FDRA
FOOTWEAR DISTRIBUTORS AND RETAILERS OF AMERICA

March 10, 2022

The Honorable Robert Silvers
Under Secretary
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
Washington, DC 20528

Re: ***Notice Seeking Public Comments on Methods To Prevent the Importation of Goods Mined, Produced, or Manufactured With Forced Labor in the People's Republic of China, Especially in the Xinjiang Uyghur Autonomous Region, Into the United States (Docket No. DHS-2022-0001)***

Dear Mr. Silvers:

On behalf of the Footwear Distributors & Retailers of America (FDRA), we write to provide comments to the Forced Labor Enforcement Task Force (Task Force) in response to the January 24th Federal Register Notice (F.R. 3567) on the enforcement strategy required by the Uyghur Forced Labor Prevention Act (UFLPA).

FDRA is the footwear industry's trade and business association, representing more than 500 footwear companies and brands across the U.S. This includes the majority of U.S. footwear manufacturers and over 95 percent of the industry. FDRA has served the footwear industry for more than 75 years, and our members include a broad and diverse cross section of the companies that make and sell shoes, from small family-owned businesses to global brands that reach consumers around the world.

FDRA and its members have zero tolerance for forced labor. Our member companies work diligently to select and build relationships with factory partners that are reliable and maintain high ethical standards. This includes vendor contracts with explicit terms, frequent meetings with factory partners, and a strong system of regular audits, verification, and training for factories. Our members continue to explore and adopt new tools and technologies to better track and monitor global supply chains.

In addition, FDRA maintains an industry Code of Conduct, adopted by several leading U.S. brands, that implements strong criteria for factories and reiterates our strong commitment to zero tolerance for forced labor, slavery, human trafficking, and child labor. FDRA also serves as a member of the Forced Labor Working Group (FLWG), an inter-association committee that meets weekly to address best practices and other issues in this area. The FLWG has filed separate comments to this Federal Register Notice, and FDRA endorses those comments as well.

Working with the FLWG, FDRA has consistently called on the Administration to prioritize this issue and partner with our allies to pursue a global approach to the situation in the Xinjiang Uyghur Autonomous Region (XUAR). In March 2020, FDRA joined the FLWG in issuing a joint statement on the situation in the XUAR, which can be found at the following link:

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https://nrf.com/media-center/press-releases/joint-statement-nrf-aafa-fdra-rila-and-usfia-reports-forced-labor. In March 2021, FDRA and the FLWG issued a public statement calling for a global approach to this issue: https://nrf.com/media-center/press-releases/joint-statement-aafa-fdra-nrf-rila-usfia-support-global-approach. As the statement highlights, no single country and no single approach will suffice to address this issue, and it will require strong leadership from the U.S. government and our allies.

Many U.S. brands have cut ties with the XUAR, and FDRA members do not produce footwear in the XUAR. However, shifting sourcing completely outside of China is not a viable option and would drastically increase inflation. Global supply chains allow companies to deliver goods to consumers at lower costs. China provides more than 70 percent of shoes by volume to the U.S. market each year. Even if it were possible to find alternative suppliers in other countries in the near term (which in many cases it is not), shifting production outside of China to higher-cost sourcing countries would mean huge price increases that would directly impact consumers at a time when the United States is witnessing soaring inflation.

Our industry faces additional challenges with any sourcing shift. Footwear production requires substantial capital investment and a large workforce dedicated to learning the intricate skill of shoemaking. It takes more than 100 touches to make a basic pair of leather dress shoes. Setting up a new factory involves years of planning and relationship building as well as integrating dozens of regional suppliers. Brands must also devote significant time and resources to ensuring that factories have the strongest labor, environmental, chemical safety, and product safety standards possible. In addition, a sourcing country must have the factory base and infrastructure necessary to support footwear production and the efficient flow of goods across international borders.

While some of the largest U.S. brands have made the significant investments required to diversify sourcing, small footwear businesses are most often the least diversified. The considerable skill, experience, and infrastructure that already exist in China allow entry by all types of footwear companies at all price points, and therefore many small and family-owned U.S. footwear businesses source 100 percent of their imports from China. Moreover, Chinese factories produce the majority of low-priced shoes purchased by working American families at value family retail chains. Even when final construction of footwear takes place outside of China, a vast majority of the materials and value of a finished shoe still originates in China. It is likely that this will continue for the foreseeable future.

The solution is not for U.S. brands to pull out of China, but to work to ensure that global supply chains have no connection to forced labor. This will require U.S. government leadership and engagement with China, cooperation with our allies and partners, a workable enforcement strategy from U.S. Customs & Border Protection (CBP), and a strong partnership between CBP and trusted importers.

As the Task Force develops the enforcement strategy in accordance with the UFLPA, we believe two areas need particular focus: the best allocation of resources for effective enforcement and greater clarity and guidance from CBP. Our comments will address these two key issues.

In addition, the FDRA submits a comprehensive enforcement plan for the U.S. Government to administer the UFLPA. The UFLPA imposes a complex set of requirements on both the interagency Forced Labor Enforcement Task Force as well as CBP, including but not limited to the application of a rebuttable presumption that XUAR-sourced merchandise is produced with forced labor; identifying the products that are subject to the rebuttable presumption; and granting exceptions to the rebuttable presumption. It is critical for the Executive Branch to carry out these functions in a manner that is lawful, including because it adequately respects the due process rights of relevant U.S. parties; and also is consistent with the Administration's policy objectives, which encompass not only stopping forced labor around the world, but also reducing inflation here at home. Furthermore, the FLETF and CBP need to coordinate their actions in implementing the UFLPA, so as to avoid any unintended disruptions to international trade. The attached enforcement plan achieves these objectives, and we encourage the U.S. Government to adopt it as its own.

Allocating Resources for Effective Enforcement: De Minimis Standard

To ensure that resources are properly allocated to effectively administer the new law, FDRA urges the Task Force to consider implementing a de minimis standard in enforcing the embargo on products subject to the UFLPA. The act is all encompassing. A de minimis standard would allow CBP, importers, and producers to focus on the principal components and materials in imported products to ensure they are not supplied by entities using forced labor. This is not to suggest that CBP and others should ignore information that a minor input was made with forced labor, but rather that CBP and others need not conduct the same onerous investigation as to the ultimate source(s) of minor inputs.

Section 2(d)(3) of the UFLPA requires the Task Force to provide recommendations for tools to be adopted to ensure that CBP can accurately identify and trace goods made with forced labor in the XUAR. Adopting a *de minimis* standard would assist CBP in reaching this goal, because it would allow CBP to focus on major components and materials produced in the XUAR.

The bill of materials for a typical shoe may have as many as forty entries from multiple sources. Importers and producers may have limited visibility into the upstream suppliers of certain minor components and materials. They also may have limited ability to force upstream suppliers (with whom they likely do not have a contractual relationship) to provide information regarding the identity of their component suppliers or to agree to third-party audits. Chinese companies in particular may be unwilling to cooperate in U.S. companies' forced labor-related due diligence efforts, given China's Anti-Foreign Sanctions Law as well as the Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures.

The UFLPA places a tremendous burden on CBP as well as importers and producers. A *de minimis* standard would allow all parties to focus on the more important inputs, making it more

likely that these inputs do not incorporate forced labor. This approach is in keeping with the purpose of the Act, eliminating forced labor in supply chains.

In August 2021, CBP adopted a *de minimis* approach in connection with the WRO on silica-based products. It noted: "if the contribution of prohibited labor to the whole product is insignificant both from a quantitative and qualitative perspective, CBP may consider the product outside the scope of the statute." That position was later abandoned – without explanation. It should not have been. It is a rational response designed to allow CBP to focus on major forced labor sources.

An importer or producer who attempts to establish that a product made in the XUAR was not made with forced labor should be allowed to do so by focusing on the major inputs. Even allowing that, establishing the absence of forced labor by "clear and convincing evidence" is daunting.[1] Meeting this requirement for every input, regardless of how insignificant, is potentially impossible. This is the case with respect to footwear and other products which have extensive bills of materials. A *de minimis* exception would not eliminate the severe difficulty in establishing the absence of forced labor for footwear products but would at least make it theoretically possible.

The challenge does not arise with product sourced directly from the XUAR. Rather, the challenge arises with respect to products sourced from elsewhere in China or third countries that may incorporate XUAR-originating inputs. Neither CBP nor importers or producers can be expected to meet this challenge if they are required to ascertain the ultimate source of each component and material in a product sourced outside the XUAR. A *de minimis* standard would allow all parties to focus on the more important inputs, making it more likely that these inputs do not incorporate forced labor. This approach is in keeping with the purpose of the Act, to eliminate forced labor in supply chains.

For these reasons, FDRA urges the Task Force to adopt a *de minimis* exception. FDRA suggests that the exception be set at 10 percent. This is the standard set in preference programs for the allowable amount of non-originating materials in, for example, the USCMA, HTS GN 12(e).

On a related issue, we encourage the Task Force to create an exception for tracing the source of recycled materials. An increasing number of companies are focused on making sustainable footwear for consumers. However, recycled goods are often intermingled and can be impossible to trace back to the original source. Implementation of the UFLPA should be done in a way that ensures it does not have the unintended consequence of discouraging the use of recycled materials.

Strengthening Partnerships and Information Between CBP and Industry

FDRA Members share the goals of eradicating forced labor from supply chains. To achieve this goal, CBP needs to develop a strong partnership with importers and provide clear and robust guidance for companies seeking to comply with the UFLPA.

[1] Our understanding is that as few as 20 percent of shipments detained because of a WRO are released. This demonstrates the difficulty of establishing the absence of forced labor in a supply chain.

First, CBP should look for ways to enhance existing partnerships. The Customs-Trade Partnership Against Terrorism (C-TPAT) program, administered by CBP, allows companies to work directly with CBP to protect and secure global supply chains. C-TPAT members must adopt a series of robust security procedures to receive expedited processing by CBP under the program.

