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FORCED LABOR AND SUPPLY CHAINS**Marketing Opportunity to Business Imperative: How Yesterday's 'Dolphin-Safe' Tuna Became Today's Child, Human Trafficking, and Slave Labor-Free Product**

BY T. MARKUS FUNK

Those scouting for the next compliance tsunami—the kind that quietly gains momentum, only to become the frenzied topic of concern in corporate boardrooms (Foreign Corrupt Practices Act *a la* 2007, anyone?)—need look no further. As of this year,

T. Markus Funk, a Partner at Perkins Coie, helped establish the firm's Corporate Social Responsibility and Supply Chain Practice (the first such specialized practice of its kind among the AmLaw 100). A veteran of the Chicago U.S. Attorney's Office who served overseas with the State Department in post-conflict Kosovo leading U.S. efforts to fight corruption and trafficking, Markus and U.S. District Judge Virginia Kendall in 2012 co-wrote "Child Exploitation and Human Trafficking: Examining the Global Challenges and U.S. Responses."

Markus also serves as the Chair of the American Bar Association's Corporate Social Responsibility and Forced Labor Task Force and is the Special Adviser to the ABA's Criminal Justice Section Council on trafficking and supply chain matters. Contact Markus at mfunk@perkinscoie.com.

government-mandated, consumer and advocacy group driven efforts to rid worldwide supply chains of the taint of forced labor¹ promise to cause compliance personnel sleepless nights and public relations teams anxious days. Supply-chain scandals such as those that recently, and very publicly, rocked Apple only pour fuel on this already growing corporate social responsibility fire.

"Child-free" or "slave-free" products are the 2012 successors to once boundary-pushing items such as "dolphin-safe" tuna and "cruelty-free" cosmetics. And it doesn't take much to see why protecting children and vulnerable laborers is at least as easy a legislative and consumer sell as protecting dolphins.

Whatever one's view of the public policy wisdom of this new legal regime, it is a consumer-driven compliance area gaining traction and deserving careful attention.

Indeed, consumer and advocacy-group pressure in the United States and beyond, buoyed by the public's natural recoil against forced labor (a term encompassing trafficked, child, and slave labor, as well as involuntary servitude and debt bondage), has in short order yielded far-reaching legislative responses. Ground-breaking new legal requirements, such as those driving the landmark California Transparency in Supply Chains Act (see flow chart below) and the European Union Directive on Transparency and its proposed amendments, impose unique, unfamiliar compliance

¹ As well as conflict minerals, unfair-trade materials, and other increasingly unpopular sources of perceived ethical immaturity.

and third-party due diligence obligations on the global business community.

The resulting compliance challenges not only demand fresh thinking and specialized skill-sets, but also push companies seeking reputations as ethical and socially responsible actors to switch to proactive compliance offense. After all, who wants to be known for selling products tainted by forced labor?

In response to increasingly vocal consumer calls for information about what products are made with forced labor, in 2011 the California legislature passed the California Transparency in Supply Chains Act of 2010 (S.B. 657). Effective Jan. 1, the act requires qualifying companies (and there are more than 3,200 of them) to publicly disclose the precise nature and scope of their efforts to eradicate human trafficking, slavery, child labor, and other forms of forced labor from their worldwide supply chains.²

Although now mandatory, compliance with the California act has lagged. This, in turn, is animating advocacy groups to devise “naming and shaming” campaigns targeting those who ignore the California Act’s disclosure requirements or whose disclosures are incomplete or, worse, inaccurate. For companies needing a nudge toward compliance, the arrival of such negative PR-generating, revenue-depleting activism swiftly moves compliance from an item on the “to do” list to a “to do *right now*” business imperative.

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Following hot on the heels of the California Supply Chains Act, moreover, is the highly anticipated Business Transparency on Trafficking and Slavery Act (H.R. 2759) (see flow chart below), introduced in Congress last August by Rep. Carolyn Maloney (D-N.Y.) and referred to the House Committee on Financial Services. Together, these twin efforts to export moral exigencies form a new compliance vanguard that has already garnered Executive Branch support.

