

USTR Relaunches Exclusion Process for China Section 301 Tariffs

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On October 4, 2021, [U.S. Trade Representative Katherine Tai announced](#) the restart of an exclusion process that could lead to the reinstatement of certain exemptions from tariffs imposed on Chinese imports under Section 301 of the Trade Act of 1974 (Section 301). Under the previous exclusion program, interested parties could petition the Office of the U.S. Trade Representative (USTR) for an exclusion from Section 301 tariffs — which can be prohibitive, reaching up to 25% — on particular products imported from China. Apart from exclusions for products related to addressing COVID-19, which are handled through a separate mechanism,¹ all of the exclusions previously granted have expired.

In a [notice dated October 8, 2021](#), USTR announced that it would restart the process by inviting public comment on whether to reinstate expired exclusions that it had previously granted, and then extended, with respect to [549 products](#). Although the scope of the new process is more limited than some had hoped, many companies will welcome it.

Companies that have benefitted from exclusions in the past that fall within the list of 549 products should consider whether to submit comments in support of reinstating those exclusions. Alternatively, companies may want to consider whether to submit comments opposing the reinstatement of certain exclusions that confer an advantage on competitors. Regardless, companies should carefully monitor the exclusion process and related legislative developments.

Origins of the Tariffs and the Previous Exclusion Process

In 2018, USTR imposed tariffs on Chinese imports following an investigation conducted under Section 301. Based on that investigation, USTR found that the acts, policies and practices of the Chinese government related to technology transfer, IP and innovation were unreasonable and discriminatory, and burdened or restricted U.S. commerce.² USTR then proceeded to impose tariffs in successive waves, based on a series of product lists.

An important element of this tariff program was the availability of an exclusion process. Under this process, which was in effect from June 2018 to December 2020, interested parties could petition USTR to exempt certain products from Section 301 tariffs, and in some cases comment on whether to extend those exclusions before they expired. Successful petitions resulted in product-specific exclusions, based on a 10-digit HTS code and, in most cases, a technical description of the product. Once an exclusion was granted, all importers of the product, not merely the importer who made the petition, could take advantage of the exclusion. USTR accepted public comments both in favor of and opposing exclusions and extensions.

USTR evaluated petitions on a case-by-case basis, taking into account the following four factors: (i) availability of the product in question from non-Chinese sources; (ii) attempts by the importer to source the product from the U.S. or third countries; (iii) the extent to which the imposition of Section 301 tariffs on the particular product would cause severe

¹ Beginning on March 5, 2020, USTR issued tariff exclusions on certain medical products from China related to the U.S. response to COVID-19, in consultation with the Department of Health and Human Services. After granting 200 initial product exclusions consisting mostly of personal protective equipment, [USTR opened a public comment process for additional exclusions](#) on March 25, 2020. As a result of that public comment process, [USTR announced](#) additional extensions and exclusions on December 29, 2020. After some exclusions expired, USTR reopened the public comment process on the potential extension for 99 products and later announced an [interim 45-day extension](#) to consider public comments. The interim extension is valid through November 14, 2021.

² Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301, 83 Fed. Reg. 14,906 (April 6, 2018).

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economic harm to the importer or other U.S. interests; and (iv) the strategic importance of the product to the Chinese government's Made in China 2025 industrial policy or other Chinese industrial programs.

According to the most [recent available data](#) from the U.S. Government Accountability Office (GAO), out of the 52,746 exclusion requests submitted to USTR, 87% were denied, with the vast majority (69%) denied for failure to show severe economic harm. Another 23% were denied for failure to show the product was available only from China, and the remaining 9% denied for other reasons. USTR granted 13% of the requests, after which the excluded HTS codes and, in many cases, a technical description of the product were published in the *Federal Register*.

