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USTR TO WEIGH RENEWING PREVIOUSLY EXTENDED SECTION 301 EXCLUSIONS AS PART OF CHINA TRADE POLICY REALIGNMENT

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Beginning Tuesday, October 12, 2021, the U.S. Trade Representative (USTR) will accept public comments on whether to reinstate expired Chinese product exclusions from the Section 301 tariffs that had previously been extended. This comes as the Biden Administration begins to reveal a realignment of the U.S.–China trade relationship with a worker-centric domestic economic agenda. BCLP's international trade team is available to help companies that import or produce goods subject to these exclusions to prepare comments, which must be filed no later than December 1 to be considered.

Background on the Section 301 Action Against China

Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, authorizes the USTR to take retaliatory trade measures against a foreign country to eliminate any act, policy, or practice that it determines is unreasonable or discriminatory and burdens or restricts U.S. commerce. In August 2017, the Trump Administration conducted a Section 301 investigation into the trade policies and practices of the People's Republic of China related to technology transfer, intellectual property, and innovation. The USTR concluded in March 2018 that China's forced technology transfer requirements, cyber-enabled theft of U.S. intellectual property and trade secrets, discriminatory licensing practices, and state-funded strategic acquisition of U.S. assets all justified action.

Following public hearings, the USTR ultimately has imposed Section 301 tariffs of between 7.5 and 25 percent *ad valorem* on four tranches of Chinese goods valued annually at nearly $370 billion and covered by over 10,000 full or partial eight-digit subheadings of the Harmonized Tariff Schedule of the United States (HTSUS). The initial two tranches first took effect on July 6, 2018 (List 1) and August 23, 2018 (List 2). After China imposed equivalent measures, the USTR issued two more tranches, effective September 24, 2018 (List 3), and September 1, 2019 (List 4A). A proposed tariff on $180 billion of additional Chinese goods was suspended indefinitely after the United States and China reached a "Phase One" agreement in December 2019 that addressed certain issues covered by the Section 301 investigation.

The USTR also established for each tranche a process by which interested parties could request that certain products be excluded from the tariff for one year, ultimately issuing more than 2200 exclusions defined as full ten-digit subheadings or more specific "carve-outs" thereto. The USTR periodically invited comments on extending these exclusions for up to one more year, granting extensions on 549 exclusions and allowing the remainder to expire. All exclusions expired no later than April 18, 2021 without a further opportunity for extension.

Biden Administration China Trade Policy Revealed

Since his inauguration, President Biden has largely maintained the status quo with China, including by leaving the Section 301 tariffs in place. But in long-awaited remarks to the Center for Strategic and International Studies on Monday, October 4, USTR Katherine C. Tai previewed the Administration's "strategic vision for realigning our trade policies towards China to defend the interests of America's workers, businesses, farmers, and producers and strengthen our middle class."

The USTR announced four initial steps: (1) enforcing China's commitments, including agricultural purchases, under the Phase One Agreement; (2) restarting the "targeted tariff exclusions process to mitigate the effects of certain Section 301 tariffs that raised costs on Americans"; (3) addressing concerns with Chinese trade policies and practices not dealt with by the Phase One Agreement; and (4) coordinating and consulting with allies and partners to shape fairer global trade rules.

Request for Comments on Reinstatement of Exclusions

The first concrete action came the following day, October 5, when the USTR issued a draft **Federal Register notice** soliciting comments on the "possible reinstatement of certain exclusions" from the Section 301 action. Specifically, the notice states that the USTR is considering renewing only those 549 exclusions that had previously been extended, a press release explaining "[a]s these exclusions were previously found to warrant additional time." **Comments will be accepted Tuesday, October 12 at 12:01am through Wednesday, December 1 at 11:59pm via the USTR online comments portal.** Parties are eligible to comment regardless of whether they participated in an exclusion process to date. The USTR has provided a **reference index** of the exclusions in question and a **facsimile** of a form listing the information required.

The three factors the USTR will consider to determine whether to reinstate an exclusion are familiar from previous exclusion submissions:

- Whether the product covered by the exclusion remains available only from China, considering domestic and third-country production and capacity, as well as changes since the tariff was imposed in the product's global supply chain and efforts to source the product from outside of China (*availability*);

- Whether reinstating the exclusion will impact or result in severe economic harm to the commenter or other U.S. interests (*harm*); and
- The overall impact of the exclusion on the goal of eliminating China's unfair trade practices (*effectiveness*).

When preparing comments on exclusion reinstatements, companies should consider Ambassador Tai's remarks on realignment, where she explained that her office "place[s] a lot of weight in what we hear from our businesses, especially our small- and medium-sized businesses that certainly have been impacted by the tariffs." The White House likewise explained to reporters that the exclusion process will be used to benefit American workers. The notice states that the USTR will particularly consider the impact of reinstatement on small businesses, employment, manufacturing output, and critical supply chains in the United States.

The USTR's decision comes months after the Senate passed the United States Innovation and Competition Act of 2021, which would reinstate all approximately 2200 exclusions and establish a new product exclusion process, and amid unprecedented litigation in the U.S. Court of International Trade in which over 3500 plaintiffs asked the court to hold all List 3 and 4A tariffs unlawful, alleging they were determined more than one year from initiation of the investigation in violation of Section 301. Meanwhile, a separate 99 exclusions for medical-care products responsive to the COVID-19 pandemic set to expire September 30 were extended through November 14 as the USTR reviews public comments on longer extensions.

The experienced international trade team at BCLP is available to assist companies that produce or import goods subject to the previously extended exclusions with filing comments on the proposed Section 301 exclusion reinstatements before the December 1 deadline.

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