Human trafficking and child labor exist in nearly every country and industry, and companies need to find ways to address the issue in their supply chains, attorneys Bradford K. Newman and Blake R. Bertagna say in this BNA Insights article. To provide businesses with a comprehensive tool that will assist in addressing this problem in a real-world environment, the American Bar Association recently adopted model principles on labor trafficking and child labor.

The authors provide an overview of the ABA’s Model Principles and explain how businesses can utilize a risk-based approach to adopt and implement them. The authors also offer best practices in the form of five immediate steps companies can take to align their policies and practices with these principles.

The ABA’s Newly Adopted Principles Assist Companies in Eliminating Supply Chain Human Trafficking and Child Labor

BY BRADFORD K. NEWMAN AND BLAKE R. BERTAGNA

1 In September 2012, President Obama issued an Executive Order, “Strengthening Protections Against Trafficking in Persons in Federal Contracts” (187 DLR A-4, 9/26/12), which places significant responsibility on contractors and subcontractors to act affirmatively to prevent trafficking and forced labor. The Obama administration recently proposed two new federal procurement rules to implement and expand on the Executive Order. Congress has also considered a supply chain law, the Business Transparency on Trafficking and Slavery Act (H.R. 2759), which, in addition to adding child labor, would have created disclosure obligations similar to those in the Cali-
in a challenging economic and competitive environment that forces them to do more with fewer resources.

One particularly vexing issue for companies is how to effectively and efficiently address labor trafficking and child labor in the supply chain. Mindful of the challenging business and regulatory landscape, the American Bar Association recently adopted the black letter Model Principles (Model Principles) portion of the ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor (Model Policies) and resolved to urge businesses to adopt policies against trafficking and child labor that are consistent with the four Model Principles for Businesses and four Model Principles for Suppliers.

This article provides an overview of the Model Policies and explains how businesses can utilize the ABA’s risk-based approach to adopt and implement each of the Model Policies to help ensure compliance with their legal (and moral) obligations to help combat labor trafficking and child labor in the supply chain.

II. Central Tenets of the ABA Model Policies

As part of her broad assault on all forms of human trafficking and child labor, the immediate past President of the ABA, Laurel Bellows, asked the ABA’s Business Law Section to take the laboring oat in devising a useful tool for businesses—of all sizes and across various industries—that could be utilized in a real-world operating environment as an immediate resource to efficiently take affirmative measures to help eradicate labor trafficking and child labor in their supply chains. In response, a broad-based Working Group of the ABA Business Law Section prepared the Model Policies, which it did over a multiyear period after comprehensive study and analysis of existing laws, regulations, and policies.

One noteworthy feature of the ABA Model Policies is a risk-based approach that accounts for the delicate balance businesses must strike between the realities of labor trafficking and child labor risks in their supply chain versus the depth of their resources for addressing these risks. The policies specifically contain a process that factors operational constraints into a rational and powerful framework that makes the formulation suggested by the Model Policies work effectively in practice.

The ABA’s Policies are built on the eight Model Principles (four for businesses and four for suppliers).

- Principle 1—The business/supplier will prohibit labor trafficking and child labor in its operations.
- Principle 2—The business/supplier will conduct a risk assessment of the risk of labor trafficking and child labor and continually monitor implementation of this policy.
- Principle 3—The business/supplier should: (i) train relevant employees; (ii) engage in continuous improvement; and (iii) maintain effective communications mechanisms with its suppliers.
- Principle 4—The business/supplier will devise a remediation policy and plan that addresses remediation for labor trafficking or child labor in its operations.

The accompanying commentary and guidance for each Model Principle makes clear that the principles were drafted to afford businesses the maximum flexibility to tailor their individual policies to align with the specific supply chain, products, size, structure, culture, resources, and business needs of the adopting entity. They are not intended nor designed to be prescriptive.

III. Defining Trafficking and Child Labor

Defining the phrases “human trafficking” or “trafficking in persons” is an elusive task. There is not true consensus in the international community about how trafficking should be defined. Nonetheless, the majority of definitions share common elements. First, the trafficking typically involves an act of recruiting, transporting, harboring or receiving a person. Second, the means by which the trafficking is accomplished is through the use of force, fraud or coercion. Third, the objective of the trafficking is exploitation for labor or sexual services.

The Business Law Section reviewed the numerous existing definitions for trafficking utilized by the United States, United Nations, the International Labor Organization and other leading institutions. The drafters settled on the following definition of “labor trafficking”: “[t]he act of recruiting, harboring, transporting, providing, or obtaining a person for involuntary labor or services by means of force or physical threats, fraud or deception, or other forms of coercion.” This definition also extends to “trafficking-related activities,” i.e., “[a]ll activities that directly support or promote” labor trafficking, and specifically, those practices typically used by labor brokers to facilitate labor trafficking.

In addition, the Business Law Section defined “child labor” as “[w]ork performed by a person who is under the minimum legal working age to be employed as determined by (i) a Business’ s or Supplier’s policy, (ii) the law of the jurisdiction in which the work will be performed, or (iii) the International Labor Organization Minimum Age Convention No. 138—whichever indicates the higher minimum age requirement.”

