

## Whitepaper: A Summary of Human Trafficking Compliance Challenges

### I. Introduction

January 2014 was National Slavery and Human Trafficking Prevention Month in the United States. By proclamation, the President asked us “to recognize the vital role we can play in ending all forms of slavery.”<sup>1</sup> To that end, we examine recent legislative attention to the human trafficking crisis, discuss the resulting compliance challenges, and suggest that compliance controls developed in the anti-money laundering (“AML”) and anti-bribery and corruption (“ABC”) spaces can be leveraged to execute human trafficking-specific compliance requirements.

AML and ABC compliance regulations were born of the best intent: to eradicate massive global problems. The regulations resulted in astronomical corporate compliance spending, but few would argue that money laundering or corruption are less serious problems today than they were ten years ago.<sup>2</sup> Likewise born of good intent, robust new regulations will require more companies to invest in formal human trafficking-specific compliance controls. We hope ten years hence the regulations will be credited with a marked and material decrease in human trafficking activity.

Whether successful or not, from an operational perspective, just as in the AML and ABC compliance spaces, implementing human trafficking-related controls such as risk assessments, training, testing and commensurate policies and procedures will be standard discussion topics. 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.”

We suggest that compliance wheels do not need to be re-invented. That is because compliance disciplines developed in the AML and ABC spaces overlap significantly with those required to measure and mitigate human trafficking risk, including risk assessment processes and onboarding due diligence measures. The challenge for many companies will be to re-focus existing compliance mechanisms, not to create wholly new compliance processes.

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<sup>1</sup> White House, Office of the Press Secretary, *Presidential Proclamation – National Slavery and Human Trafficking Prevention Month, 2014* (Dec. 31, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/12/31/presidential-proclamation-national-slavery-and-human-trafficking-prevent>.

<sup>2</sup> The Global Financial Integrity Group found that within the developing world, illicit monetary outflows increased from 2002-2011. According to the report, in 2011, the developing world lost US\$946.7 billion in illicit outflows, representing a 13.7% increase over 2010. Overall, from 2002 to 2011, illicit outflows increased at an average rate of 10.2% per year over the decade, which significantly outpaced GDP growth. Global Financial Integrity, *Illicit Financial Flows from Developing Countries: 2002-2011*, December 2013, available at [http://iff.gfintegrity.org/iff2013/Illicit\\_Financial\\_Flows\\_from\\_Developing\\_Countries\\_2002-2011-LowRes.pdf](http://iff.gfintegrity.org/iff2013/Illicit_Financial_Flows_from_Developing_Countries_2002-2011-LowRes.pdf).

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## *II. The Scope of the Human Trafficking Problem*

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.<sup>3</sup> 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.*<sup>4</sup>

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.<sup>5</sup> 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).<sup>6</sup> In a September 2012 speech directing the government to strengthen its response to human trafficking, President Obama articulated the fundamental reasons why the issue requires attention:

*It ought to concern every person, because it's a debasement of our common humanity. It ought to concern every community, because it tears at the social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name – modern slavery.*<sup>7</sup>

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<sup>3</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 3, *opened for signature* Dec. 12, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319, *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%202237/v2237.pdf>.

<sup>4</sup> U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Human Trafficking*, <http://www.ice.gov/human-trafficking/> (last visited Mar. 28, 2014).

<sup>5</sup> 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/> (last visited Mar. 28, 2014).

<sup>6</sup> State of California Department of Justice, Office of the Attorney General, *Human Trafficking*, <http://oag.ca.gov/human-trafficking/> (last visited Mar. 28, 2014).

<sup>7</sup> The White House, Office of the Press Secretary, *Fact Sheet: the Obama Administration Announces Efforts to Combat Human Trafficking at Home and Abroad* (Sept. 25, 2012) *available at* <http://www.whitehouse.gov/the-press-office/2012/09/25/fact-sheet-obama-administration-announces-efforts-combat-human-trafficki>

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Nevertheless, some still believe human trafficking is a “somewhere-else” problem, i.e., a crime that happens in other countries, but could not possibly take place in the U.S. Evidence to the contrary abounds. For example, a prostitution study conducted during the week of the 2014 Super Bowl revealed some 38 websites promoting individuals who appeared to be juvenile sex trafficking victims.<sup>8</sup> Moreover, per the Bureau of Justice Statistics, during the period from January 2008 to June 2010, federally funded task forces opened some 2,500 human trafficking investigations.<sup>9</sup> 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:<sup>10</sup>

