

**Commercial Customs Operations Advisory
Committee (COAC)
Intelligent Enforcement Subcommittee
Forced Labor Working Group**

April 15, 2020

COAC

COMMERCIAL CUSTOMS OPERATIONS
ADVISORY COMMITTEE

**Forced Labor Working Group
COAC Recommendations
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Introduction

The Forced Labor Working Group (FLWG) was initially established on July 13, 2016, and re-established September 27, 2019, as part of the Intelligent Enforcement Subcommittee. The SOW for the current FLWG encompasses the following four Objectives:

1. Forced Labor Allegation

- a. Defining the elements of a credible high-quality allegation, including the mechanisms of reporting.
- b. Types of documents that comprise a credible high-quality allegation.

2. Meaningful CBP Form 28 related to Forced Labor

- a. Define elements of a CBP Form 28 for a specific inquiry related to an entry that is subject to a WRO.
- b. Work product should lead to criteria required to demonstrate Proof of Admissibility to CBP - 19 CFR § 12.43.

3. Industry Collaboration and Leadership to address Forced Labor

- a. Engage industry organizations taking a leadership position to combat Forced Labor
 - i. Identify best practices, and
 - ii. Identify industry standards that can be adopted
- b. Identify and catalog best practices for identification of forced labor supply chain risks
- c. Develop methodology for ways industry can take a collaborative approach to combat Forced Labor practices and improve supply chain traceability as it relates to forced labor

4. Statutory Guidance: Disclosure Process & Benefits

- a. Develop guidelines on the disclosure procedure and reporting requirements that importers should follow when an incident of forced labor is found to reasonably exist in their supply chain.
- b. Identify reasonable factors that CBP can consider for voluntary self-disclosure, full cooperation, and timely and appropriate remediation related to forced labor violations.

As reported during the last public COAC meeting held on December 4th, 2019 in Washington, D.C., the FLWG membership was expanded to include additional subject matter experts with diverse industry representation and Non-Government Organizations (NGOs). The additional FLWG members were divided into subgroups based on area of expertise to address the following objectives:

- a. Meaningful CBP Form 28 related to Forced Labor;
- b. Industry Collaboration and Leadership to address Forced Labor; and
- c. Statutory Guidance related to forced labor disclosure.

During this time, each of the subgroups held bi-weekly calls to develop the work product and supporting recommendations. The FLWG held four calls since the last public COAC meeting to review progress and provide feedback on the work product for each of the subgroups. The following recommendations will be presented during the April 15th, 2020 COAC meeting and include elements of a credible high-quality allegation; Forced Labor CBP Form 28 questions with criteria related to proof of admissibility; and Statutory Guidance related to a forced labor prior disclosure. The Industry Collaboration subgroup will continue to work towards achieving the objective in the next quarter.

FORCED LABOR ALLEGATION

- Define the elements of a credible high-quality allegation, including the mechanisms of reporting and types of documents that comprise a credible high-quality allegation.

Recommendation:

- 1) COAC recommends CBP develop a guidance document that includes specific criteria to assist individuals and organizations in identifying meaningful information to include when reporting forced labor allegations. We have provided the specific criteria in Appendix A.

MEANINGFUL QUESTIONS RELATED TO FORCED LABOR

- Define elements of a CBP Form 28 for a specific inquiry related to an entry that is subject to a WRO. Work product should lead to criteria required to demonstrate Proof of Admissibility to CBP - 19 CFR § 12.43.

Recommendations:

- 2) COAC recommends CBP modernize the current forced labor regulations in 19 CFR § 12.43 and provide for a public comment period. CBP should consider the following updates:
 - a. In regards to Proof of Admissibility requirements per 19 CFR § 12.43, rely less on reference to specific documents, such as the forced labor Certificate of Origin, that are obsolete or may become so in the future and incorporate the Forced Labor CBP Form 28 questions that can be used to start the dialog with trade in the course of determining Proof of Admissibility.
 - b. Currently, forced labor regulations are silent as to when and how CBP must detain merchandise subject to a WRO. COAC recommends CBP update the regulations so they are similar with existing procedures, policies and directives for detention of merchandise, which CBP is required to follow in order to make a final determination within a specified timeframe. CBP should establish an appropriate timeframe to respond to an importer's proof of admissibility as a result of a WRO, and this timeframe should be incorporated into the revision of the regulations.¹

¹ COAC previously recommended this under recommendation 010120, which was not fully implemented.

