

Trade Compliance Flash: Analysis: U.S. Government's UFLPA Enforcement Strategy and Guidance to Importers

Need-to-Know Information on Day 1 of CBP's June 21 Implementation of the UFLPA

International Alert

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Last week, U.S. Customs and Border Protection (CBP) issued its much-anticipated [Operational Guidance for Importers](#) (the **Importer Guidance**) on the Uyghur Forced Labor Prevention Act (UFLPA). This release was followed on June 17 by U.S. Department of Homeland Security's (DHS) publication of the [Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China](#) (the **Enforcement Strategy**). The trade community has been awaiting these documents since the passage of the UFLPA, which creates a rebuttable presumption that goods manufactured wholly or in part in China's Xinjiang Uyghur Autonomous Region (XUAR), or by certain entities, are made with forced labor and therefore prohibited from importation to the U.S. The rebuttable presumption goes into effect today, June 21, leaving importers little time to digest the new guidance documents which will govern CBP's immediate enforcement of the law.

The Importer Guidance and Enforcement Strategy contain critical information that companies should use to inform their strategies for managing their risks of enforcement under the UFLPA. Here is what you need to know about the guidance on Day 1 of the new regime's implementation.

High-level Summary of the Two Documents Released by the U.S. Government

- The **Enforcement Strategy** provides important details regarding how CBP will implement the UFLPA. The UFLPA mandated that the DHS-led Forced Labor Enforcement Task Force (FLETF) develop an Enforcement Strategy for the law's implementation by June 21, when CBP will begin enforcing the rebuttable presumption that goods made wholly or in part in the XUAR or by certain entities are inadmissible. The Enforcement Strategy includes the following key details related to the UFLPA's implementation:
 - The identification of entities that produce goods using forced labor in the XUAR or are otherwise connected to forced labor in the XUAR, and to which the rebuttable presumption will apply (the UFLPA Entity List)
 - "High-priority sectors" for targeted enforcement and an enforcement plan for each
 - Guidance to importers on effective due diligence and how to prove that goods were not made in the XUAR or with forced labor
 - How CBP plans to enhance its authorities and tools to prevent goods made with forced labor from entering the U.S.
- The **Importer Guidance** is meant to complement the Enforcement Strategy and describes CBP's enforcement process under the UFLPA. Like the Enforcement Strategy, it offers insight to importers regarding (1) the due diligence they should conduct to ensure their supply chains are free from forced labor and (2) the type, nature, and extent of evidence that CBP will require from them to demonstrate that their supply chains are free from content from the XUAR or from Entity List suppliers. It also discusses how importers can overcome the rebuttable presumption and demonstrate that their goods were *not* made with forced labor if they do contain content from the XUAR or Entity List suppliers.

Key Takeaways for Importers

1. CBP and DHS have established a concept of two paths for importers to secure the release of detained goods: (1) a UFLPA Scope Review or (2) a No Forced Labor Review.

The guidance sets forth two distinct (and mutually exclusive) paths importers can take to secure the release of goods detained

under the UFLPA.

- **Path 1 – UFLPA Scope Review** : Under the first path, the importer can attempt to show that the relevant goods are not within the scope of the UFLPA, *i.e.*, that no part of the goods was manufactured in XUAR and that no entity on the UFLPA Entity List was involved in the manufacture. The focus of CBP's review then becomes whether the importer's "supply chain tracing documentation" – documentation which traces the supply chain from the raw materials to the imported good – sufficiently demonstrates the provenance of the goods. The importer does **not** need to rebut the presumption that the goods were made with forced labor, significantly lowering the requirements for proving admissibility under the UFLPA.
- **Path 2 – No Forced Labor Review** : Under the second path, the importer accepts that the goods are within the scope of the UFLPA but contends that no part of the goods were made with forced labor and no organizations on the Entity List were used in their manufacture. CBP must grant these importers a formal exception to the rebuttable presumption for the goods to be admitted. The requirements for demonstrating admissibility under Path 2 are much more onerous than under Path 1. Not only must the importer provide supply chain tracing documentation, but they must also provide information on their due diligence system and supply chain management measures and – likely the most difficult to obtain – evidence that the workers at the factories in the supply chain are working voluntarily. This evidence **must** demonstrate that any indicators of forced labor either do not exist or have been fully remediated. In addition, an exception will not be granted unless the importer has fully responded to all CBP requests for information about the goods and demonstrated that it has "fully complied" with the Enforcement Strategy's guidance to importers with respect to due diligence, supply chain tracing, and supply chain management measures.

Note that CBP confirmed that it will continue to use the "reasonable but not conclusive" standard to determine which shipments to detain under the UFLPA, which is the same standard it uses in detaining shipments under Withhold Release Orders (WROs), the preexisting mechanism for preventing goods made from forced labor from entering the U.S. Under this standard, CBP detains goods when it has "reasonable but not conclusive" evidence that they were made using forced labor.

As a practical matter, we expect that most importers who experience detentions will seek to have their goods released under Path 1.

