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In this issue:

Forced Labor in the Automotive Industry

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Since the Uyghur Forced Labor Prevention Act (UFLPA) went into effect in June 2022, U.S. Customs and Border Protection (CBP) has focused its enforcement on certain products, including polysilicon, cotton, and tomatoes. Recent developments indicate that the automotive industry may be the next focus of enforcement. Reports have been issued by influential human rights NGOs suggesting that various raw materials and components used in automotive manufacturing may be tainted by forced labor and connected to the Xinjiang region. Further, a few public alerts suggest that CBP has already begun issuing detention notices for shipments containing aluminum products used in the automotive industry.

Companies in the automotive industry should proactively increase their due diligence efforts to identify raw materials or components in their supply chains that may pose a forced labor risk and should be ready to respond to CBP's documentation requests in the event their shipments are detained, excluded, or seized at a U.S. port of entry.

Background

Various jurisdictions around the world, including the United States, Mexico, and European countries, have established rules in recent years that are intended to eliminate forced labor from companies' supply chains and/or ban the entry of products made with forced labor into their markets. For example, on February 17, 2023, Mexico issued regulations prohibiting imports of goods produced with forced labor as part of its commitment to the United States-Mexico-Canada Agreement (USMCA). In 2022 the European Commission proposed a new law that prohibits trade in products made with forced labor within the EU market. In addition, other countries, such as Germany, France, and Australia, have enacted similar laws intended to address forced labor issues in companies' supply chains.

In the United States, Section 307 of the Tariff Act of 1930 prohibits the importation of any product mined, produced, or manufactured wholly or in part in any foreign country by forced labor, including forced or indentured child labor. (See 19 U.S.C. § 1307.) CBP, which is charged with enforcing the laws applicable to importation of products manufactured by forced labor, can issue Withhold Release Orders and findings to prevent merchandise produced using forced labor from being imported into the United States.

The UFLPA, which went into effect on June 21, 2022, established a rebuttable presumption that any goods mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region (XUAR) of the People's Republic of China (PRC) or produced by certain entities identified in the list maintained by CBP (UFLPA Entity List) are made in whole or part by forced labor and subject to

Section 307 of the Tariff Act of 1930. The presumption also applies to goods made in or shipped through the PRC and other countries that include inputs made in XUAR.

To enforce the UFLPA, CBP can take specific enforcement actions, including identifying, detaining, and/or excluding or seizing shipments subject to UFLPA's rebuttable presumption. When a shipment is detained, CBP will provide notice to the importer that includes instructions on how to request an exclusion or establish that an importation is outside the scope of the UFLPA.

If goods are detained by CBP under the UFLPA, importers have two paths to seek entry. First, they may seek an "exception" to the presumption by demonstrating by clear and convincing evidence that the goods subject to the rebuttable presumption were not produced wholly or in part by forced labor.

Second, the importer may contend that the UFLPA does not apply to its importation – i.e., that its imported goods were not mined, produced, or manufactured wholly or in part in the XUAR or by an entity on the UFLPA Entity List – and request an applicability review.

According to the CBP's statistics, from the UFLPA's effective date on June 21, 2022, until March 3, 2023 (roughly eight months), CBP has subjected 3,237 shipments valued at $961 million to UFLPA reviews or enforcement actions, and it has denied (i.e., seized, excluded, exported, or destroyed) 424 shipments and released 1,090 shipments into the United States. The remaining shipments are still pending a determination.

CBP regularly meets with U.S. government agencies, NGOs, industries, and foreign governments to gather information on forced labor within supply chains, and acts on the gathered information from any of these sources. Consequently, CBP's enforcement of forced labor laws, including UFLPA, typically focuses on certain industries and products as it gathers more information about a product or industry's specific supply chain.

In 2022, for example, CBP's UFLPA enforcement focused on several products that were identified as high-risk for their connections to forced labor in the XUAR. These products include apparel, cotton and cotton products, silica-based products, and tomatoes. The solar industry was particularly hit hard, and solar equipment worth hundreds of millions of dollars was seized at U.S. ports.

