

BHR Client Alert: Uyghur¹ Report

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Public Policy, Compliance, and Global Problem Solving

In recent years and with increased vigor in recent months, stakeholders and governments, including the United States, have focused on labor-related and other human rights issues concerning the treatment of Uyghur and other minority Muslim groups in the Xinjiang region of China. In this post, we provide an overview of some of these developments and considerations for multinationals with global value chains that may be impacted.

The Issue

There are growing concerns that serious human rights violations are occurring in the Xinjiang Uyghur Autonomous Region (“XUAR”) -- including a recent [report](#) by China scholar Adrian Zenz about forced sterilization, and a [report](#) earlier this year by the Australian Strategic Policy Institute about forced labor, which included a deep dive into the supply chains of multiple multinationals. This has spurred a number of policy developments in both the United States and across the global community in recent weeks, including publication by multiple U.S. Cabinet Departments of a significant business advisory on forced labor and other human rights abuses, new sanctions legislation signed by President Trump, new designations on the Entity List by the U.S. Department of Commerce, and recent enforcement actions by U.S. Customs and Border Protection (“CBP”). Other developments include the publication of draft guidance from the Department of State recommending companies take certain due diligence measures, as well as pending legislation in Congress that, if adopted, could dramatically alter the legal landscape for corporations whose global value chains might implicate XUAR.

International organizations have reported increasingly about human rights concerns in XUAR over the past few years. In 2018, the UN Committee on the Elimination of Racial Discrimination [raised concerns](#) about the detention of Uyghurs and other Muslim minorities who were arbitrarily detained or disappeared in the region. Since 2018, reports of alleged human rights violations have included accounts of “[internment camps](#)” and mass arbitrary detentions, severe physical and psychological abuse, [deaths in custody](#), [forced labor practices](#), medical neglect, involuntary collection of biometric data and storage in databases used by police, widespread and oppressive [mass surveillance](#), religious persecution, political indoctrination, mass transfers of Uyghurs and other minority groups to factories across China, and other infringements of human rights. Concerns persist in relation to alleged forced labor in the production of key raw materials from the region, including cotton. (China is the world’s largest producer of cotton and, according to China’s National Bureau of Statistics, more than 70% of its cotton is produced in XUAR.)

¹ This term is also spelled “Uighur” by certain stakeholders.

Legal and Policy Developments

The United States

Reports of human rights abuses committed in XUAR have galvanized the strong interest of both the U.S. Congress on a bipartisan basis and Executive branch agencies, including those with regulatory capability. As the U.S. moves into a presidential election season, U.S. relations with China appear to be a preeminent foreign policy issue with domestic ramifications, and among the highest profile human rights issues. Both political parties are formulating campaign positions highly critical of China's trade and economic policies as well as focusing on human rights concerns in Hong Kong and especially in XUAR. The dynamics of a heated political season that will culminate on November 3 will likely exacerbate risk for companies with supply chains in XUAR. It is during this period that further important legislation may well be considered in Congress and CBP may continue to aggressively use its enforcement authority to deny entry into the U.S. for products produced by forced labor in China and elsewhere. Secretary of State Pompeo's recent personal engagement on Chinese human rights policies signals the high-level attention paid to these issues in the coming months.

A. Measures Addressing Human Rights Risks in Supply Chains (“Upstream Risks”)

- ***U.S. Inter-agency Business Advisory:*** On July 1, 2020, the Departments of State, Treasury, Commerce and Homeland Security published a [Business Advisory](#) on Xinjiang supply chains (the “Advisory”). The Advisory highlights harsh repression in XUAR and is targeted at businesses with potential exposure in their supply chains to XUAR or to facilities outside of XUAR that use labor or goods from XUAR. The Advisory encourages businesses to implement human rights due diligence policies and procedures in line with international standards such as the UN Guiding Principles on Business and Human Rights and to take a risk-based approach to assessing and mitigating human rights risks, as well as legal, reputational, and economic risks. The Advisory notes that well-documented due diligence policies and procedures “may potentially be considered as mitigating factors by U.S. authorities in the event businesses inadvertently engage in sanctionable activity or activity that violates domestic law.”

