

## 6 Ways To Excise Xinjiang Forced Labor From Supply Chains

By Rachel Alpert and Grace Signorelli-Cassady (July 27, 2021, 5:03 PM EDT)

Over the past few years, the U.S. government has increased scrutiny of products imported into the U.S. in an effort to combat the use of forced labor and other human rights abuses in China's Xinjiang Uyghur Autonomous Region.

Following a number of U.S. Customs and Border Protection withhold release orders and associated detentions of goods potentially associated with Xinjiang, proposed legislation to further expand such CBP enforcement and an updated U.S. Department of State Xinjiang supply chain business advisory, it is now more important than ever for U.S. importers to clearly document each step in a supply chain.[1]

Currently, withhold release orders under Section 307 of the Tariff Act of 1930 subject imports of certain hair and silica-based products, and all cotton and tomato products with a nexus to Xinjiang, to detention at the border.

However, the proposed Uyghur Forced Labor Prevention Act would create a rebuttable presumption that all goods produced, mined or manufactured in Xinjiang are not entitled to enter the U.S. unless the importer can affirmatively show that those goods are not the result of forced labor.[2]

The recently updated State Department advisory lists a broad range of industries and products in which the U.S. government has identified forced labor and may therefore focus enforcement under the Uyghur Forced Labor Prevention Act, if enacted, or new withhold release orders, including:

- Apparel and textiles, including bedding, carpets, wool and cotton products;
- Electronics, including electronics assembly and cell phones;
- Solar energy, including "nearly every step of the production process, from raw silicon material mining to final solar module assembly";
- Motor vehicles;



Rachel Alpert



Grace Signorelli-Cassady

- Agriculture, including specifically cotton and tomatoes; and
- Mining of coal, uranium and asbestos.[3]

The advisory further cautions, however, that all "[r]aw and refined materials, commodities, intermediate goods, byproducts, and recycled materials" may have connections to forced labor and human rights violations in Xinjiang, "regardless of the final product and region of origin or export." The potential supply chain impact is thus incredibly broad.

### **Checking Supply Chains for Forced Labor**

In light of the increasing scrutiny on Xinjiang forced labor, it is particularly important for companies to clearly identify and document every step of the supply chain in order to be prepared to demonstrate to CBP that a product does not include items made with prohibited forced labor.

Although CBP has not issued a single resource providing clear instructions on how companies should demonstrate their products are free of Xinjiang forced labor, the following six best practices will help companies document key steps in the supply chain, as identified in the State Department advisory and CBP rulings and guidance documents, as well as the United Nations Office of the High Commissioner for Human Rights, Organization for Economic Cooperation and Development and U.N. International Labor Organization resources.[4]

#### ***1. Check suppliers for Xinjiang forced labor warning signs.***

The advisory lists numerous warning signs specific to Xinjiang forced labor. These include:

- Operating within or near internment camps, prisons or industrial parks involved in the Chinese government's poverty alleviation efforts;
- Mention of an education training center, coupled with poverty alleviation efforts, ethnic minority graduates, reskilling vocational training or reeducation;
- Companies in Xinjiang with high revenues but few employees paying into the government's social security insurance program; or
- A Xinjiang-based company with nonstandard hiring practices, such as hiring workers through government recruiters.

#### ***2. Comply with U.S. sanctions, export controls, CBP, and U.S. Department of Labor requirements and guidance.***

The U.S. government has sanctioned and designated numerous specific Xinjiang-based companies and products as associated with forced labor.

These include U.S. sanctions and export controls on Xinjiang Production and Construction Corps entities and other entities on the U.S. Department of the Treasury Specially Designated Nationals and Blocked Persons List;[5] industries identified on the U.S. Department of Labor Trafficking Victims Protection Reauthorization Act list;[6] companies designated on the U.S. Department of Commerce's Entity List;[7] and companies and products under CBP withhold release orders.[8]

### ***3. Document the origin and method of production of each step in the supply chain.***

For goods subject to detention under a withhold release order, CBP suggests that companies provide "[s]upply chain maps that specify the locations of manufacturers, factories, farms, [and] processing centers." [9] In the context of the Xinjiang cotton and tomato withhold release orders, CBP instructs that companies provide supporting documentation that traces the supply chain "from point of origin" to "the merchandise imported into the United States." [10]

CBP expects a high degree of detail in such documentation, as evidenced in a May CBP appeal ruling, in which Uniqlo Co. Ltd. failed to demonstrate its products were not produced by forced labor linked to the Xinjiang Production and Construction Corps. [11] In the decision, CBP noted that it was not enough to provide evidence to establish that the raw cotton used to produce the subject cotton garments in Australia, the U.S. and Brazil was sourced from entities outside of China.

