Insight

IN-DEPTH DISCUSSION

August 4, 2015

House Bill Would Require Public Disclosure of Company Policies to Combat Supply Chain Trafficking

BY MICHAEL CONGIU, JOHN KLOOSTERMAN, STEFAN MARCULEWICZ AND MARK ESKENAZI

On July 27, 2015, U.S. Representatives Carolyn Maloney (D-NY) and Chris Smith (R-NJ) introduced the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 (H.R. 3226) (the "Bill"). The Bill would require that publicly traded companies more broadly and specifically disclose their policies and efforts aimed at ridding their supply chains of slavery and human trafficking. It is anticipated that a Senate version of the Bill will be introduced soon. The Bill is similar in certain respects to the United Kingdom's recently enacted Modern Slavery Act 2015[1] and the California Transparency in Supply Chains Act of 2010, which took effect in 2012.[2] The Bill also bears some similarity to recent amendments to the Federal Acquisition Regulation, effective March 2, 2015, also directed at eliminating trafficking within government contractors' supply chains.[3]

The Proposed Requirements

The Bill would amend Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) to require publicly traded companies with over $100 million in annual worldwide gross receipts to disclose on their website, and report yearly to the Securities and Exchange Commission (SEC), the extent to which they conduct any of the following activities:

Maintain and enforce a policy to identify and eliminate the risks in their supply chains of forced labor, slavery, trafficking, and the worst forms of child labor. "Forced labor," "slavery," and "human trafficking" are defined in the Bill as any labor practice or trafficking activity in violation of national and international standards, including ILO Convention No. 182, the Trafficking Victims Protection Act of 2000, and acts that would violate certain provisions of federal criminal law if they had been committed in the United States. "The worst forms of child labor" similarly refers to child labor in violation of national and international standards, including ILO Convention No. 182.

1 See Tahl Tyson, *United Kingdom: New Law to Combat Supply Chain Slavery and Human Trafficking*, Littler ASAP (July 14, 2015).

2 See John C. Kloosterman, *California Supply Chain Law Affects Large Retailers and Manufacturers Doing Business in California*, Littler Insight (Dec. 2, 2011).

3 See Elizabeth A. Lalik and Katherine A. Fearn, *Anti-Trafficking Regulations Impose New Obligations on All Federal Contractors*, Littler Insight (Apr. 10, 2015).

- Maintain a policy prohibiting their employees and the employees associated with their supply chains from engaging in commercial sex acts with a minor. Notably, the Bill broadly defines the term "supply chain" to include all labor recruiters, suppliers of products, components parts of products, and raw materials used by the company in the manufacturing of its products—whether or not the company has a direct relationship with the supplier.
- Engage in third-party evaluation of the risks in their supply chains of forced labor, slavery, trafficking, and the worst forms of child labor, including a description of measures taken to eliminate the risks and consultation with labor unions, workers' associations, or workers.
- Conduct audits of suppliers, which include investigating their labor practices, verifying whether they have the appropriate systems in place to identify the risks of forced labor, slavery, trafficking, and the worst forms of child labor within their own supply chains, and evaluating whether those systems comply with the company's own policies.
- Require suppliers to attest that the materials they manufacture and their recruitment of labor are carried out in compliance with laws[4] concerning forced labor, slavery, trafficking, and the worst forms of child labor.
- Maintain internal accountability standards, supply chain management, procurement systems, and reporting procedures for employees, suppliers, contractors, or other entities in their supply chains who fail to meet the company's standards on forced labor, slavery, trafficking, and the worst forms of child labor.
- Train the employees and management who have direct responsibility for supply-chain management on issues related to forced labor, slavery, trafficking, and the worst forms of child labor, especially with respect to mitigating risks within the supply chains.
- Ensure that suppliers' recruitment practices comply with both the company's policies combating exploitative labor practices and the audits of labor recruiters.
- Ensure, where forced labor, slavery, trafficking, and the worst forms of child labor are identified in the supply chain, that remedial action is provided to victims, including support for programs designed to prevent such events in the industry or sector where they are identified. "Remedial action" is defined as the activities or systems the company puts in place to address non-compliance identified through monitoring or verification; the Bill notes without elaboration that these systems "may" apply to either individuals adversely impacted by the non-compliant conduct or to address "broader systematic processes."

The Proposed and Required Disclosures

According to the Bill, the link on the company's website must be labeled, "Global Supply Chain Transparency," and disclosures responding to the listed items must be placed under a heading entitled, "Policies to Address Forced Labor, Slavery, Human Trafficking, and the Worst Forms of Child Labor."

In addition to a link on the company's website, and to further publicize these matters, the Bill would require the SEC to post on its own website a list of companies required to make the disclosures as well as a compilation of the information they disclose.

If the Bill were to pass, within a year of enactment, the SEC and Secretary of State would be required to issue regulations implementing the disclosure requirements. Although the Bill does not expressly set forth remedies for failure to comply, it is possible the SEC would have responsibility to enforce the disclosure requirements, as the bill adds those requirements by amending the Securities Exchange Act.

The Bill in its Broader Context

Of course, until its passage, the Bill does not have the force of law, and questions remain whether and in what form it will advance through Congress. Nevertheless, the Bill represents an additional example of broader government action aimed at addressing adverse human rights impacts throughout corporate operations, business partnerships, and suppliers. The House justification for the Bill is, in part, to provide a means to assist investors and consumers from "inadvertently promoting or sanctioning … crimes through production and purchase of raw materials, goods and finished products that have been tainted in the supply chains."

4 The Bill does not specify what "laws" should be minded pursuant to this requirement.

Entities covered by the Bill may or may not also be covered by the California and UK laws, and vice versa. Retail and manufacturing businesses are the only entities covered by the California law; the Bill and the UK law do not contain that limitation. The UK law, unlike the Bill and the California law, applies only to certain entities that satisfy a minimum turnover requirement, and lacks a $100 million global gross receipt threshold. Furthermore, the Bill, unlike the California law, covers only public companies.

While the listed disclosure items across the two laws and the Bill are similar, there are differences among them, including the "due diligence processes" referenced in the UK law and the "independent, unannounced" audits in the California law. The Bill expressly proposes requiring disclosures related to suppliers' recruitment practices; the UK and California laws do not.

Moreover, like the UK and California laws, the Bill proposes only the disclosure of the extent to which entities perform the listed items; it does not require that they take affirmative action. For example, while the Bill proposes requiring companies to report whether they maintain and enforce a policy to identify and eliminate the cited supply chain risks, the measure does not mandate that the companies actually maintain and enforcement such a policy. Of course, even though a company could comply with the Bill by disclosing that it takes no action to combat trafficking, doing so could have negative implications for the business's reputation.

Finally, the Bill, like the California law, notes without elaboration that the link be "conspicuous and easily understandable," but does not state whether a company can post the link on a page other than the homepage, such as on a corporate social responsibility page of its website, or one containing other information it reports to the SEC.[5]

Littler will monitor this Bill and report on any developments. In the meantime, companies with questions about the Bill, or broader business and human rights matters, should consult experienced employment counsel.

5 In its guidance on the California law, the California Attorney General's office takes the view that the link must be posted on the company's homepage, not on a sub-page, like a corporate social responsibility page or one linking to SEC filings. It will be interesting to see if the Bill ultimately adopts the California approach.