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U.S. Government Agencies Issue Xinjiang Supply Chain Advisory

This month, the U.S. Department of State, along with the U.S. Department of the Treasury, the U.S. Department of Commerce and the U.S. Department of Homeland Security, issued a business advisory concerning forced labor risks associated with Xinjiang labor. The advisory contains information to help companies assess Xinjiang-related forced labor risks, as well as compliance recommendations. Although the advisory is characterized as only being explanatory and not having the force of law, it notes that well-documented and implemented due diligence policies and procedures may potentially be considered as mitigating factors by U.S. authorities in the event businesses inadvertently engage in activity that violates U.S. laws relating to forced labor in supply chains. Accordingly, supply chain compliance policies and procedures should take the advisory into account.

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In this Alert, we discuss those portions of the advisory that address supply chain risks. Note that the advisory also discusses risks associated with providing goods, services and technology with a nexus to Xinjiang surveillance and due diligence by banking and financial institutions.

The Regulatory Framework

As noted in the advisory, forced labor in supply chains may violate several U.S. laws and regulations and can result in civil and/or criminal liability.

Section 307 of the Tariff Act prohibits the importation of merchandise mined, manufactured or produced, wholly or in part, by forced labor, including convict labor, forced child labor and indentured labor. The advisory notes that, where evidence indicates that goods from Xinjiang are produced with forced, indentured or convict labor, U.S. Customs and Border Protection will deny U.S. entry to those goods, which could lead to the goods being seized and forfeited, or the issuance of civil penalties against the importer and other parties. Recent CBP Withhold Release Orders involving goods from Xinjiang are discussed later in this Alert.

U.S. Immigration and Customs Enforcement's Homeland Security Investigations also may initiate criminal investigations relating to the importation of goods made with forced labor in violation of U.S. law. This can lead to the criminal prosecution of individuals and/or companies for their roles in the importation of the goods into the United States, potentially resulting in incarceration, fines, and seizure and forfeiture of the goods.

In addition, the Federal Acquisition Regulation's anti-human trafficking provisions prohibit forced labor in the performance of U.S. federal government contracts and under certain circumstances require contractors to put in place specific compliance procedures and engage in due diligence. If a contractor is found to be in violation of the FAR, the contracting agency can impose a range of remedies, including suspension and debarment. In addition, both CBP and ICE, as well as agencies within DHS, may take administrative enforcement action against contractors or suppliers who violate the FAR anti-human trafficking provisions. For further information concerning the FAR anti-human trafficking provisions, see our earlier Alerts [here](#), [here](#) and [here](#).

The Trafficking Victims Protection Reauthorization Act criminalizes the act of benefitting financially, or by receiving anything of value, from forced labor where the defendant knew of or recklessly disregarded the forced labor and knowingly participated in the relevant venture. U.S. defendants can be held criminally liable under the TVPRA even when the forced labor occurs in another country.

Potential Indicators of Forced Labor or Labor Abuses

The advisory notes the following potential indicators of Xinjiang forced labor or labor abuses:

- **Lack of transparency.** Companies operating in Xinjiang using shell companies to hide the origin of their goods, writing contracts with opaque terms and conducting 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 (such as Education Training Centers 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 and companies involved in the mutual pairing assistance program.
- **Government recruiters.** Companies operating in Xinjiang implementing non-standard hiring practices and/or hiring workers through government recruiters.
- **Factory location.** Companies operating in Xinjiang located within the confines of internment camps, near internment camps or within the confines of or adjacent to industrial parks involved in poverty alleviation efforts, or new factories built near internment camps.

Industries at Risk for Labor Abuses

The advisory includes an illustrative, non-exhaustive list of industries in Xinjiang in which public reporting has indicated labor abuses may be taking place. The advisory indicates that businesses should consider the list as an additional risk factor for human rights due diligence. The following industries are on the list: (1) agriculture (including products such as hami melons, korla pears, tomato products and garlic); (2) cell phones; (3) cleaning supplies; (4) construction; (5) cotton yarn, cotton fabric, ginning, spinning mills and cotton products; (6) electronics assembly; (7) extractives (including coal, copper, hydrocarbons, oil, uranium and zinc); (8) fake hair and human hair wigs and hair accessories; (9) food processing factories; (10) hospitality services; (11) noodles; (12) printing products; (13) footwear; (14) stevia; (15) sugar; (16) textiles (including apparel, bedding, carpets and wool); and (17) toys.

However, the advisory notes that inclusion of an industry on the list does not confirm that all goods produced in the listed industries in Xinjiang involve forced labor.

There have though been WROs issued with respect to goods from Xinjiang. During May and June 2020, CBP issued WROs detaining imports of hair products believed to have been manufactured with forced labor by two Chinese companies operating in Xinjiang. In addition, during September 2019, CBP issued a WRO detaining imports of garments believed to have been produced with prison or forced labor by a Chinese company operating in Xinjiang.

Compliance Recommendations

The advisory contains high-level compliance recommendations, as discussed below. However, the advisory indicates that it is explanatory only and does not have the force of law. It does not supplement or modify statutory authorities, executive orders or regulations. Its sole intent is to provide information to businesses and individuals that they may consider in assessing their potential exposure to involvement with entities engaged in human rights abuses, as part of a risk-based approach to due diligence.

Awareness. As an initial matter, the advisory recommends that businesses with potential supply chain exposure to entities involved in human rights abuses in Xinjiang or the use of forced labor in Xinjiang be aware of the risks outlined in the advisory. In this regard, the advisory includes (1) a map of pairing program participants with counterparts, (2) an illustrative list of industries in Xinjiang in which public reporting has indicated labor abuses may be taking place (this list is described earlier in this Alert), (3) high-level information concerning the Xinjiang cotton supply chain and (4) links to various other resources.

The advisory indicates that businesses and individuals may collaborate with industry groups to share information, develop the capacity to research potential indicators of forced labor or labor abuses in Chinese languages and build relationships with Chinese suppliers to understand their possible relationships in Xinjiang under the mutual pairing assistance program.

Due Diligence. On a substantive level, the advisory recommends that businesses implement reasonable human rights-related 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. As earlier noted, the advisory indicates that well-documented and implemented due diligence policies and procedures potentially may be considered as mitigating factors by U.S. authorities in the event businesses inadvertently engage in activities that violate U.S. laws concerning forced labor in supply chains.

The advisory acknowledges that due diligence practices will vary based on the size and nature of the particular business. Accordingly, the guidance in the advisory is principles-based rather than prescriptive.

The advisory does however call out specific compliance measures that alone may not be effective. The advisory notes that audits alone may not be a credible source of information for indicators of labor abuses. It also is skeptical that businesses will have the necessary access to suppliers in Xinjiang to support meaningful remediation.

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