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Practical Implementation of the Uyghur Forced Labor Prevention Act (UFLPA) for U.S. Importers

Key points

The “rebuttable presumption” of the Uyghur Forced Labor Prevention Act (UFLPA) became effective June 21, 2022.

U.S. Customs and Border Protection (CBP) has issued several releases addressing implementation of the UFLPA, including the Operational Guidance document and a 60-page report to Congress.

If goods are stopped by CBP for UFLPA enforcement purposes, to enter the goods the importer must establish that the goods are not produced by any company in the Xinjiang Uyghur Autonomous Region (XUAR) or tied to any entity on the UFLPA Entity List, or otherwise ask for an exemption.

Obtaining information on the source of all of the inputs into a final product, sometimes going back several production steps, will be a major challenge in some instances.

For legal and other business reasons, importers should have a compliance program in place for XUAR forced labor issues.

How much supply chain tracing and documentation is enough to satisfy these new standards is likely to be a balancing of costs, ability to obtain information going deeply into the supply chain, the importance of the imported goods to

the importer and the actual implementation and enforcement practices of CBP.

Importers should continue to closely monitor how compliance and enforcement is handled by CBP in the coming weeks and months.

Overview

The Uyghur Forced Labor Prevention Act (UFLPA), which became law on December 23, 2021, contains a “rebuttable presumption” that became effective June 21, 2022 and applies to all imports on or after that date. While U.S. law (19 U.S.C. §1307) already prohibits the importation of goods produced by forced labor, the UFLPA imposes more targeted sanctions and imposes new standards of proof applicable to goods tied in any manner to the Xinjiang Uyghur Autonomous Region (XUAR) in China, with such goods being “presumed” to be produced by forced labor and thereby excluded from entering the United States.

As importers are aware, there has been a statutory obligation on the part of importers for many years to exercise “reasonable care,” which generally requires importers to “know your supply chain.” Consistent with those standards, importers faced with an UFLPA enforcement action – who believe their goods (including inputs and raw materials) have no connection to the XUAR or any entity on the UFLPA Entity List – will need to provide documentation to U.S. Customs and Border Protection (CBP) demonstrating that the merchandise is outside the scope of the UFLPA because the goods lack any connection to the XUAR. In that regard, importers claiming their goods are outside the scope of UFLPA will be required to prove the negative, i.e., prove that goods are not tied to the XUAR.

Rebuttable presumption

For goods that are found to have a connection to the XUAR or an entity on the UFLPA Entity List, the UFLPA reverses the standard of proof through its “rebuttable presumption.” Importers accused of violations under UFLPA whose goods are within the scope of the law have the right to request an exception, but must prove “by clear and convincing evidence” that their merchandise is not tied in any manner (including the use of raw materials) to the XUAR. The legal standard of “clear and convincing evidence” is higher than having to offer proof by a “preponderance of the evidence,” which generally is the standard necessary to prevail in administrative actions. Combined with the necessity of proving that goods were not covered because of connections to the XUAR, this new landscape for forced labor compliance will create major new challenges for many importers and U.S. businesses.

The legal framework

Under the UFLPA, goods that are subject to a XUAR enforcement action will be processed under UFLPA procedures, and detained, excluded or seized as the facts may require. This means that the goods will be barred from entry into the United States unless an importer can (1) prove that the goods

should not be barred because they have no connection to the XUAR or an entity on the UFLPA Entity List or (2) rebut the UFLPA presumption that goods connected to the XUAR or an entity on the Entity List involve forced labor and obtain an exception from CBP.

A major challenge for importers trying to comply with the law is that there is no *de minimis* standard in the law, and thus even if a product has trace amounts of inputs from Xinjiang or involving Uyghur laborers, it could, in principle, be barred from entry. In its *Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China* of June 17, 2022, CBP indicates that its priorities will be on products with the highest risk, which include imports directly from Xinjiang Province or from companies on the CBP Entities List, on transshipped goods from those sources or other places, or from entities not in Xinjiang Province but which are related to an entity in that province. The June 17 publication contains the current Entity List referenced above, but that current list appears to simply be companies already faced with a Withhold Release Order (WRO) in place against them and thus provides little new guidance to importers. The CBP Entity List is to be updated periodically, according to CBP, but when that will occur remains to be seen.

High priority goods include cotton, apparel, tomatoes and polysilicon products, all of which are major products of Xinjiang Province. Importers should keep in mind, however, that cotton from Xinjiang, for example, that is sold to another country and then transformed through several steps into another production in that country still is subject to the UFLPA by the terms of the law. Thus, importers cannot treat this list of priority products as exclusive.

If the goods of an importer are stopped by CBP for UFLPA enforcement purposes, the options for an importer are difficult. The importer must establish that the goods are not produced by any company in the XUAR or tied to any entity on the UFLPA Entity List (*i.e.*, a determination that the goods are outside UFLPA's scope). If CBP believes that it has evidence that the goods are tied to the XUAR, the importer must seek an UFLPA exception and rebut with "clear and convincing evidence" the statute's presumption of forced labor. This requirement for an importer to prove a negative – that the imported goods have no connection to the XUAR or any entity on the UFLPA Entity List – gives the government the ability to easily reject an importer's information as insufficient and exclude the goods from entry.

