

What Retail Really Wants from the Uyghur Bill: ‘You Really Have to Guess What the Issue Is’

By *Jasmin Malik Chua*



A man wears a mask to protect members of his family who he says have been put into forced labor camps in China, as members of the Uyghur American Association rally in front of the White House, Thursday, Oct. 1, 2020, after marching from Capitol Hill in Washington, in support of the Uyghur Forced Labor Prevention Act which has passed the House and now will go on to the Senate. The bill prohibits some imports from Xinjiang and imposes sanctions for human rights violations.

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American retail's Big Four trade groups are calling for greater clarity, uniformity and transparency on the Department of Homeland Security's enforcement of the [Uyghur Forced Labor Prevention Act](#) (UFLPA), which was signed into law in December and whose "rebuttable presumption" barring the majority of products from China's [Xinjiang](#) region is scheduled to take effect in June.

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In a document drafted by the law firm ArentFox Schiff in response to the Federal Register Notice request for comment, the [American Apparel & Footwear Association](#) (AAFA), the [National Retail Federation](#) (NRF), the Retail Industry Leaders Association (RILA) and the U.S. Fashion Industry Association (USFIA) propose a "multi-stakeholder approach" to enforcement that prioritizes due diligence over detention, a time-consuming endeavor that can rack up costs and result in the loss, spoilage or obsolescence of goods as they await a [final verdict](#).

"The problem is that to date [forced labor](#) detentions have been enforced arbitrarily and inconsistently," said Angela Santos, an ArentFox Schiff partner who helped compile the groups' remarks. "What is done at one port is different from another port, and the information requested by customs differs depending on who is looking at your shipment. In addition, you don't know why your goods are [being detained](#)—customs never tells you, 'This is your problematic supplier. This is your nexus to the [Withhold Release Order] supplier region.' So you really have to guess what the issue is."

The trade organizations' Forced Labor Working Group (FLWG) said it and its members condemn the [use of forced labor](#) and understand that traceable supply chains are a vital piece of the ethical sourcing puzzle. But it also insists that brands and retailers cannot be expected to bear the "hefty onus" of ensuring compliance alone. Together, the AAFA, NRF, RILA and USFIA represent more than 16,000 companies, including boldface names such as Adidas, Gap, J.Crew and Patagonia. Domestically, the retail industry underpins the livelihoods of 32 million American workers, making it the nation's largest private-sector employer.

While brands and retailers are "committed" to performing supply-chain due diligence, and many already align with international standards such as the United Nations Guiding Principles on Business and Human Rights, this process did not "historically include" the [full traceability workup](#) that is now required for each shipment under the heightened scrutiny, the FLWG said. Most importers have relationships only with their first or second-tier suppliers and must rely on them to [delve deeper](#). Doing so requires "fundamental changes" to business operations and data sharing that require the cooperation of a raft of stakeholders.

“The forced labor prohibitions have been on books for a long time, but until the last few years, they really were not enforced,” Santos previously told Sourcing Journal. In 2021, Customs and Border Protection (CBP) grounded [1,469 shipments](#) that contained roughly \$486 million of goods suspected to be made by modern slavery. With the agency’s recent addition of a second forced labor investigations branch, the number is only likely to grow. AAFA estimates cotton-related detentions at roughly 1,000.

China’s blocking statute and anti-sanctions law, designed to counteract foreign sanctions on Chinese entities, pose another challenge. “The statute says that [Chinese companies] have to report when they’re asked for information that may threaten China’s trade or that they find is anti-competitive,” Santos said at [a webinar](#) last month. “We’ve heard from many fashion companies that their suppliers don’t want to give them documentation because they’re scared, and so that makes it difficult as well.”

The FLWG said it’s willing to work with the government and other organizations to tackle these problems without issuing penalties such as fines. With the bill promising to deliver more structure, the trade groups want the interagency Forced Labor Enforcement Task Force (FLETF) to publish a list of the “actual perpetrators” of forced labor: the entities “active or complicit” in the coerced labor of Uyghurs and other persecuted Muslim groups in Xinjiang, something that Beijing has repeatedly denied.

“No one wants to support the use of forced labor,” Santos told Sourcing Journal. “They would like to have this information ahead of time so that they avoid those problematic suppliers. And customs has resisted that today because they think that these companies will simply disappear or rename themselves. But there’s precedent for this: The Export Controls, [Entity](#) and Sanctions Lists are used to determine whether companies can export goods to certain entities and outside of the United States. So it will function the same way.”

