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U.S. Government Seeks Public Comments on Implementation of Xinjiang Regional Import Restrictions

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On January 24, 2022, the U.S. Department of Homeland Security ("DHS") published a notice in the Federal Register requesting public comments on the implementation of the new regional import restriction affecting goods from the Xinjiang Uyghur Autonomous Region ("Xinjiang") of China that will take effect in June 2022. This notice was triggered by the recent passage of the Uyghur Forced Labor Prevention Act ("UFLPA"), Pub. L. 117-78, which we recently covered here. The UFLPA bans any imports that are wholly or partly sourced from or processed in Xinjiang by establishing a statutory "*rebuttable presumption*" that all such items from Xinjiang were made with forced labor. For such goods to be allowed into the United States under this new statute, an importer must rebut that presumption and show by "*clear and convincing evidence*" the goods or components thereof that were from Xinjiang were not made, grown or mined with the use of forced labor. Moreover, the importer must also demonstrate that it has complied with new federal guidelines (yet to be issued) regarding supply chain due diligence. This new UFLPA process thus diverges significantly from previous practice under Section 307 of the Tariff Act of 1930 ("Section 307"). In the past, U.S. Customs and Border Protection ("CBP") would block the import of certain goods only after receiving a specific allegation that those particular goods had been made using forced labor contrary to Section 307 and would then require the importer to rebut that specific allegation with respect to those particular goods.

Under the UFLPA, the U.S. Government's Forced Labor Enforcement Task Force ("FLETF"), led by DHS, must establish a strategy to implement the new import restriction after seeking public comments and conducting a public hearing. That strategy must include guidance to importers on UFLPA compliance, including supply chain due diligence and management measures. Importers, U.S. purchasers and other members of the public can now submit their thoughts on how the U.S. Government should craft such new rules and enforcement priorities. Those new rules will establish benchmarks for the degree and manner of supply chain due diligence that will be expected of importers to ensure that their supply chains are free from the use of forced labor in Xinjiang and the type and amount of required evidence that importers will now have to produce to rebut the statutory presumption. Such public comments are due to DHS by March 10, 2022 by submission through an online portal specified in the Federal Register notice, which is available here. (DHS has also emphasized that it will only accept electronic submissions of comments using the precise methods specified in the notice and not by any other means such as a traditional comment letter sent in by mail or courier service.)

One key distinction that importers should bear in mind is that the UFLPA ban will potentially reach well beyond goods made in or sourced from Xinjiang itself and will now extend to goods that are from other regions of China or even from a third country. The new import restriction will apply if any material input includes something that was made, processed, mined or grown in Xinjiang. As a hypothetical example, if a U.S. importer were to import running shoes from a shoe supplier in Country A that include shoe laces made by a shoe lace manufacturer in Country B that had purchased the cotton yarn for those laces from a producer in Shanghai who had in turn purchased its cotton from a cotton grower in Xinjiang, those running shoes – for which the U.S. importer would typically list Country A as their "country of origin" in regard to U.S. customs – could still be potentially subject to the UFLPA bar. This new restriction will thus be vastly broader than CBP's previous Withhold Release Orders ("WROs") under Section 307 that had targeted only specific classes of goods sourced from Xinjiang or the goods of specific companies whose production facilities are in Xinjiang.

Given the much more expansive scope of the new import restriction, the new required compliance with the yet-to-be established guidance, and the potential impact on virtually the entire trade community, there is widespread anxiety about how CBP will interpret and enforce the UFLPA. While the U.S. Government has thus far published certain limited joint guidance from several agencies on how members of the trade community can identify the use of prohibited forced labor in their supply chains here, it seems likely that the forthcoming new UFLPA-driven rules and guidelines may well alter the requirements or expectations for supply chain due diligence. For now and until the FLETF produces its reports and publishes guidance as required by the UFLPA, the trade community will not know the evidentiary standard or the level of due diligence that CBP will apply to determine if imported goods will be subject to the UFLPA ban.

What is important at the moment is that DHS is providing all members of the trade community an opportunity to try to influence the development of those new rules and enforcement priorities through this public comment and hearing process. In particular, that DHS notice seeks comments on the following topics:

- Risk of importing goods made with forced labor in China;
- Supply chain mechanisms that could lead to forced labor imports;
- Procedures to reduce such risk;
- Forms of forced labor used in China;
- Types of goods that are made in Xinjiang or in collaboration with Xinjiang's

government;

- High-priority sectors for enforcement (besides, cotton, tomato, and polysilicon);
- Unique characteristics of supply chains for high-priority sectors;
- Methods for detecting additional entities that export goods sourced from Xinjiang or work with Xinjiang's government to use forced labor;
- Methods for enforcing the prohibition on imports of goods made with forced labor;
- Methods for CBP to identify and trace goods at U.S. ports that violate Section 307;
- Supply chain due diligence and importers' leverage to ensure imports comply with Section 307;
- Evidence required to show that goods are not made wholly or in part with forced labor in Xinjiang;
- Tools and protocols that could help importers trace and verify that the supply chain is compliant with UFLPA;
- Evidence required to show to CBP that goods originating from China are not wholly or partly made with forced labor;
- Methods to trace the origin of goods, including third-country supply chains, to ensure UFLPA compliance;
- U.S. Government collaboration with nongovernmental organizations and the private sector to update its UFLPA strategy;
- U.S. Government coordination with nongovernmental organizations and the private sector for UFLPA enforcement; and
- Any other measures that FLETF should consider to prevent imports of goods made with forced labor.

If you have any questions about the DHS notice or the UFLPA, please feel free to contact the attorneys listed in this update. With offices in North America, Asia, and Europe, Dorsey & Whitney LLP counsels importers and other members of the trade community on U.S.-China trade issues, including customs and import compliance and responses to Section 307 WROs.