

## House Releases New Trade Provisions in the America COMPETES Act

Bill includes significant international trade provisions that differ from Senate version of China bill; if House bill is passed, Congress will need to resolve differences through conference

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On January 25, 2022, the U.S. House of Representatives released the [America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength \(“COMPETES”\) Act of 2022](#). This long-awaited bill is the House counterpart to legislation the Senate passed on June 8, 2021, entitled the [U.S. Innovation and Competition Act \(“USICA”\)](#). Both bills are largely designed to respond to China, and they cover a wide range of issues ranging from the production of semiconductors to labor standards. The America COMPETES Act has yet to secure passage in the House, where it is unlikely to draw Republican support. If it passes the House, the legislation will move to a conference committee where the House and Senate must resolve differences between the competing bills. Bipartisan support for the post-conference bill will likely be required given the Senate’s 60-vote threshold.

In this alert, we analyze how significant trade-related provisions in the House and Senate bills would impact U.S. and foreign companies. We also discuss material differences between the competing trade titles, which the two chambers would need to resolve in any conference.

- The House and Senate bills both reauthorize the Generalized System of Preferences and the Miscellaneous Tariff Bill, which reduce tariffs on particular imports. Both bills also include provisions to combat forced labor in the seafood supply chain.
- The House bill separately includes (i) important changes to the statutory provision that permits duty-free importation of merchandise worth less than \$800 (the so-called “*De Minimis* rule”); (ii) amendments to trade remedy laws (primarily antidumping and countervailing tariffs) that permit more aggressive application of such tariffs; and (iii) reauthorization of Trade Adjustment Assistance to benefit U.S. workers, firms, farmers, and communities negatively affected by increased imports. These provisions do not appear in the Senate’s USICA legislation.
- Finally, the House bill omits various provisions adopted by the Senate in USICA, including sections that (i) broaden the availability of product exclusions from Section 301 tariffs on imports from China; and (ii) ramp up enforcement of the prohibition on imports of products made with forced labor.

## Significant Trade Provisions in Both Bills

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### Generalized System of Preferences (“GSP”)

GSP seeks to encourage economic growth in developing countries by permitting duty-free treatment of certain U.S. imports from eligible countries. The program expired on December 31, 2020, but both bills propose to renew the program and make it effective retroactively to imports entered since expiration. While the House bill proposes to extend the program through the end of 2024, the Senate has proposed to extend it through 2026. Both bills also amend the eligibility criteria for duty-free treatment by imposing stricter environmental and labor standards on countries that benefit from GSP and by requiring them to promote rule of law, good governance, and equitable economic policies.<sup>1</sup> The Senate’s version also requires GSP beneficiaries to employ policies that promote digital trade.<sup>2</sup> Given these proposals, fewer countries would likely be eligible for the GSP program if it is renewed.

### Miscellaneous Tariff Bill (“MTB”)

The MTB provides for a temporary suspension or reduction of tariffs on certain products, usually where there is no domestic production and the forgone tariff revenue is minimal. Companies can apply to the U.S. International Trade Commission (“ITC”) for suspension or reduction of tariffs for particular products. The America COMPETES Act and USICA both authorize more MTB cycles through which companies can apply for tariff reductions or suspensions, with the first in 2022 and the second in 2025. Unlike the Senate bill, the America COMPETES Act also limits eligibility for this program by excluding finished goods, such as goods that are ready for sale and goods that will not undergo any substantial processing or transformation in the United States.<sup>3</sup>

### Forced Labor in Seafood Supply Chains

Both bills include provisions to mandate new efforts to combat forced labor and human trafficking in seafood supply chains, but the America COMPETES Act is far more detailed than the Senate’s USICA.<sup>4</sup> The House bill would expand the existing Seafood Traceability Program covering fish and fish products to reach all seafood and seafood products imported to the United States.<sup>5</sup> It would mandate the collection of additional data elements for imported seafood, including the location of catch or cultivation, chain-of-custody records, vessel identification numbers, and labor conditions in the harvesting and processing of imported seafood.<sup>6</sup> Finally, it would also require import audits targeted at countries where seafood supply chains are at risk of

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<sup>1</sup> America COMPETES Act, § 105001(a)(2); USICA, § 74001(a)(2).

