AMERICAN SPICE TRADE ASSOCIATION, INC.

1101 17th Street, N.W. • Suite 700
Washington, DC 20036 USA
Tel: 202-331-2460 • Fax: 202-463-8998
E-mail: info@astaspice.org
Web: www.astaspice.org

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VIA REGULATIONS.GOV **PUBLIC DOCUMENT**

Cynthia Echeverria
Acting Director of Trade Policy
U.S. Department of Homeland Security

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]

The American Spice Trade Association (ASTA) respectfully submits these comments in the above captioned matter, pursuant to the Department of Homeland Security's Federal Register Notice dated January 24, 2022, issued on behalf of the Forced Labor Enforcement Task Force (FLETF).

ASTA appreciates the opportunity to submit comments in response to the Federal Register Notice published by the U.S. Department of Homeland Security, on behalf of the Forced Labor Enforcement Task Force (FLETF). ASTA condemns the use of forced labor and supports the U.S. government's efforts to eliminate products made with forced labor from U.S. supply chains.

ASTA was founded in 1907 and represents the interests of approximately 200 members – including large multi-national companies, as well as small and mid-sized family-owned companies – that grow, dehydrate, and process spices. ASTA's members include U.S.-based agents, brokers, importers, and companies based internationally that grow spices and ship them to the U.S., and other companies associated with the U.S. spice industry. ASTA members manufacture and market the majority of spices sold in the U.S. for industrial, food service, and consumer use. ASTA and our members' highest priority is ensuring the supply of pure, safe spice to American consumers. In addition, both the association and its members are committed to the use of fair, ethical, and responsible trading practices in the spice industry. We condemn forced labor, and the use thereof, in the strongest terms. Our members are committed to identifying and eradicating these practices from their supply chains, and ASTA is committed to supporting these efforts through education and resources to promote industry best practices.

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There are a wide variety of spices grown all over the world, including in China. Since the issuance of the State Department's Xinjiang Business Advisory in 2020 (the "Advisory"), and given the relevance of the Chinese market for spice importers, ASTA's members have been reevaluating their supply chain oversight processes to ensure compliance with the Advisory and the absence of forced labor through traceability, supplier questionnaires, supply chain mapping, and audits. For certain products, where China represents the vast majority of global production, some members have explored the feasibility of shifting crop production to third-countries with comparable growing conditions, and in some cases have found alternatives but need time to transition and scale operations. However, agricultural supply chains cannot be moved overnight. It takes time to identify suitable alternative growing regions, plant crops, train farmers, and establish the infrastructure necessary to support the industry in a new region.

For these reasons, as the FLETF engages in the development of a strategy for the enforcement of the Uyghur Forced Labor Prevention Act (UFLPA), ASTA urges for clarity, specificity, and consideration of the unique nature of individual supply chains in that strategy. Our industry is dedicated to combatting forced labor, but we also seek the establishment of due process, transparency, and clear direction for facilitating the importation of merchandise that is compliant, and therefore not prohibited under the law. For the industry to extensively adopt meaningful changes, we must have this information before enforcement action takes place.

Details and specific requests further elaborating on this general framework, focusing in particular on the development of statutorily-mandated guidance for importers regarding compliance are as follows:

- Submit Enforcement Strategy and Importer Guidance in Advance of Rebuttable Presumption Effective Date. ASTA was pleased to see Congress include the development of guidance for importers, along with their input, as part of the UFLPA enforcement strategy in Section 2(d)(6) of the implementing statute. Clear articulation of the type, nature, and extent of evidence to demonstrate that goods originating in China are not mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region (XUAR) or with forced labor, as well as other clarifications, will be critical for importers seeking to comply with the law. Companies seeking to operate in good faith and in accordance with the UFLPA will need time to review and adopt internal practices to demonstrate that merchandise is not prohibited on its effective date.

  The statute provides that the rebuttable presumption will be effective 180 days after enactment, and the deadline for submission of the strategy (including importer guidance) is

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not later than 180 days after enactment. Notably, compliance with guidance provided in Section 2(d)(6) is part of the criteria an importer must establish to rebut this presumption. As nothing prevents issuance *before* the date of enactment, ASTA urges the FLETF to issue importer guidance as far in advance as it can of the 180-day deadline (or June 21, 2022) to provide direction for the entry and clearance of merchandise that will be subject to the new law upon arrival and demonstrate an exception to the import prohibition, where applicable.

