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## Trade And Investment In China Headed For More Scrutiny Due To Forced Labor Issues

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### The United States Has Taken Major Steps Towards Combating Forced Labor In China, And More Action Is Coming

U.S. enforcement actions and legislative developments in Congress signal a sweeping U.S. effort to take more intensive action against forced labor involving China's Uyghur ethnic minority and the Xinjiang Uyghur Autonomous Region ("XUAR") of the People's Republic of China ("China"). The U.S. government is signaling increased controls, scrutiny, and outright prohibitions on certain trade and investment with China that has a nexus to the XUAR. As a result, companies with supply chains running through China must be diligent in reviewing their global operations and guarding against disruptions from current and future trade actions.

The Biden Administration is exerting increased pressure on China's continued Uyghur human rights abuses in Xinjiang. Recent actions by the United States include adding fourteen Chinese entities to the U.S. Department of Commerce's ("Commerce") Bureau of Industry and Security ("BIS") Entity List (which requires a license for most U.S. items to be exported to the listed entities). Further, the Administration issued an updated interagency supply chain advisory that takes a stronger stance against China's human rights abuses targeting Uyghurs in Xinjiang, identifies potential supply chain exposure for U.S. companies doing business in China, and signals increased diligence expectations. The Administration is making a global push on these issues as well, seeking to enlist like-minded countries in an effort to exclude products of forced labor from supply chains. Following the G7 Summit in June 2021, the White House issued a statement that the United States, along with the world's leading democracies, is "committed to ensure global supply chains are free from the use of forced labor[.]"<sup>1</sup>



Congress also has been active on these issues and is becoming increasingly hawkish on trade flows running through China. Specifically, Congress currently is considering the Uyghur Forced Labor Prevention Act (“UFLP Act”) and the Ensuring American Global Leadership and Engagement Act (“EAGLE Act”), which target the importation into the United States of goods produced by forced labor in China.

While this alert focuses on U.S. actions to address forced labor in China, it is important to recognize that U.S. allies are taking similar positions with respect to forced labor practices throughout the global supply chain, as we recently have discussed. In addition, U.S. actions are not limited to targeting forced labor in the XUAR. Rather, these actions are part of a broader effort to address forced labor throughout China. For example, the U.S. Department of Labor has noted that Uyghur workers at a factory in Quanzhou face similar forced labor conditions.<sup>2</sup> Other reports indicate that in recent years China has relocated tens of thousands of Uyghur workers from the XUAR to work in factories across China, including as part of a Chinese government program known as Xinjiang Aid.<sup>3</sup> This increases the complexity of compliance in this emerging legal and reputational risk area.

### U.S. GOVERNMENT ACTIONS ON UYGHUR FORCED LABOR

The Biden Administration has taken several actions in July to pressure China regarding human rights and forced labor issues in Xinjiang, including the following:

#### Addition of Fourteen Entities to Commerce’s Entity List

On July 9, 2021, BIS added 34 additional entities to its Entity List, which is maintained by Commerce under the Export Administration Regulations (“EAR”) to identify entities that are subject to specific license requirements for the export, reexport, and/or transfer of U.S. items. BIS determined that fourteen of the new entities enable China’s “campaign of repression, mass detention, and high-technology surveillance against Uyghurs, Kazakhs, and members of other Muslim minority groups in the [XUAR] of China, where [China] continues to commit genocide and crimes against humanity.”<sup>4</sup> As a result of this action, all exports of EAR-controlled items – goods, software, and technology – to these 14 entities are prohibited absent a license issued by BIS. As a practical matter, however, BIS generally will apply a presumption of denial and may review license applications for certain items only on a case-by-case basis.

