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MEMORANDUM

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BY ELECTRONIC MAIL

FROM: Olsson Frank Weeda Terman Matz PC

RE: Customs and Trade Update: U.S. Supreme Court IEEPA Oral Argument and Potential Tariff Refund Options

Yesterday (November 5), the U.S. Supreme Court held oral argument in a landmark case challenging President Donald Trump's imposition of sweeping tariffs under the International Emergency Economic Powers Act (IEEPA). The core legal issue is whether IEEPA grants the president broad authority to impose tariffs without prior congressional approval or investigation. Trump's tariffs, including those targeting fentanyl-related imports and reciprocal tariffs on multiple trading partners, are up for consideration. While it is impossible to predict the way that the Supreme Court will rule based on this argument, the general consensus is that the Government did not have a successful day yesterday.

Prior to the argument, many legal experts believed there is a strong likelihood that the Supreme Court will strike down tariffs imposed by President Trump under the International Emergency Economic Powers Act (IEEPA), because the law enables the President to "regulate" imports but does not specifically authorize the imposition of tariffs. Other analysts predicted that the conservative-majority Court will broadly interpret presidential authority over foreign affairs and uphold the duties, noting past judicial deference to executive powers in such contexts.

Predictions that the Supreme Court will strike down the IEEPA-based tariffs have increased following yesterday's argument. The justices on the Court's liberal wing (Sotomayor, Kagan, and Jackson) clearly seemed inclined to strike the tariffs down, with Justice Sotomayor in particular repeatedly characterizing the tariffs as an impermissible exercise of the legislative power to tax rather than (as argued by the Government) a permissible exercise of the executive's power to conduct foreign affairs. While we believe that Justices Thomas and Alito (the most conservative Court members) most likely will vote to uphold the tariffs, their questions

nevertheless displayed some skepticism as to their legality. The questions asked by the potential swing justices (Barrett, Goresuch, Roberts, and Kavanaugh) seemed similarly skeptical, with Justices Barrett and Goresuch seeming perhaps most inclined to their legality. While it is important to remember that courts can and do rule in ways that may seem contrary to the questions posed during oral argument, most commentators agree that the likelihood that the Court will strike the tariffs down seems now to have increased.

If the Court does strike down the tariffs, it could choose to broadly hold that the IEEPA does not authorize the President to impose tariffs (to impose a "tax" on imports) under any circumstances, and that the IEEPA-based tariffs before it were therefore unlawful. Alternatively, it could choose to avoid the issue of whether IEEPA authorizes the President to impose tariffs and instead rule more narrowly that one or more of the tariffs before it did not meet IEEPA's statutory requirements (for example, rule that the "emergency" related to the U.S. trade deficit does not support the imposition of the reciprocal tariffs as to one or more of the countries on which they have been imposed). If the Court rules more narrowly, some of the tariffs at issue might remain in place; alternatively, even if it strikes all of the tariffs before it down, it might leave the door open to the President to impose other IEEPA-based tariffs if he met certain statutory requirements.

Prior to the argument, White House officials expressed confidence that the Court will uphold these tariff powers but have simultaneously developed a Plan B in case the Court limits the president's authority. This fallback strategy involves deploying alternative statutes such as Section 301 (addressing unfair trade practices) and Section 232 (allowing tariffs on national security grounds; a provision used expansively in recent years for steel, aluminum, autos, auto parts, copper, lumber, furniture, and heavy trucks, along with ongoing reviews of pharmaceuticals, semiconductors, minerals, aircraft, wind turbines, medical supplies, and more), though these alternatives are generally narrower, slower, and susceptible to legal challenges. Alternatively, Trump could use alternative statutory authorities to reimpose tariffs, including Section 122 of the Trade Act of 1974, which allows a temporary global import surcharge of up to 15 percent for 150 days, pending congressional approval for any extensions. However, keeping Section 122 tariffs in place for a lengthy period of time might face substantial obstacles in Congress, even with a Republican majority. The administration also acknowledges that no other provisions provide the same speed and flexibility as IEEPA for broad, global tariff imposition. Several justices similarly noted the existence of these alternative remedies during yesterday's argument.

