International Trade Update

June 2022

Uyghur Forced Labor Prevention Act Effective June 21: DHS and CBP Issue Highly Anticipated Guidance for Importers

Key Notes:

- Effective June 21, 2022, the Uyghur Forced Labor Prevention Act (UFLPA) establishes a rebuttable presumption that all goods produced, mined or manufactured in the Xinjiang region of China or by certain entities designated to the UFLPA Entity List are produced from forced labor and prohibited from entry into the United States.
- The prohibition on entry includes finished products that are manufactured in whole or in part using inputs sourced directly or indirectly from Xinjiang, even if imported from outside China.
- CBP has provided guidance on the enforcement process for the UFLPA to aid the trade community to comply with the UFLPA's requirements and rebut the presumption.
- DHS has provided importer guidance on the UFLPA including due diligence and supply chain tracing and management.
- DHS has also established the UFLPA Entity List with several listed companies. Products sourced from companies on the UFLPA Entity List are subject to the rebuttable presumption regardless of where they are produced.

The Uyghur Forced Labor Prevention Act (UFLPA) was passed into law on December 21, 2021, to ensure enforcement of Section 307 of the Tariff Act of 1930, which prohibits the importation of 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." It creates a rebuttable presumption that all products produced in whole or in part in the Xinjiang Uyghur Autonomous Region ("XUAR" or "Xinjiang") or by persons designated to the UFLPA Entity List were produced from forced labor and must be denied entry into the United States pursuant to Section 301 of the Tariff Act. The UFLPA's provisions are effective as of June 21, 2022. For more information on the requirements set forth in the UFLPA, see SmarTrade Update of January 2022.

On June 13, 2022 CBP published Operational Guidance for Importers (the "CBP Guidance"). On June 17, 2022 DHS published the "Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China" (the "UFLPA Strategy"). The CBP Guidance is intended to provide transparency to stakeholders on CBP's enforcement operations and the type of documentation regarding subject imports it will expect importers to produce to overcome the presumption of forced labor, especially in the Xinjiang region. The UFLPA Strategy is mandated by the UFLPA to provide importers with interpretive guidance on the scope of the compliance program importers must demonstrate (in addition to the import specific documentation) to overcome the presumption. Critically, the UFLPA Strategy provides guidance to importers on due diligence, supply chain tracing, and supply chain management measures.

This briefing provides an overview of the CBP Guidance and the UFLPA Strategy. It includes key takeaways that

importers and the trade community should consider to ensure compliance with the UFLPA and its enforcement procedures.

How Will Importers Know When Goods are Subject to the UFLPA's Rebuttable Presumption?

All goods sourced directly or indirectly from Xinjiang or from an entity on the UFLPA Entity List are subject to the UFLPA's rebuttable presumption. This includes raw materials and intermediate or finished goods imported not only from China but also from third countries. Identifying goods subject to the UFLPA is one of the complications facing importers. Importers can be proactive in supply chain tracing to identify subject goods. If importers do not self-identify, they will be notified that their imports are subject to the UFLPA through CBP enforcement action notices.

The CBP Guidance and the UFLPA Strategy urge companies to proactively conduct their own due diligence to ensure their products do not contain any raw materials, inputs or goods sourced from Xinjiang or the persons designated to the UFLPA Entity List. This should include a forced labor risk assessment of goods and suppliers and engagement with suppliers to identify all entities in the supply chain, the source of all goods and related inputs, and all manufacturing steps involved.

What Process and Enforcement Mechanisms will CBP Use for Imports within the Scope of the UFLPA?

1. CBP will identify imports within the scope of the UFLPA's rebuttable presumption.

The CBP Guidance does not provide much insight on how CBP will identify importations that fall within the scope of the UFLPA, except that it will rely on the UFLPA Entity List as well as other information gathered through data collection and analytics. The UFLPA Strategy references a number of data mining and other tools that DHS and CBP are using or plan to use.

2. CBP will notify importers of the enforcement action take under the UFLPA on an importation.

The CBP Guidance describes three potential enforcement actions that CBP may take under the UFLPA related to an importation: detention, exclusion and seizure/forfeiture.

Detention

When a shipment is detained, CBP will issue a detention notice pursuant to 19 U.S.C. § 1499 and 19 C.F.R.§ 151.16 and provide the reason for the detention and instructions on how to rebut the presumption under the UFLPA. CBP will have five days upon examination to determine whether to detain shipment and upon detainment, thereafter, will accept information from the importer to determine admissibility. Imports may present an Immediate Export in-bond to seek permission to export the detained shipment prior to exclusion or seizure.

Exclusion

CBP may also issue a notice exclusion of entry for imports that it determines to be in violation of the UFLPA. Exclusions may be protested by importers pursuant to 19 U.S.C. § 1514 and 19 CFR Part 174.

Seizure and Forfeiture

Imports determined to be in violation of the UFLPA may also be subject to seizure and forfeiture and CBP will issue a notice of seizure pursuant to 19 U.S.C. § 1595a and 19 C.F.R. Part 171. Seizures and forfeitures will be referred to the Fines, Penalties and Forfeitures (FPFO) officer at the port of entry. Importer petitions for release of the imported goods will be reviewed by the FPFO or Regulations and Rulings.

How Can Importers Respond to UFLPA Enforcement?

