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The Uyghur Forced Labor Prevention Act Goes Into Effect in the United States

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On December 23, 2021, President Biden signed the Uyghur Forced Labor Prevention Act (the "UFLPA" or "Act") into law.[1] The UFLPA, which received widespread bipartisan support in Congress, is the latest in a line of U.S. efforts to address the plight of Uyghurs and other persecuted minority groups in China's Xinjiang Uyghur Autonomous Region (the "XUAR").

A key feature of the Act is the creation of a rebuttable presumption that all goods manufactured even partially in the XUAR are the product of forced labor and therefore not entitled to entry at U.S. ports. The Act also builds on prior legislation, such as 2020's Uyghur Human Rights Policy Act,[2] by expanding that Act's authorization of sanctions to cover foreign individuals responsible for human rights abuses related to forced labor.

I. Background

In recent years, both the executive and legislative branches have demonstrated an increased interest in "lead[ing] the international community in ending forced labor practices wherever such practices occur,"[3] with a particular focus on the XUAR.

2020 saw a boom in efforts across agencies and the houses of Congress, beginning with the Department of Homeland Security's January publication of a Department-wide strategy to combat forced labor in supply chains.[4] Later that year, DHS joined the U.S. Departments of State, Treasury and Commerce to issue a joint advisory warning of heightened risks of forced labor for businesses with supply chain exposure to the XUAR.[5]

The U.S. also emphasized eliminating forced labor in supply chains through its international obligations at this time. The 2020 United States-Mexico-Canada Agreement ("USMCA") required each party to this free trade agreement to "prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor."[6] To carry out this obligation, President Trump issued an executive order in May 2020 establishing the Forced Labor Enforcement Task Force ("FLETF"), chaired by the Secretary of Homeland Security and including representatives from the Departments of State, Treasury, Justice, Labor, and the Office of the U.S. Trade Representative.[7] The implementing bill of the USMCA requires the FLETF to serve as the central hub for the U.S. government's enforcement of the prohibition on imports made through forced labor.[8]

In Congress, Rep. James McGovern (D) and Sen. Marco Rubio (R) — co-chairs of the Congressional-Executive Commission on China — introduced the first versions of the UFLPA in the House of Representatives[9] and the Senate[10] in March 2020. The bill received unusual, wide bipartisan support, with co-sponsors among Congress's most conservative and most liberal members.[11] Each bill passed in its respective house in early 2021, and a compromise bill — reconciling differences of timing and reporting processes between the two versions — was sent to the President in mid-December[12] before being signed into law.

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II. Presumptive Ban on Imports from the XUAR

The UFLPA's trade provisions are notable both for their expansive scope and the heightened evidentiary standard required to rebut the Act's presumptive prohibition on all imports from the XUAR.

a. Scope of the Import Ban

The UFLPA's scope is broad, instructing U.S. Customs and Border Protection ("CBP") to presume that "any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in" the XUAR were made with forced labor and are therefore unfit for entry at any U.S. ports.**[13]**

This presumption extends also to goods, wares, articles, and merchandise produced by a variety of entities identified by the FLETF in its strategy to implement the Act. This includes entities that work with the XUAR government to recruit, transport, or receive forced labor from the XUAR,[14] as well as entities that participate in "poverty alleviation" and "pairing-assistance" programs[15] in the XUAR.[16]

CBP has traditionally had the authority to prevent the importation of "[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by . . . forced labor" through the issuance of Withhold Release Orders ("WROs").[17] The UFLPA broadens this power by creating a rebuttable presumption that all articles produced in whole or in part in the XUAR or by entities that source material from persons involved in XUAR government forced labor schemes are automatically barred from entry into the United States, even absent a WRO or any specific showing of forced labor in the supply chain.

b. Exceptions to the Import Ban

Despite this broad prohibition, importers of goods covered by the UFLPA may still be able to rebut the presumption against importation. The Act specifies that the presumption will not be applied if the Commissioner of CBP determines that:

