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WHITE PAPER

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Combating Forced Labor: The Increased Use of Withhold Release Orders and Formal Findings

As has been described in previous Jones Day *White Papers*, the global problem of human trafficking—and the goal to eradicate it—profoundly effects corporate entities with global supply chains. This is particularly true for corporate entities that import goods into the United States, as it has long been the case that goods made with forced labor are not entitled to entry or importation. The United States Customs and Border Protection may use Withhold Release Orders (WROs), or formal findings, to enforce this prohibition. As indicated by the recent increase in the number of WROs issued, and statements made by various governmental agencies, imported goods are being more heavily scrutinized for evidence that forced labor was present in their supply chain, and the issuance of WROs and formal findings will likely be used more frequently than has been seen historically. If an importer is issued a WRO, or a formal finding, the goods will be denied entry or seized until the importer is able to affirmatively show that the goods were not, in fact, produced with forced labor. Companies should consult with counsel and labor experts to ensure compliance with best practices and relevant laws.

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INTRODUCTION

As has been described in previous Jones Day *White Papers*, the global problem of human trafficking—and the goal to eradicate it—profoundly affects corporate entities with global supply chains.¹ We have previously discussed steps that corporate entities should consider taking when examining their supply chains for signs of forced labor. In this *White Paper*, we describe the effect human trafficking may have on a corporate entity's ability to import and export goods and the uptick in the U.S. government's use of Withhold Release Orders ("WROs") to prevent goods made with forced labor from entering the United States.

It has long been the case that goods made with forced labor are not entitled to entry or importation into the United States.² U.S. Customs and Border Protection ("CBP") can prevent importation of goods made with forced labor either by issuing a WRO or a formal finding against an importer, resulting in the exclusion or possible seizure of the goods.³ Though these enforcement tools have been used sparingly in the past, the unprecedented issuance of five WROs on September 30, 2019, signals that preventing prohibited goods made with forced labor from entering the United States is an enforcement priority for CBP.⁴

THE BASICS OF WITHHOLD RELEASE ORDERS AND FORMAL FINDINGS

Forced labor is defined as "convict labor, forced labor, or indentured labor under penal sanctions," and includes forced child labor.⁵ Any port director or principal CBP officer who has reason to believe that goods being imported into the United States have been made with forced labor shall communicate his or her belief to the CBP Commissioner.⁶ Additionally, anyone outside of CBP who has reason to believe that imported goods were produced with forced labor may report to the Commissioner through the e-Allegations Online Trade Violation Reporting System, or by calling 1-800-BE-ALERT.⁷ The Forced Labor Division within CBP's Office of Trade leads the agency's enforcement efforts prohibiting the importation of goods made with forced labor.

Upon receipt of a report, the Commissioner will conduct an investigation that "appears to be warranted by the circumstances of the case," considering any representations offered by "foreign interests, importers, domestic producers,

or other interested persons" to determine whether there is evidence that forced labor has been used.⁸ Due to variation in the amount and reliability of information that CBP may receive, the scope and scale of investigations are left to the Commissioner's discretion.⁹

If the Commissioner finds information that "reasonably but not conclusively" indicates that the goods have been made with forced labor, a WRO shall be issued, which prevents the goods from release into the United States.¹⁰ The importer can then either re-export the goods or contend that the goods were not made with forced labor. To obtain release of shipments subject to a WRO, importers must submit a certificate of origin signed by the foreign seller along with a detailed statement demonstrating that the goods were not produced with forced labor, typically through a supply chain audit report.¹¹ CBP may then either release or exclude the goods.¹²

If the Commissioner obtains evidence sufficient to make a determination that the goods have been produced in violation of the ban on importation of goods made with forced labor, the Commissioner, with the approval of the Secretary of the Treasury, will publish a formal finding in the *Customs Bulletin* and the *Federal Register*.¹³ A formal finding requires "conclusive evidence, i.e., probable cause, that the goods were made with forced labor"—more evidence than is required for a WRO.¹⁴ If the evidence submitted by the importer fails to establish that the goods were not produced with forced labor, the goods will be treated as prohibited under 19 U.S.C. § 1307 and may be seized and subject to summary forfeiture proceedings.¹⁵

WROs and formal findings remain in effect until revoked or modified, which may occur only if evidence shows that the goods were not made or are no longer being made with forced labor, or if the goods are no longer being or likely to be imported into the United States.¹⁶ A recent example of the evidence sufficient to revoke a WRO involved a Malaysian company seeking to import stevia products into the United States in 2017.¹⁷ In response to CBP's investigation and imposition of a WRO, the importer provided two audit reports that found no evidence of forced labor, proper procedures in place to assess suppliers in the company's supply chain, proper traceability systems, and conformance with relevant regulations.¹⁸ The company also provided its Global Labor Policy and Supplier Code of Conduct, as well as detailed purchase records and financial documentation to demonstrate that the goods were not made with forced

labor.¹⁹ CBP ultimately released the company's shipments based on the evidence submitted by the importer.