For example, Secretary of State Hillary Rodham Clinton, discussing human trafficking, recently commented that “[the U.S. Government] must work with industry leaders so that consumers can know that the products or services they buy came from responsible sources.”

Consumer and Federal Trade Commission false-advertising actions, public interest group “naming and shaming” campaigns, consumer boycotts, shareholder lawsuits, and myriad other potential governmental and legal intrusions threaten the unprepared. On the flip side, companies viewed as being proactive and respon-

sive to forced labor concerns can expect public relations gains, not to mention reduced governmental, consumer, and advocacy-group scrutiny. Put simply, preparation for the pending federal act and compliance with the recent California act is smart business.

The pending federal act, as currently drafted, will apply to you if you:

1. Are publicly traded or otherwise required to submit annual reports to the Securities and Exchange Commission; and
2. Have annual gross *worldwide* receipts exceeding \$100 million.

If you fall under the Act, you must file an annual report with the SEC titled “[Your-Name-Here]’s Policies to Address Forced Labor, Slavery, Human Trafficking and the Worst Forms of Child Labor.”

In that SEC report, you must disclose the extent to which you:

- Have a written policy to identify and eliminate supply-chain exploitation risks.
- Prohibit the use of your corporate products, facilities, or services to facilitate exploitation.
- Periodically vet your supply chain for exploitation risks.

If you conduct such verification, you must disclose:

- the most significant risks identified and remedial measures taken;
- whether the verification was conducted by a third party, such as outside counsel;
- whether the verification process (1) included consultations with independent unions, workers’ associations, or workers within the workplace; and (2) whether the results of such consultations were incorporated into the verification process; and
- the extent to which unannounced audits conducted by independent auditors were part of the vetting/verification process.

- Assess suppliers’ management and procurement systems to verify whether they appropriately identify exploitation risks.
- Provide training to employees with direct supply-chain management responsibilities.
- Require supplier certification that *materials incorporated* (!) into the products made for or sold to you are produced in compliance with local laws.
- Ensure that *suppliers’* recruiting practices comply with your anti-exploitation standards and verify compliance through periodic supplier audits.
- Maintain standards and procedures for addressing employee and supplier noncompliance.

² See generally T. Markus Funk, *Preparing for the Next Compliance Battleground: Eliminating Trafficking, Forced Labor, Child Labor, and Slavery from Global Supply Chains*, BLOOMBERG LAW REPORTS (CORPORATE COUNSEL) (Feb. 12, 2012).

. . . So what can you do to get ahead of the problem?

First, Assess Your Risk Profile

→ Have experienced counsel determine whether you:

- ◆ obtain goods from suppliers operating in countries with significant supply-chain compliance risk;
- ◆ have a clearly articulated code of conduct concerning forced labor;
- ◆ specify what you expect from your suppliers (and *their* suppliers);
- ◆ describe to suppliers the consequences of noncompliance;
- ◆ train both employees with supply-chain responsibilities and key suppliers;
- ◆ have standard contract language reasonably designed to prevent violations;
- ◆ routinely conduct targeted high-risk business partner due diligence;
- ◆ seek annual employee and business partner certifications;
- ◆ provide your managers supervising suppliers with reliable, day-to-day sources for meaningful advice and counsel; and
- ◆ encourage voluntary internal reporting.

Second, Assemble a Compliance Team

→ Create an internal team and educate them on the law.

→ Consider retaining experienced outside counsel to help:

- ◆ create a compliance program workplan, timeline, and budget;
- ◆ construct appropriate compliance policies and integrate them into existing compliance framework;
- ◆ train internal personnel and educate suppliers;
- ◆ draft standard contract language;
- ◆ perform due diligence on potential business partners;

- ◆ periodically vet/audit existing suppliers operating in high-risk areas; and
- ◆ conduct internal investigations into instances of possible misconduct.

Third, Create Supplier Due Diligence/Compliance Files

→ Keep a reliable record of due diligence and vetting efforts.