Importers may respond to UFLPA enforcement action by providing information sufficient to: (1) meet the conditions and requirements set forth in Section 3(b) of the UFLPA to rebut the presumption, or (2) demonstrate that the importation is outside the scope of the UFLPA (essentially, that it does not contain goods sourced from Xinjiang or companies on the UFLPA Entity List).

1. Importers may request an exception by showing compliance with Section 3(b) of the UFLPA to overcome the presumption.

Section 3(b) of the UFLPA provides an exception to the CBP Commissioner's application of the rebuttable presumption if it determines that the importer of record (IOR) has:

i. Fully complied with the UFLPA Strategy importer guidance issued under section 2(d)(6) of the UFLPA and any implementing regulations ("UFLPA Importer Guidance");
ii. Completely and fully responded to all inquiries for information to ascertain whether the goods were mined, produced or manufactured in whole or in part with forced labor; and
iii. By clear and convincing evidence that the good was not mined, produced or manufactured in whole or in part with forced labor.

The UFLPA Importer Guidance states that to fulfill the first prong of the rebuttable presumption test, importers must show effective due diligence, supply chain tracing and supply chain management.

- Due diligence includes:
  - Engaging stakeholders and partners
  - Assessing risks and impacts
  - Developing a code of conduct
  - Communicating and training across supply chains
  - Monitoring compliance
  - Remediating violations
  - Independent review
  - Reporting of performance and engagement
- Supply Chain Tracing involves "mapping" the entire supply chain and demonstrating the goods and their inputs' chain of custody from the beginning of the supply chain to the buyer of the finished product.
- Supply Chain Management involves measures taken to prevent and mitigate identified risks of forced labor. These include vetting suppliers, requiring corrective action if forced labor is identified in the supply chain, and consequences for failure to take corrective action.

Importers are encouraged to leverage U.S. government and NGO publications to assist in implementing due diligence, supply chain tracing and supply chain management measures.

The CBP Guidance provides the type of documentation required to support the request for exception are as follows:

(a) Documents evidencing importers have a due diligence system will show:
- Supply chain mapping and assessment from raw materials to imported goods;
- Engagement with suppliers and stakeholders to assess and address forced labor;
- Supplier code of conduct forbidding forced labor and noting China as high-risk;
- Training for employees and agents; and
- Monitoring of supplier compliance with code of conduct.

(b) Documents evidencing importers have engaged in supply chain tracing will show:
- Supply chain tracing information, including all stages of mining, production or manufacture of imported goods and components in the supply chain, the role/contact information of all suppliers and manufacturers, related persons, and affidavits verifying this information.
- Information about the merchandise and its components, including payment records, shipping records, inventory records and import/export records; and
- Information about the miner, producer or manufacturer including, mining records, production orders, and factory related records.

(c) Documents evidencing importer's supply chain management measures:
- Internal controls to prevent and mitigate risk of forced labor in supply chain; and
- Operating system or accounting system that includes audited financial statements.

(d) Documents evidencing that goods originating in China were not produced in whole or in part from forced labor:

- Supply chain map identifying all entities involved with production of goods and components;
- Information on workers and worker recruitment including, payment of wages, production output per worker, recruitment practices, voluntary employment; and
- Credible audits to identify forced labor indicators and remediation.

2. Importers may show the importation falls outside the scope of the UFLPA.

The CBP Guidance also provides that if CBP has taken enforcement action and the importer believes that its importation falls outside the scope of the UFLPA, it may provide information to CBP to that effect. Specifically, importers will need to show that the imported goods and its inputs are sourced completely from outside of the Xinjiang region of China and have no connection to the UFLPA Entity List.

The CBP Guidance provides that the type of documentation required to support that the import is outside the purview of the UFLPA requires a showing of documents evidencing the importer has engaged in supply chain tracing and documentation that traces the supply chain for the goods and their components (see the list of documents in 1(b) above.)

3. Additional documentation will be required for imports of cotton, tomatoes and polysilicon within the scope of the UFLPA.

The CBP Guidance also notes additional documentation that importers should consider submitting for commodities with high-risk of forced labor, cotton, polysilicon and tomatoes. These include: flow charts of the production process and maps of the regions where the processes occur with numbered steps and supporting documents for each step. For cotton and tomato products, importers should identify the origin, processing facilities and production processes of the tomato seeds, tomatoes, and tomato products or cotton at the bale level to the finished product. For polysilicon products, importer will need to demonstrate all entities involved in the manufacture, manipulation, or export of the good and country of origin of each material.

Considerations

Companies should consider the following steps to assess their UFLPA compliance and preparedness.

- Assess whether their current procedures for due diligence, supply chain tracing and supply chain management are aligned with the UFLPA.
- Review their risk profile and identify goods that may be subject to the UFLPA.
- If applicable, gather and prepare documentation to rebut the presumption of forced labor under the UFLPA.
- Train and educate internal stakeholders on supply chain tracing and the UFLPA requirements.
- Educate suppliers on the UFLPA and address supply chain tracing and management needs.
- Revise purchase order terms and conditions and supplier codes of conduct.
- If applicable, assess the impact of the UFLPA's enforcement on their supply chain to determine whether alternate sourcing will be necessary.

FOR MORE INFORMATION

For more information, please contact:

Francesca M.S. Guerrero
Partner, International Trade
202.973.2774
Francesca.Guerrero@ThompsonHine.com

Joyce Rodriguez
Managing Associate, International Trade
202.973.2724
Joyce.Rodriguez@ThompsonHine.com

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