

# USTR released the Section 301 product exclusion process for List 3 goods from China

25 June 2019

On 20 June 2019 the Office of the United States Trade Representative (USTR) announced the [final product exclusion process](#) for List 3 by which U.S. stakeholders can request exclusion of particular Chinese products classified within a covered tariff subheading from Section 301 duties. Parties seeking exclusion can file with the USTR starting on 30 June 2019 but no later than 30 September 2019.

## Background

In August 2017 the USTR initiated an investigation pursuant to Section 301 of the Trade Act of 1974 into the alleged unfair trade practices by the Chinese government that harmed U.S. interests. To date, the Trump administration has imposed tariffs on selected Chinese import goods in the following three lists:

- 25 percent ad valorem rate of duties on US\$34 billion of Chinese goods listed in List 1, per the USTR's notice on [20 June 2018](#).
- 25 percent ad valorem rate of duties on US\$16 billion of Chinese goods listed in List 2, per the USTR's notice on [16 August 2018](#).
- 10 percent ad valorem duties on nearly US\$200 billion of Chinese goods listed in List 3, per the USTR's notice on [21 September 2018](#).

The USTR originally imposed 10 percent import duties on Chinese items listed in List 3. The duties were scheduled to increase to 25 percent on 2 January, but the increase was postponed after President Trump and President Xi met during the G-20 Summit in Argentina last December and agreed to start bilateral talks. However, after a breakdown in the talks, the USTR, at the direction of President Trump, published a Federal Register [notice](#) that formally increased the tariffs on US\$200 billion of Chinese goods in List 3 from 10 percent to 25 percent, effective from 10 May 2019. While the USTR previously resisted a product exclusion process for List 3, it has now put one into effect.

### List 3 product exclusion process

The List 3 product exclusion process differs in several respects from that used on Lists 1 and 2. General information regarding the List 3 product exclusion process and how it differs from previous procedures for Lists 1 and 2 are outlined below.

- **Timeline** – The window for exclusion requests of List 3 Chinese products is scheduled to open on 30 June 2019 and close on 30 September 2019.
- **Broader range of products covered by a single request** – Requests need to identify the Harmonized Tariff Schedule of the United States (HTSUS) code for the product. While a separate request has to be filed for each product, the USTR has changed the procedure to allow a "product" to be more broadly defined as a range of particular goods, so it covers multiple sizes or models as long as the underlying product characteristics are the same. This means that it may no longer be necessary to file multiple requests for a product with different sizes or specifications.
- **Product description materials** – The new Exclusion Request Form (form) specifies that the requester shall include the 10-digit HTSUS for the product addressed in the exclusion request and a detailed description of the product including function, application, and principal use. The USTR also provides greater leeway in the form to identify and distinguish the product in terms of its use by accepting U.S. Customs and Border Protection (CBP) rulings, photos, specification sheets, and previous import documentation. Submitting photos and illustrative description materials may make it easier for U.S. Customs to administer an exclusion, which is an important factor. In addition, the USTR and U.S. Customs appear to be backing away from previous restrictions on identifying products in terms of actual or chief use, although they continue to prohibit requests that identify a product using nonpublic criteria.
- **Criteria for Lists 1 and 2** – The new form contains 17 questions, which is longer than the 12 questions from the List 1 and 2 forms. Similar to the exclusion procedures for List 1 and 2, the form asks whether the product is available in the United States or third countries, whether imposition of additional tariffs would cause severe economic harm to the requester or other U.S. interests, and whether the particular product is strategically important or related to "Made in China 2025" or other Chinese industrial policies. New to the form is whether the requester has submitted any exclusion requests for prior rounds of tariffs and what is the total value of imports that are subject to China 301 tariffs. Availability from the United States or third countries, opposition by a U.S. producer, and inclusion on China's "Made in China 2025" priorities appear to be important factors to the USTR review process.
- **Response to an exclusion request** – After a company files a request, anyone in opposition can file a response within 14 days after the request is posted on the USTR's online portal. The requester can then file a reply to a response within seven days after the close of the 14-day response period, or seven days after the posting of a response.
- **Timing for submissions** – The USTR estimates there will be 60,000 product exclusion requests for List 3, and so similarly to the Lists 1 and 2 exclusion processes, the USTR's decision-making process is likely to take a long time. However, any requests that are approved are retroactive. While submitting requests earlier in the process may move an application up in the queue, a rushed or incomplete application has less chance of getting through the rigorous multistage review by the USTR, the Section 301 Committee, and U.S. Customs.

- USTR decision-making – Because the USTR has been flooded with product exclusion requests, it has previously taken a long time for most parties to receive a determination on their exclusion requests. However, it is worth considering a request if the tariffs have a significant impact on your business, as the process appears to involve meaningful review of the need for potential exclusions. So far, our experience is that, while roughly 20 percent of the requests we have filed have been fully approved, over half have moved to Stage 3, which means they have been reviewed by the Section 301 Committee and sent to U.S. Customs for a determination as to their "administrability."

### **Outlook to the intensified trade conflict**

In response to the USTR's increase on tariffs on List 3 to 25 percent, China immediately announced on 13 May that it would increase tariffs on many of the products on its retaliatory third list. For its part, the USTR has launched the notice and comment process for List 4, targeting most of the remaining U.S. imports from China for 25 percent tariffs. List 4 covers roughly US\$300 billion in Chinese goods. Hearings on List 4 are concluding on Tuesday, 25 June 2019. Depending on if and when President Trump approves the final imposition of duties on List 4, duties on covered products could go into effect in mid-to-late July.

Presidents Trump and Xi have agreed to meet at the G-20 Economic Summit in Osaka, Japan on 28-29 June 2019 and discuss a resolution to the ongoing trade conflict. If the meeting goes well, the two potential outcomes are (1) a resumption of negotiations by Ambassador Lighthizer and Treasury Secretary Mnuchin and Vice Premier Liu He and their working-level teams, and (2) postponement of the List 4 tariffs, the imposition of which would otherwise represent a significant escalation by the United States and also carry risks of a significant consumer backlash, since the list covers high-profile and high-volume products such as cellphones, laptops, televisions, footwear, and apparel.

It is unlikely that the two sides will reach a substantive deal in Osaka given the fundamental differences between the two sides over the remaining systemic and enforcement issues – which appear too wide to be resolved in a week. It is always possible that President Trump could overrule Ambassador Lighthizer and strike a deal himself in Osaka, but this would involve political risks.

Ideally, List 4 will be postponed while the two governments try to work out a final deal, although this could take several months – or more if they get bogged down again over the remaining systemic and enforcement issues.

If you have any questions regarding this alert or need further assistance on your product exclusion process, please contact any of the lawyers below.

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