

# CBP Anti-Forced Labor Guidance Leaves Solar Sector Wanting

By **Harry Clark, Jeanine McGuinness and Maria Sergeyeva** (March 6, 2023)

On Feb. 23, U.S. Customs and Border Protection released new guidance for importers regarding the Uyghur Forced Labor Prevention Act, or UFLPA.[1]

The guidance provides recommendations on best practices for importers' applicability review submissions to CBP — information and documentation designed to establish that imports do not have connections to China's Xinjiang region that would render them restricted from entry into the U.S. under the statute.

The guidance is part of an effort by the U.S. government to reconcile the UFLPA and an adequate supply of solar panels for U.S. solar energy development.

## Background

Effective June 21, 2022, the UFLPA established a rebuttable presumption that goods mined, produced or manufactured, in whole or in part, in China's Xinjiang region or by designated entities were made with forced labor. As such, they are to be precluded from entry into the U.S. under section 307 of the Tariff Act.

CBP's unpredictable detention patterns present a major challenge for parties that rely on international supply chains, such as solar project developers.

In addition to supply delays, which result in project development delays, UFLPA detentions of solar modules also may give rise to reputational concerns about reliance on forced labor. That is, solar power developers and power buyers, or offtakers, may be concerned that solar module import detentions will erroneously suggest that they are connected to forced labor.

The new guidance consists of best practices for applicability reviews, new FAQs and guidance on preparing the applicability review submissions.[2]

The new guidance generally does not cover submissions seeking an exception from the UFLPA if the imported items fall within the scope of the UFLPA because they were mined, produced or manufactured, wholly or in part, in the Xinjiang region or by an entity on the UFLPA entity list.

It also does not alter or add to previous guidance for importers on supply chain due diligence.

## Preparing Applicability Review Submissions

CBP's new guidance purports to provide practical direction on preparing and organizing documentation evidencing importers' supply chain due diligence for applicability review



Harry Clark



Jeanine McGuinness



Maria Sergeyeva

submissions. That said, CBP states in the new guidance that it is not establishing prescriptive requirements for the types of documentation and information that it will recognize as being determinative.

To facilitate applicability reviews by CBP, U.S. importers may take the following steps:

- Ensure that submitted documentation is easy for CBP to review.
  - Provide complete, well-organized documentation packages, featuring executive summaries, annotated lists of documents, English translations and additional explanatory material.
  
  - For solar module imports, provide documents outlined by CBP in the model table of contents for each level of supply chain, as described below.
  
- Notify CBP when the supply chain for a particular import is identical to one previously reviewed and cleared by CBP to accelerate the review process.
  - Submit a summary tracing report showing that the supply chain is identical to the previously cleared supply chain.
  
- Connect with the CBP point of contact included in the detention notice with questions.
  - Request an extension of the submission deadline if importers require additional time to collect and prepare the documentation.
  
  - Request a meeting with CBP if the documentation is particularly complex.
  
- Engage with the appropriate CBP Centers of Excellence and Expertise prior to arrival of high-risk imports.

CBP indicates that admissibility packages from its Customs Trade Partnership Against Terrorism trade compliance partners will be prioritized for review.

For solar module importers, the new guidance provides a sample table of contents for submissions, in which CBP lists the categories of documents suggested for each step of the supply chain — from module producers to suppliers of cells, wafers, ingots, polysilicon, and metallurgical grade silicon, and to suppliers of quartzite.

Such documents include packing lists, bills of lading, country-of-origin certifications, invoices, purchase orders, contracts, production records, inventory of inputs and outputs, proofs of payment, and transportation records for all stages of the solar module manufacturing process.[3]

### **Key Takeaways**

The new guidance may help mitigate severe challenges for the U.S. solar industry posed by detention of imported products such as solar panels. As the Biden administration has sought to promote renewable energy production, UFLPA detentions of solar panels have undermined development of solar power facilities.

The guidance purports to address the foremost challenge with UFLPA detentions — uncertainty about the required contents of an applicability review submission seeking CBP's release of detained merchandise.

The guidance confirms that the heart of applicability review submissions should be transaction, financial, and transportation documentation that records merchandise's supply chain back to the raw materials, and shows that there was no production connection to Xinjiang.

For solar panels, the supply chain documentation should include documents related to the mining of quartzite used to produce polysilicon for solar cells.

Unfortunately, the guidance's utility will likely be limited. It does not include a checklist of information and documentation that, if included in an applicability review submission, will result in release of merchandise detained by CBP. And the new guidance goes little beyond CBP's June 2022 advice on material that should populate applicability review submissions.

### **Next Steps**

The new UFLPA guidance does not seem to be what industry needs to negotiate UFLPA requirements effectively. But continued engagement with CBP on this subject may bear fruit.

The new guidance indicates that CBP has succeeded in reducing applicability review processing times for detained shipments, on average, to two to three weeks after submission of a complete documentation package to CBP for the first time, and 10 to 14 days for shipments that have supply chains identical to previously reviewed and cleared supply chains.

CBP expects the processing times to decrease further as importers gain experience with submitting applicability packages and CBP becomes more familiar with major importers' supply chains.

Finally, CBP has indicated that it is exploring opportunities to partner with industry to pilot

technology that could assist industry's efforts to comply with the UFLPA. It will host a Forced Labor Technical Expo in Washington, D.C., this spring.

---

*Harry Clark is a partner and head of the international trade and investment practice at Orrick Herrington & Sutcliffe LLP.*

*Jeanine McGuinness is a partner at the firm.*

*Maria Sergeyeva is an associate at the firm.*

*Associate Milana Karayanidi and Greg Hume, an economist and compliance specialist in the firm, also contributed to this article.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Pub. L. 117-78 (Dec. 23, 2021).

[2] CBP, Best Practices for Applicability Reviews: Importer Responsibilities, CBP Publication No. 3083 0223 (Feb. 23, 2023); CBP, FAQs: Uyghur Forced Labor Prevention Act (UFLPA) Enforcement (Feb. 23, 2023); CBP, Guidance on Executive Summaries and Sample Tables of Contents: Preparing a UFLPA Applicability Review Submission, CBP Publication No. 3082 0223 (Feb. 23, 2023).

[3] See *id.* for a full list of documents.