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The Countdown to the UFLPA

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The countdown continues to June 21—the day U.S. Customs and Border Protection (“CBP”) begins enforcing the Uyghur Forced Labor Prevention Act (“UFLPA”). The law, signed by President Biden at the end of 2021, relies on a “guilty until proven innocent model,” creating a rebuttable presumption that all goods created “wholly or in part” from the Xinjiang Uyghur Autonomous Region of China, or in connection with activities associated with forced labor, are subject to being seized at the U.S. border. While we continue to await guidance from an interagency Forced Labor Enforcement Task Force (“FLET”) supporting the strategy for CBP’s enforcement of the law, CBP is rapidly staffing up in anticipation of active and substantial enforcement, and public comments from the business community demonstrate the law’s inherent challenges and the importance of undertaking meaningful supply chain due diligence on goods being imported from China. And soon, U.S. importers will not be alone, as forced labor import bans of a similar sort are being considered by a variety of countries and the European Union itself.

UFLPA

On December 23, 2021, [H.R. 6256](#), the UFLPA, was signed into law. It seeks to expand Section 307 of the Tariff Act of 1930 ([19 U.S.C. § 1307](#)), which states that it is illegal to import into the United States “goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part” by forced labor. The new law provides that nearly all goods “mined, produced, or manufactured wholly or in part in” Xinjiang, by entities connected to the creation or export of forced labor goods (including those that use forced labor to create products, that work with regional authorities to supply forced labor out of the region, and that export forced labor goods from China to the United States), or by entities sourcing material from Xinjiang under the “poverty alleviation” program or the “pairing-assistance” program, are deemed goods subject to seizure and exclusion under Section 307. The narrow exception exists if the Commissioner of CBP determines “by clear and convincing evidence” that covered goods “were not produced wholly or in part by” forced labor, and that the importer has complied with guidance to be issued by the FLET. That guidance will include: (A) due diligence, effective supply chain tracing, and supply chain management measures to ensure that goods are not mined, produced, or manufactured wholly or in part with forced labor, (B) the type, nature, and extent of evidence that demonstrates that goods originating in China were not created “wholly or in part” in Xinjiang, and (C) the type, nature, and extent of evidence that demonstrates that goods originating from China, or which have been seized under Section 307, were not created with forced labor. The law goes into effect 6 months after adoption, or June 21, 2022.

CBP is Getting Ready for Enforcement

We continue to await that promised guidance. However, in the interim, CBP has made clear that this law will be enforced in a serious and meaningful way. CBP has [stated](#) that it will issue letters to importers

who it has identified as having previously imported merchandise that may be subject to the law, so that they may “address any forced labor issues in their supply chains in a timely manner.” In that same statement, it ominously added that regardless of whether you receive a letter, “All importers are expected to review their supply chains thoroughly and institute reliable measures to ensure imported goods are not produced wholly or in part with convict labor, forced labor, and/or indentured labor (including forced or indentured child labor).” To back up CBP’s words, DHS in its 2023 budget [asked](#) for \$70.3 million to support enforcement of the law. That contemplates an increase of 300 additional positions, funding for technology and program enhancements, “analytic models in support of enhanced targeting to sustain a completely new risk posture needed around the presumption of ‘guilty until innocent’[,] ... various tools for data, analysis, and targeting needs for increased supply chain tracing capabilities.” Those efforts will support, in DHS’s estimation, an increase of over 11.5 million shipments and subsequent transactions at ports of entry – up from less than 1 million in 2021. In turn that will lead to a dramatic increase in admissibility petitions to more than 20,000 per year – up from 301 in 2021 – and an “[i]ncrease in volumes of detentions and seizures” at ports across the country.

Business Concerns

Anticipating such a dramatic change, FLETF received roughly 180 written [comments](#) in response to a notice seeking public comments [published](#) in the Federal Register on January 24, 2022. Many of those same comments were echoed in a [hearing](#) on April 8, chaired by the FLETF. The comments were varied, but several consistent themes from companies and business organizations emerged.

