

U.S. Bars More Imports and Weighs Broader Measures on Cotton From Xinjiang, China

by Dave Townsend and T. Augustine Lo

On September 14, U.S. Customs and Border Protection (“CBP”) expanded a ban on certain imports from the Xinjiang Uyghur Autonomous Region (“Xinjiang”) in the People’s Republic of China (“PRC”) while saying that it was still weighing a potentially much broader ban of the importation of all cotton and cotton products from Xinjiang. CBP’s action follows other recent U.S. measures to target the alleged use of forced labor from Uyghur and other Muslim minority groups in Xinjiang, including asset freezes against certain PRC government officials imposed by the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”), and the addition of certain Chinese companies to the Entity List by the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”) that will restrict the ability of U.S. companies to export items to such listed companies.

In light of these new CBP measures and the apparent threat of even broader prohibitions, U.S. companies should closely review their supply chains to determine if any of their goods sourced from the PRC (especially if they are apparel items or have textile content) originate from Xinjiang. There will likely be growing financial, legal and reputational risks from the importation of such products made in Xinjiang or from cotton grown in Xinjiang, including the potential of further federal legislation to mandate more such import bans by CBP in the future. Both U.S. companies sourcing from the PRC and producers and suppliers in the PRC should be prepared to act more proactively to cope with the escalating risks from these new CBP measures.

CBP’s Latest Import Bans.

CBP’s bans imposed on September 14 are through Withhold Release Orders (“WROs”) that apply to specific products from five named companies operating in or sourcing from Xinjiang with individual effective dates in August or September 2020:

- All products made by workers supplied by the Lop County No. 4 Vocational Skills

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- Hair products made at the Lop County Hair Product Industrial Park;
- Apparel from Yili Zhuowan Garment Manufacturing Co., Ltd. and Baoding LYSZD Trade and Business Co., Ltd.;
- Cotton from Xinjiang Junngar Cotton and Linnen Co.; and
- Computer parts from Hefei Bitland Information Technology Co., Ltd.

It should be noted CBP's WRO entered against the training center in Lop County unusually covers every kind of product made by the workers supplied to Chinese companies by that training center, so it remains to be seen exactly how widely CBP will apply this particular WRO to block the entry of goods from the PRC.

CBP will rely on these latest WROs to prevent the release of any imports of the specified goods linked to these five entities, effectively banning their U.S. importation unless the importers can eventually persuade CBP the goods were not made with forced labor. When CBP announced these five WROs, CBP also publicly stated that it is also still considering a WRO on all cotton goods from Xinjiang. China is the world's second largest producer of cotton, and Xinjiang is believed to produce over 80 percent of all the cotton raised in China. Accordingly, if CBP were to adopt such a broader measure against all Xinjiang cotton or cotton products, such a move would likely cause considerable disruptions to most established global textile and apparel supply chains.

Claimed Human Rights Abuses in Xinjiang.

The human rights situation in Xinjiang has come under intense scrutiny from both Congress and the Administration, from certain other national governments and the European Union, and from various non-governmental organizations ("NGOs") that charge the PRC government has compelled over one million Uyghur and other minority Muslims in Xinjiang to move into "reeducation" or "training" camps and then to work as forced labor in factories on behalf of Chinese companies that have cooperative programs with certain Chinese government ministries. The PRC authorities have vehemently denied these allegations and responded that such centers are only seeking to reduce the danger of Islamic fundamentalism and terrorism in Xinjiang and to enhance economic opportunities for the Uyghur and other Muslim minority groups in the region by giving them better Chinese language literacy and more currently useful vocational skills. However, PRC officials have also tended to limit western media access to Xinjiang, making it more difficult to verify the actual facts on the ground and thus adding to the widespread suspicions about the true state of affairs there.

In recent months, the Administration has imposed asset freezes, export bans, and import bans on named Chinese companies and a handful of PRC government officials claimed to be responsible for such sustained human rights violations in Xinjiang. In addition, Congress is now actively considering legislation that would require CBP to impose even broader import prohibitions against a range of imports from Xinjiang.