CBP Will Likely Focus on the Automotive Industry in 2023

Recent developments indicate that the automotive industry may be the next focus of UFLPA enforcement.

In April 2022 U.S.-based Horizon Advisory investigated the Xinjiang aluminum sector and found that this sector, along with the textile, agriculture, and solar industries, is at high risk of forced labor exposure. Horizon reported that 17% of China's aluminum production, which already makes up 60% of the world's primary aluminum production, comes from Xinjiang, and that aluminum tainted with forced labor in the Xinjiang region may have implications for various downstream industries, including the automotive industry.

In December 2022 Sheffield Hallam University published a report, "Driving Force: Automotive Supply Chains and Forced Labor in the Uyghur Region," which asserts that major international auto manufacturers' supply chains are exposed to materials produced with forced labor in the XUAR. According to the report, various major Chinese upstream suppliers of the automotive industry have presence in the XUAR or may be sourcing materials produced there.

Further, the report asserts that "[b]etween raw materials mining/processing and auto parts manufacturing, we found that practically every part of the car would require heightened scrutiny." The report also identifies as high-risk various raw materials and automotive components, such as base metals (e.g., steel, aluminum, and copper), batteries, and electronics. The report names certain international manufacturers that are documented to source these components from the named Chinese suppliers that are alleged to be tied to the XUAR.

The report has attracted significant attention from the media and other stakeholders in the automotive industry. On December 6, 2022, United Auto Workers President Ray Curry called on the automotive industry to shift its entire supply chain out of the Xinjiang region. And on December 22, 2022, Senate Finance Committee Chair Ron Wyden sent letters to major automotive manufacturers asking questions about, among other things, their due diligence efforts to identify components that are linked to forced labor and the XUAR. While Senator Wyden's letter recognized that "automobiles contain numerous parts sourced across the world and are subject to complex supply chains," it also emphasized that "this recognition cannot cause the United States to compromise its fundamental commitment to upholding human rights and U.S. law." Senator Wyden also reminded manufacturers that "[u]nless due diligence confirms that components are not linked to forced labor, automakers cannot and should not sell cars in the United States that include components mined or produced in Xinjiang." On March 28, 2023, Senator Wyden followed up with a second set of letters addressed to Tier 1 automotive suppliers and major automotive manufacturers asking additional questions regarding auto supply chain links to forced labor. In a public statement, he said that automakers' responses to the initial round of questions "failed to provide specific details" about their due diligence efforts, "often claiming that suppliers had the responsibility for ensuring that their supply chains are free of forced labor." As a result, Senator Wyden sent letters to Tier 1 suppliers and major automakers asking questions about how these companies source materials and oversee their supply chains. Notably, he explained that the information gathered during the initial stages of the investigation "raises serious questions about tier 1 suppliers' ability to ensure that sub-suppliers do not rely on forced labor," and that the complexity of auto supply chains "cannot cause the United States to compromise its fundamental commitment to upholding human rights and U.S. law."

Further, A.P. Moller-Maersk recently reported that CBP has begun issuing detention notices against aluminum products under the UFLPA, and that it will "most likely focus on aluminum automotive commodities and other commodities classified under Chapter 76" of the Harmonized Tariff Schedule, which provides for aluminum products.

What Should the Automotive Industry Do?

All of these recent developments suggest that CBP will expand its UFLPA enforcement focus on automotive industry supply chains in 2023 and onward. Automotive manufacturers should proactively increase their due diligence efforts to identify materials in their supply chains that may be tied to the XUAR or otherwise produced with forced labor.

When CBP detains a shipment at the border, an importer can either request an exception to the UFLPA or ask for an applicability review, claiming that the imported goods and their inputs are sourced completely outside of the Xinjiang region and have no connection to the UFLPA Entity List. Significant documentation is required to demonstrate that the shipment is not subject to the UFLPA or to request an exception from the UFLPA based on an assertion that the product was not produced with forced labor.

