



Section 301: Tariff Exclusions on U.S. Imports from China

In 2018, the U.S. Trade Representative (USTR) determined, pursuant to an investigation under “Section 301” (Title III of the Trade Act of 1974, 19 U.S.C. §§2411-2420), that China’s acts, policies, and practices related to technology transfer, intellectual property (IP), and innovation are unreasonable or discriminatory and burden or restrict U.S. commerce. To counter them and obtain their elimination, the Trump Administration imposed, under Section 301, four rounds of increased tariffs on approximately two-thirds of U.S. imports from China. However, to avoid harm to U.S. interests, the USTR instituted “tariff exclusions” for certain U.S. imports that would otherwise be subject to tariffs. This is the first time that the agency has established an exclusion request process, and several Members of Congress have raised concerns about its implementation.

Some Members have questioned USTR’s ability to “pick winners and losers” through granting or denying requests or have pushed for broad tariff relief amid concerns about the negative impact of tariffs on the U.S. economy. Others, not wanting to undermine the use of Section 301 to address China’s unfair trade practices, have discouraged the USTR from granting tariff exclusions at all. The agency established an exclusion process for each of the four stages of tariff increases under Section 301—all of which have now closed. The USTR’s latest actions in response to the Coronavirus Disease 2019 (COVID-19) pandemic suggest that new exclusions and extensions might be limited in scope to medical supplies related to the pandemic, and not be aimed at providing broader tariff relief.

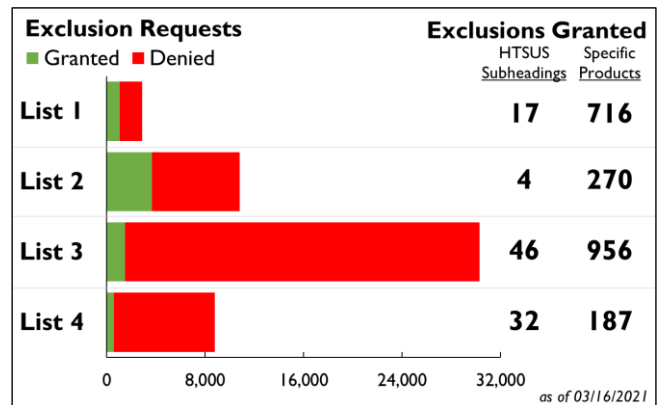
Background

In August 2017, long-standing concerns over China’s policies on IP, subsidies, technology, and innovation led the USTR to launch an investigation—under Section 301—into those policies and their impact on U.S. stakeholders. The investigation concluded that four broad policies or practices justified U.S. action: (1) China’s forced technology transfer requirements, (2) cyber-enabled theft of U.S. IP and trade secrets, (3) discriminatory and non-market-based licensing practices, and (4) state-funded strategic acquisition of U.S. assets. Subsequently, as part of its efforts to pressure China to change these practices, the United States imposed additional tariffs, of up to 25%, on certain U.S. imports from China under four separate actions (per Lists 1-4).

During the Section 301 notice, hearing, and comment period on proposed tariff increases, the USTR heard numerous U.S. stakeholders who expressed concerns about how additional tariffs could affect their businesses, as well as U.S. consumers. In response, for each Section 301 action regarding a new list of covered products, the USTR created a process whereby interested parties could request that a particular product be excluded from the tariffs, subject to certain criteria. Title III of the Trade Act of 1974 does not outline a formal process for exclusions or require the USTR to establish one. The determination to do so appears to be solely at the USTR’s discretion.

With the COVID-19 pandemic, the agency has prioritized the review of exclusion requests concerning medical products, resulting in new exclusions and extensions for some personal protective equipment (PPE) in short supply. Separately, the USTR also requested public comments on whether to remove additional products covered by any list that are relevant to the U.S. response to the COVID-19 pandemic. As a result, it has recently granted new exclusions for certain medical-care products.

Figure 1. Section 301 Exclusions



Source: CRS with information from the Office of the USTR.

Note: Figures may not reflect amendments to product-specific exclusions and do not include requests submitted on or after March 25, 2020, in response to 85 FR 16987. However, exclusions granted to date and noted here may have been informed by those requests.

Section 301 Tariff Exclusion Process

The tariff exclusion process enabled interested parties—including law firms and trade associations—to petition for an exemption from the Section 301 tariff increases for specific imports classified within a 10-digit Harmonized Tariff Schedule of the United States (HTSUS) subheading. The time window to submit new exclusion requests is closed, but the USTR reportedly continues to consider extensions of exclusions already granted. While the USTR approved, on average, 35% of new requests under the first two actions, the approval rates under the third and fourth actions were 5% and 7%, respectively.

According to the USTR, all requests are evaluated on a case-by-case basis. The agency has indicated that, in determining which requests to grant, it considers the following: (1) availability of the product in question from non-Chinese sources, (2) attempts by the importer to source the product from the United States or third countries, (3) the extent to which the imposition of Section 301 tariffs on the particular product will cause severe economic harm to the importer or other U.S. interests, and (4) the strategic importance of the product to “Made in China 2025” or other Chinese industrial programs. Past exclusions also have been granted for reasons that are thought to include, among others, U.S. national security interests and demonstrable economic hardship from the tariffs for small businesses.

