

IN THE MATTER OF

# USTR SECTION 301 INVESTIGATIONS OF 60 ECONOMIES

## FAILURE TO IMPOSE AND EFFECTIVELY ENFORCE A PROHIBITION ON THE IMPORTATION OF GOODS PRODUCED WITH FORCED LABOR

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### **OMB A-123 INTERNAL CONTROL FINDINGS, APA § 706(2)(A) REVIEWABILITY ANALYSIS, AND CROSS-AGENCY EVIDENTIARY RECORD**

This document establishes four legal findings grounded in OMB Circular A-123, federal enforcement records, congressional testimony, and agency-published data. Each finding is framed for APA § 706(2)(A) reviewability, GAO/OIG citation, and immediate administrative action. No finding in this document relies on inference or advocacy. Each finding cites the agency's own published record, the agency's own stated mandatory duty, and the agency's own documented failure to discharge that duty. The document is structured for filing in federal court, citation by GAO, and use by contracting officers and program managers as the basis for corrective action.

# PRELIMINARY STATEMENT — SCOPE AND STANDARD OF REVIEW

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This document is submitted as a supplement to the pre-hearing brief filed in USTR-2026-0134. It addresses a discrete set of administrative law questions that arise from the interaction between: (1) the mandatory duties imposed on federal agencies by OMB Circular A-123 (Management's Responsibility for Enterprise Risk Management and Internal Control, 2026 revision) and related oversight instruments; (2) the documented performance of those agencies in discharging forced labor import enforcement obligations under 19 U.S.C. § 1307, P.L. 117-78 (UFLPA), and the Section 301 investigation; and (3) the standard of judicial review applicable to agency action under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

## I. The APA § 706(2)(A) Standard

Under APA § 706(2)(A), a reviewing court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Supreme Court established in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) that agency action is arbitrary and capricious when the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The four legal findings presented below are each structured to demonstrate that the documented enforcement failures of CBP and DHS with respect to forced labor import enforcement satisfy at least one of the State Farm criteria for arbitrary and capricious agency action. Each finding is independently sufficient for APA § 706(2)(A) review. Cumulatively, they establish a pattern of systematic noncompliance with mandatory statutory duties, inadequate internal controls under OMB A-123, and agency awareness of enforcement collapse without corrective action — the paradigmatic conditions for arbitrary and capricious designation.

## II. OMB Circular A-123 as the Internal Control Standard

OMB Circular A-123 (2026 revision), implementing the Federal Managers' Financial Integrity Act (31 U.S.C. § 3512), requires agency heads to annually assess, document, and report on the adequacy of the agency's system of internal controls over federal programs. A 'material weakness' under A-123 is a significant deficiency — a weakness in design or operation of internal controls — that precludes the agency from providing reasonable assurance that its program objectives are being achieved. A-123 requires that material weaknesses, once identified, be reported to OMB and Congress and addressed in a corrective action plan with defined milestones.

For purposes of this analysis, the 'program objective' against which CBP/DHS performance is measured is the mandatory duty imposed by 19 U.S.C. § 1307 to exclude from entry all merchandise produced with forced labor, and the UFLPA strategy and enforcement targets established by DHS in its published UFLPA Strategy documents. The failure to meet those

objectives — documented in CBP's own published UFLPA Enforcement Statistics Dashboard — is the predicate for each of the four findings that follow.

### **III. Evidentiary Standards**

Each finding is supported exclusively by: (a) federal statutes and regulations; (b) official agency publications, including CBP's own UFLPA Enforcement Statistics Dashboard, DHS's published UFLPA Strategy documents, and CBP's Resource Optimization Model; (c) congressional hearing records (House Homeland Security Subcommittee, Serial No. 118-34, October 19, 2023), which constitute admissible legislative history; (d) OMB directives and circulars; and (e) GAO and OIG reports and standards. No finding in this document relies on third-party advocacy claims or unverified data. Where specific figures are cited, the source document and access date are identified.

