Business and Ethical Challenges: Human Rights Requirements, Due Diligence, Remediation and Brand Protection

Table of Contents

1. Abstract


4. Short Summary of 2018 Model Report and Model Clauses

5. Frequently Asked Questions about the 2018 Report and Model Clauses

6. Getting the Right Balance: Mapping the ABA’s Model Supply Chain Contract Clauses to the UN Guiding Principles on Business and Human Rights by John F. Sherman, Ill

7. U.S. Customs and Border Protection Materials
   a. CBP Trade and Travel Report – Fiscal year 2018
   b. Reasonable Care: An Informed Compliance Publication
   c. Prior Disclosure: An Informed Compliance Publication

8. Continuum of Corporate Response to Human Rights in Supply Chains and Attorney–Client Privilege Hypothetical


10. Panel Participant Bios
1. Abstract for Business and Ethical Challenges: Human Rights Requirements, Due Diligence, Remediation and Brand Protection
This Program will (1) provide a brief summary of the cycle of human rights violations in supply chains and summarize the growth of legislative and investor focus on supply chain human rights issues; (2) present feedback and suggested revisions to the 2018 Report and Model Contract Clauses for International Supply Contracts from the Uniform Commercial Code Committee’s Working Group to Draft Human Rights Protections in International Supply Contracts; (3) provide practical supplier contracting and due diligence recommendations, tools and risk assessment procedures to avoid human rights abuses; and (4) address attorney ethical obligations and the attorney-client privilege in supply chains as well as in merger and acquisition transactions.

Human rights violations in the work force (no or insufficient pay, dangerous hourly demands, toxic exposure on the job site and/or sub-standard housing, etc.) most often appear to involve the lower or lowest rung of a multi-tier international supply chain. Typically, this is the result of a breakdown in the company’s internal controls and due diligence processes. Red flags slip through the cracks and go unresolved, causing legal, financial and reputational damage that cannot always be fully repaired. As more and more countries outside of the United States adopt law to fight human rights violations, properly assessing the risk of human rights violation within the company’s supply chain and implementing an effective vendor risk management program to assure compliance is essential to ensure that goods are not tainted by modern slavery, child labor or other human rights violations.

The work necessary for coordination of the efforts of the company’s internal legal, compliance and procurement departments, however, can be daunting. Corporate resistance and real challenges encountered in drafting human rights policies and contract provisions, including the possible increase in the risk of litigation, have to be addressed. The role of proposed contract provisions that are legally effective and operationally likely given the scope of enterprises, diversity of interests and persons affected by these issues will be considered by the Panelist, along with discussions of the importance of a buyer’s code of conduct and contract remedies structured to best further future remediation of human rights violations. An effort will be made by the Panel to map the Working Group’s Model Clauses to the UN Guiding Principles on Business and Human Rights.

Informed by the Panelists’ knowledge of global policies and procedures, advice will be provided as to how to develop an enterprise-wide understanding of, and commitment to, human rights (health and safety requirements, anti-forced labor, child labor and indentured labor constraints) while optimizing market-specific approaches. In addition, the Panel will discuss tools for developing meaningful reporting and diligence strategies
to complement existing compliance systems and anticipate regulatory and litigation trends. The role of U.S. Customs and Border Protection (CBP) to mitigate the risk of forced labor-produced goods from entering the U.S. under the Tariff Act of 1930, as amended by the Trade Facilitation and Trade Enforcement Act of 2015, will be explained along with CBP authority to detain goods by issuing withhold release orders at the ports of entry if information reasonably, but not conclusively, indicates that merchandise is made with forced labor. Relevant portions of the Reasonable Care publication from CBP will be reviewed, and what CPB auditors look for in trying to determine whether imported goods are tainted by convict, forced or indentured labor along with practical steps companies can take in any forced labor inquiry will be addressed.

The Panel will discuss how a lawyer should advise a client given the ethical, business, social and moral issues that are implicated along with the ever growing international legal requirements. The Panel intends to point out that the multiple aspects of potential liability for exploitative labor practices (legal, moral and social) require increased vigilance as well as thoughtful prevention and remediation of harm caused in the process of imposing harsh delivery or price point demands upon those making a company's products. In addressing Brand Protection, the Panel will discuss both the need for proactive corporate initiatives in this context and the interesting question of who owns the attorney-client privilege after discovery of a human rights violation in the audit or due diligence process. The crime/fraud exception and constraints of the privilege will be examined especially in the context of a merger or acquisition when the buying company uncovers wrongdoing in advance of, or subsequent to, an acquisition and wishes to secure DOJ cooperation credit for successor liability after the transaction. ABA Model Rules 1.6(b)(1), 1.13(c), 1.16(b)(4) and 2.1 will be highlighted and Panelists will also be asked to explain how they would raise these professional responsibility issues in rendering advice.
2. Delivering value and managing risks: how human rights are relevant for business, Client Alert from White & Case (April 2019)
Delivering value and managing risks: how human rights are relevant for business

April 2019

Authors: Clare Connellan, Jacquelyn MacLennan, Rebecca Campbell, Owen Pell, Mark Clarke, Kirsti Massie, Kirsten Odynski, John Tivey, Tallat Hussain, Emiko Singh, Emily Holland, Rebecca Copcutt

Mounting pressure on businesses to gain clarity on their social and environmental footprint will challenge corporate operations in 2019. New risks are present but there are also opportunities for companies willing actively to engage.

Drivers for change are coming from many directions:

- **Growth of legal risks**: new laws with mandatory reporting, issue-specific litigation, sector norms and sanctions.
- **Wider stakeholder pressures**: benchmarking and increased activism from investors, shareholders, customers and civil society.
- **Global issues**: conflicts, climate change, environmental disasters and sustainable development.

Below we highlight six areas where human rights will feature prominently on board agendas in 2019.

**Role of investors**

*ESG information will influence investor decisions.*

Financial institutions and private investors are increasingly incorporating human rights into the environmental, social and governance (ESG) standards now influencing investment. The market is adding content to the “S” in ESG. Issues including modern slavery, worker and community health and safety, and freedom of expression are perceived as material to financial performance. Investors will need to keep abreast of evolving international frameworks, including the UN Principles for Responsible Investment and the European Commission’s Action Plan on sustainable finance.

**Reporting on High-risk supply chains**

*Corporate response to high-risk supply chains is under scrutiny.*

A range of mandatory reporting obligations require board level engagement, e.g.:

- In the UK, Government and civil society pressure is being exerted on organisations to issue compliant Modern Slavery Act 2015 statements to show how they address slavery in supply chains. An independent review of the Modern Slavery Act is expected in March 2019, alongside public disclosure of non-compliant companies.
• Australia’s Modern Slavery Act is now in force, with reporting obligations for companies operating in Australia with a turnover of more than AUS$100m.

• In France, the implementation of the French Duty of Vigilance law for the largest French companies requires risk-mapping of issues in the supply chain, a plan to manage risk and reporting back on its implementation.

• The Netherlands and Switzerland appear poised to introduce further reporting requirements on human rights due diligence in 2019.

• USA’s Global Magnitsky sanctions designations increase the compliance burden on companies to ensure they are not doing business with parties blacklisted for serious corruption or human rights violations.

Companies will need to identify potential risks, probe whether their policies and procedures are proportionate to the severity of risks and, outside their integrated supply chains, consider what commercial influence they can deploy in mitigation. Top of mind for many companies will be how to react appropriately in response to increasing (and in some cases, increasingly robust) requirements, and rising transparency expectations. This may be relevant even to companies not technically caught by current legislation. Conducting appropriate due diligence in a manner informed by the UN Guiding Principles on Business and Human Rights will be essential.

Focus on Corporate Accountability

Parent company tort litigation

A series of claims filed against parent companies for harms allegedly caused by foreign subsidiaries.

Current actions in the UK, US, Canada and France have exacerbated a troubling tension between increasing transparency about global corporate activity and supply chains and creating litigation risks. It remains to be seen whether disclosure-based suits in the US have a chilling effect on modern slavery disclosures and other statements of corporate commitment. In 2019, several judgments are expected that will give greater guidance to companies on liability in general and steps they should take to avoid and mitigate harm which could raise the stakes in how companies look at, and are judged on, these issues.

Climate Change Litigation

An increased sense of global urgency around climate change impacts and the development of national laws and international commitments are driving a growth in climate change litigation.

In 2018, there were nearly 1,000 ongoing climate change related cases internationally. Many of these cases indicate a trend linking environmental harms to adverse human rights impacts. In the Netherlands, the court determined that the Dutch government had breached the European Convention on Human Rights by failing to pursue a more ambitious greenhouse gas emissions reduction target for the end of 2020. In Colombia, the court ruled that the government's failure to reduce emissions from deforestation in the Amazon had breached fundamental constitutional human rights. In Australia, climate change was one of the grounds that the New South Wales Land and Environment Court used to uphold a refusal for planning permission for an open-cut coal mine. Recently, in the UK, the High Court ruled that the government's planning policy on shale gas was unlawful because of failure to take into account new scientific and technical evidence relating to greenhouse gas emissions. Public consultation on the policy was also ruled as "unfair and unlawful". Further landmark rulings expected in 2019 could impact the landscape of litigation, where success for the claimants would be expected to encourage the filing of similar lawsuits. One example is the much-publicised US constitutional case, Juliana v United States, where 21 individual youth plaintiffs are suing the US government on the grounds that it has failed to protect the rights of young people by promoting and subsidising the use of fossil fuels despite knowing their effect. Another proceeding to watch is the Philippines’ Human Rights Commission investigation into the corporate responsibility of 47 fossil fuel companies for climate-related human rights impacts. The findings of the Commission are expected to be published in June 2019.
Operating in conflict zones and institutionalising prevention of mass atrocities

Harnessing the power of the private sector in prevention efforts receives fresh focus.

Some governments are focused on institutionalizing the prevention of mass atrocities and managing business operations in conflict zones. Governments and law enforcement authorities increasingly see links between mass atrocity crimes in conflict zones and other serious crimes including slavery, corruption, money laundering, or sanctions avoidance. This issue is moving beyond a compliance issue to a board agenda item, especially for businesses operating or considering acquisitions in conflict-prone regions. Institutionalization also means helping states to engage in ongoing monitoring and direct and meaningful deterrence prior to the point of crisis management or intervention. Some states are encouraging public-private partnerships to deliver solutions in difficult areas, working with business to deliver stable solutions and support the rule of law. Non-state efforts to articulate the corporate role in conflict-affected areas and encourage implementation of practical tools in the form of international principles and guidelines at scale continues.

Transparency and benchmarking

The role of benchmarks as a catalyst for improving transparency and performance.

There has been a rapid expansion in the number of human rights and sustainability indices and metrics projects worldwide. The field is no longer small or easy to understand, and corporate engagement and strategies have been far from uniform. Some benchmarked companies view the ratings and rankings mechanisms as valuable opportunities to build transparency on corporate issues and action. Others engage in a far more limited fashion, if they engage at all.

By better understanding benchmarks that are being developed, businesses will have an opportunity to respond, as well as engaging with the creators of benchmarks to ensure their methodologies are sound and reflect business realities.

Corporate responses will no doubt shift as investors, shareholders, customers, regulators and other stakeholders begin to consider and apply the information and analysis furnished by benchmarks more seriously. The prominence of benchmarks will increase in 2019 as new benchmarks are introduced (e.g. by the World Benchmarking Alliance, The Maturity Institute) and methodologies become more focused and sophisticated.

Sector initiatives

Technology, financial services and extractives sectors have seen industry-specific challenges and new initiatives to engage with distinct concerns.

Technology

Technology companies are seen as forces for both good and bad in the area of human rights. On the one hand, technology has the potential to be a positive means of advancing human rights: freedom of expression is enhanced as information of abuses can be shared quickly and widely, local communities and international groups are empowered as they can mobilise and communicate cheaply and effectively. The use of blockchain may be transformative to encourage responsible sourcing and reduce child labour or human trafficking in supply chains.

On the other hand, technology companies are accused of restricting fundamental rights of privacy and ownership of personal data, and technology may facilitate the monitoring and repression of rights.

The use of technology to improve access to justice for individuals is under consideration in many countries, while the contribution of AI to the future of society is a matter of intense debate. Investors, activists and benchmarks track indicators relating to governance, privacy, security and expression, and some leading tech companies have formed the Global Network Initiative to consider these issues.
2019 will be a year where tech companies remain very much in the spotlight; media scrutiny will be high and focus will be on increasing regulation worldwide.

Financial Institutions

Over 90 financial institutions now publicly commit to the Equator Principles, setting the standard for social and environmental due diligence in project finance. In 2019, the Equator Principles will be updated again to include distinct human rights due diligence.

In addition, 28 banks joined forces with the UN Environment Programme Finance Initiative (UN EPFI) in 2018 to launch a global public consultation on defining the Principles for Responsible Banking. The financial services sector is seeing a broader transition towards the identification and mitigation of adverse human rights impacts from financial products and services. The UN EPFI Principles are currently under consultation, welcoming sector input on the relationship with the UN Guiding Principles on Business and Human Rights.

Financial Institutions typically experience negative human rights impact through the funding or investment of projects controlled by its customers, with the risk of "causing or contributing" to a human rights impact (as distinguished from "direct" or "indirect" impact in the UN Guiding Principles). Increasing numbers of responsible lenders undertake supplementary due diligence to ensure they are alert to possible human rights violations. The Dutch Banking Sector Agreement offers an opportunity for banks to improve their human rights due diligence, in line with the UN Guiding Principles.

Financial institutions also face the additional challenge of balancing client confidentiality with transparency. Supply chain and value chain risk management will present the biggest challenges.

Extractives

Extractives companies face heightened focus on rights of indigenous people, health and safety, security and workforce rights.

In the mining and metals sector, growing emphasis on ethics and sustainability issues from commercial customers, investors, regulators and industry initiatives continues to drive disclosures and technological advancements in supply chain practices.

Despite some lingering uncertainty regarding the future and enforcement of the US Conflict Minerals Rule, by and large companies are continuing to report and in many cases conduct due diligence on the use and provenance of 3TG and derivative metals in their products. Some will soon face similar compliance obligations pursuant to the EU Conflict Minerals Regulation, which takes effect in 2021 and differs in certain respects from the US rule (e.g., subject companies, geographic scope of inquiry).

Meanwhile the London Metals Exchange joins other exchanges that have become advocates for ESG reporting, poised to roll out responsible sourcing protocols developed in conjunction with market participants.

Companies are increasingly applying industry transactional experience to responsible supply chain management, including new technologies piloted such as blockchain. In an area where standards have trailed technology, there are important considerations including revisions to corporate codes and contractual provisions, regulatory access and information security. As our insight last year demonstrated, blockchain could allow companies to demonstrate and emphasize the sustainability attributes of their products with obvious effects on diligence, disclosure and purchasing decisions.

The Global Battery Alliance, launched in 2017, is an example of the international community's effort to operate on a multi-stakeholder level to engage high-risk value chains and accelerate movement towards socially responsible, environmentally sustainable activities.
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Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk

2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts, ABA Business Law Section*

David V. Snyder (chair) and Susan A. Maslow (vice chair)**

I. INTRODUCTION

In cooperation with other groups in the ABA Business Law Section and the wider American Bar Association, the ABA Business Law Section formed the Working Group to Draft Human Rights Protections in International Supply Contracts (“Working Group”). This is part of a larger effort to achieve widespread implementation of the ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor1 as well as other human rights protections.

* This report is the product of the Working Group, as explained in the text, and reflects the rough (and sometimes debated) consensus of the Working Group. While produced under the auspices of the Uniform Commercial Code Committee of the American Bar Association Business Law Section, the report has not been approved or endorsed by the Committee, the Section, or the Association as of the time of publication. Accordingly, the report should not be construed to be the action of either the American Bar Association or the Business Law Section. Nothing contained herein, including the clauses to be considered for adoption, is intended, nor should it be considered, as the rendering of legal advice for specific cases or particular situations, and readers are responsible for obtaining such advice from their own legal counsel. This report and the clauses and other materials herein are intended for educational and informational purposes only. The lawyer who advises on the use of these clauses must take responsibility for the legal advice offered.

** David Snyder is chair and Susan Maslow as vice chair served as principal drafters of the report. David Snyder is Professor of Law and Director of the Business Law Program at American University Washington College of Law in Washington, D.C., and would like to acknowledge grant funding from the law school as well as travel funding from the American Bar Association. He would also like to thank Michael T. Francel, Chiara Vitiello, and Katherine Borchert for excellent research assistance. Susan Maslow is a partner at Antheil Maslow & MacMinn, LLP in Bucks County, Pennsylvania.

1. There are both ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor (“ABA Model Principles”) and ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor (“Model Policies”) (emphasis added). The ABA Model Principles are the high level articulation of the detailed material in the Model Policies. The ABA Model Principles also form Part II of the Model Policies. Only the ABA Model Principles were adopted by the ABA House of Delegates, so only the ABA Model Principles represent the official position of the American Bar Association. For a detailed discussion, see E. Christopher Johnson, Jr., Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor, 70 Bus. Law. 1085.
We cannot stand by when children are trafficked and traded or when workers die in factory collapses and fires. The hope is that following the steps outlined in the ABA Model Principles will help eradicate labor trafficking and child labor from supply chains, making a difference to real people—their health, safety, and freedom—and, in some cases, saving lives.

In addition, companies need to comply with an increasing number of human-rights-related laws and regulations. The clauses below are designed to be compatible with a company’s policies with respect to any human rights-related subject, including anti-trafficking, worker safety, conflict minerals, antidiscrimination, and sustainability. In this sense, the clauses are agnostic as to subject. The substance and content of those policies is beyond the scope of this Working Group; they were the subject of earlier ABA work and have also been the subject of similar projects at the United Nations, the Organisation for Economic Co-operation and Development (“OECD”), and elsewhere. The foundational idea behind the present work is to move the commitments that companies require, whatever they may be, from corporate policy statements to the actual contract documents where those policies may have greater impact.

At the same time, the clauses below seek to minimize the risks inherent in the adoption of any corporate policy. Claims have been made against companies based on those companies’ undertakings as buyers in the supply chain. In other words, there is risk for such companies, often unrecognized and inadequately addressed in current supply contracts. The disclaimers included below address these issues, although no risk can be eliminated entirely.

II. PROTECTION THAT IS LEGALLY EFFECTIVE AND OPERATIONALLY LIKELY

Adoption of policies at the corporate level, while a good start, is not always enough: principles need to be put into practice. One way to do so is to integrate the policies into supply contracts, purchase orders, and similar documents that are part of the operational as well as the legal life of buyers and suppliers. The contracts and related documents are what govern, and often guide, the behavior of the parties. Enlightened contractual terms have great potential to make a difference when combined with effective remedies for their violation and a willingness to enforce them.

III. READY-MADE LANGUAGE FOR TRICKY ISSUES: CLAUSES TO MANAGE RISK AND MINIMIZE EXPOSURE FOR COMPANIES WHILE PROTECTING WORKERS AND COMPLYING WITH REGULATIONS

The mission of the Working Group is to make available well considered clauses that protect workers and that are sensitive to the legal and business

2. See supra note 1.
risks that companies face. The drafting is challenging. Sales law and contract law are keyed to production of conforming goods, like well-stitched soccer balls. The background law does not deal easily with the problem of soccer balls that are perfectly stitched but that were sewn by child slaves. Further, companies reasonably wish to minimize the litigation risk and liability exposure while remaining compliant with generally applicable laws, particular regulations (like the Federal Acquisition Regulation), and moral imperatives. The clauses suggested below aim to address these sometimes conflicting goals, and they recognize that there are inevitably risks, which can be mitigated and perhaps minimized but not eliminated. The proposed clauses include annotations to explain the choices made and their benefits and risks. For those who want in-depth treatment, an upcoming symposium will be published later this year in the American University Law Review.3

Companies may wish to adopt these clauses for a number of reasons:

- Compliance with U.S. anti-trafficking statutes;4
- Compliance with other U.S. laws, such as regulations or prohibitions of imports made with child labor or forced labor;5
- Compliance with U.S. state laws, like the California law on supply chain transparency;6
- Compliance with the Federal Acquisition Regulation ("FAR");7
- Compliance with foreign law,8 such as the national transpositions of the EU non-financial reporting directive;9 and
- Mitigation of potential liability under state statutory and common law theories such as undertaking liability,10 third-party beneficiaries,11 and deceptive advertising.12

11. See Doe I v. Wal-Mart Stores, 572 F.3d 677, 681–82 (9th Cir. 2009).
Whatever moral and legal commitments companies want to require can be accommodated in what this Working Group entitles Schedule P, which the model clauses incorporate, but the actual content of Schedule P is beyond the scope of this Working Group.

Clauses to Be Inserted into Supply Contracts, Purchase Orders, or Similar Documents for the Sale of Goods

The following clauses are designed for supply contracts. They assume that assurances with respect to compliance with certain human-rights-related policies is desired or required by the buyer and that such policies will appear in an appendix to the agreement, Schedule P, just as the buyer’s specifications for goods themselves are likely to appear in an appendix. The clauses below are intended to make those policies legally binding and to provide enforceable remedies for their violation while also managing the risk that may come with such policies.

The ABA Model Principles and Policies are an example of what might appear in Schedule P; many companies may wish to adopt or adapt them. Some companies may prefer or need something broader (see infra note 18 regarding certain laws that apply to some buyers), and other companies may need something broader still (e.g., to comply with the FAR, other human rights and health and safety standards, or moral obligations). Other possibilities include the OECD Guidelines and the UN Guiding Principles (the Ruggie Principles). Many companies will already have supplier codes of conduct or similar documents that they can use as the content of Schedule P, or Schedule P may simply require obtaining and maintaining certification from a designated third party. The content of Schedule P will likely vary significantly by industry and is beyond the scope of this Working Group.

The text proposed assumes that buyers are located in the United States and that the applicable law is the Uniform Commercial Code (the “U.C.C.”) or the United Nations Convention on Contracts for the International Sale of Goods (the “CISG,” a treaty to which the United States is a party). Buyers and suppliers in other jurisdictions may also find these clauses a useful starting point.

Note on negotiation stance. The proposed text is buyer-friendly, sometimes extremely so, and it could be perceived by some suppliers as unduly aggressive. The drafters have crafted the text this way because some buyers may have the leverage to use the proposed text, and in any case, these clauses are aimed primarily at companies in the

891 F.3d 857 (9th Cir. 2018); McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954 (N.D. Cal. 2016), aff’d, No. 16-15794, 2018 WL 3358227 (9th Cir. July 10, 2018); Dana v. Hershey Co., 180 F. Supp. 3d 652 (N.D. Cal. 2016), aff’d, No. 16-15789, 2018 WL 3358223 (9th Cir. July 10, 2018) and the fishermen cases, such as Sud v. Costco Wholesale Corp., No. 15-cv-03783-JSW, 2015 WL 192569, at *1 (N.D. Cal. Jan. 15, 2016). Other cases are pending and some have recently been filed. For more comprehensive consideration of recent and pending litigation in this area, see generally Ramona L. Lamprey, Mitigating Risk, Eradicating Slavery: The Business Case for Eradicating Slave Labor in the Supply Chain to Reduce Domestic Liability, 69 Am. U. L. Rev. (forthcoming 2019).

13. The letter “P” was chosen to designate the schedule because it stands for “Principles” or “Policies” such as the ABA Model Principles and Policies.

role of buyer. The text as proposed gives an indication of what a company would want as buyer, and each company can decide if particular provisions need to be adjusted or eliminated based on its negotiating position and its stance in other transactions (given that most companies are sometimes in the position of buyer and sometimes in the position of seller).

1. Representations, Warranties, and Covenants on Abusive Labor Practices. Supplier represents and warrants to Buyer, on the date of this Agreement and throughout the contractual relationship between Supplier and the Buyer, that:

1.1 Compliance. Supplier and its subcontractors and [to Supplier’s [best] knowledge]15 the [shareholders/partners, officers, directors, employees, and] agents of Supplier and all intermediaries, subcontractors, consultants and any other person providing staffing for Goods or services required by this Agreement [on behalf of Supplier](collectively, the “Representatives”) are in compliance with Schedule P.18 Each shipment and delivery of Goods shall constitute a representation by Supplier and Representatives of compliance with Schedule P; such shipment or delivery shall be deemed to have the same effect as an express representation. [Supplier’s delivery documents shall include Supplier’s certification of such compliance.]19

15. An unqualified representation supports Buyer’s goals to allocate the risk of undiscovered issues to Supplier and contractually encourage Supplier to gather accurate information about its subcontractors. The parties may negotiate the knowledge qualifier and the degree of knowledge required as it relates to additional levels of subcontractors and any other third party and whether “best” knowledge should be defined to include the imposition of certain periodic inquiry obligations on Supplier. It can also reinforce the Buyer’s right to revoke acceptance under U.C.C. section 2-608.

16. “Goods” is assumed to be defined earlier in the Agreement (and not defined in Schedule P). See also infra note 29 (on the definition of “Nonconforming Goods”).

17. Supplier may attempt to negotiate the use of the phrase “on behalf of Supplier” here, but such a phrase might allow Supplier to argue that the breaching Representative did so without Supplier’s knowledge or authority, which defeats the purpose of a strict representation and covenant.

18. The content of Schedule P is beyond the scope of this document, but note that some suggest the best practice is to avoid reference to specific laws in favor of a general reference because legislative initiatives in some countries are broader than in others. In the event that the drafter nevertheless wishes to require that Supplier specifically represent compliance with anti-trafficking and similar legislation, consider avoiding the term “applicable,” which will limit required adherence by companies that do not meet the size or revenue requirements of certain legislation. Prominent guidance can be found, for example, in the sources listed at supra note 4, as well as the U.N. Guiding Principles on Business and Human Rights (often called the Ruggie Principles); see John Ruggie (Special Representative of the Secretary-General), Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31, annex (Mar. 21, 2011), https://www.unhhr.org/Documents/Issues/business/A-HRC-17-31_AEV.pdf. Note again however, that specific guidance with respect to law that might be desired by Buyer or Supplier to be included in Schedule P is beyond the scope of this document, and this note does not attempt to be exhaustive (omitting, for example, certain anti-trafficking legislation as well as conflict mineral issues and the EU rules on non-financial and diversity information).

19. The bracketed sentence may support Buyer's continuing reliance upon Supplier's monitoring and compliance. The actual express representation would arguably make reliance more reasonable, and such reliance may delay Buyer's discovery and could help explain periodic rather than consummated or continual audits by Buyer. See also infra section 2.4. Delivery documents could include commercial invoices, packing lists, beneficiary's certificates, or an additional document delivered with the goods or required through banking channels to obtain payment for the goods. See infra note 38. If the bracketed language is included, the second clause of the preceding sentence should be deleted.
1.2 Schedule P Compliance Through the Supply Chain. Supplier and its Representatives shall make the performance of all of its Representatives subject to the terms and conditions in Schedule P and Supplier shall ensure that Supplier, its Representatives, and all of its and their respective Representatives acting in connection with this Agreement do so throughout the contractual relationship only on the basis of legally binding and enforceable written contracts that impose on and secure from the Representatives terms [in compliance with] [equivalent to those imposed by] [at least as protective as those imposed by] Schedule P. To restate for clarity, each Supplier and each Representative shall require each of its Representatives’ compliance so that such obligations are required at each step of the supply chain. Notwithstanding anything contained herein to the contrary, Supplier shall be responsible for the strict observance and performance by Supplier and its Representatives of the terms and conditions in Schedule P and shall be directly liable to Buyer for any violation by Supplier or its Representatives of Schedule P.

1.3 Supplier’s Policies. Supplier shall establish and maintain throughout the term of this Agreement its own policies and procedures to ensure compliance with Schedule P (“Supplier’s Policies”), which shall include a reporting mechanism for Representatives to report potential and actual violations of Supplier’s Policies and/or Schedule P. Within ___ days of (a) Supplier having reason to believe there is any potential or actual violation of Supplier’s Policies and/or Schedule P, or (b) receipt of any oral or written notice of any potential or actual violation of Supplier’s Policies and/or Schedule P, Supplier shall provide a detailed summary of (i) the factual circumstances surrounding such violation, (ii) the specific provisions of the Supplier’s Policies and/or Schedule P that are alleged to have been violated, and (iii) the investigation and remediation that has been conducted or that is planned.

1.4 Provision of Information. Upon request, Supplier shall deliver to Buyer such information and materials as Buyer reasonably requires with respect to the subject matter of Schedule P.

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20. Supplier may again attempt to negotiate the use of the phrase “acting on the behalf of Supplier” here. Buyer, if possible, will want to avoid such language. See supra note 17.

21. As part of Buyer’s due diligence in choosing its Supplier, it should request copies of all anti-trafficking policies, as well as similar policies, and should determine, for example, how and when training is conducted and to whom it is given, how Supplier’s policies are monitored, and how compliance is checked and certified. If Supplier does not have its own policies against forced and child labor, including worker health and safety, for example, or if Buyer prefers, Supplier can be required to adopt Buyer’s policies.

22. All of the covenants set forth above are prospective. Counsel to Buyer may consider requiring Supplier to state that it has no history of using forced labor or underage workers, subjecting workers to hazardous conditions or other similar conduct, and has never been the subject of investigations or proceedings relating to such conduct. In some industries and for some companies, such historical assurances cannot be made or expected, even though the companies are currently compliant and may have been compliant for a number of years.
2. Rejection of Goods and [Cancellation] [Avoidance] of Agreement.

2.1 Strict Compliance. It is a material term of this Agreement that Supplier and Representatives shall strictly comply with Schedule P.

2.2 Rejection. Buyer shall have the right to reject any Goods produced by or associated with Supplier or Representative that Buyer has reason to believe has violated Schedule P, regardless of whether the rejected Goods were themselves produced in violation of Schedule P, and regardless of whether such Goods were produced under this or other contracts.\(^{23}\)

2.3 [Cancellation.] [Avoidance.] Noncompliance with Schedule P [substantially impairs the value of the Goods and this Agreement to Buyer]\(^{24}\) [is a fundamental breach of the entire Agreement]\(^ {25}\) and Buyer may immediately [cancel] [avoid]\(^ {26}\) this entire Agreement with immediate effect and without penalty and/or may exercise its right to indemnification and all other remedies.\(^ {27}\) Buyer shall have no liability to Supplier for such [cancellation] [avoidance].

2.4 Timely Notice. Notwithstanding any provision of this Agreement or applicable law (including without limitation [the Inspection Period in Section ___ of this Agreement and] [Articles 38 to 40 of the CISG] [and U.C.C. §§ 2-607 and 2-608]),\(^ {28}\) Buyer's rejection of any Goods\(^ {29}\) as a result of noncompliance with


\(^{24}\) Because installment contracts under Article 2 of the U.C.C. do not enjoy the "perfect tender" rule applicable to a single-delivery contract, such installment contracts should include the phrase within the first bracket. The additional phrase within the first bracket "and this Agreement" should be included if Buyer wishes not only to reject goods based on noncompliance with Schedule P but also wishes to terminate the installment contract in its entirety in light of, for example, Buyer's internal policy, the possible damage to Buyer's reputation, or justifiable fear of a repeated breach by Supplier.

\(^{25}\) The phrase within the second bracket is applicable for agreements to which the CISG applies, whether for a single delivery or an installment contract, under article 49.

\(^{26}\) "Cancellation" occurs when a "party puts an end to the contract for breach by the other" under U.C.C. section 2-106(4). "Avoidance" is the appropriate term under CISG article 49.

\(^{27}\) This section expressly provides for cancellation as a remedy in the event of Supplier's failure to comply with a human rights policy adopted as part of a supply contract. Ultimately, without a contract clause expressly permitting cancellation for human rights policy breaches, Buyer may have a difficult time assembling compelling evidence that the value of the goods was fatally and "substantially impaired" due to the violation of the policy. The value of a particular good supplied in violation of a human rights policy might not necessarily change in the marketplace due to the troubled and tainted background of manufacture.

