

ESG Essentials: What You Need To Know Now

Episode 7 – Uyghur Forced Labor Prevention Act

Colvin: Welcome back to "ESG Essentials: What You Need to Know Now," a podcast from your friends at Fox Rothschild. I'm your host, [David Colvin](#), Co-Chair of the firm's [Environmental, Social and Governance Practice Group](#). Our series of short, bite-sized podcasts covers core ESG concepts and explores important issues for businesses that are concerned with developing and deploying an ESG profile; or responding to increased scrutiny from regulators, investors, and consumers regarding their environmental and social impact; and minimizing the potential legal and business risks associated with ESG.

In this episode of the podcast, I'm really excited to welcome Brittney Powell from the firm's Washington, DC office. Brittney represents clients in a wide range of complex business, international trade and environmental matters, but with a particular focus and emphasis on international trade.

Today, Brittney's here to talk to us a little bit about the Uyghur Forced Labor Prevention Act, which was recently signed into law by President Biden. It's something that all importers of goods should be familiar with. Brittney, welcome to today's podcast.

Powell: Hi David. Thank you for having me. I'm excited to join you today.

Colvin: Just to level set, talk to us a little bit about the Act, what it is and what it's designed to accomplish.

Powell: On December 23, 2021, President Biden signed into law the Uyghur Forced Labor Prevention Act, or the UFLPA. This act establishes a rebuttable presumption that all goods mined or manufactured, even partially, in the Xinjiang Uyghur Autonomous Region, or XUAR, of China are made with forced labor.

As a consequence, all imports from this region are prohibited from entering into the United States, unless an importer can establish by clear and convincing evidence that forced labor was not used in any step of the production process. That's from the production of raw materials to the finished goods.

Forced labor is defined as convict labor, forced labor or indentured labor under penal sanctions and includes forced child labor. Although it has long been the case that goods made with forced labor are not entitled to entry into the United States, this new law greatly expands Customs and Border Protection's, or CBP's, enforcement authority and creates the presumption that importers must now overcome should they import merchandise from the XUAR.

Colvin: Brittney, as I understand it, even though the President signed the statute into law back in December, it's not yet in force, or at least fully in force yet. Is that right?

Powell: That is correct. The Act will fully enter into force on June 21, 2022. However, CBP has been more heavily scrutinizing imported goods for evidence that forced labor may be present in the supply chain. The agency has been more actively enforcing its authority to issue withhold release orders, which are essentially letters to importers who intend to import merchandise suspected of using forced labor. In those situations, CBP is not allowing products to enter the United States until the importer shows affirmatively that its products were not made with forced labor.

Colvin: When you refer to CBP that's Customs and Border Protection?

Powell: Correct. CBP is Customs and Border Protection. They have also been issuing letters to importers that have been identified as previously importing merchandise that may be subject to the UFLPA in order to encourage them to address any forced labor issues in their supply chains.

However, whether an importer receives a letter from CBP or not, they all have an obligation to review their supply chains thoroughly and institute reliable measures to ensure imported goods are not produced with forced labor.

Colvin: With respect to this very specific region within China, are there targeted products or industries that CBP is looking at with respect to the enforcement of this law? Are there particular industries that source goods out of that region, that folks should be aware of?

Powell: Yes, the UFLPA mandates that cotton, tomatoes and polysilicon be high priority sectors. The addition of polysilicon has a direct impact on the U.S. solar energy industry, as it is a key material in the manufacture of solar panels. China is the world's leading producer of polysilicon, with nearly 50% of global production originating from the Xinjiang province.

So, this is an important resource at a critical moment when the United States and many other countries are adopting more sustainable solutions to combat climate change. While these three industries have already been identified as high priority sectors, the Act also charges an existing forced labor enforcement task force to prepare a list of other high priority sectors, as well as a sector specific enforcement plan, which will be issued around June 21.