# THE FOUR LEGAL FINDINGS

## LEGAL FINDING (A)

### Agencies Possess Sufficient Authority to Discharge the Mandatory Forced Labor Import Enforcement Duty

#### Supporting Authority:

19 U.S.C. § 1307 (Tariff Act of 1930, § 307): 'All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by ... forced labor ... shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited.' (Mandatory exclusion — no exceptions stated in text.) | 19 CFR § 12.42: 'Whenever the Commissioner of CBP has reason to believe that merchandise produced by forced labor is being, or is likely to be, imported into the United States, he shall transmit a report ... and the Secretary of the Treasury shall instruct ... to withhold release.' (Mandatory investigative and withholding duty.) | P.L. 117-78 § 3(a): Establishes rebuttable presumption for XUAR goods; DHS authorized to implement by regulation. | 19 U.S.C. § 1499: CBP authorized to detain merchandise pending examination for compliance with applicable law — no limitation on volume or product category. | 19 U.S.C. § 1517: CBP required to investigate allegations of trade enforcement evasion within 15 business days. | 50 U.S.C. §§ 1701-1706 (IEEPA): President authorized to block transactions under declared national emergency with foreign nexus. | FAR 52.222-50: Mandatory contract clause requiring contractor certification of forced-labor-free supply chains. | OMB Circular A-123 (2026): Agency heads required to establish and maintain adequate internal controls over federal programs and to report material weaknesses.

#### Contradiction Between Duty and Outcome:

The existence of authority is established by the statute's text and the regulations promulgated under it. The question for APA § 706(2)(A) purposes is not whether authority exists but whether the agency has acted consistently with that authority. The contradiction between authority and outcome is demonstrated by the disparity between the mandatory 'shall not be entitled to entry' language of § 1307 — which is unconditional — and CBP's published UFLPA Enforcement Statistics Dashboard, which documents that CBP stopped approximately \$172 million in goods under UFLPA authority in FY2025 against a documented import exposure of \$840.6 billion in goods from the 60 economies under Section 301 investigation — an enforcement coverage rate of approximately 0.02 percent. CBP does not publish a legal analysis concluding that § 1307's mandatory exclusion applies only to the 0.02 percent of goods it is currently screening. No such analysis exists in the public record. The statutory text contains no volume limitation, no staffing-contingent exemption, and no de minimis carve-out that would authorize the current enforcement posture.

#### APA § 706(2)(A) Reviewability:

Under State Farm, 463 U.S. at 43, agency action is arbitrary and capricious when the agency has 'entirely failed to consider an important aspect of the problem.' The mandatory duty to exclude all forced-labor goods under § 1307's unconditional text is an aspect of the enforcement problem that CBP's published enforcement data demonstrates has not been systematically addressed. A reviewing court applying APA § 706(2)(A) may find that an agency's enforcement posture — \$172 million screened against \$840.6 billion in documented exposure — is inconsistent with a statute that uses the words 'shall not be entitled to entry' without qualification. The agency bears the burden of demonstrating a 'rational connection between the facts found and the choice made.' Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). The CBP dashboard data, cited as an agency's own publication, is the factual predicate for this reviewability analysis.

## LEGAL FINDING (B)

## Agencies Possess Sufficient Data to Identify, Quantify, and Act on Forced Labor Import Exposure

### Supporting Authority:

U.S. Census Bureau FT900 Dataset (authority: 13 U.S.C. § 301): Official federal record of all U.S. imports by country, HTS chapter, and time period. Published monthly. Used by USTR, Commerce, and Treasury for all trade policy determinations. Provides country-specific, sector-specific import volumes for all 60 Section 301-investigated economies. | DOL ILAB TVPRA List, 11th Edition (September 5, 2024): Lists 204 goods from 82 countries produced with forced or child labor, mapped to HTS codes via DOL's BETTER Trade Tool HTS Classification Methodology. | CBP UFLPA Enforcement Statistics Dashboard: CBP's own published enforcement data, updated quarterly, providing WRO counts, entity list entries, shipment detention values, and denial rates. | Walk Free / Minderoo Foundation Global Slavery Index 2023: Country-specific forced labor prevalence estimates for all 60 investigated economies, used by USTR and DHS in published strategy documents. | DHS UFLPA Strategy (June 2022) and Updates (July 2024, August 2025): DHS's own published identification of priority sectors, enforcement mechanisms, and documented forced labor in specific supply chains. | OMB Evidence Act (P.L. 115-435) and OMB M-21-27: Require agencies to develop and use data to assess program effectiveness. CBP ACE system: Processes every import entry electronically, receiving HTS code, country of origin, importer of record data pre-arrival.

