

**DRAFT MODEL CONTRACT CLAUSES (MCCs), INCLUDING THE BUYER
MCCs, AND THE RESPONSIBLE PURCHASING CODE OF CONDUCT**

TO THE CONSULTATION GROUP:

PLEASE NOTE THAT THIS DOCUMENT CONTAINS ONLY WORKING DRAFTS OF THE
MCCs, THE BUYER MCCs, AND THE CODE. IT SHOULD NOT BE CIRCULATED OR QUOTED
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I. DRAFT MODEL CONTRACT CLAUSES (MCCs), INCLUDING THE BUYER MCCs

Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk

~~2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts, ABA Business Law Section*~~

Please note: Certain MCCs have yet to be fully harmonized with the new language proposed. Once recommendations for changes have been agreed, other related provisions will be harmonized.

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CLAUSES TO BE INSERTED INTO SUPPLY CONTRACTS, PURCHASE ORDERS, OR SIMILAR DOCUMENTS FOR THE SALE OF GOODS

The following clauses are designed for supply contracts. They ~~assume that assurances with respect to compliance with certain human rights-related policies is desired or required by the buyer and that such policies will be~~ are developed for use by parties that desire to implement contractual provisions to address and minimize the risk of human rights harms in supply contracts. The specific human rights related policies that are to be implemented would appear in an appendix or schedule to the agreement, (referred to herein as “Schedule P” in the case of the supplier and “Schedule Q” in the case of the buyer), just as the buyer’s specifications for goods themselves are likely to appear in an appendix or schedule. The clauses below are intended to allow flexibility to contract for higher levels of protections, make those ~~policies~~ protections legally binding and ~~to~~ provide enforceable remedies for their violation, while also managing the risk that may come with such policies. In light of the multitude of sectors and the variety of industry specific concerns, these clauses are intended to serve as a common foundation, but they will require deal and party specific tailoring in order to achieve the desired policy objectives of each of the parties.

The ABA Model Principles and Policies¹ are an example of what might appear in Schedule P; many companies may wish to adopt or adapt them. Some companies may prefer or need something broader (see infra note ~~5~~ 8)

¹* This report is the product of the Working Group, as explained in the text, and reflects the rough (and sometimes debated) consensus of the Working Group. While produced under the auspices of the Uniform Commercial Code Committee of the American Bar Association Business Law Section, the report has not been approved or endorsed by the Committee, the Section, or the Association as of the time of publication. Accordingly, the report should not be construed to be the action of either the American Bar Association or the Business Law Section. Nothing contained herein, including the clauses to be considered for adoption, is intended, nor should it be considered, as the rendering of legal advice for specific cases or particular situations, and readers are responsible for obtaining such advice from their own legal counsel. This report and the clauses and other materials herein are intended for educational and informational purposes only. The lawyer who advises on the use of these clauses must take responsibility for the legal advice offered. There are both ABA Model Business and Supplier *Principles* on Labor Trafficking and Child Labor (“ABA Model Principles”) and ABA Model Business and Supplier *Policies* on Labor Trafficking and Child Labor (“Model Policies”) (emphasis added). The ABA

regarding certain laws that apply to some buyers), and other companies may need something broader still (e.g., to comply with the FAR, other human rights and health and safety standards, or moral obligations). Other possibilities include multilateral soft law standards such as the OECD Guidelines and the UN Guiding Principles (the Ruggie Principles), which offer non-binding, voluntary guidance for multinational corporations for improving the human rights performance of their supply chains. Many companies will already have supplier codes of conduct or similar documents that they can use as the content of Schedule P. In sum, or Schedule P may simply require obtaining and maintaining certification from a designated third party. The ~~the~~ content of Schedule P will likely vary significantly by industry and is beyond the scope of this Working Group.

The Working Group has developed a range of tools to support buyers' efforts to live up to their own commitments to protect human rights across the supply chain. Specifically, in addition the model contract clauses that serve to operationalize suppliers' obligations to protect workers' human rights, the Working Group has also prepared a Responsible Purchasing Code of Conduct (attached hereto as Schedule Q, the "Buyer Code") that buyers may be interested in adopting, either informally or formally, in some form. Buyers wishing to formalize their commitment to responsible purchasing or sourcing could include the Buyer Code (or some version of it) as a Schedule Q to their supply agreements. The model contract clauses below thus refer to two schedules, Schedule P containing the supplier's human rights obligations under the contract, and Schedule Q containing the buyer's human rights obligations under the contract. Again, the content of these schedules is ultimately for the parties to determine, the Working Group is simply offering some suggestions for what such schedules might contain. That said, the following clauses and the Buyer Code appended hereto are the product of an extensive consultation process involving feedback from U.S. companies, general counsels, legal advisors, industry associations, and civil society organizations. The clauses below and the Buyer Code thus reflect a broad range of views and inputs, which the Working Group has endeavored to synthesize into a workable and highly modular/adaptable contractual toolkit.

The following clauses have been drafted to be (generally) aligned with the UN Guiding Principles on Business and Human Rights (the "Guiding Principles"), which represent the international consensus on the human rights standards applicable to transnational corporations and other business enterprises.² Please refer to the footnotes throughout for references to specific provisions of the Guiding Principles operationalized through these clauses.

The text proposed assumes that buyers are located in the United States and that the applicable law is either the applicable state law where the buyer is located that implements the Uniform Commercial Code (the "U.C.C.")

Model Principles are the high level articulation of the detailed material in the Model Policies. The ABA Model Principles also form Part II of the Model Policies. Only the ABA Model Principles were adopted by the ABA House of Delegates, so only the ABA Model Principles represent the official position of the American Bar Association. For a detailed discussion, see E. Christopher Johnson, Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083 (2015). See also the Model Principles Task Force website: http://www.americanbar.org/groups/business_law/initiatives_awards/child_labor.html.

² The UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (accessible at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) were unanimously endorsed by the UN Human Rights Council in 2011 and reflect a strong consensus by states, businesses, and civil society on how to address business involvement in human rights abuse. The Guiding Principles are built upon three mutually supporting pillars: (i) the state duty to protect human rights; (ii) the corporate responsibility to respect human rights; and (iii) the need for greater access to remedy. The responsibility to respect human rights applies to all business enterprises, regardless of size, sector, location, and organizational structure and means not infringing on internationally recognized human rights both in a business's own operations and in its business relationships, including in its supply chain. The uptake of the Guiding Principles has been rapid and widespread, now embedded in global multistakeholder norms, global, national and regional governmental policy, mandatory human rights due diligence laws, reporting and disclosure laws and regulations, bilateral treaty arbitration decisions, the private law of contracts, the practices and policies of leading companies and business organizations, nonjudicial dispute resolution mechanisms, the skyrocketing growth in the use of Environmental, Social, and Governance (ESG) factors by investors, and the advocacy of civil society. The most recent and notable development in this area may be the April 29, 2020 announcement by the European Commissioner for Justice of the Commission's plan to legislate mandatory corporate environmental and human rights due diligence in the EU in line with the Guiding Principles. See Business & Human Rights Resource Center, *EU Commissioner for Justice commits to legislation on mandatory due diligence for companies*, (April 2020), available at <https://www.business-humanrights.org/en/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies>. Before this, France and the Netherlands had already enacted their own human rights due diligence legislation, and several E.U. states, and Switzerland, were independently in process of doing so.