1. The importer of record has:
    - Fully complied with all due diligence and evidentiary guidance established by the FLETF pursuant to the Act, along with any associated implementing regulations; and
    - Completely and substantively responded to all CBP inquiries seeking to ascertain whether the goods were produced with forced labor; and
2. "Clear and convincing" evidence shows that the goods were not produced wholly or in part with forced labor.[18]

Each time the Commissioner determines that an exception to the import ban is warranted under the criteria above, the Commissioner must submit a report to Congress within 30 days, identifying the goods subject to the exception and the evidence upon which the determination is based.[19] The Commissioner must make all such reports available to the public.[20]

III. High-Priority Enforcement Sectors

As part of its enforcement strategy, the UFLPA instructs the Forced Labor Enforcement Task Force to prepare both a list of high-priority sectors subject to CBP enforcement, and a sector-specific enforcement plan for each of these high-priority sectors.[21] The Act mandates that cotton, tomatoes, and polysilicon must be among the high-priority sectors, building upon CBP's existing WRO against all cotton and tomato products produced in the XUAR.[22]

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The addition of polysilicon on this list of high-priority sectors directly impacts the U.S. solar energy industry: nearly half of the world's polysilicon — a key material for the manufacture of solar panels — is produced in the XUAR.[23] Despite the dominance of Chinese polysilicon, however, solar industry groups have embraced the passage of the UFLPA and are encouraging solar companies to move their supply chains out of the XUAR.[24] Corporate responsibility concerns surrounding the sourcing of polysilicon from the XUAR have been circulating for at least a year, and the solar industry groups have acted proactively to create standards and procedures to trace and audit supply chains of this important resource. To further this industry-wide goal of eradicating forced labor from solar supply chains,[25] these industry groups recently published a "Solar Supply Chain Traceability Protocol."[26]

IV. Sanctions

The UFLPA also amends the Uyghur Human Rights Policy Act of 2020 to underscore that sanctions may be imposed due to "[s]erious human rights abuses in connection with forced labor" related to the XUAR. Within 180 days of enactment, the President is required to submit an initial report to Congress identifying non-U.S. persons subject to sanctions under this new provision.[27] The sanctioned individuals will be subject to asset blocking, as provided under the International Emergency Economic Powers Act,[28] as well as the revocation or denial of visas to enter the United States. The President must submit additional reports at least annually identifying non-U.S. persons responsible for human rights violations in the XUAR, including with respect to forced labor, as provided under the Uyghur Human Rights Policy Act.[29]

V. Compliance Takeaways

a. Establishing "Clear and Convincing" Evidence

The Act does not specify what types of evidence might suffice to establish by clear and convincing evidence that goods are not the product of forced labor. Instead, the Act charges the FLETF with publishing an enforcement strategy containing, among other things, "[g]uidance to importers with respect to . . . the type, nature, and extent of evidence that demonstrates that goods originating in the People's Republic of China . . . were not mined, produced, or manufactured wholly or in part with forced labor."[30]

While the Act does not clarify what evidence would be necessary to meet the "clear and convincing" standard, CBP has issued guidance regarding the detailed evidence importers may need to provide to obtain the release of goods detained pursuant to certain WROs. A similar high bar of documentation — if not higher — will likely be required under the UFLPA. In addition to the required Certificate of Origin and importer's detailed statement,[31] CBP has highlighted the following forms of evidence as helpful to importers seeking the release of shipments detained pursuant to a WRO:

- An affidavit from the provider of the product;
- Purchase orders, invoices, and proof of payment;
- A list of production steps and records for the imported merchandise;
- Transportation documents;
- Daily manufacturing process reports;
- Evidence regarding the importer's anti-forced labor compliance program; and
- Any other relevant information that the importer believes may show that the shipments are not subject to the import ban.[32]

The exact contours of any guidance to be issued by the Forced Labor Enforcement Task Force remains uncertain. However, companies with supply chain exposure to the XUAR

