

Business Signals

A periodic newsletter about the legal implications of issues affecting businesses and business owners in the Central Gulf Coast region.

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Client Alert (Time Sensitive): The U.S./China Trade Dispute – How Affected Businesses Can Seek Tariff Exclusions to Minimize Impact.

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Recent Developments

On August 1, 2019, President Donald Trump announced that the imposition of new 10% tariffs on roughly \$300 billion worth of Chinese imports will become effective on September 1, 2019. These tariffs, however, are just the latest volley in a longstanding dispute.

The United States has recently implemented a separate round of 25% tariffs on the import of an estimated \$200 billion worth of wide-ranging Chinese goods and products. While importers of products and component parts will be initially hit with these duties, the costs will inevitably trickle down to end-line manufacturers and consumers. The government has provided a process for requesting an exclusion from the tariffs, but such requests must be timely submitted and approved. Obtaining a grant of exclusion could be of vital importance to an affected business, as the new larger round of tariffs is poised to be enacted.

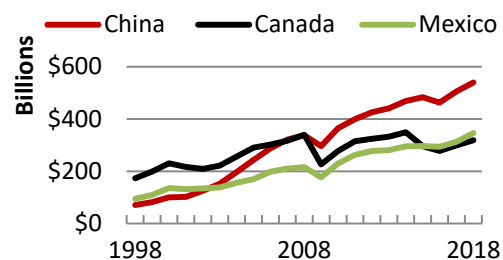
Background

By now, anyone with a phone, computer, or television is at least vaguely aware that the United States is involved in a trade dispute with China. Indeed, since the 2016 presidential campaign, while the national discourse has been dragged every

which way, the financial sector has kept at least one wary eye focused on the China trade problem.

Indeed, it is difficult to understate how large a portion China currently plays in the US market, especially when compared with just two decades earlier. In 2018, China was easily the largest importer into the United States, accounting for roughly \$540 billion dollars of import value in goods.¹ Compare those figures with data from 1998, when China ranked as only the fourth highest importer and accounted for only \$71.2 billion worth, or 7.8%, of total goods into the US. As indicated by these statistics, and as demonstrated below, China's rise to prominence has been swift and dynamic.

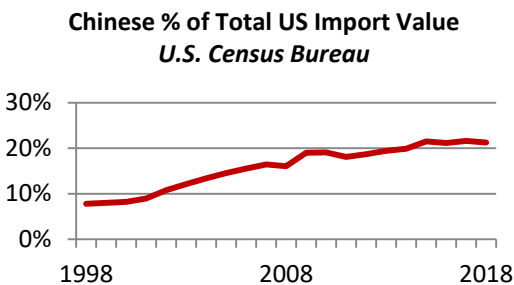
1998-2018 Top US Importers by Value
U.S. Census Bureau



¹ US Census Bureau, USA Trade. 2018 saw \$539,503,427,742.00 worth of goods come into the US from China. Through May 2019, the US had imported an additional \$180 billion in goods from China.

Such a rise, however, has not come without drawing substantial attention and criticism.

Since the 2016 election cycle, then candidate and now President Trump has repeatedly taken aim at China's trade practices, ultimately initiating what are known as "Section 301 Investigations" through the Office of the United States Trade Representative (USTR) on August 18, 2017,² pursuant to the Trade Act of 1974.³ Under the Act, Congress delegated to the executive branch the authority to impose sanctions on foreign nations who have either violated trade agreements or otherwise engaged in unfair trade practices. Specifically, Section 301 of the Act,⁴ for which the investigations and sanctions are named, provides that the Trade Representative, is authorized to, among other powers, "impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate."



The Section 301 investigations focused specifically on the impact of China's trade policies on American intellectual property, innovation, and technology transfer, and initially led to the imposition of a 25% tariff on roughly \$50 billion worth of Chinese imports. According to the US

² 82 FR 40213.

<https://ustr.gov/sites/default/files/enforcement/301Investigations/FRN%20China301.pdf>.

³ 19 U.S.C. § 2101 *et seq.*

⁴ 19 U.S.C. § 2411.

Trade Representative's [Executive Summary](#) of the investigations:

[A] key part of China's technology drive involves the acquisition of foreign technologies through acts, policies, and practices of the Chinese government that are unreasonable or discriminatory and burden or restrict U.S. commerce and are part of a multifaceted strategy to advance China's industrial policy objectives. These acts, policies, and practices are applied across a broad range of sectors, and are implemented through a diverse set of state and state-backed actors.⁵

While the initial tariffs on \$50 billion of Chinese goods (split into "List 1" and "List 2" of \$34 billion and \$16 billion, respectively) caused a stir in the trade and economic sectors, they were just the beginning.

Current tariffs

Not satisfied by the level of cooperation and continued dubious trade practices by the Chinese government, in September of 2018, the President and USTR imposed a 10% tariff on additional Chinese goods valued at an estimated \$200 billion in annual trade value (referred to as "List 3").⁶ In May of 2019, these duties were increased from 10% to 25%.⁷

As the value differences between the tariff actions suggest (\$50B to \$200B), the scope of imported goods in List 3 is far broader than in either List 1 or 2.⁸ Indeed,

⁵ Available at:

<https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Draft%20Exec%20Summary%203.22.ustrfinal.pdf>

⁶ 83 FR 47974.

⁷ 84 FR 20459.