- 3) COAC recommends CBP use update the questions that are used on a CBP Form 28 to solicit information to confirm forced labor admissibility as opposed to a detention notice. The suggested questions are provided as Appendix B and the aim is to provide CBP with meaningful information for a specific entry or a set of entries, as it relates to forced labor. They are not intended to be used as an equivalent to an audit, or to gather broad information over the entire supply chain for an importer.

STATUTORY GUIDANCE: DISCLOSURE PROCESS & BENEFITS

- Develop guidelines on the disclosure procedure and reporting requirements that importers should follow when an incident of forced labor is found to reasonably exist in their supply chain.
- Identify reasonable factors that CBP can consider for voluntary self-disclosure, full cooperation, and timely and appropriate remediation related to forced labor violations.

Recommendations

- 4) Regulatory Framework: Since 19 § CFR 162.74 only allows for violations of 19 USC 1592 and 1593(a), COAC recommends that CBP update 19 CFR § 162.74 to include violations of 19 USC 1307 and 19 USC 1595(a). COAC has suggested language for 19 § CFR 162.74 as attached in Appendix C.
- 5) Disclosure Eligibility: COAC recommends CBP design a disclosure process that includes the following elements:
 - a. Disclosures are for violations of 19 USC 1307 and 19 USC 1595(a).
 - b. Disclosures are allowed for the importation of any article which is being or has been introduced, or attempted to be introduced into the commerce of the United States.
 - c. Disclosures apply to goods made in whole or in part of forced labor in that forced labor incidents discovered at both direct suppliers and upstream suppliers are eligible for disclosure.
 - d. A WRO should not be considered an ongoing investigation that limits disclosure eligibility if the importer and their supplier(s) are not named in the investigation.
 - e. The timeline to submit a disclosure should be consistent with the current prior disclosure process in that an importer can file notification of a possible disclosure, be granted 90 days to conduct an internal investigation, and then file a full disclosure or withdrawal the notification, depending on the outcome of the investigation. Extensions of the 90-day period may be requested by the disclosing party. This will allow importers to secure the disclosure benefits early in their supply chain review process, conduct a thorough review, and take remedial action if necessary.
 - f. For CTPAT partners, the existing benefit that allows for a disclosure to be made within 30 days of notification from CBP (as long as there is no ongoing investigation or consideration of fraud), should also be extended to violations of 19 USC 1307 and 19 USC 1595(a).

- 6) Disclosure Benefits: COAC recommends CBP design a disclosure process that offers the following benefits in exchange for a company's voluntary disclosure:
 - a. Companies that file a disclosure on past importations will be exempt from all penalties.
 - b. If a company submits a disclosure, and, in addition to past importations, they have subject merchandise in transit to the U.S., that merchandise will not be subject to the seizure process. Instead, the company will be afforded the option of exporting or destroying the goods.
 - c. For past importations where a CF 4647 Notice of Redelivery has been issued, a company will not be subject to a liquidated damage claim for failure to redeliver, if the subject goods are no longer available to be redelivered (for example, sold).

- 7) Disclosure Factors: COAC recommends that CBP consider the following factors in evaluating and making a determination on the outcome of a disclosure:
 - a. Company's level of cooperation with the CBP investigation.
 - b. Company's demonstrated efforts to remediate issues pertaining to goods made with forced labor in regards to the specific supplier and associated facility such as the outcomes and history of previous social compliance audits, including corrective actions.
 - c. Company's overall commitment and established social responsibility compliance program to combat forced labor in their supply chains including efforts to communicate requirements, provide training and guidance to their suppliers.

- 8) Agency Alignment: COAC recommends that CBP coordinate with ICE to have similar disclosure processes for potential violations, violations, or any other criminal matter.

- 9) Outreach: COAC recommends CBP publish a dedicated Informed Compliance Publication (ICP) on forced labor to include guidance on mechanisms to report forced labor allegations, investigations/WROs, due diligence, enforcement, prior disclosure, and mitigating factors.

APPENDIX A
Specific Criteria for a Forced Labor Allegation

1. Context

- a. Detailed description of the alleged forced labor situation
- b. Number of alleged victims
- c. Age and/or age range of alleged victims
- d. National origin of alleged victims

2. Supply chain type (e.g. finished good, raw material, mining, commodity, etc.)

- a. Suspected Parties Involved
- b. Single location or multiple locations
- c. Single commodity or multiple commodities?
- d. Overview of business type(s) involved (e.g. farm, mill, manufacturer, exporter, warehouse, logistics provider, importer, etc.)