#### Updates to the Xinjiang Supply Chain Business Advisory

On July 13, 2021, six federal agencies including the U.S. Departments of State, Treasury, Commerce, Homeland Security, Labor, and the Office of the U.S. Trade Representative issued an updated Xinjiang Supply Chain Business Advisory (the “Updated Advisory”). The Updated Advisory is very direct in pointing out that companies involved in global trade with China run a heightened risk of exposing their supply chains to entities engaged in Uyghur forced labor, which increases U.S. government expectations for companies to exercise due diligence to comply with U.S. enforcement actions against forced labor in China. The Updated Advisory also includes a noteworthy shift in messaging by explicitly warning companies that “businesses and individuals that do not exit supply chains, ventures, and/or investments connected to Xinjiang could run a risk of violating U.S. law[.]”<sup>5</sup> Indeed, this language calling for an “exit” from business relations in the XUAR is very strong and, we believe, a harbinger of more trade actions to come. Notably, this warning refers to supply chains writ large, not just companies that have active manufacturing operations or investments in XUAR. Given that products from the XUAR make their way into supply chains through the rest of China, any company doing business in China should be taking a close look at its international sourcing and procurement.

The Updated Advisory also provides companies with practical information on potential indicators of the presence of forced labor in the supply chain, including two specific poverty alleviation programs, the Xinjiang Aid and Mutual Assistance Programs, and subsidies for energy, transportation, and labor costs. The Xinjiang Aid and Mutual Assistance programs finance the construction of factories in Xinjiang and elsewhere in China that also rely upon the use



of Uyghur workers. These programs often are referred to as “poverty alleviation” efforts and include Chinese government efforts to “re-educate” Uyghur workers. Further, the Updated Advisory points out indicators that an entity is or may be engaged in forced labor, including entities subject to or included on: (1) the Department of Labor’s list of goods purchased by child labor or forced labor; (2) BIS’s Entity List; (3) a Withhold Release Order (“WRO”) from U.S. Customs and Border Protection (“CBP” or “Customs”); and (4) the Department of the Treasury’s Specially Designated Nationals and Blocked Persons List.

### FEDERAL PROHIBITION ON THE IMPORTATION OF FORCED-LABOR GOODS

For almost 100 years, federal law contained a prohibition on the importation of merchandise mined, produced, or manufactured, wholly or in part, in any foreign country by forced or indentured labor, including forced child labor (often referred to as “Section 307”).<sup>6</sup> For most of that time, CBP rarely enforced this provision because the statute also contained a “consumptive demand” provision. Under that provision, certain forced-labor products still could be imported into the United States in cases where a comparable product was not made in the United States in sufficient quantities. Congress deleted the consumptive demand provision from the statute as part of the Trade Facilitation and Trade Enforcement Act of 2015 (“TFTEA”), which President Obama signed in early 2016.

CBP enforces the prohibition at the border. The principal enforcement mechanism is the issuance of a WRO, which instructs CBP to detain shipments of affected imports. The importer may petition CBP for an admissibility determination, but the burden of proof on the importer to disprove the use of forced labor is very high. CBP also may demand redelivery of imports that took place before the issuance of the WRO. Importantly, CBP has issued WROs that cover not only certain products that originated in the XUAR (e.g., cotton or tomatoes) but also “downstream products produced outside the XUAR that incorporate these inputs.”<sup>7</sup> In other words, companies should be considering their whole supply chain for risk exposure, including components, sub-components, and raw material inputs that may be sourced from China and other hot spots for forced labor. Perhaps not surprisingly, CBP increasingly has used its border authority under Section 307 since Congress repealed the consumptive demand provision. This trend is likely to continue as a part of the Biden Administration’s larger “whole of government” approach to supply chain and forced labor issues.

Readers should not conclude that CBP’s forced labor efforts only target China. To the contrary, CBP continues to issue WROs with respect to forced labor imports from other countries (e.g., disposable gloves from Malaysia), so this issue implicates all aspects of the global supply chain.

### UPDATE ON LEGISLATIVE PROPOSALS REGARDING UYGHUR FORCED LABOR

#### The UFLP Act

On July 14, 2021, the U.S. Senate unanimously passed the UFLP Act. The bill would broaden the list of entities to which CBP is authorized to apply a rebuttable presumption that goods imported from the XUAR result from Uyghur forced labor. The Senate version of the bill also would require: (1) a public comment period to solicit comments on how best to ensure that goods mined, produced, or manufactured wholly or partly by forced labor in China are not imported into the United States; (2) the U.S. Departments Treasury and Homeland Security to issue a strategy to prevent such imports; and (3) amendment of the Uyghur Human Rights Policy Act of 2020 to include a new category of foreign persons to be subject to U.S. sanctions, *i.e.*, foreign persons responsible for “systemic rape, coercive abortion, forced sterilization, or involuntary contraceptive implantation policies and practices.”<sup>8</sup> Companion legislation remains pending in the House of Representatives.<sup>9</sup>



