The ABA Model Principles: Not Only a Tool for Compliance, but Also One to End Slavery and Child Labor in Supply Chains

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Introduction

The regulatory environment relating to slavery/forced labor/labor trafficking (we will treat these terms as synonymous) and child labor in corporate supply chains continues to grow as the United States and the United Kingdom have new laws in this area, and France and other countries in Europe consider legislation. Enforcement in the United States has commenced under the recently enacted Trade Facilitation and Trade Enforcement Act, where goods tainted

Question: While fashion has changed a great deal since 1939 when the term was initially coined, the term “white-collar crime” has become a mainstay when referring to financially motivated
with labor trafficking and child labor can be seized, forfeited, and destroyed. Therefore, it is important for business enterprises to seriously consider how these developments can potentially impact their business and reputation.

The objective of this article is to demonstrate that business enterprises that conform their internal policies to the ABA Model Principles—and then implement them accordingly—will not only be in substantial compliance with both currently enacted and anticipated supply-chain legislation, but also on a path to addressing the underlying problem: labor trafficking and child labor in supply chains. Although penalties from legal violations can be severe, reputational damage that can be incurred from the presence of labor trafficking or child labor in the supply chain often is far more harmful.

In such a situation, under Corporate Social Responsibility (CSR) principles, the business might decide to take action to address labor trafficking or child labor because: (i) it is the CSR legal expectation to obey the law; (ii) reputational harm could risk the success of the business enterprise as a CSR economic expectation; or (iii) it is the right thing to do as a CSR ethical expectation.

This article builds on the research in co-author E. Christopher Johnson Jr.’s article, “Business Lawyers Are In a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor,” 70 Bus. Law. 1083 (2015) (the Article). As with any good sequel, one need not have read the Article in order to comprehend this one. However, for more depth, please refer to the Article and the Model Policies website.

This article often refers to both the ABA Model Principles and the related Model Policies. The ABA Model Principles form the core of the Model Policies, but are the only part of the Model Policies adopted by the ABA as its official policy. They are a high-level commitment to addressing labor trafficking and child labor. There are four ABA Model Principles for businesses, and four ABA Model Principles for suppliers, and they are the same for both, to wit:

Principle 1: The business/supplier will prohibit labor trafficking and child labor in its operations.

Principle 2: The business/supplier will conduct a risk assessment of the risk of labor trafficking and child labor and continually monitor implementation of this policy.

Principle 3: The business/supplier should: (i) train relevant
employees; (ii) engage in continuous improvement; and (iii) maintain effective communications mechanisms with its suppliers.

Principle 4: The business/supplier will devise a remediation policy and plan that addresses remediation for labor trafficking or child labor in its operations.

The Model Policies provide commentary and guidance for the ABA Model Principles, but are not intended to be an off-the-shelf or one-size-fits-all product. Instead, they offer a toolkit of useful guidance and commentary that identify optional considerations for a business to take into account when developing its own policies. These options include adopting and implementing policies based on the ABA Model Principles, modifying existing policies consistent with the ABA Model Principles, or a more comprehensive set of fine-tuned business and supplier policies in a manner consistent with the materials on the Model Policies website.

Overview of Labor Trafficking and Child Labor in Supply Chains

The International Labor Organization (ILO) estimates that 20.9 million men, women, and children are subjected to human trafficking around the world. Some reliable estimates put this number as high as 45.8 million. Of these victims, some 4.5 million are in sex trafficking and are forced into commercial-sex industry activities ranging from pornography to prostitution. Another 14.2 million are trafficked in economic activities including agriculture, construction, domestic work, and manufacturing. Human trafficking is a major criminal enterprise and a $150 billion industry, second only to drug trafficking.

Despite the progress made in curbing the problem, child labor figures are even higher. The ILO estimates that, globally, 168 million children are still exploited in this manner. More than half of them, 85 million, perform hazardous work.

