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## Good News – There Might be a Section 301 Tariffs List 3 Product Exclusion Process. Bad News – But Only if the List 3 Tariffs Go Up to 25%.

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Back in October, Senator Tim Kaine (D.Va) and 10 other Democratic Senators sent a letter to the USTR urging him to establish a product exclusion process for items covered by List 3 of the Section 301 tariffs similar to the processes already in place for products on Lists 1 and 2. See prior Client Alerts concerning Section 301: July 9, June 21, June 15, and April 4, 2018.

Consistent with earlier rumors that the administration did not initially propose an exclusion process for List 3 since they felt that 10% duty was sufficiently low so as not to require it, a reply from USTR Robert Lighthizer to Senator Kaine dated January 11, 2019 states: "If duty rates on the \$200 Billion trade action is raised to 25%, the USTR will initiate an appropriate exclusion process."

The tariffs imposed on the \$50 billion Chinese products covered by Lists 1 and 2 were 25%; the tariff imposed on the \$200 billion List 3 when it went into effect in October was 10%, but scheduled to rise to 25% on January 1, 2019. After President Trump and Chinese President Xi agreed to a 90 day period of trade negotiations at the G20 summit in Argentina in November, President Trump also announced a delay of implementation of the List 3 increase until March 2, 2019. (See Client Alert from December 18, 2018.) While there have been some encouraging signs in the trade talks between China and the US, the White House has provided little insight into its reaction to Chinese outreach or its possible actions at the conclusion of the 90-day moratorium. After discussions in Beijing last week about intellectual property theft and increased purchases of U.S. goods and services. Senator Chuck Grassley of Iowa reportedly said on Tuesday that the USTR Lighthizer told him that he saw no progress on structural issues during those discussions. Higher-level talks are scheduled in Washington later this month.

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One possible outcome is that the List 1, 2, and 3 tariffs are extended indefinitely at their current rates, in which case the USTR would not initiate a List 3 exclusion process.

The USTR's commitment to initiate an "appropriate" exclusion process for List 3 if the tariff does increase suggests that such a process may well differ significantly from the List 1 and List 2 processes. The first of the decisions from the earlier exclusion processes were published in the December 28<sup>th</sup> Federal Register (See Client Alert dated January 2, 2019.), but no more have appeared since the partial government shutdown. The number of products included in List 3 dwarfs those included in the prior Lists and would be expected to present significant logistical challenges.

The USTR's letter to Senator Kaine also contained further guidance on "Chinese goods admitted into FTZs and subsequently entered into U.S. commerce", although the Kaine letter had made no mention of that issue. The guidance provided in Mr. Lighthizer's letter (apparently in response to ongoing questions being raised to the USTR office) is: "As of this time, we have not found a basis for exempting U.S. importers who use FTZs from the additional duties when those duties apply to all other importers." This should be instructive to those of our clients who have inquired about possible benefits of using FTZ's to mitigate the effect of the Section 301 tariffs.

The message in the January 11<sup>th</sup> letter to Senator Kaine is mixed. All affected importing companies would undoubtedly hope for the complete removal of all of the 301 tariffs. As an intermediate solution, however, some might prefer to see a higher duty with a realistic chance for a total exemption while others might favor the certainty of the lower 10% rate without exceptions. This adds yet another level of uncertainty for importers to the already complex Section 301 tariff situation.

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