

CLIENT ALERT

New Legislation and Guidance Aimed at Addressing Forced Labor in Xinjiang, China

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New Business Guidance to Address Supply Chain Risks and Considerations

The Departments of State, Treasury, Commerce, and Homeland Security issued guidance on July 1, 2020 titled “Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses in Xinjiang” (the “advisory”). The advisory broadly recommends that businesses with potential exposure in their supply chain to the Xinjiang Uyghur Autonomous Region of China (“Xinjiang”) be aware of the reputational, economic, and legal risks involved with conducting business in the region and implement human rights due diligence policies and procedures to address the risk. The advisory highlights that since March, 2017, more than one million ethnic Uyghurs, Kazakhs, Kyrgyz, and other Muslim minorities have been held in internment camps designed to eradicate the detainees’ cultural and religious identities and to indoctrinate them with Chinese Communist Party ideology. Detainees have been subject to overcrowding, sleep and food deprivation, medical neglect, physical and psychological abuse, forced labor, sexual abuse, denial of religious practices, and forced studying of Communist Party propaganda.

The advisory recommends businesses and individuals remain aware of these abuses and urges them to evaluate exposure to risks, implement due diligence policies, procedures, and internal controls to ensure compliance practices are appropriately accounting for potential risk throughout supply chains. The advisory identifies three primary areas of risk: (1) assisting in developing surveillance tools for the Chinese government in Xinjiang; (2) relying on labor or goods sourced in Xinjiang in their supply chains, given the prevalence of forced labor and other labor abuses in the region; and (3) aiding in the construction of internment facilities or manufacturing facilities in close proximity to them.

A number of potential indicators of forced labor are laid out in the advisory. Of note for businesses are lack of transparency among firms operating in Xinjiang and factory location. These firms often use shell companies to hide the origin of their goods, use contracts with opaque terms, and conduct financial transactions that make it difficult to determine where the goods were produced or by whom. Factories built near internment camps, within their confines, or in industrial parks nearby are often additional indicators that forced labor may be utilized.

Businesses are recommended to collaborate with each other and with industry groups to exercise leverage in conducting human rights due diligence. Businesses should examine the end users of their products, technology, research, and services to reduce the likelihood that they are being used to advance the human rights abuses in Xinjiang. Furthermore, businesses providing construction materials to Chinese entities that may be operating in Xinjiang are encouraged to conduct due diligence practices to reduce the likelihood that internment camps are the ultimate beneficiaries of their business. These due diligence efforts should be well-documented in the event that businesses inadvertently engage in sanctionable activity or activity that violates U.S. law.

Despite the importance of due diligence efforts, the advisory points out the challenges presented with doing so. In particular, third-party audits may not be as reliable a source of information in Xinjiang as they typically are. At issue are repeated instances of auditors facing detention and harassment, the use of government translators who convey misinformation, and interviews with workers that may be unreliable. The advisory suggests that businesses pool and share information to better identify and assess indicators of forced labor.

While the penalties for the use of forced labor are varied, the advisory focuses on the use of Customs and Border Protection prohibitions against importing and benefitting from supply-chain related use of goods produced with forced labor. Penalties may include civil or criminal actions, including denying entry to goods produced with or benefitting from forced labor, seizure and forfeiture of such goods, and the issuance of penalties against the importer and other parties. Criminal investigations may be opened to prosecute individuals and/or corporations for their roles in the importation of goods into the U.S. in violation of U.S. law.

Uyghur Human Rights Policy Act of 2020

Prior to the issuance of the guidance, on June 17, 2020, President Trump signed the Uyghur Human Rights Policy Act of 2020 (the “Act”). The Act aims to address human rights violations and abuses by the Government of the People’s Republic of China (“China”) through the mass surveillance and internment of over 1,000,000 Uyghur and other minority ethnic groups in Xinjiang. The Act was passed with broad bipartisan support, passing the Senate unanimously and clearing the House in a 413-1 vote.

The Act requires the President to submit a number of reports to Congress providing detailed information on the scope and perpetrators of human rights abuses in Xinjiang. In particular, the Act requires the President to submit a public report to Congress within six months and annually thereafter identifying any foreign person and official of the Government of China that is responsible for the denial of human rights in the Xinjiang Uyghur Autonomous Region. Sanctions will then be imposed against each individual identified in the President’s report. Such sanctions shall include blocking the property of identified individuals and denying admission to the United States. Importantly, these sanctions shall not include the authority or a requirement to impose sanctions on the importation of goods into the U.S.

