Congressional Research Service
Informing the legislative debate since 1914

IN FOCUS

Updated December 10, 2020

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.

In particular, 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. To date, the agency has 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 action in response to the Coronavirus Disease 2019 (COVID-19) pandemic suggests new exclusions might be limited in scope to medical supplies related to COVID-19, and not be aimed at providing broader tariff relief.

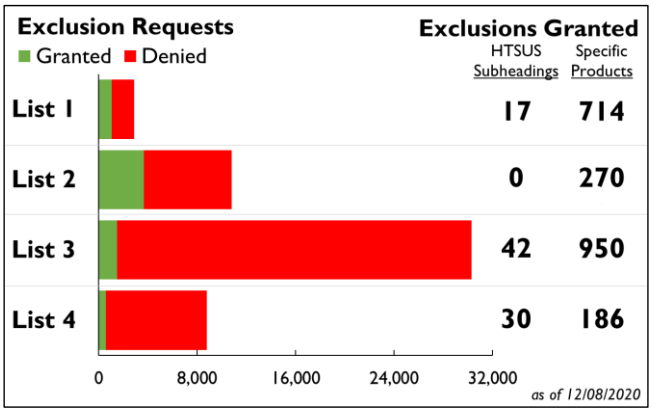
Background

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, 2, 3, and 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 recently prioritized the review of exclusion requests concerning medical products, resulting in new exclusions for some personal protective equipment (PPE) in short supply. Separately, the USTR requested public comments on whether to remove additional products covered by any list that are relevant to the U.S. response to COVID-19.

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, trade associations, and customs brokers—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 now closed, but the USTR is considering extensions of exclusions granted from Lists 1, 2, 3, and 4. While the USTR approved, on average, 35% of 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 issues an exclusion, it is generally 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.

Through January 31, 2020, the USTR received a total of 52,746 exclusion requests, pertinent to all four actions. Of these, 6,804 (13%) have been granted and 45,942 (87%) have been denied (as of December 8, 2020) (**Figure 1**). Specifically, the exclusions are reflected in approximately 89 10-digit HTSUS tariff subheadings and 2,120 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 has also issued extensions to certain exclusions that have expired or are set to expire soon. These apply to 42 (of the 89) HTSUS subheadings and 507 (of the 2,120) specially prepared product descriptions.

COVID-19 and Medical-Care Products

The USTR announced on March 20, 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 has 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).

New Exclusion Process?

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 remained open until 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 provided no further guidance on the types of products that the USTR considers to be "medical-care products." In terms of the substance of the comments, they had to "identify [specifically] the particular product of concern and explain precisely how the product relates to the response to the COVID-19 outbreak." For example, comments could "address whether a product is directly used to treat COVID-19 or to limit the outbreak, and/or whether the product is used in the production of needed medical-care products." In addition, comments were asked to include, to the extent possible, the 10-digit "subheading of the HTSUS applicable to the product, and the identity of the particular product in terms of its functionality and physical characteristics (e.g., dimensions, material composition, or other characteristics)."

The review of comments is to run parallel to, and is not to affect, any ongoing product exclusion requests still under review. The USTR has not indicated what form the response will take or when it will respond to comments—only that it will review them on a rolling basis. These comments may already be informing product exclusion decisions, or may lead to the establishment of a new formal exclusion process, akin to that used for Lists 3 and 4, but strictly for medical products.

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 first session of 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 Trump Administration contemplates making use of Section 301 authorities in a number of ongoing cases (e.g., against France and Vietnam), Congress could consider amending Section 301. For example, it could establish a formal product exclusion process or set specific guidelines for when and how to grant 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.

Andres B. Schwarzenberg, Analyst in International Trade and Finance

IF11582

Disclaimer