Client Alert | International Trade

US Trade Representative Issues Federal Register Notice to Implement May 10th Tariff Increase on "List 3" Chinese Goods; Chinese Delegation to Visit Washington on May 9th

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On May 8, 2019, the Office of the US Trade Representative (USTR) published a draft Federal Register notice increasing the Section 301 tariff rate on approximately US $200 billion worth of "List 3" Chinese imports to 25 percent (from the current rate of 10 percent), effective at 12:01a.m. EDT on Friday, May 10, 2019 but only with respect to goods exported to the United States on or after May 10 and subsequently entered for consumption – thus sparing China-origin goods already en route (or soon to be en route) to the United States but landing after May 9, 2019.

The Federal Register notice is scheduled for official publication in the Federal Register on Thursday, May 9. USTR Robert Lighthizer announced on Monday, May 6 that USTR would issue the notice at the direction of the President and because, in the view of the Trump administration, China recently "[retreated] from specific commitments that have already been made" in the ongoing bilateral negotiations between the two countries – a move that the United States considers to be "unacceptable." (please refer to the White & Case Client Alert dated May 7, 2019), with a link here.)

Following USTR Lighthizer's statement, China's Ministry of Commerce stated that China's Vice Premier, Liu He, still plans to visit the United States from May 9 to 10 to continue the bilateral negotiations. However, China also has pledged to retaliate should the United States implement its threatened tariff increase on May 10. US officials have acknowledged that the two sides could potentially reach an agreement this week that would avert the tariff increase, but the current state of the discussions and the limited time available for further negotiations has heightened doubts that such an agreement will be reached.

USTR's Federal Register notice does not reference the potential fourth round of Section 301 tariffs that the Trump administration has threatened to impose on the remaining US $325 billion in annual US imports from China that are not now subject to Section 301 duties. However, USTR Lighthizer indicated on Monday that USTR might publish a separate Federal Register notice proposing such tariffs for public comment this week, signaling that the US-China trade dispute could escalate even further in the coming days.

We discuss these developments and their implications below.

Federal Register notice on "List 3" tariff increase

USTR's Federal Register notice states that the United States continues to engage with China "with the goal of obtaining the elimination of the acts, policies, and practices" covered in the Section 301 investigation, but that "[i]n the most recent negotiations, China has chosen to retreat from specific commitments agreed to in earlier rounds." Thus, "in light of the lack of progress in discussions with China, the President has directed the Trade Representative to increase the rate of additional duty to 25 percent" on products covered by USTR's third (US $200 billion) tariff action in the Section 301 investigation. Such products are currently subject to an additional duty of 10 percent.

Effective date and exemption for goods in transit

The notice states that the tariff increase on List 3 goods will be effective with respect to goods that are (i) entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 10, 2019; and (ii) exported to the United States on or after May 10, 2019. Thus, the notice appears to exclude from the increased tariff rate goods that are shipped from China prior to May 10 but enter the United States on or after the effective date of the tariff increase. Consequently, subject merchandise already in transit to the United States (*e.g.*, goods that were exported before the United States announced the tariff increase) may be able to enter at the previous Section 301 duty rate of 10 percent, provided that the importer can demonstrate that the goods were exported before May 10.

USTR's prior Section 301 actions have not provided such exemptions for goods in transit, but USTR may have done so in this case due to the unusually short notice given to importers regarding the coming tariff increase. USTR's notice does not specify how parties can demonstrate that goods were exported prior to May 10, but forthcoming announcements from US Customs and Border Protection may provide instructions on this point. Customs regulations and guidance indicate that the date of export would be the date the merchandise finally leaves the country of export for the United States. Our informal discussions with CBP for confirmation on determining the date of export have thus far provided no additional guidance.

List 3 exclusion process confirmed

The notice confirms that USTR will establish a process by which interested persons may request that particular products on List 3 be excluded from the 25 percent duty. USTR has stated that it will publish a separate notice describing the product exclusion process, including the procedures for submitting exclusion requests, and an opportunity for interested persons to submit oppositions to a request. USTR did not specify when it will initiate the List 3 exclusion process, but it will likely do so within the next several weeks. The exclusion processes for Lists 1 and 2 were initiated approximately 3 weeks and 5 weeks, respectively, after USTR announced the imposition of tariffs on such products.

If USTR does establish a product exclusion process for List 3, the process will likely mirror the ones that USTR established for Lists 1 and 2. In both cases, USTR published a Federal Register notice inviting interested parties to submit exclusion requests and setting out the criteria that should be addressed in such requests. All exclusion requests were due within a relatively short timeframe of approximately 90 days after the notice's publication, and USTR has not subsequently re-opened the process for further exclusion requests or stated if it will do so. USTR received more than 13,700 exclusion requests for products on Lists 1 and 2 (of which more than 7,000 remain pending), and less than 1,500 requests – covering a small portion of covered goods – have been approved so far. USTR is likely to receive many more requests for List 3, given its annual trade value of US $200 billion (compared to US $50 billion for Lists 1 and 2).