\(^{28}\) Articles 38 to 40 of the CISG require that Buyer examine the goods or cause them to be examined within as short a period as is practicable. Buyer loses the right to rely on a lack of conformity of the goods if it does not give Supplier notice within a reasonable time after Buyer discovers or ought to have discovered a defect and, at the latest, within two years of the date of delivery (or other contractual period) unless Supplier knew or could not have been unaware of the defect. Because U.C.C. section 2-607(3)(a) provides a similar argument that Buyer's failure to notify Supplier of a breach within a reasonable time bars any remedy, it is suggested that the contractual text be included to limit disputes about what constitutes a reasonable time. If the U.C.C. is referenced in the text, the applicable state version should be cited.

\(^{29}\) "Nonconforming Goods" and "Inspection Period" are assumed to be defined earlier in the Agreement (and not defined in Schedule P). The definitional portion of the Agreement must include as "Nonconforming Goods" any goods received by Buyer that Buyer has reasonable grounds to believe (i) include any materials in fabrication, assembly, packaging, or shipment, directly or indirectly, that do not
Schedule P shall be deemed timely if Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.

2.5 No Right to Cure. Supplier hereby acknowledges that it shall have no right to cure by substitution and tender of Goods created and/or delivered without violation of Schedule P if Buyer elects to refuse such tender, in Buyer's sole discretion.30

3. [Revocation of Acceptance]31

3.1 Notice of Buyer's Discovery. Buyer may revoke its acceptance, in whole or in part, upon notice sent [in accordance with Section ___] to Supplier of Buyer's discovery of Supplier's noncompliance with Schedule P, which the parties have agreed in Section 2 above is a nonconformity that substantially impairs the value of the Goods and this Agreement to Buyer.

3.2 Same Rights and Duties as Rejection. Upon revocation of acceptance, Buyer shall have the same rights and duties as if it had rejected the Goods before acceptance.

3.3 Timeliness. Notwithstanding any provision of this Agreement or applicable law (including without limitation [the Inspection Period in Section ___ of this Agreement and] U.C.C. § 2-608), Buyer's revocation of acceptance of any Goods as a result of noncompliance with Schedule P shall be deemed timely if comply with Schedule P; or (ii) originate from or are associated with a Supplier or Representative that [may have] [is reputed to have] [has] violated human rights protections similar to Schedule P.

30. This clause negates Supplier's right to cure under U.C.C. section 2-508 and CISG articles 37 and 48. In cases of mere technical or recordkeeping violations, Buyer may elect to accept the tender of a cure. In other cases, Buyer may not want to do business with a Supplier that violates Schedule P. Under the provision as drafted, Buyer retains discretion here. Many parties, however, may prefer to provide a right to cure; experience suggests that many violations may consist of recordkeeping problems or other clerical shortcomings. Even in cases of substantive violations of health and safety standards, for example, the parties may prefer to institute a program to alleviate the problems (e.g., by providing for appropriate working conditions) rather than to end the Agreement and throw the employees out of work. For these reasons, a "notice and cure" clause may be preferable to the elimination of any cure right for Supplier. In such a situation, this section should add, "Except as provided in Section ___" at the beginning. Another section can then provide for Buyer to give notice of default to Supplier. That default notice would trigger a cure period, either set by this Agreement or by the notice (as the parties prefer), and if cure is not effected within that period, then Supplier would be in breach, which would then trigger the remedies provided in the Agreement. In this way, a Supplier who does not comply with Schedule P is in default but is given a chance to fix the problem. A Supplier who implements a successful fix thus avoids breach, and Buyer will have no right to a remedy (but perhaps no need for one either). A notice-and-cure mechanism may make the Agreement more palatable to Supplier, although Buyer may prefer the stronger rights provided in the text as drafted, or Buyer may need them under the FAR. See 48 C.F.R. § 22.1703(c) (2018) (requiring contractor certification (within threshold limits) that it will "monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities" (emphasis added)). The text as drafted avoids the problem of disputes about whether a cure is successful. Further, nothing in the text as drafted prevents Buyer from forbearing to exercise its remedies and giving Supplier a period to cure if Buyer thinks a cure would be appropriate. The provision on Notice of Breach appears in section 5.1. Any forbearance should include an appropriate notice of reservation of rights.

31. The clauses on revocation of acceptance are designed primarily for use in contracts governed by the U.C.C. and are drafted with U.C.C. section 2-608 in mind. They should be omitted in contracts governed by the CISG. For this reason, section 3 is bracketed.
Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.

4. Nonvariation of Matters Related to Schedule P.

4.1 Course of Performance, Established Practices, and Customs. Course of performance and course of dealing (including, without limitation, any failure by Buyer to effectively exercise any audit rights)\textsuperscript{32} shall \textit{not} be construed as a waiver and shall not be a factor in Buyer's right to reject Goods, [cancel] [avoid]\textsuperscript{33} this Agreement, or exercise any other remedy. Supplier acknowledges that with respect to the matters in Schedule P, any reliance by Supplier on course of performance, course of dealing, or similar conduct would be unreasonable. Supplier acknowledges the fundamental importance to Buyer of the matters in Schedule P and understands that no usage or practice established between the parties should be understood otherwise, and any apparent conduct or statement to the contrary should \textit{not} be relied upon.\textsuperscript{34} The parties agree that no usage of trade, industry custom, or similar usage shall apply to this Agreement to the extent such custom or usage would lessen the protections provided or the obligations imposed by Schedule P. No person except [Title/Officer] has authority on behalf of Buyer to vary Schedule P or any provisions relating to it, and any such variation must be in a signed writing or an authenticated electronic communication.

4.2 No Waiver of Remedy. Buyer's acceptance of any Goods in whole or in part will not be deemed a waiver of any right or remedy\textsuperscript{35} nor will it otherwise limit Supplier's obligations, including, without limitation, those obligations with respect to warranty and indemnification.

5. Remedies.

5.1 Notice of Breach. If Buyer has reason to believe, at any time, that Supplier or a Representative is not in compliance with Schedule P, Buyer shall notify Supplier [in accordance with Section ____]. [Buyer's notice requesting remediation as well as Buyer's notices of breach or rejection [or revocation]\textsuperscript{36} may be given orally or in writing.] A notice to remediate noncompliance with Schedule P also constitutes notice of breach of this Agreement.\textsuperscript{37}

5.2 Investigation and Suspension of Payment. Buyer has the right to suspend all payments to Supplier, whether due under this Agreement or other agreements,

\textsuperscript{32} What audit rights Buyer has, if any, are beyond the scope of this document and should be set forth in Schedule P.

\textsuperscript{33} "Cancel" for agreements under the U.C.C., "avoid" for the CISG. See supra note 26.

\textsuperscript{34} The first phrase uses the terminology of U.C.C. section 1-303 and the second phrase uses the terminology of CISG article 9(1).

\textsuperscript{35} U.C.C. § 2-601 (2011).

\textsuperscript{36} Again, revocation language should be used in U.C.C. but not CISG contracts.

\textsuperscript{37} This section addresses notice requirements under Article 2 of the U.C.C. For instance, section 2-607(3)(a) requires notice of a breach within a reasonable time after constructive discovery of the breach. A buyer who fails to give such notice will find its claims barred, with many courts holding that pre-suit notice is required.
if Buyer deems, in its sole discretion, that investigation of possible noncompliance with Schedule P is advisable. Such suspension of payments will continue during investigation. Supplier shall fully cooperate with investigation by Buyer or Buyer's agents. Without limitation, such cooperation shall include, at Buyer's request, working with governmental authorities to enable Buyer or its agents to enter the country, to be issued appropriate visas, and to investigate fully. 38

5.3 Exercise of Remedies. Remedies shall be cumulative. Remedies shall not be exclusive of, and shall be without prejudice to, any other remedies provided at law or in equity. Buyer's exercise of remedies and the timing thereof shall not be construed in any circumstance as constituting a waiver of its rights under this Agreement. In addition to the right to [cancel] [avoid] this Agreement, in whole or in part, and any other remedies available to Buyer, in the event that Supplier or a Representative fails to comply with Schedule P, Buyer may:

a. deem itself insecure and demand adequate assurance from Supplier of due performance in conformance with Schedule P;

b. obtain an injunction with respect to Supplier's noncompliance with Schedule P, and the parties agree that noncompliance with Schedule P causes Buyer great and irreparable harm for which Buyer has no adequate remedy at law and that the public interest would be served by injunctive and other equitable relief;

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38. Some supply contracts will call for payment by letter of credit, which will complicate the right to suspend payment. When a documentary credit is involved, the supply contract and letter of credit should require presentation of a certificate of compliance with Schedule P. Ideally the certificate would be issued by a third party that has audited the Supplier or Representatives, but a beneficiary's certificate may also be helpful if a third-party certificate is impractical. Under U.S. law, a false beneficiary's certificate could allow an injunction against payment on grounds of "material fraud by the beneficiary on the issuer or applicant." See U.C.C. § 5-109(b) (2011). Purposeful falsity of the certificate might perhaps be helpful even if suit must be in London or in a jurisdiction following English law, which requires fraud on the documents. The leading case from the House of Lords is United City Merchants (Ins.) Ltd. v. Royal Bank of Canada, [1983] A.C. 168, 193 (referring to "documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue"); see also Inflatable Toy Co. Pty Ltd v. State Bank of New South Wales Ltd., [1994] 34 NSWLR 243 (applying Australian law). If the violation of Schedule P constitutes an illegal act, the illegality theory may also be useful in a suit governed by English law. In any case, the certificate should be required to be dated within a reasonably short time of the draw. Many banks probably will not object to the requirement of an additional certificate as certificates (e.g., by SGS) are commonplace in such transactions, and environmental certificates are similar to (and in some cases may be the same as) a certificate of compliance with Schedule P. While some banks may resist the requirement of such a certificate because of fear of injunction actions and the concomitant extension of the credit risk if the injunction is ultimately denied, most banks seem unlikely to be concerned by the requirement of one more certificate, and any additional credit risk from an injunction may be mitigated by a bond or other credit support as contemplated by U.C.C. section 5-109(b)(2) and comment 7, or by the civil procedure laws of the jurisdictions in which the certificate is to be observed or by other bankruptcy or bonding provisions in the reimbursement agreement. Still, despite all of these efforts, suspension of payment may be impossible in cross-border documentary credit transactions because frequently a foreign bank will have honored before the injunction can issue. Once one bank honors in good faith, the commitments along the chain all become firm and cannot be enjoined. See U.C.C. § 5-109 (2011).
c. require Supplier to remove an employee or employees and/or other Representatives;

d. require Supplier to terminate a subcontract;

e. suspend payments, whether under this Agreement or other agreements, until Buyer determines, in Buyer’s sole discretion, that Supplier has taken appropriate remedial action;

f. decline to exercise available options under this Agreement; and

g. obtain damages. 39

5.4 Damages. [Supplier acknowledges that it may be difficult for Buyer to fix actual damages or injury to its business, prospects and reputation with respect to Goods produced in violation of Schedule P or associated with a company that has violated Schedule P, and the parties have therefore agreed to liquidated damages in an amount calculated as follows:] 40 [In the event Supplier or Representative fails to comply with Schedule P, Buyer shall be entitled to all general and consequential damages (together with the liquidated damages set forth above), including but not limited to losses arising from:

a. procurement of replacement Goods;

b. non-delivery of Goods;

c. diminished sales of Goods arising not only from the Goods to have been sold under this Agreement, but to include other diminished sales caused by noncompliance with Schedule P; and

d. [harm to reputation]. 41, 42

39. This section reflects the remedies provided in the FAR § 52.222.50 relative to combating trafficking in persons. Additionally, the clause adds an insecurity provision under U.C.C. section 2-609. The clause also clarifies that injunctive relief may be necessary. In addition, while Buyer may want to work with a Supplier toward full compliance, Buyer should be prepared to face waiver arguments. The timing of the exercise of remedies is sensitive and the exercise of remedies and any requests for damages may themselves have impacts on human rights. Therefore, this provision expressly recognizes that such careful consideration of the exercise of remedies by Buyer does not constitute a waiver of any rights. Further, with respect to removal of employees (section 5.3.c.), see infra note 48. Note also that the remedies provisions here (including sections 5.2 and 5.3.c. on suspension of payments) do not mention setoff, see 11 U.S.C. §§ 506(a)(1), 553 (2018) (setoff is a secured claim in bankruptcy), recoupment, clawback, or similar remedies; if these remedies are not already provided in the main agreement, counsel may wish to consider making such rights explicit in this clause.

40. While Buyer in some industries may prefer to adopt a liquidated damages clause, U.C.C. section 2-718 generally prohibits penalties, including providing that “unreasonably large liquidated damages [are] void as a penalty.” The ultimate enforceability of these provisions will turn on whether the exercise of the remedy in the contractual clause was reasonable. Particular care should be exercised if Buyer includes the bracketed language that allows liquidated damages in addition to other damages.

41. If no liquidated damages are included above for harm to reputation,

42. Section 5.4 addresses monetary remedies, including consequential and special damages, recoverable in the event of a breach by Supplier. While measures such as diminished sales and harm to reputation are specifically included, Buyer may face challenges with respect to proving damages. This is common in claims for breach of contract, but Buyer may have special challenges with respect to the impact on its brand that results from violations of human rights policies. It is not
5.5 Return, Destruction or Donation of Goods; Nonacceptance of Goods.

a. Buyer may, in its sole discretion, store the rejected Goods for Supplier's account, reship them back to Supplier or, if permitted under applicable law, destroy or donate the Goods, all at Supplier's sole cost and expense.

b. Buyer is under no duty to resell any Goods produced by or associated with a Supplier or Representative who Buyer has reasonable grounds to believe has not complied with Schedule P, whether or not such noncompliance was involved in the production of the Goods. In an effort to reduce its possible damages and not as a penalty, Buyer is entitled to discard, destroy or donate to a charitable entity any such Goods. Notwithstanding anything contained herein to the contrary or instructions otherwise provided by Supplier, destruction or donation of Goods rejected [or as to which acceptance was revoked], and any conduct by Buyer required by law that would otherwise constitute acceptance, shall not be deemed acceptance and will not trigger a duty to pay for such Goods.

5.6 Indemnification. Supplier shall indemnify, defend and hold harmless Buyer and its officers, directors, employees, agents, affiliates, successors and assigns (collectively, "Indemnified Party") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, penalties, fines, costs or expenses of whatever kind, including, without limitation, the cost of storage, return, or destruction of Goods, the difference in cost between Buyer's purchase of Supplier's Goods and replacement Goods, reasonable attorneys' fees, audit fees, and the costs of enforcing any right under this Agreement or applicable law, in each case, that arise out of the violation of Schedule P by Supplier or any of its Representatives. This Section shall apply, without limitation, regardless

clear that suppliers will agree to the inclusion of Buyer's lost profits, real or imagined, as damages. Nor is it clear, however, that Supplier will have strong views on damages; Supplier may be judgment proof—for lack of assets or for procedural reasons—and damages may not be a realistic remedy in any case. The suggested text is presented as a starting place for discussions with respect to damages. An agreed liquidation amount may be an acceptable compromise.

43. Donation of goods manufactured or otherwise delivered with the use of forced labor may not be permitted by the U.S. Customs and Border Protection, Cargo Security, Carriers and Restricted Merchandise Branch, Office of Trade. Buyer's only option as an importer may be to return or export the goods. Other countries may have similar restrictions on the possession and ownership of merchandise mined, produced, or manufactured in any part with the use of a prohibited class of labor and such laws, which are beyond the scope of this document, must be examined before donations are made.

44. See supra note 31.

45. This section is drafted to address concerns that might be raised with respect to the U.C.C. section 1-305 mandate to place the aggrieved party in the position of its expectation, without award of consequential or penal damages unless specifically allowed, particularly with respect to minimizing damages. See also U.C.C. § 2-715 (2011) (consequential damages cannot be recovered if they could have been prevented). With an understanding that mitigation applies and may be non-waivable, particularly with respect to claims of consequential damages, an attempt by Buyer to avoid mitigation might be seen as a lack of good faith. Nevertheless, reselling the goods that are produced in violation of a human rights policy may be understood as increasing Buyer's damages, rather than reducing them. Accordingly, Buyer should be entitled to discard, destroy, or donate to a charity any goods produced in violation of a human rights policy as an attempt toward mitigation, rather than against it.
of whether claimants are contractual counterparties, investors, or any other person, entity, or governmental unit whatsoever.

5.7 Disclaimer Clauses. Notwithstanding anything contained herein:

a. Buyer does not assume a duty to monitor Supplier or its Representatives, including, without limitation, for compliance with laws or standards regarding working conditions, pay, hours, discrimination, forced labor, child labor, or the like.\textsuperscript{46}

b. Buyer does not assume a duty to monitor or inspect the safety of any workplace of Supplier or its Representatives nor to monitor any labor practices of Supplier or its Representatives;\textsuperscript{47}

c. Buyer does not have the authority and disclaims any obligation to control (i) the manner and method of work done by Supplier or its Representatives, (ii) implementation of safety measures by Supplier or its Representatives, or (iii) employment or engagement of employees and contractors or subcontractors by Supplier or its Representatives;\textsuperscript{48}

d. There are no third-party beneficiaries to this Agreement; and

e. Buyer assumes no duty to disclose the results of any audit, questionnaire, or information gained pursuant to this Agreement other than as required by applicable law.\textsuperscript{49}

\textsuperscript{46} This disclaimer conflicts with the requirements of the FAR, 48 C.F.R. §§ 52.222–56, 22.1703(c) (2018) (requiring contractor certification (within threshold limits) that it will “monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities”).

\textsuperscript{47} Again, note the conflict with the FAR. See 48 C.F.R. §§ 52.222–56, 22.1703(c) (2018).

\textsuperscript{48} Note supra section 5.3.c. This disclaimer is included to help negate claims of undertaking liability or liability under the peculiar risk doctrine. See Rahman v. J.C. Penney Corp., No. N15C-07-174MMJ, 2016 WL 2616375, at *9 (Del. Super. Ct. May 4, 2016). This disclaimer could conflict with the section noted above, however, and counsel should consider whether it is better to have the power to require that its suppliers fire employees or other representatives or whether the disclaimer as to this factor (which relates to whether a supplier is an independent contractor) is more important. See also supra section 5.3.b.

\textsuperscript{49} This provision emphasizes that Buyer is assuming no contractual duties to disclose although Buyer may have duties to disclose under other standards (legal or non-legal). For example, Buyer must determine if it provided false or misleading information to Customs and Border Protection and other officials in the event that goods are initially accepted and removed from the dock but are later determined to be tainted by forced labor. If the original information is false, a duty to amend may arise. See, e.g., 18 U.S.C. § 541 (2018); 19 C.F.R. § 12.42(b) (2018). As another example, under the FAR, contractors and subcontractors must disclose to the government contracting officer and agency inspector general “information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct.” 48 C.F.R. § 22.1703(d).
4. Short Summary of 2018 Model Report and Model Clauses
2018 REPORT AND MODEL CONTRACT CLAUSES from the Working Group to Draft Human Rights Protections in International Supply Contracts, ABA Business Law Section

Protecting Workers and Managing Company Risk

Child slaves might make great soccer balls. Without careful drafting, goods made with forced or child labor may breach no obligations under a supply contract, at least not in the usual sense. Nor is it clear what remedies are appropriate when supply chains include forced or child labor, or when suppliers’ workers are killed in factory fires or building collapses. At the same time, companies’ duties to control supply chains are mounting steadily. The Model Clauses are drafted to address these and other legally complex issues. They aim to:

- help companies control their suppliers and supply chains and meet growing compliance obligations;
- protect workers in international supply chains; and
- minimize companies’ litigation and other liability risks.

The goal is to make supply chain control and worker protection both legally effective and operationally likely. Frequently companies have no shortage of policies; they often appear on the company website, and they may be incorporated by reference into supply contracts (frequently as a “Code of Conduct”). The issues are more complicated than can be handled easily by a simple incorporation clause, however, and the Model Clauses attempt to address those complexities.

The Model Clauses fully recognize that companies have different policies and practices with respect to supply chain management; the Working Group is keenly aware that there is no broad consensus on the standards to be applied or the operational methods to implement them. The Model Clauses are agnostic as to particular standards and operational methods; each company can use its own. The policies may relate to antitrafficking, worker safety, conflict minerals, antidiscrimination, sustainability, or other issues. Companies that do not already have such policies can use the ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor, https://www.americanbar.org/groups/business_law/initiatives_awards/child_labor/principles/ or the work of the UN, the OECD, or other projects.

The Model Clauses move the commitments that companies require of their suppliers from corporate policy statements to the actual contract documents where those policies may have greater impact. The contractual documents are what govern, and often guide, the behavior of the parties. Contractual terms have great potential to make a difference when combined with effective remedies. At the same time, the Model Clauses seek to minimize litigation risks, usually unrecognized in current supply contracts, arising from claims similar to those made against companies based on their public statements and undertakings as buyers in the supply chain. Although no risk can be eliminated entirely, the disclaimers in the Model Clauses address these concerns directly.

For further information, contact Professor David Snyder (dsnyder@wcl.american.edu), the Working Group chair; or Susan Maslow, Esq., (smaslow@ammlaw.com), the vice chair.
5. Frequently Asked Questions about the 2018 Report and Model Clauses
FREQUENTLY ASKED QUESTIONS
about the Model Contract Clauses
protecting workers in international supply chains

1. Do the Model Clauses solve the problems of protecting human rights in supply chains?

Answer. We wish they could solve all the problems, but no one document can. The Model Clauses are just one tool. The Model Clauses focus on buyers who want to make sure their suppliers are compliant. The goal is to make supply chain control and worker protection both legally effective and operationally likely. Frequently companies have no shortage of policies; they often appear on the company website, and they may be incorporated by reference into supply contracts (frequently as a "Code of Conduct"). The Model Clauses import these policies—or other policies that companies may want to adopt—into the contractual documents where the policies can be put into operation and can take effect legally.

2. Do we need the Model Clauses if we already incorporate human rights protections in our supply contracts?

Answer. Probably. Most contractual documents we have seen simply have a clause saying something like, "Buyer’s Code of Conduct is hereby incorporated by reference and made a part of this Contract as if fully stated herein." The issues are more complicated than can be handled with a simple "incorporation by reference" clause like that, and the Model Clauses address those complexities. For example, a simple incorporation clause does not address what happens if the Code of Conduct is violated. Does the buyer still have to take the goods and pay for them (after all, the goods themselves might be fine in the sense of not having any defects in the physical object). Who has what duties with respect to compliance? The Model Clauses try to address these and other issues.

3. The Model Clauses look like legalese. How do they make human rights protections more operationally likely?

Answer. The Model Clauses move human rights commitments into the actual contract documents. Those documents often guide set-up and production and are used by the purchasing arm of the company (the people who issue the POs) as much as by the lawyers. Putting the commitments in the supply contract—the same place where the specs for the goods are—makes them more operationally likely. Plus, of course, the contractual documents govern the behavior of the parties, so they are taken seriously, especially when combined with effective legal remedies.

4. Why do the Model Clauses focus on the goods and not the human rights commitments?

Answer. The goods are the center of the contract and the focus of the operational divisions of the company. The focus on the goods pulls in the procurement/purchasing arm of the company, and placing the Model Clauses in the contract documents pulls in the general counsel’s office. The operational arms have direct experience with and responsibility for quality control and
conformity with specs. The focus on the goods also allows buyers and suppliers to build on an already existing process for discussing and assessing conformity, although this time the emphasis is on conformity with human rights expectations rather than with technical product specs. In other words, it takes advantage of a ready-made process for buyers and avoids reinventing the wheel.

5. How do the Model Clauses mesh with our own company commitments?

Answer. We hope the Model Clauses work perfectly with your own company commitments because the Model Clauses do not themselves state what commitments a company should make. For example, they do not say anything about forced labor, sustainability, conflict minerals, fire exits, appropriate working ages, or anything along those lines. The company can resolve all of those issues as it likes, based on its own assessment of the human rights risks that are most relevant for its business and industry. The Model Clauses simply equip the company with tools to make its own policies enforceable contractually.

6. Where do the Model Clauses stand on health and safety, freedom of association, and similar matters?

Answer. Again, this is up to the company to set its own policy or to follow policies offered by the UN, the International Labour Organisation (ILO) or others. In a way, the Model Clauses are agnostic about what should go in Schedule P; the Model Clauses are entirely flexible. That said, the Working Group is not agnostic. The UN Guiding Principles on Business and Human Rights (UNGPs) have been the leading source of principles worldwide, and they have been endorsed by the ABA, of which the Working Group is a part. Further, the ABA has its own Model Principles and Policies on Labor Trafficking and Child Labor (ABA Model Principles). See also the next question and answer. In short, the UNGPs and ABA Principles should be seen as a minimum commitment for Schedule P.

7. What if we don't have our own policies on this yet?

Answer. If a company does not already have policies, it can choose some that are widely available, such as the UNGPs and the ABA Model Principles. A memo is available with guidance on how to use the Model Clauses in a way that comports with the UNGPs—and ideally that sees the UNGPs as a floor, not a ceiling. In addition, industries often have their own guiding principles available, such as the Automotive Industry Guiding Principles to Enhance Sustainability Performance in the Supply Chain and the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector.

8. Where in the contract do the human rights commitments go?

Answer. They go in an appendix to the contract called “Schedule P.” The Model Clauses have the effect of pulling the company’s human rights policies into the contract legally. And very importantly, by being appended to the agreement with other schedules that are about the goods, they are placed in the hands of the people who can put them into practice. For instance, Schedule A probably has the specs for the goods. Schedule B probably has the schedule for production. Schedule C might have provisions for protecting intellectual property. And so on.
We call it “Schedule P” for convenience (“P” stands for “Principles” or “Policies”), but it might be Schedule D, or whatever (depending on how many schedules there are).

9. Can my company be liable for failing to address human rights issues in supply chains? And on the other hand, can we be liable for trying to address the problems?

Answer. We can’t give you any particularized legal advice, but simply put, yes, a company may be liable for doing nothing about problems in its supply chain (for example, if there is forced labor). It can also be liable for trying to address human rights violations but not doing so adequately. But the company is not necessarily liable in either case. Here’s a simple way to look at it: You can be sued for anything—even walking down the street. Just because someone sues you doesn’t mean they’ll win. Companies have been sued for alleged acts and omissions with respect to human rights violations; in general, the companies have won. But not always. The particular facts matter, and different laws apply in different situations.

The other aspect of being sued for human rights violations is that these lawsuits are public and, even if a company eventually wins, this type of publicity can damage a company’s brand for years.

The reality is that businesses always face legal risk, including “getting sued.” Our Working Group researched the statutes and the cases in this area, and the Model Clauses try to minimize the legal risk to companies. Companies who try to ignore human rights issues in their supply chains face serious legal risk: probably much greater legal risk than taking responsible steps like adopting sensible policies and implementing them through the Model Clauses and other tools (like conducting “due diligence” investigations, arranging for audits of the supply chain, identifying problems and remediating them, and not making unrealistic demands on suppliers). Since you can also be sued for trying to do the right thing, the disclaimers in Section 5.7 of the Model Clauses seek to address this kind of litigation risk. The disclaimers help a company sued under some of the theories used in these cases by providing, for example, that the buyer does not assume a duty to monitor, inspect or control the method of work.

However, legal risk cannot be eliminated, and we cannot guarantee that the Model Clauses are risk-free. They aren’t; nothing is. But the Model Clauses try to be honest about the risks and also clear about the decisions that companies and their lawyers will have to make. The Model Clauses are suggested as a way to manage the risk that is already there.

10. Can the Model Clauses be used in supply contracts for all industries, or only some?

Answer. The Model Clauses can be incorporated into supply contracts for all industries. That said, some industries are more affected by human rights risks than others, and some are more affected when news of violations reaches consumers. Garment manufacturing, agriculture, and fishing stand out right now, and there are cases in the U.S., for example, against chocolate companies for not disclosing the possibility that their products contain forced child labor and against Costco for selling “slave shrimp.” Companies of course need to take their industry and company’s own specific human rights risks into account.

A related point is that, depending on the industry, companies may have more or less leverage over their suppliers’ human rights performance. Generally, the lower the costs of switching
suppliers, the greater the buyer’s leverage (this tends to be true in the garment and food industries); the higher the switching costs, the less the leverage the buyer has (this tends to be true in the automotive and electronics industries). The Model Clauses assume that the buyer has a lot of leverage. This leverage is exerted by including pro-buyer clauses in the contract, like robust remedies against the supplier, extensive disclaimers of buyer responsibility, and so on. This assumption drives the (sometimes extremely) buyer-friendly approach of the Model Clauses. The Working Group therefore recommends that companies adjust the clauses to match their leverage position, their industry, and their own commitments to human rights. As noted in the Model Clauses themselves, for instance, some of the disclaimers cannot be used by government contractors, which must adhere to certain commitments provided for in the Federal Acquisition Regulation (FAR). And as outlined in the guidance memo on the UNGPs (see FAQ 7), some adaptation of the Model Clauses may be necessary for a company to be fully consistent with the UNGPs. Further, some companies may want to adopt a “responsible buyer” code of conduct, discussed in the next question.

11. Do the Model Clauses take a position on how much responsibility buyers should bear for human rights violations in their supply chain?

**Answer.** The short answer is no, they don’t. In fact, the Model Clauses as currently drafted equip buyers with a large contractual stick for deterring their suppliers from engaging in bad human rights practices. But buyers’ own practices are important too, and buyers should strive to support their suppliers’ compliance with Schedule P. To be successful, buyers need to avoid purchasing practices that put undue pressure on suppliers (like last-minute changes to orders with no extension of delivery times or increase in per-unit price). Those kinds of buyer demands can easily lead to supplier violations of Schedule P, which are not good for either the supplier or the buyer, and those violations will of course constitute a default under the contract.

In this regard, the Working Group recommends that companies consider a “do no harm” commitment for their supply chains. The commitment—whether it be a public commitment or an internal policy—could be formalized through a responsible buyer code of conduct. Companies seeking inspiration on how to draft one can look to the UNGPs; the ABA Model Principles; and the Ethical Trading Initiative’s Guide to Buying Responsibly. They could also look to recent research by the ILO and Insight Investment.

12. Do the disclaimers in the Model Clauses erode the objectives of the UN Guiding Principles and perhaps even violate applicable law (like the Federal Acquisition Regulation (FAR) or the French Duty of Vigilance)?

**Answer.** The footnotes for the disclaimers try to make it clear that the drafter looking at the Model Clauses must evaluate the specific company’s legal duties and corporate responsibilities. If the company has adopted the UN Guiding Principles or is subject to FAR, one or more of the disclaimers may be inappropriate. But it can also be noted that the Model Clauses contemplate the possibility that the company has adopted policies that go beyond US law and include employee and contractor health and safety requirements. In short, different companies are bound by different laws, and different companies are willing to take on different levels of responsibility. Obviously not all companies are government contractors bound by the
FAR, and not all companies are bound by French law. Some companies who are not bound by these laws may simply want to “start slow.” The Model Clauses are designed to work for these different companies so they can tailor their commitments as appropriate. Again, the notes to the clauses will help lawyers include the disclaimers that help and delete the clauses that don’t. And as mentioned above (FAQ 7), a memo is available on how to adapt the Model Clauses so they are fully consistent with the UNGPs.

13. Do the Model Clauses address remedies if the supplier breaks its human rights commitments?

**Answer.** Yes, and this is one of the most important aspects of the Model Clauses. The usual remedies in the law of sales don’t work very well in these situations. The Model Clauses address that problem with careful drafting in Section 5.

14. Do the Model Clauses address remediation so problems can be fixed without terminating the supplier?

**Answer.** Yes, they do—but a company must decide how best to deal with this. The Model Clauses give a couple of choices. Companies can set out remediation rights in the contract (through a “notice and cure” mechanism). That’s in footnote 30 of the published Model Clauses (it’s footnote 17 in the Word version). But as also indicated in that note, some companies may prefer a straight termination right, even if they do not plan to use it. Sometimes the message is, “We can terminate you, but we won’t, as long as you fix the problem.” The termination right appears in Section 5.3.

What should be emphasized is that except in the most egregious situations, remediation (fixing the problem) is better—for everyone—than abrupt termination. Remediation preserves the valuable commercial relationship between the buyer and supplier and is thus better for both of them. Fixing the problem also protects workers who may be thrown out of work by termination and thus wind up in an even worse situation. Some companies prefer to have the termination right in the contract as it appears in Section 5.3 but generally do not plan to use it, although it can serve as leverage to drive remediation efforts. Other companies provide for notice and cure, and termination only if cure is unsuccessful. The bottom line is that remediation is almost always the goal, regardless of what the contract says.

