

Trade Compliance Flash: Lessons Learned from CBP's Enforcement of Forced Labor Withhold Release Orders

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U.S. Customs and Border Protection's (CBP) enforcement of the Anti-Forced Labor Statute (19 USC § 1307) continues full speed ahead. CBP has detained over 1,200 shipments in fiscal year (FY) 2021 due to forced labor concerns – a 280 percent increase compared to FY2020. Most of the detentions relate to the [Xinjiang cotton](#), [XPCC](#), and [Hoshine](#) Withhold Release Orders (WROs), which have primarily affected apparel and solar panel importers. In this Trade Compliance Flash, we discuss lessons learned from recent CBP guidance and our work with importers who have had merchandise detained by CBP pursuant to WROs. Taken together, these lessons underscore the need for companies to focus on human rights due diligence fundamentals, including risk and impact assessment, prevention, mitigation, detection, monitoring, and communication with stakeholders.

Lesson 1: There are No Shortcuts for Overcoming Shipment Detentions or WROs

Many companies that have had shipments detained by CBP under a WRO have sought clarity regarding whether specific initiatives (*e.g.*, social audits of factories) or documentation can resolve CBP's forced labor concerns. As noted in a previous [Trade Compliance Flash](#), CBP regulations are silent on the burden of proof to release detained merchandise. Although detention notices generally include a paragraph that lists information requested of the importer, there is no checklist or specific set of documents or tests that will guarantee the release of merchandise.¹ Instead, CBP's latest [FAQ Guidance on Forced Labor](#) (FAQ Guidance), published on August 25, 2021, reinforces that no single initiative or set of documents provides a shortcut to having detained shipments released. For example, the FAQ Guidance warns against overreliance on social audits, quoting a panelist from the Human Trafficking Legal Center, who stated that "[t]here is ample evidence-based research that demonstrates social audits, as they are currently administered, are ineffective in identifying and reducing forced labor." Overall, the FAQ Guidance suggests that importers need to pursue a holistic approach to due diligence that includes conducting risk assessments, mapping the supply chain (*i.e.*, tracing the provenance of the inputs used to make the imported product), meaningful supplier audits, potential forensic testing (*e.g.*, to determine the origin of cotton), and working with suppliers to remediate issues.

In practice, CBP will evaluate the documentation submitted for each detention separately and determine whether it is enough to overcome its suspicion of forced labor. Those who have had merchandise detained under a WRO are painfully aware that few shipments have been released and CBP's reasoning for releasing those shipments is not widely known as CBP does not publish its enforcement decisions and, in our experience, is reluctant to discuss its reasons for excluding merchandise with the importer of record. As such, companies can better position themselves to respond to detentions by preparing a comprehensive appeal that details the company's efforts to identify, mitigate, and remediate forced labor risks in its U.S. supply chain, and traces the origin of materials that are of particular interest to CBP (*e.g.*, the silica used to make solar products). Some of this information has not traditionally been requested of suppliers (and sub-suppliers) in certain industries and therefore may not be readily available. Yet, CBP's detention notices remain the best source of guidance for importers seeking to compile the necessary information and they should be viewed as a standard for which to aim even if it may be presently unattainable.

Lesson 2: Companies Can Successfully Resolve CBP's Concerns by Focusing Due Diligence Efforts on the International Labor Organization's 11 Indicators of Forced Labor

CBP reiterated in its most recent FAQ Guidance that companies' compliance systems should use the oft-cited [11 International Labor Organization \(ILO\) Indicators of Forced Labor](#) as a guide post for conducting forced labor risks assessments, formulating forced labor prevention strategies, and adequately remediating detected cases of forced labor. Indeed, recent WROs mention the ILO indicators of concern. For example, CBP identified two indicators of forced labor as the basis for the Hoshine WRO: intimidation and threats and restriction of movement.

CBP's willingness to reward concerted, holistic forced labor remediation efforts and focus on the 11 ILO Indicators of Forced Labor were demonstrated in its recent [decision to modify a Finding](#) against disposable glove manufacturer Top Glove Corporation Bhd.'s Malaysian facilities. CBP's [announcement](#) noted specifically that the company addressed "all indicators of forced labor identified at its Malaysian facilities," including providing "more than \$30 million in remediation payments to workers and improving labor and living conditions at the company's facilities."

