
A TEMPORARY SOLUTION: USING THE FCPA TO CRIMINALIZE MODERN SLAVERY

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ABSTRACT

Multinational corporations perpetuate and directly benefit from human rights abuses, such as modern slavery, in their supply chains. While many other countries have joined the trend of enacting anti-modern slavery legislation, under current federal United States law, it is difficult to hold corporations criminally liable for human rights abuses committed abroad. However, anti-corruption statutes have been aggressively enforced by the DOJ, SEC, and their foreign counterparts. Corruption plays an essential role in facilitating modern slavery in global supply chains. After describing the various ways corruption is used by enslavers, this paper argues that prosecutors can use the Foreign Corrupt Practices Act as a tool to criminalize modern slavery in the supply chains of multinational corporations and encourage corporations to improve their modern slavery compliance efforts. Because prosecutors may not be willing or able to enforce the FCPA in certain circumstances due to tenuous jurisdictional links, this paper will also briefly explore liability under other existing laws as well as propose amendments to the FCPA and the federal modern slavery bill to fill the liability gaps.

CONTENTS

INTRODUCTION.....	208
I. RELATIONSHIP BETWEEN CORRUPTION AND MODERN SLAVERY	210
II. LIABILITY FOR MODERN SLAVERY UNDER THE FCPA	215
<i>A. The Rise and Success of the Foreign Corrupt Practices Act</i>	215
<i>B. The FCPA Anti-Bribery Provisions</i>	216
<i>C. The FCPA Accounting Provisions</i>	222
<i>D. Case Study: Apple’s Use of Forced Labor and Child Labor</i>	227
III. IMPROVING OTHER LAWS TO DISCOURAGE MODERN SLAVERY	230

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<i>A. Shortcomings in the New Wave of Modern Slavery</i>	
<i>Legislation</i>	230
<i>B. Failures of the Alien Tort Statute and the Trafficking Victims</i>	
<i>Protection Reauthorization Act</i>	236
<i>C. Amending the FCPA</i>	238
CONCLUSION	239

INTRODUCTION

The global supply chains of fifty of the world's largest businesses depend on a hidden workforce of 116 million who perform informal work or even slave labor.¹ These businesses are among the numerous that often pose a significant threat to the human rights of those who interact with their supply chains, especially their hidden workers.² However, international human rights treaties typically do not impose direct legal obligations on private actors, including businesses.³ Rather, states have a duty to enact and enforce national legislation to protect individuals and communities from human rights abuses by businesses.⁴ While not binding, the United Nations Guiding Principles on Business and Human Rights (UNGPs) aim to address these issues by explaining states' duties and businesses' responsibilities to protect and respect human rights, and provide guidelines on how they should be put into practice.⁵

Freedom from enslavement is a human right; the International Covenant on Economic, Social and Cultural Rights establishes in Articles 6 and 7 the "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" and fair wages.⁶ However, the International Labour Organization (ILO) estimates 40.3 million people were victims of

¹ INT'L TRADE UNION CONFEDERATION, SCANDAL: INSIDE THE GLOBAL SUPPLY CHAINS OF 50 TOP COMPANIES 6 (2016).

² See U.N. Secretary-General, *Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 1, U.N. Doc. A/74/198 (July 19, 2019).

³ OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., FREQUENTLY ASKED QUESTIONS ABOUT THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, at 5, U.N. Doc. HR/PUB/14/3, U.N. Sales No. E.14.XIV.6 (2014).

⁴ *Id.* See *Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 2, ¶¶ 1-3.

⁵ John Ruggie (Special Representative of the Secretary-General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises - Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, annex, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

⁶ International Covenant on Economic, Social and Cultural Rights arts. 6, 7(a), Dec. 16, 1966, 993 U.N.T.S. 3.

modern slavery on any given day in 2016, and illegal profits generated by forced labor amount to \$150 billion USD annually.⁷ To give effect to the UNGPs and address this problem, California and several countries, including the United Kingdom (UK), France, Australia, and the Netherlands, have passed modern slavery legislation.⁸ In the United States (US), the Business Supply Chain Transparency on Trafficking and Slavery Act was most recently proposed in the House in March 2020.⁹ An almost identical bill was last proposed in 2018, but it died before enactment thus leaving the US without a federal modern slavery statute.¹⁰

However, anti-corruption statutes have been aggressively enforced by the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), and their counterparts abroad.¹¹ Corruption plays an important and central role in facilitating human rights abuses committed by corporations, such as securing slave labor through human trafficking in order to lower the cost of their goods.¹² Corruption is an “endemic feature” of trafficking—enabling it to “flourish.”¹³ The US Trafficking Victim Protection Act (TVPA) acknowledges the link between trafficking and corruption, stating “[t]rafficking in persons is often aided by official corruption in countries of origin, transit, and destination.”¹⁴ Corruption is essential to the success of

⁷ INT’L LABOR ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 9 (2017); *Modern Slavery in Global Supply Chains*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/infographics/modern-slavery-in-global-supply-chains> (last visited Feb. 13, 2021).

⁸ California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43; Modern Slavery Act 2015, c. 30, § 54 (U.K.); Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017 on the Duty of Care of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 [hereinafter Corporate Duty of Vigilance Law]; *Modern Slavery Act of 2018* (Cth) pt. 2 (Austl.); Wet Zorgplicht Kinderarbeid, Stb. 2019, 401 (Neth.) [hereinafter Dutch Child Labor Due Diligence Act].

⁹ Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Cong. (2020).

¹⁰ See Business Supply Chain Transparency on Trafficking and Slavery Act of 2018, H.R. 7089, 115th Cong. (2018). See also *Actions Overview H.R.7089 — 115th Congress (2017-2018)*, CONGRESS.GOV <https://www.congress.gov/bill/115th-congress/house-bill/7089/actions?r=6&s=1> (last visited Feb. 13, 2021).

¹¹ LIBERTY ASIA ET AL., MODERN SLAVERY AND CORRUPTION: LEGAL ANALYSIS OF RELEVANT LAWS AND THEIR APPLICATION 4, 16-17 (2015) [hereinafter LIBERTY ASIA].

¹² ORG. FOR ECON. CO-OPERATION & DEV., BACKGROUND PAPER: DEVELOPING A FRAMEWORK FOR COMBATTING CORRUPTION RELATED TO TRAFFICKING IN PERSONS 10 (2016) [hereinafter OECD].

¹³ IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, HUMAN TRAFFICKING AND PUBLIC CORRUPTION REPORT 5, 16 (2016).

¹⁴ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114

human trafficking operations in many ways; “[c]orrupt law enforcement agents facilitate the recruitment, transportation and exploitation of trafficking victims, and corrupt criminal justice authorities can help traffickers by obstructing investigations and prosecutions of cases as well as hinder the protection of victims of trafficking.”¹⁵ The Organisation for Economic Co-operation and Development (OECD) argues that “[a]ddressing human trafficking and corruption jointly is more effective than addressing these two issues individually.”¹⁶

Given the prevalence of corruption in forced labor flows, the Foreign Corrupt Practices Act (FCPA), the US anti-corruption statute, can be used as a tool to prosecute modern slavery abuses in supply chains that are sufficiently linked to the US. However, because there is often a tenuous jurisdictional link between bribe payer and the US, it would also be advantageous for legislatures to amend the FCPA or adopt new modern slavery legislation.

This Note proceeds as follows: Part I explains the connection between corruption and modern slavery. In particular, this Part highlights the similarities between the underlying policy reasons for regulating both corruption and modern slavery and explains how corruption can be used by human traffickers. Part II addresses how to establish liability for modern slavery under the FCPA. Finally, Part III suggests ways to improve current binding legislation as well as proposed legislation.

I. RELATIONSHIP BETWEEN CORRUPTION AND MODERN SLAVERY

The strong link between corruption and modern slavery creates potential for the FCPA to be used as a tool to disrupt modern slavery in global supply chains. “Countries that make the least effort to fight human trafficking are also those who tend to have high levels of perceived corruption.”¹⁷ When victims of labor trafficking perceive corruption to be high, traffickers can use this “to their advantage in the recruitment of victims, and to control them” by letting their victims know that escape would be futile due to corrupt law enforcement.¹⁸ Countries with the most severe human trafficking issues also rank the lowest on the Corruption Perception Index.¹⁹ These simultaneously

Stat. 1464.

¹⁵ OECD, *supra* note 12, at 10.

¹⁶ *Human trafficking and corruption*, OECD, <https://www.oecd.org/gov/ethics/human-trafficking.htm>.

¹⁷ OECD, *supra* note 12, at 10.

¹⁸ *Id.*

¹⁹ VERITÉ, CORRUPTION & LABOR TRAFFICKING IN GLOBAL SUPPLY CHAINS - WHITE PAPER 3 (2013). Transparency International’s Corruption Perception Index measures the perceived levels of public sector corruption in 180 countries and territories. *CPI 2020: Global Highlights*, TRANSPARENCY INT’L (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi->

corrupt and labor trafficking hotspot countries include: Indonesia, Thailand, Vietnam, Bangladesh, India, Myanmar, Nepal, Mexico, Guatemala, Ecuador, and the Philippines.²⁰ Further, one study found that “the presence of corruption in a country is a significantly stronger predictor of human trafficking than other poverty-related causes.”²¹

The United Nations Convention against Corruption (UNCAC) describes corruption as a force “undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.”²² More pointedly, the OECD defines corruption as “active or passive misuse of the powers of Public officials (appointed or elected) for private financial or other benefits.”²³ The FCPA does not define corruption, but instead criminalizes bribery of foreign officials.²⁴ Modern slavery is a term that is relatively new and distinguishable from the traditional forms of slavery in which one person physically owned and controlled another.²⁵ Rather, according to the US Department of State, modern slavery incorporates a more diverse range of activities including sex trafficking and forced labor, also sometimes referred to as labor trafficking, which encompasses child labor, debt bondage or bonded labor as well as traditional slavery.²⁶

Corruption facilitates slavery, which is why, despite prohibition against it being a preemptory norm in international law, slavery continues to exist and leads to nearly \$150 billion in annual profits for exploiters.²⁷ With the prospect of large profits outweighing the costs of paying bribes to get public officials to turn a blind eye, human trafficking becomes a “high reward/low risk” option for a foreign migrant labor supply chain.²⁸

2020-global-highlights.

²⁰ VERITÉ, *supra* note 19, at 3.

