

HUMAN TRAFFICKING

BY ART MIDDLEMISS AND HILLARY ROSENBERG

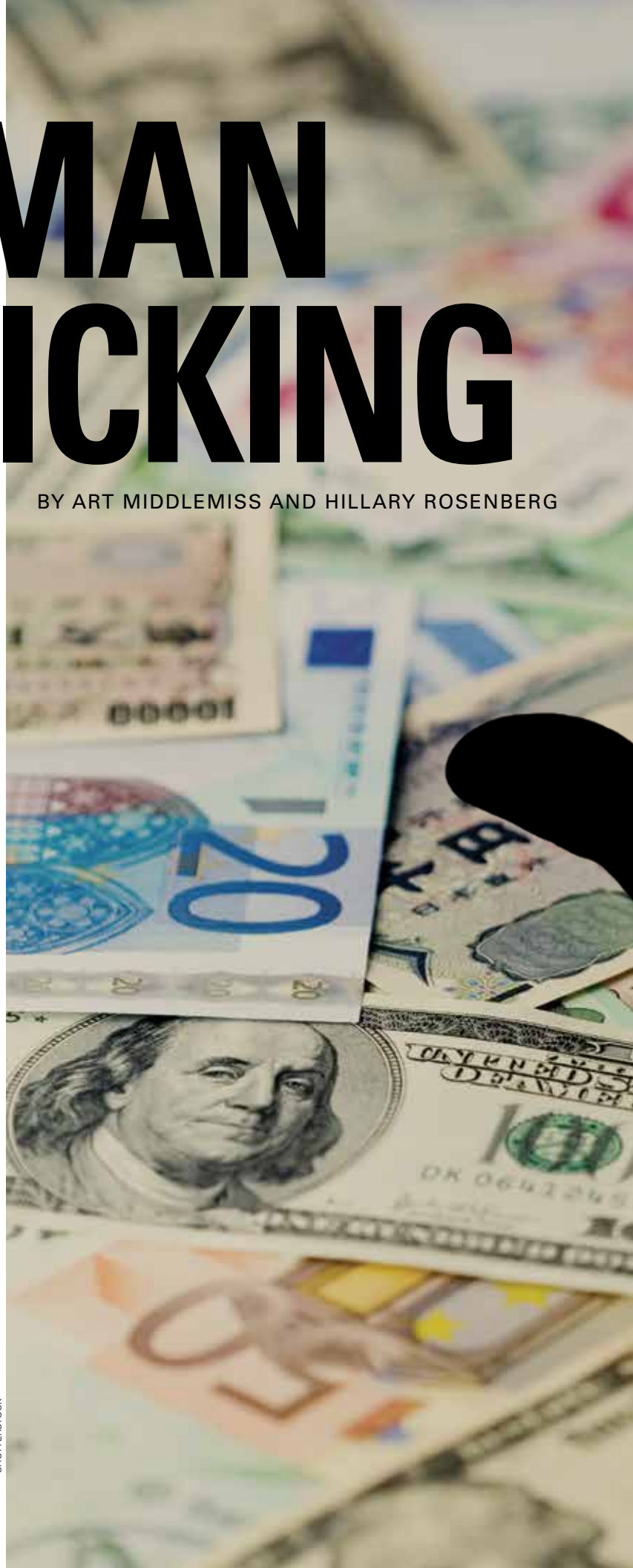
YOU MAY THINK slavery is a bygone problem. Or, it's possible you heard of Nigerian militants kidnapping 200 schoolgirls in May, and threatening enslavement, and you thought slavery might be happening now—only somewhere else. However, slavery is a current problem in the United States. A recent study involving sex trafficking at the 2014 Super Bowl (an event as all-American as apple pie) demonstrated that human trafficking, sadly, is flourishing even in the United States.

Last March, the Office of Sex Trafficking Intervention Research at Arizona State University's School of Social Work, published a study entitled "Exploring Sex Trafficking and Prostitution Demand During the Super Bowl 2014 (<https://ssw.asu.edu/research/stir/exploring-sex-trafficking-and-prostitution-demand-during-the-super-bowl-2014>). The study placed two fake adult services ads in the New York and New Jersey metro area during the ten days preceding the Super Bowl. The ads received almost 1,500 total contacts, including contact from individuals seeking services and potential traffickers offering employment opportunities. The study identified some 38 websites advertising the sexual services of what appeared to be underage children, or juvenile sex trafficking victims.

