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### UFLPA: Overview of compliance challenges, best practices

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by Evelyn Suarez and Thad McBride

Passing Congress with broad bipartisan support and signed into law on December 23, 2021, the Uyghur Forced Labor Prevention Act (UFLPA) continues a trend by Congress to strengthen US laws to fight against forced labor.<sup>[1]</sup> Specifically, the UFLPA targets goods coming from China’s Xinjiang Uyghur Autonomous Region (XUAR), imposing a “rebuttable presumption” that goods having a nexus to XUAR are made with forced labor.

The UFLPA itself identifies three products—cotton, tomatoes, and polysilicon—for extra scrutiny. U.S. Customs and Border Protection (CBP) subsequently targeted apparel and silica-based products, such as the raw materials used to make aluminum alloys, silicones, and polysilicon. More recently, the automotive industry has been under the microscope, and CBP is under pressure to scrutinize imports of automotive parts, steel, and aluminum.<sup>[2]</sup>

CBP has made clear that forced labor is a “top tier” enforcement priority. Since enactment of the UFLPA, CBP has detained over \$1.4 billion in goods.<sup>[3]</sup> Initially, solar panel products were hit hard, and apparel, footwear, textiles, and manufacturing materials have also been detained. Additionally, CBP’s Dashboard shows goods being stopped from other countries, such as Malaysia and Vietnam.

In the context of increasingly complex supply chains, UFLPA enforcement has created a variety of compliance challenges for companies. This article discusses the UFLPA and provides thoughts on how companies should address the challenges posed by the law.

#### Background

The most unique aspect of the UFLPA is that it establishes a “rebuttable presumption” that “all goods, wares, articles, or merchandise mined, produced, or manufactured, wholly or in part,” in XUAR, or connection with an entity on the UFLPA Entity List, are made with forced labor and thereby prohibited from entering the United States unless proved otherwise.<sup>[4]</sup> Goods are not subject to the rebuttable presumption if there is no nexus to XUAR; however, they still cannot be made with forced labor. Other goods suspected of being made with forced labor are subject to another process called a Withhold Release Order (WRO).<sup>[5]</sup>

Even if there is a nexus to XUAR, the goods may be admitted if the importer can show they were not made with forced labor. However, this is no easy task as information demanded by the US government on the labor practices of Chinese companies may be difficult to obtain.<sup>[6]</sup>

Ultimately, if CBP suspects that goods have a nexus to XUAR, it must stop or “detain” the goods.<sup>[7]</sup> The importer

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has certain options available based on processes that CBP might employ, including detention, exclusion, and seizure and forfeiture.<sup>[8]</sup>

For example, the importer might seek, by making an Applicability Review Request to CBP, to prove that the shipment is outside the scope of the UFLPA.<sup>[9]</sup> A product would be outside of range if it has no nexus to XUAR (i.e., nothing was sourced from and there is no connection to an entity in the region). To make this argument, the importer would need to map its entire supply chain.<sup>[10]</sup> The importer would also need to show that the goods are free from forced labor and cooperate fully and substantively with all CBP requests for information.<sup>[11]</sup> The specific type of information needed will vary depending on the facts and circumstances of the shipment in question. CBP deals with these matters on a case-by-case basis.<sup>[12]</sup> Thus, to obtain release of detained cargo, information provided to CBP must be directly related to the supply chain for the specific shipment and cannot be generic.

