

Uyghur Forced Labor Prevention Act Enforcement Starts on Imports from China and on Imports with China Origin Inputs

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As of June 21, 2022, importers of goods from China and other countries that contain China origin inputs of components or raw materials are subject to the enforcement provisions of the Uyghur Forced Labor Prevention Act (UFLPA). As a result, importers should now perform significant due diligence on all tiers of the supply chain of their imports and update their compliance policies and internal controls to address the risks of forced labor in their supply chains.

This statute strengthens enforcement of the existing prohibitions on the import of any goods made with forced labor with a focus on China and its forced labor practices in the Xinjiang Uyghur Autonomous Region (XUAR).

Most significantly, Customs is now operating under the presumption that any goods “produced, or manufactured wholly or in part” in the Xinjiang region or by certain designated entities were made using forced labor and are prohibited from import into the United States. Customs will detain shipments containing such goods. Importers of such detained goods will need to rebut this presumption by providing “clear and convincing” affirmative evidence that forced labor was not used.

If an importer succeeds in rebutting the presumption and Customs grants what it calls an exception under the UFLPA, there may be Environmental, Social & Governance (ESG) implications because Customs will release information about its decision publicly. Customs and DHS guidance published in the last few days makes clear that meeting this high evidentiary standard will be challenging. If an importer has a shipment detained by Customs that has no connection to Xinjiang or an UFLPA-designated entity, then the importer needs to demonstrate that the shipment is not subject to the UFLPA and its presumption.

Trade in Goods Made with Forced Labor Has Long Been Prohibited

There has been a longstanding statutory prohibition on import of goods tainted by forced labor dating back to 1930 codified at 19 U.S.C. § 1307:

All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the

importation thereof is hereby prohibited[.]

Customs has enforced this prohibition on forced labor by investigating whether there is forced labor in the supply chains of imports into the U.S.

- Customs has temporarily detained shipments publishing a Withhold Release Order (WRO) where it had reasonable suspicion that an import is a product at least in part of forced labor.
- Customs has seized shipments publishing a Finding where it determined with probable cause that an import is the product at least in part of forced labor.
- If importers were able to submit evidence to Customs demonstrating the goods were not produced with forced labor, the shipment would be released. Otherwise, entry would be prohibited. For shipments under a WRO, the importer would be permitted to export the goods elsewhere. For shipments under a Finding, the seized goods would be forfeited to Customs.

U.S. Department of Labor maintains a *List of Goods Produced by Child Labor or Forced Labor*. In addition, certain entities determined to be responsible for forced labor human rights abuses have been sanctioned pursuant to the Global Magnitsky Sanctions Regulations by the U.S. Department of the Treasury Office of Foreign Assets Control (OFAC). The Department of Commerce has also prohibited exports without an export license to certain entities responsible for forced labor abuses by designating these entities on the Bureau of Industry and Security's (BIS) Entity List.

The Uyghur Forced Labor Prevention Act and New Guidance on Enforcement

The Uyghur Forced Labor Prevention Act (UFLPA) was signed into law by President Biden in late December 2021 and the enforcement provisions came into force six months later on June 21, 2022. The Government recently released long-awaited guidance on how the UFLPA will be enforced:

- On June 13, 2022, Customs released [UFLPA Operational Guidance for Importers](#).
- Two business days before UFLPA enforcement commenced, the interagency Forced Labor Enforcement Task Force (FLETF) headed by the Department of Homeland Security released its UFLPA-required strategy for enforcement of the new statute, [Strategy to Prevent the Importation of Goods Mined, Produced, Or Manufactured With Forced Labor in the People's Republic of China](#). The sixty-page document includes guidance for importers about the due diligence and evidence that will be required to overcome the rebuttable presumption that forced labor was used in imports with production connected to the Xinjiang region. Pursuant to the UFLPA, before issuing the strategy, the task force in spring 2022 had solicited comments from the public and held hearings.

