

Lawyers: Forced Labor Detentions Are Happening After Goods Are Cleared

A Husch Blackwell partner said that although most importers have not been surprised when CBP tells them they are intending to do an intensive exam on their goods when they arrive in port over forced labor issues, his firm has had several clients whose goods were cleared, and then, in the first month after that date, CBP issues a redelivery notice.

Robert Stang, who was speaking during a July 13 [webinar](#) about compliance with the Uyghur Forced Labor Prevention Act, said that in those cases, the goods could already be for sale online or on shelves. “There can be some pretty hefty fines if you fail to redeliver timely,” he said. CBP can demand liquidated damages equal to the value of the goods, the webinar’s presentation slides said. But, in that case, CBP will give you a reason why it’s asking for redelivery, which can help importers decide how to proceed.

Jasmine Martel, another international trade attorney at the firm, advised that if your good has a link to Xinjiang, it’s better to reexport and not try to rebut the presumption that forced labor was involved somewhere in the good’s supply chain.

But William Jansen, branch manager, customs brokerage at Noatum Logistics, cautioned that you have to make sure that reexports’ paperwork is proper. He said CBP has been looking for a booking on a carrier and an immediate export bond. He said sometimes CBP has erroneously released the goods instead of canceling the entry, which triggers duty payment.

Jansen agreed with Stang that just because a shipment clears doesn’t mean an importer is in the clear when it comes to UFLPA. He said he’s seen requests for redelivery “almost at the final hour.”

Stang said there are proactive steps importers can take, as they do their best to map their complete supply chain

back to raw materials. He said companies can give written guidance to vendors on what’s not permissible in their labor practices and write into purchase orders agreements that the firms will maintain production records and provide them if requested. He said purchase orders should also designate “who will be responsible for cost, including transportation and logistics, in responding to UFLPA enforcement action or reexport of the goods.”

He said these sorts of agreements are ones that Chinese firms have agreed to if they have a relationship with the American buyers, for instance, when those buyers have traveled to their factories over the years.

He said that in those cases, the firm sees that the two companies work out language that all feel comfortable with. “And if you can’t, you have to ask yourself why,” he said.

He said CBP will issue binding rulings that goods are not subject to UFLPA if you request the ruling before the goods arrive. But, he cautioned, you would have to ask for a fresh ruling any time a vendor changes, and maybe even if you change a consolidation center. There have been no UFLPA rulings yet. — *Mara Lee*

CBP Discussing Lower Standard of Care, Optional Submission of Some Data Under 21CCF

As CBP moves toward collecting data from “non-traditional” parties earlier in the supply chain as part of its reimaged 21st Century Customs Framework, major questions include the standard to which that data will be held, as well as how CBP will enforce those standards on supply chain actors beyond the agency’s jurisdiction, CBP and industry officials said during a [panel](#) discussion July 18.

Earlier entry data has from the 21CCF’s inception been a key part of the discussion. CBP hopes to capture data directly from supply chain actors from the moment a transaction begins, starting with sales data from the online marketplace if one is involved, then ingredient and country of origin

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information from the manufacturer and container seal data showing any tampering during shipment, said Gail Kan, acting executive director-trade policy & programs at CBP.

“All of that can be happening in real time and being provided to CBP at a much earlier point of time than we're getting it today,” said Kan, speaking at CBP’s Trade Facilitation and Cargo Security Summit. That could result in the earlier filing of the entry by the broker or importer, and in turn the earlier release of the shipment.

CBP intends to make these types of filing arrangements optional, in an acknowledgement that the technologies required are not available to all, Kan said. “You have bigger companies out there that are going to be able to take advantage of technology differently than the smaller companies, the mom and pops or the foreign sellers sitting at home selling on the different marketplaces,” she said.

“In the formal context, we are giving individual entities the option, the importers the option of being able to provide this type of data to CBP, rather than make it mandatory to accommodate the differences that we know the trade is going to experience as we move forward into the next 50 or so years,” Kan said.

But for those who chose to use it, the inclusion of filing by non-traditional actors in the entry process will raise enforcement concerns, said Lenny Feldman of Sandler Travis, speaking on the same panel. “Are we concerned that a party that CBP does not have jurisdiction over now has the right to file that information that we will be used for targeting?” Feldman asked. “Is it ready for prime time?”

