

# US Multilateral Trade and Policy Developments

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## Trade Policy Developments

### United States Adopts Laws to Restrict Certain Foreign Software Applications and Data Broker Transactions

On April 24, 2024, President Biden signed into law H.R. 815,<sup>1</sup> a law containing emergency supplemental appropriations funds for Israel, Ukraine, and Taiwan, as well as new sanctions, export control, and cross-border digital services restrictions. This Alert discusses the two digital-related provisions, the “Protecting Americans from Foreign Adversary Controlled Applications Act” and the “Protecting Americans’ Data from Foreign Adversaries Act of 2024.”

#### Protecting Americans from Foreign Adversary Controlled Applications Act

H.R. 815 Division H is the “Protecting Americans from Foreign Adversary Controlled Applications Act,” which bans applications that are either named in the law (e.g., TikTok) or that are designated by the president as “foreign adversary controlled applications.” Such a prohibition can be lifted if the application is sold to an entity that is not considered to be controlled by a foreign adversary, making divestment a potential alternative to the prohibition.

This bill was previously H.R. 7521, which passed the House by a vote of 352 to 65 on March 13, 2024 and was then rolled into H.R. 815 to accelerate its enactment.<sup>2</sup> Senators had reportedly been discussing changes to the text that would help it withstand court challenges, including making divestment an easier option and basing the prohibition power more clearly on national security justifications. Ultimately, the only change the Senate made before the bill’s quick passage into law was to extend the implementation time for prohibition orders from 180 days to 270 days with a 90-day extension option.

#### Prohibition

The law prohibits entities from distributing, updating, or maintaining an application that is designated as a foreign adversary controlled application in the United States by either:

- Providing services that distribute, maintain, or update a foreign adversary controlled application through app stores that users in the United States would use to access the foreign adversary controlled application; or
- Providing internet hosting services to enable the distribution, maintenance, or updating of such foreign adversary controlled application for users in the United States.

#### *Designating a foreign adversary controlled application*

The law defines “foreign adversary controlled application” as a “website, desktop application, mobile application, or augmented or immersive technology application that is operated, directly or indirectly” by a “covered company” that is “controlled by a foreign adversary” and determined by the president to threaten national security.

A “covered company” is “an entity that operates, directly or indirectly (including through a parent company, subsidiary, or affiliate), a website, desktop application, mobile application, or augmented or immersive technology application” that allows the creation and sharing of third-party generated content and has at least one million active monthly users. The definition excludes apps that have the primary purpose of allowing users to post product, business, and travel reviews.

<sup>1</sup> H.R.815 - Making emergency supplemental appropriations for the fiscal year ending September 30, 2024, and for other purposes, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/815>.

<sup>2</sup> H.R.7521 - Protecting Americans from Foreign Adversary Controlled Applications Act, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/7521>.

“Controlled by a foreign adversary” means a covered company is (i) “a foreign person that is domiciled in, is headquartered in, has its principal place of business in, or is organized under the laws of a foreign adversary country;” (ii) an entity that is at least 20% owned by such a foreign person; or (iii) other persons subject to the direction or control of such foreign persons or entities. The foreign adversary countries under this law are China, Iran, North Korea, and Russia.<sup>3</sup>

In making a determination that a covered company that threatens national security is a foreign adversary controlled application, the president would have to provide notice to Congress 30 days before making the determination and publish a public notice.

Besides applications designated by the president as fitting this definition, the law itself specifically designates applications owned by ByteDance Ltd. (including TikTok) as foreign adversary controlled applications. The listed companies automatically became subject to the prohibition upon the law’s enactment.

### ***Divestment opportunity***

The prohibition would enter force 270 days after the date the president designates an application as a foreign adversary controlled application (or 270 days after the law’s enactment in the case of companies named in the law), with an option for the president to grant a one-time 90-day extension.

The delay in the prohibition entering into force provides space for control of the designated application to be transferred to an entity that is not controlled by a foreign adversary, at which point the president may lift the designation and the prohibition would not enter force. The president may also lift an already-enforced prohibition if a divestiture occurs after the 270-day (or 360-day) mark. To enable these transfers of control, the prohibition would not apply to activities that are necessary to enable a planned divestiture.

For a designated foreign adversary controlled application to qualify for the lifting of the designation and prohibition, the president must determine that a “qualified divestiture” has taken place. A qualified divestiture is a divestiture that the president has determined through an interagency process would:

- “Result in the relevant foreign adversary controlled application no longer being controlled by a foreign adversary,” and
- “Precludes the establishment or maintenance of any operational relationship between the United States operations of the relevant foreign adversary controlled application and any formerly affiliated entities that are controlled by a foreign adversary, including any cooperation with respect to the operation of a content recommendation algorithm or an agreement with respect to data sharing.”

### ***Enforcement penalties***

Technology platforms, including third-party service providers like app stores and hosting services that violate the prohibitions would be liable for penalties.

- For providing services that distribute, maintain, or update a foreign adversary controlled application through app stores, violating entities would be subject to fines up to US\$5,000 times the number of users that accessed the prohibited application.
- For providing internet hosting services to enable the distribution, maintenance, or updating of the application, entities would be subject to fines up to US\$500 times the number of users affected.

<sup>3</sup> Based on 10 USC 4872(d)(2), accessible here: <https://www.govinfo.gov/content/pkg/USCODE-2022-title10/pdf/USCODE-2022-title10-subtitleA-partV-subpartI-chap385-subchapIII-sec4872.pdf>.

### **Judicial review**

The law includes a 90-day statute of limitations (or 165 days for entities named in the act) for filing petitions of review to challenge a determination. The US Court of Appeals for the DC Circuit has exclusive jurisdiction.

The law is likely to quickly attract significant legal challenges, especially from the applications named as foreign adversary controlled applications in the text. TikTok's CEO has already said the company intends to challenge its ban in court. To judge the merits of the claims about this law, courts will likely apply established balancing tests to judge whether the law's potential restriction on constitutional rights is an acceptable remedy for the government's national security interest. This will be a long and complex process that will likely eventually lead to the Supreme Court.

### **Protecting Americans' Data from Foreign Adversaries Act of 2024**

Division I of H.R. 815 contains the "Protecting Americans' Data from Foreign Adversaries Act Of 2024." This law prohibits data brokers from providing personally identifiable data of US persons to foreign adversary countries (*i.e.*, China, Iran, North Korea, and Russia) and entities controlled by foreign adversary countries, which will be enforced by the Federal Trade Commission (FTC). This bill was previously H.R. 7520,<sup>4</sup> which passed the House by unanimous vote on March 20, 2024. It was then rolled into H.R. 815 to accelerate its enactment.

### **The Executive Order on Bulk Sensitive Data**

The law has the same objective as an Executive Order (EO) restricting bulk data transactions that President Biden recently issued, though the law's approach is markedly different.

On February 28, 2024, President Biden signed Executive Order 14117 on "Preventing Access to Americans' Bulk Sensitive Data and United States Government-Related Data by Countries of Concern."<sup>5</sup> The EO calls for the Department of Justice (DOJ) to promulgate regulations to prevent the large-scale transfer of sensitive personal data and US Government-related data to "countries of concern" (*i.e.*, China, Russia, Iran, North Korea, Cuba, and Venezuela) and impose security requirements on vendor agreements. The DOJ issued an advance notice of proposed rulemaking (ANPRM) on March 3, 2024 that describes the primary regulations to be implemented under the EO and requests stakeholder feedback.<sup>6</sup>

With the law passed and the EO issued, the United States now has two similar restrictions under development. Comparing the two, the law focuses narrowly on activities of traditional third-party data brokerages, rather than bulk data transfers more generally; it includes lower ownership thresholds for its definition of an entity that is controlled by a foreign adversary, potentially creating more spillovers for companies in third countries; it covers a substantially wider array of personal data types; and it does not include a *de minimis* exception for small data transfers (the EO, in contrast, is specifically interested in bulk data and sets enforcement thresholds to that effect). Besides those differences in coverage, the law is enforced by a different agency and is set to enter force on a faster timeline. The law takes effect 60 days after enactment (June 23, 2024), a significantly faster timeline than the EO had anticipated. The executive branch has not yet explained how it intends to resolve the conflict or how companies should plan to comply with both rules.

### **The prohibition**

<sup>4</sup> H.R.7520 - Protecting Americans' Data from Foreign Adversaries Act of 2024, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/7520>.

<sup>5</sup> Executive Order 14117 on "Preventing Access to Americans' Bulk Sensitive Data and United States Government-Related Data by Countries of Concern," accessible here: <https://www.federalregister.gov/documents/2024/03/01/2024-04573/preventing-access-to-americans-bulk-sensitive-personal-data-and-united-states-government-related>.

<sup>6</sup> "National Security Division; Provisions Regarding Access to Americans' Bulk Sensitive Personal Data and Government-Related Data by Countries of Concern," 89 FR 15780 (March 5, 2024), accessible here: <https://federalregister.gov/d/2024-04594>.

The law makes it unlawful for a covered data broker “to sell, license, rent, trade, transfer, release, disclose, provide access to, or otherwise make available personally identifiable sensitive data of a United States individual” to foreign adversary countries or entities that are controlled by a foreign adversary country. The covered “foreign adversary countries” are again China, Iran, North Korea, and Russia.

“Controlled by a foreign adversary” again means an individual or entity that is (i) “a foreign person that is domiciled in, is headquartered in, has its principal place of business in, or is organized under the laws of a foreign adversary country;” (ii) an entity that is at least 20% owned by such a foreign person; or (iii), other persons subject to the direction or control of such foreign persons or entities. The law does not define “subject to the direction or control of” for the third category, making the FTC’s interpretation of the term important to understanding the full scope of the law’s coverage.

The law’s definition of entities that are controlled by a foreign adversary appears broader than the definition of covered persons in the EO. Both policies target data transfers to individuals or entities associated with adversary countries, but whereas the law extends the designation to entities that are at least 20% owned by an entity that is domiciled in, is headquartered in, has its principal place of business in, or is organized under the laws of a foreign adversary country, the DOJ ANPRM proposes to set its comparable ownership threshold to 50%.

The law directs the FTC to enforce the prohibition under the Federal Trade Commission Act as an unfair or deceptive practice<sup>7</sup> with the accompanying means and powers of the Federal Trade Commission Act. The FTC is the United States’ lead enforcer of federal consumer privacy regulations and recently began to increase its scrutiny of data brokers over allegations of privacy lapses.<sup>8</sup> The law’s focus on the national security and counter-intelligence elements of data protection, however, may exceed the independent consumer protection agency’s experience. The EO, in contrast, primarily relies on the DOJ for enforcement.

### ***Covered data brokers***

A covered data broker is an entity that “sells, licenses, rents, trades, transfers, releases, discloses, provides access to, or otherwise makes available data of United States individuals that the entity did not collect directly from such individuals to another entity that is not acting as a service provider.” This narrow definition would seemingly exclude first party data collectors that may themselves directly sell user data to entities controlled by foreign adversaries.

Specifically excluded from coverage are entities that are collecting, processing, transferring, or receiving data of an individual on behalf of the individual; are providing products or services for which the personally identifiable sensitive data is not the product or service; are providing news coverage; or are acting as service providers (in that they are collecting, processing, and transferring data on behalf of other entities). The bill left many key terms in this list undefined, which will likely require further clarification in the ensuing FTC implementing regulations.

The law’s data brokerage prohibition appears to have a narrower focus than the bulk sensitive personal data prohibition in the EO. The EO extends its prohibition to vendor agreements, employment agreements, investment agreements, and other transactions that may involve the transmittal of bulk sensitive personal data, rather than focus specifically on data transfers by third-party data brokerages.

### ***Personally identifiable sensitive data***

<sup>7</sup> Section 18(a)(1)(B) of the Federal Trade Commission Act (15 USC 57a(a)(1)(B)), accessible here: [https://uscode.house.gov/view.xhtml?req=\(title:15%20section:57a%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:15%20section:57a%20edition:prelim)).

<sup>8</sup> “FTC Cracks Down on Mass Data Collectors: A Closer Look at Avast, X-Mode, and InMarket,” FTC, March 4, 2024, accessible here: <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/03/ftc-cracks-down-mass-data-collectors-closer-look-avast-x-mode-inmarket>.

“Personally identifiable sensitive data” is any “sensitive data” that “identifies or is linked or reasonably linkable, alone or in combination with other data, to an individual or a device that identifies or is linked or reasonably linkable to an individual.”

The coverage of the term “sensitive data” is significantly broader than the definition in the EO. Like the EO, it covers government-issued identifiers, healthcare information, financial information, biometric identifiers, genetic information, and precise geolocation data. Then, the law also covers private communications and metadata; account log-in credentials; information identifying sexual behavior; calendar and address book information, phone or text logs, photos, audio recordings, videos, and other select forms of data maintained for personal use on individual’s devices (and their cloud backups); any image that “shows the naked or undergarment-clad private area of an individual;” information that would reveal video content selected by individuals; any information about individuals under the age of 17; information identifying race, color, ethnicity, and religion; information identifying an individual’s online activities; information that may reveal an individual is a member of the armed forces; and any other data that could be used to determine the sensitive data covered.

“Precise geolocation information” is further defined as information derived from a device of an individual that “reveals the past or present physical location of an individual or device that identifies or is linked or reasonably linkable to one or more individuals, with sufficient precision to identify street level location information of an individual or device or the location of an individual or device within a range of 1,850 feet or less.”

The law’s definition of a “United States Individual” whose data is protected under this standard is vague, applying to “a natural person residing in the United States.” The precise scope of this definition is unclear, though the FTC could clarify it in ensuing implementing regulations. In contrast, the EO applies to “United States persons,” which it defines as US citizens, nationals, and lawful permanent residents; individuals admitted to the United States as refugees or that are granted asylum; entities organized under US law (including foreign branches); or any person in the United States.

## United States Finalizes the IRA’s New Clean Vehicle Tax Credit Rules

On May 6, 2024, the US Department of the Treasury (Treasury), Internal Revenue Service (IRS), and Department of Energy (DOE) published the final rules that will guide implementation of the Inflation Reduction Act’s (IRA) amended Section 30D new clean vehicle tax credit and the 25E previously-owned clean vehicle tax credit.<sup>9</sup> The final rules cover the critical mineral and battery supply chain regional content requirements, the foreign entity of concern (FEOC) definition and restriction, and the tax credit transfer rules for car dealers.