FDRA recommends using the existing C-TPAT program to facilitate enforcement of the UFLPA. The program already includes robust security protocols that companies must adopt, and CBP should review the current program and look for ways to enhance these protocols as they relate to forced labor. This would encourage more companies to join the C-TPAT program and serve the program's goal of improving U.S. national security. It would also help CBP more efficiently use resources to combat forced labor. CBP should create a special program within C-TPAT that applies only to forced labor. Since a small number of footwear companies currently participate in the larger C-TPAT program, a forced labor specific program within C-TPAT would encourage greater industry participation. Members who participate in the sub-program would be required to adopt any forced labor requirements of the larger C-TPAT program, and in exchange would receive prioritized CBP processing for enforcement related to the UFLPA.

In addition, in order to ensure that they are fully compliant with the UFLPA, companies need to have clear guidance from CBP. This includes:

- A requirement that CBP disclose the basis upon which it is detaining goods in a forced labor context.

- Identification of where the alleged offense occurs in the supply chain, if the detention is based on an offense that occurs before it reaches the final manufacturer.

- Clear guidance on the specific information CBP requires importers to provide to show that a good is not made with forced labor.

- A clear definition of "clear and convincing" evidence for purposes of granting an exception to the rebuttable presumption.

- Confirmation that, as in other 307 situations, if an importer whose goods are detained is unable to establish they are not covered by the legislation, the importer is allowed to export the goods.

Recommendations on Enforcement Plan

Below you will find our full recommendations for the enforcement plan the U.S. Government should consider adopting for the UFLPA. We have also included responses to the questions from the Federal Register Notice. Thank you again for the opportunity to provide input on this critical issue.

Sincerely,

Matt Priest
President & CEO
Footwear Distributors and Retailers of America

Proposed Uyghur Forced Labor Prevention Act Enforcement Strategy

Summary of Enforcement Strategy

I. Recommendations for the Forced Labor Enforcement Task Force ("FLETF")

A. Designations for the Enforcement Lists required by Section 2(d)(2)(B) of the UFLPA

i) Federal Register Notice-and-Comment for Enforcement List Proposals

1. Before the FLETF adds an entity, facility, or product to the Enforcement Lists, the FLETF should issue a Federal Register notice proposing the addition and inviting public comment. The proposal should contain the name of the relevant entity, facility, or product, along with the evidentiary basis for the proposal.
2. The FLETF should provide a clear definition of "forced labor" that takes into account practical economic factors in China, as well as the totality of working conditions affecting the subject workers (e.g., equal treatment in terms of pay, promotions and working conditions; accommodation for religious preference; and freedom to leave employment).
3. The FLETF should establish an on-the-record channel for receiving information pertinent to proposed designations.
4. Information received from third parties, which pertains to Enforcement List designations, should be signed by the submitting party and detailed as to the facility, entity, or good, stating the basis for such knowledge and the date range that such knowledge was obtained.
5. General or circumstantial allegations, such as second-hand reports prepared by NGOs and media, should not be sufficient for a designation.

ii) Final Federal Register Notice for Enforcement List Designations

1. After the comment period, if the FLETF determines that the evidence warrants a designation on the Enforcement Lists, this designation should only become effective through a subsequent final Federal Register notice.
2. The FLETF should only add the relevant entity, facility, or product to the Enforcement Lists if there is direct, recent credible evidence indicating that the entity, facility, or product involves forced labor. The FLETF must keep in mind that inclusion on the list will result in disruption of important lawful commercial interests, deprivation of property rights, and reputational harm.

B. Enforcement List De-Designation Process

i) Any entity or facility included on the FLETF lists should have an open-ended opportunity through a clearly defined regulatory process to remediate such designation through the submission of information to the FLETF. Although the statute does not explicitly call for such a process, it is critical to incentivizing the elimination of forced labor and providing listed parties with due process rights.

ii) Any affected party that remediates the basis for a prior designation should be removed from the Enforcement Lists in a timely manner.

II. Recommendations for U.S. Customs and Border Protection ("CBP")

A. Determinations to Apply the Rebuttable Presumption to a Particular Product

i) CBP should establish a fair, transparent, record-based, and time-limited process for determining whether particular products are subject to the rebuttable presumption, based on the criteria in the UFLPA.

ii) CBP should require that allegations be signed by the submitting party (*i.e.*, not be anonymous) and be detailed as to the facility, entity, or good, stating the basis for such knowledge and the date range that such knowledge was obtained.

iii) CBP should create a clearly defined regulatory process for interested parties to submit a rebuttal prior to the application of the rebuttable presumption. Application of the rebuttable presumption should not be based only on allegations from a submitting party.

iv) If CBP determines through this defined regulatory process by a "preponderance of evidence" that a particular product meets the statutory requirements for application of the rebuttable presumption, then CBP should issue an unclassified determination explaining the basis for applying the presumption.

v) CBP should make available on a public website any proceedings regarding the potential application of the rebuttable presumption, along with the relevant allegations.

B. Proceedings to Grant Exceptions to the Rebuttable Presumption

i) CBP should establish clear standards and timeframes to adjudicate exception requests to rebut the presumption against import, as set forth in Section 4 of the UFLPA.

ii) CBP should establish a public electronic system for receiving requests for exceptions to the rebuttable presumption.

iii) Requests for exceptions should be adjudicated by CBP within 60 days.

iv) If CBP decides to allow parties to respond to requests for exceptions, then the requestor should have an opportunity for a surrebuttal (as is the case in current for exclusion proceedings for tariffs under Section 232 of the Trade Expansion Act of 1962).

v) CBP should be mindful of the fact that companies are being asked to "prove a negative." Therefore, companies that take reasonable steps to ensure the absence of forced labor in their supply chains should be deemed to have provided "clear and convincing evidence." CBP should take into account due diligence measures taken by companies including both historical due diligence and compliance with due diligence guidance published as a result of the UFLPA.

vi) CBP's determinations on requests for exceptions should be appealable directly to the CIT.

C. *De Minimis* Exception

i) CBP should set forth a definition of what "in part" means in the context of goods produced by forced labor "wholly or in part." The import ban should not apply to goods that have only *de minimis* amounts of inputs that may be otherwise covered by the rebuttable presumption, or when the rebuttable presumption applies at a stage of production that is many steps removed from the imported product.

D. Contents of Guidance to be Issued to Importers

i) Clear definition of "forced labor"

(1) CBP should articulate a clear definition of "forced labor" that takes into account practical economic factors in China, and that reviews the totality of working conditions.

ii) Proposed and final CBP regulations on the "clear and convincing" evidence standard

(1) CBP should publish proposed and final regulations defining and providing guidance on what constitutes "clear and convincing" evidence for purposes of granting an exception to the rebuttable presumption.

(2) The regulations should lay out a clear pathway for importers to achieve compliance – while being sensitive to the practical difficulties of conducting supply chain audits and traceability exercises in China.

(3) CBP should also develop a webpage that provides up-to-date information regarding enforcement related issues, including investigations, FAQs, and Enforcement List issues. This webpage should include links to the dockets for each FLETF/CBP determination and provide the evidence upon which the FLETF/CBP relied.

iii) Proposed and final CBP regulations for importer due diligence

(1) CBP should publish proposed and final regulations defining and providing guidance to importers regarding "due diligence, effective supply chain tracing, and supply chain management measures," compliance with which is necessary to rebut the presumption. (Section 3(d) of the UFLPA specifies that such regulations may be issued).

(2) The regulations should identify specific criteria which, if met, constitute compliance with the corresponding statutory requirement.

iv) Sequencing of CBP regulations

(1) Both sets of regulations should be issued in proposed and final form prior to the implementation of the rebuttable presumption, so that importers have the opportunity to comply and adapt supply chains before becoming subject to novel evidentiary standards that carry economic harm and reputational risk.

E. Enforcement Priorities

i) High priority sectors

1. During the first year following the effective date of the UFLPA, FLETF Enforcement Lists and CBP enforcement should focus only on the High Priority Sectors specifically listed in the UFLPA (tomatoes, cotton, and polysilicon), as well as products whose final production or assembly occurs in the territory of Xinjiang.

ii) Key principles of an enforcement plan
   1. The FLETF should not make any designations on the Enforcement List outside the High Priority Sectors until June 2023 at the earliest, in order to provide adequate time for the recommended process for making additions to the Enforcement List. (Exceptions can be made for entities/facilities to which WROs currently apply.

iii) Forced Labor Working Group
   1. The FLETF/CBP should convene a working group with representatives from the public and private sectors, including importers and retailers, to spearhead initiatives related to the enforcement of, and compliance with, the UFLPA.

III. Sequencing/Interagency Coordination/Other Issues Related to Administration of the UFLPA

A. As noted above, FLETF Enforcement List designations should undergo *Federal Register* notice and comment in draft form before becoming final and before CBP applies the rebuttable presumption to entities/facilities on the lists.

B. As noted above, CBP regulations on rebutting the presumption (including regulations providing guidance to importers on due diligence, as called for in the UFLPA) should undergo notice and comment in draft form, before CBP applies a rebuttable presumption pursuant to the UFLPA. (However, CBP should continue enforcing WROs currently in place, including those that apply to Xinjiang.)

C. In general, implementation of the UFLPA should avoid unnecessarily impeding trade. The Section 232 exclusion process illustrates the risk of "collateral damage" to benign imports resulting from a bureaucratic exception process that lacks clear processes, standards, and timelines.

D. The FLETF should be cognizant of the fact that forced labor is not unique to China (and indeed the FLETF itself was established pursuant to USMCA implementing legislation). So the FLETF should administer the UFLPA in a manner that would be acceptable if applied to other countries where forced labor is also a concern.

Introduction

Two basic principles should guide the Forced Labor Enforcement Task Force's ("FLETF") development of a Uyghur Forced Labor Prevention Act ("UFLPA") enforcement strategy.

First, existing law imposes significant due process-related requirements on the way that the Executive Branch administers virtually every aspect of the UFLPA. For example, under the Fifth Amendment of the U.S. Constitution, the Government must "take reasonable measures to ensure basic fairness to the private party and that the government follow procedures reasonably designed to protect against erroneous deprivation of the private party's interests." In addition, by statute, U.S. Customs and Border Protection ("CBP") must offer a notice and comment period before making decisions that "have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions" – including applying the UFLPA's rebuttable presumption to goods that previously were imported freely. In order to avoid colliding with these widely-accepted legal guardrails, the FLETF and implementing agencies must establish a comprehensive procedural structure for the administration of the UFLPA, before the UFLPA results in changes at the border.

