

How Reports Of Forced Labor In China May Affect US Imports

By **Sydney Mintzer and Timothy Lee** (March 25, 2020, 5:29 PM EDT)

On March 7, media reports surfaced that a factory in Nanchang, China, which produces components for electronics products sold by global technology companies, is allegedly using forced labor.[1] These reports threaten to further increase U.S. Customs and Border Protection's scrutiny of articles imported into the U.S. that are thought to be produced using forced labor.

CBP need only have a reasonable suspicion that articles imported into the U.S. are produced in part by forced labor to justify issuing a withhold release order, or WRO, which prevents the admission of suspect articles into the U.S. until an investigation can be completed.

These media reports have also caught the attention of U.S. lawmakers, some of whom are seeking to pass legislation that would require companies that are considered issuers under U.S. securities laws to review their supply chains and disclose whether their products are made with forced labor in China.[2]

This article provides an overview of the current law, discusses recent cases, the pending legislation and the implications for businesses with global supply chains.

Legal Background and Procedure

U.S. law has long prohibited the importation of merchandise produced using forced labor. This reaches back 90 years, when the Tariff Act of 1930 was passed and Section 307 prohibited the importation of merchandise mined, produced or manufactured, wholly or in part, in any foreign country by convict labor, or forced or indentured labor — including forced child labor.[3]

Although this law has been on the books for decades, an exemption previously available to importers mitigated its impact by allowing for the importation of merchandise produced with forced labor if consumption of the merchandise in the U.S. exceeded the domestic production capacity. However, on Feb. 24, 2016, President Barack Obama signed into law the Trade Facilitation and Trade Enforcement Act of 2015, which amended the Tariff Act by eliminating the exemption. The Trade Facilitation and Trade Enforcement Act grants CBP wider latitude to pursue enforcement, and CBP has done just that.

Under the implementing regulations, any person who has reason to know that merchandise is being, or



Sydney Mintzer



Timothy Lee

is likely to be, imported into the U.S. and is produced using forced labor can submit that information to the CBP commissioner.[4] Based on the information provided, the commissioner will conduct an investigation and evaluate whether there is a reasonable suspicion to issue a WRO or to conclusively determine that the merchandise is prohibited under Title 19, Section 1307 of the U.S. Code. If the commissioner issues a WRO, CBP will prevent admission of all merchandise within the scope of the WRO.

If the commissioner is provided with information sufficient to make a conclusive determination that the goods in question are subject to the provisions of 19 U.S.C. Section 1307, the commissioner will publish a formal finding to that effect in the Customs Bulletin and in the Federal Register.

Violations of 19 U.S.C. Section 1307 can result in civil penalties and the merchandise will be subject to seizure and forfeiture absent a successful protest by the importer. Importantly, there is no de minimis provision under the law that would authorize the importation of items with only trivial amounts of merchandise made with forced labor.

Recent Enforcement Actions

Since the enactment of the Trade Facilitation and Trade Enforcement Act in 2016, CBP has issued 11 active WROs.[5] For example, based on information that the vessel's tuna had been harvested with the use of forced labor, on Feb. 4, 2019, CBP issued a WRO against tuna and tuna products from the fishing vessel Tunago No. 61.[6]

Other recent cases include all garments produced by Hetian Taida Apparel Co. Ltd. in China and disposable rubber gloves produced in Malaysia by WRP Asia Pacific Sdn Bhd, both of which are subject to WROs issued by CBP on Sept. 30, 2019.[7]

Moreover, although CBP generally does not issue WROs that target entire product lines or industries, on Nov. 1, 2019, it issued a WRO on all tobacco produced in Malawi and all products containing tobacco produced in Malawi.[8]

In addition to CBP's civil enforcement actions, U.S. Immigration and Customs Enforcement's Homeland Security Investigations can pursue criminal investigations against individuals or companies for the importation of merchandise produced with forced labor.

