

MAYER | BROWN

US-China Trade

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Editor's Note

As global economic and geopolitical environments enter a new era, companies need to continuously develop and adjust their coherent global business strategies to secure and further expand business opportunities in all markets while minimizing political and legal risks by ensuring compliance. To assist you with that task, Mayer Brown's US-China Trade Monthly provides news and insights related to the latest US developments impacting the US-China bilateral trade relationship. In this inaugural issue, we will discuss: (1) recent US legislation that will generally prohibit any goods with a tie to Xinjiang from being imported into the United States in the near future; (2) the status of US Congress' ongoing efforts to pass a comprehensive China bill; and (3) a proposed revocation of the de minimis threshold in US customs rules with respect to Chinese imports. With the fluidity of current and pending US and other countries' sanctions related to the Russia-Ukraine crisis, we will hold off covering any impacts around US-China trade until we have a clearer picture of the full extent of the global sanctions.

Comment Period Opens on Uyghur Forced Labor Prevention Act

On January 24, 2022, the U.S. Department of Homeland Security, on behalf of the Forced Labor Enforcement Task Force (FLETF), [opened the comment period for the Uyghur Forced Labor Prevention Act](#) (UFLPA). The comment period allows interested stakeholders to submit recommendations on how to best implement regulations that will enforce the UFLPA. The comment period will close March 10.

BACKGROUND

The UFLPA, signed into law on December 23, 2021, creates a rebuttable presumption that goods "mined, produced, or manufactured wholly or in part" in the Xinjiang Uyghur Autonomous Region (XUAR) are made with forced labor and are prohibited from entering the United States. The legislation directed U.S. Customs and Border Protection (CBP) to create guidance on what comprises the "clear and convincing evidence" due diligence standard necessary to rebut this presumption. Though it is unclear how CBP will implement this standard, its previous Withhold-Release Orders (WROs) on goods from XUAR provide a preview of what CBP is likely to consider important in these standards.

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The UFLPA also directs CBP to create a strategy to prevent the importation of Chinese goods produced using forced labor from other areas of China. This strategy will include the guidance on compliance with the “clear and convincing evidence” standard and any further rulemaking that CBP and the FLETF deem necessary to implement the strategy. The UFLPA requires CBP to include cotton, tomatoes, and polysilicon on the list of enforcement sectors as part of this strategy.

For more background on the UFLPA, please refer to Mayer Brown’s [Legal Update](#) on the subject.

COMMENT PERIOD

The open comment period is the public’s chance to shape CBP’s thinking on the regulations that will make up the diligence standard needed to rebut the presumption that a good made wholly or in part in the XUAR is made with forced labor, and to inform CBP’s larger strategy for blocking the importation of goods from China made with forced labor.

Going forward, the UFPLA will follow the timeline below:

ACTION	DATE
Written comment period closes.	March 10, 2022
FLETF holds a public hearing, with witnesses, on the use of forced labor in China.	No later than April 24, 2022 (45 days after the comment period closes)
FLETF strategy on preventing imports of Chinese goods made with forced labor due.	June 21, 2022 (180 days after enactment of UFPLA)
Rebuttable presumption that goods from XUAR are made with forced labor enters into force.	June 21, 2022 (180 days after enactment of UFPLA)

The UFLPA also gives the CBP and FLETF the authority to make rules to enforce the strategy, with those due on June 21, 2022. There are no set deadlines for this rulemaking process.

America COMPETES Act Passed in the US House

On February 4, 2022, the America COMPETES Act passed in the U.S. House of Representatives. The legislation is intended to bolster domestic manufacturing and allow U.S. companies to better compete with Chinese companies in the global marketplace. It also makes several changes to U.S. trade laws, which are outlined in more detail below and in other articles of this newsletter.

HOUSE LEGISLATION

The following changes to U.S. trade laws are present in the America COMPETES Act:

- **Trade Remedies Reforms:** Division K, Title II of the America COMPETES Act makes several changes to trade remedies laws, including:

- » **Establishing successive antidumping and countervailing duty (AD/CVD) investigations at the Department of Commerce:** The legislation defines a successive investigation as one involving the same class or kind of imports investigated at the same time, or a recently completed investigation involving the same type of merchandise in which the International Trade Commission released an affirmative decision within the last two years. If an investigation is considered a subsequent one, the legislation speeds up the timeline for the Department of Commerce (Commerce) to issue a preliminary decision within 85 days, and a final decision 75 days after that. This provision is meant to speed up AD/CVD investigations on countries or companies considered to be “repeat offenders,” or countries or companies that frequently are subject to AD/CVD investigations.
- » **Applying Countervailing Duties to Subsidized Activity Outside of the Investigated Country:** The legislation will allow Commerce to consider and address subsidies offered to producers by a government outside of the investigated country as part of a countervailing duty investigation. This program is designed to address subsidies to non-Chinese producers in the Belt and Road Initiative.
- » **Codifying Circumvention Investigations:** The legislation sets timelines for circumvention investigations, which occur when Commerce has reason to believe that goods imported from a country not subject to an AD/CVD order were made with component parts that were subject to an AD/CVD order, and the decision to import the goods to the U.S. from the third country was done to avoid AD/CVD duties. The legislation states that Commerce must respond to any circumvention inquiry request within 30 days, provide a preliminary determination within 90 days, and issue a final determination within 120 days, subject to extensions. [Previous circumvention investigations have focused](#) on goods imported from other countries that incorporated Chinese components.
- » The legislation also clarifies the definitions of the following terms used in AD/CVD investigations:
 - **Normal Value:** The legislation specifically states that sales of low quantities of product sold at unusually high prices are outside the normal course of trade, or not “normal value” in an antidumping investigation. This change will prevent small shipments from distorting normal value calculations.
 - **Constructed Value:** The legislation states that Commerce may calculate duty drawbacks in constructed value calculations only when the duty is included in the cost of production. In addition, it directs Commerce to disregard inputs from non-market economies, including China.
 - **Particular Market Situation:** The legislation allows Commerce to find a particular market situation when subsidies from another country are distorting the cost of production in the export country. A finding of a particular market situation allows Commerce to calculate a company’s production cost through methods other than its provided material and fabrication cost.
- **National Critical Capabilities Reviews:** Division K, Title IV of the America COMPETES Act establishes the Committee on National Critical Capabilities, an interagency committee that will review “covered transactions,” or transactions that offshore essential elements of “national critical capabilities,” systems, and assets that are so vital to the United States that the inability to develop such systems would have a debilitating effect on national security or crisis preparedness. After review, the Committee will submit a recommendation to the President, who may block the transaction if it impacts national security and disaster preparedness. Although not explicitly directed at China, [independent economic analysts at the Rhodium Group have determined that up to 43 percent](#) of U.S. foreign investment in China over the last 20 years could have been subject to review by the proposed board.

SENATE LEGISLATION

America COMPETES is the House's version of the United States Innovation and Competition Act (USICA), which passed the Senate in June 2021. However, the bills are not identical. Among other differences, there are sanctions provisions in USICA not present in the House legislation:

- Division E, Title II requires the President to impose sanctions on individuals that "knowingly engage in significant activities undermining cybersecurity against any person, including a democratic institution, or governmental entity on behalf of the Government of the People's Republic of China."

THE FUTURE OF THE PENDING LEGISLATION

As noted above, USICA and America COMPETES are not identical; differences between the pieces of legislation will be settled in a conference committee, or a bipartisan group of Senators and Representatives who will resolve differences and send the final bill to the President for signature. All of the provisions outlined above are unique to their specific bills. Therefore, the conference committee will be extremely important in determining which of these trade provisions end up in the final bills. In addition, the Import Provision, discussed elsewhere in this newsletter, is included in the House bill but not the Senate bill. Thus, it is possible that the Import Provision will not be included in the final version of the America COMPETES Act.

The Import Security and Fairness Act Proposes Changes to U.S. Customs *De Minimis* Treatment

The U.S. House of Representatives passed the Import Security and Fairness Act (the "Import Provision") as part of the America COMPETES Act. The Import Provision would eliminate the *de minimis* duty exemption for imports from countries that are identified as both (i) non-market economies and (ii) on the U.S. Trade Representative's Priority Watch List of countries that violate intellectual property standards. China meets both criteria. If passed, the Import Provision would require importers of merchandise from China to pay duties and taxes on that merchandise, regardless of the merchandise's value. Violators of the Import Provision (i.e., importers of Chinese merchandise who claim *de minimis* treatment) would be subject to a civil penalty of \$5,000 for the first violation and \$10,000 for each subsequent violation, in addition to any other applicable penalties.

BACKGROUND

Under U.S. customs laws and regulations, from the 1990s until 2016, shipments valued at \$200 or less could qualify for *de minimis* treatment, meaning no duties or taxes would be charged on the importation of that shipment. In March 2016, pursuant to the 2015 Trade Facilitation and Trade Enforcement Act of 2015, CBP raised the *de minimis* threshold to \$800 or less.

The Import Provision is currently part of the proposed America COMPETES Act. In addition to eliminating *de minimis* treatment for non-market economies included on the Priority Watch List, the Import Provision would also eliminate *de minimis* treatment for importations involving persons who are suspended or debarred from doing business with the Federal Government at the time of importation. While Representative Kurt Schrader (D-OR) initially proposed striking the Import Provision from the America COMPETES Act in order to preserve existing *de minimis* rules, he eventually withdrew his proposal.

THE FUTURE OF THE IMPORT PROVISION

Please see above for the next step of the America COMPETES act. Apart from being included in the larger House bill, earlier this year, Representative Earl Blumenauer (D-OR), chairman of the U.S. House Ways and Means Trade Subcommittee, introduced the Import Provision as a separate bill, also titled the Import Security and Fairness Act. Thus, the Import Provision could later pass on its own. In addition to what is included in the America COMPETES Act version of the Import Provision, Representative Blumenauer's proposed legislation would eliminate *de minimis* treatment for articles subject to enforcement actions under Section 301 of the Trade Act of 1974 or Section 232 of the Trade Expansion Act of 1962 (more commonly known as "Section 301 tariffs" and "Section 232 tariffs," respectively).

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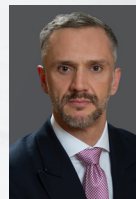
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