1 ~~1.~~ ***Representations, Warranties, and Covenants on Abusive Labor Practices.*** Supplier represents and warrants to Buyer, on the date of this Agreement and throughout the contractual relationship between Supplier and ~~the~~ Buyer, that:

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[⁵Each shipment and delivery of Goods shall constitute a representation by Supplier and Representatives of compliance with Schedule P; such shipment or delivery shall be deemed to have the same effect as an express representation.] [Supplier's delivery documents shall include Supplier's certification of such compliance.]⁶²

- 1.2 ~~-Schedule P Compliance~~ *Throughout the Supply Chain.*¹⁰ Supplier [and its Representatives] shall make the performance of all of its Representatives subject to the terms and conditions in Schedule P ~~-and-~~ Supplier shall use all commercially reasonable efforts¹¹ to ensure that ~~Supplier,~~ its Representatives, and all of its and their respective Representatives acting⁷¹² in connection with this Agreement do so throughout the contractual relationship only on the basis of legally binding and enforceable written contracts that impose on and secure from the Representatives terms [in compliance with] [equivalent to those imposed by] [at least as protective as those imposed by] Schedule P. [To restate for clarity, each Supplier and each Representative shall require each of its Representatives' compliance with, and implementation of, ongoing monitoring tools in accordance with Section 1.3 so that such obligations are required at each step of the supply chain. Notwithstanding anything contained herein to the contrary, Supplier shall be responsible for the strict observance and performance by Supplier and its Representatives of the terms and conditions in Schedule P and shall be directly liable to Buyer for any violation by Supplier or its Representatives of Schedule P.]
- 1.3 *Supplier's Policies.*¹³ Supplier shall establish and maintain throughout the term of this Agreement its own policies and procedures to ensure compliance with Schedule P ("Supplier's Policies"); ~~which-~~ The Supplier's Policies shall include a reporting mechanism for ~~its~~ Representatives to report potential and actual violations of Supplier's Policies ~~-and/or Schedule P, applicable law, and/or~~

⁵ The content of Schedule P is beyond the scope of this document, but note that some suggest the best practice is to avoid reference to specific laws in favor of a general reference because legislative initiatives in some countries are broader than in others. In the event that the drafter nevertheless wishes to require that Supplier specifically represent compliance with anti-trafficking and similar legislation, consider avoiding the term "applicable," which will limit required adherence by companies that do not meet the size or revenue requirements of certain legislation. Prominent guidance can be found, for example, in U.S. anti-trafficking statutes; see, e.g., Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7114 (2018); see also 18 U.S.C. §§ 1589-1592 (2018) (criminal sanctions for forced labor, trafficking, and peonage); Trafficking Victims Protection Reauthorization Act of 2013 (TVPRA) (Title XII of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013)); as well as the U.N. Guiding Principles on Business and Human Rights (often called the Ruggie Principles); see John Ruggie (Special Representative of the Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, annex (Mar. 21, 2011), https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf. Note again however, that specific guidance with respect to law that might be desired by Buyer or Supplier to be included in Schedule P is beyond the scope of this document, and this note does not attempt to be exhaustive (omitting, for example, certain anti-trafficking legislation as well as conflict mineral issues and the EU rules on non-financial and diversity information).

⁶² The bracketed sentence may support Buyer's continuing reliance upon Supplier's monitoring and compliance. The actual express representation would arguably make reliance more reasonable, and such reliance may delay Buyer's discovery and could help explain periodic rather than constant or continual audits by Buyer. See also *infra* section 2.4 Section 3.4. Delivery documents could include commercial invoices, packing lists, beneficiary's certificates, or an additional document delivered with the goods or tendered through banking channels to obtain payment for the goods. See *infra* note 2544. If the bracketed language is included, the second clause of the preceding sentence should be deleted.

¹⁰ Principle 13 of the Guiding Principles requires that business enterprises avoid causing or contributing to adverse human rights impacts through their own activities (and address such impacts where they occur), and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationship, even if they have not contributed to those impacts. Accordingly, this clause seeks to embed obligations to comply with human rights through the entire supply chain.

¹¹ "Commercially reasonable efforts" is a flexible standard that has generally been understood as not requiring a party to take any action that would be commercially detrimental under the circumstances. It is a fact-based standard that is dependent on circumstances and industry norms. Since human rights obligations are not well-settled in business contracts, it is unlikely to, on its face, impose an obligation to conduct a heightened human rights due diligence inquiry. Reference to ongoing monitoring tools and human rights due diligence obligations under Section 1.3 provides guidance on what efforts are required of Supplier.

⁷¹² Supplier may again attempt to negotiate the use of the phrase "acting on the behalf of Supplier" here. Buyer, if possible, will want to avoid such language. See *supra* note 47. In negotiating this provision, Buyer should consider the relative negotiating strength of each party.

¹³ Principle 15 of the Guiding Principles requires business to put in place policies and processes for human rights compliance, including human rights due diligence and remediation of adverse human rights impacts, which are appropriate to their size and circumstances. Principles 16 through 19 of the Guiding Principles elaborate on these requirements and set out standards in terms of human rights policy commitments, human rights due diligence (including through meaningful consultation with stakeholders), communication of human rights impacts, and remediation.

Schedule P.¹⁴ The Supplier's Policies shall further include appropriate qualitative and quantitative compliance indicators and provide mechanisms for Supplier and its Representatives to receive feedback from both internal and external stakeholders regarding compliance.⁸ Within _____ days of (a) Supplier having reason to believe there is any potential or actual violation of Supplier's Policies and/or Schedule P, or (b) receipt of any oral or written notice of any potential or actual violation of Supplier's Policies and/or Schedule P, Supplier shall provide to Buyer a detailed summary of (i) the factual circumstances surrounding such violation, (ii) the specific provisions of the Supplier's Policies and/or Schedule P that are alleged to have been violated, and (iii) the investigation and remediation that has been conducted or that is planned.^{9,15}

~~1.4 Provision of Information. Upon request, Supplier shall deliver to Buyer such information and materials as Buyer reasonably requires with respect to the subject matter of Schedule P.~~

1.4 Buyer's Commitment to Support Supplier Compliance with Schedule P.¹⁶

- a. Buyer shall establish and maintain throughout the term of this Agreement policies and procedures to [ensure compliance with Schedule Q and] support Supplier's compliance with Schedule P by engaging in responsible purchasing practices, ("Buyer's Policies"). Buyer's Policies shall include a mechanism for receiving feedback on compliance from both internal and external stakeholders, including Supplier.
- b. If requested by Supplier, Buyer shall provide reasonable assistance¹⁷ to aid Supplier's efforts to comply with Schedule P [in accordance with Buyer's commitment to cooperate pursuant to Schedule Q and] in accordance with Good Industry Practice.¹⁸

¹⁴ As part of Buyer's human rights due diligence in choosing its Supplier, it should request copies of all anti-trafficking policies, as well as similar policies, and should determine, for example, how and when training is conducted and to whom it is given, how Supplier's policies are monitored, and how compliance is checked and certified. If Supplier does not have its own policies against forced and child labor and against other forms of abusive labor practices affecting worker health and safety, for example, or if Buyer prefers, Supplier can be required to adopt Buyer's policies.

