Navigating the UK Modern Slavery Act: A Compliance Challenge

Michael R. Littenberg and Kim B. Nemirow / Ropes & Gray

A large number of companies subject to the UK Modern Slavery Act's (MSA) transparency provisions are expected to release disclosure statements by the middle of this year. The MSA requires certain multinational businesses to disclose what steps they have taken, and their related policies and procedures, to help eradicate slavery and human trafficking from their business and their supply chains. In the US, the California Transparency in Supply Chains Act of 2010 requires many of the same disclosures, though it only applies to certain retailers and manufacturers. As more firms begin to grapple with the disclosure statements they must prepare and publish on their websites under the UK MSA, RANE recently spoke to Michael R. Littenberg and Kim B. Nemirow, partners at Ropes & Gray, about the best way to approach this new requirement.

Every company is different. As a result, there is no single off the shelf statement or compliance program that is appropriate for all companies. Some companies that must prepare an MSA statement have minimal risk of modern slavery in their supply chain and the risk of modern slavery being present in their own business is non-existent.

On how companies should be preparing for the UK Slavery Act

Companies should begin by assessing whether they are required to prepare an MSA statement. With multinationals, we often find that only a portion of their business is picked up, since they are doing business in the UK through one or more discrete subsidiaries, which may mean that their covered business does not meet the compliance threshold of the MSA. A surprise to many companies in the US is that the jurisdictional sweep of the MSA is much broader than the California Act. As a result, many US companies that do not have to prepare a statement under the California Act have a publication requirement under the UK MSA.

On how companies determine if they are covered by that threshold

An entity is required to prepare an MSA statement if it is a "commercial organization" that provides goods or services, carries on business in the UK and has worldwide annual turnover of £36 million or greater. The UK Home Office guidance indicates that companies should use "a common sense approach" in determining if they are doing business in the UK. The guidance indicates that companies with no "demonstrable business presence" in the UK are not subject to the Act's transparency provisions.

In contrast, the California Act only applies to manufacturers and retailers with annual worldwide gross receipts of more than $100 million.

On disclosure requirements of the MSA and California Act

Whether it's the MSA or the California Act, these are disclosure-only regulations. They do not require companies to put in place a policy, have a compliance program or engage in supply chain due diligence. These types of regulations are, however,

intended to create a "race to the top" through disclosure, and many companies will be loath to publish disclosure that effectively says that they do nothing around this issue.

The MSA does not contain mandatory topics that must be covered in the statement. Instead, it provides six suggested disclosure topics, including the organization's structure, business model and supply chain relationships, as well as the organization's policies, due diligence and auditing processes, steps taken to assess and manage modern slavery risk, key performance indicators and training. This is in contrast to the California Act, which contains five mandatory topics, including the extent to which a company engages in the verification of product supply chains to evaluate the risk of human trafficking and slavery, conducts supplier audits, requires supplier certifications, maintains internal accountability standards and provides training. There is significant overlap between the disclosure topics contained in the two acts. As a result, many companies are electing to use one combined statement that is intended to satisfy the requirements of both acts.

Companies should not get too fixated on the lack of stated penalties in the acts for non-compliance. There may be other, more significant ramifications arising out of disclosures.

On how companies are approaching disclosure

Every company is different. As a result, there is no single off the shelf statement or compliance program that is appropriate for all companies. Some companies that must prepare an MSA statement have minimal risk of modern slavery in their supply chain and the risk of modern slavery being present in their own business is non-existent. Other companies have a much greater risk of modern slavery in their supply chain, especially several tiers removed. These differences in risk profile should be reflected in both the statement and compliance initiatives.

On the topics that should be addressed in the disclosure statement

Most companies discuss any relevant internal and supplier facing policies. They also typically discuss their diligence process if any related to modern slavery in the supply chain, as well as if supplier audits look at this issue. Statements also often discuss any identified modern slavery risks and the steps that have been taken to address and mitigate those risks. Statements also often address any relevant training for company and supplier personnel. What companies disclose will be a function of their risk assessment to date and their particular compliance initiatives. Most companies are in the early stages of thinking about modern slavery risk, so statements and compliance programs remain a work in process.

On the potential penalties the MSA or California Act carry

Strictly speaking, whether it's under the MSA or the California Act, the penalties for non-compliance provided in these acts are minor. The sole stated remedy in the two acts is injunctive relief enjoining future violations. There are no stated monetary or criminal penalties, nor other sanctions. However, this is an overly simplistic way to look at compliance with these acts, since the primary constituencies that will be focusing on disclosures will be NGOs, socially responsible investors, commercial customers and consumers. Public opinion, rather than regulators, will be the primary drivers of disclosure and compliance practices.

On other legal issues companies could face as a result of their disclosure

Companies should not get too fixated on the lack of stated penalties in the acts for non-compliance. There may be other, more significant ramifications arising out of disclosures. In California, there have been lawsuits arising out of alleged inaccuracies in California Act disclosures. Modern slavery-related and similar claims also have been brought under tort statutes, as well as under corporate statutes where books and records have been sought or breach of fiduciary duty has been alleged. In addition, NGO rankings of modern slavery disclosures and compliance programs are increasing, as are "name and shame" and social media campaigns and shareholder proposals. The statements that companies publish can exacerbate or mitigate these risks.

On the broader compliance impact of the MSA

Strictly speaking, the act is only addressing modern slavery and the statements that companies put out tend to be limited to their activities around this issue. However, from a compliance perspective, companies should think more holistically about supply chain risk and compliance. Where there is modern slavery risk, other risks often are present as well, such as child labor or discrimination against women and minorities. Risks such as bribery, money laundering and other forms of corruption also may be present. Modern slavery risk tends to not exist in isolation.

ABOUT THE EXPERTS

Michael R. Littenberg *is a partner in Ropes & Gray's New York office. As part of his practice, for more than 25 years, Michael has been active in advising leading US and foreign public and private companies on supply chain compliance and corporate social responsibility matters, including relating to, among other areas, anti-human trafficking. Michael advises a significant number of companies on compliance with the California Transparency in Supply Chains Act, the UK Modern Slavery Act, the FAR anti-human trafficking rule, the US Conflict Minerals Rule, the pending EU Conflict Minerals regulation, REACH, RoHS, OFAC and anti-boycott and other supply chain and CSR-related regulations.*

Kim B. Nemirow *is a partner in Ropes & Gray's Chicago office and a Registered Foreign Lawyer in Hong Kong. Having recently returned to the US after many years in the law firm's Hong Kong office, she focuses on white collar cases in Asia, Latin America, and globally. She has done extensive work in advising multinational organizations and individuals in a wide range of US DOJ and SEC investigations, internal investigations, and compliance matters, including CSR and supply chain compliance matters. She has led many investigations for various clients, including private equity and pharmaceutical companies, into potential violations of the FCPA, securities laws, and various health care fraud statutes.*

ABOUT RANE

RANE (Risk Assistance Network + Exchange) is an information and advisory services company that connects business leaders to critical risk insights and expertise, enabling risk and security professionals to more efficiently address their most pressing challenges and drive better risk management outcomes. RANE clients receive access to a global network of credentialed risk experts, curated network intelligence, risk news monitoring, in-house analysts and subject matter experts, and collaborative knowledge-sharing events.