

Locke Lord QuickStudy: FLETF Strategy Guidance to Comply ??With the Uyghur Forced Labor Prevention Act?

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On June 21, 2022, the Uyghur Forced Labor Prevention Act (“UFLPA”) took effect and established the rebuttable presumption that any goods mined, produced, or manufactured wholly or in part in Xinjiang Uyghur Autonomous Region (“XUAR”) of People’s Republic of China (“PRC”), or by an entity on the UFLPA Entity List, are prohibited from importation into the U.S. (click [here](#) for our prior QuickStudy on the UFLPA). The UFLPA directed the Forced Labor Enforcement Task Force (“FLETF”) to develop a strategy to for the enforcement of the UFLPA which was concurrently issued on June 21, 2022 (the Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s Republic of China (the “Strategy”). The Strategy is intended to complement operational guidance released on June 13, 2022, by U.S. Customs and Border Protection (“CBP”).

The Strategy includes a list of entities and products that CBP is required to presume are tainted by forced labor (see “Entity List”). The Strategy also includes a comprehensive risk assessment, a forced labor scheme evaluation, and a list of entities and goods subject to the rebuttable presumption. The Strategy also provides guidance to importers on how to conduct due diligence, effective supply chain tracing, and supply chain management measures. Importers of goods made wholly or in part in the XUAR or by entities and products on the Entity List must comply with this guidance in order to import such goods.

The Entity List

Based on the criteria set forth in the UFLPA, the FLETF created a list of entities that it presumes mine, produce, or manufacture goods in the XUAR with forced labor. Given increased in interagency coordination in the Western world, we expect that the Entity List will updated regularly and published in the Federal Register. As such, we advise U.S. importers to monitor for changes and additions to the Entity List for changes and to regularly screen their supply chain against the most recent version of the Entity List.

High-Priority Sectors

The FLETF Survey identifies high-priority industry sectors that include the following XUAR products and components: apparel, cotton and cotton products, tomatoes, silica-based products (including polysilicon), and

downstream products (likely to include aluminum alloys, automobiles, petroleum, concrete, glass, ceramics, sealants, electronics, and solar panels). The CBP must apply the rebuttable presumption to products from these high-priority sectors that produced, in whole or in part, in the XUAR or by entities on the Entity List. CBP plans to employ a risk-based approach to prioritize the highest-risks goods within these sectors based on current data in order to identify and interdict the entry of these goods.

Guidance to Importers

Should importers seek to rebut the presumption that specific goods are made with forced labor, they must first demonstrate that they have complied with the Strategy due diligence guidance, responded completely and substantively to all CBP requests for information, and document, with clear and convincing evidence, that its products were not mined, produced or manufactured wholly or in part with forced labor. The “clear and convincing” standard is higher than the preponderance of the evidence standard and requires significantly greater documentation than the current standard required for “Withholding and Release Orders” or “WROs”. Depending upon the importance of the product to the importer, defending the absence of forced labor using the clear and convincing standard may not be cost-effective.

If the Commissioner of CBP does find an exception is justified following a review of an exemption request, CBP must report its findings to Congress within thirty days of its decision. The exception will be publicly available. If granted an exception, importers may identify additional shipments that utilize identical supply chains previously reviewed and determined admissible by CBP for faster release of future shipments.

“Clear and Convincing” Standard

U.S. importers are likely to face significant challenges to overcome the high evidentiary burden to rebut the presumption as compared to other U.S. forced labor prohibition laws. For that reason, it is important to conduct thorough due diligence to document that forced labor does not touch any part of their supply chain, down to the raw materials. The burden of proof is placed entirely on the importer, which could adversely affect U.S. importers and their supply chain.

The evidence must show that no workers involved in any facet of production of the goods were recruited, transported, transferred, harbored, or received with any Chinese government involvement or any entity part of the Entity List. Documentary evidence containing a complete list of the workers involved in each stage of production is required, with information such as (i) wage payment documentation, (ii) production output per week, and (iii) worker recruitment practices. Such evidence must be provided by the importer within thirty days of the good being detained.

The FLETf relies on the U.S. Department of Labor’s *Comply Chain* to outline the elements they look for when determining whether an importer’s due-diligence system is in fact effective. The elements include:

- Engagement of stakeholders and partners;
- Assessment of risks and impacts;
- Development of a code of conduct;
- Communication and training across the supply chain;
- Monitoring of compliance;

- Remediation of violations;
- Independent review; and
- Report of performance and engagement.

The Strategy guidance suggests at least two due diligence steps, (i) effective supply chain tracing and (ii) effective supply chain management measures, as internal controls to ferret out forced labor within their supply chains.

Effective Supply Chain Tracing

An importer should know their suppliers and labor sources at every level of the supply chain. Supply chain “mapping” requires importers or a third party to collect and identify each supplier utilized throughout the entire supply chain. The Mapping must also document the conditions in which work is being done at each phase of the supply chain, from the raw material suppliers to the finished product.

The Strategy further advises importers to include identity preservation and segregation to prevent commingling of product inputs during the supply chain. This is done by ensuring each input is packaged, processed, and traced separately from other product inputs. Lastly, FLETF recommends that importers obtain written affidavits from each stage of the production process establishing that no forced labor is involved.

Effective Supply Chain Management Measures

Prior to entering a contract with any potential supplier, importers should establish a vetting process and review of all supply chain agreements. Should forced labor be found within the supply chain, it is necessary to have the right to corrective action and negative consequences if such corrective action is not taken (e.g., terminating the contractual relationship, delay and make whole fees, etc.). The Strategy suggests that importers should set up information systems to manage these measures and regularly update all mapping and risk assessment information.

There are additional measures an importer can implement in their supply chain management to mitigate the risk that a supplier uses forced labor. Importers may want to diversify their supply chain and direct more purchases to allied countries. The Strategy recommends using investigative firms and third-party resources to monitor their suppliers using teleconference meetings and in-person visits to observe the business operations.

While risk in this situation is not completely avoidable, following such suggestions can demonstrate good-faith intent to comply with the UFLPA. However, such measures may be costly and possibly ineffective. For that reason, importers must take a risk-based approach in determining how to comply with the UFLPA with focus on entities and products that could have contact with the XUAR.

Importers’ Response to the UFLPA

Many U.S. importers are uncertain how the UFLPA will impact them. Moving forward, importers should observe how CBP enforces the UFLPA, monitor the evidence that the CBP accepts to rebut the presumption, regularly check for updates to the Entity List, implement policies, procedures and internal controls to ensure compliance

with the UFLPA, and, if necessary, make strategic business changes to minimize any impact the UFLPA enforcement may have.

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or tax advice. Please reach out to the authors for any specific questions. We expect to continue to monitor the topics addressed in this paper and provide future client updates when useful.

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