What can we, as legal and compliance professionals, do about the current problem of slavery (i.e. human trafficking)?

For the last several years, presidential proclamations declared January to be National Slavery and Human Trafficking Prevention Month. This past January, President Obama asked us, in his Presidential Proclamation on National Slavery and Human Trafficking Prevention, "to recognize the vital role we can play in ending all forms of slavery." As lawyers and compliance professionals trained to spot issues and escalate risk, we can assist in the fight against human trafficking by raising awareness of human trafficking,

SHUTTERSTOCK





Modern-Day Slavery and Compliance Challenges

recognizing red flags, and helping our clients react to existing laws designed to deter, detect, and report human trafficking. Below, we outline the scope of human trafficking, examine legislation enacted to combat human trafficking, and discuss some of the challenges faced by companies subject to new compliance requirements.

Definition and Scope of Human Trafficking

Human trafficking is slavery, the trade in human beings. It involves recruiting, transporting, harboring or receiving human beings, by the use of force, threats of force, fraud, or other forms of coercion, including the abuse of power or a position of vulnerability. Human beings are trafficked for purposes of sexual exploitation, forced labor, or even for the removal of organs. Per the

Immigration and Customs Enforcement (ICE) website:

Human trafficking is one of the most heinous crimes that ICE investigates. In its worst manifestation, human trafficking is akin to modern-day slavery. Victims pay to be illegally transported into the United States only to find themselves in the thrall of traffickers. They are forced into prostitution, involuntary labor and other forms of servitude to repay debts—often entry in the United States. In certain cases, the victims are mere children. They find themselves surrounded by an unfamiliar culture and language without identification documents, fearing for their lives and the lives of their families.

The global scope of human trafficking is startling; according to the U.S. State Department, some 27 million people globally are victims of human trafficking at any one time.¹ Apart from the drug trade, human trafficking is the world's fastest growing criminal enterprise and, at an estimated \$32 billion, the world's second most profitable (tied with arms dealing).²

It is not a "somewhere else" problem, i.e., a crime that happens in other countries, but could not possibly take place in the U.S. The Bureau of Justice Statistics reports that, during the period from January 2008 to June 2010, federally funded task forces opened some 2,500 human trafficking investigations. Facts underlying individual prosecutions provide even more chilling evidence, such as those detailed below, each drawn from the University of Michigan Law School Human Trafficking Database, which contains 146 cases from the U.S., the largest number of human trafficking cases reported and tracked in the database:

- Three brothers held four teenage girls from Mexico captive and forced them to prostitute themselves in the New York City and Mexico. They promised them marriage, but then they beat them into submission, to earn money through prostitution;³
- A Florida man was convicted after selling drugs to young women to get them addicted, then forcing them into prostitution by threatening to confiscate their drugs and cause them to suffer withdrawal.⁴

HUMAN TRAFFICKING COMPLIANCE CHALLENGES

- A man in Washington State convicted after recruiting runaway minors with promises of food and shelter in return for money earned by prostitution;⁵
- A man and woman in Washington State were convicted after forcing a 19-year-old woman into servitude by withholding her passport and other identification documents, and isolating her in their home;⁶
- A group of men in western New York were convicted after harboring undocumented Mexican immigrants who were made to work in restaurants through the use of force and threats of legal action;⁷
- A Pennsylvania woman was convicted after bringing two women to the U.S. from Vietnam and forcing them to enter sham marriages, clean the woman's home, and work without pay in a nail salon. Often this occurred for eleven hours a day, seven days a week.⁸

In this context, it is hardly surprising that legislators, both at the state and federal levels, have acted to combat human trafficking. Below, we examine recently enacted laws, the resulting new compliance requirements, and the existing compliance mechanisms companies may leverage to satisfy these new requirements.

