

President Biden Signs New Law Requiring U.S. Blockage of All Imports Made Wholly or Partly in Xinjiang, China

by Dave Townsend and T. Augustine Lo

President Biden signed into law on December 23 legislation that will, for the first time, require U.S. Customs and Border Protection (“CBP”) to detain all imports that are made wholly or partly in the Xinjiang Uyghur Autonomous Region of China (“Xinjiang”) or by certain persons working with Xinjiang’s regional government. On December 14, the U.S. House of Representatives passed the Uyghur Forced Labor Prevention Act (“UFLPA”) (H.R. 6256) unanimously, and then the Senate also unanimously approved the UFLPA on December 16. Given that rare unanimous bipartisan support for the UFLPA, we expect the Biden Administration will now aggressively implement the UFLPA by increasing CBP enforcement against imports believed to have a nexus with Xinjiang. We propose steps below that both Chinese and U.S. companies can take to reduce the likelihood of such UFLPA disruptions in their supply chains.

Pre-UFLPA Law and Forced Labor

Even before the enactment of the UFLPA, foreign-source imports made with forced, prison or child labor had already been subject to detention and potential seizure by CBP under Section 307 of the Tariff Act of 1930 (“Section 307”). To implement Section 307, CBP issued Withhold Release Orders (“WROs”) that would instruct CBP officers to detain specified classes of products from specific companies or geographic regions because of alleged involvement of forced, convict or child labor. If CBP found that an import is subject to such a Section 307 “forced labor” WRO, CBP would then detain the import and not release those goods unless the importer could demonstrate to CBP’s satisfaction that the import had not been made wholly or in part with forced labor. However, if the importer was unable to make that showing, then CBP would issue a Section 307 finding and proceed to seize and forfeit the goods.

Since 2018, CBP had already issued a series of WROs that targeted broad categories of goods produced in Xinjiang or made with inputs sourced from Xinjiang because of

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alleged human rights violations and evidence of forced labor from Uyghur and other Muslim minority groups in Xinjiang used in the production of those goods. These WROs cover many companies or classes of products such as tomatoes, textiles, and silicon used in solar panel products. (Please see our earlier updates on those WROs [here](#), [here](#), and [here](#).)

Some members of Congress had earlier urged both the Trump and Biden Administrations to issue a region-wide WRO for Xinjiang under Section 307, which would presume all goods with a nexus to Xinjiang are tainted by forced labor. However, to date, CBP had not issued a region-wide WRO covering all such goods from Xinjiang. Apparently impatient with CBP's stance, Congress has now effectively created such a region-wide WRO through the UFLPA by imposing a new rebuttable presumption that all goods made in Xinjiang or made elsewhere from inputs sourced from Xinjiang are tainted by the use of forced labor.

We expect CBP will now zealously enforce this new statutory directive from Congress and will issue further details about its implementation plans no later than the UFLPA's effective date of June 21, 2022 ("Effective Date"). In the meantime, Chinese suppliers and U.S. importers should assume that any future import of goods from China or from third countries with an arguable nexus to Xinjiang could potentially become subject to CBP detention after the Effective Date. Moreover, an affected U.S. importer will likely face serious evidentiary difficulties to satisfy its burden of proof to overcome the UFLPA's statutory presumption if CBP knows of any connection to Xinjiang in the importer's supply chain. As an example, if a U.S. firm is importing shirts made by a clothing factory in third country X that contain buttons, thread or fabric sourced by that factory from suppliers in Xinjiang, the U.S. importer may have to secure documentation from its country X factory about that producer's inputs which are not usually accessible to the importer. However, absent such producer-level documentation about its own supply chains, the U.S. importer may not be able to overcome the UFLPA's presumption.

Key Parts of the UFLPA

Rebuttable Presumption: The UFLPA requires that CBP apply a presumption that imports "mined, produced, or manufactured wholly or in part" in Xinjiang or that involve certain persons or programs tied to the Xinjiang regional government, were made with forced labor and so are not eligible to enter the United States. However, a U.S. importer may rebut this presumption by providing "clear and convincing" evidence that the imports were not produced wholly or in part by forced labor and has complied with CBP guidance on sourcing from Xinjiang. In addition, the UFLPA creates a process for the U.S. Government to develop a strategy for enforcing the UFLPA.

