

Are you sure that your shirt is slavery-free? : The California Transparency in Supply Chains Act of 2010

Beginning on January 1, 2012, the California Transparency in Supply Chains Act of 2010 (CATSCA) will require that certain retail sellers and manufacturers doing business in California disclose their efforts to eradicate slavery and human trafficking from their direct supply chain of tangible goods.¹

CATSCA requires that retail sellers and manufacturers with annual worldwide gross receipts of one hundred million dollars (\$100,000,000) or more disclose their efforts for ensuring slavery-free products providing at least the following information:

- Explanations of the scope of efforts to analyze and assess their product supply chain for actual or potential risks of slavery and human trafficking occurrences and whether a third, independent party conducts these risk assessments.
- Whether the seller or manufacturer demands certification from its direct suppliers stating that all the materials used in the product comply with slavery and human trafficking laws in the country or countries of origin.
- Whether the seller or manufacturer maintains internal accountability standards for any employees or contractors who do not meet company standards and procedures regarding slavery and human trafficking.
- Whether the seller or manufacturer offers training on slavery and human trafficking matters to personnel responsible for the supply chain, especially training in how to mitigate risk.
- Whether the seller or manufacturer foresees performing announced or unannounced audits to assess whether a supplier is in compliance with company standards on slavery and human trafficking.

The CATSCA disclosure must be posted on the website of retail sellers or manufacturers obligated to do so by the law with a link to the required information in a conspicuous and easy to understand manner. If retail sellers or manufacturers subject to the law lack a website, they must provide this information within 30 days upon any consumer's written request.

The California Attorney General may bring an action for injunctive relief to address CATSCA violations, without prejudice of other remedies available in other laws. The Franchise Tax Board will make available annually to the Attorney General a list of those retail sellers and manufacturers subject to mandatory disclosure under CATSCA.

¹ See Bill Number SB 657, http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.html.

CATSCA recognizes that slavery and human trafficking exist everywhere, including the United States.² It refers to the U.S. Department of Labor report required by the Trafficking Victims Protection Reauthorization Acts of 2005 and 2008, which states that 122 goods from 58 countries were allegedly produced by forced labor or child labor in violation of international standards.³ CATSCA also recognizes that state and federal laws as well as international treaties are in place to curtail slavery and human trafficking.⁴ CATSCA aims to tackle the problems of slavery and human trafficking through market incentives by giving consumers the ability to know what companies are doing to ensure that their products and supply chain are slavery-free, thereby encouraging conscientious consumers to purchase products from compliant companies.

CATSCA, which was supported by the Coalition to Abolish Slavery and Trafficking (CAST), the Alliance to Stop Slavery and End Trafficking (ASSET), and the Consumer Federation of California,⁵ signals the confluence of increasing

² See generally LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE 2010, at 229-64 (analyzing the specific characteristics of human trafficking in the United States).

³ U.S. Department of Labor, Trafficking Victims Protection Reauthorization Act, <http://www.dol.gov/ilab/programs/ocft/tvpra.htm>. See also U.N. Special Representative for Business and Human Rights, Corporate Implementation of Human Rights Due Diligence Processes. Cf. generally Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), <http://www1.umn.edu/humanrts/links/norms-Aug2003.html> (the preamble of these standards states that “transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments such as ... the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.” Further, Article 1 asserts the duty of transnational corporations and other business to promote, secure and ensure respect for human rights recognized in international and national law. Companies may not benefit from war crimes, genocides, torture, forced disappearance, forced or compulsory labour, among others. Specifically, they should not use forced or compulsory labour as forbidden by the relevant international instruments and national legislation); cf. also United Nations Global Compact, <http://www.unglobalcompact.org/> (initiative for encouraging business to align their practices with human rights principles). For an analysis of the international initiatives to articulate human rights responsibilities of businesses see DAVID WEISSBRODT ET AL, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS (4th ed.), 2009, at 53 ff.