The most significant new restriction imposed by the UFLPA is that as of June 21, 2022, there is a rebuttable presumption that goods "produced, or manufactured wholly or in part" either (1) in the Xinjiang Uyghur Autonomous Region (XUAR) of China; or (2) by certain entities designated by the Forced Labor Enforcement Task Force were made using forced labor and are prohibited from import

into the United States. The UFLPA Entity List of designated entities was included in the Strategy document and it will be maintained by the Task Force. Updates to the List will be published in the Federal Register.

Importers will have 30 days (in contrast to the 90 days with WROs) to challenge a shipment detained after Customs determines it falls within the scope of the UFLPA and applies the new UFLPA presumption that the shipment is presumed to be the product of forced labor. When Customs issues its final ruling excluding the goods from entry, importers will then have 180 days to file a protest and if the protest is denied, to file a court action. The newly issued Government guidance sheds light on UFLPA implementation and enforcement, notably the following:

- Importers will need to demonstrate that they are following the Strategy's guidance on what constitutes supply chain due diligence and management and cooperate fully with Customs inquiries. If the detained goods have a connection to Xinjiang or the UFLPA Entity List, importers will need to present "clear and convincing evidence" that their shipment was not produced with forced labor. If the detained goods have no connection to Xinjiang or the UFLPA Entity List, importers will need to present evidence of this lack of connection.
 - Importers will need to update their compliance policies, internal controls, and compliance training to address the risks of forced labor in their supply chains.
 - Importers will need to adopt a risk-based approach to compliance as the "clear and convincing" evidence standard to overcome the presumption is not defined and the type, nature, and extent of evidence Customs will require will vary case-by-case based on the facts and circumstances of a given imported good and the risk factors presented.
 - If an importer has a shipment detained by Customs that has no connection to Xinjiang or an UFLPA-designated entity, then the importer needs to demonstrate to Customs evidence to that effect. If Customs agrees the shipment is not subject to the UFLPA and its presumption, Customs will permit entry of the shipment.
 - The Strategy identified a few high-priority sectors for enforcement (apparel, cotton/cotton products, silica-based products including polysilicon, and tomatoes/tomato products) and provided specific guidance for importers of these commodities or products with these inputs.
 - There is no *de minimis* exception. Thus, even if goods do not fall within the scope of the hi-priority sectors, importers still need to increase their supply chain due diligence and other compliance measures.
 - A critical part of due diligence will be the mapping of the entire supply chain through to raw materials, i.e., mapping all tiers. Mapping will involve knowing the parties involved at each stage, what processes were conducted on the raw material, component or other input, and even working conditions of the labor force at each stage. Importers will need supporting documentation.
 - Importers will need to demonstrate active management and controls over their suppliers on an ongoing basis.

- If a supplier commingles inputs from Xinjiang and from elsewhere, importers face the risk that shipments of goods with inputs from such suppliers are at risk of being detained under the presumption. It is unlikely that an importer would be able to provide detailed documentation that inputs were not commingled for its production to overcome the presumption without having exerted the effort in advance to map its supply chain and ensure its suppliers had sufficiently detailed protocols in place and documentation made and preserved of how its goods were produced.
- The Task Force acknowledges that due diligence efforts in the Xinjiang region will be challenging given China's restrictions in the region and its use of coercion. It notes that traditional auditing may be inadequate. Nevertheless, the Strategy states that such barriers to effective due diligence do not relieve the burden on importers to follow the guidance and overcome the presumption.
- A further complication to heightened due diligence is China's opposition to extraterritorial application of U.S. laws and its blocking regulations enacted in 2021. These blocking regulations prohibit compliance with U.S. laws and regulations and permit persons to bring a civil lawsuit for damages against those who are complying with U.S. law. Importers will have significant challenges in obtaining cooperation from Chinese suppliers to conduct the needed due diligence on their supply chain in China.
- Companies importing goods with a connection to Xinjiang or a UFLPA-designated entity will be subject to public scrutiny with the resulting Environmental, Social & Governance (ESG) implications. Customs is required to submit periodic reports to Congress identifying instances where an importer rebutted the presumption and Customs granted an exception allowing entry of the import. These reports will outline the evidence Customs considered in making its determination. Customs is required to make these reports publicly available.