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US Government Publishes Uyghur Forced Labor Prevention Act Enforcement Strategy

The Strategy provides useful guidance for importers seeking to comply with the provisions of the UFLPA.

The Uyghur Forced Labor Prevention Act (UFLPA) was signed into law by President Biden on December 23, 2021, to bolster the US government's prohibitions on the importation into the US of goods produced using forced labor¹ in or connected to the Xinjiang Uyghur Autonomous Region of China (Xinjiang).

On June 21, 2022, the key provision of the UFLPA took effect, introducing a “rebuttable presumption” that any goods mined, produced, or manufactured wholly or in part in Xinjiang, or produced by certain entities connected to Xinjiang, were produced using forced labor and therefore prohibited from importation into the US by virtue of Section 307 of the Tariff Act 1930 (Tariff Act). Under the new law, importers can overcome this presumption if they comply with specific due diligence guidance, respond to inquiries from US Customs and Border Protection (CBP) regarding forced labor, and submit “clear and convincing evidence” that the goods were manufactured without forced labor.

On June 17, 2022, the Forced Labor Enforcement Task Force (FLETf)² published its Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China (the Strategy), which includes guidance to importers on the nature of the due diligence processes and other supply chain management controls expected of importers seeking to comply with the UFLPA, and the types of evidence required to “rebut” the presumption.

This Client Alert considers the effect of the rebuttable presumption, breaks down the key provisions of the Strategy, and provides insights to assist importers in navigating the UFLPA.

The Rebuttable Presumption

Before considering how the Strategy supplements and assists the enforcement of the UFLPA's rebuttable presumption, it is important to understand the mechanisms and processes involved in the presumption itself. The presumption applies to “any goods, wares, articles, and merchandise”:³

- mined, produced, or manufactured⁴ wholly or in part in Xinjiang; or

- produced by an entity on a list established under clause (i), (ii), (iv), or (v) of Section 2(d)(2)(B) of the UFLPA (collectively the UFLPA Entity List, which is contained in the Strategy — see below for further details).

CBP presumes goods that fall into one of these categories have been produced using forced labor and, therefore, are not entitled to entry into the US pursuant to the Tariff Act. CBP may grant an exception and allow such goods to be imported only after determining:

- the importer has fully complied with the guidance for importers described in the Strategy;
- the importer has completely and substantively responded to all inquiries for information submitted by CBP in relation to forced labor; and
- by “clear and convincing evidence,” the goods were not produced in whole or in part by forced labor.

Within 30 days of granting an exception, CBP must submit a report to appropriate congressional committees that specifies the goods that have been granted an exception, and the evidence that CBP has reviewed to determine that the exception should be granted.

The rebuttable presumption under the UFLPA is not the first measure that the US has taken to remove items produced using alleged forced labor in China from US supply chains; indeed, it follows a series of other actions over the past two years, including the January 2021 Withhold Release Orders (WROs) on cotton and tomato products connected to Xinjiang, and silica-based products made by Hoshine Silicon Industry Co. As of June 21, 2022, the UFLPA superseded these existing WROs.

Overview of the Strategy

The Strategy contains a number of important insights for importers, including:

- a comprehensive overview of the US government’s assessment of the risks of importing goods produced with forced labor in China;
- an evaluation and description of common forced labor schemes, certain lists of entities and products impacted by forced labor in China (including the UFLPA Entity List, as described in greater detail below), US government enforcement plans, and lists of high-priority sectors for enforcement;
- recommendations for efforts, initiatives, tools, and technologies that companies can use to accurately identify and trace affected goods;
- a description of how CBP plans to enhance its use of legal authorities to prevent entry of goods in violation of the Tariff Act;
- a description of additional US government resources necessary to ensure that no goods made with forced labor enter through US ports;
- guidance to importers regarding (i) existing processes and the evidence required to demonstrate that their products are either outside the scope of the UFLPA, or (ii) the nature of the evidence required to overcome the rebuttable presumption; and

- an overview of the US government's plan to coordinate and collaborate with NGOs and private sector entities to help implement and update the Strategy.

UFLPA Entity List and Government Labor Schemes

UFLPA Entity List

The Strategy lists the entities FLETF has identified as associated with forced labor connected to the Xinjiang region (the UFLPA Entity List). Importers seeking to import goods into the US involving these entities in the supply chain will be required to gain an exception to the rebuttable presumption in order to complete the import process successfully.

