

U.S. Customs and Border Protection Releases Importer Guidance for Uyghur Forced Labor Prevention Act Implementation

by Lawrence Ward, Dave Townsend, and T. Augustine Lo

On June 13, 2022, U.S. Customs and Border Protection (“CBP”) published its long-awaited operational guidance (“Guidance”) to importers to explain how CBP plans to implement the Uyghur Forced Labor Prevention Act (“UFLPA”) that becomes effective on June 21, 2022 [\[link\]](#). The Guidance outlines four key components for importer compliance with an emphasis on an importer gaining visibility about the labor conditions through its entire supply chain all the way back to the raw materials used to produce any imported goods. Such importer knowledge will be required regarding all imported goods made in China and of all imported goods made elsewhere that involve raw materials or other inputs sourced from China. The Guidance also outlines the procedure to contest any CBP enforcement actions under the UFLPA. CBP notes that importers should read the Guidance in conjunction with a forthcoming UFLPA Strategy that an interagency task force will issue separately on the UFLPA’s implementation date.

As previously reported [\[here\]](#) when the UFLPA was enacted in December 2021, the UFLPA’s most significant new legal aspect is its “rebuttable presumption” that all goods made wholly or in part in the Xinjiang Uyghur Autonomous Region of China (“XUAR”) or by certain listed entities under the UFLPA were made with forced labor and so are to be barred from admission into the United States. To overcome that automatic presumption, the UFLPA allows importers to provide CBP with “clear and convincing evidence” that the goods were not made in whole or in part with forced labor, and by showing that the import complies with CBP’s published Guidance. Because admission of goods detained under the UFLPA will require compliance with CBP’s published Guidance, the trade community had eagerly awaited the release of this document. The evidentiary hurdle for overcoming the UFLPA presumption will be quite high, and so it could be very challenging for importers to be able to satisfy CBP’s Guidance to release any goods detained or seized by CBP under the UFLPA.

Preexisting Law

As previously reported [\[here\]](#), CBP already had authority under Section 307 of the Tariff

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Act of 1930 (19 U.S.C. §1307) to detain and exclude goods that CBP suspects to be made in whole or in part with forced labor. After CBP receives a credible allegation, or independently obtains information leading to reasonable suspicion, CBP would issue a Withhold Release Order (“WRO”) to direct officers at ports to detain further imports of the suspected merchandise. An importer facing such an WRO then could present evidence to show that no forced labor was involved or, alternatively, seek to re-export the detained goods before CBP issues any conclusive finding that forced labor was involved. (Once CBP conclusively finds that forced labor was involved, the goods could become subject to seizure and forfeiture.) Under that existing Section 307 authority, as we had previously explained [\[here\]](#), CBP had issued several WROs in recent years targeting goods made in the XUAR because of public attention to the human rights conditions of Uyghurs and other minority groups in that region, including goods made in whole or in part of cotton, tomatoes, and polysilicon from the XUAR.

The key difference, however, is that Section 307 did not previously include a statutory presumption that XUAR goods should be barred, subject to a “clear and convincing” evidentiary standard. (Congress did enact a similar presumption subject to “clear and convincing” evidence with respect to goods made in whole or in part with North Korean labor as part of the Countering America’s Adversaries Through Sanctions Act of 2017 (“CAATSA”), which has led to some examples of CBP enforcement. However, there are no publicly available precedents where importers successfully overcame that CAATSA presumption.) CBP’s Guidance for the UFLPA implementation indicates that the CBP’s previous Section 307-based WROs issued with respect to XUAR-origin goods will become subsumed into its new UFLPA enforcement measures.