### Contradiction Between Duty and Outcome:

The data gap is not a gap in data availability — it is a gap in data integration. The Census Bureau publishes monthly FT900 data identifying exact import volumes by country and HTS code. DOL publishes annual TVPRA findings mapping forced labor goods to HTS codes. CBP processes every import entry by HTS code in ACE pre-arrival. These three data systems — all funded, operational, and maintained by the federal government — contain all information necessary to identify every shipment in every HTS code from every Section 301-investigated economy that falls within a TVPRA-documented forced labor product category. The National Treasury Employees Union, in its October 2023 submission to the House Homeland Security Subcommittee (Serial No. 118-34), documented that CBP trade personnel have not increased since FY2003 despite a 32-fold increase in trade volume. This is an admission by the workforce union representing CBP officers that the operational gap is one of human capacity applied to available data — not an absence of data. No DHS or CBP publication concludes that the data necessary to identify forced labor import exposure is unavailable. DHS's own UFLPA Strategy identifies priority sectors and supply chain risks in specific detail, demonstrating that DHS has analyzed the same data it is not applying systematically at the border.

### APA § 706(2)(A) Reviewability:

Under State Farm, an agency acts arbitrarily when it 'entirely failed to consider an important aspect of the problem.' 463 U.S. at 43. Where an agency possesses data sufficient to identify the scope of a mandatory enforcement obligation but does not integrate that data into its enforcement operations, the resulting enforcement posture is not a product of agency expertise — it is a product of administrative inaction that runs counter to the evidence before the agency. The FT900 data, TVPRA list, and ACE entry records constitute 'the evidence before the agency' for State Farm purposes. The OMB Evidence Act's mandate to use data for program evaluation creates an additional administrative law duty whose breach supports APA § 706(2)(A) review. An agency that acknowledges, in its own strategy documents, the existence of forced labor in specific supply chains but does not operationalize that acknowledgment through integration of available federal data systems has offered 'an explanation for its decision that runs counter to the evidence before the agency.' State Farm, 463 U.S. at 43.

## LEGAL FINDING (C)

## Enforcement Outcomes Are Materially Deficient Relative to the Agency's Own Documented Standards and Mandatory Statutory Objectives

### Supporting Authority:

OMB Circular A-123 (2026), Section III.A: 'A material weakness exists when a significant deficiency in the design or operation of internal controls... precludes the entity from providing reasonable assurance regarding the achievement of its objectives.' | 31 U.S.C. § 3512(d) (Federal Managers' Financial Integrity Act): Requires agency heads to report annually to OMB and Congress on whether internal controls provide 'reasonable assurance that the objectives of applicable laws and regulations are being achieved.' | GAO Standards for Internal Control in the Federal Government (Green Book, GAO-14-704G), Principle 16: 'Management should perform monitoring activities to evaluate whether each component of internal control is present and functioning.' | GPRA Modernization Act (P.L. 111-352) and OMB A-11, Part 6: Require agencies to establish measurable performance goals and report actual performance against goals. | DHS UFLPA Strategy (June 2022): DHS stated that 'ending forced labor is a moral, economic, and national security priority for DHS' — establishing a formal programmatic objective against which performance is measurable. | CBP UFLPA Enforcement Statistics Dashboard (accessed April 7, 2026): Agency's own publication reporting FY2025 enforcement value of approximately \$172 million, representing a decline of approximately 90 percent from FY2024's approximately \$1.76 billion.

### Contradiction Between Duty and Outcome:

OMB A-123 defines a material weakness as a deficiency that precludes 'reasonable assurance regarding the achievement of its objectives.' DHS's stated objective is that 'ending forced labor is a moral, economic, and national security priority.' The enforcement data in CBP's own published dashboard provides the performance measurement against that objective: \$172 million in stopped goods in FY2025 against a documented import exposure of \$840.6 billion — a coverage rate of 0.02 percent. This is not a performance shortfall that requires inference or extrapolation. It is a ratio calculable from two government-published data sources: the CBP dashboard (enforcement) and the Census Bureau FT900 (exposure). Under A-123's definition, a program that achieves 0.02 percent of its mandatory objective while the agency simultaneously documents expanding enforcement scope (FLETF priority sectors: 4 sectors in 2022; 7 sectors in 2024; 12 sectors in 2025) satisfies the definition of a material weakness as a matter of arithmetic. The FY2024-to-FY2025 enforcement value decline of approximately 90 percent is an additional A-123 indicator: Green Book Principle 16 requires management to monitor whether internal controls are 'present and functioning.' A 90 percent single-year decline in a program's primary performance metric, with no published corrective action plan, is evidence that monitoring is not functioning. The FMIA 31 U.S.C. § 3512(d) reporting requirement creates a legal obligation to report this as a material weakness. No DHS or CBP publication acknowledges this A-123 obligation in the context of forced labor enforcement.

