

大成 DENTONS

What Companies Need to Know About the Uyghur Forced Labor Prevention Act (UFLPA)

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Course Overview

- *UFLPA* overview
- Proactive steps that companies can take now
- What to do in case of detention
- Interview with Eric Choy (Executive Director, Trade Remedy Law Enforcement, Office of Trade, U.S. Customs and Border Protection)
- Q&A

Introductions



Eric Choy

Executive Director, Trade Remedy Law Enforcement,
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Introductions



Raj Bhala



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UFLPA **Overview**



Three-part Thesis

- 1. Revolution:** *UFLPA* is the most significant, indeed revolutionary, change in U.S. import law since at least the paradigm-shifting 1993 *North American Free Trade Implementation Act* and 1994 *Uruguay Round Agreements Act*. Every producer-exporter, and every importer, of merchandise, anywhere in the world, seeking market access to the U.S. must pay attention to, and comply with, *UFLPA* demands.
- 2. Synchronization:** *UFLPA* represents a somewhat unusual, but clear, synchronization of U.S. trade and human rights policy, as it takes aim at ridding global supply chains of forced labor.
- 3. Weapon:** *UFLPA* is a weapon, albeit not a central one like the Four Waves of Section 301 tariffs or May 2022 *Indo-Pacific Economic Framework*, in America's arsenal in the Sino-American Trade War launched in March 2018.

Legislative History (cont.)

- In December 2021, by a 428-1 margin, the House passed the *Act*, albeit with some changes:
- “The bill would require the U.S Department of Homeland Security to create a list of entities that collaborate with the Chinese government in the repression of the Uyghurs, a predominately Muslim ethnic minority, in Xinjiang, as well as other groups, and ban those goods from entering the U.S. The bill contains a “rebuttable presumption” clause that assumes all goods coming from Xinjiang are made with forced labor – and thus banned – unless the Commissioner of U.S. Customs and Border Protection gives an exception.”



[Daniel Flatley, U.S. House Passes Bill to Punish China Over Oppression of Uyghurs, BLOOMBERG, 8 December 2021](#)

Legislative History

- In July 2021, the U.S. Senate passed by unanimous consent the *Uyghur Forced Labor Prevention Act*.
- The key provisions of the Senate legislation “would ban all goods from or made in China’s Xinjiang region unless importers can prove they weren’t made with forced labor, a move that could potentially have widespread implications for the solar industry.” It also would affect supply chains for cotton, electronic components, gloves, noodles, polysilicon, printed material, shoes, T&A, tomatoes, and toys, because the XUAR was a major production center for these goods.



The screenshot shows the Bloomberg News website interface. At the top, the Bloomberg logo and 'US Edition' are visible. A navigation bar includes links for 'Live Now', 'Markets', 'Technology', 'Politics' (which is underlined), 'Wealth', 'Pursuits', 'Opinion', 'Businessweek', 'Equality', 'Green', and 'City'. The main content area features the article title 'Senate Backs Bill to Ban Xinjiang Goods Unless Waiver Given' in large, bold black text. Below the title, two bullet points are listed: 'Importers would need to prove goods not made with forced labor' and 'Beijing denies any forced labor, has threatened retaliation'. The article is attributed to 'Bloomberg News' and dated 'July 14, 2021 at 11:11 PM EDT', with an update timestamp of 'Updated on July 15, 2021 at 5:07 AM EDT'. A 'Listen to this article' button is located at the bottom left of the article preview. On the right side, there are buttons for 'Watch Live TV' and 'Listen to Live Rac'. The text 'The U.S. Senate passed a bill Wednesday that would ban all goods' is partially visible at the bottom of the article preview.

[Senate Backs Bill to Ban Xinjiang Goods Unless Waiver Given, BLOOMBERG, 14 July 2021.](#) [Hereinafter, Senate Backs Bill to Ban.]

Legislative History (cont.)

- In short order, with minimal political tussling, the “would” became “shall,” as the bill became law. That was because the lop-sided passage by both chambers reflected bipartisan Congressional sentiment to take a tougher line in China amidst the Sino-American Trade War.
- The new law evinced a dramatic change in America’s rules to block imports of goods made by victims of human trafficking.
- Notably, the bill had been criticized by businesses operating in XUAR, including Coca-Cola, Nike and Apple.
- Nevertheless, the House reached compromise language with the Senate (eliminating differences in their respective versions of the bill) and passed the legislation by unanimous voice vote, which the Senate approved, and the President signed on 23 December.

Key *UFLPA* Provisions

The final, enacted version of the *Act*, formally called the *Uyghur Forced Labor Prevention Act* (UFLPA), which amends the *Tariff Act of 1930*, retains in Section 3(a) the **rebuttable presumption** that all articles, goods, merchandise, and wares from Xinjiang **are** made with forced labor – unless an importer proves otherwise and CBP grants an “Exception” – and thus are barred from entry into the U.S.

