

Trade Compliance Flash: U.S. Agencies Issue Warnings: Chinese Government Actions in Xinjiang and Hong Kong Create Risks for Global Businesses

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Introduction

Last week, the U.S. Department of State and several other agencies involved in implementing and enforcing U.S. national security and trade policy published two business advisories that collectively signal increased legal risks for multinational companies with supply chains, operations, or investments in the People's Republic of China. The new advisories – the updated Xinjiang Supply Chain Business Advisory and the new Hong Kong Business Advisory – are the strongest showing to date that the U.S. government views (1) alleged state-sponsored human rights abuses in China's Xinjiang Uyghur Autonomous Region (Xinjiang) and (2) the Chinese government's imposition of the National Security Law on the Hong Kong Special Administrative Region (Hong Kong) as creating new and heightened risks for businesses and persons with operations or investments linked to these regions. We will summarize the key features of these advisories and provide our takeaways for affected U.S. businesses.

Xinjiang Supply Chain Business Advisory

On July 13, 2021, the U.S. Departments of State, Treasury, Commerce, Homeland Security, Labor, and the Office of the U.S. Trade Representative jointly issued an updated [Xinjiang Supply Chain Business Advisory](#) (XJ Advisory) warning companies and individuals with *any* links to Xinjiang that enforcement by U.S. agencies will only continue to ratchet up in the face of alleged human rights abuses against Uyghurs, ethnic Kazakhs, ethnic Kyrgyz, and members of other Muslim minority groups throughout China. In a stern warning, the XJ Advisory states that “[g]iven the severity and extent of these abuses, businesses and individuals that do not exit supply chains, ventures, and/or investments connected to Xinjiang could run a high risk of violating U.S. law.”

Key Aspects

- The XJ Advisory describes the risks U.S. persons and businesses face in undertaking business partnerships with, investing in, sourcing from, or providing other support to companies operating in Xinjiang, linked to Xinjiang, or with laborers from Xinjiang. These legal risks include:
 - Violating statutes criminalizing forced labor, including knowingly benefitting from participation in a venture while knowing or in reckless disregard of the fact that the venture has engaged in forced labor, including the Trafficking Victims Protection Act of 2000 (TVPA)¹
 - Violating U.S. sanctions enforced by Treasury's Office of Foreign Assets Control (OFAC) by dealing with sanctioned persons, including those sanctions imposed under [Executive Order \(E.O.\) 13818](#), as well as more limited sanctions imposed on Chinese Military-Industrial Complex Companies under [E.O. 13959, as amended](#)
 - Violating U.S. export controls by exporting items without a license to entities subject to export restrictions administered by Commerce's Bureau of Industry and Security (BIS)²
 - Violating the prohibitions enforced by U.S. Customs and Border Protection (CBP) on importing goods produced in whole or in part with forced labor or convict labor³
- Given these risks, the XJ Advisory urges businesses to undertake **“heightened human rights due diligence to identify potential supply chain links to entities operating in Xinjiang, linked to Xinjiang (e.g., through the pairing program or Xinjiang supply**

chain inputs), or utilizing Uyghur and other Muslim minority laborers from Xinjiang.” While calling for greater due diligence, the XJ Advisory cautions that businesses “are likely to face obstacles to conducting adequate due diligence to fully identify and avoid complicity in human rights abuses linked to Xinjiang,” including government controls, a lack of government and corporate transparency, threats of detention of auditors and workers and a police state atmosphere in Xinjiang.

- The XJ Advisory includes **explanations of the due diligence expectations** and **specific legal risks** related to Xinjiang that certain businesses and individuals may be exposed to, with a focus on the cotton and solar sectors. It also provides in Annex 2 a **list of industries that the U.S. government has identified as using forced labor in Xinjiang**. These include:
 - Agriculture
 - Cell phones
 - Cleaning supplies
 - Construction materials
 - Electronics
 - Extractives (*e.g.*, coal, copper hydrocarbons, oil, uranium, and zinc)
 - Food processing
 - Footwear
 - Gloves
 - Hospitality services
 - Noodles
 - Printing products
 - Various solar and renewable energy inputs, including metallurgical grade silicon, polysilicon, ingots, wafers, crystalline silicon solar cells, crystalline silicon solar photovoltaic modules
 - Stevia
 - Textiles (including such products as apparel, bedding, carpets, wool, viscose)
 - Toys