<sup>2</sup> USICA, § 74001(a)(2).

<sup>3</sup> America COMPETES Act, § 106002.

<sup>4</sup> *Id.* §§ 70101-70131; USICA, § 71002.

<sup>5</sup> America COMPETES Act, § 70112; see also 50 C.F.R. § 300.324 (establishing Seafood Traceability Program).

<sup>6</sup> America COMPETES Act, § 70114.

using forced labor and human trafficking, such as China, Vietnam, Indonesia, and Peru.<sup>7</sup> Although USICA would mandate that U.S. Customs and Border Protection (“CBP”) issue regulations within one year concerning the verification of seafood imports to prevent the importation of seafood harvested or produced with forced labor, it does not detail the nature of any required new measures.<sup>8</sup>

## Significant Trade Provisions Only in the House’s America COMPETES Act

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### Changes to the *De Minimis* Rule

Under Section 321 of the Tariff Act of 1930 (19 U.S.C. § 1321), import transactions valued at less than \$800 are eligible for admission into the United States pursuant to informal entry procedures (requiring less paperwork than standard entry processes) set forth in CBP’s regulations and known as the “*De Minimis* rule.”<sup>9</sup> The *De Minimis* rule also exempts importers from paying some taxes and duties and from classifying merchandise under the Harmonized Tariff Schedule of the United States. Some merchandise—such as imports subject to antidumping or countervailing duty orders or to tariff-rate quotas—does not qualify for the *De Minimis* rule regardless of its value.

The America COMPETES Act would broaden the scope of merchandise that is *ineligible* for Section 321 entry under the *De Minimis* rule. In particular, it would bar (1) goods from countries that are both non-market economies and on the U.S. Trade Representative’s (“USTR”) intellectual property rights Priority Watch List (currently only China meets both criteria); (2) goods subject to Section 301 or Section 232 enforcement actions; and (3) goods covered by a single order or contract that are forwarded through a distribution or processing facility (*i.e.*, one used primarily for the storage of articles intended for subsequent shipment) in a foreign country. Finally, the America COMPETES Act would also prohibit suspended or debarred importers from utilizing the *De Minimis* rule.

### Trade Remedies

The America COMPETES Act also seeks to revamp trade remedy laws in ways that increase the risk of antidumping and countervailing tariffs. The House bill draws on bipartisan legislation originally introduced by Senators Rob Portman (R-OH) and Sherrod Brown (D-OH). The Portman-Brown bill was not included in USICA.

A major change in the House bill is that it authorizes “successive” investigations, *i.e.*, concurrent or follow-on investigations. In antidumping and countervailing duty investigations, the ITC determines whether the U.S. domestic industry is materially injured or threatened with material injury by reason of those imported goods. These provisions are designed to address the so-called “whack-a-mole” problem where “trade remedy orders are put in place on imports from

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<sup>7</sup> *Id.* §§ 70114-70115.

<sup>8</sup> USICA, § 71002.

<sup>9</sup> The *De Minimis* rule threshold was previously only \$200, but the amount was raised to \$800 with the passage of the [Trade Facilitation and Trade Enforcement Act of 2015 \(“TFTEA”\)](#).

one country, and, as a result, the U.S. market is flooded with dumped or subsidized imports of that same product from a different country.”<sup>10</sup> The proposal requires the agency to take into account its injury determination in the prior investigation and prohibits the ITC from issuing a negative injury determination where recent improvements in the domestic industry’s performance are due to relief granted in the prior investigation.<sup>11</sup> These changes make it more difficult for the ITC to issue a negative injury determination in a successive investigation.

