International Trade Alert

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U.S. Agencies Issue Business Advisory Warning of Xinjiang-Related Supply Chain Exposure and OFAC Imposes Blocking Sanctions on Chinese Persons Related to Human Rights Abuse in Xinjiang

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Key Points

- On July 1, the Departments of Commerce, Homeland Security, State, and the Treasury issued a joint advisory on the "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 describes efforts by the Trump administration and Congress to increase scrutiny of surveillance practices and labor conditions in the Xinjiang province of the Peoples Republic of China ("China" or PRC) and provides specific recommendations to exporters, importers, and financial institutions to evaluate and mitigate associated risks.
- The advisory does not create new requirements or prohibitions; however, it presages potential forthcoming enforcement actions, including additions to the Commerce Department's Entity List, Withhold Release Orders (WROs) on imports of goods, and economic sanctions against entities and individuals implicated in surveillance and labor conditions in Xinjiang and elsewhere in China. On July 9, 2020, the Treasury Department took the first of such actions by designating four PRC officials including Chen Quanguo, the Communist Party Secretary of the Xinjiang Uyghur Autonomous Region, and the Xinjiang Public Security Bureau under the Global Magnitsky sanctions program.
- Businesses and individuals, including importers and exporters of record, financial institutions, and government contractors and subcontractors should read the advisory and consider implementing compliance measures consistent with its recommendations.

Background

On July 1, 2020, the U.S. Departments of Commerce, Homeland Security, State, and the Treasury issued a joint advisory on the "Risks and Considerations for Businesses

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with Supply Chain Exposure to Entities Engaged in Forced Labor and Other Human Rights Abuses in Xinjiang." The advisory follows months of increased attention by

Congress, the Trump administration, and nongovernmental organizations (NGO) on labor conditions in Xinjiang and the treatment of Uyghurs and members of Muslim minority groups in China. Specifically, the advisory describes a range of specific abuses including "mass arbitrary detentions, severe physical and psychological abuse, forced labor and other labor abuses, oppressive surveillance used arbitrarily or unlawfully, religious persecution, political indoctrination, forced sterilization, and other infringements of the rights of members of those groups in Xinjiang." The advisory also describes how these concerns are, in the words of Secretary of State Pompeo, "no longer confined to the Xinjiang region" but spread across China through "government-facilitated arrangements with private sector suppliers."

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Impact and Guidance for Exporters, Importers, and Financial Institutions

Against this backdrop, the agencies warn businesses of the "reputational, economic, and legal risks of involvement with entities that engage in human rights abuses, including but not limited to forced labor in the manufacture of goods intended for domestic and international distribution." The agencies specifically call on "[b]usinesses, individuals, and other persons, including but not limited to academic institutions, research service providers, and investors ["businesses and individuals"] that choose to operate in Xinjiang or engage with entities that use labor from Xinjiang elsewhere in China" to heed the warnings in the advisory and "implement human rights-related due diligence policies and procedures."

Towards this end, while the advisory itself is "explanatory only and does not have the force of law," the agencies outline a range of ongoing U.S. government efforts to curb alleged human rights abuses related to Xinjiang in the areas of import and export controls and financial sanctions. They also provide specific guidance to importers, exporters, and financial institutions on how to identify Xinjiang-related risks. The advisory further urges businesses and individuals to "evaluate their exposure" to Xinjiang-related risks and "to the extent necessary, implement due diligence policies, procedures, and internal controls to ensure that their compliance practices are commensurate with identified risks and international best practice across the upstream and downstream supply chain, and in making investment decisions."

In particular, the advisory highlights three types of "supply chain exposure" that broadly track export, import, and financial activities implicating Xinjiang:

1. Assisting in developing surveillance tools for the PRC government in Xinjiang.
2. Relying on labor or goods sourced in Xinjiang, or from factories elsewhere in China implicated in the forced labor of individuals from Xinjiang in their supply chains, given the prevalence of forced labor and other labor abuses in the region.
3. 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.

