

Indirect Tax Alert

USTR announces various actions related to exclusion processes for China origin goods covered under trade remedy actions and initiates revisions for future exclusion requirements; US continues to evaluate certain country eligibility benefits under GSP

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Executive summary

The United States (US) Trade Representative (USTR) has advanced four notable actions related to the exclusion process for punitive tariffs levied on Chinese origin goods.

First, on 24 October 2019, USTR published an exclusion request process for the US\$300b¹ worth of Chinese origin goods subject to 15% punitive tariffs under Section 301 of the *Trade Act of 1974* (Section 301) covered under List 4².³ The exclusion process follows previously implemented requirements and will run from 31 October 2019 to 31 January 2020.

Second, in a Federal Register Notice (FRN) on 28 October, the USTR published newly granted exclusions for Chinese origin products subject to punitive tariffs on List 3⁴ items (US\$200b worth of Chinese origin goods).⁵ The FRN includes 93 new exclusions to products otherwise subject to a 25% punitive tariff.⁶

Third, on 31 October, in an FRN, the USTR announced it was seeking a public request for comments regarding the extension of exclusions that have been granted to Chinese origin goods under certain Harmonized Tariff Schedule (HTS) codes subject to punitive tariffs on the \$34b action taken in July 2018 (List 1).⁷ These are currently set to expire on 28 December 2019.

Most recently, on 1 November the USTR outlined in an FRN,⁸ planned modifications to the method utilized for collecting details regarding exclusion requests, including the addition of new questions related to alternative availability or shifts in costs from China producers of goods subject to punitive tariff actions. Additionally, USTR has requested that the Office of Management and Budget (OMB) renew the Section 301 exclusion process for three years.

Outside of US-China relations, the USTR continues to utilize the Generalized System of Preferences (GSP) review mechanism as part of its overall ongoing assessment of its trading partners. On 25 October 2019, the USTR announced enforcement and adjustment actions regarding the GSP status of several countries, namely, Thailand, Ukraine, South Africa, Azerbaijan, Bolivia, Iraq and Uzbekistan.⁹ Most notably the US stated its intent to remove \$1.3b of Thai origin products from GSP eligibility beginning in April 2020, while restoring approximately \$12m of GSP benefits, effective as of 30 October 2019, that were previously removed for Ukrainian origin goods.

Detailed discussion

Exclusions

List 4 Exclusion Process

On 24 October 2019, the USTR published the exclusion process for Chinese origin products subject to the punitive tariffs of List 4 (List 4A and 4B¹⁰). The process, which opened on 31 October 2019 and closes 31 January 2020, mirrors the exclusion process for each of the prior lists.

Consistent with the exclusion process for List 3, all submissions can be made through the online portal provide in the FRN and must include a rationale for the product exclusion request which address the following factors:

- ▶ Commercial availability of the product outside of China
- ▶ Potential harm to the requester or other US interests if the exclusion is not granted
- ▶ Whether the product is strategically important or related to Beijing's "Made in China 2025" or other industrial programs

Requesters are permitted to submit any other information relevant to their request, including comments on Customs and Border Protection's (CBP) ability to administer the exclusion requested.

Exclusions granted will be effective for one year, beginning from the 1 September 2019 effective date for List 4A.

List 3 exclusions

On 28 October 2019, the USTR announced new exclusions for products otherwise subject to Section 301 punitive tariffs on Chinese origin goods, outlined below.

The FRN includes a new specific 8-digit HTS code, 9903.88.33, for reporting the products now covered by the latest exclusions. The exclusions cover 83 products based on product descriptions. Some examples include:

- ▶ Certain imitation leather fabrics imported under 5903.10.2090
- ▶ Pressure washers imported under 8424.30.9000
- ▶ Various hand operated butterfly valves imported under 8481.80.3030
- ▶ Mobile wi-fi hotspots imported under 8517.62.0020
- ▶ Various bassinets imported under 9403.89.6003

The exclusions, once granted, are retroactive to the date of import, and therefore companies may claim refunds on punitive duties already paid on the now-excluded products. The refund request process for punitive duties paid on products that have been granted exclusion for List 3 has been published by CBP via the Cargo Systems Messaging Service.¹¹ To claim a refund, importers must file a post-summary correction (PSC) on affected entries within the prescribed timeframe for PSC filings (i.e., before liquidation). In the event the entry has already been liquidated, the liquidation may be protested.

