



INTERNATIONAL LABOR RIGHTS FORUM

**UNITED STATES DEPARTMENT OF LABOR,
BUREAU OF INTERNATIONAL LABOR AFFAIRS
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RE: Notice of Initial Determination Updating the List of Products Requiring Federal Contractor Certification as to Forced/Indentured Child Labor Pursuant to Executive Order 13126.

Introduction

The International Labor Rights Forum (ILRF) submits these comments in response to the Department of Labor's (DOL) request for submissions pursuant 74 Federal Register 175 (11 September 2009), pp: 46794-46796 in regards to the proposed new products requiring contractor certification for the use of forced child labor in violation of US law and international standards. The proposed additions to Executive Order 13126 marks a strong next step towards implementing a comprehensive US government policy to begin combating forced child labor that will complement and assist in the full realization of the USG goals to eradicate forced child labor. The revised EO 13126 recognizes that actions to eliminate forced child labor must be based on sound evidence and that any action must be evenly applied without imposing political considerations.

Since 2001, when the original list of products under EO 13126 was issued, the international community's understanding of the causes and effects of forced child labor improved significantly. The Department of Labor, the International Labor Organization and national governments around the world have taken renewed and vigorous steps to better understand and eradicate child labor. Unfortunately, as the Department of Labor's recent report *List of*

Goods Produced by Child Labor or Forced Labor shows, we still have a long way to go before forced child labor is eradicated from global production.

As the Department of Labor has explained, it has the legal mandate to “to inform the public of the significant incidence . . . forced labor in the production of certain goods” and to help drive sound purchasing decisions on the part of consumers to reduce the demand for forced child labor-made goods.¹ As the single largest consumer of goods in the United States, the United States Government (USG), through EO 13126, ratification of ILO Convention 182 on the Worst Forms of Child Labor, the Trafficking Victims Reauthorization Protection Act of 2005 (TVPRA)², the Tariff Act of 1930,³ the Fair Labor Standards Act, and the Walsh-Healy Public Contracts Act, has established a clear policy to be a high road market driver in the effort to eradicate child labor and forced labor from global supply chains and prevent the US government from supporting enterprises who use forced child labor. As a first step, the DOL’s proposed revisions to EO 13126, which are based on strong evidence and applied evenly across industries and countries, is a vital to ensure fulfillment of this important USG policy.

United States Government policy towards eradicating forced child labor must be multi-pronged in order to eliminate all incentives for the use of forced child labor, and an updated, usable EO 13126 is a key component. Over the past 15 years, the USG has implemented broad reaching programs to help national governments meet their obligation to protect its children from abusive forms of labor. The DOL has spent more than \$720 million working with the ILO and foreign government to improve education opportunities, conduct studies and analysis of the drivers of forced child labor, and to help foreign government reform their laws and policies. Development programs aimed at building the capacity of foreign governments to eliminate forced child labor is just one side of the equation, though. Until today, the USG has not taken any serious effort to use its market power as a consumer, rather than a regulator, to effect changes in the private sector to drive down demand for forced child labor.

The proposed update to EO 13126 is a significant step in the right direction to use consumer power to eradicate forced child labor. It recognizes that where forced child labor is a serious problem, corporations have an obligation improve transparency to ensure that they are not exacerbating the problem through their business practices or purchasing decisions. Those companies who wish to do business with the USG simply have to demonstrate that it has taken special steps to identify whether forced child labor is present in their supply chains. By requiring companies to take special measures, such as implementing third-party, independent monitoring and certification for forced child labor, the USG will effectively undermine the incentive corporations have to look the other way and remain willfully blind to labor conditions in their own supply chains in order to ensure a steady supply for a cheap price. We believe that the improved EO 13126, which reflects an unbiased, real world view of the child labor problem, will greatly promote reasonable

¹ See United States Department of Labor, *List of Goods Produced by Child Labor or Forced Labor*, September 10, 2009.

² 22 U.S.C. §7101 *et seq.*

³ 19 U.S.C. §1307

measures for identifying forced child labor at the corporate-level, rather than national level, and will help drive workable solutions to the address problems in corporate supply chains.

The Department of Labor has demonstrated a “reasonable basis” to include the proposed new products to the List.