### Notable changes

The final rules adopt most of the proposed rules the agencies issued in 2023 as originally written, with a few notable changes:

- Treasury’s final rule provides the full details for the Traced Qualifying Value Test, a strict supply chain tracing system that manufacturers must use to measure qualifying critical mineral regional value in electric vehicle batteries after the transitional 50% value added test is phased out. Treasury also extended the transition period in which manufacturers can use the 50% value added test from 2025 to 2027, delaying the implementation of the Traced Qualifying Value Test.

<sup>9</sup> “Clean Vehicle Credits Under Sections 25E and 30D; Transfer of Credits; Critical Minerals and Battery Components; Foreign Entities of Concern,” 89 FR 37706 (May 6, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/06/2024-09094/clean-vehicle-credits-under-sections-25e-and-30d-transfer-of-credits-critical-minerals-and-battery>; and “Interpretation of Foreign Entity of Concern,” 89 FR 37079 (May 6, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/06/2024-08913/interpretation-of-foreign-entity-of-concern>.



- The DOE's FEOC final interpretive rule elaborates on the finds of current and former senior government officials who are included in the restriction, as well as several other clarifications on the meaning of FEOC.
- Treasury's final rule adds synthetic and natural graphite contained in anode materials to the impracticable-to-trace battery materials exception of the FEOC restriction (previously called the non-traceable battery materials exception), delaying implementation of the FEOC restriction for those materials (along with the already-listed applicable critical minerals contained in electrolyte salts, electrode binders, and electrolyte additives) until 2027.
- Treasury's final rule makes the FEOC content allocation-based determination into a permanent exception for when manufacturers are unable to physically track the specific minerals or their associated constituent materials to the battery cell. In the proposed rule, this exception had been a temporary measure that would have expired on December 31, 2026.

The final rules also make various other clarifications, offer new commentary on interpreting certain aspects of the rules, add new definitions, specify coverage for hydrogen fuel cell clean vehicles, and add new compliance procedures for submissions of vehicle identification numbers.

### Overview of Section 30D

The IRA restructured the US new clean vehicle subsidy under Internal Revenue Code section 30D, removing previous volume caps on qualifying vehicle sales but imposing a variety of new regional content, vehicle price, and income-based restrictions. To qualify for the new credit, manufacturers must first establish that the vehicle is a "clean vehicle" subject to Section 30D's definition. Clean vehicles must meet certain general characteristics, be made by a company that is reporting the necessary vehicle information to the Treasury (a "qualifying company") and must have undergone "final assembly" in North America (defined as the United States, Mexico, and Canada).

Qualifying clean vehicles have access to a credit of up to \$7,500, consisting of \$3,750 that is conditional on the subject vehicle meeting certain critical minerals local content requirements ("Critical Minerals Requirement") and \$3,750 that is conditional on the subject vehicle meeting certain battery components local content requirements ("Battery Component Requirement").

The IRA also specifically disqualifies clean vehicles from coverage under the Section 30D tax credit if any battery minerals or components originate from FEOCs. An FEOC includes, among other things, any foreign entity that is "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation (*i.e.*, China, Russia, Iran or North Korea)."

### Critical mineral and battery component content requirements

Section 30D's \$7,500 in tax credits is split between two provisions, the Critical Mineral Requirement and the Battery Component Requirement. Likewise, Treasury's rule includes separate compliance processes for demonstrating a clean vehicle's qualification for the two credits. A clean vehicle may qualify for both halves of the credit or only one, depending on production process. Manufacturers must demonstrate compliance with the requirements to the IRS in an upfront review process for a vehicle to receive the credits. The IRS will continue to elaborate on the upfront review process in the Internal Revenue Bulletin.

The processes for meeting the two requirements are summarized below. Treasury and the IRS published a Notice of Proposed Rulemaking for Section 30D on April 17, 2023, which manufacturers have been relying on since.<sup>10</sup> In the final rule, Treasury reorganized these sections, consolidated the relevant technical definitions, added processes for calculating qualifying critical mineral content (which was incomplete in the proposed rule), finalized the upfront review

<sup>10</sup> "Section 30D New Clean Vehicle Credit," 88 FR 23370 (April 17, 2023), accessible here: <https://www.federalregister.gov/documents/2023/04/17/2023-06822/section-30d-new-clean-vehicle-credit>.



process, added a new section clarifying that qualifying new fuel cell clean vehicles automatically receive the entire \$7,500 credit (as they do not have electric vehicle batteries), and added illustrative examples of the regional value calculations.

### ***Critical Mineral Requirement***

Clean vehicles that satisfy the Critical Minerals Requirement will receive a tax credit of up to \$3,750 (scaling upward based on the size of the battery). To satisfy the requirement, a share of the critical minerals contained in the vehicle's battery must be "extracted or processed in the United States, or in any country with which the United States has a free trade agreement in effect," or be "recycled in North America." The applicable critical minerals for this requirement are those listed in Section 45X(c)(6) of the advanced manufacturing production credit.<sup>11</sup> The final rule includes key definitions, steps, and calculations necessary to determine compliance with this requirement.

The requirement uses a three-step test for determining qualifying content, which is mostly unchanged from the proposed rule:

- **Step 1:** Determine the procurement chain for each critical mineral. Each critical mineral procurement chain needs to be identified and evaluated separately. The procurement chain is "a common sequence of extraction, processing, or recycling activities that occur in a common set of locations, concluding in the production of constituent materials."
- **Step 2:** Evaluate each procurement chain to determine its qualifying value. To be treated as a "qualifying critical mineral," minerals procured must be either "extracted or processed in the United States, or in any country with which the United States has a free trade agreement in effect" or "recycled in North America."

For 2023 and 2024 (and with an option to extend to 2025 and 2026), Treasury is applying a transitional supply chain tracing rule that it calls the "50% of value added test." Under this test, if 50% of the value added of mining, processing, or recycling of the mineral occur in the covered economies, then it is a "qualifying critical mineral." The proposed rule had said use of the 50% of value added test would end in 2025, but the final rule gives manufacturers the option of continuing to use it until 2027.

After the transition rule expires, Treasury will apply the more stringent "Traced Qualifying Value Test." Though the proposed rule explained this test would eventually be adopted, Treasury did not explain the content of the test at that time. The final rule includes the full Traced Qualifying Value Test and explains that it will require manufacturers to fully trace the value added in each procurement chain that it applies toward the requirement. Only the share of value that is added in the United States or a country with which the United States has a free trade agreement in effect, or that is recycled in North America, will be treated as a "qualifying critical mineral" under this test. As expected, this is a significantly stricter standard than the 50% of value added test and will require much closer examination of supply chains, though the immediate impact may be lessened by the new option for an extended implementation timeline.

- **Step 3:** Calculate the percentage of the value of qualifying minerals contained in the final battery. To qualify for the subsidy, the battery must contain a certain percentage of "qualifying critical mineral content." The rules set out specific procedures for carrying out this test, which would divide the "total value of qualifying critical minerals" (or the total traced qualifying value) from step two by the "total value of critical minerals." The required share of "qualifying critical mineral content" starts at 40% for 2023 and increases by 10 percentage points a year until it reaches 80% at the end of 2026.

<sup>11</sup> "Section 45X Advanced Manufacturing Production Credit," 88 FR 86844 (December 15, 2023), accessible here: <https://www.federalregister.gov/documents/2023/12/15/2023-27498/section-45x-advanced-manufacturing-production-credit>.

The definition of “free trade agreement” (FTA) for the purpose of step two has been one of the most politically important questions related to implementation of Section 30D. The rule defines FTA to include any country with which the United States currently has a comprehensive free trade agreement. It would also allow the Treasury Secretary to extend coverage to other countries with which the United States has non-comprehensive trade agreements. These non-comprehensive agreements must meet certain criteria, including that they commit the parties to reducing trade barriers, refraining from new trade barriers, establishing high standards for labor and environmental disciplines, and refraining from export restraints. The rule designates Japan as qualifying under the non-comprehensive trade agreement criteria. Japan signed a critical minerals trade agreement with the United States on March 28, 2023. Similar agreements with the EU and UK are under negotiation since then but have not yet been completed.

Another important decision relates to Treasury’s differentiation between battery inputs that are subject to the Critical Minerals Requirement (which can be made in any free trade agreement partner country) and battery components that are subject to the Battery Component Requirement (which can be made only in North America). To draw a line in the stages of production between the two requirements, Treasury has classified “constituent materials” under the Critical Mineral Requirement instead of under the Battery Component Requirement, making them the final product relevant to calculating the value of applicable critical minerals. “Constituent materials” are “materials that contain applicable critical minerals and are employed directly in the manufacturing of battery components,” which are then assembled into battery components. “Constituent materials” include “powders of cathode active materials, powders of anode active materials, foils, metals for solid electrodes, binders, electrolyte salts, and electrolyte additives.” The final rule adds further clarification to this definition by explaining that “battery materials” (a newly defined term in the final rule) without applicable critical minerals are not considered constituent materials.

### ***Battery Component Requirement***

The second component of the tax credit, which also provides up to \$3,750, requires that a certain share of the battery’s components be manufactured or assembled in North America. The required percentage starts at 50% in 2023 and increases to 100% by 2029. The final rule puts forward a four-step process for determining whether a car meets the Battery Component Requirement, adopting the April proposed rule without change.

- **Step 1:** Determine whether each component is a “North American battery component.” To qualify, substantially all the manufacturing or assembly of the component must occur in North America. This determination is made without regard to the location of the manufacturing or assembly of any components that make up the particular battery component.
- **Step 2:** Determine the total incremental value of the North American battery components. If the battery components qualify as “North American battery components” according to the definitions in step one, the manufacturer should determine their incremental value (the value of that battery component minus the value of the manufactured or assembled battery components). The sum of these incremental values represents the “total incremental value of North American battery components.”
- **Step 3:** Find the total incremental value of all components. The manufacturer would then add together the total incremental value of all battery components to determine the “total incremental value of battery components.”
- **Step 4:** Calculate the share of value that qualifies. The manufacturer would divide the “total incremental value of North American battery components” from step two by the “total incremental value of battery components” from step three to find the “qualifying battery component content” share. Manufacturers would use this share to determine whether the car qualifies for the Battery Component tax credit. The applicable percentage starts as 50% in 2023, then raises to 50% for 2024 and 2025. In 2026, 2027, and 2028, the applicable percentage is 70%, 80%, and 90%, respectively. Starting in 2029, it will be 100%.

## Foreign Entity of Concern restriction

The IRA disqualifies electric vehicles from coverage under the Section 30D tax credit if any of their batteries minerals or components originate from FEOCs. In December 2023, the DOE published a proposed interpretive rule to define FEOC,<sup>12</sup> and Treasury issued a proposed rule for qualified manufacturers to determine compliance with the IRA's FEOC restrictions using the DOE definition of FEOC.<sup>13</sup> Treasury and DOE's final rules largely adopt the proposed rules, though with some clarifications and expanding a few flexibilities in the supply chain tracing process.

The IRA's FEOC restriction cites the FEOC restriction in the 2021 Infrastructure Investment and Jobs Act's (IIJA) Battery Materials Processing and Manufacturing grant program as its basis.<sup>14</sup> These laws describe an FEOC generally as a foreign entity that is owned by, controlled by or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation (i.e., China, Russia, Iran, or North Korea) or a foreign entity that is subject to various listed US sanctions and export control designations. The definition of FEOC relies on the terms "foreign entity," "owned by, controlled by, or subject to the direction," "subject to the jurisdiction" and "government of a foreign country" for interpreting what entities it covers. The law itself did not define these terms, delegating the task to the DOE.

The FEOC restriction found in the IIJA and IRA is different from the FEOC restriction in the CHIPS and Science Act of 2022 (CHIPS Act). The CHIPS Act's version of the FEOC is stricter, applying to more third country entities and subsidiaries and leaving regulators with less flexibility. As DOE notes in its final rule, "the term FEOC within [IIJA] section 40207 [...] is intended to both reduce reliance upon covered nations in the battery supply chain and provide a pathway for companies in the United States and third-party countries to increase production of critical minerals, battery components, and battery materials" whereas the CHIPS Act's provision "concerns the prevention of transfers of semiconductor technology to covered nation governments."

## DOE's definition of FEOC

The DOE interpretive rule clarifies the FEOC restrictions by establishing new definitions for "government of a foreign country," "foreign entity," "subject to the jurisdiction," and "owned by, controlled by, or subject to the direction." The definitions apply to both the Section 30D credits and to the IIJA section 40207 battery processing and manufacturing grant programs.

The final definitions are mostly unchanged from those in the December proposed interpretive rule, but DOE has provided minor clarifying additions to the definitions of senior government officials and ownership thresholds, as well as commentary in its responses to public feedback about how it is interpreting and applying the definitions. DOE's definitions are summarized below. With these definitions, DOE intends to present bright-line tests that companies can rely on to evaluate their own supply chains.

□ "Foreign entity" means one or more of the following:

- (i) a government of a foreign country;
- (ii) a natural person who is not a lawful permanent resident of the United States, citizen of the United States, or any other protected individual;

<sup>12</sup> "Interpretation of Foreign Entity of Concern," 88 FR 84082 (December 4, 2023) (issued by the DOE on December 1, 2023), accessible here: <https://www.federalregister.gov/documents/2023/12/04/2023-26479/interpretation-of-foreign-entity-of-concern>.

<sup>13</sup> "Section 30D Excluded Entities," 88 FR 84098 (December 4, 2023) (issued by Treasury on December 1, 2023), accessible here: <https://www.federalregister.gov/documents/2023/12/04/2023-26513/section-30d-excluded-entities>.

<sup>14</sup> IIJA section 40207 (42 USC 28741), Infrastructure Investment and Jobs Act, Public Law 117–58, 117th Congress, accessible here: <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>.

- (iii) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country; or
  - (iv) an entity organized under the laws of the United States that is owned by, controlled by or subject to the direction of an entity that qualifies as a foreign entity under paragraphs (i) - (iii).
- "Subject to the jurisdiction" means either:
- the foreign entity is incorporated or domiciled in, or has its principal place of business in, a covered nation; or
  - with respect to the critical minerals, components, or materials of a given battery, the foreign entity engages in the extraction, processing, or recycling of such critical minerals, the manufacturing or assembly of such components, or the processing of such materials, in a covered nation.
- "Owned by, controlled by or subject to the direction" means either:
- 25% or more of the entity's board seats, voting rights, or equity interest, with each metric evaluated independently, are cumulatively held by that other entity, whether directly or indirectly via one or more intermediate entities; or
  - with respect to the critical minerals, battery components, or battery materials of a given battery, the entity has entered into a licensing arrangement or other contract with another entity (a contractor) that entitles that other entity to exercise effective control over the extraction, processing, recycling, manufacturing, or assembly (collectively, "production") of the critical minerals, battery components, or battery materials that would be attributed to the entity.
- "Government of a foreign country" includes the following:
- a national or subnational government of a foreign country;
  - an agency or instrumentality of a national or subnational government of a foreign country;
  - (a dominant or ruling political party of a foreign country; or
  - a current or former senior foreign political figure (including both government and political party leaders, as well as their immediate family members).