Second, from a policy perspective, it is important that administration of the UFLPA not result in supply chain bottlenecks and/or unnecessary increases in consumer prices. The President declared that one of the Administration's top economic goals is to get inflation under control. While the U.S. Government should of course continue seeking to prevent the unlawful importation of products produced with forced labor, there is a risk that the UFLPA's "rebuttable presumption" will be applied so broadly, and the associated exclusion process will be so cumbersome, that goods without any credible connection to forced labor are detained or seized at the border – thereby disrupting supply chains and increasing prices.

The U.S. Government's recent experience with Section 232 steel and aluminum tariffs, and the associated exclusion processes, illustrates on a smaller scale how bureaucratic red tape can needlessly interfere with international trade – and draw criticism from private parties, Members of Congress, and Offices of Inspectors General, and also generate significant litigation against the U.S. Government. The FLETF must ensure that it avoids repeating these errors in administering the UFLPA – particularly given that U.S. annual imports from China are valued at more than $400 billion.

Below, we sketch out an enforcement strategy for the UFLPA that is consistent with these principles. Section I contains recommendations for the FLETF to develop a clear and transparent process for fulfilling its statutory obligation to designate entities and facilities that will be the targets of UFLPA enforcement ("Enforcement Lists"), as well as a de-designation process. Section II contains recommendations to CBP for creating a fair, transparent, record-based, and time-limited process for administering its responsibilities under the UFLPA, including determining when to apply the rebuttable presumption, and when to grant exceptions. Section III contains recommendations for Executive Branch agencies to sequence and coordinate implementation of the UFLPA.

I. Recommendations for the FLETF

The UFLPA instructs the FLETF to develop a strategy for preventing the importation into the United States of goods mined, produced, or manufactured wholly or in part with forced labor in the PRC. The strategy is to be submitted to Congress, and released to the public, by June 21, 2022, and not less than annually thereafter.

The strategy must contain certain lists, including the following:

- A list of entities working with the government of the Xinjiang Uyghur Autonomous Region ("XUAR") to move forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region;
- A list of products mined, produced, or manufactured wholly or in part by entities on the list referenced in the prior bullet;
- A list of entities that exported products described in the prior bullet from the PRC into the United States; and
- A list of facilities and entities, including the Xinjiang Production and Construction Corps, that source material from the XUAR or from persons working with the government of the XUAR or the Xinjiang Production and Construction Corps for purposes of the "poverty alleviation" program or the "pairing-assistance" program or any other government labor scheme that uses forced or involuntary labor.

These lists (hereinafter the "Enforcement Lists") are significant not only as elements of the FLETF's strategy, but also because of their effect at the border. Specifically, the UFLPA instructs CBP to apply the rebuttable presumption to facilities and entities referenced in the first, third, and fourth bullets above. Thus, the FLETF must ensure that the process for including entities on these lists is lawful, including by affording affected parties adequate due process, and also is consistent with the broader policy objectives of the Administration, including not only ensuring workers' rights but also avoiding unnecessary increases to inflation.

Below we outline a recommended process for designating and de-designating entities and facilities from the Enforcement Lists.

A. Designations for the Enforcement Lists required by Section 2(d)(2)(B) of the UFLPA

i) Federal Register Notice-and-Comment for Enforcement List Proposals

(1) Before the FLETF adds an entity, facility, or product to the Enforcement Lists, the FLETF should issue a *Federal Register* notice proposing the addition and inviting public comment. The proposal should contain the name of the relevant entity, facility, or product, along with the evidentiary basis for the proposal.

Entities and facilities that may be added to the Enforcement Lists are entitled to due process prior to any such designation by the FLETF. Accordingly, the FLETF should issue a *Federal Register* notice inviting public comment on each proposed addition of an entity, facility, or product to the Enforcement Lists, along with detailed identifying information and the basis for the designation.

After a party is included on the Enforcement Lists, all goods manufactured by the designated entity and destined for the United States may be seized by CBP. U.S. parties that attempt to import such goods are at risk of losing their property at the border. Due process requires that the government provide procedural protections before depriving importers of such property interests.

In principle, a party's due process rights can arise from the Fifth Amendment of the U.S. Constitution, if there is a risk of deprivation of property, or from a statutory scheme that creates an explicit or implicit expectation of such protection. *NEC Corp. v. United States*, 151 F.3d 1361, 1370 (Fed. Cir. 1998).[2]

The fundamental requirement of due process is "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). *Mathews* sets forth a balancing test that requires the court to weigh "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. Accordingly, before the FLETF includes an entity or facility on the Enforcement Lists, due process requires that any U.S. party with a property interest in the relevant product – including potentially the U.S. importer, the U.S. purchaser, lenders, and insurers – be provided the opportunity to be heard in a meaningful way.[3]

[2] *See Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012) (the U.S. Government is obliged to "take reasonable measures to ensure basic fairness to the private party and that the government follow procedures reasonably designed to protect against erroneous deprivation of the private party's interests.").

[3] Designations on the Enforcement Lists are unlike sanctions designations, which are governed by the International Emergency Economic Powers Act ("IEEPA") and subject to minimal pre-deprivation procedural due process in light of the risk of "the transfer of assets subject to the blocking order" and because a "pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets, thereby making the IEEPA sanctions program virtually meaningless." *Islamic Relief Agency v. Unidentified FBI Agents*, 394 F.2d 34, 49-50 (D.D.C. 2005) (internal citations omitted). By contrast, Enforcement List designations are not issued pursuant to any declared national emergencies under IEEPA, and no risk of asset transfer exists under the UFLPA, thereby requiring more comprehensive due process protections to affected importers.

Furthermore, due process requires "that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014). An "essential principle of due process" is that notice and opportunity to be heard must be provided *before* depriving a party of its property interest. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Therefore, prior to designating an entity or facility on an Enforcement List, the FLETF must provide relevant U.S. parties with access to non-classified information that would serve as the basis of a designation and an opportunity to rebut such evidence.

The FLETF is also bound by law to provide procedural protections to importers affected by decisions as consequential as this. The applicable statutory scheme that creates an explicit or implicit expectation of such cognizable due process protection for importers, *NEC Corp.*, 151 F.3d at 1370, is outlined in 19 U.S.C. § 1625, which imposes certain procedural requirements on the Secretary of Homeland Security before modifying or revoking interpretative rulings and decisions concerning customs matters.[4] Specifically, the Secretary is required to offer a notice and comment period before issuing interpretive rulings or decisions that, among other things, "have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions."[5] The FLETF, which is chaired by the Secretary of the Department of Homeland Security, is similarly bound by this framework. As a result, the FLETF is required to provide sufficient notice and meaningful opportunity for comment before it issues a decision placing an entity or facility on the Enforcement Lists.

Accordingly, before the FLETF adds an entity, facility, or product to the Enforcement Lists, the FLETF should issue a *Federal Register* notice proposing the addition and inviting public comment. The proposal should contain the name of the relevant entity, facility, or product, along with the evidentiary basis for the proposal.

(2) The FLETF should provide a clear definition of "forced labor" that takes into account practical economic factors in China, as well as the totality of working conditions affecting the subject workers (*e.g.*, equal treatment in terms of pay, promotions and working conditions; accommodation for religious preference; and freedom to leave employment).

"Forced labor" is the central concept at issue in the UFLPA. Providing a clear and usable definition of "forced labor" for the purpose of enforcement action is necessary as a matter of good governance and to meet the applicable standards set forth in section 3(b)(2)(F) of Executive Order 12988, "Civil Justice Reform," which requires "agencies to define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items."

[4] Courts have applied a liberal scope to the definition of "interpretive ruling or decision." *See Int'l Custom Prod., Inc. v. United States*, 549 F. Supp. 2d 1384, 1393, 310 (Ct. Int'l Trade 2008) (concluding that a Notice of Action was an "interpretive ruling or decision" within the meaning of section 1625(c)).

[5] 19 U.S.C. § 1625(c)(2). After an entity is added to the Enforcement Lists, all future imports will require additional documentation prior to entering the United States. Thus, future transactions involving that entity's goods would be subject to worst treatment than previous transactions.

The FLETF should adequately consider all relevant economic conditions – such as pay, working conditions, opportunity for advancement, opportunity to quit – to ensure that the definition accurately captures forced labor. This would be consistent with the International Labour Organization's ("ILO") practice, which recommends examining several factors which, taken together, point to a forced labor case. *Special Action Programme to Combat Forced Labour*, "ILO Indicators of Forced Labour," at 3. Further, the definition should account for the totality of working conditions affecting subject workers and should include factors that provide evidence suggesting that forced labor is not present. For example, the FLETF should take into consideration whether minority populations employed in labor programs are subject to identical working conditions and terms as other populations and are free to leave their employment voluntarily.

The definition of forced labor will likely have implications not only for the FLETF but also for CBP. Accordingly, the definition should be sufficiently specific to prevent undue interference with trade flows, and also clear enough to ensure administrability by CBP.

(3) The FLETF should establish an on-the-record channel for receiving information pertinent to proposed designations.

As discussed in Part I(A)(i)(1), due process requires the parties be provided a meaningful opportunity to rebut evidence presented against it. An on-the-record process with sufficiently detailed allegations is one fundamental type of process to protect an importer's due process rights and to mitigate the possibility that anonymous, erroneous, or unfounded second-hand allegations are made against certain parties. Such allegations must meet a certain standard of specificity in order to be credible. The FLETF can develop specific mechanisms to protect the identity of submitters of allegations in the event that there is a risk of retaliation against that party. *See supra* Part I(A)(i)(1).

Further, failure to fully develop the evidentiary record will leave FLETF vulnerable to litigation. As the District Court for the District of Columbia explained, "when an agency action is 'bound up with a record-based factual conclusion' the reviewing court is tasked with determining if the agency's conclusion is supported by 'substantial evidence.'" *Xiaomi Corporation v. U.S. Department of Defense et al.*, No. 1:2021cv00280, at 14 (D.D.C. 2021) (citing *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999)). The FLETF should take steps to ensure that the record is fully developed in order to protect against rebuke from the courts.

