

Trade Compliance Flash: Uyghur Forced Labor Prevention Act: Prepare for Broader Enforcement of U.S. Anti-Forced Labor Law

International Alert

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On December 23, 2021, President Biden signed into law the [Uyghur Forced Labor Prevention Act](#) (the UFLPA), a law designed to "ensure that goods made in the Xinjiang Uyghur Autonomous Region [the XUAR] of the People's Republic of China [China] do not enter the United States market." The UFLPA mandates that the U.S. government develop a strategy to ensure that goods made with forced labor in China, generally, and in the XUAR specifically, are prevented from importation into the U.S. (hereinafter, the Strategy). The Strategy will include the identification of entities that produce goods using forced labor in the XUAR, a list of products made by these entities, and "high-priority sectors" for targeted enforcement. Most significantly, the UFLPA creates a **new** "rebuttable presumption" that **all** goods made in whole or in part in the XUAR, or by entities identified by the U.S. government as having certain connections to forced labor in the XUAR, are prohibited from entry into the United States.

We anticipate that the UFLPA will have a significant impact on the future of U.S. Customs and Border Protection's (CBP) enforcement of the U.S. law prohibiting the import of goods made with forced labor¹ and that this impact will be felt most acutely in industries not yet targeted by CBP. To date, CBP's XUAR-related enforcement efforts have targeted specific goods – most notably in the apparel and solar industries – based on CBP's "reasonable suspicion" that these specific goods are made in whole or in part with forced labor. The UFLPA has the potential to drastically expand CBP's enforcement, as it mandates that CBP apply a broad, new "rebuttable presumption" that **all goods produced in whole or in part in the XUAR** are prohibited from entry into the U.S. The UFLPA also requires CBP to apply this "rebuttable presumption" – and deny from entry into the U.S. – goods produced **outside of the XUAR** but by certain entities and facilities that source material or labor from the XUAR.

The UFLPA allows for an exception to this presumption, but only when CBP has "clear and convincing evidence" that the goods were not made with forced labor. Practically speaking, for businesses with supply chains involving the XUAR **or** entities that otherwise source material or labor from the XUAR, the burden will likely fall on U.S. importers to furnish the "clear and convincing" evidence that their supply chains are free from forced labor and that their goods are therefore admissible into the U.S. Further, to clear their goods for entry into the U.S., importers will also be required to conduct anti-forced labor due diligence and supply chain mapping to ensure to that they do not import **any** goods made with forced labor in China, generally, and in particular from the XUAR. Importers who do not have full visibility into their supply chains may be caught unaware by what we expect to be a surge in enforcement of existing anti-forced labor laws under the UFLPA.

Despite these implications, the UFLPA offers some hope to importers, as it may result in greater clarity and certainty on how companies can demonstrate to U.S. authorities that their goods were not made with forced labor. As companies in the apparel and solar industries can attest, the lack of clear guidance on the evidence required to prove that goods are free from forced labor has caused significant supply chain disruptions in the past year. The UFLPA now requires the U.S. government to offer "guidance to importers" regarding (1) supply chain due diligence they should conduct to ensure that their supply chains are free from forced labor and (2) the "type, nature, and extent of evidence" that importers of goods from China can use to sufficiently demonstrate to CBP that their goods were not made **either** by forced labor **or** in the XUAR. Depending on the content of this (forthcoming) guidance, the UFLPA may aid importers by resulting in concrete instruction from U.S. authorities on how to prove that supply chains are free from forced labor.

Below we discuss the operative provisions of the UFLPA, the key takeaways for importers, and the steps that companies should take now to prepare for the expected increase in enforcement of U.S. anti-forced labor laws by CBP – without which their goods may be deemed inadmissible for entry into the U.S. under the UFLPA.

