

Trade Compliance Flash: USTR Publishes First Product-Specific Exclusions from Section 301 Tariffs

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On December 28, 2018, the Office of the United States Trade Representative (USTR) published a list of 31 products that were granted a one-year exclusion from the tariffs imposed on Chinese goods pursuant to Section 301 of the Trade Act of 1974 (the Section 301 Tariffs). This list, published in a Federal Register Notice, is available [here](#). The 31 exclusions granted cover 984 requests, all in connection with products covered by the first tranche of tariffs imposed on \$34 billion worth of Chinese imports (so-called "List 1"). To date, no exclusions have been granted for products covered by the second tranche of tariffs imposed on \$16 billion worth of imports (List 2). Below are our takeaways on the exclusions granted and USTR's ongoing exclusion process.

- **Despite a slow start, the exclusions granted provide reason for optimism.** Of the 10,797 requests that have thus far been filed for List 1 products, 984 (9 percent) have been granted and 1,258 (12 percent) denied, with another 8,556 (79 percent) still pending. Therefore, although a significant backlog remains, USTR has granted almost half of the exclusion requests that have thus far been adjudicated. We believe this is cause for cautious optimism: if current trends continue, it is reasonable to expect that hundreds more exclusion requests will be granted, both in connection to List 1 and List 2. Nevertheless, we caution that the requests adjudicated thus far may not be representative of the whole. In addition, USTR required an average of approximately 90 days to reach a decision on the requests adjudicated to-date, suggesting that the agency could require several more months to work through the remaining requests.
- **The exclusions granted thus far cover products from only a handful of tariff subheadings.** Over 95 percent of the products granted a tariff exclusion fall into a handful of HTSUS (Harmonized Tariff Schedule of the United States) subheadings, namely: (1) injection-type molds for rubber or plastics (8480.71.80); (2) single-row radial bearings of various dimensions (8482.10.5044, 8482.10.5048, and 8482.10.5052); (3) linear-acting hydraulic motors (8412.21.00); (4) refrigerated self-contained drinking water coolers (8418.69.01); and (5) thermostats for air conditioning (9032.10.00). These products are used for a wide range of applications across industries.
- **Successful exclusion requests focused on the lack of non-Chinese supply and economic harm to U.S. interests. They also did not draw opposition from U.S. industry.** In the Federal Register Notice announcing the List 1 exclusion process, available [here](#), USTR set forth three substantive factors that exclusion requests should address: (1) whether the particular product is available only from China, with specific reference to whether a particular product and/or a comparable product is available from sources in the United States and/or in third countries; (2) whether the imposition of additional duties on the particular product would cause severe economic harm to the requestor or other U.S. interests; and (3) whether the particular product is strategically important or related to "Made in China 2025" or other Chinese industrial programs. Successful exclusion requests generally addressed all three factors. We summarize successful arguments for each factor below:
 - **Product Availability Outside China.** To satisfy this factor, successful exclusion requests provided concrete, particularized reasons the product could not be sourced from outside China. For example, successful arguments include: (1) that manufacturers outside China lack the know-how or intellectual property necessary to make the product to the importer's specification, or (2) that transferring production to a new, non-Chinese supplier would require significant capital investment, testing, and certification and therefore take several months or years. Conversely, USTR denied requests where it concluded that the product was available from non-Chinese sources, even at a higher cost or with some modifications.
 - **Economic Harm to U.S. Interests.** Successful exclusion requests provided concrete, particularized reasons for the economic

harm factor as well. For example, successful requests demonstrated that additional duties would result in reduced market share against international competitors, curtailed or reduced U.S. hiring, or cut-backs in U.S.-based research and development. Conversely, USTR denied requests that simply alleged that higher costs would result in reduced profitability or additional costs to consumers, without providing a particularized analysis of the negative impact to U.S. interests.

- **Strategic Importance of Products.** Both successful and unsuccessful arguments for this factor made essentially the same argument – *i.e.*, that the covered product was not part of one of the sectors targeted by "Made in China 2025" or that the requestor was not aware of any unfair technology transfer practices in connection with the product. USTR nevertheless rejected these arguments and denied the exclusion requests for certain sensitive products, such as avionics components or high-tech scientific instruments.
- **Congressional and other government advocacy may have played a role for some requests.** Several successful exclusion requests included letters of support from Members of the House of Representatives, Senators, or local government officials. Such support may have played a role in ensuring that such requests received extra attention, or perhaps even tipped the scales in close cases. In addition, most of the exclusions granted have been for small or medium-sized enterprises, which often appear to be better able to satisfy USTR's economic harm criterion.
- **Companies will be able to take advantage of exclusions requested by their competitors or modify products to conform to the product exclusion language.** The exclusions granted are product-specific, rather than company-specific, which means that exclusions are available to any importer that can demonstrate that its product falls within the language for one of the exclusions. As the product exclusions are very detailed, companies that import a similar product may wish to seek a binding classification ruling from U.S. Customs and Border Protection (CBP) to ensure that its product falls within the exclusion language. Alternatively, importing companies may seek to tweak their product's design to ensure that it meets the language of the tariff exclusion provision. The exclusions are retroactive to July 6, 2018, which means that companies can claim a refund of any Section 301 duties paid on eligible products imported since that date.
- **The exclusions granted serve as a blueprint for future exclusion request processes.** USTR has not set up an exclusion process for the final List 3 tranche of Section 301 Tariffs, which cover \$200 billion worth of U.S. imports from China. However, there has been a considerable amount of political pressure in favor of such an exclusion process – which is only likely to intensify if the U.S. and Chinese governments fail to reach an agreement in the ongoing "trade war" by the March 1 deadline set by U.S. negotiators, when tariffs on List 3 products are scheduled to increase from 10 percent to 25 percent if an agreement is not reached. If a List 3 exclusion process is put into place, the exclusions granted for List 1 will likely assist companies in crafting effective exclusion arguments. In addition, if the Section 301 Tariffs extend into 2019 and beyond, the 2018 exclusion request process may help guide future List 1 or List 2 exclusion requests as well.

For more information, please contact:

[Richard A. Mojica, rmojica@milchev.com](mailto:rmojica@milchev.com), 202-626-1571

[Collmann Griffin, cgriffin@milchev.com](mailto:cgriffin@milchev.com), 202-626-5836

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