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Department of Homeland Security Publishes FAQs on North Korean Labor in Supply Chains

On March 30, the U.S. Department of Homeland Security published FAQs relating to Section 321(b) of the Countering Americas Adversaries Through Sanctions Act. The CAATSA was adopted on August 2, 2017. Section 321(b) restricts entry into the United States of goods made with North Korean labor, wherever located, and imposes sanctions on foreign persons that employ North Korean labor.

This Alert describes the more significant FAQs published by DHS. For additional information on the CAATSA, see our earlier Alert [here](#).

Rebutting the Presumption that North Korean Labor Is Forced Labor

The CAATSA established a presumption that goods made with North Korean labor involve the use of forced labor. As a result, goods made with North Korean labor generally are prohibited under Section 307 of the Tariff Act, which prohibits the importation into the United States of goods, wares, articles and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor, forced labor or indentured labor under penal sanctions. However, the presumption can be rebutted if the Commissioner of Customs and Border Protection finds, by “clear and convincing evidence,” that the goods, wares, articles or merchandise were not produced with convict labor, forced labor or indentured labor under penal sanctions.

According to the FAQs, “clear and convincing evidence” is a higher standard of proof than a preponderance of the evidence, and generally means that a claim or contention is highly probable. An importer who wishes to import merchandise that is subject to the rebuttable presumption under the CAATSA carries the burden to overcome the presumption by providing sufficient information to meet the clear and convincing standard.

Due Diligence to Mitigate the Risk of North Korean Labor in the Supply Chain

The FAQs recommend that companies review due diligence best practices and closely reexamine their entire supply chain with the knowledge of high risk countries and sectors for North Korean workers.

The FAQs note that, generally, human rights due diligence and related practices identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed. The FAQs acknowledge that due diligence will likely vary based on the size of the company and industry. The FAQs also note that due diligence is a flexible, risk-based process and not a specific formula for companies to follow.

The FAQs provide the following examples of actions that may be taken to ensure due diligence:

- a high-level statement of policy demonstrating the company’s commitment to respect human rights and labor rights;
- a rigorous continuous risk assessment of actual and potential human rights and labor impacts or risks of company activities and relationships, which is undertaken in consultation with relevant stakeholders, such as governments, local business partners and members of civil society such as local communities, workers, trade unions, vulnerable groups and NGOs;

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- integrating the foregoing commitments and assessments into internal control and oversight systems of company operations and supply chains; and
- tracking and reporting on areas of risk.

The FAQs also indicate that importers have the responsibility to exercise reasonable care and provide CBP with such information as is necessary to enable CBP to determine if merchandise may be released from CBP custody. As it relates to North Korean forced labor, to demonstrate reasonable care, an importer may present any material that it chooses to, which may include comprehensive due diligence efforts that may have been undertaken, such as:

- Information demonstrating that it engaged meaningfully with affected stakeholders, including workers and trade unions, as part of the due diligence process;
- Workforce composition at the location in question;
- Training materials on North Korean forced labor prohibitions that have been provided to suppliers and sub-contractors;
- Company policies, and evidence of implementation, on using North Korean laborers;
- Contracts with suppliers and sub-contractors that state its policy on North Korean forced labor;
- Publishing the full names of all authorized production units and processing facilities, the worksite addresses, the parent company of the business at the worksite, the types of products made and the number of workers at each worksite;
- Information on how and to whom wages are paid at the location;
- Information demonstrating that recruitment agencies are within the scope of any third-party audit with suppliers;
- Documents verifying the use of authorized recruitment agencies and brokers or that the company uses direct recruitment;
- Documents verifying that the fee structure presented by the recruitment agency is transparent and has been verified through worker interviews;
- If the company has reimbursed any fees paid, verification of such reimbursement;
- Demonstrated commitment to human rights and labor due diligence at the highest levels of the company; and
- Results of human rights and labor impact assessments.

Additional CBP Guidance on Exercising Reasonable Care

The FAQs note that importers have an obligation to exercise reasonable care (as discussed above) and take all necessary and appropriate steps to ensure that goods entering the United States comply with all laws and regulations, including Section 307 of the Tariff Act and the CAATSA. In this context, the FAQs note that CBP recently updated its Informed Compliance Publication on reasonable care (this occurred during September 2017). CBP's guidance, which is described below, is linked to in the FAQs.

In the forced labor context, CBP recommends that importers examine the following questions, which, in its view, may prompt or suggest a program, framework or methodology that importers may find useful in avoiding compliance problems and meeting reasonable care responsibilities:

- Have you taken reliable measures to ensure imported goods are not produced wholly or in part with convict labor, forced labor and/or indentured labor (including forced or indentured child labor)?

