

US Government Releases Xinjiang Supply Chain Business Advisory Update

Key Notes:

- On July 13, 2021, the U.S. government released an updated version of the Xinjiang Supply Chain Business Advisory advising U.S. companies of the widespread, PRC-government sponsored forced labor and intrusive surveillance practices targeting ethnic and religious minorities in Xinjiang.
- The Advisory urges U.S. companies with supply chains, ventures or investments connected to Xinjiang to undertake heightened due diligence efforts.
- U.S. companies that do not exit supply chains or ventures connected to Xinjiang are at high risk of violating U.S. law.

On July 13, 2021, the U.S. government released an updated version of the Xinjiang Supply Chain Business Advisory (“Advisory”), originally released in July 2020. The Advisory warns U.S. companies that the People’s Republic of China (PRC) government continues to engage in “horrific abuses in the Xinjiang Uyghur Autonomous Region (Xinjiang) and elsewhere in China, targeting Uyghurs, ethnic Kazakhs, and ethnic Kyrgyzin,” including state-sponsored forced labor and other human rights abuses amidst ongoing genocide and crimes against humanity. Importantly, it highlights the high risk to businesses with supply chain or investment links to Xinjiang, which include risk of U.S. customs violations and seizure of goods and U.S. export control and sanctions violations. The U.S. Department of Labor (DOL) and the Office of the U.S. Trade Representative (USTR) have now joined as co-signatories to the Advisory, along with the U.S. Departments of State, Treasury, Commerce and Homeland Security. Companies should note that, although the

Advisory highlights risks under U.S. law, the same activity may also violate non-U.S. laws targeting modern slavery or human rights abuses in various jurisdictions.

Four Primary Avenues of Risk Exposure

The U.S. government identifies four primary types of exposure to entities engaged in human rights violations:

- (1) Assisting or investing in the development of surveillance tools for the PRC government in Xinjiang, including tools related to genetic collection and analysis.
- (2) Supplying U.S.-origin commodities, software, and technology to entities engaged in such surveillance and forced labor practices.
- (3) Aiding in the construction and operation of internment facilities used to detain Uyghurs and members of other Muslim minority groups, and/or in the construction and operation of manufacturing facilities that are in close proximity to camps and reportedly operated by businesses accepting subsidies from the PRC government to subject minority groups to forced labor.
- (4) Sourcing labor or goods from Xinjiang, or from entities elsewhere in China connected to the use of forced labor of individuals from Xinjiang, or from entities outside of China that source inputs from Xinjiang.

Engaging in these types of activities could expose U.S. companies to civil and criminal liability in violation of U.S. sanctions, export controls, laws prohibiting importations of

goods produced with forced labor or convict labor and other statutes prohibiting engagement in forced labor related to federal contracts and joint ventures. In addition to penalties for violations, goods considered to be produced by forced labor are subject to detention and seizure by U.S. Customs and Border Protection (CBP).

Types of Potential Legal Violations

(1) Export Controls Risk

The Advisory outlines the significant risk of violating U.S. export controls for companies exporting, reexporting or transferring (in-country) cameras, tracking technology, biometrics and similar items or technology known to aid surveillance systems in China. Additionally, there are numerous entities designated by the Commerce Department's Bureau of Industry and Security (BIS) to the Entity List, like the Xinjiang Production and Construction Corp (XPCC) and related entities, known to be complicit in and supportive of the surveillance system in China, to which exports, reexports and in-country transfers of items subject to the EAR are prohibited.

BIS considers human rights concerns when reviewing license applications under the EAR and will assess whether items may be used to engage in, or enable violations or abuses of, human rights including those involving censorship, surveillance, detention, or excessive use of force.

(2) Sanctions Risk

Additionally, there is heightened risk of violating U.S. sanctions through direct or indirect dealings with persons designated to the Specially Designated Nationals and Blocked Entity List (SDN) for engaging in or supporting human rights violations in China. The Treasury Department's Office of Foreign Assets Control (OFAC), through the Global Magnitsky Sanctions Regulations, prohibits U.S. persons from engaging in any dealings with SDNs and with entities owned 50% or more by SDNs. The XPCC and several other Xinjiang-connected entities are designated SDNs.

Entities related to China's surveillance technology sector have also been identified by the U.S. government and are designated to OFAC's Non-SDN Chinese Military Industrial Complex Companies ("NS-CMIC") List pursuant to Executive Order (EO) 13959. The EO prohibits U.S. persons from engaging in certain investment-related activities with entities on the NS-CMIC List.

(3) Import Risks

The Tariff Act of 1930 prohibits the importation into the United States of merchandise produced in whole or in part by forced or child labor. Violations may be subject to civil and criminal penalties. Goods determined to be in violation of these laws are subject to seizure.

As part of its enforcement efforts, CBP also issues Withhold Release Orders (WROs) directing U.S. ports of entry to detain imports of merchandise identified to have been produced from forced labor. CBP has issued seven WROs related to forced labor in Xinjiang. U.S. companies with products anywhere in their supply chain, including upstream raw materials, subject to the WRO are at increased risk of dealing in products made with forced labor.

