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Complying with the Uyghur Forced Labor Prevention Act – a Detailed Compliance Roadmap

On December 23, 2021, the Uyghur Forced Labor Prevention Act was signed into law. The Act creates a presumption for purposes of Section 307 of the U.S. Tariff Act that goods produced in the Xinjiang Uyghur Autonomous Region of China, or by entities specified by the U.S. government, are produced using forced labor. The forced labor presumption took effect last week, on June 21.

Attorneys
Michael R. Littenberg
Samantha Elliott
Peter Witschi

In the lead-up to the effectiveness of the forced labor presumption, on June 17, the U.S. Department of Homeland Security delivered to Congress its *Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s Republic of China*. The UFLPA required the Forced Labor Enforcement Task Force, chaired by DHS, to develop a strategy for supporting the enforcement of Section 307 to prevent the importation into the United States of goods produced with forced labor in China. In addition, on June 13, U.S. Customs and Border Protection issued *Operational Guidance for Importers* that complements the Strategy.

The Strategy and Guidance indicate that businesses should undertake heightened due diligence to ensure compliance with the Tariff Act and identify potential supply chain exposure to companies operating in the XUAR, linked to the XUAR or utilizing Uyghur and other Muslim minority laborers. In this Alert, we describe in detail the due diligence program elements and importer documentation discussed in the Strategy and the Guidance – which will in many cases be challenging to apply and satisfy – as well as other aspects of the Strategy and Guidance. Our earlier Alert describing the UFLPA is available [here](#).

The Entity List

The UFLPA required the strategy developed by the FLETf to include a list of the following:

- Entities in the XUAR that produce goods with forced labor. Ten entities are listed.
- Entities working with the government of the XUAR to recruit, transport, transfer, harbor or receive forced labor of Uyghurs, Kazakhs, Kyrgyz or members of other persecuted groups out of the XUAR. Ten entities are listed, one of which also is on the list described above.
- Products produced by entities on the foregoing lists.

The following products are listed: (1) apparel; (2) clothing; (3) computer parts; (4) cotton, processed cotton and cotton products; (5) electronics; (6) garments; (7) hair products; (8) polysilicon, including solar-grade polysilicon; (9) rail transportation equipment; (10) silica-based products; (11) textiles; and (12) touch screens for handheld devices and cars and other similar products.

- Entities that exported the products described above from China into the United States.

The Strategy notes that entities identified as manufacturers also may be exporters. The Strategy indicates that DHS has not identified additional exporters at this time but that it will continue to investigate and gather information about additional relevant entities.

- Facilities and entities that source material from the XUAR or persons working with the XUAR government or the Xinjiang Production and Construction Corps for purposes of the “poverty alleviation” or “pairing-

assistance” program or any other government labor scheme that uses forced labor. Eleven entities are listed, all of which are included on the other lists noted above.

Goods from the foregoing entities are subject to the UFLPA’s rebuttable forced labor presumption.

The listed entities will be familiar to many importers. A significant number of the entities were previously the subject of Withhold Release Orders and all were noted in the U.S. State Department’s July 2021 Xinjiang Supply Chain Business Advisory.

Exercising Due Diligence

The UFLPA required the FLETF to provide guidance to importers on due diligence, effective supply chain tracing and supply chain management measures to ensure that importers do not import goods produced with forced labor from China, especially from the XUAR.

As used in the Strategy, due diligence includes assessing, preventing and mitigating forced labor risk in the production of goods imported into the United States. This construct is consistent with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

While systems may vary from industry to industry, the Strategy indicates that an effective due diligence system in any industry may include the following elements:

- Engaging stakeholders and partners

Stakeholders may include individuals and communities affected by the operations and practices of a business, including those who work for suppliers throughout the supply chain. The Strategy indicates that importers must engage with suppliers involved directly in the production of goods that will be imported into the United States and either work through those suppliers to engage, or engage directly, with producers of raw materials and components used in the imported goods to assess and address forced labor risk.

