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Congressional Compromise Means Importers Should Start Preparing for New Xinjiang Forced Labor Legislation

by [Jason Waite](#), [Lian Yang](#), [BJ Shannon](#)

In recent months, both the House and Senate have expressed interest in passing additional legislation to stop U.S. imports of goods made with forced labor from China's Xinjiang Uyghur Autonomous Region (XUAR). The Senate passed a version of the Uyghur Forced Labor Prevention Act in July, and the House passed a similarly titled bill last week, but the two versions had significant differences. On December 14, lawmakers announced that they reached a compromise version of the legislation.

The proposed legislation, which aligns more closely to the Senate's initial version, could be passed by both the House and Senate and sent to the President for signature by the end of this week. In that case, new guidance would be published and new restrictions would take effect by mid-2022.

The legislation has four main components: (1) a requirement that a Forced Labor Enforcement Task Force solicit public comment, hold a hearing, and issue an enforcement strategy; (2) a rebuttable presumption that certain Xinjiang-linked goods are made with forced labor; (3) a requirement that the Secretary of State develop a diplomatic strategy to address forced labor in the XUAR; and (4) a requirement that the President take sanctions actions under the Uyghur Human Rights Policy Act of 2020 against certain serious human rights abusers in the XUAR. The compromise version of the legislation does not include the Securities and Exchange Commission disclosure requirements that were in the version of the bill initially passed by the House.

Enforcement Strategy

Within 30 days of enactment of the legislation, the Task Force must open a 45-day public comment period. Within 45 days after the close of that period, the Task Force must hold a hearing, and then, by the same date the rebuttable presumption takes effect (180 days after enactment), the Task Force in collaboration with the Secretary of Commerce and the Director of National Intelligence must publish a forced labor enforcement strategy.

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The enforcement strategy must include a risk assessment of imports made with forced labor in Xinjiang or with Uyghur or certain other minority labor in other parts of China and measures that can reduce risk (such as supply chain tracing), and a description and assessment of the programs in China that lead to the use of forced labor. It must also include recommendations for how U.S. Customs and Border Protection (CBP) can identify and trace Xinjiang goods, how CBP can enhance use of its legal authorities and other tools to prevent imports of goods made with forced labor (including pilot programs to test new technologies), and additional resources needed by CBP.

Significantly, the strategy must then provide guidance to importers on effective due diligence and supply chain tracing and on what evidence CBP will require to demonstrate that goods are not made in Xinjiang and are not made with forced labor, as well as a plan for collaboration with other government agencies, NGOs, and the private sector to implement the enforcement strategy.

The assessment of programs in China that lead to the use of forced labor must include a list of Xinjiang entities that use forced labor, a list of entities working with the XUAR government to recruit or transport forced laborers, a list of products made by these entities, a list of entities that export the named products, a list of entities that source material from Xinjiang or that use labor from XUAR forced labor programs, and a plan for identifying additional entities. The assessment must also include an enforcement plan and a list of high-priority sectors (including cotton, tomatoes, and polysilicon).

The Task Force must submit its report to Congress by the 180-day deadline and must submit an update to Congress annually thereafter. The Task Force must also make all unclassified portions of the report available to the public.

Rebuttable Presumption of Forced Labor

Also beginning 180 days after the legislation is enacted (so mostly likely in late June 2022), CBP will apply to all imported goods made wholly or in part in Xinjiang or by any of the entities identified in the Task Force report a rebuttable presumption that the goods are made with forced labor and, as such, are inadmissible.

In order to rebut the presumption, the importer must provide “clear and convincing evidence” that the goods were not made with forced labor, and the importer must also show that it has fully complied with all due diligence requirements identified by the Task Force and has fully responded to all CBP inquiries.

CBP must report to Congress whenever it finds that the presumption has been rebutted.

Key Points for Importers to Consider

While the rebuttable presumption of forced labor in Xinjiang-linked goods will not take effect until 180 days after enactment of this legislation, importers should begin preparing now. Importers should account for two significant challenges in this process.

First, because the legislation covers not only finished goods from Xinjiang but also goods with any material input from Xinjiang and any goods made by identified groups of forced laborers, the reach of this legislation is incredibly broad.

Second, because the rebuttable presumption takes effect on the same day that the Task Force's first report is due, importers must prepare without the benefit of Task Force guidance on due diligence, evidence to rebut the presumption, or enforcement targets. This timing highlights the importance of industry participation in the public comment process. Moreover, while the legislation will not impact existing withhold release orders (WROs) or ongoing enforcement actions, the Task Force guidance on due diligence and evidentiary requirements could apply more broadly to importers responding to these matters.

Additionally, importers should begin to trace their supply chains for Xinjiang content. The legislation does not clarify how CBP will decide which shipments have Xinjiang content and are subject to the rebuttable presumption. The Task Force report may guide CBP's enforcement, but until that guidance is available, importers might focus on named high-priority sectors (cotton, tomatoes, and polysilicon), as well as sectors that have received more informal attention (such as chemicals, other foodstuffs, rayon or other textiles, or leather) and on goods produced closest to Xinjiang. Importers should also look for "blind spots" where Xinjiang content is difficult to rule out.

For Xinjiang-linked content, importers should begin to work with suppliers to identify available evidence to show that no forced labor is involved and to assess risk in these supply chains. Our international trade team has significant experience in forced labor enforcement matters and in tracing international supply chains, and we are available to help you prepare to do business within this new legal framework.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Jason M. Waite
202.239.3455
jason.waite@alston.com

Bobbi Jo (BJ) Shannon
202.239.3344
bj.shannon@alston.com

Kenneth G. Weigel
202.239.3431
ken.weigel@alston.com

Chunlian Yang
202.239.3490
lian.yang@alston.com

Brian Frey
202.239.3067
brian.frey@alston.com

John O'Hara
202.239.3131
john.ohara@alston.com

Lucas Queiroz Pires
202.239.3235
lucas.queirozpires@alston.com

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WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86.10.85927500
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32.2.550.3700 ■ Fax: +32.2.550.3719
CHARLOTTE: One South at The Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
FORT WORTH: Bank of America Tower ■ 301 Commerce ■ Suite 3635 ■ Fort Worth, Texas, USA, 76102 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 5th Floor ■ Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 1950 University Avenue ■ Suite 430 ■ East Palo Alto, California, USA 94303 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333