Commercial Customs Operations Advisory Committee (COAC)
Intelligent Enforcement Subcommittee

IPR Recommendations Background & Forced Labor Recommendations Background

COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE

April 2020

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 draft 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

(vi) 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) Nothwithsanding 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.

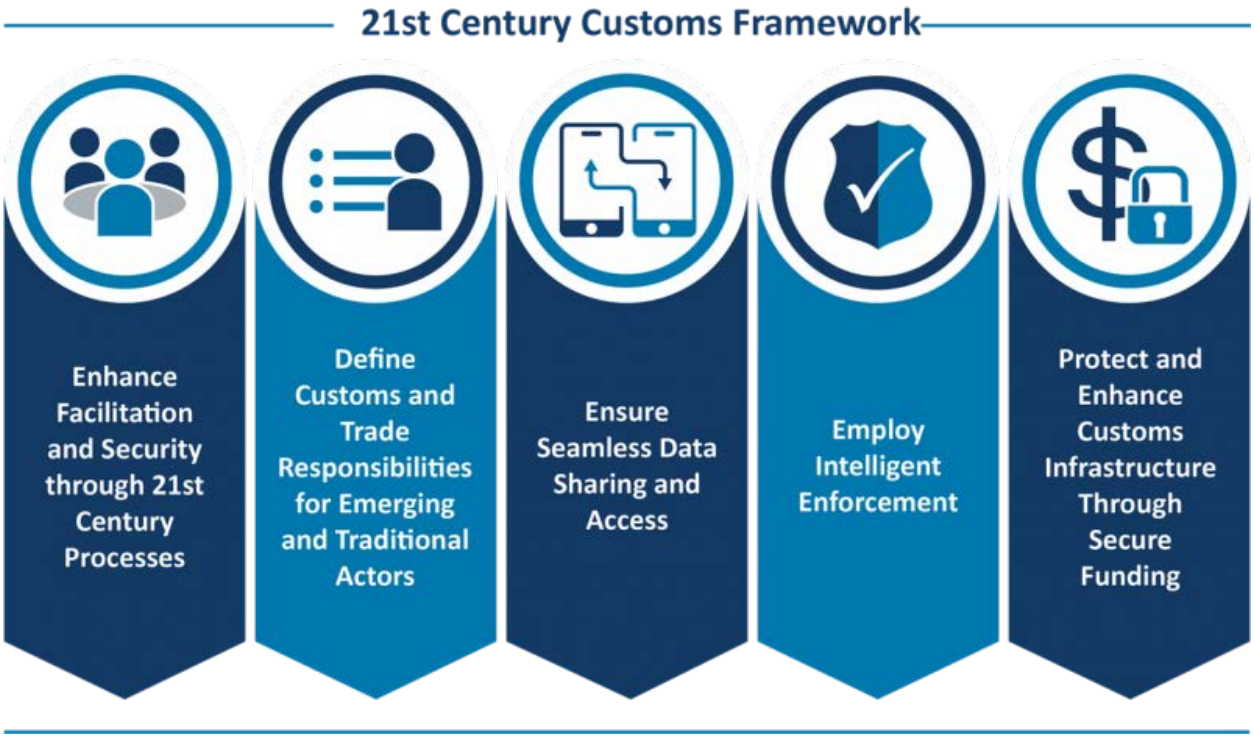
(3) For past importations where a CF 4647 Notice of Redelivery has been issued, a company will not be subject to liquidated damages penalties for failure to redeliver, if the subject goods are no longer available to be redelivered (for example, sold).

(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.

IPR Working Group Recommendations

Background Paper

During the 3rd quarterly meeting of the 10th Term Commercial Operations Advisory Committee (COAC), a subcommittee on IPR Enforcement was established on August 16, 2007. The IPR Subcommittee has since been transitioned to the IPR Working Group (WG) currently residing under the Intelligent Enforcement Subcommittee of the 15th term of COAC. After a brief hiatus, the IPR WG was realigned with CBP's 21st Century Customs Framework to think of the "Art of the Possible" to fully tackle the growing challenges for IPR enforcement especially in the areas of data sharing. A list of the IPR WG members is provided for in Appendix A.