Most recently, CBP has identified cotton and tomato products from Xinjiang and silica-based products from Hoshine Silicon Industry Co., Ltd and its subsidiaries, to be produced from forced labor in Xinjiang. Companies importing any cotton, tomato, or silica-based products from China, including finished or intermediate products produced with these raw materials, are at heightened risk for seizure by CBP and violations of import regulations.

Warning Signs of Forced Labor and Human Rights Violations

The Advisory also provides a list of "warning signs of forced labor in the operating environment of Xinjiang." These red flags include, but are not limited to, involvement of government labor force recruiters, companies part of the mutual pairing assistance program, companies receiving subsidies for energy, transportation, and labor costs, XPCC

affiliated entities, business locations and affiliations to Xinjiang, and use of goods listed on the U.S. Department of Labor's List of Goods produced from Child Labor or Forced Labor.

The area of heightened risk likely to impact the largest number of companies involves sourcing of any goods, directly or indirectly, from the Xinjiang region. ***It is important to understand that manufactured goods which are several steps removed from the forced labor used to source a raw material, are still considered to be produced with forced labor.*** As noted, risk associated with forced labor is not strictly limited to entities in the Xinjiang region, but also includes engaging with entities that source labor or goods from the Xinjiang region throughout China.

The Advisory sets forth industries, including specific raw materials, intermediate materials and finished goods that have been linked to forced labor in Xinjiang. (This does not mean that other goods may not present red flags.) Companies should consider whether their global supply chains might include any of these materials or components, and if so, engage in heightened due diligence to ensure the materials or components do not originate from forced labor in Xinjiang. It is also critical that companies document in detail the sourcing of these materials so that they may rebut the presumptions of CBP or respond to other government inquiries.

- Agriculture (cotton, melons, pears, tomato product¹, garlic)
- Cell Phones
- Cleaning Supplies
- Construction
- Cotton and Cotton Products
- Electronics Assembly
- Extractives (coal, copper, hydrocarbons, oil, uranium, and zinc)
- Fake Hair and Human Hair (wigs, accessories)
- Food Processing Factories
- Footwear
- Gloves

¹ See CBP, WRO, Cotton and tomato products from Xinjiang (January 13, 2021).

- Hospitality Services
- Metallurgical Grade Silicon²
- Noodles
- Printing Products
- Renewable Energy³ (polysilicon, ingots, wafers, solar cells, photovoltaic modules)
- Textiles (apparel, bedding, carpets, wool, viscose)
- Stevia
- Sugar
- Toys

Heightened Due Diligence Efforts

(1) *U.S. companies should examine the end-users and ultimately beneficiaries of their products, technology, research, collaborations, services and their relationship to Xinjiang and the PRC government.*

Companies should understand whether their products and technology may be used for surveillance related to internment camps, the broader surveillance apparatus of the PRC government, and companies that use or benefit from forced labor. This includes the collection of biometric data, abusive genetic analysis schemes and the coercive transfer of members of ethnic minority groups.

Similarly, the provision of goods used to construct internment facilities or factories located within internment camps, including concrete, steel, rebar, chain-link fencing, paving materials, and glass, may present risks. Related investments in these industries in China should also be reviewed to ensure they are not complicit in or supporting human rights violations.

(2) *Understand that employing human rights due diligence best practices to identify risk in the supply chain, investment or venture, is necessary but may not be enough.*

The Advisory indicates that while important, common forced labor due diligence best practices like third-party audits, onsite inspections and working with local law enforcement and suppliers may not be sufficient in this

² See CBP, WRO, Silica products from Hoshine Silicon Industry Co., Ltd. (June 23, 2021).

³ See *id.*

context. For example, auditors may be subject to government pressure or unable to obtain true access to suppliers. Therefore, the Advisory suggests that companies should consider exiting supply chains or investments with links to forced labor or surveillance systems in Xinjiang or other provinces of China.

- (3) *Collaborate with industry groups to share information, develop the capacity to research potential indicators of forced labor or labor abuses linked to Xinjiang and build relationships with Chinese suppliers.*

The Advisory suggests that companies should engage industry leaders to share information and engage with local suppliers and actors in China as a human rights due diligence best practice.

- (4) *Use available U.S. government resources.*

Annex 6 to the Advisory lists all the U.S. government online resources available to companies to help them identify risk and engage in human rights due diligence best practices. This includes the State Department's human rights due diligence guidance documents on vetting end-users for products or services with surveillance capabilities ("Guidance")⁴ and the Responsible Sourcing Tool.⁵

For example, at page 8, the Guidance provides a list of human rights due diligence and risk mitigation considerations that provide step-by-step guidance and red flags. The Responsible Sourcing Tool is an information resource that describes steps for assessing risk of forced labor by product, industry and region and engaging in risk-based due diligence.

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⁴ U.S. Department of State, Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities (September 30, 2020).

⁵ U.S. Department of State and Verite, Responsible Sourcing Tool, available at <https://www.responsiblesourcingtool.org/>.