ELECTRONIC TRANSACTIONS ASSOCIATION
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September 4, 2018

VIA REGULATIONS.GOV **PUBLIC DOCUMENT**

The Honorable Robert E. Lighthizer
United States Trade Representative
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: **Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property and Innovation**

Docket No. USTR-2018-0026

HTSUS Nos. 8442.50.10; 8471.60.90; 8471.90.00; 8473.29.00; 8473.30.11; 8473.30.51; 8504.40.95; 8517.62.00; 8531.20.00; 8544.42.10; 8544.42.20; and, 8544.42.90.

Written Comments of the Electronic Transactions Association

Dear Ambassador Lighthizer:

The Electronic Transactions Association ("**ETA**") respectfully submits these written comments in the above-referenced matter. These comments are submitted in response to the notices published on July 17, 2018, and August 7, 2018,[1] which require that comments be submitted no later than September 6, 2018. Accordingly, these comments are timely.

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[1] *Notice of Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 33608 (July 17, 2018) ("**July Notice**") (maintaining original $34 billion action and the proposed $16 billion action and proposing a modification to take further action in the form of an additional 10 percent *ad valorem* duty on products of China with an annual trade value of approximately $200 billion) and *Extension of Public Comment Period Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 38760 (August 7, 2018) ("**August Notice**") (extending certain comment periods set out in the July notice because the U.S. Trade Representative announced on August 1, 2017, that the President had directed the U.S. Trade Representative to consider raising the level of the additional duty in the proposed supplemental action from 10 percent to 25 percent); *see also*, *Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 14906 (Apr. 6, 2018) ("**April Notice**") (original $34 billion action) and *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Act, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 28710 (June 20, 2018) ("**June Notice**") (proposed $16 billion action). On July 17, 2018, ETA submitted a timely request to appear and testify at the hearing on August 20, 2018.

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A. Who We Are

The ETA is the global trade association of the payments technology industry. ETA represents over 500 companies involved in electronic transactions processing products and services. ETA's membership spans the breadth of the payments industry to include independent sales organizations ("**ISOs**"), payments networks, financial institutions, transaction processors, mobile payments products and services, payments technologies, and software providers ("**ISV**") and hardware suppliers.

B. Our Position

The ETA opposes the imposition of duties on twelve HTSUS tariff subheadings. The tariff subheadings fall, basically, into two categories.

- The first are items like HTSUS 8471.90.00 (Magnetic or optical readers, nesoi; machines for transcribing data on data media in coded form and machines for processing such data, nesoi) and HTSUS 8517.62.00 (Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing appa [sic])[2] (collectively, "**POS Products**"). POS Products are standalone products used in the payments industry to facilitate or execute a transaction.

- The second are items like HTSUS 8442.50.10 (Printing plates); HTSUS 8471.60.90 (Other input or output units of digital ADP machines, nesoi, not entered with the rest of a system); HTSUS 8473.29.00 (Parts and accessories of machines of headings 8470, nesoi); HTSUS 8473.30.11 (Printed circuit assemblies, not incorporating a cathode ray tube, of the machines of 8471); HTSUS 8473.30.51 (Parts and accessories of the ADP machines of heading 8471, not incorporating a CRT, nesoi); HTSUS 8504.40.95 Static converters (for example, rectifiers), nesoi; HTSUS 8531.20.00 (Indicator panels incorporating liquid crystal devices (LCD's) or light emitting diodes (LED's); HTSUS 8544.42.10 (Insulated electric conductors nesoi, for a voltage not exceeding 1,000 V, fitted with modular telephone connectors); HTSUS 8544.42.20 (Insulated electric conductors nesoi, used for telecommunications, for a voltage not exceeding 1,000 V, fitted with connectors); and, HTSUS 8544.42.90 (Insulated electric connectors nesoi, for a voltage not exceeding 1,000 V, fitted with connectors, nesoi) (collectively, "**Parts**"). Parts are accessories or replacement items that are essential components to the effective functioning of POS

ETA's CEO, Jason Oxman, testified as a member of Panel 12 on August 21, 2018. These comments supplement such testimony.

[2] This is a broad HTS heading which includes cameras used in other electronic devices, such as video conference systems or Bluetooth wireless earphones.

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Products. Parts may also be used to upgrade security protocols without the need to replace the entire device.

POS Products and Parts are referred to herein as "**the Devices.**" ETA's position is that imposing the proposed duties on the Devices: (i) would not be practicable or effective to curb or eliminate the acts, policies, and practices of China related to technology transfer, intellectual property and innovation;[3] and, (ii) would cause disproportionate economic harm to U.S. interests, including small- or medium-size businesses and consumers.