Given the challenges involved in the existing Section 301 exclusion process, the increased duty rate on List 3 goods, and the current difficulties in the bilateral negotiations with China, interested parties may wish to monitor closely any announcements from USTR regarding the List 3 exclusion process and prepare to submit exclusion requests as soon as possible after the process is initiated.

No mention of potential “List 4” tariffs

USTR’s Federal Register notice does not reference the potential fourth round of Section 301 tariffs that the Trump administration has threatened to impose on the remaining US $325 billion in annual US imports from China that are not currently subject to Section 301 duties. However, USTR Lighthizer indicated on Monday that USTR might publish a separate Federal Register notice proposing such tariffs this week.

If USTR does propose a fourth tariff action in the Section 301 investigation, it will likely follow the same process it used prior to the implementation of the first three tariff actions. In those instances, USTR issued a Federal Register notice (1) containing a proposed list of products to be subject to additional tariffs; (2) requesting public comments on whether products should be removed from (or added to) the list based on certain criteria (with a comment deadline approximately one month after the date of the notice); and (3) scheduling a public hearing on the proposed tariff list approximately one month after the date of the notice. Based on this process, USTR removed certain products from the lists of goods on which tariffs ultimately were imposed (*e.g.*, due to lack of alternative sources for the product or disproportionate economic harm to US interests).

A fourth US tariff action covering the remainder of US imports from China would represent a major escalation of the bilateral trade dispute, and would affect a wide range of products including consumer goods (toys, sports equipment, footwear, and clothing), textiles, electronics and machinery, chemicals, plastics and rubber. USTR has not clarified whether goods that were removed from the first three proposed tariff lists based on public comments would be included on the fourth proposed tariff list.

A full list of the Harmonized Tariff System of the United States (HTSUS) codes and products potentially affected by such tariffs is available upon request.

Outlook

As noted above, China’s Ministry of Commerce confirmed on May 7 that Chinese Vice Premier Liu He plans to visit Washington from May 9 to 10, at the invitation of USTR Lighthizer and Secretary Mnuchin, to continue negotiations with the United States. Both US officials during a May 6 briefing indicated that the United States is not walking away from the bilateral negotiations, but that the Trump administration considers China’s alleged efforts to renegotiate previously-agreed commitments to be unacceptable. USTR Lighthizer accused China of seeking “substantial and substantive changes” to agreed-upon language that amounted to “reneging on prior commitments,” which reportedly related to technology transfer and other issues. He speculated that China did so because “these were serious real commitments that were enforceable and…some people in China found that difficult and objected to it.” Secretary Mnuchin stated that China’s recent demands represented “a big change in the direction for the negotiations,” and that “[w]e are not willing to go back on documents that have been negotiated in the past[.]”

During the same briefing, Secretary Mnuchin indicated that the May 10 tariff increase on List 3 goods could potentially be averted if, during the negotiations scheduled this week, “the [Chinese] team came back and was prepared to meet the commitments that they made to us previously and negotiate in good faith on the remaining issues[.]” Ambassador Lighthizer stated that "[i]f we can get the kind of deal that makes substantial structural changes, the President would like that kind of deal, but that's just not where we are right now[.]” Though the United States has not rejected the possibility of calling off the tariff increase, it currently appears more likely that the increase will occur as scheduled, particularly given the US decision to publish the Federal Register notice, the current state of the bilateral negotiations, and the limited time remaining for further negotiations (indeed, Vice Minister He is not scheduled to arrive in Washington until May 9, less than 24 hours before the tariff increase takes effect). However, the Federal Register notice language tying application of the tariffs to the date of exportation could mute the immediate commercial impact of Friday’s tariff increase and buy negotiators more time – *i.e.*, the several weeks it takes for ocean freight to leave China and arrive in the United States – to resolve the current impasse and thereby avert serious financial harm to US and Chinese stakeholders.

Nevertheless, China’s Ministry of Commerce warned on May 8 that, if the United States implements the tariff increase on List 3 goods, China “will have to take necessary countermeasures.” Such countermeasures are expected to take the form of further tariff increases on US goods. China has not indicated whether it will continue to conduct bilateral negotiations with the United States if the List 3 tariff increase occurs, but there is a significant risk that a US tariff increase on Friday and subsequent Chinese retaliation will cause the negotiations to come to a standstill or collapse altogether (particularly if the United States also goes forward with the threatened “List 4” tariffs on all remaining Chinese imports). Thus, while many stakeholders had hoped that the ongoing negotiations with China might soon lead to a reduction in the Section 301 tariffs and Chinese retaliation, there is now a real risk that trade restrictions between the two countries will escalate further in the near- to medium-term.

USTR’s Federal Register notice is available here.

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