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should expect compliance with the UFLPA to require significant supply chain diligence and documentation obligations. These obligations may exceed the already high benchmarks on diligence established by the FLETF and CBP through years of sustained engagement with non-governmental organizations and other standard-setting stakeholders who are focused on eradicating forced labor from supply chains globally.

b. Due Diligence

The Act instructs the FLETF to issue guidance on "due diligence, effective supply chain tracing, and supply chain management measures" aimed at avoiding the importation of goods produced with forced labor in the XUAR within 180 days of the UFLPA's enactment.[33]

Until the FLETF issues this guidance, companies importing goods into the U.S. should look to recognized international standards to conduct due diligence of their supply chains to identify potential ties to the XUAR. For example, the "Xinjiang Supply Chain Business Advisory" identifies the following standards as providing useful guidance on best practices for this due diligence:[34] the UN Guiding Principles on Business and Human Rights,[35] the OECD Guidelines on Multinational Enterprises,[36] and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[37] The Advisory warns, however, that third-party audits alone cannot guarantee credible information for due diligence purposes, both because of official harassment of auditors and because of workers' fear of reprisals for speaking to these auditors.[38] To combat this information gap, the Advisory encourages businesses to collaborate within industry groups to share information and build relationships with Chinese suppliers.[39]

The unique circumstances of the forced labor crisis in the XUAR may render due diligence efforts insufficient, however. In 2020, the Congressional-Executive Commission on China warned that "due diligence in Xinjiang is not possible" because of official repression and harsh reprisals against whistle blowers, which is made possible by extensive state surveillance in the XUAR.[40] (Notably, this warning coincided with the introduction of the first versions of the bills that would later become the UFLPA.) Moreover, China enacted a series of "blocking statutes" in 2021 authorizing, *inter alia*, countersanctions and civil liability for Chinese nationals who comply with attempts to enforce foreign laws extraterritorially in China.[41] This threat of liability, coupled with the already-existing reprisals, limits the ability of companies to obtain reliable information about their supply chain activity in the XUAR.

VI. Timeline for Enforcement

The Act's rebuttable presumption against the importation of goods produced in the XUAR or by entities identified by the FLETF is set to take effect 180 days after the UFLPA's enactment, on June 21, 2022.

The Act provides that the process for developing the enforcement strategy will proceed as follows:

1. Within 30 days of enactment (by Jan. 22, 2022): The FLETF will publish a notice soliciting public comment on how best to ensure that goods mined or produced with forced labor in China — and particularly in the XUAR — are not imported into the United States.[42]
2. No less than 45 days after notice is given (by Mar. 8, 2022): The public, including private sector businesses and non-governmental organizations, will submit comments in response to the FLETF's notice.[43]
3. Within 45 days of the public comment period closing (by Apr. 22, 2022): The FLETF will hold a public hearing, inviting witnesses to testify regarding measures that can be taken to trace supply chains for goods mined or produced in whole or

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in part with forced labor in China and to ensure that goods made with forced labor do not enter the United States.[44]

4. No later than 180 days after enactment (June 21, 2022): The FLETF, in consultation with the Secretary of Commerce and the Director of National Intelligence, must submit to Congress a strategy for supporting CBP's processes for enforcing the Act. This strategy must include guidance to importers regarding due diligence and supply chain tracing, as well as the nature and extent of evidence required to show that goods originating in China were not mined or produced with forced labor.The Forced Labor Enforcement Task Force must thereafter submit an updated strategy to Congress annually.[45]

Notably, the FLETF's enforcement strategy need only be submitted by the day the Act's rebuttable presumption takes effect. Therefore, importers may have little or no advance notice as to what evidence they must submit to rebut the presumption against importation.