²¹ *Id.* (citing Sheldon Zhang & Samuel Pineda, *Corruption as a Causal Factor in Human Trafficking*, in ORGANIZED CRIME: CULTURE, MARKETS AND POLICIES (Springer 2008), http://link.springer.com/chapter/10.1007%2F978-0-387-74733-0_4#page-1).

²² G.A. Res. 58/4, at 2 (Oct. 31, 2003).

²³ ORG. FOR ECON. COOP. & DEV., *Effects of European Union Accession, Part I: Budgeting and Financial Control*, app. 3, OCDE/GD(97)163 (Mar. 1998).

²⁴ See Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) [hereinafter FCPA]; CRIMINAL DIV., U.S. DEP’T. OF JUST. & ENF’T DIV., U.S. SEC. & EXCH. COMM’N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 1 (2d ed. 2020) [hereinafter FCPA RESOURCE GUIDE].

²⁵ Katherine L. Christ & Roger L. Burrirt, *Current Perceptions on the Problem of Modern Slavery in Business*, 1 BUS. STRATEGY & DEV. 103, 103-04 (2018).

²⁶ Off. to Monitor & Combat Trafficking in Persons, *What is Modern Slavery?*, U.S. DEP’T OF STATE, <https://www.state.gov/what-is-modern-slavery/> (last visited Feb. 14, 2021).

²⁷ CARR CENTER FOR HUMAN RIGHTS POLICY, CORRUPTION AND HUMAN RIGHTS: THE LINKAGES, THE CHALLENGES AND PATHS FOR PROGRESS: SYMPOSIUM REPORT 16 (2018).

²⁸ IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, *supra* note 13, at 17

Corruption is a useful tool for human traffickers, labor agencies, recruiters, and employers. Human trafficking victims reported they observed complicity of public officials at all stages of trafficking: recruitment, transportation, exploitation, and avoiding legal liability.²⁹ There are four main ways corruption facilitates trafficking: it “(1) allows the crime of human trafficking to remain invisible; (2) facilitates impunity even if trafficking is detected; (3) facilitates trafficking circuits in the country; and (4) increases the danger of re-victimisation for trafficking victims.”³⁰ For liability under most anti-corruption statutes, the bribe must be paid to a public official.³¹ In order to achieve these four main goals, public officials can participate in modern slavery-related corruption as: (1) direct participators; (2) facilitators of the crime; and (3) facilitators of impunity.³²

First, “[p]ublic officials can directly participate in human trafficking—playing an active role in the recruitment, transportation, and exploitation of their victims.”³³ A corrupt official may traffic just one or several individuals into forced labor by misusing their government position.³⁴ For example, a Ugandan “labour recruitment company allegedly trafficked Ugandan women into domestic servitude in Iraq. The Ugandan government revoked the recruiting company’s license, only to later renew it. The company’s managing director at the time was a member of the ruling party’s executive committee.”³⁵ Also, at least twenty-five civil trafficking cases have been brought against diplomats and foreign officials who have trafficked victims for domestic servitude in the US from 2003 to 2015; the number of actual occurrences is thought to be much higher.³⁶

Second, public officials can facilitate human trafficking by providing

(citing *Breaking the Chain: Corruption and Human Trafficking*, TRANSPARENCY INT’L, (Sept. 1, 2011), https://www.transparency.org/news/feature/breaking_the_chain_corruption_and_human_trafficking).

²⁹ UNITED NATIONS OFF. OF DRUGS & CRIME, THE ROLE OF CORRUPTION IN TRAFFICKING IN PERSONS 3-4 (2011), https://www.unodc.org/documents/human-trafficking/2011/Issue_Paper_-_The_Role_of_Corruption_in_Trafficking_in_Persons.pdf.

³⁰ IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, *supra* note 13, at 16 (citing IACC, *WS#7 Corruption and Human Trafficking: unraveling the undistinguishable for a better fight. Long Workshop report*, 14th International Anti-Corruption Conference 2010, Bangkok, Thailand, November 10-13, 2010, p. 2. (workshop report available at https://web.archive.org/web/20160414075351/http://14iacc.org/wp-content/uploads/ws1.2CamilleKarbassi_LR.pdf).

³¹ See, e.g., FCPA RESOURCE GUIDE, *supra* note 24, at 7.

³² IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, *supra* note 13, at 19.

³³ *Id.*

³⁴ *Id.* at 22.

³⁵ *Id.* at 23 (citing Anna Cavell, *Ugandan Women Tricked into Domestic Slavery in Iraq*, BBC WORLD (Mar. 31, 2011), www.bbc.com/news/world-12887018).

³⁶ *Id.*

traffickers with the resources needed to transport victims across borders or checkpoints, maintain the conditions for exploitation, recruiting victims, and re-victimizing workers in exchange for a portion of the profits.³⁷ For example, “[i]n Bombay, India, prostitution is illegal yet continues to thrive, fueled by law enforcement corruption. The owners of illegal brothels along Fauckland Road pay bribes to the police every day, and police will even bring back girls who attempt to escape.”³⁸ Another example of public officials facilitating forced labor occurs in Thailand’s shrimp fishing industry. Many of the migrant dock workers are Rohingya men removed by Thai police from detention facilities and later beaten, tortured, and unpaid while working on the docks.³⁹ To ensure that the workers or any other interveners do not ruin the exploitation scheme, undercover police officers guard the docks.⁴⁰ Thailand is the largest exporter of shrimp, and the US is its biggest importer, thus billions of dollars are at stake for Thailand and American companies involved in the trade.⁴¹

In Nepal, the process of sending workers abroad involves several opportunities for public officials to receive bribes in order to facilitate the process. For permission to send workers abroad legally, agencies need to receive visa approval from Nepal’s Department of Foreign Employment.⁴² The Department has “become a breeding ground for corruption due to over centralization and inefficiency.”⁴³ In 2010, the World Bank estimated that approximately \$200 million USD are paid annually in bribes in Nepal’s foreign employment industry.⁴⁴ In addition to the visa, prospective migrant workers need many government documents before departure, such as birth certificates, passports, citizenship certifications, insurance, etc.—many of which are hard to obtain.⁴⁵ Thus, recruiting agents will buy fake documents and bribe public officials to turn a blind eye to the obvious forgery, including the official approval to migrate at the border or other checkpoints.⁴⁶ Another opportunity arises when foreign recruiting agencies want to pay workers sent from Nepal below the minimum wage set by the Nepali government—which

³⁷ LIBERTY ASIA & FREEDOM FUND, MODERN SLAVERY AND CORRUPTION: BRIEFING PAPER 8 (2015) [hereinafter MODERN SLAVERY AND CORRUPTION].

³⁸ CARR CENTER FOR HUMAN RIGHTS POLICY, *supra* note 27, at 16.

³⁹ *Id.*; IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, *supra* note 13, at 24.

⁴⁰ CARR CENTER FOR HUMAN RIGHTS POLICY, *supra* note 27, at 16.

⁴¹ *Id.*

⁴² VERITÉ, *supra* note 19, at 4.

⁴³ *Id.*

⁴⁴ VERITÉ & FREEDOM FUND, AN EXPLORATORY STUDY ON THE ROLE OF CORRUPTION IN INTERNATIONAL LABOR MIGRATION 6 (2016).

⁴⁵ VERITÉ, *supra* note 19, at 5.

⁴⁶ *Id.*

violates Nepali law.⁴⁷ To circumvent this law, recruiting agencies will pay bribes to Nepali Labor Department officials to get them to approve applications of their workers who will be paid less than the minimum wage.⁴⁸ Because of the high levels of corruption in the official process, many migrant workers “opt for unofficial channels into foreign employment—individual or local ‘agents’ who function outside the legal framework.”⁴⁹ However, the unofficial channel significantly increases a migrant worker’s vulnerability to forced and bonded labor.⁵⁰

Lastly, public officials help traffickers and recruiters avoid arrest and criminal liability.⁵¹ While the percent of trafficking convictions globally has been increased from less than 20% in 2010 to 67% in 2016, total numbers of convictions in African and Middle Eastern countries still remain very low.⁵² When traffickers use their profits to bribe police officers, judges, and other public officials, the local government is often willing to turn a blind eye to the trafficking of which they are aware.⁵³ According to the International Bar Association Presidential Task Force Against Human Trafficking 2016 report: “Corruption may be a key factor in explaining the extremely low number of trafficking prosecutions—and the even smaller number of convictions—around the world. With the right connections, traffickers can influence the outcomes of investigations and judicial actions.”⁵⁴ The report further explains that paying bribes to law enforcement is a useful way for traffickers to evade arrest, avoid criminal conviction, and getting officials to obstruct investigations.⁵⁵ For example, in the Democratic Republic of Congo (DRC), “the government looks the other way as children and adults work for barely anything in a cobalt mine in Katanga Province.”⁵⁶ Foreign companies running the mines pay off the DRC government, allowing them to supply the multi-trillion dollar technology industry with raw materials.⁵⁷

⁴⁷ *Id.*

⁴⁸ *Id.* at 6.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.*

⁵¹ IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, *supra* note 13, at 19.

⁵² UNITED NATIONS OFF. ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 23 (2018), https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf.

⁵³ See IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, *supra* note 13, at 5.

⁵⁴ *Id.* at 19.

⁵⁵ *Id.*

⁵⁶ CARR CENTER FOR HUMAN RIGHTS POLICY, *supra* note 27, at 16.

⁵⁷ *Id.*

II. LIABILITY FOR MODERN SLAVERY UNDER THE FCPA

The DOJ and SEC's FCPA Resource Guide acknowledges the connection between modern slavery and corruption. The Guide explains that corruption "threatens stability and security by facilitating criminal activity within and across borders, such as the illegal trafficking of people."⁵⁸ Although the FCPA was not drafted to address modern slavery specifically, its broad interpretation allows whistleblowers, NGO practitioners, and enforcers to use the FCPA to address modern slavery nonetheless.⁵⁹ The FCPA could provide a threatening tool to create liability for modern slavery and encourage changes to corporate compliance programs because given its strong history of enforcement, "no business would want to defend a FCPA case against the US DOJ, and no individual director or employee would even want to entertain the idea of prison from a FCPA conviction."⁶⁰

A. The Rise and Success of the Foreign Corrupt Practices Act

The FCPA was enacted in response to the 1972 Watergate scandal centering on former US President Richard Nixon which led to the discovery of the Nixon Administration's involvement in the creation of "corporate slush funds being used for illegal political contributions in the U.S. and for bribing foreign government officials."⁶¹ At least 400 American businesses paid more than \$300 million in foreign bribes.⁶² This scandal marks the catalyst of the FCPA which was signed into law five years later in 1977 because it "called into question the fundamental idea that business enterprises were capable of acting morally."⁶³ The FCPA "intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace."⁶⁴

However, the FCPA was rarely enforced for three decades until the Enron and WorldCom scandals of 2002.⁶⁵ Enron and WorldCom were large corporations that engaged in pervasive corrupt accounting practices which led to massive losses in capital markets and public demand for Congress to enact legislation that deterred corporate corruption.⁶⁶ As a result, Congress

⁵⁸ FCPA RESOURCE GUIDE, *supra* note 24, at 2.

