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'Setting a higher bar' for modern slavery due diligence: A conversation with Kate Dunbar

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Modern slavery within the supply chain has risen to the forefront of compliance officers' concerns, especially in the last five years, as jurisdictions around the globe erect regulatory frameworks with the goal of ultimately eradicating modern slavery. We interviewed Kate Dunbar, Senior Business & Human Rights Analyst at Assent Compliance Inc., about the regulations currently in place and how they compare. Below is an edited version of Ms. Dunbar's written responses to our questions. Look for follow-ups on these topics in future issues of RSCC.

RSCC: Which regulations are the most important for a compliance officer to know and understand?

KD: Since 2015, modern slavery laws have proliferated, from one jurisdiction to the next. Between one and three new laws have been enacted globally each year, and the result is a seemingly complex web of differing requirements impacting businesses across verticals and geographies. In the eyes of many compliance professionals, it may not seem possible to take a single approach to meeting all of their requirements and protecting their organizations from risk; however, this is not the case. Although these regulations vary in their scope, nature and requirements, they are aligned in their intent to eradicate modern slavery in supply chains, and all point to the same path for companies to take—that of robust modern slavery supply chain due diligence.

RSCC: How can compliance officers navigate the regulatory framework in the best possible way?

KD: To better understand how to navigate this regulatory framework, let us first untangle the different types of regulations we are facing. Loosely speaking, these laws can be categorized into three buckets.

First, we have the transparency modern slavery laws. These include the pioneer [California Transparency in Supply Chains Act \[of 2010\]](#), followed by the [U.K.'s 2015 Modern Slavery Act](#) and, most recently, the [New South Wales Modern Slavery Act](#) and [Australia's federal Modern Slavery Act 2018](#), which were both enacted in 2018. These laws require companies to publicly report on the extent of their efforts to address modern slavery in their operations and supply chains, and the requirements of each new regulation are stricter than the last. Companies within the scope of several of these laws should seek to clear the highest bar possible, ensuring that a single statement meets the requirements of all relevant legislation.

Second, we have due diligence laws. These laws look beyond reporting, requiring companies to take action to address modern slavery risks in their supply chains. Such laws include [the 2015 U.S. Federal Acquisition Regulation \(FAR\) 52.222.50 on Combating Trafficking in Persons](#), and the [2017 French Corporate Duty of Vigilance Law](#). Similar due diligence laws are also currently under consideration in the Netherlands and Switzerland.

Third, we have U.S. trade laws. These include the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) and the [ban on North Korean forced labor](#) under the [2017 Countering America's Adversaries Through Sanctions](#)

Act (CAATSA). By closing the loophole of “consumptive demand exemption” in the U.S. Tariff Act of 1930, the TFTEA effectively prohibits the import of goods made with forced, child or indentured labor into the U.S. Meanwhile, Title III of CAATSA puts forward the presumption that North Korean labor equates to forced labor, and is, therefore, prohibited under the TFTEA. The burden is on companies to conduct sufficient due diligence to be able to prove to enforcement agencies — in this case, U.S. Customs and Border Protection and the Office of Foreign Assets Control — that these labor rights abuses and, in the case of CAATSA, sanctions regulations violations did not occur in the procurement or production of their goods.

When determining the course of action to take in addressing modern slavery risk, companies must be broad in their considerations. If they limit themselves by only assessing which regulatory requirements they are in scope of, they will fail to understand the many ways in which modern slavery risk can negatively impact their businesses. Regulatory compliance is only one part of the puzzle.

Companies intent on protecting their brands, businesses and stakeholder relations must consider the negative impacts that could result from failing to conduct modern slavery due diligence. The regulations I have mentioned here point to the need for companies to ensure robust modern slavery supply chain due diligence, which, according to the United Nation’s Guiding Principles on Business and Human Rights, is an ongoing risk management process. This includes the identification, mitigation and prevention of risks, and accounting for how risks are being addressed in the supply chain. It is the blueprint for a single approach to meeting multiple and fast-evolving regulatory requirements.

