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HUMAN TRAFFICKING, CORRUPTION AND THE NEW FRONTIER OF CORPORATE SOCIAL RESPONSIBILITY

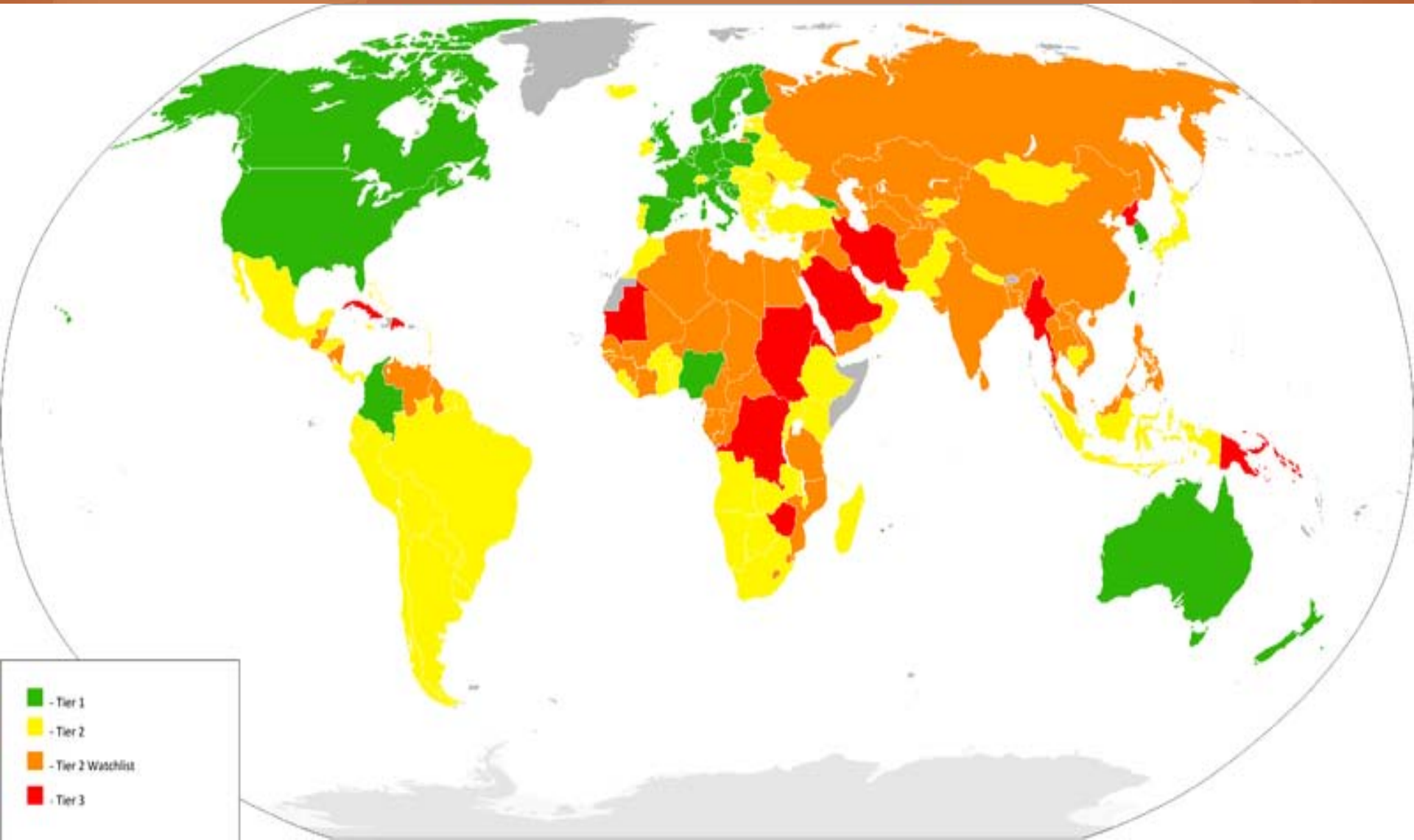
Gulf Coast AML Forum September 2013

- Virginia M. Kendall
United States District Court Judge
Co-Author, Child Exploitation and Trafficking
with T. Markus Funk