Currently, the law says filers of entry data must exercise reasonable care or, for brokers, reasonable supervision or control, Feldman said. But that may be “too high of a bar” for data streaming in “from all these parties across the globe earlier on in the process,” he said. “Are we looking at a strict liability standard, a penalty right off the bat if you get the data wrong? I'd hope not. But maybe we have to look at what's reasonably reliable or how parties can reasonably verify data, and if not, a reasonable belief would be appropriate,” Feldman said.

Similarly, CBP also is looking at using Importer Security Filing data for screening purposes, as it adds “another layer

of liability or exposure for these parties who really might be trying their best to provide the data, but again, it might be more difficult to assure its accuracy, Feldman said. “Maybe CBP is not expecting that same level of accuracy, but they're expecting an indication of what's coming in having an idea of what they need to stop and again, that's important.”

Homing in on the responsibilities of parties in the new entry process in both the formal and informal contexts will be critical, especially with so many foreign actors involved, Feldman said. “Do we need a bond” to “show that they have some connectivity to the U.S. and they are going to be held accountable?” he asked. “And what do we do about these foreign parties who are going to be providing this data, if in the past we have not had jurisdiction over them and frankly, we probably never will?”

According to Kan, CBP has begun to tackle some of these questions, at least in the context of revisions to 19 USC 1321 on low value entries. Part of CBP’s approach is to have “one data set,” where security filings for manifest purposes will “be able to transfer seamlessly into the entry side,” Kan said. To accomplish that, the agency will have to “break through that wall” created by the “Security Act prohibition about not being allowed to use certain data,” but also “make it palatable enough for the trade” by being cognizant about concerns around the standard of care, she said.

CBP has “reached consensus” that to apply reasonable care, at least in the de minimis context, is “not the right way to go,” and instead is “adopting that Security Act concept of reasonably reliable, which is a much lower standard,” Kan said.

“In putting that standard into the de minimis context, what we wanted to do was make sure” parties that aren’t accustomed to sending CBP data “are comfortable providing data to us that might not be at the same quality initially as the entry data set,” Kan said. They will be held to “a lower standard, which is palatable hopefully to the trade since they're used to it today in the security context,” she said. “For everything else that we consider to be entry data we'll hold them at the reasonable care standard or a different standard, depending on how we regulate.”

“Having that flexibility and having that cognizant awareness of the discomfort of asking for all of this new data

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upfront under too high of a standard is all built into the 1321 [Section 321] provision, as we've agreed upon from our discussions," Kan said. — *Brian Feito*

CBP to Increase User Fees 18.6% for FY23

CBP will increase Consolidated Omnibus Budget Reconciliation Act (COBRA) fees by 18.629% to adjust for inflation in fiscal year 2023, the agency said in a [notice](#). Affected fees include the merchandise processing fee, vessel and truck arrival fees and the customs broker permit user fee. The Fixing America's Surface Transportation Act, passed in 2015, required that CBP make inflation adjustments and fee limitations when deemed necessary (see [ITT 12/04/2015](#)). The fees are effective Oct. 1, the start of FY23.

Neal: GSP, MTB Will Get Figured Out by End of Year

House Ways and Means Chairman Richard Neal, D-Mass., said that even though the politics around an end-of-year tax extender may change if Congress makes some renewable energy tax credits permanent, he believes it's still likely that the modernization act for the Generalized System of Preferences benefits program and Miscellaneous Tariff Bill can get done by the end of the year.

"Those are priorities for me," he said in a hallway interview at the Capitol July 29, the last day before the House leaves for August recess. "And we feel very strongly about it. And there's going to be a lot of room here at the end of the session, I think, to get a lot of these things perfected, and passed."

Committee ranking member Kevin Brady, R-Texas, said the committee Republicans would like to include changes to the competitive needs limitation rules in a Generalized System of Preferences renewal, similar to what was proposed in a bipartisan bill (see [ITT 12/10/2021](#)) introduced by Reps. Jackie Walorski, R-Ind., and Stephanie Murphy, D-Fla.

He said the Democrats and Republicans haven't finished their discussion on what the elements of negotiation will be, "but again, we're hopeful we have these discussions in August with staff ... but I still worry this may not get serious til November. That's what I worry about."

"It's going to be chaos in the lame duck session, especially if there's a change in majority, as expected, so you gotta prep all your food now ... and figure out what that final stuff is. As you know, there's some big gaps to bridge in trade, not necessarily on GSP and MTB."

Brady said during a hallway interview that the Senate trade title's language on Section 301 exclusions, which is supported by House Republicans, is an area where it's going to take work to find consensus. He said it's not true that it would tie the administration's hands—which is what some opponents say—because of the language that says the U.S. trade representative can inform Congress she will not reopen an exclusions process because it would undermine the action.