- **Timing of the law.** Several comments expressed concern that importers will not be prepared to meet the law’s demands by June 22. Some asked for a suspension for 12 months, while others asked for transitional enforcement focusing on those high risk sectors – including cotton, tomatoes and polysilicon—that are referenced in the law and have been subject to broad government Withhold Release Orders connected to the Xinjiang region. Others noted that small and medium sized enterprises should be given further time to prepare for the law’s enforcement.
- **“In part.”** Numerous commentators expressed concern about the law’s including of a “wholly or in part” standard that could lead to seizing goods where only a tiny fraction has any connection to Xinjiang or covered activities or entities. Indeed, as one commentator noted, on the face of the law, even an insignificant trace of an input alleged to have been made with forced labor could taint the product. Commentators urged for a clearly defined *de minimis* exception based on the quantity of the alleged problematic components—e.g., less than 5%—and/or on how critical they are to the final product.
- **Clarity on diligence.** Numerous comments expressed the substantial concerns about what kind of due diligence is expected. Commentators asked for lists of specific entities and products connected to forced labor, as the law itself calls for. They asked for trusted trader programs, and U.S. government or third party certification systems. They asked for guidance on good or best practices associated with conducting due diligence in China.
- **Clarity on what triggers a review.** Some comments noted the lack of clarity on how a review is triggered, or the steps that CBP takes. They requested a clear framework identifying the process through which CBP acts.
- **Timeliness of the review process.** Business commentators expressed concern around the timeliness of CBP reviews of detained shipments. Several indicated that while companies must

quickly marshal evidence to demonstrate that goods are not connected to forced labor, there is no time period in which CBP must make a determination. That can impact business operations of importers, and lead to goods becoming spoiled or ruined.

As the comments make clear, there is substantial concern around critical aspects of the law. These include what kind of due diligence should be undertaken, the meaning of the law's critical phrase "wholly or in part," and the process that CBP will undertake. Those concerns are unlikely to delay enforcement of the law, however.

Steps to Take Now

As we await further guidance, there are steps companies can take right now to prepare based on past CBP guidance. This includes [guidance](#) regarding other similar laws and [guidance](#) in connection with recent Withhold Release Orders "to ensure they can effectively trace and manage supply chains, and to provide sufficient documentation to comply with customs laws, including 19 U.S.C. § 1307." As this guidance reflects, companies should consider:

1. Adopting a high-level statement of policy demonstrating a company's commitment to respect human rights and labor rights;
2. Using contracts that incorporate the policy and expected practices, with flowdown provisions for subsuppliers;
3. Mapping their supply chains connected to China, seek to learn the identities of as many subsuppliers as possible, and assess the relevant risks that goods being imported from the country will be covered by the UFLPA;
4. Conducting public information searches for public allegations connecting supply chain entities to forced labor;
5. Preparing training materials for employees and suppliers around the company's expectations;
6. Gathering commercial and production documents, including certificates of origin or manufacturers' affidavits. Documentation produced in the ordinary course of business includes full records of transactions and supply chain documentation to demonstrate all parties involved in the manufacture or export of a particular good, and the origin of the materials back to suspected source of forced labor; and
7. And adopting internal controls and oversight systems of the company's operations and supply chain.

Other steps are reflected in our [prior publications](#) on the subject. However, it is clear that it will not be enough for companies to perform "tick-the-box" exercises, as recent U.S. enforcement decisions reveal (see, for example, a 2021 [ruling](#) prohibiting imports of apparel believed to be tied to forced labor in North Korea, despite an accreditation report concluding that the manufacturer did not use North Korean labor). Company due diligence will need to be rigorous, consistent, and comprehensive to meet CBP's expectations.

Conclusion

There is little question that the law, when it goes into effect, will have a substantial impact on companies importing from China, and supply chains more generally. However, U.S. businesses and supply chains will not be alone. Canada already has started enforcing the Customs Tariff Act, its own version of Section 307. Similarly, wide-reaching forced labor import bans are being considered in other jurisdictions, such as [Australia](#) and the [EU](#), and discussed in others, such as the [U.K.](#) In other words, while compliance with the impending UFLPA may seem onerous, U.S. importers soon will not be alone.

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