

USTR invites comments on potential Section 301 exclusions in response to the coronavirus

25 March 2020

The Office of the U.S. Trade Representative (USTR) has announced it is accepting comments on potential Section 301 tariff exclusions for Chinese imports necessary to respond to the coronavirus. USTR is likely to expeditiously lift the Section 301 tariffs on relevant products because of the imminent public health concerns. Thus, stakeholders should consider submitting comments on any product at all relevant to the coronavirus response.

New Section 301 comment process

In 2017 the administration initiated a Section 301 investigation to determine whether China's acts, policies, and practices related to technology transfer, intellectual property, and innovation negatively affected U.S. economic interests. In 2018 USTR made an affirmative determination that China's actions were unreasonable or discriminatory and burdened or restricted U.S. commerce. As a result, USTR placed tariffs on well over US\$300 billion worth of Chinese imports, impacting a range of products, including medical supplies.

To address the coronavirus pandemic, USTR has already removed tariffs on certain medical care products including masks, gloves, and other disposable protective gear. On 20 March 2020 USTR [invited](#) the public to comment on whether additional exclusions are necessary "to keep current on developments in our national fight against the coronavirus pandemic."

In the past, USTR has refrained from imposing tariffs on pharmaceutical and medical device products because of the negative optics of using such products as hostages in essentially commercial disputes. In a *Wall Street Journal* op-ed¹, former USTR Robert Zoellick criticized the Trump administration's Section 301 tariffs for "making it harder for first responders to procure masks, sterile gloves, goggles, hospital gowns, surgical drapes, thermometers and breathing masks." The op-ed cited a Peterson Institute study, which estimated that tariffs have been imposed on US\$5 billion of Chinese medical products, and thus "may [be] contribut[ing] to shortages and higher costs of vital equipment at a time of nationwide health crisis."² Ambassador

¹ "Trump's Tariffs Leave the U.S. Short on Vital Medical Supplies," Ambassador Robert B. Zoellick, *Wall Street Journal* (18 March 2020) https://www.wsj.com/articles/trumps-tariffs-leave-the-u-s-short-on-vital-medical-supplies-11584551602?mod=article_inline.

² Chad P. Bown, "Trump's trade policy is hampering the US fight against COVID-19," (Peterson Institute for International economics (13 March 2020)). <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-trade-policy-hampering-us-fight-against-covid-19>.

Lighthizer quickly responded with an op-ed³ attacking "hackneyed efforts" to "pin some blame for the current crisis on the administration's Section 301 tariffs on China." Lighthizer argued that the Section 301 tariffs did not cover key medical products; any decline in Chinese imports has been offset by increased imports from other countries; and USTR has granted immediate exclusions from the Section 301 tariffs for all critical medical products. Finally, Lighthizer argued that the current shortages show "U.S. dependence on China for key medical supplies is a strategic vulnerability," which "President Trump's economic and trade policies are helping to overcome."

Key takeaways:

- **Opportunity for additional exclusions:** This new USTR comment process is separate from the existing exclusion processes. However, the outcome will likely be the same – additional product exclusions from Section 301 tariffs. Stakeholders should take advantage of this opportunity to submit comments for any medical products that are currently subject to tariffs.
- **Accelerated timetable:** The comment process is open until at least 25 June 2020 and may be extended. However, given the urgency in responding to the coronavirus, USTR will likely act quickly. For example, prior to announcing the new comment process, USTR issued three separate exclusion lists totaling over 30 products within a seven-day span. The agency appears eager to extricate itself from what could become an untenable situation, in which it owns part of the current shortages of medical equipment needed to treat a nationwide epidemic.
- **Broad scope of products:** USTR's notice states that comments should address medical care products "needed to respond to the COVID-19 outbreak." The scope of products is likely to be interpreted expansively to include any products that at all relate to treatment for the coronavirus. This includes, for example, products to treat patients, limit the outbreak, or produce medical care products. Moreover, comments can address products for which an exclusion is currently pending or was already denied.

If you have any questions regarding USTR's new Section 301 comment process, please contact any of the listed lawyers.

³ Lighthizer Responds on Medical Trade Tariffs," Ambassador Robert E. Lighthizer, *Wall Street Journal* (20 March 2020) <https://www.wsj.com/articles/lighthizer-rebuts-zoellick-on-medical-trade-11584732340>.

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