(4) Information received from third parties, which pertains to Enforcement List designations, should be signed by the submitting party and detailed as to the facility, entity, or good, stating the basis for such knowledge and the date range that such knowledge was obtained.

As discussed in Part I(A)(i)(3), allegations should be sufficiently detailed to establish credibility in the allegations for consideration by the FLETF and to provide an affected party a meaningful opportunity to respond. Anonymous allegations, second-hand reports, or allegations that lack sufficient specificity or reliability should not be relied upon by the FLETF.

(5) General or circumstantial allegations, such as second-hand reports prepared by NGOs and media, should not be sufficient for a designation.

As discussed in Part I(A)(i)(3), allegations should be sufficiently detailed to establish credibility in the allegations for consideration by the FLETF and to provide an affected party a meaningful opportunity to respond. Anonymous allegations, second-hand reports, or allegations that lack sufficient clarity specificity or reliability should not be relied upon by the FLETF.

ii) Final Federal Register Notice for Enforcement List Designations

(1) After the comment period, if the FLETF determines that the evidence warrants a designation on the Enforcement Lists, this designation should only become effective through a subsequent final *Federal Register* notice.

As discussed in Part I(A)(i)(1), in order to protect the due process rights of affected importers, FLETF should, after considering the evidence provided through an initial notice-and-comment period, issue any final determination through a subsequent *Federal Register* notice. This formal process for designations will also help protect the due process rights of affected importers. Further supporting this approach, 19 U.S.C. § 1625(c) requires that the Secretary of the Department of Homeland Security publish a final ruling or decision within 30 days after the closing of the comment period.

(2) The FLETF should only add the relevant entity, facility, or product to the Enforcement Lists if there is direct, recent credible evidence indicating that the entity, facility, or product involves forced labor. The FLETF must keep in mind that inclusion on the list will result in disruption of important lawful commercial interests, deprivation of property rights, and reputational harm.

As noted above, the evidence that the FLETF's determination is based on needs to be sufficiently credible and specific and take into account contrary evidence, in order to protect the due process rights of importers and other parties with a property interest in the transaction. Otherwise, determinations will be vulnerable to extensive challenge on statutory and constitutional grounds.

Furthermore, a "reasonable suspicion" standard should be insufficient to an add entity, facility, or product to the Enforcement Lists. Rather, the FLETF should harmonize the standard of proof required to designate an entity or facility on an Enforcement List with the standard used in other agencies' regulations for similar types of lists. The Administrative Procedure Act ("APA"), 5 U.S.C. § 706, requires that agency determinations be supported by "substantial evidence." For example, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") is required to find "reasonable cause to believe, based on specific and articulable facts," that an entity has been involved in activities contrary to national security before placing it on its Entity List. 15 C.F.R. § 744.11(b). Similarly, courts have confirmed that a designation on the U.S. Treasury Department's Office of Foreign Assets Control's ("OFAC") list of Specially Designated Nationals must be supported by substantial evidence. *See, e.g.*, *Al Haramain Islamic Found.*, 686 F.3d at 976 ("…we review for substantial evidence the agency's factual findings."). Therefore, designating an entity on the basis of "reasonable suspicion" alone, or speculation or

conjecture, is insufficient to meet the evidentiary standard required by the APA and applicable case law.

B. Enforcement List De-designation Process

i) **Any entity or facility included on the FLETF lists should have an open-ended opportunity through a clearly defined regulatory process to remediate such designation through the submission of information to the FLETF. Although the statute does not explicitly call for such a process, it is critical to incentivizing the elimination of forced labor and providing listed parties with due process rights.**

De-designation or de-listing procedures are a routine part of other U.S. regulatory processes, including for economic sanctions and export control designations, and should be adopted here to address due process concerns and advance several policy objectives.

Such a de-designation mechanism advances the policy objective of deterring certain behavior and encouraging reforms and remediation of unlawful behavior (not merely taking punitive action against such behavior). As OFAC has recognized, the "power and integrity of the Office of Foreign Assets Control (OFAC) sanctions derive not only from its ability to designate and add persons to the Specially Designated Nationals and Blocked Persons List (SDN List), but also from its willingness to remove persons from the SDN List consistent with the law. The ultimate goal of sanctions is not to punish, but to bring about a positive change in behavior."[6]

Like the objective of OFAC sanctions programs, UFLPA ultimately seeks to end forced labor in XUAR, UFLPA, Section 1(2), and throughout China – and not merely to punish parties that may have engaged in forced labor practices in the past. Indeed, it would be fundamentally unfair and disproportionate to impose a permanent ban on imports from facilities and entities which may have engaged in forced labor practices in the past. Furthermore, in order to incentivize the cessation of forced labor practices abroad, it is necessary to allow for de-designation in appropriate circumstances. Accordingly, the FLETF and CBP should establish a process and promulgate regulations under Section 3(d) of the UFLPA that, like 31 C.F.R. § 501.807, that would allow a listed party to submit arguments or evidence that rebuts the basis for the designation or demonstrates that the factual basis for the designation has been remediated through additional reforms.

ii) **Any affected party that remediates the basis for a prior designation should be removed from the Enforcement Lists in a timely manner.**

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[6] *See Filing a Petition for Removal from an OFAC List*, available at https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-list-sdn-list/filing-a-petition-for-removal-from-an-ofac-list. In addition, 31 C.F.R. § 501.807 provides that "[a] person blocked under the provisions of any part of this chapter, including a specially designated national, specially designated terrorist, or specially designated narcotics trafficker (collectively, "a blocked person"), or a person owning a majority interest in a blocked vessel may submit arguments or evidence that the person believes establishes that insufficient basis exists for the designation. The blocked person also may propose remedial steps on the person's part, such as corporate reorganization, resignation of persons from positions in a blocked entity, or similar steps, which the person believes would negate the basis for designation."

As discussed above in Part I(B)(i), including procedures for de-designation or de-listing advances the UFLPA's policy objectives by encouraging parties to remediate unlawful behavior.

II. Recommendations for CBP

Under the UFLPA, CBP has two main responsibilities: (1) applying the UFLPA's rebuttable presumption to two types of products (2) and granting exceptions to the rebuttable presumption in appropriate cases.

The classes of products to which CBP should apply the rebuttable presumption are as follows: (i) goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China; and (ii) goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by an entity on the Enforcement Lists. However, the statute does not specify how CBP is to determine whether a particular product at the border belongs to one of these two classes.

In addition, the UFLPA requires CBP to grant exceptions from the rebuttable presumption if it determines that three criteria are met: (i) that the importer has fully complied with forthcoming guidance to importers, which will be included in the FLETF strategy; (ii) that the importer has completely and substantively responded to all inquiries for information submitted by CBP to ascertain whether the goods were mined produced, or manufactured wholly or in part with forced labor; and (iii) that there is clear and convincing evidence that the product was not produced wholly or in part by forced labor.

The plan below lays out an approach for CBP to determine that products are subject to the rebuttable presumption, and to apply the criteria for rebutting the presumption, which is lawful and consistent with the Administration's policy objectives.

A. Determinations to Apply the Rebuttable Presumption to a Particular Product

i) CBP should establish a fair, transparent, record-based, and time-limited process for determining whether particular products are subject to the rebuttable presumption, based on the criteria in the UFLPA.

As a practical matter, a clear and transparent process for applying the rebuttable presumption will assist CBP with administration of enforcement of UFLPA. The challenges of matching specific physical products arriving at a U.S. port with products, entities, and facilities in China could be significant. Moreover, given the UFLPA's emphasis on targeting products produced "wholly or in part" with forced labor, CBP may be faced with the additional challenge of analyzing products with potentially only minor or *de minimis* inputs that can be traced to forced labor, further compounding the challenges of administration.

Additionally, such a comprehensive, transparent enforcement process will allow CBP to develop the record necessary to make determinations that are consistent with its obligations under the APA. Specifically, CBP must articulate a "rational connection" between allegations that the goods in question were manufactured in the XUAR or produced by an entity on a list required by Section 2(d)(2)(B) of the UFLPA. Failure to do so would render CBP's determination "arbitrary and capricious" under the applicable standards. *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State*

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 56 (1983) ("…the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard."). Creation of a fair, transparent, record-based, and time-limited process – including revealing any non-classified information used to justify seizing imports – is necessary to protect affected U.S. parties' due process rights.

Therefore, in developing and implementing its enforcement process, CBP should deploy a transparent, record-based public process more akin to the process by which it conducts covered merchandise referrals under the Enforce and Protect Act of 2015 ("EAPA"), rather than the process it currently uses for implementing WROs. Section 517 of the EAPA established a framework by which CBP conducts civil administrative investigations of potential duty evasion of an antidumping and/or countervailing duty order. Specifically, Section 517(b)(4)(A)(i) creates a process under which CBP is required to refer an EAPA investigation for further decision-making in the event that CBP is unable to determine whether the merchandise at issue is covered merchandise within the meaning of Section 517(a)(3). Accordingly, both the EAPA and 19 C.F.R. § 351.227 reflect the importance of a transparent, record-based process, which CBP should carry forward in implementing the UFLPA.

Further, in a case where CBP failed to provide adequate public information in an EAPA investigation, the Court of International Trade ("CIT") remanded the agency's determination, finding that "the record indicates that Customs failed to ensure that confidential filings were accompanied by the requisite public summaries." *See Royal Brush Mfg., Inc. v. United States*, 483 F. Supp. 3d 1294, 1305 (Ct. Int'l Trade 2020). Specifically, the CIT "remand[ed] the matter to Customs to address and remedy the lack of public summaries by providing Royal Brush an opportunity to participate on the basis of information that it should have received during the underlying proceeding." *Id.* at 1308. Similar shortcomings in the context of administering the UFLPA would expose CBP to significant litigation risk.

