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SECTION 301 TARIFFS UPDATE: 1) “Tariffs Have Failed to Alter China’s Behavior”; 2) Some Exclusions Reinstated; 3) “Review of Necessity” and 4) CIT Panel Remands Lists 3 and 4 to Address Public Comments

Client Alert

4.5.2022

March brought spring and daylight savings time, but no other sunshine to the U.S. consumers and businesses who have already paid over \$130 Billion in Section 301 tariffs. In testimony before the House Ways and Means Committee on March 29th, the U.S. Trade Representative (USTR) Katherine Tai conceded that talks with China about improved “Phase One” trade agreement compliance have failed to produce results, and that the 301 (and other) tariffs currently in place on China imports have failed to incentivize China to make any fundamental changes to its trade-related practices. She did not outline any proposals to remove or otherwise alter the tariffs, however; instead she discussed the need to focus on rebuilding the U.S. industrial manufacturing base as a “new tool” to defending U.S. “values and interests from the negative impacts of the [People’s Republic of China]’s unfair economic policies and practices.”

REINSTATEMENT OF 352 EXCLUSIONS

Many importers were also disappointed that the USTR announcement last week the of the reinstatement of some exclusions from the Section 301 tariffs on imported Chinese products extended only to about 60% of the same subset of exclusions it had agreed to reconsider. The list of 352 reinstated exclusions includes electronics, apparel, furniture, industrial components, automotive parts, chemicals, and medical supplies, and was in response to comments solicited by the USTR in the fall of 2021 regarding reinstatement of a total of 549 previously granted and extended exclusions. The pool of 549 was in itself a small subgroup of the roughly 2,200 Section 301 exclusions that had been granted since 2018 but which expired in 2020. An additional 50,000 or more exclusion requests that had been filed by importers had been denied by the USTR; the

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reason given for the denial for most of those requests was a failure to show “severe economic harm” to the requestor.

The 352 exclusions that have been reinstated will only be retroactive to entries made on or after October 12, 2021. They will be valid going forward through December 2022. The agency has stated that it may consider further extension of the reinstated exclusions. The list of 352 reinstated exclusions in the USTR Notice is organized into four groups based on the “List” under which the particular tariffs were originally imposed (i.e., List 1, List 2, List 3 or List 4A). Some of the reinstated exclusions cover entire Harmonized Tariff Schedule of the United States (HTSUS) subheadings, while others cover specific product descriptions within HTSUS subheadings. The list of reinstated exclusions can be found here: [Reinstatement of Certain Exclusions Previously Extended | United States Trade Representative \(ustr.gov\)](#). As with all Section 301 tariff exclusions, the reinstated exclusions are available for any product that meets the description in the product exclusion, regardless of whether the importer filed an exclusion request with USTR.

U.S. importers that have entered such goods since October 12, 2021 should prepare to amend those filings to realize duty refunds and instruct brokers to use the exclusions through December 31, 2022. Customs brokers will need to file an appropriate secondary HTS classification of the excluded goods upon entry. To seek refunds for Section 301 duties paid on entries on such goods made since 12:01am on October 12, 2021, importers will need to either file a Post Summary Correction with U.S. Customs and Border Protection (CBP) for unliquidated entries, or a protest for liquidated entries (within 180 days of entry). For liquidated entries the importer should file a protest with CBP (recognizing that protests must be filed within 180 days of the date of liquidation). We anticipate additional guidance from the CBP on these processes.

REVIEW OF NECESSITY

In the absence of any meaningful momentum toward removal or revision of the 301 tariffs, or at least a robust 301 exclusion process, importers are left with few options to mitigate the impact. Thousands of importers have joined in the Court of International Trade litigation challenging the Lists 3 and 4 tariffs. [Butzel Client Alert, February 1, 2022; see more below] Meanwhile, their trade associations have turned their attention to the upcoming “Review of Necessity” that Section 307 of the Trade Act of 1974 requires the USTR to initiate soon.

Section 307(c) states that tariffs imposed under Section 301 expire 4 years after they are imposed unless the USTR receives a request for continuation and then conducts an analysis of their effectiveness and consequences. The review must examine the effectiveness of the tariffs in achieving their objectives and other actions that could be taken, as well as the effects of such actions on the U.S. economy, including consumers, and must take place within 60 days of the potential expiration. List 1 tariffs were imposed 4 years ago on July 6th; the other Lists follow several months later.

Dozens of trade associations (including the Motor and Equipment Manufacturer’s Association (MEMA) who have formed a coalition known as “Americans for Free Trade” are urging the USTR to undertake its “Review of Necessity” of all 4 Lists simultaneously into a “holistic assessment” of the “Trump

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Administration's tariffs and whether the Biden-Harris Administration will continue them as part of its China policy." The group is advocating a "fully transparent" review process with meaningful public comment periods and public hearings to assure all stakeholders have an opportunity to provide input.

CIT REMANDS LISTS 3 AND 4 TO USTR TO RESPOND TO PUBLIC COMMENTS

A three-judge panel of the Court of International Trade issued a mixed ruling on April 1, 2022 in the multi-plaintiff litigation challenging the validity of Section 301 Lists 3 and 4. The court rejected the federal government's argument the tariffs were a Presidential action and therefore non-justiciable; and instead agreed with the plaintiffs that the USTR's actions in promulgating the tariffs were covered by the Administrative Procedure Act (APA).

However, the court disagreed with the plaintiffs that China's unfair trade practices described in the Section 301 investigation limited the USTR's authority to the initial List 1 and List 2 tariffs; and that the USTR had therefore exceeded its authority investigation by responding to China's retaliatory actions with the retaliatory List 3 and List 4 tariffs on an additional \$500B of goods.

Nonetheless, the court agreed with the plaintiffs that, in violation of the APA, the USTR failed to respond to public comments in a manner that allows the court to review the USTR's justification for the Lists 3 and 4 tariffs, and therefore remanded those Lists back to the USTR to provide such an explanation within 90 days. The court cautioned the USTR that it may 'only further explain the justifications it has given' for the List 3 and 4A tariffs ... it may not identify new reasons that were not previously given unless it takes new agency action." While the court declined to vacate the tariffs at this juncture, it is not clear whether it would do so in the future.

CONCLUSION

Importers have been hoping that the upcoming Reviews of Necessity will force the current administration to move the impact of the tariffs on the U.S. economy to a front burner. The terse situation with China, Treasury Secretary Yellen's concession that the tariffs are contributing to inflation, and the added pressure of the CIT remand on the USTR seem to assure that President Biden will be forced to come to take some aggressive action soon on another hot button issue he inherited. We will continue to monitor developments and keep you apprised.

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