Consistent with the USTR announcement on 20 September 2019, the time period for any exclusions granted under List 3, including those described above, will expire as of 7 August 2020, to be aligned to for administrative ease.¹²

Potential extension of exclusions for List 1

On 6 July 2018, the USTR imposed a 25% ad valorem duty on \$34b of Chinese origin goods as part of a Section 301 action against China due to acts, policies and procedures regarding technology transfer, intellectual property (IP) and innovation that were determined by be harmful to the US economy.¹³ Following the imposition of the punitive tariffs, the USTR announced a process in which companies could request exclusions from tariffs, which would be granted at the USTR's discretion.¹⁴

The first set of exclusions were announced by the USTR on 21 December 2018 and were subsequently published in a FRN on 28 December 2018. This first tranche covered approximately 1,000 separate requests by US importers covering a disparate range of products that the USTR had determined meet specified criteria for exclusion (see EY Global Tax Alert, [US grants limited exemptions from Section 301 duties and announces annual special review of Section 301; continued uncertainty ahead](#), dated 2 January 2019). These exclusions are set to expire on 28 December 2019.

Beginning 1 November 2019, the USTR is seeking public comments regarding the possibility of extending specific product exclusions granted under the December 2018 FRN for a period of up to twelve months. The USTR noted the following criteria should be included in public commentary to assist them in assessing whether or not to grant the extension:

- ▶ Whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries,
- ▶ Any changes in the global supply chain since July 2018 with respect to the particular product, or any other relevant industry developments, and
- ▶ The efforts, if any, the importers or US purchasers have undertaken since July 2018 to source the product from the United States or third countries.

The deadline for submitting comments regarding the exclusion extensions will be 30 November 2019.

Renewal and amendments to exclusion process

In its efforts to improve the exclusion request process utilized for Section 301 punitive tariffs, the USTR announced in an FRN on 1 November 2019 new modifications regarding the collection of information for exclusion requests while the tariffs remain in place.

Interestingly, the USTR has amended the scope and focus of collected information. Within the exclusion request, requestors are asked to answer newly added questions, such as:

- ▶ Whether they support extending the exclusion, along with a public version of the requester's rationale and,
- ▶ Whether the Chinese suppliers have lowered their prices for products covered by the exclusion following the imposition of the duties.

In the same FRN, the USTR requests the OMB to extend the proposed exclusion process for a period of three years, while also requesting public commentary regarding the amendments of scope, which must be submitted by 2 December 2019.

GSP actions

The GSP was implemented as part of the *Trade Act of 1974* and became effective on 1 January 1976. The program, originally designed to promote economic growth in developing countries by helping countries diversify their trade with the US, provides duty-free benefits for a wide range of qualifying products listed in the US HTS.

The GSP contains multiple processes for USTR to determine eligibility for the program such as ongoing reviews, regular assessments of beneficiary developing countries, public comments to determine the launch of new eligibility reviews, and the annual GSP product review. The USTR actions announced on 25 October 2019 regarding GSP status changes for several nations are a result of these processes.

As part of the ongoing eligibility reviews, the USTR made changes to GSP status for certain products originating in Thailand, Ukraine, Bolivia, Iraq and Uzbekistan.

The most notable results of the eligibility review pertain to Thailand and Ukraine. In the case of Thailand, approximately one-third, or \$1.3b, of the \$4.4b¹⁵ Thai origin goods were removed from GSP eligibility while one-third, or \$12m, of \$36m estimated trade value of Ukrainian origin goods was restored.

In the announcement, the USTR noted that the Thai GSP removals were taken in response to Thailand's lack of action to provide internationally-recognized worker rights, such as protections for freedom of association and collective bargaining.

The removal of Thai products covered by GSP has an effective date of 25 April 2020 and covers 573 8-digit HTS codes and spans 54 HTS chapters. The USTR noted in their announcement that the list of removed products focused on goods where the US is a large export market for Thailand, but where Thailand makes up a small share of US imports. Notable products removed from GSP benefits include:

- ▶ All seafood products
- ▶ Ginger imported under 0910.12.00
- ▶ Certain aluminum alloy bars and rods imported under 7604.29.30
- ▶ Gold rope necklaces and chains imported under 7113.19.21

- Printed circuit assemblies imported under 8538.90.30
- Electrical lamps and lighting fixtures imported under 9405.40.84

In the case of the Ukraine, the USTR noted that the decision to reinstate GSP for certain Ukrainian origin goods was in response to Ukraine's passage of legislation regarding improvements to managing collective management organizations (CMOs), which are responsible for collecting and distributing royalties to right holders.