- Assessing risks and impacts

The Strategy indicates that, to conduct a forced labor risk assessment, importers must map supply chains for their imported goods and then identify steps at risk of using forced labor. In making a forced labor risk assessment, factors to consider include, but are not limited to:

- The origin of the imported goods and any raw materials or components in the imported goods;
- Transactions among entities along the supply chain tied to the specific imported goods;
- Locations and identities of entities in the supply chain;
- Business relationships among entities in the supply chain;
- Use of publicly available data sets to estimate the probability that raw materials or components originated in the XUAR; according to the Strategy, when there are indications that raw materials or components do not originate from the stated location, such as inputs from countries that are known to lack production capacity that matches its output volume, additional due diligence is needed; and
- Indications a supplier at any tier of the supply chain is using detainee or ex-detainee labor or is receiving workers from the XUAR through government-labor programs.

According to the Strategy, effective supply chain management measures include (1) having a process to vet potential suppliers for forced labor prior to entering into a contract with them, (2) requiring that supplier contracts necessitate corrective action by the supplier if forced labor is identified in the supply chain and (3) outlining the consequences if corrective action is not taken, such as termination of the contractual relationship. The Strategy further indicates that effective supply chain management also includes having access to documentation, personnel and workers for verification of the absence of forced labor indicators, including at the recruitment stage.

The Strategy indicates that importers should be able to demonstrate how risk and impact assessment information is used to inform forced labor risk prevention and mitigation.

- Developing a code of conduct

For supply chains that touch the XUAR or involve entities that use labor transferred from the XUAR under government labor programs, the code of conduct must specifically forbid the use of forced labor and address the risk of use of government labor schemes, such as pairing assistance, poverty alleviation or other labor transfer programs.

In addition, the Strategy indicates that the importer should incorporate the 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 facilities). If the importer plans to rely on direct suppliers to ensure its upstream suppliers implement standards consistent with the importer's code of conduct, the contract with the direct supplier also should require the direct supplier to (1) ensure that upstream suppliers train employees on detecting forced labor, (2) conduct self-audits or obtain independent audits (including on recruitment of workers and use of government labor programs), (3) implement corrective action plans, (4) track and report on their performance of the contract's requirements and (5) require and monitor subcontractor adherence to the code of conduct.

- Communicating and training across the supply chain

The Strategy indicates that importers are required to provide training to their employees or agents responsible for selecting suppliers, including on (1) risks of forced labor identified by risk assessments, (2) the prohibition on importing into the United States goods produced with forced labor, (3) the presumption that goods made in the XUAR or by companies on the Entity List are made using forced labor, (4) risks of suppliers being included on future additions to the Entity List and (5) the importer's code of conduct. Training of the importer's employees and agents (as applicable) should integrate efforts to eliminate forced labor risk into the supplier selection and contracting process.

The Strategy indicates that communicating the standards included in the code of conduct to agents (if applicable), suppliers at all tiers of the supply chain, labor brokers, recruiters and employment agencies (if applicable), workers and trade unions and communities and civil society groups is also an important element of a due diligence system.

- Monitoring compliance

The Strategy notes that importers should monitor supplier compliance with the code of conduct, particularly for those suppliers and subcontractors in the XUAR or on the Entity List. According to the Strategy, this may be accomplished by conducting credible audits or through processes that go beyond traditional auditing and may involve the use of technology or partnerships with civil society.

The Strategy reiterates the guidance in the July 2021 Xinjiang Supply Chain Business Advisory that audits, including third-party audits, are not alone sufficient to demonstrate due diligence and may not be a credible

source of information for indicators of forced labor in the XUAR, due to the difficulty of conducting credible audits.

- Remediating violations

As noted in the Strategy, if indicators signifying the presence of forced labor in the supply chain are identified, importing goods prior to remediation is prohibited. To continue importing goods made by the supplier, the importer must demonstrate that it has fully remediated all indicators of forced labor. If an importer intends to continue sourcing inputs from the supplier, it must develop a corrective action plan that specifically addresses all indicators of forced labor.

