

Indirect Tax Alert

US issues additional Section 301 exclusions, China continues to provide retaliatory tariff relief, and WTO Appellate Body Alternative is reached

EY Tax News Update: Global Edition

EY's Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration [here](#).

Also available is our [EY Global Tax Alert Library](#) on ey.com.

Executive summary

On 25 March 2020 and 26 March 2020, the United States (US) Trade Representative (USTR) published in two separate announcements newly granted exclusions to Chinese-origin goods subject to punitive tariffs under Section 301 of the *Trade Act of 1974* (Section 301). The first set of published exclusions apply to items subject to 7.5% punitive duties on List 4A,¹ covering US\$115 billion² worth of Chinese-origin goods.³ The second set of published exclusions apply to items subject to 25% punitive duties on List 3,⁴ covering \$200 billion worth of Chinese-origin goods.⁵

China, on 17 February 2020, following commitments made to the US under the Phase One Trade Agreement (See EY Global Tax Alert, [US and China sign Phase One Economic and Trade Agreement though tariffs remain](#), dated 16 January 2020) announced an exclusion process for specified goods necessary to increase China purchases from the US. The program provides exclusion of any punitive tariffs previously imposed that range from 2.5% to 25%.

In addition, it was announced on 27 March 2020 that 16 World Trade Organization (WTO) member countries, notably excluding the US, had implemented an agreement to provide an interim alternative to the now defunct Appellate Body to those countries party to the agreement.⁶

Detailed discussion

USTR grants new products exclusions

Following the various actions of punitive tariffs applied to Chinese-origin goods under Section 301, the USTR provided an opportunity for US stakeholders to request the exclusion of specific products classified within an 8-digit Harmonized Tariff Schedule of the US (HTSUS) subheading covered by each of the four tranches by establishing formal exclusion request processes.

After review of each exclusion request is completed, the USTR issues a denial or a grant, at its discretion, based upon specified criteria and facts presented by the submitted request. Under this process, the USTR then publishes formal determinations of all granted HTSUS numbers and product descriptions for awareness to the trade community.

On 25 March 2020, the USTR announced new product exclusions for Chinese-origin goods subject to 7.5% punitive tariffs under List 4A. The exclusions cover five 10-digit HTSUS subheadings and seven product descriptions, together covering 36 separate exclusion requests. Notable products granted exclusions in this notice include:

- ▶ Other articles of plastic, not elsewhere specified or included imported under HTSUS 3926.90.9925
- ▶ Coverings, of plastics, designed to fit over wound sites or casts thereby forming a protective seal for keeping the covered area dry and debris free while showering or bathing imported under HTSUS 3926.90.9990
- ▶ Ice bags of textile materials, for treating injuries or soreness, each refillable imported under HTSUS 6307.90.9889
- ▶ Apparatus suitable for wearing on the wrist, having time-display functions, each article having an accelerometer and being capable of displaying and transmitting data sent to it by a network (e.g., portable ADP unit, LAN or cellular network) imported under HTSUS 8517.62.0090
- ▶ Flat panel color monitors incorporating video recording or reproducing apparatus with a diagonal not exceeding 75 cm imported under HTSUS 8528.72.6420

Notably, this round of granted exclusions covers items such as Apple watches and Fit Bits (under HTSUS 8517.62.0090), which were previously assessed Section 301 tariffs at 15% under List 4A as implemented on 1 September 2019, and later modified to 7.5% on 14 February 2020 (See EY Global Tax Alert, [US and China sign Phase One Economic and Trade Agreement though tariffs remain](#), dated 16 January 2020).

The FRN includes a new specific 8-digit HTS code, 9903.88.44, for reporting the products now covered by the latest exclusions. The exclusions apply to goods imported from 1 September 2019 and will extend for one year to 1 September 2020.