There is no timetable for providing responses to filed requests, but the agency periodically announces decisions on pending requests through *Federal Register* notices. The “index” on the “USTR Exclusion Portal” also indicates the status of each request in the review process. When the USTR has issued an exclusion, it has generally been valid for one year after the exclusion notice is published in the *Federal Register* and retroactive to the imposition of the tariffs (with the starting date varying by applicable list). Exclusions are not specific to the requestor, so any party importing a product covered by an exclusion may do so under the exclusion and request retroactive tariff refunds from U.S. Customs and Border Protection (CBP).

Through January 31, 2020, the USTR received a total of 52,746 exclusion requests, pertinent to all four actions. Of these, 6,804 (13%) were granted and 45,942 (87%) were denied (**Figure 1**). Specifically, the exclusions are reflected in 99 10-digit HTSUS tariff subheadings and 2,129 specially prepared product descriptions—all of which cover 6,804 separate requests. Because most exclusions apply to specific products within a relevant subheading—not to entire subheadings, CRS could not determine the exact amount of trade covered by the exclusions. The USTR also issued extensions to certain exclusions. They apply to 52 (of the 99) HTSUS subheadings and 516 (of the 2,129) specially prepared product descriptions. These extensions have expired or are set to expire in September 2021. (These figures reflect the new exclusions and extensions granted in December 2020 and discussed below.)

COVID-19 and Medical-Care Products

The USTR announced in March 2020 that, prior to the COVID-19 outbreak, the agency had been working with the U.S. Department of Health and Human Services “to ensure that critical medicines and other essential medical products were not subject to additional Section 301 tariffs.” Consequently, the United States had not imposed tariffs on certain critical products, such as ventilators, oxygen masks, and nebulizers. The USTR indicated that, in recent months, it had prioritized the review of requests for exclusions on medical care products, resulting in exclusions granted on basic medical supplies, including gloves, soaps, facemasks, surgical drapes, and hospital gowns.

Since March 2020, the USTR has exempted certain medical products from Section 301 tariffs in several rounds of exclusions. CRS could not determine exactly how many of them have been exempted on the basis of COVID-19 concerns, as the USTR does not specify the rationale for granting exclusions in its announcements. While some products can be easily identified, there are others with known or potential medical uses—or inputs for the manufacture thereof—that have received exclusions but whose ultimate purpose cannot always be ascertained from HTSUS subheadings or the provided product descriptions (e.g., organic chemicals or textiles for the manufacture of pharmaceuticals or PPE).

Recent New Exclusions and Extensions

On March 25, 2020, the USTR published a *Federal Register* notice seeking comments to determine if further modifications to the Section 301 tariffs on U.S. imports of from China are necessary to respond to the COVID-19 pandemic in the United States. Specifically, the agency requested comments on whether to remove Section 301

duties on “medical-care products” related to the COVID-19 response. Accordingly, the USTR opened a new comment period, which closed on June 25, 2020. Comments could be submitted regarding any medical product subject to Section 301 tariffs, whether or not it was subject to a pending or denied exclusion request. The notice asked that comments “explain precisely how the product relates to the response to the COVID-19 outbreak,” but it provided no further guidance on the types of products that the USTR considers to be “medical-care products.” The review of comments was to run parallel to, and was not to affect, any ongoing product exclusion requests that were still under review.

In response to these comments and the advice from advisory committees, on December 22, 2020, the USTR determined to extend 80 product exclusions on medical-care products that were set to expire on December 31, 2020 (until March 31, 2021) and to grant new tariff exclusions on additional medical-care products. These new exclusions (originally effective from January 1 through March 31, 2021) were reflected in 10 10-digit HTSUS tariff subheadings and 9 specially prepared product descriptions, including clinical thermometers, disinfectants, surgical gowns, and face shields. On March 5, 2021, the USTR extended—through September 30, 2021—the 99 product exclusions included in the December 2020 announcement.

Issues for Congress

In recent years, some Members have raised the issue with the USTR of establishing or streamlining an exclusion process during hearings and in letters to the USTR. For instance, for the third and largest action (List 3), a bipartisan group of more than 160 Representatives urged the Trump Administration to consider granting exclusions. Subsequently, the joint explanatory statement to the FY2019 appropriations law (P.L. 116-6) directed the USTR to establish a product exclusion process for that third stage of tariffs within 30 days of the law’s enactment. During the 116th Congress, some Members introduced legislation to limit USTR’s discretion on whether and how to grant or deny exclusion requests. These proposals included the American Business Tariff Relief Act of 2019 (S. 2362) and the Import Tax Relief Act of 2019 (S. 577/H.R. 1452).

As the Biden Administration reviews the Section 301 actions against China and possibly makes use of Section 301 authorities in a number of ongoing investigations initiated under the Trump Administration (e.g., against France and Vietnam), Congress could consider amending Title III of the Trade Act of 1974. For example, it could require greater congressional consultation or approval before trade restrictions are imposed, modified, or waived pursuant to Section 301 or establish a formal product exclusion process. Alternatively, it could engage with the Administration to develop and implement specific guidelines for when and how to grant and extend exclusions. This could potentially promote transparency, consistency, and proper application of standards in reviewing exclusion requests, thereby helping to ensure that the USTR carries out Section 301 objectives as prescribed by Congress.

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