Legislative Reactions to Human Trafficking

State Action

According to the human trafficking watchdog, Polaris Project, almost all of the 50 states and the District of Columbia have statutes criminalizing human trafficking.⁹ While these state laws broadly prohibit any form of human trafficking, they do not place an affirmative duty on companies to implement controls to prevent human trafficking. However, in 2010, California passed a law that requires businesses to disclose their implementation of anti-human trafficking compliance controls.

Per the California Transparency in Supply Chains Act of 2010 (Cal. Civil Code § 1714.43, the "California Act"), which took effect in 2012, all retailers and manufacturers doing business in the state with annual worldwide gross receipts exceeding \$100 million must publicly disclose (on their websites or upon request), "its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale."¹⁰ The disclosure must reveal steps the company has taken to prevent human trafficking in its supply chains. Injunctive relief is the only remedy specified for failing to disclose this information; however, other California laws severely punish those engaged in human trafficking, either directly or indirectly.

Federal Action

The Trafficking Victims Protection Act of 2000 (TVPA), along with its subsequent amendments and reauthorizations, prohibits U.S. government contractors, subcontractors, and their employees from engaging in "severe" forms of trafficking.¹¹ In addition, Congress has passed regulations designed to provide the TVPA with regulatory teeth. Like the California Act, these regulations, in one form or another, impose a duty on U.S. government contractors to implement controls to prevent and detect human trafficking.



The most significant of these regulations are the September 2012 Executive Order, entitled "Strengthening Protections Against Trafficking in Persons in Federal Contracts"; the Ending Trafficking in Government Contracting (ETGC) provisions of the Fiscal Year 2013 National Defense Authorization Act; and the ETGC provisions (comment period ended December 20, 2013).

Each regulation contains distinct attributes, but all require U.S. government contractors to implement compliance plans that include controls to monitor and detect human trafficking. Each focuses on well known indicia or "red flags" of trafficked labor, such as unfair recruitment practices, wages, and living conditions.

The basic elements of these proposed compliance plans will be familiar to anti-money laundering (AML) and anti-bribery and corruption (ABC) compliance practitioners as resembling the traditional "four-pillar" compliance program, fundamental to the AML and ABC worlds. The basic elements of the proposed FAR Rule compliance plan require relevant contractors to:

1. Create anti-human trafficking policies and procedures to detect, deter, and report human trafficking-related activity;
2. Develop training programs;
3. Provide for responsible internal program oversight; and
4. Allow for third-party testing and review.

What Companies Need to Think About

The new regulations will require many companies to think long and hard about anti-human trafficking compliance. These regulations, like the anti-money laundering and anti-bribery and corruption laws before them, were born of the best intent—to eradicate massive global problems. Despite astronomical corporate compliance spending, few would argue that money laundering and corruption are less serious problems today than they were ten years ago.¹² By contrast, we hope ten years from now these new regulations will be credited with a marked and material decrease in human trafficking activity.

Just as in the AML and ABC compliance spaces, implementing human trafficking-related controls such as risk assessments, training, testing, and attendant policies and procedures will be standard requirements from an operational perspective. Likewise, the risk

of compliance failures will be devastating, exposing companies to significant criminal and civil penalties in addition to the profound reputational risk of being publicly pegged as a “human trafficker.”

As a result of increased attention to the human trafficking issue and the enactment of the above-described regulations, companies face increased expectations to take proactive measures to prevent human trafficking activity in their supply chains. The question becomes, how is it best to execute these new requirements? We suggest that the compliance wheels do not need to be re-invented. Rather, compliance disciplines developed in the AML and ABC contexts overlap significantly with those required to measure and mitigate human trafficking risk, including risk assessment processes and on-boarding due diligence measures. The challenge for many companies will be to re-focus existing compliance mechanisms, not to create wholly new compliance processes.

Many firms today are exploiting the structural and operational similarities inherent in the construction of effective AML and ABC programs. For example, despite the fact that they are designed to protect against different substantive risks, AML and ABC programs share the same basic structural components, namely:

1. Internal program oversight;
2. Policies and procedures to prevent and detect human trafficking, including risk assessments, monitoring protocols, and confidential reporting mechanisms;
3. A training program; and
4. Independent testing and review.