The Advisory also draws attention to potential consequences of engagement with entities involved with human rights abuses. For example, the Advisory discusses the criminalization of obtaining a financial benefit from forced labor where a defendant “knew or recklessly disregarded forced labor and knowingly participated in the relevant venture” under the Trafficking Victims Protection Act (“TVPA”). Accordingly, companies and certain of their employees may be subject to criminal violations of the TVPA resulting in possible criminal fines or imprisonment.

While the Advisory does not have the force of law, set against a backdrop of legislative and policy developments in the U.S., the publication provides a significant steer on good business practice with respect to managing risks in XUAR.

- ***Uyghur Human Rights Policy Act:*** On June 17, 2020, President Trump [signed into law](#) the Uyghur Human Rights Policy Act (“UHRPA”) of 2020, which addresses “upstream” human rights supply chain risks in XUAR. As discussed in our recent [global alert](#) on Business and Human Rights developments, the law previously passed both the Senate and House with overwhelming support. Among other measures, the UHRPA directs the

executive branch to identify and impose sanctions that would deny visas and freeze assets of foreign individuals and entities responsible for human rights abuses in XUAR.

- ***Uyghur Forced Labor Prevention Act:*** Congress is also currently considering another piece of [legislation](#) — the Uyghur Forced Labor Prevention Act (“UFLPA”). Introduced in the House of Representatives on March 11, 2020 and in the Senate on March 12, 2020, the UFLPA would target the use of forced labor in XUAR by the Chinese Communist Party and aims to prevent any goods manufactured with such forced labor from entering the United States. Commenting on the proposed legislation -- and demonstrating the increased scrutiny on the role of U.S. and multinational companies in contributing to human rights violations -- Senate co-sponsor Marco Rubio (R-FL) appealed to companies, [noting](#) that “[w]hile the U.S. Government should take all precautionary measures to ensure that goods made in XUAR don't enter our market, companies have a moral duty and responsibility to prove that their sourced products have been produced without forced labor.”

Although it would be unusual for Congress to enact two separate bills addressing the same subject matter in a single term, it is possible that the increased public scrutiny on human rights violations in China will build support for the UFLPA. The prospects for its passage will also depend in part on the positions taken by the Trump and Biden campaigns in the run-up to the U.S. presidential election, and also on how the business community responds to the proposed legislation. Given it is a revenue measure under Congressional precedents, the bill can only originate from the House, and the House bill cannot come to the floor under House rules without the approval of the House Ways and Means Committee. This Committee is traditionally quite vigilant in resisting proposals to apply import bans and other trade restrictions as tools of foreign policy, but if there is enough external stakeholder engagement on this issue, it is possible that the Ways and Means Committee would agree to it. Recent [allegations](#) from former National Security Advisor John Bolton that President Trump [encouraged](#) the establishment of Chinese concentration camps in XUAR may also galvanize Congressional action on the issue.

Among other measures, the proposed legislation would (if passed in its current form):

- Require companies to obtain certification from the Commissioner of CBP before importing goods from XUAR. This would create a rebuttable presumption that all goods manufactured in XUAR are made with forced labor, unless the CBP Commissioner determines otherwise by “clear and convincing evidence.”
- Require a Presidential determination “whether reasonable grounds exist” for issuing a “Withhold Release Order” pursuant to section 307 of the Tariff Act of 1930 on six Chinese companies operating in XUAR. If imposed, goods produced by such companies will be barred from entry into the United States.
- Require the Secretary of State, in coordination with other federal agencies, to publish a report within 90 days identifying Chinese entities that directly or indirectly use forced labor in XUAR, including a list of products made wholly or in part by forced labor in XUAR, and also naming businesses that sold products in the United States made wholly or in part with forced labor in XUAR.
- Authorize the President to impose sanctions on any foreign entities that use such forced labor in their supply chains. Section 8 of the UFLPA provides that the Executive must designate each person that “knowingly engages in, is responsible for, or facilitates” forced labor in XUAR or who “knowingly engages in, contributes to,

