

**Commercial Customs Operations Advisory
Committee (COAC)
Intelligent Enforcement Subcommittee**

**Forced Labor Working Group White
Paper**

June 29, 2022

COAC

COMMERCIAL CUSTOMS OPERATIONS
ADVISORY COMMITTEE

COAC Forced Labor Working Group (FLWG)

At the outset, we reiterate our emphatic support for the prevention, identification, and eradication of forced labor globally. We also recognize and applaud the bipartisan commitment of the U.S. Congress to ensure effective implementation of Uyghur Forced Labor Protection Act (UFLPA), and we share in UFLPA's overall goal to achieve effective and efficient enforcement of Section 307 of the Trade Act of 1930, including the rebuttable presumption under UFLPA and Countering America's Adversaries Through Sanctions Act (CAATSA¹). Members of the Trade, in UFLPA FRN submissions and during the Forced Labor Enforcement Task Force hearing, requested an aligned approach for forced labor under Section 307, including for the rebuttable presumptions in UFLPA and CAATSA. This approach should be centered on transparency from CBP, and early engagement with importers, to enable advancement of information and evidence early in the process by importers to clear shipments.

The COAC FLWG is advocating for an enhanced partnership with CBP to eradicate forced labor in the supply chain to ensure the voice of Trade is fully represented. A true partnership involves listening to all viewpoints and taking into consideration challenges, concerns, and suggestions for an effective approach.

Communication is a hallmark of the UFLPA's requirements, as demonstrated by its public comment and public hearing elements, the creation of an inter-agency collaborative Forced Labor Enforcement Task Force (FLETf), the continued engagement of the COAC Forced Labor Working Group, broader CBP engagement with members of the Trade, and the FLETf's forthcoming entities lists, that we hope will help importers and all parties identify and take action towards perpetrators of forced labor.

The Trade is accustomed to working in partnership with CBP, including difficult situations, to find workable solutions to the problem at hand. COAC and the members of the Trade have been committed to working in partnership on the issue of forced labor, Section 307 including the rebuttable presumptions. Clarity from CBP to U.S. importers is needed, as is cooperation, if we are to achieve our shared aims of eradicating forced labor. Since passage, signature into law, and implementation of the Trade Facilitation and Trade Enforcement Act, COAC has submitted concrete recommendations to CBP on a broad range of topics related to forced labor, and importers did so again during the recent UFLPA implementation public comment process. While CBP's

¹ "In August 2017, Congress enacted the Countering America's Adversaries Through Sanctions Act (CAATSA), which, among other things, created a rebuttable presumption that significant goods, wares, merchandise, and articles mined, produced, or manufactured wholly or in part by North Korean nationals or citizens are the products of forced labor and therefore prohibited from importation under Section 307."

Importer Guidance provides general information, it disappointingly does not reflect incorporation of the many practical recommendations that have been submitted over the years.²

CBP must increase transparency, engagement, and communication, early and often, with the Trade community regarding the current process for enforcement as well as the detention or release of goods believed to be linked to forced labor.

Without greater engagement, visibility, transparency, and specificity on the UFLPA importer guidance, the very concept of partnership that CBP has historically maintained with the importing community is hindered. Without CBP adding the needed specificity and other considerations that the FLWG highlights in the recommendations that are presented in this document, the UFLPA Importer Guidance would fail to effectively leverage businesses' capacity to deter the offending behavior, as well as, long held and internationally accepted principles related to transparency, stakeholder engagement and remedy.

The COAC Forced Labor Working Group developed the following summary of challenges and recommendations related to the CBP UFLPA Operational Guidance for Importers. These challenges and recommendations are consistent with prior COAC FLWG recommendations, COAC public comments, and UFLPA implementation public comments received.

Training and communication

Training and communication are key to the success of the implementation of UFLPA and the eradication of forced labor. CBP must prioritize proactive, transparent, and ongoing education for the Trade. Additionally, CBP must also develop bi-directional training within the agency to ensure consistency in effective communication, enforcement, and outreach across ports of entry and Centers of Excellence. The content to be addressed must include the following:

- Clear regulatory requirements and related publications to promote compliance;
- clear enforcement and engagement expectations of CBP personnel and Trade for goods suspected of violating UFLPA;
- well defined rebuttable presumption process (proof of admissibility) including examples of clear and convincing evidence and mapping expectations for importers to model;
- well defined detention and exception process for importers to have clear understanding of the requirements and expectations for an effective response; and
- ensure that CBP personnel have a strong working knowledge of supply chain processes to temper expectations and lead to a more productive dialogue when a shipment is questioned or detained.