⁸ ~~As part of Buyer's due diligence in choosing its Supplier, it should request copies of all anti-trafficking policies, as well as similar policies, and should determine, for example, how and when training is conducted and to whom it is given, how Supplier's policies are monitored, and how compliance is checked and certified. If Supplier does not have its own policies against forced and child labor, including worker health and safety, for example, or if Buyer prefers, Supplier can be required to adopt Buyer's policies.~~

^{9,15} All of the covenants set forth above are prospective. Counsel to Buyer may consider requiring Supplier to state that it has no history of using forced labor or underage workers, subjecting workers to hazardous conditions or other similar conduct, and has never been the subject of investigations or proceedings relating to such conduct. In some industries and for some companies, such historical assurances cannot be made or expected, even though the companies are currently compliant and may have been compliant for a number of years.

¹⁶ See supra note 13 on Guiding Principles 15-19. As part of Buyer's human rights due diligence in choosing its Supplier, it should request copies of all human rights policies, and should determine, for example, how and when training is conducted and to whom it is given, how Supplier's policies are monitored, and how compliance is checked and certified. If Supplier does not have its own policies against forced and child labor and against other forms of abusive labor practices affecting worker health and safety, for example, or if Buyer prefers, Supplier can be required to adopt Buyer's policies. Furthermore, in accordance with Principle 17 of the Guiding Principles, Buyer must undertake human rights due diligence. Human rights due diligence "can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders." (Guiding Principles, commentary to Principle 17, p. 18)

¹⁷ As market standards are unlikely to provide adequate measures for what constitutes "reasonable assistance," Buyer's obligations to support Supplier's compliance should be reflective of Buyer's commitments, as articulated in Schedule Q. Assistance could be financial, in kind (e.g. equipment, technological), or technical (training and capacity building).

¹⁸ "Good Industry Practice" is defined as the exercise of that degree of skill and care which would reasonably and ordinarily be expected from a skilled and experienced person [acting in good faith and] carrying out the same type of activity under the same or equivalent circumstances [[in a similar location] and acting generally in accordance with [all applicable laws]].

1.5 *Provision of Information.*¹⁹ Supplier and Buyer shall have and keep records of the information and materials necessary to demonstrate compliance with the obligations contained in this Agreement and shall deliver such information and materials to the other party, as reasonably requested.²⁰

1.6 *Placing and Changing Orders.*

- a. Each order submitted by Buyer to Supplier shall constitute a representation by Buyer that [, to the best of Buyer's knowledge after conducting reasonable diligence,²¹ it has taken Supplier's production and financial capacity into account in formulating the terms of the order [with regard to price, quantity, and the timeline for delivery][, in accordance with Schedule Q.]
- b. In the event that Buyer requires, in whole or in part, performance by Supplier that is beyond the scope of Supplier's obligations under [this Agreement] [an original order], Buyer shall clearly state in its order that such additional or different work is subject to the mutual agreement of Buyer and Supplier, [and that such work shall be performed pursuant to a [change order] [amendment to the Agreement,] [in accordance with Schedule Q.]
- c. [In accordance with Schedule Q,] If changes to an order (including but not limited to quantity increase, decrease, or change to design specifications) are necessary, Buyer will engage in dialogue with Supplier and strive to ensure that Supplier can adjust to the new requirements without running afoul of Schedule P. If Supplier cannot deliver in compliance with Schedule P as a result of a requirement change, the parties will strive to identify new modifications that will enable such compliance.
- d. If it becomes necessary for Supplier to engage subcontractors in order to comply with the changed requirements, Buyer shall not unreasonably withhold or delay its consent or approval in relation to such subcontracting.

1.7 *Living Wage.* Supplier shall comply with all applicable [employment law/labor law], including any minimum wage [and international treaty] requirements. Buyer and Supplier shall cooperate in good faith to determine what would constitute a living wage for Supplier's employees and endeavor to agree to a contract price that allows Supplier to pay its employees such a living wage.²²

1.8 *Operational-Level Grievance Mechanism.*²³ Supplier warrants that an adequately funded and governed non-judicial Operational Level Grievance Mechanism ("OLGM") is in place during the

¹⁹ Principle 20 of the Guiding Principles mandates that business track the effectiveness of their response to adverse human rights impacts through feedback from both internal and external sources, including affected stakeholders.

²⁰ Principle 21 of the Guiding Principles requires businesses to communicate externally, particularly where concerns are raised by affected stakeholders, and sets out standards for the form, frequency, adequacy and confidentiality of such human rights reporting. Additionally, such human rights due diligence is in line with the UK's Modern Slavery Act of 2015 ("MSA"), which contains a requirement in Section 54 that commercial organizations report on whether or not they have policies in place to combat human rights violations within their supply chains.

²¹ "Best knowledge" is defined as imputing knowledge onto Buyer of human rights violations in the event that Buyer fails to investigate or inquire into Supplier's businesses and dealings.

²² There are many formulas for determining a living wage, and such assessments. Given the difficulty of determining what that wage might be at the outset, these clauses seek to place the obligation on both Buyer and Supplier to work together to make the relevant assessments.

²³ Guiding Principle 29 provides that all businesses must have in place an OLGM to resolve human rights disputes early and directly, through engagement and dialogue with stakeholders. It is part of the businesses' ongoing human rights due diligence responsibility. Guiding Principle 22 expects that a business should cooperate with or participate in legitimate remedial processes when they recognize that they have caused or contributed to an adverse impact. Legitimate processes can include state judicial and nonjudicial dispute resolution mechanisms, as well as non-state nonjudicial mechanisms. Under Guiding Principle 31, all nonjudicial dispute resolution mechanisms, state and non-state, should meet seven effectiveness criteria: (1) legitimacy, (2) accessibility, (3) predictability, (4) equitability, (5) transparency, (6) rights-compatibility, and (7) a source of continuous learning. An OLGM is a non-state dispute

Agreement term, in order to effectively address, prevent, and remedy any human rights harm that may occur in connection with the Agreement through a process of engagement and dialogue designed to reflect the perspectives of stakeholders. Supplier further warrants that the OLG is legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue. Supplier warrants that it has open channels of communication with individuals or groups of stakeholders likely to be impacted by potential or actual human rights violations so that the latter may easily report the occurrence or likelihood of human rights harms without fear of retaliation.

2 Remediating Human Rights Harms Linked to Contractual Activity

- 2.1 Joint Remediation.** In the event that a Schedule P [or a Schedule Q] breach results in, or is likely to result in, a severe human rights harm,²⁴ Buyer and Supplier shall develop a joint remediation plan (a “Joint Remediation Plan”),²⁵ which shall include benchmarks and milestones for achieving remedy for victims, including judicial and nonjudicial dispute resolution mechanisms, as appropriate. In developing and implementing the Joint Remediation Plan, the Parties shall endeavor to engage with applicable stakeholders, such as other buyers, suppliers, workers, and affected communities. The Parties shall jointly implement and secure funding for the Joint Remediation Plan, in order to ensure that victims can address their grievances effectively and swiftly, and that additional or re-occurring harm is prevented.²⁶
- 2.2 Right to Cure.**²⁷ In the event of a breach by Supplier of its obligations under Schedule P, Buyer shall give notice of default to Supplier, which will trigger a [commercially reasonable] cure period [as set forth under this Agreement] [as agreed by the mutual written agreement of the parties (each acting in good faith and in a commercially reasonable manner)]. A breach will be considered “cured” when it has met the benchmarks set out in the Joint Remediation Plan in accordance with Section 2.1. If the breach is not cured within the designated period, Buyer may exercise any of its remedies under the Agreement or under applicable law.
- 2.3 Right to Terminate Following Failed Remediation.** In the event that remediation is unsuccessful or that Supplier proves unable or unwilling to meet the benchmarks or milestones set forth in the Joint Remediation Plan, Buyer will have the right to exercise the rejection and termination rights set forth in this Section and in those that follow.
- 2.4 Right to Immediate Termination.** Notwithstanding anything to the contrary herein, the Agreement may be terminated by Buyer without providing a cure period if Supplier has engaged in fraudulent or corrupt practices.

resolution mechanism whose key feature is engagement and dialogue with stakeholders. Stakeholders should participate in the design of the OLG, in order to take their views in account. An OLG should also meet criterion (8)—engagement and dialogue with stakeholders.