15. How can I get more information?

The quick and easy way to get more information is to email David Snyder (dsnyder@wcl.american.edu), the chair of the Working Group, and/or Sue Maslow (smaslow @ammlaw.com), the vice chair. We are happy to help.
GETTING THE RIGHT BALANCE:
Mapping the ABA’s Model Supply Chain Contract Clauses to the UN Guiding Principles on Business and Human Rights

John F. Sherman, III∗
July 28, 2019

No business wants to be surprised to learn from social media that the goods that it purchased have been produced with slave or child labour, that it has done little to prevent that harm, and that it has even contributed to this harm through its purchasing practices. The business case for avoiding involvement in such harm is strong. It includes ensuring the license to operate, securing sustainable supply chains, increasing productivity, acquiring and maintaining customers, improving reputation, engaging and retaining talented employees, strengthening consumer loyalty, anticipating new regulations, honoring commitments to business partners, reducing the cost of capital, and minimizing the risk of litigation.¹

The ABA’s draft Model Contract Clauses on Modern Slavery and Child Labor (“MCC’s”)² constitute a hugely important and innovative contractual mechanism to help buyers to remove the taint of human rights abuse from their supply chains. In implementing them, company lawyers will still need guidance on how to use the MCC’s in order to achieve their intended purpose. Since the 2011 UN Guiding Principles on Business and Human Rights (“UNGPs”) are the authoritative global standard on business and human rights, the MCC’s should be mapped to them.³

The MCC’s are intended to balance a buyer’s desire to eliminate human rights harm from its supply chain with its desire to minimize the risk of legal claims. Of course, buyers should take steps in their contacts to protect themselves from legal claims. At the same time, they should avoid going so far that the contracts do not improve the human rights performance of suppliers, or worse, incentivize them to hide and cheat. This argues in favor of a more proactive approach by buyers that will not only decrease

∗ This paper reflects my personal views only, and not necessarily those of any organization or person with whom I am or have been affiliated, which are listed below only for identification. Since 2008, I have acted as:
  • Senior legal counsel to Harvard Kennedy School Professor John Ruggie, who was the Special Representative of the UN Secretary General on Business and Human Rights and the author of the UN Guiding Principles on Business and Human Rights (“UNGPs”);
  • General Counsel and Senior Advisor to Shift (the leading center of expertise on the UNGPs);
  • Senior Program Fellow of the Corporate Responsibility Initiative at the Harvard Kennedy School of Government;
  • Co-chair of the International Bar Association’s Corporate Responsibility Committee and Chair of the IBA’s Business and Human Rights Working Group; and
  • A member of the Business and Human Rights Advisory Group to the ABA Human Rights Center.

Prior to 2008, I was Deputy General Counsel of National Grid USA.
the likelihood of such abuse, but also count in the company's favor in court should it be sued.\textsuperscript{4}

In her excellent commentary on the MCC's, Professor Sarah Dadush rightly praises the MCC's because they enable buyers to require their suppliers, and their representatives, to ensure that goods are not made with modern slavery or child labor anywhere in the supply chain.\textsuperscript{5} However, she also criticizes the MCC’s because they offload the buyer's human rights responsibilities onto suppliers, which is at odds with the UNGPs. She therefore recommends that the MCC's be modified by:\textsuperscript{6}

- Requiring buyers to assess the financial and managerial capacity of suppliers to meet the human rights performance requirements of the MCC's;
- Supporting the supplier's efforts to perform under the MCC's;
- Requiring suppliers to report not only on existing human rights problems, but also on potential ones;
- Encouraging buyers to take, as the first step, collaboration between buyers and suppliers to solve problems, rather than take a retaliatory and punitive approach to supplier contract violations;
- Taking steps to ensure that victims of human rights harm are provided with remedy; and
- Adjusting buyer responsibility in the event that it contributes to harm by the buyer.\textsuperscript{7}

I second her praise, criticism, and suggested modifications to the MCC’s. But rather than repeat her legal analysis, I attempt to view the MCC's solely through the lens of the UNGPs. Although the UNGPs are a soft law standard, they have hardened into law in many cases, and will greatly influence how public and commercial law will be applied and interpreted in the field of business and human rights.

The remainder of this note explains why and how the MCC’s should reflect the UNGPs: section I summarizes the background, content, and uptake of the UNGPs; section II explains the importance of the UNGPs to legal advice; and section III describes the application of the UNGPs to the MCC’s.

I. The Background, Content, and Uptake of the UNGPs

The UNGPs reflect a strong consensus by states, businesses, and civil society on how to address business involvement in human rights abuse. This problem arose following the expansion of global trade in 1990s, due to the fragmentation and outsourcing of production processes into lengthy and complex global supply chains, and the inability to global society to address the problem effectively. The increase in global trade has raised the standard of living for many around the world, and reduced poverty levels. However, hundreds of millions of people have been cut off from the benefits of development, and suffered human rights harm.\textsuperscript{8}
A. Background

The UNGPs were drafted by Harvard Kennedy School Professor John Ruggie, the Special Representative to the UN Secretary General on Business and Human Rights, following a six year period of multistakeholder consultations, research, and pilot projects. They reflect a strong consensus among governments, business groups, and civil society that led to the unanimous endorsement of the UNGPs in 2011 by the UN Human Rights Council, and their subsequent wide global uptake.

B. The UNGPs

The UNGPs consist of 31 principles and integrated commentary that operationalize Ruggie’s “Protect, Respect, and Remedy” framework, which are based on three mutually supporting pillars:

<table>
<thead>
<tr>
<th>Pillar</th>
<th>Comment</th>
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<tbody>
<tr>
<td>I. The state duty to respect human rights from abuse by third parties, including businesses. (UNGPs 1-10)</td>
<td>This duty is discharged through effective policies, regulation, and adjudication. The UNGPs do not create new legal obligations for states. Rather, they recognise existing obligations that international human rights law imposes on states to protect people from human rights harms committed by third parties, including businesses.</td>
</tr>
<tr>
<td>II. The corporate responsibility to respect human rights (UNGPs 11-24)</td>
<td>The responsibility to respect applies to all business enterprises, regardless of size, sector, location, and organizational structure. This means not infringing on internationally recognized human rights both in a business’s own operations and in its business relationships, including in its supply chain. This responsibility is not by itself a legal duty and is not limited by local law. However, it does not exist in a law free zone. It is not a voluntary sign-up standard. Businesses are expected to • Publicize a high level commitment to respect human rights and embed it in the organization. • Conduct human rights due diligence. • Remedy harm that they caused or contributed to.</td>
</tr>
<tr>
<td>III. The need for greater access to remedy by victims (UNGPs 25-31)</td>
<td>This is addressed to both states and businesses, and includes both judicial and nonjudicial remedies. States have the primary obligation under international human rights law to ensure that those who are affected by human rights abuses in their territory and/or jurisdiction have access to effective remedy, both judicial and non-judicial. As part of their responsibility to respect human rights, businesses are</td>
</tr>
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1. Human Rights Due Diligence

Understanding human rights due diligence is critical. Pillar Two expects that companies will conduct human rights due diligence from the perspective of the affected stakeholder to determine the human rights risks of a company’s operations and business relationships. Unlike commercial or legal due diligence, human rights due diligence does not look at human rights risks from the perspective of the business, although in the mid- to long-term, harm to people and harm to business will converge.

Human rights due diligence is an ongoing process with four stages, in which businesses should identify their risks of harm to people, integrate their findings into their businesses operations and their responses to the risks, track their human rights performance, and be prepared to communicate their performance as appropriate (for example, to persons who are at risk). Here is a diagram:

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2. Involvement in supply chain human rights abuse

How a buyer should respond to involvement in human rights abuse depends on its mode of involvement. There are three modes of involvement: cause, contribution, and linkage. The ILO-IOE Child Labour Guidance Tool for Business shows how these modes of involvement applies to child labor:
<table>
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<tr>
<th>Description</th>
<th>Examples</th>
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<tr>
<td>A company may <strong>cause</strong> a child labour impact through its own actions or decisions.</td>
<td>Employing children below the minimum age provided for in ILO Convention No. 138.</td>
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<tr>
<td></td>
<td>Exposing children under 18 to hazardous working conditions.</td>
</tr>
<tr>
<td></td>
<td>Repeatedly changing product requirements for suppliers without adjusting production deadlines or prices, thus incentivizing them to engage subcontractors who rely on child labour.</td>
</tr>
<tr>
<td></td>
<td>Contributing to the cumulative pollution of a river, negatively affecting local farmers' livelihoods, leading them to send their children to work to compensate for loss of income.</td>
</tr>
<tr>
<td></td>
<td>Embroidery on a retail company's clothing products that is subcontracted by a supplier to child labourers in homes, in violation of contractual obligations and not incentivized by the retail company.</td>
</tr>
<tr>
<td></td>
<td>Procuring raw materials or commodities produced with child labour on the spot (cash) market or through an agent.</td>
</tr>
</tbody>
</table>

Contribution and linkage are the two modes of involvement that are likely the most pertinent to buyer-supplier relationships. These are the appropriate responses for the buyer under the UNGPs in such circumstances:

- Where a buyer **contributes** to an impact, the UNGPs expect that it will
  - Stop its actions in order to prevent or mitigate the impact in the future,
  - Use or increase its **leverage** with the supplier to do so, and
  - Contribute to **remediate** the harm if it has occurred to the extent of its contribution.

- Where a buyer is **linked** to a child labor impact that it did not cause or contribute to, the UNGPs expect that it will:
  - Use or increase its **leverage** with the supplier to prevent or mitigate the impact.
  - It is **not** expected to provide remedy, although it can do so if it wishes.
• If leverage does not work in either mode (contribution or linkage), the buyer should consider termination of the relationship, if practicable, taking into account the adverse human rights impacts of doing so. (For example, it is dangerous to dismiss child laborers without taking into consideration the loss of income to families and the likelihood that children will be exposed to additional dangers; e.g., being forced into prostitution to replace lost wages).  

3. Prioritization based on salient risks of human rights harm

Businesses are expected to prioritize their attention to the most severe likely human rights risks, in the absence of legal guidance. The UNGPs define severity based on scale (the gravity of the impact), scope (the number of people affected), and irremediability (the inability of people to make whole). A severe likely human rights risk (with primary emphasis on severity) is called a “salient risk”. Therefore, the supply chain contract should identify the salient risks of human rights harm.

4. Exercising leverage

Leverage—i.e., influencing others to change their behavior—is at the heart of what companies can reasonably be expected to do in practice when faced with human rights challenges in their business relationships. Contracts such as the MCC’s are a primary example of the type of leverage that buyers can exercise to influence suppliers to respect human rights. In addition, where the contract isn’t sufficient to solve the problem, companies have engaged in more collaborative approaches.

C. Uptake of the UNGPs

The UNGPs have cascaded far beyond their UN origins. They are reflected in or incorporated in international multistakeholder norms (e.g., the OECD Guidelines for Multinational Enterprises, ISO Corporate Responsibility Standard 26000, the International Finance Corporation’s revised performance standards), public policy (e.g., statements by the G7, the G20, the EU, the African Union, ASEAN, the OAS, and national action plans issued by dozens of countries to implement the UNGPs); reporting and disclosure requirements (e.g., from the EU, the UK, the US., Australia and elsewhere); mandatory human rights due diligence laws (e.g., as enacted by France and The Netherlands and under consideration in Switzerland, Germany and elsewhere); investor pressure to report meaningfully on human rights performance, as seen by the skyrocketing use of ESG by investors; the practices and policies of leading companies; and endorsement by international and national bar associations.

This wide and rapid uptake (compared to other contested global initiatives, such as climate change) indicates that the UNGPs predict how the law will evolve in the future when it comes to human rights.
II. The importance of soft law to hard law legal advice

Some lawyers are reluctant to advise on soft law standards, which they may view as too ambiguous. However, the UNGPs are so ubiquitous and woven into the field of business and human rights that lawyers should do more than just rely on statutes and regulations that relate to human rights abuse in supply chains. They should be prepared to understand and advise on the relevance of the UNGPs.

The ABA endorsed the UNGPs in 2012, and in so doing, its Human Rights Center referred to the ABA’s Model Rule of Professional Conduct 2.1. The commentary to Model Rule 2.1 emphasizes the importance of providing advice on non-legal context “especially where practical considerations, such as cost or effects on other people, are predominant.” It notes that “moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” The report of the Human Rights Center identified the UNGPs as an example of the type of considerations contemplated by Model Rule 2.1.

This means recognizing that the lawyer’s role is not merely to act as a technical expert, but also as a wise counselor. The International Bar Association took this approach when in 2016 it endorsed and provided a Practical Guide on how lawyers should implement the UNGPs in their practice. The approach draws support not only from ABA Model Rule of Professional Conduct 2.01, but also from the well-known report of the Harvard Law School Center on the Legal Profession’s 2014 report, Lawyers as Professional and as Citizens: Key Roles and Responsibilities in the 21st Century.

III. The UNGPs should guide the formation, interpretation and application of the MCC’s

The UNGPs should inform the content and structure of the MCC’s. In particular, the MCC’s should be viewed through the lens of human rights due diligence, and be interpreted and modified appropriately.

A. The UNGPs should inform the content and structure of the MCC’s

Schedule P of the MCC’s is an empty container for the human rights performance standards of the contract. The MCC’s are agnostic as to subject matter, and provide no guidance as to its content, other than to give examples of laws addressing modern slavery and child slavery, and normative standards such as the UNGPs.

However, consideration of the UNGPs should inform the content and structure of the MCC’s, because the UNGPs constitute “the global authoritative standard” that provides “a blueprint for the steps all states and businesses should take to uphold human rights.” The MCC’s explicitly derive from, and are intended to operationalize, the 2014 ABA Model Business Principles (“ABA Model Principles”), which in turn are based on the UNGPs. The 2018 Report supporting the endorsement of the Model Principles explicitly acknowledges the foundational status of the UNGPs, and notes that in 2012,
the ABA endorsed the UNGPs, urging the legal community to integrate them into their practices.\textsuperscript{23}

B. The performance standards of Schedule P should not be tied exclusively to legal compliance.

As noted earlier, the responsibility to respect human rights is not limited by local law. This is intended to avoid a race to the bottom, where companies compete to outsource production to countries with the least protection for human rights.

However, the responsibility to respect human rights doesn’t exist in a law-free zone. As noted in the MCC’s Report by the Working Committee, existing laws and regulations require disclosure of the presence of modern slavery and child labor in supply chains and mandatory due diligence laws requiring businesses to take affirmative steps to end such abuse.

Unfortunately, these laws are neither uniform nor comprehensive. They constitute a loose patchwork of efforts by different states in different industries and sectors to regulate different business behaviors. And yet the presence of human rights abuse in supply chains is a global problem that extends across different tiers in a single supply chain and subjects buyers and suppliers to multiple legal requirements.

For example, Apple leads a vast international supply chain network. In 2014, a finished iPhone sat atop a supply chain pyramid consisting of 785 suppliers in 31 countries. The network included 60 US suppliers, who outsourced the fabrication of their components to supplies in Japan, South Korea, and Taiwan, which in turn sourced from lower cost locations in Southeast Asia. Foxconn, based in Taiwan with operations in China, assembled the final product.\textsuperscript{24} No single set of legal standards applies to all of these transactions.

C. Schedule P should refer to the salient risks of human rights of abuse that human rights due diligence reveals in a buyer’s supply chain

As a result, Schedule P should refer specifically to the salient risks that the business discovers in its supply chain as a result of human rights due diligence, whether or not they are effectively regulated by state law. The MCC’s are focused on modern slavery and child labor. Those are salient risks, and it is appropriate for the buyer to focus contractual attention to them by defining such risks explicitly in Schedule P.

1. Other salient risks should be included in Schedule P besides modern slavery and child labour

However, there may be other salient risks in the supply chain, such as the risk of death and serious accidents in the workplace, the risks of rape in the workplace, the risk of environmental catastrophe, and the risk of violence from company security forces, to name a few. If human rights due diligence reveals that those risks exist in the supply chain they should be included in Schedule P.
For example, the Rana Plaza factory collapse in 2013 killed over 1,100 workers, as a result of deficiencies in the factory's structure. This was not a modern slavery or child labor risk, but a workplace safety risk. If a company has such risks in its supply chain that are not related to modern slavery and child labor, they should also be included. It makes little sense to include some salient risks in Schedule P and exclude others.

2. All salient risks should be defined with clarity and precision

When defining salient risks, contract drafters should aim for clarity and precision. For example, not all work performed by children is considered child labor. As described by the ILO-IOE Guidance, child labor means all unacceptable work performed by children; i.e., work that exposes them harm or abuse because: 1) it is likely to impede the child's education and full development (due to the child's age); and/or 2) it jeopardizes the physical, mental or moral wellbeing of a child (due to the nature of the work). Therefore, Schedule P should be as clear as possible when defining the salient risks within their scope.

3. Schedule P should retain flexibility to cover salient risks not discovered in pre-contract human rights due diligence

Human rights due diligence is an ongoing process, which extends through the life of the contract. The parties may discover additional, unanticipated salient risks after the contract is signed. Therefore, Schedule P should contain some flexibility in contract language to allow the buyer to include such unanticipated risks within the contract's scope. Reference in Schedule P to the UNGPs and the need to conduct human rights due diligence during the contract would be useful in this regard.

D. Schedule P should result from a dialog between buyer and supplier, and not be imposed by buyer on a take-it-or-leave-it basis

Section P's agnosticism to content is a source of potential strength that can enhance its effectiveness. That is, it allows the parties to adapt Schedule P to the unique circumstances of the buyer-supplier relationship; i.e., the applicable internal and external standards (e.g., laws, sector specific standards, internal company codes, etc.), the financial and managerial capacities of the buyer and supplier, the sector, the country, and the position of the supplier in the chain.

In large organizations with complex and lengthy supply chains, it may be tempting to standardize the MCC’s as much as possible by disregarding these variables. However, doing so may lead to a tick-box approach to contract compliance that would make the MCC’s not fit for purpose. It is therefore critical for buyers and suppliers to talk to each other to ensure that both parties know what is expected of them, and that the expectations are reasonable. Otherwise, it is likely that the supplier will not take the MCC’s seriously on the grounds that they are too one sided, unrealistic based on the supplier’s limited resources, and constitute "green washing".
Moreover, a one-sided, take-it-or-leave-it approach by buyers to the MCC’s might subject them to attack in litigation based on lack of mutuality, lack of consideration, contracts of adhesion, and similar arguments.29

E. The MCC’s should not encourage the buyer to offload its human rights responsibilities to the supplier.

As noted earlier, human rights due diligence is an ongoing process. It starts prior to contract negotiation and extends through the life of the contract. It expects that buyers will undertake a proactive role in identifying and addressing human rights abuse by suppliers. However, the MCC’s encourage a largely passive approach. For example:

- Section 2.4 provides that the supplier has no right to cure delivery of goods that are produced in violation of Schedule P, as otherwise would be provided by U.C.C. section 2-508 and CISG articles 37 and 38. The practical effect of this is to trigger the buyer’s right to terminate the supplier and seek damages based on the buyer’s right to seek indemnification from the supplier.30
- Section 5.7a disclaims any obligation of the buyer to monitor any supplier tier for compliance with laws or standards regarding working conditions, pay, hours, discrimination, forced labor, child labor, or the like.
- Section 57.b disclaims any obligation of the buyer to inspect the safety of any workplace in any supply chain tier.
- Section 57.c disclaims any obligation to control the manner of work done, safety measures, or engagement of employees and contractors or subcontractors at any supply chain tier.
- Section 57.d disclaims any liability to third parties.

Collectively, these provisions effectively offload a buyer’s human rights responsibilities onto its suppliers, as Prof. Dadush correctly notes.31 Such an approach is at odds with the buyer’s responsibility to conduct human rights due diligence for three reasons:

- First, a buyer is responsible for its own actions that contribute to human rights harm caused by the supplier.
- Second, offloading encourages a top-down compliance approach to human rights performance, which is ineffective and counterproductive.
- Third, persons injured by supply chain harm may likely be left without remedy.

These points are explained in further detail below.

1. A buyer is responsible for its own actions that contribute to human rights abuse by the supplier.

As noted earlier, a buyer’s purchasing practices may contribute to supplier human rights abuse. This is particularly likely where the supplier lacks the financial and managerial capacity to perform under the MCC’s, and the buyer’s business model induces the supplier to cheat and cut corners in order to meet contractual price, quality, and
delivery requirements.

a) The “Fast Fashion “business model

The so-called “fast fashion” business model of the garment industry is a good example. This is shown by the April 2019 report from Human Rights Watch, Paying for a Bus Ticket and Expecting to Fly: How Apparel Brand Purchasing Practices Drive Labor Abuses (“HRW Report”)\textsuperscript{32} and by the Better Buying Index 2018 report (“Better Buying Index”)\textsuperscript{33}.

The HRW Report identifies how buyer purchasing and sourcing practices in the apparel industry can incentivize suppliers to engage in dangerous conduct, such as subcontracting to unauthorized sources, the most notorious example of which is the Rana Plaza tragedy in 2014. The Better Buying Index is an independent, supplier-centric rating agency that identifies and ranks buyers based on seven purchasing and sourcing practices in the apparel industry that could contribute to human rights harm by suppliers: planning and forecasting, design and development, cost and cost negotiation, sourcing and order placement, payment and terms, management of the purchasing process, and harmonization with the company’s CSR practices. These practices, if not carefully paid attention to, can result in buyer contribution to human rights harm.

b) The weakness of a top-down approach

The current version of the MCC’s lack commitments by buyers to support the actions of buyers in respecting human rights, or to refrain from taking action that will contribute to supply chain human rights abuse. Instead, they treat the elimination of human rights abuse in supply chains as a supplier problem to be resolved by compliance audits, by the exercise of contractual penalties and remedies, such as rejection of nonconforming goods, claims for damages, or by termination.

Recent learning, however, has shown that such a top-down compliance approach is unlikely to result in improved human rights performance by suppliers. Instead, it is more likely to encourage cheating by suppliers or the use by suppliers of unauthorized subcontractors.\textsuperscript{34}

As a result, the MCC’s disregard of buyer contribution to human rights harm may be counterproductive. To avoid this problem, the MCC’s should, as recommended by Prof. Dadush, contain commitments by buyers to support suppliers and to avoid undermining them. Otherwise, the use of MCC’s could be seen as window-dressing in the event that human rights abuse occurs notwithstanding the contract.

2. Offloading human rights to suppliers encourages a top-down compliance approach that discourages collaboration and is likely to be ineffective and counterproductive

The experience of leading companies indicates that a collaborative approach to solving human rights supply chain problems is much more likely to produce sustainable improvement in human rights performance than a top-down, compliance approach.\textsuperscript{35}

As Shift observed in its 2013 report, From Audit to Innovation: Advancing Human Rights
in Global Supply Chains, buyers often have limited visibility into their supply chains, many suppliers lack capacity to fix problems, and many suppliers lack incentives to commit to improve social performance. Moreover:

- “Many [supply chain] issues are systemic in nature, beyond the direct control of suppliers: While audits may reveal issues related to unsatisfactory working conditions, the root causes of many of these practices can be traced to structural or systemic issues, beyond the direct control of individual suppliers, requiring systemic responses – including social context, regulatory environments, and the broader labor relations context in the country.”

- “Companies often fail to recognize their own role in contributing to adverse impacts on workers: At the same time that brands and retailers preach social compliance, their own purchasing practices too often undercut their stated commitments to better social performance in their supply chains and contribute directly to the impacts they are intent on preventing. Companies may change designs, production volumes, and production schedules, without adjusting prices or timeframes, and without a clear understanding of the implications of these practices for their suppliers.”

Similarly, determining the right response to a supplier violation of Schedule P should require a collaborative approach by buyer and supplier to determine the root cause of the problem, in order to determine how and if it can be fixed. It makes little sense to terminate a supplier without first doing such an analysis, since substitution of a different supplier facing the same pressures may yield the same result. Moreover, terminating a supplier runs the risk of causing human rights harm by shutting down a factory and throwing people out of work.

In the event that collaboration doesn’t work to solve a problem, the contract should also provide for mediation or other alternative dispute resolution techniques designed to facilitate dialog, rather than jumping straight to breach, termination, and then litigation.

3. Offloading human rights responsibilities may likely leave victims of harm without access to remedy

As shown earlier, Pillar Three of the UNGPs expects that businesses should provide or participate in legitimate remedial processes (which can be judicial or nonjudicial), to enable access to remedy for stakeholders, where the business identifies that it has caused or contributed to such harm. This includes harm that occurs beyond the first tier of the supply chain.

Providing remedy for contribution to human rights harm does not mean that a buyer should write a blank check to claimants. Nor does it mean disregarding the primary responsibility of suppliers to remedy the harm that they directly caused. It applies only where the buyer agrees that it has contributed to harm. The extent of remedy should be proportionate to the business’s contribution to the harm. And where the business
disagrees that it contributed to the harm, or the extent of its contribution to the harm, it is entitled to insist upon an adjudication of the issue by a legitimate third party (such as a judge or arbitrator, for example). 39

Providing remedy under the UNGPs for buyer contribution to harm can be accomplished by providing or cooperating in legitimate processes, which can include judicial and nonjudicial dispute resolution mechanisms such as: company based operational level grievance mechanisms, provided that they meet specified criteria; 40 multistakeholder sector-based initiatives such as the Child Labour Monitoring and Remediation System (CLMRS); 41 participation in arbitration conducted under the developing Hague Rules on Business and Human Rights Arbitration; 42 and similar nonjudicial remedial processes.

However, Disclaimer 5.7(d) of the MCC’s provides that “there are no third-party beneficiaries to this Agreement”. This explicitly disclaims any duty to provide remedy to any persons harmed, whether or not the buyer contributes to their harm through its purchasing practices (such as the fast fashion business model described earlier). 43

This disclaimer may be typical in some commercial contracts. But without balancing it with other provisions designed to ensure that persons harmed have access to remedy, it is problematic. To offset this imbalance, the buyer should also require a commitment from the supplier, backed by evidence of its capacity and resources, to provide access to remedy for harm to victims. It should also commit to contribute to provide or participate in remedy where it agrees that it contributed to the harm. And, as Professor Dadush recommends, where the buyer contributes to harm, it should not be able to insist on its right to a total indemnity from supplier for such claims.

Conclusion and Summary

To summarize, I strongly support and congratulate the Working Group for drafting the MCC’s. However, in many cases the MCC’s do not achieve the right balance between a buyer’s desire to eliminate human rights abuse from its supply chain, with is need to protect itself against legal claims. In my view, the MCC’s lean too far in the direction of legal protection. To address these issues, I make the following recommendations, many of which echo those of Professor Dadush:

1. The commentary to the MCC’s should advise drafters to use the UNGPs to inform the content and structure of the MCC’s, in order to ensure that the MCC’s are not limited to legal compliance alone, and are fit for purpose.

2. Schedule P should cover all salient risks of supply chain human rights risks, define them with clarity, and provide flexibility to cover unanticipated salient risks human rights due diligence identifies after the contract is formed.

3. Schedule P should result from a dialog between buyer and seller, in order to ensure that both sides fully understand what is expected of them, in order to avoid a counterproductive tick-box approach, and to ensure that the supplier takes its human rights obligations seriously.
4. The MCC’s should recognize that a buyer has responsibilities for its own conduct that contributes to human rights harm by a supplier by committing to support and not undermine the supplier’s efforts.

5. When performance problems arise, the MCC’s should encourage a collaborative dialog between buyer and supplier, including a root cause analysis of the problem, rather than resort to retaliation and penalties, which can be counterproductive, particularly where the supplier lacks the capacity to perform its obligations under the MCC’s on top of its other obligations under the contract.

6. The MCC’s should recognize the need for buyers to ensure that suppliers have the capacity to remedy harm to victims of human rights abuse, and that the buyer commits to participate in legitimate remedial mechanisms when it contributes to such abuse.


5 Dadush, supra, Section B (“What the MCC’s Do Well”). She also references the OECD Guidelines on Multinational Enterprises, available http://www.oecd.org/corporate/mne/), which were amended in 2011 to import the UNGPs’ concept of human rights due diligence under the UNGPs as a core corporate responsibility. To avoid redundancy, I will refer to only to the UNGPs rather than provide parallel references.

6 Dadush, supra, pp. 1522, 1550, 1554.

7 Dadush, supra, Section II (“What the MCC’s do Poorly: Offloading Human Rights Obligations onto Suppliers”).

8 SDGs and Human Rights, supra, pp. 8-9.

9 See generally, John G. Ruggie, Just Business (Norton, 2013)


12 ILO-IOE Guidance, supra, p. 56.

13 UNGP 24.


15 ILO-IOE Guidance, supra, p. 22.


18 ABA Model Rule of Professional Conduct 2.1, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/.


21 Zeid Ra’aad Al Hussein, Ethical Pursuit of Prosperity (23 March 2015), available at https://www.lawgazette.co.uk/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.article.


23 Report in support of the ABA Model Principles, supra pp. 5 et seq.


27 CSR Contractual Practices, supra, p. 38.

28 CSR Contractual Practices, supra, p. 49.

29 CSR Contractual Practices, supra, p. 36.

30 Dadush, supra, p. 1534. (Note that Footnote 30 to the MCC’s explains that the buyer may elect to provide the supplier a right of notice and cure in order to fix the problem, and suggests that buyers may consider appropriate language to that effect).

31 Dadush, supra, Section II.


35 CSR Contractual Practices, supra, p. 48.

36 From Audit to Innovation, supra, p. 6.

37 CSR Contractual Practices, supra, p. 51.

38 See UNGP 22 and commentary.


40 See UNGPs 22 and 31, and Interpretive Guide, supra, pp. 73-76.


43 As the footnote commentary acknowledges, subsections 5.7(a) and (b) are also in tension “with the requirements of the FAR, 48 C.F.R. §§ 52.222-56, 22.1703(c) (2018) (requiring contractor certification (within threshold limits) that it will ‘monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities”).’ MCC’s, note 48.
7. U.S. Customs and Border Protection Materials
   a. CBP Trade and Travel Report – Fiscal year 2018
   b. Reasonable Care: An Informed Compliance Publication
   c. Prior Disclosure: An Informed Compliance Publication
# Trade and Travel Report

## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Travel Facilitation</td>
<td>1</td>
</tr>
<tr>
<td>Facilitating Increased International Travel</td>
<td>1</td>
</tr>
<tr>
<td>Transforming and Innovating Travel</td>
<td>2</td>
</tr>
<tr>
<td>Technology Deployments</td>
<td>2</td>
</tr>
<tr>
<td>Biometric Exit Technical Demonstrations</td>
<td>3</td>
</tr>
<tr>
<td>Preclearance</td>
<td>4</td>
</tr>
<tr>
<td>Public-Private Partnerships</td>
<td>4</td>
</tr>
<tr>
<td>Process Improvements</td>
<td>5</td>
</tr>
<tr>
<td>Trade Facilitation and Enforcement</td>
<td>5</td>
</tr>
<tr>
<td>Protecting America’s Domestic Industries from Unfair Competition</td>
<td>5</td>
</tr>
<tr>
<td>FY2018 Revenue and Trump Administration’s New Trade Remedies</td>
<td>5</td>
</tr>
<tr>
<td>Revenue Protection-Antidumping/Countervailing Duty Enforcement</td>
<td>7</td>
</tr>
<tr>
<td>Enforce and Protect Act</td>
<td>8</td>
</tr>
<tr>
<td>Centers of Excellence and Expertise</td>
<td>8</td>
</tr>
<tr>
<td>Trade Community Outreach</td>
<td>8</td>
</tr>
<tr>
<td>Forced Labor</td>
<td>9</td>
</tr>
<tr>
<td>Protecting Americans from Counterfeit and Unsafe Imports</td>
<td>9</td>
</tr>
<tr>
<td>E-commerce Strategy</td>
<td>9</td>
</tr>
<tr>
<td>IPR Enforcement</td>
<td>10</td>
</tr>
<tr>
<td>CTAC – Safety in Numbers</td>
<td>11</td>
</tr>
<tr>
<td>Modernizing Trade Systems</td>
<td>11</td>
</tr>
<tr>
<td>ACE – Milestone Achievement</td>
<td>11</td>
</tr>
<tr>
<td>Blockchain Technology Innovation</td>
<td>12</td>
</tr>
<tr>
<td>International Trade Agreements</td>
<td>12</td>
</tr>
<tr>
<td>Facilitation of Cargo</td>
<td>13</td>
</tr>
<tr>
<td>Unified Cargo Processing</td>
<td>13</td>
</tr>
<tr>
<td>International Mail</td>
<td>13</td>
</tr>
<tr>
<td>Agriculture Inspections</td>
<td>14</td>
</tr>
</tbody>
</table>

Conclusion............................................................................ 14
I. Introduction

U.S. Customs and Border Protection’s (CBP) dual mission of protecting the borders of the United States and facilitating legitimate trade and travel is not only a critical component of national security, but also of the nation’s economic prosperity.