2. The new guidance details the types of evidence that will be required to release detentions under Path 1 and Path 2.

Path 1: The Path 1 supply chain tracing documentation resembles traceability documentation which CBP has required to release goods under existing XUAR-related WROs. The list includes transaction and shipping records – such as purchase orders, invoices, packing lists, payment records, bills of lading, and certificates of origin – as well as a detailed description of the overall supply chain. However, importers subject to existing WROs should note that the list of documents requested by CBP appears slightly broader than what CBP has requested in the past. For example, importers wishing to demonstrate that their goods are outside of the scope of the UFLPA must submit evidence which allows CBP to determine the roles of various entities in the supply chain, including whether a given supplier is also a manufacturer. The Guidance and Enforcement Strategy note that the list of supply chain tracing documentation is not exhaustive and is intended to "provide importers flexibility to provide documentation consistent with their business operations."

Path 2: The Path 2 documentation also must include supply chain tracing documentation; however, importers wishing to rebut the presumption of forced labor will be required to provide documents related to their due diligence systems and supply chain management measures, as well as evidence that workers in the supply chain are working voluntarily. While some of these documents would not be particularly burdensome to collect, others will likely be near impossible. For example, the Importer Guidance says that Path 2 documentation may include individual wage and production records for workers *at each* production entity in China, and information on recruitment practices and internal controls "to ensure that *all workers in China* were recruited and are working voluntarily." Even if suppliers are willing to provide this information, it is unlikely that all suppliers in the China supply chain have these records available for all workers.

Importantly, CBP and DHS have not provided a proscriptive list of documents which they will require. Rather, the guidance states that the type, nature, and extent of evidence required "will vary based on the facts and circumstances of the import in question."

Importers had hoped that the UFLPA would require CBP to provide more concrete information regarding how to successfully overcome detentions than existed under the WRO regime. Whether importers are satisfied with the flexibility offered by CBP may depend largely on whether CBP tells importers of perceived holes in their admissibility packages and whether it allows importers to remedy those holes before making admissibility determinations.

3. Due diligence.

The Enforcement Strategy addresses diligence that importers should undertake to ensure no forced labor exists in the U.S. supply chain. Importers wishing to pursue Path 2 must fully comply with this diligence and provide documentation to prove it. Again, DHS has not provided a concrete list of requirements for a diligence system and it is therefore not clear how CBP would measure complete compliance with this diligence guidance, when assessing whether to grant an exception to the UFLPA. Some of the requirements appear fixed – for example, the Path 2 importers must develop a Code of Conduct which not only forbids forced labor but also “address[es] the risk of use of PRC government-labor schemes.” CBP will also expect importers to incorporate these provisions into their supplier contracts so that they cascade down the supply chain.

4. The UFLPA Entity List is short and includes known players (no surprises).

The first iteration of the Entity List includes less than two dozen companies (not counting affiliates and subsidiaries), all of which are known entities previously subject to WROs or identified on the U.S. Commerce Department’s Bureau of Industry and Security’s (BIS) entity list. However, the Enforcement Strategy notes that the FLETF plans to identify additional entities associated with the at-issue labor schemes in the future. DHS and CBP had a short window to prepare the UFLPA implementation framework and Importer Guidance and their investigations into other suppliers for potential inclusion on the Entity List likely remain ongoing. As such, U.S. importers should not take this as a sign that suppliers with links to the XUAR are safe for use in U.S. supply chains. As noted above, if an entity is not on the list but CBP has reasonable suspicion to believe that the entity sources from the XUAR or is connected to forced labor, CBP may still detain the importer’s goods.

5. DHS has designated only one new high-priority sector for enforcement: apparel. However, the Enforcement Strategy contains clues on other at-risk sectors.

The UFLPA mandated that the Enforcement Strategy include a plan for enforcement for high-priority sectors, which must include polysilicon, cotton, and tomatoes. In addition to cotton, the Enforcement Strategy also lists apparel, generally, as a new and distinct high-priority sector. It is unclear whether CBP will target apparel imports which do not contain cotton, but this distinct designation suggests that CBP may have concerns around other apparel inputs. Unfortunately, the Enforcement Strategy does not specify the other inputs on which CBP may be focused. [News](#) and [NGO reports](#) (which have precipitated targeted enforcement in the past) have indicated that supply chains for viscose or rayon run through the XUAR.

Importers in other sectors should not take this as a sign that they are free from risk of enforcement, as the UFLPA empowers CBP to detain goods outside of the high-priority sectors. For example, the Enforcement Strategy discusses allegations that the electronics and automotive sectors receive inputs from factories which accept minority workers through labor transfer programs known as “Xinjiang Aid.”

Finally, the Enforcement Strategy identifies silica-based materials as a high-priority sector. The UFLPA mandated that *polysilicon* (not other silica-based materials) be included among the high-priority sectors. This distinction is important for importers of goods containing other types of silica-based materials and indicates that CBP may target these goods for detention. The Enforcement Strategy specifically calls out the following downstream products: aluminum alloys, silicones, polysilicon, buildings, automobiles, petroleum, concrete, glass, ceramics, sealants, electronics, and solar panels.