Violations of IPR remain a threat to the United States economy not only by stealing market share from those who hold the rights to copyright, but also through health and safety risks. With the increase in de minimis and explosion of e-commerce, the express consignment and small package environments pose excellent circumstances in which to camouflage a black market for these types of violations.

While CBP is committed to taking action against IPR violations, available administrative remedies (seizure, abandonment, etc.) pose several challenges to the agency.

1) Depending on the remedy utilized, CBP is limited in the information it can share with rights holders, carriers, e-commerce platforms, and other interested parties, which may prevent the trade from taking more proactive and impactful action against known violators.

2) Available administrative remedies are limited and carry heavy burdens, which limit CBP's ability to scale these remedies in a manner that keeps pace with growing trade volumes.

3) Storing and/or destroying the goods that are detained, seized, or abandoned, also incur logistical and financial challenges, creating further limitations.

Objectives and Scope of Activities:

The objectives for the IPR WG are to generate advice and develop recommendations pertaining to enforcement of IPR. Building from the previous recommendations, the IPR WG expanded its focus to examine the entirety of an IPR rights holders' supply chain and develop an innovative and transformational model that leverages anticipatory and proactive behaviors that can address suspected IPR infringing goods before they are imported, as well as increasing collaboration among CBP and those with a role in enforcing the IPR seizure process.

The IPR WG identified where trade actors had opportunities to stem the flow of IPR-infringing goods before import, share and develop best practices for commercial stakeholders, improve intelligence and information flow between trade actors and CBP, and develop new solutions to reduce CBP's IPR enforcement costs, including costs associated with storage and destruction.

Proposed efforts and solutions included:

- Incentivize stakeholder support in removing violative goods from the U.S. economy;
- Strengthen partnerships between CBP and the trade community to promote compliance with IPR laws and enhance enforcement;
- Identify effective approaches for deterring IPR violations;
- Improve the effectiveness of IPR risk assessment through better identification of high and low risk shipments and/or entities;
- Streamline and modernize IPR processes through improved processes and use of technology;
- Achieve outcomes that continue to respect the rights of all parties to due process.
- Review the DHS Report and Executive Order on eCommerce to provide recommendations as needed for implementation.

Team 1 – Background to Recommendations for eRecordation

Summary of Future Vision

Thinking of the "art of the possible" for eRecordation, the trade envisions an electronic environment in which IPR enforcement is made more effective and efficient in the following fundamental ways:

I) eRecordation - flows automatically from the registration of IPR.
II) Is the hub for data upon which CBP can rely to target IPR violations.
III) The CBP system should also be a hub for data from CBP.
IV) Is a hub or portal for interactivity, allowing CBP and IPR owners the ability to share information in real time to assist CBP and sister law enforcement agencies to make enforcement determinations.

Current Status

All trademarks must be registered with the United States Patent and Trademark Office (USPTO) before they can be recorded and enforced by CBP. CBP's enforcement is directed against counterfeit imports and those that bear copying or simulating trademarks. Copyrights must first be registered with the US Copyright Office (USCO) in order to record them with CBP for enforcement against infringing copies or phonorecords.

CBP's recordation database includes information regarding all recorded marks, including images of these marks. CBP officers monitor imports to prevent the importation of goods bearing infringing marks, and can access the recordation database at each of the 317 ports of entry.

Customs and Border Protection (CBP) treats IPR as a priority trade issue and members of the trade take great pains to assist CBP to interdict imports of counterfeits in a prime example of a government-industry cooperative effort.

