Updated guidance on preparing a modern slavery report in Canada

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The Ministry of Public Safety Canada has published updated guidance and FAQs with respect to Canada's *Fighting Against Forced Labour and Child Labour in Supply Chains Act* (the Act), formerly known as Bill S-211, providing businesses operating in Canada with better insight into how to satisfy their reporting obligations in 2024. If you haven't already, take a look at our earlier publication which summarizes the key points of the Guidance.

Takeaways

- Consolidated financial statements should be used by a parent company when assessing whether it meets the size, assets, and revenue thresholds. Subsidiaries must determine if they have reporting obligations independently from their parent company and do not "consolidate up".
- Businesses should utilize a list of factors considered by the CRA to determine whether they "do business in Canada".
- Provincial and municipal institutions are not considered "government institutions" under the Act, but provincial agent Crown corporations may qualify as "entities" and have reporting obligations.
- Foreign companies that own Canadian subsidiaries will trigger reporting obligations if they meet the definition of entity.

Qualifying as an entity

Up until now, there was some confusion as to whether parent companies should consider the size, revenue, and assets of their subsidiaries in determining whether they have a reporting obligation. The updated guidance clarifies that parent companies should utilize consolidated financial statements of their subsidiaries in determining whether they meet at least two of the three size-related thresholds outlined in the definition of "entity". These thresholds are:

- At least $20 million in assets,

- At least $40 million in revenue, and
- An average of at least 250 employees.

On the other hand, subsidiaries must determine if they have reporting obligations independently from their parent company and will only have reporting obligations if they themselves meet at least two of the three size-related thresholds. The updated guidance clarifies that if a subsidiary and a parent company **both** meet the size-thresholds, they have the option of submitting a joint report if the information included in the report is shared by both companies.

Foreign corporations

Questions with respect to whether a foreign parent company that owns a Canadian subsidiary would trigger reporting obligations by virtue of its ownership of the Canadian subsidiary have been among the most frequent to arise in respect of the Act. The updated guidance and FAQs provide clarity on this issue by specifying that if both the foreign parent company and the Canadian subsidiary meet the definition of an entity and the criteria of a reporting entity, then the foreign parent company will have reporting obligations.

Similarly, a foreign corporation with no Canadian subsidiaries that nonetheless has a nexus to Canada and engages in the relevant activities to trigger reporting, will have a reporting obligation.

Provincial and municipal institutions not entities

The updated guidance also specifies that while provincial and municipal institutions are not required to report as “government institutions”, it leaves open whether provincial agent Crown corporations can have reporting obligations. Provincial agent Crown corporations are typically public corporations that operate in specific areas such as education, health, and agriculture while acting on behalf of the provincial government. The updated guidance provides little clarity as to whether these organizations will have reporting obligations except to the extent that they may qualify as an “entity”.

Doing business in Canada

The updated guidance clarifies that in order to assess whether they are “doing business in Canada”, companies should use a series of factors considered by the Canada Revenue Agency when determining whether a non-resident is “carrying on business in Canada”. These include:

- the place where agents or employees of the non-resident are located
- the place of delivery
- the place of payment
- the place where purchases are made or assets are acquired
- the place from which transactions are solicited
- the location of assets or an inventory of goods
- the place where business contracts are made
- the location of a bank account

- the place where the non-resident's name and business are listed in a directory
- the location of a branch or office
- the place where the service is performed
- the place of manufacture or production

Canada Revenue Agency has a detailed policy statement that clarifies the situations in which it considered a foreign person (including a corporation) to be doing business in Canada.

Next steps

If not already considered, publicly listed companies in Canada and other businesses in Canada that meet the applicable financial thresholds of the Act should turn their attention to determining whether they have a reporting obligation under the Act. Entities subject to the reporting requirement should begin preparing their reports in advance of the May 31, 2024, deadline, taking into consideration the instructions set out in the updated guidance and FAQs.

As of the date of writing, there remain just over 80 days before the final reporting deadline, which is little time to prepare a fulsome report, particularly given that the report requires board or governing body approval. We recommend that readers who have not already done so contact their legal or compliance advisors as soon as possible to have time to undertake the necessary work.

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