For example, according to CBP, a non-exhaustive list of documentation that may be required from an importer to demonstrate that the UFLPA does not apply to the shipment in question includes:

- Transaction and supply chain records, including full records of transactions and supply chain documentation that demonstrate the country of origin of the components – e.g., packing lists, bills of lading, manifests.
- Documents demonstrating the parties participating in the transactions, including all parties involved in the manufacture, manipulation, or export of a particular good – e.g., summarize the roles of parties involved as substantiated by other documentation, provide a flow chart of the supply chain.
- Documents relating to the payment and transportation of raw materials, including documentation showing the origin of the material and that these business transactions have occurred financially and physically – e.g., proof of payments, documentation showing the transfer of goods.

In exclusion requests, to overcome the UFLPA's presumption, importers are required to demonstrate, by clear and convincing evidence, that the imported goods were not produced wholly or in part by forced labor. To overcome the presumption, a non-exhaustive list of documentation that would likely be required by CBP includes:

- Documentation showing a due diligence system or process that may include a written supplier code of conduct, mapping of the supply chain and assessment of forced labor risks, and training on forced labor risks for employees and agents.

- Documentation on supply chain management measures, including internal controls to prevent or mitigate forced labor risks and remediate any issues.
- Documentation showing that goods originating in China were not mined, produced, or manufactured wholly or in part by forced labor, including a supply chain map identifying all entities involved, information on workers at each entity involved, and credible audits to identify forced labor indicators.

Due to the voluminous documentation required to request an exception or applicability review from CBP, it is important to prepare a plan for responding to a detention well ahead of time and to make suppliers aware of the types of documentation that will be required in the event of a detention. Further, an importer should communicate early with CBP before a high-risk import, such as aluminum, arrives at a U.S. port of entry. Those in the automotive industry should be proactive in preparing for increased UFLPA enforcement and expand their supply chain due diligence efforts, including mapping their supply chain and addressing any forced labor risks posed.

U.S. EPA Clean Trucks Plan Continues to Roll Forward

By Joel D. Eagle and Jake M. Levin

In December 2022 U.S. EPA finalized its "Final Rule and Related Materials for Control of Air Pollution from New Motor Vehicles: Heavy Duty Engine and Vehicle Standards" (Heavy Duty Rule). The Heavy Duty Rule, published in the Federal Register (88 Fed. Reg. 4296) on January 24, 2023, and effective on March 27, 2023, includes several important changes to the EPA heavy duty emissions program, including more stringent emissions standards, a greater range of engine operating conditions, longer emissions warranty periods, and a requirement that the lower emissions standards be met for longer than was required in the prior rule. The Heavy Duty Rule applies to any company that manufactures, sells or imports into the U.S. a new heavy duty highway engine, and starts with model year (MY) 2027.

Specifically, the Heavy Duty Rule aims to reduce nitrogen oxide (NOx) emissions from heavy duty trucks by 48% by 2045 with a single-step reduction of NOx (rather than a proposed two-step reduction in MY 2027 and MY 2031), along with more stringent standards for particulate matter, hydrocarbons and carbon monoxide. The Heavy Duty Rule also increases the "useful life" period for heavy duty engines from 10 to 11 years, 435,000 miles to 650,000 miles, and 22,000 hours to 32,000 hours. EPA expects the useful life period changes to drive more improvements in engines and emission-related components.

The Heavy Duty Rule also substantially increases the emission-related warranty period for heavy duty engines from five years/100,000 miles to 10 years/450,000 miles or 22,000 hours, whichever milestone occurs first. According to EPA, the longer warranty period is expected to lead to better maintenance of emission-related components and less tampering, which would in turn help to ensure the in-use benefits of emission controls.

EPA promulgated the Heavy Duty Rule pursuant to its August 2021 Clean Trucks Plan, which includes three regulatory actions designed to reduce tailpipe emissions from heavy duty trucks and vehicles: (1) more stringent NOx and GHG emissions standards for heavy duty trucks beginning with MY 2027 and tighter Phase 2 GHG emissions for MY 2027 and beyond (covered in part by the Heavy Duty Rule); (2) more stringent emissions standards for medium duty commercial vehicles beginning with MY 2027 (EPA anticipates this rule to be proposed alongside new standards for MY 2027 light duty commercial vehicles); and (3) more stringent Phase 3 GHG standards for heavy duty vehicles beginning as soon as MY 2030.

