive.[119]

National authorities will supervise these new rules and may impose fines in case of non-compliance. As is common in EU law, the Proposed EU Directive provides only generic guidance on fines. Thus, Member States should ensure that the fines are "effective, proportionate and dissuasive."[120] Companies may be liable for damages if they fail to comply with their obligations to prevent potential adverse impacts or terminate actual adverse impacts. Victims may take legal action for damages that could have been avoided with appropriate due diligence measures. However, limitation or exclusion of liability is possible, e.g., if companies seek contractual assurances from their suppliers that they comply with the companies' code of conduct and prevention action plan.

H. Australia

Australia's Modern Slavery Act (Australia MSA) entered into force on January 1, 2019 and requires Australian entities or those that carry on business in Australia with a minimum consolidated revenue of AUD 100 million to annually report on efforts to combat modern slavery.[121] The statements have mandatory reporting criteria, including the following:

- The identity of the reporting entity;
- The structure, operations, and supply chains of the reporting entity;
- The risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls;
- The actions taken by the reporting entity, and any entity that the reporting entity owns or controls, to assess and address those risks;
- How the reporting entity assesses the effectiveness of such actions;
- The process of consultation with any entities the reporting entity owns or controls or is issuing a joint modern slavery statement with; and

[119] *Annex to the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022). Included are, *inter alia*, the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the ILO's Declaration on Fundamental Principles and Rights at Work, the Persistent Organic Pollutants Convention, the Convention on Biological Diversity, and the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer.
[120] In addition, when imposing fines, Member States must take into account (i) companies' efforts to comply with any remedial action required of them by a supervisory authority, (ii) any investments made and any targeted support provided to prevent, mitigate, terminate the adverse impact or mitigate its consequences, as well as (iii) collaboration with other entities to address adverse impacts in value chains.
[121] *Modern Slavery Act 2018* (Cth) pt 1 s 3, https://www.legislation.gov.au/Details/C2018A00153. The statements must be provided to the Australian Border Force for publication on an online public register.

- Any other information that the reporting entity, or the entity giving the statement, considers relevant.[122]

The Australia MSA does not provide for any penalties for noncompliance, other than the Minister's ability to publish the identity of the entity, any remedial action requested by the Minister, and the detailed reasons the Minister deemed the entity noncompliant.[123]

III. Practical Steps for Companies

Companies operating in any of these jurisdictions already have, or soon will have, to comply with risk assessment, due diligence, and reporting requirements related to forced labor in their supply chains. Determining the appropriate level of diligence and related compliance steps can be complex and will depend on a company's business, geographic footprint, and use of suppliers of goods and services around the world. These factors and others may impact whether a company needs to focus on certain of the laws discussed in this article or should devise a consistent global approach across all of its operations.

These laws are disparate and are coming into force in different degrees and at different times, but one thing is clear—companies' responsibilities in this space will only continue to grow. Compliance, however, will be largely based on fundamental good governance concepts that should be familiar to most companies, and, ideally, many existing compliance tools can be leveraged to allow for efficient and effective approaches to these new areas. In light of the various developments in this space, companies should be proactive now about compliance with these regulations (tailored to the company and the regulation) by taking steps such as the following:

- **Adopt a "good governance" tone from the top.** Ensure commitment from the board and senior management to prevent slavery and trafficking in corporate supply chains. Leading by example is the most effective tool in demonstrating to both employees and partners that the company is serious about preventing forced labor and will thereby encourage others to act in ways that will further these values. Companies should review good governance efforts in the area of anticorruption compliance and/or the promotion of corporate social responsibility (CSR) initiatives and consider whether these human rights due diligence obligations can be approached in the same manner.
- **Allocate responsibility for human rights due diligence.** Think carefully about where responsibility for ensuring compliance with human rights due diligence obligations will be located, and ensure that the person or division with responsibility has sufficient stature within the organization and resources to properly execute these tasks. This is required

[122] *Modern Slavery Act 2018* (Cth) pt 2 s 16.
[123] Jamie Fellows & Mark David Chong, *Australia's Modern Slavery Act: Challenges for a Post-COVID World?*, 45 ALT. L. J. 209 (2020), https://journals.sagepub.com/doi/full/10.1177/1037969X20956410.

under the German Corporate Due Diligence Act and is a functional prerequisite for the effective implementation of the programs required under most of the other regulatory regimes discussed above.

