

INTERNATIONAL TRADE

Three experts on supply-chain compliance regarding forced labor discuss the Trade Facilitation and Trade Enforcement Act of 2015, signed by President Barack Obama. The authors offer advice to comply with the TFTEA, which takes effect March 10 and closes a critical loophole regarding immunity for a broad class of goods.

Importing Goods Made with Forced Labor Now Under Stricter Scrutiny



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The week of Feb. 22, the federal government took a significant step in the fight against forced (that is, slave, trafficked, child, and indentured) labor.

President Barack Obama signed into law the “Trade Facilitation and Trade Enforcement Act of 2015” (TFTEA). This enactment, which takes effect March 10, 2016, critically closes a loophole by amending the Tariff Act of 1930 (Tariff Act) to remove the long-standing “immunity” for broad classes of goods made with forced and prison labor.

And as the risk of detection increases, so does the very real risk of criminal prosecution under 18 U.S.C. § 545 (prohibiting certain categories of smuggling) and 19 U.S.C. § 1307 (prohibiting importation of products made by or through forced labor).

The International Labor Organization estimates that some 21 million people are “victims of forced labor,” and that forced labor annually generates some \$150 bil-

lion in illegal profits. The possibility that, entirely unbeknownst to the U.S. importers, categories of goods may be tainted and, therefore, denied entry into the U.S. is significant.

Of course, scrutinizing supply chains for evidence of forced labor has for some time been front-and-center in discussions among compliance professionals, in-house counsel, and management. In fact, forced labor’s impact on supply chains is the emerging “hot topic” in today’s boardrooms. The UK Modern Slavery Act of 2015, the California Transparency in Supply Chains Act, and the Federal Acquisition Regulation on Human Trafficking in Government Contracts (the logic and function of which are dissected in the chart below) are all part of a broader effort to recruit/conscript the global business community into the fight against forced labor.

Companies should continue to strive toward elimination of forced labor in their supply chains. In addition to the risk of seizure under TFTEA, businesses may face reputational damage, Federal Trade Commission and other governmental intervention, advocacy group pres-

sure and “naming & shaming” campaigns, contract termination, class actions, and other potential liabilities under other existing laws and regulations. Anti-trafficking measures may also improve public relations and employee morale, as well as helping to eliminate the scourge of modern slavery.

consumptive demands of the United States” were exempt from the ban. So, for example, because the demand for cocoa or teak far outstripped any domestic supply (after all, there is none), cocoa and teak imports were never stopped regardless of how the cocoa or teak was harvested or produced.

PRIOR TO MARCH 10, 2016 (AND FOR THE PAST 85 YEARS)

Goods in shipment made in whole or part with forced, child, indentured, or prison labor?



Category of good imported to meet “the consumptive demands of the United States” because domestic producers unable to meet U.S. demand?



Product cleared for import regardless of whether made with forced, child, indentured, or prison labor [In past 85 years, out of the hundreds of millions of imports less than 40 refused entry]

STARTING ON MARCH 10, 2016

Goods in shipment made in whole or part with forced, child, indentured, or prison labor?



- Tariff Act prohibits the shipment from being imported.
- Customs and Border Protection must include refused entry in annual report to Congress [With carve-out removed, all imports subject to scrutiny]

Requirements

Prohibition on Imports. Under the amended Section 307 of the Tariff Act (and 19 U.S.C. § 1307), all goods made “wholly or in part in any foreign country” through forced and prison labor “shall not be entitled to entry at any of the ports” of the U.S. This “wholly or in part” formulation is of particular significance, because it means that even “minor” involvement of forced or prison labor in the manufacture of a product may taint the entire product.

Reporting Requirement. Congress also implemented a reporting requirement. The Commissioner of the U.S. Customs and Border Protection (CBP) must now annually submit a report to Congress stating:

- (1) how many times merchandise was denied entry under the Tariff Act during the prior year;
- (2) a description of the merchandise; and
- (3) any other relevant information.

The first such report is due to Congress on Aug. 22, 2016.

Removing the Exception That (For 85 years) Has Swallowed the Rule

Since the Tariff Act’s passage in 1930, the U.S. has made it illegal to import any goods made with forced or prison labor. However, a controversial key carve-out provided that certain goods from abroad that met “the

The impact of the carve-out is far more than academic. For the past 85 years, the CBP has reported less than 40 instances of stopping shipments of goods suspected to have been made with forced or prison labor. Given that in many parts of the world forced and prison labor is commonplace, this low number speaks to the carve-out’s real-world impact.

True, enforcement challenges will continue. But with the carve-out a thing of the past, every indication is that scrutiny of imports, and the corresponding number stopped shipments, is likely to increase significantly.

How Are Goods Kept Out?

The TFTEA lacks specific guidance as to implementation or enforcement. The Bureau of International Labor Affairs at the Labor Department maintains an extensive list of goods determined to be produced by child labor or forced labor at <http://www.dol.gov/ilab/reports/child-labor/list-of-goods/>. Despite some early reporting to the contrary, there is no reason to believe that all goods included on the U.S. Department of Labor list will be categorically banned, e.g., all “electronics and toys from China,” “cotton from India,” or “garments from Vietnam.”