### APA § 706(2)(A) Reviewability:

Agency action is arbitrary and capricious under APA § 706(2)(A) when it 'runs counter to the evidence before the agency.' *State Farm*, 463 U.S. at 43. DHS's own published enforcement data (CBP dashboard) runs counter to DHS's own published program objective ('ending forced labor is a... national security priority') and to the mandatory statutory obligation of 19 U.S.C. § 1307. The A-123 material weakness framework provides the administrative law mechanism by which this contradiction becomes legally cognizable: a failure to report a documented material weakness under 31 U.S.C. § 3512(d) is itself an administrative law violation reviewable under APA § 706(2)(D) (agency action 'without observance of procedure required by law'). The convergence of § 706(2)(A) and § 706(2)(D) grounds — substantive arbitrariness and procedural failure — creates a dually sufficient basis for administrative and judicial review.

## LEGAL FINDING (D)

## Agency Failure to Act Constitutes an Arbitrary and Capricious Execution Risk Reviewable Under APA § 706(2)(A)

### Supporting Authority:

APA § 706(2)(A): 'The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be — arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' | Heckler v. Chaney, 470 U.S. 821 (1985): Establishes that agency decisions not to enforce are presumptively unreviewable, but that presumption is overcome 'where the statute has provided guidelines for the agency to follow in exercising its enforcement powers.' | 19 U.S.C. § 1307: Provides the statutory guideline — the word 'shall' in 'shall not be entitled to entry' is a mandatory directive that removes the Heckler v. Chaney presumption of unreviewability for categorical non-enforcement. | Norton v. Southern Utah Wilderness Alliance (SUWA), 542 U.S. 55 (2004): Agency failure to act is reviewable under APA § 706(1) when an agency fails to take a 'discrete agency action that it is required to take.' | 19 CFR § 12.42: The mandatory 'shall transmit' and 'shall instruct' language creates a 'discrete agency action that [the agency] is required to take' within the meaning of SUWA, removing § 12.42 enforcement from the Heckler v. Chaney unreviewability presumption. | OMB A-123 material weakness corrective action requirement: Creates an independent legal obligation to take corrective action upon identification of a material weakness — a discrete, mandatory duty reviewable under APA § 706(1).

### Contradiction Between Duty and Outcome:

The Heckler v. Chaney presumption that agency enforcement decisions are unreviewable does not apply here for two independent reasons. First, 19 U.S.C. § 1307's mandatory 'shall not be entitled to entry' language is a congressional directive that 'has provided guidelines for the agency to follow in exercising its enforcement powers' within the Heckler exception. The statute does not grant CBP discretion to admit forced-labor goods — it commands exclusion. An agency's decision to enforce only 0.02 percent of a mandatory exclusion obligation is not an exercise of prosecutorial discretion within a statutory grant of enforcement authority; it is a categorical departure from a statutory command. Second, 19 CFR § 12.42's 'shall transmit' language creates a discrete, mandatory action within SUWA's reviewability standard. CBP's failure to transmit reports on TVPRA-documented forced labor goods from Section 301-investigated economies — which would trigger the mandatory withholding duty — is a failure to take a discrete required action, not an unreviewable enforcement prioritization. The APA § 706(2)(A) arbitrary and capricious standard applies to the agency's apparent policy of treating mandatory duties as discretionary, because adopting a policy contrary to a statutory command is not a 'difference in view or the product of agency expertise' under State Farm — it is 'not in accordance with law' under APA § 706(2)(A).

### APA § 706(2)(A) Reviewability:

The reviewability analysis under Finding (D) operates on two tracks. First, under APA § 706(2)(A) and State Farm, the systematic gap between § 1307's mandatory exclusion command and CBP's documented enforcement posture constitutes agency action (the enforcement policy) that is not in accordance with law. Second, under APA § 706(1) and SUWA, CBP's failure to transmit reports under 19 CFR § 12.42's mandatory 'shall transmit' duty upon receiving TVPRA-documented evidence of forced labor constitutes a failure to take a discrete required action. These two grounds are independent — either alone is sufficient for judicial review. Together, they establish that the current CBP forced labor enforcement posture is subject to APA review on both substantive (§ 706(2)(A)) and structural (§ 706(1)) grounds, and that any USTR Section 301 determination that relies on that enforcement posture as evidence of adequate existing enforcement would face the same reviewability risk.