Because the [China Section 301 tariffs](#) apply to a broad range of goods — currently, four lists of tariffs on a total of \$550 billion in imports — a wide range of sectors benefitted from the exclusions. But certain categories of goods appeared to have better odds of securing exclusions than others did. For example, while USTR granted 19% of the 1,331 exclusion requests filed for plastic products, it granted only 10% of the 1,325 exclusion requests for chemical products. Other winners of the exclusion process included machinery, mechanical and electrical components, and health care products. Likewise, according to a [GAO study](#), capital goods (*i.e.*, those used by businesses to produce goods and services) and certain advanced technology products were more likely to receive exclusions, with success rates of 24% and 27%, respectively.

Section 301 Exclusion Program, Version 2.0

The rebooted version of this program is more limited in scope. At least at this point, USTR has invited public comments only with respect to whether the 549 exclusions that had previously been extended should be reinstated now that those extensions have expired. In a statement released on October 5, 2021, USTR explained that “the focus of the evaluation will be whether, despite the first imposition of these additional duties in September 2018, the particular product remains available only from China.” This statement underscores the primary rationale of the original exclusion process, which was largely intended to give importers time to make supply chain adjustments away from China. In its request for comments on the potential reinstatements, USTR elaborated that as part of the inquiry into whether a product is only available from China, USTR would consider:

- whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries;

- any changes in the global supply chain since September 2018 with respect to the particular product or any other relevant industry developments;
- the efforts, if any, that importers or U.S. purchasers have undertaken since September 2018 to source the product from the United States or third countries; and
- domestic capacity for producing the product in the United States.

In addition, USTR said that it would consider:

- the likelihood of severe economic harm to the commenter or other U.S. interests, including the impact on small businesses, employment, manufacturing output and critical supply chains in the United States; and
- the overall impact of the exclusions on the goal of obtaining the elimination of China's acts, policies and practices covered in the Section 301 investigation.

These criteria are more detailed than previous iterations of the program, and appear to create more flexibility for USTR to craft a determination. Notably, the new program places particular emphasis on the potential impact of tariffs on small business interests. Also, the new program could conceivably place less emphasis on the importance of proving severe economic harm, which accounted for 69% of rejections under the previous program.

In some cases under the previous exclusion program, comments submitted in opposition to an exclusion request played a meaningful role in the outcome, and we expect that the same will be true for the new process. For example, in 2018, Eccotemp Systems, which manufactures tankless water heaters in China and imports them into the United States, requested an exclusion on the basis that its heaters could not be manufactured outside of China. After Eccotemp filed its request on USTR's public docket, a major Japanese heater manufacturer, Rheem Manufacturing, submitted [comments opposing Eccotemp's application](#), arguing that Rheem had “spare manufacturing capacity and could supply all of the 40,625 units of tankless gas water heaters that Eccotemp reports having imported from China during 2017.” USTR subsequently denied Eccotemp's exclusion request.

Future Developments

Whether USTR will eventually broaden the new exclusion process beyond the 549 products initially selected remains to be seen. In the meantime, companies should monitor several key developments:

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The Trade Act of 2021

The Trade Act of 2021 (the Trade Act) is an amendment that was inserted into the U.S. Innovation and Competition Act, which passed the Senate in June 2021. The Trade Act would require a more expansive and consumer-focused Section 301 exclusion process than the recently announced USTR program. If the House passes the amendment, the Trade Act would directly reinstate all expired Section 301 exclusions. Further, for exclusions that expired on December 31, 2020, importers would be refunded all duties paid between that date and the enactment of the Trade Act. Lastly, the Trade Act would institute a new process for exclusions using criteria such as whether tariffs would “unreasonably

increase consumer prices for day-to-day items consumed by low or middle-income families,” and whether the article or a substitute is “commercially available” to the requestor.

New Section 301 Investigations

In September 2021, it was widely reported that the Biden administration was considering whether to initiate a new Section 301 investigation focusing on China’s use of industrial subsidies. Such an investigation could result in additional tariffs being levied on Chinese imports. Depending on the scope and magnitude of the tariffs ultimately imposed, this could significantly impact supply chains, which are already burdened by existing Section 301 tariffs.

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