Preparing for Potential Tariff Refund

The Court must issue its ruling by the end of the current term (i.e. in June or July of 2026). However, President Trump has asked the Court to issue its ruling on an expedited basis. Given that the Court has already granted an expedited briefing and argument schedule and in light of this case's importance, the Court may issue its ruling by the end of December or early January; it will be more likely to issue its ruling sooner if it strikes the tariffs down.

The most significant area of concern to importers is whether refunds of tariffs paid will be

available and, if so, whether there will be limitations on such refunds. We note that in response to a question by Justice Barrett characterizing the potential refund process as a "complete mess," the plaintiffs' attorney suggested that the Court could choose to offer only "prospective" relief (the tariffs would no longer be imposed on a go-forward basis but importers would not be able to recoup past tariffs paid); we question whether the Court would limit relief in this manner, however, given the outcry that would result if the Government were permitted to retain funds which it had ruled were not lawfully collected. Especially in light of the enormous amounts of money at stake, we recommend that importers proceed on the assumption that refunds of at least some amounts will be available if the tariffs are struck down.

Please note that if the Court strikes some or all of the IEEPA-based tariffs down, the Government will not automatically refund those tariffs paid to the importers. Rather, importers will most likely have to take proactive steps to secure any refunds due.

One significant area of uncertainty is the procedure which importers will be required to follow. Broadly speaking, there are three potential avenues under which importers could obtain refunds. **First**, importers might be required to file administrative "protests" with CBP of the liquidation of each entry as to which they paid IEEPA-based tariffs (and to file post-summary corrections, or PSCs, with CBP as to entries which had not yet liquidated). **Second**, importers might be required to file individual lawsuits in the U.S. Court of International Trade (CIT) under 28 U.S.C. § 1581(i)—the court's "residual jurisdiction"—to preserve their right to potential duty refunds, as was done in the Section 301 tariffs case on Chinese goods.[1] **Third**, the Court (or Congress) could direct CBP to establish an easily utilized refund process, as was done in the 1990s when the Supreme Court struck down fees that were formerly assessed on exports from the U.S.

Based upon questions as to statutory authority and timing and unless and until there is greater clarity on this point, **we recommend that importers consider utilizing a combination of the first and second methods (i.e. filing administrative protests as well as filing individual suits at the CIT).**

First, based upon prior Court precedent, we believe that there are substantial questions as to whether protests will be effective to recover any such refunds. However, if the correct route to refunds is by filing protest and importers fail to do so within the statutorily required time period, the consequences are severe: the importer's right to recovery either via protest or via court action is cut off. Because the statutory deadline to file protests as to individual entries may expire before the Supreme Court issues its decision, importers should take action now to preserve their right to refunds via protest filing. **Specifically, we recommend that importers:**

- Identify and maintain detailed records of all entries affected by the contested tariffs using customs data accessible through the Automated Commercial Environment (ACE).
- Actively track liquidation dates[2] of these entries, as liquidation finalizes the duty

[1] The first class-action lawsuit against the president's IEEPA tariffs was filed Nov. 4 at the U.S. District Court for the District of Columbia (Smirk & Dagger Games v. Donald J. Trump, D.D.C. # 1:25-03857).
[2] Liquidation is the process by which U.S. Customs and Border Protection (CBP) finalizes the calculation and

determination under U.S. Customs law. Given the February start date for the fentanyl tariffs on China, some of the first entries subject to IEEPA-based tariffs should be liquidating soon under the typical 314 day liquidation cycle. However, we have heard that CBP has been liquidating entries early (prior to 314 days after liquidation), apparently in an effort to cut the pool of entries which may be eligible for duty refunds. Therefore, importers should obtain the liquidation status of all entries as to which they have paid IEEPA-based tariffs as soon as possible.

