

Trade Compliance Flash: Takeaways from the Hoshine WRO FAQs

International Alert

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In June, U.S. Customs and Border Protection (CBP) issued a Withhold Release Order (WRO) on silica-based products produced by Hoshine Silicon Industry Co. Ltd. (Hoshine) and its subsidiaries. Hoshine is a Chinese company that makes metallurgical-grade silicon (also known as silicon metal), which is processed into polysilicon, a raw material used in the production of solar panels and other electronic products. The WRO instructs CBP personnel at all U.S. ports of entry to immediately begin to detain shipments containing silica-based products made by Hoshine and its subsidiaries.

Last week, CBP posted its responses to [Frequently Asked Questions](#) that clarify the scope of the Hoshine WRO. Below is a summary of the FAQs and key takeaways.

1. What is the scope of the Hoshine WRO?

CBP's Response: The WRO applies to silica-based products made by Hoshine and its subsidiaries and to materials and final goods derived from or produced using those silica-based products, regardless of where the materials and final goods are produced. Examples include, but are not limited to:

- *Component Materials:* silicon, including metallurgic grade silicon, silicon oxide, and certain silicones in primary forms
- *Intermediate Goods:* semiconductor devices, integrated circuits, and additives for aluminum alloys and concrete
- *Finished Goods:* photovoltaic cells, solar generators, solar panels, electronics, adhesives, and lubricants

Takeaway: The WRO is far-reaching in terms of products and industries potentially affected, as it applies not only to raw materials, but also to downstream products that contain silicon metals sourced from Hoshine or any its subsidiaries, regardless of where the later-stage products (*e.g.*, ingots, wafers, cells, and modules) are physically made. For example, a solar panel assembled in Japan from imported components, including ingots produced in South Korea from silicon metals sourced from Hoshine, is covered by the scope of the WRO. Notably, CBP has confirmed in its response that the WRO does indeed reach beyond solar products – it includes other finished goods such as electronics, adhesives, and lubricants – and that CBP is likely to enforce it in these industries. This warrants attention by companies in other industries, which may have previously viewed enforcement as a relatively remote risk given that previous U.S. government statements regarding the WRO mentioned *only* the *solar* supply chain.

2. Are finished products that contain a small percentage of silica-based products sourced from Hoshine or its subsidiaries subject to the WRO?

CBP's Response: CBP responded to this question by stating: "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 the statute." The response also gives the example: "if prohibited labor is used to manufacture a single part in the engine of a car, the contribution of prohibited labor to the final product (the car) may be considered '*de minimis*' for purposes of Section 1307. But, if the part is an essential part of the engine or the manufacture of the part comprises a substantial portion of the total labor, CBP may deem the car to be within the scope of Section 1307."

Takeaway: CBP asserts broad discretion in determining whether finished products are subject to the WRO. The U.S. Anti-Forced Labor Statute (19 U.S.C. § 1307) does not include a *de minimis* exception and CBP's guidance does not provide detailed objective criteria to make *de minimis* determinations.

Reasonably specific and objective ways to calculate whether an input is *de minimis* exist in other trade-related contexts. For example, under the United States-Mexico-Canada Agreement (USMCA), a good qualifies for preferential duty treatment if the value of the non-originating (outside-of-North America) materials used in the production of the good does not exceed 10 percent of the value of the finished good. We suspect that the *de minimis* exception is intended to offer relief to importers outside of the solar supply chain containing, for example, a small amount of silica-based sealant as a component part. However, at this point, importers cannot be sure how CBP will view these products. Absent a similar, clear-cut way to apply the *de minimis* exception in the context of 19 U.S.C. § 1307, the exception does not provide importers of finished products with any reasonably certain means of determining whether their goods are within the scope of the WRO. In addition, CBP's comments as to how it would analyze the applicability of the exception in the context of a car signals that the determination would be highly fact-specific and potentially time consuming if CBP must weigh evidence to assess whether components are "essential" parts of the finished product. Therefore, even if a company ultimately succeeds in convincing CBP that finished products fall within the exception, the process could entail significant supply chain disruptions.

3. How will this affect imports into the United States for goods containing silica?

CBP's Response: CBP has reason to believe that the silica-based goods produced by Hoshine are entering the commerce of the United States in violation of 19 U.S.C. § 1307. This WRO will not affect U.S. imports of silica-based products that do not contain silica-based products sourced from Hoshine or its subsidiaries. Importers are encouraged to police their supply chains to ensure that they are not importing goods made, in whole or in part, with convict, forced, or indentured labor.