- assists, or provides financial, material, or technological support for, the importation into the United States of goods produced with forced labor” in XUAR.
- Expressly list a number of multinational corporations “that are or have been suspected of directly employing forced labor or sourcing from suppliers that are suspected of using forced labor.” The proposed legislation would also require the development of a list of products made using forced labor in XUAR and a list of all businesses that sold such products in the United States.
 - **Congressional-Executive Commission on China:** In March 2020, concerns about forced labor in XUAR were also raised at a roundtable of the Congressional-Executive Commission on China (“CECC”). At the roundtable, in addition to releasing a draft of the UFLPA, the CECC also released a [research report](#) on forced labor in the region. This report referenced the same companies listed in the UFLPA.
 - **CBP’s Continued Aggressive Regulation on Forced Labor:** On the same day that the UHRPA was signed into law, the CBP [issued](#) a Withhold Release Order (“WRO”) on hair products manufactured with forced labor in XUAR based on information that reasonably indicated the use of prison labor, as well as additional situations of forced labor including excessive overtime, withholding of wages and restriction of movement. The WRO requires detention of hair products at all U.S. ports of entry. The agency has since begun [enforcing](#) this WRO, detaining on July 1, 2020 a shipment of products/ accessories suspected to be made with human hair that originated in XUAR.

B. Measures Addressing “End User” Human Rights Risks (“Downstream Risks”)

Under the guise of combatting terrorism and religious extremism, China is alleged to have established an intrusive, high-technology surveillance system across Xinjiang, which is being used to facilitate human rights abuses (including the right to be free from arbitrary interference with privacy, religious freedom, freedom of movement and freedom of expression). The State Department Advisory discussed above references assistance in developing surveillance tools for the Chinese government in XUAR— including technology with artificial intelligence, facial recognition, gait recognition and infrared technology—as a particular area of risk for businesses.

- **Commerce Department Entity List:** Regulating with respect to these “downstream” human rights risks, on June 5, 2020, the Department of Commerce blacklisted nine Chinese entities, indicating that those parties are “implicated in human rights violations and abuses in the implementation of China’s campaign of repression, mass arbitrary detention, forced labor and high-technology surveillance against Uyghurs, Kazakhs, and other members of Muslim minority groups in XUAR.” Administered by the Department of Commerce’s Bureau of Industry and Security, designation on the U.S. Entity List imposes a license requirement for the export, re-export, and transfer of all items subject to the Export Administration Regulations, and thereby restricts access to U.S. goods, software and technology. These recent nine designations followed the designations of 28 other Chinese entities last October, among them Chinese government entities and commercial companies specializing in surveillance technology that had been implicated in reported human rights abuses in XUAR. According to stakeholders, additional Entity List designations of parties linked to XUAR are likely to occur in the near term.
- **Draft State Department Guidance:** In addition to these export restrictions and to the references to due diligence in the sale of surveillance technology in the Advisory (discussed above), the Department of State last year published detailed [draft guidance](#) on the export of technology with surveillance capabilities. This guidance encouraged

exporters of surveillance technology to conduct appropriate human rights due diligence on downstream users of technology in global value chains. While not limited to mass surveillance issues in XUAR, this detailed guidance might assist companies with designing and implementing due diligence mechanisms to mitigate downstream human rights risks in the region.

Outside of the United States

Policy makers outside the United States are under increasing pressure as well to consider action in response to these human rights developments.