A human trafficking compliance program will require the same basic structure, which mirrors the requirements of the FAR “compliance plan.” As described below, operational efficiencies can be achieved by bundling together AML, ABC, and human trafficking compliance structures within the same program.

Risk Assessment

To design and implement an effective compliance program in the AML and ABC spaces, it is routine to execute a formal, documented, regularly updated risk assessment. It is only logical to do the same with respect to human trafficking compliance. Indeed, given the overlap inherent to assessments of AML, ABC, and human trafficking risk, all three types of assessments could be conducted simultaneously, leveraging the same compliance resources and processes.

For example, a well-constructed ABC risk assessment might measure the extent to which a company uses third parties to conduct business on its behalf globally, and identify the controls in place to mitigate the resultant ABC risk. Common controls include contractual representations and warranties, training, and documented due diligence. Similar controls are required to govern human trafficking risk in supply chains. Accordingly, slight alterations and additions to an existing risk assessment template may help a company assess multiple risks through one compliance exercise.¹³

Due Diligence

Both AML and ABC compliance programs are concerned with due diligence: how much, how often, and on what types of customer, agent, and counterparty. Adequate and effective due diligence can help companies identify and respond to third-party risks.

This is essential because regulators are singularly unimpressed by the “head-in-the-sand” defense, such as, “how was I supposed to know the client/vendor/third-party/finder was engaged in human trafficking?” Under the new regulations, companies are required to conduct pre- and post-engagement due diligence and relationship monitoring to determine their exposure to human trafficking risk. A company that invests compliance resources to mitigate third party corruption risk in the AML and ABC space may be able to leverage those resources to execute appropriate supply chain due diligence and identify human trafficking risk.

Adequate due diligence in the human trafficking space could be modeled after the ABC risk-based approach spelled out in the November 2012 FCPA Resource Guide.¹⁵ As described in the FCPA guidance, standard due diligence requires an understanding of a third party’s corporate structure, business reputation, involvement in high risk industries or sectors, and the business rationale for the engagement, including whether the cost of the contract reflects market and industry practice.

Apart from the drug trade, human trafficking is the world’s fastest growing criminal enterprise and, at an estimated \$32 billion, the world’s second most profitable (tied with arms dealing).

Depending on the third party’s initial risk level, enhanced AML, ABC, and human trafficking due diligence may include obtaining certifications of the third party’s compliance with applicable laws, conducting a site visit, and reviewing the third-party’s policies and procedures, including an ethics or other code of conduct, and other documents demonstrating a commitment to ethical and lawful business.

Additional human trafficking red flags include:

- Whether the third party agrees to complete work in an unreasonably short period of time;
- The rates are below market;
- The third party intends to outsource some or all of the work;
- The labor hired to perform the work will be obtained through agencies, labor brokers, or require the paying of recruitment fees;
- Workplace practices impede worker freedom (e.g. passport retention) or poor living conditions;
- There is an overall lack of transparency party’s workforce conditions and recruitment;
- And there are unexplained fees and costs passed on to the company.

As it would be in the AML and ABC compliance spaces, if a third party refuses to answer due diligence questions or is not forthcoming in providing answers, that alone would present a red flag.

To summarize, although it would require asking additional questions specific to human trafficking, a significant amount of human trafficking due diligence could be conducted and driven through the ABC and AML-related due diligence questions and completed by adding additional queries to existing templates.

Contractual Provisions and Monitoring

Contractual representations and warranties are often used to control risk. A counterparty's representation not to engage in certain behavior, and to accept certain consequences if it does, in itself is a protection. Like the contractual provisions used to protect against money laundering and corruption risk, anti-human-trafficking contractual provisions may include:

- Representations and undertakings that the third party will comply with human trafficking laws;
- Indemnity provisions if the third party violates human trafficking laws;
- Access to audit the counterparty's books and records; and
- Rights to terminate the engagement for violations of human trafficking laws.

For third parties posing higher human trafficking risk, periodic monitoring protocols could be employed. These protocols might include updating due diligence more frequently, exercising audit rights, providing periodic training, requesting annual compliance certifications, providing employees with direct responsibility for supply chain managements and holding accountable employees or contractors failing to meet company standards regarding human trafficking.