Where goods do have a nexus to XUAR but the importer can show that they are not made with forced labor, the importer could request an “Exception” to the UFLPA rebuttable presumption.<sup>[13]</sup> This requires the importer to “demonstrate that it has complied with the guidance . . . responded completely and substantively to all CBP requests for information, as well as demonstrate, by clear and convincing evidence, that its imports were not mined, produced, or manufactured wholly or in part with forced labor.”<sup>[14]</sup>

The “clear and convincing” evidentiary standard is a high bar. The importer would need to provide CBP with “[e]vidence mapping the entire supply chain, and transport along the supply chain, including which entities [were] involved at each stage.” The importer would also need to provide a “[c]omplete list of all workers at an entity subject to the rebuttable presumption in the production of the imported goods, including” their wages, residency status, number of workers in each job category, hours worked, and daily production goals.<sup>[15]</sup> And the importer must provide evidence to show the workers are working voluntarily and that none of the workers who were involved in the production of the product were recruited, transported, transferred, or harbored with the help of the Chinese government.<sup>[16]</sup>

The importer has another option if it believes it cannot obtain the evidence necessary for an Applicability Review Request or an Exception. It may export the cargo elsewhere before it receives a Notice of Seizure. Also, if the goods are excluded (i.e., denied entry into the United States), the importer may file an administrative protest with CBP under 19 U.S.C. § 1514.<sup>[17]</sup> A denial of protest is appealable to the U.S. Court of International Trade.

Other countries are enacting similar laws addressing imports made with forced labor. For example, while not as aggressive as the UFLPA, both Canada and Mexico have laws closing their doors to goods made with forced labor. Likewise, the European Union is considering proposals to ban goods made with forced labor. Germany’s Supply Chain Due Diligence Act requires companies with at least 3,000 employees—whether they are headquartered in Germany or have a branch there—to maintain a process for carrying out supply chain human rights due diligence.<sup>[18]</sup> While other countries have not gone as far as the United States in imposing a rebuttable presumption for imports with a nexus to XUAR, companies that serve multiple global markets will likely want to meet the highest burden (i.e., the rebuttable presumption).

Demonstrating that a shipment is outside the scope of the UFLPA necessitates obtaining extensive information that may not be readily available from many businesses. Supply chains are often opaque. According to a 2022 McKinsey & Company study, “forty-five percent of survey respondents say that they either have no visibility into their upstream supply chain or that they can see only as far as their first-tier suppliers.”<sup>[19]</sup>

Recognizing the difficulties inherent with UFLPA, various affected industries, such as solar, apparel, and automotive, are working together to obtain clearer guidance from CBP on what information must be provided to release detained merchandise. Some have asked for better information on those named in the UFLPA Entity List. Others have suggested multistakeholder initiatives develop voluntary standards of practice through an inclusive and engaged approach.<sup>[20]</sup> It is fair to say that the law presents challenges for both importers and CBP; there is no single answer to address the problem.

## **Compliance best practices**

Effective measures to address supply chain risk related to forced labor—and other areas of concern such as conflict minerals and economic sanctions risk—need to be integrated within an overall compliance program designed to prevent and detect violations. Regulators’ focus on supply chain integrity is not going away. For instance, on June 27, 2023, the US government issued an “Africa Gold Advisory” to provide guidance on purchasing gold from illicit actors, including the Wagner Group (the Russian mercenary organization recently involved in a coup attempt on Vladimir Putin).<sup>[21]</sup>

Generally speaking, an effective supply chain compliance and management program should consist of the following.

### **Supply chain mapping**

Mapping is essential to the due diligence process for identifying potential forced labor in a supply chain.<sup>[22]</sup>

To start, companies should send suppliers questionnaires to elicit information about the origin of each imported good and its raw materials or components, business relationships and transactions between entities in the supply chain, and locations and true identities of entities participating in the supply chain. Information on financial transactions and transportation throughout the supply chain is also needed.

New technologies may be effective in identifying the origin of inputs. CBP itself has approved the use of isotopic and other testing for cotton, but it should be remembered that there is no silver bullet here. Other companies are using blockchain technology and even leveraging artificial intelligence to track trade patterns.<sup>[23]</sup> These technologies may be more cost-effective and scalable than traditional methods.

Businesses should also seek to fill gaps through specific fact-finding missions and possibly third-party inspections. Data from third-party providers, such as Sayari, can help.<sup>[24]</sup> If problems are found, the company will want to remediate and/or discontinue doing business with the offending entity. Even if there is remediation, goods made with forced labor will not be allowed entry into the United States.