Colvin: Understanding the potential significance that, for example, polysilicon is being targeted and how that could impact the U.S. solar energy industry – and even with respect to cotton and tomatoes, given that those are the other high priority sectors – what's an importer to do to obtain a release of these goods, given that there's a presumption that they were manufactured using forced labor? How do they get access to the goods when they arrive at the United States?

Powell: To overcome the presumption of forced labor, an importer must show by clear and convincing evidence that goods are not the product of forced labor. While the Act does not specify the types of evidence that might suffice, CBP has issued some guidance regarding the detailed evidence importers may need to provide. In addition to a certificate of origin and a detailed statement from the importers, other evidence would include affidavits – not only from the producer of the finished goods, but also the raw material suppliers as – well as purchase orders, invoices, proofs of payment, and, importantly, production documents such as daily manufacturing process reports, as well as the detailed records of employee contracts, wages, and their hours worked.

Not only must this information be submitted for the finished goods, as I mentioned, but also for the raw materials. In addition, evidence that the importer can provide showing it has implemented an anti-forced labor compliance program will also go a long way in demonstrating that it has taken adequate steps to vet the supply chain before importing from a supplier.

I also think it's important to note that it is not usually sufficient to submit only sample documentation. In general, what we've seen is that when importers are issued withhold release orders from CBP, they need to submit the entire set of documents that would apply to the production of the merchandise being imported.

I know that for many companies, it would be very difficult to trace their entire supply chains from raw materials to the final product. We are aware of some supply chain tracking platforms that purport to assist with the collection of this type of data, but there have been some concerns of intentional misrepresentations in those platforms.

I'm really excited about the potential for blockchain technology. For example, to be used to address some of the challenges of record tracking and keeping. But at this stage, it's really just important for importers to engage with counsel to identify, assess and mitigate their potential risks and exposure to enforcement.

We've been working with our clients to develop compliance programs in industries that are likely to see a high level of enforcement, and to assess their risks of importing from China in particular. As I mentioned before, the task force will be issuing guidance on due diligence and effective supply chain tracing measures by June 21, 2022, which is the effective date of the Act.

Colvin: You mentioned the importance, Brittney, that folks and companies-- particularly importers here-- engage with counsel to identify, assess and mitigate the potential risks with respect to importing from this particular region in China, but also to mitigate any potential exposure to enforcement of the Act.

Does the Act impose any sanctions on importers to the extent that they're bringing goods to the United States and to its ports from this region in China?

Powell: The Act does not impose sanctions on importers. Importers would just not be allowed to import the merchandise into the United States. They would have to re-export the merchandise that they intended to import. But the Act does amend the Uyghur Human Rights Policy Act of 2020 to underscore that sanctions may be imposed due to serious human rights abuses in connection with forced labor.

By June 21, 2022, the president is required to submit an initial report to Congress identifying non-U.S. persons subject to sanctions under this new provision. Those individuals will be subject to asset blocks.

Colvin: Understanding the potential significance of this Act for importers, what are one or two things that all importers should be doing today in anticipation of the Act fully going into effect so that they can make sure that they're able to successfully import into the country, those goods that they need to operate in their business?

Powell: My recommendation is for all U.S. importers, regardless of where they're sourcing from, to have some compliance program in place to assess whether the merchandise they're importing or the raw materials used in the merchandise originate from China.

If so, there is some risk of enforcement under this Act. Since the guidance from the task force will not be issued before June 21, 2022, which is the effective date of the Act, many importers will have little to no advanced notice as to what evidence they must submit to rebut the presumption of forced labor. So, it is important to engage with their counsel to address the issues as much and as early as possible.

In the meantime, importers should also look to recognize international standards to conduct due diligence of their supply chains and develop a process to identify and mitigate their risks.

Colvin: Brittney this has been super informative and helpful. I know you'll stay on top of the issue. You're always welcome to come back to share any developments with respect to the Act as they occur.

This concludes this episode of "ESG Essentials: What You Need to Know Now." Please stay tuned for our next podcast, which will be coming your way in the next couple of weeks. Thanks so much.