On July 1, the U.S. Departments of State, Treasury, Commerce and Homeland Security

issued a rare joint business advisory summarizing their collective concerns about human rights and labor conditions in Xinjiang. The Joint Advisory's conclusion is rather stark in its warning to the U.S. business community:

Businesses with potential exposure in their supply chain to the Xinjiang Uyghur Autonomous Region (Xinjiang) or to facilities outside Xinjiang that use labor or goods from Xinjiang should be aware 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. In order to mitigate reputational, economic, legal, and other risks, businesses should apply industry human rights due diligence policies and procedures to address risks.

The Joint Advisory also provides some due diligence guidelines and suggestions for companies with complex supply chains so they can try to avoid such problems and risks when they choose to source items from China in general and from Xinjiang in particular.

Legal Background.

For some 90 years, Section 307 of the Tariff Act of 1930 has prohibited importers from entering into U.S. commerce any foreign-origin goods that were mined, produced, or manufactured wholly or in part in any by forced labor, convict labor, or child labor. However, historically, the U.S. Government had only invoked Section 307 a few dozen times over those nine decades, mainly because the federal law had also allowed CBP to release from customs custody such goods made with forced labor if they fulfilled "consumptive demand" in the United States.

However, when Congress passed the Trade Facilitation and Trade Enforcement Act in 2016, it eliminated that "consumptive demand" alternative and thus enhanced CBP's enforcement powers in regard to seizures of goods made with forced labor. CBP usually applies the Section 307 prohibition at U.S. ports of entry through WROs that apply to specific products from certain companies. However, CBP has also imposed broader import bans, such as on a regional basis with respect to entire classes of goods, if there is enough credible evidence that the alleged use of forced or other illicit labor is sufficiently widespread and endemic.

CBP will issue a WRO if it concludes there is reasonable (although not conclusive) information indicating that a company uses forced labor to produce or process goods that contravene Section 307. In deciding whether to issue a WRO, CBP has said it will consider allegations from both the private sector and NGOs that specified imports were made from forced labor and so should become subject to the Section 307 import ban. For example, an ad hoc group of NGOs, mostly human rights and labor organizations, is currently requesting that CBP block all cotton imports into the United States from Xinjiang because the group alleges the use of forced labor is so widespread and pervasive that it has tainted virtually all textile production from that region.

If CBP detains any imported goods under a WRO, the U.S. importer may then either return the detained shipment or can try to show CBP that the goods were not made with forced labor. To obtain the release of a shipment subject to a WRO, an importer must submit, within three months after the importation, a certificate of origin and a detailed statement demonstrating that the goods were not produced by forced labor, (e.g., with a precise supply chain audit report from a credible independent auditing firm). CBP will review such importer evidence on a case-by-case basis and, if CBP deems the importer's evidence sufficient, CBP will release the goods into the U.S. market. Conversely, if CBP finds the submitted evidence inadequate, the agency will exclude the goods, barring their importation, and proceed to seize and forfeit the goods (generally without any compensation to the importer).

Further Legislation Under Consideration.

Congress is currently considering two bills, H.R. 6210 and S. 3471, entitled the "Uyghur Forced Labor Prevention Act." This legislation's main feature would be to shift the burden of proof under Section 307. If Congress passes this legislation and the President then signs it into law, it would completely revamp the historical WRO process with respect to goods from Xinjiang. Within 120 days of the law's enactment, CBP would be required to treat all imported goods that are made in whole or in part within Xinjiang, and goods made by any entity working with government officials in Xinjiang under any "poverty alleviation" or "mutual pairing assistance" programs, as presumptively banned from admission into the United States. Indeed, CBP would not even be allowed to admit such goods unless CBP finds "clear and convincing evidence" that those goods were not made with forced labor, and CBP would need to report such evidence to Congress.

In other words, the Uyghur Forced Labor Prevention Act would create a "rebuttable presumption" that any goods made within Xinjiang or by companies who are aligned with PRC government officials in Xinjiang in "poverty alleviation" or "mutual pairing assistance" programs were made with forced labor. If the goods in question originate from the Xinjiang or from companies who take part in such government programs in Xinjiang, CBP would be allowed to treat those goods automatically as being the product of forced labor and thus excludable under Section 307. If this legislation passes and is signed into law, such a presumption would likely create a much greater burden on U.S. importers. CBP itself would have no real stake in releasing goods subject to such a statutory presumption, so it would fall to any affected importers to prove to CBP's satisfaction that goods should be released, notwithstanding that presumption. In effect, such a new system would automatically impose a regional WRO on all goods made in or originating from Xinjiang, requiring importers to furnish proof to CBP release their goods from customs custody, rather than waiting for CBP to make the first move under the current WRO system.