Challenges for Importers/Rights Holders/Brokers

IPR is registered in the first instance because the IPR owner wishes to protect its rights. When viewed in this context, CBP recordation is a superfluous step without added value. Thus, recordation is an impediment inherently. As a practical matter, it is a challenge for a number of reasons. One reason is that registration is frequently based on rights established in a foreign country entitled under treaty to have such rights recognized in the U.S. Consequently, the owner of the registration process may be non-resident. On the other hand, the U.S. sales and marketing function for these organizations is responsible for the supply chain to the U.S., customs clearance and interface. It is frequently the case that e-recordation is not under the immediate authority of U.S. sales and marketing. Bridging this gap requires time and coordination, especially because each country in which goods are marketed and sold may have disparate systems.

Recordation also adds expense. The recordation fee is $190 for each registered mark/copyright. In addition, rights holders often incur fees from their IP law firms for the performance of this service. There is also a time expenditure require to record. The time is not merely measured in populating data into CBP's system. It is also measured by the amount of time necessary to re-research IPR in order to validate information.

The bottom line is that eRecordation is a redundant system. Why register and then record with CBP? This complexity unnecessarily limits rights holders participation. IPR holders register because they want their rights to be enforced under Federal law. Therefore, registrations should be presumptively enforceable and enforced by CBP. Rights holders should not be obliged to perfect the eRecordation process However, we can and should maintain the data in the CBP portal in ways that will enhance enforcement and information exchange.

A Hub for Enforcement Information Needed by CBP
Though Team 2 will deal with information exchange in the broader environment, Team 1 wishes to make sure that the electronic systems used as a registry of IPR to be enforced by CBP is also multi-functional. That electronic system should also be the registry for enforcement targeting data such as:

- U.S. licensees of the IPR;
- Authorized manufacturing locations;
- Known offender data;
- Unique identifiers or verifiable credentials that promote more secure trade by providing greater insights into importers of genuine articles and their histories; and
- IPR owner contacts associated with IPR to assist with determinations of authenticity.

The system should also make it easier for CBP to research and locate information filed by IPR owners such as brand identification guides. Using automation to allow CBP officers to enter a search term and be brought automatically to the relevant page of an IP owners Brand Identification Training Guide uploaded to CBP's systems. Right now, one visible problem is that frontline officers don't have the time to search through detailed brand manuals to find what they're examining. We need to make this easier for them.

As an example data could be linked to keys that could be shared with brokers and then transmitted to CBP in the entry filing process in ACE. The keys would identify to the authorized licensee/importer (validate to IOR) and item level (to extent the holder loads this info). The key would link directly to the appropriate locations in the recordation database that could automate release or allow officers to very quickly make determinations. Shrinks the haystack and allows CBP to focus its efforts on potential bad actors. Also, it is essential that the system for maintaining the data is user friendly for SME's and automated for use by folks with lots of data to share.

This same system would also help effectuate the implementation of new enforcement tools such as debarment and a new "IPR denied parties" list. There are troves of information about counterfeiters by the trade, CBP, ICE and other agencies that can be put to more effective use. Known counterfeiters, like terrorists, proliferators and other bad actors, present a threat to U.S. health and safety. There should be included in a Denied Parties list, these known offenders. This would stop couriers, to cite one prime example, from unwittingly carrying the increasing numbers of low value (321 exemption type) counterfeit shipments flooding the country.

The above is also consistent with current COAC recommendation: **eRecordation Automation 10374:** COAC recommends the CBP receive budget and resources to make the following improvements to the eRecordation system: **Electronic Updates:** Allow rights holders to update information electronically on specific products, such as adding new, or deleting former, licensees, manufacturers or subsidiaries, in a secure mode. **Renewal Prompts:** Provide prompts or alerts of the renewal process enabling rights holders to electronically take subsequent responsive actions. **Interactive Recordation System:** Make the eRecordation system more interactive with the rights holder, permitting an exchange of more detailed information, in a secure mode, about products contained in the system in order to assist customs officers in identifying legitimate merchandise.