- **Identify centers of excellence/expertise.** Identify internal counsel/personnel with expertise on human rights, supply chain regulation, or anticorruption compliance or, in the alternative, engage outside counsel with this expertise.
- **Map your supply chain.** Map the supply chain at *all* levels to understand and flag areas of risk. Many companies stop collecting information about their suppliers and producers past the first tier of the supply chain, but more remote participants in the chain often create heightened risk. Appropriate mapping is required under the French LDV and is a functional prerequisite for risk assessments required under the U.K. and Australia MSAs, German Corporate Due Diligence Act, Dutch Child Due Diligence Act, and the Proposed EU Directive. Liaise with Procurement personnel to understand the supply chain mapping already undertaken in the company.
- **Conduct routine risk assessments.** Engage in routine audits of suppliers, evaluate areas of increased risk, and identify immediate next steps to prevent, mitigate, or remedy prohibited conduct. Risk assessment should be ongoing, and the results should be shared and reviewed internally with the compliance officer and other relevant personnel. A risk assessment is generally fundamental to all of the regulatory frameworks discussed here and is of course a best practice in establishing any effective compliance regime. Companies should draw on existing internal resources dedicated to risk assessment in other areas like corruption, money laundering, and sanctions and develop synergies with that work.
- **Create and implement policies.** Adopt policies that assert the company's commitment to eliminating forced labor, and clarify expectations that all employees, officers, and partners must comply. Policies prohibiting forced labor are relevant to all of the regulatory frameworks discussed here aside from the Tariff Act and TVPRA (and such policies nonetheless may reduce risks under the Tariff Act and the TVPRA).
- **Review and strengthen your business partner management framework.** This is arguably a functional prerequisite for the effective implementation of the programs contemplated under all of the regulatory regimes discussed above. Business partner management efforts in procurement, anticorruption, and anti-money laundering compliance can inform your approach to vetting, onboarding, contractually securing, and monitoring your business partner relationships.
    - **Apply supply chain mapping to business partner management.** Ensure that the information gleaned from your supply chain mapping (discussed above) is merged into your business partner management.
    - **Minimize use of third parties.** To the extent possible, selectively use third parties or strictly collaborate with reputable third parties after conducting proper due diligence. For example, companies may consider prohibiting the use of labor brokers, and instead require suppliers to hire employees directly or retain the

services of third-party recruiters that have satisfied company due diligence requirements.

    - **Require representations and warranties from third parties.** Require third parties to warrant that their business practices will not violate the company's stated values and policies. Companies should include provisions in contracts with suppliers, contractors, and other third parties that clearly state the company's intolerance for human trafficking and forced labor. Moreover, companies should integrate and/or reference established policies and supplier codes of conduct in their agreements to ensure suppliers understand company-wide expectations.
- **Monitoring and Auditing.**
    - **Monitoring.** Monitoring will be essential to compliance with remediation obligations under the German Corporate Due Diligence Act, the Proposed EU Directive, and UFLPA. It is of fundamental importance for the mitigation and certification measures incorporated in the rest of the regulatory initiatives discussed above. Monitoring initiatives in existing anticorruption, anti-money laundering, and sanctions compliance teams can provide a starting point for monitoring forced labor.
    - **Auditors.** Hire third-party auditors where appropriate to conduct targeted and deeper due diligence of those risk areas identified as the most problematic in the company's risk assessment. These can be key tools to reinforce monitoring efforts under all of the regulatory regimes discussed above.
- **Remedies/Reporting.** The Proposed EU Directive, German Corporate Due Diligence Act, and the LDV explicitly mandate the implementation of internal reporting mechanisms to undercover instances of forced labor; all of the other regimes that require due diligence frameworks arguably assume that companies must create some avenue for concerned employees or third parties to report potential misconduct. Most of the regimes aside from the Tariff Act, FAR, and TVPRA require reporting on efforts to assess and prevent forced labor (and, again, such processes may nonetheless reduce risk under these U.S. laws). Compliance hotline functions commonly in place in most companies can be a good starting point to develop this regime.
- **Engagement with NGOs/HR orgs.** NGOs and organizations concerned with human rights have been watching and reporting for decades on industries that operate in high-risk locations or business models. They have likewise been advocating for the types of legislation discussed above (and, in some cases, for much more robust versions of them) and have been publishing resources to help companies understand and address forced labor risks and practices. Educating those responsible in your organization on the relevant work of NGOs can give you a head start in risk-mapping for compliance with the regulations discussed above and implementing best practices. Divisions within companies dealing with CSR initiatives often have experience with stakeholder engagement and may be useful partners in developing outreach initiatives to the NGO sector where appropriate.

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