In fiscal year 2018, CBP facilitated record levels of lawful trade and travel; enhanced screening and vetting; implemented the Trade Facilitation and Trade Enforcement Act; focused on faster processing in the air, pedestrian, vehicle, and cargo environments; and completed the final step in automating its cargo processing system.

II. Travel Facilitation

Facilitating Increased International Travel

CBP continues to transform the international arrivals process to attract and welcome visitors to the United States, while maintaining the highest standards of security.

CBP officers processed more than 413.8 million travelers at air, land, and sea ports of entry in FY2018, including more than 130.8 million travelers at air ports of entry. Over the last five years, international travel to the United States has grown approximately 10.5 percent overall and 22.2 percent at airports.

International travel at U.S. air ports of entry has steadily increased since FY2009. In FY2018, arriving air travelers increased by 5.3 percent over FY2017. CBP officers welcomed home 4.7 percent more U.S. citizens traveling internationally and 4.6 percent more non-U.S. citizens at air ports of entry in FY2018.
Additionally, CBP agriculture specialists, with their extensive training and expertise in biological sciences and agriculture inspection, conducted approximately 1.66 million interceptions of prohibited plant materials, meat, and/or animal byproducts at U.S. ports of entry while interdicting more than 17,158 pests of consequence.

**Transforming and Innovating Travel**

CBP has embarked on transformative initiatives to expand air and sea traveler technologies, grow Trusted Traveler Programs, implement biometrics, automate forms collection, and eliminate duplicative processes. The goal of these initiatives is to create a traveler experience that is secure, straightforward, efficient, and best-in-class.

**Technology Deployments**

Trusted Traveler Programs, Automated Passport Control (APC), Mobile Passport Control (MPC), and Radio Frequency Identification (RFID) Ready Lanes at the land border have provided travelers with user-friendly technology that enhances their inspection experience while expediting the entry process.

At air ports of entry, the share of arriving international travelers whose processing was assisted by automated means grew from 3.3 percent in FY2013 to over 50 percent in FY2018.

In FY2018, CBP enrolled more than 2 million members into one of the four Trusted Traveler programs: Global Entry, NEXUS, SENTRI or FAST. More than 8.1 million members enjoyed the benefits of expedited processing as a Trusted Traveler in FY2018.

The majority of Trusted Travelers in FY2018, nearly 5.8 million, were enrolled in CBP’s flagship program, Global Entry. Global Entry members have access to automated kiosks at 75 U.S. airports, four of which were added in FY2018, and all 15 Preclearance locations. CBP also expanded Global Entry eligibility to Taiwan passport holders in FY2018.

CBP’s Enrollment on Arrival program enables conditionally-approved Global Entry applicants to complete their interview, the final step of the Global Entry enrollment process, while clearing CBP processing at one of 49 participating airports, 38 of which were launched in FY2018. More than 100,000 Global Entry members have used the program to complete their enrollment.

APC and MPC enable travelers to enter their biographic and travel information needed for arrival processing while waiting in line—eliminating paperwork for the traveler and an administrative task for the CBP officer. APC kiosks were deployed to six additional airports in FY2018 and are available for use at 64 locations, including all major U.S. international airports and 12 Preclearance locations. MPC expanded to three additional ports of entry (one air and two sea) in FY2018, making the app available to U.S. citizens and Canadian visitors at 29 U.S. ports of entry. In FY2018, more than 51.2 million travelers used APC kiosks and more than 1.7 million trips were processed using MPC, accounting for 40 percent of all air travelers entering the United States.
Overall wait times at the top 17 international airports indicate that these initiatives have resulted in higher traffic volume, faster processing, and shorter waits for arriving travelers.

More than 55.4 million travelers used ready lanes, dedicated primary vehicle lanes at land ports of entry for travelers with RFID documents, to expedite their entry into the United States in FY2018.

**Biometric Exit Technical Demonstrations**

CBP furthered plans in FY2018 to implement an integrated biometric entry/exit process that provides significant benefits to air travel partners in addition to meeting the congressional mandate for a biometric exit system. CBP is leading efforts to streamline the travel process by providing the air travel industry a secure platform for identifying and matching travelers to their identities.

CBP will use a traveler’s face as the primary way of identifying the traveler to facilitate entry and exit from the United States, while simultaneously leveraging fingerprint records from most foreign visitors, such as those collected during entry processing, to check derogatory holdings and perform other law enforcement checks. This biometric technology transforms how travelers interact with airports, airlines, and CBP—creating a seamless travel process that is both reliable and secure.

In FY2018, CBP and its partners operated biometric exit technical solutions at nine airports, Detroit Metropolitan Airport (DTW), Fort Lauderdale-Hollywood International Airport (FLL), Hartsfield-Jackson Atlanta International Airport (ATL), Los Angeles International Airport (LAX), Orlando International Airport (MCO), Washington Dulles International Airport (IAD), Boston Logan International Airport (BOS), John F. Kennedy International Airport (JFK), and Dallas-Fort Worth (DFW). In addition to stakeholder partnerships, CBP conducted biometric exit technology demonstrations throughout FY2018 at Miami International Airport (MIA), Chicago O’Hare International Airport (ORD), Houston George Bush Intercontinental Airport (IAH), Houston William P. Hobby Airport (HOU), John F. Kennedy International Airport (JFK), Las Vegas McCarran International Airport (LAS), San Francisco International Airport (SFO), and Seattle-Tacoma International Airport (SEA).

CBP launched Simplified Arrival in FY2018 to quickly and reliably biometrically verify a traveler’s identity and retrieve traveler records from CBP systems using the traveler’s face. This eliminates time-consuming steps for most travelers, such as document scans and fingerprint captures, and speeds up the inspection process. Simplified Arrival is the first step in re-envisioning how travelers arrive in the United States. With a faster clearance process, airlines, airports, and travelers benefit from shorter connection times and standardized arrival procedures. CBP has deployed Simplified Arrival to 15 airports, including four Preclearance locations.
CBP biometrically processed more than 8.3 million travelers using facial recognition across entry, exit, and Preclearance locations with a match rate of more than 97 percent in FY2018. Biometrics have proven an effective tool to combat the use of stolen and fraudulent travel and identity documents. Since the program’s inception, CBP officers at Washington Dulles International Airport successfully intercepted three impostors who were denied admission to the United States and identified 55 imposters on arrival in the land pedestrian environment.

In FY2018, CBP and the Transportation Security Administration (TSA) began evaluating the use of facial recognition at TSA checkpoints through pilots at John F. Kennedy International Airport and Los Angeles International Airport for identity verification. The overall goal of the partnership is to enhance security and the utilization of resources while moving towards an end-to-end seamless travel experience. These pilots will inform future plans for the use of facial recognition at TSA checkpoints.

In addition to the air environment, CBP is piloting biometric capabilities at the land border in both the pedestrian and vehicle environments and in partnership with the cruise line industry in the sea environment. Four major cruise lines are engaged with CBP to develop facial biometric processing supported by the biometric matching service for closed loop cruises to modernize traveler and crew inspections.

Preclearance

More than 19 million travelers, representing 16 percent of all commercial air travel to the United States, were precleared at one of CBP’s Preclearance locations in Canada, Ireland, the Caribbean, and the United Arab Emirates. Through Preclearance, travelers undergo CBP immigration, customs, and agriculture inspections before boarding a flight to the United States at a foreign airport rather than upon arrival in the United States.

Public-Private Partnerships

CBP selected 55 new private and public sector partners for participation in the Reimbursable Services Program in FY2018, providing the opportunity for the stakeholders to request increased or enhanced inspection services. Through the end of FY2018, CBP had expanded the Reimbursable Services Program to 164 stakeholders, covering 117 ports of entry in 19 field offices. These services include customs, immigration and agriculture processing, and border security at ports of entry. CBP provided over 197,000 additional processing hours at the request of stakeholders in FY2018—accounting for the processing of more than 3.4 million travelers and over 452,000 personal and commercial vehicles.

CBP also approved 17 new partnerships under the Donations Acceptance Program (DAP) in FY2018. Since standing up the DAP in FY2015, CBP has approved a total of 33 DAP partnerships totaling an estimated S218 million in planned and realized investment in U.S. port of entry improvements and other mission enhancements. Moreover, in FY2018 CBP fully executed acceptance agreements for seven of its DAP partnerships, including several which bolster the agency’s ability to quickly and accurately verify the authenticity of potential
counterfeit and unsafe goods entering the United States. Partnerships entered into under the DAP have and will continue to enhance border security and promote the safe and efficient flow of passenger travel and commercial trade.

Process Improvements

CBP added several new features to the I-94 website. In January 2018, CBP added a new feature under the "View Compliance" tab for Visa Waiver Program (VWP) travelers showing the number of days remaining on their lawful admission or the number of days they have remained past their admitted until date. In addition, VWP travelers still in the United States will be notified by email 10 days prior to their admitted until date and referred to the new online capability for details on their expected departure date. CBP has taken these proactive steps to help inform and remind travelers of the terms of their admission and to prevent travelers from overstaying. In September 2018, CBP enabled group payments for I-94 applications for travelers entering the U.S. at land ports of entry. A traveler, family member, representative, travel agent, or other responsible party can now submit up to 25 I-94 applications up to seven days prior to their entry and submit one payment or transaction for the total amount.

In September 2018, CBP replaced the Small Vessel Reporting System (SVRS) with the Reporting Offsite Arrival-Mobile (CBP ROAM) app as a faster way for boaters to report their arrival in the following states and territories: Georgia, Florida, South Carolina, North Carolina, Virginia, Maryland, Delaware, New York, Pennsylvania, Ohio, Michigan, Minnesota, Montana, Texas, California, Puerto Rico, and the U.S. Virgin Islands. Pleasure boaters arriving in the U.S. from a foreign port or place are required by law to immediately report their arrival to CBP. The free CBP ROAM mobile app allows users to notify CBP via personal smart device or, in certain locations, a CBP tablet at a local business or partner organization, saving time for users.

III. Trade Facilitation and Enforcement

Protecting America’s Domestic Industries from Unfair Competition

FY2018 Revenue and the Trump Administration’s New Trade Remedies

CBP remains the second largest source of revenue in the federal government and is committed to its dual role of trade facilitation and protection of revenue. Our operations have a significant impact on security as well as the facilitation of legitimate international commerce and America’s economic competitiveness. CBP is responsible for enforcing nearly 500 U.S. trade laws and regulations on behalf of 47 federal agencies, facilitating compliant trade, collecting revenue, and protecting the U.S. economy and consumers from harmful imports and unfair trade practices.
CBP processed $2.65 trillion in imports in FY2018, equating to 35.1 million entries and more than 29.7 million imported cargo containers at U.S. ports of entry. Imported cargo containers increased approximately 4.2 percent from FY2017, continuing nearly a decade of steady, year-over-year increases spurred by economic growth. Overall, CBP collected approximately $52 billion in duties, taxes, and other fees in FY2018, including more than $40.6 billion in duties, an increase of nearly 23 percent over the previous fiscal year.

Much of the increase in duty collections in FY2018 is attributed to the assessment and collection of duties on steel, aluminum, washing machines, washing machine parts, solar panels, and additional goods from China. In February 2018, pursuant to Section 201 of the Trade Act of 1974, President Trump ordered additional duties on washing machines, washing machine parts, and solar cells/panels. In addition, certain quota requirements were ordered for these products. In March 2018, pursuant to Section 232 of the Trade Expansion Act of 1962, additional duties were ordered for all steel and aluminum products from most countries of origin. In June 2018, steel and/or aluminum imports from Argentina, Brazil, and South Korea became subject to absolute quotas. Later in the summer, pursuant to Section 301 of the Trade Act of 1974, additional duties were ordered on numerous products from China in three tranches, effective July, August, and September, respectively. Combined these products represented nearly 7,000 separate subheadings under the U.S. Harmonized Tariff Schedule.

CBP has played a key role in administering these additional duties and quotas and has worked closely with representatives from the Department of Commerce and the United States Trade Representative, among others, to provide technical guidance on the implementation and ongoing administration of the new remedies. As a result, as of December 19, 2018, CBP has assessed nearly $527 million in Section 201 duties; more than $1.1 billion in Section 232 aluminum duties; over $3.4 billion in Section 232 steel duties; and more than $8 billion in Section 301 duties on goods from China.

Earlier during the fiscal year, CBP’s Office of Trade established a trade remedies branch to oversee implementation and administration of the remedies. The branch has since implemented 16 Presidential Proclamations and Federal Register Notices related to the remedies, and coordinated 23 sets of detailed import instructions for trade stakeholders via CBP’s Cargo Systems Messaging Service communications system. CBP also fully automated the collection of additional duties and quotas in the agency’s cargo processing system, the Automated Commercial Environment, or ACE. As a result of the new remedies, CBP’s ACE
quota workload increased **43 percent** in FY2018. By year end, CBP was enforcing **164** new absolute quotas related to Section 232, in addition to **three** new tariff rate quotas related to Section 201.

Finally, CBP continues to play a significant role in the exclusion process for Section 232 and 301 duties. For Section 232 duties, eligible companies can petition the Department of Commerce for exclusion from the duties. Throughout the process, the Department of Commerce seeks CBP’s determination as to whether the tariff classification provided by a requestor is consistent with the description of the merchandise for which an exclusion is sought. This allows a granted exclusion to be properly applied by CBP when the merchandise is imported and the entry is filed. As of December 21, 2018, CBP processed **24,076** steel and **4,480** aluminum Section 232 exclusion requests, totaling **28,556** administrability determinations. As of that date, CBP also activated **15,418** approved exclusions in ACE. For Section 301 duties, eligible companies can request exclusion by petitioning the Office of the U.S. Trade Representative. The U.S. Trade Representative may then seek a determination from CBP on the classification of the merchandise subject to an exclusion request. CBP also provides its view on the feasibility of creating an administrable exclusion in the form of tariff language capturing the requested product. As of December 21, 2018, CBP rendered administrability determinations in **582** cases involving Section 301 duties.

**Revenue Protection – Antidumping/Countervailing Duty Enforcement**

CBP is committed to rigorous and judicious enforcement of all U.S. trade laws, including the collection of antidumping and countervailing duties (AD/CVD) that result from orders issued by the Department of Commerce. In FY2018, **$24.2 billion** of imported goods were subject to AD/CVD. CBP collected approximately **$2.3 billion** in AD/CVD deposits and levied monetary penalties totaling over **$92.1 million** on importers for fraud, gross negligence, and negligence of AD/CVD violations. CBP entry summary reviews during FY2018 also resulted in recovery of over **$65.5 million** in AD/CVD duties owed. CBP audits identified approximately **$25 million** in owed AD/CVD duties with **$2.5 million** collected to date. Finally, CBP and U.S. Immigration and Customs Enforcement seized shipments with a domestic value of more than **$1.3 million** for AD/CVD violations.

CBP also began enforcing **53** new AD/CVD orders during FY2018, nearly a **13 percent** increase over the number of orders in place the previous year. At the end of FY2018, **469 AD/CVD orders** were in effect as compared to **416 orders** at the conclusion of FY2017.

When combatting AD/CVD evasion, CBP takes an agency-wide approach to enforcement, working in partnership with the trade community and other government agencies. CBP employs multiple methods of targeting AD/CVD evasion through internal mechanisms at the ports of entry, industry-specific Centers of Excellence and Expertise where post-release activities are processed, and on a national level at CBP’s National Targeting Center.

In addition to self-directed targeting, CBP also responds to allegations received from industry and partner government agencies. In FY2018, CBP received **85 e-Allegations** concerning the enforcement of AD/CVD orders. These allegations were primarily provided to CBP through
CBP’s e-Allegations online trade violations reporting system. Some of the allegations originated from interagency referrals. CBP trade specialists and subject matter experts research and review each allegation carefully to determine the validity of the allegation in terms of trade law violations and take appropriate enforcement actions.

*Enforce and Protect Act*

The Enforce and Protect Act (EAPA) program, codified in the *Trade Facilitation and Trade Enforcement Act of 2015*, one of the most impactful pieces of trade legislation for CBP in decades, has proven to be a successful approach to investigating large-scale, highly coordinated duty evasion schemes. Through EAPA, CBP established formal procedures for submitting and investigating allegations of evasion of AD/CVD orders against U.S. importers. In FY2018, CBP received 33 allegations under EAPA from interested parties, nearly doubling the amount of allegations from the previous year. Interim measures were taken in six ongoing EAPA investigations during FY2018 to ensure the expedited protection of revenue owed to the U.S. government. CBP issued final determinations for 12 investigations in FY2018, a sharp increase from one final determination issued in FY2017.

During the past two years, CBP has initiated 20 EAPA investigations; conducted 18 foreign onsite verifications in Thailand, Vietnam, China, Malaysia, Cambodia, and the Philippines; and prevented the evasion of $50 million in AD/CVD duties annually. Since EAPA was established in FY2017, CBP has met every statutory deadline for all EAPA investigations, even rendering decisions on interim measures in some cases ahead of required deadlines. The EAPA investigations cover a wide range of commodities, including diamond sawblades, aluminum extrusions, door thresholds, refrigerants, plywood, glycine, steel wire garment hangers, pencils, wooden bedroom furniture, oil country tubular goods, and stainless steel flanges among others.

*Centers of Excellence and Expertise*

CBP is continually exploring options that will provide additional information to protect U.S. revenue and identify those who try to evade payment of duties for trade remedies and AD/CVD. In FY2018, all 10 Centers of Excellence and Expertise (Centers) processed post-release trade activities on an account and industry-wide basis, and targeted evasive and unfair trade practices. The Centers are responsible for identifying, assessing, and prioritizing risks within their respective industries with a focus on CBP’s priority trade issues. The Centers also administer the collection of trade remedies and AD/CVD duties as well as lead and carry out operations to detect and deter unlawful trade activities.

*Trade Community Outreach*

Private sector collaboration is a CBP priority. CBP maintains a partnership with the trade community, using every opportunity to obtain industry knowledge and expertise to ensure facilitation of legitimate international trade. In FY2018, CBP held multiple AD/CVD outreach meetings with U.S. manufacturers, importers, other members of the trade community, and foreign governments. This included 18 meetings, two U.S. manufacturer facility visits, and five national steel industry seminars in Charleston, South Carolina; Chicago, Illinois; Portland,
Oregon; Baltimore, Maryland; and Long Beach, California. These outreach efforts provided CBP with AD/CVD commodity information and market intelligence to enforce AD/CVD orders issued by the U.S. Department of Commerce. Additionally, a number of EAPA workshops were held to educate trade representatives about e-Allegations and EAPA investigations.

**Forced Labor**

With the authorities provided by the *Tariff Act of 1930*, as amended by the *Trade Facilitation and Trade Enforcement Act of 2015*, CBP has increased its efforts to mitigate the risk of forced labor-produced goods from entering the U.S. Both laws prohibit the importation of goods into the U.S. that are mined, manufactured, or produced wholly or in part from forced labor, including forced child labor. As part of its authorities, CBP can detain goods produced with forced labor by issuing withhold release orders at the ports of entry if information reasonably, but not conclusively, indicates that merchandise is made with forced labor or is likely to be imported. CBP also can seize goods by issuing findings if there is probable cause indicating that the merchandise is made with forced labor.

Currently, CBP is enforcing **30 active** withhold release orders and **four active** findings. During FY2018, CBP issued **two new** withhold release orders while continuing to conduct several other forced labor investigations. The first, issued in March 2018, pertained to toys produced by the Huizhou Mink Industrial Company in China. The second was issued in May 2018 on shipments of products made with Turkmenistan cotton. During FY 2018, CBP withheld from release cotton products valued at over **$200,000** as a result of the order. In FY2018, CBP also withheld from release **14** shipments of Chinese seafood valued at **$1.2** million. The shipments were suspected of violating the *Countering America's Adversaries Through Sanctions Act (CAATSA)*, a U.S. federal law that imposes sanctions on Iran, North Korea, and Russia. Under **CAATSA**, there is a rebuttable presumption that significant goods, wares, merchandise, and articles mined, produced, or manufactured by North Korean nationals or North Korean citizens anywhere in the world are forced-labor goods prohibited from importation into the U.S.

CBP also has worked extensively to develop relationships with civil society communities, the media, and private sector businesses to gather information on forced labor in global supply chains and to provide education on U.S. compliance standards. As part of these efforts, in May 2018, CBP's Office of Trade led a delegation of U.S. government agencies that traveled to Thailand to meet with Thai government officials, fishing industry associations, non-governmental human rights organizations, and European Union officials. The trip gave the U.S. government an opportunity to educate other nations on U.S. procedures and processes as well as gain a better understanding of the labor and seafood inspection and verification processes conducted in Thailand.

**Protecting Americans from Counterfeit and Unsafe Imports**

**E-commerce Strategy**

Over the past five years, e-commerce has grown exponentially as consumers are increasingly completing purchases online. These purchases are typically shipped through international mail
and express courier services. Since FY2013, CBP has seen more than a 100 percent increase in express consignment shipments. In FY2018, CBP processed more than 161 million express bills, a 46 percent increase over FY2017 volumes. International mail shipments have increased by more than 200 percent over the past five years, from approximately 150 million international mail shipments to nearly 500 million international mail shipments each year. Adversaries seek to exploit this volume, presenting CBP with economic risks in the form of IPR infringement as well as safety risks from poor quality and untested consumer products. In FY2018, over 90 percent of IPR seizures were found in express and international mail shipments.

In addition to the exponential growth in small package volume and the associated risks, this growth has created a paradigm shift in the traditional roles and responsibilities associated with importing into the U.S. Legacy supply chain roles within the e-commerce industry are evolving to meet consumer demand with some sales platforms now acting as logistics providers, marketing platforms handling e-payments, and start-ups racing to meet consumer demand. Associated with the challenge is a new class of importers—everyday consumers who are unfamiliar with trade laws and requirements. The consumer now initiates most imports, presenting CBP with additional challenges.

CBP has taken an active approach to addressing these trends. In March 2018, CBP issued an E-Commerce Strategy. The strategy is based on four key goals: Enhancing CBP’s statutory and regulatory authorities, further developing private sector partnerships, facilitating the creation of international trade standards, and adapting CBP’s operations to the shifting supply chain.

IPR Enforcement

CBP is on the frontline of Intellectual Property Rights (IPR) enforcement, partnering with industry, other federal agencies, and foreign governments to fight cross-border trade of harmful and dangerous illicit goods. When right holders record their copyrights and trademarks with CBP, the agency can enforce those marks to protect them at the border. As of September 30, 2018, CBP was enforcing over 17,500 active recorded copyrights and trademarks. In partnership with ICE, CBP seized 33,810 shipments with IPR violations in FY2018. If the seized products were genuine, the total manufacturer’s suggested retail price of the items would have been valued at nearly $1.4 billion.

To counteract the problem, CBP ran two public awareness campaigns on the “Truth Behind Counterfeits” during FY2018. The campaigns, which were intended to educate the public on the negative impacts associated with the purchase of counterfeit goods, highlighted how purchasing knockoffs can damage the U.S. economy, destroy American jobs, support criminal activity, and be harmful to the health and safety of consumers. Both campaigns ran for eight weeks at 11 U.S. international airports. The first campaign ran in the fall of 2017 at Hartsfield-Jackson Atlanta International Airport, Newark Liberty International Airport, Miami International Airport, Phoenix Sky Harbor International Airport, Logan International Airport, and Pittsburgh International Airport. The second campaign ran in the summer of 2018 at Detroit Metropolitan Airport, O’Hare International Airport, Hartsfield-Jackson Atlanta International Airport, Philadelphia International Airport, Seattle-Tacoma International Airport, and Ft. Lauderdale-Hollywood International Airport.
CBP also is partnering with the private sector to prevent counterfeit products from entering the U.S. In February 2018, CBP joined forces with Procter & Gamble to establish the agency’s first formal Donations Acceptance Program arrangement to enforce intellectual property rights. As part of the partnership, Procter & Gamble is donating testing devices to verify the authenticity of various Procter & Gamble products. The devices help CBP officers and trade specialists to quickly determine the legitimacy of a product, reducing the possibility of counterfeit goods entering the U.S. stream of commerce.

CBP announced a second Donations Acceptance Program partnership with Otter Products in June 2018. The Fort Collins, Colorado-based manufacturer of water and shock resistant protective cases for mobile accessory devices donated products to help CBP officers identify counterfeit devices. Within three months of distributing the authentication products at ports nationwide, CBP seized more than 7,500 counterfeit Otterbox and LifeProof-branded cases worth an estimated manufacturer’s suggested retail price of $411,346.

CBP entered into a third Donations Acceptance Program with Cisco Systems, a networking hardware company. As part of the partnership, Cisco gave CBP barcode scanning devices and secure access to an online Cisco search tool so that CBP officers and import specialists could quickly scan and verify the authenticity of Cisco merchandise entering the U.S. Initially, CBP and Cisco tested the tools at a limited number of international mail and express consignment facilities. In August 2018, during a special operation, CBP seized 147 counterfeit Cisco products. If the seized products were genuine, the total manufacturer’s suggested retail price would have been $958,375.

CTAC – Safety in Numbers

The Commercial Targeting and Analysis Center (CTAC), led by CBP, is comprised of multiple government agencies responsible for targeting commercial shipments that pose a threat to the health and safety of Americans. To date, thousands of shipments of consumer goods and food products have been targeted at ports throughout the U.S. because of the investigative efforts of the center. The CTAC facilitates information sharing and leverages the collective resources of participating government agencies to prevent, deter, interdict, and investigate violations of U.S. import and export laws. A total of 12 federal agencies have signed memorandum of understanding agreements to be able to share targeting information as part of CTAC. During FY2018, CTAC facilitated efforts that led to 7,880 seizures of products posing health and safety risks to the American public.

Modernizing Trade Systems

ACE – Milestone Achievement

In February 2018, CBP completed the final step in automating its cargo processing system, the Automated Commercial Environment, or ACE. The system, which was launched more than 15 years ago, was designed to speed up the U.S. import/export process by reducing the processing and approval times of shipments. Not only did ACE eliminate duplicative and burdensome
paperwork, it also provided a “single window” that allows businesses to electronically transmit the data required by the U.S. government to import or export cargo. More than 5.3 million lines of code were developed to automate all phases of cargo processing and 269 forms have been automated across CBP and its 47 partner government agencies.

A streamlined import and export processing system has already proven to be a tremendous benefit for international trade. ACE’s automation and process simplification efforts have resulted in an estimated economic benefit of approximately $391 million for the trade community, an increase of 5.7 percent from FY2017, and $35 million for CBP in FY2018, an increase of 6 percent from FY2017. Similarly, the ACE system reduced processing times by 395,000 hours for the trade community and 678,000 hours for CBP.

In addition to funds for sustaining core ACE capabilities, CBP received $30 million in FY2018 appropriations for ACE enhancements. The enhancements, which have been identified and prioritized in collaboration with the trade community and partner government agency stakeholders, will improve and strengthen the system in a number of ways—including providing CBP access to previously unavailable admissibility data for low value shipments, modernizing the entrance and clearance process in the truck environment to provide faster truck processing times, reducing the time necessary to enter and clear vessels of all types providing a significant cost savings, and streamlining the processing of foreign trade zone communities by incorporating partner government agencies in the cargo admissions process.

Blockchain Technology Innovation

In September 2018, CBP launched a proof of concept pilot using blockchain technology to authenticate the country of origin for incoming shipments. The test, which was led by CBP’s Business Transformation and Innovation Division in the Office of Trade, used blockchain technology to verify North American Free Trade Agreement (NAFTA) and Central American Free Trade Agreement (CAFTA) certificates of origin on imported goods, claiming eligibility for these free trade agreements. Blockchain is a type of distributed ledger for maintaining a permanent, tamper-proof, and auditable record of transactional data. The technology is often used to share information between parties within a transaction domestically and abroad. Participation in the three-week test was voluntary. More than a dozen large-scale companies participated.

In November 2018, CBP’s Business Transformation and Innovation Division was awarded for its blockchain proof of concept project by the Government Innovation Awards and received a 2018 Public Sector Innovation Award. The Government Innovation Awards showcase the best examples of discovery and innovation in government Internet technology. The Public Sector Innovation category focuses on initiatives that use transformative technologies to make government function better.

International Trade Agreements

CBP enforces compliance with 14 existing free trade agreements with 20 countries. On November 30, 2018, President Trump, President Peña Nieto of Mexico, and Prime Minister
Trudeau of Canada signed the new United States-Mexico-Canada Agreement (USMCA), which, if implemented, will replace the existing North American Free Trade Agreement. Throughout FY2018, CBP subject matter experts provided technical guidance and assistance to the negotiators of the agreement, principally at the Office of the U.S. Trade Representative. The USMCA includes many provisions that directly affect CBP’s and the Department of Homeland Security’s (DHS) operations, including customs enforcement, trade facilitation, and immigration. Specifically, the USMCA includes provisions designed to enhance DHS’s border management mission and creates new opportunities for further collaboration with Canadian and Mexican customs counterparts.

Facilitation of Cargo

Unified Cargo Processing

During FY2018, three new unified cargo processing centers opened at the U.S.-Mexico border. An innovative concept, unified cargo processing was initiated by CBP and Mexico’s Tax Administration Service (SAT) in 2016 to conduct joint cargo inspections at the facilities of the importing or exporting country. The joint inspections have reduced duplicate cargo processing and wait times at the border. This, in turn, has significantly lowered the cost of doing business in the region and has enhanced national security for both countries.

With the opening of the three, new facilities, the U.S. and Mexico are now conducting unified cargo processing at nine major commercial ports of entry. One of the facilities, which opened in November 2017, is located in Mexico at San Jerónimo, Chihuahua. The other two facilities, which opened in December 2017 and June 2018, are based in Otay Mesa, California and El Paso, Texas, respectively.

In November 2017, CBP and Canada’s Border Services Agency (CBSA) signed a memorandum of understanding to test the concept of unified cargo processing for trade facilitation at the first northern border location. The joint inspection facility in Champlain, New York became operational one week later on November 27, 2017. The pilot allows CBSA officers to review non-intrusive inspection images with CBP to verify manifest information for shipping containers arriving in Canada. Currently, CBP and CBSA are exploring additional locations for unified cargo processing in the U.S.

International Mail

The U.S. Postal Service receives international mail from more than 190 countries. An increasing number of foreign postal operators provide advance electronic data to the U.S. Postal Service, which is then passed on to CBP. The advance data helps CBP expedite the flow of commerce because that data allows CBP to target only those shipments that are deemed high-risk. In FY2018, CBP received advance electronic data on 297 million international postal shipments. This was a 300 percent increase from the number of international postal shipments with advance electronic data in FY2016. With nearly half a billion international mail shipments each year, the need for advance electronic data is critical for CBP. Having the data available frees up officers so they can focus on the highest risk shipments and facilitate the movement of goods.
Agriculture Inspections

During FY 2018, CBP agriculture specialists conducted 783,591 examinations on imported agriculture or agricultural-related commodities at the U.S. ports. These examinations yielded 38,929 pests that are considered harmful to crops, vegetation, and the ecological environment. CBP agriculture specialists examine agriculture imports for potential pests and diseases, incorrectly manifested and smuggled items, and prohibited animal products and byproducts. As part of their inspection process, CBP agriculture specialists examine wood packaging materials associated with cargo to search for wood-boring insects such as Asian long-horned beetles. They also inspect containers and conveyances for hitchhiker pests such as Asian gypsy moths and exotic fruit flies as well as for contamination from prohibited weed seeds, food scrap, or soil. CBP agriculture specialists also are trained to identify and contain emerging and rapidly evolving biological threats that are dangerous to America.

