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US Authorities Increase Enforcement of Ban on Importing Goods Made with Forced Labor

Advisory

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US Customs and Border Protection (CBP) has taken three high-profile actions in recent months to prevent certain products from entering the United States from China's Xinjiang Uyghur Autonomous Region (XUAR). These actions, on October 1, 2019,¹ May 1, 2020,² and June 17, 2020³ were taken under a law prohibiting the import of goods made from forced labor. This Advisory provides background on this law, the manner in which it has been invoked in recent years with regard to the use of forced labor, and what companies can expect in the future.

Since 1930, a US law, Section 307 of the Tariff Act of 1930, 19 U.S.C. 1307 (Section 1307), has prohibited import into the United States of goods "mined, produced, or manufactured wholly or in part" by convict, forced, or indentured labor.⁴ The language of the prohibition is very broad. Approximately 24.9 million people around the world are currently subjected to forced labor, including millions of children.⁵ However, for the first 86 years of the law's existence, a "consumptive demand" exception in Section 1307 allowed goods into the United States, despite their production by forced labor, if the domestically produced supply of the goods was not sufficient to meet domestic demand for the goods.⁶

As a result of this exception, enforcement of the Section 1307 prohibition was very rare. This changed in February 2016, when President Obama signed the bipartisan Trade Facilitation and Trade Enforcement Act (TFTEA) that repealed the consumptive demand exception to the import ban. This amendment was motivated by significant attention to the importation and sale in the United States of forced labor-produced goods such as seafood, cocoa, and cotton.⁷ Since the legislative change in February 2016, CBP has taken 15 enforcement actions against imports due to forced labor concerns, as contrasted with just 39 actions against importers in the 86 years prior to the TFTEA.⁸

Increased enforcement of the forced labor law in the Trump Administration is consistent with the Administration's generally aggressive approach on trade issues and increased Congressional attention to the desirability of applying a forced labor ban to imports from certain countries. The Trump Administration has emphasized the general need to fight much more aggressively against "unfair" trade. In terms of forced labor in particular, President Trump signed the Countering America's Adversaries Through Sanctions Act (CAATSA) in August 2017, which created a rebuttable presumption that any goods produced or manufactured by North Korean citizens or nationals are produced through forced, indentured, or convict labor.⁹ The 116th Congress has also seen several bills that focus on addressing forced labor of ethnic Uyghurs and other Muslim minorities in XUAR.¹⁰

The recent press coverage related to forced labor and the Uyghur population,¹¹ the related bills in the US Congress, and enforcement actions by CBP on the Uyghur and other issues, likewise suggest that the United States government may invoke this law more frequently in the future to address a variety of forced labor issues around the world. Importers of goods into the United States are advised to be aware of this issue and take actions to mitigate the risk of forced labor products in their supply chains. The following discussion provides background on the law as it now stands, and can serve as an initial reference for companies importing goods that may be subject to forced labor concerns.

How does Section 1307 define "forced labor"?

Section 1307 addresses imports made with "convict labor or/and forced labor or/and indentured labor."¹² With respect to

"forced labor," Section 1307 provides:

"Forced labor", as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term "forced labor or/and indentured labor" includes forced or indentured child labor.¹³

These phrases are not further defined in the statute. However, the US government's selection of targets for enforcement and public statements about designations provide useful information on factors companies should consider in their risk assessments.

In addition, it is worth noting the international liaison activities undertaken by the US Department of Labor's Bureau of International Labor Affairs (ILAB). The ILAB represents the US government at the International Labor Organization (ILO),¹⁴ and participates actively in ILO initiatives. The ILO recently published what it believes to be key indicators of forced labor, including abuse of vulnerability, deception, restriction of movement, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, and debt bondage.¹⁵ The ILO's analysis and findings, while certainly not binding on ILAB or any other part of the US government, are helpful indicators of what may be considered forced labor.

How does CBP investigate and enforce the prohibition on importing goods made by forced labor?

