

## International Trade and Customs Alert: New UFLPA Compliance Guidance: An Overview for US Importers and Supply Chain Partners

June 27, 2022

### Key Points

- On June 21, 2022, CBP began enforcing the UFLPA's revisions to section 307 of the Tariff Act of 1930—19 U.S.C. § 1307—by applying a rebuttable presumption that the following goods are prohibited from importation and not entitled to entry into the United States: “[a]ny goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part” in (1) China’s XUAR province or (2) by any entity identified in the enforcement strategy developed by the FLETF, namely in the UFLPA Entity List.
- Sectors that are a high priority for UFLPA enforcement include apparel, cotton and cotton products, silica-based products (including polysilicon), and tomatoes and downstream products. CBP has also indicated that it will employ a “risk-based approach” that focuses on high-risk goods, including “those imported directly from Xinjiang into the United States and from entities on the UFLPA Entity List.” CBP will also prioritize “illegally transshipped goods with inputs from Xinjiang, as well as goods imported into the United States by entities that, although not located in Xinjiang, are related to an entity in Xinjiang (whether as a parent, subsidiary, or affiliate) and likely to contain inputs from that region.”
- The FLETF and CBP have issued a strategy report and compliance guidance, which together provide key UFLPA information to importers and their supply chain partners with respect to the strategy, government expectations and the application of the rebuttable presumption. On June 17, 2022, the FLETF issued its UFLPA Enforcement Strategy, which includes guidance to importers on the rebuttable presumption, the initial UFLPA Entity List and the enforcement plan, among other statutorily required information. Prior to this, on June 13, 2022, CBP issued UFLPA Operational Guidance for importers and their supply chain partners, which includes information about CBP’s intended enforcement policy. The Operational Guidance is intended to supplement the guidance to importers contained in the FLETF Enforcement Strategy.

### Contact Information

**Akin Gump has a robust customs team and extensive experience in advising on compliance, enforcement and remediation activities related to forced labor and related supply chain concerns. If you have questions about this alert and the UFLPA, would like assistance in responding to CBP inquiries (e.g., a detention notice), or would like to discuss potential legal remedies related to the UFLPA and its enforcement, please contact:**

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## Background

The Uyghur Forced Labor Prevention Act (UFLPA) was passed nearly unanimously by Congress and signed into law by President Biden on December 23, 2021. Among its key provisions is a requirement that U.S. Customs and Border Protection (CBP) apply a “rebuttable presumption” that all goods, wares, articles and merchandise mined, produced or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region (XUAR or Xinjiang) in the People’s Republic of China (PRC), or by entities identified on the UFLPA Entity List, are presumed to be made with forced labor and are prohibited from entry into the United States, effective June 21, 2022.

Under the UFLPA, an importer can obtain an exception from this rebuttable presumption if it demonstrates that it: (1) has fully complied with guidance issued by the interagency Forced Labor Enforcement Task Force (FLETF) and any regulations implementing the guidance; (2) has completely and substantively responded to inquiries for further information from CBP; and (3) has provided “clear and convincing evidence” that the goods were not mined, produced or manufactured wholly or in part using forced labor.

The UFLPA builds on the foundational authority for regulating imports of goods produced from forced labor found in Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307). Section 307 prohibits the importation of “[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor[,] forced labor[, or] indentured labor,” which includes forced or indentured child labor. Further background on the UFLPA and its requirements can be found in a previous Akin Gump [client alert](#).

As of June 21, 2022, and without any exception for goods on the water, any importation into the United States is subject to potential UFLPA enforcement. In the event that CBP issues a UFLPA detention notice, an importer should be prepared to either: (1) rebut the presumption; or (2) re-export the goods prior to exclusion under 19 U.S.C. § 1499. Should CBP exclude the goods, the importer has a protest right against the exclusion, which may provide an expedited path to judicial review in the U.S. Court of International Trade for any available legal challenges. On the other hand, if CBP engages in a more enforcement-oriented approach such as a seizure and forfeiture process, other legal remedies may be available after an attempt to rebut the presumption.