Both of these groups are exploited in the supply chains of products in our everyday lives. A graphic depiction of this is a fact sheet distributed by the State Department’s Office to Monitor and Combat Trafficking in Persons. It shows that, from the time one gets out of bed until the moment one goes to sleep, trafficking may be responsible for producing common products such as clothes, smartphones, computers, electronics, coffee, food, bricks, tires, and even cotton sheets. These products or their ingredients are among the 136 goods from 74 countries on the Department of Labor’s List of Goods Produced by Child Labor or Forced Labor (DOL List), which is a list of goods and their source countries that involve a significant incidence of child labor or forced labor.

The exploitation usually occurs halfway around the world but
begins right here with consumer demand for low prices. In order to meet this demand, businesses have increased the importance of supply-chain management, which can increase value, savings, and innovation. Unfortunately, however, it can also lead to exploitation when unscrupulous labor brokers and others take advantage of workers.

**Trade Facilitation and Trade Enforcement Act of 2015—A Game Changer?**

Until this year, goods tainted with labor trafficking or child labor such as those on the DOL List could get into the United States under the so-called consumptive demand exception in the Tariff Act of 1930—a loophole that permitted goods made with forced labor or child labor to be imported into the United States if there is a domestic need for the product, and domestic production is insufficient to meet that need. Earlier this year, however, Congress passed and President Obama signed (on February 24, 2016) the Trade Facilitation and Trade Enforcement Act, which eliminates the consumptive demand exception. In doing so, such goods can be blocked from entering the country. U.S. Customs and Border Protection has an anonymous reporting website through which consumers, competing and downstream businesses, and civil society can report suspected tainted goods.

Recent enforcement of the Trade Facilitation and Trade Enforcement Act has finally given a full set of teeth to the Tariff Act regarding the importation of goods produced with forced or child labor. The enforcement provisions of the Tariff Act (19 U.S.C. §§ 1595, 1595a) allow seizure and forfeiture of tainted goods, and the implementing regulations (19 C.F.R. §§ 12.42–.45) also allow possible destruction of such goods. Accordingly, on March 30, 2016, U.S. Customs and Border Protection seized textile-manufacturing products of a Chinese chemical supplier, Tangshan Sanyou, that allegedly contain materials produced with forced prison labor. Because Tangshan Sanyou supplies its products to businesses like Sritex, which produces U.S. military uniforms, it and each of its downstream partners may not only be identified as a customer of slave-made goods, but also may be violating the updated Federal Acquisition Regulation, which is discussed later in this article.

This seizure is one of the first examples of an importing company not only risking adverse publicity and losing ground to competitors but also losing possession of its product under the Tariff Act—a triple whammy that should catch the attention of every business enterprise that imports goods into the United States. This reality raises the stakes for business enterprises to ensure that its products are not tainted with labor trafficking or child labor. The ABA Model Principles and the related Model Policies are tools that informed on the latest business law practice news and information that will benefit you and your clients.
can help businesses do just that.

**The ABA Model Principles and Related Model Policies**

In 2012, as part of former ABA President Laurel Bellows’s 
*presidential initiative to confront human trafficking*, she asked the Business Law Section to develop best practices for business enterprises encountering human trafficking. The Section put together a working group of more than 50 leading business and legal experts from a broad spectrum of interests, including judicial, business, human rights, international law, management and labor employment, nongovernmental organizations, and government, to create a set of voluntary business and ethical standards that would help combat labor trafficking and child labor while avoiding unnecessary regulation or liability. Eighteen months later, after approximately 100 drafts distributed and heavily negotiated among this diverse group and publicly, the Section submitted Resolution 102B at the 2014 ABA Mid-Year Meeting. The resolution before the ABA House of Delegates sought the adoption of the Model Principles as ABA policy and urged businesses to adopt and implement their own business and supplier policies on labor trafficking and child labor consistent with the Model Principles. The House adopted the resolution without objection.

In a recent positive development in February of 2016, the Canadian Bar Association also adopted Model Business Principles on Forced Labour, Labour Trafficking, and Illegal or Harmful Child Labour. See 2016 C.B.A. Res. 16-03-M. The impetus to create the Canadian Model Principles was spearheaded by Stephen Pike, an ABA Business Law Section member, working with a team from the Canadian Corporate Counsel Association without any separate input from the ABA Business Law Section. Although varying in scope from the ABA Model Principles, the Canadian Model Principles are otherwise substantially similar. This will be reviewed in more detail in a separate article.

