CLIENT ALERTS & INSIGHTS

Section 122 Tariffs - A New Path Forward after SCOTUS Decision

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Key Takeaways

- Following the Supreme Court's decision striking down tariffs under the International Emergency Economic Powers Act, the White House quickly imposed a new 15% surcharge on most global imports using Section 122 of the Trade Act of 1974, with several key product exclusions, and a limited duration of up to 150 days.
- The White House's response creates added complexity and compliance challenges for importers. The legal landscape for tariffs remains unsettled following the decision. Further changes are likely as the Administration explores more permanent alternatives.
- Staying informed and agile will be critical as new Section 301 investigations are expected to commence soon. Importers can prepare by closely monitoring change, participating in public comment periods when those become available, and maintaining vigilance for both regulatory compliance and cost containment in this high enforcement environment.

The White House acted swiftly as promised following the U.S. Supreme Court's decision to strike down tariffs implemented under the International Emergency Economic Powers Act ("IEEPA"). The President signed a new Executive Order on Friday, February 20, 2026, invoking Section 122 of the Trade Act of 1974 (19 USC § 2132). The EO established a new 10% surcharge on all global imports beginning February 24, 2026, with some important exceptions. One day later, the President announced on Truth Social that the effective tariff rate would be 15% instead of 10%.

The President has statutory authority to proclaim temporary import surcharges, and temporary import quotas, under Section 122 during "situations of fundamental international payments problems." Three types of fundamental problems can trigger this tool: (1) large and serious United States balance-of-payments deficits; (2) imminent and significant depreciation of the dollar in foreign exchange markets; or (3) international balance-of-payments disequilibrium that require corrective cooperation with other countries. The period for which surcharges up to 15% may be implemented cannot extend beyond 150 days without an act of Congress. No President has exercised this authority before now. The new EO cites international payment problems-including trade deficit, and imminent and significant threat to the depreciation of the U.S. dollar-as the crises underlying these new duties.

Most importantly for importers, the new Section 122 surcharge will not apply to certain key products subject to other tariff programs or of high value for national security and industrial policy. Items

subject to USMCA duty-free status or the Section 232 tariffs on particular sectors and goods are the most striking categories of carve-outs. The new EO noticeably does not speak to imports subject to Section 301 duties. Other categories of items excluded from this new surcharge are: bullion, energy, natural resources and fertilizers not available in the United States, and certain textiles and apparel articles from some countries.

The EO also includes an in-transit savings clause that shields goods loaded onto a vessel at the port of lading and in transit on the final mode of transit prior to entry in the United States before 12:01am, Eastern Standard Time, on February 24, 2026, or entered for consumption or withdrawn from a bonded warehouse for consumption before 12:01am, Eastern Standard Time, on February 28, 2026.

The White House intends to pursue alternative measures under other statutes to prepare a more long-standing and legally durable alternative to IEEPA and now Section 122-based tariffs. U.S. Trade Representative Greer specifically identified Section 301 as the likely path forward. Section 301 was the favored tariff measure for addressing unfair trade practices from China during the Trump 45 Administration and continued through the Biden Administration. New investigations under Section 301 are expected to promptly commence followed by an expedited administrative process.

Our team previously outlined Section 122, 301 and other statutory alternatives available to the White House if the IEEPA tariffs were deemed unlawful. We also published our immediate reactions on the day of the Supreme Court decision striking down IEEPA tariffs.

Benesch attorneys are monitoring developments closely while helping clients with domestic and international supply chains remain adept to this evolving environment. Benesch client alerts and legal publications are available for you to receive by signing up HERE.

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