Takeaways

- **The U.S. government has taken a much sterner tone in its warnings about the risks of forced labor and human rights abuses in China.** The language in the XJ Advisory is noticeably more severe than that used in a [similar advisory issued last year](#), reflecting the U.S. government’s increasingly aggressive attitude towards enforcement in this area.
- **Enforcement actions will continue to ratchet up and expand across various U.S. government enforcement agencies**. While this updated XJ Advisory has no legal impact on its own, it serves as a clear notice to affected persons and businesses that future enforcement actions and restrictions, including import detentions (*i.e.*, Withhold Release Orders (WROs)), imposition of sanctions, Entity List additions, and prosecutions under the TVPA, are likely.
 - Businesses in industries listed in Annex 2 with supply chain links to China should consider themselves on notice for possible risks

of forced labor. As a result, enforcement agencies will expect them to undertake due diligence and implement traceability processes for their supply chains (*i.e.*, identify the provenance of materials used to produce their products).

- **While import detentions under WROs appear to be the most widely used enforcement tool to address forced labor in Xinjiang, CBP and other agencies are expected to use other enforcement mechanisms at their disposal.**
 - According to recent statistics from CBP, there have been around 800 shipments of goods detained under WROs in 2021 alone. Many of these shipments have been detained under the WROs targeting Xinjiang and the Xinjiang Production and Construction Corps (and its subordinates and affiliate entities). These WROs remain among the most comprehensive and broad in scope that CBP has issued.
 - There have been few public signs of CBP issuing fines or seizures under 19 U.S.C. 1595a, which prohibits imports made contrary to law, or 19 U.S.C. 1592, which requires importers to exercise reasonable care in the entry of items into the United States. However, CBP officials have intimated that meeting the "reasonable care" standard for items directly subject to a WRO requires importers to demonstrate full visibility into all segments of its supply chain (*i.e.*, not knowing the origin of some inputs, despite reasonable attempts to trying to obtain that information, is not a valid defense). Given the challenges of ensuring traceability in China in general, companies at risk of a WRO should strongly consider undertaking these efforts now or exploring alternative sourcing strategies.
 - In addition, the U.S. Department of Justice has signaled that it is beginning to prepare criminal prosecutions under the TVPA.
- **Given the emerging enforcement landscape, companies should carefully consider potential steps to maximize the protections of attorney-client privilege over related due diligence efforts.** The XJ Advisory warns companies of the "legal risks" associated with supply chains linked to the region and also emphasizes heightened due diligence expectations. This presents the risk that, in seeking to comply, companies will create materials that could become the subject of requests by U.S. government regulators. For example, companies have historically engaged outside consultants or auditing firms to conduct forced labor and social compliance audits – a key component of human rights due diligence – leaving audit reports and related communications *outside* the umbrella of privilege. Given the range of enforcement actions that a company may face if potential violations are found, legal and compliance departments should actively participate in such due diligence efforts and consider taking steps to maximize privilege protections where appropriate.

Hong Kong Business Advisory

On July 16, 2021, the U.S. Department of State, in conjunction with the U.S. Departments of the Treasury, Commerce, and Homeland Security, issued the [Hong Kong Business Advisory](#) (HK Advisory), warning that the passage and imposition of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law or NSL) on Hong Kong by the Chinese government in June 2020 has significantly reduced Hong Kong's political and economic autonomy and undermined protected rights and freedoms. As a result, businesses and persons operating in Hong Kong face new and emerging legal, financial, and regulatory risks under both U.S. and Chinese law. The HK Advisory also notes that certain "business and rule of law risks" traditionally present in mainland China now increasingly exist in Hong Kong. In addition to highlighting specific risk areas, the HK Advisory states that individuals and businesses subject to U.S. jurisdiction operating in Hong Kong should be aware of increasing enforcement and compliance challenges moving forward.

Key Aspects

- The HK Advisory highlights several areas of increased risk under U.S. law for businesses and persons operating in Hong Kong as a result of the NSL and recommends that entities subject to U.S. jurisdiction review and update compliance measures as the situation in Hong Kong evolves. These risks include:
 - U.S. sanctions compliance risks, particularly given the increase in parties subject to U.S. sanctions imposed in response to the

