

Insights

US, EU ISSUE GUIDANCE ON EXPECTATIONS FOR DUE DILIGENCE TO ADDRESS FORCED LABOR RISKS

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On July 13, 2021, the US Department of State, US Department of the Treasury, US Department of Commerce, US Department of Homeland Security, Office of the United States Trade Representative, and US Department of Labor issued an [updated advisory](#) (the “US Xinjiang Supply Chain Advisory”) to alert businesses to risks and considerations associated with forced labor and human rights abuses linked to the Xinjiang region of China. In tandem with the US guidance, the European Commission and the European External Action Service issued their own guidance (the “EU Due Diligence Guidance”) setting out a framework for what constitutes effective due diligence measures to address the risk of forced labor in an organization’s supply chain. Together, the documents underscore the importance that entities ensure that they have in place procedures to identify and address risks related to forced labor in their operations and their supply chains.

The US Xinjiang Supply Chain Advisory supplements an advisory that was issued in July 2020 by the US Department of State, US Department of the Treasury, US Department of Commerce, and US Department of Homeland Security to alert businesses to circumstances in which forced labor could be present in their supply chains and to encourage businesses to engage in due diligence to identify and address these risks. The updated advisory, which now includes measures being undertaken by the Office of the United States Trade Representative and US Department of Labor, identifies four broad categories in which businesses could face risks related to forced labor and human rights abuses:

- Assistance or investment in the development of surveillance tools for the Chinese government in Xinjiang;
- Sourcing of goods or labor from Xinjiang, or from other locations connected to forced labor in Xinjiang or that rely on inputs from Xinjiang;
- Supply of US-origin commodities, software, or technology to entities engaged in surveillance and forced labor practices; and
- Assistance with the construction and operation of internment facilities for the detention of Uyghurs or other Muslim minority groups or with the construction and operation of

manufacturing facilities near camps and operated by businesses that accept subsidies from the Chinese government to subject minority groups to forced labor.

Entities should ensure that they review their operations and their supply chains to identify the extent to which any of the categories may be present in their business and implement measures to address the relevant risks. Among the specific measures identified in the advisory are the following:

- Implementing measures to address risks related to forced labor and human trafficking as part of the organization's BSA/AML compliance regime;
- Including a review of forced labor risks as part of due diligence in the M&A context;
- Identifying and addressing warning signs of forced labor, particularly in industries (such as agriculture, cotton, and solar) identified as using forced labor in Xinjiang;
- Conducting due diligence on the end-users of an organization's products, technology, and services, including the voluntary measures set out in the US State Department's *Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities*;
- Performing screening of counterparties (including customers, suppliers, and end users) against the SDN List, Entity List, Non-SDN Chinese Military-Industrial Complex Companies List, as well as companies and products subject to Withhold Release Orders issued by the US Department of Homeland Security, Customs and Border Protection and of goods on the US Department of Labor's List of Goods Produced by Child Labor or Forced Labor;
- Collaborating with industry groups to research and share information regarding potential red flags.

Although it acknowledges the challenges that businesses are likely to face in conducting adequate due diligence, including obstacles to performing audits, the US Xinjiang Supply Chain Advisory makes clear that the existence of such challenges does not relieve businesses from conducting diligence, warning entities that the cost of performing increased diligence is less than that of the economic and reputational aspects of economic sanctions.

For its part, the EU Due Diligence Guidance sets out a framework for effective due diligence measures that EU businesses can undertake to address the risk of forced labor in their supply chains. Like the US Xinjiang Supply Chain Advisory, the EU Due Diligence Guidance calls for organizations to implement policies and procedures that are tailored to the organization's risk profile. The guidance sets out specific considerations that should be considered when implementing such due diligence procedures to address forced labor:

- Enacting policies that address risks of forced labor, including a zero-tolerance policy for forced labor, procedures for reporting and escalating risks, and measures for building awareness with company personnel regarding forced labor;
- Red flags linked to countries, migration, and debt risk;
- Performing risk assessments of suppliers and supply chain segments;
- Providing support for suppliers and business partners for implementing corrective actions to address forced labor risks;
- Analyzing steps that can be taken to address state-sponsored forced labor;
- Providing for responsible disengagement or remediation; and
- Considering diligence that is gender-responsive, relates to discrimination of ethnic or religious minorities, and relates to raw materials of unknown or high-risk origin

While the framework set out in the EU Due Diligence Guidance is voluntary in nature, the guidance states that the European Commission is currently preparing a legislative proposal that will introduce mandatory human rights and environmental due diligence. Hence, organizations would be well served to start identifying and addressing forced labor risks now so that they can be well-positioned upon any future release of mandatory due diligence standards.

The publication of the US Xinjiang Supply Chain Advisory and the EU Due Diligence Guidance puts organizations on notice that increased attention is being paid to forced labor and human rights considerations. Organizations should take steps now to assess their operations and supply chains for risks associated with forced labor and other human rights abuses and implement measures to proactively address such risks.

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