⁵⁹ MODERN SLAVERY AND CORRUPTION, *supra* note 37, at 7.

⁶⁰ *Id.* at 12.

⁶¹ BABAK BOGHRATY, ORGANIZATIONAL COMPLIANCE AND ETHICS 134 (2019).

⁶² *Id.* (citing Joe Palazzolo, *From Watergate to Today, How FCPA Became So Feared*, WALL ST. J. (Oct. 2, 2012, 12:01 AM), <http://www.wsj.com/articles/SB10000872396390444752504578024791676151154>).

⁶³ *Id.* at 134-36.

⁶⁴ FCPA RESOURCE GUIDE, *supra* note 24, at 1.

⁶⁵ BOGHRATY, *supra* note 61, at 136.

⁶⁶ *Id.*

passed the Sarbanes-Oxley Act of 2002 (SOX) a few months after these scandals, which “holds corporate officers and directors personally liable for their companies’ non-compliance with the accounting and internal control provisions of the FCPA, dramatically increasing the consequences of non-compliance.”⁶⁷

Since the passage of the FCPA, there has been a growing international consensus that corruption must be combatted, and thus, several international anti-corruption conventions were formed.⁶⁸ The first international anti-corruption convention was the 1996 Inter-American Convention Against Corruption.⁶⁹ Using the growing international consensus, the United States strongly advocated for the 1998 OECD Anti-Bribery Convention—which required OECD members to pass legislation patterned after the FCPA—because the American government was eager to create an even playing field between American corporations that were no longer allowed to bribe foreign officials and corporations based in other OECD members.⁷⁰ Adopted in 2003, the United Nations Convention Against Corruption was soon to follow.⁷¹

The OECD Convention was successful at motivating countries to change their laws to prohibit foreign bribery, but most countries are still reluctant to bring their own prosecutions and enforce their anti-bribery statutes.⁷² Meanwhile, the enforcement of the FCPA by the DOJ and the SEC has ramped up since 1997—when the OECD Convention concluded.⁷³ In 2019, FCPA-related charges were brought at a fast pace; there were fifty-four FCPA enforcement actions, resulting in \$2.6 billion in corporate fines.⁷⁴ The FCPA has remained a strong deterrent which is illustrated by a “decline in investments in corrupt countries by companies subject to the FCPA” and an increase in the implementation of FCPA internal controls.⁷⁵

B. The FCPA Anti-Bribery Provisions

The FCPA has two parts: the anti-bribery provisions and the accounting

⁶⁷ *Id.* (citing Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.)).

⁶⁸ FCPA RESOURCE GUIDE, *supra* note 24, at 6.

⁶⁹ *Id.* at 8.

⁷⁰ *See* BOGHRATY, *supra* note 61, at 138.

⁷¹ *Id.* at 143.

⁷² Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 U. VA. L. REV. 1611, 1681 (2017).

⁷³ *Id.* at 1676.

⁷⁴ 2019 Year-End FCPA Update, GIBSON DUNN (Jan. 6, 2020), <https://www.gibsondunn.com/2019-year-end-fcpa-update/>.

⁷⁵ Anu Thomas, *A Reimagined Foreign Corrupt Practices Act: From Deterrence to Restoration and Beyond*, 30 TEMP. INT’L & COMP. L.J. 385, 394-95 (2017).

provisions.⁷⁶ The FCPA anti-bribery provisions make it illegal for domestic concerns (citizens, nationals, residents, companies incorporated in the US and their agents), issuers (companies listed or traded on the US stock exchange and their agents), and foreign individuals acting within the US territory to bribe foreign officials.⁷⁷ In addition to most of the largest American companies, issuers also includes more than fifty of Thailand's major companies, their agents, and their subsidiaries.⁷⁸ In fact, most multinational corporations are subject to the FCPA and its extraterritorial jurisdiction allows the FCPA to apply to "corrupt conduct occurring across the globe, including conduct with limited ties to the United States."⁷⁹

Specifically, the anti-bribery provisions prohibit "[a]n offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" for the purpose of obtaining or retaining business to (1) any foreign official or (2) "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official."⁸⁰

The first element needed for liability under the FCPA is that the payment must be made "corruptly."⁸¹ If the intent is to improperly influence a government official, then it is corrupt.⁸² The bribe does not need to be accepted nor does it need to succeed in its ultimate purpose.⁸³ For example, if a trafficker pays a border agent a bribe in exchange for forged visa, but the border agent never delivers the forged visa or never even accepts the bribe, the DOJ and the SEC can still bring an enforcement action.⁸⁴ The DOJ and the SEC do not need the act of trafficking itself to have taken place or evidence of trafficking.⁸⁵ The intent of the briber is sufficient to satisfy this element.⁸⁶

Another element of the FCPA is that the offer, payment, or promise to pay must be made something "of value."⁸⁷ The benefit can be either directly to government officials or to someone close to them.⁸⁸ The payment can take

⁷⁶ FCPA RESOURCE GUIDE, *supra* note 24, at 9.

⁷⁷ *Id.*

⁷⁸ MODERN SLAVERY AND CORRUPTION, *supra* note 37, at 10.

⁷⁹ LIBERTY ASIA, *supra* note 11, at 13-14.

⁸⁰ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1.

⁸¹ *Id.*

⁸² LIBERTY ASIA, *supra* note 11, at 5.

⁸³ FCPA RESOURCE GUIDE, *supra* note 24, at 13.

⁸⁴ *See id.*

⁸⁵ LIBERTY ASIA, *supra* note 11, at 6.

⁸⁶ *See id.* at 5.

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* at 7.

many forms such as cash, gifts, travel, entertainment, charitable donations, political contributions, or jobs if the candidate is otherwise unqualified, as long as there is an “indicia of corrupt intent.”⁸⁹ There is no minimum threshold amount required to consider something a corrupt payment or gift; rather, what is dispositive is whether the government official subjectively values the benefit.⁹⁰ Thus, even though the bribes paid to border officials along well-established trafficking routes or at visa offices might be considered small payments, these bribes could constitute “anything of value” and give rise to FCPA liability.⁹¹ In fact, numerous FCPA enforcement actions have been premised on the systematic, long-standing payments of small bribes to individual customs officials.⁹²

In addition to being something of value, in order to be covered under the anti-bribery provisions, the bribe must be paid for the purpose of obtaining or retaining business.⁹³ Similar to the something of value element, the business advantage element is broadly interpreted.⁹⁴ In *United States v. Kay*, the Fifth Circuit has defined a “business advantage,” as anything giving a company “an unfair advantage over competitors.”⁹⁵ The Court explained that the company was put at a competitive advantage because “[a]voiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend.”⁹⁶ Thus, cheap labor used in the manufacture of its products creates a business advantage due to the same “indirect or direct financial benefits” described in *United States v. Kay*.⁹⁷ The FCPA Guide explicitly states that “[i]nfluencing the adjudication of lawsuits or enforcement actions” is considered a business advantage.⁹⁸ When public officials facilitate the impunity of modern slavery after receiving bribes to ignore violation of labor laws, a company is receiving a business advantage covered by the FCPA.⁹⁹ Further, paying bribes to customs or border officials to facilitate trafficking across borders constitutes a business advantage.¹⁰⁰

The last element required by the FCPA is that the payment to be made to (1) “any foreign official; (2) any foreign political party or official thereof; (3)

⁸⁹ FCPA RESOURCE GUIDE, *supra* note 24, at 15.

⁹⁰ *See id.* at 14.

⁹¹ LIBERTY ASIA, *supra* note 11, at 7.

⁹² *Id. See, e.g.,* Sec. Exch. Comm’n v. Jackson, 908 F. Supp. 2d 834 (S.D. Tex. 2012).

⁹³ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1.

⁹⁴ FCPA RESOURCE GUIDE, *supra* note 24, at 11.

⁹⁵ *United States v. Kay*, 359 F.3d 738, 749 (5th Cir. 2004).

⁹⁶ *Id.*

⁹⁷ VERITÉ, *supra* note 19, at 3.

⁹⁸ FCPA RESOURCE GUIDE, *supra* note 24, at 12.

⁹⁹ LIBERTY ASIA, *supra* note 11, at 9.

¹⁰⁰ *See* FCPA RESOURCE GUIDE, *supra* note 24, at 12; LIBERTY ASIA, *supra* note 11, at 9.

any candidate for foreign political office; or (4) any person, while knowing that all or a portion of the payment will be given to an individual in the first three categories.”¹⁰¹ Foreign officials include both low-ranking employees and high-level officials, such as judges, employees of state-owned businesses, secretaries or ministers that set foreign policies, border agents, and “administrative employees that issue visas and passports.”¹⁰² Recruiters and human traffickers most commonly pay bribes to “labor officers that grant work permits, immigration officials that issue visas and passports, and law enforcement personnel that police trafficking.”¹⁰³ These recipients likely qualify as foreign officials under the FCPA.¹⁰⁴

Similarly, payments to third parties are also prohibited under the FCPA in certain circumstances.¹⁰⁵ Under the deliberate ignorance doctrine (also known as “head-in-the-sand” or “willful blindness”), a company would be liable for their payments to third parties if a company subject to the FCPA ignored red flags, and thus, the company knew or should have known that at least a portion of the money will be used to pay a bribe to a foreign official.¹⁰⁶ Constructive knowledge is sufficient to establish criminal liability; defendants cannot escape liability by intentionally avoiding actual knowledge if there are red flags which would indicate a high probability corruption in the supply chain.¹⁰⁷ Some potential red flags include: “deception regarding employment terms and conditions, illegal or unethical placement fees charged to foreign contract workers, unexplained fees and costs, lack of transparency, and workplace practices such as passport retention and ‘runaway insurance’ deposits.”¹⁰⁸ While knowledge “cannot be based solely on conflicting and sometime unsubstantiated general reports” about pervasive corruption in forced labor flows where a multinational company has a potentially corrupt supplier, it can be established by firsthand visits to supplier’s factories and statements made by supply chain workers to agents of the multinational company.¹⁰⁹

¹⁰¹ FCPA RESOURCE GUIDE, *supra* note 24, at 19 (citing Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1).