A Hub for Information from CBP
IPR owners want to be able to connect/trace detentions to seizures. There's needless frustration experienced by brand owners contacted by Customs to authenticate detained imports suspected to be counterfeits. For all of our efforts, we do not and cannot know whether our feedback results in a seizure because the seizure notices do not link back to detention notices.

Problems arise when CBP officials are not sure whether imports are real or fake. When imports are suspected to be counterfeits, CBP officers will regularly detain the goods and ask the IPR holders for help in authenticating them. In response, IPR holders provide feedback but frequently do not learn whether that feedback was effective as they are often not informed of the results. Moreover, if they receive notice of seizure, the notice does not refer back or tie to detentions. In short, there are limited meaningful methods for IPR holders to gauge the effectiveness of their efforts to help CBP.

We would like to see this remedied: CBP should report the results of assistance rendered by IPR holders so that the latter can track and trace on a transaction basis from detention to seizure or release. With this information, IPR holders will know better how the assistance provided to CBP should be refined or improved. They will be able to show their management that the resources invested in helping the government are well spent and will be in a better position to evaluate increases in resourcing (either personnel or budgetary). They will be incentivized to continue to work together with CBP in a two-way collaborative effort in which responses to CBP requests are conditioned to best achieve the objective of protecting U.S. businesses and consumers.

In addition, currently, there is no access for brokers who play an integral part in the Customs clearance and enforcement process. As key trade partners to importers and CBP, often with access to data very early in the supply chain, brokers are equally concerned with ensuring the facilitation of legitimate goods and enforcement against bad actors. Lack of access to current information inhibits the broker's ability to properly vet importers and act as an effective force multiplier in preventing the importation of infringing goods. Customs brokers should also have access to information about rights holders recorded goods, something that would add a layer of enforcement, help to facilitate trade and automate screening processes.

A Vehicle for Real Time Communication with IPR Owners of Record and Between CBP Offices
The electronic system can be used to send and receive e-messages for purposes of authentication of detained goods. It can also be used for issue notices of seizure to IPR holders. In either case, functionality could include the ability of IPR owners to request additional information such as photographs and samples. IPR bond information can also reside in the system.

IPR owners who've recorded contact information can indicate email addresses and mobile device IDs for purposes of automatic distribution of the above-mentioned messages from CBP. Consistent with current COAC recommendation eRecordation 10356 the system would foster internal CBP communications.

eRecordation 10356 stated as follows: COAC recommends that CBP improve communication with the ports of entry through the designated CBP Centers when onboarding new rights holders who register their brand through the eRecordation process. This should encourage participation in the eRecordation program by avoiding unnecessary delays, detentions or seizures.

Possible Solutions for Discussion Related to Above
Until the CBP system can be automatically updated with registered IPR for automatic enforcement, certain interim steps need to be considered. To modernize the Customs operations around IPR enforcement, the Working Group has already suggested an interactive eRecordation portal that would reduce the lag-time in recording trademarks and allow for real-time updates of authorized user information. In addition, Team 1 recommends the elimination of trademark-by-trademark recordation. The IPR owner should be able to record multiples marks and trademarks simultaneously.

Another solution would be a portal that would allow rights holders to file their IPR and other information at the same time. Additionally, it has been proposed that the Automated Commercial Environment (ACE) be updated to carry the capability of recording IPR, including the renewal of marks as well as the expiration and renewal of license agreements, etc. thus alleviating the need for separate systems.

Team 2 Background to Recommendations

Team 2 was established to discuss and review recommendations for Data Sharing, the DHS Report on Combatting Trafficking in Counterfeit and Pirated Goods (provided in Appendix B), and the Presidential Executive Order on Ensuring Safe and Lawful eCommerce for U.S. Consumers, Businesses, Government Supply Chains, and Intellectual Property Rights (provided in Appendix C). The background to each recommendation is provide below.