**Compliance**

Human trafficking and child labor are illegal in virtually every country. In the case of human trafficking, 169 countries are parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol). More than 100 countries have *passed anti-trafficking laws*, and many have established specialized law-enforcement units. In the case of child labor, 168 countries have ratified the ILO Minimum Age Convention (No. 138). However, violations of these laws are commonplace—particularly overseas—due to the *demand for cheap labor and services and the lack of meaningful law enforcement*, as well as various other contributing factors. If a business relies on lack of enforcement as a strategy for avoiding prosecution, it is taking a risk that the enforcement policy will change, thereby
exposing it to potential civil and criminal liability.

The majority of existing supply-chain laws require public disclosure of efforts taken to address labor trafficking and/or child labor but do not require specific action taken toward that end. These laws are designed to provide consumers and the court of public opinion with information on the progress of corporations to address slavery issues in supply chains and appropriately reward or punish business enterprises based on their progress or lack thereof in doing so. For example, the proposed federal Business Supply Chain Transparency on Trafficking and Slavery Act (currently in the House of Representatives) would require disclosures similar to those required by the California Transparency in Supply Chains Act—that is, actions taken by business enterprises to eradicate slavery in its supply chains—although the federal disclosures would be prepared primarily for the U.S. Securities and Exchange Commission.

Internationally, the United Kingdom passed its Modern Slavery Act, another disclosure law which requires “commercial organizations” operating on U.K. territory with turnover (revenue) exceeding £36 million to publish reports (approved by a senior officer, e.g., directors or partners) on steps taken during the prior financial year to ensure that slavery and trafficking are not taking place in the business or its supply chains. An update on the law is available here. In addition, France is in the process of passing a law that requires French corporations and outsourcing companies with 5,000 employees or more, and multinational enterprises operating in France with 10,000 employees or more, to adopt and publish “plans of vigilance” that cover a wide variety of risks: human rights, fundamental freedoms, physical harm, environment, health, safety, and corruption. Given that it requires a plan to be adopted, it goes a step further than other disclosure laws. This bill will also create civil liability in the event of human rights violations overseas. Various “interested parties” are empowered to initiate court actions, and judges are authorized to enforce the “duty of vigilance” through injunction, damages/fines, etc.

The Federal Acquisition Regulation (FAR) is an example of a supply-chain law that is not a disclosure law but requires specific actions to be taken to uphold its mandate of prohibiting contractors, subcontractors, and their employees from engaging in severe forms of trafficking, procuring commercial sex acts, and using forced labor in the performance of a U.S. government contract or subcontract. The FAR has now been updated based on President Obama’s Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts.

The Article provides a comprehensive discussion of how specific provisions of these various laws relate to the ABA Model Principles and the related Model Policies, which are available here.
As a further guide to those interested in the conformity between these laws and the ABA Model Principles and the related Model Policies, the following charts visually demonstrate such conformity (or lack thereof):

![Chart showing conformity between laws and ABA Model Principles]

Each group of seven colored bars describes the specific, related Model Business and/or Supplier Policy to the left of the group. The top bar in each group (in blue) summarizes the requirements of the associated Model Policy. Each of the lower bars (yellow to brown) represents one law (or proposed law) applicable to businesses. The length of each of the lower bars relative to the top bar (and to each other) represents how closely that law compares to the analogous Model Policy. Also, any law that only requires mere disclosure or certification of the associated measures “taken” against human trafficking—that is, without requiring a business to have actually taken such measures—is marked with an extra symbol (†) to highlight this distinction. Additionally, an asterisk (*) denotes a legal requirement that to date is not included in the Model Policies. Finally, a caret (^) denotes a related Model Policy that would constitute an Internal Accountability Standard and Procedure (IASP) under both the California Transparency in Supply Chains Act and U.S. Business Supply Chain Transparency on Trafficking and Slavery Act. In most commercial arrangements, IASPs appear in many aspects of such an arrangement, just as is the case with the Model Policies.