Instead, CBP identified the following information gaps, which among other things proved fatal to Uniqlo's appeal:

- Invoices and other documentation regarding the finished garments did not reflect a fabric composition percentage;
- Uniqlo did not submit records reflecting actual cotton yarn production, weaving and dyeing;
- Uniqlo did not submit records reflecting the cutting and sewing of the cotton fabric into a finished garment; and
- Uniqlo did not demonstrate that the production of the finished garments was actually completed by the identified non-Xinjiang manufacturer or its employees.

### ***4. Obtain clear copies of current and past employee identification.***

Documenting that employees and supply chain participants are not Xinjiang laborers can help to overcome a presumption of forced labor for detained merchandise. For example, CBP's March decision that Dandong Huayang Textiles Garment Co. Ltd. [12] had not overcome a presumption under Section 321(b) of the Countering America's Adversaries Through Sanctions Act that its detained merchandise was produced with North Korean forced labor noted that:

- Documentation submitted did not consistently reflect the same total number of employees;
- Fewer identification cards were submitted than there were current employees;
- Submitted identification cards did not account for employees who left within the past 12 months; and
- The majority of identification cards were not sufficiently clear to determine the cards' authenticity. [13]

### ***5. Institute explicit policies against forced labor and track implementation.***

CBP notes that copies of policies and evidence of their implementation are helpful to demonstrate how companies have addressed forced labor.[14] CBP specifically suggests that a company code of conduct be shared with all suppliers in the global supply chain, and that it include specific language regarding minimum labor standards.[15] Companies should ensure these policies are current — another red flag that CBP identified in its Uniqlo decision.[16]

#### **6. Conduct comprehensive external audits — but know their limits.**

CBP includes copies of recent unannounced third-party audits among its list of helpful documentation demonstrating how companies have addressed forced labor.[17]

CBP's Dandong Huayang Textiles decision underscores the importance of accounting for all employees in the audit review, noting that one reason the company failed to establish that its detained merchandise was not produced with forced labor was that auditors had not interviewed all employees, thus undermining an audit report's conclusion that all employees were Chinese and not North Korean.[18]

While recognizing that due diligence best practices typically include onsite visits and audits, in the context of Xinjiang, the advisory notes that third-party audits alone are not a sufficient due diligence program "and may not be a credible source of information for indicators of labor abuses in the region."

#### **Conclusion**

The advisory acknowledges that all Chinese-linked businesses "are likely to face obstacles to conducting adequate due diligence to fully identify and avoid complicity in human rights abuses linked to Xinjiang."

Among other things, "[g]overnment controls, the lack of government and corporate transparency, the threat of detention of auditors and workers, and a police state atmosphere in Xinjiang impose significant obstacles to ensuring the reliability of audits on working conditions and respect for human rights."

China's new Anti-Foreign Sanctions Law further complicates the ability of companies to impose Xinjiang labor-related supply chain requirements.[19]

In light of these complexities, the breadth of available resources and the unique aspects of each industry and supply chain, there is no one-size-fits-all formula for ensuring products are free of Xinjiang forced labor.

As the U.S. increases scrutiny and pressure on imports related to Xinjiang, businesses should take steps now to ensure they can properly document that their products and supply chains are free of Xinjiang forced labor to ensure compliance and avoid import disruption.[20]

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*Rachel Alpert is a partner and Grace Signorelli-Cassady is an associate at Jenner & Block LLP.*

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[1] See, Withhold Release Orders and Findings, U.S. Customs and Border Protection (last visited July 22,

2021), <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings>; Uyghur Forced Labor Prevention Act, 117th Congress (2021-2022), Library of Congress, <https://www.congress.gov/bill/117th-congress/senate-bill/65/titles?r=5&s=1>; and Xinjiang Business Advisory, U.S. Department of State (July 13, 2021), <https://www.state.gov/wp-content/uploads/2021/07/Xinjiang-Business-Advisory-13July2021-1.pdf>.

[2] Uyghur Forced Labor Prevention Act, 117th Congress (2021-2022), Library of Congress, <https://www.congress.gov/bill/117th-congress/senate-bill/65/titles?r=5&s=1>.

[3] Further information is provided in Annexes 2-4 of the Advisory.

[4] Guiding Principles on Business and Human Rights, United Nations Office of the High Commissioner for Human Rights (2011), [https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf); [6] OECD Guidelines for Multinational Enterprises, Organization for Economic Co-operation and Development (2011), <http://mneguidelines.oecd.org/guidelines/>; Combating Forced Labor, International Labor Organization (2015), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_101171.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_101171.pdf).