²⁴ Under Guiding Principle 24, businesses are entitled to prioritize focusing their attention on the most severe human rights harm or harms a delayed response to which would make them irremediable. A “severe harm” is characterized by the gravity of its impact, the number of people that are or will be affected, the ability to make people whole, or any combination of these factors.

²⁵ Any Joint Remediation Plan will be mutually agreed between Buyer and Seller to address specific harms caused and challenges related to their specific circumstances.

²⁶ Under the Guiding Principles, businesses are responsible for providing remedy where they caused human rights harm directly through their own operations, and where they contributed to human rights harm caused by others. Remediation is both backwards looking and forward looking. It is backwards looking because it attempts to make people whole for the harm they have suffered. It is forward looking because it seeks to prevent future recurrence of the harm. There are many different forms of remedy, including “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.” (Guiding Principles, commentary to Principle 25).

²⁷ A right to cure is essential to the ability of Supplier to avoid the harmful human rights impacts on workers and others that may result from the termination by Buyer of the Agreement, as discussed in Section 2.5.

2.5 Considerations in Respect of Any Termination. In any termination of the Agreement, whether due to a failure to comply with Schedule P or otherwise (including the occurrence of a Force Majeure event), Buyer shall give due regard to the potential human rights impacts of such termination and exit the Agreement responsibly, with an eye toward mitigating and avoiding any negative impacts, damage, or hardship that such termination may generate.

3 ~~2.1~~ **Rejection of Goods and [Cancellation] [Avoidance] of Agreement.**

3.1 ~~2.1~~ **[Strict Compliance.** It is a material term of this Agreement that Supplier and Representatives shall strictly comply with Schedule P.]

3.2 ~~2.2~~ **Rejection.** In the event of an uncured breach of Schedule P, Buyer shall have the right to reject any Goods produced by or associated with Supplier or Representative that Buyer has reason to believe has violated Schedule P, regardless of whether the rejected Goods were themselves produced in violation of Schedule P, and regardless of whether such Goods were produced under this or other contracts.⁺²⁸

3.3 ~~2.3~~ **[Cancellation.] [Avoidance.]** ~~Noncompliance with~~ An uncured breach of Schedule P [substantially impairs the value of the Goods and this Agreement to Buyer]⁺²⁹ [is a fundamental breach of the entire Agreement]⁺³⁰ and Buyer may immediately [cancel] [avoid]⁺³¹ this entire Agreement with immediate effect and without penalty and/or may exercise its right to indemnification and all other remedies.³² Buyer shall have no liability to Supplier for such [cancellation] [avoidance].]

3.4 ~~2.4~~ **Timely Notice.** Notwithstanding any provision of this Agreement or applicable law (including without limitation [the Inspection Period in Section ____ of this Agreement and] [Articles 38 to 40 of the CISG] [and U.C.C. §§ 2-607 and 2-608]),⁺³³ Buyer's rejection of any Goods⁺³⁴ as a result of noncompliance with Schedule P shall be deemed timely if Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.

⁺²⁸ See U.C.C. §§ 2-601, 2-602 (2011).

⁺²⁹ Because installment contracts under Article 2 of the U.C.C. do not enjoy the "perfect tender" rule applicable to a single-delivery contract, such installment contracts should include the phrase within the first bracket. The additional phrase within the first bracket "and this Agreement" should be included if Buyer wishes not only to reject goods based on noncompliance with Schedule P but also wishes to terminate the installment contract in its entirety in light of, for example, Buyer's internal policy, the possible damage to Buyer's reputation, or justifiable fear of a repeated breach by Supplier.

⁺³⁰ The phrase within the second bracket is applicable for agreements to which the CISG applies, whether for a single delivery or an installment contract, under article 49.

⁺³¹ "Cancellation" occurs when a "party puts an end to the contract for breach by the other" under U.C.C. section 2-106(4). "Avoidance" is the appropriate term under CISG article 49.

³² This ~~section~~ Section expressly provides for cancellation as a remedy in the event of Supplier's failure to comply with a human rights policy adopted as part of a supply contract. Ultimately, without a contract clause expressly permitting cancellation for human rights policy breaches, Buyer may have a difficult time assembling compelling evidence that the value of the goods was fatally and "substantially impaired" due to the violation of the policy. The value of a particular good supplied in violation of a human rights policy might not necessarily change in the marketplace due to the troubled and tainted background of manufacture.

⁺³³ Articles 38 to 40 of the CISG require that Buyer examine the goods or cause them to be examined within as short a period as is practicable. Buyer loses the right to rely on a lack of conformity of the goods if it does not give Supplier notice within a reasonable time after Buyer discovers or ought to have discovered a defect and, at the latest, within two years of the date of delivery (or other contractual period) unless Supplier knew or could not have been unaware of the defect. Because U.C.C. section 2-607(3)(a) provides a similar argument that Buyer's failure to notify Supplier of a breach within a reasonable time bars any remedy, it is suggested that the contractual text be included to limit disputes about what constitutes a reasonable time. If the U.C.C. is referenced in the text, the applicable state version should be cited.

⁺³⁴ "Nonconforming Goods" and "Inspection Period" are assumed to be defined earlier in the Agreement (and not defined in Schedule P). The definitional portion of the Agreement must include as "Non-conforming Goods" any goods received by Buyer that Buyer has reasonable grounds to believe (i) include any materials in fabrication, assembly, packaging, or shipment, directly or indirectly, that do not comply with Schedule P; or (ii) originate from or are associated with a Supplier or Representative that [may have] [is reputed to have] [has] violated human rights protections similar to Schedule P.

~~2.5 — No Right to Cure. Supplier hereby acknowledges that it shall have no right to cure by substitution and tender of Goods created and/or delivered without violation of Schedule P if Buyer elects to refuse such tender, in Buyer's sole discretion.¹⁷~~

4 ~~3~~ **Revocation of Acceptance.**¹⁸³⁵

4.1 ~~3.1~~ **Notice of Buyer's Discovery.** Buyer may revoke its acceptance, in whole or in part, upon notice sent [in accordance with Section ____] to Supplier of Buyer's discovery of Supplier's [uncured breach of] ~~[noncompliance with]~~ Schedule P, which the parties have agreed in Section ~~2—3~~ above is a nonconformity that substantially impairs the value of the Goods and this Agreement to Buyer.

4.2 ~~3.2~~ **Same Rights and Duties as Rejection.** [Upon revocation of acceptance, Buyer shall have the same rights and duties as if it had rejected the Goods before acceptance.]

4.3 ~~3.3~~ **Timeliness.** Notwithstanding any provision of this Agreement or applicable law (including without limitation [the Inspection Period in Section ____ of this Agreement and] U.C.C. § 2-608), Buyer's revocation of acceptance of any Goods as a result of noncompliance with Schedule P shall be deemed timely if Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.]