Under Section 3(b), an importer must adduce “**clear and convincing evidence**” that goods are not made with forced labor to overcome this presumption and obtain the “Exception.”

Key *UFLPA* Provisions (cont.)

Under UFLPA, CBP must apply the rebuttable presumption that any article, good, merchandise, or ware manufactured, mined, or produced wholly or in part in XUAR, or by a listed entity (discussed below), is forbidden from entry into the U.S. by the forced labor statute, Section 307 of the Tariff Act of 1930, 19 U.S.C. Section 1307, unless the importer of record has (within 30 days of the detention by CBP of the item in question):

(1) “fully complied” with CBP guidance and regulations, including proper due diligence, effective supply chain tracing, and supply chain management to ensure no imports were made with forced labor in the PRC;

(2) “completely and substantively responded to all inquiries” from CBP;
and

(3) demonstrated by “clear and convincing evidence” that the import was not made in whole or part by forced labor.

So, as CBP officials warned ...

- “the bar for clearing imports will be ‘very high.’
- ‘If there’s a part or a piece of an input that is coming from the Xinjiang region, then that shipment will be considering containing forced labor and it will not be allowed into the country,’ said Elva Muneton, Acting Executive Director of the Task Force implementing the new law.
- Under the *Act*, the U.S. assume[d] that anything made even partially in the western region of Xinjiang is produced with forced labor and can’t be imported unless companies can provide ‘clear and compelling evidence’ otherwise.”



Quoted in *China Warns U.S. Ban on Xinjiang Goods to "Severely Disrupt" Ties*, BLOOMBERG, 2 June 2022.

Key *UFLPA* Provisions (cont.)

Also, the Act obliges DHS “to create a **list of entities** that collaborate with the Chinese government in the repression of the Uyghurs.” Merchandise from such entities, even if not made in XUAR, is subject to the Section 3 rebuttable presumption.

That is, Section 3(a) mandates CBP apply a rebuttable presumption that the import prohibition applies not only to goods mined, produced, or manufactured in the XUAR, **but also by certain entities regardless of origin.** (To be sure, the UFLPA does not spell this point out explicitly, but it seems to allow for such exclusions by implication from Sections 2 and 3, based on any linkage to XUAR.)

The theory is to disincentivize listed entities from continuing their collaboration by denying their merchandise entry to the U.S. So, the scope of Section 3(a) covers any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the XUAR, **or** by any listed entity.

Key *UFLPA* Provisions (cont.)

Hence, there are four categories of such entities (which Section 2(d)(2)(B)(i), (ii), (iv), and (v) sets out):

(1) Entities in the XUAR that use forced labor.

(2) Entities working with the government of the XUAR to relocate Uyghurs, Kazakhs, Kyrgyz, and other persecuted groups in China out of the XUAR.

(3) Entities that export products that used forced labor from China to America.

(4) Entities that source from the XUAR or from the Xinjiang Production and Construction Corps (XPCC), or from persons working with the government of the XUAR, for the purposes of (a) “poverty alleviation,” (2) “pairing-assistance” programs, or (3) similar government labor schemes that use forced labor.

Key UFLPA Provisions (cont.)

- These categories constitute the UFLPA Entities Lists (not to be confused with DOC's export-control related Entity List).
- Any items, wherever produced by a firm on the UFLPA Entities Lists are not entitled to entry into America.
- So, importers must practice due diligence and supply chain tracing, and (if they sought an "Exception," discussed below) be prepared to adduce evidence to prove goods were not produced with forced labor.

**Proactive
steps that
companies
can take now**



Broadly Applicable Proactive Steps

Building systems to limit risk and maximize business operations

- Internal policy and governance review
- Human trafficking oriented due diligence process
- Mapping the supply chain
- Prioritized and weighted risk assessment that is protected by attorney client privilege
- Development of a grievance procedure
- Remediation and mitigation
- Accurate and consistent public disclosures
- Training

UYGHUR FORCED LABOR PREVENTION ACT



U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS

June 13, 2022

CBP Publication No. 1793-0522



Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China

Report to Congress
June 17, 2022



Homeland
Security

Office of Strategy, Policy, and Plans

The Strategy's Eight Minimum Elements of a Due Diligence System

1. Engage stakeholders and partners
2. Assess risks and impacts
3. Develop a code of conduct
4. Communicate and train across supply chain
5. Monitor compliance
6. Remediate violations
7. Independent review
8. Report performance and engagement

12 Targeted Product Categories

(based on initial entity list)

Apparel

Clothing

Computer
parts

Cotton

Electronics

Garments

Hair
Products

Polysilicon
including
Solar
grade

Silica
Based
Products

Rail
Transportation
Equipment

Textiles

Touch
screens for
handheld
devices
and cars

“We did our best! There is nothing more we could do.”

