



August 14, 2020

Lewis Karesh  
Assistant U.S. Trade Representative for Labor  
Office of the U.S. Trade Representative  
Executive Office of the President  
600 17th Street NW  
Washington, D.C. 20508

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**Re: Interagency Labor Committee for Monitoring and Enforcement Procedural Guidelines for Petitions Pursuant to the USMCA (85 FR 39257)**

Dear Mr. Karesh:

The Retail Industry Leaders Association ("RILA") appreciates the opportunity to submit comments in response to the above referenced Notice and Request for Comments ("Notice") published in the Federal Register on June 30, 2020, by the Office of the U.S. Trade Representative ("USTR") on behalf of the Interagency Labor Committee for Monitoring and Enforcement ("the Committee"). The Committee has invited public comment on interim procedural guidelines for receipt and review of petitions alleging violations of the labor provisions of the United States-Mexico-Canada Agreement ("USMCA"). While RILA is generally supportive of the guidelines, we believe certain provisions are overly broad and ambiguous and warrant further clarification to ensure the process operates in a fair, transparent, and consistent manner. We therefore provide several recommendations below for the Committee's consideration to address these concerns and improve the petition process.

RILA is the trade association of the world's largest, most innovative, and recognizable retail companies and brands. We convene decision-makers, advocate for the industry, and promote operational excellence and innovation. Our aim is to elevate a dynamic industry by transforming the environment in which retailers operate. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad. RILA's membership includes some of the largest importers in the United States.



## I. Process Established by the Interim Guidelines, Generally

The USMCA, which entered into force on July 1, 2020, requires the Parties to the agreement ("the Parties") to comply with the labor obligations identified within Chapter 23 of the agreement ("Labor Chapter"). Allegations of noncompliance with the Labor Chapter will be investigated, and if necessary, potential remedies will be sought against the Party in question. In addition to the obligations contained within the Labor Chapter, the United States and Mexico entered into a bilateral agreement—contained at Annex 31-A of the USMCA—that establishes the "Rapid Response Labor Mechanism" ("RRLM") to quickly identify and investigate allegations that a specific covered facility in either country denied their workers the rights of free association and collective bargaining ("denial of rights").

To trigger investigations into such allegations of noncompliance or denials of rights, members of the public are directed to submit petitions to the Office of Trade and Labor Affairs ("OTLA") at the Department of Labor's Bureau of International Labor Affairs. OTLA will then submit those petitions to the Committee, which was established to help carry out USMCA enforcement. In addition to USTR, the Committee is composed of representatives from the Departments of Labor, State, Treasury, Agriculture, Commerce, and Homeland Security as well as the U.S. Agency for International Development.

The guidelines published in the June 30 Federal Register Notice set forth the requirements for petitions alleging violations of the Labor Chapter and Annex 31-A of the USMCA and the process the Committee will use to evaluate the validity of these petitions. For petitions alleging violations of the Labor Chapter, the guidelines establish a 20-day review window for the Committee to determine whether the petition warrants further review. If the Committee determines further review is warranted, it has 60 days to then determine whether there is "sufficient, credible evidence" that the Party is not in compliance with its labor obligations under the USMCA. Upon completion of their review, the Committee will inform the USTR whether sufficient evidence exists to trigger the enforcement actions available under the USMCA's Labor Chapter.

For petitions submitted under Annex 31-A, the Committee has 30 days to conduct a review and determine whether there is "sufficient, credible evidence" that a denial of rights occurred at the covered facility to trigger the RRLM. If the Committee determines there is sufficient evidence, it will inform the USTR for purposes of initiating the RRLM process established in the USMCA Implementation Act.<sup>1</sup> If the Committee determines the petition lacks sufficient, credible evidence that a denial of rights at the covered facility occurred, the Committee must inform the Senate Committee on Finance and the House Ways and Means Committee.

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<sup>1</sup> [Public Law 116-113](#), codified at [19 U.S.C. §§ 4501 et seq.](#)

## II. Recommendations for the Committee's Procedural Guidelines for Petitions

Below we make a number of observations and recommendations to improve the Committee's process for reviewing submitted petitions and determining their validity prior to initiating the labor enforcement mechanisms established under the USMCA. We believe these recommendations, if adopted, will help ensure the process is administered in a fair, transparent, and predictable manner.

### A. Establish A Clear Definition for "Sufficient, Credible Evidence"

The interim guidelines require that petitions include identifying information for the petitioner and the facility or Party in question, as well as supporting information for the allegation of noncompliance or the denial of rights. We understand this supporting information is required to assist the Committee in determining whether a petition meets the "sufficient, credible evidence" standard that noncompliance or a denial of rights has occurred. While we recognize this standard was established in the USMCA Implementation Act specifically with regards to the RRLM and then extended to these guidelines, we believe further clarification is needed to ensure petitioners and employers have a clear understanding of what this standard requires.

We therefore urge the Committee to establish a definition clarifying what constitutes "sufficient, credible evidence" for purposes of evaluating petitions. Such clarification will help deter the filing of frivolous, fraudulent, or malicious claims designed to injure an employer's reputation or burden the employer for anticompetitive purposes. We also believe establishing a clear definition will ensure more consistent and fairer treatment of petitions and establish greater certainty and predictability within the process.