- a Florida man convicted after selling drugs to young women to get them addicted, then forcing the women into prostitution by threatening to confiscate their drugs and cause them to suffer withdrawal.<sup>11</sup>
- a man in Washington State convicted after recruiting runaway minors with promises of food and shelter in return for money earned by prostitution;<sup>12</sup>
- a man and woman in Washington State convicted after forcing a 19-year-old woman into servitude by withholding her passport and other identification documents and isolating her in their home;<sup>13</sup>
- a group of men in western New York convicted after harboring undocumented Mexican immigrants whom they forced to work in restaurants by the use of force and threats of legal action;<sup>14</sup>
- a Pennsylvania woman 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 for eleven hours a day, seven days a week.<sup>15</sup>

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<sup>8</sup> Arizona State University, School of Social Work, Office of Sex Trafficking Intervention Research, *Exploring Sex Trafficking and Prostitution Demand During the Super Bowl 2014*, at 6 & 11 (Mar. 2014), <https://ssw.asu.edu/research/stir/exploring-sex-trafficking-and-prostitution-demand-during-the-super-bowl-2014> (last visited Apr. 1, 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 from individuals seeking services and potential traffickers offering employment opportunities.

<sup>9</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Characteristics Of Suspected Human Trafficking Incidents, 2008-2010* (Apr. 2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2372> (last visited Apr. 1, 2014).

<sup>10</sup> University of Michigan Law School, Human Trafficking Law Project Database, [www.law.umich.edu/clinical/HuTrafficCases/pages/searchdatabase.aspx](http://www.law.umich.edu/clinical/HuTrafficCases/pages/searchdatabase.aspx) (last visited Apr. 1, 2014). The United Nations Office on Drugs and Crime also maintains a database tracking human trafficking cases worldwide. The database contains 146 cases from the U.S., the largest number of human trafficking cases reported and tracked in the database. See <https://www.unodc.org/cld/search.jsp?> (last visited Apr. 1, 2014).

<sup>11</sup> *United States v. Fields*, No. 8:13-cr-198-T-30(TGW), 2013 U.S. Dist. LEXIS 135763 (M.D. Fla. Sept. 18, 2013).

<sup>12</sup> Second Superseding Indictment, *United States v. Hampton*, No. CR08-5671 (BHS) (W.D. Wash. Apr. 30, 2009).

<sup>13</sup> Indictment, *United States v. Kenit*, No. 3:11-cr-05182-RJB (W.D. Wash. Mar. 24, 2011).

<sup>14</sup> *United States v. Mireles*, No. 08-CR-00349, 2009 U.S. LEXIS 109176 (W.D.N.Y. Nov. 23, 2009).

<sup>15</sup> *United States v. Phan*, 628 F. Supp. 2d 562 (M.D. Pa. 2009).

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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 the laws enacted, the resulting new compliance requirements, and the actions companies may be able to take to leverage existing compliance mechanisms to satisfy the new requirements.

### **III. Recent Legislative Reaction Designed to Stop Human Trafficking**

#### **A. Federal Reaction – Legislation Targeted at Government Contractors**

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.<sup>16</sup>

In 2006, through enactment of the Federal Acquisition Regulation (“FAR”), the government began to provide the TVPA’s blanket prohibition with regulatory teeth. Without substantial guidance about how or when to do so, the FAR mandated that contractors inform their government contracting officer of information received “from any source” that alleged “severe” forms of human trafficking engaged in by a contractor, its employee, subcontractor, or subcontractor’s employee.

Today, additional human trafficking regulatory requirements are swiftly coming into sharp focus. The most significant events are three:

1. An October 2012 Executive Order, entitled “Strengthening Protections Against Trafficking in Persons in Federal Contracts” (the “2012 Order”);<sup>17</sup>
2. A January 23, 2013 amendment to the Fiscal Year 2013 National Defense Authorization Act (“NDAA”), which contains Title XVII, entitled “Ending Trafficking in Government Contracting” (the “ETGCA”);<sup>18</sup> and
3. The September 26, 2013 FAR- and Department of Defense-issued proposed rules, published in response to the 2012 Order and the ETGCA (the comment period ended December 20, 2013) (the “proposed FAR Rule”).<sup>19</sup>

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<sup>16</sup> The Trafficking Victims Protection Act of 2000 (the “TVPA”) 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.