RSCC: How do the various regulations compare, in terms of effectiveness in combating modern slavery?

KD: The U.S. has a number of modern slavery regulations impacting business, and, as the largest importer in the world, its ban on the import of goods made with forced and indentured child labor is far-reaching, impacting companies globally. In addition to TFTEA and CAATSA, another key piece of U.S. modern slavery legislation is the Trafficking Victims Protection Act of 2000, which creates civil liability for corporate negligence toward forced labor in the supply chain.

Companies that have contracts with the U.S. federal government must ensure compliance with this act. Certain companies with contracts above USD 500,000 must provide a compliance plan outlining the actions they have taken to mitigate the risk of human trafficking and slavery in their operations and supply chains.

The U.S. has led the way with the TFTEA ban on forced labor, but it falls behind other countries, such as the U.K. and Australia, which have national-level modern slavery transparency laws in place, and France, which has enacted its Corporate Duty of Vigilance Law. Watch this space, however, as the U.S. House of Representatives is currently considering the federal Business Supply Chain Transparency on Trafficking and Slavery Act.

RSCC: How strong is enforcement of these regulations? Is the U.S. framework strong on paper but weak on action?

KD: Enforcement of U.S. modern slavery legislation is hard to track and varies from one regulation to the next. While we know that compliance with the U.S. Federal Acquisition Regulation is closely monitored by contracting officers, we do not have visibility into contracts lost as a result of failure to comply with the regulation.

Enforcement of the TFTEA ban on importing goods made with forced or indentured child labor is more straightforward. Customs and Border Protection is responsible for enforcing the TFTEA, and information about withhold release orders issued under the act can be found on the agency’s website. Since the TFTEA was enacted, seven withhold and release orders have been issued on the import of goods coming from China, Turkmenistan

and, most recently, Taiwan.

The impact of the Trafficking Victims Protection Act is much easier to track, with around 300 lawsuits filed in recent years and verdicts in the tens of millions of U.S. dollars, including high-profile cases involving Tesla, Inc., Signal International, LLC and Phatthana Seafood Co. Ltd.

Since CAATSA was signed into law in August 2017, one company has been fined for violation of North Korean forced labor sanctions. A cosmetics company, e.l.f. Cosmetics, avoided a USD 40-million penalty through a settlement with the Office of Foreign Assets Control, resulting in a significantly reduced fine of USD 1 million; however, the number of requests for information sent out to companies by enforcement agencies with regards to their compliance with sanctions regulations is unknown.

Overall, while we are seeing increased scrutiny and commitment from U.S. enforcement agencies around modern slavery laws, instances of publicly known enforcement action remain scarce. Public interest is on the rise, however, along with investor and NGO scrutiny. Benchmark reports, guidance, boycotts and media coverage of companies' efforts to address modern slavery, or lack thereof, frequently make the headlines.

Regulatory requirements are often not the key driver for addressing modern slavery risk in the supply chain. The negative impacts resulting from a failure to conduct modern slavery due diligence extend well beyond those related to law enforcement, and include lack of investment, loss of business, supply chain disruption, damage to brand image and consumer boycotts. Consumer-facing companies know all too well the importance of safeguarding their reputations, especially in an age where consumers are seeking out corporations that take a stand on issues they care about, as demonstrated by Nike, Inc.'s decision to feature Colin Kaepernick in a recent ad campaign. In the electronics sector, for instance, major brands are setting their own supply chain requirements and working with suppliers to address modern slavery risk. Although regulators play an essential role, they are far from the only influential stakeholders taking on the task of setting a higher bar for corporate accountability around modern slavery risk in global supply chains.

Takeaways

- Modern slavery has moved decisively into the mainstream. Regulations governing how companies manage their supply chains are proliferating across the globe.
- Despite the strong regulations in place in major economies across the world, regulation alone is not the driver of compliance. Mitigating the risks to brand, reputation and pressure from consumers are also essential drivers of compliance.

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