In 2018, ICE initiated 217 domestic and international cases on forced labor and seized approximately \$1.45 million in goods domestically and internationally.[9] Homeland Security Investigations also made 560 criminal arrests both domestically and globally, which resulted in 88 indictments and 92 convictions.[10]

Pending Legislation Regarding Forced Labor in China

On March 12, Rep. Jennifer Wexton, D-Va., introduced a bill in the U.S. House of Representatives that seeks to increase transparency into how companies are directly or indirectly using forced labor in China to produce their products. The bill, which is titled the Uyghur Forced Labor Disclosure Act of 2020, or UFLDA, was drafted in response to the reports on the use of forced labor in China, particularly by a handful of well-known global brands.[11]

If passed, the bill would amend Section 3 of the Securities Exchange Act to require the U.S. Securities and

Exchange Commission to implement rules requiring issuers to submit an annual report or proxy statement that discloses whether the issuer or any of its affiliates directly or indirectly engaged with an entity or its affiliate to import (1) manufactured goods, including electronics, food products, textiles, shoes and teas that originated in the Xinjiang Uighur Autonomous Region, or XUAR; or (2) manufactured goods containing materials that originated in the XUAR.

Moreover, the issuer would have to disclose whether such manufactured goods or materials originated in forced labor camps, which are defined as, in relevant part, any entity using convict labor, forced labor or indentured labor described under Section 307 of the Tariff Act or any other entity the SEC determines is appropriate.

The issuer would also have to provide the following information: (1) the nature and extent of the commercial activity related to such goods or materials; (2) the gross revenue and net profits, if any, attributable to the goods or materials; and (3) whether the issuer or its affiliate intends to continue with the importation of such goods or materials.

The bill requires the SEC to make all disclosures public on its website, and to conduct an annual assessment on the compliance of issuers with the disclosure obligation, which must be submitted to Congress in a report.

Should the bill become law, it would require issuers to conduct an audit of their supply chains in order to meet their disclosure obligations. Because the disclosures would be made public, it would also shine the spot light on companies that are directly or indirectly using forced labor from the XUAR, which would likely lead to public criticism and damage to their brand.

Moreover, the bill would provide an additional basis for CBP to initiate an investigation under 19 U.S.C. Section 1307, which could lead to the issuance of a WRO or the prohibition on the importation of the relevant goods or materials into the U.S.

Similar companion bills were introduced in the House of Representatives and the Senate on March 11 and 12 by Rep. Jim McGovern, D-Mass., and Sen. Marco Rubio, R-Fla. The bills, entitled the Uyghur Forced Labor Prevention Act, or UFLPA,^[12] also highlight the heightened scrutiny that U.S. lawmakers are placing on the issue of forced labor.

If enacted into law, the UFLPA would require the president to submit a determination within 60 days on whether there are grounds to issue WROs under Section 307 of the Tariff Act with respect to six Chinese technology, textile and food companies that are explicitly named in the bills.

Other notable provisions of the bill would:

- Require the secretary of the U.S. Department of State to provide a list to Congress of products made using forced labor in the XUAR and a list of businesses that sold such products in the U.S.;
- Require the president to impose sanctions on foreign persons determined to knowingly engage, be responsible for or facilitate the forced labor of Uyghurs, Kazakhs, Kyrgyz and members of other Muslim minority groups in the XUAR, or knowingly engage in, contribute to, assist or support the importation of goods into the U.S. produced with forced labor from the XUAR;

- Create a rebuttable presumption that significant goods manufactured in whole or in part in the XUAR are made with forced labor and thus prohibited from entry into the U.S. under Section 307 of the Tariff Act;
- Require issuers to make the following disclosures to the SEC:
 - Whether the issuer knowingly engaged in activity with an entity or the affiliate of an entity “engaged in creating or providing technology or other assistance to create mass population surveillance systems” in the XUAR, including any entity included on the U.S. Department of Commerce’s Bureau of Industry and Security’s entity list;
 - Whether the issuer knowingly, directly or indirectly, “purchased or otherwise acquired significant types or amounts of textiles made from material produced or manufactured” in the XUAR;
 - Whether the issuer knowingly engaged in an activity with an entity or an affiliate of an entity identified as a proposed or actual subject of a WRO issued by CBP;
 - Whether the issuer knowingly conducted any transaction or had dealings with certain persons and entities subject to sanctions under the UFLPA, the Global Magnitsky Human Rights Accountability Act, or was responsible for, or complicit in, committing atrocities in the XUAR.