Recommendation 12 on Blockchain Example
In the world of electronic equipment, this could be serial numbers applied by the Rights Holder for specific models of legitimate goods such as servers, routers, switches, disk drives, etc. For electronic components such as integrated circuits, capacitors, etc. the data would include date code and lot code for specific part numbers of legitimate product. For non-electronic products, this approach could be applied to anything with a unique identifier such as a serial number or production code. The Importer and/or CBP would interrogate the Blockchain database as follows:

- Before an order is placed, or before shipment, the overseas supplier provides the serial number, model number, date code, part number, etc. to the Importer. The Importer queries the Blockchain database. If there is a match, then the order is placed and shipment proceeds. If there is not a match, then the order is cancelled and the shipment never happens. CBP does not have to deal with the product at all.
- After the shipment begins from the overseas port, the carrier (e.g., UPS, FedEx, DHL, other) provides the commercial invoice to CBP for preclearance. CBP uses optical character recognition to capture the serial number, model number, date code, part number, etc., and interrogate the Blockchain database. If there is not a match, then the shipment is targeted for further inspection upon arrival at the port of entry. If there is a match, the shipment proceeds without further inspection or proceeds to visual inspection upon arrival.
- If scenarios 1 or 2 are not possible, then the Import Specialist at the port of entry could interrogate the Blockchain database during the physical inspection process.

Recommendation #13 Data Sharing Background
Although CBP has well-drafted regulations and timelines for sharing data with both importers and IP owners, those regulations have not been reasonably implemented and suffer from lack of automation. In particular, CBP regulations provide for notice of detention to the Importer with a seven-day period to respond before disclosing information to the IP owner (19 CFR 133.21(b) but

- The same detailed information is not provided to the importer
- The information often goes to an intermediary (e.g. express carrier) rather than the importer/consignee
- The information is not shared timely or through an automated system with either the importer or IP owner

Recommendation #14 Trusted IPR Vendor Background:
What one company considers a "bad actor" might actually be a contractual issue. We suggest focusing on a "Known" Vendor list, which would allow CBP to focus more closely on the importers who are not authorized or otherwise known to CBP with prior importation history. CBP has a history of repeatedly detaining genuine goods based upon reasonable suspicions that the goods are counterfeit because they are goods traded lawfully in the secondary, unauthorized, parallel or gray market. The goods are often regarded as suspicious because the importer is "unknown" to CBP or the goods are older, reconditioned or refurbished models. The importers are often long-time importers who share the interests of CBP and IP rights holders in stopping counterfeit goods. CBP's effort to focus on and find counterfeit goods would be greatly enhanced by diminishing the number of inspections, detention, seizure and forfeiture actions involving goods ultimately determined to be genuine.

The below example provides some background scenarios on why this could be useful.

Example 1: UNIM Corporation (Unauthorized Importer) has been in business for ten (10) years routinely importing brand name electronics, health and beauty aids into the US. UNIM has a strong policy against

buying and selling counterfeit goods and has no history with CBP of seizures involving counterfeit goods. It also consistently checks CBP recordations to avoid products which are gray market restricted or subject to the Lever Rule.

UNIM has received many detention notices from CBP based upon a suspicion that its goods were counterfeit. In most instances they obtained release of the goods by proving authenticity (either during the detention stage or after seizure). On a few occasions, they have abandoned such goods where the value of the shipments were very small and the evidence of authenticity was unavailable, or found unacceptable by CBP, and the cost of further pursuit of the issue was prohibitive. On one occasion a shipment included goods concededly counterfeit: UNIM abandoned those goods upon learning that counterfeit goods had been shipped and cooperated with CBP in its investigation of the transaction.

Also, UNIM has often been sued, and successfully defended against, claims that the goods which they bought and sold were counterfeit or infringing. There have been many cases involving counterfeit claims which were essentially claims to further restrict unauthorized trade in genuine goods.

Scenario 1: UNIM imported a small shipment of used computer equipment ($25,000 value) which had been refurbished abroad. CBP determined that the goods were counterfeit based upon a proprietary test provided to it by the brand owner.

