

January 4, 2022

President Biden Signs Uyghur Forced Labor Prevention Act – Overview and Near-term Compliance Recommendations

On December 23, President Biden signed the Uyghur Forced Labor Prevention Act, following passage by the House and Senate with near-unanimous support. Among other things, the Act creates a presumption for purposes of section 307 of the U.S. Tariff Act that goods produced in the Xinjiang Uyghur Autonomous Region of China, or with labor linked to specified Chinese government-sponsored labor programs, are produced using forced labor.

Attorneys
[Michael R. Littenberg](#)
[Samantha Elliott](#)

The Act will require a significant number of importers into the United States to strengthen their forced labor and import compliance programs. Companies further downstream also will want to assess supply chain risks presented by the Act and implement compliance program enhancements to mitigate those risks. This Alert discusses the Act in detail and provides near-term recommendations for companies.

Forced Labor Presumption for Xinjiang-Linked Goods

Section 307 of the Tariff Act prohibits the importation into the United States of goods, wares, articles and merchandise mined, produced or manufactured wholly or in part in any foreign country by forced labor (for brevity, in this Alert, we refer to “goods” that are “produced,” rather than using the longer articulation in section 307).

Section 3 of the Uyghur Forced Labor Prevention Act creates a rebuttable presumption that, for purposes of section 307 of the Tariff Act, goods produced wholly or in part in the Xinjiang Uyghur Autonomous Region of China are produced using forced labor.

In addition, the presumption applies to goods produced by entities outside of the XUAR that participate in pairing and other government-sponsored labor programs that involve forced labor. These entities will be contained on a list to be prepared by a U.S. Government task force, as part of the Government’s strategy for supporting enforcement of section 307. The task force and its work are discussed later in this Alert.

Exceptions to the Presumption

The forced labor presumption established by section 3 of the Act does not apply if the Commissioner of U.S. Customs and Border Protection determines that the importer has fully complied with guidance and implementing regulations issued pursuant to the Act and the importer has completely and substantively responded to all inquiries for information submitted by the Commissioner to ascertain whether the goods were produced wholly or in part with forced labor.

The presumption also does not apply if, by clear and convincing evidence, the Commissioner determines that the goods were not produced wholly or in part by forced labor. This is expected to be a high bar. The Countering America’s Adversaries Through Sanctions Act establishes an analogous presumption for North Korean labor. According to an FAQ issued pursuant to the CAATSA, “clear and convincing evidence” is a higher standard of proof than a preponderance of the evidence, and generally means that a claim or contention is highly probable. According to that FAQ, an importer who wishes to import merchandise that is subject to the rebuttable presumption under the CAATSA carries the burden to overcome the presumption by providing sufficient information to meet the clear and convincing standard. The CAATSA FAQ is discussed in our earlier Alert available [here](#). The information required is likely to be consistent with the requirements specified in the FAQs published by CBP in connection with its withhold release orders relating to XUAR cotton and tomato products and Hoshine Silicon Industry Co. Ltd (the cotton and tomato products WRO is discussed in our earlier Alert [here](#)).

If the Commissioner determines an exception to the forced labor presumption is appropriate, the determination will become a matter of public record. Under the Act, the Commissioner is required to submit to the appropriate congressional committees and make available to the public, within 30 days after the determination, a report identifying the goods and evidence considered.

Additional Regulations and Guidance

Section 3 of the Act expressly authorizes the Commissioner to prescribe regulations to implement the foregoing exceptions to the forced labor presumption of that section. It also authorizes the Commissioner to amend any other regulations relating to withhold release orders in order to implement section 3 of the Act.

Effective Date

The forced labor presumption takes effect 180 days after the enactment of the Act, which is June 21, 2022.

Sunset

The forced labor presumption will sunset on the eighth anniversary of the Act. It also will sunset earlier if the President submits to the appropriate congressional committees a determination that the Chinese Government has ended mass internment, forced labor and any other gross violations of human rights experienced by Uyghurs, Kazakhs, Kyrgyz, Tibetans and members of other persecuted groups in the XUAR.