On 26 March 2020, the USTR published in an FRN new product exclusions for Chinese-origin goods subject to 25% punitive tariffs under List 3. The exclusions cover one 10-digit HTSUS subheading, which covers one exclusion request, and 176 product descriptions, which cover 202 separate exclusion requests. Notable products granted exclusions in this notice include:

- ▶ Hot pepper seeds, of a kind used for sowing, imported under HTSUS 1206.91.6090
- ▶ Backpacks with outer surface of textile materials of man-made fibers, each measuring at least 35 cm but not more than 75 cm in height, at least 19 cm but not more than 34 cm in width, and at least 5 cm but not more than 26 cm in depth imported under HTSUS 4202.92.3120
- ▶ Printed cartons, boxes or cases of corrugated paper or paperboard, other than sanitary food or beverage containers imported under HTSUS 4819.10.0040
- ▶ Screen protectors of tempered safety glass, with adhesive on one side, in rectangular sheets having rounded corners, each measuring at least 55 mm by 120 mm but no more than 212 mm by 278 mm and at least 0.51 mm but no more than 0.55 mm in thickness imported under 7007.19.0000
- ▶ Hydraulic jacks of a kind for raising vehicles, with a lifting capacity of not more than 550 kg imported under 8425.42.0000
- ▶ Color television cameras of a kind used with vehicle displays imported under HTSUS 8525.80.3010
- ▶ Bicycles, including mountain-type, with drop bar, tubeless, folding imported under HTSUS 8712.00.4800
- ▶ Flameless pillar candles with LED lamps powered by batteries, each measuring at least 7.6 cm but not more than 20 cm in diameter and having a was exterior imported under HTSUS 9405.40.8440

The FRN includes a new specific 8-digit HTS code, 9903.88.43, for reporting the products now covered by the latest exclusions. The exclusions apply to goods imported from 24 September 2018 and will extend to 7 August 2020.

China continues to provide retaliatory tariff relief

On 18 February 2020, China's Customs Tariff Commission (the Commission) issued an announcement⁷ regarding the market-based procurement exclusion process for goods imported from the US. The goods under consideration were those goods that had been previously subject to additional duties triggered by China's counter measures taken in response to the US Section 301 actions. The announcement provided a list of eligible goods by description of 696 distinct tariff numbers.

Products included on the list cover mainly agricultural, energy and manufactured products, which were deemed to be consistent with the scope of China's commitment to increase procurement of US-origin goods under the Phase One agreement. The announcement provided an application mechanism for Chinese companies or enterprises within China to request a formal exclusion grant which meets the program requirements. China's Ministry of Finance began accepting applications as of 2 March 2020. Unlike the overall US exclusion process, China's Ministry of Finance is providing its decision on items covered by the current list to the requestor only.

Previously, the Commission has granted two rounds of product exclusions under the previously announced process covering all or part of the products classified under 81 eight-digit tariff codes.

The new market-based procurement exclusion process has notable differences with the previous process:

1. The new process is applicant-based, specific to a set amount of "purchase plan." In contrast, the previous process was product-based.
2. All enterprises in China that plan to purchase and import the relevant goods from the US are eligible.
3. The application result will not be public and the granted approval is only applicable to the applicant.
4. Applicants may include items that are not on the eligible good list or the previously announced product exclusion list in the application, subject to certain conditions.
5. Under the new process, duties paid on past import transactions cannot be recovered.

WTO member countries implement stop gap arbitration process

In early December 2019, terms for two of the three judges residing on the WTO Appellate Body expired, leaving the Appellate Body without the requisite three arbitrators needed to preside over cases brought to the intergovernmental organization review panel. The Appellate Body, which typically consists of seven adjudicators, has gradually decreased to three after the US repeatedly exercised its veto against the appointment of new judges over the last few years. For more information on the WTO Appellate Body disbanding, see EY TradeWatch article, [WTO Appellate Body Disbands](#), on page 12.

In late January 2020, 17 WTO member countries issued a statement announcing that they had reached an agreement in which the countries party to the arrangement would preserve the two-step dispute settlement system at the WTO in disputes among them. The 17 WTO member countries included Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union (EU)⁸ (presently including the United Kingdom), Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, and Uruguay. Subsequently, South Korea and Panama dropped from the agreement, while Hong Kong joined.

On 27 March 2020, the remaining 16 members noted above put into place a Multi-party Interim Appeal Arbitration Agreement (the Agreement). The Agreement, pursuant to Article 25 of the WTO Dispute Settlement Understanding, ensures that disputes occurring among the parties will continue to benefit from a functioning dispute settlement system at the WTO level, including the option to request an independent and impartial appeal.

Notably, Canada and Mexico have signed on as part of the coalition while separately pursuing implementation of the US-Mexico-Canada Agreement (USMCA) with the US.