The final rule elaborates upon the meaning of "senior political figure," including by stating that in the case of China, the rule covers "(a) individuals currently or formerly in senior roles within the PRC government, at the central and local levels; (b) individuals currently or formerly in senior roles within the Chinese Communist Party (CCP) and bodies and commissions under the Central Committee; (c) current and former members of the CCP Central Committee, the Politburo Standing Committee, the Politburo, the National People's Congress and Provincial Party Congresses, and the national Chinese People's Political Consultative Conference (CPPCC); and (d) current but not former members of local or provincial CPPCCs."

The DOE's proposed interpretive rule had invited public feedback on whether it should use additional authorities under the IIJA to potentially designate specific entities as FEOC regardless of the established FEOC definition and add a voluntary pre-review process in which the DOE could offer advance rulings on FEOC compliance. In the final interpretive rule, DOE declined to establish the pre-review process (directing companies to the Treasury-led Section 30D eligibility determinations instead). The final interpretive rule did not include a final decision on the use of the

FEOC determination authority and stated the DOE “continues to consider whether and how to use the determination authority,” suggesting it may revisit the topic later.

The electric vehicle battery and critical mineral industries are globally integrated, so the application of DOE’s definition to joint ventures located outside of covered nations will warrant close examination. Not all subsidiary or joint venture arrangements located outside the jurisdiction of covered nations would be FEOCs themselves under DOE’s definition. Generally, a joint venture would be an FEOC if it is a “foreign entity” and is either “subject to the jurisdiction” of a covered nation government, or is “owned by, controlled by or subject to the direction of” the “government of a foreign country” that is a covered nation. Battery manufacturers and mineral processing and mining joint ventures formed outside of a covered nation, but that still involve those covered nations will have to carefully review their corporate structures to determine whether they meet the 25% cumulative ownership standard or the contract standards presented under the definition of “owned by, controlled by or subject to the direction.” The DOE’s clarifying notes lay out a formulaic process for assessing these criteria, which will require a careful fact-based review for each entity. Close examination becomes especially important in situations where a covered government is several tiers of minority corporate ownership away from the subject joint venture, in which case the DOE’s formulas may attenuate the assessed level of control to below the required 25% threshold.

### **Section 30D FEOC Restriction**

Treasury’s rule provides definitions, procedures, and due diligence standards for qualified manufacturers to determine the compliance of a clean vehicle with the FEOC restrictions for purposes of the Section 30D tax credit. The rule explains how manufacturers should determine FEOC compliance for battery components at the time of their manufacture and trace critical mineral supply chains to determine compliance. The rule also covers processes for documenting and certifying compliance at relevant levels of the supply chain, several transitional rules that give critical minerals suppliers additional flexibility, a regime for reviewing compliance, and penalties for non-compliance.

For battery components, the restriction entered effect on January 1, 2024 (for which manufacturers had to rely on the proposed rule) and for critical minerals and associated constituent materials, the rules will enter effect on January 1, 2025. Treasury will not consider a battery compliant with the FEOC restriction until the documentation process is complete. The Treasury rule provides a transitional process for new clean vehicles placed into service between December 31, 2023 and January 1, 2025, temporarily allowing manufacturers to bypass certain physical tracking requirements while certifying FEOC compliance.

The general process for determining that a clean vehicle’s battery is FEOC-compliant follows a three-step physical tracking process, described below.

- **Step 1:** The manufacturer determines whether the relevant battery components and applicable critical minerals are FEOC-compliant, following the rules for FEOC-compliant battery components and applicable critical minerals.
- **Step 2:** The manufacturer physically tracks the FEOC-compliant battery components and applicable critical minerals to the specific battery cells that are assembled from them, following the rules for FEOC-compliant battery cells. The rules for this step of the process allow an allocation-based determination for applicable critical minerals in cases where manufacturers are unable to physically track the specific minerals or their associated constituent materials to the battery cell. The proposed rule had originally made this exception a temporary measure that would end on December 31, 2026. In response to industry feedback, the final rule has made the exception a permanent rule.
- **Step 3:** The manufacturer tracks the battery cells and other battery components to the specific batteries, following the rules for FEOC-compliant batteries.

The rules do not specify any particular supply chain tracing standard, instead instructing manufacturers to rely on the standards available in the industry at the time of certification. The final rule extends the “reasonable reliance on supplier attestation” due diligence standard to also cover third-party manufacturers or suppliers, instead of only applying it to the qualified manufacturer itself.

Starting in 2025, FEOC enforcement will switch to an upfront review system to strengthen compliance. Under this system, automakers will submit attestations, certifications, and other documentation demonstrating FEOC-compliant battery production and procurement capacity. Treasury, with analytical support from DOE, will review these submissions and produce a ledger tracking the number of compliant batteries that an automotive manufacturer has each year. Automakers will be able to receive credits for FEOC-compliant clean vehicles sold up to the number of FEOC-compliant batteries reported and recorded in their applicable compliant-battery ledger. Treasury acknowledges in the final rule that this is a novel compliance process and stated that it will “continue to engage with OEMs and other stakeholders to develop the rules under the upfront review process.” The IRS provided initial guidance for the process in Revenue Procedure 2023-38.<sup>15</sup>

The FEOC restriction includes a transition rule to allow certain “impracticable-to-trace battery materials” to bypass the restriction until January 1, 2027. The proposed rule had referred to this exception as being for “non-traceable battery materials,” but Treasury changed to the designation to impracticable-to-trace battery materials to acknowledge that manufacturers will eventually develop tracing processes. Neither the due diligence requirement nor the FEOC-compliance designation would apply to these materials before that time. The transition rule applies to graphite contained in anode materials (both synthetic and natural) and applicable critical minerals contained in electrolyte salts, electrode binders, and electrolyte additives. Treasury’s original proposed rule only included applicable critical minerals contained in electrolyte salts, electrode binders, and electrolyte additives, but added graphite in the final rule following requests from electric vehicle manufacturers.

To qualify for the impracticable-to-trace battery materials transition rule, qualified manufactures must include a report during the upfront review process that explains how the company plans to comply with the FEOC restrictions for these materials once the transition rule expires. The IRS will elaborate on the requirements for these reports’ content in Internal Revenue Bulletin guidance. The final rule notes that the forthcoming reporting requirements “will include robust documentation of efforts made to date to secure FEOC-compliant battery supply, such as potential suppliers engaged, offtake agreements, and contracts entered into with domestic or compliant suppliers.”

### **Section 25E previously-owned clean vehicle tax credit**

The Section 25E previously-owned clean vehicle credit provides a tax credit equal to the lesser of \$4,000 or 30 percent of the sale price for qualified sales of qualifying previously-owned clean vehicles. To qualify, taxpayers must meet certain income threshold limits and the vehicle must be a model year which is at least two years earlier than the calendar year in which the taxpayer acquires the vehicle, the original use of which began with a different taxpayer, which is transferred in a qualified sale, and which meets certain qualifying clean vehicle standards. The regional content and FEOC requirements under Section 30D do not apply for Section 25E.

The final rule clarifies that the previously-owned clean vehicles this tax credit applies to include battery electric vehicles, plug-in hybrid electric vehicles, fuel cell motor vehicles, and plug-in hybrid fuel cell motor vehicles.

### **Transfer of tax credits**

The IRA also added a new system for claiming clean vehicle tax credits. Starting in 2024, taxpayers qualifying for the Section 30D and 25E tax credits can transfer the credit to dealers, allowing the taxpayer to receive the tax credit in

<sup>15</sup> Revenue Procedure 2023-38: Submission of Information to IRS by Qualified Manufacturers of Clean Vehicles, Previously-Owned Clean Vehicles, and Commercial Clean Vehicles, accessible here: <https://www.irs.gov/pub/irs-drop/rp-23-38.pdf>.



the form of a discount on the sales price or a direct payment.<sup>16</sup> The rule includes the finalized processes for these tax credit transfers, which Treasury had originally published in a separate proposed rule in October 2023.<sup>17</sup>

### Politics and sustainability of the rules

In drafting these rules, the regulators sought to balance incentivizing uptake of electric vehicles with encouraging supply chains to move out of China. Disputes over the free trade agreement provisions of the regulations also highlight how the Biden administration has struggled to manage concerns from US allies about the import substitution effects of the subsidies. Efforts to balance these competing interests have led to frictions between industry groups and objections from members of Congress who disagree with the Biden administration's interpretation of the law's intent. Automotive industry groups, for their part, have praised the flexibilities the Biden administration included in the regulations as pragmatic solutions that will help expand the industry.<sup>18</sup>

Disagreements will likely motivate continued debate, efforts by members of Congress to change the law, and court challenges, all of which could lead to future changes to the regulations. In Congress, even some Democrats are among President Biden's opponents on the matter. Sen. Joe Manchin (D-WV) said he would introduce a Congressional Review Act resolution to invalidate the final rules and back legal challenges in response to the final rules' publication, calling the flexibilities and transitional standards including in the final rule "outrageous and illegal."<sup>19</sup> Sen. Sherrod Brown (D-OH) took aim at the new graphite FEOC exception, saying the rule will undermine new graphite producers in Ohio.<sup>20</sup>

Republican critics have been harsher, with some seeking significant curbs on the subsidies and others seeking outright repeal, accusing the Biden administration and the IRA's supporters of funneling tax dollars to China. On April 17, 2024, the House of Representatives' Ways and Means Committee approved two bills targeting foreign access to the Section 30D tax credits.

- **H.R. 7980, the End Chinese Dominance of Electric Vehicles in America Act.**<sup>21</sup> The bill would expand the FEOC restriction to cover more contractual and supplier relationships with Chinese entities, as well as more situations in which Chinese entities have minority shareholdings. The bill passed along partisan lines with 22 Republicans voting in favor and 18 Democrats voting against.
- **H.R. 7983, the Stop Executive Overreach on Trade Agreements Act,** would stop the Biden administration from using critical mineral trade agreements to satisfy the FTA content standard in the Section 30D tax credit.<sup>22</sup> The bill would define "free trade agreement" in law as a trade agreement "that (1) is approved by Congress and

<sup>16</sup> "Clean vehicle credit seller or dealer requirements," IRS, accessible here: <https://www.irs.gov/credits-deductions/clean-vehicle-credit-seller-or-dealer-requirements>.

<sup>17</sup> "Transfer of Clean Vehicle Credits Under Section 25E and Section 30D," 88 FR 70310 (October 10, 2023), accessible here: <https://www.federalregister.gov/documents/2023/10/10/2023-22353/transfer-of-clean-vehicle-credits-under-section-25e-and-section-30d>.

<sup>18</sup> Statement on Final EV Tax Credit Rules, Alliance for Automotive Innovation, May 3, 2024, accessible here: <https://www.autosinnovate.org/posts/press-release/statement-on-updated-ev-tax-credit-rules>.

<sup>19</sup> "Manchin: Administration's Final 30D EV Tax Credit Rule Endorses 'Made in China,'" May 3, 2024, accessible here: <https://www.energy.senate.gov/2024/5/manchin-administration-s-final-30d-ev-tax-credit-rule-endorses-made-in-china>.

<sup>20</sup> "Brown Slams Biden Administration Decision To Allow American Tax Dollars To Support Chinese EV Parts," May 3, 2024, accessible here: <https://www.brown.senate.gov/newsroom/press/release/sherrod-brown-slams-biden-administration-decision-allow-american-tax-dollars-support-chinese-ev-parts>.

<sup>21</sup> H.R.7980 - End Chinese Dominance of Electric Vehicles in America Act of 2024, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/7980>.

<sup>22</sup> H.R.7983 - Stop Executive Overreach on Trade Agreements, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/7983>.



(2) eliminates restrictions on substantially all trade with the partner.” It passed the Ways and Means Committee along partisan lines 25 to 17 with all Republicans voting in favor and all Democrats opposed.

The Ways and Means Republicans highlighted the bills again in a press release criticizing the final regulations on May 4, 2024.<sup>23</sup> Bills such as these are unlikely to succeed in the current legislative session. That said, these proposals will be an option Republicans consider if they gain more control over either the legislative or executive branches in the November 2024 elections.

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<sup>23</sup> “Biden Administration Surrenders to China on Final EV Regulations, Weakens America's Trade Policies,” May 4, 2024, accessible here: <https://waysandmeans.house.gov/biden-administration-surrenders-to-china-on-final-ev-regulations-weakens-americas-trade-policies/>.

## Biden Administration Expands Protections and Supports for US Solar Manufacturing Sector

On May 16, 2024, the Biden administration announced several measures to support the US solar sector.<sup>24</sup> The policies include new tariffs, updates to the Inflation Reduction Act's (IRA) Domestic Content Bonus Credits, trade enforcement actions, and proposals for new measures under consideration. The announcement came shortly after the United States Trade Representative (USTR) announced it would raise Section 301 tariffs on Chinese solar panels from 25% to 50%,<sup>25</sup> and after the Commerce Department initiated antidumping duty (ADD) and countervailing duty (CVD) investigations into solar cell imports from Cambodia, Malaysia, Thailand, and Vietnam.<sup>26</sup>

### Actions covered in the announcement

- **Revoking the Section 201 crystalline silicon photovoltaic (CSPV) products tariff exception for bifacial solar panels:** The Biden administration intends to end the current policy of excepting bifacial panels from the Section 201 safeguard tariff. The Trump administration originally issued the exception in June 2019, along with exceptions for several other products. USTR later determined that the exception was undermining the intent of the tariff and attempted to withdraw it. However, court challenges to the action prevented the removal of the exception. When renewing the Section 201 action in February 2022, the Biden administration revived the bifacial panel exclusion, likely as a result of these court challenges.<sup>27</sup>

The Biden administration will make the exception's withdrawal official in a forthcoming notice. Ending the exception would apply a tariff of 14.25% to imports of bifacial solar panels through February 6, 2025 and then a tariff of 14% from February 7, 2025 through February 6, 2026.<sup>28</sup> The forthcoming notice will include a savings clause, allowing importers that have already made purchases to take delivery within 90 days of the tariff's implementation without being subject to the tariff.