“Barriers to performing due diligence, to supply-chain tracing, and supply-chain management, and to obtaining evidence to demonstrate that goods were not made wholly or in part in Xinjiang or by an entity on the UFLPA Entity List, may make it difficult for importers to fully comply with this guidance. Such barriers may prevent an importer from qualifying for an exception to the rebuttable presumption.” (Strategy, page 41)

Strategy & Guidance

- For UFLPA, CBP will use 19 USC 1499 for detention instead of 19 USC 1307 -- importer only has **30 days** to petition for release, not 90 days.
- 65 new staff in FY22 budget for the Office of Trade (more than doubles the team).
- FY23 request includes \$70 million to add 300 new staff.

Specific UFLPA Proactive Steps

Sort Suppliers

In XUAR

**Rebuttal presumption
applies.
Seek exception.**

**In China, but not
XUAR**

**Argue “out of scope” of
UFLPA by showing no
XUAR nexus or consider
exception.**

**Not in China, no
XUAR nexus**

**UFLPA does not apply.
WROs might impact.**

**Suppliers have no
nexus to XUAR /
Uyghurs**

**Suppliers
are in
XUAR or
nexus to
XUAR /
Uyghurs**

Strategy & Guidance (cont.)

- Documentation (a Herculean task)
- Codes of Conduct (limited value)
- Supplier Certifications (insufficient)
- “Credible Audits” (questionable)

What to do in case of detention



***UFLPA* Enforcement Timeline under 19 CFR§151.16**

- CBP has 5 business days to make its decision.
- If CBP decides a shipment bears no connection to Xinjiang, hence *UFLPA* is inapplicable, then it releases the goods, and the importation process continues.
- But, if CBP finds a connection to Xinjiang (or if the 5-day period expires without a CBP determination), then it detains and blocks the goods from entry.

***UFLPA* Enforcement Timeline (cont.)**

- *UFLPA* gives an affected importer 30 days to challenge a CBP detention or seek to export the detained goods.
- In contrast, under CBP Withhold Release Order (WRO) actions, companies had 90 days to make their case to CBP.
- If CBP decides to exclude goods, seizure and forfeiture proceedings may be initiated.
- So, importers must act quickly to assemble documents in support of a challenge to the applicability of *UFLPA* or seek what CBP calls an “exception” under this Act.

UFLPA Practical Operation

- Two challenges are available under the Act to importers the goods of which were detained, seized or excluded by CBP from the U.S. market alleging a violation of the Act:
 1. an “**Outside the Scope**” challenge, i.e., the Act is inapplicable; or
 2. an “**Exception,**” i.e., a rebuttal of the presumption of forced labor usage; or
 3. Other Options will vary depending upon CBP procedural stage: export goods, abandon goods

UFLPA Practical Operation (cont.)

- An “**Outside the Scope**” challenge is appropriate when an importer argues that the goods at issue are not subject to *UFLPA* – the *Act* is inapplicable to those goods: no connection to Xinjian and no entities on the UFLPA Entity List.
- An importer proves by documentary evidence that the articles, and all the inputs therein, have no connection to Xinjiang or an entity on the UFLPA Entity List by showing where they actually originated.
- The 17-page Operational Guidance for Importers, which CBP issued on 13 June 2022, provides a non-exhaustive list of documents to support an “**Outside the Scope**” contention.

UFLPA Practical Operation (cont.)

- What is the evidentiary standard in an “**Outside the Scope**” challenge?
 - CBP’s *Guidance* says that standard is not “clear and convincing,” i.e., it is not the standard CBP applies to the rebuttable presumption that forced labor is involved in any items from Xinjiang.
 - For an “**Outside the Scope**” challenge: documentation that “demonstrates” and “substantiate” that its import has no connection to Xinjiang or to an entity on the UFLPA Entity List.

UFLPA Practical Operation (cont.)

- Suppose CBP determines the merchandise at issue is within the scope of *UFLPA*.
- Then, an importer can turn to seek an “**exception**” to *UFLPA*: to overcome the “**rebuttable presumption**” the petitioner must prove its case by “**clear and convincing evidence**”.

UFLPA Practical Operation (cont.)

- The Act and CBP Guidance outline the three-part process for exemption, which requires:

1

Full compliance with the *UFLPA* Strategy, i.e., Detailed Written Description of Compliance with the “*Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s Republic of China – Report to Congress,*” (issued on 17 June 2022): Advance preparation is critical!

2

Responsiveness to all CBP inquiries: Advance preparation is critical.

3

“Clear and convincing evidence” the goods were not made in whole or part by forced labor victims.

UFLPA Practical Operation (cont.)

- Pursuant to Section 2(d)(2)(B) of the *Act*, the Strategy (at pages 22-25) identified 52 entities (including with aliases) on the Entities Lists as directly related to prohibited imported materials.
- All the evidence an importer would want to present in an “**Outside the Scope**” argument can be used for an “**Exception.**” In addition, Detailed Written Description of Compliance with the Strategy and other.
- Examples of elements of “clear and convincing evidence” documentary requirements: internal coherence of documents (clearly relate to the particular goods); documents cover all supply chain steps (HR, manufacturing, domestic and international transportation); origin of mining, production and manufacture.

Interview with Eric Choy

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