

# GLOBAL TRADE COMPLIANCE COMMUNIQUE



## Trading With China in 2019--Year of the Pig

The Chinese Lunar New Year started on February 5, 2019 and began the Year of the Pig. Both the U.S. and China engaged in a tit-for-tat tariff contest throughout 2018, causing disruption in established supply chains and Pacific shipping schedules. It is anticipated that progress will be made during negotiations in 2019 that will stimulate U.S.-China trade activity.

Addison-Clifton recommends U.S. companies develop compliance action plans to address the changing compliance challenges they will face during the Year of the Pig, including:

- Confirm eligibility for imported product exclusions from Section 301 tariffs announced by the United States Trade Representative ("USTR") on December 28, 2018.
- Confirm country-of-origin of finished products made outside of China with Chinese components or sub-assemblies to avoid Section 301 tariffs.
- Confirm application of China Compulsory Certification (a/k/a "CCC") mark requirements for commercial/industrial products exported to China.

## Notice of Section 301 Product Exclusions

On December 28, 2018, the USTR announced product exclusions from the Section 301 *ad valorem* 25% tariff imposed on July 6, 2018 on goods from China classified in 818 subheadings of the Harmonized Tariff Schedule of the United States ("HTSUS").

Approximately 10,811 exclusion requests were submitted, of which nearly 1,000 exclusions were granted, impacting 31 different HTSUS subheadings. The exclusions have a retroactive effective date of July 6, 2018.

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## HTSUS Classifications and Section 301

In U.S. Customs and Border Protection (“CBP”) Ruling HQ H299857 (September 6, 2018), a Chinese-origin 129-piece mechanic’s toolset classified under subheading 8206.00.00, HTSUS, contained 5 items that were classified under subheading 8466.10.0175, HTSUS. Although the toolset itself was subject to the 25% Section 301 tariff, the toolset contained items that were subject to the Section 301 tariff. The CBP found that when importing goods put up in sets for

retail sale that contain articles subject to Section 301, the entire set will be subject to the additional 25% tariff if the product that imparts the essential character to the set is covered by Section 301. If the HTSUS provision under which the entire set is classified is not covered by Section 301, but the set contains components that are covered, the 25% duty will not be assessed on the individual components.

*“We do not dispute, that, if entered separately, as mentioned in T.D. 91-7, each item would be subject to the column one rate of duty associated with its tariff classification, with only the items specifically listed in U.S. Note 20(b) of Subchapter III, Chapter 99, HTSUS, subject to the 301 measures.”*

## U.S. Export Controls for Emerging Technologies

### China Military Rule Prohibited Sales

The U.S. Government prohibits the supply of certain civil or dual-use items that are subject to the Export Administration Regulations (“EAR”) to China if the exporter knows, or has reason to know, the item is intended for a “military end-use” in China.

Under this rule, a U.S. person’s awareness can be inferred from evidence of a conscious disregard of facts or from a person’s willful avoidance of facts. It is common for Chinese business enterprises to engage in both commercial and military activities.

A significant number of China-based parties are identified on the Specially Designated Nationals and Blocked Persons List. If one of these persons owns, directly or indirectly, at least 50% interest in an entity, the entity is treated as if it were on the list.

On November 19, 2018, the U.S. Bureau of Industry and Security (“BIS”) published advance notice of proposed rulemaking seeking public comment on criteria for identifying emerging technologies that are essential to U.S. national security. The technologies have potential conventional weapons, intelligence collection, weapons of mass destruction or terrorist applications that could provide the U.S. with a qualitative military or intelligence advantage. As part of the National Defense Authorization Act for Fiscal Year 2019, Congress enacted the Export Control Reform Act of 2018 (“ECRA”) that authorizes the BIS to establish appropriate controls, including interim controls, on the export, re-export or transfer (in-country) of emerging and foundational technologies.

Under the ECRA, emerging and foundational technologies are those that are essential to the national security of the U.S. These technologies will be determined by an interagency process that will consider both public and classified information. In identifying emerging and foundational technologies, the process must consider: (1) the development of these technologies in foreign countries; (2) the effect export controls may have on the development of such technologies in the U.S.; and (3) the effectiveness of export controls on limiting the proliferation of these technologies in foreign countries.

