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INTERNATIONAL TRADE

Three Perkins Coie attorneys warn retailers—and those working with them—to take note: As the holidays approach, it's worth a quick check to ensure your holiday sales are not undermined by forced labor or bribery—today's two top, and interconnected, supply chain threats.

The Secret Ingredient Guaranteed to Spoil Retailers' Holiday Cheer: Forced Labor (and Bribery) in Your Supply Chain



BY T. MARKUS FUNK, PAUL O. HIROSE AND ALEX H. BAILEY

The holiday retail season is an ideal time to check that forced labor and bribery—the two top and interconnected supply-chain threats—do not undermine the success of your critical sales period.

Not long ago, many in the business community viewed ensuring a supply chain free from the taint of “forced labor”—an umbrella term that includes trafficked, child, slave and indentured labor—as primarily a PR/marketing concern. After all, the skeptic will argue, can a U.S. or European retailer or manufacturer really control what goes on in a factory in China, India, Brazil, Vietnam or other distant locations?

In fact, this is virtually the same view many had in 2000 of the Foreign Corrupt Practices Act, the now-familiar 1970s enactment that was essentially unknown for most of its statutory existence. From the enforcers' perspective, however, the answer is simple: today's companies are expected to police their supply chains like never before, regardless of the practical challenges to effectively doing so.

The real-world challenges facing companies trying to ensure supply chain integrity are, in fact, undeniable. Nevertheless, during the past five years or so, legislatures in the U.S., Europe and elsewhere have recruited—or, perhaps more accurately, conscripted—the business community into the global effort to rid supply chains of forced labor (and bribery). But before we address the question of *how* to protect yourself, let's consider some compliance realities and *why* forced labor has joined the Foreign Corrupt Practices Act as today's leading compliance challenge.

Compliance Reality #1: Forced Labor Is a Very Real Threat To Your Supply Chain

The motivation for the veritable groundswell of legislation and enforcement efforts is as clear as it is laudable—labor exploitation has reached epidemic proportions and is an issue that must be taken seriously. While bribery and corruption can certainly take place without forced labor, the opposite is not true; bribery of

foreign officials such as immigration, factory and labor inspectors is *part and parcel* of virtually any foreign operation using forced labor. And there are many such foreign operations. Consider these recent best estimates related to forced labor:

- A criminal industry valued at \$150 billion, second only to narcotics and greater than arms smuggling.
- Over 20 million global victims annually.
- 161 countries are either source, transition or destination countries for forced labor.
- Forced labor taints products consumers use every day.

Compliance Reality #2: Legislators and Enforcers Are More Serious About Forced Labor

While the specifics concerning some recent initiatives might be debatable, it is clear that forced labor in supply chains is no longer simply grabbing the attention of a handful of advocacy organizations. Retailers and manufacturers—and, in particular, those that are public-facing—can expect future confrontations and pressure from mounting advocacy and consumer groups (“soft scrutiny”), as well as from governmental/law enforcement entities (“hard scrutiny”), squarely focused on their supply chains.

This increased focus on supply chains has been especially evident in relatively recent enactments of, and amendments to, forced labor laws in the U.S., Europe and elsewhere. Some of the latest developments demonstrate why exercising strict control over supply chains is today’s business imperative:

- **California Transparency in Supply Chains Act (S.B. 657).** The California Act, signed into law in 2010, requires qualifying companies (retailers or manufacturers with more than \$100 million in global receipts and with assets or payroll over \$50,000 in California) to disclose through a link on their website homepage the precise nature and scope of their efforts (or lack of efforts) to eradicate forced labor from their worldwide supply chains.

Specifically, they must answer questions concerning what they are doing to audit suppliers, maintain internal accountability standards, etc. And making false or misleading disclosures can draw consumer and class action lawsuits and government attention.

See the flow chart detailing the California Act’s requirements and logic.

- **Trade Facilitation and Trade Enforcement Act of 2015.** This enactment, which took effect March 10, 2016, closed a long-standing loophole by amending the Tariff Act of 1930 to remove the controversial “immunity” for broad classes of goods made with forced labor that once met “the consumptive demands of the United States.” Read a more detailed examination of the TFTEA requirements.

- **New Requirements for Federal Contractors and Their Subs.** In the wake of President Obama’s Executive Order on Trafficking in Government Contracts, the 2015 version of the Federal Acquisition Regulation (FAR) added six more categories of prohibited conduct going

far beyond overtly violent or coercive conduct. The 2015 version of the rule—requiring automatic self-reporting and featuring no *de minimis* exceptions, safe harbors, etc.—prohibits several types of conduct not covered by the 2009 FAR. This includes the use of recruitment fees, withholding of identity or immigration documents such as passports or drivers’ licenses, failure to pay return transportation costs, provision of substandard housing, and failure to provide written work documents in the workers’ native language where required to do so by law. Potential criminal and civil penalties, as well as debarment, give these provisions particularly sharp teeth. Read a flow chart detailing the FAR provisions’ requirements and logic.