- **Considering raising the Section 201 CSPV cells quota:** The Section 201 tariff rate quota on certain unassembled CSPV cells allows 5 gigawatts of cells to be imported every year before importers must begin paying the safeguard tariff. The Biden administration is considering raising the quota to 7.5 gigawatts if importers

<sup>24</sup> "Fact Sheet: Biden-Harris Administration Takes Action to Strengthen American Solar Manufacturing and Protect Manufacturers and Workers from China's Unfair Trade Practices," May 16, 2024, accessible here: <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/16/fact-sheet-biden-harris-administration-takes-action-to-strengthen-american-solar-manufacturing-and-protect-manufacturers-and-workers-from-chinas-unfair-trade-practices/>.

<sup>25</sup> "U.S. Trade Representative Katherine Tai to Take Further Action on China Tariffs After Releasing Statutory Four-Year Review," USTR, May 14, 2024, accessible here: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/us-trade-representative-katherine-tai-take-further-action-china-tariffs-after-releasing-statutory>; and "Fact Sheet: President Biden Takes Action to Protect American Workers and Businesses from China's Unfair Trade Practices," White House, May 14, 2024, accessible here: <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/14/fact-sheet-president-biden-takes-action-to-protect-american-workers-and-businesses-from-chinas-unfair-trade-practices/>.

<sup>26</sup> "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From Cambodia, Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations," 89 FR 43809 (May 20, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/20/2024-11031/crystalline-silicon-photovoltaic-cells-whether-or-not-assembled-into-modules-from-cambodia-malaysia>; and "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From Cambodia, Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations," 89 FR 43816 (May 20, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/20/2024-11027/crystalline-silicon-photovoltaic-cells-whether-or-not-assembled-into-modules-from-cambodia-malaysia>.

<sup>27</sup> Proclamation 10339 of February 4, 2022: "To Continue Facilitating Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products)," 87 FR 7357, accessible here: <https://www.federalregister.gov/documents/2022/02/09/2022-02906/to-continue-facilitating-positive-adjustment-to-competition-from-imports-of-certain-crystalline>.

<sup>28</sup> See US Note 18, Subchapter III, Chapter 99 (at p 182) of the 2024 Harmonized Tariff Schedule for further details on the tariff and its coverage, accessible here: <https://hts.usitc.gov/>.

reach the 5-gigawatt threshold this year, though the announcement does not make a firm commitment. As of May 20, 2024, this year's quota is 52% filled.<sup>29</sup>

- **Ending the tariff waiver for Southeast Asian solar product imports subject to the China circumvention determination and enforcing the utilization rule:** The Biden administration's temporary waiver of tariffs on imports solar cells and modules completed in Cambodia, Malaysia, Thailand, or Vietnam using components from China, and subsequently exported to the United States, will expire on June 6, 2024.<sup>30</sup> After that date, the Southeast Asian exporters covered by the ruling will become subject to the tariffs under the ADD and CVD orders on solar cells and modules from China.<sup>31</sup>

To use the temporary exception, the imported solar products must be "utilized" (used or installed) in the United States by the "utilization expiration date," which is 180 days after the date of the waiver's termination on June 6, 2024. This measure is intended to prevent companies from stockpiling solar panels before June 6. The announcement notes that US Customs and Border Protection (CBP) intends to vigorously enforce the utilization rule and requires importers to provide detailed information about when installation will occur. CBP may soon issue further details on its plans for enforcing the utilization rule during the phase-out of the waiver.

- **Monitoring import surges and oversupply:** The Biden administration notes that US solar imports from Southeast Asia have expanded significantly in recent years and that Chinese manufacturers are expanding production in the region. In response, the announcement warns that the administration is monitoring imports from Southeast Asia and will "ensure the U.S. market does not become oversaturated and will explore all available measures to take action against unfair practices." What actions the Biden administration may be considering (beyond the new ADD and CVD investigations and the circumvention duties) are unclear from the announcement. One suggestion from representatives of the US domestic industry has been for the government to implement an import monitoring system for solar panels similar to the steel and aluminum import monitoring systems that are in use today.
- **Adding new flexibilities to the IRA's Domestic Content Bonus Credit:** Alongside the White House announcement, the Department of the Treasury issued updated guidance for the IRA's Domestic Content Bonus Credit.<sup>32</sup> The IRA provides a bonus tax credit for the investment and manufacturing tax credits in sections 45, 45Y, 48, and 48E if the projects use iron, steel, and manufactured products sourced from domestic producers. Treasury issued initial guidance for the bonus tax credits in May 2023, but the proposed rules for calculating domestic value added were complex and critical issues had been left unresolved.<sup>33</sup>

The May 2024 updates will simplify the process for US solar and other green energy projects to qualify for the bonus tax credit by giving them the option to rely on default Energy Department cost estimate safe harbors instead of using suppliers' direct production costs for calculating domestic value added. The guidance also

<sup>29</sup> More information on the quotas is accessible here: <https://www.cbp.gov/trade/quota/bulletins/qb-24-507-2024>.

<sup>30</sup> "Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord With Presidential Proclamation 10414," 87 FR 56868 (September 16, 2022), accessible here: <https://www.federalregister.gov/documents/2022/09/16/2022-19953/procedures-covering-suspension-of-liquidation-duties-and-estimated-duties-in-accord-with>.

<sup>31</sup> "Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Scope Determination and Final Affirmative Determinations of Circumvention With Respect to Cambodia, Malaysia, Thailand, and Vietnam," 88 FR 57419 (August 23, 2023), accessible here: <https://www.federalregister.gov/documents/2023/08/23/2023-18161/antidumping-and-countervailing-duty-orders-on-crystalline-silicon-photovoltaic-cells-whether-or-not>.

<sup>32</sup> "Notice 2024-41: Domestic Content Bonus Credit Amounts under the Inflation Reduction Act of 2022: Expansion of Applicable Projects for Safe Harbor in Notice 2023-38 and New Elective Safe Harbor to Determine Cost Percentages for Adjusted Percentage Rule," accessible here: <https://www.irs.gov/pub/irs-drop/n-24-41.pdf>.

<sup>33</sup> "Notice 2023-38: Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E," accessible here: <https://www.irs.gov/pub/irs-drop/n-23-38.pdf>.

expands the types of projects that can qualify for the bonus tax credits, adding non-utility scale rooftop solar to the definition of covered solar projects and adding a new categorization for hydropower and pumped hydropower storage.

Treasury is inviting public comments on the new guidance, with replies due by July 15, 2024. The Notice includes details on how to submit comments. Taxpayers may rely on Notice 2023-38 (as modified by Notice 2024-41) to satisfy the domestic content bonus credit requirements for any applicable project which begins construction before the date that is 90 days after the date of publication in the Federal Register of the full proposed regulations. Treasury may also issue additional guidance on other aspects of the regulation.

- **Issuing research and development grants for domestic solar manufacturers:** Alongside the IRA's domestic manufacturing tax credits, the Infrastructure Investment and Jobs Act (IIJA) allocated funding to subsidize the development and deployment of new technologies in US solar manufacturing. On May 16, 2024, the US Department of Energy announced 10 awardees for \$27 million to support innovative manufacturing projects and 8 awardees of \$44 million to support development of thin-film photovoltaic technologies.<sup>34</sup>

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<sup>34</sup> "Silicon Solar Manufacturing and Dual-use Photovoltaics Incubator Funding Program," accessible here: <https://www.energy.gov/eere/solar/silicon-solar-manufacturing-and-dual-use-photovoltaics-incubator-funding-program>; and "Advancing U.S. Thin-Film Solar Photovoltaics Funding Program," accessible here: <https://www.energy.gov/eere/solar/advancing-us-thin-film-solar-photovoltaics-funding-program>.

## Trade Actions

### Section 301

#### USTR Issues Details of the Proposed Section 301 China Tariff Increases, Seeking Public Input

On May 22, 2024, the United States Trade Representative (USTR) unveiled the details of the proposed increases in Section 301 tariffs on imports from China.<sup>35</sup> If adopted, the action would raise tariffs on solar power products, electric vehicles, batteries, critical minerals, semiconductors, ship-to-shore gantry cranes, steel and aluminum products, and certain medical supplies. USTR first announced the new tariffs on May 14, 2024, but did not provide details at that time.<sup>36</sup> The advance copy of the Federal Register Notice circulated on May 22 (the “Notice”) provides important details on the products to be covered by the new tariffs at the Harmonized Tariff Schedule (HTS) 8-digit and 10-digit level, the dates on which the tariffs are proposed to enter effect, and the coverage of the two tariff exclusion systems. Details on how companies can apply for the new tariff exclusions and the status of the current exclusion lists were not included in the Notice. USTR has said it will make additional announcements to clarify those aspects soon.

#### Covered products and implementation schedule

Annex A of the Notice lists 382 HTS-8 codes and 5 HTS-10 codes that the increased tariffs would cover. The tariffs listed as entering effect this year would be implemented beginning on August 1, 2024. The tariffs scheduled for 2025 and 2026 will enter effect on January 1 of their respective years. The proposed new tariff levels and dates of entry into force are listed below:

| Sector Category                                     | Proposed Tariff and Application Date |
|---|--------------------------------------|
| Battery parts (non-lithium-ion batteries)           | 25% on August 1, 2024                |
| Electric vehicles                                   | 100% on August 1, 2024               |
| Lithium-ion electrical vehicle batteries            | 25% on August 1, 2024                |
| Respirators and facemasks                           | 25% on August 1, 2024                |
| Syringes and needles                                | 50% on August 1, 2024                |
| Ship to shore gantry cranes                         | 25% on August 1, 2024                |
| Solar cells (whether or not assembled into modules) | 50% on August 1, 2024                |
| Steel and aluminum products                         | 25% on August 1, 2024                |
| Critical minerals                                   | 25% on August 1, 2024                |
| Semiconductors                                      | 50% on January 1, 2025               |
| Lithium-ion non-electrical vehicle batteries        | 25% on January 1, 2026               |
| Rubber medical and surgical gloves                  | 25% on January 1, 2026               |
| Permanent magnets                                   | 25% on January 1, 2026               |

<sup>35</sup> “Request for Comments on Proposed Modifications and Machinery Exclusion Process in Four-Year Review of Actions Taken in the Section 301 Investigation: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,” Docket Number USTR-2024-0007, accessible here: <https://ustr.gov/sites/default/files/USTR%20FRN%20Four%20Year%20Review%20Proposed%20Modifications%20fin.pdf>.

<sup>36</sup> “U.S. Trade Representative Katherine Tai to Take Further Action on China Tariffs After Releasing Statutory Four-Year Review,” USTR, May 14, 2024, accessible here: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/us-trade-representative-katherine-tai-take-further-action-china-tariffs-after-releasing-statutory>; and “Fact Sheet: President Biden Takes Action to Protect American Workers and Businesses from China’s Unfair Trade Practices,” White House, May 14, 2024, <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/14/fact-sheet-president-biden-takes-action-to-protect-american-workers-and-businesses-from-chinas-unfair-trade-practices/>.

|                  |                        |
|------------------|------------------------|
| Natural graphite | 25% on January 1, 2026 |
|------------------|------------------------|

Like the other Section 301 tariffs, the new tariffs would only apply to direct imports of the listed products from China. The tariffs would generally not apply to downstream products, whether imported from China or a third country, that are under different HTS codes.

### **New exclusion processes for industrial machinery**

USTR intends to establish a new exclusion process under which companies may request that specific products be excepted from the Section 301 tariffs. Unlike previous exclusion processes that applied to all covered products, this new exclusion process will only apply to machinery used in domestic manufacturing that is classified within certain HTS subheadings under Chapters 84 and 85. The eligible HTS subheadings are listed in Annex B of the Notice. Granted exclusions will be effective through May 31, 2025.

USTR will have to establish a procedure for companies to file these exclusion requests, which they will explain in a separate forthcoming notice.

### **Solar manufacturing equipment exclusion**

USTR is proposing 19 automatic tariff exclusions for solar manufacturing equipment. These exclusions will be effective upon the date of the Notice and will last through May 31, 2025. The exclusions are based on product description instead of HTS codes and can be found in Annex C of the Notice. The products are all within HTS 8486.10.0000, 8486.20.0000, and 8486.40.0030. USTR originally applied tariffs to these products as part of the List 2 trade action in 2018.

### **Status of the current exclusions**

Updated on May 24: USTR announced on May 24, 2024, that the exclusion lists will be extended for two weeks, until June 14, 2024.<sup>37</sup> At that point, 234 of the exclusions (listed in Annex D of the Notice) will expire. The remaining exclusions will remain in effect for one more year, until May 31, 2025 (the same date on which the manufacturing equipment exclusions under the new Section 301 expansion would expire). The announcement emphasizes that USTR expects importers to treat the expirations as temporary and to seek alternative suppliers outside of China.

### **Request for public comments**

This Notice is only a proposal, not the final action. USTR is accepting comments on the proposed changes until June 28, 2024. Participating in the public comment process can help shape the outcome of the action and prompt USTR to further clarify its actions. USTR's responses may also inform any potential legal challenge should a final action be adopted.

USTR will open a docket on May 29, 2024 on the USTR Comments Portal for the public to submit comments on the Notice.<sup>38</sup> The Notice includes further instructions on how to submit comments.

USTR's specific questions for public consideration include the following:

- The effectiveness of the proposed modification in obtaining the elimination of or in counteracting China's acts, policies, and practices related to technology transfer, intellectual property, and innovation.
- The effects of the proposed modification on the US economy, including consumers.

<sup>37</sup> "Notice of Extension of Certain Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation," 89 FR 46948 (May 30, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/30/2024-11904/notice-of-extension-of-certain-exclusions-chinas-acts-policies-and-practices-related-to-technology>.

<sup>38</sup> USTR Comments Portal, accessible here: <https://comments.ustr.gov/>.

- The scope of the product description to cover ship-to-shore cranes under subheading 8426.19.00 (Transporter cranes, gantry cranes, and bridge cranes).
- For facemasks, medical gloves, and syringes and needles, whether the tariff rates should be higher than the proposed rates.
- For facemasks, whether additional statistical reporting codes under tariff subheading 6307.90.98 should be included.
- Whether the tariff subheadings identified for each product and sector adequately cover the products and sectors included in the President's direction to the Trade Representative.
- Whether the subheadings listed in Annex B should or should not be eligible for consideration in the machinery exclusion process and whether Annex B omits certain subheadings under Chapters 84 and 84 that cover machinery used in domestic manufacturing and should be included.
- For the proposed solar manufacturing machinery exclusions in Annex C, USTR requests comments on the scope of each exclusion, including any suggested amendments to the product description.