"There are a number of Democrats who have been asking the administration to do a real, transparent [Section] 301 exclusion process. My guess is, the answer lies somewhere with fine-tuning or changing the Senate bill somewhat to try to find that sweet spot."

When asked by *International Trade Today* if he'd give the Section 301 tariff exclusion language a 50/50 chance to get passed, he said he thought the chances were not that good.

But he said he hopes he's wrong about that. "We really need one, this economy's really changed so dramatically in the last two years. You've got to have a good process in place. Not one that's automatic for exclusions, and not one that automatically dismisses, rejects those applicants, but one that really looks at each one and says, 'This is good for America; this is not.'"

He said Senate Finance and House Ways and Means committee leaders can have conversations about whether they should retain language in the Senate bill that automatically grants exclusions if the agency takes too long to make a decision. "There's a way to do this," he said, repeating for emphasis: "There's a way to do this." — *Mara Lee*

Schumer Says China Conference Can Conclude in September; Brady Skeptical

Senate Majority Leader Chuck Schumer, D-N.Y., speaking on the floor of the Senate just before the CHIPS bill passed,

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said he wants the conference committee for the House and Senate China packages to continue negotiating.

"While this bill contains many critical investments in chips and scientific research, there are other major proposals from both sides that are still in the works within the conference committee.

"That important work must continue, it will continue, and it is my intention to put the Conference Committee bill on the floor in September after their work is complete," he said.

Senate and House negotiators didn't reach agreement on any trade proposals, which included renewal of the Generalized System of Preferences benefits program and the Miscellaneous Tariff Bill, significant changes to trade remedies law, removing Chinese packages from de minimis eligibility, renewing Trade Adjustment Assistance, and directing the administration to re-start a broad Section 301 exclusion process.

"I would love to see us find common ground on GSP, MTB and [Section] 301 exclusions by September," Rep. Kevin Brady, R-Texas, told *International Trade Today* July 27. Brady, the top Republican on the House Ways and Means Committee, was holding a phone call with reporters. "I'm not necessarily optimistic about that, because there are some roadblocks here, and that would take a while to work, during that August work period. But my goal is to have these issues solved by the end of the year, and that tax and healthcare, and hopefully, trade package, sooner would be better, no doubt about it. But with the China bill essentially dead, the conference bill, dead, it really will be our responsibility—[Ways and Means Committee] Chairman [Richard] Neal, [Senate Finance Committee] Chairman [Ron] Wyden, [Senate Finance Committee] ranking member [Mike] Crapo and I—to try to piece together those elements that can be adopted by Congress and hopefully by the end of the year."

On the question of how far back the MTB retroactivity could go if the renewal comes in December, Brady said, "I don't know. That is one of those moving pieces in this discussion, on retroactivity."

He said retroactivity would be a tremendous help to businesses in this economy, but said there has been no draft agreement on retroactivity.

House Majority Leader Steny Hoyer, D-Md., told *ITT* during a press conference at the Capitol that even though Neal was not able to reach agreement with his Senate counterparts on the trade title, he expects the proposals to continue to be debated until Congress adjourns in December. "I don't want to predict what action will be taken on" GSP and MTB, he said, but said that both Republicans and Democrats are interested in moving some of these trade proposals. — *Mara Lee*

Commerce Secretary Says Biden Hesitating on Section 301 Tariffs Over Jobs Concerns

Commerce Secretary Gina Raimondo acknowledged that lifting Section 301 tariffs is one of the few levers the White House has to lower inflation right now, but implied that President Joe Biden is hesitating because unions are arguing it would hurt workers.

The AFL-CIO has even opposed reopening a broad Section 301 exclusion process, and the United Steelworkers just testified in front of the International Trade Commission last week that tariffs under both Section 232 and Section 301 are allowing union factories to maintain or even expand employment.

Raimondo, who was interviewed on CBS' "[Face the Nation](#)" on July 24, said the president is still thinking about what to do about the China tariffs, as it's a big decision.