The UFLPA Entity List includes:

- a) a list of entities in Xinjiang that the FLETF has identified as producing goods, in whole or in part, with forced labor;
- b) a list of entities that the FLETF has identified as working with the government of Xinjiang to recruit, transport, transfer, harbor, or receive forced labor of Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups in Xinjiang;
- c) a list of entities that export products mined, produced, or manufactured wholly or in part by entities in categories (a) and (b) from China into the US; and
- d) a list of facilities and entities, including the Xinjiang Production and Construction Corps (XPCC), that source material from Xinjiang or from persons working with the government of Xinjiang or the XPCC for purposes of the poverty alleviation program, the pairing assistance program, or any other government labor scheme that the FLETF identifies as using forced labor.

The UFLPA Entity List currently contains only organizations that were previously identified as subject to WROs or on the Bureau of Industry and Security (BIS) Entity List (a list of entities and individuals subject to licensing requirements under the Export Administration Regulations). The FLETF did not add any new names to the list as of June 21, 2022. However, the Strategy identifies a process by which additional organizations can be added to the UFLPA Entity List, and notes that the UFLPA Entity List will be regularly reviewed by FLETF agencies. Companies with supply chain activity in China should regularly monitor this list for updates.

In the future, entities included on the UFLPA Entity List may be located outside of Xinjiang, and may instead be working with the Xinjiang government, exporting goods from entities working with the Xinjiang government, or sourcing material pursuant to a government program that the FLETF has identified as using forced labor. Therefore, importers should be aware of whether their supply chains include these entities, and continue to monitor these lists as they are updated by the FLETF.

Government Labor Schemes

The Strategy contains descriptions of the pairing assistance and poverty alleviation schemes operated by the Chinese government that are referenced in the UFLPA, and provides helpful insights to companies seeking to monitor for such activities in their supply chains.

- The **pairing assistance program** is described as a state-sponsored scheme whereby companies throughout China may establish satellite factories in Xinjiang that are staffed by Uyghurs and members of other ethnic minorities in what are referred to as Vocational Training Centers. The FLETF alleges in the Strategy that much of the work done pursuant to the pairing assistance program can be defined as forced labor, and the program is especially prevalent in the textile and garment sectors.
- The **poverty alleviation program** is described in the Strategy as placing Uyghurs and other minority groups in farms and factories across China (outside Xinjiang), where they are “compelled to work under the threat of penalty.” Given that the poverty alleviation program is likely to encompass a number of items produced outside of Xinjiang, entities that the FLETF identifies as being involved in this program are likely to be located outside of Xinjiang, but nonetheless are still impacted by the rebuttable presumption of the UFLPA.

The Strategy notes that companies should be aware of these schemes and the ways in which they may impact supply chains, including via the use of forced labor in contravention of the Tariff Act. While the rebuttable presumption applies only to products produced in whole or in part in Xinjiang or by an entity on the UFLPA Entity List, the Strategy notes that CBP will implement an enforcement plan that detains products found to have a nexus to “any...entity found to utilize forced labor via a government labor scheme” as well as goods shipped to the US from entities that, although not located in Xinjiang, are related to an entity in Xinjiang. It therefore appears that certain products that are not strictly within the scope of the rebuttable presumption will nonetheless be subject to increased scrutiny by CBP, an approach that is echoed in CBP’s own UFLPA operational guidance for importers.

High Priority Sectors for Enforcement

The UFLPA required that the Strategy explicitly identify a list of certain high-priority sectors for enforcement in relation to alleged forced labor in China, as well as a specific enforcement plan for those sectors. This list needed to include “cotton, tomatoes and polysilicon,” in addition to other relevant sectors as determined by the FLETF.

Consistent with the requirements of the UFLPA, the Strategy identifies the following high-priority sectors for enforcement in relation to alleged forced labor in China, the first three of which were specifically called out in the UFLPA and prior WROs:

- Cotton and cotton products
- Silica-based products (including polysilicon)
- Tomatoes and downstream products
- Apparel (*newly added*)

According to the Strategy, the FLETF added apparel as a priority sector in light of reports that forced labor is allegedly used in the production of apparel in China, and that the garment and textile industry in Xinjiang is currently expanding. The Strategy also notes the mutual pairing assistance program and poverty alleviation program as key factors for including the apparel sector on this list. While apparel made with cotton (including cotton cloth, threads, or other cotton-based materials) was already covered by existing WROs, the inclusion of the full apparel industry may have considerable impacts on importers of apparel items into the US from China.

Although most of these high-priority sectors were already the subject of WROs, the Strategy clarifies that the rebuttable presumption under the UFLPA will be the enforcement process used by CBP to deal with goods in these sectors, even if those goods were previously subject to other enforcement mechanisms or import restrictions.

