

U.S. Customs Bans More Textile Imports From China

by Dave Townsend and T. Augustine Lo

On December 2, 2020, U.S. Customs and Border Protection (“CBP”) issued a Withhold Release Order (“WRO”) against cotton products made by the Xinjiang Production and Construction Corps (“XPCC”) or any of its affiliates (collectively, “XPCC”) because those Chinese entities are viewed as relying on the use of forced labor from Uyghur or other minority Muslim groups in Xinjiang. This new WRO could affect a significant share of all U.S. textile imports from the People’s Republic of China (“PRC”) and possibly other cotton products from non-Chinese sources that are made from cotton or cotton items originating with XPCC, thus reverberating widely within the textile and apparel industries. It could also affect many U.S. retailers and consumers because XPCC reportedly accounts for about one-third of Xinjiang’s cotton and cotton goods production, and Xinjiang, located in the northwest corner of the PRC, produces the vast majority of that nation’s cotton and cotton goods. Moreover, CBP has indicated that it will detain not only products directly sourced from XPCC but also any products from other firms, even those in third countries, that use XPCC-sourced cotton raw material inputs.

As a consequence of the ever-broadening scope of CBP WROs and potential Congressional action against U.S. imports of goods from Xinjiang (as noted below), U.S. importers and businesses in a wide range of industries should proactively review their PRC supply chains to safeguard those supply chains against reliance on XPCC or other such suppliers based in Xinjiang. U.S. importers and businesses will likely need to consider the growing potential monetary and reputational risks in importing items from such suppliers in Xinjiang. As a result of the XPCC WRO, U.S. importers will also need to ask if their suppliers have used XPCC-produced cotton inputs, including for products originating from suppliers in countries other than the PRC.

In announcing the WRO, CBP and the Department of Homeland Security (“DHS”) leadership emphasized the sweeping reach of XPCC and its involvement in the Xinjiang textile supply chain. DHS Acting Deputy Secretary Ken Cuccinelli claimed the WRO against XPCC’s goods would block billions of dollars of U.S. imports from Xinjiang and likened the targeting of XPCC to an effective regional ban on all textiles from Xinjiang.

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However, despite that assertion, in publishing the WRO, at least for the time being, CBP itself said it would implement its WROs on a company-specific basis to avoid penalizing other Chinese firms in Xinjiang that do not, so far as CBP knows, rely on forced labor.

CBP and DHS touted the far-reaching action as a way to satisfy growing Congressional demands for a regional ban on all goods from Xinjiang. In spite of that stated goal, however, top Democrats on the House Ways and Means Committee (which has primary oversight power over U.S. trade policy) reacted to the CBP announcement by releasing their own statement supporting the WRO but also calling it “clearly not enough.” Earlier this year, the House of Representatives, in a relatively rare display of bipartisanship, passed the Uyghur Forced Labor Prevention Act by a nearly unanimous margin of 406 to three. That legislation would impose a rebuttable presumption that all imports from Xinjiang were made with the use of forced labor, shifting the burden of proof to each U.S. importer to demonstrate to CBP that its goods were not so made. Although the Senate has yet to take up that bill, a bipartisan group of Senators has already indicated support for it, and many believe it could still be enacted into law this year or at least early in 2021. In addition, Congress is also weighing other legislation to increase additional mandatory securities disclosures by publicly traded U.S. companies about their reliance on and use of imports from the Xinjiang region of the PRC.

According to the U.S. Government, XPCC is a paramilitary group that has engaged in human rights violations and forced labor in the Xinjiang region. Earlier this year, on July 30, the U.S. Department of the Treasury Office of Foreign Assets Control (“OFAC”) placed XPCC on the OFAC list of Specially Designated Nationals (“SDNs”). That SDN designation prevents U.S. persons from having any direct or indirect transactions with XPCC or any company in which XPCC owns 50% or more unless authorized by a specific license issued by OFAC. The new CBP WRO reinforces the OFAC SDN bar because it applies to goods that were produced at any point along the supply chain by XPCC.

The new WRO is expressly intended to apply to products even if multiple intermediary entities are involved between XPCC and the U.S. importer. For example, the WRO covers textile products made with XPCC-harvested cotton that may first have to be transformed from picked cotton into cotton yarn that is then woven into cotton fabric that is then cut and sewn into cotton lining that is then used to make cotton garments that are finally sold to a U.S. company. In announcing the WRO, DHS stated that it intends the new WRO to cover such textiles even when the XPCC contribution may be multiple steps removed from the garment production, and CBP stated that it expects U.S. companies to “self-police” through systematic due diligence efforts to prevent products containing XPCC-sourced cotton (or other cotton products) from being imported into the United States.

CBP’s latest move extends a series of WROs that have covered a variety of U.S. imports having a nexus to Xinjiang. As we have reported previously [here](#) and [here](#), CBP had already banned other products from Xinjiang, especially in the textile and cotton sector, although to date those bans had been targeted against goods made by specific entities.

In the XPCC WRO, CBP will now exclude goods produced by XPCC at any stage in a potentially lengthy and even multi-national supply chain. U.S. importers of such goods should therefore consider the probability that CBP will now demand documentation demonstrating that its imports are not made with XPCC-produced cotton fibers or other cotton inputs. Lacking such documentation, U.S. importers could risk having CBP reject their import entry, requiring the importer either to re-export the product from the United States or to attempt to convince CBP that the products are not subject to the WRO. If the importer is unable to make that showing, CBP could potentially seize and forfeit the goods, leading to loss of the merchandise.

Section 307 of the Tariff Act of 1930 prohibits importing into the United States foreign-origin goods that were mined, produced, or manufactured wholly or in part by forced labor, convict labor, or child labor. Historically, CBP would enforce Section 307 by issuing a WRO if it concludes there is reasonable (although not conclusive) information indicating that a company uses forced labor to produce or process goods. In deciding whether to issue such a WRO, CBP has said it will consider allegations from both the private sector or non-governmental organizations (“NGOs”) that alleged certain imports were made from forced labor and so should be subject to the Section 307 import ban. Traditionally, the affected importer could then challenge that finding by submitting a certificate of origin and other evidence that the goods were not produced by forced labor.

However, as noted above, the Uyghur Forced Labor Prevention Act already passed by the House and awaiting a vote in the Senate would effectively reverse the traditional Section 307 process by creating a rebuttable presumption that all goods from Xinjiang are the product of forced labor. However, it may be increasingly difficult for the U.S. importer to collect sufficient evidence to rebut such a presumption if this legislation becomes U.S. law. In recent times, reliable and credible independent audit firms have found it all but impossible to perform meaningful due diligence and inspections of worker conditions in Xinjiang’s production facilities, particularly those owned and operated by XPCC, a state-owned enterprise with very close ties to PRC security officials. PRC officials have, however, regularly disputed that XPCC or any other companies in Xinjiang rely upon the use of forced labor and have insisted instead that PRC government retraining and vocational programs in that region are wholly voluntary and are intended only to improve the economic conditions for those participants.

Given the growing political pressure in Congress about the forced labor issue, even under the new incoming Biden Administration, it seems a virtual certainty that 2021 will likely bring more and broader punitive action with respect to goods allegedly made through the use of forced labor from Uyghur or other minority Muslim groups in Xinjiang. It is also worth recalling that U.S. laws have always imposed a range of health and safety requirements that typically rely on documentation of the provenance of imported goods, so coping with this new WRO and other similar preventative measures aimed at the Xinjiang forced labor issue will require U.S. importers to exercise even greater care in their due diligence efforts and “self-policing” measures as they establish and monitor their global supply chains, especially those reliant upon suppliers in the PRC.

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 laws.