# EVIDENTIARY CONSISTENCY ACROSS AGENCIES

The following subsection documents the independent, convergent identification of the same enforcement failures by multiple federal agencies, congressional actors, and the workforce union representing CBP personnel. Convergence across independent sources is the evidentiary standard most likely to survive judicial scrutiny under APA § 706 and most likely to be cited by GAO under its Yellow Book criteria for findings that are documented, corroborated, and not subject to single-source reliability challenges.

**EVIDENTIARY STANDARD:** Each admission below is drawn from a separate, independent institutional source. No source is the submitter of this document. Each source is either a federal agency's own published record, a congressional committee's official hearing transcript (Serial No. 118-34), an industry organization's sworn testimony, or a federal workforce union's submitted statement. The convergence of these independent sources on the same factual findings satisfies the corroboration standard applicable in federal administrative law proceedings.

## A. The Enforcement Gap — Independently Identified by Five Sources

**CBP, April 7, 2026** — UFLPA Enforcement Statistics Dashboard (CBP Publication No. 5344-0126)

"FY2025 UFLPA enforcement value: approximately \$172 million. FY2024 enforcement value: approximately \$1.76 billion. Year-over-year decline: approximately 90 percent. Cumulative enforcement since June 21, 2022: approximately \$3.94 billion across approximately 41,857 shipments."

**Chairman Dan Bishop (R-NC), October 19, 2023** — House Committee on Homeland Security, Subcommittee on Oversight, Investigations, and Accountability, Serial No. 118-34

"Even though 2022 U.S. textile and apparel imports totaled \$153.2 billion under UFLPA, CBP only detained less than 1,000 shipments worth \$39 million from June 2022 to the present in the textile and apparel sector. Of those detentions, only \$8 million worth were denied entry."

**Kimberly Glas, President and CEO, NCTO, October 19, 2023** — Sworn testimony, House Committee on Homeland Security, Subcommittee on Oversight, Investigations, and Accountability, Serial No. 118-34

"U.S. imports of textile apparel and footwear in 2022 totaled \$184 billion, but only \$39 million in shipments were detained for possible UFLPA violations over the last 15 months. To put it in context, that's a mere 2/10 of a single percentage point of total imports. Enforcement for textile has actually decreased over the last year, both for UFLPA and in our free trade agreement countries."

**National Treasury Employees Union (NTEU), October 19, 2023** — Statement of Doreen P. Greenwald, National President, NTEU — submitted for the record, Serial No. 118-34

"Despite the significant investment in forced labor trade intervention, prevention, and enforcement, the number of CBP's non-uniformed trade personnel has not materially increased since CBP was

established in 2003, even though inbound trade volume multiplied 32 times between fiscal year 2003 and fiscal year 2023."

**Acting CBP Commissioner Troy Miller, September 2023** — Public statement cited in testimony, Serial No. 118-34

"The record volume of de minimis shipments makes 'screening these shipments and ferreting out contraband incredibly challenging."

## B. The De Minimis Circumvention Pathway — Independently Identified by Three Sources

**Chairman Dan Bishop (R-NC), October 19, 2023** — Opening statement, Serial No. 118-34

"Small, low-value, de minimis shipments pose a growing obstacle to CBP's enforcement capabilities. More than 60 percent of de minimis shipments come from China, including from direct-to-consumer clothing retailers that face scrutiny over their supply chain's risk of using forced labor in Xinjiang. De minimis shipments have doubled in the past 5 years alone, rising from \$500 million in fiscal year 2019 to over a billion in the past year."

**Kimberly Glas, President and CEO, NCTO, October 19, 2023** — Sworn testimony, Serial No. 118-34

"De minimis means minimal inspection. In 2016, we had 150 million of these packages. Today, we are on record for 1 billion individual packages containing forced labor goods, counterfeits, fentanyl, largely uninspected and receiving VIP express treatment making de minimis the world's greatest black market. UFLPA is impossible to enforce with this loophole."

**Ranking Member Glenn Ivey (D-MD), October 19, 2023** — Opening statement, Serial No. 118-34

"I believe the de minimis number was raised from \$200 to \$800. That might mean that if there's individual shipping, like especially by email ordering or electronic requests, that there's a way to circumvent the law that was put in place simply by just sending it in smaller amounts."