3. Timeline

- a. Period of time of suspected activity (e.g. specific date, multiple dates, range of time, etc.)

4. Geography

- a. Region(s), location address(s), coordinates, etc. where alleged misconduct occurred

5. Status

- a. Current status of the goods at issue (e.g. harvested, warehouse at origin, in transit, etc.)

6. Source

- a. Describe how the suspected violations are known (e.g. first-hand knowledge, second-hand knowledge, worker interviews, grievance mechanism, auditor observation, direct observation, general suspicion, etc.)

7. Supporting Evidence

- a. Examples of evidence supporting the alleged violation (e.g. photographs with timestamp and/or geotags, video, auditor records, worker statements, and documentation, such as worker pay roll records, labor contracts, wage and hour statements, etc.)

8. Prior Allegation

- a. Indicate whether any of the information provided in this allegation has been previously reported and to whom. (e.g. other government agencies, Non-Government Organizations, supplier, importer, etc.)

APPENDIX B
Meaningful CBP Form 28 questions related to Forced Labor

1. Do you have a corporate social responsibility program that addresses human rights and forced labor concerns within the supply chain? What is the name of the department and what is its reporting structure with your organization? If not, what functional area is responsible for addressing human rights concerns?
2. Provide a copy of the agreement between the importer and the manufacturer/seller/shipper that addresses the prohibition of forced labor within the supply chain for this entry. Please include copies of the supplier's code of conduct and/or human rights and forced labor policies covered in this entry, and any other information you consider relevant.
3. Please explain what due diligence was conducted on the manufacturer/seller/ shipper of the imported goods covered in this entry to help identify, prevent and mitigate adverse human rights impacts, such as forced labor.
 - a. Provide an overview of each of the methods used (e.g., third-party auditing, certification, training, corrective action plans, grievance mechanisms, etc.)
 - b. Provide evidence of the methods employed in 3.a.
4. Please explain the recruitment and employment practices of the manufacturer/seller/shipper of the imported goods covered in this entry, including but not limited to labor recruiters, migrant workers, worker age requirements, and International Labor Organization Forced Labor Indicators, etc.
5. How do you detect and address the areas of greatest forced labor risk in the supply chain, particularly where you have direct relationships, influence and a financial commitment (e.g. typically the finishing, packaging, final transformation of the imported goods)?
6. Describe the end-to-end supply chain and confirm the level of social compliance and forced labor verification activities related to the subject entry.
 - a. What are the impediments that prevent you from obtaining visibility beyond the named parties on this entry (e.g. manufacturer/seller/ shipper)?
7. Do you require the parties named on this entry (manufacturer/seller/shipper) to have a formal risk management program to identify, prevent, mitigate and account for how they address human rights, such as forced labor in their supply chain?
 - a. What methods are used to verify these practices involved in your supply chain for the subject entry?
 - b. Do you periodically review these records to ensure compliance?

APPENDIX C
19 CFR § 162.74 COAC Suggested Language

§ 162.74a Forced Labor Prior disclosure.

(a) *In general* - (1) A forced labor prior disclosure is made if the person concerned discloses the circumstances of a violation (as defined in paragraph (b) of this section) of 19 U.S.C. 1307 and 19 U.S.C. 1595a, either orally or in writing to a Customs officer before, or without knowledge of, the commencement of a formal investigation of that violation and takes corrective action in accordance with paragraph (c) of this section.

(2) A person shall be accorded the full benefits of prior disclosure treatment, as defined in paragraph (j) of this section, if that person provides information orally or in writing to Customs with respect to a violation of 19 U.S.C. 1307, 19 U.S.C. 1592 or 19 U.S.C. 1595a, if the concerned Fines, Penalties, and Forfeitures Officer is satisfied the information was provided before, or without knowledge of, the commencement of a formal investigation, and the information provided includes substantially the information specified in paragraph (b) of this section. In the case of an oral disclosure, the disclosing party shall confirm the oral disclosure by providing a written record of the information conveyed to Customs in the oral disclosure to the concerned Fines, Penalties, and Forfeitures Officer within 10 days of the date of the oral disclosure. The concerned Fines, Penalties and Forfeiture Officer may, upon request of the disclosing party which establishes a showing of good cause, waive the oral disclosure written confirmation requirement. Failure to provide the written confirmation of the oral disclosure or obtain a waiver of the requirement may result in denial of the oral prior disclosure.