- Provide Enforcement Flexibilities During a 12-Month Transition Period. Taking into consideration unprecedented supply chain disruptions, global trade uncertainty, and logistical challenges, time will be essential for compliance-oriented importers to review, assess, and act on guidance, as well as implement any regulations issued in connection with the UFLPA. As such, the industry requests the FLETF to direct U.S. Customs and Border Protection (CBP) to utilize enforcement flexibilities and provide a 12-month transition period, with an additional six months for small and medium-sized companies, to allow as much notice and time as possible for importers to implement compliance procedures. Enforcement flexibility and targeting discretion, to the extent permitted by statue and within CBP's authority, would be particularly helpful if the issuance of guidance is not feasible in advance of the rebuttable presumption effective date.

- Consider the Nature of Agricultural Supply Chains. The FLETF guidance should consider the nature of agricultural commodity supply chains, which may vary in structure and complexity, when assessing supply chain management procedures and establishing evidentiary thresholds and documentation necessary to establish compliance. Depending on the product, millions of smallholder farmers are involved in the production of spices and their livelihoods depend on fair labor practices. Each supply chain involves distinct socioeconomic circumstances, geographical considerations, and business practices. Specific risks and mitigation strategies may differ by company depending on unique circumstances, such as the specific commodities, growing characteristics, business practices, and source countries or regions in their supply chains. Common practices include the use of codes of conduct, supplier agreements/attestations, employee, vendor, supplier, and farmer training, as well as direct supplier and third-party audits. In addition to consideration of supply-chain nuances and complexities in the development of an enforcement strategy, the FLETF should also issue commodity-specific guidance for any commodity within a sector that is designated or subsequently listed as "high risk" according to Section 2(d)(2)(B)(vii) of the statue.

- Clearly Define Process and Criteria for Entity Listing – and Delisting. Section 2(d)(2)(B) provides for the development of lists designating entities in the XUAR that: (1) mine, produce,

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or manufacture wholly or in part any goods made with forced labor; (2) work with the XUAR government to recruit, transport, transfer harbor or receive forced labor of Uyghurs, Kazaks, Kyrgyz, or members of other persecuted groups out of XUAR; (3) export products mined, produced or manufactured in whole or in part by such entities; and (4) facilities and entities, including the Xinjiang Production and Construction Corps (XPCC), that source material from XUAR or the XPCC or from persons working with the XUAR government or the XPCC, for purposes of the poverty alleviation or paring-assistance program or any other government labor scheme that uses forced labor. The law attaches significant consequences to the listing of any such entity, whose imports are deemed prohibited under Section 307 of the Tariff Act of 1930 and not entitled to entry at U.S. ports. As such, the FLETF should develop a process by which it will list entities, as well as a process for the removal of entities from such lists. The process should at a minimum include clear criteria (for both entity listing and delisting) that identify government agency issued reports or other guidance consulted for such lists, including those from the Department of Labor and State Department. Listing procedures should also include a petitioning process with an opportunity for notice and comment by interested parties.

- Distinguish UFLPA Evidentiary Standards for Clearing Seized Merchandise from other Section 307 Actions. Importer guidance, as well as any implementing regulations issued by CBP, should clearly distinguish the difference between evidentiary standards required to clear merchandise detained under the UFLPA from other enforcement actions taken pursuant to Section 307. In particular, CBP should ensure that the "clear and convincing" standard, which must be satisfied to establish that products were not made with forced labor, applies to XUAR-origin and listed entities only, and not to withhold release orders (WROs) or findings, where the present standard is "satisfactory evidence." In addition, CBP should clearly articulate how it will apply these standards in recognition of the different evidentiary threshold levels, with examples of the nature and type of evidence required to demonstrate a lower "satisfactory" standard on the one hand, and the higher "clear and convincing" standard on the other. Importantly, CBP should not apply this higher standard to merchandise that is not subject to, or outside the scope of UFLPA's rebuttable presumption.

- Provide Threshold Analysis and Examples of Evidence for Demonstrating China-Origin Products Are Not from XUAR or Produced by Listed Entities. When an importer seeks to demonstrate that merchandise is not subject to the UFLPA, CBP should confirm that as a tactical first line of defense, the importer may establish that the merchandise is not from the XUAR or a listed entity. Moreover, if established, CBP should find that the merchandise does not fall within the scope of the act and permit entry. If an importer fails to demonstrate the goods are not in scope, only then must CBP require proof the goods are not made with forced

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labor. Formal adoption of this two-step approach, which CBP has taken with respect to enforcement of WROs and findings, should be applied to the UFLPA.

