



JONES DAY
COMMENTARY

CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: NEW DISCLOSURE REQUIREMENTS FOR COMPANIES DOING BUSINESS IN CALIFORNIA TO TAKE EFFECT JANUARY 1, 2012

On January 1, 2012, California Civil Code Section 1714.43, or the California Transparency in Supply Chains Act of 2010 (“the Act”), will go into effect. This new law will require large retail sellers and manufacturing companies to publicly disclose what, if any, efforts they have taken to eliminate slavery and human trafficking from their supply chains. The Act does not require companies to take any remedial steps to combat slavery or human trafficking; rather, the Act seeks to shine a light on these issues in the hope that pressure from consumers, shareholders, and activists will encourage companies to voluntarily police their own supply chains.

COMPANIES SUBJECT TO THE ACT

Any “retail seller” or “manufacturer” doing business in California and having at least \$100 million in annual worldwide gross receipts is subject to the Act. The Act defines “retail seller” as an entity listing retail trade as its principal business activity code on its tax return. Similarly, a “manufacturer” is an entity that lists manufacturing as its principal business activity code on its tax return.¹

A company is considered to be “doing business in California” if (i) it is organized or commercially domiciled in California; (ii) its sales in California for the

¹ Cal. Civ. Code § 1714.43(2)(C),(D).

applicable tax year exceed the lesser of \$500,000 or 25 percent of the company's total sales; (iii) the real property and the tangible personal property of the company in California exceed the lesser of \$50,000 or 25 percent of the company's total real property and tangible property; or (iv) the amount paid in California by the company for compensation exceeds the lesser of \$50,000 or 25 percent of the total compensation paid by the company.²

The annual gross receipts required for a company to be subject to the Act—\$100 million—are measured globally. This requirement was intended to function as an exemption for companies that lack the ability to exert economic influence on suppliers—not to exempt large companies that do not do extensive business within California.³ Accordingly, a company based outside of California may still be subject to the Act, even if the extent of its California business is relatively small.

REQUIREMENTS OF THE ACT

Any company subject to the Act must post a “conspicuous and easily understood” link on its web site to a statement that shall, “at minimum, disclose to what extent, if any” the retail seller or manufacturer.⁴

- Engages in verification of product supply chains to evaluate and address risk of human trafficking and slavery (specifying whether the verification was conducted by a third party).
- Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains (specifying whether the verification was an independent and 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 human trafficking.
- Provides company employees and management who have direct responsibility for supply chain management with training on human trafficking and slavery, particularly with respect to mitigating risk within the supply chains of products.

In the event the retailer or manufacturer does not have a web site, consumers must be provided with a written disclosure containing the above information within 30 days of submitting a written request.

ENFORCEMENT AND REMEDIES

Exclusive enforcement of the Act is vested with the Attorney General. Every year, the Franchise Tax Board will provide the Attorney General with a list of retail sellers and manufacturers that meet the requirements for the Act, based on the previous year's tax returns. The only remedy available to the Attorney General for those companies that fail to comply with the Act is injunctive relief.⁵

Although the Act expressly does not create a private right of action, it does state that “[n]othing in this section shall limit remedies available for a violation of any other state or federal law.”⁶ Companies can expect California's active class action plaintiffs' bar will pore over representations made pursuant to the Act seeking to identify false or misleading representations or omissions that might form the basis of a claim under other California statutes.

2 Cal. Rev. & Tax. Code § 23101.

3 California State Assembly Committee on Judiciary, Analysis of Senate Bill no. 657, June 29, 2010, pg. 9.

4 Cal. Civ. Code § 1714.43(c)(1)-(5).

5 Cal. Civ. Code § 1714.43(d).

6 *Id.*

COMPLIANCE

The Act states that those companies subject to the Act are merely required to disclose the extent to which they engage in specified acts designed to combat human trafficking and slavery. A company theoretically could simply state that it does not take any action and still be in compliance with the Act. However, the negative public relations consequences of such a response may far outweigh the costs of implementing the policies necessary to support affirmative responses.

Companies that assess their supply chains will also be better prepared for similar legislation likely to come out of other states or the federal government. For example, in August a bill was introduced in the House of Representatives that would require all companies subject to SEC reporting requirements to disclose in their annual reports what measures were taken to identify and address conditions of slavery, human trafficking, forced labor, and child labor within the companies' supply chains.⁷ The federal bill would also require companies to disclose whether the company ensured that remediation was provided to victims where violations were identified.

The California Attorney General has not provided any guidance on how she will assess compliance with the Act. Likewise, because the Act has yet to be implemented, it is unclear the extent to which plaintiff attorneys, consumers, and/or activist groups will pick up on the Act as a potential basis for lawsuits under other statutes. Jones Day has extensive experience successfully defending similar claims; however, given the costs and potential for negative publicity attached to such lawsuits, companies are well advised to thoroughly assess their supply chain and carefully craft the required disclosures under the Act.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Timothy G. Hoxie

San Francisco
+1.415.875.5810
tghoxie@jonesday.com

Christopher J. Lovrien

Los Angeles
+1.213.243.2316
cjlovrien@jonesday.com

David S. Boyce

Los Angeles
+1.213.243.2403
dsboyce@jonesday.com

Amanda Pushinsky

Los Angeles
+1.213.243.2353
apushinsky@jonesday.com

⁷ H.R. 2579, "Business Transparency on Trafficking and Slavery Act."