- Based upon that decision, CBP issued a seizure notice and skipped the detention notice process.
- The notice to UNIM provided no information regarding the basis for determining the goods were counterfeit.
- UNIM requested samples, images or photos and the FPF office denied the request, advised UNIM to file a FOIA request, its FOIA request was denied and the CEE subsequently provided images.
- A request for an explanation of the basis of the determination that the goods were counterfeit was denied on the grounds that the information provided to CBP by the brand owner is confidential.

Scenario 2: UNIM imported a shipment of fragrance products which CBP detained based upon a suspicion that the goods were counterfeit. The goods were detained and a detention notice placed in the mail stating that the goods were detained for possible violation of the trademark laws and with an accompanying notice that the importer had 7 days to respond to the notice before CBP would provide detailed information to the IP owner.

- UNIM received the detention/7-day notice five days later and immediately requested a sample, images or photos to determine whether to contest or concede the detention.
- Forty-five days later, with no response to the request for a sample, photos or images, CBP issued a seizure notice.
- The importer repeatedly spoke to CBP on the phone, filed written requests for extensions of time to respond to the detention notice; filed responsive petitions to the detention and seizure notices.
- Images were provided six months after the detention and based upon those images, the importer conceded that the goods were counterfeit and abandoned the goods.

Issues:

1. Does CBP have defined authority to dispense with the detention notice process? When should it exercise that authority?
2. Does CBP have good information to provide detention notices electronically on the date of detention, and if not, can it do so?
3. Can CBP share more detailed information in its detention notice, allowing the importer to understand the reason for CBP's suspicion so that it may respond to that suspicion?
4. CBP currently does not take advantage of its authority to share samples, photos or images with the importer to enable it to resolve the problem during the 7-day period for an importer's response to a detention notice (19 CFR 133.21(a)(1). Can it, or should it, do so?
5. CBP currently does not take advantage of its authority to share samples, photos or images with the IP owner in a timely fashion to promote early resolution of its suspicions (19 CFR 133.21(a)(3) for redacted samples and 19 CFR 133.21 and 19 CFR 133.21(c) and (e) for unredacted. Can it, or should it, do so?

6. CBP currently does not have a way to treat a company like UNIM as low risk, and in fact, more than likely treats it as high-risk, resulting in unnecessary devotion of substantial resources into prolonged detention-petition-seizure-petition-release procedures. Can CBP develop risk assessment criteria that lowers its risk assessment of companies like UNIM?

Example 2: In many instances, a shipment of goods may be detained due to the presence of what CBP determines to be a potentially infringing accessory. By way of example, a shipment of portable wireless speakers may be packaged with an adaptor that is claimed to bear an infringing certification mark or a manual that is alleged to include an infringing reference to another's trademark.

In these types of situations, the importer typically had no intent to purchase/import goods with potentially infringing marks. Often the main article, in this case the speakers, bear the importer's own branding, so there is no attempt to trade off the allegedly infringed mark. In the example, it is unlikely that the adaptor or the manual would have been visible to a potential purchaser. The speakers themselves are not counterfeit.

In such circumstances, we propose that the importer be given the opportunity to manipulate the shipment to remove and destroy the allegedly infringing accessory/manual under Customs' supervision at the CES or at a local bonded warehouse to resolve the detention outside of the seizure process. Under the Customs laws and regulations, such manipulation is permissible where goods are considered confusingly similar (*See* 19 C.F.R. §133.22). Under this proposal, no infringing goods would enter U.S. commerce and any potential health and safety concerns would be eliminated. Seizure is inefficient and expensive for both the importer and CBP. Implementation of this proposal would help promote greater Government efficiencies.