In addition to sanctions, the Act requires the Secretary of State to submit a public report, within six months, on human rights abuses in Xinjiang Uyghur Autonomous Region to Congress. The report must include detailed information regarding the number of individuals detained in internment camps; a description of the conditions in such camps, including an assessment of methods of torture, efforts to force individuals to renounce their faith, and other human rights abuses; the number of individuals in forced labor camps; methods used to reeducate detainees in the camps, including identification of government agencies in charge of reeducation; an assessment of the use of forced labor and a description of foreign industries and companies benefitting from such labor; an assessment of the level of access to the Xinjiang Region granted by China to foreign diplomats and consular agents, independent journalists, and representatives of nongovernmental organizations; an assessment of the mass surveillance, predictive policing, and other methods used to violate the human rights of persons in Xinjiang; a description of the frequency with which foreign governments are forcibly returning refugees and other asylum seekers to Xinjiang; a description of U.S. diplomatic efforts to address human rights abuses in Xinjiang and to protect asylum seekers from the region and the identification of the Department of State offices responsible for leading these efforts.

A number of additional reports must also be submitted to Congress to report on issues related to the treatment of Uyghurs. For example, within 90 days, the Director of the Federal Bureau of Investigation shall submit a report to Congress that outlines all of

the efforts taken to protect U.S. citizens and residents, including Uyghurs and Chinese nationals, legally studying or working in the U.S. who have experienced harassment or intimidation within the U.S. by officials or agents of the Government of China.

Lastly, within 6 months, the Director of National Intelligence shall submit a public report to Congress outlining an assessment of the national and regional security threats posed to the U.S. by China's policies in Xinjiang; a description of the acquisition or development of technology by China to facilitate internment and mass surveillance in Xinjiang, including technology related to predictive policing, large-scale data collection and analysis, and threats the acquisition, development and use of this technology poses to the U.S.; and a list of Chinese companies involved in the construction or operation of internment camps in Xinjiang or in providing mass surveillance technology. The Director of National Intelligence shall also submit a classified report to Congress that assesses the ability of the U.S. to collect and analyze intelligence related to the scope and scale of detention and forced labor in Xinjiang, the gross violations of human rights perpetrated in the internment camps, and other Chinese policies in Xinjiang that constitute gross violations of human rights.

The Act comes on the heels of increased scrutiny related to the use of forced labor, both in Xinjiang and more generally. On June 5, 2020, the Department of Commerce's Bureau of Industry and Security ("BIS") designated nine Chinese entities to its Entity List for their involvement in forced labor and mass surveillance in Xinjiang, prohibiting their participation in an export transaction. And, on May 1, 2020, a Withhold Release Order was issued by Customs and Border Protection against Hetian Taida Apparel Co., Ltd. for its use of forced or prison labor in Xinjiang, prohibiting imports of its goods into the U.S.

Prior to the Act, a March 2020 report by the Congressional-Executive Committee on China outlined the difficulty of receiving reliable information about Chinese supply chains, stating that audits are not likely to be effective tools to identify forced labor in a company's supply chains. As a result, some suggest that the only viable solution for companies seeking to avoid sanctions by the Act is to consider the entire region of Xinjiang as "tainted" with different forms of forced labor. Furthermore, some reports have indicated that Uyghurs and Kazakhs from Xinjiang have been relocated to other parts of China for forced labor, potentially tainting supply chains that do not touch Xinjiang. As a result, the report recommends U.S. companies do not source materials or products from within Xinjiang or from companies that work with the government in Xinjiang.

The immediate impact of the law and the advisory is to increase visibility of the forced labor issues; some see implementation linked to the US-China trade negotiations in the short-term, but in the longer term the reports required by the law will increase pressure for designations by OFAC in addition those already made by BIS. It is, however, also another opportunity for anyone sourcing from China to take additional steps to evaluate suppliers. Just as KYC has become the rule for banks and exporters, "know your supplier" is increasingly carrying the same weight.

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