"There are potential labor implications. One thing about this president is he will never do anything that he thinks will hurt workers in America and/or hurt union workers in America. And so he's being appropriately deliberative to make sure that, yes, he wants to reduce inflation, and he wants to make it easier for consumers. But he wants to be certain that when we do it, or if we do it, it won't have any impact on American workers," she said. — *Mara Lee*

Latest PGA Regulatory Agendas List New Rules on FDA Prior Notice, USDA User Fees

Partner government agencies listed several new rulemakings in the spring 2022 [Unified Agenda](#) involving trade. FDA added new proposals on prior notice requirements and canned tuna standards, and indicated a final rule on

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traceability requirements for high risk foods is imminent. The CDC said it will propose changes to its dog import requirements, and USDA added a new proposed rule on its user fees.

FDA added for the first time to its regulatory agenda a new [rulemaking](#) that would amend prior notice requirements for importers. The proposed rule would require prior notice submitters to “provide the name of the mail service and mail tracking number for articles of food imported or offered for import by international mail,” the agenda said. It would also “create a timeframe for submitting post-refusal/hold submissions and, if such submissions are not submitted within the timeframe, to clarify FDA’s and CBP’s processes for having the food exported or destroyed per CBP general order merchandise requirements.”

Another newly listed FDA [proposal](#) would amend requirements for the canned tuna standard of identity. “This proposed rule, if finalized, will modernize and update this food standard in a number of technical ways and is in partial response to a citizen petition submitted by” Bumble Bee Foods, Star-Kist and Tri-Union Seafoods (better known as Chicken of the Sea). “We tentatively conclude that this action, if finalized, will promote honesty and fair dealing in the interest of consumers by revising an outdated standard of identity,” FDA said.

FDA’s regulatory agenda also says a [final rule](#) setting requirements for additional traceability records for high-risk foods is coming by year’s end. The agency proposed the regulations in September 2020 (see [ITT 09/22/2020](#)). According to the agenda, a consent decree issued in 2019 required that the agency issue the final regulations by Nov. 7, 2022.

A newly listed Centers for Disease Control and Prevention [proposed rule](#) would amend that agency’s regulations on the import of dogs from high-risk rabies countries, the agenda said. “The proposed rule will outline requirements regarding an importation system that will reduce fraud and improve the U.S. government’s ability to verify U.S. entry requirements and mitigate the introduction of dogs infected with rabies and other communicable diseases of public health concern. Importation requirements for cats will not change,” it said.

New rulemakings added for the first time to USDA’s regulatory agenda include [proposed](#) revisions to the Animal and Plant Health Inspection Service’s agriculture quarantine and inspection user fee regulations “to facilitate full cost recovery,” the agenda said. Fees would be updated with “more current operational data,” and would incorporate “recurring costs such as capital improvements and staffing needs,” USDA said. “Inflation would also be incorporated into our model,” and “other changes are also being contemplated,” it said.

Other newly listed APHIS rulemakings include [proposed](#) import requirements for live dogs from regions where African swine fever exists, as well as [proposed](#) regulations that would allow the importation of fresh beef from Paraguay.

Other newly listed regulations from PGAs include a [proposal](#) from the Fish and Wildlife Service to strengthen protections for the African elephant under Section 4(d) of the Endangered Species Act and “clarify the existing enhancement requirement during our evaluation of the application for a permit to import African elephant sport-hunted trophies,” the agenda said.

The Alcohol and Tax and Trade Bureau listed a new [proposed rule](#) revising its labeling regulations to recognize certain alcohol beverage products manufactured in Japan. “Consistent with a recent U.S. - Japan trade agreement, TTB is proposing for public comment changes that would recognize certain shochu and awamori product names as limited to products manufactured in Japan in accordance with the laws and regulations of Japan,” it said.

Finally, a newly listed EPA [proposed rule](#) would amend that agency’s regulations on ozone-depleting substances (ODS) to “reconcile and clarify definitions of existing requirements and update recordkeeping and reporting requirements to improve consistency,” the agenda said. — *Brian Feito*

FMC Issues Guidance for Disputes Under OSRA

The Federal Maritime Commission this week issued [guidance](#) to parties looking to dispute carrier charges that may not be complying with the Ocean Shipping Reform Act of 2022. The guidance outlines the steps for submitting a complaint with the FMC.

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California Ports Postpone New Surcharges by 1 Month

The Los Angeles and Long Beach ports again postponed a new surcharge meant to incentivize the movement of dwelling containers (see [ITT 10/28/2021](#)), this time by one month, the two ports [announced](#) July 29. The ports had planned to begin imposing the fee in November 2021 but have postponed it each week since. The latest extension delays the effective date until Aug. 26. The ports said they will “reassess fee implementation after monitoring data over the next month.” — *Ian Cohen*

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