The U.S. Department of Commerce (“Commerce”) investigates whether subject imports are being sold at less than fair value (*i.e.*, dumped) or unfairly benefitting from countervailable subsidies provided by a foreign government. The America COMPETES Act alters Commerce’s authority in dumping cases and includes highly technical changes to multiple methodologies and calculations, including: the types of sales Commerce may consider when calculating a respondent’s normal value; the application of duty drawback in calculating export or constructed export price; the authority to find a particular market situation and disregard the recorded costs of producers; and the calculation of cost of production where certain market distortions may exist.<sup>12</sup> For subsidies proceedings, the bill (1) allows Commerce to investigate cross-border subsidies, that is, subsidies offered to exporters or producers in the country under investigation but provided by a government located elsewhere;<sup>13</sup> and (2) requires Commerce to investigate claims of currency undervaluation as a subsidy and clarifies when currency undervaluation provides a benefit to foreign producers.<sup>14</sup> After antidumping or countervailing tariffs have been ordered by the agency, Commerce reviews whether imports are circumventing the tariffs, for example, after the product is altered in some way. The House bill permits Commerce to apply a finding of circumvention to entries made prior to the initiation of a circumvention inquiry and authorizes circumvention findings on a country-wide, rather than just a company-specific, basis.<sup>15</sup>

CBP is tasked with, *inter alia*, assessing tariffs on imports and addressing possible tariff (or duty) evasion by importers. While CBP’s authority to review duty evasion allegations is currently limited to evasion of antidumping or countervailing tariffs, the proposed legislation expands that

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<sup>10</sup> Rob Portman U.S. Senator for Ohio, Press Releases, [Portman, Brown Introduce Legislation to Strengthen Trade Remedy Laws, Protect American Workers](#).

<sup>11</sup> American COMPETES Act, § 102001(a)(3).

<sup>12</sup> *Id.* §§ 102102-102105.

<sup>13</sup> *Id.* § 102101(a)(4).

<sup>14</sup> *Id.* §§ 102301-102302. In February 2020, Commerce had [amended](#) its regulations to make it easier for the agency to find that currency undervaluation is a countervailable subsidy, specifically defining when currency undervaluation provides a benefit. With respect to the finding of a benefit, the House’s proposal appears to be an endorsement of Commerce’s amended regulation.

<sup>15</sup> *Id.* § 102201. Commerce [amended](#) its rules in September 2021 by creating separate circumvention regulations for the first time, and the House bill seemingly endorses many of the changes made by Commerce.

authority to cover tariffs stemming from safeguard measures.<sup>16</sup> In the short term, this change would impact importers of solar cells and panels and large residential washers, which are currently subject to safeguard measures in the United States. Additionally, the proposed legislation authorizes CBP to establish a confidential information sharing system through which outside counsel can have access to confidential information filed by other parties.<sup>17</sup> Counsel to parties involved in duty evasion proceedings currently cannot access this confidential information, making it impossible for a party, such as an alleged evader, to respond fully to the allegations made against it.

### **Trade Adjustment Assistance (“TAA”)**

The current TAA program is set to expire on June 30, 2022. The House’s legislation includes a number of provisions to reauthorize and modernize TAA, which assists workers negatively impacted by increased imports, such as through income support and job training. In an effort to ensure TAA benefits reach the most severely affected communities and in recognition of racial disparities and inequities in the economy, the proposed legislation makes several changes to TAA for workers, firms, farmers, and communities. TAA provisions were reportedly a top priority for House Democrats and therefore key to securing their support for including a trade title in the bill.

## **Significant Trade Provisions Only in the Senate’s USICA**

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### **Section 301 Exclusions**

Beginning in 2018, the United States imposed tariffs on Chinese goods pursuant to Section 301 of the Trade Act of 1974 (19 U.S.C. § 2411). These tariffs were imposed pursuant to four lists issued by the USTR, which outlined specific goods and product descriptions, along with corresponding tariff rates. Importers could apply for exclusions for products described in the lists, but any granted exclusions were temporary and have since expired. USTR recently invited requests to reinstate certain product exclusions that were extended by the Trump Administration.<sup>18</sup> The set of extended exclusions eligible for possible reinstatement is limited to 549 products, a small subset of the exclusions initially granted, and USTR’s review remains pending.

