US Weighs Further Xinjiang-Related Enforcement, Including Cotton Import Ban

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Overview
The Trump administration is considering a ban on US imports of Xinjiang-origin cotton and other products due to allegations of widespread forced labor. The scope of the possible restrictions has not been made public but credible reporting suggests that it could include cotton and tomato products from the Xinjiang Uyghur Autonomous Region (XUAR) or wider prohibitions covering cotton products from across China and third-countries relying on XUAR-sourced materials or labor.

XUAR produces an estimated 20% of the world's cotton and 85% of China's cotton. The far western province is also the site of alleged human rights violations, including the detention and internment of ethnic Uyghur and Turkic Muslim minorities, surveillance of local populations, and use of forced and prison labor from the XUAR.

A ban on Xinjiang-sourced cotton products could radically impact global supply chains and the apparel industry, and further escalate the US-China trade war. The Trump Administration has aggressively employed sanctions and export controls against Chinese officials and entities. In recent months, it has targeted XUAR-based actors and activities, including barring exports to dozens of companies active in XUAR and implementing blocking sanctions on the Xinjiang Production and Construction Corps (XPCC), a massive state-owned enterprise that administers part of the Xinjiang region.

In a July interagency business advisory, the US Departments of the Treasury, State, Commerce, and Homeland Security warned of the legal, economic, and reputational risk of continuing Xinjiang-related commercial activities. Beyond cotton supply chains, the business advisory also highlighted risks in other sectors (such as agriculture and food processing, automobiles, extractives, footwear, toys, electronics, and construction). The US government alleges that these sectors also 1) rely on forced labor of individuals from XUAR in their supply chains, 2) assist in developing surveillance tools for use in the XUAR, or 3) aid in the construction of detention facilities in XUAR or manufacturing facilities in XUAR that are near camps that accept subsidies from the Chinese government to use XUAR-sourced labor.

Withhold Release Order
The reported mechanism for the possible Xinjiang-cotton import ban is an administrative measure known as a “withhold release order” (WRO), which can be implemented by the US Department of Homeland Security's Customs and Border Protection agency (CBP). CBP is entitled to withhold the release of imported goods when there is information available to “reasonably” indicate that the goods or materials were produced by forced, indentured, or convict labor pursuant to 19 C.F.R. § 12.42(e) as authorized under Section 307 of the Tariff Act of 1930 (Section 307).
Pursuant to a WRO, importers must either export the detained shipments or submit, within three months, a certificate of origin and detailed statement demonstrating the merchandise was not produced with forced labor. If CBP determines the proof submitted is insufficient, it will exclude the shipment. Where CBP finds “probable cause” that goods or materials were produced with forced, indentured, or convict labor, it will publish a formal “finding” to that effect in the Customs Bulletin and in the Federal Register, 19 CFR §12.42(f). Importers may then submit a certificate of origin or detailed statement to contest the finding. If CBP finds that the proof is insufficient to establish admissibility of the merchandise, it will seize the merchandise for violation of Section 307.

The reports of a possible WRO covering all Xinjiang cotton products arose after the submission on August 28 of a petition from various labor, human rights and religious freedom organizations to CBP requesting a “regional” WRO covering cotton and cotton-based goods sourced with forced labor from XUAR. Specifically, the petition requests that CBP “urge all importers to identify and map through all credible means its business relationships” to determine whether they have “direct suppliers in the [XUAR]” or “suppliers in China or globally that source inputs produced in the [XUAR],” and require those companies to disclose those suppliers to CBP. Petitioners also propose a “two-pronged approach,” to addressing the concerns they raise in the petition:

- First, that CBP issue an immediate WRO covering all finished goods that either (a) were assembled by supplier companies in the XUAR or (b) contain inputs (including cotton, yarn, or fabric) produced by companies that own or operate facilities in the XUAR that have accepted Chinese government subsidies or employed workers provided by the government, regardless of whether the finished goods were produced in the XUAR (the petitioners append a “non-exhaustive list of companies” they believe meet these criteria).
- Second, with respect to importers of cotton-based goods from suppliers outside of Xinjiang (whether elsewhere in China or outside of China) that source any inputs produced in XUAR, that CBP “work with” those importers for a period of no longer than six months, after which CBP would ban imports from importers that fail to establish that their suppliers source inputs exclusively from factories outside XUAR not using Uyghur forced labor.