5 ~~4~~ **Nonvariation of Matters Related to Schedule P.**

5.1 ~~4.1~~ **Course of Performance, Established Practices, and Customs.** Course of performance and course of dealing (including, without limitation, any failure by Buyer to effectively exercise any audit rights)¹⁹³⁶ shall *not* be construed as a waiver and shall *not* be a factor in Buyer's right to reject Goods, [cancel] [avoid]²⁰³⁷ this Agreement, or exercise any other remedy. Supplier acknowledges that with respect to the matters in Schedule P, any reliance by Supplier on course of performance, course of dealing, or similar conduct would be unreasonable. Supplier acknowledges the fundamental importance to Buyer of the matters in Schedule P and understands that no usage or practice established between the parties should be understood otherwise, and any apparent conduct or statement to the contrary should not be relied upon.²¹³⁸ The parties agree that no usage of trade, industry custom, or similar usage shall apply to this Agreement to the extent such custom or usage would lessen the protections provided or the obligations imposed by Schedule P. No person except [Title/Officer] has authority on behalf of Buyer to vary Schedule P or any provisions

¹⁷—This clause negates Supplier's right to cure under U.C.C. section 2-508 and CISG articles 37 and 48. In cases of mere technical or recordkeeping violations, Buyer may elect to accept the tender of a cure. In other cases, Buyer may not want to do business with a Supplier that violates Schedule P. Under the provision as drafted, Buyer retains discretion here. Many parties, however, may prefer to provide a right to cure; experience suggests that many violations may consist of recordkeeping problems or other clerical shortcomings. Even in cases of substantive violations of health and safety standards, for example, the parties may prefer to institute a program to alleviate the problems (e.g., by providing for appropriate working conditions) rather than to end the Agreement and throw the employees out of work. For these reasons, a "notice and cure" clause may be preferable to the elimination of any cure right for Supplier. In such a situation, this section should add, "Except as provided in Section ____," at the beginning. Another section can then provide for Buyer to give notice of default to Supplier. That default notice would trigger a cure period, either set by this Agreement or by the notice (as the parties prefer), and if cure is not effected within that period, then Supplier would be in breach, which would then trigger the remedies provided in the Agreement. In this way, a Supplier who does not comply with Schedule P is in default but is given a chance to fix the problem. A Supplier who implements a successful fix thus avoids breach, and Buyer will have no right to a remedy (but perhaps no need for one either). A notice-and-cure mechanism may make the Agreement more palatable to Supplier, although Buyer may prefer the stronger rights provided in the text as drafted, or Buyer may need them under the FAR. See 48 C.F.R. § 22.1703(e) (2018) (requiring contractor certification (within threshold limits) that it will "monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities" (emphasis added)). The text as drafted avoids the problem of disputes about whether a cure is successful. Further, nothing in the text as drafted prevents Buyer from forbearing to exercise its remedies and giving Supplier a period to cure if Buyer thinks a cure would be appropriate. The provision on Notice of Breach appears in section 5.1. Any forbearance should include an appropriate notice of reservation of rights.

³⁵ The clauses on revocation of acceptance are designed primarily for use in contracts governed by the U.C.C. and are drafted with U.C.C. section 2-608 in mind. They should be omitted in ~~eon-tracts~~ contracts governed by the CISG. For this reason, ~~section 3—Section 4~~ is bracketed.

³⁶ What audit rights Buyer has, if any, are beyond the scope of this document and should be set forth in Schedule P.

³⁷ "Cancel" for agreements under the U.C.C., "avoid" for the CISG. See *supra* note ~~13~~ 33.

³⁸ The first phrase uses the terminology of U.C.C. section 1-303 and the second phrase uses the terminology of CISG article 9(1).

relating to it, and any such variation must be in a signed writing or an authenticated electronic communication.

5.2 ~~4.2~~ *No Waiver of Remedy.* Buyer's acceptance of any Goods in whole or in part will not be deemed a waiver of any right or remedy²²³⁹ nor will it otherwise limit Supplier's obligations, including, without limitation, those obligations with respect to warranty and indemnification.

6 ~~5.~~ *Remedies.*

6.1 ~~5.1~~ *Notice of Breach.* If Buyer has reason to believe, at any time, that Supplier or a Representative is not in compliance with Schedule P, Buyer shall notify Supplier [in accordance with Section ____]. [Buyer's notice requesting remediation as well as Buyer's notices of breach or rejection [or revocation]²³⁴⁰ may be given orally or in writing.] A notice to remediate noncompliance with Schedule P also constitutes notice of breach of this Agreement.⁴¹

6.2 ~~5.2~~ *Investigation and Suspension of Payment.* [Except as provided in Section 2.2,] [Buyer has the right to suspend all payments to Supplier, whether due under this Agreement or other agreements, if Buyer deems, in its sole discretion, that investigation of possible noncompliance with Schedule P is advisable. Such suspension of payments will continue during investigation. Supplier shall fully cooperate with investigation by Buyer or Buyer's agents. Without limitation, such cooperation shall include, at Buyer's request, working with governmental authorities to enable Buyer or its agents to enter the country, to be issued appropriate visas, and to investigate fully.²⁵⁴²]

²²³⁹ U.C.C. § 2-601 (2011).

²³⁴⁰ Again, revocation language should be used in U.C.C. but not CISG contracts.

⁴¹ This ~~section~~ Section addresses notice requirements under Article 2 of the U.C.C. For instance, section 2-607(3)(a) requires notice of a breach within a reasonable time after constructive discovery of the breach. A buyer who fails to give such notice will find its claims barred, with many courts holding that pre-suit notice is required.

²⁵ Some supply contracts will call for payment by letter of credit, which will complicate the right to suspend payment. When a documentary credit is involved, the supply contract and letter of credit should require presentation of a certificate of compliance with Schedule P. Ideally the certificate would be issued by a third party that has audited the Supplier or Representatives, but a beneficiary's certificate may also be helpful if a third-party certificate is impractical. Under U.S. law, a false beneficiary's certificate could allow an injunction against payment on grounds of "material fraud by the beneficiary on the issuer or applicant." See U.C.C. § 5-109(b) (2011). Purposeful falsity of the certificate might perhaps be helpful even if suit must be in London or in a jurisdiction following English law, which requires fraud on the documents. The leading case from the House of Lords is *United City Merchants (Invs.) Ltd. v. Royal Bank of Canada*, [1983] A.C. 168, 183 (referring to "documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue"); see also *Inflatable Toy Co. Pty Ltd v. State Bank of New South Wales Ltd*, [1994] 34 NSWLR 243 (applying Australian law). If the violation of Schedule P constitutes an illegal act, the illegality theory may also be useful in a suit governed by English law. In any case, the certificate should be required to be dated within a reasonably short time of the draw. Many banks probably will not object to the requirement of an additional certificate as certificates (e.g., by SGS) are commonplace in such transactions, and environmental certificates are similar to (and in some cases may be the same as) a certificate of compliance with Schedule P. While some banks may resist the requirement of such a certificate because of fear of injunction actions and the concomitant extension of the credit risk if the injunction is ultimately denied, most banks seem unlikely to be concerned by the requirement of one more certificate, and any additional credit risk from an injunction may be mitigated by a bond or other credit support as contemplated by U.C.C. section 5-109(b)(2) and comment 7, or by the civil procedure laws or rules of certain jurisdictions or by collateralization or bonding provisions in the reimbursement agreement. Still, despite all of these efforts, suspension of payment may be impossible in cross-border documentary credit transactions because frequently a foreign bank will have honored before the injunction can issue. Once one bank honors in good faith, the commitments along the chain all become firm and cannot be enjoined. See U.C.C. § 5-109 (2011).