IV. Conclusion

CBP is the face at the border for all travelers and cargo entering the U.S. Each day, more than one million people arrive at 328 U.S. ports of entry by air, land, and sea and $11 billion worth of international trade crosses our borders. More than 30,000 CBP officers, agriculture specialists, trade and revenue staff, and mission support staff support CBP’s critical anti-terrorism mission; enforce import and export laws and regulations of the U.S.; implement immigration policies and programs; and protect the U.S. from foreign animal and plant pests, diseases, and invasive species that could cause serious damage to U.S. crops, livestock, pets, and the environment.
What Every Member of the
Trade Community Should Know:

Reasonable Care

An Informed
Compliance Publication

September 2017

U.S. Customs and
Border Protection
NOTICE:

This publication is intended to provide guidance and information to the trade community. It reflects the position on or interpretation of the applicable laws or regulations by U.S. Customs and Border Protection (CBP) as of the date of publication, which is shown on the front cover. It does not in any way replace or supersede those laws or regulations. Only the latest official version of the laws or regulations is authoritative.

Publication History

First Published January 1998
Revised February 2004
Revised September 2017

PRINTING NOTE:

This publication was designed for electronic distribution via the CBP website (https://www.cbp.gov) and is being distributed in a variety of formats. It was originally set up in Microsoft Word97®. Pagination and margins in downloaded versions may vary depending upon which word processor or printer you use. If you wish to maintain the original settings, you may wish to download the .pdf version, which can then be printed using the freely available Adobe Acrobat Reader®.
PREFACE

On December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), also known as the Customs Modernization or “Mod” Act, became effective. These provisions amended many sections of the Tariff Act of 1930 and related laws.

Two new concepts that emerged from the Mod Act are “informed compliance” and “shared responsibility,” which are premised on the idea that in order to maximize voluntary compliance with laws and regulations of CBP, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the Mod Act imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s rights and responsibilities under CBP regulations and related laws. In addition, both the trade and CBP share responsibility for carrying out these requirements. For example, under Section 484 of the Tariff Act, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and determine the value of imported merchandise and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met. CBP is then responsible for fixing the final classification and value of the merchandise. An importer of record’s failure to exercise reasonable care could delay release of the merchandise and, in some cases, could result in the imposition of penalties or, in certain instances, referral for criminal enforcement.

The Office of Trade, Regulations and Rulings (RR) has been given a major role in meeting the informed compliance responsibilities of CBP. In order to provide information to the public, CBP has issued a series of informed compliance publications, on new or revised requirements, regulations or procedures, and a variety of classification and valuation issues.

This publication, prepared by the Border Security and Trade Compliance Division, RR, is entitled Reasonable Care. It provides guidance on the use of reasonable care in entering merchandise. It is part of a series of informed compliance publications advising the public of CBP regulations and procedures. We sincerely hope that this material, together with seminars and increased access to rulings of CBP, will help the trade community to improve voluntary compliance with customs laws and to understand the relevant administrative processes.

The material in this publication is provided for general information purposes only. Because many complicated factors can be involved in customs issues, an importer may wish to obtain a ruling under the CBP Regulations, 19 C.F.R. Part 177, or to obtain advice from an expert who specializes in customs matters, for example, a licensed customs broker, attorney or a customs consultant.
Comments and suggestions are welcomed and should be addressed to the Executive Director, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, D.C. 20229-1177.

Alice A. Kipel
Executive Director, Regulations and Rulings
Office of Trade
INTRODUCTION ................................................................................................................. 7

GENERAL QUESTIONS FOR ALL TRANSACTIONS: ......................................... 8

QUESTIONS ARRANGED BY TOPIC: ......................................................................... 8
  Merchandise Description & Tariff Classification ................................................... 8
  Valuation .................................................................................................................. 10
  Country of Origin/Marking/Quota ......................................................................... 11
  Intellectual Property Rights .................................................................................... 13
  Forced Labor .......................................................................................................... 14
  Miscellaneous Questions ......................................................................................... 15

ADDITIONAL INFORMATION .................................................................................. 17
  The Internet ............................................................................................................ 17
  CBP Regulations ................................................................................................... 17
  Customs Bulletin ................................................................................................... 17
  Importing Into the United States ........................................................................... 18
  Informed Compliance Publications ....................................................................... 18
  Value Publications .................................................................................................. 18
  "Your Comments are Important" .......................................................................... 19
REASONABLE CARE

INTRODUCTION

One of the most significant effects of the Mod Act is the establishment of the clear requirement that parties exercise reasonable care in importing into the United States. Section 484 of the Tariff Act, as amended, requires an importer of record to use reasonable care to make entry by filing such information as is necessary to enable CBP to determine whether the merchandise may be released from CBP custody, and using reasonable care, complete the entry by submitting with CBP the declared value, classification and rate of duty and such other documentation or information as is necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable requirement of law is met. CBP notes that requirements related to information and documents apply to electronic records, as well as to hard copy records. Despite the seemingly simple connotation of the term reasonable care, this explicit responsibility defies easy explanation. The facts and circumstances surrounding every import transaction differ—from the experience of the importer to the nature of the imported articles. Consequently, neither CBP nor the importing community can develop a foolproof reasonable care checklist which would cover every import transaction. On the other hand, in keeping with the Mod Act’s theme of informed compliance, CBP would like to take this opportunity to recommend that the importing community examine the list of questions below. In CBP’s view, the list of questions may prompt or suggest a program, framework or methodology which importers may find useful in avoiding compliance problems and meeting reasonable care responsibilities.

Obviously, the questions below cannot be exhaustive or encyclopedic—ordinarily, every import transaction is different. For the same reason, it cannot be overemphasized that, although the following information is provided to promote enhanced compliance with the customs laws and regulations, it has no legal, binding or precedential effect on CBP or the importing community. Rather, it is an attempt to educate, inform and provide guidance to the importing community. Consequently, CBP believes that the following information may be helpful to the importing community and hopes that this document will facilitate and encourage importers to develop their own unique compliance measurement plans, reliable procedures and reasonable care programs.

As a final reminder, it should be noted that to further assist the importing community, CBP issues rulings and informed compliance publications on a variety of technical subjects and processes. It is strongly recommended that importers always make sure that they are using the latest versions of these publications.
ASKING AND ANSWERING THE FOLLOWING QUESTIONS MAY BE HELPFUL IN ASSISTING IMPORTERS IN THE EXERCISE OF REASONABLE CARE:

GENERAL QUESTIONS FOR ALL TRANSACTIONS:

1. Do you have access to the CBP Regulations (Title 19 of the Code of Federal Regulations), the Harmonized Tariff Schedule of the United States (HTS), and the U.S. Government Printing Office (GPO) publication Customs Bulletin and Decisions? Do you have access to the CBP website, Customs Rulings Online Search Service (CROSS), or other research service to permit you to establish reliable procedures and facilitate compliance with customs laws and regulations?

2. Has a responsible and knowledgeable individual within your organization reviewed the customs documentation prepared by you or your expert to ensure that it is full, complete and accurate? If that documentation was prepared outside your own organization, do you have a reliable system in place to ensure that you receive copies of the information as submitted to CBP; that it is reviewed for accuracy; and that CBP is timely apprised of any needed corrections?

3. If you use an expert to assist you in complying with customs requirements, have you discussed your importations in advance with that person and have you provided that person with full, complete and accurate information about the import transactions? Do you follow the advice received from your expert and keep a written record of that advice?

4. Do you have a customs compliance program and procedures in place to ensure that your entries are submitted correctly? Are they accessible to all employees who are involved in the importation process?

5. Are identical transactions or merchandise handled differently at different ports or within the same Center of Excellence and Expertise? If so, have you brought this to the attention of the appropriate CBP officials?

QUESTIONS ARRANGED BY TOPIC:

Merchandise Description & Tariff Classification

Basic Question: Do you know or have you established a reliable procedure or program to ensure that you know what you ordered, where it was made, how it was made and what it is made of?

1. Have you provided or established reliable procedures to ensure you provide a complete and accurate description of your merchandise to CBP in accordance with 19
U.S.C. § 1481? (Also, see 19 C.F.R. § 141.87 and 19 C.F.R. § 141.89 for special merchandise description requirements.)

2. Have you provided or established reliable procedures to ensure you provide a correct tariff classification of your merchandise to CBP in accordance with 19 U.S.C. § 1481? Information regarding tariff classification can be found in the CBP Informed Compliance Publication: "What Every Member of the Trade Community Should Know About: Tariff Classification".

3. Have you obtained a "ruling" from CBP regarding the description of the merchandise or its tariff classification (see 19 C.F.R. Part 177), and if so, have you established reliable procedures to ensure that you have followed the ruling and brought it to CBP's attention? Ruling requests may be submitted electronically by accessing the eRulings template. However, if you cannot meet the requirements for submitting an electronic ruling request, you can still submit a request for a binding ruling by mail to:

   Director, National Commodity Specialist Division
   U.S. Customs and Border Protection
   Attn: CIE/Ruling Request
   201 Varick Street, Suite 501
   New York, NY 10014

4. Where merchandise description or tariff classification information is not immediately available, have you established a reliable procedure for obtaining and providing that information, and is the procedure being followed?

5. Have you consulted the HTS, CBP's informed compliance publications, court cases and/or CBP's rulings on CROSS to assist you in describing and classifying the merchandise?

6. Have you consulted with a customs "expert" (e.g., an attorney, licensed customs broker, or a customs consultant) to assist in the description and/or classification of the merchandise?

7. If you are claiming a conditionally free or special tariff classification/provision for your merchandise (e.g., Generalized System of Preferences (GSP), North American Free Trade Agreement (NAFTA), heading 9802, etc.), how have you verified that the merchandise qualifies for such status? Have you obtained or developed reliable procedures to obtain any required or necessary documentation to support the claim? For example, if making a NAFTA preference claim, do you already have the required origin information in your possession?

8. Is the nature of your merchandise such that a laboratory analysis or other specialized procedure is suggested to assist in proper description and classification?
9. Have you developed a reliable program or procedure to maintain and produce any required customs entry documentation and supporting information?

**Valuation**

Basic Questions: Do you know or have you established reliable procedures to know the price actually paid or payable for your merchandise? Do you know the terms of sale (i.e., Incoterms® such as Ex Works (EXW), Free on Board (FOB), or Cost Insurance and Freight (CIF)); whether there will be rebates, tie-ins, indirect costs, additional payments; whether assists were provided, commissions or royalties paid? Are amounts actual or estimated? Are you and the seller related parties?

1. Have you provided or established reliable procedures to provide CBP with a proper declared value for your merchandise in accordance with 19 U.S.C. § 1484 and 19 U.S.C. § 1401a?

2. Have you obtained a "ruling" from CBP regarding the valuation of the merchandise (see 19 C.F.R. Part 177), and if so, have you established reliable procedures to ensure that you have followed the ruling and brought it to CBP's attention? Valuation ruling requests should be mailed to:

   U.S. Customs and Border Protection
   Office of Trade
   Regulations and Rulings
   Valuation and Special Programs Branch
   90 K Street, NE, 10th Floor
   Washington, DC 20229-1177

3. Have you consulted the CBP valuation laws and regulations, Customs Valuation Encyclopedia, CBP's informed compliance publications, court cases and CBP's rulings on CROSS to assist you in valuing merchandise?

4. Have you consulted with a customs "expert" (e.g., attorney, licensed customs broker, customs consultant) to assist in the valuation of the merchandise?

5. Do you have a complete set of documents from the import transaction ready for CBP review, including purchase orders, invoices, sales agreements, shipping documents, and proof of payment?

6. If you purchased the merchandise from a "related" seller, have you established procedures to ensure that you have reported that fact upon entry and taken measures or established reliable procedures to ensure that value reported to CBP meets one of the "related party" tests? See 19 U.S.C. § 1401a(b)(2)(B); 19 C.F.R § 152.103(l).
7. If there is no bona fide sale for exportation to the United States between the buyer and the seller, have you considered the other valuation methods in the order specified in 19 U.S.C. § 1401a(a)?

8. If deductive value is used as the method of appraisement of the imported merchandise, do you have information concerning the subsequent sales in the United States of the merchandise being appraised, identical or similar merchandise, as well as the enumerated deductions under 19 U.S.C. § 1401a(d)?

9. If computed value is used as the method of appraisement of the imported merchandise, do you have information concerning the various elements of this method of appraisement under 19 U.S.C. § 1401a(e) including the material and processing costs incurred in the production of the merchandise, profit and general expenses, the value of any assists, and packing costs?

10. Have you taken measures or established reliable procedures to ensure that all of the legally required costs or payments associated with the imported merchandise have been reported to CBP (e.g., assists, all commissions, indirect payments or rebates, royalties, proceeds, etc.)?

11. If you are declaring a value based on a transaction in which you were/are not the buyer, have you substantiated that the transaction is a bona fide sale at arm's length and that the merchandise was clearly destined to the United States at the time of sale?

12. If you are claiming a conditionally free or special tariff classification/provision for your merchandise (e.g., GSP, heading 9802, NAFTA, etc.), have you established a reliable system or program to ensure that you reported the required value information and obtained any required or necessary documentation to support the claim?

13. Have you established a reliable program or procedure to produce any required entry documentation and supporting information?

**Country of Origin/Marking/Quota**

Basic Question: Have you taken reliable measures to ascertain the correct country of origin for the imported merchandise?

1. Have you established reliable procedures to ensure that you report the correct country of origin on customs entry documents? The country of origin reporting regulations include, but are not limited to, 19 C.F.R. Part 134, Subparts B and E. Additional information regarding country of origin marking requirements may be found in the CBP Publication, "What Every Member of the Trade Community Needs to Know About: U.S. Rules of Origin – Preferential and Non-Preferential Rules of Origin".

2. Have you established reliable procedures to verify or ensure that the merchandise is properly marked upon entry with the correct country of origin (if required) in accordance
with 19 U.S.C. § 1304 and any other applicable special marking requirement (watches, gold, textile labeling, etc.)? Information regarding special marking requirements may be found in CBP's informed compliance publications.

3. Have you obtained a "ruling" from CBP regarding the proper marking and country of origin of the merchandise (see 19 C.F.R. Part 177), and if so, have you established reliable procedures to ensure that you followed the ruling and brought it to CBP's attention? Ruling requests may be submitted electronically by accessing the eRulings template. However, if you cannot meet the requirements for submitting an electronic ruling request, you can still submit a request for a binding ruling by mail to:

   Director, National Commodity Specialist Division
   U.S. Customs and Border Protection
   Attn: CIE/Ruling Request
   201 Varick Street, Suite 501
   New York, NY 10014

4. Have you consulted with a customs "expert" (e.g., an attorney, licensed customs broker, or a customs consultant) regarding the correct country of origin/proper marking of your merchandise?

5. Have you taken reliable and adequate measures to communicate customs country of origin marking requirements to your foreign supplier prior to importation of your merchandise?

6. If you are claiming a change in the origin of the merchandise or claiming that the goods are of U.S. origin, have you taken required measures to substantiate your claim (e.g., do you have U.S. milling certificates or manufacturer's affidavits attesting to the production in the United States)?

7. If you are importing textiles or apparel, have you developed reliable procedures to ensure that you have ascertained the correct country of origin in accordance with 19 U.S.C. § 3592 (Section 334, Pub. Law 103-465) and assured yourself that no illegal transshipment or false or fraudulent practices were involved?

8. Do you know how your goods are made, from raw materials to finished goods, by whom and where?

9. Have you checked the CBP Quota Enforcement and Administration website, as well as its link to the CBP publication: "Are my goods subject to Quota"?

10. Have you established reliable procedures to check Commodity Status Reports and Tariff Preference Levels and/or the quota bulletins issued by CBP to determine if your goods are subject to a quantitative restriction (either a tariff rate quota or a tariff preference level) and whether the limit has been filled?
11. Have you taken reliable measures to ensure whether your goods are subject to visa(s) and/or licenses, permits or certificates (LPCs)? If so, have you obtained the appropriate visa(s) and/or LPCs? See https://www.cbp.gov/trade/ace/features/quotace.

12. In the case of textile articles, have you prepared or developed a reliable program to accurately construct the Manufacturer's Identification (MID) codes for all shipments of textile and textile products listed in 19 C.F.R. § 102.21(b)(5)?

13. Have you established a reliable document maintenance program or procedure to ensure you can produce any required entry documentation and supporting information, including any required certificates of origin or certifications?

**Intellectual Property Rights**

Basic Question: Have you determined or established a reliable procedure to permit you to determine whether your merchandise or its packaging bears or uses any trademarks or copyrighted matter or is patented and, if so, that you have a legal right to import those items into, and/or use those items in, the United States?

1. If you are importing goods or packaging bearing a trademark registered in the United States, have you checked or established a reliable procedure to ensure that it is genuine and not restricted from importation under the gray-market or parallel import requirements of U.S. law (see 19 C.F.R. § 133.21), or that you have permission from the trademark holder to import such merchandise?

2. If you are importing goods or packaging which consist of, or contain registered copyrighted material, have you checked or established a reliable procedure to ensure that it is authorized and genuine? If you are importing sound recordings of live performances, were the recordings authorized?

3. If you are importing goods that have been refurbished or remanufactured, do you have documentation detailing the remanufacturing process?

4. Have you checked or developed a reliable procedure to see if your merchandise is subject to a U.S. International Trade Commission or court ordered exclusion order?

5. Have you established a reliable procedure to ensure that you maintain and can produce any required entry documentation and supporting information?
Forced Labor

Basic question: Have you taken reliable measures to ensure imported goods are not produced wholly or in part with convict labor, forced labor, and/or indentured labor (including forced or indentured child labor)?

1. Have you established reliable procedures to ensure you are not importing goods in violation of 19 U.S.C. § 1307 and 19 C.F.R. §§ 12.42-12.44?

2. Do you know how your goods are made, from raw materials to finished goods, by whom, where, and under what labor conditions?

3. Have you reviewed CBP’s "Forced Labor" webpage, which includes a list of active withhold release orders and findings, as well as forced labor fact sheets?

4. Have you reviewed the Department of Labor’s "List of Goods Produced by Child Labor or Forced Labor" to familiarize yourself with at-risk country and commodity combinations?

5. Have you obtained a "ruling" from CBP regarding the admissibility of your goods under 19 U.S.C. § 1307 (see 19 C.F.R. Part 177), and if so, have you established reliable procedures to ensure that you followed the ruling and brought it to CBP’s attention?

6. Have you established a reliable procedure of conducting periodic internal audits to check for forced labor in your supply chain?

7. Have you established a reliable procedure of having a third-party auditor familiar with evaluating forced labor risks conduct periodic, unannounced audits of your supply chain for forced labor?

8. Have you reviewed the International Labour Organization’s "Indicators of Forced Labour" booklet?

9. Do you vet new suppliers/vendors for forced labor risks through questionnaires or some other means?

10. Do your contracts with suppliers include terms that prohibit the use of forced labor, a time frame by which to take corrective action if forced labor is identified, and the consequences if corrective action is not taken, such as the termination of the contractual relationship?

11. Do you have a comprehensive and transparent social compliance system in place? Have you reviewed the Department of Labor’s "Comply Chain" webpage?
12. Have you developed a reliable program or procedure to maintain and produce any required customs entry documentation and supporting information?

**Miscellaneous Questions**

1. Have you taken measures or developed reliable procedures to ensure that your merchandise complies with other agency requirements (e.g., FDA, EPA/DOT, CPSC, FTC, Agriculture, etc.) prior to or upon entry, including the procurement of any necessary licenses or permits?

2. Have you taken measures or developed reliable procedures to check to see if your goods are subject to a Commerce Department antidumping or countervailing duty investigation or determination, and if so, have you complied or developed reliable procedures to ensure compliance with customs reporting requirements upon entry (e.g., 19 C.F.R. § 141.61)?

3. Is your merchandise subject to quota and/or visa requirements, and if so, have you provided or developed a reliable procedure to provide a correct visa or other document for the goods upon entry?

4. Have you taken reliable measures to ensure and verify that you are submitting the correct type of CBP entry (e.g., TIB, T&E, consumption entry, antidumping or countervailing duty entry, mail entry, etc.)?

5. Have you established that you have the right to make entry?
ADDITIONAL INFORMATION

The Internet

The home page of CBP on the internet provides the trade community with current, relevant information regarding CBP operations and items of special interest. The site posts information—which includes proposed regulations, news releases, publications and notices, etc.—that can be searched, read online, printed or downloaded to your personal computer. The website was established as a trade-friendly mechanism to assist the importing and exporting community. The website also links to the home pages of many other agencies whose importing or exporting regulations CBP helps to enforce. The website also contains a wealth of information of interest to a broader public than the trade community. For instance, the "Know Before You Go" publication and traveler awareness campaign are designed to help educate international travelers.

The web address of U.S. Customs and Border Protection is http://www.cbp.gov.

CBP Regulations

The current edition of CBP Regulations of the United States is a loose-leaf, subscription publication available from the Superintendent of Documents, U.S. Government Printing Office, via the internet, phone, fax, postal mail, or email. Internet: http://bookstore.gpo.gov. Phone: DC Metro Area: (202) 512-1800, Toll-Free: (866) 512-1800, Monday through Friday, 8 a.m. – 4:30 p.m. EST, Fax: (202) 512-2104. Mail: U.S. Government Printing Office, P.O. Box 979050, St. Louis, MO 63197-9000. Email: Contactcenter@gpo.gov. A bound edition of Title 19, Code of Federal Regulations, is also available for sale from the same address. All proposed and final regulations are published in the Federal Register, which is published daily by the Office of the Federal Register, National Archives and Records Administration, and distributed by the Superintendent of Documents. Information about online access to the Federal Register may be obtained by calling (202) 512-1530 between 8 a.m. and 4:30 p.m. EST. The Federal Register is available online at https://www.ecfr.gov/. These notices are also published in the weekly Customs Bulletin described below.

Customs Bulletin

The Customs Bulletin and Decisions (Customs Bulletin) is a weekly publication that contains decisions, rulings, regulatory proposals, notices and other information of interest to the trade community. It also contains decisions issued by the U.S. Court of International Trade, as well as customs-related decisions of the U.S. Court of Appeals for the Federal Circuit. The Customs Bulletin is available online at https://www.cbp.gov/document/bulletins.
Importing Into the United States

This publication provides an overview of the importing process and contains general information about import requirements. The current edition of Importing Into the United States contains material explaining the requirements of the Mod Act. The Mod Act fundamentally altered the relationship between importers and CBP by shifting to the importer the legal responsibility for declaring the value, classification, and rate of duty applicable to entered merchandise.

The current edition contains a section entitled "Informed Compliance." A key component of informed compliance is the shared responsibility between CBP and the import community, wherein CBP communicates its requirements to the importer, and the importer, in turn, uses reasonable care to assure that CBP is provided accurate and timely data pertaining to the importation.

Single copies may be obtained from local offices of CBP, or from the Office of Public Affairs, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Washington, DC 20229. An online version is available at the CBP website.

Informed Compliance Publications

CBP has prepared a number of Informed Compliance publications in the "What Every Member of the Trade Community Should Know About:..." series. Check the website http://www.cbp.gov for current publications.

Value Publications

Customs Valuation Encyclopedia (with updates) is comprised of relevant statutory provisions, CBP Regulations implementing the statute, portions of the Customs Valuation Code, judicial precedent, and administrative rulings involving application of valuation law. This publication may also be found online.

The information provided in this publication is for general information purposes only. Recognizing that many complicated factors may be involved in customs issues, an importer may wish to obtain a ruling under CBP Regulations, 19 C.F.R. Part 177, or obtain advice from an expert (such as a licensed customs broker, an attorney or a customs consultant) who specializes in customs matters. Reliance solely on the general information in this pamphlet may not be considered reasonable care.

Additional information may also be obtained from CBP's ports of entry. Please consult the CBP website for an office near you. Contact information for ports of entry can also be found on the internet at www.cbp.gov/contact/ports.
“Your Comments are Important”

The Small Business and Regulatory Enforcement Ombudsman and 10 regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement activities and rate each agency’s responsiveness to small business. If you wish to comment on the enforcement actions of U.S. Customs and Border Protection, call 1-888-REG-FAIR (1-888-734-3247).

REPORT SMUGGLING: 1-800-BE-ALERT

Visit our website: http://www.cbp.gov

U.S. Customs & Border Protection
What Every Member of the Trade Community Should Know:

Prior Disclosure

An Informed Compliance Publication

August 2017

U.S. Customs and Border Protection
NOTICE

This publication is intended to provide guidance and information to the trade community. It reflects the position on or interpretation of the applicable laws or regulations by U.S. Customs and Border Protection (CBP) as of the date of publication, which is shown on the front cover. It does not in any way replace or supersede those laws or regulations. Only the latest official version of the laws or regulations is authoritative.

Publication History

First Published: May 1998

PRINTING NOTE

This publication was designed for electronic distribution via the CBP website (http://www.cbp.gov) and is being distributed in a variety of formats. It was originally set up in Microsoft Word97®. Pagination and margins in downloaded versions may vary depending upon which word processor or printer you use. If you wish to maintain the original settings, you may wish to download the .pdf version, which can then be printed using the freely available Adobe Acrobat Reader®.
PREFACE

On December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), also known as the Customs Modernization or “Mod” Act, became effective. These provisions amended many sections of the Tariff Act of 1930 and related laws.

Two concepts that emerged from the Mod Act are “informed compliance” and “shared responsibility,” which are premised on the idea that in order to maximize voluntary compliance with the laws and regulations of U.S. Customs and Border Protection (CBP), the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the Mod Act imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s rights and responsibilities under customs regulations and related laws. In addition, both the trade and CBP share responsibility for carrying out these requirements. For example, under Section 484 of the Tariff Act, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and determine the value of imported merchandise and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met. CBP is then responsible for fixing the final classification and value of the merchandise. An importer of record’s failure to exercise reasonable care may delay release of the merchandise and, in some cases, may result in the imposition of penalties.

The Office of Trade (OT), Regulations and Rulings (RR) plays a major role in meeting the informed compliance responsibilities of CBP. In order to provide information to the public, CBP has issued a series of informed compliance publications (ICPs).

This ICP, prepared by OT, RR, Penalties Branch, is entitled “The ABC’s of Prior Disclosure” and is part of a series of ICPs advising the public of customs regulations and procedures. We hope that this material, together with seminars and increased access to CBP ruling letters, will help the trade community to improve voluntary compliance with customs laws and understand the relevant administrative processes.

The material in this publication is provided for general information purposes only. Because many complicated factors can be involved in customs issues, an importer may wish to obtain a ruling letter pursuant to 19 CFR Part 177, or advice from an expert who specializes in customs matters, such as a licensed customs broker, attorney or consultant.

Comments and suggestions are welcomed and should be addressed to the Executive Director, Office of Trade, Regulations and Rulings, U.S. Customs and Border Protection, 90 K Street, N.E., 10th Floor, Washington, D.C. 20229-1177.

Alice A. Kipel
Executive Director
Regulations and Rulings
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<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>7</td>
</tr>
<tr>
<td>WHO MAY SUBMIT A PRIOR DISCLOSURE TO CBP?</td>
<td>8</td>
</tr>
<tr>
<td>WHAT IS A PRIOR DISCLOSURE?</td>
<td>8</td>
</tr>
<tr>
<td>WHY SHOULD I ELECT TO MAKE A PRIOR DISCLOSURE?</td>
<td>9</td>
</tr>
<tr>
<td>WHEN SHOULD I SUBMIT A PRIOR DISCLOSURE TO U.S. CUSTOMS AND BORDER PROTECTION?</td>
<td>9</td>
</tr>
<tr>
<td>WHERE DO I SUBMIT A PRIOR DISCLOSURE?</td>
<td>10</td>
</tr>
<tr>
<td>HOW DOES U.S. CUSTOMS AND BORDER PROTECTION DECIDE IF THE PRIOR DISCLOSURE I SUBMIT IS VALID?</td>
<td>10</td>
</tr>
<tr>
<td>FREQUENTLY ASKED QUESTIONS</td>
<td>11</td>
</tr>
<tr>
<td>APPENDIX A: PRIOR DISCLOSURE CHECKLIST (19 U.S.C. § 1592)</td>
<td>19</td>
</tr>
<tr>
<td>APPENDIX B: INFORMATION FOR STATISTICAL SAMPLING</td>
<td>21</td>
</tr>
<tr>
<td>APPENDIX C: CBP REGULATIONS ON PRIOR DISCLOSURE</td>
<td>23</td>
</tr>
<tr>
<td>ADDITIONAL INFORMATION</td>
<td>31</td>
</tr>
<tr>
<td>The Internet</td>
<td>31</td>
</tr>
<tr>
<td>CBP Regulations</td>
<td>31</td>
</tr>
<tr>
<td>Customs Bulletin</td>
<td>31</td>
</tr>
<tr>
<td>Importing Into the United States</td>
<td>32</td>
</tr>
<tr>
<td>Informed Compliance Publications</td>
<td>32</td>
</tr>
<tr>
<td>Value Publications</td>
<td>33</td>
</tr>
<tr>
<td>“Your Comments are Important”</td>
<td>34</td>
</tr>
</tbody>
</table>
(This page intentionally left blank.)
THE ABC’S OF PRIOR DISCLOSURE
Pursuant to 19 U.S.C. § 1592
(Section 592, Tariff Act of 1930, as amended)

INTRODUCTION

The following information is provided by CBP to help you understand the basics of prior disclosure. In this updated ICP, CBP’s Office of Trade, Regulatory Audit (OT, RA) has included specific information relating to the use of statistical sampling methodologies and duty offsets when calculating the loss of duties associated with a prior disclosure, including the information that must be provided to CBP when submitting a disclosure that uses statistical sampling. While not specifically addressed in this ICP, it should be noted that Title 19, United States Code (U.S.C.) Sections 1592(c)(5) through (c)(13) (19 U.S.C. § 1592(c)(5) – (c)(13)) set forth the various free trade agreements (FTAs) that contain specific prior disclosure provisions. A person making a prior disclosure with respect to a specific FTA (i.e., United States-Chile Free Trade Agreement, etc.) should verify that its claimed prior disclosure meets the requirements set forth in the applicable FTA and corresponding regulatory provisions (See Title 19, Code of Federal Regulations (CFR) Part 10 (19 CFR Part 10)).

The prior disclosure provision contained in 19 U.S.C. § 1592 provides reduced penalties to a person who notifies CBP of the circumstances of a violation of the customs laws and regulations, before CBP or U.S. Immigration and Customs Enforcement (ICE)/Homeland Security Investigations (HSI) discovers the possible violation and notifies the party of the discovery of the possible violation. In certain cases, a valid prior disclosure may result in either substantial mitigation or cancellation of a penalty in full. Valid prior disclosures can save a person time and money, but all parties (including CBP) must be aware of the prior disclosure requirements in order to realize the benefits of this provision of law. The official CBP policy is to encourage the submission of valid prior disclosures.

It is important to remember that this ICP only involves prior disclosures submitted pursuant to 19 U.S.C. § 1592.

In the following pages, we will discuss the “who, what, why, where, when and how” of prior disclosures, followed by a list of frequently asked questions (FAQs) related to prior disclosures. In addition, for those parties contemplating the submission of a prior disclosure, we have included a checklist following the FAQs section which may be helpful in completing the submission of the disclosure. We have also included a list of specific information to be provided to CBP when submitting a prior disclosure that uses a statistical sampling methodology. Lastly, we have included a copy of the CBP Regulations (19 CFR §§ 162.74 and 163.11) governing prior disclosures for your information.
WHO MAY SUBMIT A PRIOR DISCLOSURE TO U.S. CUSTOMS AND BORDER PROTECTION?

Answer: *Any* party involved in the business of importing into the United States may file a prior disclosure with CBP for any violation it believes it has committed with respect to 19 U.S.C. § 1592. The parties who may file a prior disclosure include, but are not limited to, importers, customs brokers, exporters, shippers, and foreign suppliers/manufacturers.