Guidance for Exporters

On the subject of surveillance, the advisory recounts recent efforts by the Department of Commerce to list and leverage Entity List restrictions against a range of Chinese technology companies and public security bureaus allegedly implicated in human rights violations and abuses in Xinjiang. The advisory goes on to describe the "Xinjiang surveillance infrastructure" as an "unprecedented, intrusive, high-technology surveillance system across Xinjiang, as part of a province-wide apparatus of oppression aimed primarily against traditionally Muslim minority groups." According to the advisory, this system is enabled by technologies including "artificial intelligence, facial recognition, gait recognition, and infrared technology," as well as mobile apps used by police to track personal data about Xinjiang residents and "cloud databases" used to centralize collected information. The advisory notes the role of "Chinese surveillance and technology companies" supported by PRC government contracts, but also points to "evidence that these [Chinese] businesses also get support from foreign academics, scientists, businesses, and investors."

With respect to these concerns, the advisory warns that businesses and individuals engaged in certain activities or who are otherwise "directly linked to those in Xinjiang engaged in" certain listed activities may face "reputational risks and/or trigger U.S. law enforcement or other actions . . . ." These activities include:

- Selling or providing biometric devices, cameras, computers, items with surveillance capabilities, microchips and microprocessors, tracking technology, or related equipment, software, and technology, or maintenance of goods that have been known to arbitrarily track and control the movements of Uyghurs or others in Xinjiang.
- Engaging in or with joint ventures with PRC government officials and departments, or Chinese companies whose intellectual property has been known to aid the development or deployment of a surveillance system used arbitrarily against members of minority groups or others, including:
  - Granting PRC government officials access to genetic databases or aiding the PRC government in involuntary collection of genetic data.
  - Participation in facial recognition research related to Chinese minorities.
  - Conducting research partnerships with Chinese technology facial recognition firms known to be involved with enabling China's surveillance activities or inviting such parties to conferences where technical issues on surveillance-related activities will be discussed.
  - Attending conferences related to surveillance activities and facial recognition technology in which such entities play a leading role, including through organizing or sponsoring these conferences.
- Providing services to internment camps or training of Xinjiang authorities, police, or PRC government officials that enable arbitrary detention, or arbitrary or unlawful surveillance on the basis of ethnic group, religion, or other protected class.

Guidance for Importers

On the subject of forced labor, the advisory and related comments by Acting DHS Deputy Secretary Ken Cucinelli recount various recent and ongoing efforts by the Trump administration and Congress to increase scrutiny and enforcement related to labor conditions in Xinjiang and for Muslim minorities throughout the PRC.

As we described in our publication on this topic in March of this year, 2019 marked an uptick in DHS attention to and enforcement of forced labor authorities, beginning with a memorandum of understanding between Immigration and Customs Enforcement (ICE) and Liberty Shared in July 2019 and culminating in Customs and Border Protection's (CBP) issuance on September 30, 2019, of what would be the first of a string of Xinjiang-related WROs. Following a series of congressional hearings and NGO activity in late 2019 calling for further scrutiny of labor conditions in Xinjiang, DHS released a formal strategy describing its commitment to combatting human trafficking and forced labor on January 15, 2020, which included among five "key goals" leveraging "DHS law enforcement and national security authorities to investigate, take enforcement action, and refer [human trafficking and forced labor] cases for prosecution." Since CBP's September WRO, it went on to issue additional Xinjiang-related WROs on May 1 and June 17, 2020, and announced on July 1 the seizure of nearly 13 tons of hair worth more than $800,000 that it suspects may have been produced using "forced child labor and imprisonment." In describing the seizure, Brenda Smith, CBP's Executive Assistant Commissioner for the Office of Trade, said that "[i]t is absolutely essential that American importers ensure that the integrity of their supply chain meets the humane and ethical standards expected by the American government and by American consumers" (CBP, July 1).

In Congress, Rep. McGovern and Sen. Rubio introduced, with bipartisan support, companion bills entitled the Uyghur Forced Labor Prevention Act (Bill Text, Reuters, March 11), which would, if enacted as written, create significant obligations and restrictions for textile and other importers with supply chains connected directly or indirectly to Xinjiang. While the bills remain pending in Congress, they continue to gain co-sponsors and in some respects have had their political paths cleared by the passage and enactment on June 17, 2020, of the Uyghur Human Rights Policy Act of 2020 (S. 3744), which received overwhelming support in both the House and Senate before being signed by President Trump. As noted in the advisory, the Uyghur Human Rights Policy Act "directs the President to impose sanctions on each foreign person the President determines is responsible for certain actions with respect to specified ethnic Muslim minority groups in the Xinjiang region in China."