In preparation for entry into force, on June 17, 2022, the FLETF issued its [Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s Republic of China](#) (“FLETF Enforcement Strategy”). Earlier in the week, on June 13, 2022, CBP released [Operational Guidance](#) intended to supplement the guidance to importers contained in the FLETF Enforcement Strategy. This alert summarizes the two guidance documents and identifies key compliance considerations for U.S. importers and their supply chain partners.

### [FLETF Enforcement Strategy: Considerations for Importers](#)

On June 17, 2022, the Department of Homeland Security, in its role as the FLETF chair, published the FLETF Enforcement Strategy. The FLETF Enforcement Strategy is required by Section 2 of the UFLPA and will be updated annually. It incorporated

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input from various public- and private-sector stakeholders submitted during a public consultation period in March 2022.

The FLETF Enforcement Strategy contains the following:

1. An assessment of the risk of importing goods mined, produced or manufactured wholly or in part with forced labor in the PRC (Section I, pages 10-17)
2. An evaluation and description of forced labor schemes, the four-part UFLPA Entity List, UFLPA-required plans and high-priority sectors for enforcement (Section II, pages 18-30)
3. Recommendation for efforts, initiatives, tools and technologies that will allow CBP to accurately identify and trace affected goods (Section III, pages 31-33)
4. A description of how CBP plans to enhance its use of legal authorities and tools to prevent entry of goods that are made using forced labor (Section IV, page 34)
5. A description of additional resources necessary to ensure no goods made with forced labor enter the United States (Section V, pages 35-39)
6. Guidance to importers (Section VI, pages 40-51)
7. The FLETF's plan to coordinate with appropriate nongovernmental organizations (NGOs) and private-sector entities to implement and update the FLETF Strategy (Section VII, pages 52-57).

### **Risk Assessment and Summary of PRC Forced Labor Schemes**

Citing comments from industry stakeholders, the FLETF Enforcement Strategy acknowledges that the presence of certain factors may lead to the importation of goods made with forced labor from the PRC. Specifically, the FLETF Enforcement Strategy notes that factors such as lack of supply chain visibility, third-country or province manufacturing processes, international transshipment and evasion, and certain PRC policies and practices prevent the effective implementation of U.S. import laws and regulations pertaining to forced labor.

The FLETF Enforcement Strategy then provides a high-level overview of PRC government labor schemes that allegedly facilitate genocide and crimes against humanity against Uyghurs and other ethnic and religious minority groups in XUAR. It explains the indicators of forced labor (in reference to the International Labour Organization's Forced Labour Convention) that the U.S. government has identified in those labor programs, including: intimidation and threats, abuse of vulnerability, restriction of movement, isolation, abusive working conditions and excessive overtime.

### **UFLPA Entity List**

The FLETF Strategy includes the UFLPA Entity List, as required under Section 2(d)(2)(B) of the UFLPA. The listed entities are subject to the UFLPA presumption that their products are prohibited from entry into the United States under 19 U.S.C. § 1307. The FLETF divided the UFLPA Entity List into four subparts, including the following:

- Entities in Xinjiang that mine, produce or manufacture wholly or in part any goods, wares, articles and merchandise with forced labor, pursuant to UFLPA Section 2(d)(2)(B)(i)

- Entities working with the government of Xinjiang to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz or members of other persecuted groups out of Xinjiang, pursuant to UFLPA Section 2(d)(2)(B)(ii)
- Entities that exported products made by entities listed under UFLPA Sections 2(d)(2)(B)(i) and (ii) from the PRC into the United States
- 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 PRC labor programs.

The FLETF Enforcement Strategy also listed products mined, produced or manufactured by entities on the list, pursuant to UFLPA Section 2(d)(2)(B)(iii), which include apparel and other textiles, cotton and cotton products, computer parts and other electronics components, hair products, polysilicon and other silica-based products, and rail transportation equipment (among others).

At this time, the UFLPA Entity List was sourced solely from existing CBP Withhold Release Orders (WRO) and the Bureau of Industry and Security (BIS) Entity List. However, the FLETF stated that it will continue to update the UFLPA Entity List and that it may add or remove entities. The FLETF Strategy contains numerous references to recent academic and NGO reports that have made allegations with respect to companies engaging in forced labor, indicating that such reports could be a basis for future additions or modifications to the UFLPA Entity List.