(b) *Disclosure of the circumstances of a violation.* The term “discloses the circumstances of a violation” means the act of providing to Customs a statement orally or in writing that:

- (1) Identifies the class or kind of merchandise involved in the violation;
- (2) Identifies the importation included in the disclosure by entry number or by indicating each concerned Customs port of entry and the approximate dates of entry;
- (3) Specifies the supplier of the merchandise involved in the violation; and
- (4) Sets forth, to the best of the disclosing party's knowledge, the corrective action that an importer has taken to remove the use of forced labor in the production of the merchandise covered by the disclosure or states that the disclosing party will provide such data, or any information or data unknown at the time of disclosure, within 90 days of the initial disclosure date. Extensions of the 90-day period may be requested by the disclosing party from the concerned Fines, Penalties, and Forfeitures Officer to enable the party to obtain the information or data. Inasmuch as it is the policy of U.S. Customs & Border Protection to promote forced labor prior disclosures, such extensions shall be freely given unless Customs advises that an extension beyond the initial 90 days provided for herein may not be granted due to compelling law enforcement reasons.

(c) *Identification of Producer Using Forced Labor and Notice of Corrective Action.* A person who discloses the circumstances of the violation shall submit in writing to Customs the name of the producer of the goods made, or suspected of being made, using forced labor. A person who discloses the circumstances of the violation shall also submit to Customs the details known to that person regarding the existence of forced labor at the producer at the time the merchandise covered by the disclosure was produced. A person who discloses the circumstances of the violation shall take corrective action within 90 days of filing their disclosure and shall certify to Customs it

has taken the corrective action. Corrective action shall consist of the disclosing party doing at least one of the following two acts: (a) ceasing to do business with the producer who used forced labor in the production of the imported goods, effective immediately or (b) developing a remediation plan for the producer to eliminate forced labor from the production of the imported goods. If the corrective action consists of a remediation plan, the person who discloses the circumstances of the violation shall notify Customs of the remediation plan, including when the remediation plan has been completed by the producer.

(d) Effective time and date of prior disclosure - (1) If the documents that provide the disclosing information are sent by registered or certified mail, return-receipt requested, and are received by Customs, the disclosure shall be deemed to have been made at the time of mailing.

(2) If the documents are sent by other methods, including in-person delivery, the disclosure shall be deemed to have been made at the time of receipt by Customs. If the documents are delivered in person, the person delivering the documents will, upon request, be furnished a receipt from Customs stating the time and date of receipt.

(3) The provision of information that is not in writing but that qualifies for prior disclosure treatment pursuant to paragraph (a)(2) of this section shall be deemed to have occurred at the time that Customs was provided with information that substantially complies with the requirements set forth in paragraph (b) of this section.

(e) Addressing and filing prior disclosure - (1) A written prior disclosure should be addressed to the Commissioner of Customs, have conspicuously printed on the face of the envelope the words “forced labor prior disclosure,” and be presented to a Customs officer at the Customs port of entry of the disclosed violation or at any Customs Center for Excellence and Expertise.

(2) In the case of a prior disclosure involving violations at multiple ports of entry, the disclosing party may orally disclose or provide copies of the disclosure to all concerned Fines, Penalties, and Forfeitures Officers. In accordance with internal Customs procedures, the officers will then seek consolidation of the disposition and handling of the disclosure. In the event that the claimed “multi-port” disclosure is made to a Customs officer other than the concerned Fines, Penalties, and Forfeitures Officer, the disclosing party must identify all ports involved to enable the concerned Customs officer to refer the disclosure to the concerned Fines, Penalties, and Forfeitures Officer for consolidation of the proceedings.

(f) Verification of disclosure. Upon receipt of a prior disclosure, the Customs officer shall notify Customs Office of Investigations of the disclosure. In the event the claimed prior disclosure is made to a Customs officer other than the concerned Fines, Penalties, and Forfeitures Officer, it is incumbent upon the Customs officer to provide a copy of the disclosure to the concerned Fines, Penalties, and Forfeitures Officer. The disclosing party may request, in the oral or written prior disclosure, that the concerned Fines, Penalties, and Forfeitures Officer request that the Office of Investigations withhold the initiation of disclosure verification proceedings until after the party has provided the information or data within the time limits specified in paragraph (b)(4) of this section. It is within the discretion of the concerned Fines, Penalties and Forfeitures Officer to grant or deny such requests.