NSL under E.O. 13936

- Increased U.S. export controls compliance requirements, including those applicable to exports of certain items destined for Chinese military end-uses and end-users⁴ as a result of BIS's removing Hong Kong as a separate destination under the Export Administration Regulations (EAR)
- While warning of increased U.S. sanctions risks, the HK Advisory cautions that businesses operating in Hong Kong that comply with U.S. sanctions may face retaliation from the Chinese government under China's Anti-Foreign Sanctions Law, which, among other things, enables authorities in China to impose countermeasures on individuals or businesses complying with foreign sanctions against Chinese entities. The HK Advisory suggests the NSL may also permit the Chinese government to apply similar countermeasures to businesses and individuals complying with U.S. sanctions in Hong Kong, including:
 - Denying visas or entry into Hong Kong
 - Stealing, seizing, or freezing property within Chinese territory
 - Prohibiting or restricting relevant transactions
 - Taking any other "necessary measures"
- In addition, the HK Advisory warns of additional risks under the NSL for U.S. persons or businesses operating in Hong Kong, including:
 - Data privacy risks and unwanted surveillance from enforcement authorities acting under the NSL
 - Revocation of relevant licenses for companies and individuals found to be in violation of the NSL
 - General uncertainty with respect to rule of law in Hong Kong that may lead to confiscation of travel documents and exit bans, as well as arrest and detention under the NSL

Takeaways

- **The HK Advisory signals that more U.S. sanctions targeting Hong Kong officials and other persons are likely** . As the Chinese government continues to exercise its authority under the NSL, which the U.S. government broadly views as undermining Hong Kong's autonomy, we expect the U.S. government to announce more sanctions on Hong Kong officials and entities under E.O. 13936.
- **Businesses operating in Hong Kong should assess whether complying with U.S. law exposes them to risks under Chinese law** . Businesses reliant on independent media or involved in industries where sanctions or export controls compliance is a concern, such as in banking and finance, technology, or software development — particularly where a business's products have potential military applications — should carefully consider whether operating in Hong Kong and maintaining compliance with U.S. sanctions and export controls may trigger Chinese government countermeasures or civil suit under the Anti-Foreign Sanctions Law.
- **Even where the risk of countermeasures is low, businesses should take seriously the risks associated with storing data in Hong Kong**. The data privacy risks highlighted by the HK Advisory are reiterated by the warnings on the perceived eroding rule of law and potential limitations on due process in Hong Kong. Under the NSL, authorities may search premises, intercept communications, and conduct covert surveillance when investigating potential offenses against national security — without court approval. Police have executed dawn raids against local companies for potential violations and the U.S. government perceives that Western companies are at risk of similar actions. Businesses may have little recourse to challenge seizures of data in Hong Kong courts, as cases brought under the NSL may, in certain instances, be investigated by Chinese officials and subject to mainland China, rather than Hong Kong government, jurisdiction. Businesses should consider these factors and the potential risks posed to

their operations and employees.

These advisories signal increasing risks for companies doing business in China. Miller & Chevalier's Business & Human Rights, Economic Sanctions & Export Controls, and Customs & Import Trade practices are monitoring increasing compliance risks in the area and are guiding companies through navigating new and broader enforcement risks in order to ensure full compliance and avoid disruption to their business by:

- Conducting in-depth due diligence on high-risk operations
- Developing and updating anti-forced labor policies and procedures
- Risk mapping and developing assessment and product traceability processes
- Collaborating with specialized forced labor auditors on-the-ground in high-risk regions
- Remediating forced labor indicators identified in audits
- Interacting with CBP regarding WROs to secure reversals
- Developing and updating stakeholder communications regarding forced labor compliance efforts
- Providing counseling and training to ensure sanctions and export controls compliance
- Conducting transactional due diligence to identify sanctions and export controls risks
- Preparing export controls and sanctions-related licensing requests
- Conducting internal investigations to identify and remediate sanctions and export controls violations
- Defending businesses before enforcement agencies, including OFAC and BIS

Please contact us for further details on how Miller & Chevalier's [Business & Human Rights](#), [Economic Sanctions & Export Controls](#), and [Customs & Import Trade](#) practices are helping companies develop strategic approaches to anti-forced labor and compliance.

Nate Lankford, nlankford@milchev.com, 202-626-5978

Richard A. Mojica, rmojica@milchev.com, 202-626-1571

Virginia S. Newman, vnewman@milchev.com, 202-626-1581

Manuel Levitt, mlevitt@milchev.com, 202-626-5921

Mary H. Mikhaeel, mmikhaeel@milchev.com, 202-626-5909

Brian J. Fleming*

**Former Miller & Chevalier attorney*

¹22 U.S.C. § 7101.

²15 C.F.R. § 744.16.

³19 U.S.C. § 1307.

⁴See 15 C.F.R. § 744.21.

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