Key Components of the UFLPA

A. Government Strategy for Preventing Importation of Goods Made with Forced Labor in China, Including the Identification of "High-Priority Sectors for Enforcement"

The UFLPA requires the Forced Labor Enforcement Task Force (the Task Force) – an inter-agency group chaired by the Department of Homeland Security² (DHS) – to develop a strategy "for supporting the enforcement of Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) to prevent the importation into the United States of goods mined, produced, or manufactured in whole or in part with forced labor in [China]". DHS will develop the Strategy in consultation with the Director of National Intelligence and the Secretary of Commerce. The UFLPA requires the Task Force to submit the Strategy to the relevant U.S. Congressional committees within 180 days from the date of the law's enactment.

- The Strategy must include a comprehensive assessment of the risk of importing goods made with forced labor from China and lists of entities implicated in the alleged forced labor abuses in China, including:

Entities in the XUAR that mine, produce, or manufacture wholly or in part any goods, wares, articles, and merchandise with forced labor

Entities working with the government of the XUAR to recruit, transport, transfer, or receive forced labor, Uyghurs, or "members of other persecuted groups" out of the XUAR

A list of products produced by the entities appearing on lists (1) or (2) above\

A list of entities that export products identified in list (3) above from China to the U.S.

A list of facilities and entities, including the Xinjiang Production and Construction Corps (XPCC), that source material from the XUAR or from "persons working with the government" of the XUAR or with the XPCC as part of any government labor schemes which use forced labor, including the XUAR's "poverty alleviation" and "pairing-assistance" programs

A list of high-priority sectors for enforcement, which must include cotton, tomatoes, and polysilicon

- The Strategy must include an enforcement plan for each of the above-identified entities and "high-priority sectors," which may include issuing additional withhold release orders (WROs).³
- The Strategy must also include "**guidance to importers**" that addresses, *inter alia*:
 - Supply chain due diligence, tracing, and "management measures" to ensure that importers do not import into the U.S. **any** goods made with forced labor in China, generally, and particularly in the XUAR
 - The "type, nature, and extent of evidence" that importers can use to demonstrate that goods originating in China were not produced wholly or in part **either** in the XUAR **or** with forced labor, generally (anywhere in China)

B. Rebuttable Presumption

The UFLPA requires CBP to apply a "rebuttable presumption" that goods made in whole or in part in the XUAR or by any of the entities identified in the lists described in paragraphs 1-5 above are prohibited from import into the U.S. The UFLPA further authorizes CBP to develop new or to amend existing regulations to implement this rebuttable presumption.

The UFLPA allows for exceptions to the rebuttable presumption, but only where CBP determines that:

- The importer has "fully complied" with the (forthcoming) guidance to importers, as well as any future regulations issued by CBP to

implement the guidance;

- The importer has completely responded to any requests for information by CBP regarding the goods; **and**
- CBP has "clear and convincing evidence" that the goods were not made in whole or in part with forced labor.

C. Additional Basis for Sanctions Under the Uyghur Human Rights Policy Act of 2020

In addition to import restrictions, the UFLPA amends the Uyghur Human Rights Policy Act of 2020, which authorizes sanctions on foreign persons that the president has determined are responsible for certain human rights violations of Uyghurs or other ethnic minorities in the XUAR. Prior to enactment of the UFLPA, the Uyghur Human Rights Policy Act of 2020 authorized sanctions against individuals deemed responsible for torture, prolonged detention, and abduction of Uyghurs and other ethnic minorities in the XUAR. The UFLPA now adds to this list persons that the president determines have engaged in "serious human rights abuses in connection with forced labor" in the XUAR. It also requires the president to identify such in a report to Congress and to impose sanctions on these persons. The president must make the report to Congress within 180 days of the UFLPA's enactment.