<sup>17</sup> Exec. Order 13627, 77 Fed. Reg. 60,029 (Oct. 2, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>.

<sup>18</sup> National Defense Authorization Act for Fiscal Year 2013, H.R. Res. 4310, 113<sup>th</sup> Cong. (2013)(enacted)

<sup>19</sup> The original deadline for public comments was November 25, 2013.

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

**i. 2012 Order**

The 2012 Order, among other things, clarified compliance requirements for U.S. government contractors. Specifically, the Order strengthened the FAR by prohibiting specific activities:

- Charging employees recruitment fees;
- Denying employees access to their passports, drivers' licenses and other identification;
- Using misleading recruitment practices such as providing false information about wages, living conditions, or work locations;
- In overseas projects, refusing to pay return transportation costs at the end of employment for third-country nationals who traveled specifically to work on the contract.

**ii. ETGCA**

With the ETGCA, Congress significantly expanded the definition of human-trafficking related activity and increased criminal penalties for contractors who engage in those activities. The ETGCA not only prohibits severe forms of trafficking, as defined by the TVPA, but also criminalizes activities by contractors, subcontractors, grantees and sub-grantees that “directly support or advance trafficking in persons.” These acts include:

- Making false or misleading representations related to wages or working conditions when soliciting or offering employment;
- Charging employees unreasonable or illegal recruitment or placement fees;
- Failing to provide housing consistent with the safety standards applicable in the host country (if housing is provided);
- Confiscating or denying employees access to identity documents;
- Refusing to pay return transportation costs for employees outside the U.S. to the country from which they were recruited.

Furthermore, government contractors must obtain “compliance certifications” from all overseas contractors whose work is performed outside the U.S. and is valued at more than US\$500,000. Contractors must certify that they have implemented procedures to prevent, monitor, detect and react to human trafficking related activity, and that they have not and will not engage in human trafficking-related activity during the period of contract performance.

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In addition to obtaining compliance certifications, the ETGCA requires government contractors to refer reports of “credible information” to their agency inspector general. The ETGCA outlines what actions the agency must consider in response to the allegations, including suspension and debarment of the contractor.

**iii. Proposed FAR Rule**

Going beyond the TVPA’s original outright prohibition of engaging in human trafficking, and building on the rules espoused in the 2012 Order and the ETGCA, the proposed FAR Rule sets forth the strictest standards. Notably, where the 2012 Order and the ETGCA differ, the proposed FAR Rule generally adopts the more onerous standard. For example, the 2012 Order and ETGCA differ in that the ETGCA prohibits outright the charging of employee recruitment fees whereas the 2012 Order prohibits only “unreasonable” recruitment fees; adopting the more onerous standard, the proposed FAR Rule prohibits all recruitment fees.

**a. Government Contractors Must Implement a Compliance Plan**

The proposed FAR Rule requires government contractors to implement a “compliance plan” “appropriate to the size and complexity of the contract and to the nature and scope of the activities performed.”<sup>20</sup> With some significant additional burdens, described below, the basic elements of the “compliance plan” will be familiar to AML and ABC compliance practitioners. In short, the “compliance plan” resembles closely a traditional “four-pillar” compliance program.

The basic elements of the proposed FAR Rule “compliance plan” require relevant contractors to:

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

Specific compliance requirements applicable to all U.S. government contracts (regardless of contract value or where the contract is performed) include the development of policies that prohibit:

- Destroying, concealing, confiscating or otherwise denying access to an employee’s identification documents;

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<sup>20</sup> Federal Acquisition Regulation, Ending Trafficking in Persons, 187 Fed. Reg. 78, 59317, 59319 (September 26, 2013) (to be codified at 48 C.F.R. Parts 1, 2, 9, 12, 22, and 52).