⁴² Some supply contracts will call for payment by letter of credit, which will complicate the right to suspend payment. When a documentary credit is involved, the supply contract and letter of credit should require presentation of a certificate of compliance with Schedule P. Ideally the certificate would be issued by a third party that has audited Supplier or Representatives, but a beneficiary's certificate may also be helpful if a third-party certificate is impractical. Under U.S. law, a false beneficiary's certificate could allow an injunction against payment on grounds of "material fraud by the beneficiary on the issuer or applicant." See U.C.C. § 5-109(b) (2011). Purposeful falsity of the certificate might perhaps be helpful even if suit must be in London or in a jurisdiction following English law, which requires fraud on the documents. The leading case from the House of Lords is *United City Merchants (Invs.) Ltd. v. Royal Bank of Canada*, [1983] A.C. 168, 183 (referring to "documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue"); see also *Inflatable Toy Co. Pty Ltd v. State Bank of New South Wales Ltd*, [1994] 34 NSWLR 243 (applying Australian law). If the violation of Schedule P constitutes an illegal act, the illegality theory may also be useful in a suit governed by English law. In any case, the certificate should be required to be dated within a reasonably short time of the draw. Many banks probably will not object to the requirement of an additional certificate as certificates (e.g., by SGS) are commonplace in such transactions, and environmental certificates are similar to (and in some cases may be the same as) a certificate of compliance with Schedule P. While some banks may resist the requirement of such a certificate because of fear of injunction actions and the concomitant extension of the credit risk if the injunction is ultimately denied, most banks seem unlikely to be concerned by the requirement of one more certificate, and any additional credit risk from an injunction may be mitigated by a bond or other credit support as contemplated by U.C.C. section 5-109(b)(2) and comment 7, or by the civil procedure laws or rules of certain jurisdictions or by collateralization or bonding provisions in the reimbursement agreement. Still, despite all of these efforts, suspension of payment may be impossible in cross-border documentary credit transactions because frequently a foreign bank will have honored before the injunction can issue. Once one bank honors in good faith, the commitments along the chain all become firm and cannot be enjoined. See U.C.C. § 5-109 (2011).

6.3 ~~5.3~~ *Exercise of Remedies.* Remedies shall be cumulative. Remedies shall not be exclusive of, and shall be without prejudice to, any other remedies provided at law or in equity. Buyer's exercise of remedies and the timing thereof shall not be construed in any circumstance as constituting a waiver of its rights under this Agreement. In addition to the right to [cancel] [avoid] this Agreement, in whole or in part, and any other remedies available to Buyer, in the event that Supplier or a Representative fails to comply with Schedule P, Buyer may:

- a. deem itself insecure and demand adequate assurance from Supplier of due performance in conformance with Schedule P;
- b. obtain an injunction with respect to Supplier's noncompliance with Schedule P, and the parties agree that noncompliance with Schedule P causes Buyer great and irreparable harm for which Buyer has no adequate remedy at law and that the public interest would be served by injunctive and other equitable relief;
- c. require Supplier to remove an employee or employees and/or other Representatives;
- d. require Supplier to terminate a subcontract;
- e. suspend payments, whether under this Agreement or other agreements, until Buyer determines, in Buyer's sole discretion, that Supplier has taken appropriate remedial action;
- f. decline to exercise available options under this Agreement; and
- g. obtain damages.⁴³

6.4 ~~5.4~~ *Damages.* ~~[Supplier acknowledges that Buyer and Supplier acknowledge that [neither Buyer nor Supplier should benefit from a Schedule P or a Schedule Q violation, and that remediation is central to any strategy for addressing such violation(s)] [and that] [it may be difficult for Buyer to fix actual damages or injury to its business, prospects and reputation with respect to Goods produced in violation of Schedule P or associated with a company that has violated Schedule P, and the parties have therefore agreed to liquidated damages in an amount calculated as follows:_____~~
 _____] [In the event Supplier or its Representative fails to comply with Schedule P, Buyer shall be entitled to all general ~~and consequential~~ damages [together with the liquidated damages set forth above],²⁷⁴⁴ including but not limited to losses arising from:

- a. procurement of replacement Goods;
- b. non-delivery of Goods;

⁴³ This ~~section~~ Section reflects the remedies provided in the FAR § 52.222.50 relative to combating trafficking in persons. Additionally, the clause adds an insecurity provision under U.C.C. section 2-609. The clause also clarifies that injunctive relief may be necessary. In addition, while Buyer may want to work with a Supplier toward full compliance, Buyer should be prepared to face waiver arguments. The timing of the exercise of remedies is sensitive and the exercise of remedies and any requests for damages may themselves have impacts on human rights. Therefore, this provision expressly recognizes that such careful consideration of the exercise of remedies by Buyer does not constitute a waiver of any rights. Further, with respect to removal of employees (~~section 5.3.e~~ Section 6.3.c.), *see infra* note ~~35~~ 53. Note also that the remedies provisions here (including ~~sections 5.2~~ Sections 6.2 and ~~5.3.e~~ 6.3.c. on suspension of payments) do not mention setoff, *see* 11 U.S.C. §§ 506(a)(1), 553 (2018) (setoff is a secured claim in bankruptcy), recoupment, clawback, or similar remedies; if those remedies are not already provided in the main agreement, counsel may wish to consider making such rights explicit in this clause.

⁴⁴ While Buyer in some industries may prefer to adopt a liquidated damages clause, U.C.C. section 2-718 generally prohibits penalties, including providing that "unreasonably large liquidated damages [are] void as a penalty." The ultimate enforceability of these provisions will turn on whether the exercise of the remedy in the contractual clause was reasonable. Particular care should be exercised if Buyer includes the bracketed language that allows liquidated damages in addition to other damages.

- c. diminished sales of Goods arising not only from the Goods to have been sold under this Agreement, but to include other diminished sales caused by noncompliance with Schedule P; and
- d. [harm to reputation²⁸⁴⁵].⁴⁶

6.5 ~~5.5~~ *Return, Destruction or Donation³⁰⁴⁷ of Goods; Nonacceptance of Goods.*

- a. Buyer may, in its sole discretion, store the rejected Goods for Supplier's account, reship them back to Supplier or, if permitted under applicable law, destroy or donate the Goods, all at Supplier's sole cost and expense.
- b. Buyer is under no duty to resell any Goods produced by or associated with a Supplier or Representative who Buyer has reasonable grounds to believe has not complied with Schedule P, whether or not such noncompliance was involved in the production of the Goods. In an effort to reduce its possible damages and not as a penalty, Buyer is entitled to discard, destroy or donate to a charitable entity any such Goods. Notwithstanding anything contained herein to the contrary or instructions otherwise provided by Supplier, destruction or donation of Goods rejected [or as to which acceptance was revoked],⁴⁸ and any conduct by Buyer required by law that would otherwise constitute acceptance, shall *not* be deemed acceptance and will *not* trigger a duty to pay for such Goods.⁴⁹

6.6 *Indemnification.*

- a. ~~5.6~~ *Indemnification.*—Supplier shall indemnify, defend and hold harmless Buyer and its officers, directors, employees, agents, affiliates, successors and assigns (collectively, "Indemnified Party") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, penalties, fines, costs or expenses of whatever kind, including, without limitation, the cost of storage, return, or destruction of Goods, the difference in cost between Buyer's purchase of Supplier's Goods and replacement Goods, reasonable attorneys' fees, audit fees, and the costs of enforcing any right under this Agreement or applicable law, in each case, that arise out of the violation of Schedule P by Supplier or any of its Representatives. This Section shall apply, without limitation, regardless

²⁸⁴⁵ If no liquidated damages are included above for harm to reputation.