New Required Due Diligence Measures and Documentary Evidence

- Supply Chain Due Diligence. The Guidance calls for an importer due diligence system that includes the components below. While many importers already have supply chain due diligence measures and supplier codes of conduct in place, they may not have visibility into suppliers beyond those providing inputs to them directly, as will now be required under the Guidance. Practical implementation of these measures in China and other countries may prove to be challenging for many reasons.
 - *Engagement with suppliers and other stakeholders to assess and address forced labor risk;*
 - *Mapping of the supply chain and assessment of forced labor risks along the supply chain from raw materials to production of the imported good;*
 - *Written supplier code of conduct forbidding the use of forced labor and addressing the risk of use of Chinese government labor schemes;*
 - *Training on forced labor risks for employees and agents who select and interact with suppliers;*
 - *Monitoring of supplier compliance with the code of conduct;*
 - *Remediation of any forced labor conditions identified or termination of the supplier relationship if remediation is not possible or is not timely completed;*
 - *Independent verification of the implementation and effectiveness of the due diligence system; and*
 - *Reporting performance and engagement publicly on its due diligence system.*

- Documents for Supply Chain Tracing. The Guidance provides a non-exhaustive list of documents that importers may be required to provide to CBP to overcome the UFLPA's rebuttable presumption. As noted above, the Guidance requires scrutiny into all tiers of the importer's supply chain all the way back to the raw materials used to make the goods. Many importers previously did not encounter such a heightened level of scrutiny unless their goods were detained under CBP's previous Section 307 forced labor enforcement measures (which we previously described [here]). The Guidance confirms and expands on such existing measures by specifying particular forms of documentation, supported with affidavits, from all tiers of the importer's supply chain. Such a CBP demand for supply chain tracing could now apply to goods from any region of China or from a non-Chinese location if there is suspicion that it was made with inputs sourced from the XUAR.
 - Evidence on Overall Supply Chain.
 - *Detailed description of supply chain including imported merchandise and components thereof, including all stages of mining, production, or manufacture;*
 - *The role(s) of the entities in the supply chain, including shippers and exporters for example, CBP will need to determine whether a supplier is also a manufacturer;*
 - *For entities in the supply chain, identify any [affiliated] relationships in accordance with 19 C.F.R. § 152.102(g);*
 - *A list of suppliers associated with each step of the production process, including names and contact information (addresses, email addresses, and phone number); and*
 - *Affidavits from each company or entity involved in the production process.*
 - Evidence Regarding Detained Merchandise and Components.
 - *Purchase orders;*
 - *Invoice for all suppliers and sub-suppliers;*
 - *Packing list;*
 - *Bill of materials;*
 - *Certificates of origin;*
 - *Payment records;*
 - *Seller's inventory records, including dock/warehouse receipts;*
 - *Shipping records, including manifests, bills of lading (e.g., airway/vessel/trucking);*
 - *Buyer's inventory records, including dock/warehouse receipts;*
 - *Invoices and receipts for all suppliers and sub-suppliers;*
 - *Import/export records;*
 - Evidence Regarding Miner, Producer, or Manufacturer.
 - *Evidence listed above pertaining to merchandise or any component thereof for raw materials. See below for specific examples related to high-risk commodities, such as cotton, polysilicon, and tomatoes. The Guidance attaches an appendix that is specific to these three commodities;*
 - *Mining, production, or manufacturing records;*

- *Any other evidence to demonstrate that a good was not mined, produced, or manufactured wholly or in part by forced labor;*
- **Supply Chain Management Measures.** The Guidance calls for evidence of internal controls that mitigate and remediate forced labor risks. The Guidance also specifies that any financial documents provided to CBP must be part of the importer's records maintained in an operating or accounting system that is used for the importer's normal financial reporting purposes.
- **Evidence that Chinese-Origin Goods Were Not Made with Forced Labor.** This part of the Guidance effectively expands the scope of concern to include all of China under the assumption that XUAR origin items could be sent to factories throughout China for incorporation into exported products. The Guidance calls for (a) supply chain mapping of all entities involved in the production process; (b) information about worker conditions at each entity in that supply chain, such as wages paid and output per worker; (c) information about worker recruitment methods and controls to ensure all work is voluntary; and (d) credible audits to identify and remediate forced labor.