- **Pending Legislation in the U.S.** U.S. Representatives Carolyn Maloney and Chris Smith have proposed legislation requiring public companies with global receipts of more than \$100 million to disclose annually in their SEC filings the measures they are taking to prevent human trafficking, slavery and child labor. Rep. Maloney has unsuccessfully pushed for this bill—in various forms—for some years now; one of those efforts is detailed here.

- **U.K.’s Modern Slavery Act 2015.** Companies with business interests in the United Kingdom are now subject to another anti-trafficking regime. On the heels of the U.K.’s Bribery Act 2010, which is a close analog of the U.S. Foreign Corrupt Practices Act but extends even further, the U.K. government has now borrowed significantly from the California Transparency in Supply Chains Act to impose its own stricter disclosure framework. The U.K. Act, passed by Parliament in 2015, requires companies to make a slavery and human trafficking disclosure statement on their website. Review this flow chart for details of the U.K. Act’s requirements and logic.

- **Pending Legislation in Other Countries.** There is pending anti-trafficking/supply chain legislation in France (“Devoir de Vigilance”), Spain, the Netherlands and Sweden and reportedly in Switzerland, Germany and elsewhere. There is also the possibility that similar measures could be adopted by the European Union, thereby setting up a default “global standard.”

Review the Human Trafficking/Forced Labor Laws & Regulation Comparison Matrix for more information.

Compliance Reality #3: Failure to Take Compliance Seriously Can Cause Devastating Reputational/Brand Damage (or Worse)

On the “soft scrutiny” side, organizations such as China Labor Watch, KnowTheChain, Slavery Footprint, Global Exchange and Free2Work, as well as such media outlets as Al Jazeera, CNN, Conscious Magazine, The New York Times and TIME magazine, are increasingly scrutinizing the conduct of “Western” companies with transnational supply chains originating out of the developing world. Their high-profile focus has been on companies with household names selling directly to consumers but has not expanded to a broader class of retailers or manufacturers.

Compliance Reality #4: Compliance Is Challenging, Serious and Achievable

The previous summary points out the ever-more-intense supply chain compliance expectations concerning both forced labor and bribery/corruption. Given these new realities, retailers and manufacturers of all sizes must ensure that their:

1. Anti-forced-labor statements 100% accurately reflect the company's actual practices;
2. Anti-corruption compliance efforts take into consideration the dangers of forced labor; and
3. Compliance practices are robust enough to withstand the heightened public and enforcer scrutiny.

Yesterday's compliance thinking will not meet today's requirements in these developing, specialized areas. Experienced and practical approaches are critical to developing and implementing a supply chain compliance program, as well as to updating an existing program with a compliance tune-up. Contact experienced counsel to talk you through the challenges as well as the solutions to supply chain compliance.

About the Authors

Markus Funk is a former Assistant U.S. Attorney in Chicago and Section Chief with the State Department in the Balkans. Funk is also the founding co-chair of Perkins Coie's Supply Chain Compliance and CSR Corporate Social Responsibility Compliance Practice (the first such specialized practice among the Am Law 100 largest firms). In 2008, he was the founding co-chair of the American Bar Association's Anti-Trafficking Task Force, and in 2016 he and U.S. District Judge Virginia

Kendall co-authored the second edition of their widely-cited book *Child Sexual Exploitation and Trafficking: Examining Global Enforcement and Supply Chain Challenges and U.S. Responses* (Rowman Littlefield). Funk can be reached at mfunk@perkinscoie.com.

Paul Hirose is the co-Chair of Perkins Coie's Supply Chain Compliance and Corporate Social Responsibility Practice. A former Certified Public Accountant, Hirose has substantial audit and compliance experience, allowing him to counsel clients on supply chain compliance programs in order to minimize legal exposure and potential brand damage while maximizing stakeholder buy-in. Hirose provides compliance counsel related to key laws and regulations including: The California Transparency in Supply Chains Act; the U.K. Modern Slavery Act of 2015; and the U.S. government contractor requirements found in the Federal Acquisition Regulations. Hirose can be reached at phirose@perkinscoie.com.

Alex Bailey is a commercial litigator at Perkins Coie. Besides representing companies in court and arbitration proceedings, Bailey regularly conducts internal investigations and advises companies on compliance with anti-trafficking and corrupt practices laws. A member of the firm's Supply Chain Compliance and Corporate Social CSR Responsibility Compliance Practice, Bailey's substantial litigation experience allows him to approach his clients' compliance challenges with an eye toward preventing and, if necessary, defending compliance-related lawsuits. Bailey can be reached at abailey@perkinscoie.com.

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