The first step toward triggering an enforcement action under Section 1307 is a report by "any person" to a CBP officer that merchandise produced by forced labor is being imported, or is likely to be imported, into the United States.¹⁶ If the CBP officer believes the report may be true, the officer must submit a report to the CBP Commissioner providing details on the possible violation of law.¹⁷ The Commissioner next investigates the report, considering information provided by "foreign interests, importers, domestic producers, or other interested persons."¹⁸ If the Commissioner believes there is sufficient evidence of forced labor, he or she will decide how to proceed, which will depend on how compelling the evidence appears to be. CBP may issue a detention order (also known as a "withhold release" order) if the "information available reasonably but not conclusively indicates that merchandise" to be imported has been produced with forced labor.¹⁹ Alternatively, CBP may issue an official finding of cause, which would be published in the Customs Bulletin and the Federal Register, if the investigation finds probable cause that a class of merchandise is produced with the use of forced labor.²⁰

An importer can challenge a CBP finding of cause by invoking CBP's administrative process. This requires appealing to higher authorities in CBP within 30 days of the ruling, detailing the nature of and justification for the objection. To challenge a CBP detention order, an importer must establish by satisfactory evidence that the merchandise is not a product of forced labor by submitting a certificate of origin for the goods and a statement detailing the importer's efforts to ascertain the source and production processes used in the production of the merchandise.²¹ If the Commissioner finds the merchandise is admissible, the goods will be released. If this appeal is denied, the importer may appeal to the Court of International Trade within 30 days.

When and under what circumstances does CBP enforce the prohibition on importing goods made by forced labor?

In the 86 years between the Tariff Act of 1930 and the Trade Facilitation and Trade Enforcement Act of 2016, CBP issued only 39 "withhold release" orders or official findings of cause under Section 1307. The vast majority of the actions that were taken —26 orders and 6 findings—targeted goods imported from China; the only other countries whose imports were subject to CBP enforcement during this period were India, Japan, Mexico, Mongolia, and Nepal.²² From November 2000 through February 2016, CBP did not issue a single enforcement action. However, in the years following TFTEA's passage, CBP has issued fifteen detention orders from China and several other countries affecting the following products:

- Soda ash, calcium chloride, caustic soda, and viscose/ rayon fiber from China (March 29, 2016)²³
- Potassium products from China (March 29, 2016)²⁴
- Stevia from China (May 20, 2016)
- Peeled garlic from China (September 16, 2016)
- Toys from China (March 5, 2018)
- Cotton from Turkmenistan (May 18, 2018)

- Seafood from a fishing vessel Tunago No. 61 (February 4, 2019)²⁵
- Bone black from Brazil (September 30, 2019)
- All garments from a manufacturer in China (September 30, 2019)
- Gold from Democratic Republic of the Congo (September 30, 2019)²⁶
- Disposable rubber gloves from Malaysia (September 30, 2019)²⁷
- Artisanal rough cut diamonds from Zimbabwe (September 30, 2019)
- Tobacco products from Malawi (November 1, 2019)²⁸
- Hair products from China (May 1, 2020)
- Seafood from a fishing vessel Yu Long No. 2 (May 8, 2020)
- Hair products from China (June 17, 2020)

This geographic expansion and the uptick in enforcement actions highlight the potential going forward for broadened, active enforcement of the prohibition against forced labor goods. CBP's Trade Enforcement Task Force, formed after the passage of TFTEA, and CBP's increased international presence since 2016 both have contributed to increases in oversight and enforcement. In addition, the United States-Mexico-Canada Agreement Implementation Act instructs the President to establish a Forced Labor Enforcement Task Force to monitor the enforcement of the prohibition against importation of goods with a particular focus on Mexico.²⁹

After the significant media coverage of forced labor in XUAR, Congress is also beginning additional initiatives to tackle this issue. At the time of this advisory's publication, three bills have been introduced.³⁰ As one example, the Uyghur Forced Labor Prevention Act³¹ introduced by Senator Rubio creates a rebuttable presumption that goods produced in the XUAR should be subject to an import prohibition, similar to the rebuttable presumption for North Korean goods under the CAATSA.

While it is still too early to discern whether new measures will pass Congress or how the current Administration will prioritize the various tools already available to screen imports on this issue, the President's interest in taking a more assertive trade enforcement posture regarding US imports continues to be strong.³² Accordingly, importers should be prepared for continued scrutiny, with a distinct possibility that enforcement efforts will ratchet up further. We also note that state level initiatives could increase with the current attention to this issue.³³

What are the best resources for learning about US policy on forced labor?

The Bureau of International Labor Affairs (ILAB) at the US Department of Labor maintains a list, revised when needed, of goods and their source countries that raise concerns about forced or child labor.³⁴ The list is intended as a resource for companies in carrying out their risk assessments and due diligence on labor rights in their supply chains.