IV. Prohibiting Labor Trafficking and Child Labor From Operations

The first Principle, while seemingly simple, serves as an essential foundation for a business’s policy. Busi-
nesses should start from a “zero tolerance” perspective when it comes to the use of labor trafficking and child labor. There are many benefits to having a written zero-tolerance policy. Each employee, supplier and agent receives uniform information about the company’s position as to labor trafficking and child labor. They are immediately put on notice of the company’s expectations.

Commentary accompanying the first principle underscores the reasonable limits that can be placed on a company’s responsibility. It recommends that policies explicitly state that the company does not “knowingly tolerate” labor trafficking or child labor in its operations. The “knowing” standard acknowledges that a company’s responsibility should not extend to instances of labor trafficking or child labor about which it could not reasonably be aware. Setting this threshold is another realistic and equitable approach that balances the potentially unlimited scope of liability that could be imposed on companies given the complexity of supply chains and business realities.

V. A Risk-Based Approach

The second principle is crucial to a company’s policy. The introduction section of the model policies states that “The Model Policies adopt a risk-based approach to ensure that measures to address issues of labor trafficking and child labor are commensurate with the risks identified, so that the sources of the greatest risk receive the most attention, thereby facilitating efficient allocation of resources.” This framework is consistent with the position of the United Nations.

In its “Guiding Principles on Business and Human Rights,” it observes that “where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is more significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant factors. Usually, businesses can easily identify their direct suppliers. But as noted below, imposing a requirement that businesses always map deep into the supply chain, which often fluctuates frequently, to identify every second-, third-, and fourth-tier supplier can be burdensome, impractical and even impossible.

Accordingly, the Model Policies are explicitly designed to apply to the business itself and its “first-tier suppliers,” i.e., those suppliers who contract directly with the business, unless other triggers are present. The Model Policies suggest aiming compliance efforts beyond the first tier only if: i. the businesses determines that there is “a material risk” of wrongdoing by the supplier; ii. taking appropriate action “is practicable and not cost prohibitive in comparison to the value of the materials purchased” from that supplier; and iii. the product is “material” to the business.

B. Assigning and Prioritizing Risk.

The next step is to assign a risk level to each of the suppliers. The assigned risk may turn on several factors. Three are worth noting.

First, the risk may turn on the type of product. Certain products are more likely to be produced by forced labor or child labor. The Department of Labor publishes a List of Goods Produced by Child Labor or Forced Labor that can assist with this assessment.

Second, the risk may be influenced by the origin of the product. A valuable resource in this assessment is the State Department’s annual Trafficking in Persons Report, which places 187 countries into one of three tiers based on the extent of their governments’ efforts to comply with anti-trafficking standards.

Third, the value of the product or contract may play a role.

C. Performing Due Diligence.

Based upon the findings of the risk assessment, a business should take effective measures to ensure that covered suppliers are adhering to the company’s anti-trafficking policy. The Model Policies supply two chief tools to assist with this continual due diligence process.

First, the business can obtain a certification from the supplier that the product or service provided to the business complies with the applicable laws regarding labor trafficking and child labor.

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In the real-world operational context, the Model Policies provide businesses with exactly what they need—the flexibility to tailor their anti-trafficking efforts to precisely the portions of their supply chain that require it the most, without imposing impractical and onerous constraints on already overburdened procurement and compliance functions.

Second, the business can conduct announced and unannounced audits of the supplier’s facilities. It may use a qualified independent third party (i.e., an entity with no affiliation to the business that has expertise in investigating labor trafficking and child labor violations) to conduct these audits. The audits may involve meetings with management, walk-throughs of the facilities to observe conditions, interviews with workers at the facility, and the review of documents such as employment agreements, payroll records, and personnel files.

The utilitarian elegance of the ABA’s risk-based approach cannot be overstated. In the real-world operational context, the Model Policies provide businesses with exactly what they need—the flexibility to tailor their anti-trafficking efforts to precisely the portions of their supply chain that require it the most, without imposing impractical and onerous constraints on already overburdened procurement and compliance functions.

VI. Training Relevant Employees, Engaging in Continuous Improvement, and Communicating With Suppliers

The third Principle is grounded in necessary training techniques for a procurement and compliance function that may not otherwise be aware of the risks. Many different parties play a role in a business’s compliance with its anti-trafficking obligations. These include employees, suppliers, vendors, recruiters, and labor brokers. Each function should understand its roles and responsibilities, and the business’s expectations, for minimizing the risks of labor trafficking in the supply chain. Once again, the Model Policies provide for a thoughtfully tailored—rather than broad and scattershot—approach.

The Model Policies establish three layers of training or communication. First, they recommend training “relevant” employees, i.e., employees with supervision as to the supply chain. Second, they suggest communicating the company’s anti-trafficking policy to 1) relevant employees; 2) suppliers; and 3) labor brokers, recruiters, and employment agencies. Finally, they recommend making the company’s policy available to the public by posting it on the company’s website.

The third Principle reflects the operational flexibility intended under the Model Policies. Businesses have considerable discretion in the provider of the training as well as the content of the training. They also have discretion whether to limit training to those with direct oversight of the supply chain or expand the scope to the general employee population.

