

UK's New 'Name And Shame' Approach To Anti-Trafficking (Law360 - April 1, 2019)

By Markus Funk, Paul Hirose and Marcus Haggard

To the extent there ever was any doubt, companies falling under the U.K. Modern Slavery Act of 2015's **jurisdiction** (and there are, as we shall see, many of them) must get their supply chain disclosures ready for prime-time (and have no time to waste).

You may have been one of the lucky 17,000 CEOs worldwide who received the U.K. Home Office's[1] Oct. 18, 2018, letter reminding you of your company's obligation to publish the mandatory Modern Slavery Act annual transparency statement. There has been considerable anxiety and speculation in some quarters concerning what this all means (the Home Office's letter unfortunately was not a model of clarity). The answer was, in fact, relatively close at hand. We did a little digging and discovered a recent **tender announcement** that provides key insights into what will follow.

Home Office's Tender Tells the Tale — Publication of Noncompliant Companies and Injunctions Against Noncompliant Companies Are on the Enforcement Menu

The tender, which closed on March 22, 2019, was titled "Auditing compliance with Section 54 of the Modern Slavery Act 2015." As relevant here, the tender seeks a vendor/organization that, in exchange for £20-30,000, will conduct a one-time audit of the some 5,000 "in-scope" companies. The goal is for the vendor to determine compliance with — or, more accurately, to identify companies that are not in compliance with — the act's "minimum legal requirements."

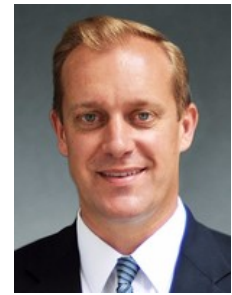
Moving from the general to the specific, the Home Office's intent to pursue a "name and shame" approach emerges from the tender's Appendix B:

The information provided by the [selected vendor's] audit ... may be used to inform enforcement action against non-compliant companies, potentially including publishing a list of non-compliant companies. [2]

Further, the tender reveals that the Home Office will write letters to noncompliant companies "[p]rior to any publication of the names of non-compliant organisations." Finally, the tender discusses the intended "use of [High Court] injunctions [brought by the U.K. secretary of state] against non-compliant companies."

Timing Is Everything

While the Home Office is not explicit, a fair inference from the timetable in the tender documents discloses that (1) the vendor will be awarded the contract on April 2, 2019; (2) a



Markus Funk



Paul Hirose



Marcus Haggard

“project initiation meeting” will occur on or by April 19; and (3) the vendor must provide “outputs” (that is, a list of offending companies) in no later than six weeks.

In short, by May 31 the U.K. Home Office should be reviewing the vendor’s list of noncompliant companies and determining its next steps in terms of “naming and shaming” and pursuing enforcement through injunctions.

As attorneys who have reviewed and drafted literally hundreds of supply chain disclosures and have designed and implemented corresponding compliance programs, we have learned through our practice that the number of companies that are likely out of compliance with the Modern Slavery Act will be considerable (both because some companies that are required to disclose simply do not do so, and because companies’ disclosures fail to follow the technical specifications). And where your company falls on the (non)compliance continuum, and how to address any shortfalls, is something that has never been more time-sensitive.

Who Must Comply With the U.K. Disclosure Requirements?

By way of brief background, multinational companies with business interests in the U.K. are now subject to an additional anti-trafficking regime by virtue of the U.K.’s efforts to fight against global human trafficking. Borrowing significantly from the California Transparency in Supply Chains Act, the Modern Slavery Act, passed by Parliament in 2015, requires certain businesses to make a slavery and human trafficking disclosure statement on their websites. (See [here for a comparison](#) of the two acts.) The reporting obligation applies to each financial year.