→ Chronicle your responses to perceived instances of noncompliance.

→ Maintain information concerning trainings provided, attendance, topics covered, etc.

→ Devise internal “accountability standards and procedures” for employees or suppliers failing to meet company standards—and track their performance.

Fourth, Educate Suppliers and Obtain Their Compliance Assurances

→ Determine personnel within your suppliers’ structure who are the appropriate points of contact.

→ Write your suppliers and notify them of the new policy and your expectations.

→ Implement a system for annual supplier compliance certifications.

→ Consider requiring direct suppliers to include “flow-down” clauses to help ensure sub-suppliers also comply with your policies and procedures.

Fifth, Make the Mandatory Disclosures—and Do So Accurately

→ Fully and accurately disclose through your homepage the results of your supply-chain efforts.

→ Make sure disclosure is “conspicuous” and “easily understood.”

Whatever one’s view of the public policy wisdom of this new legal regime, it is a consumer-driven compliance area gaining traction and deserving careful attention. Although it took U.S. FCPA enforcers some 30 years to get out of the starting blocks, they were pursuing the more abstract public policy objectives of spreading democracy and free trade by combating bribery. Supply chain compliance, in contrast, is motivated by consumer demand for products free from the taint of forced labor. It should come as no surprise that this more intuitive and appealing objective is quickly gaining traction.



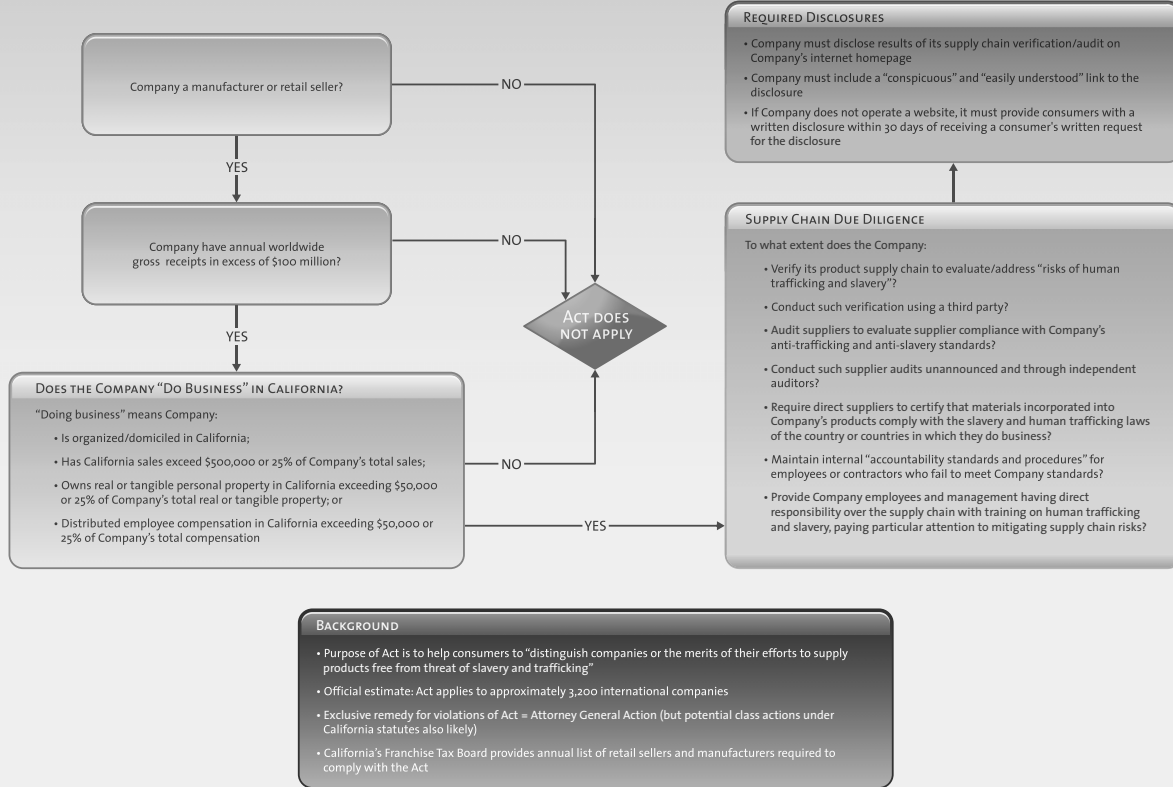
T. Markus Funk,
Point of Contact
Corporate Social Responsibility Practice
MFunk@perkinscoie.com



