International Trade Update

July 2020

Departments of State, Commerce, Homeland Security and the Treasury Caution Businesses Regarding Human Rights Abuses in Xinjiang

Key Notes:

- The departments' joint "Xinjiang Supply Chain Business Advisory" urges U.S. companies to monitor their activities in China, particularly in the Xinjiang region, where the Chinese government is repressing ethnic minorities and committing human rights abuses
- U.S. businesses, individuals, academic institutions, service providers, investors and others operating in this region could face significant reputational, economic and legal risk if sufficient due diligence of supply chain activity in China is not conducted
- U.S. agencies will increase enforcement against businesses in the United States who violate the law by contributing to human rights abuses in Xinjiang and elsewhere in China

On July 1, 2020, the U.S. Departments of State, Commerce, Homeland Security and the Treasury issued an advisory detailing the risk of exposure to businesses with supply chain entities that engage in human rights abuses, including forced labor in Xinjiang and elsewhere in China. According to a statement released by Secretary of State Mike Pompeo, since 2017, the Chinese Communist Party (CCP) has engaged in a campaign of systematic repression of Uyghurs, ethnic Kazakhs, ethnic Kyrgyz and members of other Muslim minority groups that includes widespread arbitrary detention and forced labor. The secretary stated, "Targeted against ethnic and religious minorities, the People's Republic of China's [PRC] use of forced labor is no longer confined to the Xinjiang region but is increasingly taking place across China through PRC government-facilitated arrangements with private sector manufacturers."

Separately, Secretary of Commerce Wilbur Ross stated that "China continues to commit brutal human rights abuses against ethnic minorities from Xinjiang, including operating dystopian surveillance systems and employing the contemptible practice of forced labor."

Summary of the Advisory

The Xinjiang Supply Chain Business Advisory is intended to alert businesses of the potential exposure in their supply chains to entities that engage in human rights abuses in Xinjiang—or elsewhere in China. The advisory warns that "businesses, individuals, and other persons, including but not limited to academic institutions, research service providers, and investors, that choose to operate in Xinjiang or engage with entities that use labor from Xinjiang elsewhere in China should be aware of reputational, economic, and, in certain instances, legal, risks associated with certain types of involvement with entities that engage in human rights abuses, which could include Withhold Release Orders (WROs), civil or criminal investigations, and export controls." While the advisory goes into great detail, the three primary types of supply chain risk exposure can be summarized as:

- Assisting in developing surveillance tools for the PRC government in Xinjiang, particularly given that surveillance systems can be equipped with artificial intelligence, facial recognition, gait recognition and infrared technology, and are being used throughout Xinjiang to track movements, monitor behaviors and identify individuals for detention;

- Relying on labor or goods sourced in Xinjiang, given the prevalence of forced labor and other labor abuses in the region, or from factories elsewhere in China implicated in the forced labor of individuals from Xinjiang under the guise of "vocational training"; and
- Aiding in the construction of internment facilities used to detain Uyghurs and members of other Muslim minority groups, and/or in the construction of manufacturing facilities that are in close proximity to camps operated by businesses accepting subsidies from the PRC government to subject minority groups to forced labor.

Human Rights Due Diligence Is Necessary

In order to mitigate reputational, liability and commercial risks, the U.S. government advises that businesses should apply appropriate industry due diligence policies and procedures. Such due diligence should include "human rights due diligence," referencing the UN Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises, and the International Labor Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy as guidance on best practices. Further, the advisory states that entities with banking ties to the U.S. financial system should be aware that financial institutions are required to adopt a risk-based approach to their anti-money laundering, countering terrorist financing, and countering proliferation financing (AML/CFT/CPF) programs.

Possible Enforcement Actions

The advisory concludes by citing the various U.S. authorities for any necessary enforcement actions or sanctions for any parties engaging in human rights abuses in Xinjiang and elsewhere in China. Such authorities include: (i) Bureau of Industry and Security (BIS) export control and licensing actions, including the Entity List; (ii) Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) prohibitions on imports of suspected goods benefiting from forced labor; (iii) prohibitions under the Federal Acquisition Regulation, Combating Trafficking in Persons (FAR 52.222-50) from engaging in forced labor; (iv) enforcement provisions under the Trafficking Victims Protection Act (TVPA) that criminalize the act of benefiting financially, or receiving anything of value, from forced labor where the defendant knew or recklessly disregarded such forced labor and knowingly participated in the relevant venture; (v) authority under the "Uyghur Human Rights Policy Act of 2020" that directs the president to impose sanctions on each foreign person determined to have engaged in human rights violations; and (vi) various sanctions authorities and executive orders administered by Treasury's Office of Foreign Assets Control (OFAC) that build upon the Global Magnitsky Human Rights Accountability Act.

Commerce Additions to the Entity List and OFAC Sanctions

Ross noted in his statement that this advisory follows previous actions taken by BIS designating 37 Chinese entities engaged in or enabling human rights abuses in Xinjiang to the Entity List, the most recent of which became effective on June 5, 2020. These Entity List actions restrict access to U.S. goods and technology through the establishment of entity-specific license requirements for the export, re-export and transfer of U.S goods to these designated parties.

Similarly, OFAC has begun sanctioning and placing Chinese entities and individuals on the Specially Designated Nationals and Blocked Entity (SDN) List, most recently on July 9, 2020. As a result of this action, all property and interests in property of these entities that are in the United States or in the possession or control of U.S. persons must be blocked and reported to OFAC. Further, unless authorized by a general or specific license, U.S. persons are generally prohibited from dealing with any entities placed on the SDN List.

With this advisory memo, U.S. companies should be prepared for increased scrutiny by the relevant U.S. regulatory and enforcement agencies when providing goods, services and technology with a nexus to Xinjiang and other areas of China where there is the possibility – or potential indicators – of forced labor or labor abuses.

FOR MORE INFORMATION

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