Implications and Takeaways

The heightened scrutiny in this area has significant implications for businesses with global supply chains. Importers typically do not know that CBP is investigating a forced labor allegation until it issues a WRO. Companies caught flat-footed once a WRO is issued can be hamstrung for months before CBP completes its investigation. Providing the proof necessary to convince CBP that a company’s products are not made using forced labor or materials made using forced labor can be a painstaking process.

Specifically, in order to obtain release of shipments subject to a WRO, the importer must within three months of the importation submit a certificate of origin and a statement showing in detail that every reasonable effort was made “to determine the source of the merchandise and every component thereof and to ascertain the character of labor used in the production of the merchandise and each of its components.”[13]

Depending on the outcome of this submission, CBP will then either release or reject entry of the goods subject to the WRO. The effort that goes into providing the detailed report to CBP within three months can require significant logistical coordination that can be hampered by the complexity of a company’s supply chain and the country where the goods or materials are produced.

For example, providing the details necessary to convince CBP that a company’s goods were not manufactured in the XUAR using forced labor may be complicated by the need to obtain the proper authorization to collect the necessary information. Companies would be wise to conduct a thorough due diligence of their supply chains, particularly when those supply chains involve countries with a history of using forced labor.

Being prepared prior to the issuance of a WRO will make it much easier to engage CBP after the fact with evidence exonerating particular suppliers. That is especially true where CBP issues a broad WRO that covers an entire product, industry or state/province. Being prepared would also help companies to get out in front of, or even altogether avoid, the disclosure requirements that would be imposed under the UFLDA or the UFLPA should they, or something similar, become law.

Sydney H. Mintzer is a partner and Timothy C. Lee is an associate at Mayer Brown LLP.

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[1] “Gadgets for tech giants made with coerced Uighur labor,” AP News, March 5, 2020.

[2] Rep. Jennifer Wexton, Press Releases, Wexton Introduces Legislation Requiring Disclosure of Imports Tied to Uyghur Forced Labor, available at <https://wexton.house.gov/news/documentsingle.aspx?DocumentID=184>.

[3] 19 U.S.C. Section 1307.

[4] 19 C.F.R. Section 12.42.

[5] See generally CBP's Withhold Release Orders and Findings page, available at <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings>.

[6] CBP, National Media Release, CBP Issues Detention Order on Tuna Harvested by Forced Labor Aboard the Tunago No. 61, available at <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-tuna-harvested-forced-labor-aboard-tunago#wcm-survey-target-id>.

[7] CBP, National Media Release, CBP Issues Detention Orders against Companies Suspected of Using Forced Labor, available at <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-orders-against-companies-suspected-using-forced>.

[8] CBP, National Media Release, CBP Issues Withhold Release Order on Tobacco from Malawi, available at <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-tobacco-malawi>.

[9] ICE, Forced Labor and Forced Child Labor Fiscal Year 2018 Report to Congress, available at https://www.dhs.gov/sites/default/files/publications/ice_-_forced_labor_and_forced_child_labor.pdf.

[10] Id.

[11] A draft of the bill is available at https://wexton.house.gov/uploadedfiles/uyghur_forced_labor_disclosure_act_wexton.pdf.

[12] A draft of the bill is available at https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/MCGOVE_039_xml%20as%20introduced..pdf.

[13] 19 C.F.R. Section 12.43(b).