[5] Specially Designated Nationals And Blocked Persons List (SDN) Human Readable Lists, U.S. Department of the Treasury (last visited July 22, 2021), <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>.

[6] List of Goods Produced by Child Labor or Forced Labor, U.S. Department of Labor (last visited July 22, 2021), <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>.

[7] Entity List, U.S. Department of Commerce (last visited July 22, 2021), <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list>.

[8] Withhold Release Orders and Findings, U.S. Customs and Border Protection (last visited July 22, 2021), <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings>.

[9] Helpful Hints for Submitting Proof of Admissibility and WRO Revocation/Modification Requests, U.S. Customs and Border Protection (Aug. 2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints\\_FactSheet\\_508comp\\_2\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints_FactSheet_508comp_2_0.pdf).

[10] Xinjiang Uyghur Autonomous Region WRO Frequently Asked Questions, U.S. Customs and Border Protection (last visited July 22, 2021), <https://www.cbp.gov/trade/programs-administration/forced-labor/xinjiang-uyghur-autonomous-region-wro-frequently-asked-questions>.

[11] H318182 — Uniqlo Co., Ltd., U.S. Customs and Border Protection (May 10, 2021), [https://www.customsmobile.com/rulings/docview?doc\\_id=HQ%20H318182&highlight=uniqlo](https://www.customsmobile.com/rulings/docview?doc_id=HQ%20H318182&highlight=uniqlo).

[12] H317249 — Dandong Huayang Textiles and Garments Co. Ltd., U.S. Customs and Border Protection (Mar 5, 2021), <https://rulings.cbp.gov/search?term=Forced%20Labor&collection=ALL&sortBy=RELEVANCE&pag>

eSize=30&page=1.

[13] CAATSA Title III Section 321(b) FAQs, U.S. Department of Homeland Security (March 30, 2018), <https://www.dhs.gov/news/2018/03/30/caatsa-title-iii-section-321b-faqs>.

[14] Helpful Hints for Submitting Proof of Admissibility and WRO Revocation/Modification Requests, U.S. Customs and Border Protection (August 2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints\\_FactSheet\\_508comp\\_2\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints_FactSheet_508comp_2_0.pdf).

[15] Responsible Business Practices on Forced Labor Risk in the Global Supply Chain, U.S. Customs and Border Protection (August 2018), [https://www.cbp.gov/sites/default/files/assets/documents/2018-Aug/CBP%20Responsible%20Business%20Practices%20on%20Forced%20Labor\\_v4%20%28FINAL%20with%20Publication%20Number%29.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2018-Aug/CBP%20Responsible%20Business%20Practices%20on%20Forced%20Labor_v4%20%28FINAL%20with%20Publication%20Number%29.pdf).

[16] H318182 — Uniqlo Co., Ltd., U.S. Customs and Border Protection (May 10, 2021), [https://www.customsmobile.com/rulings/docview?doc\\_id=HQ%20H318182&highlight=uniqlo](https://www.customsmobile.com/rulings/docview?doc_id=HQ%20H318182&highlight=uniqlo).

[17] Helpful Hints for Submitting Proof of Admissibility and WRO Revocation/Modification Requests, U.S. Customs and Border Protection (August 2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints\\_FactSheet\\_508comp\\_2\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints_FactSheet_508comp_2_0.pdf).

[18] H317249 — Dandong Huayang Textiles and Garments Co., Ltd., U.S. Customs and Border Protection (Mar 5, 2021), <https://rulings.cbp.gov/search?term=Forced%20Labor&collection=ALL&sortBy=RELEVANCE&pageSize=30&page=1>.

[19] Anti-sanctions law to protect China's interests, Embassy of the People's Republic of China (June 11, 2021), <http://sc.china-embassy.org/eng/zgyw/t1883185.htm>.

[20] For additional context and best practices, please read our prior alerts, Six Best Practices in Corporate Human Rights and Social Responsibility, Jenner & Block (Feb. 9, 2021), [https://jenner.com/system/assets/publications/20710/original/Best\\_Practices\\_Human\\_Rights\\_and\\_Social\\_Responsibility.pdf?1613089515](https://jenner.com/system/assets/publications/20710/original/Best_Practices_Human_Rights_and_Social_Responsibility.pdf?1613089515); and EU Guidance on Forced Labor in Supply Chains, Jenner & Block (July 16, 2021), <https://jenner.com/library/posts/21126>.