### **Contract language**

The American Bar Association has developed model contract clauses to protect human rights in international supply chains. In the model clauses, buyers and sellers have contractual obligations requiring cooperation and responsibility for ensuring the contract’s human rights objectives are met.<sup>[25]</sup> These contract clauses can be used to reduce, identify, and—if necessary—reject goods associated with forced labor.

### **Monitoring and remediation**

Companies must actively monitor compliance, including through audits conducted by the company or third parties, managerial vigilance, and even an anonymous whistleblower hotline. Importantly, under the UFLPA,

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once an indication of forced labor in the supply chain is established, all goods made prior to remediation are barred from entering the United States. Therefore, an importer must develop and implement a corrective action plan to remediate the abuse and demonstrate to CBP that the transgression has been corrected before future products are admitted.

## Code of conduct and policies and procedures

Specific processes—such as those identified above—should be underpinned by a robust code of conduct and related policies and procedures. In relation to the UFLPA and other relevant laws related to forced labor, the code should expressly forbid the use of forced labor in the supply chain.<sup>[26]</sup>

The U.S. Department of Homeland Security suggests that an importer “incorporate [their] code of conduct into its supplier contracts, including specification of all activities that a supplier is required to undertake as part of the importer’s due diligence system, such as allowing auditors and verification organizations necessary access to the facilities.”<sup>[27]</sup> Companies can also develop a supplier code of conduct that third-party partners must sign before an engagement begins.

## Going forward

A good understanding of a supply chain can not only root out forced labor and other restricted inputs in a supply chain but also help a company to prove that its products are ethically produced and environmentally sustainable. This is both good legal compliance and business. Companies that ignore the UFLPA can be unpleasantly surprised by detention, which can lead to a seizure and forfeiture. The best policy is to be prepared and proactive in fully understanding and documenting your supply chain.

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## Takeaways

- The Uyghur Forced Labor Prevention Act (UFLPA) creates a rebuttable presumption that imports having a nexus to Xinjiang Uyghur Autonomous Region are made with forced labor; it thus will be detained, excluded, or even seized and forfeited.
- U.S. Customs and Border Protection (CBP) has made clear that forced labor is a top-tier enforcement priority and has already detained more than \$1.4 billion worth of goods. CBP has targeted a diverse range of industries and products and says it will expand enforcement to all imported products.
- Supply chain visibility is a necessary component of good business practices and compliance with laws like the UFLPA. Noncompliance poses serious legal, reputational, and financial risks.
- Mapping is fundamental to supply chain due diligence. Companies should also use contractual provisions as added protection and consider technological tools for due diligence and tracing.
- The UFLPA presents ongoing challenges not only for importing companies but also for CBP enforcement. Industry associations are working with CBP and the U.S. Department of Homeland Security for greater clarity.

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<sup>1</sup> U.S. Customs and Border Protection, “Uyghur Forced Labor Prevention Act,” last modified June 26, 2023, <https://www.cbp.gov/trade/forced-labor/UFLPA>. US import bans of products made with forced labor date back even before the Smoot-Hawley Tariff Act of 1930, which is the basis of modern-day law, 19 U.S.C. § 1307.

**2** Laura Murphy, Kendyl Salcito, Yalkun Uluyol, Mia Rabkin, and an anonymous team of authors, Driving Force: Automotive Supply Chains and Forced Labor in the Uyghur Region, December 2022, Helena Kennedy Centre for International Justice at Sheffield Hallam University, <https://www.shu.ac.uk/helena-kennedy-centre-international-justice/research-and-projects/all-projects/driving-force>; Ana Swanson, “Global Car Supply Chains Entangled with Abuses in Xinjiang, Report Says,” *The New York Times*, December 6, 2022, <https://www.nytimes.com/2022/12/06/business/economy/global-car-supply-chains-xianjiang-forced-labor.html>.