### Internationalizing the China tariffs

USTR has begun to pressure US allies into adopting similar barriers to Chinese exports, arguing that Chinese overproduction of the products covered by this tariff action threaten other economies as well. Discussing the new tariffs on May 16, National Economic Council Director Lael Brainard stated that “foreign partners, including the EU, Brazil, South Africa, Thailand, and India, have started or publicly considered trade actions of a similar nature” and that the United States intends to promote more coordinated action through the G-7 and G-20.<sup>39</sup>

Treasury Secretary Janet Yellen will be pushing for the G-7 to present a common front against Chinese exports during the May 24-25 finance ministers’ meeting. Previewing the agenda at a conference ahead of the meetings, Secretary Yellen explained “we want to see healthy green technology sectors, from innovative start-ups to green manufacturing factories, in the United States, Europe, and around the world, not just in China.”<sup>40</sup>

If US allies take any corresponding action, the result will likely be a collection of substantively similar but unilateral policies, not a multilateral instrument. For example, USTR has endorsed the European Union’s anti-subsidy investigation into imports of Chinese electric vehicles. The UK Trade Remedies Authority has also expressed concern about subsidized Chinese electric vehicles, especially since the EU and US barriers might divert more Chinese exports to the UK.

In North America, USTR is particularly concerned about the potential for Chinese companies to use other members of the US-Mexico-Canada Agreement (USMCA) and the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) to access the US market. Mexico – in response to both the internal politics of its upcoming election and pressure from USTR – has recently begun to raise tariffs, especially for steel and aluminum. The Canadian government has stated that it is talking to USTR about raising Canada’s electric vehicle tariffs, though it has not yet taken any action. The Biden administration has also proposed making changes to the USMCA that could block Chinese investment in the region, but the USMCA review will not come until 2026, making this a more distant option.

<sup>39</sup> “Remarks by National Economic Advisor Lael Brainard on Responding to the Challenges of China’s Industrial Overcapacity,” White House, May 16, 2024, accessible here: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/05/16/remarks-by-national-economic-advisor-lael-brainard-on-responding-to-the-challenges-of-chinas-industrial-overcapacity/>.

<sup>40</sup> “Remarks by Secretary of the Treasury Janet L. Yellen at TechQuartier in Frankfurt, Germany,” US Treasury, May 21, 2024, accessible here: <https://home.treasury.gov/news/press-releases/jy2361>.



## Biden Administration Expands Section 301 Tariffs on Imports from China, Targeting Green Energy, Metals, Minerals, Port Cranes, Medical Equipment, and Semiconductors

On May 14, 2024, the Biden administration announced expansions to the United States' Section 301 tariffs on imports from China, proposing to raise tariffs on solar panels, electric vehicles, batteries, green energy supply chain inputs, ship-to-shore port cranes, steel products, aluminum products, medical syringes, and personal protective equipment (PPE).<sup>41</sup> If adopted, some of the new tariffs would enter effect this year, while others would phase in gradually in 2025 and 2026. All current tariffs under the Section 301 action would also remain in place.

The United States Trade Representative (USTR) plans to issue more information on the specific products that would be covered by the tariffs, the new exclusion process, and the implementation timeline in a Federal Register Notice (FRN) next week. The announcement is the culmination of the statutory four-year review of the Section 301 Investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, which USTR commenced two years ago in May 2022.<sup>42</sup>

### The forthcoming Federal Register Notice

According to the May 14 announcement, USTR will issue the full proposed changes in the Federal Register the week of May 19-25. This notice should include a list of the specific products subject to the higher tariffs by Harmonized Tariff Schedule (HTS) subheading and product description, along with the tariff rates and implementation schedule.

The FRN will also invite interested stakeholders to submit comments on the proposed tariff increases, as has occurred for previous changes to the Section 301 tariffs. Participating in the public comment process can help shape the outcome of the action and prompt USTR to provide further clarification about its actions. USTR's responses may also inform any potential legal challenge should a final action be adopted. Because USTR intends to hold this public comment period on the proposed changes, finalization and implementation of the tariffs may take several more months.

### Covered products and implementation

Listed below are the key changes to the Section 301 tariffs. According to USTR, all other products that are currently covered by Section 301 tariffs will remain covered at their current tariff rates.

| Sector category  | Proposed change                      |
|--|--------------------------------------|
| Battery parts (non-lithium-ion batteries)                            | Increase from 7.5% to 25% in 2024    |
| Electric vehicles  | Increase from 25% to 100% in 2024    |
| Lithium-ion electric vehicle batteries                               | Increase from 7.5% to 25% in 2024    |
| Personal protective equipment (including respirators and face masks) | Increase from 0%-7.5% to 25% in 2024 |
| Syringes and needles   | Increase from 0% to 50% in 2024      |
| Ship to shore port cranes  | Increase from 0% to 25% in 2024      |
| Solar cells (whether or not assembled into modules)                  | Increase from 25% to 50% in 2024     |

<sup>41</sup> "U.S. Trade Representative Katherine Tai to Take Further Action on China Tariffs After Releasing Statutory Four-Year Review," USTR, May 14, 2024, accessible here: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/us-trade-representative-katherine-tai-take-further-action-china-tariffs-after-releasing-statutory>; and "Fact Sheet: President Biden Takes Action to Protect American Workers and Businesses from China's Unfair Trade Practices," White House, May 14, 2024, <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/14/fact-sheet-president-biden-takes-action-to-protect-american-workers-and-businesses-from-chinas-unfair-trade-practices/>.

<sup>42</sup> "Four-Year Review of Actions Taken in The Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation," USTR, May 14, 2024, [https://ustr.gov/sites/default/files/05.13.2024%20Four%20Year%20Review%20of%20China%20Tech%20Transfer%20Section%20301%20\(Final\)%20rev.pdf](https://ustr.gov/sites/default/files/05.13.2024%20Four%20Year%20Review%20of%20China%20Tech%20Transfer%20Section%20301%20(Final)%20rev.pdf).

| Sector category                              | Proposed change                      |
|--|--------------------------------------|
| Steel and aluminum products                  | Increase from 0%-7.5% to 25% in 2024 |
| Semiconductors                               | Increase from 25% to 50% by 2025     |
| Lithium-ion non-electrical vehicle batteries | Increase from 7.5% to 25% in 2026    |
| Rubber medical and surgical gloves           | Increase from 7.5% to 25% in 2026    |
| Permanent magnets                            | Increase from 0% to 25% in 2026      |
| Natural graphite                             | Increase from 0% to 25% in 2026      |
| Other critical minerals                      | Increase from 0% to 25% in 2024      |

Some of these sectors are already subject to Section 301 duties and will see those tariff rates increase, while others would be new additions. USTR did not include a full detailed list of the specific products that would be subject to the tariffs in its announcement. It is unclear whether USTR intends to raise tariffs on all products covered by these broad descriptions, or if the actions would be targeted more narrowly within those categories.

The tariffs on electric vehicles, solar cells, and steel and aluminum products would enter effect sometime in 2024. The other tariffs would not be implemented until 2025 or 2026, a timeline USTR has said is meant to give affected US manufacturers time to find alternative suppliers. The announcement does not contain a detailed timeline of when the tariffs would enter effect, only referencing the calendar years.

Like the other Section 301 tariffs, the new tariffs would only apply to direct imports of the listed products from China. The tariffs would generally not apply to downstream products, whether imported from China or a third country, that are under different HTS codes.

### The targeted sectors

USTR stated that it is targeting these sectors because either China is seeking to expand its market share with respect to those products, or because the United States is making investments in expanding its own market share. USTR alleges that the Chinese government has provided extensive support to the solar, battery (and mineral inputs), electric vehicle, and semiconductor industries with the intent of expanding exports.

On the US side, the Biden administration has led efforts to introduce new subsidies for green energy products, electric vehicles, and semiconductors under the CHIPS and Science Act, Inflation Reduction Act (IRA), and the Infrastructure Investment and Jobs Act. USTR's report characterizes the tariffs as complementary to the US subsidy policies, stating that the tariffs will further encourage US companies to diversify green energy and semiconductor sourcing away from China.

- **Steel and aluminum:** The tariff rate on certain steel, aluminum, and certain derivative products will increase from rates of between 0% and 7.5% to 25% in 2024. The administration announced the increased tariffs for steel and aluminum in April, when President Biden called on USTR to triple the rates. Imports of Chinese steel and aluminum are also subject to Section 232 tariffs of 25% and 10%, respectively. Combining the Section 232 tariffs with the increased Section 301 tariffs will yield tariff rates of 50% for steel products and 35% for aluminum products.
- **Semiconductors:** The tariff rate on semiconductors will increase from 25% to 50% by 2025. USTR's report and announcement of the tariffs draw particular attention to the mature/legacy node chips (those that are 28nm or larger), but the announcement simply states that USTR proposes to raise tariffs on "semiconductors." It is possible that USTR in fact only intends to raise tariffs on mature node chips, but the intent is unclear.

The Bureau of Industry and Security (BIS) is also considering action against mature-node chips, and recently completed a Section 705 survey examining how US companies use mature node chips in manufacturing.<sup>43</sup> Further regulatory action “to bolster the semiconductor supply chain, promote a level playing field for legacy chip production, and reduce national security risks posed by the People’s Republic of China (PRC)” may follow as the government learns more about the sector. The precise nature of the eventual potential policy action is unclear for now. Though USTR raises similar concerns as BIS, USTR’s report makes no reference to BIS’s proceedings.

- **Electric vehicles:** The tariff rate on electric vehicles under Section 301 will increase from 25% to 100% in 2024. Chinese electric vehicle manufacturers do not currently export to the United States. The US domestic industry and Biden administration are however concerned that Chinese companies may begin exporting to the United States soon, suspecting that the current tariff of 27.5% (25% plus the 2.5% most favored nation (MFN) rate) is low enough that China’s subsidies can eventually overcome it. US electric vehicle manufacturers also benefit from subsidies of their own, which present an added barrier to imports from China. Combining the tariffs with the foreign entity of concern (FEOC) restrictions in the IRA electric vehicle subsidies, the Biden administration is now employing multiple policy tools to exclude Chinese electric vehicles and battery inputs from the US market.
- **Batteries, battery components, and critical minerals:** The tariff rate on lithium-ion electric vehicle batteries and battery parts will increase from 7.5% to 25% in 2024, and the tariff rate on other lithium-ion batteries will increase from 7.5% to 25% in 2026. Tariff rates for critical minerals will also increase from 0% to 25% in 2024. The phase-in time for tariffs on natural graphite and permanent magnets will be slightly longer, increasing from 0% to 25% by 2026. Like the electric vehicle tariff, these battery input tariffs compliment the IRA’s subsidies. The final FEOC restrictions, which the administration published on May 6, 2024,<sup>44</sup> will require battery manufacturers to exclude Chinese critical minerals from their batteries by January 1, 2025. Similar to the Section 301 tariffs, the FEOC restriction’s application to graphite is delayed and will not enter force until January 1, 2027.
- **Solar cells:** The tariff rate on solar cells (whether or not assembled into modules) will increase from 25% to 50% in 2024. USTR argues the tariff increase is necessary to protect the US industry from subsidized and dumped Chinese imports, despite Chinese solar panels already being subject to antidumping and countervailing duties (in addition to the 25% Section 301 tariff and the global safeguard tariff). Like the electric vehicle tariffs, USTR also notes how the solar tariffs compliment the IRA’s solar panel manufacturing subsidies. Solar panel tariffs on imports from Southeast Asia will also rise soon. President Biden’s temporary duty suspension for solar cells and modules that have been completed in Southeast Asia using parts and components from China will expire on June 6, 2024.<sup>45</sup>
- **Ship-to-shore port cranes:** The tariff rate on ship-to-shore cranes will increase from 0% to 25% in 2024. The Biden administration has already begun to restrict use of Chinese-built cranes in US ports due to security concerns. In February 2024, the Coast Guard issued directions to port operators to fix security vulnerabilities related to these cranes, and the Biden administration announced plans to invest \$20 billion to produce new port

<sup>43</sup> “BIS Deploys Assessment On The Use Of Mature-node Chip,” January 18, 2024, accessible here: <https://www.bis.gov/press-release/bis-deploys-assessment-use-mature-node-chip>.

<sup>44</sup> “Clean Vehicle Credits Under Sections 25E and 30D; Transfer of Credits; Critical Minerals and Battery Components; Foreign Entities of Concern,” 89 FR 37706 (May 6, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/06/2024-09094/clean-vehicle-credits-under-sections-25e-and-30d-transfer-of-credits-critical-minerals-and-battery>; and “Interpretation of Foreign Entity of Concern,” 89 FR 37079 (May 6, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/06/2024-08913/interpretation-of-foreign-entity-of-concern>.

<sup>45</sup> “Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Scope Determination and Final Affirmative Determinations of Circumvention With Respect to Cambodia, Malaysia, Thailand, and Vietnam,” 88 FR 57419 (August 23, 2023), accessible here: <https://www.federalregister.gov/documents/2023/08/23/2023-18161/antidumping-and-countervailing-duty-orders-on-crystalline-silicon-photovoltaic-cells-whether-or-not>.

cranes with a US-based subsidiary of Mitsui Engineering & Shipbuilding.<sup>46</sup> USTR brings this security concern into its argument for tariffs, suggesting that “increasing section 301 duties may be appropriate to support the security interests of the United States from the threat of Chinese state-sponsored cyber intrusions of critical infrastructure.”

USTR also recently launched a separate Section 301 investigation into China's acts, policies, and practices targeting the maritime, logistics, and shipbuilding sectors.<sup>47</sup> The domestic industry petitioner in that investigation raised specific complaints about Chinese state support for ship-to-shore cranes and other port logistics infrastructure. If USTR decides to proceed with remedies in that investigation, further action against cranes and shipping equipment is possible.

- **Certain medical products:** The tariff rates on syringes and needles will increase from 0% to 50% in 2024; tariffs on certain PPE, including respirators and face masks, will increase from between 0% and 7.5% to 25% in 2024; and tariffs on rubber medical and surgical gloves will increase from 7.5% to 25% in 2026. The report argues that increasing tariffs on medical equipment will protect new domestic manufacturing capacity that has emerged since the COVID pandemic, which would support preparedness for public health emergencies.

#### **New exclusions processes for industrial machinery and solar manufacturing**

The FRN will also explain the process companies would use to apply for exclusions from the tariffs. Rather than being open to all products like the previous exclusion processes, this exclusion process will only be open to industrial machinery used in domestic manufacturing. Appendix K of USTR's four-year review report contains the list of the HTS Chapter 84 and Chapter 85 codes that can qualify. The exclusions, if granted, would apply retroactively to the date of the imposition of the Section 301 tariff.