Overview: Why is CSR the Current Compliance “Hot Topic”



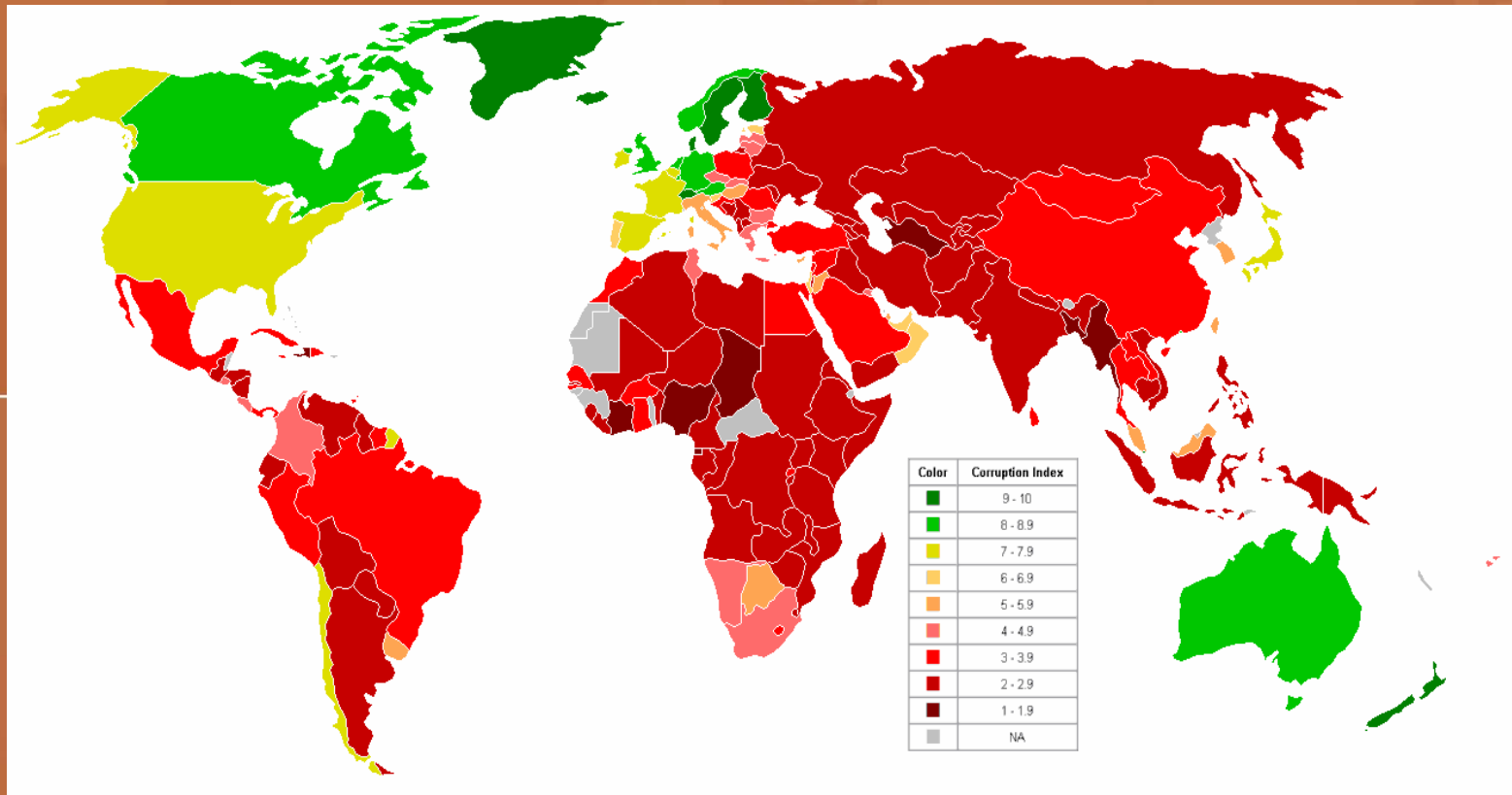
Where is Human Trafficking Most Prevalent?



