

International Trade Alert

Akin Gump
STRAUSS HAUER & FELD LLP

USTR Grants First Product Exclusion Requests from Section 301 Tariffs

January 2, 2019

Key Points

- Late on Friday, December 21, 2018, the United States Trade Representative (USTR) quietly announced that it has granted the first product **exclusions** for products covered by “List 1” of the Section 301 tariffs, effective December 28, 2018. The announcement came three days after the product exclusion requests for products covered by the “List 2” tariffs were due.
- The granted exclusions cover all products within seven 10-digit subheadings (covering 918 separate product exclusion requests) and 24 specially prepared product descriptions (covering 66 product exclusion requests).
- Since the exclusions are retroactive to July 6, 2018, and cover all imports of an excluded product regardless of importer, we recommend that importers carefully review the list of excluded products to see whether the exclusions cover any of their imported merchandise.
- USTR indicated that it will “continue to issue decisions on pending requests on a periodic basis.”

Introduction and Background

In March 2018, following its investigation under Section 301 of the Trade Act of 1974 (19 U.S.C. § 2411) (“Section 301”), USTR determined that China’s acts, policies and practices related to technology transfer, intellectual property and innovation were unreasonable, discriminatory, and burdened U.S. commerce. Consequently, USTR determined that the United States would impose additional ad valorem duties on certain goods imported from China equivalent in value to the burden or restriction being imposed by China on U.S. commerce.

USTR implemented the additional duties in three stages. First, in June 2018, after a public comment period, USTR imposed an additional duty of 25 percent on 818 product lines covering approximately \$34 billion worth of imports from China (“List 1”). U.S. Customs and Border Protection (CBP) began collecting these additional duties on

Contact

Lars-Erik A. Hjelm
Email
Washington, D.C.
+1 202.887.4175

Suzanne Kane
Email
Washington, D.C.
+1 202.887.4037

Andrew R. Schlossberg
Email
Washington, D.C.
+1 202.887.4314

July 6, 2018. Then, in August 2018, after another public comment period, USTR imposed an additional duty of 25 percent on 279 product lines covering approximately \$16 billion worth of imports from China (“List 2”). Finally, in October 2018, after an additional public comment period, USTR imposed an additional duty of 10 percent on 5,745 product lines covering approximately \$200 billion worth of imports from China. (“List 3”). The duty for the List 3 product lines was initially set to increase to 25 percent on January 1, 2019, but USTR postponed this increase to March 2, 2019, in order to provide additional time for the United States and China to negotiate an agreement to end the Section 301 dispute.

USTR implemented product exclusion processes for products covered by Lists 1 and 2 through which stakeholders could request that USTR exclude particular products classified within a covered Harmonized Tariff Schedule (HTS) subheading from the additional duties described above. USTR asked requestors to specifically address:

- Whether the particular product is only available in China and specifically whether the particular product and/or a comparable product is available from sources in the United States and/or third countries.
- Whether the imposition of additional duties on the particular product would cause severe economic harm to the requestor or other U.S. interests.
- Whether the particular product is strategically important or related to “Made in China 2025” or other Chinese industrial programs.

The deadline to submit exclusion requests for products covered by List 1 was October 9, 2018, and the deadline for List 2 was December 18, 2018. USTR has not implemented a product exclusion process for products covered by List 3.

Overview of USTR Action Granting List 1 Product Exclusion Requests

On December 21, 2018, USTR posted an advanced copy of a Federal Register “Notice of product exclusions” on its website (“Notice”) (available [here](#)), which announced that USTR granted approximately 1,000 separate exclusion requests under List 1, covering products covered by (i) seven 10-digit tariff subheadings (which cover 918 product exclusion requests), and (ii) 24 specially prepared product descriptions (which cover 66 product exclusion requests). USTR released these exclusions from the List 1 duties for publication three days after the product exclusion requests for relief from the List 2 duties were due. The Notice was published in the Federal Register on December 28, 2018, and is effective as of that date.

USTR did not provide specific reasoning for each exclusion; rather, it restated the three factors listed above from its original notice that announced the exclusion process. Notably, USTR’s Notice also states that each determination also took into account “advice from advisory committees and any public comments on the pertinent exclusion requests.”

USTR granted exclusions from the Section 301 duties for the following seven 10-digit tariff subheadings from the Section 301 tariffs:

- **8412.21.0075**, which covers certain hydraulic power engines;
- **8418.69.0120**, which covers certain drinking-water coolers;

- **8480.71.8045**, which covers certain injection molds;
- **8482.10.5044**, which covers certain single-row, radial ball bearings having an outside diameter of 9 mm but not over 30 mm;
- **8482.10.5048**, which covers certain single-row, radial ball bearings having an outside diameter over 30 mm but not over 52 mm;
- **8482.10.5052**, which covers certain ball bearings having an outside diameter over 52 mm but not over 100 mm; and
- **8525.60.1010**, which covers certain CB radio transceivers.

USTR also created exemptions for 24 specially prepared product descriptions, which it lists in an annex to the Notice. These exemptions cover, among other products, certain spark-ignition marine engines, salad spinners, winches, elevators, belt conveyors, stainless steel products, radiation therapy systems and thermostats.

USTR's Notice creates a new subheading, 9903.88.05, to the Harmonized Tariff Schedule of the United States (HTSUS) to implement the exclusions. Notably, these exclusions are retroactive to July 6, 2018 (which was the effective date of the List 1 duties), and extend for one year after the publication of the exclusion determination in the Federal Register, which was December 28, 2018.

On December 31, 2018, CBP issued a Cargo Systems Messaging service (CSMS) **notice** confirming that it will issue instructions on entry guidance and implementation of the product exclusions “[a]t the conclusion” of the current government shutdown. CBP specified that any updates to the Automated Customs Environment (ACE) (e.g., to accept subheading 9903.88.05) will not be implemented until 10 business days after the shutdown has ended and that any entries referencing 9903.88.05 before the ACE updates will be rejected.

Recommendations and Next Steps

- Importers should carefully review the list of exclusions to determine whether any exclusions may apply to products that they import.
- For importers who import products covered by the exclusions, we recommend reviewing entries of covered products since July 6, 2018, and identifying those that are eligible for retroactive refunds. Once CBP has updated ACE to accept the new subheading 9903.88.05, importers and brokers can file Post Summary Corrections (PSCs) for unliquidated entries of covered merchandise to obtain retroactive relief (or protests should there be any liquidated entries).
- Similarly, for entries of covered products filed on or after the effective date, December 28, 2018, importers and brokers should be prepared, in the interim, to post applicable Section 301 duties and then file PSCs for refunds retroactive to July 6, 2018 after CBP updates ACE 10 business days after the end of the government shutdown.

In addition, USTR indicated that it will continue to issue decisions on pending exclusion requests “on a periodic basis,” so importers should continue to advocate for exclusions, despite earlier speculation that the exclusion process would not be fruitful for most who applied.