

**ALERT**

# What Companies Need to Know: Uyghur Forced Labor Prevention Act Signed Into Law

December 27, 2021

View our webinar, "How Does the Uyghur Forced Labor Prevention Act Affect Your Company?" [\*\*here\*\*](#).

After more than a year of debate in the U.S. Congress as to the scope and enforceability, the Uyghur Forced Labor Prevention Act (UFLPA or Act) passed Congress with strong bipartisan support. President Biden has publicly supported the legislation and signed it into law on December 23, 2021. The scope of the UFLPA is broad and has the potential to impact a range of high-technology and low-technology industries with supply chain links to the People's Republic of China (PRC), no matter how remote.

The overarching objective of the UFLPA is to prevent the importation into the United States of goods made with forced labor. Although the prohibition of such imports already exists in U.S. law, specifically Section 307 of the Tariff Act of 1930, as amended (19 U.S.C. § 1307), the UFLPA reflects the difficulty that U.S. Customs and Border Protection has faced when implementing this prohibition, specifically the lack of information regarding the types of industries and companies that are impacted by the use of forced labor when taking into account all segments of the value chain. The UFLPA attempts to address this difficulty by imputing a "rebuttable presumption" that all goods, including raw materials, originating from the Xinjiang Uyghur Autonomous Region (XUAR) in the PRC benefit from forced labor and so should be prohibited from entering the U.S. market unless the importer is able to demonstrate by "clear and convincing evidence," a high threshold, that its imports do not include any goods made from forced labor within any element of the supply chain. This rebuttable presumption takes effect 180 days after the UFLPA is enacted.

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## Coverage of the UFLPA

Notably, the scope of the UFLPA covers “goods mined, produced, or manufactured wholly or in part with forced labor in the People’s Republic of China . . . especially in the Xinjiang Uyghur Autonomous Region,” which means that raw materials made with forced labor when incorporated into semi-finished or finished products are within the scope of these prohibitions. Further, the Act expressly addresses the importation of such goods from third countries – whether, for example, further processed, further manufactured, or assembled in third countries before being exported to the United States.

The UFLPA calls for the U.S. government to coordinate with the governments of Mexico and Canada to effectively implement Article 23.6 of the United States-Mexico-Canada Agreement (USMCA), which already prohibits the importation of goods produced in whole or in part by forced or compulsory labor. Among other actions, the Act also calls for the United States government to actively work internationally to prevent, publicly denounce, and end human trafficking including with respect to forced labor anywhere in the world, and to work through diplomatic channels and multilateral institutions to address gross violations of human rights in the XUAR, including the imposition of restrictive measures including the use of “visa and financial sanctions, export restrictions, and import controls.”

## Enforcement Strategy

The UFLPA requires the Forced Labor Enforcement Task Force, already established under Section 741 of the USMCA (19 U.S.C. § 4681), to publish in the Federal Register a notice soliciting public comments on how to ensure that goods mined, produced, or manufactured wholly or in part with forced labor in the PRC are not imported into the United States. Forced labor includes such labor by the Uyghurs, Kazakhs, Kyrgyz, Tibetans, and members of other persecuted groups in the PRC. The Act also directs the Task Force to conduct a public hearing inviting witnesses to testify about the use of forced labor in the PRC and measures to prevent the importation of goods made from forced labor into the United States.

Subsequent to the public comments and hearing, the UFLPA directs the Task Force – in consultation with the Secretary of Commerce and the Director of National Intelligence (DNI), and through coordination and collaboration with appropriate nongovernmental organizations and private sector entities – to develop and implement a strategy to prevent such imports. The development of this strategy will include the following elements:

- A comprehensive assessment of the risks associated with importing goods mined, produced, or manufactured wholly or in part with forced labor in the PRC, and which identifies, to the extent possible, (a) the circumstances that could lead to the importation of such goods into the United States, and (b) procedures that may be implemented or improved to reduce such risks.
- A comprehensive description and evaluation of the PRC’s “pairing assistance” and “poverty alleviation” programs, or any other government labor scheme, that includes forced labor by Uyghurs, Kazakhs, Kyrgyz, Tibetans, or members of other persecuted groups outside of the XUAR. This would include providing:

- a list of entities in the XUAR that mine, produce, or manufacture wholly or in part, any goods, wares, articles, and merchandise with forced labor;
  - a list of entities working with the government of the XUAR to recruit, transport, transfer, harbor, or receive forced labor or persecuted groups;
  - a list of products mined, produced, or manufactured wholly or in part by these entities;
  - a list of entities that exported these products from the PRC into the United States;
  - a list of facilities and entities that source material from the XUAR (including the Xinjiang Production and Construction Corps, XPCC) or from persons working with the XUAR government (or the XPCC) for the purpose of the “poverty alleviation” or “pairing assistance” program or any other government labor scheme that uses forced labor; and
  - plans for identifying additional facilities and entities, sectors of high-priority, and an enforcement plan for the detection and prohibition of the importation of goods made from forced labor.
- Development of recommendations of “efforts, initiatives and tools and technologies” to be adopted to ensure that Customs can “accurately identify and trace goods” made in the XUAR from entering the United States, and a description of how Customs will better use its legal authorities and other tools to prevent the importation of such goods, including recommendations as to additional resources that may be necessary by Customs to carry out these requirements.

The UFLPA additionally mandates that the Task Force develop guidance for importers with respect to due diligence steps and effective supply chain tracing to help them adhere to the prohibitions of Section 301 of the Tariff Act and the new requirements of UFLPA. It also directs the Task Force to submit its strategy as an unclassified report (with a classified annex as appropriate) to Congress, within 180 days after the date of enactment of the UFLPA, which would also be made available to the public and be regularly updated.

