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Congress Calls for Exclusion Process for Tariffs on $200 Billion in Chinese Imports

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International Trade; Public Policy

Late last week, President Trump signed an appropriations bill to keep the government funded. In its Joint Explanatory Statement accompanying this legislation, Congress directed the Trump Administration to establish an exclusion request process for tariffs on $200 billion in Chinese imports by March 17, 2019, in line with the process provided for prior rounds of tariffs. The Congressional statement is not binding, and the Administration has not yet responded officially, though previously, it had indicated that it would not provide an exclusion process unless the tariffs were increased from 10 percent to 25 percent. Of course, if an agreement between the U.S. and Chinese governments were reached that results in the lifting of these tariffs, the question of exclusions would be rendered moot.

The current 10 percent tariffs on $200 billion in Chinese imports are the third and widest-ranging tranche of tariffs imposed pursuant to the U.S. Administration's determination in March 2018 under Section 301 of the Trade Act of 1974 (Section 301) that China's technology transfer and intellectual property (IP) policies are harming U.S. companies. When imposing these tariffs in September 2018, the Trump Administration had announced that the duty level would increase from 10 to 25 percent on January 1, 2019. Subsequently, following a December 1, 2018, working dinner meeting between President Trump and Chinese President Xi Jinping, the U.S. Administration postponed the January 1 increase to enable negotiations to proceed, but stated that the increase to 25 percent would take place on March 1, 2019, absent an agreement between the two governments.

In its Joint Explanatory Statement, Congress observed that although the Office of the U.S. Trade Representative (USTR) had provided an exclusion request process for the first two rounds of Section 301 tariffs on $34 billion and $16 billion in Chinese imports, respectively, "[i]t is concerning that there is no exclusion process" for the third round. The statement mandated that "USTR shall establish an exclusion process for tariffs imposed on goods subject to Section 301 tariffs in round 3" and that the process "should be initiated" within 30 days of the legislation's enactment, "following the same procedures as those in rounds 1 and 2, allowing stakeholders to request that particular products classified within a tariff subheading . . . be excluded from the Section 301 tariffs." In addition, the statement directed USTR to consult with various Congressional committees regarding the "nature and timing of the exclusion process" and provide those committees with a status update within 30 days following the law's enactment. The 30-day deadline falls on March 17, 2019.

It is possible that USTR will soon initiate the exclusion request process requested by Congress. To be sure, the directives in the Joint Explanatory Statement do not have statutory force; the appropriations legislation itself is silent as to the exclusion process, referencing only amounts appropriated for salaries and expenses of the Office of the USTR. Furthermore, Congress's call for an exclusion process comes into tension with prior reports that USTR would allow exclusions from the tariffs on $200 billion in Chinese imports only if those tariffs were increased from 10 to 25 percent following unfruitful negotiations with Beijing. Nonetheless, USTR will have strong incentives to comply with the Joint Explanatory Statement, as it reflects the intent of the appropriations committees, which approve USTR budgets annually.

If the additional tariff exclusion process is opened and parallels the prior processes as the Joint Explanatory Statement contemplates, then requesting companies will need to submit a range of information regarding the products they wish to exclude. In requesting exclusions from the second $16 billion list, companies were required to identify the physical characteristics of the product for which exclusion was sought and the 10-digit Harmonized Tariff Schedule of the United States (HTSUS) subheading under which the relevant imports were classified. Additionally, requestors had to address whether (1) the product is only available from China; (2) imposition of additional duties on the product would cause severe economic harm to the requestor or other U.S. interests; and (3) the product is strategically important to or related to Chinese industrial programs such as "Made in China 2025." The Federal Register notice outlining the $16 billion list exclusion request process, which closed in December 2018, is available here.

Meanwhile, the U.S.-China trade talks are ongoing. According to a White House statement in December 2018, the current negotiations cover "forced technology transfer, intellectual property protection, non-tariff barriers, cyber intrusions and cyber theft, services and agriculture," as well as increasing China's purchases of U.S. goods and services. China has stated that it sees removal of tariffs as a primary goal of the negotiations, but the Administration has not responded to this point, emphasizing instead resolution of structural issues. Resolution of these structural issues could be extremely challenging in a short timeframe. Last week, USTR Robert Lighthizer and Secretary of Treasury Steve Mnuchin were in Beijing for meetings with Chinese Vice Premier Liu He and other high-level Chinese officials. While the White House characterized the meetings as "detailed and intensive" and resulting in "progress," it also made clear that "[m]uch work remains" in forging agreement. While delaying the tariff increase beyond March 1 is quite possible, it is too soon to know for sure whether President Trump will take this action. Negotiations between senior U.S. and Chinese officials continue this week in Washington. These negotiations will no doubt inform President Trump's willingness to further delay List 3 tariff increases.

Companies with interests in U.S.-China trade relations should take appropriate steps to try to shape outcomes of the bilateral negotiations and monitor developments affecting supply and market access. Although USTR is no longer accepting exclusion requests for the tariffs on $34 billion and $16 billion in Chinese imports, the anticipated exclusion process for the $200 billion list could unlock new opportunities.

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