### **High-Priority Sectors for Enforcement**

The FLETF Enforcement Strategy also identified the following industries as “high-priority” sectors for enforcement: (a) apparel; (b) cotton and cotton products; (c) silica-based products (including polysilicon); and (d) tomatoes and downstream products. For these high-priority sectors, CBP will employ a risk-based approach. The FLETF indicated that currently, the highest-risk goods are those imported directly from Xinjiang and from entities on the UFLPA Entity List. CBP also intends to prioritize illegally transshipped goods with inputs from Xinjiang as well as goods imported into the United States by entities that, although are not located in Xinjiang, are related to an entity in Xinjiang and therefore likely to contain inputs from Xinjiang.

### **Guidance to Importers**

Section VI of the FLETF Strategy contains long-awaited guidance to importers on several aspects of the UFLPA, including the below points and takeaways (among others).

First, consistent with Section 3(c) of the UFLPA, the FLETF Strategy provides guidance on how an importer seeking to rebut the presumption can demonstrate that it: (1) has fully complied with the requirements set forth in the FLETF Enforcement Strategy; (2) has completely and substantively responded to inquiries for further information from CBP; and (3) has provided “clear and convincing evidence” that the goods were not mined, produced or manufactured wholly or in part using forced labor.

The “clear and convincing” evidence standard is not entirely new in the context of forced labor enforcement,<sup>1</sup> but it does impose an onerous burden on importers to prove the **absence** of forced labor. Despite requests from the trade community,

neither the FLETF nor CBP has described with particularity what “clear and convincing” evidence means in the context of the UFLPA. Instead, the FLETF noted that “the type, nature, and extent of evidence required from the importer . . . will vary on the facts and circumstances of the import in question.” It also identified non-exhaustive examples of documentation that importers “should” include in response to CBP requests, such as:

- Evidence that maps the entire supply chain—including transport—and the entities involved at each stage
- Evidence of worker identities, payments, residency statuses, hours worked and production outputs at entities that appear on the UFLPA Entity List
- Evidence of controls to ensure such workers were not recruited, transported, transferred, harbored or received with the involvement of the government of the PRC, the XPCC or entities on the UFLPA Entity List
- Evidence that “reliably demonstrates” each worker from Xinjiang is working voluntarily—including evidence that workers’ recruitment to a job, transport from Xinjiang, continuation at the job, and living and working conditions at the job site are voluntary and free of forced labor indicators.

Second, the FLETF Strategy also recognizes that goods that are not connected with the XUAR and have no connection to the UFLPA Entity List are outside the scope of the UFLPA. Importers wishing to demonstrate that their goods are outside the scope of the UFLPA must also provide substantial documentary evidence, according to the FLETF Strategy, including detailed supply chain maps or descriptions documenting the identity and roles of each entity in the supply chain for the particular good, among other kinds of evidence.

Third, Section VI of the FLETF Strategy provides general guidance on how importers can establish due diligence and effective supply chain tracing and management to ensure that importers do not import any goods mined, produced or manufactured wholly or in part with forced labor from China, especially from the XUAR. Specifically, the FLETF Strategy contains the following eight recommendations for conducting effective due diligence in relation to the XUAR, based on the Department of Labor’s [Comply Chain tool](#):

1. Engaging stakeholders and partners.
2. Assessing risks and impacts.
3. Developing a code of conduct for suppliers.
4. Communicating and training across supply chains.
5. Monitoring compliance.
6. Remediating violations.
7. Undertaking independent review (third-party verification).
8. Reporting performance and engagement.

In explaining the above eight recommendations, the FLETF Strategy emphasizes the importance of importers’ ability to fully map and trace their supply chains from the raw materials through to the finished product. The language of the guidance is framed in

mandatory terms in many instances and emphasizes the high expectations of the FLETF and CBP with respect to the breadth and depth of the kinds of documentation importers should maintain to ensure that forced labor does not exist in their supply chains. Additionally, the FLETF Strategy notes that effective supply chain management measures include: vetting suppliers prior to entering into a contract with them; requiring corrective actions by the supplier if forced labor is identified in the supply chain; and outlining the consequences if corrective action is not taken (e.g., termination of the contractual relationship).