⁴ See generally U.S. Department of State, U.S. Laws on Trafficking in Persons, <http://www.state.gov/g/tip/laws/index.htm>. See also generally ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 2010, esp. at 54-143. (giving an overview of the international rules addressing human trafficking).

⁵ See Sara A. Altschuller, *Preparing for Compliance with the California Transparency in Supply Chains Act*, <http://www.csrandthelaw.com/2010/10/articles/legislation/the-california-transparency-in-supply-chains-act-new-legislation-requires-disclosures-on-corporate-efforts-to-eliminate-slavery-and-human-trafficking>; James Mattesish, *New California ‘Anti-Slavery and Human Trafficking’ Disclosure Obligations on Manufacturers and Retailers*, Nov. 2010, <http://www.gtlaw.com/NewsEvents/Publications/Alerts?find=139749>; Coalition to Abolish Slavery and Trafficking (CAST), Supply Chain Transparency Act (SB657) has been signed Into law by Gov. Schwarzenegger, <http://www.castla.org/sb657-signed-into-law>, Sept. 30, 2010, posted on Oct. 1, 2010.

corporate responsibility practices, refined traceability technologies, and more informed and discerning consumer preferences.

Many large retail companies have already implemented standards for ensuring the quality and environmental and ethical compliance of the products and their provenance.⁶ Also, as standard practice, large retailers and many other large companies require certification as to lack of human rights abuses, such as slavery and human trafficking, in their supply agreements.⁷ In addition, third parties are monitoring and analyzing the company practices so the company claims about their products and practices can be reliably compared and verified. For instance, a recent report entitled *Toward a Safe, Just Work Place*, a study supported by a network of 20,000 retailers, analyzed and compared data on the compliance programs of major apparel companies in the U.S. market.⁸ According to this report, Levi Strauss & Co, Wal-Mart Stores, Gap Inc., Hanesbrands, Nordstrom, and Gildan Activewear fared well with regard to compliance programs because they are “not only doing the basics of auditing facilities but also committing significant resources to remediation, continuous improvement, and collaboration at many levels... [They allow] substantive third-party critiques and furnish public reporting.”⁹

Recent technological developments coupled with Internet capabilities facilitate traceability that goes beyond traditional product labeling to include “microscopic electronic devices, genetic markers for agricultural products, and a

⁶ See Steve New, *The Transparent Supply Chain: Let your consumers know everything about where your products come from –before they discover it first*, 76 HARVARD BUSINESS REVIEW, Oct. 2010 (commenting that “consumers, governments, and companies are demanding details about the systems and sources that deliver the goods. They worry about quality, safety, ethics, and environmental impact. Farsighted organizations are directly addressing new threats and opportunities in answering the question where does this stuff come from? But many companies are already making a strong case for provenance of their products.” *Id.* at 77.). See also Paul Tyrrel, *Buyers unravel the ethics behind the label*, Sept. 15, 2010, THE FINANCIAL TIMES LIMITED (commenting that the Global Reporting Initiative, a network of 20,000 organisations developing a framework for corporate sustainability reporting, published, “The Transparent Economy”, a report that identified traceability as a key challenge in corporate reporting over the next decade). The Transparent Economy is available at Global Reporting Initiative, <http://www.globalreporting.org/LearningAndSupport/GRIPublications/LearningPublications/Explorations/>.

⁷ See Moses & Singer, *Sellers and Manufacturers: Beware* [http://www.globalreporting.org/LearningAndSupport/GRIPublications/LearningPublications/Explorations/Anti-Slavery and Human Trafficking Law](http://www.globalreporting.org/LearningAndSupport/GRIPublications/LearningPublications/Explorations/Anti-Slavery%20and%20Human%20Trafficking%20Law), Client Alert, December 2010, <http://www.mosessinger.com/articles/files/CaliforniaAntiSlaveryTrafficking.pdf>. Cf. generally DANIEL E. LEE & ELIZABETH J. LEE, HUMAN RIGHTS AND THE ETHICS OF GLOBALIZATION, 2010, at 71-3. (commenting that certain companies have been adopting codes of conduct for ensuring suppliers’ compliance, inter alia, with ethical and human rights standards).