**3** U.S. Customs and Border Protection, “Uyghur Forced Labor Prevention Act Statistics,” accessed June 21, 2023, <https://www.cbp.gov/newsroom/stats/trade/uyghur-forced-labor-prevention-act-statistics>.

**4** U.S. Department of Homeland Security, “UFLPA Entity List,” last updated June 9, 2023, <https://www.dhs.gov/uflpa-entity-list>. Maintained by the U.S. Department of Homeland Security, the UFLPA Entity List is a consolidated register of four lists consisting of (1) entities in Xinjiang that mine, produce, or manufacture wholly or in part any goods, wares, articles and/or merchandise with forced labor; (2) entities working with the government of Xinjiang to recruit, transport, transfer, harbor, or receive forced labor of Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of Xinjiang; (3) entities that exported products made by entities in lists 1 and 2 from the People’s Republic of China into the US; and (4) facilities and entities, including the Xinjiang Production Corps, that source material from Xinjiang or from persons working with the government of Xinjiang or the Xinjiang Production and Construction Corps for the purposes of the “poverty alleviation” program or the “pairing-assistance” program or any other government-labor scheme that uses forced labor. The UFLPA Entity List will be updated periodically.

**5** U.S. Department of Homeland Security, “UFLPA Frequently Asked Questions,” last updated June 9, 2023, <https://www.dhs.gov/uflpa-frequently-asked-questions>.

**6** U.S. Customs and Border Protection, “Uyghur Forced Labor Prevention Act.”

**7** A recent yet unpublished CBP Headquarters ruling (HQ H330077, dated April 26, 2023) sheds some light on what would constitute information that “reasonably but not conclusively indicates” that merchandise (1) falls into the purview of section 1307, and (2) is being, or is likely to be, imported into the U.S. under the applicable regulations, 19 C.F.R. §12.42(e). It stated that “[t]he phrase ‘reasonably but not conclusively’ has generally been interpreted as akin to ‘reasonable suspicion,’ which, in the criminal context, requires ‘a particularized and objective basis’ of criminalized activity.’ See *Ornelas v. United States*, 517, U.S. 690, 696 (1996). While reasonable suspicion requires ‘more than an inchoate and unparticularized suspicion or hunch,’ it is a ‘less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence . . .” *Illinois v. Wardlow*, 528 U.S. 119, 123–124 (2000).

**8** U.S. Customs and Border Protection, Uyghur Forced Labor Prevention Act: U.S. Customs And Border Protection Operational Guidance For Importers, CBP Publication No. 1793–0522, June 13, 2022, [https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP\\_Guidance\\_for\\_Importers\\_for\\_UFLPA\\_13\\_June\\_2022.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf). This document has a description of the importation process and enforcement of UFLPA, and also provides information on the type of evidence CBP looks for to show that the goods were not mined, produced, or manufactured wholly or in part in XUAR and that goods originating in China have no connection to forced labor. U.S. Customs and Border Protection, Office of Trade, Best Practices for Applicability Reviews: Importer Responsibilities, CBP Publication No. 3083 0223, last modified February 23, 2023, <https://www.cbp.gov/document/guidance/best-practices-applicability-reviews-importer-responsibilities>; U.S. Customs and Border Protection, Office of Trade, Guidance on Executive Summaries and Sample Tables of Contents: Preparing a UFLPA Applicability Review Submission, CBP Pub. No. 3082 0223, February 23, 2023, <https://www.cbp.gov/document/guidance/guidance-executive-summaries-and-sample-tables-contents>.

**9** U.S. Customs and Border Protection, “FAQs: Uyghur Forced Labor Prevention Act (UFLPA) Enforcement,” last modified March 24, 2023, <https://www.cbp.gov/trade/programs-administration/forced-labor/faqs-uflpa->

enforcement.