As required by EO 13126, the Department of Labor has more than demonstrated a “reasonable basis” to expand the products covered by the Executive Order to include these additional products. The DOL has conducted vigorous research, held hearings and solicited significant comments when compiling the list. The DOL has demonstrated a strong understanding of child labor and forced labor and the differences between child labor and forced child labor when making its determinations for each of the proposed new products, as is evidenced by the fact that the DOL identified over 122 goods produced with child labor in 58 countries, but categorized only 29 of those products from 23 countries as including forced child labor. The amount of research into each of the proposed products was extensive and reputable.

Data on forced child labor is very difficult to find. Forced labor, like trafficking, remains a hidden problem not easily found by outside researchers. Yet, as demonstrated by the bibliography, the body of data relied upon by the DOL represents thousands of hours of dedicated research by established professionals. Often, researchers undertook significant risks to uncover evidence of forced child labor reviewed by the Department of Labor. We believe that the DOL assessment of those reports were accurate.

Of course, some may criticize some of the data for being outdated or old, but we do not believe that data on child labor, or particularly forced child labor, has a short shelf life. In many of the industries identified, particularly agriculture industries, child labor has been demonstrated to be persistent and recurring, and the experience of the DOL, the ILO, and child labor researchers indicates that seven year old data, the oldest data reviewed for the purposes of this report, remains informative and relevant. For example, despite more than 13 years of efforts by the ILO and national governments to eliminate forced child labor from the soccer ball industry in India and Pakistan, bonded child labor persists.

Finally, the amount and quality of information reviewed by the DOL to reach its “reasonable basis” determination for each of the products is more than sufficient for the purposes of EO 13126. As described below, the purpose of the list is not to blacklist any particular product or begin a boycott of goods from a particular country. Rather the purpose is to raise a red-flag for both government procurers and for the private sector that forced child labor is a serious problem in those 29 industries and that extra precautions must be taken before procuring those goods to ensure that nobody’s rights have been trampled in the production process.

EO 13126 does not purport to be the final, definitive statement whether every listed product is made with forced labor. Nor is a product listing on the EO akin to a criminal charge that requires information beyond a reasonable doubt that forced child labor is present in a company’s supply chain. It is simply a tool by which the USG can try to mitigate any negative impact its purchasing decisions may have based on reasonable data. To that end, the data reviewed by DOL before announcing its proposed updates to EO 13126 provides

compelling reasons to take the extra precautions mandated by the EO for each of the products listed.

The proposed list of products for EO 13126 will help drive informed, evidence-based procurement policies that are evenly applied to help eliminate forced child labor at the corporate level.

The newly proposed additions to EO 13126 reflect the harsh reality that forced child laborers in global supply chains remains a widespread and systematic problem. As a result, it will drive informed, evidence-based solutions to the forced child labor problem. However, EO 13126 will only be effective if it remains an unbiased, evenly applied standard for all companies to follow.

As we noted in our testimony before the DOL hearing on May 28, 2008, we were particularly concerned about the initial foray into creating a list of countries and products produced by child labor pursuant EO 13126 in 2001. At that time, the Department of Labor apparently failed to publish an unbiased, fair list of goods that the DOL “ha[s] a reasonable basis to believe might have been produced by forced or indentured child labor.” Instead, for reasons unknown to the public, the DOL decided instead to target only two particular countries, Pakistan and Burma, apparently reflect political considerations rather than evidence-based policies. The Department of Labor’s additions to the list of products, and the process leading to the changes, is a significant step towards remedying these early problems.

While some industry representatives have publicly pressed the DOL to move away from the evidence-based procurement policy in favor of “political considerations test”,⁴ we believe that this proposal would significantly undermine the purposes of the EO. Foremost, the EO is focused on ensuring more transparency at the corporate-level, not the national government level. EO 13126 recognizes that corporations, not just country governments, play a vital role in ending the problem of forced child labor. Its aim is to address the lack of transparency within global corporations to reduce incentives contributing to the persistence of forced child labor in these industries. To achieve that goal, EO 13126 simply provides a way for the USG to ensure that its suppliers are committed to transparent, responsible production without forced child labor.

To be clear, providing an undefined “political consideration” exception to EO 13126 will significantly undermine goal of EO 13126 to improve transparency and accountability at the corporate-level. We believe, in fact, that an effective EO 13126 will encourage industry as a whole to follow the lead of some of its members to take meaningful corporate-level steps to address systematic problems in its own supply chain while also working with national governments to implement national level programs to address child labor.

⁴ See <http://www.candyusa.com/News/PRdetail.cfm?ItemNumber=1798>

The proposed revisions to EO 13126 will not bar purchases of listed products but rather will direct USG purchases towards high-road companies that demonstrate “good faith efforts” identify forced child labor in their own supply chain.