The FLETF Strategy acknowledges that it may be difficult for an importer to fully comply with due diligence and effective supply chain tracing and management requirements and to obtain evidence that demonstrates that goods were not made wholly or in part in XUAR or by an entity on the UFLPA Entity List. For example, it is challenging for an importer to execute unannounced audits and interview employees located at a supplier's facility. However, the FLETF Strategy notes that such challenges do not remove the importer's responsibility to follow the FLETF Strategy's requirements and failure to comply with the requirements may prevent an importer from qualifying for an exception to the rebuttable presumption. The FLETF Strategy further warns importers that if their importations involve inputs from factories that source materials both from within Xinjiang and outside of Xinjiang, the importations may be subject to detention since it would be difficult to verify that the supply chain for imports to the United States only contains non-Xinjiang materials and have not been replaced by or commingled with Xinjiang materials at any point during the manufacturing process.

### CBP Operational Guidance: Considerations for Importers

On June 13, 2022, CBP released [Operational Guidance](#) to assist importers in preparing for the implementation of the UFLPA's rebuttable presumption. According to CBP, the Operational Guidance is intended to complement the FLETF Strategy by providing importers with information about the documentation to present to CBP to rebut the presumption contained in the UFLPA. CBP is careful to emphasize throughout the Operational Guidance that importers are responsible for complying with the FLETF Strategy and that the Operational Guidance is only supplementary. That said, importers should carefully review the Operational Guidance because one of the elements that importers must establish to rebut the UFLPA presumption is that they have completely and substantively responded to CBP inquiries. The Operational Guidance is directly relevant to that element in that it communicates CBP's expectations for such responses by importers with respect to detained shipments.

In Section I of the Operational Guidance, CBP explains that it will enforce the UFLPA by identifying, detaining, excluding or seizing imported goods that are subject to the UFLPA's rebuttable presumption. Using a risk-based approach, CBP will review shipments on a case-by-case basis for UFLPA applicability. CBP will identify shipments through a variety of sources, including from the UFLPA Entity List. The Operational Guidance notes that shipments imported on or after June 21, 2022 that are subject to the UFLPA, which previously would have been subject to a XUAR WRO, will be processed under UFLPA procedures, and detained, excluded or seized.

Section II of the Operational Guidance provides an overview to importers on requesting an "exception" to the rebuttable presumption, i.e., rebutting the

presumption. Importers may request an exception to the rebuttable presumption from CBP during a detention, after an exclusion or during the seizure process.

Section III of the Operational Guidance includes a list of existing U.S. government and international resources that can be used as a reference to support an importer's supply chain due diligence, tracing and management efforts. To the extent they have not already done so, importers should familiarize themselves with the resources listed in this section, as CBP is likely to expect that importers are aware of and implementing best practices consistent with those resources throughout their supply chains to the extent applicable.

Section IV of the Operational Guidance provides an overview on the types of information that CBP will require if the importer requests an exception to the UFLPA's rebuttable presumption. This list is generally more detailed than the broad categories stated in the FLETF Enforcement Strategy. For example, CBP requires the following categories of information and gives particularized examples of each category in the Operational Guidance:

- Documentation that demonstrates a due diligence system or process
- Documentation that traces the supply chain from raw materials to the imported good (including evidence pertaining to the overall supply chain, evidence pertaining to merchandise or any component thereof or evidence pertaining to miner, producer or manufacturer)
- Documentation on supply chain management measures including internal controls to prevent or mitigate forced labor risks
- Evidence that goods were not mined, produced or manufactured wholly or in part in XUAR, including documentation that traces the supply chain for the imported goods
- Evidence that goods originating in China were not mined, produced or manufactured wholly or in part by forced labor.

Lastly, the Operational Guidance clarifies that importers may identify additional shipments that have identical supply chains to those that CBP has previously reviewed and determined to be admissible by CBP, to facilitate the faster release of future, identical shipments.

Section V of the Operational Guidance provides specific guidance for supply chain documentation that importers may consider submitting for commodities that are deemed a high risk for forced labor—namely cotton, polysilicon and tomatoes.

<sup>1</sup> For example, the Countering America's Adversaries Through Sanctions Act (CAATSA) imposes the same evidentiary burden with respect to the absence of North Korean labor in importers' supply chains.