WHAT IS A PRIOR DISCLOSURE?

Answer: A *valid* prior disclosure discloses the circumstances of a violation of 19 U.S.C. § 1592 to CBP before, or without knowledge of, the commencement of a formal investigation of that violation by CBP, and includes a tender of any actual loss of duties associated with the violation. Pursuant to 19 U.S.C. § 1592, CBP can assess monetary penalties against parties who make material false statements, acts or omissions in connection with their importations. The material false statements, acts or omissions must result from the parties’ negligence, gross negligence or fraudulent conduct. Some typical examples of such violations include undervaluation, misdescription of merchandise, misclassification, overvaluation, evasion of an antidumping/countervailing duty (AD/CVD) order, improper country of origin declarations or markings, or improper claims for preferential tariff treatment under a free trade agreement or other duty preference program.

Title 19 U.S.C. §1592(c)(4) provides for prior disclosure treatment. It should be noted that parties are not required to make a prior disclosure, but can *elect* to submit a disclosure. If a party elects to make a prior disclosure of a violation, *before or without knowledge* of a formal CBP or ICE/HSI investigation of the violation, then the party will receive reduced penalties (See 19 U.S.C. § 1592(c)(4)(A) and (B)). The penalty amount is zero if the importations involve unliquidated (i.e., open) customs entries and no fraud is involved. If the entries are liquidated (i.e., closed or finalized) and no fraud is involved, the penalty is equal to the interest on the actual loss of duties computed from the date of liquidation to the date of the party’s tender of the loss of duty resulting from the violation. If a fraudulent violation is disclosed, the penalty is reduced from the normal assessment of the domestic value of the merchandise to 100 percent of the duty loss, or if the violation involves no duty loss, the penalty is reduced to 10 percent of the dutiable value of the merchandise.

In all cases involving liquidated entries and duty loss violations, the party must tender the duty loss to CBP in order for the prior disclosure to be considered valid. The disclosing party may choose to make the tender either at the time of the claimed disclosure or within 30 days after CBP notifies the party in writing of CBP’s calculation of the actual duty loss. (See “When” section below regarding the timing of this tender.) Upon receipt of a prior disclosure, CBP will review the submission and notify the disclosing party as to whether the prior disclosure is valid. If the prior disclosure is determined to be valid, CBP will issue a request for payment of the reduced penalty amount, if applicable. If the prior disclosure is determined to be invalid on the basis that CBP had commenced a formal investigation of the disclosed violation, CBP will commence penalty proceedings under 19 U.S.C. § 1592 and must attach a copy of the “writing” evidencing the commencement of
the investigation to the prepenalty notice.

The specific rules governing prior disclosures are set forth in the CBP Regulations at 19 CFR §§ 162.74 and 163.11. These regulatory provisions are provided in Appendix C of this ICP for your information. By following these rules carefully, you can avoid common mistakes if you elect to submit a prior disclosure.

WHY SHOULD I ELECT TO MAKE A PRIOR DISCLOSURE?

Answer: The obvious reason to submit a prior disclosure is to receive reduced penalties in connection with a violation of 19 U.S.C. § 1592. In some cases, parties have saved millions of dollars in potential penalties by submitting a valid prior disclosure. However, there are other benefits that often accrue to the disclosing party. Conducting periodic self-assessment of your importing activities and availing yourself of this provision of law may allow you to detect and correct errors, as well as ensure future compliance with customs laws and regulations. The submission of a prior disclosure may also result in additional time and money savings in the form of reduced legal expenses and/or the elimination of lengthy CBP penalty proceedings. The Government also benefits when a party submits a prior disclosure by eliminating or reducing expenditures of valuable resources and manpower involved in investigating a violation.

WHEN SHOULD I SUBMIT A PRIOR DISCLOSURE TO U.S. CUSTOMS AND BORDER PROTECTION?

Answer: The question of when to submit a prior disclosure to CBP involves a judgment call that depends on your particular circumstances. As a general rule, if you can identify the import transactions that violate 19 U.S.C. § 1592, and you wish to submit a prior disclosure, you should do so as soon as possible. If you delay the submission of a prior disclosure, you run the risk that CBP may discover the violation, commence a formal investigation, and notify you of the commencement of a formal investigation, thereby cutting off your right to make a prior disclosure.

Certain factors may exist which will influence your decision regarding when to submit a prior disclosure. If CBP has already contacted you regarding the violation, you may decide to forgo a prior disclosure (but see FAQs below concerning the availability in such cases of additional relief). In addition, if you have not yet assembled all the correct information involving the transactions which are in violation of 19 U.S.C. § 1592, this may influence your decision to submit the prior disclosure. Under these circumstances, the CBP regulations allow you to initiate the prior disclosure while affording you 30 days after you have initiated the disclosure to assemble any additional information or data unknown at the time of the disclosure. You may also ask the concerned Fines Penalties and Forfeitures Officer (FPFO) for extensions of time beyond the 30 days to submit the necessary information or data.

CBP officers are frequently asked about the appropriate time to submit duties that are due involving the disclosed violation. CBP regulations state that a disclosing party should tender any loss of duties involving liquidated entries covered by its disclosure at the time
of the submission of the claimed prior disclosure. If you are granted an extension(s) by CBP to assemble the aforementioned information and to calculate the loss of duties, the tender should be submitted with the "perfected" prior disclosure. However, if you are not sure of the amount of the actual duty loss, you may wish to wait until CBP notifies you of its calculation. If you choose this latter option, the regulations (See 19 CFR § 162.74(c) in Appendix C below) provide that the disclosing party may tender the amount calculated by CBP within 30 days of CBP notification. We note that the regulations provide for limited CBP Headquarters Review of local customs duty loss calculations, but parties who qualify for this limited review must still deposit the loss of duties determined by the local CBP office to obtain such review. Headquarters review is limited to those cases where the actual loss of duties, taxes or fees determined by CBP exceeds $100,000 and is deposited with CBP, more than one year remains on the statute of limitations, and the disclosing party has complied with all other prior disclosure regulatory provisions. Headquarters review of the loss of duties under this provision is limited to determining issues of correct tariff classification, correct rate of duty, elements of dutiable value, and correct application of any special rules (e.g., GSP, CBI, HTS 9802, etc.). Headquarters review decisions are final and not subject to appeal. Disclosing parties who request and obtain such a review by Headquarters waive their right to contest either administratively or judicially the actual loss of duties finally calculated by CBP under this procedure. (See 19 CFR 162.74(c)).

WHERE DO I SUBMIT A PRIOR DISCLOSURE?

Answer: You may submit a prior disclosure to the appropriate Center of Excellence and Expertise (Center) or any port of entry where the disclosed violation occurred. If violations occurred at a number of CBP ports, you should list all of the concerned ports in the disclosure. This will facilitate CBP's consolidation of the multi-port prior disclosure at a single port or Center.

HOW DOES U.S. CUSTOMS AND BORDER PROTECTION DECIDE IF THE PRIOR DISCLOSURE I SUBMIT IS VALID?

Answer: CBP will first verify that you have disclosed all of the circumstances of the violation in accordance with the regulations (See 19 CFR § 162.74(b) in Appendix C below). An incomplete disclosure of the circumstances of the violation is a common error associated with prior disclosures, yet is easily avoidable by following the requirements set forth in the regulations. Once CBP determines that you have disclosed the circumstances of the violation, the agency will then verify whether CBP or ICE/HSI has commenced a formal investigation of the disclosed violation, and whether CBP or ICE/HSI communicate to you the existence of that investigation. If no open formal investigation exists, or CBP determines that you have no knowledge of a formal investigation, CBP will notify you that your disclosure is valid, assuming, of course, that the information you provided is verified as accurate and any actual loss of duties has been tendered. If, upon a thorough review of the facts relating to the prior disclosure, CBP determines that there was no violation of 19 U.S.C. § 1592, it is CBP's policy to refund the actual loss of duties on liquidated entries tendered with the prior disclosure.
FREQUENTLY ASKED QUESTIONS

1. Who in CBP decides whether my prior disclosure is valid?

Answer: In most cases, the FPFO at the port of entry or at the Center where the admitted violation(s) took place – will decide whether the prior disclosure is valid (See 19 CFR § 162.74(a)(2)).

2. I have never been contacted by a CBP officer regarding the violation I wish to disclose. Does that mean I qualify for prior disclosure benefits if I fully disclose the circumstances of the violation and tender any duty loss associated with the violation?

Answer: Ordinarily in such cases where there has been no CBP or ICE/HSI contact, you will receive prior disclosure benefits, assuming that you satisfy all of the requirements set forth in 19 CFR § 162.74 and 19 U.S.C. § 1592(c)(4). You should be aware, however, that CBP or ICE/HSI may have already commenced a formal investigation of the circumstances regarding the violation before you submitted the disclosure. In all cases, before submitting any prior disclosure, you should review the provisions in 19 CFR § 162.74(i) to ensure that none of the events listed in that section has taken place. The events listed in 19 CFR § 162.74(i) can give rise to a presumption that a disclosing party had knowledge of the commencement of a formal CBP and/or ICE/HSI investigation. You should remember that the disclosing party has the burden to prove lack of knowledge of the commencement of a formal investigation.

3. I have reviewed my import transactions and have discovered a mistake on my entry documents relating to the value of the merchandise. Although the value I reported was too low, I have not been contacted by CBP or ICE/HSI and I know that this was not an intentional error. Should I submit a prior disclosure?

Answer: We recommend that you submit a prior disclosure. If you submit a prior disclosure and CBP determines that no violation took place, there are no penalty consequences under 19 U.S.C. § 1592 and, therefore, no record of the disclosure is made. On the other hand, if you submit the prior disclosure and CBP determines that a 19 U.S.C. § 1592 violation did occur, you will be accorded the full benefits of prior disclosure treatment for that violation, assuming of course that you fully disclosed the circumstances of the violation before or without knowledge of the commencement of a formal investigation of what was disclosed, and tendered any loss of duties on liquidated entries.

4. How do I fully disclose the circumstances of a violation?

Answer: You should follow the requirements set forth in 19 CFR § 162.74(b). These four rather straightforward requirements involve the specifics of the import transactions involved (e.g., class or kind of merchandise, details of the violation, customs entries involved, etc.) and the correct information or data that should have been provided to CBP in the entry documents.

5. I have discovered certain undeclared importation costs which CBP may consider
dutiable. Do the prior disclosure rules permit me to obtain a CBP decision or review on the dutiability issue before I submit the disclosure and tender any duties which might be due?

Answer: First, it is important to remember that the importer is responsible for submitting true and accurate information to CBP, including all dutiable elements of the transaction. If you have determined that required costs have not been reported to CBP, we recommend that you consider submitting a prior disclosure. You will be notified by CBP whether any duty tender you submitted was insufficient and given an opportunity to increase your tender to the amount requested by CBP. In cases where CBP determines the actual loss or duties, taxes or fees exceeds $100,000, you may be eligible for CBP Headquarters review of the basis for determining the duty calculation prior to the decision on the validity of the disclosure, but such appeals require the deposit of the disputed amount, are limited in scope, and the Headquarters decision is final. In all other cases, if CBP denies the validity of the disclosure because you failed to tender the correct loss of duties (i.e., failed to acknowledge the dutiability of certain costs), you will be able to challenge such determination if CBP commences a subsequent 19 U.S.C. § 1592(a) penalty proceeding.

6. Must I submit my disclosure in writing?

Answer: A party may submit an oral prior disclosure; however, CBP recommends that all prior disclosures be submitted in writing. By submitting a disclosure in writing, the scope and details of the disclosure are documented and the credibility of any oral disclosure does not become an issue. Also, although an oral disclosure is permissible, the regulations require that oral disclosures be followed up in writing within 10 days to a CBP or ICE/HSI officer. The problems associated with oral disclosures become clear in those cases involving hundreds of import transactions, particularly where different types of merchandise are involved.

7. How far back in time should I go in reviewing my transactions and deciding the scope of my prior disclosure?

Answer: It is essential to remember that you determine the scope of the prior disclosure. For example, if you make a valid disclosure of 2015 violations and CBP, during its disclosure verification proceedings discovers violations that occurred in 2014, you only get prior disclosure treatment for the 2015 violations. A good rule of thumb to follow in defining the scope of your disclosure is to cover those violations not barred by the statute of limitations, i.e., five years from the date of discovery for fraud, and five years from the date of entry for those violations involving gross negligence or negligence. It should also be remembered that the scope issue affects CBP as well. For example, if CBP or ICE/HSI has an open investigation involving alleged false country of origin violations covering only your 2015 widget imports, you may be able to obtain prior disclosure treatment for violations that you disclose which occurred before 2015.

8. What is a formal investigation and how does it affect prior disclosure?

Answer: The prior disclosure regulations provide that a formal investigation of a 19 U.S.C.
§ 1592 violation is considered to be commenced on the date recorded in writing by CBP as the date on which facts and circumstances were discovered or information was received that caused CBP to believe that a possibility of a violation existed. (See 19 CFR § 162.74(g) in Appendix C for complete definition). If CBP has commenced a formal investigation and the disclosing party is aware of the CBP investigation, then it may be precluded from filing a prior disclosure for the entries at issue. However, if an Import Specialist, CBP Officer or auditor merely asks you to provide samples and/or product literature, the request for additional information alone will not constitute the commencement of a formal investigation.

If an auditor, Import Specialist, or CBP Officer has reason to believe that you may have committed a 19 U.S.C. § 1592 violation, creates a “writing” memorializing the date on which facts and circumstances were discovered or information was received which caused CBP to believe that a possibility of a violation of 19 U.S.C. § 1592 existed, and asks you specific questions regarding the suspected violation, a formal investigation may be deemed to have commenced. Depending on the types of questions the CBP Officer asks, you may be charged with having knowledge that a formal investigation has commenced. If you then try to make a prior disclosure, it may be denied. A notice of commencement of an investigation can take the form of a formal letter issued by CBP, a CBP Form 29 or its electronic equivalent, or an email articulating the facts of a possible 19 U.S.C. § 1592 violation.

If you submit a clearly labeled prior disclosure and CBP later denies prior disclosure treatment on the basis that CBP or ICE/HSI had commenced a formal investigation of the disclosed violation, CBP is required to provide you with a copy of the “writing” evidencing the commencement of a formal investigation in a subsequent penalty proceeding. If you can demonstrate that you had no knowledge of the commencement of a formal CBP or ICE/HSI investigation at the time of your disclosure, you may still be afforded prior disclosure benefits (See 19 CFR 162.74(i) in Appendix C).

9. I know that CBP or ICE/HSI has commenced a formal investigation of my 2015 imports involving undeclared royalties I paid my supplier. May I get disclosure benefits if I disclose a misdescription involving the same shipments?

Answer: Yes, you may receive prior disclosure benefits for the misdescription of the merchandise provided that the CBP or ICE/HSI investigation only related to the royalty violations and you fully disclose the circumstances of the violations involving the misdescription (including tendering any actual loss of duties). In other words, a party may obtain prior disclosure benefits for additional violations of 19 U.S.C. § 1592 that were not covered by the scope of a CBP or ICE/HSI investigation.

10. If I submit a valid prior disclosure of a violation of 19 U.S.C. § 1592, can I be criminally prosecuted based on the information I disclose?

Answer: If you submit a prior disclosure containing information which gives CBP reason to believe that a criminal violation has occurred, CBP and ICE/HSI are legally obligated to refer that information to the appropriate U.S. Attorney’s office. The U.S. Attorney’s office
then is responsible for making a decision whether to prosecute the alleged criminal violation. In general, based on CBP’s experience, a valid prior disclosure of a non-fraudulent violation is rarely prosecuted by the U.S. Attorney’s office. However, it should be reiterated that the U.S. Attorney’s office makes the decision on whether or not to prosecute a criminal violation.

11. I have been notified that the Office of Trade, Regulatory Audit will be conducting an audit of my 2015 widget importations in 2 months. What should I do before the team arrives?

Answer: CBP recommends that you utilize this 2-month period to conduct a self-assessment of your importations. By doing so, if you discover potential violations of 19 U.S.C. § 1592, you may obtain prior disclosure benefits if you fully disclose the circumstances of the violations before the audit team arrives.

12. Does the fact that CBP or ICE/HSI may commence a formal investigation of a potential violation, and possibly preclude a prior disclosure, chill or inhibit a free and frank exchange of information between importers and CBP officials?

Answer: There is no simple answer to this question. CBP has adopted a policy that encourages the submission of prior disclosures. On the one hand, CBP and ICE/HSI are law enforcement agencies and are required to enforce the law when they have reason to believe that a violation has occurred. On the other hand, CBP is also responsible for the facilitation of lawful international commerce. Striking a balance between these objectives requires both CBP and the trade to exercise shared responsibilities, which is one of the principal tenets of the Customs Modernization Act. If you are an importer and have exercised reasonable care in filing your entries, you should not feel constrained to discuss your importations with CBP. An importer is responsible for exercising reasonable care in entering merchandise, by providing sufficient information as is necessary to enable CBP to determine whether the imported product can be released from CBP custody, and to determine whether all other requirements of governing laws are met. CBP considers that an importer who exercises reasonable care in filing its entries is not negligent and, therefore, does not violate 19 U.S.C. § 1592. Even if CBP has commenced a formal investigation of a violation this would not automatically preclude a prior disclosure provided that the disclosing party has no knowledge of the commencement of a formal CBP or ICE/HSI investigation.

An important point to remember about prior disclosures is that they are rooted in fairness to both the Government and the trade community. For example, if a party submits a valid prior disclosure, the party may receive the benefits of significantly reduced penalties that the law provides. On the other hand, where there is no prior disclosure and CBP or ICE/HSI first discovers the violation (and the violator has knowledge of the commencement of an investigation), prior disclosure treatment will not be afforded to the violator.

13. How am I notified by CBP that my prior disclosure is valid or invalid?

Answer: If a prior disclosure is determined to be valid, CBP will notify you by means of a
19 U.S.C. § 1592 prepenalty notice and set forth the amount of the reduced penalty assessment in its notice, in accordance with 19 U.S.C. §1592(c)(4)(A) and (B). This notice will provide instructions regarding payment of any reduced penalty and also serves as the CBP record of the disclosed violation. If the interest owed is less than $1,000, the FPFO shall exercise discretion in determining whether to initiate a penalty action. If a violation involves a non-duty loss violation or unliquidated entries, no penalty should be assessed and any unliquidated duties should be collected by a rate advance. In these cases, the FPFO should advise the disclosing party in writing that the disclosure is valid and that no penalty will be assessed. If a prior disclosure does not meet the requirements of 19 CFR § 162.74, the FPFO will proceed with a penalty under 19 U.S.C. § 1592 at the prescribed statutory penalty amounts.

14. Should I make a prior disclosure of my CBP violations if I know that such violations are under formal investigation by CBP?

Answer: This is a judgment call which you must make based on your particular circumstances. Some parties choose to disclose circumstances of a violation in cases where they have knowledge of the commencement of a formal investigation of such violation in order to obtain additional mitigation in subsequent penalty proceedings under 19 U.S.C. § 1592. In such a case, by providing the details of the violation to CBP and by exhibiting extraordinary cooperation beyond that expected from a person under investigation for a CBP violation, a person may be eligible for mitigation in the form of significantly reduced penalties under the mitigation guidelines for 19 U.S.C. § 1592 penalties, even though they do not qualify for prior disclosure treatment. Further details regarding such extraordinary relief may be found in Appendix B to Part 171 of the CBP Regulations.

15. Can I use statistical sampling in calculating the loss of duties identified in a claimed prior disclosure?

Answer: Yes, a private party conducting an independent review of certain transactions and a calculation of lost duties, taxes, and fees or lost duties for prior disclosure purposes may use statistical sampling provided that: (1) review of 100 percent of the transactions is impossible or impractical; (2) the sampling plan is prepared in accordance with generally recognized sampling procedures; and (3) the sampling procedure is executed in accordance with that plan (See 19 CFR § 163.11(c)(3)). You should submit with your disclosure an explanation of the sampling plan and methodology employed and the execution and results of the review. The time period, scope, sampling plan employed, execution, and results are subject to CBP review and approval.

Note that the use of statistical sampling requires knowledge of probability and statistical theories and its use in a prior disclosure claim may require consultation with and compilation by an expert. (See Appendix B below which details the type of information you or your expert should provide to CBP.)

16. Will CBP review and approve my sampling plan prior to execution?

Answer: You may request to discuss a proposed sampling plan and methodology with CBP
to ensure the proposed methodology is acceptable and to remedy any defects prior to committing the resources to executing the plan. However, the actual execution of the sampling plan and the resulting projections are still subject to CBP review and approval regardless of whether you discussed the proposed sampling plan with CBP beforehand. If additional information affecting the suitability of the original sampling plan’s design comes to CBP’s attention, CBP may reconsider and reject the sample results or require the importer to remedy any defects.

17. During my evaluation of the entries in preparing my prior disclosure claim, I identified overpayments of duties, taxes, and fees on a number of entries. Will I be allowed to offset these overpayments with any underpayments?

Answer: Yes, under 19 CFR § 163.11(d), the overpayments of duties, taxes, and fees may be offset against underpayments of duties, taxes, and fees in prior disclosure claims where the requirements are satisfied. Offsetting will be allowed only on finally liquidated entries within the time period and scope of the prior disclosure claim provided that: (1) the identified overpayments or over-declarations were not made for the purpose of violating any provision of law, including laws other than customs laws; (2) the identified underpayments or under-declarations were not made knowingly and intentionally; and (3) all other requirements of 19 CFR § 163.11(d) are met. After the applicable FPFO has reviewed the disclosure and determined it to be valid, the Office of Trade, RA will review and evaluate all such prior disclosures and determine whether the application of offsetting may be approved.

18. Is offsetting permitted across different types of duties, taxes, and fees? For instance, can overpayments in duty be offset against underpayments of harbor maintenance fees?

Answer: Yes, offsetting is permitted regardless of the type of duties, taxes, and fees involved as long as the entries are finally liquidated and the requirements of 19 CFR § 163.11(d) are satisfied. However, offsetting involving AD/CVD will only be permitted where CBP has received final liquidation instructions from the Department of Commerce for all affected cases and those liquidation instructions have not been overruled or enjoined by the U.S. Court of International Trade.

19. While calculating the loss of revenue, I found more overpayments than underpayments on “finally liquidated” entries. Can I request a refund?

Answer: No, once liquidation is final, then no refund is available to you.

20. I forgot to claim a duty allowance or preference at the time of entry and now the entries have finally liquidated. Can I use offsetting to make the claim in a prior disclosure?

Answer: No, offsetting is not allowed with respect to overpayments or over-declarations resulting from a failure to timely claim or establish a duty allowance or preference at the time of entry (e.g., failure to claim eligibility for a Free Trade Agreement or preferential
trade legislation program, failure to claim drawback before the drawback period expired, or failure to claim U.S. Goods Returned or allowance for U.S. trade components in headings 9801 and 9802 of the tariff schedule).

21. I used statistical sampling to prepare my prior disclosure claim and I identified both underpayments and overpayments. Will I be allowed to project both the underpayments and overpayments in calculating the loss of revenue?

Answer: It depends on the liquidation status of the entries. Offsetting is only permitted where the entries have finally liquidated. If the universe is composed of finally liquidated entries, both the underpayments and overpayments can be projected. If you are using a universe of entries with mixed liquidation statuses, there is a risk of not being able to project any overpayments that occur on entries that are not finally liquidated or having to redesign and re-execute the sampling plan.
Appendix A – Prior Disclosure Checklist

Appendix B – Information to be Provided to CBP When Submitting a Prior Disclosure Employing Statistical Sampling

Appendix C – CBP Prior Disclosure Regulations (19 CFR § 162.74 and 19 CFR § 163.11)
APPENDIX A: PRIOR DISCLOSURE CHECKLIST (19 U.S.C. § 1592)

The following checklist may prove helpful if you have made the decision to submit a prior disclosure to CBP. Answering all of the questions below may assist you in completing your prior disclosure submission.

1. Is your prior disclosure addressed to the Commissioner of CBP and does your submission indicate your name, address and telephone number? (Note: Although addressed to the Commissioner, the submission must list all of the concerned ports of entry.)

2. Have you identified the class or kind of merchandise involved in the disclosed violation?

3. Have you identified the importation included in the disclosure by customs entry number, or by indicating each concerned CBP port of entry and the approximate dates of entry? (Reminder: The disclosing party defines the scope of the prior disclosure.)

4. Have you provided the specific material false statements, omissions or acts involved in the disclosed violation and how and when they occurred?

5. Have you provided the true and accurate information or data which should have been provided in the entry? (Note: In this regard, remember to specify that you will provide any unknown information or data within 30 days of your initial disclosure — if it is not available at the time of your initial disclosure you may ask the concerned FPFO for extensions of this 30-day time period.)

6. If you used a statistical sampling methodology to calculate the loss of duty, have you described that methodology, including the elements of the sampling plan discussed in Appendix B below?

7. Have you calculated any loss of duty involving liquidated entries covered by the prior disclosure? (Note: This amount includes all duties, taxes and user fees.) And, if so, have you prepared a check in the amount of the duty loss made payable to CBP and submitted it along with your prior disclosure?

8. Have you specifically identified overpayments of duties, taxes, or fees for which you are seeking to offset against any underpayment and did you ensure that all affected entries are “finally liquidated”?

9. Have you identified all of the CBP ports where the disclosed violations occurred? (Remember that the submission must list all the concerned ports of entry.)

10. If you are mailing the prior disclosure, have you considered sending it registered or return receipt requested so that the time of disclosure is the date of mailing? (Reminder: Failure to mail the disclosure in this manner will mean that the time of the
disclosure will be considered the date of receipt by CBP.)

11. If you are sending the prior disclosure electronically to CBP, have you requested a delivery receipt?
APPENDIX B. Information to be Provided to CBP When Submitting a Prior Disclosure Employing Statistical Sampling Methodology

A list of specific sampling elements has not been described in the CBP regulations; however, some general descriptive elements may facilitate the review process of the prior disclosure. The following information should be included in disclosures that use a statistical sampling methodology:

· Sampling objective: The question you are trying to answer about the universe which defines the characteristics, occurrences, errors, and/or values to be evaluated.

· Statistical sampling type (e.g., attribute or variable) and approach (e.g., physical unit, dollar unit, attribute discovery, etc.): Attribute sampling is used to reach a conclusion on the frequency or occurrence of a particular attribute (e.g., to calculate a rate of compliance). Variable sampling is used to reach a conclusion about errors in terms of erroneous amounts (e.g., dollars in error). Variable sampling is generally more appropriate for determining the monetary impact of any sample error(s). As such, attribute sampling would generally be an uncommon approach to quantifying loss of duties for disclosure purposes. Provide an explanation for your chosen approach.

· Description of misstatement condition: Represents the error being measured (i.e., criteria for identifying and reporting errors; defines what will be counted as an error and projected onto the universe/sampling frame).

· Detailed universe/sampling frame descriptions: The universe is the population from which you are selecting the sample and the sampling frame is the physical or electronic representation of the universe from which the sample is taken. We recommend you have an electronic version readily available. The description should include the source of the data; specific time period; the scope (e.g., types of entries, specific classifications or manufacturers, etc.); descriptive characteristics (e.g., size and value; mean, medium, and mode of values; standard deviation, etc.), and an explanation for any items excluded from the sampling frame (e.g., individually significant items removed for separate evaluation).

· Explanation of any stratification methods used (if applicable): Process of separating a universe into different subgroups for separate selection, review, and evaluation. It is mainly used to group like items together and is generally used for purposes of improving the precision of sample results in a universe with a high amount of variability.

· Sampling Unit: The individual items that compose the sampling frame that may be selected for testing (e.g., entries, entry lines, dollars, general ledger transactions, etc.).

· Sample size and basis for sample size selection: Describe/identify the parameters (and associated logic) used to determine the sample size (e.g., confidence level, critical error rate, presumed error rate, desired precision, sample sizing guidelines, etc.) and identify
any software and/or guidelines used.

- Sample selection process to select individual sample items: All items in the universe/sampling frame must have an equal chance of selection. Random selection is typically the most suitable approach (e.g., random number generator).

- Evaluation and projection of sample results: Identify the number and nature of the errors found in the sample and the treatment of those errors. Identify the statistical sampling software or formulas used to project the errors. Explain the evaluation of the precision of the sample results including the point estimate (single figure that serves as the “best estimate” of the projection of sample errors to the universe/sampling frame), confidence level (degree of assurance that the true or actual answer is within a specified range; typically 95 or 99 percent), and precision interval (range within which the actual value in the sampling frame should fall at a given confidence level).

This list is not an all-inclusive list. CBP may request the sampling frame files, as well as, the sample evaluation files, so you should be prepared to provide relevant documentation used to select and evaluate the sample selections.
APPENDIX C: CBP PRIOR DISCLOSURE REGULATIONS - 19 CFR
§ § 162.74 and 163.11

162.74 Prior Disclosure

(a) In general. -- (1) A prior disclosure is made if the person concerned discloses the circumstances of a violation (as defined in paragraph (b) of this section) of 19 U.S.C. § 1592 or 19 U.S.C. § 1593a, either orally or in writing to a Customs officer before, or without knowledge of, the commencement of a formal investigation of that violation, and makes a tender of any actual loss of duties, taxes and fees or actual loss of revenue in accordance with paragraph (c) of this section. A Customs officer who receives such a tender in connection with a prior disclosure shall ensure that the tender is deposited with the concerned local Customs entry officer.

(2) A person shall be accorded the full benefits of prior disclosure treatment if that person provides information orally or in writing to Customs with respect to a violation of 19 U.S.C. § 1592 or 19 U.S.C. § 1593a if the concerned Fines, Penalties and Forfeitures Officer is satisfied the information was provided before, or without knowledge of, the commencement of a formal investigation, and the information provided includes substantially the information specified in paragraph (b) of this section. In the case of an oral disclosure, the disclosing party shall confirm the oral disclosure by providing a written record of the information conveyed to Customs in the oral disclosure to the concerned Fines, Penalties and Forfeitures Officer within 10 days of the date of the oral disclosure. The concerned Fines Penalties and Forfeiture Officer may, upon request of the disclosing party which establishes a showing of good cause, waive the oral disclosure written confirmation requirement. Failure to provide the written confirmation of the oral disclosure or obtain a waiver of the requirement may result in denial of the oral prior disclosure.

(b) Disclosure of the circumstances of a violation. The term "discloses the circumstances of a violation" means the act of providing to Customs a statement orally or in writing that:

(1) Identifies the class or kind of merchandise involved in the violation;

(2) Identifies the importation or drawback claim included in the disclosure by entry number, drawback claim number, or by indicating each concerned Customs port of entry and the approximate dates of entry or dates of drawback claims;

(3) Specifies the material false statements, omissions or acts including an explanation as to how and when they occurred; and

(4) Sets forth, to the best of the disclosing party's knowledge, the true and accurate information or data that should have been provided in the entry or drawback claim documents, and states that the disclosing party will provide any information or data unknown at the time of disclosure within 30 days of the initial disclosure date. Extensions of the 30-day period may be requested by the disclosing party from the concerned Fines, Penalties and Forfeitures Officer to enable the party to obtain the information or data.
(c) Tender of actual loss of duties, taxes and fees or actual loss of revenue. A person who discloses the circumstances of the violation shall tender any actual loss of duties, taxes and fees or actual loss of revenue. The disclosing party may choose to make the tender either at the time of the claimed prior disclosure, or within 30 days after CBP notifies the person in writing of CBP calculation of the actual loss of duties, taxes and fees or actual loss of revenue. The Fines, Penalties and Forfeitures Officer may extend the 30-day period if there is good cause to do so. The disclosing party may request that the basis for determining CBP asserted actual loss of duties, taxes or fees be reviewed by Headquarters, provided that the actual loss of duties, taxes or fees determined by CBP exceeds $100,000, and is deposited with CBP, more than 1 year remains under the statute of limitations involving the shipments covered by the claimed disclosure, and the disclosing party has complied with all other prior disclosure regulatory provisions. A grant of review is within the discretion of CBP Headquarters in consultation with the appropriate field office, and such Headquarters review shall be limited to determining issues of correct tariff classification, correct rate of duty, elements of dutiable value, and correct application of any special rules (GSP, CBI, HTS 9802, etc.). The concerned Fines, Penalties and Forfeitures Officer shall forward appropriate review requests to the Chief, Penalties Branch, Office of International Trade. After Headquarters renders its decision, the concerned Fines, Penalties and Forfeitures Officer will be notified and the concerned Center Director will recalculate the loss, if necessary, and notify the disclosing party of any actual loss of duties, taxes or fees increase. Any increases must be deposited within 30 days, unless the local CBP office authorizes a longer period. Any reductions of the CBP calculated actual loss of duties, or and fees shall be refunded to the disclosing party. Such Headquarters review decisions are final and not subject to appeal. Further, disclosing parties requesting and obtaining such a review waive their right to contest either administratively or judicially the actual loss of duties, taxes and fees or actual loss of revenue finally calculated by CBP under this procedure. Failure to tender the actual loss of duties, taxes and fees or actual loss of revenue finally calculated by CBP shall result in denial of the prior disclosure.