VII. Global Efforts to Address Forced Labor in the XUAR

The U.S. is far from the only country targeting forced labor through new executive and legislative actions. In the past year, jurisdictions around the globe have developed a variety of new strategies for eliminating the importation of goods produced with forced labor in the XUAR. These global efforts vary in scope, and many have not yet taken effect. Companies with supply chain exposure to the XUAR should, however, prepare for an increasingly complex international regulatory landscape in coming years.

a. The European Union ("EU")

On September 15, 2021, the European Commission ("EC") President Ursula von der Leyen announced plans for a ban on products made by forced labor to be proposed in 2022.[46] While the XUAR was not named, the proposed measure has been viewed to directly target forced labor in this region.[47] Recent reports, however, have highlighted disagreements within the EC as to which department is to spearhead the proposal due to trade sensitivities.[48] Therefore, little progress has been made. Most recently, in December 2021, the EU Executive Vice-President for Trade, Valdis Dombrovskis, warned the EC of the risks of a ban targeting only forced labor in the XUAR being deemed as "discriminatory". He further noted that the UFLPA "cannot be automatically replicated in the EU,"[49] and argued instead that including the ban within the EU's proposed Sustainable Corporate Governance Directive ("SCG Directive") would be more effective.[50]

The EU has sought to address forced labor more generally via its proposal — in the form of the SCG Directive — for EU-based companies to undertake mandatory human rights due diligence to increase their accountability for human rights and environmental abuses in their supply chains. After lengthy delays, the EC's proposal for the SCG Directive is now due in early 2022.[51]

At the moment, it remains unclear whether the EU will follow the U.S. in imposing a stand-alone ban on imports from the XUAR, or whether the proposed measures will be weakened by incorporating them into the SCG Directive proposal.

b. United Kingdom

The U.K. does not currently have legislation equivalent to the UFLPA. However, officials within the Foreign Office and the Department for International Trade have suggested that similar efforts to address imports made with forced labor in the XUAR may be imminent.[52] These efforts would build on the U.K.'s ongoing "review of export controls as they apply to Xinjiang . . . to prevent the exports of goods that may contribute to human rights abuses in the region."[53]

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c. Canada

In coordination with the United Kingdom and other international partners, the Canadian government released a statement in January 2021 addressing its concerns with the situation in the XUAR. The government announced that it would adopt a number of measures to combat the alleged human rights violations in the XUAR, including:[54]

1. Prohibition on Imports of Goods Produced by Forced Labor: On November 24, 2021, Sen. Housakos introduced Bill S-204, an act to amend the "Customs Tariff (goods from Xinjiang)."[55] Currently at the second reading stage in the Canadian Senate, this bill is intended to prevent the importation of goods believed to be produced through forced labor.[56] Consistent with Canada's obligations under the USMCA, this prohibition would prevent the importation of goods believed to be produced using forced labor in the XUAR.
2. Xinjiang Integrity Declaration for Canadian Companies: Following the amendments made to the Customs Tariff, the Canadian Government established an Integrity Declaration on Doing Business with Xinjiang Entities to guide Canadian companies' business practices in the region. The Integrity Declaration is mandatory for all Canadian companies that (i) source goods, directly or indirectly, from the XUAR or from entities that rely on Uyghur, (ii) are established in the XUAR, or (iii) seek to engage in the XUAR market. If any such company fails to sign the Integrity Declaration, they will be ineligible to receive support from the Trade Commissioner Service.[57]
3. Export Controls: The Canadian government stated that it will deny export licenses for the exportation of goods or technologies if it determines that there is a substantial risk that the export would result in a serious violation of human rights under the Export and Import Permits Act 1985.[58]

d. Australia

In June 2021, Sen. Patrick introduced the Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2021 to the Australian Senate. The introduction of this bill follows the growing concerns in Australia that the Australian Modern Slavery Act 2018 does not adequately address the issue of state-sanctioned forced labor. Rather limited in its scope, the Modern Slavery Act 2018 requires certain companies to submit annual statements reporting on the risks of modern slavery in their operations and supply chains, as well as any steps they are taking to address such risks. Other entities based or operating in Australia may report this information voluntarily.[59]