ILAB's current list contains 148 goods from 76 countries. The list is a helpful resource, as it details the areas of a country where the forced or child labor is concentrated, how widespread the problem is, the ages and other demographics of the victims, the hazards to which child laborers are exposed, the forms of forced labor, and other relevant information. Sugarcane, tobacco and cotton are the products most frequently listed in the agricultural sector; bricks are the products most frequently listed in the manufacturing sector; and gold is the product most frequently listed in the mining sector.³⁵

While CBP Section 1307 enforcement actions do not target entire product lines or industries in problematic countries or regions, its investigations utilize ILAB's reports that evaluate specific product imports from a given country. CBP also publishes on its website a list of all "withhold release" orders and findings, including those related to forced labor, which can serve as a guide for companies (although it would not reveal all pending areas of CBP interest). In addition, under the TFTEA, CBP must provide an annual report to the House Ways and Means Committee and the Senate Finance Committee.³⁶ The report must detail the number of forced labor-related enforcement actions in the year preceding the reporting period and describe all merchandise denied entry under Section 1307. Reviewing the goods and countries of origin denied entry in these reports can help importers anticipate which products and regions may be subject to future enforcement action.³⁷

The Commercial Customs Operations Advisory Committee (COAC) established under TFTEA to advise the Secretaries of the

Department of the Treasury and Department of Homeland Security on the commercial operations of CBP also is relevant here.³⁸ The COAC membership is comprised of government officials and individuals from the trade. The COAC established the Forced Labor Working Group on July 13, 2016, and recently made recommendations to establish best practices for the industry and to find ways to increase industry participation in the fight against forced labor.

What should importers do to ensure they are not importing forced labor goods subject to enforcement action?

Importers should be alert to the potential issue of forced labor in their supply chains. In addition to checking the US government information mentioned above, many companies review other publicly available information, including reports in the countries from which they import, comments by international organizations, press reports, and other data sources.³⁹ A company may draft and issue a policy against using forced labor in its supply chain and communicate that policy to any potential suppliers. The company may also perform a supply chain audit and conduct due diligence on outside parties, including subcontractors and suppliers. Many companies may ask suppliers to certify that there is no forced labor in their supply chain, and to issue their own policy statements on the subject. Company policies also include implementing a strong anti–forced labor compliance program, which could include training employees responsible for importing to spot, investigate, and handle potential reports of forced labor.⁴⁰ It is important for importers to document these and other efforts clearly, to ensure there is a clear record of the company's compliance in this area, and to help address inquiries by federal authorities, should any occur.

What lies ahead for enforcement of the prohibition on the import of goods made by forced labor?

A series of key recent events indicates we are likely to see continued and perhaps even more active enforcement of Section 1307 against US importers. Starting in 2016, US law closed a major exception in the law, so the way is now completely clear for the United States to block the import of goods made with forced labor, and to bring enforcement actions against importers that seek to bring in such goods. President Trump and his team have taken numerous assertive actions against imports during the past three years, hitting a range of US trading partners, with China as a frequent focus. CBP has increased its Section 1307 enforcement activities, and the annual reports CBP sends to Congress keep the law front of mind for the Hill and the Administration. Increased press coverage of issues like the Uyghur campaign in China increase the impetus for action, as demonstrated by recent legislative initiatives by members from both sides of the aisle. In short, importers will want to take note.

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¹ U.S. Customs and Border Protection, *CBP Issues Detention Orders against Companies Suspected of Using Forced Labor* (garments produced by Hetian Taida Apparel Co., Ltd.), October 1, 2019.

² U.S. Customs and Border Protection, *CBP Issues Detention Order on Hair Products Manufactured with Forced Labor in China* (hair products produced by Hetian Haolin Hair Accessories Co. Ltd.), May 1, 2020.

³ U.S. Customs and Border Protection, *CBP Issues Detention Order on Hair Products Manufactured with Forced Labor in China* (hair products produced by Lop County Meixin Hair Product Co. Ltd.), June 17, 2020.

⁴ 19 U.S.C. § 1307.

⁵ See International Labour Organization, *Forced Labor, Modern Slavery and Human Trafficking*.

⁶ See Trade Facilitation and Trade Enforcement Act, Pub. L. 14-125, 130 Stat. 122, sec. 910(a) (2016); *Fact Sheet: Q and A: Repeal of the Consumptive Demand Clause*, U.S. Customs and Border Protection.

⁷ See Ian Urbina, *U.S. Closing a Loophole on Products Tied to Slaves*, New York Times, Feb. 15, 2016.

⁸ U.S. Customs and Border Protection, *Forced Labor Withhold Release Orders and Findings*.

⁹ Department of Homeland Security, [CAATSA Title III Section 321\(b\) FAQs](#).

¹⁰ Uyghur Intervention and Global Humanitarian and Unified Response Act of 2019, S.178, 116th Cong. (2019); Uyghur Forced Labor Prevention Act, S. 3471, 116th Cong. (2020); and Uyghur Forced Labor Disclosure Act of 2020, H.R. 6270, 116th Cong. (2020).