(d) Effective time and date of prior disclosure. -- (1) If the documents that provide the disclosing information are sent by registered or certified mail, return-receipt requested, and are received by Customs, the disclosure shall be deemed to have been made at the time of mailing.

(2) If the documents are sent by other methods, including in-person delivery, the disclosure shall be deemed to have been made at the time of receipt by Customs. If the documents are delivered in person, the person delivering the documents will, upon request, be furnished a receipt from Customs, stating the time and date of receipt.

(3) The provision of information that is not in writing but that qualifies for prior disclosure treatment pursuant to paragraph (a)(2) of this section shall be deemed to have occurred at the time that Customs was provided with information that substantially complies with the requirements set forth in paragraph (b) of this section.

(e) Addressing and filing prior disclosure. -- (1) A written prior disclosure should be addressed to the Commissioner of Customs, have conspicuously printed on the face of the envelope the words "prior disclosure", and be presented to a Customs officer at the Customs port of entry of the disclosed violation.

(2) In the case of a prior disclosure involving violations at multiple ports of entry, the disclosing party may orally disclose or provide copies of the disclosure to all concerned Fines, Penalties and Forfeitures Officers. In accordance with internal Customs procedures, the officers will then seek consolidation of the disposition and handling of the disclosure. In the event that the claimed multi-port disclosure is made to a Customs officer other than the concerned Fines, Penalties and Forfeitures Officer, the disclosing party
must identify all ports involved to enable the concerned Customs officer to refer the disclosure to the concerned Fines, Penalties and Forfeitures Officer for consolidation of the proceedings.

(f) Verification of disclosure. Upon receipt of a prior disclosure, the Customs officer shall notify Customs Office of Investigations of the disclosure. In the event the claimed prior disclosure is made to a Customs officer other than the concerned Fines, Penalties and Forfeitures Officer, it is incumbent upon the Customs officer to provide a copy of the disclosure to the concerned Fines Penalties and Forfeitures Officer. The disclosing party may request, in the oral or written prior disclosure, that the concerned Fines, Penalties and Forfeitures Officer request that the Office of Investigations withhold the initiation of disclosure verification proceedings until after the party has provided the information or data within the time limits specified in paragraph (b)(4) of this section. It is within the discretion of the concerned Fines, Penalties and Forfeitures Officer to grant or deny such requests.

(g) Commencement of a formal investigation. A formal investigation of a violation is considered to be commenced with regard to the disclosing party on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of a violation existed. In the event that a party affirmatively asserts a prior disclosure (i.e., identified or labeled as a prior disclosure) and is denied prior disclosure treatment on the basis that Customs had commenced a formal investigation of the disclosed violation, and Customs initiates a penalty action against the disclosing party involving the disclosed violation, a copy of a "writing" evidencing the commencement of a formal investigation of the disclosed violation shall be attached to any required prepenalty notice issued to the disclosing party pursuant to 19 U.S.C. 1592 or 19 U.S.C. 1593a.

(h) Scope of the disclosure and expansion of a formal investigation. A formal investigation is deemed to have commenced as to additional violations not included or specified by the disclosing party in the party's original prior disclosure on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of such additional violations existed. Additional violations not disclosed or covered within the scope of the party's prior disclosure that are discovered by Customs as a result of an investigation and/or verification of the prior disclosure shall not be entitled to treatment under the prior disclosure provisions.

(i) Knowledge of the commencement of a formal investigation. — (1) A disclosing party who claims lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge. A person shall be presumed to have had knowledge of the commencement of a formal investigation of a violation if before the claimed prior disclosure of the violation a formal investigation has been commenced and:

(i) Customs, having reasonable cause to believe that there has been a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a, so informed the person of the type of or circumstances of the disclosed violation; or

(ii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, had, either orally or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or

(iii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, requested specific books and/or records of the person relating to the disclosed violation; or

(iv) Customs issues a prepenalty or penalty notice to the disclosing party pursuant to 19 U.S.C. 1592 or 19 U.S.C. 1593a relating to the type of or circumstances of the disclosed violation; or
(v) The merchandise that is the subject of the disclosure was seized; or
(vi) In the case of violations involving merchandise accompanying persons entering the United States or commercial merchandise inspected in connection with entry, the person has received oral or written notification of Customs finding of a violation.

(2) The presumption of knowledge may be rebutted by evidence that, notwithstanding the foregoing notice, inquiry or request, the person did not have knowledge that an investigation had commenced with respect to the disclosed information.

(j) Prior disclosure using sampling -- (1) A private party may use statistical sampling to “disclose the circumstances of a violation” and for calculation of lost duties, taxes, and fees or lost revenue for purposes of prior disclosure, provided that the statistical sampling satisfies the criteria in 19 CFR 163.11(c)(3). The prior disclosure must include an explanation of the sampling plan and methodology that meets with CBP’s approval. The time period, scope, and any sampling plan employed by the private party, as well as the execution and results of the self-review, are subject to CBP review and approval. In accordance with 19 CFR 163.11(c)(1), in circumstances where the private party and CBP have discussed and accepted the sampling plan and its methodology, or adjustments to it, the private party submitting a prior disclosure employing sampling under this paragraph may not contest the validity of the sampling plan or its methodology, and challenges of the sampling itself will be limited to computational and clerical errors after CBP conducts its review and makes a determination. This is not a waiver of the private party’s right to later contest substantive issues it may properly raise under applicable regulations, as provided in 19 CFR 163.11(c)(1). (2) If a private party submits a prior disclosure claim employing sampling, CBP may review other transactions from the same time period and scope that are the subject of the prior disclosure.
163.11 Audit Procedures.

(a) General requirements. In conducting an audit under 19 U.S.C. 1509(b), the CBP auditors, except as otherwise provided in paragraph (f) of this section, will:

(1) Provide notice, telephonically and in writing, to the person to be audited of CBP's intention to conduct an audit and a reasonable estimate of the time to be required for the audit;

(2) Inform the person who is to be the subject of the audit, in writing and before commencement of the audit, of that person's right to an entrance conference, at which time the objectives and records requirements of the audit, and any sampling plan to be employed or offsetting that may apply, will be explained and the estimated termination date of the audit will be set. Where a decision on a sampling plan and methodology is not made at the time of the entrance conference, CBP will discuss these matters with the person being audited as soon as possible after the discovery of facts and circumstances that warrant the possible need to employ sampling;

(3) Provide a further estimate of any additional time for the audit if, during the course of the audit, it becomes apparent that additional time will be required;

(4) Schedule a closing conference upon completion of the audit on-site work to explain the preliminary results of the audit;

(5) Complete a formal written audit report within 90 calendar days following the closing conference referred to in paragraph (a)(4) of this section, unless the Executive Director, Regulatory Audit, Office of International Trade, CBP Headquarters, provides written notice to the person audited of the reason for any delay and the anticipated completion date; and

(6) After application of any disclosure exemptions contained in 5 U.S.C. 552, send a copy of the formal written audit report to the person audited within 30 calendar days following completion of the report.

(b) Petition procedures for failure to conduct closing conference. Except as otherwise provided in paragraph (f) of this section, if the estimated or actual termination date of the audit passes without a CBP auditor providing a closing conference to explain the results of the audit, the person audited may petition in writing for a closing conference to the Executive Director, Regulatory Audit, Office of International Trade, Customs and Border Protection, Washington, DC 20229. Upon receipt of the request, the director will provide for the closing conference to be held within 15 calendar days after the date of receipt.

(c) Use of statistical sampling in calculation of loss of duties or revenue—(1) General. In conducting an audit under this section, regardless of the finality of liquidation under 19 U.S.C. 1514, CBP auditors have the sole discretion to determine the time period and scope of the audit and will examine a sufficient number of transactions, as determined solely by CBP. In addition to examining all transactions to identify loss of duties, taxes, and fees under 19 U.S.C. 1592 or loss of revenue under 19 U.S.C. 1593a, or to determine compliance with any other applicable customs laws or other laws enforced by CBP, CBP auditors, at their sole discretion, may use statistical sampling methods. During the audit, CBP auditors will explain the sampling plan and how the results of the sampling will be projected over the universe of transactions for purposes of calculating lost duties, taxes, and fees or lost revenue and, where appropriate, overpayments and
over-declarations eligible for offsetting under paragraph (d) of this section. The person being audited and CBP will discuss the specifics of the sampling plan before audit work under the plan is commenced. Once the sampling plan is accepted, the audited person waives the ability to contest the validity of the sampling plan or its methodology at a later date and challenges of the sampling will be limited to challenging computational and clerical errors. CBP’s authority to conduct the audit or employ statistical sampling is not dependent on the audited person’s acceptance of the specifics of the sampling plan. An audited person’s acceptance of the sampling plan and methodology must be in writing and signed by a management official with authority to bind the company in matters of trade, imports, and/or other affairs under the customs laws, CBP regulations, or other applicable laws. The audited person may submit the signed waiver to the CBP auditor. The appropriate field director, Regulatory Audit, will sign the waiver for CBP. Where the sampling plan or methodology is subsequently adjusted or modified, at CBP’s discretion, acceptance of the adjustments or modifications also must be in writing and signed. This is not a waiver of the audited person’s right to later contest substantive issues, such as misclassification, undervaluation, etc., that may properly be raised under applicable regulations, including in a request for CBP Headquarters advice under 19 CFR 171.14, a request for CBP Headquarters review under 19 CFR 162.74(c), a response to a prepenalty notice issued by CBP under 19 U.S.C. 1592(b)(1) or 19 U.S.C. 1593a(b)(1), a petition submitted in response to a penalty notice issued by CBP under 19 U.S.C. 1592(b)(2) or 19 U.S.C. 1593a(b)(2) (19 CFR part 171) and 19 U.S.C. 1618, a supplemental petition submitted under 19 CFR 171.61 and 171.62, or any action commenced in a court of proper jurisdiction.

(2) Projection. For purposes of this section, "projection" of sampling results over the universe of transactions is the process by which the results obtained from the sample entries actually examined are applied to the universe of entries set within the time period and scope of the sampling plan to yield a reliable assessment of that which is sought to be ascertained or measured in the audit, including, but not limited to, lost duties or revenue, or overpayments or over-declarations, as described in paragraph (d)(1) of this section.

(3) When CBP uses statistical sampling. CBP auditors have the sole discretion to use statistical sampling techniques when:(i) Review of 100 percent of the transactions is impossible or impractical;(ii) The sampling plan is prepared in accordance with generally recognized sampling procedures; and(iii) The sampling procedure is executed in accordance with that plan.

(4) Statistical sampling by audited persons under CBP supervision. CBP may authorize a person being audited to conduct, under CBP supervision, self-testing of its own transactions within the time period and scope of the audit as originally set or later modified by CBP at its discretion. Audited persons permitted in advance by CBP to conduct self-testing of certain transactions under CBP supervision within the time period and scope of a CBP audit may use statistical sampling methods, provided that the criteria contained in paragraph (c)(3) of this section are satisfied. CBP will determine the time period and scope of the CBP-approved and supervised self-testing and will explain any sampling plan to be employed in accordance with paragraph (c)(1) of this section. The execution and results of the self-testing and the sampling plan are subject to CBP approval, and the audited person is subject to the waiver of paragraph (c)(1) of this section.
(5) **Statistical sampling by a private party submitting a prior disclosure.** A private party conducting an independent review of certain transactions and a calculation of lost duties, taxes, and fees or lost revenue for purposes of prior disclosure, in accordance with 19 CFR 162.74(j), may use statistical sampling, provided that the private party submits an explanation of the sampling plan and methodology employed and that the criteria in paragraph (c)(3) of this section are satisfied. Where the private party submits a prior disclosure employing statistical sampling, the time period, scope, and any sampling plan employed by the private party, as well as the execution and results of the self-review, are subject to CBP review and approval. Where CBP and the private party discuss and accept the sampling plan and methodology, or an adjustment to it, the waiver of paragraph (c)(1) of this section applies.

(d) **Offset of overpayments and over-declarations in 19 U.S.C. 1592 penalty cases—(1) General.** In conducting any audit authorized under 19 U.S.C. 1509 and this section for the purpose of calculating the loss of duties, taxes, and fees or monetary penalty under any provision of 19 U.S.C. 1592, CBP auditors identifying overpayments of duties or fees or over-declarations of quantities or values that are within the time period and scope of the audit, as established solely by CBP, will treat the overpayments or over-declarations on finally liquidated entries as an offset to any underpayments or under-declarations also identified on finally liquidated entries, provided that:(i) The identified overpayments or over-declarations were not made by the person being audited for the purpose of violating any provision of law, including laws other than customs laws,(ii) The identified underpayments or under-declarations were not made knowingly and intentionally, and(iii) All other requirements of this paragraph (d) are met.

(2) **When audited person conducts self-testing under CBP supervision.** Offsetting will apply to self-testing conducted by an audited person under CBP supervision (i.,e., during a CBP audit), provided that all requirements of this paragraph (d) are met, CBP approves the self-testing in advance and, upon review of the self-testing, CBP approves its execution and results.

(3) **When a private party submits a prior disclosure.** Offsetting will apply when a private party submits a prior disclosure, provided that the prior disclosure is in accordance with 19 CFR 162.74 and CBP approves the private party's self-review, including its execution and results. CBP's Office of International Trade, Regulatory Audit will review and evaluate all such prior disclosures and approve offsetting where it is satisfied that the requirements of 19 U.S.C. 1509(b)(6) and this paragraph (d) are met.

(4) **Time period and scope determined by CBP; projection when sampling employed.** In conducting an audit under paragraph (d)(1) of this section or authorizing an audited person's self-testing as described in paragraph (d)(2) of this section, CBP will have the sole authority to determine the time period and scope of the audit. In conducting a review of a private party's prior disclosure as described in paragraph (d)(3) of this section, the time period and scope employed will be subject to CBP approval. In each of these circumstances, where statistical sampling is involved, CBP auditors will examine only the selected sample transactions. The results of the sample examination, with respect to properly identified overpayments and over-declarations and properly identified underpayments and under-declarations, will be projected over the universe of transactions to determine the total overpayments and over-declarations that are eligible for offsetting and to determine the total loss of duties, taxes, and fees.
(5) \textit{Same acts, statements, omissions, or entries not required.} Offsetting may be permitted where the overpayments or over-declarations were not made by the same acts, statements, or omissions that caused the underpayments or under-declarations, and is not limited to the same entries that evidence the underpayments or under-declarations, provided that they are within the time period and scope of the audit as established by CBP and as described in paragraph (d)(4) of this section.

(6) \textit{Limitations.} Offsetting will not be allowed with respect to specific overpayments or over-declarations made for the purpose of violating any provision of law, including laws other than customs laws. Offsetting will not be allowed with respect to overpayments or over-declarations resulting from a failure to timely claim or establish a duty allowance or preference. Offsetting will be disallowed entirely where CBP determines that any underpayments or under-declarations identified for offsetting purposes were made knowingly and intentionally.

(7) \textit{Audit report.} Where overpayments or over-declarations have been identified in accordance with paragraph (d)(1) of this section, the audit report will state whether they have been made within the time period and scope of the audit.

(8) \textit{Disallowance determinations referred to Fines, Penalties, and Forfeitures office.} Any determination that offsets will be disallowed where overpayments/over-declarations were made for the purpose of violating any law, or where underpayments or under-declarations were made knowingly and intentionally, will be made by the appropriate Fines, Penalties, and Forfeitures (FP&F) office to which the issue was referred. CBP will notify the audited person of a determination whether to allow offsetting in whole or in part. The FP&F office will issue a notice of penalty under 19 U.S.C. 1592(b) and/or notice of liability for lost duties, taxes, and fees under 19 U.S.C. 1592(d) where it determines that such action is warranted. If the FP&F office issues a notice of penalty, the audited person may file a petition under 19 U.S.C. 1592(b)(2), 19 U.S.C. 1618, and 19 CFR part 171 to challenge the action.

(9) \textit{Refunds limited.} An overpayment of duties and fees will only be credited toward a refund if the circumstances of the overpayment meet the requirements of 19 U.S.C. 1520 or the requirements of 19 U.S.C. 1514(a) pertaining to clerical error, mistake of fact, or other inadvertence in any entry, liquidation, or reliquidation.

(e) \textit{Sampling not evidence of reasonable care.} The fact that entries were previously within the time period and scope of an audit conducted by CBP in which sampling was employed, in any circumstances described in this section, is not evidence of reasonable care by a violator in any subsequent action involving such entries.

(f) \textit{Exception to procedures.} The provisions of paragraph (a) of this section may not apply when a private party submits a prior disclosure under paragraph (d)(3) of this section. Paragraphs (a)(5), (a)(6), (b), (d)(8), and (d)(9) of this section do not apply once CBP and/or ICE commences an investigation with respect to the issue(s) involved.
ADDITIONAL INFORMATION

The Internet

The home page of CBP on the Internet’s World Wide Web, provides the trade community with current, relevant information regarding CBP operations and items of special interest. The site posts information -- which includes proposed regulations, news releases, publications and notices, etc. -- that can be searched, read on-line, printed or downloaded to your personal computer. The web site was established as a trade-friendly mechanism to assist the importing and exporting community. The web site also links to the home pages of many other agencies whose importing or exporting regulations CBP helps to enforce. The web site also contains a wealth of information of interest to a broader public than the trade community. For instance, on June 20, 2001, CBP launched the “Know Before You Go” publication and traveler awareness campaign designed to help educate international travelers.

The web address of U.S. Customs and Border Protection is http://www.cbp.gov.

CBP Regulations

The current edition of CBP Regulations of the United States is a loose-leaf, subscription publication available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; telephone (202) 512-1800. A bound, 2016 edition of Title 19, Code of Federal Regulations, which incorporates all changes to the Regulations as of April 1, 2016, is also available for sale from the same address. All proposed and final regulations are published in the Federal Register, which is published daily by the Office of the Federal Register, National Archives and Records Administration, and distributed by the Superintendent of Documents. Information about on-line access to the Federal Register may be obtained by calling (202) 512-1530 between 7 a.m and 5 p.m. Eastern time. These notices are also published in the weekly Customs Bulletin described below.

Customs Bulletin

The Customs Bulletin and Decisions (“Customs Bulletin”) is a weekly publication that contains decisions, rulings, regulatory proposals, notices and other information of interest to the trade community. It also contains decisions issued by the U.S. Court of International Trade, as well as customs-related decisions of the U.S. Court of Appeals for the Federal Circuit. Each year, the Government Printing Office publishes bound volumes of the Customs Bulletin. Subscriptions may be purchased from the Superintendent of Documents at the address and phone number listed above.
Importing Into the United States

This publication provides an overview of the importing process and contains general information about import requirements. The November 2006 edition of Importing Into the United States contains much new and revised material brought about pursuant to the Customs Modernization Act ("Mod Act"). The Mod Act fundamentally altered the relationship between importers and U.S. Customs and Border Protection by shifting to the importer the legal responsibility for declaring the value, classification, and rate of duty applicable to entered merchandise.

The November 2006 edition contains a section entitled "Informed Compliance." A key component of informed compliance is the shared responsibility between U.S. Customs and Border Protection and the import community, wherein CBP communicates its requirements to the importer, and the importer, in turn, uses reasonable care to assure that CBP is provided accurate and timely data pertaining to his or her importation.

Single copies may be obtained from local offices of U.S. Customs and Border Protection, or from the Office of Public Affairs, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Washington, DC 20229. An on-line version is available at the CBP web site: http://www.cbp.gov/sites/default/files/documents/Importing%20Into%20the%20U.S.pdf. Importing Into the United States is also available for sale, in single copies or bulk orders, from the Superintendent of Documents by calling (202) 512-1800, or by mail from the Superintendent of Documents, Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250-7054.

Informed Compliance Publications

CBP has prepared a number of ICPs in the "What Every Member of the Trade Community Should Know About:..." series. Check the Internet web site http://www.cbp.gov for current publications.
Value Publications

Customs Valuation under the Trade Agreements Act of 1979 is a 96-page book containing a detailed narrative description of the customs valuation system, the customs valuation title of the Trade Agreements Act (§ 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. §1401a)), the Statement of Administrative Action which was sent to the U.S. Congress in conjunction with the TAA, regulations (19 C.F.R. §§152.000-152.108) implementing the valuation system (a few sections of the regulations have been amended subsequent to the publication of the book) and questions and answers concerning the valuation system. A copy may be obtained from U.S. Customs and Border Protection, Regulations and Rulings, Valuation & Special Programs Branch, 90 K Street, N.E., 10th Floor, Washington, D.C. 20229-1177.

Customs Valuation Encyclopedia (with updates) is comprised of relevant statutory provisions, CBP Regulations implementing the statute, portions of the Customs Valuation Code, judicial precedent, and administrative rulings involving application of valuation law. This publication is available on the Internet web site http://www.cbp.gov.

The information provided in this publication is for general information purposes only. Recognizing that many complicated factors may be involved in customs issues, an importer may wish to obtain a ruling under CBP Regulations, 19 C.F.R. Part 177, or obtain advice from an expert (such as a licensed customs broker, attorney or consultant) who specializes in customs matters. Reliance solely on the general information in this pamphlet may not be considered reasonable care.

Additional information may also be obtained from CBP ports of entry. Please consult your telephone directory for an office near you. The listing will be found under U.S. Government, Department of Homeland Security.
“Your Comments are Important”

The Small Business and Regulatory Enforcement Ombudsman and 10 regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of CBP, call 1-888-REG-FAIR (1-888-734-3247).

REPORT SMUGGLING 1-800-BE-ALERT OR 1-800-NO-DROGA

Visit our Internet web site: http://www.cbp.gov
8. Continuum of Corporate Response to Human Rights in Supply Chains and Attorney-Client Privilege Hypothetical
CORPORATE CULTURE REGARDING HUMAN RIGHTS HARM AND VIOLATIONS

Good Global Citizen
Active Anti-HRV Policies & Procedures

Rule Follower
Some Recognition of Applicable Law

Two Facer
Policies Only

Eyes Wide Shut
Plausible Deniability

Negligent Actor
"Benign" Neglect

Bad Actor
Endorsement

Reports Due:
1. Under Name & Shame Legislation (UK, California, Australia)
2. Under Vigilance Legislation (France, Netherlands)
3. FAR
4. SEC
5. CBP Section 307 of TERRA
6. Voluntary: Global Reporting Initiative Standards, Sustainability Accounting Standards Board
MODES OF INVOLVEMENT IN HUMAN RIGHTS HARM AND VIOLATION PREVENTION

Two Facer
- Policies Only/Linked Harm
  - Web Site
  - Code of Conduct
  - No Assessment/No Audits
  - No Policy
  - No Risk Assessment
  - No Audits

Eyes Wide Shut
- Plausible Deniability/Linked Harm (No Knowledge)

Negligent Actor
- "Benign" Neglect/Contribution (Limited Knowledge)
  - Business as Usual
    - Price Point
    - Time Line

Bad Actor
- Endorsement/Cause (Participation)
  - Discovery without Remediation
In house counsel (the “GC”) is called by the Global Manager of Responsible Sourcing of a major chocolate manufacturer for advice as to how to develop better protocol upon discovery of significant child labor in a tier four supplier. After thirty minutes of a very general discussion based on “What ifs....?”, it becomes apparent to the GC that the company’s officer is not really asking about a hypothetical, but is trying to determine how to respond to his discovery of specific violations of Company posted human rights policy. The GC asks for a copy of the results of the audit investigation that included the discovery of child labor and other human rights violations, but that report is never sent. Unfortunately, the Global Manager seems unwilling to follow the GC’s advice and truly remediate the situation. When the GC tries to share what he has learned with the President, and then the Chairman of the Board, neither have any reaction other than expressing their support of the Global Manager and their belief that “He is doing his best in a bad situation.”

- Does the attorney-client privilege apply?
- Would your answer change if an outside firm attorney was called?
- Would your answer change if the GC learned of the matter at a Board Meeting?
- If the privilege applies, what may the GC disclose?
- If the privilege applies, what must the GC disclose?
- Should the GC blow a whistle?
- Does the holding in Wadler v. Bio Rad Laboratories, Inc. (finding that whistleblowers reporting possible violations of the FCPA (and by analogy human rights violations) are not protected by the Sarbanes-Oxley Act) influence your answers?
- If the Company becomes an acquisition target, what should the GC do with his or her notes relating to the phone call in response to the prospective buyer’s due diligence request?
- Post transaction, can Buyer use the GC’s notes (and the audit report) for DOJ cooperation credit? In an asset deal? In a stock deal?
Model Rule 1.6(a)

Client-Lawyer Relationship

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm;
Model Rule 1.6 (b)(2) & (3)

(2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.

(3) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.
Death or substantial bodily harm or crime/fraud that is reasonably certain to result in substantial injury to financial interests: such as may occur in factories, mines, fishing boats and other sites around the world where forced, trafficked laborers and children toil in corporate supply chains?
Model Rule 1.13(c)

This rule allows, but does not require a lawyer representing a corporation to reveal confidences if the corporation’s highest authority insists on violating the law (such as new HR laws).
Model Rule 2.1 Counselor

In rendering advice, a lawyer may refer not only to the law, but to other considerations such as moral, economic, social and political factors that may be relevant to a client’s situation.
Due Diligence Discovery of Human Rights Abuses

TARGET’S COUNSEL

Deal Dies

Seller Wants Disclosure

Attorney Client Privilege
Preserved = No Disclosure

BUYER’S COUNSEL

Deal Proceeds

Seller doesn’t want Disclosure

Buyer wants Disclosure for cooperation credit

Attorney Client Privilege
Preserved = Disclosure

Attorney doesn’t want Disclosure

ABA Model Rules? 1.6(b)(1); 1.13(c); 2.1
NY Rules?
DE Rules?
PA Rules?
SEC?
Non-disclosure Agreement/Exceptions
Rule 1.16: Declining or Terminating Representation

Client-Lawyer Relationship

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has **used the lawyer’s services to perpetrate a crime or fraud**;

(4) the client insists upon taking **action that the lawyer considers repugnant** or with which the lawyer has a **fundamental disagreement**;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) **other good cause for withdrawal exists**.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANFORD S. WADLER,
Plaintiff-Appellee,

v.

BIO-RAD LABORATORIES, INC., a
Delaware Corporation; NORMAN
SCHWARTZ,
Defendants-Appellants.

No. 17-16193
D.C. No.
3:15-cv-02356-JCS

OPINION

Appeal from the United States District Court
for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding

Argued and Submitted November 14, 2018
San Francisco, California

Filed February 26, 2019

Before: Susan P. Graber and Mark J. Bennett, Circuit
Judges, and Leslie E. Kobayashi,* District Judge.

Opinion by Judge Bennett

* The Honorable Leslie E. Kobayashi, United States District Judge
for the District of Hawaii, sitting by designation.
SUMMARY**

Labor Law

The panel vacated in part the district court’s judgment after a jury trial, affirmed in part, and remanded in a whistleblower retaliation suit.

The jury found that Bio-Rad Laboratories, Inc., and its CEO violated the Sarbanes-Oxley Act, the Dodd-Frank Act, and California public policy by terminating the employment of Bio-Rad’s former general counsel, Sanford Wadler, in retaliation for his internal report that he believed the company had engaged in violations of the Foreign Corrupt Practices Act in China.

Vacating the SOX verdict, the panel held that the district court erred in instructing the jury that statutory provisions of the FCPA constitute rules or regulations of the SEC for purposes of whether Wadler engaged in protected activity under SOX § 806. Because a properly instructed jury could return a SOX verdict in favor of Wadler, the panel remanded for the district court to determine whether a new trial was warranted.

With respect to Wadler’s California public policy claim, the panel concluded that the district court’s SOX instructional error was harmless and therefore affirmed the verdict and corresponding damages as to that claim.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.
Addressing additional issues in a contemporaneously-filed memorandum disposition, the panel also vacated the district court's Dodd-Frank verdict and remanded.

COUNSEL

Kathleen M. Sullivan (argued) and William B. Adams, Quinn Emanuel Urquhart & Sullivan LLP, New York, New York; Karin Kramer, Andrew P. March, and John M. Potter, Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, California; for Defendants-Appellants.

Michael John von Loewenfeldt (argued), Kenneth P. Nabity, and James M. Wagstaffe, Kerr & Wagstaffe LLP, San Francisco, California, for Plaintiff-Appellee.

OPINION

BENNETT, Circuit Judge:

In this whistleblower retaliation case, Bio-Rad Laboratories, Inc. ("Bio-Rad" or "the Company") and its CEO, Norman Schwartz, appeal an $11 million jury verdict in favor of Bio-Rad's former general counsel, Sanford Wadler.1 The jury found that Defendants violated the Sarbanes-Oxley Act ("SOX"), the Dodd-Frank Act, and California public policy by terminating Wadler's employment in retaliation for his internal report that he believed the Company had engaged in serious and prolonged

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1 We refer to the Defendants collectively as "Bio-Rad" except when necessary to distinguish between them.
violations of the Foreign Corrupt Practices Act ("FCPA") in China.

On appeal, Defendants argue that the district court erred by instructing the jury that statutory provisions of the FCPA constitute "rule[s] or regulation[s] of the Securities and Exchange Commission" ("SEC") for purposes of whether Wadler engaged in "protected activity" under SOX § 806, 18 U.S.C. § 1514A(a). We agree. We reject, however, Bio-Rad's argument that no properly instructed jury could return a SOX verdict in favor of Wadler. Accordingly, we vacate the SOX verdict and remand for the district court to determine whether a new trial is warranted.

With respect to Wadler's California public policy claim, by contrast, we conclude that the district court's SOX instructional error was harmless and therefore we affirm the verdict and corresponding damages as to that claim.

In a memorandum disposition filed this date, we conclude that the instructional error was not harmless as to the SOX claim. We also reject Bio-Rad's challenges to the district court's evidentiary rulings and the sufficiency of the evidence. Finally, we vacate with instructions to enter judgment in favor of Bio-Rad as to the Dodd-Frank claim in light of Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 778 (2018), which held that Dodd-Frank does not apply to purely internal reports. We therefore also vacate the portion of damages attributable solely to the Dodd-Frank verdict, approximately $2.96 million plus interest.

Accordingly, we vacate in part, affirm in part, and remand for consideration of whether a new trial is warranted as to the SOX claim.
I.

We must view the evidence at trial in the light most favorable to the verdict. *Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1115 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2582 (2018). Because the jury returned a verdict in favor of Wadler on all claims, we review the pertinent facts adduced at trial in the light most favorable to him.

A.

The trial centered on a memorandum that Wadler delivered to the Audit Committee of Bio-Rad’s Board of Directors in February 2013 (the “Audit Committee Memo” or “Memo”) and Schwartz’s subsequent decision to terminate Wadler’s employment in June 2013. Wadler stated in the Memo that he believed Bio-Rad employees in China had violated the FCPA’s bribery and books-and-records provisions, and that senior management was likely complicit.

The factual basis for the Memo, and Wadler’s reasons for writing it, can be traced back to 2009. In that year, Bio-Rad’s internal audit team discovered that Bio-Rad salesmen in Vietnam and Thailand had engaged in potential FCPA violations. At Wadler’s recommendation, Bio-Rad hired FCPA attorney Patrick Norton of Steptoe & Johnson to investigate.

