

USTR blocks ordered exclusion process for third round of "Section 301" tariffs on imports from China

7 March 2019

Legislation funding the U.S. government that was signed into law by President Trump on 15 February 2019 includes report language directing the Office of the U.S. Trade Representative (USTR) to implement an exclusion process for articles subject to the third round of tariffs on Chinese products (List 3) imposed under Section 301 of the Trade Act of 1974 (Section 301). Until now, USTR has indicated that there would not be a product exclusion process for List 3 tariffs unless the tariffs were increased from 10 percent to 25 percent.

Despite the congressional pressure, USTR Robert Lighthizer indicated at a 27 February Ways and Means Committee hearing that he has no plans to implement an exclusion process for List 3 unless the tariff are increased from 10 percent to 25 percent. As Lighthizer noted, the congressional directive was contained in nonbinding report language, as opposed to the bill itself. The tariffs were originally scheduled to increase on 1 March, but that increase was put on hold by President Trump in view of progress in the U.S.-China negotiations and the potential for a deal that could lead to the removal of some or all of the Section 301 tariffs, and thus could moot the need for an exclusion process for List 3.

Members of Congress have been under increasing pressure from constituents with products on List 3 who have had to deal with associated higher costs for key imported products, parts, and components from China. Both Republican and Democratic members of Congress have been vocal in expressing their unhappiness with the situation, and used the spending bill as an opportunity to require USTR to put an exclusion process into place.

The new procedures, which are intended to be identical to those adopted for product exclusions from earlier rounds of Section 301 duties, were scheduled to be implemented within 30 days after enactment (i.e., by 18 March 2019). This appears to be unlikely at this point.

Background

At issue are 10 percent tariffs imposed since 24 September 2018, on an estimated US\$200 billion in imported goods from China. These tariffs have been levied to counter allegedly unfair or unreasonable Chinese acts, policies, and practices related to technology transfer, intellectual property, and innovation. This action follows on two prior rounds of 25 percent tariffs already imposed – the first went into effect on 6 July 2018 on an estimated US\$34 billion in imports from

China, and the second went into effect on 23 August 2018 on another US\$16 billion in imports from China.

The 10 percent tariffs on these articles are currently scheduled to increase to 25 percent on 2 March 2019, absent an agreement being reached in the broader trade dispute between the United States and China. As of the date of this alert, such negotiations are intensifying and appear to be making progress, but the final outcome remains uncertain and depends on President Trump.

Likely exclusion procedures

In both prior rounds of Section 301 tariffs, USTR established a process allowing stakeholders (including associations) to request that particular products classified within a tariff subheading subject to the tariffs be excluded. However, USTR announced that no such exclusion process would be adopted for the third round of 10 percent tariffs. Congress has now sought to rectify this situation by mandating the implementation of identical exclusion procedures for the third round of tariffs.

It is therefore anticipated that the new exclusion process will involve requests for one-year exclusions that will be evaluated on a case-by-case basis. In the prior exclusion procedures the granted exclusions applied retroactively to the starting date of the tariffs. It is not clear what effective period is contemplated for exclusions from the third round.

USTR is already struggling under a major backlog of product exclusion requests for Lists 1 and 2, so the process for addressing List 3 requests could be protracted. In addition, the United States and China are engaged in intensive negotiations in an effort to reach an agreement that could lead to removal of some or all of the U.S. tariffs and Chinese retaliatory tariffs. If the negotiations fail, however, the List 3 tariffs are likely to increase to 25 percent on 2 March 2019.

For further information or assistance in connection with the exclusion process, please contact any of the lawyers identified below.

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