### **Rebuttable Presumption Applied by Customs**

One of the most important provisions of the UFLPA is the imposition of a rebuttable presumption that, with respect to any goods, wares, articles and merchandise mined, produced, or manufactured wholly or in part in the XUAR or produced by any of the entities using forced labor as identified by the Task Force: (1) the importation of such items is prohibited under Section 307 of the Tariff Act, and (2) such items are not entitled to entry at any U.S. ports. The rebuttable presumption takes effect 180 days after the date of the enactment of the UFLPA.

To overcome this rebuttable presumption, Customs must determine that the importer of record has both complied with the Task Force’s guidance to importers, including applicable regulations, and has responded to all inquiries for information requested by Customs to ascertain the use of forced labor with respect to the imported goods. Customs must also determine “by clear and convincing evidence” that the goods, wares, articles, or merchandise were not mined, produced, or manufactured wholly or in part by forced labor. The Act further requires Customs to submit to Congress and make available to the public, within 30 days, a report identifying the evidence considered by Customs when overcoming this rebuttable presumption with respect to

the importation of a specific good.

### **Diplomatic Strategy and Sanctions**

The UFLPA further requires, within 90 days after its enactment, that the Department of State, in coordination with other Federal departments and agencies, submit to Congress a report of the United States' strategy to promote the international awareness of forced labor in the XUAR as well as an international strategy to address it. The State Department is further directed to develop, in consultation with the Secretaries of Commerce, Homeland Security, and Treasury, lists that include the identification of (1) entities in the PRC or affiliates of such entities that use or benefit from forced labor in the XUAR, and (2) foreign persons that have acted as agents of these entities.

The State Department is also mandated to develop a plan of action to address forced labor in the XUAR using existing authorities including:

- the Trafficking Victims Protection Act of 2000 (Public Law 106–386; 22 U.S.C. § 7101 et seq.);
- the Elie Wiesel Genocide and Atrocities Prevention Act of 2018 (Public Law 115–441; 22 U.S.C. § 2656 note); and
- the Global Magnitsky Human Rights Accountability Act (22 U.S.C. § 2656 note).

Equally as important, the UFLPA expands the scope of the Uyghur Human Rights Policy Act of 2020 (PL 116-145; 22 U.S.C. § 6901) to include the imposition of sanctions for serious human rights abuses in connection with *forced labor*. The Uyghur Human Rights Policy Act of 2020 already imposes sanctions on foreign individuals and entities, including the PRC government, responsible for various other human rights abuses in the XUAR. The sanctions imposed could include the blocking of assets and declaring individuals ineligible for visas or admission into the United States. This means that, within 180 days of enactment, the Office of Foreign Assets Control (OFAC) of the Treasury Department could impose sanctions on a range of additional foreign persons responsible for human rights abuses, unless those sanctions can be waived, and add those parties to OFAC's Specially Designated Nationals and Blocked Persons List (SDN List).

The foregoing rebuttable presumption, diplomatic strategy, and sanctions provisions will sunset on the earlier of eight years after the date of the enactment of the UFLPA or the date on which the President submits to Congress a determination that the PRC government has ended its mass internment, forced labor, and gross human rights violations within the XUAR.

### **Immediate Considerations for Importers and Companies Potentially Impacted**

***The penalties for violation of the UFLPA will likely be high and involve civil or criminal penalties, or both.***

- The “rebuttable presumption” imputed by the UFLPA now means that the burden of proof shifts from the U.S. government to private entities in demonstrating that imported goods do not benefit from forced labor in the XUAR. The evidentiary requirements to overcome this presumption will be significant and will likely involve traceability across the entire value chain. The likely outcome here, if importers are not

prepared, is more audits, detentions, seizures, and other enforcement activities by Customs.

- U.S. importers and entities with supply chains that may involve the PRC should consider engaging with the U.S. government through the public comment period to help inform the implementation of this Act in a manner that is consistent with their business practices. This includes advising the U.S. government on the scope of the import ban, guidelines for importer certifications, due diligence requirements (including recordkeeping requirements), the procedures governing any enforcement process by the U.S. government, reasonable evidentiary requirements by parties to overcome the rebuttable presumption, and the standard under which entities allegedly engaged in forced labor practices would be designated in order to increase transparency for the importing community and other impacted parties.
- Given the 180-day period for implementation of this Act, companies should move swiftly to assess their supply chain risks. Companies should not assume that their supply chains are not impacted. There are significant volumes of raw materials, such as cotton, silica, and other materials/minerals, that are derived from XUAR and incorporated into a range of finished products, including electronic equipment, machinery, consumer goods, and various forms of textiles. Supply chain assessments are feasible and companies are now required to examine through coordination with their suppliers (including second, third, fourth-tier suppliers) the extent to which their materials are either sourced from the XUAR or commingled with other products sourced from the XUAR.
- Companies should also move quickly to proactively establish plans to address any vulnerabilities or potential for vulnerabilities, no matter how remote, by communicating policy changes to suppliers and updating supplier and importer contracts.
- Companies should also be prepared to update their trade compliance programs to include additional due diligence measures, updates to their restricted party screening procedures, re-evaluation of their supplier and customer onboarding processes, and other relevant procedures.
- Companies should also be aware that compliance with U.S. laws may potentially and automatically trigger risks under a range of Chinese laws, including the Chinese Anti-Foreign Sanctions Law.

For more information about the UFLPA, please contact one of the attorneys listed on the alert.

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