Norton reported his findings to Bio-Rad’s Board of Directors in September 2011. Specifically, Norton reported that he had found evidence that Bio-Rad employees were violating the FCPA’s bribery and books-and-records provisions in Vietnam, Thailand, and Russia. As for China, Norton reported several “red flags,” including “[v]ery high, unexplained commissions” and a “history of widespread
corruption” in the country’s medical products market. Norton reported, however, that “no evidence of improper payments” had been found to date in China.

In June 2012, Wadler and Schwartz received the results of a sales documentation audit that had been initiated at the request of Bio-Rad’s licensor, Life Technologies, Inc. (“Life Tech”). The audit, which covered the years 2006 to 2010, revealed that Bio-Rad owed Life Tech around $30 million in royalty obligations due to Bio-Rad’s missing documentation of end-user prices for products primarily in the Chinese market.

Wadler and John Cassingham, an in-house patent lawyer who reported to Wadler, repeatedly attempted to obtain the missing sales documents from China. In November 2012, Cassingham finally succeeded in obtaining a complete set of documents for a single transaction and sent those documents to Wadler. Wadler testified that Cassingham thought the documents showed bribery. Wadler further testified that he subsequently told Schwartz about the potential bribery, but Schwartz responded that he was not going to do anything about it.

Wadler’s concerns increased as he and Cassingham spoke to other employees. In December 2012, for example, a senior Bio-Rad manager in China told Wadler that he had never visited one of Bio-Rad’s main distributors to look for documents, despite the distributor’s failure to comply with Bio-Rad’s documentation requests. A different Bio-Rad employee in China later told Cassingham (who in turn told Wadler) about a widespread “under the covers” scheme in which cover sheets on import/export documents were used to show the official number of products while the shipments themselves were padded with free extra products. Wadler later obtained around 160 sets of Chinese sales documents,
thirty percent of which showed the product-padding pattern that fit the description of the “under the covers” scheme.

In January 2013, Wadler discovered that Bio-Rad employees in China had entered into unauthorized contracts with distributors. In the course of investigating those contracts, Wadler learned that they were not accurate translations of approved English-language distributor contracts, but had instead been translated from an earlier template that did not include FCPA compliance provisions. Wadler’s junior attorneys also informed him that the contracts provided for unauthorized “incentives payable in free product – between 1–3% of sales if [salesmen] achieved certain targets,” with a “financial impact of . . . approximately one million dollars.”

B.

On February 8, 2013, Wadler delivered the Memo to the Audit Committee, reporting his belief that there were “serious and prolonged violations of the FCPA in Bio-Rad’s business in China.” Wadler listed several sources of concern: (1) a free-product scheme that “suggest[ed] several possibilities for bribery”; (2) Bio-Rad’s inability to obtain documents for the Life Tech audit, which “could itself be considered a substantive and clear violation of [the FCPA’s] books and records requirements”; and (3) the Chinese distributor contracts without FCPA compliance language. Wadler concluded that “these practices [we]re endemic and that high levels of management within the company had to know they were happening,” which, he continued, was why he had not yet discussed his concerns with senior management (including Schwartz).

Wadler recommended that Bio-Rad “promptly conduct an in depth investigation into business practices in China”
and that the Company report his suspicions to the government and to the Company's auditors. The Company's duty to report was "especially true," he wrote, because it had "meetings scheduled with the government agencies in late February to discuss the 'tone at the top' in relationship to penalties for the violations in Vietnam, Russia, Thailand and Brazil." Wadler opined that it "would deeply prejudice how the government would view the company if we had discussions about 'tone at the top' knowing that there [were] potentially serious additional violations that were being withheld."

C.

In response to the Memo, the Audit Committee authorized Wadler to hire Davis Polk & Wardwell to investigate his concerns. On February 20, 2013, the Chairman of the Audit Committee told Schwartz about the Memo. Two days later Schwartz informed the head of Bio-Rad's human resources department that Wadler had "been acting a little bizarre lately" and that Schwartz might "want to put him on an administrative leave." By March, Schwartz had become "entirely frustrated" with Wadler but believed that "he must stay in place until [an] FCPA settlement" with the government was final.

Davis Polk reported the findings of its investigation to Bio-Rad's Board of Directors on June 4, 2013. Davis Polk found that there was "no evidence to date of any violation—or attempted violation—of the FCPA" in China. Schwartz fired Wadler three days later. Bio-Rad later paid the government a total of $55 million to resolve its investigation into FCPA issues in Vietnam, Thailand, and Russia. Nothing was paid as a result of any FCPA issues in China.
II.

In May 2015, Wadler brought this action for compensatory and punitive damages against the Company and Schwartz. As relevant here, Wadler alleged violations of SOX and Dodd-Frank as to both Defendants, and a violation of California public policy under *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1336–37 (Cal. 1980) (the “*Tameny*” claim) against the Company only. The case proceeded to a jury trial in January 2017.

At trial, Wadler set out to prove that Schwartz fired him in retaliation for reporting alleged FCPA violations to the Audit Committee, while Bio-Rad attempted to show that Wadler was fired due to his poor performance and dysfunctional relationship with management. Bio-Rad also tried to show that Wadler wrote the Memo only because he was concerned about his job security, and that it would have been unreasonable for a general counsel in Wadler’s position to believe that the Company had violated the FCPA in China.

At the close of trial, the judge gave several jury instructions concerning when an employee engages in “protected activity” for purposes of SOX, *Tameny*, and Dodd-Frank. For each of the three claims, the instructions stated that Wadler had to prove he engaged in protected activity under SOX, which in turn depended on whether he disclosed conduct that he reasonably believed violated a “rule or regulation of the” SEC. The main instruction at issue in this appeal, Instruction 21, stated that, under “the rules and regulations of the [SEC] applicable to Bio-Rad,” it is unlawful to (1) bribe a foreign official; (2) fail to keep accurate and reasonably detailed books and records;
(3) knowingly falsify books and records; and (4) knowingly circumvent a system of internal accounting controls.²

The jury returned a verdict in favor of Wadler on all three claims. As to all three claims in general, the jury awarded Wadler $2.96 million in compensatory damages for past economic loss against both Defendants. The district court doubled that amount under Dodd-Frank’s doubling provision, 15 U.S.C. § 78u-6(h)(1)(C)(ii), resulting in a total award of $5.92 million plus interest against Schwartz. Because the jury also awarded Wadler $5 million in punitive damages against the Company based on the Tameny claim, the total award against the Company was $10.92 million plus interest.

Bio-Rad subsequently filed a renewed motion for judgment as a matter of law ("JMOL") and a motion for new trial. Bio-Rad argued, inter alia, that Wadler’s disclosure of alleged FCPA violations was not protected activity under SOX because provisions of the FCPA, a statute, do not constitute SEC rules or regulations for purposes of SOX § 806. The district court denied Bio-Rad’s motions. The court concluded that the FCPA is a “rule or regulation of the SEC” for purposes of SOX because “the FCPA is an amendment to the Securities ... Exchange Act of 1934 and is codified within it.” This appeal followed.

III.

We have jurisdiction under 28 U.S.C. § 1291 over the appeal of the denial of a motion for new trial and renewed

² For simplicity, throughout this opinion we refer to the books-and-records provisions listed in paragraphs two and three of Instruction 21, and the internal accounting controls provision in paragraph four of Instruction 21, collectively as the "books-and-records" provisions.
motion for JMOL, and the district court’s interlocutory rulings at trial. See *Hall v. City of Los Angeles*, 697 F.3d 1059, 1070 (9th Cir. 2012). The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367.

We review de novo whether a jury instruction correctly states the law. *Wilkerson v. Wheeler*, 772 F.3d 834, 838 (9th Cir. 2014). The denial of a motion for JMOL is also reviewed de novo, *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016), and the denial of a motion for new trial is reviewed for abuse of discretion, *Crowley v. Epicept Corp.*, 883 F.3d 739, 748 (9th Cir. 2018) (per curiam). We review de novo questions of statutory interpretation. *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 964 (9th Cir. 2018).

IV.

A. The SOX Claim

Section 806 of SOX prohibits publicly traded companies from retaliating against an employee who lawfully reports any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C.] section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . .

18 U.S.C. § 1514A(a)(1). The question before us is whether the district court erred by instructing the jury that, for purposes of § 806, rules or regulations of the SEC include the FCPA’s books-and-records provisions, 15 U.S.C.
§ 78m(b)(5), (2)(A), and anti-bribery provision, id. § 78dd-1(a). We conclude that the court erred. However, because a properly instructed jury could return a verdict in Wadler’s favor, we vacate the SOX verdict and remand for the district court to consider whether a new trial is appropriate in light of our decision to affirm the Tameny verdict.

1.

As a threshold matter, we consider whether Bio-Rad’s claim of instructional error is properly before us with respect to paragraphs two through four of Instruction 21 concerning books and records. Wadler argues that Bio-Rad invited error or waived the books-and-records part of its claim, in light of Bio-Rad’s shifting positions in the district court. Bio-Rad correctly conceded in the district court, and continues to concede on appeal, that one of the FCPA books-and-records provisions in Instruction 21 is also an SEC regulation within the scope of § 806. See 17 C.F.R. § 240.13b2-1 (“No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account . . . ”). At times, however, Bio-Rad appeared to abandon a challenge to all three books-and-records provisions listed in Instruction 21 by targeting only the FCPA anti-bribery provision. Although Bio-Rad’s position was not always clear, we conclude that its actions did not rise to the level of invited error or waiver.

As for invited error, Bio-Rad originally objected to the jury instructions on the ground that reporting any FCPA violation is not SOX-protected activity. Although Bio-Rad narrowed its objection at one point to only the anti-bribery portion of the instructions, Bio-Rad expressly preserved its original objection at the final jury instructions conference. The district court then stated that Bio-Rad’s position that a statute is not a rule or regulation for purposes of § 806 was “very clear.” On this record, we cannot say that Bio-Rad
was responsible for any error in the jury instructions. See Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1270 (9th Cir.), amended by 289 F.3d 615 (9th Cir. 2002).

Bio-Rad also raised its present claim in the JMOL briefing such that it is not waived on appeal. Bio-Rad specifically argued, in its JMOL motion, that the FCPA is not a rule or regulation of the SEC because it is a statute. Even if Bio-Rad again limited the scope of that argument to the anti-bribery context in its renewed JMOL motion, the district court addressed the merits of the basic issue before us now: whether any FCPA provision can be a rule or regulation of the SEC for purposes of § 806. Accordingly, that issue is properly before us. See True Health Chiropractic, Inc. v. McKesson Corp., 896 F.3d 923, 930 (9th Cir. 2018), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Jan. 25, 2019) (No. 18-987); see also Tarabochia v. Adkins, 766 F.3d 1115, 1128 n.12 (9th Cir. 2014) (“Even if a party fails to raise an issue in the district court, we generally will not deem the issue waived if the district court actually considered it.”).

We therefore proceed to the merits of the issue raised on appeal: whether Instruction 21 erroneously listed the FCPA’s anti-bribery and books-and-records-provisions as “rules or regulations of the SEC” under SOX § 806.

2.

In construing the provisions of a statute, “we begin with well-settled canons of statutory interpretation.” Zazzali v. United States (In re DBSI, Inc.), 869 F.3d 1004, 1010 (9th Cir. 2017). “A primary canon of statutory interpretation is that the plain language of a statute should be enforced according to its terms, in light of its context.” ASARCO, LLC v. Celanese Chem. Co., 792 F.3d 1203, 1210 (9th Cir. 2015).
We also presume that Congress acts intentionally when it uses particular wording in one part of a statute but omits it in another. *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015). Thus, when a statute uses the phrase “law, rule, or regulation” in one section but uses only “law” in a different section, the word “law” does not encompass administrative rules or regulations. *Id.* at 919–20; *Dep’t of Treasury, IRS v. Fed. Labor Relations Auth.*, 494 U.S. 922, 931–32 (1990).

Applying these principles here, we hold that § 806’s text is clear: an FCPA provision is not a “rule or regulation of the [SEC].” 18 U.S.C. § 1514A(a)(1). Although the words “rule” and “regulation” could perhaps encompass a statute when read in isolation, the more natural and plain reading of these words together and in context is that they refer only to administrative rules or regulations. That the phrase “rule or regulation” is used in conjunction with an administrative agency, the SEC, suggests that it encompasses only administrative rules or regulations. Most notably, Congress uses the phrase “any rule or regulation of the [SEC]” in the same list in which it uses “any provision of Federal law relating to fraud against shareholders,” *id.*, which strongly suggests that there is a difference between the meaning of “rule or regulation” and “law.” *See MacLean*, 135 S. Ct. at 919–20; *Dep’t of Treasury, IRS*, 494 U.S. at 931–32. The most obvious explanation is that “law” encompasses statutes, like the FCPA, whereas “rule or regulation” does not.

We reject Wadler’s arguments for a different interpretation. First, Wadler argues that “rule or regulation of the SEC” should be broadly interpreted in light of SOX’s remedial purpose of protecting employees who report corporate misconduct. It is a “familiar canon of statutory
construction that remedial legislation should be construed broadly to effectuate its purposes,” Tcherepnin v. Knight, 389 U.S. 332, 336 (1967), but this canon should not be “treated . . . as a substitute for a conclusion grounded in the statute’s text and structure,” CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2185 (2014).

Second, Wadler’s reliance on legislative history—in the form of statements made on the Senate floor—is equally unavailing. When, as here, “a statute’s language is plain and unambiguous, our inquiry ends.” Christie v. Ga.-Pac. Co., 898 F.3d 952, 958 (9th Cir. 2018).

In sum, statutory provisions of the FCPA, including the three books-and-records provisions and anti-bribery provision listed in Instruction 21, are not “rules or regulations of the SEC” under SOX § 806. The district court erred in instructing the jury otherwise. As noted above, in a memorandum disposition filed this date, we conclude that the instructional error was not harmless as to the SOX claim.

3.

Having found error that was not harmless, we must determine the proper remedy. Bio-Rad argues that we must reverse with instructions to enter judgment in its favor because a properly instructed jury could not return a verdict for Wadler. We disagree.

When a district court commits instructional error, we reverse and direct entry of judgment if “the evidence presented [at] trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated [instruction].” Boyle v. United Techs. Corp., 487 U.S. 500, 513 (1988). Bio-Rad argues that there is insufficient evidence to support a verdict based on properly formulated
instructions. Although Bio-Rad acknowledges that Instruction 21 properly lists a books-and-records falsification provision as an SEC rule or regulation in light of 17 C.F.R. § 240.13b2-1, Bio-Rad contends that there is insufficient evidence to prove that Wadler reported conduct that he reasonably believed violated that regulation.

Evidence is insufficient only "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Conversely, if "reasonable minds could differ as to the import of the evidence," the evidence is sufficient. Id. at 250–51. Sufficiency is a low bar, especially because "we must construe the facts in the light most favorable to the jury's verdict." Shafer, 868 F.3d at 1115 (internal quotation marks omitted).

This already low bar is further lowered by the substantive law governing protected activity under § 806. See Anderson, 477 U.S. at 250. In a new trial, Wadler would not have to prove that he reported an actual violation. Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1001 (9th Cir. 2009); Sylvester v. Parexel Int'l LLC, No. 07-123, 2011 WL 2517148, at *14 (Dep't of Labor May 25, 2011) (en banc). He would have to prove only that he "reasonably believed that there might have been" a violation and that he was "fired for even suggesting further inquiry." Van Asdale, 577 F.3d at 1001. We have referred to this standard as a "minimal threshold requirement." Id.

Construing the facts in the light most favorable to the verdict, a jury permissibly could find that Wadler satisfied that minimal requirement. First, a reasonable jury could find that the Audit Committee Memo suggested further inquiry into whether Bio-Rad falsified books and records. The Memo described many instances in which Bio-Rad's
shipping documents did not match the billing documents of distributors or end-users. Although a jury could find that such discrepancies did not raise books-and-records concerns, or that they did not specifically implicate the SEC’s falsification regulation, a reasonable jury also could find that further inquiry was warranted with respect to falsification.

Second, a reasonable jury could find that Wadler reasonably believed that Bio-Rad had falsified books and records. In a new trial, Wadler would have to prove that he subjectively believed that the conduct described in the Memo evidenced the falsification of books and records and that his belief was objectively reasonable in the circumstances. *Van Asdale*, 577 F.3d at 1000; *Sylvester*, 2011 WL 2517148, at *12. The objective reasonableness component, the only component that Bio-Rad challenges on appeal, “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Sylvester*, 2011 WL 2517148, at *12 (quoting *Harp v. Charter Comms'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009)). “The reasonable belief standard requires an examination of the reasonableness of a complainant’s beliefs, but not whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities.” *Id.* at *13.

There is sufficient evidence to support the objective reasonableness of Wadler’s belief that Bio-Rad had falsified books and records. Before he submitted the Audit Committee Memo in February 2013, Wadler was aware of Bio-Rad’s FCPA issues in several countries and the numerous “red flags” in China. Wadler testified that Cassingham thought the Life Tech audit documents showed
bribery. Wadler also testified that a Bio-Rad employee reported an “under the covers” scheme in which Bio-Rad shipped free products. Finally, Wadler discovered Chinese contracts without FCPA compliance language and with unauthorized terms providing for free product incentives.

Bio-Rad argues that this evidence does not directly implicate books-and-records falsification. A reasonable jury, however, could find that a general counsel in Wadler’s position reasonably believed that Bio-Rad was falsifying books and records as part of its alleged FCPA violations in China. While the evidence needed to support a whistleblower’s reasonable belief will necessarily vary with the circumstances, § 806 generally does not require an employee to undertake an investigation before reporting his concerns. See Van Asdale, 577 F.3d at 1002 (“Requiring an employee to essentially prove the existence of fraud before suggesting the need for an investigation would hardly be consistent with Congress’s goal of encouraging disclosure.”). Such a requirement would undermine the purpose of SOX, particularly where, as here, a general counsel reports his concerns to the Board of Directors because he believes that senior management is complicit in unlawful conduct. Wadler’s Audit Committee Memo prompted further investigation, and the Audit Committee’s Chair testified that he thought Wadler “did a terrific job” by reporting his concerns. In these circumstances, there is sufficient evidence to support a SOX verdict under a properly formulated falsification instruction.3 We therefore

3 Because the evidence at trial was even stronger with respect to the other FCPA provisions listed in Instruction 21, we reject Bio-Rad’s argument that the district court erred by concluding that substantial evidence supports all three verdicts.
do not reverse with instructions to direct entry of judgment in Bio-Rad’s favor.

Accordingly, we vacate the SOX verdict against the Company and Schwartz and remand for the district court to consider whether a new trial is warranted. In light of our decision below, affirming the Tameny verdict against the Company and the corresponding verdict for compensatory damages for past economic loss, the district court should consider whether, and to what extent, any retrial would result in an impermissible double recovery for the same injury. See California v. Chevron Corp., 872 F.2d 1410, 1414 (9th Cir. 1989). The district court may also consider any other reasons why our opinion might bar or obviate the need for a SOX retrial, or might limit the issues in such a retrial. If a new trial is warranted, the district court may consider in the first instance whether to allow a “fraud against shareholders” theory, as well as any other arguments consistent with this opinion. See, e.g., Bator v. Hawaii, 39 F.3d 1021, 1030 n.9 (9th Cir. 1994).

B. The Tameny Claim

We now consider Bio-Rad’s challenge to the Tameny verdict. Bio-Rad argues that the SOX instructional error tainted the Tameny verdict because Wadler’s engaging in protected activity under SOX was a predicate to his success on the Tameny claim. However, Wadler contends that the Tameny instruction, Instruction 27, referred to the SOX-protected activity instructions simply to tell the jury that he had to prove that he was retaliated against for reporting conduct that he reasonably believed violated the FCPA provisions in Instruction 21—not because SOX itself was a necessary part of his Tameny theory at trial. We agree with Wadler.
Under California law, a Tameny claim must rely on a "fundamental public policy" that is "tethered to" a constitutional or statutory provision. Green v. Ralee Eng'g Co., 960 P.2d 1046, 1048–49 (Cal. 1998). The California Supreme Court has not decided whether SOX or the relevant FCPA provisions are tethered to a fundamental public policy for purposes of Tameny. Because the parties do not dispute those questions, we will not decide them either. Instead, we assume without deciding that a plaintiff may state a Tameny claim by alleging that he was retaliated against (1) for engaging in SOX-protected activity or (2) for reporting conduct that he reasonably believed violated the FCPA's bribery or books-and-records provisions, regardless of whether that report is protected by SOX. See id. at 1051 (recognizing that Tameny protects reporting "a statutory violation for the public's benefit"); id. at 1059 ("[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity."); Collier v. Superior Court, 279 Cal. Rptr. 453, 458 (Ct. App. 1991) (recognizing that Tameny protects reporting bribery).

Wadler properly raised a Tameny theory based on a fundamental public policy tied to the FCPA, which was independent of his claim under SOX. To begin with, the Tameny portion of Wadler's complaint referenced both the FCPA and SOX. And, like his complaint, the first version of Wadler's proposed Tameny instruction referenced both SOX and the FCPA. Most notably, just before trial, Bio-Rad proposed a Tameny instruction that did not reference SOX at

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4 Indeed, as we explain below, Bio-Rad proposed a jury instruction in the district court suggesting that it accepted that the relevant FCPA provisions are tethered to a fundamental public policy for purposes of Tameny.
all: “The plaintiff has the burden of proving . . . that Bio-Rad discharged Plaintiff for making a report of what the Plaintiff in good faith and reasonably believed was an FCPA violation.” The judge then proposed a Tameny instruction (Instruction 27) referencing only SOX. However, there is nothing to suggest that the judge did so in order to remove an FCPA-based Tameny theory from the case. To the contrary, all available evidence indicates that the Tameny instruction referred to protected activity under SOX simply to present the jury with a single factual theory of Tameny liability, which the parties understood could be based on a fundamental public policy tied to either SOX or the FCPA. As Wadler acknowledged in the district court, and as Bio-Rad recognizes on appeal, there was “complete overlap between the type of protected activity involved in [Wadler’s Tameny] claim and his claim under the Sarbanes-Oxley Act.” Considering the structure of the final jury instructions and the record as a whole, we conclude that Wadler presented the jury with a single factual theory of Tameny liability, which turned on his report of alleged FCPA violations and was not dependent on his claim under SOX.

Instruction 27 (the Tameny instruction) was the first in a chain of cross-references that ultimately made the success of Wadler’s Tameny claim dependent on whether Bio-Rad retaliated against him for reporting conduct that he reasonably believed violated the FCPA. Instruction 27 told jurors that, to prevail on his Tameny claim, Wadler had to prove that a motivating reason for his discharge was engaging in protected activity under SOX. It then referred jurors to the SOX instructions in order to determine if his activity was protected.

Notably, jurors were instructed that, to prevail on a Tameny claim, Wadler had to believe that one of the
provisions listed in Instruction 21 (captioned "The Foreign Corrupt Practices Act") had been violated. Instruction 21 listed provisions of the FCPA: it is unlawful to (1) bribe a foreign official; (2) fail to keep accurate and reasonably detailed books and records; (3) knowingly falsify books and records; and (4) knowingly circumvent a system of internal accounting controls. Although this Instruction was erroneous to the extent that it told jurors that a violation of the FCPA was a rule or regulation of the SEC for the purposes of SOX, as discussed supra, there is no dispute that Instruction 21 correctly described the provisions of the FCPA. See 15 U.S.C. § 78dd-l(a) (anti-bribery); id. § 78m(b)(2)(A) (keeping accurate books and records) & (b)(5) ("knowingly circumvent . . . a system of internal accounting controls" and "knowingly falsify any book, record, or account."). Thus, on the Tameny claim, jurors were instructed that Wadler had to show that he had reasonably believed Bio-Rad violated the provisions of the FCPA listed in Instruction 21 and that Bio-Rad discharged him for disclosing that belief.

Assuming, as we must, that the jury correctly followed the cross-references in the instructions, Westinghouse Elec. Corp. v. Gen. Circuit Breaker & Elec. Supply Inc., 106 F.3d 894, 901 (9th Cir. 1997), it necessarily found that Bio-Rad violated Tameny with respect to the alleged FCPA violations. We have repeatedly held that an instructional error is harmless when the jury necessarily would have reached the same verdict under a proper instruction. See Snyder v. Freight, Constr., Gen. Drivers, Warehousemen & Helpers, Local No. 287, 175 F.3d 680, 688–89, 688 n.12 (9th Cir. 1999); United States v. Washington, 106 F.3d 1488, 1490 (9th Cir. 1997) (per curiam); Westinghouse Elec. Corp., 106 F.3d at 902. In these circumstances, the SOX instructional error was harmless as to the Tameny verdict.
because Wadler’s *Tameny* claim—that Bio-Rad retaliated against him for reporting conduct that he reasonably believed violated the FCPA—did not depend on SOX.

V.

In sum, on the SOX claim, we **VACATE** and **REMAND** for the district court to consider whether a new trial is warranted. On the *Tameny* claim, we **AFFIRM** the jury’s verdict, which is against the Company only. We also **AFFIRM** the corresponding award of compensatory and punitive damages against the Company, except for the portion of damages attributable to Dodd-Frank’s doubling provision. As discussed in the memorandum filed this date, we **VACATE** the Dodd-Frank verdict with instructions to the district court to enter judgment in favor of the Company and Schwartz on that claim.

**VACATED in part, AFFIRMED in part, and REMANDED.** The parties shall bear their own costs on appeal.
10. Panel Participant Bios
Emily Holland is a senior associate at White & Case LLP based in Washington DC. Her practice focuses on multi-jurisdictional investigations and compliance matters, complex litigation, and business and human rights and sustainability issues. With respect to the latter, Emily counsels multinationals across geographies and sectors on the legal, operational, financial, and reputational risks and opportunities for businesses presented by the evolving business and human rights and broader sustainability agenda. She participates with various working groups, including the ABA Center for Human Rights Business and Human Rights Project and the US Council for International Business Responsible Business Working Group, and sits on the boards of the Fund for Peace and Princeton in Africa. Prior to becoming barred, Emily worked in the journalism and humanitarian fields, visiting numerous conflict and post-conflict jurisdictions worldwide, and briefly served in the US State Department’s Office of Policy Planning. She has published and presented extensively on human rights issues as a lawyer, journalist and NGO professional. In 2011, she co-authored a memoir of a woman helping child soldiers in her native Liberia, And Still Peace Did Not Come.
E. Christopher Johnson, Jr., CEO and Co-Founder, Center for Justice, Rights & Dignity and retired GM North America Vice President and General Counsel, attributes his accomplishments to his Lord and Savior Jesus Christ who, throughout Johnson’s life, has surrounded him with many loving and supportive family members, friends and colleagues who have and continue to significantly contribute to his growth and development. This includes his late parents and first wife Sheryl, his current wife Rhonda, children, Erin and Chip and granddaughter Souluna.

Johnson, a West Point graduate and decorated Army veteran is primarily dedicated to fighting human trafficking. This passion stems from a 2011 mission trip to India where he and his wife were exposed to the injustice, enormity and brutality of human trafficking leading to them forming the Center for Justice Rights & Dignity which is committed to promoting justice in this and other areas. This work includes Johnson’s leadership role in the development and implementation of the ABA Model Principles and Policies on Labor Trafficking and Child Labor, as the Chair of the ABA Business Law Section’s CSR Committee, Board President of the Michigan Abolitionist Project and Board Chair of the Men’s Advocacy Group of New Friends New Life in Dallas. In addition, over his professional career, Johnson has created or co-created over 125 works of scholarship, 15 of which are published, relating to various justice and professionalism initiatives.

Other leadership roles have included rising to the rank of Cadet Captain, the highest level of rank attainable at West Point, President of the Student Bar Association at New York Law School, as a successful Army officer, within the bar including formerly serving in the ABA House of Delegates, as a Commissioner of the State Bar of Michigan and Chair of ABA Africa, and in the community including leadership roles at his churches over the years, as a member of the Board of Trustees of Tuskegee University, and formerly with the American Cancer Society, United Way, UNCF and others.
Alice Alexandra Kipel

Alice Alexandra Kipel is the Executive Director, Regulations & Rulings (RR), Office of Trade, U.S. Customs and Border Protection (CBP). The RR Directorate is responsible for issuing binding rulings on behalf of CBP and for promulgating the agency’s regulations.

Ms. Kipel is an attorney with over 30 years of experience in international trade and customs litigation. While in private practice, she focused on Section 337 investigations before the U.S. International Trade Commission (ITC), involving intellectual property right (IPR) issues, and antidumping and countervailing duty administrative proceedings before the ITC and the Department of Commerce, as well as related judicial review proceedings before the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit. Her work in the private sector included close collaboration with the financial, legal, sales/marketing and logistics personnel at various multi-national corporations to successfully integrate border enforcement compliance controls into the companies’ business practices.

In 2015, Ms. Kipel left private practice and entered into federal government service. Before coming to CBP, she served as an Attorney-Advisor in the U.S. Department of the Interior’s Office of the Solicitor. In this capacity, Ms. Kipel provided counsel to the Bureau of Ocean Energy Management (BOEM) on issues related to the Outer Continental Shelf Oil and Gas Leasing Program. She also defended BOEM in legal challenges brought against the bureau before the Interior Board of Land Appeals.

Ms. Kipel holds an A.B. degree from Princeton University (1979) and received her J.D. from Georgetown University Law Center (1982).
Shawn MacDonald is CEO of Verité, a civil society organization that promotes workers’ rights in global supply chains through research, consulting, training, assessments, and policy advocacy. Before his appointment as CEO in 2016, Shawn had led Verité’s research, program, and policy work since 2003. Shawn has broad international and domestic experience in labor rights, corporate social responsibility, social entrepreneurship, workplace health, and multi-sector partnerships. Before joining Verité, he was Director of Accreditation at the Fair Labor Association, Vice President of Ashoka, Senior Advisor at Meridian Group International, and co-founder of the Development and Employment Policy Project and the Coalition for International Fair Hiring. Additionally, he worked for a variety of civil society organizations in Asia, Africa, and Eastern Europe. He holds a Ph.D. from George Mason University’s School for Conflict Analysis and Resolution and an AB in History from Harvard University.
Stephen A. Pike

A partner in Gowling WLG's Toronto office, Stephen A. Pike is a senior legal adviser to global and Canadian businesses, primarily in the retail and consumer products and services sectors.

Stephen provides advice on corporate governance, transactional, product distribution, regulatory and risk management issues including supply chain and ESG issues. He regularly advises American businesses and investors acquiring or establishing a Canadian business, and bringing new products into the Canadian market.

Stephen is Vice-Chair of the Corporate Social Responsibility Law Committee of the Business Section of the American Bar Association and speaks frequently on combatting modern slavery, forced labour and child labour in supply chains.
Professor David V. Snyder was appointed professor of law at the American University Washington College of Law in the fall of 2007 and was appointed director of the Business Law Program in 2008. He graduated summa cum laude from Tulane University Law School in 1991, and he has been a professor of law at Tulane, Indiana (Bloomington), and Cleveland-Marshall College of Law. He has been a regular visiting professor at the law school of the University of Paris II (Panthéon-Assas) since 2012, and has also been a visiting professor at the University of Paris 10 (Nanterre La Défense), Boston University, and the College of William and Mary. In addition, he has taught summer courses at the University of Mainz (Germany). After graduating from law school, Professor Snyder served as a law clerk to the Honorable John M. Duhé Jr. of the United States Court of Appeals for the Fifth Circuit, and subsequently joined the D.C. firm of Hogan & Hartson (now Hogan Lovells). In 2014 Professor Snyder was awarded a MacCormick Fellowship during which he delivered the annual Wilson Memorial Lecture at the University of Edinburgh.

Professor Snyder's teaching and research interests are primarily in contracts and commercial law, including their international and comparative aspects. He was chair of the Section on Contracts of the Association of American Law Schools (2005-2006) and chaired the Washington steering committee for the XVIIIth International Congress of Comparative Law (2010). He is an elected member of the American Law Institute, a titular member of the International Academy of Comparative Law, and has served on the board of directors of the Washington Foreign Law Society and the board of editors of the American Journal of Comparative Law. He currently chairs the American Bar Association Business Law Section Working Group to Draft Human Rights Protections in International Supply Contracts.

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