It is also important to note that the charts generally only compare the types of actions required—such as risk assessment, employee training, and cooperation with due diligence—as opposed to the types of trafficking activities prohibited by each authority—such as forced labor, commercial sex acts, and violations of human rights. Only the first group of bars—related Model Policies 1.A.1—indicates differences in the latter. All subsequent groups of bars simply compare the types of actions that must be taken or disclosed regarding such “prohibited practices” or “violations.” Therefore, please always refer back to the 1.A.1 group to identify the relevant

http://www.americanbar.org/publications/blt/2016/06/02_chan.html
"prohibited practices" under a given law. Below are the rest of the charts for Model Policies 1.B to 4:

### ABA Model Business Principle 1—Related Policies

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The trend of increasing legislation is likely to continue as more countries are considering laws in this area, including Australia, the Netherlands, and Switzerland. In addition, further slavery and human-rights reporting may be driven throughout the European Union as countries begin to implement the EU nonfinancial reporting directive.

Potential liability also exists under the Foreign Corrupt Practices Act (FCPA) when a company uses a labor broker who bribes an official. Such liability is described in detail on pages 1113 to 1114 of the Article, using a hypothetical situation that illustrates how FCPA liability would arise and a discussion of how implementing the ABA Model Principles could avoid that risk.

Beyond Compliance

As shown above, the ABA Model Principles and the related Model Policies exceed many of the supply-chain laws because they provide that a business or supplier either shall or may, as the case may be, implement certain actions based on risk assessment, as compared to merely reporting on actions taken. Obviously, one of the ABA working group’s concerns in constructing the Model Principles and the related Model Policies was that the reporting requirements in the various laws were the items important to regulators and, as such, could at some point in the future become actual requirements. For the present, however, adopting them would constitute a CSR ethics expectation, or the right thing to do.

As noted above, some of the provisions of the Federal Acquisition Regulation (FAR) exceed those of the ABA Model Principles and the related Model Policies in a number of areas. For example, the FAR forbids contractors and their suppliers and employees from procuring commercial sex acts, requires contractors to report violations, enforces strict rules against a broader range of fraudulent recruiting practices, and includes provisions on housing and transportation. An excellent article on the FAR (from which much of the data in this article was obtained) was written by Michael Navarre and Michael Mutek, “Final Trafficking in Persons”
The ABA Model Principles: Not Only a Tool for Compliance, but Also One to End Slavery and Child Labor in Supply Chains | Business Law Section


The Risk-Based Approach

The Model Principles and the related Model Policies adopt a risk-based approach to ensure that measures to address issues of labor trafficking and child labor are commensurate with the risks identified so that the sources of the greatest risk receive the most attention, thereby facilitating efficient allocation of resources.

This approach is facilitated by risk assessments conducted by a business or supplier to ascertain whether, in a given circumstance, there is a risk of labor trafficking or child labor. The risk assessment considers factors such as the type of business conducted, where the business will be conducted, the history of labor trafficking or child labor in an industry or sector, operating context, the particular operations, products, or services involved, and any other factors a business or supplier deems relevant. With the support and collaboration of the U.S. Department of State’s Office to Monitor and Combat Trafficking in Persons in conjunction with other department and U.S. government agency experts, Verité has developed a tool to help business enterprises and others, particularly government contractors, assess such risks at responsiblesourcingtool.org.

Litigation Risk Is Also a Potential Reputation Risk

The litigation environment has also intensified in this area due to increased consumer awareness of commercial-speech, disclosure, and truth-in-advertising law. For example, multiple class-action lawsuits were filed in California in the second half of 2015 against chocolate-producing companies such as Hershey, Mars, and Nestle, and against seafood-sourcing businesses such as Costco (farmed shrimp) and Nestle S.A. (makers of Fancy Feast cat food). The main theory of liability in these cases was misrepresentation (or incomplete disclosure) of product sources. Even though such cases have been dismissed in courts of law, there is always the risk that any damage to a company’s reputation may already have become irreversible in the court of public opinion. Recall that by the time accounting firm Arthur Andersen prevailed in the U.S. Supreme Court on its case relating to criminal document destruction, it was no longer a viable entity, given the significant adverse publicity. This is especially the case when the cause of action is brought under EEOC laws, the Thirteenth Amendment, the Ku Klux Klan Act, the Trafficking Victims Protection Act, RICO, and Title VII of the Civil Rights Act.