USTR has also proposed 19 temporary exclusions from the solar cells-related tariffs for certain solar manufacturing equipment, which are listed in Appendix L of the four-year review report. The solar exclusions are based on product description, instead of HTS codes. The products are all within HTS 8486.10.0000, 8486.20.0000, and 8486.40.0030.

#### **Status of the current exclusions**

USTR's announcement does not explain what will become of the current tariff exclusion list. As the four-year review has proceeded over the past two years, USTR has maintained 352 general exclusions and 77 COVID-related exclusions from the tariffs. Those exclusions will all expire on May 31, 2024, unless extended. USTR's report notes the approaching expiration date but does not say what USTR intends to do at that time. In the past, USTR has often announced exclusion extensions with only a few days' notice, so an announcement at the end of the month remains possible. It is also possible that USTR will allow all the current exclusions to expire, maintaining only the new machinery exclusion process. If the exclusions expire, the covered products would be subject to tariffs ranging from 7.5% to 25% beginning on June 1, 2024.

#### **USTR's other policy recommendations**

USTR's four-year review also makes several recommendations for actions that could be taken by other parts of the executive branch or by Congress.

<sup>46</sup> “Fact Sheet: Biden-Harris Administration Announces Initiative to Bolster Cybersecurity of U.S. Ports,” February 21, 2024, accessible here: <https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/21/fact-sheet-biden-harris-administration-announces-initiative-to-bolster-cybersecurity-of-u-s-ports/>.

<sup>47</sup> “Initiation of Section 301 Investigation: China's Acts, Policies, and Practices Targeting the Maritime, Logistics, and Shipbuilding Sectors for Dominance,” 89 FR 29424 (April 22, 2024), accessible here: <https://www.federalregister.gov/documents/2024/04/22/2024-08515/initiation-of-section-301-investigation-chinas-acts-policies-and-practices-targeting-the-maritime>.

- **Recommends Congress increase US Customs and Border Protection’s (CBP) funding so the government can enforce the tariffs more aggressively.** With USTR setting significantly higher tariffs on China than on the rest of the world, incentives for traders to evade the tariffs with false origin declarations and transshipment is increasing. CBP’s investigations into tariff evasion have increased significantly in recent years, driven by these rising tariff differentials and increased political focus on customs law enforcement. USTR, in its report, argues that CBP’s budget has not kept pace with these enforcement needs and advocates for action to expand CBP’s capacity.
- **Recommends US law enforcement and intelligence agencies increase collaboration with the private sector to improve cybersecurity to better combat state-sponsored technology theft.** The report draws attention to significant allegations of Chinese state-directed hacking and intellectual property theft and argues that more action is needed to protect US companies. USTR urges the government and the private sector to identify vulnerabilities in computer networks, report hacking incidents to law enforcement, and cooperate with prosecution efforts.
- **Recommends that the government should continue assessing policies to shift US industrial supply chains away from China.** USTR argues that the government should continue to develop and adopt policies to shift manufacturing supply chains away from China, though the report does not make any specific policy recommendations aside from raising the Section 301 tariffs. In recent months, USTR has begun advocating for its own approach to supply chain security policy and conducting public hearings on the matter.<sup>48</sup> USTR’s call for public input argued that past tariff liberalization and “an unfettered global marketplace” have fostered dangerous “operationally complex supply chains,” suggesting USTR’s approach to supply chain resilience is focused on domestic industry protection. USTR’s position contrasts with efforts to build international collaboration and improve disaster preparedness, like the policies developed by the Commerce Department in the Indo-Pacific Economic Framework for Prosperity (IPEF) Agreement Relating to Supply Chain Resilience.

### Reviewing the original tariffs

Aside from proposing changes to the Section 301 tariffs, the four-year review report also examined the effectiveness of the original tariffs in changing China’s policies and assessed the effects of the tariffs on the US economy. The report found the Section 301 actions “have been effective in encouraging the PRC to take steps toward eliminating some of its technology transfer-related acts, policies, and practices” including technology transfer policies and foreign ownership restrictions, but that China “has not eliminated many of its technology transfer-related acts, policies, and practices, which continue to impose a burden or restriction on U.S. commerce.” The report goes on to argue that China’s approach to industrial planning is continuing to motivate technology transfer and highlights allegations of state-sponsored intellectual property theft, as well as other continuing concerns with policies that encourage technology transfer.

On the economic effects, the review found that the Section 301 tariffs and China’s retaliatory tariffs have had a negative effect on the US economy but have also helped expand domestic production in the sectors protected by the US tariffs. The review also argues the tariffs have encouraged US importers to source merchandise from countries other than China, noting that the share of US imports coming directly from China has fallen. USTR argues this trade diversion supports the Biden administration’s supply chain diversification objectives and reduces the risk of technology transfer occurring in the future.

<sup>48</sup> “Request for Comments on Promoting Supply Chain Resilience,” 89 FR 16608 (March 7, 2024), accessible here: <https://www.federalregister.gov/documents/2024/03/07/2024-04869/request-for-comments-on-promoting-supply-chain-resilience>.



## Section 232

### United States to Revoke 12 Exclusions from Section 232 Steel and Aluminum Tariffs Effective July 1, 2024

On May 20, 2024, the Department of Commerce's Bureau of Industry and Security (BIS) published a Final Rule revising its Section 232 Steel and Aluminum tariff exclusions.<sup>49</sup>

The Final Rule removes 12 General Approved Exclusions (GAEs) – 6 for steel and 6 for aluminum – that BIS added in the December 2020 rule and maintained through the December 2021 rule. The steel and aluminum articles specified by these 12 GAEs will revert to the tariffs, tariff rate quotas, and other treatment previously established under Presidential Proclamations 9704 (with respect to aluminum) and 9705 (with respect to steel)<sup>50</sup> as well as subsequent Proclamations.

To seek relief from these tariffs or quotas, importers will now have to submit specific exclusion requests in the Section 232 Exclusions Portal.<sup>51</sup> The Final Rule will enter effect on July 1, 2024. BIS regularly reevaluates the coverage of the GAEs and may make other additions or removals in the future.

The Final Rule makes no changes to the other 81 GAEs in supplements no. 2<sup>52</sup> and no. 3,<sup>53</sup> nor does it make any changes to the exclusion application process. This Final Rule is the first of two final actions that BIS intends to issue based on a Proposed Rule issued in August 2023.<sup>54</sup> The second action will likely make several changes to the exclusion application process, which BIS described in the August 2023 Federal Register Notice.

#### Table of GAEs for revocation

| Item  | GAE identifier          | HTSUS code   | Item description   |
|-------|-------------------------|--------------|--|
| Steel | GAE.24.S:<br>7211296080 | 7211.29.6080 | FLAT-ROLLED IRON/NONALLOY STL, WIDTH >= 300MM BUT <600MM, NOT CLAD/PLATED/COATED, NFW THAN COLD-RLD (COLD-REDUCED), >= 0.25% CRBN, THK <= 1.25MM |
| Steel | GAE.43.S:<br>7209900000 | 7209.90.0000 | FLAT-ROLLED IRON/NONALLOY STL, WDTN >= 600MM, COLD-RLD, NOT CLAD/PLATED/COATED, WHETHER OR NOT IN COILS  |
| Steel | GAE.46.S:<br>7216330090 | 7216.33.0090 | H SECTIONS IRON/NONALLOY STL, HOT-RLD/DRWN/EXTRD, HEIGHT >= 80MM   |
| Steel | GAE.84.S:<br>7209270000 | 7209.27.0000 | FLAT-ROLLED IRON/NONALLOY STL, WDTN >= 600MM, COLD-RLD, NOT CLAD/PLATED/COATED, NOT COILS, THK 0.5-1MM   |

<sup>49</sup> "Revisions of the Section 232 Steel and Aluminum Tariff Exclusions Process," 89 FR 43740 (May 20, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/20/2024-10725/revisions-of-the-section-232-steel-and-aluminum-tariff-exclusions-process>.

<sup>50</sup> Proclamation 9704 of March 8, 2018: Adjusting Imports of Aluminum Into the United States (83 FR 11619), accessible here: <https://www.federalregister.gov/documents/2018/03/15/2018-05477/adjusting-imports-of-aluminum-into-the-united-states>; and Proclamation 9705 of March 8, 2018: Adjusting Imports of Steel Into the United States (83 FR 11625), accessible here: <https://www.federalregister.gov/documents/2018/03/15/2018-05478/adjusting-imports-of-steel-into-the-united-states>.

<sup>51</sup> The Section 232 Exclusions Portal is accessible here: <https://232app.azurewebsites.net/steelalum>.

<sup>52</sup> Supplement No. 2 to Part 705—General Approved Exclusions (GAEs) for Steel Articles Under the Section 232 Exclusions Process, accessible here: <https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-A/part-705/appendix-Supplement%20No.%202%20to%20Part%20705>.

<sup>53</sup> Supplement No. 3 to Part 705—General Approved Exclusions (GAEs) for Aluminum Articles Under the Section 232 Exclusions Process, accessible here: <https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-A/part-705/appendix-Supplement%20No.%203%20to%20Part%20705>.

<sup>54</sup> "Revisions of the Section 232 Steel and Aluminum Tariff Exclusions Process," 88 FR 58525 (August 28, 2023), accessible here: <https://www.federalregister.gov/documents/2023/08/28/2023-18328/revisions-of-the-section-232-steel-and-aluminum-tariff-exclusions-process>.

| Item     | GAE identifier          | HTSUS code   | Item description   |
|----------|-------------------------|--------------|--|
| Steel    | GAE.90.S:<br>7216100010 | 7216.10.0010 | U SECTIONS IRON/NONALLOY STL, HOT-ROLLED/DRAWN/EXTRUDED, HEIGHT <80MM  |
| Steel    | GAE.93.S:<br>7208380015 | 7208.38.0015 | FLAT-ROLLED IRON/NA STL, WIDTH >= 600MM, HOT-RD, NOT CLAD/PLATED/COATED, COILS, THICKNESS >= 3MM BUT <4.75MM, HIGH-STRENGTH STL                              |
| Aluminum | GAE.1.A:<br>7609000000  | 7609.00.0000 | ALUMINUM TUBE OR PIPE FITTINGS (COUPLINGS, ELBOWS, SLEEVES)  |
| Aluminum | GAE.4.A:<br>7604210010  | 7604.21.0010 | ALUMINUM ALLOY HOLLOW PROFILES OF HEAT-TREATABLE INDUSTRIAL ALLOYS OF A KIND DESCRIBED IN NOTE 6 TO THIS CHAPTER   |
| Aluminum | GAE.5.A:<br>7604291010  | 7604.29.1010 | ALUMINUM ALLOY PROFILES OTHER THAN HOLLOW PROFILES OF HEAT-TREATABLE INDUSTRIAL ALLOYS OF A KIND DESCRIBED IN NOTE 6 TO THIS CHAPTER                         |
| Aluminum | GAE.9.A:<br>7601209080  | 7601.20.9080 | UNWROUGHT ALUMINUM ALLOY, SHEET INGOT (SLAB) OF A KIND DESCRIBED IN STATISTICAL NOTE 3 TO THIS CHAPTER   |
| Aluminum | GAE.10.A:<br>7607116010 | 7607.11.6010 | ALUMINUM FOIL OF THICKNESS >0.01 MM AND <=0.15 MM, ROLLED, NOT BACKED, BOXED & WEIGHING <=11.3 KG  |
| Aluminum | GAE.13.A:<br>7604295090 | 7604.29.5090 | ALUMINUM ALLOY BARS AND RODS, OTHER THAN ROUND CROSS SECTION, OTHER THAN HEAT-TREATABLE INDUSTRIAL ALLOYS OF A KIND DESCRIBED IN NOTES 5 & 6 OF THIS CHAPTER |



## Trade Agreements

### USMCA

#### **United States, Mexico, and Canada Review Implementation of the USMCA and Adopt Procedures for Coordinating Emergency Situations that Disrupt Trade Flows**

On May 22, 2024, US Trade Representative Katherine Tai, Mexico's Secretary of Economy Raquel Buenrostro, and Canada's Minister for Export Promotion, International Trade and Economic Development Mary Ng met in Phoenix, Arizona to chair the fourth meeting of the Free Trade Commission (FTC) of the United States-Mexico-Canada Agreement (USMCA).<sup>55</sup>

During this meeting, the Ministers reviewed the implementation of the USMCA in different areas. They also agreed to expand their trilateral collaboration on issues related to non-market policies and practices of third countries, including in the automotive and other sectors.

An important outcome of the meeting was the adoption of procedures for coordination and consultation among the Parties to the USMCA in response to an emergency situation impacting North American trade flows. Canada and the United States also announced the establishment of internal mechanisms to coordinate in such situations.

"The COVID-19 pandemic underscored how important it is to have established procedures for coordination before an emergency situation," said Ambassador Tai. "This agreement is the next step to strengthen North American competitiveness and resilience and reflects our steadfast commitment to work together under the USMCA to deliver for our workers and businesses," she added.<sup>56</sup>

#### **Trilateral response to emergency situations**

The Parties have acknowledged that the disruption of North American trade flows in emergency situations can have significant negative impacts on the Parties' domestic economies and generally on North American competitiveness and may inhibit timely recovery from an emergency.

In February 2023, the FTC adopted Decision No. 5, which established a framework for coordination and consultation to support maintaining North American trade flows in emergency situations, and also set up a Trilateral Coordination Sub-Committee on Emergency Response.<sup>57</sup>

At this last meeting, the FTC adopted an Addendum modifying and supplementing Decision No. 5, setting out procedures to operate in emergency situations.<sup>58</sup> Under the Addendum, any of the three countries can request an "extraordinary session" of the Sub-Committee if it "assesses that an emergency situation is currently or imminently disrupting North American trade flows."

The Party requesting the extraordinary session is expected to provide the other Parties with sufficient information on the current or imminent disruption of North American trade flows to allow the Sub-Committee to decide whether or not to begin formal domestic and trilateral coordination and cooperation to remedy or mitigate the disruption. This decision, in turn, would trigger a series of consultative steps to resolve the disruption.

<sup>55</sup> The Joint Statement is accessible here: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/united-states-canada-and-mexico-joint-statement-fourth-meeting-usmcacusat-mec-free-trade-commission>.

<sup>56</sup> The USTR press release is accessible here: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/ustr-announces-new-action-improve-emergency-response-collaboration-under-usmca>.

<sup>57</sup> FTC Decision No. 5 is accessible here: <https://ustr.gov/sites/default/files/2023-02/FTC%20decision%20%235%20trade%20flows%20English%20Final.pdf>.