In addition, there is yet another bill, H.R. 6270, that has been introduced in the House of Representatives known as the "Uyghur Forced Labor Disclosure Act of 2020." If passed into law, this legislation would require all U.S. companies whose securities are publicly

listed on any American stock exchange and who do business in Xinjiang to review and disclose specific data about their supply chains, including whether any of its goods are produced in or supplied from internment camps or factories using forced labor. Furthermore, under H.R. 6270, if any such public company were to import goods made with forced labor, that company would also be required to disclose the nature and extent of the forced labor used to produce or supply those items, the company's gross revenue and net profits attributable to those items, and if the company intends to continue their importation. However, it is not clear how this proposed set of disclosure requirements would be squared with the underlying current law in Section 307 of the Tariff Act, which already forbids the importation into the United States of any such goods made with the use of forced labor. Hypothetically, if a public company were to have this degree of prior knowledge and awareness about the use of forced labor in Xinjiang to make its products, it is difficult to see why such a company would choose to try to import those products into the United States, given the already-existing duty of CBP to issue WROs to block the entry of such goods under Section 307 and thus all of the foreseeable adverse legal, financial and reputational consequences for that company.

It thus appears that Congress, in one form or another, will be adding new laws in this area in response to its understanding of the human rights situation in Xinjiang, placing further stresses upon U.S. companies whose supply chains have come to rely upon Chinese sources of production in recent decades. Such external pressures may either compel much more rigorous vigilance and preventative measures from U.S. companies that intend to remain reliant on PRC suppliers or the eventual movement of such supply chains to other producer nations in Asia, Latin America or Africa with similar cost and logistical characteristics in regard to textiles and apparel manufacturing.

Conclusion.

The most imminent risk for future WROs appears to be in textiles from Xinjiang, although CBP's latest September 14 actions also imply that its future WROs could go beyond textiles and apparel to affect electronics, automotive parts or other kinds of merchandise commonly sourced from the PRC generally and from Xinjiang in particular. Moreover, given the H.R. 6210 and S. 3471 legislation now under consideration, Congress could also force CBP to impose WROs on considerably more imports originating in Xinjiang or in other PRC provinces where Uyghur or other minority Muslim workers originally from Xinjiang may now be employed through the PRC's reeducation and training programs.

Over the past three years, U.S. importers have had to contend with escalating trade tensions and the imposition of punitive Section 301 tariffs of up to 25 percent on many goods imported from the PRC. Now, U.S. importing companies could also face the complete blockage of imports of certain goods on the basis they were produced, either in whole or in part, with the use of forced labor in the PRC, contrary to Section 307 of the Tariff Act. On top of that, U.S. firms should also consider the separate potential reputational damage from accusations of doing business with PRC suppliers or

producers that the U.S. Government has charged with using forced labor. Such concerns have already begun to affect the purchasing patterns of major retail brands such as the well-known Swedish firm H&M, which has announced it has now stopped buying both finished goods and even cotton yarn originating in Xinjiang.

As a result, both U.S. and non-U.S. companies whose supply chains may involve producers or suppliers in the PRC, especially in Xinjiang, should be prepared to act more proactively. Such steps would include additional due diligence and preventative audits by credible, competent and independent third party auditing agencies; adoption of meaningful human rights policies and guidelines; obtaining more direct written assurances and commitments from suppliers about their non-use of such illicit labor; focusing on clear contractual remedies if CBP were to enter a Section 307 WRO against goods shipped to the United States; and being generally prepared to respond to considerably more public, social media and U.S. Government attention to these concerns about the potential use of forced labor in Chinese supply chain situations.

Dorsey & Whitney attorneys are experienced in helping U.S. and international companies, including Chinese companies, to assess and mitigate the risks in their global supply chains, including under U.S. import and export law.