⁴⁶ Section 6.4 addresses monetary remedies, including consequential and special damages, recoverable in the event of a breach by Supplier. While measures such as diminished sales and harm to reputation are specifically included, Buyer may face challenges with respect to proving damages. This is common in claims for breach of contract, but Buyer may have special challenges with respect to the impact on its brand that results from violations of human rights policies. It is not clear that suppliers will agree to the inclusion of Buyer's lost profits, real or imagined, as damages. Nor is it clear, however, that Supplier will have strong views on damages; Supplier may be judgment proof—for lack of assets or for procedural reasons—and damages may not be a realistic remedy in any case. The suggested text is presented as a starting place for discussions with respect to damages. An agreed liquidation amount may be an acceptable compromise.

³⁰⁴⁷ Donation of goods manufactured or otherwise delivered with the use of forced labor may not be permitted by the U.S.

Customs and Border Protection, Cargo Security, Carriers and Restricted Merchandise Branch, Office of Trade. Buyer's only option as an importer may be to return or export the goods. Other countries may have similar restrictions on the possession and ownership of merchandise mined, produced, or manufactured in any part with the use of a prohibited class of labor and such laws, which are beyond the scope of this document, must be examined before donations are made.

⁴⁸ See *supra* note ~~18~~37.

⁴⁹ This ~~section~~ *Section* is drafted to address concerns that might be raised with respect to the U.C.C. section 1-305 mandate to place the aggrieved party in the position of its expectation, without award of consequential or penal damages unless specifically allowed, particularly with respect to minimizing damages. See also U.C.C. § 2-715 (2011) (consequential damages cannot be recovered if they could have been prevented). With an understanding that mitigation applies and may be non-waivable, particularly with respect to claims of consequential damages, an attempt by Buyer to avoid mitigation might be seen as a lack of good faith. Nevertheless, reselling the goods that are produced in violation of a human rights policy may be understood as increasing Buyer's damages, rather than reducing them. Accordingly, Buyer should be entitled to discard, destroy, or donate to a charity any goods produced in violation of a human rights policy as an attempt toward mitigation, rather than against it.

of whether claimants are contractual counterparties, investors, or any other person, entity, or governmental unit whatsoever.

- b. Notwithstanding 6.6(a), Supplier shall not be required to indemnify Buyer if Buyer [breached Schedule Q and/or] in any way contributed to Supplier's breach of Schedule P.

6.7 ~~5.7~~ *Disclaimer Clauses.* Notwithstanding anything contained herein:

- a. Except as provided in Section 1.4, Buyer does not assume a duty to monitor Supplier or its Representatives, including, without limitation, for compliance with laws or standards regarding working conditions, pay, hours, discrimination, forced labor, child labor, or the like;⁵⁰
- b. Except as provided in Section 1.4, Buyer does not assume a duty to monitor or inspect the safety of any workplace of Supplier or its Representatives nor to monitor any labor practices of Supplier or its Representatives;³⁴
- c. Buyer does not have the authority and disclaims any obligation to control (i) the manner and method of work done by ~~Supplier or its~~ Representatives, (ii) implementation of safety measures by ~~Supplier or its~~ Representatives, or (iii) employment or engagement of employees and contractors or subcontractors by ~~Supplier or its~~ Representatives;⁵¹
- d. [There are no third-party beneficiaries to this Agreement;-] and
- e. Buyer assumes no duty to disclose the results of any audit, questionnaire, or information gained pursuant to this Agreement other than as required by applicable law.³⁶⁵²

⁵⁰ This disclaimer ~~conflicts~~ is consistent with the requirements of the FAR, 48 C.F.R. §§ 52.222–56, 22.1703(c) (2018) (requiring contractor certification (within threshold limits) that it will “monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities”).

³⁴ ~~Again, note the conflict with the FAR. See 48 C.F.R. §§ 52.222–56, 22.1703(c) (2018).~~

⁵¹ Note *supra* section ~~5.3-e~~ 6.3.c. This disclaimer is included to help negate claims of undertaking liability or liability under the peculiar risk doctrine. See *Rahaman v. J.C. Penney Corp.*, No. N15C-07-174MMJ, 2016 WL 2616375, at *9 (Del. Super. Ct. May 4, 2016). This disclaimer could conflict with the ~~section~~ Section noted above, however, and counsel should consider whether it is better to have the power to require that its suppliers fire employees or other representatives or whether the disclaimer as to this factor (which relates to whether a supplier is an independent contractor) is more important. See also *supra* ~~section~~ Section 5.3.b.

³⁶⁵² This provision emphasizes that Buyer is assuming no contractual duties to disclose although Buyer may have duties to disclose under other standards (legal or non-legal). For example, Buyer must determine if it provided false or misleading information to Customs and Border Protection and other officials in the event that goods are initially accepted and removed from the dock but are later determined to be tainted by forced labor. If the original information is false, a duty to amend may arise. See, e.g., 18 U.S.C. § 541 (2018); 19 C.F.R. § 12.42(b) (2018). As another example, under the FAR, contractors and subcontractors must disclose to the government contracting officer and agency inspector general “information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct.” 48 C.F.R. § 22.1703(d). Cf. Guiding Principle 21 on human rights reporting obligations on businesses.

II. SCHEDULE Q (THE BUYER CODE)

TO THE CONSULTATION GROUP: **PLEASE NOTE THIS IS A** **WORKING DRAFT**

Responsible Purchasing Code of Conduct

1 Institutional commitments.

- 1.1 We recognize that the human rights due diligence responsibilities enshrined in the Guiding Principles and the OECD Guidelines for Multinational Enterprises represent a normative floor, not a ceiling. We recognize that, depending on how we choose to engage in procurement, our practices can either improve human rights and the quality of life of our suppliers and their workers, or exacerbate and compound adverse human rights impacts for those same people.
- 1.2 We will train and incentivize our procurement team to evaluate both price and ethical criteria in selecting which suppliers to contract with and to understand the direct links between our procurement practices and the labor conditions in our supply chains.
- 1.3 We will seek at all times to foster a culture of cooperation and partnership with our suppliers in order to achieve or exceed our human rights standards.
- 1.4 We commit to treating our suppliers with the same respect and ethical care that we treat our own employees.
- 1.5 We will act in good faith and treat suppliers with respect and consideration in all our dealings and communications, throughout our relationship with them. We will foster a culture of cooperation and partnership with our suppliers in order to improve the human rights performance of our supply chain.
- 1.6 In order to maximize the effectiveness of our human rights policies, we will ensure that our arrangements with suppliers are captured in a written contract.

2 Selecting suppliers.

- 2.1 We will select suppliers that have the financial and managerial capacity to meet their commercial and human rights obligations under the contract.
- 2.2 We will engage in dialogue with suppliers to ensure that they fully understand what is expected of them with respect to their human rights obligations under the contract.