Additional monitoring controls specific to human trafficking would include:

- Provides employees with direct responsibility for supply chain managements with training on human trafficking and slavery, particularly with respect to how to mitigate risks within the supply chain; and
- Implements procedures to hold accountable employees or contractors failing to meet company standards regarding human trafficking.

As the law in this area expands, both on the federal and state levels, companies will face increased pressure to develop compliance programs that proactively eradicate human trafficking in supply chains.

Confidential Reporting and Internal Investigations

Like their AML and ABC counterparts, effective human trafficking compliance programs should include procedures that allow individuals to report allegations of trafficking confidentially, without fear of retaliation. As discussed below, employee training on hotline reporting procedures should reference human trafficking concerns, and the individuals that receive the calls should receive training on how to handle such calls. Where violations of the company's human trafficking policy are identified, disciplinary and remediation measures can be leveraged from existing protocols regarding employee misconduct. Human trafficking compliance training should emphasize the hotline's existence and make all employees aware that it should be used to report suspected human trafficking activity.

Training Program

Training is vital to communicating the policies and procedures employees are expected to know and follow. Who receives training, how often it is provided, and the method in which it is provided (e.g. online module, in-person, etc.) will be driven by the risk assessment results. While in-depth human trafficking training may be required for the most high-risk areas of a company, lower risk groups might receive human trafficking training as part of an already existing compliance training program. Training sessions should be well-documented, reflecting the attendees, date of training, length of training, training method, and the list of materials provided at the training session. Tracking protocols may leverage AML and ABC training procedures.

Where appropriate, agents of the company and other high-risk third parties, such as labor brokers, should receive training on the company's policies and procedures relating to AML, ABC, and human trafficking. The results of a well-constructed risk assessment should assist in identifying the most high-risk third parties.

Independent Testing

Effective AML and ABC compliance programs require independent testing of the effectiveness of the company's internal controls. AML and ABC testing ensures that a compliance program exists not just on paper, but that its policies and practices have been integrated into the company's operations and culture in both principle and substance. A company's general audit group may perform this testing function; however, to demonstrate a robust compliance program to regulators, it can be beneficial to have the testing conducted by an independent, external group.

Regardless of who conducts the testing, the same resources and protocols used in the AML and ABC spaces can be applied in the human trafficking space. Opportunities for improvement should be identified and remediated through updated procedures, improved internal controls, and where necessary, the imposition of disciplinary measures holding accountable employees or contractors failing to meet company standards regarding human trafficking.

Conclusion

As the law in this area expands, both on the federal and state levels, companies will face increased pressure to develop compliance programs that proactively eradicate human trafficking in supply chains. The current state of the human trafficking legal landscape, and its conceptual overlap with AML and ABC, make the development and implementation of a human trafficking compliance program both vital to a company's overall compliance structure and easily integrated into existing company practices. Companies should anticipate making changes to their compliance plans to meet the expected requirements. ■

Endnotes

¹ U.S. Department of State Office to Monitor and Combat *Trafficking in Persons*, *Trafficking in Persons Report 2013*, at 7 (June 2013), <http://www.state.gov/j/tip/rls/tiprpt/2013/>

² State of California Department of Justice, Office of the Attorney General, *Human Trafficking*, <http://oag.ca.gov/human-trafficking/>



³ *U.S. v. Lopez-Perez*, 178 F. Supp2d 1236 (E.D.N.Y. 2002).

⁴ *United States v. Fields*, No. 8:13-cr-198-T-30(TGW), 2013 U.S. Dist. LEXIS 135763 (M.D. Fla. Sept. 18, 2013).

⁵ Second Superseding Indictment, *United States v. Hampton*, No. CR08-5671 (BHS) (W.D. Wash. Apr. 30, 2009).

⁶ Indictment, *United States v. Kenit*, No. 3:11-cr-05182-RJB (W.D. Wash. Mar. 24, 2011).

⁷ *United States v. Mireles*, No. 08-CR-00349, 2009 U.S. LEXIS 109176 (W.D.N.Y. Nov. 23, 2009).