¹⁰² LIBERTY ASIA, *supra* note 11, at 7.

¹⁰³ *Id.* at 8.

¹⁰⁴ *Id.*

¹⁰⁵ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1.

¹⁰⁶ FCPA RESOURCE GUIDE, *supra* note 24, at 23.

¹⁰⁷ *See* United States v. Kozeny, 667 F.3d 122, 133-34 (2d Cir. 2011).

¹⁰⁸ VERITÉ, *supra* note 19, at 2.

¹⁰⁹ *See* Ratha v. Phatthana Seafood Co., No. CV16-04271-JFW (ASx), 2017 WL 8293174 at *5 (C.D. Cal. Dec. 21, 2017) (citing Doe I. v. Nestle USA, Inc., 766 F.3d 1013, 1017 n.1 (9th Cir. 2014) (“The defendants are well aware of the child slavery problem in the Ivory Coast. They acquired this knowledge firsthand through their numerous visits to Ivorian farms.”); Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 684 (S.D. Tex. 2009) (alleging

Because payments to subsidiaries, third parties, agents and suppliers (if agency can be established) are covered under the FCPA, “[o]utsourcing of the employment and management of foreign contract workers by a supply chain participant will not insulate a company from potential FCPA liability where corrupt payments result in an indirect or direct benefit such as cheap migrant labor.”¹¹⁰ Thus, the DOJ and the SEC can impute liability from agents, sub-agents, employees, and subsidiaries acting “on behalf of” the parent company to the parent company as well as its directors and officers.¹¹¹ When issuers, domestic concerns, and their agents hire employment agencies, labor brokers or suppliers, this could trigger (1) agency and sub-agency liability or (2) third party payments liability because there is a high risk that these agents will have an abundance of interactions with foreign public officials to secure forced labor from migrants.¹¹²

However, the ordinary purchaser-supplier relationship is not sufficient to establish agency.¹¹³ Rather, an agency relationship requires the purchaser to exercise control, or have a right to control, any aspect of the supplier’s business and the supplier to agree or understand that the purchaser would control them.¹¹⁴ Agency can also be established if a supplier is acting “on behalf of” the multinational corporation.¹¹⁵ For example, suppose Company A engages a supplier to produce a specialized component, and the supplier needs an influx of workers to meet production and thus directly bribes or hires an employment agency to bribe foreign officials in order to receive permits and visas for guest worker visas. Company A may be liable for the bribes if a court determines that (1) there was an agency relationship because the supplier was acting on behalf of Company A, and (2) either the ultimate briber was an agent of the supplier (sub-agency liability) or the supplier gave money to the ultimate briber knowing that it would be used for a bribe (third-party payment liability).¹¹⁶ Additional evidence that would weigh in favor of establishing the supplier as an agent of Company A includes: (1) if Company A had power of attorney over a supplier; (2) if Company A had the power to give interim instructions to the supplier or exercise any control; or (3) if Company A directed or participated in supplier’s labor recruitment,

defendant knew forced labor and trafficking was occurring “through statements and complaints made by laborers” to defendant)).

¹¹⁰ VERITÉ, *supra* note 19, at 2.

¹¹¹ *Id.* at 3.

¹¹² *See supra* Part I.

¹¹³ *Ratha*, 2017 WL 8292922 at *7; *see* RESTATEMENT (SECOND) OF AGENCY § 14K (AM. LAW INST. 1956).

¹¹⁴ *Ratha*, 2017 WL 8292922 at *7; *see* RESTATEMENT (SECOND) OF AGENCY § 1.01 (AM. LAW INST. 1956).

¹¹⁵ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a).

¹¹⁶ *See id.*

supplier's employment practices, or were involved in establishing the working conditions at supplier's factory.¹¹⁷

Unlike the UK Bribery Act, which provides an "adequate procedures" defense to strict liability for failure by a commercial organization to prevent bribery," the FCPA does not include a compliance defense; even if a company completes due diligence of a third party as part of a "robust corporate compliance program," it may still be liable for a bribe paid by the third party.¹¹⁸ The FCPA anti-bribery provisions include one exception and two affirmative defenses: "Facilitation Payment Exception;" the "Local Law Defense;" and the "Reasonable and Bona Fide Business Expenditure Defense."¹¹⁹

The facilitating payments exception allows for payments to be made to foreign officials "in furtherance of routine governmental action" as long as the action is neither within the official's discretion nor an abuse of the official's power.¹²⁰ When traffickers pay fees "to expedite legal processing of visas, work permits, and other government approvals, [this] may not constitute bribes" because these are non-discretionary duties—officials are obliged to review the applications.¹²¹ However, because officials are not required to approve such visas, passports, permits and quotas, payments for the benefit of application *approval* are outside of the official's scope of duty and the exception does not apply.¹²²

To employ the local law defense, the bribe must be "lawful under the written laws and regulations of the foreign official's . . . country."¹²³ Non-enforcement or local custom does not fall under this defense; payments to foreign officials that are "routine as a matter of local custom or practice may still violate the FCPA if those practices are not formally memorialized."¹²⁴ Thus, this defense is generally not used because no country has written laws that allows for bribing officials.¹²⁵

Companies are permitted to "provide reasonable and bona fide travel and lodging expenses to a foreign official" if the expenses are directly related to

¹¹⁷ See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (AM. LAW INST. 2006); *Ratha*, 2017 WL 8292922 at *4, *7.

¹¹⁸ *DOJ/SEC's Resource Guide to the U.S. Foreign Corrupt Practices Act: Jones Day Summary and Analysis*, JONES DAY (Dec. 2012), https://www.jonesday.com/en/insights/2012/12/dojsecs-resource-guide-to-the-us-foreign-corrupt-practices-act-jones-day-summary-and-analysis#_ftnref2.

¹¹⁹ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(b)-(c).

¹²⁰ FCPA RESOURCE GUIDE, *supra* note 24, at 25.

¹²¹ LIBERTY ASIA, *supra* note 11, at 10.

¹²² *Id.*; FCPA RESOURCE GUIDE, *supra* note 24, at 25.

¹²³ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(c)(1).

¹²⁴ LIBERTY ASIA, *supra* note 11, at 10.

¹²⁵ FCPA RESOURCE GUIDE, *supra* note 24, at 24.

“the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.”¹²⁶ Providing travel and other expenses to foreign officials for entertainment purposes in order to induce them to abuse their power by providing work permits, visas, and other improper benefits is not permitted under this affirmative defense.¹²⁷

C. The FCPA Accounting Provisions

In addition to the anti-bribery provisions, the FCPA also has accounting provisions which do not require proof of bribes or any allegation of improper payments and thus is generally an easier theory of bribery for the DOJ or the SEC to prove; however in the modern slavery context, it is harder to find liability under these provision.¹²⁸ Issuers fall under the jurisdiction of the FCPA accounting provisions; therefore, they need to have accurate books and records as well as adequate internal controls.¹²⁹ An issuer’s majority-held subsidiaries are also subject to the FCPA accounting provisions, and a majority-held subsidiary’s failure to comply will result in liability being imputed to the issuer; suppliers, however, are typically are not considered subsidiaries, which renders the FCPA’s accounting provisions useful only in rare and unlikely circumstances.¹³⁰ Under the explicit provisions of the statute, an issuer must use good faith to ensure that their minority-held subsidiaries and agents comply with the FCPA accounting provisions.¹³¹ However, “good faith” is a fuzzy standard. Thus, if an issuer wants to be in full compliance with the FCPA, they should threaten to divest in their minority-held subsidiaries if those subsidiaries do not comply.¹³² The SEC’s interpretation of who is covered under the FCPA accounting provisions includes agents, affiliates, joint venture partners, and “any entity over which the issuer has power or influence.”¹³³ *Sec. Exch. Comm’n v. BellSouth*

¹²⁶ *Id.*

¹²⁷ LIBERTY ASIA, *supra* note 11, at 10.

¹²⁸ *See id.* at 11.

¹²⁹ 15 U.S.C. § 78m(b)(2)(A)-(B).

¹³⁰ *See* FCPA RESOURCE GUIDE, *supra* note 24, at 43; Andreas Rühmkorf, *Global Sourcing Through Foreign Subsidiaries and Suppliers: Challenges for Corporate Social Responsibility*, in RESEARCH HANDBOOK ON TRANSNATIONAL CORPORATIONS 7 (Alice de Jonge & Roman Tomasic eds., 2017) (“[S]uppliers are usually completely independent from the transnational company, i.e. they are owned by other people who are not linked to the transnational corporation.”).

¹³¹ 15 U.S.C. § 78m(b)(6).

¹³² BOGHARTY, *supra* note 61, at 211 (“The SEC defines an ‘affiliate’ as ‘a person that directly, or indirectly . . . controls, or is controlled by, or is under common control with, the person specified.’”).

¹³³ *Id.*; FCPA RESOURCE GUIDE, *supra* note 24, at 43.

establishes that if an issuer “controls” an affiliate or subsidiary (by ownership, contract, or otherwise), an issuer’s affiliate or subsidiary must comply with the FCPA.¹³⁴ Consequently, an issuer may have a duty to use good faith efforts to convince their suppliers to comply with the accounting provisions if the issuer “wield[s] considerable leverage over their [suppliers]. . . who depend on them for business.”¹³⁵

For the books and records provision, there is no materiality threshold, thus any inaccuracy is sufficient for civil liability.¹³⁶ Moreover, no intent is required for civil liability because violations of the books and records as well as the internal controls provisions do not require proof of scienter.¹³⁷ However, criminal liability requires knowledge or a “conscious undertaking” to falsify records or mislead auditors through a statement or conscious omission of material facts.¹³⁸ This can be established if an issuer was “aware of the falsification and did not falsify through ignorance, mistake, or accident” or intentionally failing to implement a system of internal controls.¹³⁹

To comply with the books and records provision, those covered under the accounting provisions must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”¹⁴⁰ The statute explains that “‘reasonable detail’ means such level of detail . . . as would satisfy prudent officials in the conduct of their own affairs.”¹⁴¹ Accordingly, perfect detail is not required and a corporation should weigh relevant factors, including cost-benefit analysis of whether more investment in accuracy costs less than a potential FCPA fine. Further, books and records are inaccurate if they fail to list bribes or inaccurately describe illegal payments to public officials as something other than bribes.¹⁴²

Companies need to ensure that the labor or material suppliers under their

¹³⁴ *In re BellSouth Corp.*, S.E.C. Release No. 34-45279, 2002 WL 47167 (Jan. 15, 2002). The SEC defines control as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” BOGHRATY, *supra* note 61, at 211 (citing 17 C.F.R. § 240.12b-2 (2017)).