3 Negotiating the contract.

- 3.1 We will ensure that our supply contracts are negotiated and performed with both human rights and financial objectives in mind.
- 3.2 We will require our suppliers to comply with all local minimum wage laws and to aspire to pay their employees a living wage,⁵³ even when this may not be required by law. We will ask and give

⁵³ There is no international standard for defining a living wage. One methodology agreed upon by the members of the Founding Global Living Wage Coalition takes into consideration costs of living which consists of food, housing, and other essential needs. As the calculation of costs are dependent on local circumstances, stakeholders should be involved in the process of determining such costs.

suppliers an opportunity to tell us whether the contract price that we offer will facilitate or compromise their ability to meet this requirement.

- 3.3 We will avoid offering contracts on a take it or leave it basis and give suppliers an opportunity to negotiate in good faith, without treating their response as an automatic rejection of our offer.
- 3.4 We will give suppliers an opportunity to tell us whether they can meet our timelines while complying with our [human rights policies/supplier code of conduct], and, should they reasonably require more time to deliver a product in order to remain in compliance with our policies, we will strive to agree to a timeline that would allow them to do so, unless commercially impracticable.
- 3.5 We will include incentives for our suppliers to improve their human rights performance and to exceed our minimum expectations for what constitutes compliant behavior.

4 *Performing and renewing the contract.*

- 4.1 We will place orders with lead times that do not trigger excessive working hours or unauthorized and unregulated sub-contracting, except in emergency or other critical situations. In such emergency cases, we will negotiate with suppliers' contract modifications in good faith and agree to additional compensation for suppliers to compensate them for providing such critical work. If suppliers engage in any needed sub-contracting during such emergency cases, we will seek to review and authorize such sub-contracting as soon as reasonably practicable after receiving notice from a supplier.
- 4.2 In the event of an unexpected and significant⁵⁴ drop in our orders, we will in good faith share in the cost that such a drop represents for suppliers. We will develop a cost sharing formula with suppliers that will differentiate between orders that have already been in transit, orders that are completed but have not yet left a supplier's facilities, orders that are partially manufactured, and orders the manufacturing of which has yet to begin but for which suppliers have already incurred expenses, for example, by acquiring the materials necessary to produce the order.
- 4.3 We will share with suppliers the responsibility and risk for the economic performance of the contract. In the event that our order forecasts differ [significantly] from the final volume ordered, we will enter into a risk sharing arrangement with our suppliers whereby we will agree upon the minimum volume to be purchased as soon as reasonably practicable after either we or our suppliers become aware of any such discrepancy between the order forecasts and final volume ordered.
- 4.4 We will communicate clearly, promptly and accurately on all issues (e.g. quantity increases or decreases, design alterations, timeline adjustment) concerning our orders. In cases where oral instructions are provided, we will confirm such instructions in writing in a commercially reasonable period of time.
- 4.5 We will refrain from changing orders repeatedly and with short notice without appropriate compensation and accommodation for our suppliers to maintain compliance with our [human rights policy/supplier code of conduct].
- 4.6 If changes to our order are necessary, we will engage in a dialogue with suppliers to establish that they can adjust to our new requirements without running afoul of our [human rights policy/supplier code of conduct]. If they cannot, we will strive to identify new modifications that will enable the contract to conform to our human rights expectations, for example, by amending target delivery times.

⁵⁴ "Significant" may be defined differently, depending on the industry and other market circumstances.

- 4.7 We will provide reasonable material and practical support (e.g. financial, in kind, or technical capacity building) to our suppliers in striving to meet their obligations under our [human rights policy/supplier code of conduct].
- 4.8 We will collaborate with our suppliers to establish benchmarks for assessing their human rights performance in order to enable our procurement team to make informed assessments regarding whether to award, renew, or terminate contracts.
- 4.9 When it comes time to renew contracts with our suppliers, we will seek to reward suppliers for superior human rights performance and commit to staying with those who perform well, even if they cost more, if a higher price will ensure that workers will be paid a living wage and that they can work under healthy and safe conditions.
- 4.10 We will regularly seek feedback from our suppliers on the impact of our purchasing practices for the contract's human rights performance and ensure that said feedback will not produce adverse consequences for suppliers. We will also commit to providing feedback to our suppliers so that they are able to improve their policies and programs.

5 *Responding to human harms and responsible exit.*

- 5.1 We will ensure that effective, adequately funded and governed operational level grievance mechanisms are in place to listen to and address to the concerns of potentially affected stakeholders, including workers, labor unions, community members, and other third parties affected by our supply chain and to address and directly remedy human rights grievances that may occur in connection with our contracts' performance at an early stage. These operational level grievance mechanisms will be consistent with the effectiveness criteria laid out in the Guiding Principles (legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue).
- 5.2 In the event a severe human rights harm occurs during the contract, we will collaborate with our suppliers to determine the root causes of the harm. If we identify that our purchasing practices caused or contributed to the harm, we will cease our conduct that caused or contributed to the harm, participate in legitimate processes to remediate the harm, and endeavor to use or build our leverage with suppliers and others to avoid or mitigate the remaining impact of the harm. If we identify that our purchasing practices did not cause or contribute to the harm, and that the harm was directly linked to the performance of the contract, we will endeavor to use or build our leverage with our suppliers and others to avoid or mitigate the remaining impact of the harm. We may, if we choose, contribute to the remedy of the harm in such circumstances, but we are not obliged to do so.
- 5.3 Before terminating suppliers, we will consider the extent to which using and building leverage is successful, the severity of the abuse, and whether terminating a supplier would itself have adverse human rights consequences. We will support suppliers in addressing the problems that led to the harm and turn to termination of the contract only as a last resort, in situations where suppliers do not improve, because we recognize that termination itself will likely have negative human rights impacts (such as heightening tensions between a supplier's workers and managers and putting people out of work).
- 5.4 As concerns terminating our contracts generally, in situations where there is no human rights harm at issue, we will evaluate all possible options for alternatives to disengagements, including suspending or reducing executive pay or dividend payments to shareholders or seeking loans to continue to pay suppliers for existing payment obligations; provided that such obligation is limited to payments already incurred by us and does not create new obligations to seek loans with the goal

of sustaining such contracts. If the termination of a contract is due to lower demands, we will reasonably consider shifting orders to other products.

- 5.5 In terminating our contracts, we commit to exiting our arrangements responsibly, with an eye toward mitigating and avoiding the damage and hardship that termination may bring to bear on a supplier's workers, especially when such damage and hardship are severe. We will engage in timely and regular consultation with potentially impacted stakeholders as well as our suppliers and provide reasonable notice of our decision to terminate the contract. Such assessments and notice will also be made whenever we make decisions about invoking the force majeure provisions in our supply contracts.
- 5.6 When we must terminate contracts due to sudden changes in general conditions of the relevant industry, general political, economic, business, or market conditions or trends, we will strive to mitigate the adverse impact that termination may bring to suppliers and their workers. We will collaborate with government entities where needed to address challenges resulting from the disengagement and offer to provide workers training and capacity building. We will work with suppliers and modify delivery terms to allow for longer periods of delivery than originally agreed upon. We will continue payment or provide advances payment to suppliers for orders already made before the disruption and take reasonable measures to assure that all wages and legally entitled severance payments are made to a supplier's workers.