⁸ *United States v. Phan*, 628 F. Supp. 2d 562 (M.D. Pa. 2009).

⁹ Polaris Project, *2013 Analysis of State Human Trafficking Laws*, at 6 (August 2013), http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf. North Dakota is the only state that has not made even minimal efforts to enact a basic legal framework to combat human trafficking.

¹⁰ State of California Department of Justice, Office of the Attorney General, *Human Trafficking Legislation*, <http://oag.ca.gov/human-trafficking/legislation>

¹¹ The Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7113, defines “severe forms of trafficking in persons” as:

^a sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or

^b the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt, bondage or slavery.

¹² 22 U.S.C. § 7102(9).

¹³ Global Financial Integrity found that within the developing world, illicit monetary outflows increased from 2002 to 2011. According to the report, the developing world lost US\$946.7 billion in illicit outflows in 2011, representing a 13.7% increase over 2010. From 2002 to 2011, illicit outflows increased at an average rate of 10.2% per year over the decade, significantly outpacing GDP growth. Dev Kar & Brian LeBlanc, *Illicit Financial Flows from Developing Countries: 2002-2011*, Global Financial Integrity, at ix-x (Dec. 2013), http://iff.gfintegrity.org/iff2013/Illicit_Financial_Flows_from_Developing_Countries_2002-2011-LowRes.pdf

¹⁴ Assessing corruption-related risk is another example of ABC controls overlapping with human trafficking risk. A direct correlation appears to exist between countries with high corruption-related risk and those with human trafficking risk. See *Corruption & Labor Trafficking in Global Supply Chains*, White Paper, Verite, at 3-6 (Dec. 2013), http://www.verite.org/sites/default/files/images/WhitePaper_Corruption%26Labor%20Trafficking%20FINAL.pdf. This is another reason it makes sense to measure ABC and human trafficking risk at the same time, via the same compliance exercise.

¹⁵ FCPA refers to the U.S. Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1 to -3), the central anti-bribery and corruption law in the United States.

ABOUT THE AUTHORS

ARTHUR MIDDLEMISS practices law in the areas of financial crimes compliance. He has extensive experience planning, building, and running global financial crimes compliance programs, with a particular emphasis on anti-corruption and anti-money laundering. He provides strategic counsel to foreign and domestic entities seeking to mitigate regulatory, criminal and reputational risk. His expertise includes securities and other fraud-related investigations. Previously, Middlemiss directed the anti-corruption program of one of the world's largest financial institutions, where he also held senior positions related to anti-money laundering compliance. He served as an Assistant District Attorney in the New York County District Attorney's Office. As Bureau Chief of Investigations Division Central, also known as DANY Overseas, Middlemiss supervised the investigation and prosecution of complex white collar criminal cases, focusing on matters involving securities fraud, international money laundering, tax evasion, and illegal money remitters. Middlemiss co-led the District Attorney's investigation into the role of financial institutions in Enron's collapse. He can be contacted at arthur.middlemiss@lewisbaach.com

HILLARY ROSENBERG, Counsel at Lewis Baach Kaufmann Middlemiss, practices in the area of financial crimes compliance. She provides strategic counsel to foreign and domestic entities seeking to mitigate regulatory, criminal and reputational risk in the areas of anti-money laundering, anti-corruption, and sanctions. Her practice also includes internal corporate investigations and white-collar criminal representation.

Prior to joining the firm, Rosenberg was Vice-President and Compliance Director of the Global Anti-Corruption Program at JPMorgan Chase & Co., where she designed and executed an enterprise-wide compliance program to mitigate corruption-related risk. Her experience included working with the firm's lines of business to develop, implement and evaluate global compliance controls relating to gifts & entertainment, third-party intermediaries, and majority-controlled entities. Rosenberg also helped create the annual risk assessment, devised and delivered compliance-related training, and conducted internal investigations regarding employee misconduct. Previously, Rosenberg served for seven years as an Assistant District Attorney in the Manhattan District Attorney's Office, where she investigated and prosecuted a variety of violent and white-collar criminal offenses, including securities, money laundering and complex financial fraud cases. She can be contacted at hillary.rosenberg@lewisbaach.com.