Sen. Patrick's bill would go a step further in combatting state-sanctioned forced labor by amending the Customs Act 1901 to prohibit the importation into Australia of goods that are produced in whole or in part by forced labor.[60] Although the bill makes no specific reference to China, human rights abuses in the XUAR were repeatedly cited as the proposal's impetus during the Senate debate. Moreover, if passed, the bill would have the effect of banning the importation of goods made with Uyghur forced labor.[61] The bill was passed through the Australian Senate with cross-party support and the endorsement of the Australian Council of Trade Unions. The bill must now pass the House of Representatives to become law.[62]

e. New Zealand

New Zealand has taken a notably softer stance than the U.S. Although New Zealand's parliament unanimously declared in May 2021 that severe human rights abuses against the Uyghur ethnic minority group were taking place in the XUAR, the motion merely expressed the parliament's 'grave concern'[63] over these human rights abuses. The Uyghur community in New Zealand have requested for parliament to take stronger action, such as declaring the oppression of Uyghurs in China a 'genocide' and placing a ban on

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the importation of products made by forced labor in the XUAR.[64]

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[1] Pub. L. 117-78 (2021).

[2] Pub. L. 116-145 (2020).

[3] Pub. L. 117-78, § 1(2) (2021).

[4] Department of Homeland Security Strategy to Combat Human Trafficking, the Importation of Goods Produced with Forced Labor, and Child Sexual Exploitation (Jan. 2020), U.S. DEPARTMENT OF HOMELAND SECURITY, https://www.dhs.gov/sites/default/files/publications/20_0115_plcy_human-trafficking-forced-labor-child-exploit-strategy.pdf.

[5] Xinjiang Supply Chain Business Advisory (Jul. 2, 2020, updated Jul. 13, 2021), U.S. Department of the Treasury, https://home.treasury.gov/system/files/126/20210713_xinjiang_advisory_0.pdf.

[6] United States-Mexico-Canada Agreement art. 23.6, Jul. 1, 2020, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

[7] Exec. Order No. 13923, 85 Fed. Reg. 30587 (2020).

[8] 19 U.S.C. § 4681 (2020).

[9] Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. (2019–2020).

[10] Uyghur Forced Labor Prevention Act, S. 3471, 116th Cong. (2019–2020).

[11] *Id.* (House bill's co-sponsors included Dan Crenshaw, Rashida Tlaib, and Ilhan Omar.). Uyghur Forced Labor Prevention Act, S. 3471, 116th Cong. (2019–2020). (Senate bill's co-sponsors included Tom Cotton, Marsha Blackburn, Dick Durbin, and Elizabeth Warren.).

[12] Zachary Basu, House unanimously passes Uyghur forced labor bill, Axios (Dec. 15, 2021), https://www.axios.com/congress-uyghur-forced-labor-bill-d4699c95-16ea-4b42-bda4-eb5baa29326a.html.

[13] Pub. L. 117-78 § 3(a) (2021).

[14] *Id.* at § 2(d)(2)(B)(ii).

[15] The PRC government has established large-scale "mutual pairing assistance" programs, wherein companies from other provinces of China are incentivized to open satellite factories in the XUAR. *See* Xinjiang Supply Chain Business Advisory, *supra* note 5 at 6. The State Department has raised concerns that pairing-assistance programs and other poverty alleviation measures have served as a cover for forced labor and the transfer of Uyghurs and other persecuted minorities to other parts of the country. Forced Labor in China's Xinjiang Region: Fact Sheet, U.S. Department of State (Jul. 1, 2020), *available at* https://www.state.gov/forced-labor-in-chinas-xinjiang-region/.

[16] Pub. L. 117-78 § 2(d)(2)(B)(v) (2021).

[17] 19 U.S.C. § 1307.

[18] Pub. L. 117-78 § 3(b) (2021).

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[19] *Id.* at § 3(c).

[20] *Id.*

[21] *Id.* at § 2(d)(2)(B)(viii)–(ix).

[22] CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang, U.S. Customs and Border Protection (Jan. 13, 2021), https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave.