## C. The Supply Chain Traceability Gap — Independently Identified by Three Sources

**Chairman Dan Bishop (R-NC), October 19, 2023** — Prepared statement, Serial No. 118-34

"CBP should significantly expand its use of isotopic testing and other supply chain tracing technologies to identify cotton sourced from Xinjiang, as well as for other trade enforcement issues. Earlier this year, CBP conducted isotopic testing on clothing samples and found that 15 percent of the items tested positive for cotton from Xinjiang."

**Ranking Member Glenn Ivey (D-MD), October 19, 2023** — Opening statement, Serial No. 118-34

"It does appear that there have been interceptions of shipments where forced labor goods have been included in those, and the new testing methods, I think, have reflected that to some extent. But I do wonder about next steps, whether there's an effort, or the ability, frankly, to take it beyond that point with respect to sanctions. There's language about asset blocking, for example."

**Ranking Member Bennie G. Thompson (D-MS), October 19, 2023** — Prepared statement, Serial No. 118-34

"As companies grapple with the new requirements of UFLPA and discover ways to evade the intent of the law, it will be essential for DHS to have continued support from Congress — whether that requires more funding to bolster CBP's trade enforcement and DHS's expansion of the entities list, or new restrictions on what can and cannot be imported."

## D. The UFLPA Mandatory Reporting Gap — Independently Identified

**Ranking Member Glenn Ivey (D-MD), October 19, 2023** — Opening statement, Serial No. 118-34

"Just in my review in preparation for this hearing myself, it appears that additional oversight is going to be important here. In reviewing the statute, I saw that there are many reports that are generated, or required to be generated by the statute, but I don't know that either they are being generated or we are reviewing them as closely as we should."

FAILURE MODE	SOURCE 1	SOURCE 2	SOURCE 3	SOURCE 4
Enforcement gap: fraction of 1% coverage	CBP Dashboard (agency)	Chairman Bishop (R-NC)	NCTO testimony (industry)	USTR FT900 cross-reference
De minimis loophole — 1B+ packages	Chairman Bishop (R-NC)	Ranking Member Ivey (D-MD)	NCTO testimony (industry)	Acting Commissioner Miller (agency)
Supply chain traceability gap	Chairman Bishop (R-NC) — isotopic	Ranking Member Ivey (D-MD)	Ranking Member Thompson (D-MS)	NTEU (workforce union)
Staffing crisis — 32x volume, flat staff	NTEU submission (workforce union)	CBP ROM (agency)	NTEU (workforce union)	House appropriations record
Mandatory reports not generated/reviewed	Ranking Member Ivey (D-MD)	P.L. 117-78 § 2(c) text	FLETF charter documents	DHS OIG prior reports

**EVIDENTIARY CONCLUSION:** Each of the four legal findings is corroborated by independent institutional sources spanning the executive branch (CBP, DHS, Acting Commissioner), the legislative branch (Chairman Bishop R-NC, Ranking Member Ivey D-MD, Ranking Member Thompson D-MS), the federal workforce (NTEU), and industry (NCTO). No finding rests on a single-source assertion. The cross-agency, cross-branch corroboration satisfies the evidentiary consistency standard applicable to GAO Yellow Book findings, OIG referral thresholds, and APA § 706 substantial evidence review.



# FORESEEABILITY AND PREVENTABILITY

For purposes of APA § 706(2)(A) review, the question of whether agency failure was foreseeable and preventable is relevant to the 'arbitrary and capricious' determination in two respects. First, where an agency was specifically warned of a control failure and did not act, the failure cannot be characterized as a product of 'agency expertise' or a 'difference in view' — it is a departure from documented awareness. Second, foreseeability and preventability bear on whether the failure constitutes a material weakness under OMB A-123, which requires not only that weaknesses be identified but that corrective action plans be developed and executed. The following documents establish that the current enforcement failures were both foreseeable and preventable on the basis of agency and congressional records predating the FY2025 enforcement collapse.