Instead, we expect the U.S. Immigration and Customs Enforcement and the CBP to develop a middle-ground, case-by-case approach. A common-sense approach will likely be informed by this list, as well as whistle-blower and advocacy organization tips and publicly-available information indicating that a particular shipment should be inspected or stopped.

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Practical Tips: What Should Companies Do?

Prepare for Broader Enforcement Efforts—Particularly if You Are Importing “Suspect Goods” From “Suspect Countries”

As of March 10, 2016, the “consumptive demands of the United States” carve-out will be a thing of the past. We believe the CBP enforcers will immediately begin to use as its first line resource the Labor Department’s list of 136 suspect goods (hailing from 74 suspect countries). With the carve-out gone, the DOL’s findings create a de facto “presumption” that these goods will violate the amended Tariff Act.

Avoid Any Taint in Supply Chain

The amended Tariff Act prohibition implicates every piece of a product. Even if one small component in a larger product is made using forced, or prison labor, the entire product can be seized. The net result is that use of forced labor in any part of the supply chain, no matter how many steps removed, could potentially result in seizure of goods. In the absence of meaningful due dili-

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gence, the danger of such import-prohibiting taint is very real. The most effective step to reduce the chances of seizure of imports is to set up robust compliance programs designed to identify and remove tainted products or components of products from the supply chain.

Prepare Supply Chain Management for Its Role in Addressing Compliance Risks

(1) Create a meaningful due diligence process by ensuring that all supplier and subcontractor contracts:

- Contain a robust indemnification clause;
- Provide audit rights;
- Require full cooperation in the case of any internal investigation or review;
- Obligate the supplier/subcontractor to immediately notify the company of any actual or potential nonperformance/problems; and
- Require the supplier/subcontractor to consent to follow a company-developed action plan in case of any non-compliance.

(2) Require reps and warranties that the supplier/subcontractor:

- Is in compliance with all applicable national and international laws and regulations, including U.S. Customs laws and regulations, as well as the company’s code of conduct, including prohibiting forced and child labor;
- Ensures that the work environment is in compliance with applicable labor and employment laws, as well as the company’s code of conduct; and

- Has not and will not, directly or indirectly, engage in certain activities connected to forced and child labor. These activities should be expressly detailed in the certification.

(3) Design due diligence forms and audit programs to evaluate and address risks of forced and child labor in the company’s supply chains.

(4) Develop and publicize internal accountability standards for employees and contractors in the company’s supply chain management and procurement systems regarding forced and child labor.

(5) Determine whether suppliers have appropriate systems to identify risks of forced and child labor within their own supply chains.

(6) Train employees and business partners, particularly those with direct responsibility for supply chain management, concerning the company’s expectations regarding forced and child labor, particularly with respect to mitigating risks within the supply chains of products.

Today’s corporate compliance officer needs to understand his or her company’s exposure to the myriad of (oft-related) problems flowing from supply chain and labor issues (real and imagined)—lawsuits, enforcement actions, prosecutions/investigations, activist pressures, and negative publicity. The impacts of these consequences range from business-disrupting to business-ending. Getting ahead of the compliance curve and aligning a proactive company approach with the current and anticipated novel legal requirements is simply smart business