1. COAC recommends CBP prioritize proactive, transparent, and ongoing education for the Trade and develop bi-directional training within the agency to ensure consistency in effective

² Report of the FLWG for COAC 15th period links previous recommendations and white papers submitted to CBP.

communication, enforcement, and outreach across ports of entry and Centers of Excellence related to implementation of UFLPA and the eradication of forced labor.

2. COAC recommends CBP develop and publish a robust Informed Compliance Publication covering all aspects tied to CBP and forced labor enforcement under 19 U.S.C. § 1307, including The Uyghur Forced Labor Prevention Act (UFLPA) and The Countering America's Adversaries Through Sanctions Act (CAASTA) rebuttable presumptions, providing necessary and specific guidance to members of the Trade regarding their reasonable care obligations and the differing evidentiary standards.

CBP must ensure an Informed Compliance Publication (ICP) on Forced Labor enforcement is developed and published as previously recommended April 27th, 2016, by the COAC FLWG³. There needs to be a robust Informed Compliance Publication covering all aspects tied to CBP and forced labor enforcement under 19 U.S.C. § 1307, including the UFLPA and The Countering America's Adversaries Through Sanctions Act (CAASTA) rebuttable presumptions, providing necessary and specific guidance to members of the Trade regarding their reasonable care obligations and the differing evidentiary standards. The existing ICP for reasonable care, which includes a series of questions for importers to consider, does not provide clear guidance to members of the Trade. In addition, there have been requests to create greater visibility and linking on WRO and Findings website, and all references in any guidance document must be hyperlinked for ease of access. CBP should also design and implement a Frequently Asked Questions publication specific to UFLPA and ensure that it is closely monitored and updated frequently to address the enforcement trends and concerns from the Trade.

Partnership and collaboration

Partnership and collaboration between the Trade and CBP is crucial to effectively eliminate forced labor in the supply chain, not only for UFLPA, but overall. It is the common goal of both Trade and CBP to eliminate forced labor from the supply chain. CTPAT is a partnership between Trade and CBP for mitigating and eliminating supply chain risk, and members must receive benefits through partnership as a result of the additional diligence members conduct. CBP must provide a method with a transparent and documented path for importers to be deemed low risk with respect to forced labor concerns.

³ Recommendation 10121 TERC Subcommittee April 27, 2016 "COAC recommends CBP work with key stakeholders to develop and publish an Informed Compliance Publication (ICP) on Forced Labor. The Forced Labor ICP should include a detailed process for stakeholders to understand how the current forced labor process works from CBP's perspective. In order for the trade industry to become strategic leaders in the field, the ICP should also include resources and guidance from CBP and other PGAs for industry to follow."

3. In addition to CBP's intention to prioritize CTPAT Trade Compliance members, COAC recommends a proactive and collaborative approach for CTPAT members to ensure proper notification and engagement, including:
 - 1) Communicating suspected forced labor concerns and/or risks with CTPAT members before goods depart origin to reduce and avoid detentions, seizures, and unnecessary costs;
 - 2) Providing information on suspected bad actors to CTPAT members as soon as information becomes available to CBP to aid in Trade member's ability to avoid entering contractual arrangements and purchase orders; and
 - 3) Provide advanced advisory opinions and rulings related to CTPAT member supply chains to facilitate fully-vetted supply chains, minimizing port disruptions and congestion, while delivering increased predictability in cross border execution.

Definition of Clear and Convincing Evidence used through the UFLPA Operational Guidance for Importers

The following term is used throughout the CBP UFLPA Operational Guidance for Importers:

- "Clear and Convincing Evidence"
4. COAC recommends CBP clearly define these this term relative to the CBP UFLPA Operational Guidance for Importers and where possible, CBP should provide clear and detailed examples for the Trade. If the definition relies upon another section of law, please provide that reference. Alternatively provide specific language for importers to use as guidance.

Clear and Convincing Evidence, Documentary Evidence, Type and Nature of Evidence

The UFLPA Operational Guidance for Importers covers a broad range of '*Documentary Evidence to allow importers to understand the type of information that CBP will require if their merchandise is subject to the UFLPA.*' There have been calls from Trade to define the use of each of these documents. None of the resources and documents identified in the CBP UFLPA Operational Guidance for Importers would themselves reflect the presence of forced labor or absence thereof. These documents identify WHAT has been ordered, WHO is in the supply chain, and the movement of products and materials from one entity to the other. However, none of the identified documents would reflect whether forced labor is present or not. CBP should clearly explain in the guidance how it believes such documents would 'clearly rebut' the presumption of forced labor from UFLPA.