Establishing a clear and transparent process would also ensure proper administration of the UFLPA and avoid the significant pitfalls and public criticism experienced by other agencies in the administration of tariffs on steel and aluminum pursuant Section 232 of the Trade Expansion Act of 1962, and an associated product exclusion process. The Commerce Department Inspector General ("IG") in 2021 issued a comprehensive report on Commerce's failure to implement a transparent and evidence-based framework for deciding whether to grant or deny such exclusions. In its report, the IG criticized the agency by noting "[t]he lack of complete and reliable information likely affected ITA's and BIS's ability to make well-informed decisions on whether to grant or deny an ER. Regarding our second objective, we found that ER decisions lacked transparency." The IG report concluded that "[t]o improve the review process for subsequent ERs, both ITA and BIS need to make decisions based on complete and reliable information, increase transparency, and show accountability for their actions and decisions." Moreover, the same non-transparent process that led to this unflattering IG report also generated litigation before the CIT, in which the Department of Commerce took the unusual step of requesting a voluntary remand to correct what it felt was unsupportable position based that lacked substantial evidence. *See, e.g.*, *Borusan Mannesmann Pipe U.S. Inc. v. United States*, No. 20-00012, 2020 WL 3470104, at *1 (Ct. Int'l Trade June 25, 2020) (granting the agency's request for a remand to redetermine its bases for denying certain exclusions). On a practical level, the IG identified that absence of a clear and transparent process resulted in the poor

administration of the Section 232 Tariff exclusion process, including a large backlog of exclusion requests. The IG went on to also find that a "lack of transparency that contributes to the appearance of improper influence in decision-making for tariff exclusion requests." The suboptimal structure and administration of this exclusion process needlessly disrupted trade and supply chains. If similar problems were to occur with respect a large share of the products imported from China, as a result of the UFLPA, the same types of problems would occur on a much larger scale.

As CBP and the interagency begin to implement the UFLPA, they must take into account lessons learned from EAPA and the Section 232 product exclusion process.

For the foregoing reasons, it is essential that CBP establish a fair, transparent, record-based, and time-limited process for determining whether particular products are subject to the rebuttable presumption, based on the criteria in the UFLPA.

ii) **CBP should require that allegations be signed by the submitting party (*i.e.*, not be anonymous) and be detailed as to the facility, entity, or good, stating the basis for such knowledge and the date range that such knowledge was obtained.**

As noted above, the rationale for requiring sufficiently detailed and credible allegations is to protect an importer's due process rights and to mitigate the chances that anonymous, erroneous, or unfounded allegations are made. Such allegations need to meet a certain standard of specificity in order to be credible. CBP can develop specific mechanisms to protect the identify of submitters of allegations in the event that there is a risk of retaliation against that party.

iii) **CBP should create a clearly defined regulatory process for interested parties to submit a rebuttal prior to the application of the rebuttable presumption. Application of the rebuttable presumption should not be based on information from only a submitting party.**

As noted above, CBP must develop a clearly defined regulatory process to take into account contrary evidence, prior to the application of the rebuttable presumption, in order to protect the due process rights of relevant U.S. parties. This evidence should be taken into account *before* the rebuttable presumption is applied to a particular product. Otherwise, determinations will be vulnerable to extensive challenge on statutory and constitutional grounds.

iv) **If CBP determines through this defined regulatory process by a "preponderance of evidence" that a particular product meets the statutory requirements for application of the rebuttable presumption, then CBP should issue an unclassified determination explaining the basis for applying the presumption.**

In order to apply the rebuttable presumption to a particular product, CBP should determine by a preponderance of the evidence that the product meets the statutory criteria for application of the rebuttable presumption (*i.e.*, either that it was produced wholly or in part in the XUAR, or that it was produced wholly or in part by an entity or at a facility on the Enforcement Lists). A "preponderance of evidence" standard, if properly applied, would protect the due process rights of importers and avoid challenges to agency action on various statutory or constitutional grounds. By contrast, as discussed above, "reasonable suspicion" is too low, and would leave

the decision to apply the rebuttable presumption vulnerable to litigation challenges. In addition, as discussed in Part I(A)(i)(1), due process requires "that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence." *Ralls Corp.*, 758 F.3d at 296.

v) **CBP should make available on a public website any proceedings regarding the potential application of the rebuttable presumption, along with the relevant allegations.**

Creation of a public website will provide the public with confidence that the UFLPA is being implemented in a fair, transparent, and organized manner and also advance basic standards of due process for affected importers. As explained in the Office of Management and Budget's July 2016 update to Circular No. A-130 – *Managing Information as a Strategic Resource*, agencies' responsibility to disseminate information to the public is discharged by, among other things, "[p]ublishing public information online in a manner that promotes analysis and reuse for the widest possible range of purposes, meaning that the information is publicly accessible, machine-readable, appropriately described, complete, and timely." The creation of a public website that summarizes any proceedings in a docket form would advance this important principle of good governance.

B. Proceedings to grant exceptions to the rebuttable presumption

i) **To rebut the presumption against import as set forth in Section 4 of the UFLPA, CBP should establish clear standards and timeframes for CBP to adjudicate the evidence submitted by the requestor.**

As noted above, the UFLPA delineates a process for CBP to grant exceptions to the rebuttable presumption, if certain criteria are met. CBP should establish clear standards and a limited timeframe to adjudicate evidence submitted by a party requesting an exception from the UFLPA's rebuttable presumption. Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (also known as the "Mod" Act) introduced "the concept of 'informed compliance,'" which represents the idea "that importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that [CBP] will not unilaterally change the rules without providing importers proper notice and an opportunity for comment." *Aspects Furniture Int'l, Inc. v. United States*, 392 F. Supp. 3d 1317, 1324 (Ct. Int'l Trade 2019) (citing S. Rep. No. 103–189 at 63-64 (1993)). CBP therefore has a unique responsibility to issue clear guidance to importers in connection with the evidence that they must marshal to rebut the presumption. As discussed in detail below, this guidance should set forth a clear process for receiving exception requests, a timeline for adjudicating such requests, and the types of evidence that CBP would consider in granting an exception. Such procedures would protect the due process rights discussed above. This would also be consistent with CBP's administration of covered merchandise referrals under the EAPA, also discussed above.

ii) **CBP should establish a public electronic system for receiving requests for exceptions to the rebuttable presumption.**

Creation of a tailor-made, public portal for importers to submit evidence to seek exceptions to the rebuttable presumption will provide the public with confidence that the UFLPA is being implemented in a fair, transparent, and organized manner. This is similar to the portals that other regulatory agencies maintain. *See, e.g.*, BIS Exporter portal, available at https://www.bis.doc.gov/index.php/exporter-portal (providing information on applications, licensing, lists, news, and guidance); *see also* OFAC portal, available at https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information (providing comprehensive list, license, and application information); and BIS Section 232 tariff exclusion portal, available at https://www.commerce.gov/page/section-232-investigations. Such a public portal will facilitate efficient administration of the UFLPA.

Relying on regulations.gov for the UFLPA exception process would be inadvisable. When the Commerce Department initially opened the Section 232 exclusion process to the public on March 19, 2018, requesters applied for exclusion by submitting requests on Regulations.gov's public comment system. However, on September 11, 2018, the Commerce Department expanded the review process, including by incorporating the rebuttal and surrebuttal periods into the comments phase.[7] Even so, the process was unwieldy, and on June 13, 2019, the Commerce Department launched its own website, the Exclusion Portal, to receive requests, rebuttals and surrebuttals.[8] The FLETF should take this experience into account by establishing a purpose-built portal at the outside.

iii) **Requests for exceptions should be adjudicated by CBP within 60 days.**

Clear timelines for adjudication of requests for exceptions are extremely important and will provide the due process protections to affected importers, as discussed in Part I(A)(i)(1). It will also avoid the lengthy and undetermined timeframe for decision-making for which the Commerce Department IG criticized the Commerce Department in connection with exclusion requests, as discussed in Part II(A)(i).

iv) **If CBP decides to allow parties to respond to requests for exceptions, then the requestor should have an opportunity for a surrebuttal (as is the case in current for exclusion proceedings for tariffs under Section 232 of the Trade Expansion Act of 1962).**

CBP should create a clearly defined process for interested parties to submit evidence supporting or opposing a request for an exemption to the rebuttable presumption. This should be limited to, at most, a response to a request for an exception, and a surrebuttal by the party requesting an exception, similar to the process that has been adopted for exclusion proceedings for tariffs under Section 232 of the Trade Expansion Act of 1962.

Initially, on March 19, 2018, when BIS published an interim final rule setting forth the processes for parties to request product exclusions from the Section 232 tariffs, such requestors did not

[7] *Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. at 46026, 46,058-59 (July 15, 2016).
[8] *See Commerce Launches New 232 Exclusions Portal*, June 13, 2019, available at https://www.bis.doc.gov/index.php/documents/section-232-investigations/2407-232-exclusions-portal-press-release/file

have an opportunity to submit a surrebuttal responding to any request objection. This raised process and fairness issues that prompted legislators, including members of the U.S. Senate Finance Committee, to directly urge the Commerce Department to implement improvements to address the lack of due process and procedural fairness for stakeholders.[9] In addition, the lack of due process, transparency, and fairness also generated litigation resulting in remands to the Commerce Department.[10] In response to these pressures, and ongoing concerns regarding the lack of due process, fairness, and transparency, BIS revised its process by adding a rebuttal and surrebuttal process.[11] By contrast, the process should not allow for an undetermined timeframe to submit such evidence, which will leave CBP vulnerable to legal challenge and criticism.

v) **CBP should be mindful of the fact that companies are being asked to "prove a negative." Therefore, companies that take reasonable steps to ensure the absence of forced labor in their supply chains should be deemed to have provided "clear and convincing evidence." Due diligence measures taken into account by CBP should include both historical due diligence and compliance with due diligence guidance published as a result of the UFLPA.**

Section 3 of the UFLPA requires that designated entities and facilities be afforded an opportunity to rebut the presumption that goods produced wholly or in part by an entity or facility are made with forced labor in violation of 19 U.S.C. § 1307. Therefore, special care should be taken to avoid establishing an evidentiary burden that elevates the "rebuttable" presumption to a *de facto* "irrebuttable" presumption – especially given the Administration's policy interest in avoiding supply chain bottlenecks and getting inflation under control.

