

# CLIENT ALERTS

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## Section 301 Tariffs Update: Is the CIT Litigation the Only Option for Relief from the Section 301 Tariffs? Can You Still Join? Isn't Joe Biden Going to Get Rid of Tariffs? What Ever Happened to Exclusions?

### Client Alert

2.1.2022

The judicial challenge to President Trump's and the USTR's authority to implement the Section 301 List 3 and List 4 tariffs seemed like a long shot at best when plaintiffs first filed in the Court of International Trade in 2020. Nonetheless, thousands of importers have since signed on to this complex quasi-class action in "me-too" lawsuits. See Client Alert, October 2020

In July of 2021, the three judge panel assigned to the matter granted plaintiffs a preliminary injunction (since lifted) to suspend liquidation of the List 3 and List 4 tariffs that effectively forced the government to stipulate to the availability of at least some refunds if plaintiffs prevail. Also of significance was the panel's agreement that the Plaintiffs has met their burden of showing a "fair chance" of success on the merits as a prerequisite to the granting of a preliminary injunction. See Client Alert, July 2021

The CIT panel will hold oral arguments this week in New York City on Defendants' Motion to Dismiss and Plaintiffs' Cross Motion for Judgement on the Record. New plaintiffs continue to join the action, given the dearth of other options for those burdened with the Section 301 tariffs. The importer community's hopes that a Biden administration would quickly get rid of Section 301 tariffs have most recently been dampened by the President's response at his press conference on January 19, 2022 to an inquiry about rescinding the Section 301 tariffs in light of growing pressure by American business groups. President Biden responded: "We're not there yet", explaining he wants to see China meeting more of its commitments under the Phase One Agreement negotiated by the previous Administration.

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Catherine M. Karol  
Of Counsel

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Equally disheartening to importers, the USTR has made few meaningful moves towards reinstituting an exclusions process for the Section 301 tariffs. The USTR had put an exclusion process in place in 2018 that ultimately fielded over 53,000 exclusion requests through 2020. Only 13% of those requests were granted, but those that were provided over \$14B of tariff relief to importers. Virtually all those exclusions expired by the end of 2020, however. In July of 2021, the General Accounting Office (“GAO”) issued a report criticizing the lack of transparency and failure to provide reasonable assurance that the reviews were conducted consistently in the now shut-down USTR Exclusion Process.

Katherine Tai, the current USTR appointed by President Biden, acknowledged in congressional hearings in May of 2021 her “keen awareness” of bipartisan Congressional support for both renewal and improvement of the exclusions process. During those hearings, she promised action by the USTR on reinstituting exclusions before the end of 2021. Disappointingly, delivery on that promise seems to be limited to a “Request for Comments Concerning the Reinstatement of Previously Extended Exclusions” issued in October of 2021. That review is limited to 549 previously extended exclusions, 80 of which are Covid-related.

In June 2021, the Senate passed the U.S. Innovation and Competition Act (“USICA”) that contained provisions to restart and reform the Section 301 exclusion process. Democrats in the House of Representatives announced the COMPETES bill last week, addressing many of the issues addressed in USICA; however, the nearly 3,000 page bill does not appear to contain any reference to the Section 301 tariffs. In the interim, 144 bipartisan members of the House of Representatives (including numerous Michigan representatives) sent a letter last week to the USTR urging the expansion the exclusion process announced in October to all products covered by the Section 301 tariffs. The letter seeks meaningful assurances of retroactivity in such a process, as well as increased transparency, inclusivity and consistency of the process itself.

We are guardedly optimistic that an improved Section 301 Exclusion Process may emerge in the next few months, and that it may contain some retroactivity provisions. Until then, however, the CIT litigation remains at the center of the Section 301 tariffs stage. We are glad to discuss options for joining the CIT litigation with importers affected by the 301 tariffs.

**Catherine Karol**

313.225.5308  
[karol@butzel.com](mailto:karol@butzel.com)

**Mitch Zajac**

313.225.7059  
[zajac@butzel.com](mailto:zajac@butzel.com)

**Leslie Alan Glick**

202.454.2839  
[glick@butzel.com](mailto:glick@butzel.com)

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**Raul Rangel Miguel**

202.454.2841

[rangel@butzel.com](mailto:rangel@butzel.com)

**Bill Quan Yang**

313.225.7094

[yang@butzel.com](mailto:yang@butzel.com)

**He Xian**

517.372.4449

[xian@butzel.com](mailto:xian@butzel.com)