6. Other noteworthy changes to enforcement.

- Shipments imported on or after June 21 that are subject to the UFLPA, which previously would have been subject to a Xinjiang WRO, will be processed under UFLPA procedures, and detained, excluded, or seized. Shipments imported prior to June 21 will be

adjudicated through the WRO/Findings process.

- The Enforcement Strategy explains that CBP's targeting approach will be "risk-based" and "dynamic," prioritizing the high-risk imports at any given point in time. The **highest-risk** goods are those directly from the XUAR and from entities on the Entity List. CBP will **also prioritize** "illegally transshipped" goods with XUAR inputs and – notably – goods imported by entities located outside the XUAR but **related to** entities in the XUAR.

Under the WRO framework, the risks associated with suppliers with subsidiaries, parents, or affiliates in the XUAR was unclear. The U.S. government is now signaling that it may target and detain goods made by these suppliers. Importers should keep this in mind when conducting due diligence and assessing the risk associated with sourcing from suppliers with XUAR presence in their corporate family tree. Both the Importer Guidance and the Enforcement Strategy discuss the risks of "commingling" XUAR and non-XUAR materials at any given manufacturing stage. CBP and DHS warn that sourcing from both within the XUAR and outside of the XUAR presents the risk that the non-XUAR materials will be commingled with XUAR materials, that CBP may detain these goods, and that it may be difficult to verify that the supply chain is free from XUAR content.

- Importers in high-priority sectors may be required to gather more documentation than they previously did to successfully respond to WRO detentions. In recent weeks, CBP has stated that when determining admissibility, the agency may look at all supply chain entities for all inputs (and not only the higher-risk inputs that have been the focus of CBP's inquiries to date).

7. Finally, a nod to the use of technology.

Notably, the Enforcement Strategy leaves open the possibility that importers may avoid submitting supply chain tracing documentation if they can provide DNA or other scientific evidence identifying the origin of the goods. For importers with uncooperative suppliers, using technology to demonstrate admissibility may be more viable than collecting traceability documentation. However, the Enforcement Strategy cautions that the reliability of such evidence "must be demonstrated" (neither the Guidance nor the Strategy say how).

The Enforcement Strategy places a heavy emphasis on CBP's utilization of new technologies. For example, CBP is assessing new cutting-edge technologies to gain better visibility into supply chains and trace supply chains for specific goods. On the case management side, CBP will also enhance its internal systems so that all evidence, correspondence, admissibility petitions, and other materials related to a forced labor case are visible CBP-wide. CBP will develop a portal to track admissibility petitions and may also develop a portal for importers to submit their admissibility packages. These case management upgrades are undoubtedly spurred by the anticipated "significant increase" in both scope and volume of CBP reviews due to the UFLPA, which will require increased resources by CBP to effectively manage. CBP has secured \$27.5 million in the fiscal year (FY) 2022 budget to help it effectively implement the UFLPA and has requested an additional \$70.3 million for FY 2023.

Miller & Chevalier has significant experience advising U.S. importers on the UFLPA and the design of due diligence strategies to effectively assess the risks associated with companies' suppliers. This strategy necessarily changes for different companies, depending on the complexity and scale of their supply chains and variety of their U.S. imports. We use a tiered system that incorporates diligence platforms and consultants based on each company's specific needs. For a primer on how to develop your strategy, refer to our publicly available [UFLPA Due Diligence webinar](#) presented on May 21.

These advisories signal increasing risks for companies doing business in China. Miller & Chevalier's [Business & Human Rights](#), [Economic Sanctions & Export Controls](#), and [Customs & Import Trade](#) practices are monitoring increasing compliance risks in the area and are guiding companies through navigating new and broader enforcement risks in order to ensure full compliance and avoid disruption to their business by:

- Conducting in-depth due diligence on high-risk operations

- Developing and updating anti-forced labor policies and procedures
- Risk mapping and developing assessment and product traceability processes
- Collaborating with specialized forced labor auditors on-the-ground in high-risk regions
- Remediating forced labor indicators identified in audits
- Interacting with CBP regarding WROs to secure reversals
- Developing and updating stakeholder communications regarding forced labor compliance efforts
- Providing counseling and training to ensure sanctions and export controls compliance
- Conducting transactional due diligence to identify sanctions and export controls risks
- Preparing export controls and sanctions-related licensing requests
- Conducting internal investigations to identify and remediate sanctions and export controls violations
- Defending businesses before enforcement agencies, including the U.S. Department of the Treasury Office of Foreign Assets Control (OFAC) and BIS

Please contact us for further details on how Miller & Chevalier's Business & Human Rights, Economic Sanctions & Export Controls, and Customs & Import Trade practices are helping companies develop strategic approaches to anti-forced labor and compliance:

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