

Legislation Targeting Imports From Xinjiang Region Moves to President Biden's Desk

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In December 16, 2021, the U.S. Congress passed legislation that effectively prohibits imports of goods made either wholly or in part in the Xinjiang Uyghur Autonomous Region (Xinjiang) of China. The prohibition relies on a strong presumption that forced labor is used in all products coming from Xinjiang. President Joe Biden is expected to sign the legislation, and the import ban would go into effect 180 days after enactment. This development has implications for a broad range of industries that source from China, but is particularly salient for the U.S. solar industry, given the importance of Xinjiang as a center for polysilicon manufacturing.

Here are key takeaways from the legislation:

- The following products are presumed to be the product of forced labor and barred from entering the United States:
 - **goods that are mined, manufactured or produced in Xinjiang**, wholly or in part; or
 - goods produced by **entities that:**
 - **work with the Xinjiang regional government** to recruit, transport, transfer, harbor or receive forced labor out of Xinjiang;
 - **export products** to the United States that are (i) **made wholly or in part in Xinjiang** or (ii) made by entities that work with the Xinjiang regional government to recruit, transport, transfer, harbor or receive forced labor out of Xinjiang;
 - **source material from Xinjiang**; or
 - **source material from persons working with the Xinjiang regional government** or the Xinjiang Production and Construction Corps. (XPCC) in connection with government programs that use forced labor, such as the “poverty alleviation” and “pairing-assistance” programs.
- Critically, this presumption is not limited to goods produced by companies that are located in Xinjiang. For instance, the presumption applies to goods made by companies located outside of Xinjiang that source material from Xinjiang. Even goods made outside of China (*e.g.*, goods made in Vietnam or Malaysia) can be subject to the presumption if even a portion of the production process takes place in Xinjiang.
- This presumption may be rebutted, and the goods permitted entry into the United States, if U.S. Customs and Border Patrol (CBP) finds, based on clear and convincing evidence, that (i) the goods were not produced wholly or in part by convict labor, forced labor or indentured labor; (ii) the importer has complied with diligence requirements; and (iii) the importer has been responsive to CBP follow-up inquiries. CBP must provide a public report setting out these findings and transmit it to Congress. We expect that it will be very difficult (even if theoretically possible) for companies to adduce evidence sufficient to prompt CBP to render such a finding. Until further guidance is promulgated, it is unclear whether CBP will consider making sector-specific exceptions before the legislation's effective date, or later opportunities will arise to apply for case-specific exceptions.

This legislation follows significant enforcement activity by the U.S. government on this issue. On December 16, 2021, President Biden issued new sanctions against various Chinese government entities, biotechnology businesses and surveillance companies in response to their actions in Xinjiang. In addition, since 2016, CBP has issued sixteen Withhold Release Orders (WROs) directed at forced labor in China, including ten directed specifically at activity in Xinjiang. One of these WROs targets goods manufac-

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tured by a silica producer (Hoshine). As a result of the WROs, these products are effectively barred from entering the United States. We expect CBP to issue more WROs targeting forced labor in China in 2022.

Within 30 days of the bill's enactment, the Forced Labor Enforcement Task Force — comprised of the Department of Homeland Security, the Department of State, the Office of the U.S. Trade Representative and other agencies — will solicit public comment on the parameters for a governmentwide enforcement strategy. The opportunity for public comment will be open for 45 days. Within 45 days of the close of the public comment period, the task force will conduct a public hearing on the matter.

Within 180 days of the bill's enactment, the task force must submit a report to Congress setting out its enforcement strategy. A key element of this strategy is buttressing CBP and ensuring it is able to effectively implement the legislation. The report will recommend tools and technologies that CBP can use to identify and trace goods made in Xinjiang that enter a U.S. port. The report will also describe the additional resources (presumably both personnel and additional funding) that CBP will need and how CBP plans to "enhance its use of legal authorities and other tools" to implement the prohibition, including through pilot programs to test the viability of certain technologies.

The report will further include:

- a list of entities in Xinjiang that mine or produce, wholly or in part, goods through forced labor;
- a list of entities that work with the Xinjiang regional government to recruit, transport, transfer, harbor or receive forced labor out of Xinjiang;
- a list of products made by such entities;
- a list of entities and facilities that source material from Xinjiang or that work with the Xinjiang regional government or the XPCC in connection with government programs that use forced labor;
- an enforcement plan for high-priority sectors, such as polysilicon; and
- guidance for importers on due diligence and supply chain tracing methods to ensure that importers do not import goods that are the product of forced labor from China.

Assuming this legislation becomes law, U.S. businesses dealing with China will need to prioritize establishing robust diligence and documentation practices to minimize the risk of involvement in any activity that could be linked to a prohibited import. We recommend that companies explore whether and how to participate in the upcoming public comment process, and develop a strategy for engaging with U.S. government agencies.

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