In a Ministerial statement published by all 16 countries party to the agreement, the intent of the agreement provides an interim framework while a resolution mechanism for current trade disputes can be formalized as a more permanent solution.⁹ The statement also notes the countries,

“remain firmly and actively committed to resolving the impasse of the Appellate Body appointments as a matter of priority and urgency, including through necessary reform.” The Agreement is open for other countries to join, so long as the WTO Appellate Body remains defunct.

The Agreement is expected to be officially notified to the WTO in the coming weeks.

Actions for businesses

Despite the US and China reaching a Phase One agreement in January with the signing of the Economic and Trade Agreement, many tariffs on Chinese-origin goods remain in place. Any company involved in US-China trade should continue to identify the potential impact of additional duties

and explore mitigation strategies. Additionally, companies should review product exclusions granted to determine if applicable to company products, as well applying for exclusions when still applicable.

Companies who conduct any form of international trade should closely monitor WTO Appellate Body updates and consider long term impacts on their business. With any action on the Appellate Body likely months, or potentially years away, the environmental volatility will likely increase as more countries will initiate unilateral actions, prompting retaliation from others. The importance of having readily available trade data to quickly assess the consequences of actions, and potential actions, remains critical to planning in this environment.

Endnotes

1. See 84 FR 45821.
2. Currency references are to the US\$.
3. The soon to be published FRN can be found here: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-06600.pdf>.
4. See 84 FR 26930.
5. See 85 FR 17158.
6. See EU press release “EU and 15 World Trade Organization members establish contingency appeal arrangement for trade disputes.”
7. “Announcement of the Customs Tariff Commission of the State Council with regard to the Exclusion Process for Market-based Procurement Products imported from the United States and Canada under” Customs Tariff Commission Announcement 2020 No 2, 17 February 2020.
8. The European Union is the political and economic union comprised of 27 Member States, comprised of the following nations: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.
9. Complete statement can be found here: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158684.pdf.

For additional information with respect to this Alert, please contact the following:

Ernst & Young LLP (United States), Global Trade

▶ Robert Smith, <i>Irvine</i>	robert.smith5@ey.com
▶ Michael Leightman, <i>Houston</i>	michael.leightman@ey.com
▶ Lynlee Brown, <i>San Diego</i>	lynlee.brown@ey.com
▶ Michael Heldebrand, <i>San Jose</i>	michael.heldebrand@ey.com
▶ Nathan Gollaher, <i>Chicago</i>	nathan.gollaher@ey.com
▶ Todd Smith, <i>Irvine</i>	todd.r.smith@ey.com
▶ Bill Methenitis, <i>Dallas</i>	william.methenitis@ey.com
▶ Armando Beteta, <i>Dallas</i>	armando.beteta@ey.com
▶ Bryan Schillinger, <i>Houston</i>	bryan.schillinger@ey.com
▶ Michelle F. Forte, <i>New York</i>	michelle.forte@ey.com
▶ Dennis Forhart, <i>Seattle</i>	dennis.forhart@ey.com
▶ Douglas M. Bell, <i>Washington, DC</i>	douglas.m.bell@ey.com
▶ Nesia Warner, <i>Austin</i>	nesia.warner@ey.com
▶ Jay Bezek, <i>Charlotte</i>	jay.bezek@ey.com
▶ Helen Xiao, <i>Chicago</i>	helen.xiao@ey.com
▶ Sharon Martin, <i>Chicago</i>	sharon.martin1@ey.com
▶ Scott Fife, <i>Chicago</i>	scott.fife@ey.com
▶ Javier Quijano, <i>Detroit</i>	javier.quijano@ey.com
▶ James Grogan, <i>Houston</i>	james.grogan@ey.com
▶ Nicholas Baker, <i>Houston</i>	nicholas.baker@ey.com
▶ Oleksii Manuilov, <i>New York</i>	oleksii.manuilov@ey.com
▶ Parag Agarwal, <i>New York</i>	parag.agarwal@ey.com
▶ James Lessard-Templin, <i>Portland</i>	james.lessardtemplin@ey.com
▶ Amy Papendorf, <i>San Francisco</i>	amy.papendorf@ey.com
▶ Robert Schadt, <i>Washington, DC</i>	robert.schadt@ey.com
▶ Alexa Reed, <i>Detroit</i>	alexa.reed@ey.com

About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

Indirect Tax

© 2020 EYGM Limited.
All Rights Reserved.

EYG no. 001585-20GbI

1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com