The White House Office of Management and Budget recently held a series of meetings with over a dozen state and federal agencies (including the California Air Resources Board (CARB)) and private entities (including manufacturers and environmental citizen groups) to discuss the timing and scope of the GHG Phase 3 rule and is aiming to release the draft GHG 3 rule as early as the end of March or early April. The proposed GHG 3 rule appears to be in the queue ahead of the proposed multipollutant light and medium duty rule that EPA is also currently working on. EPA's goal is to issue the GHG 3 rule, and possibly the multipollutant light and medium duty rule, by the end of 2023. This recent activity follows EPA's August 15, 2022, invitation to small businesses to participate as Small Entity Representatives for a Small Business Advocacy Review Panel to provide input on the draft heavy duty Phase 3 GHG standards. The forthcoming proposed rule is expected to revise the current GHG emission limits for heavy duty vehicles while utilizing the same certification and compliance structure already in place, but importantly is expected to contain significant provisions to accelerate truck electrification, as is the case with the ongoing rulemakings at CARB, discussed below.

California Keeps on Truckin' with Advanced Clean Trucks and Advanced Clean Fleets Regulations

By Joel D. Eagle

CARB, often the leader in driving state and federal mobile source policies, continues its push toward lower and zero emissions for heavy duty vehicles with important final and proposed rules. The California Advanced Clean Trucks (ACT) regulation, passed in 2021, is part of CARB's strategy for a zero-emission vehicle (ZEV) future by 2045 for medium and heavy duty vehicles. Its purpose is to accelerate large-scale transition to zero-emission medium and heavy duty vehicles from Class 2b to Class 8.

The ACT regulation includes a ZEV sales requirement for vehicle manufacturers and a one-time reporting requirement for large entities and fleets. It sets an annual increasing ZEV sales percentage schedule for manufacturers, culminating in a 55% ZEV sales mandate for zero-emission truck/chassis sales by 2035 for Class 2b-3 (gross vehicle weight rating (GVWR) of 8,501 pounds to 14,000 pounds); 75% of Class 4-8 (GVWR of 14,001 pounds and above) straight truck sales; and 40% of truck tractor sales. The ACT regulation also establishes a one-time reporting requirement to collect information that CARB will use to assess the suitability of ZEVs in multiple use cases and to inform future CARB strategies to further accelerate ZEVs in the California market. The full list of reporting requirements is in the ACT regulation at 13 CCR §§ 2012.1 and 2012.2.

CARB is also close to finalizing the new Advanced Clean Fleets (ACF) regulation, which is designed to build off the ACT regulation. The ACF regulation, which may be finalized as early as April 2023, would apply to fleets performing drayage operations, those owned by state, local and, federal government agencies, and high-priority fleets. High-priority fleets are entities with $50 million or more in gross annual revenue that own, operate, or control at least one vehicle with a GVWR greater than 8,500 pounds, or entities that own, operate, or control a total of 50 or more vehicles with a GVWR greater than 8,500 pounds.

The proposed ACF regulation is designed to ensure that fleets, businesses, and public entities that own or direct the operations of medium and heavy duty vehicles in California purchase and operate ZEVs to achieve a smooth transition to ZEV fleets by 2045. CARB's goal is for all drayage trucks, last-mile delivery, and government fleets to be 100% ZEV by 2035 and refuse and local buses to be 100% ZEV by 2040. The proposed ACF regulation includes manufacturer sales mandates and state and local agency ZEV purchasing requirements. It would be phased in over the next 18 years to allow fleets time to replace conventional internal combustion engine vehicles with ZEVs and includes an exemption for situations where a ZEV that meets a fleet's needs is not yet available. The "ZEV Unavailability Exemption" would permit a fleet owner to buy non-ZEV vehicles and exclude them from the ZEV milestone calculation. CARB will maintain a list on its website of vehicles that are not available in ZEV or near-ZEV configurations.

