

## Compliance: Products From China



In recent months, there has been much attention focused on Beijing's labor policies

and practices toward the Uyghur Muslim population and other minority groups in China. Given that the western Xinjiang region is responsible for approximately one-fifth of the world's cotton supply, many industry players are finding compliance issues a challenge, especially after the United States banned cotton importation from the region and sanctioned Chinese political figures tied to the Chinese government programs.

It almost goes without saying that any company that purchases cotton products, whether directly or indirectly, must monitor this situation closely. Even companies that have not taken a public position on the issue cannot ignore the legal implications of importing cotton from the Xinjiang region.

### **The Legal Landscape**

More than ever, companies are being held responsible for the actions of suppliers further and further up their supply chains. Companies are responding accordingly, developing more sophisticated compliance programs that include what are increasingly the hallmarks—or perhaps the baseline—of a successful compliance program. These components include supplier standalone certifications; compliance clauses in supplier contracts; ethical and business codes of conduct that address forced labor and other related issues; third-party due diligence providers; independent audit programs; and record retention requirements. Legally mandated public disclosure regimes, such as the California Transparency in Supply Chains Act and the U.K. Modern Slavery Act, require companies to disclose the efforts they are taking to combat forced labor in their supply chains.

U.S. federal law explicitly prohibits the importation of goods made with forced labor. The U.S. Tariff Act, Section 307 (19 U.S.C. § 1307), states that "[a]ll goods, wares, articles, and merchandise, mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision." There is a low evidentiary threshold to determining which imports violate the forced-labor provisions and, in such instances, a withhold release order (WRO) may be issued. Under C.F.R. §12.42 (e), the commissioner of the U.S. Customs and Border Protection (CBP) need only find at any time that information available *reasonably, but not conclusively*, indicates that merchandise that violates Section 307's prohibition on forced labor is being, or is likely to be, imported into the United States; then he may issue a WRO. This "reasonable, but not conclusive" standard is lower than "credible evidence" or "probable cause."

Pursuant to this statutory authority, on January 13, 2021, CBP issued a wide-ranging WRO that requires CBP to detain and deny imports of cotton products and tomato products produced by any company operating in Xinjiang. Regionwide WROs are rare, as CBP normally issues WROs on a company-specific basis. The products subject to the Xinjiang WRO include cotton apparel, textiles, and other goods made with cotton; tomato seeds, canned tomatoes, tomato sauce, and other goods made with tomatoes. To request release of a particular shipment, U.S. importers may submit evidence to the port of entry where the shipment is being detained, in accordance with 19 C.F.R. § 12.43. It is incumbent upon the importer to prove admissibility of the merchandise within three months, per 19 C.F.R. § 12.43. Evidence submitted to establish admissibility must demonstrate that the imported merchandise was not produced in whole or in part in the Xinjiang Uyghur Autonomous Region using forced labor. Importers are required to submit supporting documentation that traces the supply chain from point of origin of the products to the production and processing of downstream products, to the merchandise imported into the United States. For cotton products, for example, CBP requires (among other documents) an affidavit from the yarn producer and the source of raw cotton that identifies where the raw cotton was sourced.

U.S. importers thus face a significant burden and potential disruption to their supply chain once CBP issues a WRO, which (as was the case with CBP's WRO on certain Xinjiang products) can come without advance notice. Failure to maintain an effective compliance program and to stay up to date on forced labor matters can have severe legal implications and cause significant supply chain disruption. An importer or exporter is not aware of a WRO until an import is blocked, and the blocked items include *all* imports of the same item from the same exporter, or in the case of the WRO on Xinjiang products, all imports from the region involved. This, of course, could expand to include additional targets.

Challenging a WRO can take years. In addition, companies may face liability in relation to lawsuits brought on a venture-liability basis. Under 18 U.S.C. § 1589 (b), "[w]hoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d)." As an example of the type of lawsuits companies might have to address, in 2019 several large U.S. technology companies were named in a lawsuit filed on behalf of parents of children working in cobalt mines in the Democratic Republic of Congo, alleging that the companies benefited from the forced labor in their supply chain. *Jane Doe 1, et al., v. Apple Inc., et al.*, No. CV: 1:19-cv-p3737 2019 WL 6877892 (D.D.C.). The companies have moved to dismiss the claim as meritless, but the lawsuit highlights the type of claims that companies could face in the future.

The landscape is also swiftly changing, and the Xianjiang import restrictions apply to an ever-growing variety of products. Most recently, the Biden administration [announced the issuance of a WRO](#) on silica-based products, a

critical component of solar panel materials, made by a company located in Xinjiang. In addition, the U.S. Department of Commerce updated its *Entity List* to include five more companies. Per the announcement from the White House, the companies were added "for participating in the practice of, accepting, or utilizing forced labor in Xinjiang and contributing to human rights abuses against Uyghurs and other minority groups in Xinjiang."

## **Thoughtful Decision-making Is Required**

So what, then, are companies to do about the Uyghur Muslim situation in China, including compliance with current and potential future U.S. government actions affecting trade in products from Xinjiang?

There are multiple, intertwining issues that companies should consider. First, companies must be aware that this is a highly sensitive issue from a public sentiment perspective. On one hand, there is pressure by non-Chinese media and consumers to ensure companies are not purchasing cotton from regions where the Uyghur Muslim programs are in effect. Some companies have taken very public and broad stances on the issue, and their experiences highlight the complexity of the situation. While their action was praised in their home countries, it led to widespread boycotts and public condemnation in China. In addition, the Chinese Ministry of Commerce released [Order No. 1 of 2021](#), which prohibits companies from complying with foreign laws that prohibit certain transactions with Chinese firms.

It is critical that companies make careful and well-considered decisions about how they will ensure their suppliers, and their suppliers' suppliers, in the Xinjiang region are compliant with anti-forced labor laws. Aggressive compliance programs specifically targeting forced labor in Xinjiang could trigger a backlash in China, and given their concern for human rights, many companies are willing to take this risk.

Regardless, companies must continue to maintain and refine effective compliance programs to ensure that there is no use of forced labor in their supply chains. At a minimum, companies that have not already done so should utilize certifications, compliance clauses, ethical and business codes of conduct, third-party due diligence reports, intake questionnaires, audits, and record retention requirements in their compliance programs. Companies should also remain attentive and stay apace with compliance best practices that more effectively root out noncompliant behavior in their supply chains. At the same time, companies need to devise compliance regimes that achieve their overall goals, both business and ethical. The Uyghur situation is emblematic of the ever-increasing complexity on ethical, legal, political, and public fronts, and companies should become accustomed to adapting their compliance programs to shifting landscapes.

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