Rights/Brandholder Concerns about a Trusted IRP Vendor Program

- At the July 27, 2016, quarterly meeting, the IPR Working Group concluded it efforts on the proposed IPR Known Importer Program, stating that "after extensive exploration and discussion, the COAC recommends that the Known Importer Program initiative cannot be managed uniformly by all trade associations to pilot and/or implement the program at such time."
- At the August 23, 2017, quarterly meeting, the COAC recommended that the IPR Working Group continue to consider other approaches to developing a known IPR supply chain program that includes working with the National IPR Center to extend Trade Association participants to promote the "Report IP Theft" campaign and encourage real-time reporting of IPR violations through a newly established 800 Hotline.
- CBP provided the IPR Working Group information on using CBP's e-Allegations system as a way to report IPR-related trade violations, in addition to IPR Center's "Report IP Theft" button. CBP also informed the working group of its efforts to promote the use of e-Allegations by the trade community and the public.
- During March 2020 discussions, the IPR Working Group suggested focusing on a "Trusted IPR Vendor List", which would allow CBP to focus more closely on the importers who are not authorized or otherwise known to CBP with prior importation history.
- If the COAC decides to move forward with the recommendation, we offer the following guidance:
    - Seller and importer vetting are of the utmost importance to the genuine supply chain. The current recommendation designates responsibility to various Centers of Excellence to make a vetting determination without standards or guidelines as to the process of vetting. If implemented, the COAC should establish clear standards and definitions for vetting.
    - A trade group membership or other similar organization cannot be relied on for vetting because they do not have the expertise or bandwidth to manage this detailed and technical process. Mere affiliation with an organization cannot substitute proper vetting.
    - Scale is critical. The stated purpose of the recommendation is to reduce the number of shipments CBP must open to detect counterfeits. The only way to accomplish this objective, is if the program has thousands of companies and importers on the list. If

the companies lack proper vetting, this recommendation could be used directly against the state purpose, to import additional counterfeit goods.
    - In the past, counterfeiters have been able to capture "cleared" or "known actor" lists. Counterfeit importers who are not on the list could hijack the identity of an importer on the list to ship counterfeits into the U.S.
    - If adopted, COAC should recommend recertification as a requirement every 3-6 months.
    - COAC should consider how a non-compliant actor would be removed from the list. If the current recommendation stands as written, once a vendor becomes verified, you may remain on the list indefinitely. Policies that should be considered include: one strike and you're out, an appeal process, barring an importer if failure to comply, etc.

Additional Discussion Points

- Industry partners and CBP can work together to increase the accuracy and completeness of information provided to CBP on small shipments entering the United States with the goals of decreasing unnecessary IPR exams, increasing CBP's ability to target shipments containing IPR-infringing goods, and reducing processing costs without the adoption of this recommendation.
- CBP and the IPR Working Group members can explore how other mechanisms such as block chain may be used to promote partnership on the secure provision of IPR-related supply chain data between CBP, rights holders, and potentially e-commerce platforms.

Background to Recommendation #22 on Co-Mingling

For sales made via eCommerce platforms that are fulfilled by the platform by one of its warehouses, the online merchant has the option of maintaining segregated inventory in the warehouse (barcoded and stickered with their specific merchant ID), or going "stickerless" which allows their inventory to be co-mingled with that of other merchants who sell the same SKU. The primary reason for doing this is to allow the eCommerce platform to fulfill a sale from the closest warehouse to the customer, allowing for faster delivery. Merchants see this as a way to provide better service to their customer because people want things as fast as possible. The risk, of course, is that the well-intended merchant's inventory can get co-mingled with a less scrupulous merchant's counterfeit inventory. In turn, their customer can end up getting counterfeit product. For the online customer, it's impossible to know how their order will be fulfilled. They can't tell if the inventory has been co-mingled or not.

Background to Recommendation #25 on Suspension and Debarment

CBP has instituted an operational approach to combating trade violations, safeguarding economic security and detecting, deterring, and disrupting illicit trade practices. In line with this strategy, CBP has incorporated non-procurement suspension and debarment (S&D) procedures into the trade enforcement process as an added defense measure. These are captured into the SAM database that CBP uses to manage these cases.