- Independent review

Independent third-party verification can demonstrate the implementation and effectiveness of an importer's due diligence system and is part of due diligence. The Strategy indicates that importers should periodically assess performance of their due diligence and evaluate the effectiveness of system components for ensuring that the supply chain is free of forced labor.

- Reporting performance and engagement

The Strategy encourages importers to provide regular and timely public reporting on their due diligence system, including the auditing and verification processes.

Documentation Required by CBP

Many importers were hoping for bright-line compliance guidance. In this regard, the Strategy and Guidance disappoint, since they are neither bright-line nor comprehensive. Some elements also will be challenging to apply.

The Strategy indicates that CBP is considering revisions to its regulations that will allow CBP to (1) respond more quickly and nimbly to allegations of forced labor, (2) provide importers with clear guidance as to processes, requirements and time frames for admissibility and exception determinations and (3) more uniformly implement admissibility determination processes for those determinations. These revisions may address some of the perceived shortcomings in the Strategy and Guidance.

The Strategy

In addition to discussing the elements of a due diligence program, the Strategy discusses the evidence that would facilitate a determination that a good can be imported into the United States. The evidentiary requirements are broken out separately for goods not subject to the UFLPA and goods that have China inputs but were not produced with forced labor. These requirements are expanded upon in the Guidance.

Goods not subject to the UFLPA. According to the Strategy, documentation should include:

- A detailed description of the supply chain for the imported good and its components, including all stages of mining, production or manufacture, including any step of the sourcing, manufacturing or processing of goods in third countries.

This includes documenting how the imported good was made from raw materials to finished good, by what entities, and where, including all in-house manufacturing, sub-assembly operations and outsourced production related to the imported good. This also includes documenting the roles of the entities involved at each stage of the supply chain, as well as the relationship between the entities (e.g., whether a supplier also is a manufacturer).

- Evidence that indicates the provenance of each component of the imported good.

When possible, unique identifiers should be used to track raw materials and other inputs through the supply chain. When raw materials/inputs from different suppliers are commingled, there should be an auditable process for demonstrating the origin and control of each raw material or input.

Goods originating in China. To demonstrate that goods originating in China were not made with forced labor, the Strategy indicates that evidence must demonstrate that indicators of forced labor, including intimidation and threats, abuse of vulnerability, restriction of movement, isolation, abusive living and/or working conditions and excessive hours, do not exist or are fully remediated. Evidence may include the following:

- Evidence mapping the entire supply chain and transport along the supply chain, including which entities were involved at each stage;
- The complete list of all workers at an entity subject to the rebuttable presumption in the production of the imported goods, including:
 - Evidence to demonstrate how and to whom wages are paid at each workplace;
 - Evidence to identify whether each worker comes from the XUAR, as well as the worker's residency status;
 - Evidence to demonstrate that output is consistent with the documented workers, including the (1) number of workers in each job category, total volume of material or goods input and total volume of outputs of materials or goods and (2) documents relating to hours worked and daily production output of goods;
- Evidence that none of the workers who were involved in the production of the product were recruited, transported, transferred, harbored or received with the involvement of the Chinese government, XPCC or entities on the Entity List; evidence should specifically address the controls each entity has in place to ensure that all workers are recruited voluntarily;
- Evidence that reliably demonstrates that every worker from the XUAR is working voluntarily and without menace or threat of penalty, including credible evidence that demonstrates for each such worker that:
 - recruitment to work, including recruitment to any job fair, was fully voluntary;
 - recruitment and continuation at the job were and are not subject to government or entity coercion;
 - recruitment was free of any forced labor indicator, including detention, prior detention or threats of detention, detention or threats of detention of family members or forced transfer of land to the government;
 - transport from the XUAR was voluntary and free of any forced labor indicator, including government surveillance or control of worker movements during transport from the XUAR;
 - transfer to the entity was voluntary and free of any forced labor indicator, including government surveillance;
 - living and working conditions at the entity are free of any forced labor indicator, including government surveillance or reporting by the entity to the government, restriction of movement or required activities such as political, language or cultural classes; and
 - receipt of the worker by the entity was undertaken voluntarily and without any indicators of forced labor, including government surveillance or reporting.