Corruption is a Global Problem:

Transparency International Corruption Perceptions Index

Index Scale of 1 (poor reputation) to 10 (good reputation)



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California Transparency in Supply Chains Act Disclosure Regime

The California Act Applies To...

1. Retail manufacturer/seller of *any* product (**would likely qualify – online sales count**);
 2. With annual gross worldwide receipts exceeding \$100 million; and
 3. And are “Doing business” in California (property or salaries in California exceeding \$50K)
- ✓ **November 30, 2012:** California Franchise Tax Board (FTB) confidentially released business names to AG
 - ✓ Estimated 6,000+ businesses are on list

The California Act Was Passed To...

- Help consumers “distinguish companies or the merits of their efforts to supply products free from threat of slavery and trafficking”

The California Act Requires...

Disclosure of your supply chain verification/audit results

- ✓ Disclosures must be on internet *homepage*
- ✓ Homepage disclosure must be through a “**conspicuous**” and “**easily understood**” link to full-text document (can’t hide it)

The California Act *Specifically* Requires...

Disclosure of what you did to:

- **Maintain** internal “accountability standards and procedures” for those who fail to meet your standards
- **Provide** training to those with supply chain responsibility (focus on mitigating supply chain risks and identifying trafficking)
- **Verify** supply chain to evaluate/address “risks of human trafficking and slavery”

The California Act *Also* Requires...

Disclosure of what you did to:

- **Audit** suppliers to evaluate compliance with your standards? Unannounced and through independent auditors?
- **Obtain** direct supplier certification that *materials incorporated* into goods comply with local anti-trafficking and slavery laws

Net impact: Reporting clean bill of health requires significant supply chain due diligence

What Can Happen if You Don't Comply?

California AG Injunction... But also

- ✓ **Class Actions** - Consumers say wouldn't have purchased product if knew tainted by trafficking? (Consider recent "cruelty free" class action against Avon, Estee Lauder and Mary Kay Cosmetics)
 - ✓ **Advocacy Group Pressure** - Hundreds of advocacy groups around world targeting businesses

What Can Happen If You Don't Comply? (Cont'd)

- ✓ **Boycotts** –Consumers don't want products made with child or trafficked labor
- ✓ **Shareholder Proposals and Suits** - CSR proposals have been largest class of Shareholder proposals for last 3 years
 - Note: Shareholder suits to increase with new SEC reporting requirements (e.g., Conflict Minerals Rules and H.R. 2759)
- ✓ **Federal Trade Commission Action** - Deceptive advertising theory

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H.R. 2759: The Business Transparency on Trafficking and Slavery Act

H.R. 2759 Will Apply To



Companies that:

1. Are publicly traded;
and
2. Have annual global receipts in excess of \$100 million

H.R. 2759 Will Require...

- Annual filing with SEC of report titled “Policies to Address Forced Labor, Slavery, Human Trafficking and the Worst Forms of Child Labor”
 - ✓ Disclosure contents largely mirror California Transparency in Supply Chains Act Disclosures
 - ✓ Requirement of “clean”/“untainted” supply chain mirrors Kimberley Process

Want a Federal Contract?

Join the U.S. Government's
Global Anti-Trafficking Fight



Executive Order on Trafficking in Federal Contracts

“We’re making clear that American tax dollars must never, ever be used to support the trafficking of human beings. We will have zero tolerance. We mean what we say. We will enforce it.”

- President Obama, September 25, 2012

Executive Order on Trafficking in Federal Contracts (cont'd)

Why?