[23] China Renewables: The Stretched Ethics of Solar Panels from Xinjiang, The Financial Times (Jan. 9, 2022), *available at* https://on.ft.com/3ndq1NE.

[24] Press Release, Solar Industry Statement on the Passage of the Uyghur Forced Labor Prevention Act, Solar Energy Industries Association (Dec. 16, 2021), *available at* https://www.seia.org/news/solar-industry-statement-passage-uyghur-forced-labor-prevention-act.

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[26] Solar Supply Chain Traceability Protocol 1.0: Industry Guidance, Solar Energy Industries Association (Apr. 2021), *available at* https://www.seia.org/sites/default/files/2021-04/SEIA-Supply-Chain-Traceability-Protocol-v1.0-April2021.pdf.

[27] Pub. L. 116-145 § 6(a)(1) (2020).

[28] 50 U.S.C. 1701 § 5(c)(1)(A) (1977).

[29] Pub. L. 116-145 § 6(a)(1) (2020).

[30] Pub. L. 117-78 § 2(d)(6) (2021).

[31] 19 C.F.R. § 12.43 (2017).

[32] *See* Hoshine Silicon Industry Co. Ltd Withhold Release Order Frequently Asked Questions, U.S. Customs and Border Protection (Nov. 10, 2021), https://www.cbp.gov/trade/programs-administration/forced-labor/hoshine-silicon-industry-co-ltd-withhold-release-order-frequently-asked-questions.

[33] Pub. L. 117-78 § 2(d)(6)(a) (2021).

[34] Xinjiang Supply Chain Business Advisory, *supra* note 5 at 7–8.

[35] Guiding Principles on Business and Human Rights, Office of the United Nations High Commissioner for Human Rights (2011), *available at* https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[36] OECD Guidelines for Multinational Enterprises, Organisation for Economic Co-operation and Development (2011), *available at* https://www.oecd.org/daf/inv/mne/48004323.pdf.

[37] Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, International Labour Organization (2017), *available at* https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

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[38] Xinjiang Supply Chain Business Advisory, *supra* note 5 at 9.

[39] *Id.*

[40] Staff of Cong.-Exec. Comm'n on China, Global Supply Chains, Forced Labor, and the Xinjiang Uyghur Autonomous Region (2020), https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/CECC%20Staff%20Report%20March%202020%20-%20Global%20Supply%20Chains%2C%20Forced%20Labor%2C%20and%20the%20Xinjiang%20Uyghur%20Autonomous%20Region.pdf.

[41] *See* MOFCOM Order No. 1 of 2021 on Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures, People's Republic of China Ministry of Commerce (Jan. 9, 2021), *available at* http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml.

[42] Pub. L. 117-78 § 2(a)(1) (2021).

[43] *Id.* at § 2(a)(2).

[44] *Id.* at § 2(b)(1).

[45] *Id.* at § 2(c)–(e).

[46] 2021 State of the Union Address by President von der Leyen, European Commission (Sep. 15, 2021), *available at* https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_4701.

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[52] *See* Emilia Casalicchio, UK hints at banning Chinese imports with forced labor links, Politico (Dec. 20, 2021), https://www.politico.eu/article/uk-could-impose-chinese-forced-labor-import-ban/.

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[55] *See* s-204 An Act to amend the Customs Tariff (goods from Xinjiang), Parliament of Canada (Can.) (2021) https://www.parl.ca/legisinfo/en/bill/44-1/s-204.

[56] Integrity Declaration on Doing Business with Xinjiang Entities, Government of Canada (2021) (Can.), *available at* https://www.international.gc.ca/global-affairs-affaires-mondiales/news-nouvelles/2021/2021-01-12-xinjiang-declaration.aspx?lang=eng.

[57] *Id.*

[58] Global Affairs Canada advisory on doing business with Xinjiang-related entities, Government of Canada (2021) (Can.), *available at* https://www.international.gc.ca/global-affairs-affaires-mondiales/news-nouvelles/2021/2021-01-12-xinjiang-advisory-avis.aspx?lang=eng.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's International Trade practice group:

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