¹³⁵ BOGHRATY, *supra* note 61, at 211.

¹³⁶ *See* 15 U.S.C. § 78m(b)(2)(A).

¹³⁷ *See* 15 U.S.C. § 78m(b)(2)(A)-(B).

¹³⁸ *United States v. Reyes*, 577 F.3d 1069, 1080 (9th Cir. 2009).

¹³⁹ *Id.*

¹⁴⁰ 15 U.S.C. § 78m(b)(2)(A).

¹⁴¹ 15 U.S.C. § 78m(b)(7).

¹⁴² *See* Complaint at 3-5, Sec. Exch. Comm’n v. Oracle Corp., No. CV-12-4310-CRB (N.D. Cal. Aug. 1, 2012).

control have accurate books.¹⁴³ Any bribe an issuer, subsidiary or their agents pay to a public official or a third party (including suppliers) for the purpose of facilitating human trafficking or forced labor needs to be reported in the books and records as a “bribe.”¹⁴⁴ Additionally, the payroll should accurately show the wages and salaries of workers in the supply chain.¹⁴⁵ Failure of issuers to force compliance will result in FCPA liability.

To comply with the internal controls provision, an issuer as well as its subsidiaries and affiliates must maintain a system of internal accounting controls sufficient to provide reasonable assurance of management’s control, authority, responsibility over a firm’s assets.¹⁴⁶ The statute explains that “‘reasonable assurance’ means such . . . degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”¹⁴⁷ Thus, a fail-safe control system at all costs is not the required standard of reasonableness.¹⁴⁸ Rather, a corporation needs to further invest in internal controls only if the cost does not exceed the benefits expected to be derived.¹⁴⁹ There is no specific standard to evaluate the sufficiency of internal controls seeing as “any evaluation is inevitably a highly subjective process in which knowledgeable individuals can arrive at totally different conclusions.”¹⁵⁰ However, a company can be liable under this provision if it is aware that a bribe was paid but “took no further action and did not take any steps to implement adequate internal accounting controls” to address the weakness.¹⁵¹

The FCPA Guide explains that internal controls will be adequate only if they have the following five components: control environment, risk assessment, control activities, information and communications, and monitoring.¹⁵² In general, this requires companies to “implement better governance and controls, better auditing and reporting, proper training, and better risk assessment and analysis.”¹⁵³ The COSO Framework provides further detail into what each of the five components requires.¹⁵⁴

¹⁴³ See 15 U.S.C. § 78m(b)(2)(A).

¹⁴⁴ See *id.*

¹⁴⁵ See MODERN SLAVERY AND CORRUPTION, *supra* note 37, at 14.

¹⁴⁶ 15 U.S.C. § 78m(b)(2)(B).

¹⁴⁷ 15 U.S.C. § 78m(b)(7).

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ Sec. Exch. Comm’n v. World-Wide Coin Invs., Ltd., 567 F. Supp 724, 751 (N.D. Ga. 1983).

¹⁵¹ Doshi v. Gen. Cable Corp. 386 F. Supp. 3d 815, 823 (E.D.KY 2019).

¹⁵² FCPA RESOURCE GUIDE, *supra* note 24, at 40.

¹⁵³ MODERN SLAVERY AND CORRUPTION, *supra* note 37, at 10.

¹⁵⁴ COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM’N, INTERNAL CONTROL — INTEGRATED FRAMEWORK: EXECUTIVE SUMMARY 6 (2013) [hereinafter COSO EXECUTIVE

The first component is control environment, which is “the set of standards, processes, and structures that provide the basis for carrying out internal control across the organization.”¹⁵⁵ The board of directors and senior management are required to set the tone that their company values transparency, honesty, no bribes, and ethical practices.¹⁵⁶ The company should have a clear process for hiring, developing and retaining ethical employees as well as procedures for disciplining them.¹⁵⁷

The second component, risk assessment, requires companies to assess and manage risks that might “adversely impact a company’s objective to prevent and detect corrupt payments to foreign officials.”¹⁵⁸ The risk assessment should pay close attention to third parties especially those in geographic regions with higher chances of corruption or in certain industries that are more prone to corruption.¹⁵⁹ As Verité, a fair labor nonprofit notes, “[a] tailored risk assessment is the first step in detecting and preventing human trafficking and forced labor in an extended global supply chain as well as the FCPA exposure that such practices create.”¹⁶⁰ Verité suggests that the risk assessment should focus on examining the third party’s contract labor arrangements.¹⁶¹ If a third party lacks an “effective process for the selection, evaluation and oversight of recruitment agencies and labor outsourcing providers at all stages of the labor supply chain, [this] almost inevitably” indicates that the third party has inadequate internal controls.¹⁶² To complete an effective risk assessment of liability under the FCPA, companies need to work with their third parties in order to “trace the labor supply chain back to the source country from the facilities where workers are subjected to fees and deposits, passport retention, penalties for early termination, restricted movement and other red flag practices.”¹⁶³

The third component of internal controls are control activities, which are the actions taken to mitigate risk that are established through policies and procedures.¹⁶⁴ For the riskiest transactions, such as payments to labor providers or public officials, authorizations and approvals, verifications, and segregation of duties should be required.¹⁶⁵

SUMMARY].

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *See id.*

¹⁵⁷ *Id.*

¹⁵⁸ BOGHRATY, *supra* note 61, at 425.

¹⁵⁹ *Id.* at 426-428.

¹⁶⁰ VERITÉ, *supra* note 19, at 7.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ COSO EXECUTIVE SUMMARY, *supra* note 154, at 4.

¹⁶⁵ *See id.*

Information and communication is the fourth component of the COSO Framework. Training is an integral control that all companies should focus on in order to achieve their compliance objectives.¹⁶⁶ Companies need to communicate the standards and procedures by conducting an effective training program in a way that inspires, motivates, and teaches employees to do the right thing.¹⁶⁷ An anonymous hotline for people to use in order to report any bribery or trafficking violation is a necessary control for this component.¹⁶⁸ Companies should also publish reports to external stakeholders about how the company is succeeding or failing at meeting their expectations regarding foreign labor practices and maintaining a responsible supply chain.¹⁶⁹

The last component of the COSO Framework is monitoring activities, “which covers controls that measure how the system performs in achieving its objectives.”¹⁷⁰ Control deficiencies can be discovered by ongoing evaluations as transactions occur by using an embedded compliance officer in risky units or using technology to automatically flag suspicious transactions.¹⁷¹ Another way to detect control deficiencies is by conducting retroactive audits or setting up fake tests to assess whether the payment was stopped.¹⁷²

The *Sec. Exch. Comm’n v. Oracle* complaint illustrates how parent companies can be held liable for deficiencies the internal controls of their subsidiaries even if the parent company was not aware of the weaknesses at the time.¹⁷³ Companies are “expected to [actively] police for, identify, and respond to compliance red flags in their organization,” including in their subsidiaries.¹⁷⁴ Oracle’s Indian subsidiary was selling software to a distributor, who would subsequently sell to an end user, usually the government, and would make a margin that would then get “parked” into a separate fund that likely was used for bribery or embezzlement.¹⁷⁵ The SEC had no concrete evidence that bribes were paid, so it alleged that the subsidiary had not accurately recorded the funds which violates the books

¹⁶⁶ *See id.* at 5.

¹⁶⁷ COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM’N, INTERNAL CONTROL — INTEGRATED FRAMEWORK 116 (2012).

¹⁶⁸ *See id.* at 115.

¹⁶⁹ *See id.* at 119.

¹⁷⁰ BOGHRATY, *supra* note 61, at 177.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ LIBERTY ASIA, *supra* note 11, at 11 (citing *Sec. Exch. Comm’n v. Oracle Corp.*, No. CV-12-4310-CRB (N.D. Cal. Aug 1, 2012)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (citing *Sec. Exch. Comm’n v. Oracle Corp.*, No. CV-12-4310-CRB).

and records provision.¹⁷⁶ The SEC further alleged Oracle violated the internal controls provisions by failing to “audit distributor margins against end user prices and . . . audit third-party payments made by distributors.”¹⁷⁷ Interestingly, the SEC believed that Oracle’s subsidiary had “‘concealed’ and kept ‘secret’ the conduct from Oracle,” so Oracle was not aware of red flags.¹⁷⁸ However, this case makes it clear that the FCPA is an expansive theory of liability and companies need to have adequate internal controls to detect any potential liability.¹⁷⁹ The expansiveness of the theories of liability under the FCPA makes it easier to prosecute American companies for forced labor in their overseas supply chains.

D. Case Study: Apple’s Use of Forced Labor and Child Labor

The International Trade Union Confederation estimates that Apple’s supply chain has a hidden workforce of up to 2.3 million people.¹⁸⁰ Apple outsourced most of its manufacturing and assembly to Asia, and more specifically China, in the 2000s.¹⁸¹ Today, Apple and its suppliers use lower-wage Asian countries, like Indonesia and Cambodia, for sourcing parts and components.¹⁸² There are both internal and external evaluations of the working conditions in Apple’s supply chain that consistently report forced labor.¹⁸³ Furthermore, there are reports of “60-hour working weeks, worker suicides, child labour, pay being withheld, discrimination against women and minorities, beatings and harassment” in Apple’s supply chains.¹⁸⁴ Verité surveyed 501 workers in the Malaysian electronics industry and found that 28% were in situations of forced labor and 77% were subject to debt labor at some point to pay back the recruiting fees.¹⁸⁵ In addition to debt bondage, the main drivers of the “systemic” forced labor in this industry were illegal confiscation of identity documents, physical and sexual violence, threats against family members, work-related threats, and threats to personal freedom.¹⁸⁶ In the 2018 fiscal year, Apple used at least 17 suppliers with

¹⁷⁶ *See id.* at 11-12.

¹⁷⁷ *Id.* at 12.

¹⁷⁸ *Id.*

¹⁷⁹ *See id.*

¹⁸⁰ INT’L TRADE UNION CONFEDERATION, *supra* note 1, at 17.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ VERITÉ, FORCED LABOR IN THE PRODUCTION OF ELECTRONIC GOODS IN MALAYSIA 9-10 (2014).