VII. Devising a Remediation Policy

The fourth Principle involves “remediation.” The Model Policies define “remediation” as the “[a]ctivities, systems, policies or procedures that the Business or Supplier establishes to address and remedy confirmed instances of Labor Trafficking or Child Labor in its operations.” In short, if there is a violation, the company should be prepared to respond.

The Principles recognize that it is important to carefully assess who is at fault and the identity of the party who will bear the cost of remediation. Commentary to this Principle suggests that the enterprise “immediately responsible” for the violation bear the responsibility.

Thus, to the extent the supplier is responsible, companies should include indemnification clauses in their supply contracts providing that the supplier agrees to indemnify the business and hold it harmless for violations of relevant laws and regulations, or for liability arising from a violation of the business’s policies. In the event that the responsible supplier or other third party refuses or is unable to bear those costs, the Model Policies suggest a range of potential options companies may consider to assist victims—even where the business is not at fault.

A. Redressing the Specific Harm. There are a numerous harms that can result from violations of a business’s anti-trafficking policies, and a remediation plan should have adequate flexibility to provide appropriate remedies for each.

One potential response that may be appropriate, depending on various factors beyond the scope of this article, is to report trafficking violations to law enforcement authorities. Before this is done, complex issues must be considered, including whether there are mandatory reporting requirements under a framework of local, national, and international laws.

Another type of response may be pecuniary. Workers may have been subject to debt bondage or some kind of financial entrapment. Alternatively, workers may have been forced to work long hours, with inadequate or no pay.

Where warranted, a business may consider reimbursing the debts owed to the worker or other appropriate party (e.g., labor broker) or pay the worker all unpaid wages owed. If the victim was coerced from his or her home country or family, a business may consider paying for the worker’s travel back. The business could assist the victim with identifying and securing other appropriate income-earning opportunities. In more severe circumstances (e.g., confinement or physical abuse), a business may consider facilitating the worker’s receipt of educational, psychological, and other counseling services.

B. Preventing Recurrence of the Harm. Remediation efforts should be designed to prevent the same or similar wrongs from recurring—even where the business was not at fault.

The efforts to minimize the potential of recurring harm can involve educational measures, like supple-
mental training, or more serious sanctions. If the people who perpetrated the wrongdoing were acting independently of management, the appropriate response may be to take action only as to those individuals, disciplining or terminating their employment. In cases in which a supplier’s management was directly involved, however, the business may consider more drastic actions, including terminating the relationship with the supplier.

In sum, the form of a business’s remediation plan and efforts will turn on a variety of factors. There can be no one-size-fits-all policy or response. Each case should involve a careful examination of all circumstances to determine the appropriate response. The Model Policies provide the business with intended flexibility for remediaying any discovered violations.

VIII. Best Practices

With relative ease, businesses can efficiently align their policies and practices with the ABA’s Model Principles. There are numerous steps to this process, but five immediate steps that a company can take include:

- **Consult counsel.** There is a fast-growing web of laws and regulations in this area. Engage legal counsel to assist with preparing, structuring and executing the company’s supply chain policies and practices.

- **Create a separate, stand-alone policy.** Many businesses may house their anti-trafficking and child labor policies inside their general social compliance policy or handbook. Businesses should consider utilizing a stand-alone policy to address this critical issue.

- **Know your supply chain.** In connection with mapping the supply chain, create and maintain a database that is regularly updated to identify and account for fluctuations in suppliers and *material* risks of trafficking and child labor. Businesses should create reasonable limits when defining the scope of material risks.

- **Review and revise supplier contracts and purchase orders.** Review and update supplier agreements to evaluate the scope of supplier obligations to address potential trafficking in the supply chain, and ensure supplier compliance. Make sure to provide for appropriate limitations of liability for the company, such as indemnification provisions that protect the company from unknowing violations.

- **Delegate responsibility.** Appoint a specific businesses representative or team responsible for oversight of the business’s supply chain, identifying risks, updating suppliers and modifications to the policy, and generally ensuring compliance with the company’s supply chain policies.

IX. Conclusion

The ABA’s adoption of Resolution 102B creates a useful tool for companies. The prevalence and profitability of human trafficking show no signs of relenting, as it has evolved into a $32 billion industry. By adopting and implementing consistent policies aimed at addressing issues of labor trafficking and child labor in supply chains, businesses will demonstrate their commitment to efforts to end human trafficking—something that not only is beneficial for human rights, but also constitutes sound business judgment for brand protection and consumer satisfaction.5

5 While Bradford K. Newman served as a co-chair of the Working Group, he and his co-author express only their personal views and not those of the Working Group, the Business Law Section, or the ABA. These Model Policies could not have been possible without the tireless effort and substantial thought leadership contributed by so many. With regard to this article, the authors wish to recognize and thank two key members of the Working Group for their guidance, input and assistance—William D. Johnston, Partner, Young Conaway Stargatt & Taylor, LLP and E. Christopher Johnson, Jr. Adjunct Professor, The Thomas M. Cooley Law School.