The United States Government is not barred from purchasing any of the new products listed under EO 13126. Rather, as the Federal Acquisition Regulations make clear, the list “is an alert that there is a reasonable basis to believe that such product may have been mined, produced, manufactured by forced or indentured child labor.”⁵ This “alert” then triggers the USG to take some additional, necessary precautions to ensure that it is not exacerbating forced child labor through its purchasing decisions. If a company is able to meet those enhanced requirements, which includes “certifying” that it will either refuse to supply an end product on the List or alternatively that it has undertaken “a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any end product”, then it can continue to supply goods the USG.⁶

Ideally, companies producing the 29 proposed products from 23 different countries will choose the second option of committing to vigorous efforts to root out forced child labor in their supply chains rather than refuse to source from those countries entirely. We do not believe that country-wide boycotts of products, whether for government procurement or for consumer purchasing decisions, works in every situation where forced child labor is widespread in an industry (though in some situations such as cotton from Uzbekistan, a purchasing boycott may be the only effective tool). As we advise any company who is at risk of having forced child labor in their supply chain, their first response must be to identify who the children are and where they came from. Then, the companies must commit to helping rehabilitate the children, provide them with an education, and make a long-term commitment to suppliers who are actively seeking to monitor and eradicate forced child labor from their supply chains. EO 13126 reflects this pragmatic approach by at least requiring suppliers to meet the first commitment of identifying through supply chain mapping and other “good faith” efforts whether children are producing their goods.

While some companies may complain of added compliance costs associated with undertaking “good faith” efforts, we believe these costs to be very low compared with the social and opportunity costs faced by the children who are forced to labor and their families.

Third-party, independent monitoring and certification programs by labor experts available to government suppliers are examples of available “good faith” efforts to identify forced labor in corporate supply chains.

Third-party, independent monitoring and certification programs to identify and root out forced child labor and to provide rehabilitation programs for the rescued children are increasingly available for many producers of the newly listed goods. In the carpet industry in India, Nepal and Pakistan, Rugmark certification has successfully pulled many children out of forced labor and into rehabilitation and school programs. Rugmark “was founded on a simple premise: If enough people demand certified child-labor-free rugs, manufacturers will only employ skilled, adult artisans and the exploitation of children in the carpet industry will

⁵ 48 CFR §22.15, §22.1503(c)

⁶ 48 CFR §22.15, §22.1503(c)

come to an end.” In India, 269 exporters are licensed and inspected by Rugmark; in Nepal, 500 exporters are inspected by Rugmark (or 70 percent of Nepal’s carpet exports); and in Pakistan, 13 exporters—compromising 21,000 looms—are registered with the organization. Since 1995, Rugmark has certified well over four million carpets. Importantly, when Rugmark inspectors discover children working on looms, not only does the producer lose its right to use the Rugmark label, but the children are still rescued and provided schooling paid for by companies who pay for the label.

Some cocoa producers in Cote D’Ivoire have already been working with Fair Trade certifiers to monitor and certify for forced child labor. For example, Cadbury has announced aggressive plans expand its Fair Trade certified products, including its entire Cadbury Dairy Milk line for Great Britain, Canada, Australia, and New Zealand. In Cote D’Ivoire, one large fair-trade certified cooperative has faced difficult challenge attracting buyers for their product. Other large cocoa and coffee sellers, like Starbucks, have moved to implement their own certification standards.

In the garment industry in India and Thailand, third-party, independent supply chain monitoring has become increasingly common and affordable. Organizations like the Workers’ Rights Consortium, Social Accountability International, Fair Labor Association, and Verite operate large factory monitoring and assessment programs for universities, major U.S. and European retailers, and others companies seeking to ensure that their supply chains are free of labor abuses.

In agriculture, the United States government has already started a multi-stakeholder process that will establish protocols for effective third party, independent supply chain monitoring and certification for labor standards by 2010.⁷ The stakeholders, which will comprise an Advisory Committee, will include representatives from the DOL, State Department, the USDA, industry, certification organizations, non-governmental organizations and academics. By 2010, the Advisory Committee will recommend to the Secretary of Agriculture clear standards for a third party, independent monitoring and certification program for producers or importers that would meet a contractor’s “good faith” requirements.