<sup>58</sup> Addendum to Decision No. 5 is accessible here: <https://ustr.gov/sites/default/files/Addendum%20to%20USMCA%20FTC%20Decison%20No.%205.pdf>.

As part of that effort, the Sub-Committee will consider the Report on Shared Critical Infrastructure Priorities and any additional guidance or input from the Working Group on Shared Critical Infrastructure Priorities. The Sub-Committee may establish technical working groups to address the specific circumstances of an emergency situation and propose options to address the disruption of trade flows and continuity of supply chain operations.

Each Party will consult regularly with relevant state or provincial governments and local non-governmental stakeholders, including industry and labor groups, until the trade disruption has been resolved or adequately mitigated.

The Sub-Committee will notify the FTC immediately of any decision that the trade disruption has been resolved or adequately addressed. A Party may request the formation of a review working group to develop a closure report analyzing the Sub-Committee's response to the trade disruption and any lessons learned.

### **Domestic coordination emergency response**

In addition, pursuant to paragraph 9 of Decision No. 5, the United States and Canada announced the establishment of their respective internal domestic procedures to coordinate government action and to consult with industries and other non-governmental stakeholders, including workers, most directly impacted by the disruption of North American trade flows in an emergency situation. Mexico has not yet complied with this obligation.

The US document was published by USTR but includes input from numerous other agencies across the US government (Departments of Agriculture, Commerce, Defense, Homeland Security, State, Transportation, and Treasury).<sup>59</sup> They have identified existing or planned mechanisms and authorities to coordinate and consult with other US federal government departments regarding activities related to maintaining, re-establishing, or otherwise addressing issues related to the disruption of North American trade flows in an emergency situation.

The document notes, for instance, that the US State Department's Bureau of Energy Resources works with the private sector and partner governments, including through initiatives like the Minerals Security Partnership (MSP), to promote diversification of critical mineral development and processing to bolster supplies and ensure that no single actor has disproportionate control over supply chains, including those that are vital to US defense industries. In the event of supply chain disruption, the United States can work through the MSP, diplomatic engagement, and private sector outreach to identify alternative sources of supply. Canada is also a member of the MSP.<sup>60</sup>

### **What's next?**

Ministers highlighted that this meeting marked year four on the path to the six-year joint review of the USMCA and underscored the importance of making progress toward its full implementation over the next two years. The Parties will convene a Deputies' meeting before the end of 2024 to assess progress made on the priorities discussed during the fourth meeting. Minister Ng confirmed that Canada will host the fifth FTC meeting in 2025.<sup>61</sup>

The six-year joint review is scheduled to take place in July 2026, at which the Parties will have to confirm whether or not they wish the USMCA to continue for a further 16-year term.<sup>62</sup>

<sup>59</sup> A copy of the document "U.S. Interagency Input on Coordination on North American Trade Flows in Emergency Situations" is accessible here: <https://ustr.gov/sites/default/files/Combined%20U.S.%20FTC%20Decision%20No.%205%20Data%20Call%20-%205.21.2024.pdf>.

<sup>60</sup> Besides the United States and Canada, the other MSP members include Australia, Estonia, the European Union, Finland, France, Germany, India, Italy, Japan, Korea, Norway, Sweden, and the United Kingdom.

<sup>61</sup> Canada's press release is accessible here: <https://www.canada.ca/en/global-affairs/news/2024/05/minister-ng-promotes-trilateral-cooperation-at-canada-united-states-mexico-agreement-free-trade-commission-meeting.html>.

<sup>62</sup> The Agreement shall terminate 16 years after the date of its entry into force unless each Party confirms it wishes to continue for a new 16-year term at the six-year "joint review" (i.e., July 2026), which will be carried out by the FTC.

## Petitions & Investigations

### Investigations

#### Commerce Issues Preliminary Affirmative Determinations in Aluminum Lithographic Printing Plates Antidumping Duty Investigations for China and Japan and Countervailing Duty Investigation for China

On May 1, 2024, the US Department of Commerce (Commerce) published the affirmative preliminary determinations in its antidumping duty (ADD) investigation of aluminum lithographic printing plates (printing plates), finding that imports from Japan and China are being, or are likely to be, sold in the United States at less than fair value.<sup>63</sup>

For Japan, Commerce set the preliminary estimated weighted-average dumping margins at 87.81% for Fujifilm Corporation and Fujifilm Shizuoka Co., Ltd; 157.16% for Miraclon Corporation Ltd; and 87.81% for the All-Others rate. Commerce instructed CBP to begin suspending liquidation of entries and requiring a cash deposit equal to the dumping margins beginning May 1. For China, Commerce set the preliminary estimated weighted average dumping margins at 164.31% for Fujifilm Printing Plate (China) Co., Ltd and 477.60% for the China-wide Entity. Commerce's original announcement on May 1 contained errors in the China dumping margin calculations, which it corrected in the June 3 amended notice. Commerce also determined that critical circumstances exist for imports from China, and instructed CBP to begin suspending liquidation of entries and requiring a cash deposit equal to the dumping margins starting 90 days before May 1. Commerce will make the final determinations for Japan and China no later than 135 days after May 1.

Commerce previously issued the preliminary determination for the countervailing duty (CVD) investigation into printing plates from China on March 1, 2024.<sup>64</sup> The CVD investigation preliminary determination found that countervailable subsidies are being provided to producers and exporters of printing plates from China. The preliminary estimated countervailable subsidy rates were 38.50% for Fujifilm Printing Plate (China) Co., Ltd.; 231.98% for Shanghai National Ink Co. Ltd; and 38.50% for the All-Others rate. Commerce also aligned the date of the final CVD determination with the ADD determinations.

Previously, on November 13, 2023, the US International Trade Commission (ITC) issued its preliminary determination that there is a reasonable indication that US industry is materially injured by imports of aluminum lithographic printing plates from China and Japan that are alleged to be sold in the United States at less than fair value and subsidized by China.<sup>65</sup> Following Commerce's issuance of its preliminary determinations, the ITC published the schedule for its final

<sup>63</sup> "Aluminum Lithographic Printing Plates From Japan: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures," 89 FR 35065 (May 1, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/01/2024-09456/aluminum-lithographic-printing-plates-from-japan-preliminary-affirmative-determination-of-sales-at>; "Aluminum Lithographic Printing Plates From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, and Postponement of Final Determination and Extension of Provisional Measures," 89 FR 35062 (May 1, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/01/2024-09457/aluminum-lithographic-printing-plates-from-the-peoples-republic-of-china-preliminary-affirmative>; and "Aluminum Lithographic Printing Plates From the People's Republic of China: Amended Preliminary Determination of the Less-Than-Fair-Value Investigation," 89 FR 47516 (June 3, 2024), accessible here: <https://www.federalregister.gov/documents/2024/06/03/2024-12117/aluminum-lithographic-printing-plates-from-the-peoples-republic-of-china-amended-preliminary>.

<sup>64</sup> "Aluminum Lithographic Printing Plates From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination," 89 FR 15134 (March 1, 2024), accessible here: <https://www.federalregister.gov/documents/2024/03/01/2024-04392/aluminum-lithographic-printing-plates-from-the-peoples-republic-of-china-preliminary-affirmative>; and "Aluminum Lithographic Printing Plates From the People's Republic of China: Preliminary Determination of Critical Circumstances, in Part, in the Countervailing Duty Investigation; Correction," 89 FR 26125 (April 15, 2024), accessible here: <https://www.federalregister.gov/documents/2024/04/15/2024-07903/aluminum-lithographic-printing-plates-from-the-peoples-republic-of-china-preliminary-determination>.

<sup>65</sup> "Aluminum Lithographic Printing Plates From China and Japan," 88 FR 80338 (November 17, 2023), accessible here: <https://www.federalregister.gov/documents/2023/11/17/2023-25402/aluminum-lithographic-printing-plates-from-china-and-japan>.

phase investigations on May 14, 2024.<sup>66</sup> The ITC plans to hold its hearings in September 2024 and the determination date is set for October 28, 2024.

### **Covered product**

The covered products are aluminum lithographic printing plates under HTSUS 3701.30.0000 and 3701.99.6060. The product may also enter under HTSUS 3701.99.3000 and 8442.50.1000. The written description of the covered product, included below, is dispositive. Commerce has not made any further revisions to the product scope in the preliminary determinations.

Aluminum lithographic printing plates consist of a flat substrate containing at least 90 percent aluminum. The aluminum-containing substrate is generally treated using a mechanical, electrochemical, or chemical graining process, which is followed by one or more anodizing treatments that form a hydrophilic layer on the aluminum-containing substrate. An image-recording, oleophilic layer that is sensitive to light, including but not limited to ultra-violet, visible, or infrared, is dispersed in a polymeric binder material that is applied on top of the hydrophilic layer, generally on one side of the aluminum lithographic printing plate. The oleophilic light-sensitive layer is capable of capturing an image that is transferred onto the plate by either light or heat. The image applied to an aluminum lithographic printing plate facilitates the production of newspapers, magazines, books, yearbooks, coupons, packaging, and other printed materials through an offset printing process, where an aluminum lithographic printing plate facilitates the transfer of an image onto the printed media. Aluminum lithographic printing plates within the scope of this investigation include all aluminum lithographic printing plates, irrespective of the dimensions or thickness of the underlying aluminum substrate, whether the plate requires processing after an image is applied to the plate, whether the plate is ready to be mounted to a press and used in printing operations immediately after an image is applied to the plate, or whether the plate has been exposed to light or heat to create an image on the plate or remains unexposed and is free of any image.

Subject merchandise also includes aluminum lithographic printing plates produced from an aluminum sheet coil that has been coated with a light-sensitive image-recording layer in a subject country and that is subsequently unwound and cut to the final dimensions to produce a finished plate in a third country (including the United States), or exposed to light or heat to create an image on the plate in a third country (including in a foreign trade zone within the United States).

Excluded from the scope of this investigation are lithographic printing plates manufactured using a substrate produced from a material other than aluminum, such as rubber or plastic.

### **Commerce Issues Final Results of Administrative Review of ADD Order on Certain Hot-Rolled Steel Flat Products from Japan**

On May 9, 2024, Commerce published the final results of the 2021-2022 administrative review of hot-rolled steel flat products from Japan, determining that one of the two producers/exporters of hot-rolled steel flat products from Japan sold subject merchandise in the United States at prices below normal value during the period of review while the other did not.<sup>67</sup> The final weighted-average dumping margins will be 1.39% for Nippon Steel Corporation/Nippon Steel Nisshin Co., Ltd./Nippon Steel Trading Corporation and 0.00% for Tokyo Steel Manufacturing Co., Ltd. Commerce did not make any changes in the decision from the preliminary determination, which was issued on

<sup>66</sup> "Aluminum Lithographic Printing Plates From China and Japan; Scheduling of the Final Phase of Antidumping and Countervailing Duty Investigations," 89 FR 41993 (May 14, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/14/2024-10502/aluminum-lithographic-printing-plates-from-china-and-japan-scheduling-of-the-final-phase-of>.

<sup>67</sup> "Certain Hot-Rolled Steel Flat Products From Japan: Final Results of Antidumping Duty Administrative Review; 2021-2022," 89 FR 39584 (May 9, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/09/2024-10152/certain-hot-rolled-steel-flat-products-from-japan-final-results-of-antidumping-duty-administrative>.

November 6, 2023.<sup>68</sup> Commerce will issue new duty assessment instructions to CBP for the new rates. The all-others duty rate will remain at 5.58%.

## **Commerce Issues Preliminary Results of Administrative Review of ADD Order on Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan**

On May 23, 2024, Commerce published the preliminary results of the administrative review for imports of diffusion-annealed, nickel-plated flat-rolled steel products from Japan, finding that certain producers/exporters subject to the review made sales at less than normal value.<sup>69</sup> Commerce also rescinded the review for certain companies for which the review requests were withdrawn.

Commerce calculated a preliminary weighted-average dumping margin of 12.69% for Toyo Kohan Co., Ltd., which is the only company still subject to the administrative review. Unless otherwise extended, Commerce will issue the final results of the review no later than 120 days after the publication of the preliminary determination. After completing the review, Commerce will issue any updated assessment rates to CBP.

Commerce initiated the administrative review on July 12, 2023, in response to a request for review from Thomas Steel Strip Corporation (the petitioner). In September 2023, Thomas Steel Strip Corporation withdrew its requests for reviews of Nikken Las Industry Co., Ltd. and Taiyo Manufacturing Co., Ltd. Because no other company requested reviews for Nikken and Taiyo, the preliminary determination also includes a rescission of the administrative reviews for Nikken and Taiyo.

## **ITC Issues Final Determination in Five-Year Review on Tin- and Chromium-Coated Steel Sheet from Japan**

On May 31, 2024, ITC issued its final determination in the five-year (sunset) review of the ADD order on tin- and chromium-coated steel sheet from Japan, finding that revocation of the order would likely lead to continuation or recurrence of material injury of the US industry.<sup>70</sup>

The results of Commerce's parallel sunset review, published in October 2023, found that revocation of the ADD order would likely lead to the continuation or recurrence of dumping at weighted-average margins up to 95.29%.<sup>71</sup> This is the fourth five-year review for the ADD order, which Commerce originally issued in August 2000.<sup>72</sup>

<sup>68</sup> "Notice Certain Hot-Rolled Steel Flat Products From Japan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2021-2022," 88 FR 76170 (November 6, 2023), accessible here: <https://www.federalregister.gov/documents/2023/11/06/2023-24491/certain-hot-rolled-steel-flat-products-from-japan-preliminary-results-and-partial-rescission-of>.

<sup>69</sup> "Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products From Japan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2022-2023," 89 FR 45638 (May 23, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/23/2024-11265/diffusion-annealed-nickel-plated-flat-rolled-steel-products-from-japan-preliminary-results-and>.

<sup>70</sup> "Tin- and Chromium-Coated Steel Sheet From Japan; Determination," 89 FR 47175 (May 31, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/31/2024-12014/tin--and-chromium-coated-steel-sheet-from-japan-determination>.

<sup>71</sup> "Certain Tin Mill Products From Japan: Final Results of the Expedited Fourth Sunset Review of the Antidumping Duty Order," 88 FR 69133 (October 5, 2023), accessible here: <https://www.federalregister.gov/documents/2023/10/05/2023-22127/certain-tin-mill-products-from-japan-final-results-of-the-expedited-fourth-sunset-review-of-the>.

<sup>72</sup> "Certain Tin Mill Products from Japan: Notice of Antidumping Duty Order," 65 FR 52067 (August 28, 2000), accessible here: <https://www.federalregister.gov/documents/2000/08/28/00-21930/certain-tin-mill-products-from-japan-notice-of-antidumping-duty-order>.