⁸ Both Lists 1 and 2 dealt primarily with imports of industrial, mechanical, and/or chemical goods and components. The respective Lists can be found in the Federal Register at 83 FR 28710 – 28756 (List 1) and 83 FR 40823 – 40838 (List 2), or on the website of the US Trade

the range of List 3 goods extends to such disparate items as cuts of fish, jet fuel, printer ink, photography film, herbicides, disinfectants, leather, suitcases, sawdust, various weaves of fabrics, and presumably everything in between.⁹

Because the tariffs have been imposed on such a wide spectrum of goods, the likelihood that American businesses and consumers alike will ultimately be affected by the tariffs has substantially increased, whether those goods are in the chain of commerce or ultimately in the check-out line. After all, the function of tariffs as an international retaliatory tool is designed less to *directly* harm the culpable actor as it is to incentivize the importers of the tariff-issuing state to buy their goods elsewhere.

Further, many manufacturers and other businesses that produce end-products may not immediately be aware that an item or component in such product has been subjected to the new tariffs. While the tariff may initially be borne by the importer, the costs are sure to trickle down the chain of commerce to manufacturers and consumers. Businesses owners and operators who deal in products with imported parts or components would therefore be well served to check the [USTR's Tariff List 3](#), or seek assistance from counsel or a customs broker.

The Exclusionary Process

This is not to say, however, that the United States government is not mindful of the major role China plays in international commerce and the potential plight of

American manufacturers and other companies that would not be able to properly function without the import of certain goods and components. As was conducted during the initial imposition of tariffs on List 1 and 2 goods, the USTR has opened an exclusionary process for the tariffs imposed on List 3 goods.¹⁰

Pursuant to procedures and guidelines¹¹ published by the USTR, interested parties, including trade associations, may submit a request for exclusion. The exclusion portal will be open to requests for List 3 items through the **deadline on September 30, 2019**, and unless such deadline is extended, requests for exclusion will not be accepted thereafter.

The request must contain certain product-specific information, including but not limited to the associated Harmonized Tariff Schedule (HTS) subheading, the percentage of the end product which the product constitutes, and whether the particular product or a comparable product are available in the United States or a third country. Decisions of the USTR on the exclusion requests are final and are not appealable.

Granted exclusions will be applied retroactively, beginning September 24, 2018, and will extend for one year after the publication of final exclusion determinations. If necessary, the USTR will publish guidelines for the renewal of exclusions. Additionally, U.S. Customs and Border Protection has provided guidelines for filing liquidation extension requests to ensure that duties already paid are not liquidated before the exclusion request is granted.¹²

Representative: <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions>.

⁹ 83 FR 47974, as amended by 83 FR 49153. The full list of product classifications subject to the increased rates is also available at: <https://ustr.gov/sites/default/files/enforcement/301Investigations/Tariff%20List%20%2883%20FR%2047974%2C%20as%20amended%20and%20modified%20by%2083%20FR%2049153%29.pdf>.

¹⁰ 84 FR 20459.

¹¹ 84 FR 29576.

¹² US Customs and Border Protection – Cargo Systems Messaging Service (CSMS) # 19-000260. https://csms.cbp.gov/viewmssg.asp?Recid=24252&page=&srch_argv=19-000260&srctype=all&btype=&sortby=&sby.

Looking Forward

Obtaining a grant of exclusion under applicable List 3 items could be quite significant for a business or end-line manufacturer, particularly considering that a subsequent, even larger, trade action is already in the works. On May 17, 2019, the USTR published a Request for Comments in the Federal Register concerning the potential implementation of a new trade action of tariffs up to 25% on an additional \$300 billion worth of Chinese imports.¹³ As previously noted, on August 1, President Trump signaled that an initial 10% tariff would be imposed on these imports beginning September 1.

While this new trade action is still in its early stages, it is worth noting that in less than two years, the USTR has, in three separate tranches, imposed substantial tariffs on an estimated \$250 billion dollars in Chinese imports. Further, each time tariffs of 10% have initially been imposed, they were soon increased to 25%. Any business that routinely deals in, or depends on, products, parts, or components imported from China would be well served to see if the current or proposed future tariffs will affect the costs of its product or business, and whether it can avail itself of the exclusionary process.

Businesses unsure of whether they are affected by the current tariffs as well as affected businesses planning to submit exclusion requests to the USTR for List 3 tariffs should strongly consider first seeking assistance from a licensed customs broker or legal counsel with experience in the Harmonized Tariff Schedule. During the exclusionary process for List 2 goods that closed in late 2018, nearly 3,000 exclusion requests

were submitted to the USTR.¹⁴ Only 292 were granted.¹⁵ As previously mentioned, USTR exclusion determinations are final and are not appealable.

Though the procedure and standards in place to obtain an exclusion may be rigorous, the potential benefit to affected businesses could make a significant difference in the short and long term, as the current dispute between the United States and China shows no signs of slowing. ◀▶

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Mr. Anthony welcomes the questions and comments of clients and others on this *Business Signals* topic and other legal issues at:

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¹³ 84 FR 22564. The publication includes a list of the HTS subheadings under consideration for implementation of the tariffs, which inevitably be labeled “List 4.”

¹⁴ View the Exclusion Requests Status Index spreadsheet at [https://ustr.gov/sites/default/files/enforcement/301Investigations/08.02.19 Additional %2416 Billion Trade Action Index of Product Exclusion Requests and Review Status.xlsx](https://ustr.gov/sites/default/files/enforcement/301Investigations/08.02.19%20Additional%20416%20BillionTradeActionIndexofProductExclusionRequestsandReviewStatus.xlsx)

¹⁵ 84 FR 37381.

The materials and information included herein may be time sensitive and contingent on applicable timetables and deadlines.

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