

As Key Element of Uyghur Forced Labor Law Goes Into Effect, US Agencies Set Out Implementation Strategy and Guidance

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06 / 23 / 22

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On June 21, 2022, a key element of the Uyghur Forced Labor Prevention Act (UFLPA) went into effect: the rebuttable presumption. Going forward, any imports of goods mined, produced or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region (Xinjiang) of the People's Republic of China (PRC), or by entities identified on the new UFLPA Entity List, will be presumed to have been made with forced labor and prohibited from entering the United States.

In anticipation of this milestone, the Department of Homeland Security (DHS), on behalf the Forced Labor Enforcement Task Force (FLETF), released its long-awaited [Strategy to Prevent the Importation of Goods Mined, Produced or Manufactured with Forced Labor in the People's Republic of China](#) (Strategy) on June 17, 2022. This document, coupled with [operational guidance](#) (Guidance) issued by Customs and Border Protection (CBP) on June 13, 2022, sheds valuable light on the U.S. government's expectations for importers and its approach to implementing the UFLPA.

Companies that import products from China — especially products that fall within potentially higher-risk categories, such as solar panels, tomatoes, textiles and apparel — should consult with counsel concerning the impact of these developments on their supply chain. Importers should consider undertaking a close review of existing supply agreements, policies and diligence procedures.

Implementing the Rebuttable Presumption

President Biden signed the UFLPA into law on December 23, 2021, thereby amending Section 307 of the Tariff Act of 1930, which prohibits the import of goods made using forced labor. A key element of the UFLPA is the rebuttable presumption described above, which covers the importation of (a) items from Xinjiang; (b) items mined, produced or manufactured wholly or in part with forced labor by Uyghurs, Kazakhs, Kyrgyz, Tibetans and members of other persecuted groups in the PRC; (c) goods with inputs from Xinjiang made in, or shipped through, the PRC and other countries; and (d) items produced by entities listed on the new UFLPA Entity List.

Under the UFLPA, the presumption goes into effect 180 days after the effective date of the legislation — *i.e.*, June 21, 2022. From this point on, CBP may detain, exclude or seize imports subject to the rebuttable presumption, in line with its rules and regulations. To rebut this presumption, importers must show that they have fully complied with the UFLPA Strategy and any implementing regulations with respect to due diligence, effective supply chain tracing and supply chain management; completely and substantively responded to all CBP inquiries; and established by clear and convincing evidence that imports are not the product of forced labor.

Shipments outside the scope of UFLPA. The Guidance clarifies how the presumption will operate in practice and options available to importers. As explained in the Guidance, the importer may respond to these actions by providing information to CBP establishing that the shipment falls outside the scope of the UFLPA — *i.e.*, the imported goods and their merchandise are sourced completely from outside Xinjiang and have no connection to entities on the UFLPA Entity List. If CBP determines based on this information that the shipment falls outside the scope of the UFLPA, CBP will release the shipment if it is otherwise in compliance with U.S. law and the rebuttable presumption will not come into play.

Exceptions to rebuttable presumption. Alternatively, the importer may request an exception to the rebuttable presumption, either during a detention, after an exclusion

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or during the seizure process. If an importer seeks to make such a request during the detention, it must do so quickly — *i.e.*, generally within 30 days after the date the merchandise is presented for examination to CBP. To request an exception after the exclusion or seizure notice is issued, an importer must file an administrative protest in the case of an exclusion, or use the petition process with respect to a seizure. In its Guidance, CBP states that it will prioritize requests for exception made by members in good standing of the Customs Trade Partnership Against Terrorism (CTPAT).

To ensure that any adverse customs actions are resolved quickly, importers may wish to gather as much information as possible about their supply chain *before* a shipment arrives, including documentation establishing that there is no nexus to Xinjiang or an entity on the UFLPA Entity List (*i.e.*, the shipment is outside the scope of the UFLPA), or that an exception to the presumption is warranted. This may require close cooperation with the supplier and, in turn, its upstream suppliers.

One notable provision in the Guidance: To facilitate faster release of shipments, importers may cite prior shipments with identical supply chains that have been reviewed and determined to be admissible by CBP. Although CBP’s approach is still case-by-case, the possibility of leveraging a prior determination is a welcome development.

Guidance on Due Diligence, Supply Chain Tracing and Supply Chain Management

The Strategy provides guidance to importers on due diligence, supply chain tracing and supply chain management measures to ensure that imports are not the product of forced labor. Compliance with this guidance is a requirement for securing an exception to the rebuttable presumption after goods have been detained, excluded or seized.