## Commerce and ITC Initiate Five-Year Sunset Review of ADD and CVD Orders on Glycine from China, India, Japan, and Thailand

On May 1, 2024, Commerce and the ITC published initiation notices for the first five-year sunset reviews of the ADD orders on glycine from India, Japan, and Thailand, and the CVD orders on glycine from China and India.<sup>73</sup> The ITC review will seek to determine whether revocation of the ADD and CVD orders on glycine from China, India, Japan, and Thailand would likely lead to continuation or recurrence of material injury. The Commerce review will examine whether revocation of the ADD and CVD orders would likely lead to the continuation or recurrence of dumping and subsidies.

Commerce originally issued the ADD and CVD orders in 2019.<sup>74</sup> For Japan, the original dumping margins were 53.66% for Yuki Gosei Kogyo Co., Ltd; 86.22% for Showa Denko K.K; and 53.66% for the All-Others rate.

### Covered product

The product covered by the original orders is glycine at any purity level or grade. This includes glycine of all purity levels, which covers all forms of crude or technical glycine including, but not limited to, sodium glycinate, glycine slurry and any other forms of amino acetic acid or glycine. Subject merchandise also includes glycine and precursors of dried crystalline glycine that are processed in a third country, including, but not limited to, refining or any other processing that would not otherwise remove the merchandise from the scope of this order if performed in the country of manufacture of the in-scope glycine or precursors of dried crystalline glycine. Glycine has the Chemical Abstracts Service (CAS) registry number of 56–40–6. Glycine and glycine slurry are classified under HTSUS subheading 2922.49.43.00. Sodium glycinate is classified in the HTSUS under 2922.49.80.00. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope is dispositive.

## Commerce Issues Preliminary Determinations in ADD Investigations of Aluminum Extrusions from 14 Countries

On May 2, 2024, Commerce announced its preliminary ADD determinations for aluminum extrusions from China, Colombia, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, South Korea, Taiwan, Thailand, Turkey, United Arab Emirates, and Vietnam.<sup>75</sup>

Commerce preliminarily determined that aluminum extrusions are being, or are likely to be, sold in the United States at less than fair value for all of the countries and most of the individually examined exporters, setting preliminary weighted-average dumping margins ranging from 0.0% for certain Italian, Malaysian, and Korean exporters, to as high as 376.85% for the China-Wide Entity (Commerce had also erroneously set rates as high as 605.72% for Turkish producers, which has since been corrected<sup>76</sup>). Commerce will direct CBP to suspend liquidation of entries

<sup>73</sup> "Initiation of Five-Year (Sunset) Reviews," 89 FR 35073 (May 1, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/01/2024-09424/initiation-of-five-year-sunset-reviews>; and "Glycine From China, India, Japan, and Thailand; Institution of a Five-Year Review," 89 FR 35237 (May 1, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/01/2024-09365/glycine-from-china-india-japan-and-thailand-institution-of-a-five-year-review>.

<sup>74</sup> "Glycine From India and the People's Republic of China: Countervailing Duty Orders," 84 FR 29173 (June 21, 2019), accessible here: <https://www.federalregister.gov/documents/2019/06/21/2019-13361/glycine-from-india-and-the-peoples-republic-of-china-countervailing-duty-orders>; "Glycine From India and Japan: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders," 84 FR 29170 (June 21, 2019), accessible here: <https://www.federalregister.gov/documents/2019/06/21/2019-13362/glycine-from-india-and-japan-amended-final-affirmative-antidumping-duty-determination-and>; and "Glycine From Thailand: Antidumping Duty Order," 84 FR 55912 (October 18, 2019), accessible here: <https://www.federalregister.gov/documents/2019/10/18/2019-22764/glycine-from-thailand-antidumping-duty-order>.

<sup>75</sup> "Preliminary Affirmative Determinations in the Antidumping Duty (AD) Investigations of Aluminum Extrusions from 14 Trading Partners," accessible here: <https://www.trade.gov/preliminary-determinations-ad-investigations-aluminum-extrusions-multiple-countries>.

<sup>76</sup> "Sales at Less Than Fair Value; Determinations, Investigations, etc.: Aluminum Extrusions from the Republic of Türkiye," (June 5, 2024), accessible here: <https://federalregister.gov/d/2024-12345>.

and require a cash deposit equal to the dumping margin of the covered product that is entered, or withdrawn from warehouse for consumption, on or after publication of the notice on May 7, 2024.

Commerce previously announced the preliminary results of its concurrent CVD investigation of aluminum extrusions from China, Colombia, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the United Arab Emirates, and Vietnam on March 5, 2024.<sup>77</sup> This preliminary decision set subsidy rates for only China, Indonesia, Mexico, and Turkey. On May 23, 2024, Commerce announced it would align the scope of the CVD investigations with that of the ADD investigations.<sup>78</sup>

The ITC issued its preliminary affirmative determination on November 21, 2023, finding a reasonable indication that the US industry is materially injured or threatened with material injury by imports of aluminum extrusions from China, Colombia, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, South Korea, Taiwan, Thailand, Turkey, United Arab Emirates and Vietnam that are alleged to be sold in the United States at less than fair value and to be subsidized by the governments of China, Indonesia, Mexico, and Turkey.<sup>79</sup> However, the preliminary investigation into imports from the Dominican Republic found that imports are negligible, so ITC terminated the investigation specifically for the Dominican Republic. The final phase ITC investigation is ongoing.

### Covered product

Besides aligning the scope of the CVD with the ADD investigation, Commerce has also made further modification to the complex product scope in its preliminary determination. See the Preliminary Scope Decision Memorandum II for a full discussion of the scope, including its specific details, exceptions, and applications to downstream aluminum products.

The merchandise subject to this investigation are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope is dispositive. The subject merchandise may also enter as components of products under other HTSUS codes. The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.*, pressed through a die).

<sup>77</sup> "Preliminary Affirmative Determination in the Countervailing Duty Investigation of Aluminum Extrusions from the People's Republic of China, Indonesia, Mexico, and Turkey," accessible here: <https://www.trade.gov/preliminary-determination-cvd-investigations-aluminum-extrusions-china-indonesia-mexico-and-turkey>.

<sup>78</sup> "Aluminum Extrusions From the People's Republic of China, Indonesia, Mexico, and the Republic of Türkiye: Amended Preliminary Countervailing Duty Determinations," 89 FR 45634 (May 23, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/23/2024-11346/aluminum-extrusions-from-the-peoples-republic-of-china-indonesia-mexico-and-the-republic-of-trkiye>.

<sup>79</sup> "Aluminum Extrusions From China, Colombia, Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, South Korea, Taiwan, Thailand, Turkey, United Arab Emirates, and Vietnam," November 27, 2023 (88 FR 82913), <https://www.federalregister.gov/documents/2023/11/27/2023-26057/aluminum-extrusions-from-china-colombia-dominican-republic-ecuador-india-indonesia-italy-malaysia>.



## Commerce and ITC Initiate ADD and CVD Investigations into Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from Cambodia, Malaysia, Thailand, and Vietnam

On May 20, 2024, Commerce published notices that it has initiated the ADD and CVD investigations into imports of crystalline silicon photovoltaic cells (CSPV), whether or not assembled into modules, from Cambodia, Malaysia, Thailand, and Vietnam.<sup>80</sup>

For the CVD investigation, Commerce will seek to determine whether the governments are providing countervailable subsidies to producers of CSPV from Cambodia, Malaysia, Thailand, and Vietnam. The CVD initiations follow consultations with the governments of Cambodia, Malaysia, Thailand, and Vietnam in early May. Commerce also consulted China's Minister of Commerce on May 13, 2024, because some of the alleged subsidy programs were provided by the government of China instead of by the governments of Cambodia, Malaysia, Thailand, and Vietnam.

For the ADD investigations, Commerce will seek to determine whether imports of solar cells from Cambodia, Malaysia, Thailand, and Vietnam are being, or are likely to be, sold in the United States at less-than-fair value. Commerce listed the estimated dumping margins as 125.37% for Cambodia, 81.22% for Malaysia, 70.36% for Thailand, and 271.28% for Vietnam.

The ITC published notice of its preliminary injury investigations on April 30, 2024.<sup>81</sup> The ITC will preliminarily determine within 45 days whether there is a reasonable indication that imports of CSPV from Cambodia, Malaysia, Thailand, and Vietnam that are alleged to be sold at less-than fair value and that are alleged to be subsidized are materially injuring, threatening material injury, or materially harming the establishment of the US industry. The ITC's decision must be transmitted to Commerce by June 17, 2024. In the unlikely event that the ITC reaches a negative preliminary determination for any of these allegations, the relevant investigations will end.

### Covered product

Commerce's initiation notice revised the product scope following receipt of clarifications from the petitioners. The covered product is CSPV cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.

These investigations cover crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Merchandise under consideration may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, modules, laminates, panels, building-integrated

<sup>80</sup> "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From Cambodia, Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations," 89 FR 43816 (May 20, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/20/2024-11027/crystalline-silicon-photovoltaic-cells-whether-or-not-assembled-into-modules-from-cambodia-malaysia>; and "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From Cambodia, Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations," 89 FR 43809 (May 20, 2024), accessible here: <https://www.federalregister.gov/documents/2024/05/20/2024-11031/crystalline-silicon-photovoltaic-cells-whether-or-not-assembled-into-modules-from-cambodia-malaysia>.

<sup>81</sup> "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From Cambodia, Malaysia, Thailand and Vietnam; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations," 89 FR 34268 (April 30, 2024), accessible here: <https://www.federalregister.gov/documents/2024/04/30/2024-09307/crystalline-silicon-photovoltaic-cells-whether-or-not-assembled-into-modules-from-cambodia-malaysia>.

modules, building-integrated panels, or other finished goods kits. Such parts that otherwise meet the definition of merchandise under consideration are included in the scope of the investigations.

Excluded from the scope of the investigations are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

Also excluded from the scope of the investigations are crystalline silicon photovoltaic cells, not exceeding 10,000 mm<sup>2</sup> in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Additionally, excluded from the scope of the investigations are panels with surface area from 3,450 mm<sup>2</sup> to 33,782 mm<sup>2</sup> with one black wire and one red wire (each of type 22 AWG or 24 AWG not more than 206 mm in length when measured from panel extrusion), and not exceeding 2.9 volts, 1.1 amps, and 3.19 watts. For the purposes of this exclusion, no panel shall contain an internal battery or external computer peripheral ports.

Also excluded from the scope of the investigations are:

- Off grid CSPV panels in rigid form with a glass cover, with the following characteristics: (A) a total power output of 100 watts or less per panel; (B) a maximum surface area of 8,000 cm<sup>2</sup> per panel; (C) do not include a built-in inverter; (D) must include a permanently connected wire that terminates in either an 8 mm male barrel connector, or a two-port rectangular connector with two pins in square housings of different colors; (E) must include visible parallel grid collector metallic wire lines every 1-4 millimeters across each solar cell; and (F) must be in individual retail packaging (for purposes of this provision, retail packaging typically includes graphics, the product name, its description and/or features, and foam for transport); and
- Off grid CSPV panels without a glass cover, with the following characteristics: (A) a total power output of 100 watts or less per panel; (B) a maximum surface area of 8,000 cm<sup>2</sup> per panel; (C) do not include a built-in inverter; (D) must include visible parallel grid collector metallic wire lines every 1-4 millimeters across each solar cell; and (E) each panel is (1) permanently integrated into a consumer good; (2) encased in a laminated material without stitching, or (3) has all of the following characteristics: (i) the panel is encased in sewn fabric with visible stitching, (ii) includes a mesh zippered storage pocket, and (iii) includes a permanently attached wire that terminates in a female USB-A connector.

In addition, the following CSPV panels are excluded from the scope of the investigations: off-grid CSPV panels in rigid form with a glass cover, with each of the following physical characteristics, whether or not assembled into a fully completed off-grid hydropanel whose function is conversion of water vapor into liquid water: (A) a total power output of no more than 80 watts per panel; (B) a surface area of less than 5,000 square centimeters (cm<sup>2</sup>) per panel; (C) do not include a built-in inverter; (D) do not have a frame around the edges of the panel; (E) include a clear glass back panel; and (F) must include a permanently connected wire that terminates in a twoport rectangular connector.

Additionally excluded from the scope of these investigations are off-grid small portable crystalline silicon photovoltaic panels, with or without a glass cover, with the following characteristics: (1) a total power output of 200 watts or less per panel; (2) a maximum surface area of 16,000 cm<sup>2</sup> per panel; (3) no built-in inverter; (4) an integrated handle or a handle attached to the package for ease of carry; (5) one or more integrated kickstands for easy installation or angle adjustment; and (6) a wire of not less than 3 meters either permanently connected or attached to the package that terminates in an 8 mm diameter male barrel connector.

Also excluded from the scope of these investigations are off-grid crystalline silicon photovoltaic panels in rigid form with a glass cover, with each of the following physical characteristics, whether or not assembled into a fully completed off-grid hydropanel whose function is conversion of water vapor into liquid water: (A) a total power output of no more than 180 watts per panel at 155 degrees Celsius; (B) a surface area of less than 16,000 square centimeters (cm<sup>2</sup>) per panel; (C) include a keep-out area of approximately 1,200 cm<sup>2</sup> around the edges of the panel that does not contain solar cells; (D) do not include a built-in inverter; (E) do not have a frame around the edges of the panel; (F) include a clear glass back panel; (G) must include a permanently connected wire that terminates in a two-port rounded rectangular, sealed connector; (H) include a thermistor installed into the permanently connected wire before the twoport connector; and (I) include exposed positive and negative terminals at opposite ends of the panel, not enclosed in a junction box.

Modules, laminates, and panels produced in a third-country from cells produced in a subject country are covered by the investigations; however, modules, laminates, and panels produced in a subject country from cells produced in a third-country are not covered by the investigations.

Also excluded from the scope of these investigations are all products covered by the scope of the antidumping and countervailing duty orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order, 77 FR 73018 (December 7, 2012); and Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Countervailing Duty Order, 77 FR 7017 (December 7, 2012).

Merchandise covered by the investigations is currently classified under HTSUS subheadings 8541.42.0010 and 8541.43.0010. Imports of the subject merchandise may enter under HTSUS subheadings 8501.71.0000, 8501.72.1000, 8501.72.2000, 8501.72.3000, 8501.72.9000, 8501.80.1000, 8501.80.2000, 8501.80.3000, 8501.80.9000, 8507.20.8010, 8507.20.8031, 8507.20.8041, 8507.20.8061, and 8507.20.8091. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope is dispositive.