Further U.S. Government Action Under the Act

Section 2 of the Act requires the U.S. Government to develop a strategy for supporting enforcement with respect to China of section 307 of the Tariff Act.

Public Comment and Hearing Process

The Act requires the Forced Labor Enforcement Task Force established in connection with the United States-Mexico-Canada Agreement to solicit public comments on how best to ensure that goods produced wholly or in part with forced labor in China are not imported into the United States. The strategy mandate is broad. It specifically references Uyghurs, Kazakhs, Kyrgyz and Tibetans, but also has an open-ended catch-all for members of other persecuted groups. In addition, although the strategy is to be focused on the XUAR, it is not confined to the XUAR.

The Task Force is required to publish a notice seeking public comment by January 22, 2022 (30 days after the date of the enactment of the Act). The comment period is required to remain open for at least 45 days.

Within 45 days after the end of the comment period, the Task Force is required to conduct a public hearing inviting witnesses to testify with respect to the use of forced labor in China and potential measures, including traceability measures, to prevent the importation into the United States of goods produced wholly or in part with forced labor in China.

Development of Government Strategy to Address Forced Labor

Following the public comment and hearing process, the Task Force, in consultation with the Secretary of Commerce and the Director of National Intelligence, is required to develop a strategy for supporting enforcement of section 307 of the Tariff Act with respect to China. The strategy is required to include the following seven elements (many of which contain subparts, as noted below):

- A comprehensive assessment of the risk of importing goods produced wholly or in part with forced labor in China (as specified in the Act, including from the XUAR or made by Uyghurs, Kazakhs, Kyrgyz, Tibetans or members of other persecuted groups in any other part of China).

The assessment is required to identify, to the extent feasible, (1) threats, including indirectly in supply chains, that could lead to the U.S. importation, directly from China or through third countries, of goods produced wholly or in part with forced labor and (2) procedures that can be implemented or improved to reduce these threats.

- A comprehensive description and evaluation of “pairing assistance,” “poverty alleviation” or other government labor schemes that include the forced labor of Uyghurs or members of other persecuted groups outside of the XUAR, involving the threat of penalty or in which participation is involuntary.

The Task Force is required to prepare lists of (1) entities in the XUAR that produce wholly or in part goods with forced labor, (2) entities working with the XUAR government to recruit, transport, transfer, harbor or receive forced labor of Uyghurs or other persecuted groups out of the XUAR, (3) products produced wholly or in part by entities on the foregoing lists, (4) entities that exported products described in clause (3) above from China into the United States, (5) facilities and entities, including specifically by name Xinjiang Production and Construction Corps, that source material from the XUAR or from persons working with the XUAR government or XPCC for purposes of the pairing program or other government programs that use forced labor and (6) high-priority sectors for enforcement, including specifically cotton, tomatoes and polysilicon, which were the subject of WROs in 2021.

The Task Force also is required to develop (1) a plan for identifying additional facilities and entities that source material from the XUAR or from persons working with the XUAR government or XPCC for purposes of pairing or other government programs that use forced labor, (2) an enforcement plan for each such entity whose goods are exported into the United States, which may include issuing withhold release orders, and (3) an enforcement plan for each high-priority sector.

- Recommendations for efforts, initiatives, tools and technologies to be adopted to ensure that CBP can accurately identify and trace goods made in the XUAR entering the United States.
- A description of how CBP plans to enhance its use of legal authorities and other tools to ensure that goods do not enter the United States in violation of section 307 of the Tariff Act, including through the initiation of pilot programs to test the viability of technologies to assist in the examination of goods.
- A description of the additional resources necessary for CBP to ensure that goods do not enter the United States in violation of section 307 of the Tariff Act.
- Guidance for importers addressing (1) due diligence, effective supply chain tracing and supply chain management measures to ensure that importers do not import goods produced with forced labor from China, especially from the XUAR, (2) the type, nature and extent of evidence that demonstrates that goods originating in China were not produced wholly or in part in the XUAR and (3) the type, nature and extent of evidence that demonstrates that goods originating in China, including goods detained or seized pursuant to section 307 of the Tariff Act, were not produced wholly or in part with forced labor.
- A plan to coordinate and collaborate with appropriate NGOs and private sector entities to implement and update the strategy developed under this portion of the Act.