**10** The unpublished CBP Headquarters ruling HQ H330077 (see note 7) held that the detailed supply chain tracing information provided by the importer to prove that the cotton was produced in India, processed into yarn and subsequently fabric in China outside of XUAR, and converted to clothing in Cambodia was insufficient to break the nexus to XUAR since CBP had information connecting one of the parties in the supply chain to XUAR. This ruling is troubling because of the difficulty many companies will have disassociating themselves from businesses in China that have operations both inside and of XUAR.

**11** U.S. Customs and Border Protection, “FAQs: Uyghur Forced Labor Prevention Act (UFLPA) Enforcement.”

**12** U.S. Department of Homeland Security, Office of Strategy, Policy, and Plans, “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, [https://www.dhs.gov/sites/default/files/2022-06/22\\_0617\\_fletf\\_uflpa-strategy.pdf](https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf); U.S. Customs and Border Protection, “Uyghur Forced Labor Prevention Act”; U.S. Customs And Border Protection, “UFLPA Operational Guidance for Importers,” last modified June 13, 2022, <https://www.cbp.gov/document/guidance/uflpa-operational-guidance-importers>.

**13** U.S. Customs and Border Protection, “FAQs: Uyghur Forced Labor Prevention Act (UFLPA) Enforcement.”

**14** U.S. Customs and Border Protection, “UFLPA Operational Guidance for Importers.”

**15** U.S. Customs and Border Protection, “UFLPA Operational Guidance for Importers.”

**16** U.S. Customs and Border Protection, “UFLPA Operational Guidance for Importers.”

**17** The importer in HQ H330077 filed an administrative protest under 19 U.S.C. § 1514 of CBP’s decision to exclude its merchandise. The importer can challenge CBP’s decision in the U.S. Court of International Trade.

**18** Lexis Nexis, “Global Trend Towards Mandatory Human Rights Due Diligence Accelerates as German Law Comes Into Force,” March 8, 2023, <https://www.lexisnexis.com/community/insights/professional/b/industry-insights/posts/german-due-diligence-law->

**19** Knut Aliche et al., “Taking the pulse of shifting supply chains,” McKinsey & Company, August 26, 2022, <https://www.mckinsey.com/capabilities/operations/our-insights/taking-the-pulse-of-shifting-supply-chains>.

**20** Nicola Bonucci et al., “Multi-Stakeholder Initiatives and Mandatory Due Diligence,” JD Supra, June 9, 2023, <https://www.jdsupra.com/legalnews/multi-stakeholder-initiatives-and-1113203>.

**21** U.S. Departments of State, the Treasury, Commerce, Homeland Security, Labor, and the United States Agency for International Development, “Africa Gold Advisory,” Executive Summary, June 27, 2023, <https://ofac.treasury.gov/media/931956/download?inline>.

**22** There are a variety of supply chain platforms to manage risk for sustainability, and also human rights concerns. <https://supplychaindigital.com/sustainability/top-10-supply-chain-sustainability-platforms>.

**23** “Africa Gold Advisory.”

**24** Sayari is a venture-backed and founder-led global corporate data provider and commercial intelligence platform. The information on beneficial ownership of entities is helpful in uncovering links to forced labor in XUAR. Governments, including the US, have used their platform. <https://sayari.com/about-us>.

**25** American Bar Association, “Contractual Clauses Project,” accessed June 30, 2023, [https://www.americanbar.org/groups/human\\_rights/business-human-rights-initiative/contractual-clauses-project](https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project).

**26** For suggestions regarding procurement practices to identify and exclude forced labor in the procurement cycle see: Helena Kennedy Centre for International Justice, “Ethical Procurement: Excluding Products made with Forced Labor,” Sheffield Hallam University, Issue Brief, June 6, 2023, <https://www.shu.ac.uk/-/media/home/research/helena-kennedy-centre/projects/evidence-briefs/shu-brief-6-excluding-products-made-with-forced-labor.pdf>.

**27** U.S. Department of Homeland Security, “Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s Republic of China.”

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