D. No Mandatory Disclosure Requirement/Reporting to the U.S. Securities and Exchange Commission (SEC)

For those who have been following the UFLPA's progression through Congress, the final text removed an important provision contained in the U.S. House of Representatives' version of the bill: a requirement that public companies make annual and quarterly reports to the SEC disclosing if the company knowingly engaged in certain activities related to forced labor in the XUAR (*i.e.*, providing mass population surveillance technology, running detention facilities, engaging in "paring-assistance" programs, engaging with a company subject to a WRO, dealing with persons sanctioned for their actions in the XUAR, or dealing with any person or entity "responsible for, or complicit in, committing atrocities" in the XUAR).

Takeaways for Importers

- **Supply chain due diligence is now critical for businesses whose supply chains run through China .**

The UFLPA's requirements will result in an increased number of goods, from an increased number of sectors, that will be **presumptively prohibited from entry into the U.S.**, and thus subject to detention by CBP at U.S. ports of entry. Further, the UFLPA's mandate that the Task Force develop an enforcement plan to prevent goods produced by the entities identified by the Task Force – *i.e.*, entities which use forced labor in the XUAR, export such products to the U.S., or are located **outside of the XUAR** but source/are otherwise involved in the government labor schemes alleged to involve forced labor – will likely affect importers across a much broader range of industries than are targeted by CBP's current enforcement efforts.

We cannot conclusively predict the sectors and goods that will be subject to enforcement. However, importers should look to other U.S. guidance identifying goods at "high risk" of being made with forced labor in order to anticipate whether they may become subject to CBP's rebuttable presumption or to specific, targeted enforcement by CBP (*i.e.*, new WROs). In particular, importers should review the products listed in Annex 2 of the updated [Xinjiang Business Supply Chain Advisory](#) (the Xinjiang Advisory) (*e.g.*, cell phones, cleaning supplies, footwear, gloves, toys, sugar, cotton, silica-based products used in solar panels), as well as the Department of Labor's [List of Goods Produced by Child Labor or Forced Labor](#) (the DOL List) (*e.g.*, electronics, coal, bricks, fireworks, hair products). These products may be at the forefront of those affected by the UFLPA. Importers of goods identified by the Task Force as being made by entities connected to forced labor in the XUAR will likely experience new or increased enforcement from CBP by way of additional Requests for Information (CF-28s), audits, detentions, seizures, and other enforcement activities.

- **The UFLPA's requirement that U.S. authorities provide "guidance to importers" could prove valuable, particularly for importers operating in high-risk sectors.**

The UFLPA includes a public notice and hearing period as part of the Strategy. This provision of the UFLPA could provide importers with a rare opportunity to shape enforcement. Importers should strongly consider providing comments to the Task Force regarding how they can reasonably demonstrate that their goods are not made with forced labor – and particularly how they can obtain release of their goods should CBP detain them at a U.S. port of entry. With industry participation, the guidance could help importers develop and implement supply chain due diligence that meets CBP expectations in terms of effectively responding to potential forced labor risks. To date, importers have had limited insight into the evidentiary standards and decision-making processes of CBP's Forced Labor Division. Depending on its thoroughness and practicality, the guidance could be of critical help to importers, many of whom have been forced to re-work their supply chains – even without finding evidence of forced labor – in order to navigate an emerging and quickly-changing enforcement landscape.

Nevertheless, the UFLPA does not specify whether the lists developed by the Task Force in the Strategy must be made public. Whether this information is made public will certainly affect how helpful the UFLPA's guidance will be for importers. The UFLPA states that the Strategy should be submitted to Congress in an unclassified form, but permits a classified annex, if necessary. In particular, importers would benefit from the U.S. government publishing the lists of entities that it determines have ties to forced labor in the XUAR. Failing to make this information public would hinder importers' effective supply chain due diligence, as evidenced by the difficulties importers have had conducting this diligence under CBP's current enforcement framework. (Aside from the entities named in specific WROs, CBP has historically not shared with importers the agency's lists of downstream suppliers linked to entities targeted by WROs or suspected by CBP to use forced labor in China more broadly.)