The Strategy notes that CBP will implement enforcement plans that identify and prohibit goods from each of the high-priority sectors found to have a nexus to entities connected to Xinjiang, using a risk-based and dynamic approach based on current data and intelligence. The precise details of these plans and approach are not specified in the Strategy.

Guidance for Importers

What Importers Must Demonstrate

If CBP seizes imported goods at the US border pursuant to the rebuttable presumption under the UFLPA, the importer typically has two options to secure entry of those goods into the US.

First, the importer may seek to establish that the goods are outside the scope of the UFLPA's rebuttable presumption — i.e., that the goods and its inputs are sourced completely from outside Xinjiang and have no connection to the entities on the UFLPA Entity List. If this can be demonstrated to CBP with “clear and convincing evidence,” then the goods will be released.

Alternatively, the importer may acknowledge that the import is within the scope of the UFLPA's rebuttable presumption and may request an exception. To be granted such an exception, the importer must demonstrate that it has:

- complied with the importer guidance set forth in the Strategy (see below);
- responded completely and substantively to all CBP requests for information; and
- demonstrated to CBP, using clear and convincing evidence, that the good was not produced wholly or in part with forced labor.

Guidance Requirements for Importers

To secure an exception, importers must comply with the guidance set forth in the Strategy regarding how to mitigate risks of forced labor in their supply chain, including due diligence, effective supply chain tracing, and supply chain management measures.

This guidance is a key source of information for importers to consider when developing processes and strategies to import goods from China into the US, especially importers who operate in the high-priority sectors. Even for companies that are not importing goods into the US, the guidance in the Strategy provides helpful benchmarks for best practices in mitigating forced labor risks in the supply chain.

Due Diligence and Other Supply Chain Controls

The Strategy advises that, to overcome the rebuttable presumption, importers must conduct due diligence to ensure that they are aware of the location and conditions of every element of their supply chains, and must implement other controls to mitigate risks of forced labor in their supply chains. The Strategy details the following eight aspects of effective due diligence and human rights supply chain controls, while also noting that the exact processes and procedures in place likely will vary by industry, and therefore there is no one-size-fits-all approach to an effective due diligence process.

1. Engaging stakeholders and partners	Importers should engage with stakeholders, including individuals and communities affected by the item's supply chain. The Strategy notes that sufficient due diligence may not be possible with regards to goods produced in Xinjiang or using labor from labor schemes if barriers prevent safe and secure engagement with workers and other relevant stakeholders in Xinjiang.
2. Supply chain tracing and risk assessment	<p>Importers are expected to map supply chains (i.e., understand all steps in the supply chain, from sourcing to manufacturing to finishing) and then identify the steps within the chain most at risk of using forced labor. Factors relevant for this determination include: locations and identities of entities in the chain, business relationships, and the use of publicly available data sets.</p> <p>Further guidance on supply chain tracing is included below.</p>
3. Developing and issuing a supplier code of conduct	Companies should develop and issue a written supplier code of conduct or equivalent statement of supply chain standards to their supply chain partners. For supply chains that touch Xinjiang or involve entities on the UFLPA Entity List, the Strategy states that the code of conduct must specifically address forced labor and the risk of use of state-sponsored labor programs. Importers should incorporate compliance with their supplier codes of conduct into supplier contracts.
4. Communicating and training to supply chain process owners	Importers are expected to provide training to employees or agents responsible for selecting suppliers, including training such process owners on the risks of forced labor, the prohibition of US importation of goods produced by forced labor, the rebuttable presumption under the UFLPA, risks of suppliers being included on subsequent updates to the UFLPA Entity List, and the importer's supplier code of conduct.
5. Monitoring supplier compliance through "credible audits"	<p>Importers should regularly monitor supplier compliance with the supplier code of conduct, particularly suppliers in Xinjiang or on the UFLPA Entity List. The Strategy states that this may be accomplished by conducting "credible audits" or through processes that go "beyond traditional auditing and may involve the use of technology or partnerships with civil society."</p> <p>A credible audit is stated to include the following elements: (1) unannounced arrival at the worksite and at a time when the workforce, especially workers at risk of forced labor, are likely to be present; (2) examination of International Labour Organization (ILO) indicators of forced labor; (3) worker, management, and labor broker or recruiter interviews completed in the interviewee's native language and free of employer or government intimidation; (4) unrestricted access to the worksite and any associated locations, such as cafeterias and dormitories, to observe conditions; and (5) review of documents and other information to provide additional proof of compliance and to identify or corroborate discrepancies in the information and observations of the worksite and associated facilities.</p> <p>The Strategy notes that audits, including third-party audits, are not sufficient to demonstrate due diligence and may not necessarily be a credible source of information in relation to Xinjiang. Consistent with prior US government guidance, the Strategy recognizes the challenges involved in gaining access to suppliers in Xinjiang to conduct credible audits, but states that "[t]hese due diligence barriers do not relieve importers seeking an exception to the rebuttable presumption of the statutory requirement to comply</p>