Against this backdrop, the advisory focuses on several areas of PRC government activity contributing to forced labor conditions in Xinjiang and elsewhere in China, including:

1. The government's "mutual pairing assistance" program linking companies from eastern China to factories in Xinjiang (described further in Annex 2 of the advisory).
2. Involuntary transfers of Uyghurs and other Muslim minorities from Xinjiang to factories across China (described in Annex 3 of the advisory).
3. The use of prison labor in the cotton, apparel, and agricultural sectors (described further in Annex 4 of the advisory).

To aid businesses and individuals in identifying and evaluating forced labor risks, the advisory goes on to describe six "potential indicators of forced labor or labor abuses," including:

- **Lack of Transparency**: Firms operating in Xinjiang using shell companies to hide the origin of their goods, write contracts with opaque terms, and conduct financial transactions in such a way that it is difficult to determine where the goods were produced, or by whom.

- **Social Insurance Programs**: Companies operating in Xinjiang disclosing high revenue but having very few employees paying into the government's social security insurance program.
- **Terminology**: Any mention of internment terminology (e.g., Education Training Centers (职业教育培训中心) or Legal Education Centers) coupled with poverty alleviation efforts, ethnic minority graduates, or involvement in reskilling.
- **Government Incentives**: Companies operating in Xinjiang receiving government development assistance as part of the government's poverty alleviation efforts or vocational training programs; companies involved in the mutual pairing assistance program.
- **Government Recruiters**: Companies operating in Xinjiang implementing nonstandard hiring practices and/or hiring workers through government recruiters.
- **Factory Location**: Companies operating in Xinjiang located within the confines of the internment camps, near internment camps, or within the confines of or adjacent to industrial parks involved in poverty alleviation efforts. New factories built near internment camps.

The advisory also includes (Annex 3) a "nonexhaustive" but "illustrative" list of industries in Xinjiang reported to be involved in "labor abuses," including:

- Agriculture (including such products as hami melons, korla pears, tomato products, and garlic)
- Cell Phones
- Cleaning Supplies
- Construction
- Cotton Yarn, Cotton Fabric, Ginning, Spinning Mills, and Cotton Products
- Electronics Assembly
- Extractives (including coal, copper, hydrocarbons, oil, uranium, and zinc)
- Fake Hair and Human Hair Wigs, Hair Accessories
- Food Processing Factories
- Hospitality Services
- Noodles
- Printing Products
- Footwear
- Stevia
- Sugar
- Textiles (including such products as apparel, bedding, carpets, wool)
- Toys.

Finally, the advisory discusses certain due diligence strategies and challenges for identifying and evaluating Xinjiang-related supply chain exposure. For example, the advisory describes the role and limits of third-party audits as credible sources of information for indicators of labor abuses in light of “repressive conditions” on the ground. It further encourages businesses and individuals to collaborate with industry groups to share information, develop Chinese language research capabilities, and build relationships with Chinese suppliers and recipients of U.S. goods and services to “understand their possible relationships in Xinjiang under the mutual pairing assistance program.” The advisory also points to several forced labor and human trafficking due diligence tools produced by the Departments of Labor, State, and Justice, among others (see our March publication for additional resources, including a summary of CBP’s nine-step process for initiating and adjudicating forced labor allegations).

As described in the advisory, the foundational authority for regulating imports of goods produced from forced labor is found in Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) (see our earlier Client Alert on Section 307 here). This law prohibits the importation of “[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor[,] forced labor[, or] indentured labor,” which includes forced or indentured child labor. Such merchandise is not only subject to exclusion and seizure; its importation may lead to criminal investigation of the importer and other parties involved in the import transaction—and the imposition of civil or criminal penalties (e.g., 19 U.S.C. § 1592 (penalties for fraud, gross negligence, or negligence) and 18 U.S.C. § 545 (smuggling goods in the United States)).