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- Using misleading or fraudulent practices during the recruitment of employees (e.g., failing to disclose basic information or making material misrepresentations about the key terms and conditions of employment);
- Charging employees recruitment fees;
- Providing or arranging housing that fails to meet the host country’s housing and safety standards; and
- Failing to provide a written employment contract, in the employee’s native language, prior to the employee’s departure from their country of origin.

In addition, with respect to all contracts, the proposed FAR Rule would require policies that require contractors to provide workers with:

- Provide return transportation or pay the cost of return transportation upon the end of employment (for employees who are not nationals of the country where the work takes place, and who were brought to that country to perform the work); and
- Whistleblowing and reporting procedures that
  - require all employees suspected of being victims of or witnesses to human trafficking activities to be interviewed, and protected, prior to their return to their country of origin; and
  - do not hinder or prevent suspected human trafficking victims from being witnesses for or fully cooperating with government authorities.

**b. Contract-Specific Compliance Plan Required for Overseas Work Valued Over US\$500,000**

The proposed FAR Rule would impose additional requirements on contracts exceeding \$500,000 and where the work is performed outside the U.S. In addition to implementing an anti-human trafficking compliance plan, as described above, for each contract performed outside the U.S. (except for contracts involving the purchase of commercially off-the-shelf items), the contractor is responsible for:

- Ensuring that the contract-specific compliance plan is “appropriate to the size and complexity of the contract and to the nature and scope of the activities performed, including the risk that the contract will involve services or supplies susceptible to human trafficking;”
- Providing the contract-specific compliance plan to the U.S. government contracting officer upon request;
- Posting the relevant contents of the contract-specific compliance plan, no later than the initiation of contract performance, at the workplace and on the contractor’s web site (if it has one).

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Furthermore, in addition to the compliance plans elements described above overseas contracts exceeding \$500,000 must also include:

- An awareness (training) program covering:
  - The U.S. government’s zero-tolerance policy on human trafficking;
  - The specific trafficking-related activities that are prohibited; and
  - The actions that will be taken against employees for violations of the zero-tolerance policy;
- A recruitment and wage plan that permits only the use of recruitment companies with trained employees, prohibits charging recruitment fees to employees, and ensures that wages are consistent with host country legal requirements (or explains any variance);
- A housing plan, if applicable, that ensures housing provided to or arranged for employees meets the host country’s housing and safety standards (or explains the variance);
- Procedures to prevent agents and contractors at any tier from engaging in human trafficking, and to monitor, detect, and terminate any agents, subcontractors, or subcontractor employees that engage in such activities.

**c. Government Contractor Compliance Certifications**

The proposed FAR Rule would also require a government contractor to certify, prior to receiving an award and annually thereafter, that it has “implemented a compliance plan to prevent prohibited activities” and “to monitor, detect, and terminate any agent, subcontract or subcontractor engaging in prohibited activities.” Having conducted due diligence, the contractor must further certify, to the best of its knowledge and belief, that:

- Neither it nor any of its agents, subcontractors or their agents is engaged in any trafficking in persons or activities, or
- If abuses have been found, the contractor or subcontractor has taken the appropriate remedial and referral actions.<sup>21</sup>

**d. Whistleblowing, Reporting and Cooperating**

The proposed FAR Rule also includes reporting and government cooperation requirements. Specifically, contractors would be required to inform both the government contracting officer and the relevant agency’s inspector general “immediately” if it receives “[a]ny credible information” “from any source” alleging that a contractor’s employee, subcontractor, subcontractor employee or their agent engaged in human trafficking-related activity.<sup>22</sup> In

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<sup>21</sup> Federal Acquisition Regulation, Ending Trafficking in Persons, 187 Fed. Reg. 78 at 59325.

<sup>22</sup> *Id.* at 59324.