## A. The Timeline of Foreseeable Failure

DATE	EVENT	AGENCY AWARE?	CORRECTIVE ACTION TAKEN?
June 21, 2022	UFLPA goes into effect. CBP begins UFLPA enforcement under rebuttable presumption.	Yes — DHS UFLPA Strategy published June 17, 2022.	No corrective action required at this date.
June 2022 – October 2023 (16 months)	UFLPA enforcement in textile/apparel: \$39 million detained of \$153.2 billion imported (0.025%). Cotton isotopic testing: 15% of tested samples positive for XUAR origin.	Yes — Chairman Bishop's October 2023 statement cites CBP data showing the gap.	CBP added 65 positions for UFLPA in FY2022. No systematic enforcement expansion documented.
October 19, 2023	House Homeland Security Subcommittee hearing, Serial No. 118-34. Congressional findings: enforcement gap, de minimis loophole, staffing crisis, isotopic testing underuse, mandatory reports not reviewed.	Yes — Acting Commissioner Miller's public statement on de minimis challenges cited in testimony.	No published agency response to October 2023 hearing findings has been identified in the public record.
July 2024	FLETf adds three new UFLPA Priority Sectors (aluminum, PVC, seafood). Scope of enforcement obligation expands.	Yes — DHS published the July 2024 UFLPA Strategy Update.	No corresponding staffing increase, ACE integration, or enforcement mechanism expansion documented.
August 2025	FLETf adds five more UFLPA Priority Sectors (caustic soda, copper, jujubes, lithium, steel). Third expansion of scope in three years.	Yes — DHS published the August 2025 UFLPA Strategy Update.	No corrective action plan addressing the gap between expanded scope and static enforcement capacity documented.
FY2025 (full year)	UFLPA enforcement value: approximately \$172 million — approximately 90% decline from FY2024's approximately	Yes — CBP's own dashboard documents the collapse. Published	No A-123 material weakness report filed. No OMB A-11 variance explanation published. No OIG inquiry initiated as of date of filing.

	\$1.76 billion. Concurrent exposure: \$840.6 billion from 60 Section 301 economies.	data accessible by any agency or congressional actor.	
March 12, 2026	USTR initiates Section 301 investigations of 60 economies. Scope of enforcement challenge is now 60 economies and 16 high-risk commodity sectors, against a static enforcement infrastructure.	Yes — USTR's initiation notice, FR Doc. 2026-05151, is published in the Federal Register.	No published interagency coordination plan for addressing the expanded enforcement scope has been identified.

## B. The Preventability Analysis

Preventability, for OMB A-123 and APA § 706(2)(A) purposes, does not require a showing that prevention would have been costless or effortless. It requires a showing that the agency possessed the authority, data, and operational capability to take corrective action and did not do so. Each of the following corrective actions was available to the relevant agency on the basis of existing authority and without new legislation, as of the date of the October 2023 hearing:

CORRECTIVE ACTION	AVAILABLE AUTHORITY (AS OF OCTOBER 2023)	REQUIRED ACTION	TAKEN?
Integrate DOL TVPRA-HTS crosswalk into CBP ACE pre-arrival risk targeting	CBP ACE operational authority; 19 U.S.C. § 1415 NTC authority; Evidence Act interagency data sharing; UFLPA Entity List already loaded in ACE demonstrating capability	CBP Commissioner directive — no rulemaking required	Not taken as of April 2026 filing
Issue WROs for TVPRA-listed goods from Section 301 economies under mandatory § 12.42 'shall transmit' duty	19 U.S.C. § 1307; 19 CFR § 12.42; TVPRA 11th Ed. documentation constitutes 'reasonable but not conclusive' evidence	CBP Commissioner report to Treasury Secretary; Treasury withholding order	Not initiated for categorical product-economy combinations as of filing
Publish CBP legal opinion on § 1307 / § 1321 de minimis incompatibility	CBP General Counsel authority to issue binding rulings; 19 U.S.C. §§ 1307, 1321; 19 CFR § 10.151	CBP General Counsel opinion — no congressional action required	Not published as of April 2026 filing
Submit overdue FY2023 CBP Trade ROM to Congress	HSA § 412(b); biennial submission requirement	CBP administrative submission — biennial requirement already triggered	NTEU October 2023 testimony indicated FY2023 ROM had not been submitted
File DHS A-123 material weakness report for forced labor enforcement program	31 U.S.C. § 3512(d); OMB A-123 annual requirement	DHS agency head certification — annual requirement	Not published in any accessible DHS report as of April 2026 filing

Update DOL EO 13126 list with TVPRA 11th Edition findings	EO 13126; 29 CFR Part 810; DOL authority to update list when evidence warrants	DOL ILAB administrative action — no rulemaking required	TVPRA 11th Edition published September 5, 2024; EO 13126 list update not documented as of filing
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### C. The Foreseeability Standard for APA Purposes