5. The list of documents provided in Section IV "Type and Nature of Information that May Be Required by CBP" as readily available for all imports and all the inputs of the imports is an unrealistic expectation if CBP intends to use §1499 as the UFLPA enforcement mechanism.

COAC recommends that CBP clarifies in the CBP UFLPA Operational Guidance for Importers the following:

- 1) It is unclear if all documents must be provided at the time of detention. If not, which documents from each category? Are all documents required or is a subset of documents, some from each category adequate?
- 2) It is unclear if the expectation of CBP is for importers to maintain all the documents listed readily available for all imports and all the inputs of the imports. This is an unrealistic expectation, especially if CBP intends to use §1499 as the UFLPA enforcement mechanism.
- 3) What is the purpose of each of the documents included in the list (how does the said document provide ‘clear and convincing’ evidentiary support to rebut the forced labor presumption? CBP should indicate how each of the identified documents demonstrates the absence of forced labor in the supply chain.
- 4) Does a lesser submission (e.g., certain documents vs. others) result in different treatment?

As highlighted earlier, the guidance to importers for documents that CBP would need in the event their shipment is subject to UFLPA is mainly focused on traceability to prove that an importer did not import goods from an entity suspected of forced labor. There is no guidance related to providing evidence that could be used to disprove that an entity has utilized forced labor: i.e., Social Compliance (SC) Audits, etc. Noting that CBP’s initial guidance suggests importers use tools such as ComplyChain or the Responsible Sourcing Tool, which identifies social compliance audits as one form of due diligence.

6. COAC recommends that CBP accept ‘social compliance audits’ which are maintained in the ordinary course of business, as part of the fair clear evidence for demonstrating the absence of Forced Labor for a specific shipment detained under UFLPA.

Allowing importers to include social compliance audits, in addition to other documents that are in the ordinary course of business, is even more important in instances where the importer needs to rebut the presumption related to ‘inputs’ in a product that is not directly shipped or manufactured in whole at the Xinjiang region.

Enforcement Process

As part of the CBP UFLPA Operational Guidance for Importers, CBP should outline with specificity the exam, detention, release, and seizure processes applicable in a UFLPA review. For instance, it is important that the Trade community understands what are the ‘sources’ that are going to be used for targeting imports. It would be helpful as well that CBP includes what is going to be the measurement on fidelity and credibility for the sources used.

7. COAC recommends CBP to reconsider the use of 19 U.S.C. § 1499 as an applicable detention process, instead of applying Section 307 as the UFLPA enforcement mechanism.

CBP should reconsider the impact of using 19 U.S.C. § 1499 as the UFLPA enforcement mechanism. Utilizing 19 U.S.C. § 1499 effectively reduces the number of days an importer has to present rebuttal evidence demonstrating the absence of forced labor in its supply chain. Under 19 U.S.C. § 1307, when goods are detained pursuant to a Withhold Release Order (WRO), under 19 C.F.R. § 12.43 an importer has three months from the date of importation to present certificate/rebuttal evidence demonstrating the admissibility of their goods. Under 19 U.S.C. § 1499, an importer will only have 30 days. Like a traditional WRO, the UFLPA is premised upon 19 U.S.C. § 1307. As a result, the detention period should likewise be administered under 19 C.F.R. § 12.43, and an importer addressing allegations of forced labor in its supply chain should be given the full three-month period to respond. The amount of information that may be needed to rebut an alleged violation of UFLPA is significant. Neither importers nor CBP should be hindered in their review of these matters by an unrealistically short deadline, when even the established three-month period under 19 C.F.R. § 12.43 has at times proved insufficient.

Furthermore, the use of 19 U.S.C. § 1499 introduces a parallel but distinct CBP detention process that applies different enforcement standards and timeframes on top of the existing and documented challenges characterizing the 19 U.S.C. § 1307 process. The application of the rebuttable presumption should be coordinated under a singular approach aligned under 19 U.S.C. § 1307 enforcement.

Detention Process

CBP should provide details in the UFLPA Operational Guidance for Importers on how the detention under UFLPA presumption will be administered. Efforts must be taken to not put in place a process which will lead to further supply chain delays and port congestion.