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addition, contractors must cooperate fully in providing reasonable access to its facilities and staff (both inside and outside the U.S.) to allow contracting agencies and other responsible enforcement agencies to conduct audits, investigations, or take other actions to ascertain compliance with the TVPA.<sup>23</sup>

*e. Enforcement of the Proposed FAR Rule*

For its part, the government retains vast power to enforce the proposed FAR Rule on the basis of suspicion of misconduct alone. The government, if it determines “in writing that adequate evidence exists to *suspect*” that a contractor engaged in human trafficking activity or violated any of the above-described compliance requirements, may pursue a full range of remedies, including requiring the contractor to remove a specific employee from the performance of a contract, suspending payments on a contract, termination of the contract and debarment or suspension of the contractor.<sup>24</sup> Familiar to compliance professionals in the ABC space, the proposed FAR Rule also includes specific mitigating and aggravating factors that the government will consider in determining an appropriate remedy for human trafficking violations. In particular, the government contracting officer will consider as aggravating factors a contractor’s failure to stop an alleged violation, or enforce the requirements of a compliance plan, when directed to do so by the contracting officer. On the other hand, the government contracting officer will also consider as mitigating factors whether the contractor had a compliance plan or awareness program in place at the time of the violation, and whether the contractor was in compliance with the plan.

**B. State Reaction**

In addition to the federal regulations, all 50 states and the District of Columbia have statutes criminalizing human trafficking.<sup>25</sup> The existence of state laws to punish and deter trafficking is essential because often the federal laws are unable to detect localized instances of trafficking through routine inspections, investigations and surveillance of local businesses.<sup>26</sup>

In June 2013, the Human Trafficking watchdog, Polaris, conducted a study that assessed the anti-trafficking laws and their implementation in all 50 states. Polaris rated each state in a tier from 1 to 4, with the Tier 1 states demonstrating the most significant commitment to combatting human trafficking. According to the study, 32 states were rated Tier 1, 11 states and D.C. were rated Tier 2, and 6 states were rated Tier 3. North Dakota was the only state rated Tier 4, as it has not made even minimal efforts to enact a basic legal framework to combat human trafficking.<sup>27</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 59323 (emphasis added).

<sup>25</sup> 2013 *Analysis of State Human Trafficking Laws*, Polaris Project, August 2013, available at [http://www.polarisproject.org/storage/2013\\_State\\_Ratings\\_Analysis\\_Full\\_Report.pdf](http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf).

<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Id.* at 2-3.

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While the rankings measure the states' framework to combat human trafficking, punish the traffickers, and support the victims, it does not detail which states require companies to take affirmative acts to prevent human trafficking in supply chains by implementing compliance programs.

However, in 2010, California passed a law that requires businesses doing business there to implement an anti-human trafficking compliance controls in order to comply with the California Transparency in Supply Chains Act of 2010 (Civil Code §1714.43) (the "California Act"). Per the California Act, all retailers and manufacturers doing business in the state with annual worldwide gross receipts exceeding \$100 million must disclose "its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale." Retailers and manufacturers must publicly disclose their efforts on their web sites, or make it available to consumers upon request. The disclosure must reveal whether the company:

- Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery, including whether the verification was conducted by a third party;
- Conducts audits of suppliers to ensure their compliance with company standards, and whether the verification was an independent, surprise audit;
- Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of countries where they are doing business;
- Provides relevant employees (who have direct responsibility for supply chain managements) with training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chain; and
- Implements procedures to hold accountable employees or contractors failing to meet company standards regarding human trafficking.

The California Act became effective on January 1, 2012. Injunctive relief is the only remedy specified for failure to implement the required compliance controls, although severe punishments are available under California laws for engaging in human trafficking, either directly or indirectly.<sup>28</sup>

Increased state attention to this issue is a predictor that state regulations will follow the federal law trend and require companies to implement anti-human trafficking compliance programs, just as they have done in California.

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<sup>28</sup> State of California Department of Justice, Office of the Attorney General, *Human Trafficking Legislation*, at <http://oag.ca.gov/human-trafficking/legislation> (as of January 13, 2014).

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#### **IV. Compliance Program Integration**

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 best to execute these new requirements? The best answer may be to look at and seek to leverage existing compliance mechanisms to collect, synthesize and react to similar problems, i.e., those posed by AML and ABC risk.

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. Operational efficiencies can be achieved by bundling together AML, ABC and human trafficking compliance structures within the same program. Below, we provide examples.

##### **A. Risk Assessment**

By now, it is customary in the AML and ABC spaces to declare that a formal, documented, regularly updated risk assessment must be completed to design and implement an effective compliance program. The same could easily be said of human trafficking compliance. Indeed, the substantial substantive overlap inherent to assessments of AML, ABC, and human trafficking risk means that all three types of assessments could be conducted simultaneously, leveraging the same compliance execution resources.