Those familiar with the California act will recognize many of the U.K. act’s requirements. There are some big differences, however, including the U.K. act’s notably broader jurisdictional requirements. The U.K. act’s disclosure requirements extend to any company (no matter where in the world it is headquartered or registered) that:

1. Carries on a business, or part of a business, in any part of the United Kingdom;
2. Has a total annual worldwide turnover of no less than 36 million British pounds (an amount determined by the U.K. secretary of state); and
3. Supplies goods or services.[3]

What Is a “Slavery and Human Trafficking Statement” Anyway?

In one of the most notable departures from the California act, which requires companies to expressly address specific subject areas, the U.K. Modern Slavery Act merely provides that each fiscal year, a covered company must make a disclosure stating what it has done to ensure that trafficking is not taking place in its business or supply chain. It is left up to the company to determine what areas to address. Alternatively, the company can state that it has taken no such steps (for obvious reasons, this option is selected by few, if any, public-facing companies).

The Home Office describes the disclosure requirements this way:

The [vendor's] audit should identify whether 'in scope' organisations have complied with their legal obligations:

1. The Modern Slavery Statement must include details of the steps an organisation has taken to address modern slavery risks in operations and supply chains. If an organisation is not taking any steps to address modern slavery, then they must clearly state this in their Modern Slavery Statement. A Statement which simply asserts that a 'company has no modern slavery' in its business or supply chains without explaining the steps that have been taken to ensure this would not be considered compliant.
2. [The Statement must be] published on the U.K. website. The link should be available on the organization's U.K. homepage. If the organisation does not have a website, a copy of the statement must be provided to anyone whom makes a written request for one.
3. [The Statement must be] approved by the Board of Directors (or equivalent management body). In order to demonstrate that this legal requirement has been met, the Home Office expects organisations' Modern Slavery Statements should clearly state that this approval has been given.
4. [The Statement must be] signed by a director (or equivalent).

In any event, it is critical that the disclosure be 100 percent accurate, neither overstating nor understating the company's actual activities. The disclosure statement should, but does not have to, include:

- The organization's structure, its business and its supply chains;
- Its policies in relation to slavery and human trafficking;
- Its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- The parts of its business and supply chains where there are risks of slavery and human trafficking taking place, and the steps it has taken to assess and manage those risks;

- Its effectiveness in ensuring that slavery and human trafficking are not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
- The training about slavery and human trafficking available to its staff.

Who Must Approve of Such a Statement?

The U.K. act attempts to promote accountability by requiring the disclosure statement be approved and signed in a specific manner. That is, corporations must have the disclosure statement approved by the board of directors and signed by a director; limited liability partnerships must get member approval and signature by a designated member; limited partnerships must get a general partner's signature; and any other partnership must get a partner's signature.

Where Must Such a Statement Be Disclosed?

Closely tracking the California act, the U.K. Modern Slavery Act requires that any company with a website:

1. Publish the entire disclosure statement on its website; and
2. Have a link to the disclosure statement in a prominent place on the website homepage. (In the unlikely chance that a qualifying company has no website, it must provide its disclosure statement to a requesting party within 30 days of receiving a written request.)

OK ... So What Are the Penalties for Noncompliance?

As recognized in the tender discussed above, the U.K. secretary of state may bring civil proceedings in the High Court for an injunction if a company violates the U.K. act's disclosure requirements. In Scotland, a proceeding may be brought for specific performance of a statutory duty under Section 45 of the Court of Session Act 1988.

That said, civil litigation brought by shareholders, advocacy groups, and consumer groups that focuses on alleged inaccurate, incomplete, or misleading reporting of a company's efforts is one of the most concerning potential "penalties" facing companies under the U.K. act.^[4] The other major penalty comes in the form of the aforementioned "naming and shaming" campaigns — but this time it is the U.K. government, rather than an advocacy organization, that is leading the charge.

Yikes! I Am Not Sure We Are Complying — What Should We Do?

