Seven lessons learned after year one of supply chain reporting in Canada

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For many businesses operating in Canada, May 31, 2024 marked the first annual deadline for filing annual reports under Canada's *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, formerly known as Bill S-211 or the *Modern Slavery Act* (the Act). As we have previously discussed, the Act casts a wide net with respect to the businesses that are subject to its reporting obligations, which requires disclosure of the steps taken during the previous financial year to reduce the risk of forced labour or child labour in the business' supply chain.

Given the short timeline between implementation of the Act and the reporting deadline, reporting entities and government institutions were required to move quickly to prepare their reports, often in the face of unclear and/or changing guidance. Now that the dust has settled, it is important to consider the takeaways and next steps to affect a seamless reporting period next year.

1. Assess applicability early… and annually

Assessing whether the reporting requirements of the Act apply to a business has proven to be a complex issue requiring time and thoughtful analysis. Failure to determine whether the reporting requirements apply to your organization in a timely manner can impact your ability to file a fulsome and compliant report before the annual reporting deadline.

Determining whether your business has reporting requirements under the Act is a two-step analysis: first, does your business meet the definition of an "entity" under the Act? If so, is your entity engaged in an activity that triggers reporting, namely producing or importing goods into Canada? In 2024, this assessment was particularly difficult for foreign companies who lacked a substantial nexus to Canada. Additionally, there were many questions about calculating financial thresholds.

Notably, determining that your business is or is not a reporting entity in one calendar year does not guarantee the same result in the next year. For example, a business that did not meet the applicable financial thresholds to be an entity in year one may meet those thresholds in the following year. Similarly, an entity may change the nature of its business operations or supply chains such that it no longer imports goods into Canada

and therefore doesn't engage in reportable activities. Finally, issuers with new stock exchange listings will automatically become "entities" under the Act. As such, assessment of the application of the Act must be undertaken on an annual basis.

Given the complexity of assessing the extent to which the Act applies to a company, we encourage businesses to conduct this assessment as early as possible prior to the filing deadline.

2. The deadline is the deadline

The Act requires reporting entities to file a report on or before May 31 of each year. Unfortunately, the Act does not contemplate late filing. While immediately following the May 31 filing deadline this year, Public Safety Canada's online filing portal was closed to new reports, Public Safety Canada has indicated that it will continue to accept late submissions and publish reports received past the May 31 deadline to the online catalogue and the filing portal has been amended accordingly. However, submitting a late report may still carry enforcement risk, and the government's online database will indicate whether a report was submitted after the deadline.

The Act makes late filing after the May 31 deadline a strict liability offence, however Public Safety Canada's appetite to enforce the Act in this first reporting year may be limited as there has been some indication that they will primarily focus on education and transparency in 2024. Relatedly, the Act requires the Minister of Public Safety, on or before September 30 each year, to prepare a report containing information derived from the reports filed by entities and government institutions under the Act. This requirement makes the May 31 reporting deadline important to Public Safety Canada and may impact its treatment of late reports. Entities that were unable to meet the May 31 deadline should consider the business risks associated with late filing.

Going forward, reporting entities should begin drafting and/or updating their annual reports well in advance of May 31 each year. Entities should be mindful that reports must be approved by their governing bodies (in most cases, their boards of directors) and plan to have a draft report ready for their regularly scheduled board meetings and/or add approval of the report to the board's annual governance calendar. Entities should also allow enough time to complete the mandatory questionnaire that accompanies the report's submission.

3. It is possible to revise a filed report

While the Act does not contemplate the filing of late reports, it does specifically address revised reports. For reporting entities that filed reports on or before May 31 this year but wish to improve, update or amend such reports, they may do so through Public Safety Canada's online filing portal. A revised report must include all of the information required in a report under the Act and must indicate the date of the revision and a description of the changes made to the original report. The requirements for board approval and attestation of the report will equally apply.

4. Prioritize consistent progress monitoring

Looking forward, when your entity prepares reports for subsequent years, it should look to evaluate its year-on-year progress. New reports should be consistent with or update progression with the forward-looking statements and goals stated in previous reports, if any. As reports are made publicly available, businesses may benefit reputationally from new reports demonstrating, at a minimum, consistency or, ideally, improvement. Generally, entities should exercise caution when making forward looking statements or future commitments in their reports as there is potential liability under the Act for misstatements.

5. Introduce new policies and procedures now

If you are looking to show improvement in your next year's report, the time for implementing new policies and procedures related to forced labour and child labour is now. This is particularly the case for reporting entities with a calendar fiscal year (January to December) as they are already half-way through the year that will be the subject of their next reports. As governance and operational policies and procedures take time to develop and integrate, developing them early on is the difference between a report reiterating intentions to institute new policies (or stating that you have no policies) and a report demonstrating marked progress in eradicating forced and child labour from a business' supply chain.

Remember, the Act does not require businesses to file reports for the sake of filing. Rather, it aims to encourage entities doing business in Canada to develop and enforce internal policies to eradicate exploitative practices from their supply chains. Experience from other jurisdictions has shown that external stakeholders and civil society will scrutinize entities' reports, and there are both business and legal risks in failing to make a report that is sufficiently fulsome. However, it is the policies and procedures described in the reports that are ultimately the most important to a business' supply chain practices and failures with respect to the use of forced or child labour can become public knowledge, particularly when enforcement actions are launched. As such, companies may have a competitive advantage by implementing appropriate and effective policies that actually work to insulate the company's supply chain from illegal and unethical behaviour.

6. Consider the impact on transactional and commercial agreements

Failure to comply with the reporting obligations under the Act can impact, and should be considered in, an entity's transactional and commercial agreements. Such agreements may require an entity to represent and warrant that it is in compliance with all applicable laws which will necessarily include its compliance with the Act.

Moreover, in the M&A context, purchasers must be alive to the reporting obligations that may be triggered by the acquisition of a business. If a purchaser acquires a business in the fiscal year about which they are reporting, the purchaser may become a reporting entity or, if it already was a reporting entity, may need to modify its report to account for the activities of its new acquisition. Purchasers will need to have proper access to records about the acquired entity and/or personnel who can speak to the target's supply chain practices. There may also be supply chain diligence that is warranted in the transaction given the new reporting requirement.

7. There are potentially serious enforcement risks and criminal penalties associated with non-compliance

Filing accurate and timely reports must be a priority for businesses, given the reputational and enforcement risks associated with non-compliance. Any person or entity that fails to comply with certain provisions of the Act, including a failure to file and publish report or knowingly filing a report containing false or misleading statements, is guilty of an offence punishable on summary conviction and liable to a fine of not more than $250,000. Furthermore, any person or entity's directors, officers, agents and mandataries who directed, authorized, assented to, acquiesced in or participated in the commission of an offence is also guilty of an offence, whether or not the person or entity has been prosecuted or convicted.

Reporting entities would be wise to thoroughly scrutinize their supply chain partners, even where they are not sourcing directly from vendors in high-risk regions. Reporting entities who exclusively source goods from the U.S. may feel inclined to assume they have no supply chain risks. However, a recent rise in child labour enforcement cases brought by the U.S. Department of Labour demonstrates the risks of forced and child labour pervading supply chains into the U.S. and Canada.

Conclusion

To date, just over 4,000 reports have been published to Public Safety Canada's online catalogue, with more being added each day. With the above lessons in mind, we will continue to monitor the addition of new reports as well as developments and changing guidance with respect to the Act. We also eagerly await the Minister of Public Safety and Emergency Preparedness to table his report to Parliament reflecting on the reports submitted this year.

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