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Locke Lord QuickStudy: Not So(lar) Fast My Friends – Uyghur Forced Labor Prevention Act Takes Effect June 21, 2022?

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The solar industry received welcome news last week when President Biden invoked his emergency authority under Section 318(a) of the Tariff Act of 1930 to mute the impact of the Commerce Department's anti-circumvention investigation of solar cells and modules from Cambodia, Malaysia, Thailand and Vietnam, suspending tariffs on those items for a period of 24 months while the investigation proceeds. In so doing, Biden gave a jump-start to a critical solar supply chain that had effectively been frozen by the investigation, threatening to derail as much as 16 gigawatts of proposed projects. While solar developers have been justifiably celebrating this action, another major challenge to the solar supply chain looms next week as the Uyghur Forced Labor Prevention Act ("UFLPA") is scheduled to take effect on June 21, significantly curtailing the import of products from an area of China that produces over 80% of the world's polysilicon – a high-purity form of silicon that is a key raw material in the solar photovoltaic supply chain. The UFLPA bars imports from the Xinjiang Uyghur Autonomous Region of the People's Republic of China ("XUAR"), an area of 620,000 square miles and 25 million inhabitants in Northwest China, which exports polysilicon and solar panels, in addition to agricultural products, fish, oil, minerals and other items. The UFLPA expands upon existing orders barring imports of cotton, tomatoes and silica-based products from the XUAR.

UFLPA Background

President Biden signed the UFLPA into law on December 23, 2021. The central goal of the UFLPA is to prevent the importation into the United States of goods made with forced labor of the Uyghur people of China, thereby decreasing the market for and profitability of such products to, in turn, discourage China's exploitation of the Uyghur people. Specifically, in Section 1 of the UFLPA, the U.S. Congress found that "In the XUAR, the Government of the People's Republic of China has, since 2017, arbitrarily detained as many as 1.8 million Uyghurs, Kazakhs, Kyrgyz, and members of other Muslim minority groups in a system of extrajudicial mass internment camps, in addition to arbitrarily detaining many in formal prisons and detention centers, and has subjected detainees to forced labor, torture, political indoctrination, and other severe human rights abuses."

The UFLPA requires U.S. Customs and Border Protection ("CBP") to apply a rebuttable presumption that any items mined, produced or manufactured in the XUAR, or produced by named entities associated with that region, are the product of forced labor and are barred from importation into the United States pursuant to Section 307 of

the Tariff Act of 1930 (19 U.S.C. 1307). The CBP implements Section 307 by issuing Withhold Release Orders (“WRO”) and findings to prevent merchandise produced in whole or in part in a foreign country using forced labor from being imported into the United States.

An importer must produce “clear and convincing evidence” to rebut the presumption of the use of forced labor. This is a very high bar and will require substantive documentary proof that ties every component in a product to a source that is free of forced labor. The CBP released operational guidance on June 13, 2022 (the “CBP Guidance”) which provides information regarding the type and nature of documentation that may be required by the CBP if an importer wishes to request an exception to the UFLPA’s presumption, and resources for importers to conduct supply chain due diligence, materials tracing and management. The CBP Guidance requires that importers demonstrate due diligence, effective supply chain tracing, and supply chain management measures to ensure that they do not import any goods made, in whole or in part, by forced labor, especially from the XUAR. This requirement extends throughout the entire supply chain, to include goods that may be shipped from elsewhere in China and to other countries for further processing. The UFLPA requires the CBP to publicly report to the U.S. Congress each time that it determines that an importer has overcome the rebuttable presumption; the report must identify the goods under review and the evidence upon which the determination was based.

UFLPA Strategy

An interagency Forced Labor Enforcement Task Force (“FLETF”) chaired by the Secretary of Homeland Security has been created under Section 741 of the United States-Mexico-Canada Agreement Implementation Act and empowered to develop a strategy to support the goals of the UFLPA (the “Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s Republic of China” or “Strategy”).

On January 24, 2022, FLETF published a notice seeking public comments on “Methods to Prevent the Importation of Goods Mined, Produced, or Manufactured With Forced Labor in the People’s Republic of China, Especially in the Xinjiang Uyghur Autonomous Region, Into the United States”. Based on responses to the notice received thus far, the Strategy is expected to include measures such as: (i) a plan to identify (a) products and components that are sourced from the XUAR, (b) entities that produce, source or export these items, and (c) entities that assist in the recruitment of forced labor; (ii) develop lists of products, component parts and entities that are part of the XUAR forced labor supply chain; (iii) identify high-priority sectors for enforcement both in terms of products as well as ports of entry; and (iv) provide due diligence guidance to importers regarding requirements for supply chain tracing (documentation that traces the supply chain from raw materials to the imported goods) required to evidence product and component country (region) of origin (to demonstrate that goods are not produced in the XUAR or with forced labor) and otherwise to comply with the UFLPA.