The Trump Administration has already issued multiple XUAR-related WROs in the last year, targeting, for example, specific apparel and hair product entities. While a region-wide order would be uncommon, it would not be without precedent. The US government implemented a country-wide ban on “cotton or products produced in whole or in part with Turkmenistan cotton” under Section 307 in 2018.

Related US Government Actions

The US government has also used its principal sanctions and export control tools to address XUAR-related concerns.

OFAC Sanctions

On July 31, the Treasury Department’s Office of Foreign Assets Control (OFAC) designated XPCC and two affiliated individuals pursuant to Executive Order 13818, implementing the Global Magnitsky program. The blocking sanctions bar US persons from transacting with XPCC, or any entity 50% or more owned by XPCC. The sanctions effectively cut off the state-owned enterprise, which controls large swathes of Xinjiang and its economy, from the US commercial and financial markets. XPCC is reportedly responsible for 37% of XUAR’s cotton production and the organization reportedly includes thousands of subsidiaries, creating significant compliance hurdles for international firms sourcing from the region. Given the size of the entity, OFAC has authorized “wind down” provisions for certain activities with XPCC subsidiaries until September 30. Earlier in the month, on July 9, OFAC designated the Xinjiang Public Security Bureau (XPSB), and four current or former government officials in connection with serious rights abuses against ethnic minorities in the XUAR, under the Global Magnitsky Act.

Export Controls

The Commerce Department’s Bureau of Industry and Security (BIS) has also added dozens of companies operating in XUAR to the Entity List. BIS has added companies that it believes rely on forced labor as well as technology firms that the US government has alleged support a state-surveillance apparatus in XUAR. It has also included state agencies alleged to be responsible for repression of Uyghurs and other ethnic minorities. The Entity List prohibits the export, reexport, or transfer of goods – including software and technology – subject to the US Export Administration Regulations to listed companies.

The impact of the Entity List actions is likely to have a significantly smaller footprint for the apparel industry than the XPCC sanctions or the possible regional WRO, but corporations who share information with suppliers in China, including sample products, specifications, formulas, or other technical information, should be aware of the restrictions. There is also a heightened risk that companies added to the Entity List could, in the future, be subject to more stringent restrictions.

Additional Risks
In addition to the other government actions described above, companies relying on forced and prison labor may face the risk of civil and criminal investigations in certain circumstances. For example, in addition to denying entry to goods produced with forced, indentured, or convict labor, CBP may issue civil penalties against the importer and other parties. US Immigration and Customs Enforcement’s Homeland Security Investigations (HSI) may launch criminal investigations related to the importation of goods made with forced labor in violation of US law, which could result in incarceration and fines, seizure and forfeiture of goods, and denial of export privileges. US federal government contractors and their employees, sub-contractors and their employees, and their agents are also prohibited under the Federal Acquisition Regulation, Combating Trafficking in Persons (FAR 52.222-50) from engaging in forced labor, sex trafficking, and other trafficking-related activities, and can be subject to suspension, debarment, or other sanctions. Companies and individuals also may be subject to civil liability or criminal prosecution under the Trafficking Victims Protection Act (18 USC § 1589).

Apart from these legal risks, companies also face reputational harm from high-profile news reports and pressure campaigns mounted by NGOs and others in the United States and elsewhere encouraging governments to implement measures to restrict imports that potentially could involve forced labor in Xinjiang and elsewhere.

Implications

In light of the various legal and reputational risks outlined above, companies are encouraged to take a fresh look at how their existing compliance programs address the risks of forced, indentured, convict, and child labor, labor trafficking, and related labor issues in their supply chains. This review should include related economic sanctions and export controls risks. Following a careful risk assessment, enhancements to policies and procedures, due diligence and auditing processes, training, and reporting and response mechanisms may be warranted.

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For specific advice on navigating the impacts of a possible WRO or related US sanctions and export controls, and other legal risks described above, contact a member of Steptoe’s Business & Human Rights, Economic Sanctions, Export Controls, or Customs team.

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