

Human Rights Watch Response to Request for Public Comments on Prevention of Imports Linked to Forced Labor in China

March 9, 2022

How prevalent is forced labor in China, and how can the Uyghur Forced Labor Prevention Act address the problem?

The Uyghur Forced Labor Prevention Act (UFLPA) aims to ensure goods made with forced labor from China, and the Xinjiang region especially, are not imported into the United States.¹ Since 2017, the Chinese government has detained one million Uyghurs and other Turkic Muslims in Xinjiang in so-called “political education” camps, pretrial detention centers, and prisons.² Evidence indicates that detainees in political education camps are carrying out forced labor, both during their detention and after their release.³ Authorities have also assembled Turkic Muslims and sent them to factories in provinces outside Xinjiang, in conditions that strongly suggest coercion.⁴

The UFLPA makes it easier for the US government, and Customs and Border Protection (CBP) specifically, to interdict goods from Xinjiang by requiring it to apply a presumption that goods “mined, produced, or manufactured wholly or in part in Xinjiang” are prohibited from entry to the US.⁵ The UFLPA also requires the US government to compile a list of entities (whether in Xinjiang or elsewhere in China) linked to forced labor by Uyghurs and other persecuted groups, including entities that use forced labor in Xinjiang or that source material produced in Xinjiang or from other government labor schemes.⁶ The presumption against importation also applies to products produced by an entity on that list (this submission will refer to entities on the list as “listed entities”).⁷ The presumption is scheduled to go into effect on June 21, 2022.⁸

To rebut the presumption against importation, companies must demonstrate that they have fully complied with guidance that the US government’s Forced Labor Enforcement Task Force (FLETF) will issue to importers concerning implementation of the UFLPA; have completely and substantively responded to all inquiries for information submitted by CBP; and shown by “clear

¹ Uyghur Forced Labor Prevention Act, <https://www.congress.gov/117/plaws/publ78/PLAW-117publ78.pdf>

² Human Rights Watch, “*Break Their Lineage, Break Their Roots*,” *China’s Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims* (New York: Human Rights Watch, 2021) <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting>, p. 12.

³ Ibid., p. 34.

⁴ Ibid., p. 35.

⁵ UFLPA, section 3(a).

⁶ UFLPA, section 2(d)(2)(B).

⁷ UFLPA, section 3(a), referencing section 2(d)(2)(B) (i), (ii), (iv) or (v).

⁸ UFLPA, section 3(e).

and convincing evidence” that the goods, wares, article, or merchandise were not mined, produced, or manufactured wholly or in part by forced labor.⁹

What key principles should drive implementation of the UFLPA?

UFLPA’s implementation should be driven by the following principles:

Meaningful deterrence: Passage of the UFLPA should result in significantly increased enforcement of the prohibition of imports produced from forced labor, both for products linked to forced labor in Xinjiang and elsewhere in China. CBP should aim for a frequency and level of enforcement that demonstrates to importers that they face serious scrutiny of their supply chains and meaningful consequences when they fail to adequately address links to forced labor in China. Increased enforcement will require additional resources for CBP’s forced labor capacity and for other relevant government agencies, including increased staff and technological ability to analyze global supply chains and more capacity to request and analyze information from importers about their supply chains and due diligence practices.

Human rights due diligence in Xinjiang is impossible: Meaningfully evaluating the presence of forced labor at factories or other facilities requires engagement with impacted rights holders, including workers and trade unions.¹⁰ However, the evidence of forced labor, government surveillance, and crimes against humanity in Xinjiang make it impossible for workers to safely make complaints about their employers and participate in independent assessments of their working conditions.¹¹ The US government has also said that individuals conducting audits or other risk assessments in Xinjiang are at risk of Chinese government interference.¹² These factors make it impossible to meaningfully determine that any factory in Xinjiang is free of forced labor. Companies with operations, suppliers, or sub-suppliers in Xinjiang should instead relocate their facilities or supply chains elsewhere.

Clear scope and application: To make clear that the UFLPA prohibits imports from Xinjiang, CBP should issue a Withhold Release Order (WRO)¹³ stating that any product “mined, produced,

⁹ UFLPA, section 3(b)(1)(A)(B) and 3(b)(1)(2).