- Have you established reliable procedures to ensure you are not importing goods in violation of Section 307 of the Tariff Act and related provisions?
- Do you know how your goods are made, from raw materials to finished goods, by whom, where and under what labor conditions?
- Have you reviewed CBP's "Forced Labor" webpage, which includes a list of active withhold release orders and findings, as well as forced labor fact sheets?
- Have you reviewed the Department of Labor's "List of Goods Produced by Child Labor or Forced Labor" to familiarize yourself with at-risk country and commodity combinations?
- Have you obtained a ruling from CBP regarding the admissibility of goods under Section 307 of the Tariff Act and, if so, have you established reliable procedures to ensure that you followed the ruling and brought it to CBP's attention?
- Have you established a reliable procedure of conducting periodic internal audits to check for forced labor in your supply chain?
- Have you established a reliable procedure of having a third-party auditor familiar with evaluating forced labor risks conduct periodic, unannounced audits of your supply chain for forced labor?
- Have you reviewed the International Labour Organization's "Indicators of Forced Labour" booklet?
- Do you vet new suppliers/vendors for forced labor risks through questionnaires or some other means?
- Do your contracts with suppliers include terms that prohibit the use of forced labor, a time frame by which to take corrective action if forced labor is identified and the consequences if corrective action is not taken, such as the termination of the contractual relationship?
- Do you have a comprehensive and transparent social compliance system in place? Have you reviewed the Department of Labor's "Comply Chain" webpage? (Click [here](#) for a recent webinar discussing Comply Chain that was moderated by Michael Littenberg, one of the authors of this Alert).
- Have you developed a reliable program or procedure to maintain and produce any required customs entry documentation and supporting information?

Involvement of North Korean Labor in the Transportation of Goods

The FAQs note that, generally, if North Korean nationals or citizens are not involved in the mining, production or manufacturing of imported merchandise, that merchandise is not prohibited under Section 321(b). However, if North Korean nationals or citizens are present at the docks or otherwise involved in the movement and shipping of merchandise, that may violate other provisions of the CAATSA or other U.S. laws and regulations, such as the North Korea Sanctions Regulations administered and enforced by the Treasury Department's Office of Foreign Assets Control, even if not subject to Section 321(b).

Enforcement

CBP and U.S. Immigration and Customs Enforcement, which are both part of DHS, can enforce Section 321(b) through civil and criminal enforcement actions, respectively.

The FAQs note that, if CBP finds evidence that goods have been produced with prohibited North Korean labor, CBP will deny entry and undertake available enforcement actions, which may include detention, seizure and forfeiture of the goods. Civil penalties may also be considered where appropriate. CBP generally does not publicly report information on specific detentions, seizures, enforcement actions and other pending cases until the enforcement action is complete. If a detention leads to a penalty proceeding, after the proceeding is closed, CBP may disclose the identity of the violator, the section of the law violated, the amount of the penalty assessed, loss of revenue, mitigated

amount and amount of money paid, in response to a request for that information under The Freedom of Information Act.

ICE Homeland Security Investigations may initiate criminal investigations for violations of U.S. law. ICE HSI's criminal enforcement authorities can lead to the criminal prosecution of individuals and/or corporations for their roles in the importation of goods into the United States in violation of existing laws.

The FAQs note that CBP and ICE HSI may consider a company's due diligence when contemplating engaging in an enforcement action.

Reporting

The FAQs encourage companies that find North Korean workers in their supply chains to report their findings to CBP's E-allegations site, as well as ICE's forced labor intake point.

The FAQs note that information on overseas suppliers who are using North Korean labor should be reported through the same mechanism. ICE has the discretion and statutory authorization to pay for information and/or evidence that is used in support of criminal investigations.

Selected Resources for Assessing Forced Labor Risk

Specific to North Korea, the FAQs note that the State Department regularly reports on countries and sectors hosting North Korean workers in its annual reports, including the [Country Reports on Human Rights Practices](#) and [Trafficking in Persons Report](#). The FAQs also reference research by the following NGOs: the [Database Center for North Korean Human Rights](#), the [ASAN Institute](#), [C4ADS](#) and the [Committee for Human Rights in North Korea](#).

More generally, the FAQs reference the DOL's [List of Goods Produced by Child Labor or Forced Labor](#). The List includes goods that DOL has reason to believe are produced by forced labor or child labor in the country listed. The List includes the country where the exploitation is taking place, regardless of the nationality of workers. Accordingly, the North Korean goods listed are goods produced in North Korea. Although DOL may have evidence that goods produced in other countries are produced by North Korean workers, those goods are listed under the country where the production is taking place.

Additional tools, reports, initiatives and guidance are listed in the Appendix to the FAQs. These include both U.S. Government resources, resources developed by NGOs and selected international principals and guidance.

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