Contesting CBP's Enforcement of the UFLPA

If CBP does detain an import under the UFLPA, then the importer will have opportunities to contest CBP's enforcement by providing the evidence outlined above. However, CBP will not release the goods unless it is satisfied that the information provides "clear and convincing" evidence that no forced labor was involved, including with reference to the Guidance. This evidentiary standard is a very high hurdle, and there does not appear to be any clear CBP precedent on how importers can meet this standard because, with the one recent limited exception under CAATSA noted above, the "forced labor" law in the United States over the past century has never included such a "rebuttable presumption" feature for all goods from a specific region of the world. Past Section 307 enforcement required CBP to have some specific allegation of forced labor with respect to particular goods before it could detain shipments. The UFLPA skips over that initial hurdle altogether and allows detention of all goods if some component of those goods was sourced from, made in or had undergone some processing in the XUAR, however minor. By elevating the evidentiary standard to "clear and convincing" proof to release goods under the UFLPA, importers must present significantly stronger evidence than in the past under Section 307. Since this is a largely unprecedented legal process with no prior published CBP rulings other than the handful of North Korean precedents under CAATSA that were unfavorable to importers and with no judicial decisions, and since the Guidance itself does not clearly define what will be "enough" information to constitute "clear and convincing evidence," it is hard to predict how CBP will enforce the UFLPA..

In any case, there will be three potential points where the importer will have the opportunity to present its evidence to CBP:

- (a) Detention of the goods after arrival in the United States, for which CBP is required to issue a detention notice citing the UFLPA as the cause. The detention notice would include instructions on how to present evidence to CBP. Alternatively, importers could immediately seek to re-export the goods to another destination before CBP issues a

further determination.

(b) Exclusion of the goods after CBP evaluates the importer's evidence and determines that the UFLPA presumption has not been overcome. The importer would have an opportunity to file an administrative protest within 180 days of the exclusion. If the protest is denied, the importer could then seek judicial review in the U.S. Court of International Trade within 180 days of the denial. While not specified in the Guidance, CBP might also allow re-exportation of the excluded goods to another destination in this scenario.

(c) Seizure of the goods after CBP determines that the goods are in violation of the UFLPA, which could then lead to forfeiture and permanent loss of the goods. The importer then must present a mitigation petition to CBP. Otherwise, CBP will proceed to forfeit the seized goods which would sever the importer's ownership as well as any other parties' rights to the goods (e.g., security interest as collateral for a loan). The Guidance does not spell out the factors that would lead CBP to seize goods for forfeiture as opposed to simply excluding the goods (which presumably allows the possibility of re-exportation). Given that seizures and forfeitures typically require additional CBP resources to process (including storage space for the goods pending final resolution of legal appeals), seizures might be less frequent than exclusions, and such seizures could be reserved for cases that CBP believes to be more egregious (such as a conclusive affirmative CBP finding that forced labor was involved in the production of the goods).

In addition to the above, importers could also contend that the imported goods are not sourced from the XUAR at all, in whole or in part, or seek an "exception" from the UFLPA. CBP's Guidance indicates that CBP will look to the same "Documents for Supply Chain Tracing" listed above for this evidence. Importers should note, however, that CBP must publicly report to Congress any such exceptions granted, "identifying the good and the evidence considered," meaning that some or all of the importer's submitted information may become publicly disclosed unless the documents qualify for an exemption under the Freedom of Information Act ("FOIA") and the importer asserts that FOIA exemption. Because this public reporting could lead to scrutiny from Congress, CBP likely will subject any such exception requests to stringent vetting, just as it would for importers' challenges to detentions and seizures under the UFLPA.

The trade community will shortly see the CBP's separate Strategy document that is intended to be read and applied alongside the Guidance to understand how CBP intends to execute the UFLPA. More importantly, it will be the CBP's actual on-the-ground actions at major U.S. ports of entry in the coming months that will be the best indicator of whether the UFLPA will or will not create significant additional bottlenecks or delays in American supply chains. International trade had already suffered greatly from the COVID pandemic and lock-downs, transport shortages, rising fuel and labor costs, clogged container terminals and other such factors. Many U.S. retailers now have imported consumer goods in transit and arriving at ports that are expected to fill their store shelves for the 2022 year-end holiday season, and so how that vital economic season unfolds may now be greatly dependent on the vigor and intensity of CBP's

UFLPA implementation and enforcement.

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