¹⁸⁶ *Id.* at 155-56, 181.

manufacturing locations in Malaysia.¹⁸⁷ Apple is either aware or should be aware that there is a high risk of forced labor in their operations as well as a high risk of bribery in their supply chains.¹⁸⁸

In December 2019, a lawsuit was filed against Apple, along with Google, Dell, Microsoft and Tesla.¹⁸⁹ The complaint alleges that these tech companies are “knowingly benefiting from and aiding and abetting the cruel and brutal use of young children in Democratic Republic of Congo (DRC) to mine cobalt.”¹⁹⁰ Cobalt is a vital component of every rechargeable battery in electronic devices manufactured by these companies.¹⁹¹

The plaintiffs in the lawsuit are a group of Congolese child cobalt workers who are asserting claims for “forced child labor in violation of the Trafficking Victims Protection Reauthorization Act (TVPPRA).”¹⁹² They all work in hazardous and life-threatening conditions, some were trafficked, and they receive \$0.81 per day on average.¹⁹³ It is undisputed that children mine cobalt in the DRC; cobalt mined in the DRC is listed on the U.S. Department of Labor’s List of Goods Produced with Forced and Child Labor.¹⁹⁴ In addition to this TVPPRA civil lawsuit, the DOJ and the SEC could potentially find Apple liable for an FCPA violation.

The complaint details high levels of corruption in the DRC—a 2019 Corruption Perception Index Score of 18 out of 100, which places the DRC as the 13th worst country on the 180-country index.¹⁹⁵ Plaintiffs argue that bringing their claims in the DRC would be futile because “the judicial system is notoriously corrupt” and could lead to retaliation by corrupt government officials who financial benefit from forced child labor in the DRC.¹⁹⁶

The complaint also notes the well-documented systemic corruption in the DRC cobalt sector.¹⁹⁷ Glencore, an earth mining company that allegedly uses the forced labor of Plaintiffs and thousands of other child miners in the DRC, sells cobalt to Umicore, a Belgian company, that later processes the cobalt

¹⁸⁷ APPLE, APPLE SUPPLIER LIST 1-30 (2019).

¹⁸⁸ See Annie Kelly, *Modern-Day Slavery Rife in Malaysia’s Electronics Industry*, GUARDIAN (Sept. 17, 2014), <https://www.theguardian.com/global-development/2014/sep/17/modern-day-slavery-malaysia-electronics-industry>.

¹⁸⁹ Complaint at 2, 79, Doe v. Apple, 1:19-cv-03737 (D.C. Cir. Dec. 16, 2019).

¹⁹⁰ *Id.* at 2.

¹⁹¹ *Id.*

¹⁹² *Id.* at 8.

¹⁹³ *Id.* at 9.

¹⁹⁴ *Id.* at 8 (citing *List of Goods Produced by Child Labor or Forced Labor*, US DEP’T OF LABOR, available at www.dol.gov/ilab/reports/child-labor/list-of-goods).

¹⁹⁵ *Democratic Republic of the Congo*, TRANSPARENCY INT’L, <https://www.transparency.org/country/COD>.

¹⁹⁶ Complaint at 19, 22, Doe v. Apple, No. 1:19-cv-03737 (D.C. Cir. Dec. 16, 2019).

¹⁹⁷ *Id.* at 62.

and then supplies the refined cobalt to Apple to include in batteries containing cobalt.¹⁹⁸ Both the US and the UK are investigating Glencore for bribing officials in the DRC, including “the notoriously corrupt former DRC President, Joseph Kabila,” to obtain cobalt mining concessions.¹⁹⁹

As an issuer, Apple is subject to the FCPA anti-bribery and accounting provisions. If Apple ignored red flags and knew or should have known that the money they give to the Glencore/Umicore venture will be used to pay a bribe to a foreign official, Apple could be liable for their payments to third party suppliers.

In order to state a claim for unlawful bribery under FCPA, enforcers are not required to “identify foreign officials by name” or “know precisely which government official, or which level of government official, would be targeted by [Apple’s] agent.”²⁰⁰ To meet the knowledge standard, prosecutors could use evidence that Apple had “serious concerns about the legality of [their supplier’s] business practices [or] worked to avoid learning exactly what [their supplier] was doing.”²⁰¹ This evidence of “knowledge” can come from firsthand visits to the DRC where Apple employees witnessed bribes being paid or statements made by supply chain workers received by agents of Apple.²⁰²

Apple is also lacking in internal controls because they have not adequately mitigated the high risk of their third parties paying bribes to foreign officials. Apple is subject to the California Transparency in Supply Chains Act and UK Modern Slavery Act.²⁰³ As required, Apple disclosed their efforts or steps taken to eradicate slavery and human trafficking in their supply chain.²⁰⁴ One step that Apple took in 2018 was to continue to “provide funding to the Fund for Global Human Rights, an organization that supports local human rights defenders and local activists in multiple countries, including in the DRC.”²⁰⁵ Apple also “continued to support the International Tin Association’s International Tin Supply Chain Initiative whistleblowing mechanism in the DRC that allows people to anonymously voice concerns in their local language related to the extraction, trade, handling, and export of minerals so allegations of misconduct can be surfaced and reported.”²⁰⁶

¹⁹⁸ *Id.* at 23.

¹⁹⁹ *Id.* at 62.

²⁰⁰ *Sec. Exch. Comm’n v. Jackson*, 908 F. Supp. 2d 834, 850 (S.D. Tex. 2012).

²⁰¹ *See United States v. Kozeny*, 667 F.3d 122, 134 (2d Cir. 2011).

²⁰² *See Ratha* 2017 WL 8293174, at *5.

²⁰³ APPLE, APPLE’S 2018 STATEMENT ON EFFORTS TO COMBAT HUMAN TRAFFICKING AND SLAVERY IN OUR BUSINESS AND SUPPLY CHAIN 1, 9 (2018); California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43; Modern Slavery Act 2015, c. 30, § 54 (U.K.).

²⁰⁴ *Id.* at 1.

²⁰⁵ *Id.* at 5.

²⁰⁶ *Id.*

These two steps are typical for large tech companies, however they are merely paper programs that are not forcing tech companies to do better.²⁰⁷ These programs are essentially putting the responsibility on local human rights defenders in one of the most corrupt and repressive countries to fight against the largest tech giants in the world.²⁰⁸ They also rely on “largely illiterate, desperately poor, and exceedingly vulnerable people to figure out Apple’s complaint mechanism and report supply chain violations. . . within the context of a violent regime that does not tolerate dissent and an unregulated industry that could retaliate with impunity against any whistleblowers.”²⁰⁹ It is clear that these steps, while not required under any law, are insufficient for tackling child labor and forced labor in Apple’s supply chains. The policies do not address the systemic bribery that takes place in the parts of the supply chains that use forced labor, or any procedures Apple has to mitigate the risks of bribes paid by their suppliers, which indicates inadequate internal controls.²¹⁰ Apple and other tech giants are unlikely to take purposeful steps with the goal of eradicating modern slavery in their supply chains until threatened by a legal regime as forceful as the FCPA.²¹¹

III. IMPROVING OTHER LAWS TO DISCOURAGE MODERN SLAVERY

Despite the many related American laws and the success of the FCPA, “prosecutions for trafficking are still rare, and prosecutions for trafficking-related corruption are even rarer.”²¹² This Part will explain why the other existing laws have not adequately reduced occurrences of modern slavery and how the FCPA can be amended to encourage modern slavery-related corruption prosecutions.

A. Shortcomings in the New Wave of Modern Slavery Legislation

Where jurisdiction under the FCPA is unable to be established, prosecutors can turn to effective modern slavery legislation as a legal basis for holding corporations liable for their human rights abuses. Before the US adopts its own federal modern slavery legislation, important lessons can be learned from the effectiveness and shortcomings of other countries’ legislations. These shortcomings also highlight gaps that the FCPA can fill even once the US Modern Slavery Bill is passed.

Due to a lack of progress in implementing the UNGPs, the Human Rights

²⁰⁷ Complaint at 17, *Doe v. Apple*, No. 1:19-cv-03737 (D.C. Cir. Dec. 16, 2019).

²⁰⁸ *Id.* at 17-18.

²⁰⁹ *Id.*

²¹⁰ See generally APPLE, *supra* note 203.

²¹¹ See Complaint at 17-18, *Doe v. Apple*, No. 1:19-cv-03737 (D.C. Cir. Dec. 16, 2019).

²¹² IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, *supra* note 13, at 6.

Council greenlit a treaty drafting process to create legally binding rules around business and human rights in 2014.²¹³ However, countries that are home to a greater number of corporate headquarters opposed the treaty.²¹⁴ In the absence of a treaty, national law provides the only binding enforcement for a business-related human rights violation, such as slavery.

In 2015, the UK passed the first federal modern slavery legislation: the “Modern Slavery Act,” which requires companies to prove that they have taken action to eliminate forced labor from their supply chains.²¹⁵ More specifically it requires “any commercial organisation, which supplies goods or services, carries on a business or part of a business in the UK, and whose annual turnover is £36 million or above, to produce a ‘slavery and human trafficking statement’ for each financial year.”²¹⁶ Five years prior, the UK Bribery Act of 2010, which is an anti-corruption statute similar to the FCPA, was enacted into law.²¹⁷ Both the UK Bribery Act and Modern Slavery Act are corporate social responsibility-focused legislation that aim to deepen corporate accountability in different ways.²¹⁸ The UK Bribery Act is “a stringent form of home state regulation that establishes extraterritorial corporate criminal liability and includes binding public standards and sanctions for non-compliance.”²¹⁹ On the other hand, the UK Modern Slavery Act is “a less stringent form of regulation that increases companies’ obligations with regards to disclosure and reporting on voluntary efforts to address and prevent forced labour in global supply chains; it does not establish extraterritorial liability, and includes no binding public standards or sanctions for non-compliance.”²²⁰ In 2016, Theresa May, the former Prime Minister of the UK, explained that “rather than chasing individual criminals in Britain as they are reported, we need a radically new, comprehensive approach to defeating this vile and systematic international business model at its source and in transit.”²²¹ She acknowledged the shared policy reasons

²¹³ Kendyl Salcito, *The Self-Defeating Absence of the U.S. at the U.N. Business and Human Rights Forum*, JUST SECURITY (Dec. 19, 2018), <https://www.justsecurity.org/61936/self-defeating-absence-u-s-u-n-business-human-rights-forum/>.

²¹⁴ *Id.*

²¹⁵ See Modern Slavery Act 2015, c. 30, § 54 (U.K.).