Other Features of the Act

The Act also requires the Secretary of State, in coordination with the heads of other appropriate Federal departments and agencies, to submit to Congress a report that contains a U.S. strategy to promote initiatives to enhance international awareness of and address forced labor in the XUAR. Among other things, the report is required to contain a plan to enhance bilateral and multilateral coordination, including sustained engagement with governments of U.S. partners and allies to end XUAR forced labor.

The Act also amends the Uyghur Human Rights Policy Act to allow sanctions to be imposed under that act for serious human rights abuses in connection with forced labor.

Recommended Near-term Action Items

In preparation for the effectiveness of the forced labor presumption under section 3 of the Act in roughly six months, there are a number of near-term action items importers and companies further downstream should consider.

Conduct a Risk Assessment

Importers and companies that are further downstream in the value chain should conduct a risk assessment of their supply chains. The near-term focus should be on goods produced in whole or part in the XUAR or outside the XUAR with Uyghur labor (or the labor of other groups enumerated in the Act), since that is the scope of section 3's forced labor presumption. The risk assessment should take into account both known supply chains and risks arising from gaps in traceability.

The U.S. Government's July 2021 Supply Chain Business Advisory (which updates its July 2020 Advisory discussed in our earlier Alert [here](#)) is a good reference point for assessing possible XUAR labor inputs and forced labor risk. The Advisory describes warning signs of forced labor. It also includes an illustrative list of 20 XUAR industries that public reporting has tied to potential labor abuses. However, the list is not a comprehensive diligence tool, since it not intended as an exhaustive list of XUAR industries with labor tied to U.S. imports.

Keep in mind that the strategy mandate of the Task Force is not limited to the XUAR and Uyghur labor, as discussed earlier in this Alert. A supply chain review should therefore take into account other potential risk areas. For example, the 2021 Advisory added a footnote referencing reports regarding the expansion of internment camps to Tibet and Inner Mongolia and forced labor in the fishing industry.

Assess Sufficiency of Existing Supply Chain Compliance Program

As earlier noted, the Act's forced labor presumption does not apply if the CBP Commissioner determines that the importer has fully complied with guidance and implementing regulations issued pursuant to the Act. As a near-term action item, existing compliance measures – including policies, procedures, training, diligence and remediation measures – should be reviewed against current U.S. Government forced labor guidance, since current guidance will inform guidance and regulations ultimately published pursuant to the Act.

Forced labor compliance measures should be reviewed against the July 2021 Advisory. Compliance measures also should be reviewed against the FAQs published by CBP in connection with its withhold release orders relating to XUAR cotton and tomato products and Hoshine Silicon Industry Co. Ltd (the cotton and tomato products WRO is discussed in our earlier Alert [here](#)). In particular, these FAQs describe the chain of custody documentation that may be required from importers who have goods detained pursuant to one of the WROs. In addition, compliance programs should be reviewed against the due diligence recommendations in the FAQs issued in connection with the CAATSA, and CBP's forced labor reasonable care guidance, both of which are discussed in our earlier Alert [here](#).

Risk Analysis and Survey Assessments sent to companies by CBP pursuant to section 307 of the Tariff Act and the CAATSA also are instructive, since they indicate CBP's compliance program and chain of custody expectations.

Consider Whether to Participate in the Public Consultation

As earlier noted, the Act requires the Forced Labor Enforcement Task Force established in connection with the USMCA to solicit public comments on how best to ensure that goods produced wholly or in part with forced labor in China are not imported into the United States.

Leading industry groups already engaged on this issue will no doubt provide comments to help ensure that regulations and guidance developed pursuant to the Act do not create unnecessary supply chain disruptions or compliance costs for their members. Other trade groups in potentially affected industries also should consider whether to submit comments. Large companies substantially impacted by the Act also should consider whether to comment directly.

Review Forced Labor Disclosures

Companies should ensure their forced labor disclosures match their practices, to mitigate both legal and reputational risk.