¹⁰ See, for example, Organisation for Economic Co-operation and Development, *OECD Due Diligence Guidance for Responsible Business Conduct*, p. 26-27. <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>

¹¹ See, for example, Human Rights Watch, “*Break Their Lineage, Break Their Roots,*” *China’s Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims* (New York: Human Rights Watch), <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting> p. 22-24, 34-35, 52.

¹² US Government, Xinjiang Supply Chain Business Advisory, July 13, 2021, p. 11, https://home.treasury.gov/system/files/126/20210713_xinjiang_advisory_0.pdf

¹³ Withhold Release Orders are the orders that CBP issues to allow CBP agents to detain products at ports of entry unless or until importers can prove the absence of forced labor in a product’s supply chain. US Customs and Border

or manufactured wholly or in part in Xinjiang” is prohibited from entry to the US. CBP should also issue a WRO for each listed entity covering any product they produce in whole or in part, although entities in Xinjiang would also be covered by the Xinjiang-wide WRO.

Transparency around CBP’s decisions: To demonstrate it is effectively interdicting products linked to forced labor, CBP should be transparent about its enforcement actions on imports linked to forced labor, especially prioritizing transparency with regards to actions initiated to implement the ULFPA. In addition to disclosing WROs, CBP should publicly disclose detentions, re-exportations, exclusions, or seizures of goods, including information on the company importing the banned goods; the nature of the goods; their approximate value; and the reason for the enforcement action, including reasons for revoking and modifying existing WROs.

Greater use of civil and criminal penalties: Seizing goods is not on its own an adequate deterrent for importers seeking to import goods linked to forced labor. CBP should also use its powers under the 1930 Tariff Act to issue financial penalties on companies for importing or attempting to import goods linked to forced labor. Imposing prohibitive financial penalties will disincentivize companies from continuing business in ways that ignore the need to conduct robust human rights due diligence. As of March 2021, CBP had only issued a civil penalty against one company for imports produced with forced labor, in China or elsewhere.¹⁴ The Department of Homeland Security should also utilize laws such as the Trafficking Victims Protection Act to criminally prosecute individuals and corporations for their roles in the importation of goods linked for forced labor.

How should CBP identify goods from Xinjiang or from entities linked to forced labor?

CBP’s enforcement of the UFLPA depends on its ability to identify goods that were “mined, produced, or manufactured wholly or in part” in Xinjiang or were produced by listed entities. The ULFPA explicitly requires the FLETF to solicit input on measures “that can be taken to trace the origin of goods, offer greater supply chain transparency, and identify third country supply chain routes for goods mined, produced, or manufactured wholly or in part with forced labor” in China.¹⁵ Supply chain traceability and transparency is central to detect and respond to forced labor risks and should be a key pillar of the US government’s strategy to implement the UFLPA.

Protection, “Withhold Release Orders and Findings List,” undated, <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings>

¹⁴ United States Government Accountability Office, “CBP Should Improve Communication to Strengthen Trade Enforcement,” March 2021, <https://www.gao.gov/assets/gao-21-259.pdf>, p. 12. “CBP Collects \$575,000 from Pure Circle U.S.A. for Stevia Imports Made with Forced Labor,” CBP press release, August 13, 2020, <https://www.cbp.gov/newsroom/national-media-release/cbp-collects-575000-pure-circle-usa-stevia-imports-made-forced-labor>

¹⁵ ULFPA, section 2(b)(2).

Companies should map and disclose their own supply chains

The entities most capable of mapping and disclosing supply chains are the brands and retailers that are bringing goods into the US, or that are working with importers to do so. The FLETF should state clearly that the most effective mechanism for identifying Xinjiang-linked goods would be to require all brands and retailers importing into the US, including small and medium enterprises, to map out their global supply chains, from raw materials to manufacturers, and disclose them in a time-bound manner. The FLETF should consider whether imposing this requirement is possible using existing executive powers and, if not, should recommend new legislation requiring mandatory supply chain mapping and disclosure and comprehensive human rights due diligence.

The UFLPA already explicitly requires the FLETF to issue guidance to importers on due diligence, effective supply chain tracing, and supply chain management measures.¹⁶ The guidance should make clear that the onus is on importers to obtain and disclose relevant information on their supply chains, from the origin of raw materials to the processing, production, and manufacturer of the product imported into the United States. The guidance should also make clear that, where companies are importing products made of raw materials (for example, cotton) from different sources that are intermixed in the production process, the importers must determine the origin of all the different sources of the raw material.

