

U.S. Trade Representative to Weigh Reinstatement of Certain Section 301 Tariff Exclusions

by Dave Townsend and T. Augustine Lo

As part of the Biden Administration's comprehensive review of U.S. policy towards China, Katherine Tai, the U.S. Trade Representative ("USTR"), has requested public comments on whether USTR should reinstate certain product-specific exclusions from tariffs on imports from China that were imposed under Section 301 of the Trade Act of 1974 ("Section 301"). USTR's new public comment period will run from October 12 until December 1, 2021. The USTR is inviting comments only on product-specific exclusions which USTR had previously granted and extended but which USTR has since allowed to expire (except for a handful of exclusions that were extended for COVID-19 relief). The relevant exclusions that are under consideration for reinstatement are listed [here](#).

Importers, U.S. purchasers, and U.S. manufacturers may wish to review these product exclusions for potential benefit or adverse effect on their business interests.

Section 301 Tariffs on Chinese-Origin Products.

Under Section 301, the United States currently imposes punitive tariffs of up to 25% on more than US\$300 billion worth of annual imports from China, and such Section 301 tariffs are in addition to regular import duties. USTR imposed these tariffs after investigating China's intellectual property and forced technology transfer policies and practices and publishing a report in early 2018. USTR imposed the Section 301 tariffs in four tranches starting in July 2018, which remain in effect today. These tranches are known as List 1 (25%), List 2 (25%), List 3 (25%), and List 4A (7.5%).

With each of these successive Lists, USTR enlarged the scope of Chinese imports that became subject to the Section 301 tariffs. These products are identified by the codes under the Harmonized Tariff Schedule of the United States ("HTSUS") that importers use to classify their imports for customs duties. USTR also announced a List 4B, which includes items that could yet become subject to the Section 301 tariffs in the future (covering almost all remaining Chinese imports not already subject to the Section 301

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tariffs). However, USTR held List 4B in abeyance and did not implement those tariffs and also committed that the United States would pause the imposition of any further tariffs because its trade negotiations with China had led to the “Phase One Agreement” deal in January 2020, which we have previously discussed.

How far USTR goes in reinstating these Section 301 exclusions or in consideration of other tariff relief may well turn on USTR’s assessment of China’s progress (or the lack thereof) in its Phase One Agreement commitments. China had agreed under that interim arrangement to make significant purchases of U.S. exports and to give further regulatory approvals for certain U.S. companies seeking access to the Chinese market. In a speech accompanying the announcement of what the Biden Administration calls its “new” approach to China, USTR Tai particularly noted China’s agricultural purchase commitments that have yet to be met under that Phase One Agreement.

Previous Product Exclusions.

USTR now seeks comments on a total of 549 exclusions that USTR had previously granted for specific products to ameliorate the potential harm from the Section 301 tariffs on U.S. interests. The list includes a wide variety of items such as carrying bags, cleaning solutions, electronics, manufacturing equipment, medical equipment, motors, plastics, yarns, and x-ray imaging products to name a few examples. Initially, over a two-year period, USTR granted over 2,000 one-year product exclusions. When those exclusions gradually expired over time, USTR chose to extend 549 of these exclusions because of their on-going importance to U.S. interests while allowing all the other exclusions to expire. However, USTR allowed even these 549 exclusions to expire on December 31, 2020 because of potential changes to trade policy under the incoming Biden Administration. (USTR separately granted a temporary extension for 99 product exclusions for COVID-19 relief, which are set to expire on November 14, 2021.) The newly announced USTR process is geared to consider the potential reinstatement of some or all of those 549 exclusions.

Critically, USTR will not at this time implement any new product exclusions from Section 301 tariffs. Moreover, USTR’s current request for comments does not cover the product exclusions that USTR had previously declined to extend. Accordingly, the vast majority of Chinese-origin imports still subject to Section 301 tariffs under Lists 1, 2, 3 and 4A will not be eligible for an exclusion under the current USTR process.