Human Trafficking/Forced Labor Laws & Regulation Comparison Matrix

ENACTMENT	JURISDICTION	DISCLOSURE REQUIREMENTS	NON-DISCLOSURE/SUBSTANTIVE REQUIREMENTS	PENALTIES	EFFECTIVE DATE
California Transparency in Supply Chains Act (SB 657)	All companies that are: 1. Retail seller/manufacturer (based on tax status); 2. With annual gross worldwide receipts exceeding \$100 million; and 3. "Doing business" in California (property or salaries in California exceeding \$50K).	Disclosure must address what, if anything, done to: 1. Verify supply chain to evaluate/address "risks of human trafficking and slavery." 2. Audit suppliers to evaluate compliance with company standards. Unannounced and through independent auditors? 3. Obtain certification from direct suppliers that materials incorporated into goods comply with local anti-trafficking and slavery laws. 4. Maintain internal "accountability standards and procedures" for those who fail to meet your standards. 5. Provide training to employees/management with supply chain responsibility (focus on mitigating supply chain risks and identifying trafficking). Note: Disclosures must be on internet homepage. Homepage disclosure must be through a "conspicuous" and "easily understood" link to full-text document.	None	<ul style="list-style-type: none"> California Attorney General injunction for non-compliance. Potential class action lawsuits for false or misleading declarations. Consumer and advocacy group actions. 	January 1, 2012
Executive Order on Trafficking in Government Contracts (EO 13627) The final rule amends Federal Acquisition Regulation Subpart 22.17 and Contract Clause 52.222-50	Applies to all federal contractors for goods/services (size/nature of contract irrelevant).	For contracts for services or supplies that are not off-the-shelf items that (1) exceed \$500,000 in value and (2) are to be performed outside U.S., contractors and subcontractors must create and post at the workplace and on their company website a formal compliance plan including: <ul style="list-style-type: none"> An employee awareness program about U.S. anti-trafficking policy A process for employees to report activity inconsistent with zero-tolerance policy without fear of retaliation A recruitment and wage plan Available disciplinary actions for employees that violate the policy Reciprocal expectations between company and supplier A housing plan Preventative procedures for subcontractors Each contractor and subcontractor must formally certify that it has a compliance plan in place, has conducted due diligence, and has an absence of misconduct, or if misconduct was observed, that appropriate remediation and referral actions were taken.	Federal contractors, subcontractors, their employees and their agents prohibited from engaging in human trafficking, as evidenced through: <ul style="list-style-type: none"> Using forced labor Misleading/fraudulent recruitment practices Charging recruitment fees Destroying, concealing, confiscating, or otherwise denying employee access to his or her identity docs Failing to pay return transportation costs Failing to provide employment agreement (if required) in employee's native tongue and prior to employee's departure from home country Contractors and their subcontractors must agree to: <ul style="list-style-type: none"> "Cooperate fully" with, and provide reasonable access to, agencies conducting investigations into, among other things, violations of this order Self-report, among other things, "activities that ... are inconsistent with the requirements of this order or any other applicable law or regulation" 	<ul style="list-style-type: none"> Imprisonment: "Knowing and willful" false certification is a crime. Reckless disregard or conscious avoidance of truth qualify as "knowing." Consequences include up to five years' imprisonment and \$250K fine. False Claims Act: Government Fraud (31 U.S.C. §3729). Trafficking Victims Protection Act (22 U.S.C. § 7104(g): Federal agency may terminate your contract. Debarment: Business death knell for non-compliance (48 CFR 9.406-2). Loss of award fee or termination of contract. 	March 2, 2015

Human Trafficking/Forced Labor Laws & Regulation Comparison Matrix

ENACTMENT	JURISDICTION	DISCLOSURE REQUIREMENTS	NON-DISCLOSURE/SUBSTANTIVE REQUIREMENTS	PENALTIES	EFFECTIVE DATE
Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 (Pending legislation - H.R. 3226)	All companies that are: 1. Publicly traded; and 2. Have annual gross receipts in excess of \$100 million.	Statement describing to what extent, if any, company: <ul style="list-style-type: none"> Maintains policies to identify/eliminate risks of trafficking and slavery within supply chains, and actions taken pursuant to policies; Maintains policies prohibiting employees/employees of entities associated with supply chain from engaging in commercial sex acts with minors; Evaluates and addresses risks of human trafficking and worst forms of child labor in supply chains; Audits suppliers' working conditions/labor practices; Requires suppliers to attest that their product manufacturing/labor recruitments are carried out in compliance with trafficking and slavery laws, maintain internal accountability standards & procedures, train employees responsible for supply chain management, and recruit employees in compliance with company anti-trafficking policies; Provides remediation to those who have been identified as trafficking and slavery victims. 	None	<ul style="list-style-type: none"> Securities and Exchange Commission action for failure to adequately comply. Potential class action lawsuits for false or misleading declarations. Consumer and advocacy group actions. 	Depends on if/when pending legislation passed
UK Modern Slavery Act of 2015 (Part 6 - Transparency in Supply Chains)	All companies that are: 1. Supplier of goods and/or services; 2. Corporation or partnership (wherever incorporated or formed) carrying on "a business, or part of a business," in any part of the UK; and 3. With a total annual turnover exceeding £36 million.	Statement detailing steps taken during the past financial year to ensure slavery and human trafficking are not taking place in (1) any of company's supply chains and (2) any part of its business. Approved/signed disclosure Statement may include information concerning: <ul style="list-style-type: none"> Company's structure/business/supply chains. Anti-trafficking/slavery policies. Anti-trafficking/slavery due diligence processes. Identification and management of higher-risk areas in business/supply chains. Effectiveness assessment of measures, based on performance measures company considers appropriate. Anti-trafficking/slavery trainings available to staff. 	None	<ul style="list-style-type: none"> High Court injunction (civil action brought by Secretary of State). In Scotland only, action for specific performances of a statutory duty under § 45 of the Court of Session Act 1988. 	Royal assent received March 26, 2015
Directive of the European Parliament and of the Council Concerning Various Disclosures	"The proposal provides that large companies should disclose non-financial information under a set of requirements devised to increasing transparency with the objective of strengthening the company's transparency and accountability, while limiting any undue administrative burden."	"Article 1 (a) of the proposal will require certain large companies to disclose a statement in their Annual Report including material information relating to at least environmental, social, and employee-related matters, respect of human rights, anti-corruption and bribery aspects. Within these areas, the statement will include (i) a description of its policies, (ii) results and (iii) risk-related aspects."	None	Uncertain	N/A