Guidance for Financial Institutions

In addition to the advisory’s guidance for the import and export communities, it also urges “entities with banking ties to the U.S. financial system” to “be aware” of requirements for financial institutions to adopt risk-based antimoney laundering, counter terrorist financing, and countering proliferation financing (AML/CFT/CPF) programs to identify, assess, and mitigate risks related to those regulatory regimes. The advisory specifically urges financial institutions to “assess their potential exposure to the risk of handling the proceeds of forced labor on behalf of their clients and, as appropriate, implement a mitigation process in line with the risk.” As noted in the advisory, money laundering crimes generally require the involvement of proceeds of a “specified unlawful activity,” which may include “sex trafficking, forced labor, and other crimes related to trafficking in persons.”

To address these risks, the advisory recommends that financial institutions:

- Assess their illicit finance risk.
- Implement sanctions compliance and AML/CFT/CPF and due diligence programs.
- Provide training and resources to personnel in order to effectively execute those programs.
- Communicate with counterparties, partners, subsidiaries, and affiliates to articulate their compliance expectations in a manner consistent with applicable local requirements.

In addition, all U.S. persons and financial institutions with ties to the U.S. financial system must comply with U.S. economic sanctions administered by the Treasury Department's Office of Foreign Assets Control (OFAC).

On July 9, OFAC and the State Department took the first concrete Xinjiang-related actions following the July 1 joint advisory. OFAC sanctioned four PRC officials and one Public Security Bureau pursuant to Executive Order 13818, which implements the Global Magnitsky Human Rights Accountability Act (OFAC Press Release). These individuals and entities include:

- Chen Quanguo, Communist Party Secretary of the Xinjiang Uyghur Autonomous Region (XUAR)
- Zhu Hailun, former Deputy Party Secretary of the XUAR
- Wang Mingshan, Director and Communist Party Secretary of the Xinjiang Public Security Bureau (XPSB)
- Huo Liujun, Party Secretary of the XPSB
- Xinjiang Public Security Bureau (XPSB).

As a result of the designations, U.S. persons are broadly prohibited from dealing with these persons and entities that are 50 percent or more owned, directly or indirectly, by one or more Specially Designated Nationals (SDNs) (collectively, "blocked persons"), absent a license from OFAC. U.S. persons must also block and report to OFAC any such property that is in, or comes into, their possession or control.

Also on July 9, Secretary of State Mike Pompeo designated Quanguo, Hailun, and Mingshan under Section 7031(c) of the FY 2020 Department of State, Foreign Operations, and Related Programs Appropriations Act; as a result, they and their immediate family members are ineligible for entry into the United States (State Department Press Release). Secretary Pompeo indicated that he is also placing additional visa restrictions "on other CCP officials believed to be responsible for, or complicit in, the unjust detention or abuse of Uyghurs, ethnic Kazakhs, and members of other minority groups in Xinjiang" pursuant to the State Department's October 2019 visa restriction policy under Section 212(a)(3)(C) of the Immigration and Nationality Act.

Takeaways

- The advisory does not create new import or export controls, or economic sanctions per se, but lays a foundation for future regulatory actions, including those issued by OFAC and the State Department on July 9, 2020. As described in the notice, these actions may include (but are not limited to):
  - (1) Additional designations by the Commerce Department to the Entity List
  - (2) New WROs, seizures, and requests for information from CBP and ICE
  - (3) Additional designations by OFAC
  - (4) Increased enforcement of Federal Acquisition Regulations and DHS Acquisition Regulations related to forced labor, including through suspension and disbarment.
- The advisory and the high-profile public statements accompanying its publication by the Secretary of State and others likely raises the bar for the U.S. government's

expectations about awareness of Xinjiang-related supply chain issues among the export, import, and finance communities.

- At a minimum, businesses and individuals should assess the extent of their Xinjiang-related supply chain exposure and implement risk-based measures for identifying and mitigating related reputational, economic, and legal risks.

Contact Information

Akin Gump has extensive experience advising exporters, importers, financial institutions, and government contractors on compliance, enforcement, and remediation activities related to the authorities described in the joint advisory, including with respect to Xinjiang-related issues.

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