### The EAGLE Act

The House Foreign Affairs Committee is marking up the EAGLE Act, which would recognize China’s treatment of Uyghur people as genocide, consistent with the policies of both the Trump and Biden Administrations. The proposed legislation also specifies enforcement actions that would prohibit the importation of “all goods, wares, articles and merchandise mined, produced, or manufactured wholly or in part in the XUAR of China, or by persons working with the XUAR government for purposes of the ‘poverty alleviation’ program or the ‘pairing-assistance’ program.”<sup>10</sup>

If enacted, the legislation also would establish several reporting requirements for the U.S. government and private entities concerning forced labor in China. For example, the bill would require the Forced Labor Enforcement Task Force established in the implementing legislation for the United States-Mexico-Canada Trade Agreement to submit a report on a Chinese forced labor enforcement strategy and the President to issue an annual report listing foreign persons that are engage in or facilitate forced labor in the XUAR. Such a designation would lead to the imposition of U.S. sanctions on those foreign persons.

In addition, the bill would require any listed entities that are registered with the U.S. Securities and Exchange Commission to disclose engagements with a broad number of actors and their affiliates, including: (1) entities involved in mass surveillance in Xinjiang; (2) entities building detention facilities in Xinjiang; or (3) persons that have been sanctioned for utilizing forced labor.

The ultimate prospects for the UFLP Act and the EAGLE Act are uncertain at this time. Nevertheless, it is clear that Congress is actively considering ways to intensify pressure on supply chains with a nexus to the XUAR.

### CONCLUSION

The United States continues to take comprehensive action in response to China’s human rights abuses and forced-labor practices in the XUAR. This is a rare bipartisan issue, and companies should expect continued action by the Executive Branch and Congress for the foreseeable future, resulting in significant legal, business, and reputational risk. Companies can stay ahead of the curve on this issue and avoid supply chain disruptions and negative repercussions by assessing their exposure to Uyghur forced labor and the XUAR and taking appropriate action.

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- <sup>1</sup> See Fact Sheet: New U.S. Government Actions on Forced Labor in Xinjiang, *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-new-u-s-government-actions-on-forced-labor-in-xinjiang/>.
- <sup>2</sup> See *Against Their Will: The Situation in Xinjiang*, U.S. Department of Labor, <https://www.dol.gov/agencies/ilab/against-their-will-the-situation-in-xinjiang>.
- <sup>3</sup> See *China Uighurs 'Moved Into Factor Forced Labour' For Foreign Brands*, BBC (March 2020), <https://www.bbc.com/news/world-asia-china-51697800>.
- <sup>4</sup> See Press Release, "Commerce Department Adds 34 Entities to the Entity List to Target Enablers of China's Human Rights Abuses and Military Modernization, and Unauthorized Iranian and Russian Procurement," U.S. Department of Commerce (July 9, 2021), <https://www.commerce.gov/news/press-releases/2021/07/commerce-department-adds-34-entities-entity-list-target-enablers-chinas>.
- <sup>5</sup> See *Xinjiang Supply Chain Business Advisory*, U.S. Department of State (July 13, 2021), <https://www.state.gov/xinjiang-supply-chain-business-advisory/>.
- <sup>6</sup> See 19 U.S.C. § 1307 ("Section 307").
- <sup>7</sup> See Press Release, "CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang," U.S. Customs and Border Protection (January 13, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave>.
- <sup>8</sup> See Amendment to Section 6(a)(1) of the Uyghur Human Rights Policy Act of 2020, Pub. L. 116-145.
- <sup>9</sup> See Press Release, McGovern, Smith, Colleagues Re-Introduce the Bipartisan Uyghur Forced Labor Prevention Act (February 18, 2021), <https://mccgovern.house.gov/news/documentsingle.aspx?DocumentID=398673>.
- <sup>10</sup> Section 306(b) of the Ensuring American Global Leadership and Engagement Act of 2021.