Forced Labor Enforcement Task Force: The UFLPA requires that the Forced Labor Enforcement Task Force ("Task Force") (established under the U.S.-Mexico-Canada Agreement ("USMCA") and by [Executive Order 13923](#) (May 15, 2020), and comprised of the U.S. Departments of Homeland Security, State, Treasury, and Justice and the Office of the U.S. Trade Representative) publish a notice asking for public comment on how to effectively prevent imports that rely on forced labor in Xinjiang. The UFLPA directs the

Task Force to consider how to identify threats of forced labor in supply chains, processes to reduce such threats, identification of forced labor in Xinjiang, lists of entities known to use forced labor, and the creation of a list of sectors that are of high-priority in enforcing the UFLPA. In addition, the Task Force must review ways for CBP to enforce the UFLPA and identify the resources needed for such enforcement and then submit a report to Congress with its findings and recommendations.

New Guidance on Evidence Needed to Rebut Presumption: Notably, the UFLPA requires the Task Force to create and publish new guidance for U.S. importers about what will constitute “clear and convincing” evidence that can be used to rebut the UFLPA presumption items with a nexus to Xinjiang are tainted by forced labor. The U.S. importer community would certainly welcome such guidance because, to date under the preexisting Section 307 WRO system, CBP has provided almost no advice at all on what it expects from an importer to disprove the existence of forced labor in its supply chain.

Future Imposition of U.S. Economic Sanctions: The UFLPA also requires the President to impose economic sanctions on persons determined to be responsible for the use of forced labor in Xinjiang. The President must submit a report to Congress within 180 days of identifying each such person with annual reports thereafter. The UFLPA authorizes the President to impose asset blocking sanctions on such identified users of forced labor in Xinjiang so that no U.S. person may then deal with such blocked persons or their property interests. This latter UFLPA provision may involve a novel degree of cooperation between CBP in the Department of Homeland Security and the Office of Foreign Assets Control (“OFAC”) within the Department of the Treasury.

Third Country Processing

The UFLPA makes clear that CBP must not only bar imports of goods made in Xinjiang but also must consider barring imports from third countries or other Chinese regions that may have used raw materials or other inputs sourced from Xinjiang or persons associated with Xinjiang’s regional government. For example, the UFLPA requires examination of what measures can be taken to trace the origin of goods and identify third country supply chain routes that rely upstream on the use of forced labor in Xinjiang.

Third country processing has always been a difficult issue for CBP, importers, and U.S. purchasers to confront. Historically, many third country producers have had supply chains that are largely if not entirely opaque regarding their upstream suppliers, whether those suppliers are in China or anywhere else. However, now, under the UFLPA, imports from all over the world will face potential scrutiny from CBP regarding any such nexus with Xinjiang.

The Future Outlook for UFLPA Implementation

At a time in American domestic politics where Congress seems to be deeply divided and unable to legislate, the UFLPA received 100% approval in both chambers. Both the Senate and House approved the UFLPA with rare unanimity. Moreover, since Congress chose to enact this legislation in spite of CBP’s ever-broadening WROs to deal with the

human rights situation in Xinjiang, Congress evidently expects CBP to take an even more aggressive approach to the use of forced labor in China than it already has.

In addition, upon the UFLPA's passage, U.S. Trade Representative Katherine Tai stated, "We have a moral and economic imperative to eliminate this practice from our global supply chains, including those that run through Xinjiang, China and exploit Uyghurs and other ethnic and religious minorities."¹ Also, the White House welcomed the UFLPA's approval and commended Congress for its "leadership."²

With such clear signals of full support from both the legislative and executive branches of the U.S. Government for the immediate and vigorous enforcement of the UFLPA, CBP is now likely to move quickly and to take a more expansive approach to preventing imports of goods involving the use of forced labor in Xinjiang.

Supply Chain Suggestions

We offer the following suggestions to importers, purchasers and suppliers in light of the UFLPA:

- **Perform Prompt and Appropriate Supply Chain Risk Assessments.** Global supply chains will have different risk profiles regarding potential UFLPA detention by CBP based on where raw and intermediate materials are produced and processed. For instance, several industries in China are already known to have an elevated CBP detention risk because of existing WROs against tomatoes, cotton, textiles, apparel and silica-based products (including solar panel products) sourced from Xinjiang. Now, given the UFLPA's broad application against the entire Xinjiang region, importers should assess whether their supply chains have or could have any connection to finished goods, intermediate parts or components or raw materials originating in Xinjiang. Moreover, such assessments should be done regardless of the foreign direct supplier's location, whether in China or in any third country. Finally, importers should begin these assessments immediately – it will be far too late once the goods are already in containers on their way to a U.S. port of entry.³
- **Look Upstream, Including Parts and Components and Raw Materials.** Under the UFLPA, it will be insufficient to limit risk assessments to direct suppliers to protect against potential CBP detention of imported goods and supply chain disruptions. The UFLPA and Section 307 cover products made wholly or in part from coerced labor in Xinjiang, so every element within the bill of materials for imported goods must now be scrutinized for any potential nexus to Xinjiang. CBP already expects certain industries to demonstrate a "clean" supply chain back to the raw material sources. That is admittedly a heavy burden for importer due diligence, but unless an importer can do such tracing and can produce the relevant documentation, that importer may not be able to answer fully CBP questions about possible connections of its supply chains to Xinjiang, and thus may not be able to overcome the UFLPA presumption that goods sourced in whole or in part from Xinjiang were made with forced labor. In short, "not knowing" is no longer a viable option.⁴
- **Consider Codes of Conduct and Contractual Protections.** Importers should adopt clear and transparent codes of conduct or procurement policies that reflect the thrust of Section 307 and the UFLPA in barring the purchase or supply of goods made in whole or in part with forced, convict or child labor. Importers can then also establish contractual protections against the purchase or supply of goods that would violate Section 307, the UFLPA or such company codes of conduct or policies. Direct