Tracing the supply chain and due diligence

Obtaining information on the source of all of the inputs into a final product, sometimes going back several production steps, will be a major challenge in some instances. Even in ordinary cases it is often difficult to obtain information from a supplier regarding its sources of materials, and this is made even more difficult by having to obtain additional information concerning the supplier of raw materials to the vendor of the finished goods. While an importer can read the record-keeping

requirements where CBP has stated what documents importers should obtain, the question for importers becomes, what is practical in the real world? Those answers are being worked out now by most importers.

Plainly, importers should have a compliance program in place for XUAR forced labor issues, both for legal reasons and for business and ethical reasons. Turning a blind eye to the issue, for example, could lead to allegations of collusion against an importer buying final products, or product with inputs, that it knew or should have known were being transshipped from the XUAR. Moreover, such willful ignorance also would be a poor business strategy because it puts at risk products that may be critical to the importer.

While an adequate and thorough compliance program addressing these issues is important, the question becomes, how much is enough? Importers can obtain a binding ruling from CBP on a particular supply chain. However, unlike the informed compliance approach taken on normal customs issues involving valuation or tariff classification, for example, the UFLPA currently provides no mitigation if there is a violation discovered by CBP, despite a robust compliance program. Thus, the law fails to provide the certain incentives to importers promoting customs compliance in other areas. Given the almost impossibly high standard of proof to overturn an in-scope detention under the UFLPA, it is possible that having a robust compliance program could still result in an importer's goods being banned. It may be over time that rulings by CBP will result in goods being admitted entry where such robust compliance programs are in place, but currently there is no reason to conclude that such programs will result in overturning many UFLPA enforcement actions if the importer can obtain only partial information.

Legal challenges

Challenges to the government's authority to legally impose UFLPA standards are possible, but because of the complexity and time-consuming nature of such challenges, they are expected only to be used in unusual circumstances involving critical goods where major amounts of money are at stake and CBP has rejected the information provided by the importer.

If a company is faced with UFLPA enforcement action it is advisable to cooperate to the maximum extent possible, working administratively with attorneys or consultants to supply information to CBP. A robust compliance program and cooperation from your suppliers will put an importer in a much better position to show that the product being imported contains no inputs from Xinjiang Province or connection to an entity on the UFLPA Entity List. However, if CBP issues an UFLPA related detention or exclusion notice, it nevertheless is likely to be an uphill battle to convince CBP to reverse its initial decision.

Because of possible issues with confidentiality and the ability to address the allegations regarding a WRO, it would be advisable to hire an attorney with experience in administrative law issues as well as CBP issues. If the goods that have been stopped by a WRO are of substantial importance for the importer or buyer, consider litigation. There likely will be many legal issues decided over the next few years regarding the standard and burden of proof and its application by CBP, the procedures that must be followed by CBP in its decision-making, as well as other issues that arise with any new law. In Husch Blackwell's experience with WROs for forced labor concerns issued before the implementation of the UFLPA, some were justified. But other WROs were based on faulty sources of information, so a thorough examination of the situation by a company facing an UFLPA forced labor enforcement actions will be necessary to determine the chances of success. The impact of such choices may be significant not just to the law in this area, but to the economy.

What this means to you

Grasping an understanding of the UFLPA has just begun and the importing community should continue to closely monitor how compliance and enforcement is handled by CBP in the weeks and months ahead.

CBP has issued several releases addressing implementation of the UFLPA, including the Operational Guidance document and a 60-page report to Congress on June 17, 2022. While those releases are helpful to importers, by themselves they do not necessarily address certain practical steps importers should be taking to trace their supply chain or avoid entities on the UFLPA Entity List.

Under the UFLPA, supply chain tracing will be extremely important. However, the answer to how much supply chain tracing and documentation is enough to satisfy these new standards is likely to be a balancing of costs, ability to obtain information going deeply into the supply chain, the importance of the imported goods to the importer and the actual implementation and enforcement practices of CBP. It is likely that only over the next months, or even years, will the severity of CBP's application of these standards become apparent. With no explicit mitigation factors regarding the severity of penalties contained in the statute, importers are left to make these decisions with less than an ideal amount of information.

This article is not intended to provide guidance for the situation faced by any one importer, which likely will need to be addressed by each company in consultation with their counsel. Rather, it is intended as a framework to begin to think about the real-world, practical implementation of the UFLPA for the U.S. importing community.

Upcoming webinar

Register to join us on Wednesday, July 13, 2022 from noon to 1:00 p.m. CDT for a webinar covering the impact of the UFLPA statute and Customs requirements on goods imported from China's Xinjiang Uyghur Autonomous Region. Learn about the practical implications of the act from Husch Blackwell attorneys and guest panelist customs broker William Jansen, LCB, CCS.

Contact us

For more information or if you have questions about the UFLPA, please contact Jeffrey S. Neeley, Robert D. Stang, Jasmine Martel or your Husch Blackwell attorney.