The Strategy indicates that any audit performed to demonstrate that goods originating in China were not made with forced labor that includes evidence of that conclusion must (1) explain its methodology, (2) explain how it determined the presence or absence of forced labor indicators, (3) include a description of all evidence upon which the determination was based and (4) include a description of how the auditor determined the reliability of the evidence used to reach the audit's conclusions.

The Guidance

The Guidance complements the Strategy by laying out the documentation required to be provided to CBP to (1) substantiate that there are no XUAR inputs in the product or (2) overcome the UFLPA's rebuttable forced labor presumption. The forced labor presumption applies unless the Commissioner of CBP determines it has been rebutted, i.e., there is clear and convincing evidence the goods were not produced with forced labor. Under the UFLPA, in connection with seeking to rebut the presumption, the importer must respond to all inquiries for information submitted by the CBP Commissioner to ascertain whether the goods were produced using forced labor.

The Guidance organizes required documentation into five categories, as described below. For importers contending imports are not within the purview of the UFLPA, the second (supply chain tracing information) and fourth (evidence goods were not produced in the XUAR) categories of information apply. Importers requesting an exception to the UFLPA's forced labor presumption look to the first (due diligence system information), second (supply chain tracing information), third (information on supply chain management measures) and fifth (evidence goods originating in China were not produced with forced labor) categories.

The Guidance is not intended to be an exhaustive list of the documentation CBP may request. As indicated in the Strategy, the type, nature and extent of evidence required from an importer will vary based on the facts and circumstances of the particular import. Furthermore, the Guidance notes the goal is to provide importers flexibility to provide documentation consistent with its business operations.

Due diligence system information. Documentation showing a due diligence system or process, which may include the elements below. These due diligence elements are described in more detail in the Strategy, as discussed earlier in this Alert.

- Engagement with suppliers and other stakeholders to assess and address forced labor risk;
- Mapping of the supply chain and assessment of forced labor risks along the supply chain from raw materials to production of the imported good;
- A written supplier code of conduct forbidding the use of forced labor and addressing the risk of use of government labor schemes;
- Training on forced labor risks for employees and agents who select and interact with suppliers;
- Monitoring of supplier compliance with the code of conduct;
- Remediation of any forced labor conditions identified or termination of the supplier relationship if remediation is not possible or is not timely completed;
- Independent verification of the implementation and effectiveness of the due diligence system; and
- Reporting performance and engagement publicly on the due diligence system.

Supply chain tracing information. Documentation tracing the supply chain from raw materials to the imported good. The Guidance illustrates the types of information that importers may provide, or that may be requested by CBP, to demonstrate imports are either not subject to the UFLPA or to show that imports are free of forced labor and in compliance with the UFLPA.

Evidence Pertaining to Overall Supply Chain

- A detailed description of the supply chain, including imported merchandise and components thereof, including all stages of mining, production or manufacture.
- The role(s) of the entities in the supply chain, including shippers and exporters; for example, CBP will need to determine whether a supplier also is a manufacturer.
- For entities in the supply chain, any related persons.
- A list of suppliers associated with each step of the production process, including names and contact information (addresses, email addresses and phone number).
- Affidavits from each entity involved in the production process.

Evidence Pertaining to Merchandise or Any Component

- Purchase orders.
- Invoices for all suppliers and sub-suppliers.
- Packing lists.
- Bill of materials.
- Certificates of origin.
- Payment records.
- Seller's inventory records, including dock/warehouse receipts.
- Shipping records, including manifests and bills of lading (e.g., airway/vessel/trucking).
- Buyer's inventory records, including dock/warehouse receipts.
- Invoices and receipts for all suppliers and sub-suppliers.
- Import/export records.