8. COAC recommends to CBP that at the time of detention, as a general premise, CBP should make clear that goods are being detained due to forced labor. CBP should inform the importer with specific information regarding what aspect of the transaction is being questioned, so that specific rebuttal evidence can be provided, if applicable. This is important where the shipment was not produced in or shipped from the Xinjiang region. Otherwise, Importers will not know where/how/what evidence they must rebut. This is also in keeping with recommendations made to CBP regarding the current WRO process as well as in written comments and during the April 8 hearing, including, for example:
 - 1) CBP should provide direct communication to the importer regarding the type of forced labor identified and where (at what stage of the SC, etc.), so the importer has clear information on what is to be rebutted, in addition to the parameters.
 - 2) CBP needs to be specific in its detention notice regarding the product in the shipment that is subject to the detention and the problematic entity identified or other circumstances that triggered the detention. This will ensure that importers have the needed information to provide documentation demonstrating by clear and convincing evidence that the product

was not made in whole or in part with forced labor. This may also provide the importer with insight regarding whether a supplier may be connected with the use of forced labor, in addition to reducing response time and making CBP's timeline expectations manageable.

- 3) CBP should not apply any adverse inferences to an importer's decision to export merchandise subject to a detention. We remind CBP that there may be very valid business reasons for choosing export that do not imply that forced labor was found or used in the production of that product.

Exception and Release Process

It is COAC's view that the "exception" provision – which requires a report to Congress and public disclosure – does not apply if an importer demonstrates by clear and convincing evidence that the product was not made in whole or in part in Xinjiang or by an entity described in the legislation. In such circumstances, the rebuttable presumption would not apply.

9. COAC recommends regarding the exception and release process:
 - 1) CBP should include in the guidance what will be the release mechanism when CBP detains a shipment for UFLPA in error since this will not be a granted exception to UFLPA and should not have a report to Congress and public disclosure.
 - 2) COAC recommends that CBP should clarify in the guidance document what treatment the Trade should expect for future shipments identical to one initially detained under UFLPA (e.g., timeframe, same exporter, importer, product, and circumstances). Mechanisms must be put in place to ensure consistent communication and treatment between ports/CEEs for the importer.

Foreign Trade Zone

Foreign Trade Zone (FTZ) operators provide significantly different information to CBP in advance of the goods entering into the FTZ. This impacts CBP's ability to make informed decisions on whether the goods are subject to the UFLPA or not and poses significant challenges to both the Trade and CBP if the goods are deemed subject to UFLPA after admission. The CBP UFLPA Operational Guidance for Importers does not address standard Foreign Trade Zone activity such as admissions and withdrawals with respect to UFLPA, the lack of advance data elements on a CBP form 214 to make informed detention decisions, and whether importers have the ability to use a FTZ if a detention order is issued under UFLPA.

10. COAC recommends CBP develop and provide specific guidance to importers for the following:
 - 1) The identification and handling of goods subject to UFLPA; however, were entered into a FTZ on a properly submitted CBP form 214.
 - 2) Detailed instructions for importers on how to enter goods into a FTZ for goods detained subject to UFLPA pending release through an exclusion being granted, the rebuttal of the

presumption, or for export, and the establishment of mechanisms to prevent detained goods from being released through the weekly entry process.

- 3) We believe a change to the data elements on the CBP form 214 is required to enforce UFLPA in the FTZ environment. We strongly recommend CBP work together with the Trade to identify the data element needs, the process to obtain those data elements, and the required reporting changes needed to effectively submit the data for effective enforcement.

Movement In-Bond of detained cargo

11. COAC recommends that CBP adopt a policy that allows importers to transport, in-bond as necessary, to store detained or seized cargo, allegedly produced with forced labor, in a bonded facility (e.g., bonded warehouse or foreign Trade zone) within or external to the initial port of import/entry in order to avoid or minimize unnecessary congestion as well as to provide relief from premium carrier and terminal detention or demurrage charges.

Importer Certification

12. COAC recommends that CBP not implement a certification requirement as a part of UFLPA enforcement. Importers already certify at the time of entry that the goods are eligible for entry under the presumption of reasonable care. An additional certification is a burden to the Trade and to CBP and is an unnecessary duplication.

Technology and Tools

13. COAC recommends that CBP should continue to research in collaboration with the Trade new and emerging technology options that could be beneficial for this risk area, including possible pilot programs that would have varied applications or a large percentage of stakeholders. One size doesn't fit all with technology, and not all importers can support new or existing technologies. Commodity and sectors vary requiring different levels of technology, flexibility, capabilities.