(g) Commencement of a formal investigation. A formal investigation of a violation of 19 U.S.C. 1307 is considered to be commenced with regard to the disclosing party on the date recorded in writing by the Customs as the date on which facts and circumstances were discovered or

information was received that caused the Customs to believe that a possibility of a violation existed. In the event that a party affirmatively asserts a prior disclosure (*i.e.*, identified or labeled as a prior disclosure) and is denied prior disclosure treatment on the basis that Customs had commenced a formal investigation of the disclosed violation, and Customs initiates a penalty action against the disclosing party involving the disclosed violation, a copy of a “writing” evidencing the commencement of a formal investigation of the disclosed violation shall be provided to the disclosing party when Customs notifies the disclosing party that a penalty is being contemplated. However, a withhold release order (WRO) shall not be considered the commencement of an investigation that limits disclosure eligibility if the importer and their supplier(s) are not named in the investigation.

(h) *Scope of the disclosure and expansion of a formal investigation.* A formal investigation is deemed to have commenced as to additional violations not included or specified by the disclosing party in the party's original prior disclosure on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of such additional violations existed. Additional violations not disclosed or covered within the scope of the party's prior disclosure that are discovered by Customs as a result of an investigation and/or verification of the prior disclosure shall not be entitled to treatment under the prior disclosure provisions.

(i) *Knowledge of the commencement of a formal investigation* - (1) A disclosing party who claims lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge. A person shall be presumed to have had knowledge of the commencement of a formal investigation of a violation if before the claimed prior disclosure of the violation a formal investigation has been commenced and:

(i) Customs, having reasonable cause to believe that there has been a violation of 19 U.S.C. 1307 and 19 U.S.C. 1595a, so informed the person of the type of or circumstances of the disclosed violation; or

(ii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, had, either orally or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or

(iii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, requested specific books and/or records of the person relating to the disclosed violation; or

(iv) Customs issues a prepenalty or penalty notice to the disclosing party pursuant to 19 U.S.C. 1592 relating to the type of or circumstances of the disclosed violation; or

(v) The merchandise that is the subject of the disclosure was seized; or

(vi) The issuance of a withhold release order that names the importer and their supplier; or

(vii) In the case of violations involving merchandise accompanying person entering the United States or commercial merchandise inspected in connection with entry, the person has received oral or written notification of Customs finding of a violation.

(2) The presumption of knowledge may be rebutted by evidence that, notwithstanding the foregoing notice, inquiry or request, the person did not have knowledge that an investigation had commenced with respect to the disclosed information.

(3) Notwithstanding paragraphs (i)(1) and (i)(2), persons who are Trusted Traders or members of the Customs-Trade Partnership Against Terrorism (C-TPAT) may file a forced labor prior disclosure and receive the benefits referenced in paragraph (j), even if they have knowledge of the commencement of a formal investigation for forced labor, provided such persons file a forced labor prior disclosure within 30 days of any of the events listed in paragraph (i)(1), above.

(j) *Benefits of Forced Labor Prior Disclosure.*

(1) A person who files a valid forced labor prior disclosure shall not be issued any monetary civil penalty under 19 U.S.C. 1592, 19 U.S.C. 1595a or any other provision.

(2) A person who files a valid forced labor prior disclosure shall be allowed to export or destroy, at the disclosing party's option, any merchandise covered by the forced labor prior disclosure should such merchandise be en route to the United States at the time of forced labor prior disclosure. Such merchandise shall not be seized by Customs, provided such merchandise is exported or destroyed from the United States within 30 days of its arrival in the United States.

(3) For past importations where a CF 4647 Notice of Redelivery has been issued, a company will not be subject to liquidated damages penalties for failure to redeliver, if the subject goods are no longer available to be redelivered (for example, sold).

(4) It is the policy of Customs that a person who files a valid forced labor prior disclosure shall be eligible for a deferred prosecution agreement, and not otherwise be criminally prosecuted, unless Customs determines that the violation disclosed resulted from willful conduct by the person filing the forced labor prior disclosure.