Takeaway: U.S. importers of solar panels and other silica-based products must be prepared to demonstrate the absence of Hoshine in their U.S. supply chain. This requires mapping the company's supply chain in order to trace the provenance of the materials used to make the product and the suppliers involved in each production step. Prudent importers of goods containing silica-based products are making efforts to map their supply chains prior to any detentions, as they are typically given only 90 days to show proof of admissibility once their goods are detained by CBP. Gathering traceability documentation is often a heavy lift, requiring importers to work with suppliers throughout their supply chain to gather transactional, transportation, and production records that evidence how the specific materials detained were produced throughout each level of the supply chain. Importers must show that the silica-based products at the very beginning of the supply chain were not sourced from Hoshine or its subsidiaries; if the transport, production, or process records are missing or insufficient at any tier of the supply chain, traceability is "broken," in which case CBP may exclude the products from entry into the U.S.

4. What indicators of forced labor did CBP identify against Hoshine?

CBP's Response: CBP's investigation indicated two of the International Labour Organization's [11 indicators of forced labor](#) (ILO indicators): "intimidation and threats" and "restriction of movement."

Takeaway: CBP evaluates the presence of forced labor based on the ILO indicators . See, e.g., CBP's Fact Sheet: [WRO Modification/Revocation Processes Overview](#). The ILO indicators are based on the definition of forced labor in the ILO Forced Labor Convention, and the presence of one or more indicators in a given situation may signal that forced labor exists. Per CBP's guidelines on the WRO modification/revocation process, the WRO will remain in place unless and until Hoshine has remediated all of the forced labor indicators identified by CBP. CBP would almost certainly need to assess credible, independent third-party audits in order to ensure that Hoshine had remediated the concerns identified, and because prominent auditors may be unable to conduct such audits in the Xinjiang Uyghur Autonomous Region (XUAR) for some time, it is unlikely that the Hoshine WRO will be revoked in the near future.

5. What kind of evidence will CBP expect from importers seeking release of detained shipments?

CBP's Response: Importers should be able to trace their supply chains, including the production of the silica. Specifically, importers seeking to have merchandise detained under the WRO released should provide information on the sourcing of the silica-based component materials in the imported goods. Detention notices will request *at least* the following information:

- Certificate of Origin (COO) in the format detailed in 19 C.F.R. § 12.43(a) (not a standard COO)
- Statement required by 19 C.F.R. § 12.43(b), submitted by the importer (not the seller)
- Additional information related to silica and its initially processed forms (*i.e.*, silicon metal, metallurgical grade silicon, chemical-grade silicon, silicon, etc.), specifically:
 - Affidavit from the provider
 - Identification of the source
 - Purchase orders, invoices, and proof of payment
 - List of production steps and production records
 - Transportation documents
 - Daily process reports related to the unprocessed silica and its initially processed forms and the list of entities that supplied inputs for the silica-containing products being imported

Takeaway: CBP is requesting companies to seek unprecedented cooperation from upstream suppliers . For the solar supply chain, CBP is requiring significant documentation related to the "the provider of the silica" (quartz provider) **and** the provider of the metallurgical grade silicon. Importers are highly unlikely to have direct relationships with these suppliers and must work with their direct suppliers and higher-tier indirect suppliers to (1) gain access to these lower-tier entities and (2) convince them to provide this documentation. As reported by [Bloomberg](#) and other outlets, polysilicon is in incredibly high demand right now. Buyers may thus have little leverage vis-à-vis polysilicon suppliers to extract even the identities of their sub-tier, metallurgical grade silicon suppliers. CBP expects importers to provide not only their identity but also detailed traceability documentation including "daily process reports."

This is a difficult task in any situation, but particularly complicated in China, where the government has recently formalized a regulatory regime to defend against the extraterritorial application of foreign law in the country. Two recent measures enacted by the Chinese government, the [Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Laws and Measures](#) and the [Anti-Foreign Sanctions Law](#), (1) require companies in China to report to the Chinese government situations in which normal economic activities are disrupted by the "unjustified" application of foreign law in China; and (2) make companies eligible for "countermeasures" by the Chinese government, if they help implement foreign measures deemed to "interfere" with China's internal affairs or to be "discriminatory" and "restrictive" against Chinese citizens or organizations. Although we are not aware of any adverse actions against multinational or Chinese companies based on forced labor-related due diligence efforts to date, the U.S. government's position on the XUAR is strongly contested by the Chinese government, and public statements by Chinese officials indicate that U.S. measures targeting the region are viewed as an encroachment on the nation's sovereignty. Suppliers may thus be unwilling to cooperate with foreign companies' forced labor-related due diligence efforts if they perceive that doing so may violate local law. Companies should carefully consider these Chinese law issues when conducting due diligence efforts related to the Hoshine WRO.

CBP has significantly increased its enforcement of U.S. anti-forced labor laws in the past year. It is critical that companies in high-risk sectors strengthen their anti-forced labor compliance programs, particularly if they import goods that may be subject to a WRO.

We have worked with importers in the solar and other industries to identify risk factors and level of risk, 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 updated anti-forced labor policies and procedures, remediate forced labor indicators, and interact with CBP.

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