Factors USTR Will Consider for Product Exclusions.

USTR will consider reinstating product exclusions for imports that are “available only from China.” As part of its analysis of that primary criterion, USTR will look at imports of the item or comparable items from China and non-Chinese-sources, domestic U.S. production of the item or comparable items, changes to the global supply chain since 2018 for the item, changes to the supply chain to avoid Chinese sourcing, and domestic capacity for production of the item or comparable items. As secondary factors, USTR will also consider the potential impact on U.S. interests, such as any potential harm to U.S. small businesses, employment, and manufacturing, as well as any potential effect

on USTR's ongoing trade negotiations with China. USTR created a specific form that requires submission of certain information with any comment about any particular item that would be proposed for such a Section 301 tariff exclusion, which is available [here](#).

Retroactive Application of Any Reinstated Exclusions.

If any of these Section 301 tariff exclusions are eventually reinstated, USTR will make those exclusions retroactive to October 12, 2021. Thus, U.S. importers who are seeking reinstatement of exclusions will probably also want to consider asking U.S. Customs and Border Protection ("CBP") for extensions of CBP's final assessment of import duties on such imports (a process called "liquidation"), or protesting CBP's liquidation of imports that are subject to Section 301 tariffs but may be eligible for reinstatement of an exclusion. Any such protest to CBP must be submitted within 180 days after liquidation. During prior rounds of USTR's consideration of exclusions, CBP instructed importers that they can preserve their rights to refunds of these tariffs either by asking for extensions of liquidation or by protesting liquidation that resulted in finalization of Section 301 duties for an import that may qualify for an exclusion. If an importer fails to seek such extensions or to file such protests, CBP's finalization of duties through liquidation generally would prevent that importer from recovering the Section 301 duties it had paid if and when USTR were to reinstate the exclusions for those imported goods.

Future Prospects for Tariff Relief.

As noted above, USTR's latest announced exclusion process is limited only to those several hundred items made in China for which a tariff exclusion had previously been granted and extended. Many U.S. importers and manufacturers had hoped that USTR would also consider reinstating exclusions for items that had previously been in effect but that had not been extended or perhaps even that USTR might consider entirely new exclusions. To date, USTR has chosen not to do so, although USTR Tai said the Biden Administration will consider additional exclusion processes "as warranted."

The U.S. Senate had also passed legislation with broad bipartisan support in May 2021 that would require USTR to consider exclusions for imports from China, although it still left USTR significant discretion to consider when exclusions are appropriate. This legislation has not yet been passed by the U.S. House of Representatives. However, it seems likely that the U.S. House will consider and adopt some form of trade legislation that might incorporate the Senate provisions in a final bill that will be presented to the President for signature. Importers thus may still have another later opportunity, either as a result of an act of Congress or USTR action, to seek new exclusions to escape the current Section 301 tariffs that remain in effect.

Finally, USTR has indicated that it will also continue to address China's "state-centered and non-market trade practices that were not addressed in the Phase One deal." In carrying out that pledge, the Biden Administration will likely confront China about its industrial policies through a range of measures. USTR and leading agencies such as the Departments of State, Commerce and Treasury will press on through bilateral diplomacy with their Chinese counterparts. USTR has already indicated that it may conduct further

Section 301 investigations that could lead to yet more punitive tariffs in the absence of changes in Chinese policies and practices. USTR is also likely to seek to build multilateral agreements with other close trading partners such as the European Union, the United Kingdom, and Japan to act in concert vis-à-vis China. USTR may also engage in formal dispute settlement at the World Trade Organization. With such a diverse array of factors that could affect the Biden Administration's trade policy toward China, it is hard to forecast what will happen to these U.S. tariffs in the coming months.

Conclusion.

Dorsey has attorneys experienced with helping importers, purchasers, and U.S. manufacturers with the tariff exclusion process under Section 301. Please contact any of the attorneys below for further information.