In the event of a detention, the FLWG proposes a list of evidence and specific documentation that may be accepted by the CBP so that submissions can be “expeditiously” reviewed. This, however, should be a last resort “when all diligence and remediation efforts have failed,” it said.

“It should be that customs and the government work proactively with the industry before goods are even made or before they’re exported so that companies have noticed that certain suppliers in their supply chain or certain peers are problematic,” Santos said. “That’s the only way that this is going to be effective. Enforcing it at the end of the supply chain isn’t helpful once the goods are already produced.”

Customs isn’t even hiring “the right people for the job,” Nate Herman, AAFA’s senior vice president of policy, told Sourcing Journal Thursday during the group’s Executive Summit in Washington, D.C. “You want someone who understands supply chains.” CBP has beefed up with government agency experts “who are good at enforcement,” he added, “but this is an issue where you’re talking about raw materials five, six, seven steps back in the supply chain.” That expertise is “regrettably” lacking, Herman said, though the House and Senate just earmarked \$27 million in funds to “enforce forced labor” mandates.

On Thursday, Democratic Senators Jeff Merkley of Oregon and James P. McGovern of Massachusetts, the chair and co-chair of the bipartisan and bicameral Congressional-Executive Commission on China welcomed the inclusion of more than \$27 million in new funding in the 2022 fiscal year omnibus appropriations bill for the implementation of the UFLPA.

Merkley and McGovern, together with the the commission's ranking Republican members Senator Marco Rubio of Florida and Representative Chris Smith of New Jersey had sent a letter to the leaders of the House and Senate Appropriations Committees seeking increased funding to "aggressively implement" the bill following its signing.

"It is critically important to provide Customs and Border Protection with increased funding to aggressively block goods produced in the Xinjiang Uyghur Autonomous Region (XUAR) or made with the forced labor of Uyghurs and other persecuted minorities elsewhere in China from entering the United States," they said in a statement. "The Chinese government and businesses have profited for too long from the forced labor of Uyghurs, Kazakhs and other Turkic Muslim ethnic minorities. Given the strong connection between forced labor, crimes against humanity and genocide in the XUAR, we must impose real costs for anyone profiting from atrocities. As the United States ramps up its vigilance to protect our markets from complicity in these atrocities, other countries around the world need to do the same."

Knowing which players to swerve from aside, the industry could partner with the government to expand programs, such as the Customs Trade Partnership Against Terrorism, that show that goods "don't have a nexus to Xinjiang," Santos added. The FLWG is also suggesting a third-party UFLPA accreditation scheme or an international agreement in the mold of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (for the wildlife trade) or the Kimberley Process (for conflict diamonds) that could serve the same purpose.

All of this could tie into the development of tools and technologies that can accurately identify and trace goods with ties to Xinjiang. Knowing which platforms CBP endorses would be helpful since many are not only prohibitively expensive for small and medium-sized enterprises but they're also untested.

"What the groups are asking for is participation in a pilot program, where they can provide input, test the technologies themselves [and] provide feedback to the government regarding the effectiveness of those traceability services," Santos said. "And if customs does endorse those technologies after partnering with industry, it should be enough to secure [the] release of [shipments]."

Herman said AAFA has explored more than two dozen traceable technology solutions to date, from blockchain to garden-variety software to artificial intelligence-based options to DNA tagging and mapping, and systems using chemical isotopes. "None of them [is] the silver bullet," he said, though a "combination" of platforms and approaches could get brands closer to 100 percent.

The trade groups are requesting a couple of carve-outs: one that disregards "insignificant components" or incorporates a [de minimis](#) threshold of 5 percent of total material cost, and another that makes an exception for recycled content, which Santos said is critical in light of growing momentum toward the

use of sustainable materials.

“The problem with them is that it’s even more difficult to trace the source of the inputs because they’re intermingled,” she said. “As a result, it’s really difficult to determine where the initial materials came from—it’s probably from many different sources and countries. It’s actually a problem that goes beyond the retail and textile industry; I know the solar industry is having that problem as well.”

With the comment period now closed, the FLETF now has to hone a strategy for supporting the enforcement of the UFLPA. It has also been directed to hold, by April 24, a public hearing that includes witnesses who can testify on measures to prevent the entry of products made with forced labor into the American market.

“It’s important that the government partner with the industry to come up with a feasible enforcement and implementation strategy for the UFLPA,” Santos said. “Industry should be viewed as a partner instead of [the target of] enforcement.”

Additional reporting by Jessica Binns.

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