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 throughout the globe, and identify the controls in place to mitigate the resultant ABC risk. Common controls include contractual representations and warranties, training, and documented due diligence. Like controls are required to govern human trafficking risk in supply chains. Accordingly, slight alteration and

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addition to an existing risk assessment template may help a company assess multiple risks through one compliance exercise.<sup>29</sup>

Broadly stated, both AML and ABC compliance programs are concerned with due diligence: how much, how often, and on what types of customer/agent/counterparty. Adequate and effective due diligence can help companies identify and respond to third party risks. This is essential because regulators can be expected to be singularly unimpressed by the “head-in-the-sand” defense, i.e., “how was I supposed to know the client/vendor/third party finder was engaged in human trafficking.” Under the above-described regulations, companies are required to conduct commensurate 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 risk-based approach spelled out in the November 2012 SEC/DoJ authored FCPA compliance guidance ([Link to Guidance](#)) (“FCPA guidance”).<sup>30</sup> As described in the FCPA guidance, standard due diligence requires an understanding of a third party’s:

- corporate structure;
- qualifications for the proposed engagement;
- business reputation;
- involvement in high risk industry/sectors; and
- more generally, the business rationale for engaging the third party, including the whether the cost of the contract reflects market and industry practice.

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 an onsite visit; and

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<sup>29</sup> Another example: an ABC risk assessment will measure the extent to which a company operates in countries perceived to present high corruption-related risk. A direct correlation appears to exist between those countries and human trafficking risk. See Corruption & Labor Trafficking in Global Supply Chains, White Paper, December 2013, Verite, available at

[http://www.verite.org/sites/default/files/images/WhitePaper\\_Corruption%26Labor%20Trafficking%20FINAL.pdf](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.

<sup>30</sup> U.S. Department of Justice and Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (November 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

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- review of relevant policies and procedures, including an ethics/code of conduct, and other documents demonstrating a commitment to ethical and lawful business practices.

Additional areas that could be covered to identify potential human trafficking red flags include evaluating:

- whether the third party agrees to complete work in an unreasonably short period of time;
- whether the rates are below market;
- whether the third-party intends to outsource some or all of the work;
  - If work will be outsourced, due diligence must be conducted on the outsource recipient.
- whether the labor hired to perform the work will be obtained through agencies, labor brokers, or require the paying of recruitment fees;
  - If so, additional due diligence should be conducted on those agencies and brokers to ensure not only that they are not employing trafficked labor, but also to mitigate the high corruption/bribery risk associated with such arrangements;
- the physical location or building type in which the laborers will work (e.g. a warehouse compared with an office building);
- the workplace practices impede worker freedom and living conditions (e.g. passport retention and poor quality living conditions);
- unexplained fees and costs that may passed on to the company; and
- whether there is an overall lack of transparency regarding the third party's workforce conditions and recruitment.

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

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

## **B. 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, itself is a kind of 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;

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- 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 companies posing higher human trafficking risk, periodic monitoring protocols could be employed. These protocols might include requesting updated third party due diligence more frequently, exercising audit rights, providing periodic training to relevant employees, and requesting annual compliance certifications.

### **C. Confidential Reporting and Internal Investigations**

Like their AML and ABC counterparts, effective human trafficking compliance programs would include mechanisms and procedures that allow individuals to report confidentially allegations of trafficking, without fear of retaliation. As discussed below, employee training on reporting hotline procedures should reference human trafficking issues, and the individuals that receive the calls should receive commensurate 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.

### **D. Training Program**

Training is vital to communicating to employees the policies and procedures they are expected to know and follow. Who receives training, how often training is provided, and the method of training (e.g. on-line 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 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 used to track AML and ABC training can be used to document human trafficking compliance training.

Where appropriate, agents of the company and other high risk third parties, such as labor brokers, likely 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.

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### **E. 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, and that its policies and practices have been integrated into the company's operations and culture, in both principle and substance. While a company's general audit group may perform this testing function, it can be beneficial in demonstrating a robust compliance program to regulators that testing was conducted by an independent third party outside the company.

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 remediation and disciplinary measures.

### **V. 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 these changes to their compliance plan and takes steps to update their plans that are commensurate with the expected requirements.

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