Akin Gump
STRAUSS HAUER & FELD LLP

Customs and Corporate Social Responsibility Client Alert

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In you read one thing…

- Congress and the president just closed a loophole in a customs law that will make it easier for any party, including U.S. domestic producers and advocacy organizations, to petition U.S. Customs and Border Protection (CBP) successfully to detain, seize and forfeit imported merchandise shown to have been produced by convict, forced or indentured labor.
- Any company that imports merchandise into the United States and that is unable to show that its goods are not produced with convict, forced or indentured labor is potentially at risk of CBP denying entry and detaining the products—and possibly seizing and forfeiting them.
- Importers can proactively guard against the risk that their products will be targeted by CBP by developing supply chain diligence and monitoring and reporting systems to identify and eliminate the broad types of labor proscribed by this customs law

A Loophole in CBP's Forced Labor Statute Just Closed, and Every U.S. Importer Should Take Note

The Forced Labor Statute and the Amendment

In February, the U.S. Congress passed, and President Obama enacted, the Trade Facilitation and Enforcement Act of 2015 (TFEA). Among its provisions is an amendment to the customs laws—The Tariff Act of 1930, Section 307 (the "Forced Labor Statute" or "Section 307"). This statute provides that "[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country" by convict, forced or indentured labor "shall not be entitled to entry . . . and the importation thereof is hereby prohibited." Prior to the amendment, this prohibition on entry and importation only applied if the merchandise was also available in the United States and in sufficient quantities to meet U.S. consumptive demand. CBP sometimes relied upon the theory that the goods were not available in the United States and not in sufficient quantities to meet U.S. consumptive demand. Now, CBP is precluded from relying on this exception as a basis not to enforce the statute.

Enforcement Background

For many decades, CBP has implemented the Forced Labor Statute by regulations. The regulations mandate that CBP follow strict investigative and evidentiary procedures before issuing a detention order

(called "an order to withhold release") or a broader finding, which is published in the *Customs Bulletin and the Federal Register*. Basically, while anyone can make a referral to CBP for investigation (or it can be self-generated), CBP must have demonstrable evidence that ties the prohibited labor to the production and importation of the concerned merchandise. Even after a detention order or finding, the importer still has the opportunity to prove admissibility and has the right to challenge CBP in court, if appropriate. On the other hand, if the importer is unsuccessful, significant enforcement action can follow—including seizure, forfeiture and other civil/criminal penalties—not to mention crippling reputational harm.

CBP has often been criticized for using its prosecutorial discretion not to investigate or pursue cases, particularly those decisions based on the consumptive demand exception. The courts even affirmed CBP's authority to rely upon this exception, most recently in 2005 in a case involving cocoa production in Cote d'Ivoire (*International Labor Rights Fund, et al. v. United States*), which may have been decided differently today. However, CBP has been applauded when it brings to bear its significant resources to issue a finding and to defend it in court. For example, the result of *China Diesel Imports v. United States* was the prohibition from importation of diesel engines manufactured in China with prison labor.

With the elimination of the exception, and congressional and public pressure mounting to remove prohibited labor from supply chains, the expectation is that CBP and its investigative partners (e.g., Homeland Security and the Department of State) will devote ever more resources to enforcing this important statute.

Recent Surge in CBP Enforcement

Until the end of March 2016, CBP had not issued a detention order or finding barring the entry of goods since 2000. Since that time, however, given increased awareness about corporate social responsibility and related legal developments, there has been an escalation in Section 307 interest and enforcement activity.

On March 29, 2016, following on the heels of the elimination of the consumptive demand exception, CBP issued two detention orders based on information obtained by CBP indicating that a Chinese company and its subsidiaries utilize convict labor in the production of certain commodities. The commodities barred from import by these orders are soda ash, calcium chloride, caustic soda, viscose/rayon fiber, potassium, potassium hydroxide and potassium nitrate. The expectation is that CBP will follow these orders with published findings.

On April 6, 2016, the International Labor Rights Forum's Cotton Campaign and Ruslan Myatiyev, a Turkmenistan national, filed a petition requesting that CBP bar the entry of certain specified cotton products into the United States that are allegedly being produced, wholly or in part, with cotton produced with forced labor in Turkmenistan. CBP has not, to date, acted on this petition and it is not clear if there is sufficient evidence in these referrals for investigation to allow CBP to issue detention orders that would withstand an importer's challenge—or judicial scrutiny.

Most recently, CBP created a trade enforcement task force that will focus on several areas, including shipments of items produced with forced or child labor. In its May 2, 2016, press release, CBP explains that the task force will "harness the agency's collective trade enforcement expertise as a focal point for coordination with other government agency partners, including the Department of Commerce and U.S. Immigration and Customs Enforcement's Homeland Security Investigations."

Four Reasons Why We Expect Increased Use of Section 307 Authority

For several reasons, we think importers can expect more petitions and ensuing CBP enforcement activity in the near future.

First, amending Section 307 to close the consumptive demand loophole has been a regular target of many different stakeholder groups with an interest in barring imports of such items from the United States. These groups include domestic producers and their trade associations seeking to bar competition from foreign producers of the same goods, as well as religious, labor and human rights organizations, and consumer groups who seek to use Section 307 to combat human trafficking worldwide. Indeed, the original legislative purpose of the Forced Labor Statute was not to advance corporate social responsibility per se but to protect domestic industry from unfair competition. For several of these stakeholders, and especially when compared to such initiatives as civil litigation and reporting regimes like the California Transparency in Supply Chains Act and the UK Modern Slavery Act, the amended Section 307 is a stronger and more precise tool they can use to place unwanted pressure on governments and commercial interests that benefit from trafficked labor.

Second, Section 307 allows "any person who has a reason to believe" that merchandise is being produced with forced labor to file petitions with CBP. In contrast to other administrative proceedings, the phrasing of Section 307 confers standing on any person, regardless of whether the person has a demonstrated interest, property-based or otherwise, in the items being imported. Compare this with other trade remedies; for example, antidumping and countervailing duty proceedings, where interested party status is more circumscribed. Section 307's broad standing requirement is an invitation for stakeholders with no direct economic stake in the matter to file Section 307 petitions.

Third, in part due to the advocacy described above, the State Department, Department of Labor and the International Labor Organization, among other international organizations, now make available detailed reports on labor and human rights condition around the world, including detailed listings of specific commodities being produced using coerced labor in different countries. The public availability of these reports makes it easier for petitioners to assert and CBP officials to investigate whether particular goods can be barred entry under Section 307.

Fourth, CBP itself has issued press releases and guidance to the public on Section 307, which provides a roadmap for petitioners seeking to avail themselves of the Section 307 process. CBP also has its own public policy interests in marshalling its resources to pursue cases more forcefully than it has in the past. The recently enacted TFEA also introduced a requirement for CBP to file an annual report with Congress detailing its activity under Section 307. This additional level of congressional oversight and accountability,

coupled with continued advocacy from human rights and other groups, will likely further incent CBP to take action on further Section 307 petitions.

With this trend of rising Section 307 enforcement activity, U.S. importers would be well-served to examine their supply chains to ensure that they are adequately guarding against the economic and reputational damage that could arise from Section 307 action targeting their imports.

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