Lesson 3: Companies Face Practical Challenges in Conducting Anti-forced Labor Due Diligence

Key practical challenges of conducting WRO-related due diligence in a global supply chain include (1) limited or no visibility into the relationships among parties in a company's supply chain (*e.g.*, the identity and location of upstream suppliers); (2) limited or no leverage to convince an upstream supplier with whom the company does not have a contractual relationship to produce business-confidential information (*e.g.*, the identity of its sub-suppliers, production flow charts, purchase orders, daily process reports, proof of payment) and agree to third-party audits; (3) reluctance from suppliers to cooperate with foreign companies' forced labor-related due diligence efforts if they perceive that doing so may violate local law (*e.g.*, China's Anti-Foreign Sanctions Law); and (4) the lack of clear guidance from CBP on the scope of certain WROs. On the last point, CBP's recent attempts to refine both the text of WROs and WRO guidance demonstrate efforts to avoid confusion but have not yet achieved clarity for importers in certain respects. For example:

- In August, CBP modified the text of a WRO that covers "Xinjiang Production and Construction Corporation (XPCC) and its subordinate and affiliated entities" by removing the reference to "affiliated entities."² This change was likely prompted by concerns from importers over CBP's broad interpretation of the term "affiliated entity" in the context of the WRO. The removal of "affiliated entities" suggests that the WRO only applies to entities over which XPCC has ownership or control, but CBP has not yet articulated how it determines whether an entity is a "subordinate" of the XPCC. Without further guidance from CBP, companies face substantial challenges in developing any system to determine whether CBP *might* consider an entity in its supply chain to be a subordinate of the XPCC.
- In September, after saying that "if the contribution of prohibited labor to the whole product is insignificant (both from a quantitative and a qualitative perspective), CBP may consider the product outside the scope of [19 U.S.C. § 1307]," effectively carving out a *de minimis* exception to the Hoshine WRO, the agency backtracked and removed that language from its [FAQ Guidance](#).³ The change may have been a reaction to questions about whether CBP was authorized to make this kind of exception under 19 U.S.C. § 1307 (rather than courts, which may consider this issue in potential litigation) or in response to concerns that a *de minimis* exception would create a loophole for importers. In any event, CBP will no longer have to field questions from companies on whether a certain material is quantitatively or qualitatively insignificant.

Considering these challenges, companies affected by WROs are hoping that CBP will reasonably adjust its material traceability requirements to a more practically feasible standard, at least in the short term. Some have opted to reconfigure their U.S. supply chains and source only from suppliers who can provide the information that CBP is requesting, often at a premium.

Looking Forward: More Resources for CBP Add Urgency to Forced Labor Compliance Efforts

We have noted in previous Trade Compliance Flashes that CBP has significantly increased its enforcement of U.S. anti-forced labor laws in the past year and this remains a major focus for CBP and the U.S. Department of Homeland Security (DHS) as a

whole. Notably, CBP's Forced Labor Division (FLD) recently set up a second enforcement investigation branch, which effectively doubled its investigative staff. Additionally, during a National Association of Foreign-Trade Zones virtual conference held on September 28, 2021, Ana Hinojosa, who heads CBP's Trade Remedy and Law Enforcement Directorate, stated that she expected these additional investigative resources to result in more WROs targeting suppliers operating in regions outside of Asia this coming year. These developments underscore the need to approach forced labor due diligence, prevention, detection, and remediation with a renewed sense of urgency.

We have worked with companies to assess forced labor risks, map supply chains, conduct third party supplier audits (including supplier audits conducted under privilege), conduct in-depth due diligence on high-risk operations, develop and update anti-forced labor policies and procedures, remediate forced labor indicators, and interact with CBP in connection with WROs and detained shipments. For more information, please contact Miller & Chevalier's [Business and Human Rights](#) practice:

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¹CBP's website includes "helpful hints" for submitting proof of admissibility, as well as FAQs. Although detention notices generally include a paragraph that lists information requested of the importer, it's not clear what documentation would be enough to meet CBP's expectations to show admissibility. Detention notices may request a broad swath of documentation, including affidavits from the importer regarding the source of the raw materials, production records, commercial documents (*e.g.*, purchase orders, invoices, proof of payment), transportation documents, and a summary of the production steps. This documentation is meant to give CBP visibility into the importer's supply chain – in the case of cotton products, for example, going back to the cotton grower.

²See Press Release, [CBP Issues Detention Order on Cotton Products Made by Xinjiang Production and Construction Corps Using Prison Labor](#) (Dec. 2, 2020).

³CBP, [Virtual Trade Week: Forced Labor Frequently Asked Questions \(FAQs\)](#).

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