The excellent book by Kelly Hyland and Kavitha Sreeharsha (founders of the Global Freedom Center), Freedom for All: An Attorney’s Guide to Fighting Human Trafficking, lists some of the recent headlines that can lead to reputational harm:
• Victoria’s Secret Cotton Being Supplied by Slave Labor
• Flextronics Accused of Using Slave Labor
• Hershey Sued for Info on Use of Child Labor in Cocoa Supplies
• Workers for Wal-Mart Supplier Forced into Slave Labor
• Zara Accused of Alleged “Slave Labor” in Brazil
• Woman finds Note from Chinese Labor Camp Prisoner in Kmart Decoration

Note that most of these headlines use the word “slavery” or some derivation thereof, which as explained earlier and in more detail on pages 1086 to 1088 of the Article, generally is synonymous with human trafficking and forced labor. The word is a lightning rod that certainly raises the ire of consumers, shareholders, and board members.

Conclusion

All one must do to understand that labor trafficking and child labor exist in the supply chains of many of the goods that we eat, use, and wear is to review the DOL List. As recent trends have shown, governments of the United States and Great Britain have enacted, and soon those of France, Australia, Switzerland, the Netherlands, and others will likely enact, legislation in this area.

The most forward-looking companies will see the regulatory handwriting on the wall and be proactive in developing a policy and action plan to address this issue. Such activity could also be driven by a moral concern over slavery. Either way, it could be deemed an ethical decision on the CSR scale. It also could set up the business enterprise as a leader in this area—perhaps allowing it to garner sales and investment from the growing body of socially conscious consumers and investors. Others, fearful of seizures, forfeitures, destruction of goods, and potential adverse publicity under the Trade Facilitation and Trade Enforcement Act, will also plan a course of action. This would be an economic response to the adverse business consequences that could result from a course of events.

Inevitably, however, other business enterprises will take the risk of not being caught. This could save a lot of time, trouble, and perhaps money that would be spent on the front end to begin addressing issues in the supply chain; however, problems could arise from a number of sources that will cost the business enterprise both money and reputational harm. For example, problems could arise in the form of a lawsuit from irate customers because they did not know the business enterprise’s product was made by slaves, a PR battle with an NGO that published a report on slavery or child labor in the business enterprise’s supply chain, or Customs seizing and potentially destroying the goods the business enterprise was expecting. These things could also happen to the business enterprises employing a pro-active approach, but both in the court of law and the court of public opinion, at least
they were working on the problem.

Whichever course is taken, the ABA Model Principles and the related Model Policies on Labor Trafficking and Child Labor are flexible enough to be either the starting point for a new policy or a comparison document to check the viability of an existing policy. They address substantially all of the provisions in both existing and anticipated laws, so a business enterprise using the Model Principles approach should be on solid ground legally.

The ABA Model Principles and the related Model Policies are more than just a compliance tool, however, because by employing a risk-based methodology, measures to address issues of labor trafficking and child labor are commensurate with the identified risks. Thus, the sources of the greatest risk receive the most attention, thereby facilitating efficient allocation of resources. From many perspectives, therefore, counsel should support or encourage its business clients to adopt a proactive strategy to address labor trafficking and child labor in its supply chain.

Additional Resources

For other materials on this topic, please refer to the following.

Business Law Today

The Important Role for Socially Responsible Business in the Fight Against Human Trafficking and Child Labor in Supply Chains
By E. Christopher Johnson Jr.
Vol. 42 no. 5 January 2015

The Business Lawyer

Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor
By E. Christopher Johnson Jr.
Vol. 70 Fall 2015