In the past, CBP has repeatedly indicated that certain non-existent types of documents are required to rebut a WRO detention. For example, in its detention letter issued to Uniqlo, CBP requested "[s]upporting documents related to employees that picked the cotton, time cards or the like, wage payment receipts, and daily process reports that relate to the raw cotton sold to the yarn producer." Customs Ruling HQ H318182 (May 10, 2021). However, wage payment receipts often do not exist. Requiring such nonexistent evidence is contrary to both due process

[9] Letter from U.S. Senate Finance Committee to Secretary Wilbur Ross, re: *Improvements to the Process for Product Exclusions from Section 232 Tariffs on Imported Articles of Steel and Aluminum*, U.S. Senate Finance Committee (Apr. 19, 2018), available at https://www.finance.senate.gov/imo/media/doc/4.19.18%20Hatch-Wyden%20232%20Letter.pdf.

[10] *See, e.g.*, *JSW Steel (USA) Inc. v. United States*, 466 F. Supp. 3d 1320, 1333 (Ct. Int'l Trade 2020)(Ordering that the Commerce Department (1) file "a statement that sets forth: the steps taken to ascertain that the record for the original proceeding is complete, including identifying how the Department identified missing information and the existence of ex parte communications; and, to what extent any ex parte communications were or were not directly or indirectly relied upon or referred to by Commerce in making its determinations;" (2) "file on the docket and further supplement the record with any information, inclusive of any information directly or indirectly considered by Commerce, in its determinations that it determines should be included in the record as a result of explaining the steps taken to ensure completion of the administrative record[;]" and (3) "that Commerce's determinations not to exclude twelve steel articles from the remedy imposed by the President under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, as challenged in this action. . . are remanded for further explanation and consideration, specifically to (1) identify and correct all deficiencies in the existing administrative record[.]"

[11] *Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. at 46026, 46,027, 46,032 (Sept. 11, 2018).

obligations and the requirements of the statute itself, as well as the policy objectives of the Administration.

vi) **CBP's determinations on requests for exceptions should be appealable directly to the CIT.**

As discussed above in Part II(A)(vi), given the due process rights at stake for importers, there must be an opportunity for direct judicial appeal of CBP's determinations under the UFLPA.

C. *De minimis* exception

i) **CBP should set forth a definition of what "in part" means in the context of goods produced by forced labor "wholly or in part." The import ban should not apply to goods that have only trace amounts of inputs that may be otherwise covered by the rebuttable presumption, or when the rebuttable presumption applies at a stage of production that is many steps removed from the imported product.**

Creation of a *de minimis* exception under the UFLPA would be consistent with both CBP's current administration of certain WROs and other regulatory regimes that expressly include *de minimis* exceptions to broader enforcement policies. Far from de-emphasizing the seriousness of any input produced with forced labor, such an approach would advance the cause against forced labor by allowing CBP to focus enforcement capacity and resources on products with a commercially-relevant connection to forced labor.

As relevant CBP precedent for this approach, CBP's FAQs for Hoshine Silicon Industry Co. Ltd.'s WRO state that:

> "[f]or the Hoshine WRO, CBP's application of this risk-based targeting approach is precise and, as a result, is expected to affect only those imports that contain silica-based products made by Hoshine or its subsidiaries. CBP's risk-based targeting methodologies rely on multiple sources, which may include the specific geographic location of suppliers of polysilicon in an importer's supply chain, public and private reports from reputable sources regarding Hoshine content in a U.S. supply chain, statements by suppliers indicating that they source from Hoshine, and other sources that reasonably indicate the existence of Hoshine content in a U.S. supply chain." *See The Department of Homeland Security Issues Withhold Release Order on Silica-Based Products Made by Forced Labor in Xinjiang*, CBP (June 24, 2021), available at https://www.cbp.gov/newsroom/national-media-release/department-homeland-security-issues-withhold-release-order-silica.

This current risk-based approach entails a *de facto de minimis* exception.

Similarly, the Commerce Department's Export Administration Regulations ("EAR") contain certain *de minimis* exclusions for enforcement. *See* 15 C.F.R. § 734.4(c)-(d).[12] Just as a *de minimis* rule is appropriate in the context of a legal framework that promotes U.S. national security and foreign policy interests in the context of export controls under the EAR, so too it is appropriate in the context of a framework to prevent the importation of products produced with forced labor.

Accordingly, CBP should follow its own precedent and that of other enforcement agencies in adopting a *de minimis* exception to enforcement of the UFLPA.

D. Contents of guidance to be issued to importers

i) Clear definition of "forced labor"

(1) CBP should articulate a clear definition of "forced labor" that takes into account practical economic factors in China, and that reviews the totality of working conditions.

As discussed above, providing a clear and practical definition of "forced labor" for the purpose of enforcement action is necessary as a matter of good governance and to meet the applicable standards set forth in section 3(b)(2)(F) of E.O. 12988, "Civil Justice Reform," which requires "agencies to define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items." CBP's definition should match that of the FLETF.

ii) Proposed and final CBP regulations on the "clear and convincing" evidence standard

(1) CBP should publish proposed and final regulations on what constitutes "clear and convincing" evidence for purposes of granting an exception to the rebuttable presumption.

Consistent with the UFLPA's explicit authorization, CBP should publish new regulations (proposed and final versions) on what constitutes "clear and convincing" evidence that is required to rebut the presumption. This is necessary for both due process considerations discussed in Part I(A)(i)(1) and the statutory requirement for creating a system of "informed compliance" for affected parties discussed in Part II(B)(i).

(2) The regulations should lay out a clear pathway for importers to achieve compliance – while being sensitive to the practical difficulties of conducting supply chain audits and traceability exercises in China.

[12] "**10% *De Minimis* Rule**. Except as provided in paragraphs (a) and (b)(1)(iii) of this section and subject to the provisions of paragraphs (b)(1)(i), (b)(1)(ii) and (b)(2) of this section, the following reexports are not subject to the EAR when made to any country in the world. See supplement no. 2 of this part for guidance on calculating values…**25% *De Minimis* Rule**. Except as provided in paragraph (a) of this section and subject to the provisions of paragraph (b) of this section, the following reexports are not subject to the EAR when made to countries other than those listed in Country Group E:1 or E:2 of supplement no. 1 to part 740 of the EAR. See supplement no. 2 to this part for guidance on calculating values."

The regulations should provide a clear, detailed pathway for importers to achieve compliance. This is necessary for both due process considerations discussed in Part I(A)(i)(1) and the statutory requirement for creating a system of "informed compliance" for affected parties discussed in Part II(B)(i).

(3) CBP should also develop a webpage that provides up-to-date information regarding enforcement related issues, including investigations, FAQs, and Enforcement List issues. This webpage should include links to the dockets for each FLETF/CBP determination and provide the evidence upon which the FLETF/CBP relied.

As discussed above in Parts II(B)(i)(1) and (2), the Mod Act directs CBP to make available written or electronic materials providing "advice necessary for importers and exporters to comply with the Customs laws." 19 U.S.C. § 1625(e). The creation of a webpage would assist in informing the public and affected importers about CBP's expectations and provide clarifying guidance on its enforcement standards and expectations.

iii) Proposed and final CBP regulations for importer due diligence

(1) CBP should publish proposed and final regulations providing guidance to importers regarding "due diligence, effective supply chain tracing, and supply chain management measures," compliance with which is necessary to rebut the presumption. (Section 3(d) of the UFLPA specifies that such regulations may be issued).

As part of the proposed regulations, CBP should include detailed guidance on due diligence measures expected by CBP in connection with supply chain tracing and management that would serve as evidence to rebut the presumption. This is necessary for both due process considerations discussed in Part I(A)(i)(1) and the statutory requirement for creating a system of "informed compliance" for affected parties discussed in Part II(B)(i).

(2) The guidance should identify specific criteria which, if met, constitute compliance with the corresponding statutory requirement.

The regulations should also include guidance on the specific criteria that constitute compliance with key elements of the UFLPA. This is necessary for both due process considerations discussed in Part I(A)(i)(1) and the statutory requirement for creating a system of "informed compliance" for affected parties discussed in Part II(B)(i).

iv) Sequencing of CBP regulations

(1) Both sets of regulations should be issued in proposed and final form prior to the implementation of the rebuttable presumption, so that importers have the opportunity to comply and adapt supply chains before becoming subject to novel evidentiary standards that carry economic harm and reputational risk.

Issuing regulations and necessary guidance to affected importers before applying enforcement measures is essential to ensure that importers benefit from standards of "informed compliance" and from basic due process protections. *See supra* Part II(A)(i) and Part II(B)(i).

E. Enforcement priorities

i) High priority sectors

(1) During the first year following the effective date of the UFLPA, FLETF Enforcement Lists and CBP enforcement should focus only on the High Priority Sectors specifically listed in the UFLPA (tomatoes, cotton, and polysilicon), as well as products whose final production or assembly occurs in the territory of Xinjiang.

Given the significant lack of CBP resources presently available for forced labor enforcement actions and the novelty and complexity of the UFLPA, CBP and FLETF should take an incremental approach to enforcement to ensure that enforcement is effective, transparent, and reasonable. For example, in their recent letter to the Congressional Appropriations Committees, Senator Rubio and Representative Smith stated that "[t]he House Subcommittee provided $9.2 million in its Committee-approved FY2022 Homeland Security Appropriations bill and the Senate Subcommittee provided $10 million in its draft to strengthen CBP's enforcement actions and processes to prevent the importation of products made with forced labor. Given the subsequent enactment of the Uyghur Forced Labor Prevention Act and the request by the Biden Administration for additional resources to implement it, we respectfully request that the conference report on the FY2022 bill include an even greater amount for forced labor enforcement."