What follows are our best-practice guidelines for those just getting started with (or fine-tuning) their compliance programs and related disclosures:

1. Introduce and enforce meaningful policies (or add policy language) focused on identifying and eliminating risks emanating from the various forms of coerced/forced labor within a business's supply chains. Among other places, such internally consistent policies or policy language should be included in: codes of conduct; annual compliance certifications; standard contract language; due diligence questionnaires; and supplier statements of conformity.

2. Adopt standard contract language that addresses, among other key areas:

- Indemnification;
- Audit rights;
- Requirement of full cooperation in the case of any internal investigation or review;
- Requirement of immediate notification in the case of actual or potential nonperformance/problems;
- The right to, as needed, contact the relevant authorities in the case of violation; and
- Consent to follow a company-developed action plan in case of any instances of noncompliance.

3. Design a risk-based labor verification/audit program to evaluate and address risks of coerced or child labor in the company's supply chains. As you develop this program, you should:

- Identify the greatest risks existing within the supply chain;
- Design measures tailored to reduce, control, and eliminate those risks;

- Decide whether to employ independent third parties to conduct these verifications/audits;
- Consider folding into the verification process consultations with independent unions, workers' associations, or workers within the workplace;
- Ensure that audits of suppliers evaluate supplier compliance with company standards for eliminating coerced and child labor.

4. Require appropriate certifications making it so that suppliers in the supply chain certify that, in addition to the above, materials incorporated into products comply with (1) the company's code of conduct, and (2) the laws against coerced and child labor in the country or countries in which they are doing business. Key substantive provisions should include representations and warranties that a supplier:

- Complies with all applicable national and international laws and regulations, as well as the company's code of conduct, including prohibition and eradication of coerced and child labor in its facilities, and that it requires its suppliers, including labor brokers and agencies, to do the same;
- Treats its workers with dignity and respect, provides them with a safe work environment, and ensures that the work environment is in compliance with applicable environmental, labor, and employment laws, and your code of conduct;
- Refrains from corrupt practices and does not engage in human rights violations; and
- Certifies that it has not, and will not, directly or indirectly, engage in certain activities connected to coerced and child labor. (These activities should be expressly detailed in the certification.)

5. Develop and publicize internal accountability standards, including those related to supply chain management and procurement systems, and procedures for employees and contractors regarding coerced and child labor. Make sure you have procedures in place for employees and contractors who fail to meet these standards.

6. Assess supply chain management and procurement systems of suppliers in the companies' supply chains to verify whether those suppliers have appropriate systems to identify risks of coerced and child labor within their own supply chains.
7. Train employees and business partners, particularly those with direct responsibility for supply chain management, on the company's expectations as they relate to coerced and child labor, particularly with respect to mitigating risks within the supply chains of products.
8. Guarantee that remediation is provided for those who have been identified as victims of coerced and child labor.

The fight against human trafficking has without question entered a new phase as consumers and governments come to expect that companies (and their compliance officers) will do their part to ensure that their supply chains and, ultimately, their products, are free from the taint of human trafficking and other forms of forced or coerced labor. By issuing "naming and shaming" lists and pursuing injunctions, the U.K. Home Office has very publicly transformed compliance with the Modern Slavery Act from a nice-to-have to a no-time-to-waste must-have that is here to stay.

T. Markus Funk is chairman of the white collar and investigations practice at Perkins Coie LLP and co-founder of the firm's supply chain compliance and corporate social responsibility practice. He is also an author of the 2018 ABA Compliance Officer's Desk Book.

Paul O. Hirose is senior counsel at the firm and co-chairs the supply chain compliance and corporate social responsibility practice.

Marcus Haggard is an associate at the firm.

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[1] The U.K. Home Office is a ministerial department of Her Majesty's Government of the United Kingdom, responsible for immigration, security and law and order.

[2] See Appendix B, available at <https://www.contractsfinder.service.gov.uk/Notice/Attachment/95849de9-f523-4b6d-bc1c-0fb0fd438d79>

[3] This last requirement is in contrast to the California Act, which applies only to companies that are either retail sellers or manufacturers.

[4] This has also been the case with the California Act.