²¹⁶ BUS. & HUMAN RIGHTS RES. CTR., MODERN SLAVERY IN COMPANY OPERATION AND SUPPLY CHAINS: MANDATORY TRANSPARENCY, MANDATORY DUE DILIGENCE AND PUBLIC PROCUREMENT DUE DILIGENCE 8 (2017) [hereinafter BUS. & HUMAN RIGHTS RES. CTR. 2017].

²¹⁷ See Bribery Act 2010, c. 23 (U.K.).

²¹⁸ Genevieve LeBaron & Andreas Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 GLOBAL POL’Y 15, 16 (2017).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Theresa May, *My Government Will Lead the Way in Defeating Modern Slavery*,

behind the two statutes—to ensure multi-national corporations are acting morally.²²²

While the Modern Slavery Act when enacted was radically new, it has not proven to be as effective of defeating the international business model as Theresa May had hoped. There is an incentive for businesses to implement adequate internal controls to avoid crippling sanctions under the UK Bribery Act and the FCPA, but the Modern Slavery Act “does not impose additional requirements (except in regards to reporting) and carries no sanction for non-compliance.”²²³ Like the FCPA, the UK Bribery Act gave rise to significant corporate policy and practices changes related to bribery and multinational corporations communicating these higher standards to their suppliers.²²⁴ Unfortunately, the Modern Slavery Act “does not appear to have yielded substantive change in multinational enterprises’ policy and practices regarding labour standards in their global supply chains.”²²⁵

This weakness of the Modern Slavery Act is evidenced by the UK Government’s estimation that only “60% of companies in scope have published a statement . . . [and] some of these statements are poor in quality or fail to even meet the basic legal requirements,” yet not one company has been penalized.²²⁶ Further, the Business and Human Rights Resource Centre in November 2018 found that 73% of Financial Times Stock Exchange (FTSE) 100 companies (100 companies with the highest market capitalization listed on the London Stock Exchange) were “failing to report sufficient measures to tackle modern slavery.”²²⁷ In 2018, following the first four years of the Modern Slavery Act, and Independent Review was commissioned by the UK Government to consider the effectiveness of the Modern Slavery Act as well as potential improvements for ensuring compliance and minimizing confusing over reporting obligations.²²⁸ In 2019,

TELEGRAPH (July 30, 2016), <http://www.telegraph.co.uk/news/2016/07/30/we-will-lead-the-way-in-defeating-modern-slavery/>.

²²² *See id.*

²²³ LeBaron & Rühmkorf, *supra* note 218, at 26.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Home Office, *Home Office Tells Business: Open Up On Modern Slavery Or Face Further Action*, UK.GOV (Oct. 18, 2018), <https://www.gov.uk/government/news/home-office-tells-business-open-up-on-modern-slavery-or-face-further-action>; BUS. & HUMAN RIGHTS RES. CTR., MODERN SLAVERY ACT: FIVE YEARS OF REPORTING 2 (2021) [hereinafter BUS. & HUMAN RIGHTS RES. CTR. 2021].

²²⁷ Patricia Carrier, *The Modern Slavery Act Turns Four Today. Is It Working? And How Can It Be Improved?*, BUS. & HUM. RIGHTS RESOURCE CTR. (Mar. 26, 2019), <https://www.business-humanrights.org/en/blog/the-modern-slavery-act-turns-four-today-is-it-working-and-how-can-it-be-improved/>.

²²⁸ MODERN SLAVERY UNIT, UK GOVERNMENT RESPONSE TO THE INDEPENDENT REVIEW OF THE MODERN SLAVERY ACT 2015 4 (2019).

the Independent Review made 80 recommendations, including:

- 17: “Section 54(4)(b), which allows companies to report they have taken no steps to address modern slavery in their supply chains, should be removed.”
- 18: “In section 54(5) ‘may’ should be changed to ‘must’ or ‘shall’, with the effect that the six areas set out as areas that an organisation’s statement may cover will become mandatory. If a company determines that one of the headings is not applicable to their business, it should be required to explain why.”
- 25: “Failure to fulfil modern slavery statement reporting requirements or to act when instances of slavery are found should be an offence under the Company Directors Disqualification Act 1986.”
- 30: “Government should make the necessary legislative provisions to strengthen its approach to tackling non-compliance [with section 54 of the Act], adopting a gradual approach: initial warnings, fines (as a percentage of turnover), court summons and directors’ disqualification.”²²⁹

Acknowledging the shortcomings of its Modern Slavery Act, the UK Government as agreed to implement a majority of the recommendations made by the Independent Review.²³⁰ However, the UK government did not agree with Recommendation 25 and did agree to further consultation to determine the best way to deliver the other three recommendations listed above.²³¹ After consultations, the UK Government committed to mandating reporting criteria and considering sanctions.²³² These are improvements, but they are “unlikely to be sufficiently transformative to drive the change needed.”²³³

While the US does not have a federal Modern Slavery Act, the California Transparency in Supply Chains Act (CTSCA) went into effect in 2012.²³⁴ It requires all retailers and manufacturers that do business in California and have an annual global revenue of more than US \$100 million to “disclose on their websites any actions they are taking to ‘eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.’”²³⁵

²²⁹ *Id.* at 24-25.

²³⁰ *Id.* at 23.

²³¹ *Id.* at 9-11.

²³² BUS. & HUMAN RIGHTS RES. CTR. 2021, *supra* note 226, at 8.

²³³ *Id.*

²³⁴ BUS. & HUMAN RIGHTS RES. CTR. 2017, *supra* note 216, at 8.

²³⁵ *Id.* (citing California Transparency in Supply Chains Act of 2010, CAL. CIV. CODE § 1714.43).

The UK Modern Slavery Act was partly based on the California Act.²³⁶ They both aim to educate the public by increasing transparency so that consumers and investors will encourage companies to take more action to responsibly manage their supply chains.²³⁷ However, the transparency legal framework has proven to be ineffective at eradicating modern slavery. The biggest critique that both acts face is that they fail to “require companies to take any steps to remedy risks that have been identified.”²³⁸

Both acts also are weak because the “[e]xclusive remedy for failure to comply with the laws is an action brought by the [prosecutors]. . . for injunctive relief;” and yet, not one injunction has been applied to a company under either statute.²³⁹ Four out of the seven CTSCA-related claims “have been dismissed on the grounds that the Act creates a safe harbor that protects companies that comply with the requirements of the CTSCA from other actions under California consumer protection statutes,” but the issue remains unsettled.²⁴⁰

The UK was a pioneer in the new wave of modern slavery legislation and other countries have benefitted from analyzing the UK’s weaknesses in order to enact more effective legislation. Two years after the UK passed its Modern Slavery Act, the French Parliament adopted its “Duty of Vigilance Law” which is an improvement of the UK Modern Slavery Act because it requires France’s largest companies to demonstrate that they have vetted their supply chains for all human rights violations by having “a due diligence plan to identify and address adverse human rights impacts in their operations, supply chains and business relationships.”²⁴¹ It also adds a civil remedy; “companies could be subject to liability if individuals harmed by a company’s failure to establish or implement a plan seek damages for corporate negligence.”²⁴² The first and only time this remedy has been tested was in a civil suit against Total where plaintiffs allege that the French oil company “failed to come up with

²³⁶ *Id.*

²³⁷ *Id.* at 4, 8.

²³⁸ *Id.* at 4.

²³⁹ *U.K. Modern Slavery Act: New Disclosure Requirements for Companies Operating in the United Kingdom*, FOLEY HOAG (Aug. 18, 2015), <https://foleyhoag.com/publications/alerts-and-updates/2015/august/new-disclosure-requirements-for-companies-operating-in-the-united-kingdom>.

²⁴⁰ Emma Cusumano, *Is the California Transparency in Supply Chains Act Doing more Harm than Good?*, CORP. ACCOUNTABILITY LAB (July 25, 2017), <https://legaldesign.org/calblog/2017/7/25/is-the-california-transparency-in-supply-chains-act-doing-more-harm-than-good>.

²⁴¹ BUS. & HUMAN RIGHTS RES. CTR. 2017, *supra* note 216, at 17 (citing Corporate Duty of Vigilance Law, *supra* note 8).

²⁴² Sarah A. Altschuller & Amy K. Lehr, *The French Duty of Vigilance Law: What You Need to Know*, GLOBAL BUS. AND HUM. RIGHTS (Aug. 3, 2017), <https://www.globalbusinessandhumanrights.com/2017/08/03/the-french-duty-of-vigilance-law-what-you-need-to-know/>.

a vigilance plan to address the human and environmental impact of its operations at its Tilenga site in Uganda.”²⁴³ In January 2020, the French High Court of Nanterre did not rule on the merits of the case, but rather on the venue and found that the proper venue was a commercial court.²⁴⁴

In 2018 and 2019 respectively, Australia and the Netherlands legislatures passed similar supply chain due diligence acts. The Australian Act requires companies to report on “what the entity is doing to assess and address the risks that modern slavery practices may be occurring in its global and domestic operations and supply chains.”²⁴⁵ The Dutch Child Labor Due Diligence Law is more targeted than the French Duty of Diligence Law in that companies are required to examine whether there is a “reasonable suspicion” that child labor was used to produce the goods or services.²⁴⁶ If there is a “reasonable suspicion,” the company must develop and carry out an action plan to combat the use of child labor.²⁴⁷

The US has not followed with its own federal modern slavery legislation. In 2018, Representative Carolyn Maloney (D-NY) proposed the Business Supply Chain Transparency on Trafficking and Slavery Act which later that died in committee before enactment despite stakeholder support, but was reintroduced in March 2020.²⁴⁸ The Business Supply Chain Transparency on Trafficking and Slavery Act was originally introduced in 2011 and reintroduced in both 2014 and 2015 with a companion bill in the Senate.²⁴⁹ The bill was inspired by the CTSCA but is not limited to only retailers and manufactures.²⁵⁰ It would have amended the Securities Exchange Act of 1934 and required companies to “disclose information describing any measures [it] has taken to identify and address conditions of forced labor,

²⁴³ Rebecca Rosman, *French Judges Tilt in Favour of Total in Landmark Ruling*, ALJAZEERA (Jan. 30, 2020), <https://www.aljazeera.com/ajimpact/french-judges-tilt-favour-total-landmark-ruling-200130223500626.html>.