Implications for Domestic Solar Developers

The Strategy is expected to be released on June 21, 2022, the same day the UFLPA becomes effective. Importers should prepare for June 21 by reviewing their supply chain and implementing appropriate compliance assurance measures, such as creating Certificate of Origin affidavits, establishing internal due diligence processes, and drafting policies, procedures and internal controls that will demonstrate, by clear and convincing evidence, that their imports do not include the use of forced labor and for the sake of expediency, do not contain items from the XUAR. U.S. importers will be able to identify “blocked” XUAR suppliers by referring to the FLETF lists when

published. The greater difficulty for the importer will be to identify all component parts and upstream vendors in the supply chain. For example, polymer silicon and rare earth materials used in solar panels and computer chips can be sourced from many places, including the XUAR. If CBP determines that the components were produced in the XUAR, the manufacturer, exporter and importer will need to have clear and convincing documentary proof ready to demonstrate that no component part of those products was produced with forced labor.

Importers should consult the Strategy, the CPB Guidance and other available CBP resources to properly conduct due diligence, supply chain tracing and management, and to develop clear and convincing evidence to demonstrate that items were not produced, wholly or in part, in the XUAR or by forced labor. Importers must comply with the importer guidance in the UFLPA Strategy in order to be eligible to request an exception to the rebuttable presumption. In line with internal risk assessments, businesses and individuals should undertake heightened due diligence to ensure compliance with U.S. law, and to identify potential supply chain or other exposure to companies operating in the XUAR, linked to the XUAR (e.g., through the pairing program or XUAR supply chain inputs), or utilizing Uyghur and other Muslim minority laborers from the XUAR. In the event companies identify linkages to entities with connections to the XUAR, businesses and individuals must avoid unlawful activities.

For polysilicon in particular, the CBP Guidance provides that importers need to provide:

- Complete records of transactions and supply chain documentation to demonstrate all entities involved in the manufacture, manipulation, or export of a particular good, and the country of origin of each material used in the production of the products going back to the suspected source of forced labor, i.e., production in the XUAR or by an entity on the UFLPA Strategy entities lists.
- A flow chart mapping each step in the procurement and production of all materials and identify the region where each material in the production originated (e.g., from location of the quartzite used to make polysilicon, to the location of manufacturing facilities producing polysilicon, to the location of facilities producing downstream goods used to make the imported good).
- A list of all entities associated with each step of the production process, with citations denoting the business records used to identify each upstream party with whom the importer did not directly transact.

Importers should also be aware that imports of goods from factories that source polysilicon both from within XUAR and outside of XUAR risk being subject to detention, as it may be harder to verify that the supply chain is using only non-XUAR polysilicon and that the materials have not been replaced by or co-mingled with XUAR polysilicon at any point in the manufacturing process.

Failing to demonstrate compliance with the UFLPA can subject the manufacturer, exporter and/ or importer to substantial liability that could include civil and criminal penalties such as: (i) asset blocking (prevention of importation or seizure and forfeiture of the product) or re-exportation of offending product; (ii) listing the non-U.S. participants in the forced labor supply chain (A) as “specially designated nationals” or “SDNs” to block and prohibit U.S. persons from all transactions in property and interests in property with such SDNs and/or (B) block those persons from eligibility for a U.S. visa, admission to the U.S. or eligibility for parole from U.S. prison

(including revocation of any existing access or entry into the U.S.); and/or (iii) imprisonment of up to 20 years.

Importers must also be aware that compliance with the UFLPA could trigger violation of Chinese law – particularly Chinese anti-boycott laws that could allow Chinese companies to sue U.S. importers in Chinese courts for refusing to buy Chinese products due to foreign (non-Chinese) sanctions laws.

Outlook

While the two-year suspension of tariffs on solar cells and modules from countries subject to the Department of Commerce anti-circumvention investigation did a great deal to ease the pressures on the solar supply chain, the imminent implementation of the UFLPA is a reminder that significant challenges remain.

While many in the solar industry have been preparing for this since the UFLPA was enacted, those preparations have typically been limited to taking steps to understand their supply chain to minimize potential liability due to the limited availability of regulatory guidance. For example, many developers have been inserting provisions into their panel supply contracts containing representations regarding the origin of the panels and their components and indemnification for liability incurred under the UFLPA. However, those measures are only as effective as the ability of the counterparty to stand behind them. Further, even an indemnity is of limited value if the panels for a project are confiscated and deadlines in power purchase and financing agreements are missed. As a result, solar developers, importers, lenders and investors should pay close attention to the Strategy when it is released on June 21, and put in place robust procedures consistent with the Strategy and the CBP Guidance to ensure compliance with the UFLPA for themselves as well as their contractual counterparties and upstream suppliers. We note that UFLPA does not allow a product that contains even a *de minimus* amount of banned items or components produced with forced labor in the XUAR to enter the U.S.

Conclusion

Locke Lord's renewable energy and trade regulation lawyers are monitoring these developments closely, and there is a great deal of additional detail contained in the CBP Guidance, other CBP resources, and the forthcoming Strategy. Please reach out to the authors for any questions regarding these issues or for assistance in developing procedures to comply with these new restrictions.

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