	with this guidance." Put differently, the US government expects companies to be monitoring their supply chain in China, even in the face of challenges in achieving full transparency from suppliers.
6. Remediating violations	To the extent any instances of forced labor are identified, the Strategy notes that non-compliance must be demonstrated to be fully remediated before imports are allowed to recommence.
7. Undertaking independent review of supply chain controls (third-party verification)	Independent third-party verification of due diligence methods is identified as the ability to demonstrate the implementation and effectiveness of an importer's due diligence system.
8. Reporting performance and transparency	Importers are encouraged to provide regular and timely public reporting on their due diligence systems in place in relation to Xinjiang. The Strategy does not provide specific further detail in relation to how frequently such reporting should be undertaken.

The Strategy refers importers to the US Department of Labor's [Comply Chain app](#) for further details on each of the eight areas. (The Comply Chain app is a resource that the US government previously indicated to be a helpful tool in its Business Advisory on alleged forced labor in Xinjiang, most recently updated in July 2021.)

Supply Chain Tracing Beyond Tier 1

The Strategy notes that effective supply chain tracing is an essential step in the diligence process for importers, and that importers must know the identities of their suppliers and labor sources at "all levels" of the supply chain.

To comply with the expectations in the Strategy, importers should map their entire supply chains, up to and including suppliers of raw materials, either by themselves or through a third-party provider. This mapping exercise should include not just the names of suppliers, but also an understanding of the locations and working conditions at each of those locations.

The Strategy also notes the importance of accurately documenting the chain of custody of goods and raw materials throughout the entire supply chain. There are many ways organizations can trace their supply chains, many of which leverage technology (e.g., data tracking, blockchain technology, etc.).

Without these mapping and tracing processes, the Strategy notes that it will prove challenging for importers to prove to the CBP that goods were not produced using forced labor and secure an exception.

Supply Chain Management Measures

Beyond the diligence and controls described above, the Strategy advises importers of the need to have adequate processes in place to manage vendor relationships to ensure that forced labor is not used in their value chains. Such measures may include:

- Vetting potential suppliers before entering into contracts to ensure no forced labor is taking place

- The inclusion of contractual terms that permit auditing of the supplier and, to the extent those audits identify forced labor, the requirement to implement reasonable corrective actions
- Outlining the consequences in contracts if violations occur and/or corrective action is not taken
- Ensuring access to conduct such audits, such as access to documentation, personnel, and workers for verification of the absence of forced labor
- Implementing the requirement to “cascade” terms, such as compliance with codes of conduct, through the suppliers’ own supply chain

The Strategy also points to US government and other NGO publications to assist in implementing diligence processes, and provides a list of sources that are viewed as authoritative. These include documents such as the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, the ILO Guidelines Concerning the Measurement of Forced Labor, and the US Department of State’s Responsible Sourcing Tool. While many importers may welcome the considerable recommended guidance available, this may also lead to challenges in identifying which of the many sources noted in the Strategy are to be viewed as more authoritative.

Evidence to Demonstrate That a Good Was Not Produced, Wholly or in Part, in Xinjiang or by an Entity on the UFLPA Entity List

Should goods be seized at the US border that the importer believes fall outside the scope of the rebuttable presumption (i.e., the good and its inputs are sourced completely from outside Xinjiang and have no connection to the entities on the UFLPA Entity List), then the importer will be required to demonstrate this to CBP with “clear and convincing evidence.”

The Strategy outlines the forms of evidence that typically would facilitate CBP’s determination, but does not provide a dispositive list of documents/evidence that would, in all cases, establish the import falls outside the UFLPA’s scope. The type, nature, and extent of evidence required from the importer will vary based on the facts and circumstances of the import in question. The FLETF’s goal is to provide importers flexibility to provide documentation consistent with their business operations. The Strategy notes that translation of any applicable documents into English will allow CBP to evaluate required information more efficiently.

The primary method identified by the Strategy by which importers can evidence that their import is outside the scope of the UFLPA is through accurate and detailed supply chain tracing, as discussed in detail above. CBP may request evidence to demonstrate tracing of the entire supply chain of a good, or a particular aspect of a good, and importers should be in a position to evidence the complete integrity of the supply chain.