⁸ See Amy Galland, (Conrad McKerron (contributing editor)), *Toward a Safe, Just Workplace: Apparel Supply Chain Compliance Programs*, 2010.

⁹ See *id.* at 17.

new generation of bar codes that can be read with standard mobile phones.”¹⁰ In fact, new bar codes, such as Microsoft Tag,¹¹ link mobile devices to product data that is not only comprehensive, but “can also give consumers web-based access to sourcing maps, live video of manufacturing floors, and detailed environmental and ethical certifications.”¹² Moreover, some companies, such as Historic Futures, have developed sophisticated technological solutions for total traceability of a product in the supply-chain.¹³ The informed consumer is also a force in pushing toward more transparency in the supply chain. Some consumers rely on assessments from independent, consumer-oriented companies, such as Good Guide, an online database on information about the health, environmental and social impact of 65,000 products.¹⁴ Thus, total traceability of a product to ensure quality and protect the consumer, which is a must for certain products such as pharmaceuticals, is becoming a global standard for a variety of products.

Briefly, given the good citizenship notion of companies with a heightened sense of corporate responsibility, the ease of technological tracking methods and data storage, and the further empowerment of consumers seeking to make informed purchases, it may be the case in the near future that transparent traceability is a necessary condition for the success of consumer products. To sum up, CATSCA is a regulatory compliance mechanism that helps consolidate the product traceability standard regarding slavery and human trafficking by using market incentives.

There are strengths and weaknesses to CATSCA’s reliance on market incentives. In requiring disclosure of a practice that is already common among big retail players, the government takes advantage of existing know-how, trained personnel and infrastructure. At the same time, however, this required disclosure increase the costs of entry for new actors in that market. The success of CATSCA assumes an environment of consumer awareness. It is difficult to imagine it working in societies without such consumers.

CATSCA does not impose a penalty directly for non-compliance, but allows for an injunction by the California Attorney General to correct a corporate behavior. An injunction or the mere threat thereof may affect the reputation of a retailer or manufacturer and therefore be an effective incentive for complying with CATSCA. In addition, CATSCA will indirectly prompt companies to enhance clauses in supply contracts aiming to protect a company from liability for the behavior of their suppliers. In a CATSCA environment, it will be advisable to refer specifically in disclaimers of liability clauses of supply agreements to the company’s policies, procedures, and standards regarding the provenance of a product with regard to slavery and human trafficking. Companies that cannot account for the provenance of their products may soon find themselves losing competitiveness to companies

¹⁰ Steve New, *supra* note 5, at 78.

¹¹ See Microsoft tag, <http://tag.microsoft.com/consumer/index.aspx>.

¹² See Steve New, *supra* note 5, at 79.

¹³ See Historic Futures, <http://www.historicfutures.com>.

¹⁴ See GoodGuide, <http://www.goodguide.com>.

that can. They may also be exposed to costly litigation.

CATSCA should be a welcomed development for conscientious consumers, forward-looking businesses, and human rights activists. It is a good example of how targeted, cost-effective, and timely incentives can be put in place for improving and consolidating compliance with human rights standards. In due time, it will be advisable to assess whether upholding these standards in fact reduce slavery and human trafficking or whether an extension of these standards would be effective to curtail other exploitative labor practices that do not qualify as slavery, but are nevertheless unjust.¹⁵ But, for now, with CATSCA required disclosure about efforts to determine product provenance transparently with regard to slavery and human trafficking, the government of California, responsible companies and conscientious consumers may take comfort in knowing that they are devoting their best efforts, including using sophisticated technologies, to avoid becoming tacit accomplices in a practice that should have being eradicated a long time ago.

¹⁵ See *generally* Coalition of Immokalee Workers, CIW Anti-slavery Campaign, <http://www.ciw-online.org/slavery.html> (self-described as a “worker-based approach to eliminating modern-day slavery in the agricultural industry”).