The reinstatement of certain Ukrainian origin goods to the GSP took effect 30 October 2019. The list covers 148 8-digit HTS codes and spans 148 HTS chapters. Notable products restored to GSP benefits include:

- Jams imported under 2007.99.45
- Wine imported under 2204.21.80
- Oil or fuel filters for internal combustion engines imported under 8421.23.00
- Hand-held blow torches imported under 8468.10.00
- LED lamps imported under 8539.50.00

Additionally, the USTR moved to close open GSP worker rights eligibility reviews of Bolivia and Iraq following the passage of worker rights legislation in the respective countries that align with international standards. The USTR also moved to close an open GSP IP review of Uzbekistan as a result of Uzbekistan joining the Geneva Phonograms Convention, the World Intellectual Property Organization (WIPO) Copyright Treaty; however, a GSP worker rights eligibility review remains open. In the same announcement, the USTR noted new GSP eligibility reviews would be opened regarding Azerbaijan and South Africa due to worker rights and IP concerns, respectively.

Actions for business

Companies importing goods from China that are included on List 4 are encouraged to closely monitor for an announced exclusion process. Companies planning to file exclusions are well advised to consider developing the necessary procedures and documentation to support potential duty refunds through retroactive claims similar to prior USTR exclusion proceedings.

We also note considering recent exclusions granted, companies importing Chinese origin goods which are granted exclusions should take action to seek refunds on any punitive duties previously paid. In determining applicability of the USTR Annex for HTS exclusions, companies should

exercise due diligence in determining ability to support any post-importation reviews of eligibility through review of determining the accuracy of the tariff number of a given product and that all requirement criteria are met for making the exclusion claim.

Companies that have benefited from the expiring December List 1 exclusions should consider submitting commentary, as well as closely monitoring the progressing situation. Companies should also note that the protest period for List 1 exclusions is quickly coming to a close, on 11 November 2019. Any company considering filing a protest should be sure to do so prior to the deadline.

Additionally, companies impacted by the tariffs in place (and planned) by both sides as well as those impacted by the broader China-US dispute should closely monitor developments in the coming months, as the Phase One agreement has not yet been formally drafted and will require signatures and steps for implementation by both parties.¹⁶ Terms of this preliminary deal, and any subsequent deals reached are likely to contain specific provisions that may impact certainty, and possibly duration, of outcome and will need to be closely analyzed once made available.

Immediate actions for such companies to consider include:

- Mapping their complete, end-to-end supply chain to fully understand the extent of products impacted, potential costs, and alternative sourcing options, and to assess any opportunities to mitigate the impact, such as tariff engineering to address potential increases in tariffs.
- Identifying strategies to defer, eliminate, or recover the excess duties paid such as bonded warehouses, Foreign Trade Zones, substitution drawback and Chapter 98.
- Where goods are sourced and/or manufactured in multiple countries, conducting comprehensive origin determinations to facilitate compliance as well as to consider opportunities for mitigation.
- Exploring strategies to minimize the customs value of imported products potentially subject to the additional duties such First Sale for Export.

Companies with imports from Thailand covered by the GSP removal action should evaluate the overall impact from the elimination of GSP eligibility. Such actions may include considering alternative sourcing or optimizing duty planning strategies. Conversely, companies importing goods from Ukraine that have been reinstated to GSP eligibility should review imports to determine if preferential treatment can be claimed.

Endnotes

1. Currency references in this Alert are to USD.
2. See 84 FR 45821.
3. See 84 FR 57144.
4. List 3 covers \$200b worth of Chinese origin goods.
5. See 84 FR 57803.
6. See 84 FR 20459.
7. See 84 FR 58427.
8. 84 FR 58802.
9. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement>.
10. List 4A effective date 1 September 2019, List 4B effective date 15 December 2019.
11. See CSMS # - GUIDANCE: Seventh Round of Products Excluded from Section 301 Duties (Tranche 2).
12. See EY Global Tax Alert, [USTR grants new exclusions to Lists 1, 2 and 3 for China origin goods; US and Japan reach agreement on trade in goods and digital trade](#), dated 27 September 2019.
13. See 83 FR 28710.
14. See 83 FR 32181.
15. Thai imports that claimed GSP totaled US\$4.4b in 2018.
16. See EY Global Tax Alert, [US and China reach initial accord towards trade agreement on agricultural purchases, tariff delays and next steps on framework for intellectual property and technology transfers](#), dated 14 October 2019, for more details regarding the agreement.

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