²⁴⁴ *Id.*

²⁴⁵ MODERN SLAVERY BUS. ENGAGEMENT UNIT IN THE AUSTRAL. BORDER FORCE, COMMONWEALTH MODERN SLAVERY ACT 2018 GUIDANCE FOR REPORTING ENTITIES 13 (2018).

²⁴⁶ BUS. & HUMAN RIGHTS RES. CTR. 2017, *supra* note 216, at 4 (citing Dutch Child Labor Due Diligence Act, *supra* note 8).

²⁴⁷ *Id.*

²⁴⁸ Business Supply Chain Transparency on Trafficking and Slavery Act of 2018, H.R. 7089, 115th Cong. (2018); *History of H.R. 7089, 115th Cong. 1st Session*, <https://www.congress.gov/bill/115th-congress/house-bill/7089/actions?r=6&s=1>; Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Cong. (2020); Sarah A. Altschuller, *HR 3226: New Bill Calls for Transparency on Trafficking and Slavery in Corporate Supply Chains*, FOLEY HOAG: CSR & THE L. (Aug. 4, 2015), <https://www.csrandthelaw.com/2015/08/04/h-r-3226-new-bill-calls-for-transparency-on-trafficking-and-slavery-in-corporate-supply-chains/>.

²⁴⁹ Altschuller, *supra* note 248.

²⁵⁰ *Id.*

slavery, human trafficking, and the worst forms of child labor within the company's supply chains."²⁵¹ Because it is not substantially different from the other disclosure modern slavery legislation, the bill is likely to lead to the same shortcomings and not inspire a substantive shift in corporate compliance programs. Until the US enacts its own effective federal modern slavery legislation that requires companies to take steps to address human rights risk, the FCPA may be a useful tool for creating liability for modern slavery in the supply chains of American corporations and other covered under the FCPA. Unlike the bill, FCPA can also be used to force a shift in corporate compliance with human rights due to its strong deterrent effect.

Business Transparency in Trafficking and Slavery Act (HR 3226), the proposed modern slavery act for the US, would require all businesses with more than US\$100 million in global receipts to submit an annual report to the Securities and Exchange Commission describing the steps taken to assess and address slavery within their supply chains.²⁵² The bill has been referred to the House of Representatives Committee on Financial Services several times but has never moved forward in the legislative process.²⁵³

However, the proposed bill should be modified before enactment. As other modern slavery legislation has demonstrated, simply requiring disclosure of steps taken is insufficient for inspiring effective change in the supply chains of multi-national corporations. Rather, when the U.S. passes its own legislation, it should require companies to actively seek out instances of modern slavery in their supply chains. When an instance is found, companies should also be required to take adequate steps to prevent a recurrence. Criminal and civil penalties should be imposed on companies that fail to meet these requirements. Civil society should be given the right to bring claims themselves to court.

B. Failures of the Alien Tort Statute and the Trafficking Victims Protection Reauthorization Act

When there is a lack of prosecutions, foreign victims of human rights violations, such as modern slavery, are forced to turn to civil lawsuits in order to hold corporations accountable. However, like the existing modern slavery statutes, victims of forced labor cannot turn to the Alien Tort Statute (ATS) or the TVPRA for adequate remedies. The lack of civil remedies under other laws highlights the gap that the FCPA can fill to give justice to these victims.

The ATS gives federal courts jurisdiction over civil suits brought by foreign nationals "for a tort only, committed in violation of the law of the

²⁵¹ H.R. 6279.

²⁵² BUS. & HUMAN RIGHTS RES. CTR. 2017, *supra* note 216, at 8.

²⁵³ *See id.*

nations or a treaty of the United States.”²⁵⁴ However, the US Supreme Court and Circuit Courts have significantly reduced the potential reliance on the ATS to file civil claims against companies for human rights violations.²⁵⁵ The first significant narrowing down of the ATS was in 2004 when the US Supreme Court ruled that the ATS could only provide a potential remedy to victims of “the most serious violations of human rights.”²⁵⁶ The only accepted violations are the three that “rest on a norm of international character accepted by the civilized world”: violations of safe conducts, infringement of the rights of ambassadors, and piracy.²⁵⁷ The Court of Appeals for the Second Circuit held that in order to determine liability under the Alien Tort Claims Act, plaintiffs must show that the defendants “acted with the purpose to advance violations of international humanitarian law.”²⁵⁸ In 2013, the Supreme Court found that the Alien Tort Claims Act presumptively does not apply extraterritorially.²⁵⁹ The most recent narrowing of the ATS was in 2018 in *Jesner v. Arab Bank, PLC* when the Supreme Court held 5-4 that foreign corporations cannot be sued under the ATS.²⁶⁰

After *Jesner*, the Ninth Circuit Court of Appeals affirmed in *Doe v. Nestle* that the ATS is not extraterritorial.²⁶¹ In its decision, the court found that overseas slave labor which defendants perpetuated from headquarters in the United States was both sufficiently “specific and domestic.”²⁶² However, the court reversed and remanded the case allowing plaintiffs to amend their complaint to specify “whether the [] conduct that took place in the United States is attributable to the domestic corporations,” warning that discussing “defendants as if they are a single bloc” is “a problematic approach that plaintiffs would do well to avoid.”²⁶³

In addition to the ATS, the TVPA and TVPRA aim to provide legal relief to foreign victims.²⁶⁴ These statutes criminalize commercial trafficking and

²⁵⁴ Alien Tort Statute, 28 U.S.C. §1350 (1948).

²⁵⁵ INT’L FED. FOR HUM. RTS., CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES: A GUIDE FOR VICTIMS AND NGOs ON RECOURSE MECHANISMS 8 (2016).

²⁵⁶ *Id.*

²⁵⁷ *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004)).

²⁵⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009), *cert. denied*, 562 U.S. 946 (2010) (dismissing a lawsuit that alleged that Talisman aided the Government of Sudan in the commission of genocide, war crimes and crimes against humanity).

²⁵⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013).

²⁶⁰ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018).

²⁶¹ *Doe v. Nestle*, 906 F.3d 1120, 1125 (9th Cir. 2018).

²⁶² *Id.* at 1226.

²⁶³ *Id.*

²⁶⁴ *A Modern Slavery Act for the United States*, AM. U. NAT’L SECURITY L. BRIEF (Nov. 10, 2015), <https://nationalecuritylawbrief.com/2015/11/10/a-modern-slavery-act-for-the->

specifically aim to deter trafficking, protect victims, and allow victims to receive restitution, however, are geared more towards sex trafficking.²⁶⁵ As amended in 2008, the TVPRA created six new offenses, two of which are (1) forced labor and (2) benefitting financially from forced labor.²⁶⁶ Similar to the FCPA, the TVPA and its reauthorizations apply extraterritorially and impose liability on corporations and individuals who do not directly engage in the misconduct for “reckless disregard” of the acts of third parties.²⁶⁷ The overall enforcement emphasis has still been on domestic acts of sex trafficking.²⁶⁸ However, labor trafficking for forced labor exploitation is more widespread than for forced sexual exploitation.²⁶⁹ The ILO estimated that less than 20% of the millions of victims of forced labor worldwide are trafficked for commercial sexual exploitation.²⁷⁰

Now, many plaintiffs are starting to use the economic benefit provision to add corporate co-defendants to their cases.²⁷¹ However, agency or knowledge of the third party’s actions is required for creating US jurisdiction over a corporate beneficiary that not directly put someone in a forced labor situation, which is as difficult to establish under the TVPRA as it is under the FCPA.²⁷² Thus, while the TVPRA could be a more useful tool for prosecutors than the FCPA because it specifically targets trafficking, imputing liability to corporate defendants is equally as challenging under both laws. Also, a major weakness of the TVPRA is a lack of aggressive enforcement, contrary to FCPA enforcement.²⁷³

C. Amending the FCPA

The OECD and the IBA both argue that addressing human trafficking and corruption jointly is a more effective way to combat to human trafficking

united-states.

²⁶⁵ *Id.*

²⁶⁶ *Key Legislation*, U.S. DEP’T OF JUST., <https://www.justice.gov/humantrafficking/key-legislation>.

²⁶⁷ LIBERTY ASIA, *supra* note 11, at 28.

²⁶⁸ HUMAN TRAFFICKING INSTITUTE, 2017 FEDERAL HUMAN TRAFFICKING REPORT 44-45 (2018).

²⁶⁹ INT’L LAB. ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 29 (2017).

²⁷⁰ *Id.*

²⁷¹ Laura Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director’s Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 VAND. L. REV. 499, 523-26 (2016).

²⁷² *See Ratha*, 2017 WL 8292922, at *4, *7.

²⁷³ Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RES. J. INT’L L. 17, 47 (2018).

related to corruption than, addressing the two topics separately.²⁷⁴ It suggests that countries with existing anti-corruption legislation should modify the statutes to include anti-human trafficking measures.²⁷⁵ The FCPA itself should explicitly acknowledge the link between corruption, modern slavery, and explicitly prohibiting payments of bribes for the purpose of obtaining cheap labor.²⁷⁶ Because it can be difficult to establish a principal-agent or parent-subsidiary relationship between a multinational corporation and their suppliers, the FCPA should also expand liability by explicitly holding purchasing companies liable for bribes paid by suppliers in connection with goods or services purchased by a US company. Similar to the TVPRA, the FCPA could also prohibit benefitting financially from bribery and allow for civil remedies.

CONCLUSION

Given its heavy enforcement, extraterritorial reach, and inclusion of liability for third parties, the FCPA could be a useful tool to make corporations proactively take steps to reduce modern slavery facilitated by corruption in their supply chains.²⁷⁷ However, the FCPA has never been applied in a modern slavery context, perhaps due to unwillingness to prosecute corruption with weak jurisdictional ties to the US.²⁷⁸ Current legislation struggles to compensate for the FCPA's weaknesses. The TVPRA also poses jurisdiction-related challenges and has not been aggressively enforced; the US modern slavery bill has failed to garner enough support from Congress.²⁷⁹ In instances where there are tenuous links between a bribe and the US, amending the FCPA, TVPRA, or proposed modern slavery bill may prove to be a more effective enforcement tool.²⁸⁰

²⁷⁴ OECD, *supra* note 12, at 6; IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, *supra* note 13, at 40.

²⁷⁵ See OECD, *supra* note 12, at 26.

²⁷⁶ See IBA PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING, *supra* note 13, at 40.

²⁷⁷ See LIBERTY ASIA, *supra* note 11, at 28.

²⁷⁸ *Id.* at 3.

²⁷⁹ See *supra* Part III.

²⁸⁰ See LIBERTY ASIA, *supra* note 11, at 3.