WHITE HOUSE CHOOSES EXCLUSION OF SILICA-BASED PRODUCTS PRODUCED USING FORCED LABOR, IMPACTING SOLAR PVS

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U.S. Energy Alert

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Today, the White House announced that Customs and Border Protection (CBP) has issued a withhold release order (the Order) on products manufactured using ***silica-based*** products produced by Hoshine Silicon Industry Co., Ltd., and its subsidiaries ("Hoshine"), which are purportedly the world's largest metallurgical-grade silicon producers. Hoshine has been linked to forced labor in the Xinjiang province of the People's Republic of China (the PRC). The Order covers silica-based products and materials or goods derived from or produced using those silica-based products. Thus, CBP may use the Order to seize or exclude a variety of products, including solar photovoltaic panels.

Initial indications yesterday were that the White House would announce a withhold release order in respect of polysilicon only. The Order's focus instead on the broader category of "silica-based" products covers a much broader range of products. In addition, the narrow focus on Hoshine, which mines silicon, means that companies involved in the production and import of various solar products will have to go deeper in the supply chain than expected, which may be challenging.

WHAT YOU SHOULD BE DOING NOW

The practical impact of the Order is most immediate for shipments of panels that are on their way to U.S. ports. Parties depending on those shipments should consider whether the Order is covered by force majeure provisions in relevant contracts, including procurement, engineering procurement and construction agreements, interconnection, power purchase agreements, and financing documents. In addition, anyone importing products incorporating silicon of any sort should obtain tracing information for those products and include that information in filings with CBP or have it readily available if it is not possible to file with CBP before arrival at a U.S. entry point. While CBP has yet to create a formal certification process for products that are subject to the Order, a process may ultimately be announced. In the meantime, a webpage hosted by the CBP includes some basic commentary on how to prove to CBP that materials on a shipment comply with the Order.

Solar industry actors that do not yet have shipments of panels in transit should immediately obtain information from counterparties about supply chain and contractual assurances that panels do not contain any products or materials manufactured by Hoshine and should consider taking similar actions in respect of other manufacturers in Xinjiang province (in this respect, see additional commentary below). If any products incorporate silica-based materials manufactured by Hoshine, every attempt should be made to cancel that contract or amend to stipulate that no such materials will be used.

In addition, developers and other parties who have direct contact with financing parties should review any contractual provisions that concern environmental social and governance factors, labor standards, import standards, and similar matters to ensure compliance. It may also be advisable to have open conversations with financing parties about forced labor in the supply chain and discuss adaptations to the Order and additional government action discussed below.

THERE ARE OTHER EFFORTS UNDERWAY TO EXCLUDE FORCED LABOR FROM THE U.S. SUPPLY CHAIN

The White House's announcement today is not entirely unexpected. The use of forced labor in Xinjiang has received increasing public scrutiny in recent months, particularly in relation to silicon. A report released last month, "In Broad Daylight: Uyghur Forced Labour and Global Solar Supply Chains," concluded that the solar energy industry is particularly reliant on forced labor in Xinjiang. According to the report, 95 percent of solar modules rely on solar-grade silicon, and the Xinjiang region produces 45 percent of the world's solar-grade silicon. The report indicated that more than a dozen companies have engaged in or accepted state-sanctioned forced labor transfers, and that the supply chains of 90 Chinese and international companies are affected by such forced labor. Moreover, this report specifically singled out Hoshine as a major participant in forced labor programs in Xinjiang. Accordingly, it should not be surprising that several other government organizations are also taking action.

The Department of Commerce's Bureau of Industry and Security has also added to its Entity List five PRC entities. These partially overlap with the Order and include: Hoshine Silicon Industry (Shanshan); Xinjiang Daqo New Energy; Xinjiang East Hope Nonferrous Metals; Xinjiang GCL New Energy Material Technology, and XPCC. These listings relate again to forced labor practices in Xinjiang. Including these entities in the list means export, reexport, or in-country transfer of commodities, software, and technology subject to the Export Administration Regulations is restricted where the entities above are a party to the transactions, including as an intermediary or ultimate consignee.

As of 23 June 2021, polysilicon from China was listed on the Bureau of International Labor Affairs' List of Goods Produced by Child Labor or Forced Labor (the List). The List is intended to ensure that U.S. federal agencies avoid procuring goods produced as a result of forced or child labor. The List also serves as a guide for companies assessing risk and conducting supply chain diligence. Reports from academics, nongovernmental organizations, and industry groups also help companies understand the potential risk of exposure to forced labor in their supply chains. Such resources recomment enhanced due diligence and other mitigation activities to avoid commercial and reputational damage that may result if products, components, or raw materials are sourced from companies engaged in forced labor practices.

The developing situation in Xinjiang also coincides with an increased focus by the Securities and Exchange Commission (the SEC) on environmental, social and corporate governance (ESG) issues. The SEC, under the new direction of Chairman Gary Gensler, has reportedly launched a series of inquiries into whether corporations are making proper disclosures pertaining to climate change, diversity and other ESG matters. These inquiries follow the SEC's creation in March 2021 of a Climate and ESG Task Force in its Division of Enforcement.

Forced labor in Xinjiang would fall under the ESG umbrella. If the SEC were to take action, it would not be the first time the SEC has addressed supply chain concerns. For example, in response to a humanitarian conflict in the Democratic Republic of the Congo, the SEC's conflict mineral rule under Dodd-Frank Act requiried certain public companies to perform supply chain diligence and publicly file an annual report on the presence of conflict minerals in their supply chain. The Uyghur Forced Labor Prevention Act, currently pending in Congress, would similarly task the SEC with creating rules requiring companies to disclose activities and transactions with certain Xinjiang entities. Given the SEC's new leadership and proactive approach to ESG issues, new disclosure-based rules regarding public companies' source of materials within Xinjiang could appear on the SEC's rule-making or enforcement agenda in the near future.

While it is possible that the Office of the U.S. Trade Representative (the USTR) will act in regard to products manufactured using forced labor in Xinjiang, it is notable that the USTR has not made any announcements about this yet. Over the years, the USTR has implemented several 201 and 301 investigations that impact the U.S. solar industry. Given this morning's White House announcement, it is reasonable to expect that the USTR will follow up with an investigation that may ultimately result in increased tariffs on panels or components thereof manufactured in China.

K&L Gates LLP provides advice to clients across the renewable energy industry and has teams focused on monitoring and impacting federal and state policy developments, complying with and addressing trade actions, and assisting in the elimination of forced and child labor from supply chains, including through policy and procedure development, ethical supply chain risk assessments, contract review and development of supplier codes of conduct, statutory reporting obligations, tiered due diligence of suppliers, and litigation support. Please reach out to any of the individuals listed here for assistance with understanding the impact of the White House announcement and other agency action concerning forced labor.

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