Jean-Jacques Cabou,
Point of Contact
Corporate Social Responsibility Practice
JCabou@perkinscoie.com



BREAKING DOWN THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT



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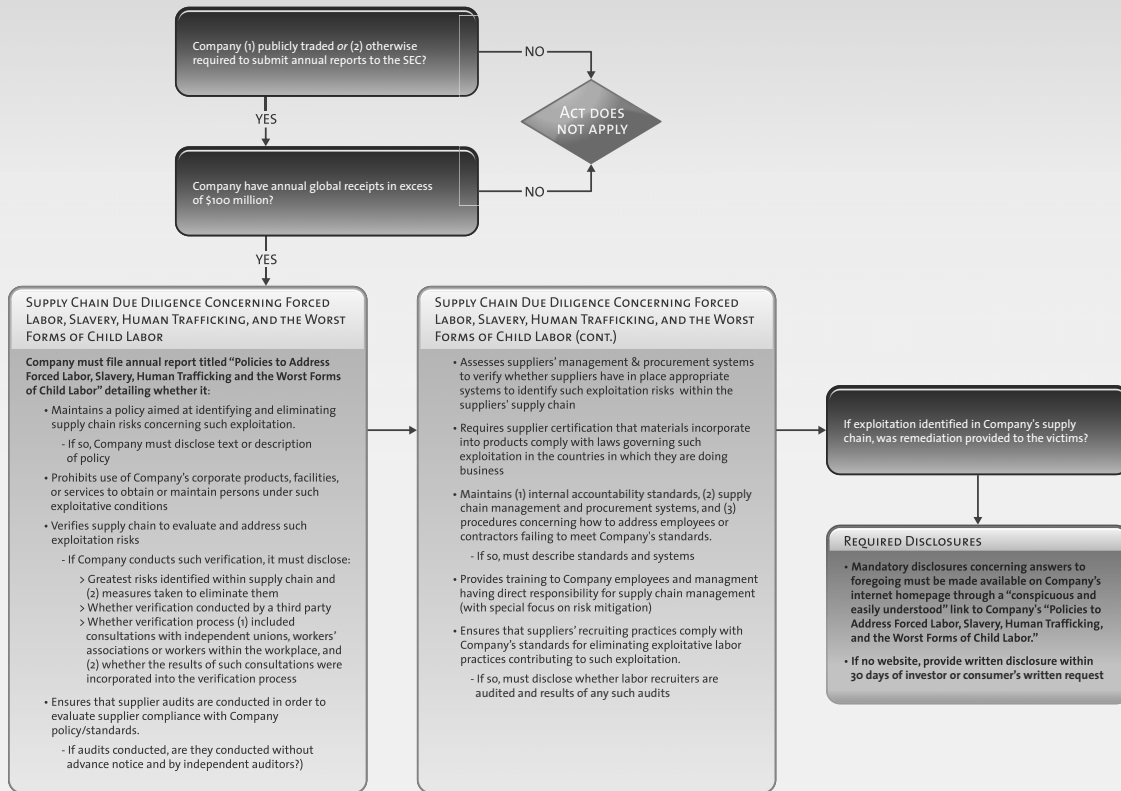


T. MARKUS FUNK,
COMPLIANCE, LITIGATION, AND WHITE COLLAR DEFENSE PARTNER
MFUNK@PERKINSCOIE.COM



Legal Counsel to Great Companies®

FEDERAL BILL H.R. 2759: "BUSINESS TRANSPARENCY ON TRAFFICKING AND SLAVERY ACT"



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