### B. Establish A Mechanism to Conserve Resources and Dismiss Frivolous Claims

Relatedly, RILA further recommends the Committee establish a mechanism to quickly dismiss frivolous claims. Such a mechanism would allow the Committee to focus its resources on credible claims. While other examples of such mechanisms exist, the processes outlined in Rules 8 and 12 of the Federal Rules of Civil Procedures may serve as a guidepost for the Committee's consideration.

### C. Ensure Petitions and Reviews Stay Within the Scope of What is Mandated

We urge the Committee to include within the guidelines clarification that petitions and any associated reviews are limited to allegations of violations of Annex 31-A ("denial of the right of free association and collective bargaining") or the Labor Chapter. This will

help ensure consistency with the USMCA Implementation Act and that the petition and review process, as well as Committee's resources, are used as intended.

We also recommend petitions claiming noncompliance under the Labor Chapter and denials of rights under Annex 31-A be filed separately even where the claims may be based on the same set of underlying facts. This will help maintain the integrity of the distinct processes for the Labor Chapter and Annex 31-A established by the USMCA Implementation Act<sup>2</sup> and avoid confusion regarding which process has been invoked.

Further, we recommend the Committee clarify that it will not consider petitions alleging dissatisfaction with the outcomes of litigation or collective bargaining where no underlying violation of the Labor Chapter or Annex 31-A is identified. For example, the results of collective bargaining should not be the subject of a petition without a specific allegation of a denial of rights nor should the quality or fairness of an established bargaining agreement. We, therefore, recommend the Committee establish a certification process to ensure petitions are appropriately limited to noncompliance with the Labor Chapter or a denial of rights under Annex 31-A and not associated outcomes.

In addition, we urge the Committee to clarify that any review will be limited to the claim alleged in the petition. For petitions alleging a denial of rights under Annex-31-A, we further recommend the Committee clarify that allegations must be not only facility-specific but also production and representation-area specific. This will allow the Committee to focus on the specific production area in a facility and the unit of workers in question – that is, those employees with a clear and identifiable interest who are or would be represented by a single labor union or employee representative in their dealings with management – as it relates to the alleged denial of rights.

#### D. Provide Transparency Throughout the Petition and Review Process

To ensure transparency throughout the petition process, we urge the Committee to include within the guidelines a requirement to notify facilities as soon as possible of any petitions filed against them. This will provide facilities with the opportunity to respond to any claims made, including the opportunity to submit evidence demonstrating compliance with the law. Ensuring facilities have an adequate and timely opportunity to address the allegations will allow for a more fulsome review and improve the transparency and integrity of the process.

In addition, we recommend all petitions determined by the Committee to meet the evidentiary threshold for further review be made public. We urge the Committee to further ensure that allegations of noncompliance and denials of rights be included to

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<sup>2</sup> 19 U.S.C. § 4646(c) and 4646(b), respectively.

avoid malicious petitions from damaging an employer's reputation or unnecessarily draining the employer entity's resources. We further recommend that the publicized information be limited to the claim, facility, and production or representation area in question, as described above. Finally, we recommend the Committee's final determination following a petition review be made public as well.

To further improve transparency, we recommend petitioners be required to identify the legal or economic interest that drives their petition. For example, a labor union may explain that it is interested in forcing a target company to sign a collective bargaining agreement or recognize their union or a strike, or a competitor may clarify that it believes the target facility is getting an unfair advantage by not complying with applicable law. Such interests are relevant to the veracity of the allegations and should be weighed by the Committee when making a determination.

We also recommend the process for evaluating petitions for "sufficient, credible evidence" – including the manner in which the Committee makes a decision following review of petitions – be described and made public. This will provide relevant stakeholders with a better understanding of what these processes can encompass, including what supporting information petitioners can provide to meet the standard. To ensure fairness, transparency, and predictability, the guidelines should make clear to stakeholders the precise processes the Committee will use to make its determinations and what will occur if/when a Committee member disagrees with a final determination.

Lastly, we urge the Committee to include as part of the review process a means for obtaining translation services. This will ensure all parties are clearly understood during the review process and full transparency of the circumstances involved. It will also lend further credibility to determinations.

#### E. Require Petitioners to Exhaust All Available Avenues Prior to Filing Petitions

We also recommend the Committee require petitioners to demonstrate that they have exhausted all other available avenues prior to filing petitions with the OTLA. For example, in alleging a denial of rights under Annex 31-A, a petitioner should work through Mexican labor law before filing a petition alleging the government has failed to enforce the law in a manner that has caused a denial of rights. This will also guard against the petition process being used as an end-around to other available remedies. It will also help prevent multiple concurrent reviews at the same time by different authorities – something that has increased significance where allegations are ultimately determined to be illegitimate. We believe such improvements will help streamline the processes for the Committee and help ensure the integrity of the RRLM.

### III. Conclusion

In conclusion, RILA strongly believes the above listed recommendations will improve the ability of the Committee to ensure that petitions alleging a violation of the Labor Chapter or a denial of rights under Annex 31-A are evaluated in a fair, transparent, and predictable manner to the benefit of the Parties, covered facilities, and workers. We appreciate the opportunity to submit these comments on behalf of our membership, and we look forward to working with the Committee on this and future issues arising from USMCA implementation.

Sincerely,



Blake Harden  
Vice President, International Trade  
Retail Industry Leaders Association