Contrary to the hopes of some observers, the Strategy does not provide a safe harbor mechanism or set out diligence procedures that are sufficient to establish that their system is compliant with the UFLPA. Instead, the Strategy emphasizes the case-by-case nature of due diligence and sets out a non-exhaustive list of elements that effective due diligence systems in any industry “may include.” Highlights include:

- **Supplier engagement:** Importers should engage with suppliers that are directly involved in the production of goods that will be imported into the United States. Importers must either work through these suppliers to engage, or engage directly, with producers of raw materials and components used in the imported goods to assess and address forced labor risk.

- **Risk assessment:** Importers should map the supply chains for their imported goods and identify steps in the chain where there is a forced labor risk.
- **Code of conduct:** Importers should develop a code of conduct that specifically prohibits forced labor and addresses the risk of using PRC government labor schemes, such as the “pairing assistance” program. In their contracts with direct suppliers, buyers should require that the direct supplier comply with the code of conduct and ensure compliance by upstream suppliers.
- **Monitoring:** The Strategy also urges importers to monitor supplier compliance with the code of conduct. Although other methods are conceivable, the Strategy discusses at length the utility of a “credible audit,” which would incorporate an array of requirements to ensure its integrity and efficacy (*e.g.*, unannounced arrival at worksite, unrestricted access to worksite and locations such as cafeterias and dormitories). At the same time, the Strategy recognizes that conducting audits in Xinjiang itself is extremely difficult, and flags that an audit alone is not sufficient to demonstrate importer due diligence.

The Strategy also highlights supply chain tracing and supply chain management measures that further reduce the risk of forced labor. These include mapping the supply chain and demonstrating the chain of custody of goods and materials from the beginning of the supply chain to the buyer of the finished product (*e.g.*, via identity preservation and segregation). The Strategy further underscores the importance of supply chain management measures such as having a process to vet potential suppliers for forced labor risk before entering into a contract, and having access to documentation, personnel and workers to verify that forced labor is not used.

Evidence Establishing the Absence of a Nexus to Xinjiang, the UFLPA Entity List or Forced Labor

The Strategy provides guidance on the type of evidence that may establish that shipments fall outside the scope of the UFLPA. This evidence would establish that goods and their inputs are sourced wholly from outside Xinjiang and have no connection to any entity appearing on the UFLPA Entity List.

Here, again, the Strategy offers a non-exhaustive list. The types of evidence that CBP may request and that may be used to demonstrate that the UFLPA does not apply include a detailed description of the supply chain and the roles of the entities involved at each step in the chain. Documentation also should include evidence indicating the provenance of each component of the imported good using unique identifiers where possible. The Strategy flags the possibility that other evidence — such as DNA tracing and isotopic testing — may be offered, but emphasizes that the reliability of this evidence must be established.

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In addition, the Strategy offers a non-exhaustive list of evidence that may be used to support a request for an exception to the rebuttable presumption. In addition to supply chain mapping, evidence establishing that goods are not the product of forced labor may include a complete list of all workers at an entity subject to the rebuttable presumption, coupled with evidence showing that workers are working voluntarily and the types of controls each entity in the chain has in place to ensure that forced labor is not used.

Notably, the Strategy emphasizes that, under the UFLPA, the evidentiary threshold for securing an exception to the rebuttable presumption is high. The importer must establish by “clear and convincing evidence” that the goods were not mined or produced wholly or in part by forced labor. With this in mind, importers should carefully review the types of evidence set out in the Strategy and assess the extent to which they would be in a position to gather and provide such evidence if goods were detained, excluded or seized.

UFLPA Entity List

As required by the UFLPA, the Strategy sets out a list of entities found to have been involved in forced labor activities. The UFLPA Entity List is comprised of entities located in Xinjiang that mine or produce goods in whole or in part using forced labor; entities working with the government of Xinjiang to recruit, transport, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz or members of other persecuted groups out of

Xinjiang; and entities and facilities that source material from Xinjiang or from persons working with the Xinjiang government or the Xinjiang Production and Construction Corps for purposes of any government-labor scheme that uses forced labor. As discussed above, any goods that are mined or produced by these entities are subject to the rebuttable presumption that they are the product of forced labor and thus prohibited from entering the United States.

The entities that appear on the UFLPA Entity List in the Strategy are all drawn from existing lists of entities with ties to forced labor. Specifically, the UFLPA Entity List includes entities that were previously targeted by a Withhold Release Order (WRO) issued by CBP, or that appear on the Bureau of Industry and Security’s Entity List, based on evidence linking them to forced labor activities.

These entities are clustered within sectors identified in the Strategy as “high-priority sectors for enforcement” — *i.e.*, apparel, cotton and cotton products, silica-based products (including polysilicon), and tomatoes and downstream products such as tomato paste. The Entity List also contains several entities that make electronics and hair products.

Critically, the Entity List set out in the Strategy is only an initial list and is subject to change. FLETF agencies may add or remove entities from the list, and we expect that the list will evolve over time. Importers should monitor any updates to the list, which may require changing supply chains as new entities are added.

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