Although the UFLPA mandates certain implementation requirements 180 days from the date of enactment (*i.e.*, by June 21, 2022), a full-scale implementation across every sector and which encompasses every potentially implicated geographic region under the UFLPA (third-countries and potentially every region of China) is simply not feasible given resource constraints. A reasonable starting point would be to focus first on the three High Priority Sectors specifically listed in the UFLPA (tomatoes, cotton, and polysilicon), as well as goods that are produced directly in Xinjiang. By contrast, CBP should defer decisions on adding other entities, facilities, and goods not produced directly in Xinjiang to the Enforcement Lists under Section 2(d)(2)(B)(viii) of the UFLPA, until CBP has demonstrated adequate enforcement capacity for the initial implementation phase. In practice, this will allow CBP to demonstrate effective enforcement on the highest priorities set for the in the statute: addressing goods from the three High Priority Sectors, as well as other goods that originate in Xinjiang. The more complex Enforcement List designations involving naming specific facilities and entities of concern require more procedural safeguards as described above and should be implemented in a later phase.

ii) Key principles of an enforcement plan

(1) The FLETF should not make any designations on the Enforcement List outside the High Priority Sectors until June 2023 at the earliest, in order to

provide adequate time for the recommended process for making additions to the Enforcement List. (Exceptions can be made for entities/facilities to which WROs currently apply.)

As discussed above in Part II(E)(i)(1), CBP does not currently have the resources needed to implement the UFLPA for all entities, facilities, and products. A reasonable starting point would be to focus on the three High Priority Sectors specifically listed in the UFLPA (tomatoes, cotton, and polysilicon).

iii) Forced Labor Working Group

(1) The FLETF/CBP should convene a working group with representatives from the public and private sectors, including importers and retailers, to spearhead initiatives related to the enforcement of, and compliance with, the UFLPA.

The creation of a public-private working group will allow the FLETF and CBP regularly consult with key stakeholders on the implementation of the UFLPA, similar to the Commercial Customs Operations Advisory Committee ("COAC")[13] or bodies created by other regulatory agencies, such as the Defense Trade Advisory Group created to advise on implementation of the International Traffic in Arms Regulations.[14]

III. Sequencing/Interagency Coordination/Other Issues Related to Administration of the UFLPA

A. As noted above, FLETF Enforcement List designations should undergo *Federal Register* notice and comment in draft form before becoming final and before CBP applies the rebuttable presumption to entities/facilities on the lists.

As discussed further in Parts I(A)(i)(1) and (3), this sequence is necessary to protect affected parties' due process rights.

B. As noted above, CBP regulations on rebutting the presumption (including regulations providing guidance to importers on due diligence, as called for in the UFLPA) should undergo notice and comment in draft form, before CBP applies a rebuttable presumption pursuant to the UFLPA. (However, CBP should continue enforcing WROs currently in place, including those that apply to Xinjiang.)

As discussed further in Parts I(A)(i)(1) and (3), this sequence is necessary to protect affected parties' due process rights.

C. In general, implementation of the UFLPA should avoid unnecessarily impeding trade. The Section 232 exclusion process illustrates the risk of "collateral damage"

[13] For more information on COAC, see https://www.cbp.gov/trade/stakeholder-engagement/coac.
[14] For more information on Defense Trade Advisory Group, see https://www.state.gov/remarks-to-the-defense-trade-advisory-group/.

to benign imports resulting from a bureaucratic exception process that lacks clear processes, standards, and timelines.

As noted above in Part II(A)(i), the Commerce Department IG has provided extensive guidance on the pitfalls of creating an exclusion or exception process without clear, transparent, and time-limited processes.

D. The FLETF should be cognizant of the fact that forced labor is not unique to China (and indeed the FLETF itself was established pursuant to USMCA implementing legislation). So the FLETF should administer the UFLPA in a manner that would be acceptable if applied to other countries where forced labor is also a concern.

The rationale for this consideration is that there will certainly be further forced labor enforcement requirements affecting other countries, such that the FLETF and CBP should carefully develop its enforcement plan under the UFLPA, which can be used as an effective precedent for other countries or programs.

Response to 18 Questions

We set forth below our answers to the 18 questions for which the Department of Homeland Security has requested public comment in connection with implementation of the UFLPA and forced labor issues generally.[15] We incorporate by reference the proposed Enforcement Strategy set forth above, which provides further legal and policy support for the answers below.

1. **What are the risks of importing goods, wares, articles and merchandise mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China, including from the Xinjiang Uyghur Autonomous Region or made by Uyghurs, Kazakhs, Kyrgyz, Tibetans, or members of other persecuted groups in any other part of the People's Republic of China?**

The U.S. government has publicly stated that it believes that state-sponsored forced labor is used in Xinjiang.[16] The full extent of forced labor use is not yet known, although it is generally agreed that not every entity operating in Xinjiang relies on forced labor. CBP has identified tomatoes, cotton, and polysilicon as industries where there is an elevated risk of forced labor.[17]

2. **To the extent feasible, as part of the assessment of risks, what mechanisms, including the potential involvement in supply chains of entities that may use forced labor, could lead to the importation into the United States from the People's Republic of China, including through third countries, of goods, wares, articles and merchandise mined, produced, or manufactured wholly or in part with forced labor?**

Since October 2019, the U.S. Department of Commerce has added 67 entities to the Export Administration Regulation's "entity list" due to their connection to human rights abuses or repression in Xinjiang.[18] Supply chains that include these entities create a higher risk that articles were produced using forced labor. Furthermore, certain products that are produced without the use of forced labor could include components or other inputs that were produced with forced labor.

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[15] *Notice Seeking Public Comments on Methods To Prevent the Importation of Goods Mined, Produced, or Manufactured With Forced Labor in the People's Republic of China, Especially in the Xinjiang Uyghur Autonomous Region, Into the United States*, 87 Fed. Reg. 3,567(Jan. 24, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-01-24/pdf/2022-01444.pdf

[16] *FACT SHEET: New U.S. Government Actions on Forced Labor in Xinjiang* (June 24, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-new-u-s-government-actions-on-forced-labor-in-xinjiang/.

[17] *CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang* (Jan. 13, 2021), https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave; The Department of Homeland Security Issues Withhold Release Order on Silica-Based Products Made by Forced Labor in Xinjiang (June 24, 2021), available at https://www.cbp.gov/newsroom/national-media-release/department-homeland-security-issues-withhold-release-order-silica.

[18] Congressional Research Service, *China Primer: Uyghurs* (Jan. 11, 2022).

3. **What procedures can be implemented or improved to reduce the threats identified in Question 2?**

The FDRA's proposed Enforcement Strategy would create a fair, transparent, and on-the-record process to ensure only articles produced with forced labor are excluded from the U.S. market. The Enforcement Strategy proposes a clear and transparent system that would ensure the UFLPA is administered in a just and effective way with proper due process protections.

Specifically, the U.S. government should establish a fair, transparent, fact-based process for making each of the following four types of determinations related to the UFLPA:

- FLETF additions of entities or facilities to the "Enforcement Lists" required by Section 2(d)(2)(B) of the UFLPA,
- FLETF removal of entities or facilities from an Enforcement List,
- CBP's determination to apply the rebuttable presumption to a particular article at the border, and
- CBP's determination to grant an exception from the rebuttable presumption, pursuant to the UFLPA.

The procedures contained in the Enforcement Strategy for reaching each of these determinations would fulfill two critical objectives: ensuring that the UFLPA is administered lawfully, including by adequately respecting due process rights; and ensuring that the administration of the UFLPA does not unduly interfere with the flow of imports into the United States. For more information, please see Parts I(A)(i)(1)-(2) and II(A)(i) of the Enforcement Strategy.

Further, procedures that ensure only entities or goods that use forced labor are excluded from the U.S. market will help prevent litigation by addressing complaints that the FLETF and CBP are acting in an "arbitrary and capricious" manner. Transparency will also help encourage buy-in from importers and the public at large. For more information, please see Part II(A)(i) of the Enforcement Strategy. Finally, establishing a clear and transparent process would avoid the significant pitfalls and public criticism experienced by the Commerce Department in the administration of tariffs on steel and aluminum pursuant Section 232 of the Trade Expansion Act of 1962, and an associated product exclusion process. For a further discussion, see Part II(A)(i) of the Enforcement Strategy.

4. **What forms does the use of forced labor take in the People's Republic of China and the Xinjiang Uyghur Autonomous Region? For example, what ''pairing assistance'' and ''poverty alleviation'' or other government labor schemes exist in the People's Republic of China that include the forced labor of Uyghurs, Kazakhs, Kyrgyz, Tibetans, or members of other persecuted groups outside of the Xinjiang Uyghur Autonomous Region? What similar programs exist in which work or services are extracted from Uyghurs, Kazakhs, Kyrgyz, Tibetans, or members of other persecuted groups under the threat of penalty or for which they have not offered themselves voluntarily?**

According to advisories issued by the U.S. government, the use of forced labor may take the form of "mutual pairing assistance programs," involuntary transfer of Xinjiang laborers to Chinese factories, and forced labor prisons in Xinjiang.[19]

5. **What goods are mined, produced, or manufactured wholly or in part with forced labor in the Xinjiang Uyghur Autonomous Region or by entities that work with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor, or receive forced labor?**

CBP has previously identified tomatoes, cotton, and polysilicon as industries where there is an elevated risk of forced labor.[20]

6. **In addition to cotton, tomatoes, and polysilicon, are there any other sectors which should be high-priority for enforcement?**

At the initial stage of enforcement of the UFLPA, the FLETF should focus its initial administration on tomatoes, cotton, and polysilicon (the "High Priority Sectors"). Although the UFLPA mandates certain implementation requirements 180 days from the date of enactment (*i.e.*, by June 21, 2022), a full-scale implementation across every sector and which encompasses every potentially implicated geographic region under the UFLPA (third-countries and potentially every region of China) is simply not feasible given resource constraints. In practice, this will allow CBP to demonstrate effective enforcement on the highest priorities set forth in the statute: addressing goods from the three High Priority Sectors (as well as other goods that originate in Xinjiang, as described in the Enforcement Strategy). The FLETF should not expand the list of High Priority Sectors until it has demonstrated proper administration of such a complex and resource-intensive undertaking efficiently and effectively. For more information, please see Part I(E)(i)(1) and (ii)(1) of the Enforcement Strategy.