The guidance should further state that importers should maintain supporting documentation to verify the supply chain, including a list of suppliers and sub-suppliers (names, addresses), a flow chart of the production process, and documentation evidencing and verifying the passage of the product through the supply chain. The risk that companies exploiting forced labor in Xinjiang or elsewhere in China seek to conceal their presence in global supply chains underscores the importance of companies providing credible and verifiable evidence of their supply chains and the different entities in it.

CBP should request and review importers' supply chain data to identify forced labor links

CBP's own efforts to identify products produced in whole or in part in Xinjiang or produced by listed entities should focus on high-risk sectors, including but not limited to the high-priority sectors (cotton, tomatoes, and polysilicon) identified in the UFLPA.¹⁷ High-priority sectors should be identified by reference to submissions from and consultations with nongovernmental organizations, including Uyghur and workers' rights groups, and academics with expertise on supply chains in Xinjiang and China more broadly.

For high-priority sectors, CBP should use tools like Risk Analysis and Survey Assessment (RASA) questionnaires to proactively seek detailed information from importers on their supply

¹⁶ UFLPA, section 2(d)(6).

¹⁷ UFLPA, section 2(b)(viii).

chains, to the raw material level, and to request certificates of origin and other evidence in support of that disclosure.¹⁸ CBP should also use RASAs or related tools to ask importers to describe how they address risks of forced labor in their supply chain and to provide evidence of their risk assessments and findings. Even prior to the passage of the UFLPA, CBP had used RASAs to request information from garment importers about potential links to cotton from China produced with forced labor. CBP should now expand its capacity to use RASAs and other tools to request and analyze supply chain data from importers, in both cotton supply chains and other high-priority sectors.¹⁹

The large number of importers of cotton-based goods and products in other high-priority sectors means that CBP will have to prioritize which importers should receive RASAs or other requests for information. This decision should be driven by CBP's analysis of the importers that are most at risk of links to Xinjiang or entities linked to forced labor. Where targeted importers fail to respond to questions about their supply chain, or where importers are not aware of their supply chain, CBP should view this as evidence that the products "reasonably but not conclusively" include material from Xinjiang or from listed entities and are subject to detention under the UFLPA. For cotton products, for example, the high percentage of cotton in China from Xinjiang (approximately 80 percent) means that importers of clothes from China or from countries known to source cotton, yarn, or apparel from China should be required to show CBP their entire supply chain to demonstrate that it includes only cotton farms and processors outside of Xinjiang.²⁰ Given the risk of mislabeling the origin of Chinese cotton to hide links to Xinjiang, CBP should also review closely the evidence that importers provide to verify their supply chain links and the origin of raw materials.

CBP should strengthen its ability to use technology to conduct supply chain tracing

In addition to reviewing information from importers, CBP should be equipped to analyze all other publicly disclosed information about supply chain links, including using website and social media scraping to collate brands and retailers' prior disclosures (in English, Chinese, and other key languages) regarding the origin of their products and materials. CBP should also strengthen its ability to analyze and trace global supply chains using supply chain databases and other technologies, including where appropriate by testing and deploying technologies such as DNA and isotopic testing. CBP should also continue to rely on the evidence of third parties, including workers' rights groups and nongovernmental organizations.

¹⁸ US Customs and Border Protection, "Audits, Risk Analysis and Survey Assessments and ISA Companies," <https://www.cbp.gov/trade/programs-administration/audits/quick-response-audits>

¹⁹ Bobbi Jo Shannon, Jason Waite, Chunlian Yang, "U.S. Customs Doesn't Cotton to XPCC's Use of Forced Labor," *JDSupra*, December 8, 2020, <https://www.jdsupra.com/legalnews/u-s-customs-doesn-t-cotton-to-xpcc-s-41123/>

²⁰ US government, Xinjiang Supply Chain Business Advisory, July 13, 2021, p. 26, https://home.treasury.gov/system/files/126/20210713_xinjiang_advisory_0.pdf

When should the presumption of forced labor be rebuttable?

