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New Human Rights Case Alleging Deception of Consumers Filed Against Food Companies (This Time on the East Coast)

In the wake of the 2016 dismissal of human rights cases filed against food companies in California, a new class action case was filed on February 26, 2018 in Massachusetts federal court ([Tomasella v. Hershey Co.](#)) alleging human rights violations associated with cocoa farming and processing. At its core, the complaint is premised on a theory of unjust enrichment in violation of the Massachusetts Consumer Protection Law—namely, that the defendants, by failing to disclose trafficking and child labor in their supply chains (and in fact asserting in their disclosures that they had "zero tolerance" for such activities), caused consumers to purchase their products when they never would have done so had they known about the purported trafficked and child labor taint in the products' supply chains. More specifically, the civil complaint alleges, among other things, that "much of the world's chocolate is quite literally brought to us by the back-breaking labor of children, in many cases under conditions of slavery" (and cites various reports and instances of media coverage to bolster this point). It then faults defendants for "not disclos[ing] this to consumers at the point of purchase." According to the complaint, "Hershey's material omissions and failure to disclose at the point of sale [are] all the more appalling considering that Hershey's Corporate Social Responsibility Report state[s] that 'Hershey has zero tolerance for the worst forms of child labor in its supply chain.' But Hershey does not live up to its own ideals." The complaint then goes on to detail various specific claims made in Hershey's Corporate Social Responsibility Report that it asserts are false or misleading ("Defendants' material omissions in the labeling of its Chocolate Products [are] deceptive because it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted, *i.e.*, the omissions enticed reasonable consumers to purchase the Chocolate Products when they would not have had they known the truth."). The claimed class includes all consumers who purchased Hershey Chocolate Products in Massachusetts during the four years prior to the filing of the complaint. When [we first commented on this type of class action back in 2015](#), we identified several infirmities with plaintiffs' approach that we believed could ultimately undo plaintiffs' efforts (and, as it turned out, our predictions proved accurate). And, of course, the merits of plaintiffs' claims will be tested in court. But for decades, consumer goods have been subject to government-regulated disclosures of one form or another. These disclosures are often noncontroversial and give consumers basic factual information—like the amount of Vitamin C in a glass of orange juice or the presence of nuts in a candy bar as a potential allergen. But recent regulatory efforts now require businesses to make disclosures on a subject of political controversy: the extent and efficacy of a company's efforts to purge its supply chain of goods and services obtained through forced labor (that is, human trafficking/slavery/indentured servitude/child labor). As this class action plays out in the coming months, it will remain essential to seek practical advice on how to ensure full compliance with the regulatory-based disclosure called for by, for example, the [California Transparency in Supply Chains Act](#) and the [UK Modern Slavery Act](#). The recent human rights cases highlight the virtue of not "overpromising" in, say, a company's California Transparency in Supply Chains Act disclosure, to avoid the risk of unnecessarily incurring liability. As to the more far-reaching disclosures called for in these lawsuits, however, the First Amendment may once again prove to be a valuable defense against private plaintiffs who are attempting to use consumer protection statutes to impose a more demanding, and potentially constitutionally impermissible, disclosure regime. While the merits of *Tomasella v. Hershey Co.* are debated in federal court, companies are well-advised to stay ahead of potential problems by putting into place practical compliance programs targeting human trafficking, child labor, coerced labor, indentured labor, slave labor, and other forms of forced labor. What follows are some basic guidelines for compliance officers either just getting started creating policies or fine-tuning a company's existing policies. **Anti-Trafficking Compliance Program Guidelines**

1. **Introduce and Enforce Meaningful Policies** (or add policy language) focused on identifying and eliminating risks emanating from the various forms of coerced/forced labor within a business's supply chains. Among other places, such internally consistent policies or policy language should be included in

- (1) codes of conduct; (2) annual compliance certifications; (3) standard contract language; (4) due diligence questionnaires; and (5) supplier statements of conformity.
2. **Adopt Standard Contract Language** that includes, among other key areas:
 - Indemnification;
 - Audit rights;
 - Requirement of full cooperation in the case of any internal investigation or review;
 - Requirement of immediate notification in the case of actual or potential nonperformance/problems;
 - Right to, as needed, contact the relevant authorities in the case of violation; and
 - Consent to follow company-developed action plan in case of any instances of noncompliance.
 3. **Design a Risk-Based Labor Verification/Audit Program** to evaluate and address the risks of coerced and child labor in the company's supply chains, including:
 - Designing features tailored to reduce, control and eliminate those risks;
 - Identifying the greatest risks existing within the supply chain;
 - Deciding whether to employ independent third parties to conduct these verifications/audits;
 - Considering including in the verification process consultations with independent unions, workers' associations or workers within the workplace; and
 - Ensuring that supplier audits evaluate supplier compliance with company standards for eliminating coerced and child labor.
 4. **Require Appropriate Certifications.** Suppliers in the supply chain should certify that, in addition to the above, materials incorporated into products comply with (1) the company's code of conduct, and (2) the laws against coerced and child labor in the country or countries in which they are doing business. Key substantive provisions should include representations and warranties that a supplier:
 - Complies with all applicable national and international laws and regulations as well as the company's code of conduct, including prohibition and eradication of coerced and child labor in its facilities, and requires its suppliers, including labor brokers and agencies, to do the same.
 - Treats its workers with dignity and respect, provides them with a safe work environment and ensures that the work environment is in compliance with applicable environmental, labor and employment laws and with the company's code of conduct.
 - Refrains from corrupt practices and does not engage in human rights violations.
 - Certifies that it has not, and will not, directly or indirectly engage in certain activities connected to coerced and child labor. These activities should be expressly detailed in the certification.
 5. **Develop and Publicize Internal Accountability Standards**, including those related to supply chain management and procurement systems, and procedures for employees and contractors regarding coerced and child labor. Make sure that the company has procedures in place for employees and contractors who fail to meet these standards.
 6. **Assess the Supply Chain Management and Procurement Systems** of suppliers in the companies' supply chains to verify whether those suppliers have appropriate systems to identify risks of coerced and child labor within their own supply chains.
 7. **Train Employees and Business Partners**, particularly those with direct responsibility for supply chain management, on the company's expectations as they relate to coerced and child labor, particularly with respect to mitigating risks within the supply chains of products.
 8. **Guarantee That Remediation Is Provided** for those who have been identified as victims of coerced and child labor.

Food companies are becoming increasingly mindful of human rights issues and compliance with the California Transparency in Supply Chains Act and similar laws and statutes. Perkins Coie lawyers have been leaders on these issues for years, and we have a team that regularly counsels food companies. In fact, [Perkins Coie's Supply Chain Compliance & Corporate Social Responsibility Practice](#) was the first such dedicated practice among the AmLaw 100 firms. For questions about supply chain compliance, please contact either [Markus Funk](#) or [Paul Hirose](#).

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