- **Regardless of the eventual content of the guidance, importers should not underestimate the practical challenges of achieving traceability and compliance with U.S. regulators' expectations regarding forced labor risks for goods made in China.**

Companies whose goods have already been detained under existing WROs already sense that they are facing a rebuttable presumption that their goods are inadmissible to the U.S. This evidentiary hurdle is compounded by the practical difficulties companies often face in obtaining sourcing information from upstream suppliers and conducting supply chain due diligence or audits in China. Importers often have no contractual relationships with indirect suppliers, and as such these suppliers are often reticent to provide the documentation that CBP's WRO-related guidance recommends (such as transaction, transportation, and production records). Local legal considerations and sensitivities regarding these issues in China – where the government strongly contests the U.S.'s allegations of state-sponsored forced labor – further complicate the assessment for importers as to what steps they can reasonably take. In short, obtaining the documentation necessary to prove the admissibility of goods is not a simple task and requires careful consideration by legal and other departments to develop and execute an action plan.

Steps Importers Should Take

In light of the increased enforcement risks posed by the UFLPA, businesses with supply chains in China should strongly consider undertaking comprehensive supply chain due diligence and other anti-forced labor compliance efforts aimed at identifying, *inter alia*, any supply chain ties to the XUAR or to China-based entities linked to the XUAR or that are otherwise involved in alleged forced labor in China. Specifically, to the extent they have not already, importers should act now to:

- Review the Xinjiang Advisory and the DOL List to determine whether they import goods at higher risk of increased enforcement under the UFLPA.
- Map the supply chain for any high-risk goods (*e.g.*, apparel) or high-risk inputs of goods (*e.g.*, cotton) in order to identify all suppliers involved in each step of the high-risk goods'/inputs' production, including those involved in supplying the raw materials for such goods.
- Conduct screening of direct and indirect suppliers in order to determine whether they have links to the XUAR or to entities publicly alleged to be connected to forced labor in China. **Note that this due diligence differs significantly from typical supplier/business partner due diligence** and there are significant obstacles to accessing useful information to inform anti-forced labor supplier screening. Importers should work with their in-house legal teams or external counsel/consultants to ensure that

their anti-forced labor due diligence is in fact effective, such that U.S. enforcement authorities would find it persuasive.

- Develop and implement supply chain traceability processes that enable the company to trace the origin of imported goods/their inputs. **Importantly, these processes should include the gathering of traceability documentation (i.e., transactional, transportation, and production records) that allow the company to evidence the origin of the goods/their inputs.**
- Develop and implement policies addressing forced labor risks and compliance obligations that apply to supply chain partners.
- Develop, incorporate, and educate suppliers on contractual provisions which require that suppliers cooperate with these initiatives. Such provisions should include specific clauses by which suppliers agree to provide traceability documentation and consent to auditing upon the buyer's request.

We work with companies to assess forced labor risks, map supply chains, conduct third party supplier audits (including supplier audits conducted under privilege), conduct in-depth due diligence on high-risk operations, develop and update anti-forced labor policies and procedures, remediate forced labor indicators, and interact with CBP in connection with WROs and detained shipments. For more information, please contact Miller & Chevalier's [Business and Human Rights](#) practice:

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¹Namely, Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307), which prohibits the import of any product made wholly or in part by forced labor.

²The Forced Labor Enforcement Task Force is an inter-agency group established in accordance with the U.S.-Mexico-Canada Agreement (USMCA) to monitor the U.S.'s enforcement of 19 U.S.C. § 1307, which prohibits the importation of goods made in whole or in part with forced labor. It is chaired by the DHS and includes representatives from the U.S. Departments of State, Treasury, Justice, and Labor, as well as the Office of the United States Trade Representative (USTR).

³WROs are CBP's primary enforcement mechanism for U.S. anti-forced labor laws, under which CBP instructs U.S. ports of entry to detain and withhold the release of specified goods upon import into the U.S.

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