The Strategy notes that DNA or isotopic tracing may enable identification of the provenance of goods without tracing the supply chain. If importers wish to use these methods, then their reliability must be demonstrated to CBP.

Evidence to Demonstrate That Goods Originating in China Were Not Mined, Produced, or Manufactured Wholly or in Part by Forced Labor

The Strategy also provides the following list of evidence that may be used to demonstrate that goods originating in China were not made wholly or in part with forced labor:

- Evidence mapping the entire supply chain, and transport along the supply chain, including which entities were involved at each stage
 - A complete list of all workers at an entity subject to the rebuttable presumption in the production of the imported goods, including:
 - Evidence to demonstrate how and to whom wages are paid at each workplace;
 - Evidence to identify whether each worker comes from Xinjiang, as well as the worker's residency status;
 - Evidence to demonstrate that output is consistent with the documented workers, including:
 - number of workers in each job category, total volume of material or goods input, and total volume of materials or goods output; and
 - documents relating to hours worked and daily production output of goods
 - Evidence that none of the workers who were involved in the production of the good were a) recruited, b) transported, c) transferred, d) harbored, or e) received with the involvement of the government of China, XPCC, or entities on the UFLPA Entity List. Evidence should specifically address the controls each entity has in place to ensure that all workers are recruited voluntarily
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- Evidence that reliably demonstrates that every worker from Xinjiang is working voluntarily, and without menace or threat of penalty, including credible evidence that demonstrates for each such worker that:
 - recruitment to work, including recruitment to any job fair, was fully voluntary;
 - recruitment and continuation at the job were and are not subject to government or entity coercion;
 - recruitment was free of any forced labor indicator, including detention, prior detention or threats of detention, detention or threats of detention of family members, or forced transfer of land to the government;
 - transport from Xinjiang was voluntary and free of any forced labor indicator, including government surveillance or control of worker movements during transport from Xinjiang;
 - transfer to the entity was voluntary and free of any forced labor indicator, including government surveillance;
 - living and working conditions at the entity are free of any forced labor indicator, including government surveillance or reporting by the entity to the government, restriction of movement, or required activities such as political, language, or cultural classes; and
 - receipt of the worker by the entity was undertaken voluntarily and without any indicators of forced labor, including government surveillance or reporting.

The Strategy further notes that any audit purporting to demonstrate and evidence that goods originating in China were not made wholly or in part with forced labor must explain its methodology, how it determined the absence of forced labor indicators, a description of all evidence upon which its determination was based, and a description of how the auditor determined the reliability of the evidence used to reach the audit's conclusions.

Conclusion

The Strategy, and particularly the guidance for importers, is a critical document for all companies that have supply chains extending into China, especially those in the apparel, cotton, polysilicon, and tomato sectors that seek to move those goods into the US. Beyond that, the Strategy provides helpful guidance on supply chain best practices to mitigate risks of forced labor in the supply chain.

Given the complexity of supply chains in these high-priority enforcement sectors, combined with the difficulty of meeting the supply chain controls set out in the Strategy, the rebuttable presumption is likely to be a challenging bar to clear to import Xinjiang-based products or products in the high-risk sectors into the US.

The Strategy now helps enable importers to decision compliance processes that meet the US government's clear expectations, and to make informed decisions about their supply chain partners and related risks.

Moving forward, US importers will be carefully watching how the UFLPA is policed by CBP, and the approach taken both in relation to seizing goods pursuant to the rebuttable presumption and the standard of evidence required to rebut the presumption.

Latham & Watkins will continue to monitor the enforcement of the UFLPA and any future updates to the Strategy. Please reach out to one of the authors of this Client Alert or your usual Latham & Watkins contact for further information or specific advice in relation to the UFLPA.

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Endnotes

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- ¹ This Client Alert sets out a factual description of the policies implemented by the US government and FLETF and its approach to enforcement of matters concerning forced labor in relation to Uyghur and other ethnic minority groups that are connected to Xinjiang. The Chinese government has denied that forced labor in relation to Uyghurs and other ethnic minority groups has taken place in connection with Xinjiang. This Client Alert does not express an opinion regarding the factual claims made by any party.
- ² The FLETF was established on May 15, 2020, and is responsible for monitoring the enforcement of the Tariff Act. The FLETF is chaired by a representative of the Department for Homeland Security and features representatives from other government bodies, including the Office of the Trade Representative and the Departments of Commerce, Justice, Labor, State, and the Treasury.
- ³ For the purposes of this Client Alert, we refer to “goods, wares, articles and merchandise” as “goods.”
- ⁴ For the purposes of this Client Alert, we refer to “mined, produced or manufactured” as “produced.”