- ***Inter-Parliamentary Alliance on China:*** In June, an Inter-Parliamentary Alliance on China (“IPAC”) was formed as a group of members of parliament from a range of political parties in Europe, Australia and North America. On June 29, 2020, IPAC published a [statement](#) indicating that it would push for a UN legal investigation to determine whether crimes against humanity or genocide have taken place in XUAR. The statement promised political action in each of the 15 legislatures represented by IPAC.
- ***State Calls for Action:*** On June 30, the UK’s Ambassador to the WTO and UN in Geneva delivered a cross-regional [joint statement](#) on behalf of 27 countries, including Australia, Canada, Germany, Japan, the Netherlands and the UK, calling on the UN Human Rights Council to take action following recent activity in XUAR (and the imposition of the new national security law in Hong Kong). This statement follows a [letter](#) submitted by UN ambassadors from 22 states last year which expressed concern to the Human Rights Council president and the High Commissioner for Human Rights about reports of arbitrary detention, widespread surveillance and restrictions, particularly targeting Uyghurs and other minorities in XUAR. On the same day, two prominent Members of the European Parliament issued a [joint statement](#) condemning China’s campaign to suppress birth-rates in XUAR and called on the European Commission and other stakeholders to act swiftly in response.
- ***Potential for International Human Rights Sanctions:*** There have been [calls](#) on various specific governments to impose sanctions against foreign individuals who have committed human rights abuses (“Magnitsky-style sanctions”) on Chinese officials for actions in XUAR. On December 12, 2019, the Canadian Senate welcomed a [motion](#) to call upon the government to impose sanctions against Chinese and/or Hong Kong officials, albeit the debate was adjourned. In June 2020, a prominent German Member of the European Parliament [called](#) on the European Union to adopt a mechanism akin to the Magnitsky Act that could be used to threaten sanctions in connection with the events in XUAR. In the UK, the Government’s recent [announcement](#) of designations under the Global Human Rights Sanctions Regulations 2020 focused on individuals and entities in Russia, Saudi Arabia, Myanmar and North Korea, rather than Chinese parties. However, in a House of Commons [debate](#) on July 6, 2020, the Foreign Secretary indicated that the Government is already working on the next wave of designations and, during the same debate, he came under pressure from prominent backbench parliamentarians to consider sanctions against those involved in human rights abuses Xinjiang and Hong Kong.

How Should Companies Respond to these Developments?

With accelerated regulation in the pipeline and sustained scrutiny of various stakeholders, this is a crucial time for companies to take stock of their operations in the region, assess any potential

human rights impacts, and implement steps to mitigate such impacts. Covington's distinct and leading Business and Human Rights team is well placed to assist companies with assessing risk and strategizing about an appropriate response to any such risks in line with domestic and international legal standards and best practice.

Some steps that businesses may consider include:

1. Ensure export controls compliance with all Entity List designations of companies operating in XUAR;
2. Revisit supply chain mapping to determine the extent to which any of their product supply chains may involve production or manufacturing in XUAR;
3. Consider measures to increase traceability of materials in a company's Chinese supply chain, especially if there are significant gaps in a company's knowledge of that process;
4. Consider adequacy of social audit procedures and other means of verifying labor standards given particular concerns about the reliability of audits in XUAR;
5. Design and implement robust human rights mitigation steps if any potential human rights risks—including forced labor and privacy infringements—are identified;
6. For companies involved in the development of surveillance technology, review the extent to which third-party human rights due diligence processes encompass diligence on downstream entities; and
7. Determine and operationalize a strategy for engagement with key relevant stakeholders, including relevant government agencies, multilateral organizations, and NGOs.

Potential for Chinese Retaliation: Companies should be aware, however, of the potential for adverse repercussions in China if they terminate business relationships with Chinese entities, especially supply agreements for critical technologies or components. Among the retaliatory tools at the Chinese government's disposal is its "Unreliable Entities List," developed by China's Ministry of Commerce after the U.S. government placed Huawei on the Entity List in May 2019. The "Unreliable Entities List" has not been implemented but is seen as a threat to deter foreign companies from halting supply to Chinese companies, especially when suspension of supply is not absolutely required for compliance with a foreign country's laws. Among the reasons stated by the Ministry of Commerce for placing a company on the list is "violating contracts or blocking or cutting off supply for non-commercial reasons." Penalties for being placed on this blacklist following an investigation are unspecified, but the Ministry of Commerce has said "necessary measures will be taken" against those on the list. So far, China has not announced the placement of any companies on this list.

A second vehicle that could lead to the blacklisting of a company is China's "Corporate Social Credit System," a tool that the Chinese government is expected to increasingly rely on to monitor and reward or punish the behavior of domestic and foreign companies. Blacklisting in this system is typically the result of serious regulatory violations or unethical market behaviors, but it is not inconceivable that behavior by a foreign company deemed detrimental to China's interests -- such as cutting off supply to a company considered strategic by the Chinese government -- could impact its score. Blacklisting in this system could lead to negative treatment at multiple regulatory and governmental touch points, including tax audits, customs inspections, and public procurement.

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