7. **What unique characteristics of such high-priority sector supply chains, including cotton, tomato, and/or the polysilicon supply chains, need to be considered in developing measures to prevent the importation of goods mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China?**

The tomato, cotton, and polysilicon industries differ significantly in their operations, including labor conditions and documentation collected in the normal course of business. An advantage of focusing initial enforcement on these three sectors is that it would provide FLETF and CBP the opportunity to focus on the High Priority Sectors' highly complex and globally-integrated supply

[19] *Xinjiang Supply Chain Business Advisory: Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses in Xinjiang*, at 6-7 (July 1, 2020), available at https://www.state.gov/wp-content/uploads/2020/07/Xinjiang-Supply-Chain-Business-Advisory_FINAL_For-508-508.pdf.

[20] *CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang* (Jan. 13, 2021), https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave; The Department of Homeland Security Issues Withhold Release Order on Silica-Based Products Made by Forced Labor in Xinjiang (June 24, 2021), available at https://www.cbp.gov/newsroom/national-media-release/department-homeland-security-issues-withhold-release-order-silica.

chains before expanding the UFLPA's scope. For more information, please see Part I(E)(i)(1) and (ii)(1) of the Enforcement Strategy.

8. **How can the United States identify additional entities that export products that are mined, produced, or manufactured wholly or in part with forced labor in the Xinjiang Uyghur Autonomous Region or by entities that work with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor, or receive forced labor?**

The FLETF should establish an on-the-record channel for receiving information pertinent to proposed designations and providing interested parties the opportunity to rebut such information through the provision of their own evidence, thereby creating a fair and transparent mechanism to assess the credibility of the allegations before a product becomes subject to the rebuttable presumption. Additionally, any entity or facility included on the FLETF lists should have an open-ended opportunity through a clearly defined regulatory process to remediate such designation through the submission of information to the FLETF. For more information, please see Part I of the Enforcement Strategy.

9. **How can the United States most effectively enforce the UFLPA against entities whose goods, wares, articles, or merchandise are made wholly or in part with forced labor in the People's Republic of China and imported into the United States?**

As noted above, the FLETF should establish an on-the-record channel for receiving information pertinent to proposed designations and providing interested parties the opportunity to rebut such information through the provision of their own evidence, thereby creating a fair and transparent mechanism to assess the credibility of the allegations before a product becomes subject to the rebuttable presumption. Additionally, any entity or facility included on the FLETF lists should have an open-ended opportunity through a clearly defined regulatory process to remediate such designation through the submission of information to the FLETF. For more information, please see Part I of the Enforcement Strategy.

In addition, at this time, CBP should focus only on the goods from the High Priority Sectors specifically listed in the UFLPA (*i.e.*, tomatoes, cotton, and polysilicon), as well as products whose final production or assembly occurs in the territory of Xinjiang. CBP does not have the resources needed to implement the UFLPA for all entities, facilities, and products. As a result, the FLETF should defer decisions on adding other entities, facilities, and goods not produced directly in Xinjiang to any list required by the UFLPA, until CBP has demonstrated adequate enforcement capacity for the initial implementation phase. For more information, please see Part I(E)(i)(1) and (ii)(1) of the Enforcement Strategy.

10. **What efforts, initiatives, and tools and technologies should be adopted to ensure that U.S. Customs and Border Protection can accurately identify and trace goods entered at any U.S. ports in violation of section 307 of the Tariff Act of 1930, as amended?**

CBP should provide a comprehensive website to support importers' compliance with the UFLPA. Such online tools should include a database of any proceedings regarding the potential application of the rebuttable presumption, a public electronic system for receiving requests for exceptions to the rebuttable presumption, and up-to-date information regarding enforcement related issues. For more information, please see Parts II(A)(v), (B)(i), and (D)(ii)(3) of the Enforcement Strategy.

11. What due diligence, effective supply chain tracing, and supply chain management measures can importers leverage to ensure that they do not import any goods mined, produced, or manufactured wholly or in part with forced labor from the People's Republic of China, especially from the Xinjiang Uyghur Autonomous Region?

CBP should publish proposed and final regulations providing guidance to importers regarding the "due diligence, effective supply chain tracing, and supply chain management measures," compliance with which is necessary to rebut the presumption imposed by CBP pursuant to the UFLPA. The guidance should identify specific criteria which, if met, constitute compliance with the corresponding statutory requirement. For more information, please see Part II(D)(iii) of the Enforcement Strategy.

12. What type, nature, and extent of evidence can companies provide to reasonably demonstrate that goods originating in the People's Republic of China were not mined, produced, or manufactured wholly or in part with forced labor in the Xinjiang Uyghur Autonomous Region?

Parties with a protected interest must have a meaningful opportunity to provide evidence in response to allegations that goods originating in the People's Republic of China were mined, produced, or manufactured wholly or in part with forced labor in the Xinjiang Uyghur Autonomous Region. Due process requires that an affected party "be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014). CBP should be mindful of the fact that companies are being asked to "prove a negative." Therefore, companies that take reasonable steps to ensure the absence of forced labor in their supply chains should be deemed to have provided "clear and convincing evidence." Due diligence measures taken into account by CBP should include both historical due diligence and compliance with due diligence guidance published as a result of the UFLPA. For a further discussion, please see Parts I(A)(i) and (II)(A)(i), (B)(v) of the Enforcement Strategy.

Further, the evidence in question here will impact determinations by the FLETF and CBP, including determinations (1) by FLETF to add or remove an entity from an Enforcement List, and (2) by CBP to apply the rebuttable presumption or to grant an exception from the rebuttable presumption. Each of these determinations are appealable directly to the CIT under 28 U.S.C. § 1581(i)(1)(D), which provides that "In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out

of any law of the United States providing for. . . (D) administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph. . . .” Subpart (C), in pertinent part covers “embargoes. . . on the importation of merchandise for reasons other than the protection of the public health or safety.” Accordingly, it is important to provide importers advance guidance on the type, nature, and extent of evidence that would demonstrate that goods originating in the People’s Republic of China were not mined, produced, or manufactured wholly or in part with forced labor in the Xinjiang Uyghur Autonomous Region.

13. **What tools could provide greater clarity to companies on how to ensure upcoming importations from the People’s Republic of China were not mined, produced, or manufactured wholly or in part with forced labor in the Xinjiang Uyghur Autonomous Region? To what extent is there a need for a common set of supply chain traceability and verification standards, through a widely endorsed protocol, and what current government or private sector infrastructure exists to support such a protocol?**

Eliminating forced labor in supply chains is a complex and difficult problem that will require coordination between the government and private stakeholders. CBP should create clear guidance through a public website and new regulations so that private entities may harmonize their efforts with best practices. For more information, see Part II(D) of the Enforcement Strategy. CBP should also develop a webpage that provides up-to-date information regarding enforcement related issues, including investigations, FAQs, and Enforcement List issues. This webpage should include links to the dockets for each FLETF or CBP determination and provide the evidence upon which the FLETF or CBP relied. The creation of a webpage would assist in informing the public and affected importers about CBP’s expectations and provide clarifying guidance on its enforcement standards and expectations. For more information, see Part II(D)(ii)(3) of the Enforcement Strategy.

14. **What type, nature, and extent of evidence can demonstrate that goods originating in the People’s Republic of China, including goods detained or seized pursuant to section 307 of the Tariff Act of 1930, as amended, were not mined, produced, or manufactured wholly or in part with forced labor?**

As noted above, CBP should be mindful of the fact that when it comes to rebutting the presumption under the UFLPA, companies are being asked to “prove a negative.” Therefore, companies that take reasonable steps to ensure the absence of forced labor in their supply chains should be deemed to have provided “clear and convincing evidence.” Due diligence measures taken into account by CBP should include both historical due diligence and compliance with due diligence guidance published as a result of the UFLPA. For more information, please see Part II(B)(i)(5) of the Enforcement Strategy.

15. **What measures 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 the People’s Republic of China?**

The regulations should lay out a clear pathway for importers to achieve compliance – while being sensitive to the practical difficulties of conducting supply chain audits and traceability exercises in China. In many situations, neither CBP nor the manufacturer has the leverage necessary to induce cooperation from upstream suppliers, even if there is no issue related to forced labor. CBP should focus its enforcement capacity and resources on products with a commercially-relevant connection to forced labor. For more information, see Part II(C)-(D) of the Enforcement Strategy.

16. **How can the U.S. Government coordinate and collaborate on an ongoing basis with appropriate nongovernmental organizations and private sector entities to implement and update the strategy that the FLETF will produce pursuant to the UFLPA?**

The FLETF and CBP should convene a working group with representatives from the public and private sectors, including importers and retailers, to spearhead initiatives related to the enforcement of, and compliance with, the UFLPA. The creation of a public-private working group will allow the FLETF and CBP regularly consult with key stakeholders on the implementation of the UFLPA. For more information, please see Part II(E)(iii)(1) of the Enforcement Strategy.

17. **How can the U.S. Government improve coordination with nongovernmental organizations and the private sector to combat forced labor in supply chains, and how can these serve as a model to support implementation of the UFLPA?**

As noted above, the FLETF and CBP should convene a working group with representatives from the public and private sectors, including importers and retailers, to spearhead initiatives related to the enforcement of, and compliance with, the UFLPA. The creation of a public-private working group will allow the FLETF and CBP regularly consult with key stakeholders on the implementation of the UFLPA. For more information, please see Part II(E)(iii)(1) of the Enforcement Strategy.

Furthermore, the FLETF should create a transparent, on-the-record process for updating the strategy to be produced pursuant to the UFLPA, including the lists required by UFLPA Section 2(d)(2)(B). Information received from third parties should be signed by the submitting party and detailed as to the facility, entity, or good, stating the basis for such knowledge and the date range that such knowledge was obtained. General or circumstantial allegations, such as second-hand reports prepared by NGOs and media, should not be sufficient for a designation without further corroboration. For more information, see Part I(A)(i)(3)-(5).

18. **Is there any additional information the FLETF should consider related to how best to implement the UFLPA, including other measures for ensuring that goods mined, produced, or manufactured wholly or in part with forced labor do not enter the United States?**

For more information, please see the proposed Enforcement Strategy.