

Supply chain scrutiny and Canada's Modern Slavery Act – a 'how-to' guide for businesses

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Bill S-211, *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*, referred to as Canada's "Modern Slavery Act" (the Act) is expected to come into force on January 1, 2024. This guide is intended to serve as a resource for businesses to determine their obligations under the Act, and how to prepare to comply.

What does this new law mean?

The Act creates a reporting obligation for certain entities engaging in specified activities. Such entities will be required to file their first reports (described below) with the Minister of Public Safety and Emergency Preparedness by May 31, 2024. Reports also must be publicly disclosed (e.g., in a prominent place on the company's website). Failure to comply with the reporting obligations under the Act can result in fines, reputational damage, and liability for directors and officers.

The Act also establishes a ban on importing goods made with child labour, which builds on the existing ban on the importation of goods made with forced labour.

Does your business have a reporting obligation?

There are two questions to ask: (1) is your business or an affiliate an "Entity", and (2) if so, does the Entity engage in certain specified activities (referred to below as "Reporting Activities")? If the answer to both of these is "yes", the Entity is required to prepare and file a report. For information on what must be included in this report, see "What must be included in your report?" below.

Entities

An "Entity" is defined as a corporation, trust, partnership or other unincorporated organization that

- is listed on a Canadian stock exchange
- has a place of business in Canada, does business in Canada, or has assets in Canada, and that meets at least two of the following conditions for at least one of its two most recent financial years: (1) has \$20 million or more in assets, (2) generated \$40 million or more in revenue or (3) employs an average of at least 250 employees

- is identified in regulations to the Act (which as of the time of writing have not yet been published)

Reporting Activities

Activities specified under the Act (for purposes of this update, "Reporting Activities") include

- producing, selling or distributing goods in Canada or elsewhere
- importing into Canada goods produced outside Canada
- controlling an "Entity" that produces, sells, or distributes goods in Canada or elsewhere, or imports into Canada goods produced outside Canada

What are 'goods'?

The term "goods" is not defined in the Act. However, the term "production of goods" is defined to include the "manufacturing, growing, extracting and processing of goods". This suggests that the term "goods" should be given a very broad definition. The definition of "goods" could be broad enough to cover a very wide range of tangible personal property, even a company which imports items/equipment for its own use, which could result in the Act applying more broadly than might be expected.

What steps should your business take before preparing its report?

It is crucial that businesses start preparing early to draft their reports. The reporting obligation necessitates disclosure of various elements of an Entity's supply chains. This requires mapping your supply chains, which, if this has not already been done (e.g., for compliance with a similar reporting requirement in another jurisdiction), will take some time.

Further, the Act establishes a presumption that, where an offence is committed by an employee, agent or mandatary of the Entity, the offence was committed on behalf of the Entity. The Act provides an exception to this where an Entity can establish that due diligence was exercised to prevent the offence. Therefore, it will be important to have relevant policies, procedures and training in place and to regularly monitor compliance to ensure your business is setting a "tone at the top".

Can you file a joint report, if more than one Entity in your business has a reporting obligation?

Yes. A joint report can be made in respect of more than one Entity.

What must be included in your report?

Entities must report on the steps the Entity has taken during its previous financial year to prevent and reduce the risk that forced labour or child labour is used at any step in the production of goods in Canada or elsewhere by the Entity or of goods imported into Canada by the Entity.

For each Entity required to report, the report must include various information about the Entity's structure, supply chains, and processes to eliminate the use of forced labour and child labour. This includes (but is not limited to): policies and due diligence processes,

identifying the parts of the business that carry a risk of forced and child labour, and any steps taken to assess and manage risk.

The report must be publicly disclosed and, in the case of a corporation incorporated under the *Canada Business Corporations Act*, must be shared with shareholders together with annual financial statements.

The report must be signed and approved by the Entity's governing body. For a joint report, the report may be approved either by the governing body of each Entity included in the report, or by the governing body of the Entity controlling each Entity in the joint report.

What if the only 'Reporting Activity' my business engages in is controlling an Entity?

If an Entity engages in Reporting Activity only by virtue of controlling another Entity that engages in Reporting Activity (i.e., the controlling Entity does not itself import, produce, sell or distribute goods), there is still an obligation to file a report with respect to that controlling Entity. However, the contents of the report may vary depending on the nature of your (and the underlying Entity's) business.

What can the Minister/authorities do in order to enforce the Act?

The Act gives the government broad powers to issue orders requiring the business to take any measures it considers necessary to ensure compliance with the Act, as well as certain search and seizure authority to verify compliance.

What are the penalties for not filing a report?

Every person or Entity that fails to comply with the Act — including by failing to make a report, failing to make the report publicly available, failing to assist in an investigation or obstructing an investigation, failing to comply with a corrective order, or providing false or misleading information in a report — is guilty of an offence punishable on summary conviction and liable to a fine of not more than \$250,000.

The Act establishes personal liability for individuals mandated to act on behalf of an Entity (including directors and officers). If a person or Entity commits an offence under the Act, any director, officer, agent, or individual otherwise mandated to act on behalf of the person or Entity who directed, authorized, assented to, acquiesced to or participated in the offence is a party to the offence, and may be subject to fines of not more than \$250,000, whether or not the Entity has been prosecuted or convicted.

Key takeaways

Businesses with a nexus to Canada should be prepared to file their initial reports by May 2024. If you require any assistance or have any questions regarding the Act or any matter regarding compliance with Canada's trade and sanctions regulatory regime, or the rapidly changing Environmental, Social and Governance (ESG) landscape, please contact a member of our International Trade and Investment or ESG teams.