- Where appropriate, consider requesting extensions of the liquidation period[3] in writing before the liquidation deadline, which CBP may grant for up to one additional year per extension, not exceeding a total of three years, subject to good cause. We note that there are some potential downsides to this approach, and that CBP has granted few if any such requests. If extensions are requested, however, you should verify with CBP or your customs broker whether such extensions have been approved.
- File Timely Protests: If entries on which importers paid IEEPA-based tariffs liquidate prior to the issuance of the Supreme Court's decision, file protests of that liquidation no later than 180 days after the date of liquidation, accompanied by a request to CBP to hold decision on the protest open pending the Supreme Court's decision.
- Potentially, in addition to filing protests, file an individual lawsuit before the CIT contesting the legality of the IEEPA-based tariffs, together with a request that the Court suspend action on the suit pending the Supreme Court's decision.
- File protests or PSCs as to issues other than the legality of the IEEPA-based tariffs: Separate from the legality of the IEEPA-based tariffs currently before the Supreme Court, there are other issues as to which importers may be entitled to a refund. If importers identify errors in classification, valuation, or duty treatment, they should promptly file formal protests or PSCs with U.S. Customs and Border Protection (CBP) to preserve refund rights, typically within 180 days of liquidation for protests or within 300 days of entry for PSCs. If protests are denied, consider pursuing judicial relief by filing a suit in the U.S. Court of International Trade to preserve rights and prevent liquidation from becoming final without proper adjudication. Some potential protestable issues include:
    - In-Transit Exemptions: CBP has clarified that only shipments transported entirely by ocean vessel qualify for in-transit exemptions under most IEEPA tariffs. Goods transferred between a feeder or relay vessel and a master vessel, even if continuously transported by sea with a through bill of lading destined for the U.S., are not exempt. This interpretation lacks precedent and presents a strong protest opportunity, particularly if IEEPA tariffs are upheld by the courts.

    - Tariff Stacking: Refunds for stacked tariffs (multiple tariffs applied on one import) are possible. Protests may claim refunds due to retroactive tariff stacking, such as excluding IEEPA fentanyl tariffs where Section 232 tariffs also apply.

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assessment of duties, taxes, and fees owed on imported goods. Under 19 U.S.C. 1504, CBP must liquidate an entry within one year of the date of entry or other applicable event. Typically, entries liquidate on average about 314 days after entry.

[3] Entries subject to tariffs imposed under the IEEPA and/or Section 232 by the Trump administration may have already been liquidated or could be liquidated imminently. Some of these tariffs were first applied as early as March 2025, with others phased in subsequently.

- Country of Origin / USMCA: CBP Centers have inconsistently processed preferential treatment claims under USMCA, sometimes requiring section 1520(d) claims, post-summary corrections, or both, often denying requests. In some cases, CBP revised the country of origin (COO) of entries without prior notice, resulting in higher tariffs.

- Value Content: Section 232 tariffs are applied based on the actual metal content of products (steel, aluminum, copper). Importers who believe CBP has overstated content or who want to dispute the assessment should file protests to correct classifications and seek refunds.

- Chapter 98 Exemptions: Some CBP Centers of Excellence and Expertise have denied claims under HTSUS Chapter 98 that may otherwise be eligible for duty-free treatment, such as HTSUS 9801.00.10 (U.S. and foreign goods returned).

- Date of Entry: Rapid tariff impositions created situations where the tariff rate changed within days. Importers may protest to claim an earlier or later date of entry based on actual cargo arrival or documentation filing.

- FTZ / TIB: Goods entered under Foreign-Trade Zone (FTZ) status or Temporary Importation Bonds (TIB) may be exempt from IEEPA tariffs.

- De Minimis: The $800 de minimis exemption was repealed as of August 29, 2025, making all low-value shipments dutiable. Importers who misclassify or overvalue low-value shipments should protest to correct duties.

- Informational Materials: Certain goods like publications, films, and artworks may qualify for exemptions, but CBP has sometimes denied claims due to misclassification.