The standard of “clear and convincing evidence”

The text of the UFLPA requires CBP to apply the presumption that Xinjiang-linked goods or those from listed entities cannot be imported unless CBP determines that the importer has shown by “clear and convincing evidence” that the goods were not mined, produced, or manufactured wholly or in part by forced labor.²¹ The “clear and convincing evidence” standard has previously been articulated in the 2017 Countering America’s Adversaries Through Sanctions Act (CAATSA), which creates a rebuttable presumption that goods, wares, merchandise, and articles mined, produced, or manufactured wholly or in part by North Korean nationals or North Korean citizens are forced-labor goods.²² The Department of Homeland Security guidance on CAATSA states that that, “clear and convincing evidence is a higher standard of proof than a preponderance of the evidence, and generally means that a claim or contention is highly probable.”²³ The evidentiary standard of “clear and convincing evidence” in the UFLPA should continue to be interpreted as being higher than the preponderance of evidence.

Goods with Xinjiang links cannot under current and foreseeable conditions meet the “clear and convincing” evidence standard

The risks to workers and auditors in Xinjiang make it impossible for companies to provide clear and convincing evidence that products made or sourced in Xinjiang are free from forced labor. The FLETF’s guidance should make clear that companies with operations, suppliers, or sub-suppliers in Xinjiang cannot under existing conditions demonstrate that their goods are free from forced labor and should instead relocate their facilities or supply chains. The guidance should also state that brands, retailers, industry organizations, and multistakeholder initiatives should stop conducting or commissioning social audits and certifications in Xinjiang regardless of the standard and methodology used. Neither importers nor CBP can rely on any social audit or certification report related to facilities or suppliers in Xinjiang.

There are significant obstacles to meaningful human rights due diligence outside of Xinjiang

Importers seeking to import goods produced by listed entities, but which are not in Xinjiang or sourcing from entities in Xinjiang, must still demonstrate by clear and convincing evidence that their goods are free from forced labor. Across China, however, there remain significant obstacles to consulting effectively with workers and nongovernmental organizations during audits or inspections. Risks to workers and auditors include government surveillance, arrest of labor

²¹ UFLPA, section 3(b)(1)(A)(B) and 3(b)(1)(2).

²² “Countering America’s Adversaries Through Sanctions Act FAQs,” US Department of Homeland Security news release, February 11, 2021, <https://www.dhs.gov/news/2021/02/11/countering-america-s-adversaries-through-sanctions-act-faqs>

²³ Ibid.

activists, and a prohibition on independent trade unions.²⁴ In 2021, the Chinese government also passed several anti-sanctions laws that could put companies with assets and personnel inside China at risk of sanction from Chinese regulators – or subject to civil liability – for taking actions to implement the ULFPA.²⁵ Obstacles to auditing in China, combined with the risk of mislabeling goods to hide Xinjiang links, also make it difficult to verify Chinese suppliers’ claims about the origin of the components and raw materials their products contain.

The FLETF should provide guidance on whether and how due diligence is possible in China (outside Xinjiang)

The FLETF should provide guidance to importers on how to assess risks of forced labor in China (outside Xinjiang), including the conditions that should be in place to ensure an audit or assessment of a facility can be conducted safely and credibly. The FLETF’s guidance should also address criticisms of standard audit methodologies and consider whether other forms of verification are possible.²⁶ The guidance should also address whether and how effective remediation is possible. Where the conditions are not in place for safe, credible, and effective investigation and remediation of allegations of forced labor, importers should disengage from the facility or supplier in question. The FLETF’s guidance should be developed in consultation with leading labor rights organizations, academics with expertise researching China, and auditing firms with expertise doing audits in mainland China.

²⁴ Human Rights Watch, *World Report 2022* (New York: Human Rights Watch, 2022) ,China chapter, <https://www.hrw.org/world-report/2022/country-chapters/china-and-tibet>; “China: Release Workers, Student Activists,” Human Rights Watch news release, December 3, 2018, <https://www.hrw.org/news/2018/12/03/china-release-workers-student-activists>; “China’s Labor Activists ‘Hold Fast to Freedom,’” Human Rights Watch news release, April 1, 2019, <https://www.hrw.org/news/2019/04/01/chinas-labor-activists-hold-fast-freedom>; <https://laoquan18.github.io/CHRD-Statement/>;

²⁵ “The New PRC Anti-Foreign Sanctions Law,” Akin Gump, <https://www.akingump.com/en/news-insights/the-new-prc-anti-foreign-sanctions-law.html>

²⁶ “Workers Sue Dyson on Allegations of Forced Labor in Malaysian Supplier,” Human Rights Watch news release, February 14, 2022, <https://www.hrw.org/news/2022/02/14/workers-sue-dyson-allegations-forced-labor-malaysian-supplier>