The representative technology categories include: nanotechnology, synthetic biology, neurotech, artificial intelligence, quantum information and sensing technology, context-aware computing, additive manufacturing, brain-computer interfaces, smart dust robotics, faceprint and voiceprint technologies, and systems-on-chip microprocessor technology.



## Dual-Use Exports to India Made Easier

On August 3, 2018, the BIS amended the EAR to formally recognize and implement India's membership in the Wassenaar Arrangement. This amendment to the EAR also removed India from Country Group A:6 and placed it in Country Group A:5 because India is now recognized as a Major Defense Partner. India has become a member in three of the four export control regimes: (1) Missile Technology Control Regime; (2) Wassenaar Arrangement; and (3) Australia Group. The effective date of the rule was August 3, 2018.

By India being placed in the Country Group A:5, U.S. exports and re-exports transactions may utilize the Strategic Trade Authorization export license exception ("STA"). The STA license exception authorizes exports, re-exports and in-country transfers that are subject to multiple reasons for control. India is the 37<sup>th</sup> country to join Country Group A:5.

The U.S. has designated India as a "Major Defense Partner" allowing the BIS to remove the requirement that U.S. exporters file certain Electronic Export Information in the Automated Export System ("AES"). Specifically, the rule amendment removes the requirement that U.S. exporters file in AES when items controlled for Crime Control (a/k/a "CC") Columns 1 and 3 and Regional Security (a/k/a "RS") Column 2 are destined for India.

## Exporting Controlled Products to Trade Shows

Under the EAR, special conditions apply when using an export license exception to temporarily export dual-use products for exhibition at a trade show outside the U.S. These special requirements include: (1) proof of control of the product while in transit; (2) length of time the product can remain outside the U.S.; (3) the storage location before and after the trade show; and (4) product functionality while abroad.



## Commerce Control List Amendments

On October 24, 2018, the BIS published a final rule that revised the Commerce Control List (a/k/a "CCL"). These 50 revisions affect items such as:

1. Category 0 - containers for shipping or packing defense articles or items controlled by "600 Series."
2. Category 1 - "Composite" structures or laminates.
3. Category 2 - anti-friction bearings and bearing systems.
4. Category 3 - general purpose electronic assemblies, modules and equipment.
5. Category 4 - digital computers and software.
6. Category 5 - information security software and technology.
7. Category 6 - optical sensors, equipment and components.
8. Category 7 - airborne altimeters.
9. Category 9 - marine gas turbine engines.

In addition, the BIS announced the removal of 37 definitions from Part 772 (Definitions of Terms Used in the EAR) and added them where they are used. The BIS also amended: (1) Supplement No. 6 to Part 774 - Sensitive List; (2) Supplement No. 7 to Part 774 - Very Sensitive List; and (3) License Exceptions APR, ENC and STA.

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## Exporting Aviation Products to China Made Easier

December 2018 marked the first anniversary of the Implementation Procedures Agreement between the U.S. Federal Aviation Administration ("FAA") and its counterpart in China, the Civil Aviation Administration of China ("CAAC"). This agreement provides a detailed roadmap for the CAAC to verify the airworthiness of FAA-certified aviation products so they can be imported into China. The foreign validation process will take 9-12 months to complete once the FAA has submitted all the type certificates and supplemental type certification supporting data.

## Recommended Compliance Actions in 2019

Addison-Clifton recommends the following compliance action items during 2019:

1. If you are a contractor or sub-contractor under a U.S. Government contract, immediately assess your compliance with the cyber-security requirements in NIST SP 800-171 for protecting the confidentiality of controlled unclassified information on non-U.S. Government information systems.
2. Review the timely filing of import documentation by your customs broker. If the filing is late, the Port Director must make immediate demand for liquidated damages in the entire amount of the bond.
3. Executive Order 13785 regarding anti-dumping duties ("ADD") and countervailing duties ("CVD") is being strictly enforced. Identify independent laboratories who can confirm the HTSUS classifications of any similar products as support for the ADD or CVD order not being applicable.