¹¹ See Peter Whoriskey and Rachel Siegel, *Cocoa's Child Laborers*, Washington Post, June 5, 2019,; Eva Dou and Chao Deng, *Western Companies Get Tangled in China's Muslim Clampdown*, Wall Street Journal, May 16, 2019,; Australian Strategic Policy Institute, *Uyghurs For Sale*, March 1, 2020.

¹² See 19 U.S.C. § 1307.

¹³ See 19 U.S.C. § 1307.

¹⁴ See U.S. Department of Labor, [International Labor Organization](#).

¹⁵ See International Labour Organization, [ILO Indicators of Forced Labour](#); The International Labour Organization (ILO) is a United Nations agency dealing with labor problems, particularly international labor standards, social protection, and work opportunities.

¹⁶ See U.S. Customs and Border Protection, [Forced Labor](#).

¹⁷ 19 C.F.R. § 12.42(b) (2000).

¹⁸ 19 C.F.R. § 12.42(d) (2000).

¹⁹ 19 C.F.R. § 12.42(e) (2000).

²⁰ 19 C.F.R. § 12.42(f) (2000).

²¹ See U.S. Customs and Border Protection, [Forced Labor Enforcement, Withhold Release Orders, Findings, and Detention Procedures](#).

²² U.S. Customs and Border Protection, [Withhold Release Orders and Findings](#).

²³ Partially active, viscose and rayon fiber have been removed from the order on October 12, 2016. *Id.*

²⁴ Revoked by CBP on February 5, 2018. *Id.*

²⁵ Revoked by CBP on March 31, 2020. *Id.*

²⁶ Partially active, removed Artisanal Small Mines DRC gold imported by the Chambers Federations on May 28, 2020. *Id.*

²⁷ Revoked by CBP on March 24, 2020. *Id.*

²⁸ Partially active, removed tobacco and tobacco products containing tobacco produced in Malawi imported by Alliance One International from the order on June 3, 2020. *Id.*

²⁹ See "The EO on the Establishment of the Forced Labor Enforcement Task Force Under Section 741 of the United States-Mexico-Canada Agreement Implementation Act," the White House, May 15, 2020.

³⁰ Uyghur Intervention and Global Humanitarian and Unified Response Act of 2019, S.178, 116th Cong. (2019); Uyghur Forced Labor Prevention Act, S. 3471, 116th Cong. (2020); and Uyghur Forced Labor Disclosure Act of 2020, H.R. 6270, 116th Cong. (2020).

³¹ Uyghur Forced Labor Prevention Act, S. 3471, 116th Cong. (2020).

³² The consistency of the US statute with international law rules is a complex issue, but the adverse politics surrounding any challenge to this rule make a dispute seem unlikely. The International Labor Organization convention, as well as a number of UN conventions, oppose the use of forced labor. The World Trade Organization rules directly authorize the prohibition of goods related to prison labor, and also allow countries leeway to take actions that protect public morals and

human health.

³³ California already has the California Transparency in Supply Chains Act, effective January 1, 2012, which requires many large companies to disclose the efforts being made to eradicate slavery and human trafficking in their supply chains. See [The California Transparency in Supply Chains Act: A Resource Guide \(2015\)](#).

³⁴ U.S. Department of Labor, [List of Goods Produced by Child Labor or Forced Labor](#).

³⁵ U.S. Department of Labor, [The List in Numbers](#).

³⁶ See Trade Facilitation and Trade Enforcement Act, Pub. L. 14-125, 130 Stat. 122, sec. 910(b) (2016).

³⁷ It is also worth noting that federal contracting rules have strengthened the obligation to ensure no purchase of goods or services produced with forced labor. A final rule amending the Federal Acquisition Regulation imposes significant responsibility on government contractors to avoid forced labor in their supply chains. Contractors must ensure that they and their subcontractors do not use forced labor in the solicitation or performance of a contract. Large contractors must develop and maintain a compliance program, and provide annual certifications of their efforts. See Kristen E. Ittig, Samuel M. Witten & Elizabeth T.M. Fitzpatrick, [The New Anti-Trafficking Rules and What They Mean for Government Contractors and Subcontractors](#), Arnold & Porter Advisory.

³⁸ U.S. Customs and Border Protection, [Commercial Customs Operations Advisory Committee \(COAC\)](#).

³⁹ See, e.g., Fair Labor Association, [Workplace Monitoring Reports](#).

⁴⁰ See, e.g., American Apparel & Footwear Association, [Learning Center](#).