HISTORICAL ENFORCEMENT THROUGH WROS AND FORMAL FINDINGS

The frequency with which CBP has issued WROs and formal findings has been inconsistent and somewhat unpredictable. There have been only 45 WROs issued since the first one was issued in 1953.²⁰ Though most countries have only one or two importers who have received a WRO, Chinese importers have received thirty-two.²¹ China is also the only country from which importers have been subject to formal findings by CBP, receiving six between 1992 and 1996.²²

The relatively small number of WROs and formal findings imposed by CBP is likely the result of the "consumptive demand" exception to the ban on importation of goods made with forced labor. The exception allowed the importation of goods produced with forced labor so long as the goods were not produced "in such quantities in the United States as to meet the consumptive demands of the United States."²³ The long-standing consumptive demand loophole to the ban on goods produced with forced labor was revoked on February 24, 2016, when President Obama signed the Trade Facilitation and Trade Enforcement Act of 2015, thereby enhancing CBP's ability to prevent the importation of goods made with forced labor.²⁴

Between 2000 and 2015, no WROs or formal findings were issued.²⁵ Since 2016, however, 13 WROs have been issued—four in 2016, two in 2018, and seven in 2019.²⁶ On September 30, 2019, five WROs were issued against manufacturers and raw material providers from five different countries suspected of using forced labor.²⁷ In response to that unprecedented number of WROs, the Executive Assistant Commissioner of CBP's Office of Trade stated that "CBP is firmly committed to identifying and preventing products made with the use of forced labor from entering the stream of U.S. Commerce," and that "[t]he effort put into investigating these producers highlights CBP's priority attention on this issue."²⁸ The most recent list of goods known to have been produced globally by forced or child labor compiled by the U.S. Department of Labor

identifies 148 goods produced in 76 countries, and may be a roadmap for future CBP enforcement actions.²⁹

While CBP does not release the evidence relied upon for particular WROs, it has stated that it relies on internal intelligence as well as third-party audits, information provided by civil society groups, and nongovernmental organizations who have expertise in the area of forced labor.³⁰ For example, one of the WROs issued on September 30, 2019, targeted a Malaysian manufacturer of rubber gloves that had been the subject of public reports of possible forced labor.³¹ Workers from one of the company's factories alleged that they were forced to work at least twelve hours a day, seven days a week, with only one day off per month.³² The workers also alleged that the company confiscated their passports and improperly withheld wages.³³

Another recent WRO, issued on November 1, 2019, prohibited the importation of tobacco from Malawi.³⁴ The U.S. Department of Labor has reported that children in Malawi are subjected to forced labor, including harvesting tobacco.³⁵ Children forced to harvest tobacco are at risk for illness from nicotine absorption, and are exposed to pesticides, chemicals, and harsh weather conditions.³⁶

INCREASED SCRUTINY OF IMPORTED GOODS PRODUCED WITH FORCED LABOR

There are other indications that the United States government continues to prioritize enforcement of the forced labor ban, and as a result companies with global supply chains should expect greater scrutiny of imported goods for indications that forced labor was used in their production.

On January 31, 2020, President Trump issued an "Executive Order on Combating Human Trafficking and Online Child Exploitation in the United States."³⁷ The order states that the Executive Branch will "prioritize its resources to vigorously prosecute offenders, to assist victims, and to provide prevention education to combat human trafficking and online sexual exploitation of children."³⁸ The order also provides for a number of steps to combat human trafficking, including: a full-time position at the Domestic Policy Council to work on human trafficking issues; an online list of the Federal Government's

human trafficking resources; improved methodologies of estimating the prevalence of human trafficking; and increased coordination between the government and law enforcement to prevent, detect, and prosecute human trafficking.³⁹

Also in January 2020, the Department of Homeland Security (“DHS”) released a comprehensive “Strategy to Combat Human Trafficking, the Importation of Goods Produced with Forced Labor, and Child Sexual Exploitation,” which outlined numerous action steps to “strengthen international, interagency, and non-governmental coordination to interdict illicit goods in our supply chains.”⁴⁰ These steps include increasing investigative and enforcement capacity at DHS, improving education and outreach to industry partners, and encouraging international partners to adopt reciprocal safeguards against forced labor.⁴¹ DHS reiterates in this strategy that WROs and formal findings are enforcement mechanisms that are utilized to prevent the importation of goods made with forced labor.⁴²

In October 2019, the Congressional-Executive Commission on China (“CECC”) held a hearing on “Forced Labor, Mass Internment, and Social Control in Xinjiang,” to examine the way that products made in forced labor camps in Xinjiang, China, had entered global supply chains.⁴³ Following the hearing, on October 31, 2019, the chair and co-chair of the CECC recommended that CBP investigate and block goods made with forced labor in Xinjiang.⁴⁴ The letter detailed how forced labor had been used to make goods found in the supply chains of several global companies and requested that the Commissioner of CBP take “aggressive action” by issuing a WRO.⁴⁵ In November 2019, a group of U.S. senators sent a letter to several cabinet agencies requesting a report on actions taken by the U.S. government to ensure the federal procurement process is not complicit in human trafficking or forced labor.⁴⁶

On July 31, 2019, U.S. Immigration and Customs Enforcement’s Homeland Security Investigations (HSI) Global Trade Investigations Division announced a first of its kind partnership with Liberty Shared, a global nongovernmental organization, to combat forced labor in global commerce.⁴⁷ By partnering with organizations with information about corporate supply chains and financial flows “HSI seeks to gather information that will lead to successful prosecutions and significant steps being made in eliminating forced labor.”⁴⁸

CONCLUSION

The recent increase in the issuance of WROs by CBP and its stated intention to ramp up enforcement efforts, and the continuing Congressional focus on human trafficking, highlights that preventing the importation of goods produced using forced labor remains an important enforcement priority.

As such, companies should consider following best practices for global supply chains outlined by CBP.⁴⁹ These practices include developing a comprehensive supply chain profile so that any importer into the United States understands the entirety of the chain of production, from raw materials to finished goods.⁵⁰ Companies should also consider requiring a written code of conduct for all suppliers in their global supply chain, including specific language as to minimum labor standards.⁵¹ Finally, companies should consider whether their internal control process for supply chain management is robust, including regular risk assessments and audits to detect and deter the use of forced labor and to promptly remediate any identified problems.⁵²

Companies should consult with counsel and labor experts to ensure that their current practices and policies regarding the use of labor in their supply chains are sufficient to comply with U.S. law.

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