Evidence Pertaining to Miner, Producer or Manufacturer

- The evidence listed above pertaining to merchandise or components for raw materials.
- Mining, production or manufacturing records; these documents should allow CBP to trace raw materials to merchandise mined, produced or manufactured.

- Production orders.
 - Reports on factory production capacity for the merchandise.
 - Reports on factory site visits by the importer, a downstream supplier sourcing from the factory or a third party.
 - Evidence that the volume of inputs of component materials matches the volume of output for the merchandise produced.
- Any other evidence to demonstrate that a good was not mined, produced or manufactured with forced labor.

In addition, the appendix to the Guidance contains suggested documents for cotton, polysilicon and tomatoes, which are treated as high-risk commodities from the XUAR.

Information on supply chain management measures. This may include internal controls to prevent or mitigate forced labor risk and remediate any use of forced labor identified in the mining, production or manufacture of imported goods. An importer should be able to demonstrate documents provided are part of an operating system or an accounting system that includes audited financial statements.

Evidence goods were not mined, produced or manufactured wholly or in part in the XUAR. This includes documentation that traces the supply chain for the goods. This portion of the Guidance refers back to the supply chain tracing information described above.

Evidence goods originating in China were not mined, produced or manufactured wholly or in part by forced labor. Documentation may include, but is not limited to:

- A supply chain map identifying all entities involved in the production of the goods;
- Information on workers at each entity involved in the production of the goods in China, such as wage payment and production output per worker;
- Information on worker recruitment and internal controls to ensure that all workers in China were recruited and are working voluntarily; and
- Credible audits to identify forced labor indicators and remediation of these if applicable.

Enforcement Priorities

The UFLPA required the Strategy to include a list of high-priority sectors for enforcement. Under the Act, the high-priority sectors must include cotton, tomatoes and polysilicon. As framed in the Strategy, the high-priority sectors for enforcement are (1) apparel; (2) cotton and cotton products; (3) silica-based products (including polysilicon); and (4) tomatoes and downstream products.

The Strategy indicates that CBP will employ a risk-based approach that is dynamic in nature and prioritizes the highest-risk goods based on current data and intelligence. According to the Strategy, the highest-risk goods currently include those imported directly from the XUAR into the United States and from entities on the Entity List. The Strategy indicates that CBP also will prioritize illegally trans-shipped goods with inputs from the XUAR, as well as goods imported into the United States by entities that, although not located in the XUAR, are related to an entity in the XUAR (whether as a parent, subsidiary or affiliate) and likely to contain inputs from that region.

CBP's enforcement plan will cover primary commodities and finished goods produced and exported from the XUAR or an XPCC-linked entity, as well as finished and semi-finished goods manufactured by other entities that were produced with inputs from the XUAR or the XPCC. The enforcement plan will apply to any producer of finished products found to utilize inputs from the XUAR or entities on the Entity List, irrespective of the country of final manufacture.

The Strategy notes that if importations involve inputs from factories that source materials both from within and outside the XUAR, the importer risks having imports detained, as it may be harder to verify that the supply chain for imports to the United States is using only non-XUAR materials that have not been replaced by or commingled with XUAR materials at any point in the manufacturing process.

Selected Other Aspects of the Strategy and Guidance

The Guidance discusses other process items not described in this Alert relating to the detention, release and exclusion of goods.

The Guidance also lists existing U.S. government, international and other resources for supply chain due diligence, tracing and management. These will already be familiar to many companies with robust forced labor compliance programs.

In addition, as required by the UFLPA, the Strategy contains (1) recommendations for efforts, initiatives, tools and technologies to accurately identify and trace affected goods, (2) a description of how CBP plans to enhance its use of legal authorities and tools to prevent entry of goods at U.S. ports in violation of Section 307 of the Tariff Act, (3) a description of additional resources necessary to ensure no goods made with forced labor enter U.S. ports and (4) a plan to coordinate and collaborate with appropriate NGOs and private-sector entities.

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