- Over 20 million men, women and children victims
- Third-party business partners (suppliers, agents, distributors, etc.) are #1 source of compliance liability

How and When?

- Federal Acquisition Regulations (FAR) amended by October 2013 (today's best estimate)
- "Zero Tolerance"
- Certifications

Executive Order on Trafficking in Federal Contracts (cont'd)

Impacts?

- Over 300,000 federal contractors and direct subcontractors must report anti-trafficking efforts
- Compliance also for suppliers and transaction partners?
- **Mandatory:** (1) no trafficking activity in supply chain and (2) agree to **self-report** and take remedial action if identify any activities “inconsistent with” the Executive Order

Executive Order on Trafficking in Federal Contracts (cont'd)

Why Comply?

- **Debarment**
 - **Imprisonment**
 - **False Claims Act**
 - **Class Actions**
 - **Advocacy Group Pressure**
 - **Consumer Boycotts**
- Business death knell for non-compliance (9.406-2)
“Knowing and willful” false certification is a crime. Reckless disregard or conscious avoidance of truth qualify as “knowing.” Consequences include up to *5 years imprisonment* & \$250K fine
Government Fraud (31 U.S.C. § 3729)
Deceptive advertising? FTC Action?
Hundreds of advocacy groups around world targeting businesses
Few want products made with child or trafficked labor. Trafficking is today’s “hot topic”

European Union CSR Initiatives



European Union & CSR

European Union: An Evolving CSR Landscape



- Business Transparency in Trafficking & Slavery Act
- Directive on Transparency and its amendments
- EU Timber Regulation
(March 2013)

- Voluntary approach found to not be working – companies not forthcoming. Result?
- Adopted April 16, 2013, **mandatory reporting for companies with 500+ employees**. Directive amends the Accounting Directives (Fourth and Seventh Accounting Directives on Annual and Consolidated Accounts, [78/660/EEC](#) and [83/349/EEC](#), respectively). The objective is “*to increase EU companies’ transparency and performance on environmental and social matters.*”
- Comply or Explain latitude will only go so far...

European Union & CSR

- EU strategy 2014 – “enhancing the visibility of CSR and improving the disclosure of social and environmental data
- EU expected to publish proposals in 2014 on how it will monitor the CSR policy commitments of EU based companies with over 1000 employees, regardless of where their operations are located.
- One aim of the legislative measures being considered is to “*improve accountability and promote sustainable business among multinationals*”
- Already held public consultation on “green-washing” to address it specifically in the Unfair Commercial Practices Directive

European Union & CSR

- Commission adopted legislative proposals in 2012 to improve disclosures for retail investment products which provide a basis for providing summary information about CSR and socially responsible investment matters.
- Effort underway to align EU CSR requirements for enterprises with more than 1000 employees to standards consistent with global approaches, i.e., ISO 26000, UNGC, or OECD GL. Implementation expected in 2014.
- Alignment to include that ALL European enterprises meet corporate responsibility to respect human rights as defined in UNGPs and that member states develop national plans for the implementation of the UNGPs. Due date? **2013**

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Forced & Human Trafficking: Prevention, Detection, and Remediation

How Forced Labor Happens in Practice

Red Flag Indicators of Vulnerability	The Recruitment 'Bait'	The Workplace 'Switch'
Migrant Labor	Deception	Substituted Terms & Conditions
'Hot Spots'	Fraudulent Visas	Labor Broker as On-Site Manager
Labor Brokers	Recruitment Loans	Passport Confiscation
Recruitment Fees		Worker Pays 'Runaway' Insurance
Who Pays the Broker?		Earnings Withheld, Delayed, Unpaid
Restrictive Guest Worker Visas		Excessive or Illegal Deductions
'Receiving' Country Protections		Freedom of Movement Curtailed
		Financial Penalties for Termination
		Third Party Control of Bank Accounts

How Should Companies Respond to this Risk?