According to the statue, evidence required to demonstrate that a product was not made with forced labor, must be "clear and convincing." As such, in applying this two-step approach, CBP should apply the "clear and convincing" standard to the second part of the analysis. The statute is silent as to the standard that should be used when establishing that a product is not from the XUAR or a listed entity. In the absence of clear language, we would argue that CBP should apply a standard to the first part of the analysis that is something less than "clear and convincing." There is nothing to suggest that this higher standard should be used unless merchandise is determined to be within the scope of the UFLPA.

Examples of evidence that CBP should accept to establish a non-XUAR origin should include records kept in the ordinary course of business and commonly used in the specific commodity trading sector. In the case of agricultural commodities, these records should include, and not be limited to: shipping records (e.g., bills of lading, packing lists, invoices), production records (e.g., batch records, warehouse records, pick tickets, other processing records) and farm records (e.g., delivery receipts, transportation records, in/out records for fresh material, weight records on deliveries).

CBP should also consider the extent to which traceability can be established to demonstrate goods are outside the UFLPA scope and indicate a willingness to consider traceability efforts that are short of full-scale. Importantly, for the spice industry, the guidance must acknowledge and account for challenges with full-scale traceability for certain agricultural commodities to the farm level or place of growth. For example, the ability to trace products back to the origin, or farm, is more difficult for some commodities than others. Traceability to a first level processor, however, may be sufficient to establish regional origin, or location within a specific-mile range, where the degree of crop perishability requires close proximity to processing facilities. Where importers must rebut a claim that merchandise is from the Xinjiang region, traceability to a farm outside XUAR, or to a processor where a cluster of farms could *not* be inside the XUAR based on the nature of the commodity, should be considered as evidence of equal weight.

In addition, for purposes of establishing origin or confirming the producing entity, the guidance should allow for consideration of supply chain audit models or certification programs that could establish or corroborate traceability or chain of custody. The guidance should also instruct CBP to consider other certifications or statements already required by

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importers that would establish origin, including certificates of origin as outlined in 19 CFR § 12.43 for the imported merchandise.

Finally, CBP should consider creating pre-clearance criteria and procedures for the entry of Chinese-origin goods where importers are able to consistently provide evidence establishing that certain supplier and commodity combinations are not from the XUAR or a listed entity. If substantiated, CBP should be able to rely on previous investigations and evidence submitted to establish that multiple entries from cleared entities within a certain timeframe are eligible for entry without detention.

- Provide Examples of Evidence Required to Demonstrate XUAR-Origin Products (and Listed Entities) Are Not Made with (or Using) Forced Labor. CBP has previously indicated that the nature of evidence required to refute allegations of forced labor will depend in part on the particular facts and circumstances of the alleged illegal practices, as well as the nature of the supply chain of the commodity at issue. When considering evidence to establish the absence of forced labor in the production of a good, CBP should consider the degree to which an importer can demonstrate established relationships with and knowledge of suppliers, as well as control and management of its supply chain. This could be established through affidavits and supplier agreements that demonstrate there is no connection to an entity affiliated with the XUAR government, other listed entities, or producing products with forced labor. The agency must also provide examples of scenarios and documentation that would successfully meet the standard of clear and convincing evidence, such as employment records, employee statements, and audit records. In the absence of clear guidance and a roadmap providing direction, establishing that a commodity sourced from the XUAR or a listed entity is not made under conditions of forced labor will be an insurmountable undertaking.

- CBP Must Disclose the Basis for Denying Entry of Detained Entries and Identify Deficiencies in Supporting Documentation. A major concern of importers seeking to establish the admissibility of merchandise detained under existing CBP Section 307 enforcement tools – namely WROs and findings – has been overbroad enforcement and lack of information about the basis for detention. Causing further frustration is CBP's failure to provide a demonstrative explanation of deficiencies in documentation provided that was found insufficient to clear detained imports for entry, leaving importers without recourse to remedy deficits or clarify compliance. There is concern CBP will replicate this pattern when enforcing the UFLPA. Even with robust due diligence and the exercise of reasonable care, importers cannot refute a claim clearly, and convincingly without the benefit of knowing what they must refute. When an importer provides supporting documentation that fails to support a claim – for example, that the merchandise is not within the scope of the order (or act) or is not made under

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conditions of forced labor – CBP should be required to provide a specific explanation accompanied with detailed examples of such shortcomings. In consideration of fundamental fairness and transparency, the FLETF should direct CBP to provide such information, which will help ensure against overbroad enforcement and assist importers with identifying and removing forced labor practices from their supply chains.

We appreciate the opportunity to provide the views of our membership and the Forced Labor Enforcement Task Force's consideration of our industry's comments. If you have any questions, please contact us.

Respectfully submitted,

Laura Shumow
Executive Director
American Spice Trade Association