Foreseeability of the harm is not a standalone APA § 706(2)(A) element — the arbitrary and capricious standard does not require proof of intent or deliberate choice. However, foreseeability bears on the 'arbitrary and capricious' analysis in the following specific manner: where an agency has been formally notified of a specific failure mode — by a congressional hearing, by its own published data, by a workforce union's submitted congressional record statement, or by its own Inspector General — and takes no documented corrective action, the resulting harm cannot be characterized as 'the product of agency expertise' under State Farm. The agency has no expertise-based defense for a failure it was specifically warned about, possessed authority to prevent, possessed data to quantify, and did not address through any published corrective action mechanism.

The October 2023 hearing record (Serial No. 118-34) constitutes formal congressional notification of each of the four failure modes documented in the Four Legal Findings. The FY2025 CBP dashboard data — published after the hearing — documents that each failure mode worsened after formal notification. This sequence (warning → inaction → worsening outcome) is the factual pattern most clearly establishing arbitrary and capricious agency action under State Farm: the agency had 'the evidence before [it]' and adopted a course of action that 'runs counter to the evidence.' 463 U.S. at 43.

## PREDICATE FOR IMMEDIATE ADMINISTRATIVE ACTION

The four legal findings, the cross-agency evidentiary record, and the foreseeability/preventability analysis together establish the factual and legal predicate for the following immediate administrative actions, each of which is available under existing authority without new legislation:

ACTION	PREDICATE FINDING	AUTHORITY	RESPONSIBLE OFFICER	DEADLINE
DHS Inspector General initiate A-123 material weakness review of CBP forced labor enforcement program	Findings (C) and (D) — documented enforcement collapse; absent corrective action plan	IG Act 5 U.S.C. App. § 5; OMB A-123 (2026)	DHS Inspector General	30 days from Congressional direction
CBP Commissioner direct TVPRA-HTS integration into ACE pre-arrival targeting	Finding (B) — agencies possess sufficient data; Finding (D) — mandatory duty not discharged	19 U.S.C. § 1415; CBP ACE operational authority; Evidence Act	CBP Commissioner	60 days — Commissioner directive, no rulemaking
CBP General Counsel publish binding opinion on § 1307 / § 1321 de minimis incompatibility	Finding (A) — authority established; Finding (D) — mandatory exclusion duty	19 U.S.C. §§ 1307, 1321; CBP rulemaking and opinion authority	CBP General Counsel	90 days from Congressional oversight letter
CBP submit overdue Trade ROM to Congress under HSA § 412(b)	Finding (C) — documented staffing deficiency; A-123 control weakness	HSA § 412(b); SAFE Port Act § 401(b)(4)	DHS Secretary / CBP Commissioner	30 days — already overdue
USTR, DOL, and DHS file coordinated EAPA allegations covering top 10 transshipment pathways	Findings (A) and (B) — authority and data sufficient; mandatory investigation duty triggered	19 U.S.C. § 1517 — 15 business day investigation trigger	USTR / DOL ILAB / DHS FLETF jointly	60 days from § 2414 determination
DOL ILAB update EO 13126 list with TVPRA 11th Edition findings from Section 301 economies	Finding (B) — data exists; Finding (C) — program objective gap	EO 13126; 29 CFR Part 810	Secretary of Labor / DOL ILAB	60 days — evidence already published
OMB direct interagency FT900-ACE-TVPRA data integration plan under Evidence Act	Finding (B) — data exists in silos; Finding (C) — A-123	P.L. 115-435 (Evidence Act); OMB M-21-27	OMB Director	90 days from Congressional direction

	control weakness			
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**ADMINISTRATIVE LAW CONCLUSION:** The four legal findings in this document establish, from the agencies' own records, that (A) the authority to enforce exists and is unconditional; (B) the data to enforce exists and is integrated across federal systems; (C) the enforcement outcomes are materially deficient by any measurable standard and constitute a reportable A-123 material weakness; and (D) the failure to enforce constitutes arbitrary and capricious execution reviewable under APA § 706(2)(A) and, under *Norton v. SUWA*, a failure to take discrete required action reviewable under APA § 706(1). No additional factual development is required to support these findings. The record is closed. The duty to act — administratively, legislatively, and judicially — is established.

**Respectfully submitted:**

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