- Tailored Risk Assessment
 - Start with 'Hot Spots' where strategic suppliers have operations
 - Use Red Flag Indicators to Screen
 - Focus on Labor traceability at sample facilities in high risk areas
- Detailed Compliance Program
 - Policy commitments
 - Terms & conditions of business
 - Supplier codes, measurable standards & reporting mechanisms
- Communicate & Train
- Monitor, Audit, & Remediate
- Periodic Reviews

SEC Conflict Minerals Rules – An Overview



The SEC Conflict Minerals Rules'

Purpose and Scope

Purpose?

- Stop atrocities in Congo region
 - ✓ Conceptually similar to 2003's Kimberley Process for conflict diamonds

What Are "Conflict Minerals"?

- Gold and other minerals determined by the Secretary of State to finance conflict in the DRC or adjoining country (Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda and Zambia)

The SEC Conflict Minerals Rules Apply To

Companies that:

1. Are public;
2. Manufacture or “contract to manufacture” a product; *and*
3. The product contains conflict minerals that are “necessary to the functionality or production” of that product

Note:

- “**Contract to manufacture**” involves an undefined “degree of influence” test
- “**Necessary to the functionality**” also undefined

The SEC Conflict Minerals Rules Apply To

Steps:

1. Do Conflict Minerals Rules apply?
2. If so, conduct “reasonable country of origin inquiry”
3. Based on this, if NOT conflict free (or unsure), prepare Conflict Minerals Report

**“There are a lot of people saying
this is the FCPA on steroids.”**

- Mark Mendelsohn

Former Deputy Chief, DOJ Fraud Section

(The Wall St. J., Dec. 28, 2010)

Overview of the U.K. Bribery Act

- ▶ The U.K. Bribery Act creates four separate offenses:
 - 1) Offering, promising, or giving a bribe to a **private** party
 - 2) Agreeing to **receive** or accepting a bribe
 - 3) Offering, promising, or giving a bribe to a foreign government official with the intent to influence the performance of his or her functions as a public official in order to obtain or retain business or a business advantage
 - 4) Failing to **prevent** bribery by associated persons
- ▶ Offense #3 most closely mirrors the FCPA. In several respects, the Bribery Act is further-reaching and possibly harsher than the FCPA.

Differences between FCPA and Bribery Act

Issue	FCPA	Bribery Act
Prohibits bribery of private officials	No*	Yes
Prohibits bribery of domestic officials	No*	Yes
Prohibits receiving bribes	No	Yes
Corrupt intent required	Yes	No**
Exception for facilitating payments	Yes	No
Exception for promotional expenses	Yes	No***
Affirmative defense for robust compliance program	No	Yes

* The U.S. Travel Act may apply.

** General offenses require evidence of improper performance (reasonable person standard). The offense of bribery of a foreign official requires evidence of an intent to influence the official in order to obtain or retain business.

*** The U.K. government says it does not intend to prohibit *reasonable and proportionate* hospitality and promotional expenses as long as there is no improper intent.

Another Difference: Jurisdiction

FCPA	U.K. Bribery Act
Applies to:	Applies to:
1) Issuers of U.S. securities	1) U.K. companies, citizens, and residents
2) “Domestic concerns”	2) Non-U.K. nationals/entities where part of act takes place in the U.K.
3) Other persons who act in furtherance of a corrupt payment while in U.S. territory	3) Companies who “carry on a business, or part of a business,” in U.K.

U.K. Bribery Act: Adequate Procedures to Prevent Bribery

- If an “**associated person**” pays a bribe for the benefit of the company, the **only defense** to criminal liability is to prove the company has “**adequate procedures**” to prevent bribery.
- Guidance published by the U.K. Government identifies six key principles:
 - 1) Proportionate procedures
 - 2) Top-level commitment
 - 3) Risk assessment
 - 4) Due diligence
 - 5) Communication (including training)
 - 6) Monitoring and review

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Questions?