Also, certification infrastructure is being widely set up globally in other labor intensive industries through the National Organic Program (NOP), run by the Department of Agriculture. While the NOP certification program does not include labor provisions, organic certifying groups are currently considering including labor standards in their programs, and these standards can be easily incorporated into the already existing NOP structure.

With the myriad of monitoring and certification initiatives already heavily utilized by major industries, if forced child labor is determined to be widespread in industries in a particular locality, importers/exporters of those products will have clear guidelines and ample opportunity to implement third party, independent monitoring and certification to meet the company’s “good faith” obligation to monitor their supply chains when certifying compliance with government contracting guidelines.

⁷ See Food and Energy Security Act of 2007, PL110-234, May 22, 2008, at §3205

An effectively implemented EO 13126 will significantly assist DHS enforce its mandate under the Tariff Act of 1930.

The TVPRA and the Tariff Act of 1930 directs the U.S. government to ensure that goods produced by forced child labor are prohibited from entering the U.S. market through trade.⁸ To that end, government agencies have been directed to work with each other and with industries involved in the production of forced child labor-made goods to create a standard set of practices to reduce forced child labor and to end the global trade in forced child labor made goods.⁹

Currently, if Department of Homeland Security has evidence that reasonably indicates that a product, or an ingredient or component thereof, that was produced by forced child labor is being, or is likely to be, imported into the United States, ICE must immediately hold the goods at the port and initiate an investigation.¹⁰ However, similar to EO 13126 process, if an importer can “certify” that its goods were not forced child labor-made, ICE can release the product for import. Though the level of due diligence required of the importers under the Tariff Act remains vague, the importer must show that it has made “every reasonable effort to determine the source of the merchandise and each of its components.” It must identify (1) the foreign seller or producer of the product; (2) the complete chain of custody of the product from the producer up to the importer, and (3) it has the burden to prove that forced child labor was not used at any stage in the production process for the good, or any of the goods components.¹¹

To the extent that the USG is procuring any of the listed products, EO 13126 procurement regulations, and the “good faith” certifications it requires, will complement DHS efforts to enforce trade prohibitions on forced labor-made goods through certification.

Conclusion

We believe that the DOL proposed list of 29 products from 23 countries is based on sound research and strong evidence sufficient for its intended use to guide US government procurement policies. It is unbiased in scope and coverage.

We are alarmed at the sheer magnitude of the persistent use of forced and child labor problems in global supply chains and believe that USG efforts to disentangle itself from tainted suppliers through a revised and improved EO 13126 are laudable. Based on the evidence on record, we believe that forced labor can only be eradicated once companies who source these products take an extra step to ensure that they are not contributing to the demand for forced labor through their purchasing policies and supply chain management.

Finally, we believe that the revised EO13126 is an important exercise of consumer power by one of the world’s largest consumers and will have a significant impact on how business operate in industries where forced child labor is a serious problem

⁸ See 22 U.S.C. §7112(b)(1)(D)

⁹ See 22 U.S.C. §7112(b)(1)(E)

¹⁰ 19 CFR §12.42 *et seq.*

¹¹ 19 CFR §12.43(b)

Respectfully submitted this 10th day of December 2009.

_____/S/_____

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RESPONSE TO Docket No. DOL-2009-0002

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RE: Request for Comments Pursuant to Notice of Initial Determination Updating the List of Products Requiring Federal Contractor Certification as to Forced/Indentured Child Labor Pursuant to Executive Order 13126

DATE: December 10, 2009

Introduction

This submission is filed on behalf of four organizations: the American Federation of Government Employees, Change to Win, the International Labor Rights Forum and SweatFree Communities.

The American Federation of Government Employees is the largest federal employee union representing 600,000 federal and D.C. government workers nationwide and overseas.

Change to Win is a 5.5-million member partnership of five unions founded in 2005 to represent workers in the industries and occupations of the 21st century economy. The affiliated unions are: Service Employees International Union, United Food and Commercial Workers International Union, International Brotherhood of Teamsters, Laborers' International Union of North America, and United Farm Workers of America.

The International Labor Rights Forum is a nonprofit advocacy organization headquartered in Washington, DC and dedicated to promoting and defending the rights of workers around the world.

SweatFree Communities is a nonprofit advocacy organization dedicated to promoting grassroots local campaigns to work with cities, states, and other government agencies to ensure that taxpayer dollars are not spent on products made in sweatshops..