Overall, CARB continues to lead the way for California, many other states, and the federal EPA in the drive toward a ZEV future. As research and development continues for ZEV batteries, drive trains, and other critical components, the pace of ZEV regulations may increase, but may also be curtailed if technological advancements cannot keep up or supply chain strains continue.

USMCA Panel Says Automakers Can Still "Roll-up" Core Parts To Meet RVC Requirements

By Dan Ujczo

A United States-Canada-Mexico Agreement (USMCA) Chapter 31 Dispute Resolution Panel started the year by concluding that automakers may continue to use the long-standing practice of "roll-up" when calculating the percentage of North American-originating materials used in the production of core automotive parts (such as engines) that is subsequently factored into the automakers' computation for determining the total amount of originating content (regional value content or RVC) for passenger vehicles and light trucks. Under the USMCA, a passenger vehicle or light truck with an RVC exceeding a certain threshold is eligible for preferential tariff treatment (presently a 72% threshold of North American-originating materials for the final assembled vehicle, which will increase to 75%). The panel flatly rejected the United States' strict interpretation that roll-up does not apply to core parts when calculating the total RVC for passenger vehicles and light trucks and instead accepted the views of Mexico and Canada that the USMCA's plain language supports the continued application of roll-up as in the North American Free Trade Agreement (NAFTA).

In plain language, roll-up is the process where once a good such as an automotive part reaches a certain RVC to be deemed "originating" under USMCA (e.g., 72%), it then will be considered as 100% originating at all subsequent stages of production. Accordingly, in the present dispute, the panel confirmed that once a core automotive part is determined to be originating by reaching the 72% RVC, it thereafter is considered 100% originating content when subsequently calculating the total RVC for the entire passenger vehicle or light truck. The value of any non-originating (i.e., "non-North American" material) for the core part is to be disregarded in the subsequent processes and calculations. This process provides flexibility for vehicle producers to meet the USMCA's high RVC thresholds for passenger vehicles and light trucks. Stated otherwise, under roll-up, once a good becomes a citizen of "USMCA land" (i.e., it is "originating"), it becomes a 100% citizen from that point forward.

While the next steps remain to be seen, the United States previously signaled it would issue new guidance on the USMCA automotive rules of origin and likely was waiting for the release of this panel decision before publishing the new guidance. Automakers and suppliers should be prepared for the issuance of new guidance this spring.

An open issue is whether the Alternative Staging Regime approval letters the United States issued to various vehicle producers will remain in effect. These approvals afford vehicle producers additional time to meet the USMCA's RVC requirements conditioned on the manufacturers' acceptance of the U.S. interpretation of roll-up for core parts and the vehicle certification. With the panel now finding that interpretation to be a breach of the agreement, it remains an issue as to whether the United States may reconsider those approvals.

Notably, there are multiple USMCA disputes underway between Canada, Mexico, and the United States on issues ranging from dairy to energy. The United States may attempt to maintain some leverage in those disputes by not immediately implementing this panel decision.

While this decision is limited to the issues presented, the rationales presented in the final report provide some guidance (and potentially comfort) to vehicle producers that the interpretation of the USMCA Automotive Rules of Origin will be limited to the agreement's plain text, thereby limiting the opportunity for further "surprises" by the respective governments.

Nevertheless, this spring will be critical for original equipment manufacturers and suppliers in light of expected and separate U.S. guidance regarding the USMCA, Inflation Reduction Act (IRA), and Build America, Buy America (BABA). Given the U.S. positions to date, it is highly likely that there will be differing standards of "originating" and "qualifying" under these separate agreements and legislative approaches. The United States may be able to achieve the result it was seeking in this USMCA dispute by using similar rationales in the IRA and BABA, which will create different, and potentially inconsistent, standards for automakers and suppliers seeking to design and implement sourcing and compliance programs.

FOR MORE INFORMATION

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