

WSGR ALERT

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NEW CALIFORNIA DISCLOSURE REQUIREMENTS REGARDING SLAVERY AND HUMAN TRAFFICKING IN SUPPLY CHAINS TO TAKE EFFECT ON JANUARY 1, 2012

The California Transparency in Supply Chains Act of 2010 (TSCA) will go into effect on January 1, 2012. The TSCA will require certain companies with more than \$100 million in annual worldwide gross receipts that do business in California to disclose via a "conspicuous link" on their main website their efforts (if any) to address risks related to slavery and human trafficking in their supply chains. The TSCA is designed to address the difficulty of policing slavery and human-trafficking crimes by requiring companies to provide consumers with information that can be used to influence corporate policy by means of purchasing power. A similar federal bill requiring companies to disclose in their annual report filed with the Securities and Exchange Commission (SEC) their efforts to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within the companies' supply chains was introduced in the U.S. House of Representatives in August 2011.

The TSCA

The TSCA created California Civil Code Section 1714.43, which will, beginning January 1, 2012, require every retail seller and manufacturer doing business in California and having annual worldwide gross receipts that exceed \$100 million to post on its website, at a minimum, the extent to which, if any, the company does each of the following with respect to its direct supply chain for tangible goods offered for sale:

- Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. This disclosure must specify if the verification was not conducted by a third party.
- Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. This disclosure must specify if the verification was not an independent, unannounced audit.
- Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
- Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
- Provides training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products, to company employees and management who have direct responsibility for supply-chain management.

The TSCA only requires *disclosure* of a company's efforts, if any, in this regard; it does not require a company to adopt particular policies related to slavery and

human trafficking in their supply chains. A company subject to the TSCA could disclose that it does not do any of the foregoing. A company's disclosures in this regard, however, likely will be scrutinized by consumers, human-rights organizations, and certain investors.

Who Is Subject to the TSCA

The TSCA adopts a number of definitions from the California Revenue and Taxation Code. For example:

- "Doing business" in California is defined in Section 23101 of the code and is satisfied by any of the following: having a commercial organization or domicile in California; generating sales in California above a certain threshold; owning real or tangible property in California above a certain threshold; and paying compensation in California above a certain threshold.
- "Manufacturer" means a business entity with manufacturing as its principal business activity code, as reported on its California tax return.
- "Retail seller" means a business entity with retail trade as its principal business activity code, as reported on its California tax return.
- "Gross receipts" are defined in Section 25120 of the code and include the gross amounts realized (the sum of money and the fair-market value of other property or

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services received) on the sale or exchange of property, the performance of services, or the use of property or capital (including rents, royalties, interest, and dividends) in a transaction that produces business income, in which the income, gain, or loss is recognized (or would be recognized if the transaction were in the United States) under the Internal Revenue Code.

Disclosure under the TSCA

The information required by the TSCA must be posted via a “conspicuous and easily understood” link on the home page of the company’s website. The statute does not define “conspicuous” or “easily understood.” The California privacy policy statute, California Business and Professions Code Sections 22575-9, however, does define the term “conspicuously post,” and may provide some guidance in this respect. Using the privacy policy statute as an analogue, whether a link is “conspicuous and easily understood” in the context of the TSCA may depend on such factors as whether the link contains key terms such as “slavery” or “human trafficking,” whether the link contrasts against the webpage’s background and surrounding text, and whether a reasonable person would notice the link.¹

Remedies under the TSCA

The TSCA provides that the exclusive remedy for a violation of the statute shall be an action brought by the Attorney General for injunctive relief, but the statute does not preempt other causes of action. Accordingly, a plaintiff may have available to it claims for failure to comply with the TSCA or misstatements in a TSCA disclosure under the California Unfair Competition Law and the Consumer Legal Remedies Act, among other claims.

Regardless of whether a company is directly subject to the TSCA, it may be impacted by

its own customers’ policies and compliance efforts. Many companies already have commenced a process of auditing and performing diligence on their suppliers in preparation of the January 1, 2012, disclosure deadline.

Purchasers who are subject to the TSCA should consider incorporating provisions into their supply agreements requiring compliance with their supply-chain human-trafficking policies. Such purchasers also may want to consider whether to require suppliers to provide reports and subject themselves to compliance audits with respect to such policies.

Federal Legislation

The federal bill, H.R. 2579, titled the Business Transparency on Trafficking and Slavery Act (BT TSA), was introduced in the House of Representatives on August 1, 2011, by Rep. Carolyn Maloney and refers to the passage of the TSCA in its findings. The BT TSA would amend Section 13 of the Securities Exchange Act of 1934 to require those companies subject to SEC reporting requirements to disclose any measures taken to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within such companies’ supply chains in their annual reports under the new heading “Policies to Address Forced Labor, Slavery, Human Trafficking, and the Worst Forms of Child Labor.”

Like the California statute, the BT TSA requires companies to disclose their efforts regarding the verification of supply chains, the auditing of suppliers, the development of standards, and the provision of training to employees and management. Also like the California statute, the BT TSA would require that this information be posted via a conspicuous and easily understood link on the home page of the company’s website. Unlike the California statute, however, the BT TSA would (a) apply to all companies subject to

SEC reporting requirements, not just retailers and manufacturers, and (b) in cases where forced labor, slavery, human trafficking, and the worst forms of child labor have been identified within a company’s supply chain, require the company to ensure that remediation is provided to those who have been identified as victims. H.R. 2579 has been referred to the Committee on Financial Services for further consideration.

What You Should Do Now for the TSCA

- Companies that are retail sellers and manufacturers with more than \$100 million in annual worldwide gross receipts that do business in California should identify the efforts that it takes (if any) to eliminate the risks of forced labor, slavery, human trafficking, and the worst forms of child labor within their direct supply chains for tangible goods.
- No later than January 1, 2012, such companies should include a conspicuous and easily understood link on their home pages describing their efforts (if any) to address risks related to slavery and human trafficking in their supply chains.
- As appropriate, such companies may wish to establish corporate policies related to slavery and human trafficking in their supply chains. If the policy includes a practice of imposing requirements on suppliers, they should include such terms in supplier agreements going forward and consider whether amendments are required to existing supplier agreements to address the policy.
- Because of the growing importance of corporate social responsibility generally, companies should consider whether to include TSCA-related disclosure as part of a larger corporate social responsibility program. For example, and if applicable, such a program also could include

¹ If a company subject to the TSCA does not have a website, the company must comply by sending a copy of the disclosure within 30 days of a request from a consumer.

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company policies regarding conflict minerals. As previously described in a WSGR Alert (http://www.wsgr.com/WSGRDisplay.aspx?SectionName=publications/pdfsearch/wsgralert_disclosure_conflict_minerals.htm), the SEC is finalizing rules required by the Dodd-Frank Act regarding disclosures by reporting issuers concerning their use of conflict minerals (generally tantalum, tin, gold, or tungsten) that originated in the Democratic Republic of the Congo or an adjoining country.

For any questions or more information on these or related matters, please contact your regular Wilson Sonsini Goodrich & Rosati attorney or any member of the firm's corporate and securities or technology transactions practices.



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