USICA would amend and impact Section 301 product exclusions in two primary ways. First, the bill would reinstate all exclusions previously granted and published by the USTR from enactment through December 31, 2022, with some narrow retroactivity provisions for a small subset of specified exclusions. By our estimate, less than 7% of previously granted exclusions would have retroactive effect under the Senate bill.<sup>19</sup> Second, USICA calls for USTR in the

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<sup>16</sup> *Id.* § 102402.

<sup>17</sup> *Id.* § 102403.

<sup>18</sup> See Covington Alert, [USTR Weighs Reinstating Limited Exclusions from Tariffs on Chinese Imports](#).

<sup>19</sup> The retroactivity provisions in § 730001 limit eligibility to the subset of exclusions that were extended to December 31, 2020. In addition, retroactivity is further limited to exclusions that

future to implement a reformed exclusion process that takes into account, *inter alia*, (1) whether the failure to grant the exclusion would result in severe economic harm to the requester; (2) whether the imposition of the duty would unreasonably increase consumer prices for day-to-day items consumed by low- or middle-income families in the United States; and (3) whether the failure to grant the exclusion is likely to result in a particular entity or entities having the ability to abuse a dominant market position.

### Forced Labor Enforcement

USICA would amend Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307), which prohibits the importation of goods made wholly or in part with forced labor.<sup>20</sup> Presently, the Forced Labor Division within CBP's Office of Trade plays a leading role in the enforcement of the import prohibition by receiving and investigating allegations of forced labor in the supply chains of imported goods. The amendments would codify the Forced Labor Division's investigative authority and would mandate that the Division prioritize investigations by consulting with the U.S. Departments of Labor and State, and by taking into account the complicity of foreign governments in facilitating forced labor and the impact of potential enforcement action, among other factors.<sup>21</sup> Furthermore, the amendments would require that the Forced Labor Division provide quarterly briefings to Congress on the status of allegations and investigative activities.<sup>22</sup>

## Legislative Outlook

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The next step is for the House to finalize and pass the America COMPETES Act. Because of the Democratic majority in the House, the bill could pass without Republican support if the Democratic caucus remains largely united. If the House passes the America COMPETES Act, a conference committee with members from both chambers will meet to resolve differences between the competing bills. As noted, the need to secure some measure of Republican support in the Senate will shape the ultimate content of the legislation. The conference process could result in significant amendments, including the removal of provisions that lack support in either chamber. Given the expected horse-trading, companies should actively monitor these developments.

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were not granted by USTR within 180 days of a liquidated entry (*i.e.*, within roughly 300 plus 180 days)—and very few exclusions were granted only after such substantial delays.

<sup>20</sup> USICA, § 71001.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade and Public Policy practices:

<b><u>Shara Aranoff</u></b>	+1 202 662 5997	<a href="mailto:saranoff@cov.com">saranoff@cov.com</a>
<b><u>John Veroneau</u></b>	+1 202 662 5034	<a href="mailto:iveroneau@cov.com">iveroneau@cov.com</a>
<b><u>Marney Cheek</u></b>	+1 202 662 5267	<a href="mailto:mcheek@cov.com">mcheek@cov.com</a>
<b><u>Alexander Chinoy</u></b>	+1 202 662 5559	<a href="mailto:achinoy@cov.com">achinoy@cov.com</a>
<b><u>James Smith</u></b>	+1 202 662 5550	<a href="mailto:jmsmith@cov.com">jmsmith@cov.com</a>
<b><u>William Isasi</u></b>	+1 202 662 5102	<a href="mailto:wisasi@cov.com">wisasi@cov.com</a>
<b><u>Victor Ban</u></b>	+1 202 662 5553	<a href="mailto:vban@cov.com">vban@cov.com</a>
<b><u>Rishi Gupta</u></b>	+1 202 662 5879	<a href="mailto:rrgupta@cov.com">rrgupta@cov.com</a>
<b><u>Natalie Dugan</u></b>	+1 202 662 5563	<a href="mailto:ndugan@cov.com">ndugan@cov.com</a>

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