In connection with a recent complaint brought by an NGO against several companies, the NGO alleged that the companies' forced labor mitigation practices were not aligned with their disclosures (recent forced labor complaints are further discussed below). In addition, suits have been brought in several U.S. and European jurisdictions under consumer protection statutes, in which the plaintiffs have alleged discrepancies between actual and stated policies and procedures to address forced labor in supply chains.

Companies also should consider whether forced labor disclosures mitigate or magnify risks from shareholders and regulators. Human rights issues are becoming an area of increasing focus for institutional investors. For example, in March 2021, BlackRock Investment Stewardship published commentary on its approach to engagement with companies on human rights impacts, while in April ISS published a paper concerning investor due diligence on modern slavery. Shareholder proposals on human rights-related issues also have been increasing.

Be Mindful of Developments in Other Jurisdictions

Over the last year, there have been developments in several other jurisdictions to address XUAR forced labor concerns, as well as to address forced labor more generally.

In January, Canada and the United Kingdom made parallel announcements concerning measures relating to XUAR products, as discussed in our earlier Alert [here](#) (note that these announcements did not involve new legal requirements).

Earlier this year, the Foreign Affairs and Business, Energy and Industrial Strategy Committees of the U.K. Parliament held an inquiry focused on Uyghur forced labor in U.K. supply chains, to establish a clearer understanding of commercial activity in the region, and what private companies perceive their ethical responsibilities to be in this area. The Committees solicited written submissions from a number of large well-known brands, some based in the United States.

Over the last several months, a series of criminal complaints were brought in Europe by NGOs against Western brands regarding the brands' alleged involvement in XUAR forced labor. In April, a suit was filed in France against four global clothing brands, alleging that the brands profited from Uyghur forced labor in the XUAR by continuing to subcontract production or market goods containing XUAR cotton. The French public prosecutor's office subsequently announced it has opened a preliminary investigation against the companies.

In September, a criminal complaint was filed in Germany against several high-profile textile brands and retailers alleging they are directly or indirectly abetting and profiting from forced labor of Uyghurs in the XUAR and might therefore be involved in crimes against humanity. In early December, a similar criminal complaint was filed against several Dutch and U.S. textile and fashion brands that have their European headquarters in the Netherlands. The NGO has asked the Dutch Public Prosecutor to investigate the companies' alleged complicity in human rights violations.

More generally, in June, a bill was introduced in the Australian Senate that would amend the Customs Act to prohibit the importation into Australia of goods that are produced in whole or in part by forced labor. The bill had its third reading in the Senate and was introduced in the House of Representatives in August.

On December 16, Prime Minister Trudeau of Canada issued mandate letters that outline his expectations for each minister. The letter to the Minister of Labour requests that he introduce legislation to eradicate forced labor from Canadian supply chains and ensure that Canadian businesses operating abroad do not contribute to human rights abuses. This would be in addition to the forced labor import prohibition added to the Customs Tariff in 2020 pursuant to the USMCA. Separately, bills have been tabled in the Canadian Senate pertaining to forced labor in supply chains generally and more specifically XUAR goods. In addition, in November, the Canada Border Services Agency acknowledged what has been reported to be its first seizure pursuant to the Customs Tariff of goods suspected of being produced with forced labor. The seizure involved a shipment of women's and children's clothing imported into Quebec from China.

Finally, mandatory human rights due diligence legislation was adopted in Germany and Norway over the summer. These acts address human rights broadly, which encompasses forced labor. The Norwegian Transparency Act takes effect on July 1, 2022, while the German Due Diligence in the Supply Chain Act takes effect at the beginning of 2023. The Norwegian and German acts are discussed in our Alerts [here](#) and [here](#), respectively.

About Our Practice

Ropes & Gray has a leading ESG, CSR and business and human rights compliance practice. We offer clients a comprehensive approach in these subject areas through a global team with members in the United States, Europe and Asia. In addition, senior members of the practice have advised on these matters for more than 30 years, enabling us to provide a long-term perspective that few firms can match.

For further information on the practice, click [here](#).