suppliers and their subcontractors should be obligated to furnish the importer or purchaser with timely, complete and accurate information about labor conditions within their supply chains and to cooperate fully with reasonable third party audit requests (see below). Such terms and conditions could also include indemnity and “hold harmless” provisions or termination clauses for losses or damages resulting from the supply of non-conforming goods inconsistent with Section 307, the UFLPA and such company codes or policies.

- **Work in Advance with Suppliers and Auditors to Disprove Ties to Xinjiang.**

Within the new measures imposed on CBP by the UFLPA, at some point, an importer might well have to produce documentary evidence about its supply chains to demonstrate the absence of any ties to Xinjiang (or, if there are such links, then at least to show that no forced labor was used in Xinjiang to produce the subject goods). Some of that information can and should definitely come from an importer’s direct supplier and its own network of producers of parts and components or raw materials. However, in some circumstances, an importer may want to augment such supplier materials with independent third party audit reports after on-the-ground audit personnel have been able to visit the relevant factories or farms and to interview production workers in a fair and objective manner, free of coercion or threat to the workers. If an importer can provide such a fulsome “paper trail” to CBP, that importer should have significantly better chances of avoiding disruptions and potential loss of merchandise under the UFLPA and of overcoming its new presumption.

- **Watch for Future CBP and Task Force Guidance.** The UFLPA envisions significant new written guidance and clarification for importers and U.S. purchasers from CBP and the Task Force. The U.S. Government is expected to publish more specific information about recommended documentation, lists of high-risk industries, and entities known to source from Xinjiang, all of which should help importers and purchasers to better understand these new compliance obligations. For example, even before the passage of the UFLPA, there was an inter-agency U.S. Government business advisory about the human rights situation in Xinjiang and various self-help measures that a U.S. importer can take to reduce the detention risks for its imports of foreign-made goods.

- **Establish a Clear Corporate Communications Plan and Organize Accordingly.**

The human rights situation in Xinjiang has become a “hot button” issue with potentially profound reputational consequences for Chinese and U.S. companies, both within China and the United States. Each company should therefore undertake a strategic review of how it will deal with press coverage or social media if allegations arise that its products should be targeted for detention under the UFLPA. For example, an importer needs a nuanced communication plan that can deal with immediate media attention to such charges but that can also avoid over-reaction and engendering adverse supplier or general public pushback, such as potential consumer boycotts in either country. Such a plan should coordinate all relevant functions within the importer or purchaser organization to address the needs of multiple audiences and constituencies, including, where appropriate, investor relations personnel.

Conclusion.

Dorsey & Whitney attorneys are experienced in helping U.S. and international companies, including both Chinese and American companies, to assess and mitigate the risks in their global supply chains, including under U.S. import and export laws.

¹ See Statement by Ambassador Katherine Tai on the Passage of the Uyghur Forced

Labor Prevention Act (Dec. 16, 2021), available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/december/statement-ambassador-katherine-tai-passage-uyghur-forced-labor-prevention-act>.

² See White House Briefing Room, *Bill Signed: H.R. 6256* (December 23, 2021), available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/23/bill-signed-h-r-6256/>.

³ At a time of unprecedented high demand for shipping capacity and near-record shipping charges, importers cannot afford to waste such precious capacity or transportation costs to ship goods into the U.S. that, by law, CBP cannot release for sale in this country. Optimally, in light of the UFLPA, an importer should know the provenance of each shipment of imported goods well before it arrives in containers for embarkation by sea or air transport.

⁴ Even if the supply chain for an import is free from the use of forced labor, U.S. companies should screen their suppliers against the latest sanctions lists in case those suppliers have engaged in sanctionable activities under the UFLPA that are unrelated to the import at hand.