- Understand Duty Drawback Opportunities: Importers exporting goods or components previously imported may qualify for duty drawback refunds of up to 99% of paid duties. Detailed records of re-exports, manufacturing processes, and destruction of goods are critical.
- For goods entered under FTZ status, evaluate whether additional procedural steps are required to ensure accurate duty assessment and refund eligibility.

The previous memoranda sent discussing presidential actions regarding these fast-moving trade developments are:

1. American First Trade Policy, Jan. 20, 2025
2. U.S. Imposes Tariffs on Mexico, Canada, and China, Feb. 2, 2025
3. Update: U.S. Imposes Tariffs on Mexico, Canada, and China, Feb. 3, 2025 (Canadian/Mexican tariffs suspended; Effective date of 10% tariff on products of China and Hong Kong)

4. Update on Trade War, Feb. 5, 2025(China's Response to New U.S. Tariffs, Impacted Industries, Potential Forthcoming U.S. Trade Activity, and Tariff Mitigation for Machinery and Parts of Machinery for Agricultural and Horticultural Use)
5. Update on Trade War: U.S. Imposes Tariffs on Steel and Aluminum, Response from Targeted Countries, and China Imposes Retaliatory Tariffs, Feb. 12, 2025
6. Update on Trade War: U.S. Releases Lists of Additional Derivative Articles of Steel and Aluminum Which Will be Subject to Section 232 Tariffs, and Issues a Presidential Memorandum on Reciprocal Trade and Tariffs, Feb. 17, 2025
7. Update on Trade War: U.S. to Move Forward with 25% Tariffs on Mexico and Canada Products and Double Tariff on Chinese-Origin Products to 20%; Section 232 Investigation on Copper Imports; USTR Requests Comments, Feb. 28, 2028.
8. Trade War Update, U.S. Tariffs on Canadian and Mexican Origin Goods; Increase in U.S. Tariffs on China; New Section 232 Tariffs on Derivative Articles of Steel and Aluminum Go into Effect; Tariff Investigations on Timber, Mar. 4, 2025.
9. Trade War Update: New Section 232 Tariffs on Derivative Articles of Steel and Aluminum Go into Effect Today – March 12, 2025.
10. Trade War Update: U.S. Imposes Automotive Tariffs; "Secondary Tariffs" on Countries Importing Oil or Gas from Venezuela; CBP Issues FAQs on Steel and Aluminum Derivatives; April 2 Reciprocal Tariff Actions; and Anticipated Sectoral Tariffs on Pharmaceuticals and Lumber, March 29, 2025.
11. Reciprocal Tariffs and other tariff actions taken on Tariff Liberation Day, April 3, 2025.
12. Section 232 on Pharmaceuticals, Semiconductors, Critical Minerals, Electronic goods, FAQ; April 17, 2025.
13. Stacking Tariffs, De Minimis Changes, Auto Tariff Adjustments, Section 232 Inclusion Process, CBP's IEEPA FAQ Update, CBP Summit, and Potential 100% Tariff on Films May 7, 2025.
14. 90-Day Pause for 125% IEEPA China Tariff UK-US Fair Trade Deal, and Trade Negotiations with other Nations, May 12, 2025.
15. OFW Memo - Trade War Update CIT Ruling On IEEPA Tariffs and Subsequent Actions, June 2, 2025.
16. Section 232 Tariffs on Steel and Aluminum and their Derivatives Double to 50% Effective June 4, June 5, 2025.
17. Trade War Update: Terms of the U.S.-U.K. Deal and other Trade Updates, June 19, 2025.
18. US Trade Deals Announced with Indonesia Japan Philippines_July 25 2025.
19. Trade Update: October 15, 2025-November 5, 2025, November 5, 2025.

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We will continue to monitor this situation closely and will report all significant developments. In the interim, please do not hesitate to reach out to us with questions or requests for additional information at Jessica Rifkin (jrifkin@ofwlaw.com) or Denise Calle (dcalle@ofwlaw.com).