Current Federal Procurement Measures Protecting the Rights of Foreign Workers

In June 1999, President Clinton issued Executive Order 13126 on the Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor. This EO was a positive step toward the protection of workers producing goods for government agencies. Until recently, this prohibition was limited to a narrow list of goods almost all of which were from Burma.

Pursuant to Section 3 of the Executive Order, the Federal Acquisition Regulatory Council published a final rule in the Federal Register on January 18, 2001, providing, amongst other requirements, that federal contractors who supply products that appear on the List issued by the Department of Labor must certify to the contracting officer that the contractor, or, in the case of an incorporated contractor, a responsible official of the contractor, has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce or manufacture any product furnished under the contract and that, on the basis of those efforts, the contractor is unaware of any such use of child labor. The GSA has noted that no contractor has ever been de-barred under this provision.

In September 2009, the International Labor Affairs Bureau (ILAB) of the U.S. Department of Labor issued a Federal Register notice that proposes to substantially expand the countries and products covered. However, to date the US Government has accepted offeror self-certification against forced and indentured child labor as a sufficient enforcement measure, and no objective measures are in place to ensure compliance. Although government acknowledgment of the potential for child labor violations in a range of industries and countries is a step in the right direction, an expanded list of concern demonstrates the need for investigatory and enforcement capacity. This submission seeks to provide recommendations to enhance enforcement of EO 13126.

Vendor Prequalification

The US Government should consider the establishment of a vendor prequalification program that requires vendors to make all adjustments to their supply chains necessary to ensure that international production facilities fully respect the labor standards outlined herein. Such adjustments may include the establishment and implementation of managerial systems, rules, procedures, and audits, as well as the payment of adequate prices to subcontractors, sufficient to effectively ensure labor compliance. Such adjustments may also include measurements of the protection of other rights that are strongly correlated with the presence or absence of forced child labor, including the international core labor standards and living wages.

Monitoring and Enforcement

The US Government should implement a program to conduct or require inspections into labor conditions at a company and its subcontractors after a bid submission but prior to the awarding of the contract and at any time after a contract has been awarded. Investigations and monitoring of factory conditions should operate on the principles of independence, professionalism, and transparency. Any organization or individual conducting monitoring should have no relationship with the company being monitored or investigated or the company's contractors. The monitoring organization should be "independent" in the sense that it should not be owned or controlled in whole or in part by, nor obtain any revenue from, any vendor, manufacturer, contractor, or subcontractor.

The monitoring methodology should include the following safeguards: unannounced factory visits; full access to factories or processing facilities; cooperation with local organizations that enjoy the trust of workers to conduct worker interviews and other aspects of the investigation; confidential and thorough worker interviews in the local language without managers and supervisors present and in settings that allow free dialogue (i.e., away from production premises).

Any person should be able to complain that the forced child labor procurement rule has been or is being violated. The US Government should ensure that the merits of each complaint are investigated and may use the services of an approved third party independent monitor for this purpose. The US Government or its designated monitor should also undertake routine inspections of the factories of contractors providing covered goods.

Contractors should be required to establish and implement, and/or cause subcontractors to establish and implement, managerial systems, rules, procedures, and audits sufficient to effectively ensure labor compliance. Contractors must also ensure that their, and/or their subcontractors' business and sourcing practices effectively ensure such compliance.

Contractors must cooperate fully with any investigation. Prime contractors should also ensure that each subcontractor cooperates fully with investigations. Refusal of a contractor to facilitate—or to cooperate fully in—the monitoring process may result in disqualification for bidding, termination of a contract or other sanctions.

Upon determination of a violation, the US Government, the prime contractor, relevant subcontractors, and the monitor should consult for the purpose of agreeing to a remediation plan. The intention is for the situation to be corrected in order to comply with the law. The US Government may impose sanctions if it finds that the prime contractor or one of its subcontractors violates any labor compliance requirement, and that the contractor refuses or fails to take all reasonable steps to ensure that the violation is expeditiously remedied. The US Government may terminate the contract without notice and without liability for unpaid amounts that otherwise would have been payable, impose a monetary penalty for each violation, or remove the contractor from the bidders' list for a period of time, in accordance with the US Government's laws and regulations for imposition of sanctions on contractors that violate conditions on contracting.

States and local government agencies that share a commitment to labor compliance in purchasing supply chains are forming a consortium to pool resources, share information, and coordinate labor standards enforcement. The US Government should join this process to share information about procurement supply chains and factory investigations, and coordinate monitoring and other enforcement activities with state and local government agencies as appropriate.