C. Discussion

These comments explain why the ETA opposes the imposition of an additional 25 percent tariff against the Devices.[4]

1. The ETA Supports the Administration's Goals But Respectfully Urges Removing The Devices From Any Increased Tariff

Like the administration and U.S. businesses that innovate and seek to protect their intellectual property assets, the ETA is concerned about China's growing use of trade and investment policies which place innovative U.S. companies at a competitive disadvantage. While the ETA strongly supports efforts to address such discriminatory practices, our members do not support the proposal to impose an additional 25 percent tariff on the Devices. If implemented, this measure would negatively impact U.S. businesses and consumers immediately yet have no discernable impact on encouraging China to change its practices. For the reasons stated herein, we respectfully request that the Devices be removed from any increase in tariffs.

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[3] *See* Findings of the Investigation Into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 published by the Office of the United States Trade Representative dated March 22, 2018 (the "**USTR's Section 301 Findings**").

[4] *See* July Notice at 33609 (Section D - Request for Public Comments) ("In commenting on the inclusion or removal of particular products [on the list of products subject to the proposed additional duties], USTR requests that commenters address specifically whether imposing increased duties on a particular product would be practicable or effective to obtain the elimination of China's acts, policies, and practices, and whether maintaining or imposing additional duties on a particular product would cause disproportionate economic harm to U.S. interests, including small- or medium-size businesses and consumers.").

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2. Keeping the Devices on List 3 Has No Impact on China

The increased tariffs will have no impact in effecting a change in China's discriminatory policies. Many of our members that manufacture in China report that their products are manufactured primarily using a mixture of U.S. as well as European intellectual property.

- Regarding POS Products, as other markets are increasing their demand for these products, in particular those in Asia, Chinese manufacturers are increasingly able to transfer sales to non-U.S. markets with little or no effort (and, likely, with lower costs and higher profit margins given shorter shipping distances).[5]

- Regarding Parts, payments technology manufacturing is a small industry leveraging the consumer electronics massive supply chain, which is based predominantly in Asia and is resident primarily in China. Unlike the massive consumer electronic supply chain, the payments technology supply chain has little leverage with Chinese contract manufacturers. Such Chinese enterprises are efficient, high-tech, and assuming *arguendo* that manufacturing for the payment industry is forced out of China, the Chinese contract manufacturers would be able to quickly sell available capacity on their manufacturing line.

- Regarding the Devices, in general, shifting production to the United States is not an option. This is not only because of increased labor and other costs but because of a lack of secondary facilities and infrastructure to support production of the Devices. This commercial infrastructure gap in the United States hampers the ability to produce the Devices in sufficient quantities to justify the increased fixed manufacturing costs required to ramp-up production. In general, U.S. inventories will last roughly three

[5] In 2016 manufacturers worldwide shipped 54.2 million payment card authorization terminals with integrated chip and/or magnetic stripe card readers. *See* The Nilson Report, Issue 1114 (July 2017) at 1 (the leading publication covering payment systems worldwide). Only 5 million of these devices were shipped to the U.S. market, which represents less than 10 percent of worldwide market share. *Id.* at 10 (Chart showing POS Terminal Shipments by Region for 2016). Significantly, The Asia-Pacific region has seen an ***uptick*** in worldwide market share for the POS terminals and a ***28.3 percent*** increase in units. *Id.* at 11. ("The Asia-Pacific region received 31.7 million POS terminals in 2016, up 28.3%, an increase of 7.0 million units"). The Middle East – Africa was the only other region that had an increase in market share over the same period. By contrast, the market share of the United States declined over the same period, with Latin America and the Caribbean ***overtaking*** the United States in shipments of new POS terminals. *Id.* The conclusion is that any further downturn in sales to the United States will be readily absorbed elsewhere in the world, in particular Asia. The growing demand for these POS terminals in non-U.S. markets suggests that China will not be significantly harmed or influenced by the imposition of the additional 25 percent tariff on POS Products. Rather Chinese manufacturers are already shifting production to alternative markets.

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months, and a shift to a third country market for production would take roughly 12 to 18 months on average, as reported by our members. The costs associated with doing so would be assessed per manufacturing line per product, which would be multiplied significantly by the number of lines utilized by each manufacturer. Plus, aside from these other issues, the primary technical issue associated in shifting production for the POS Products is the complex EMV certification and approval requirements.[6] This process would be very costly in terms of internal engineering expenses and requires the ETA member to certify different hardware.[7] In short, the 25 percent increased tariff may trigger ***consideration*** of a shift in production. But, we are told, any such shift would not result in increased U.S. production, would impact less than 10 percent of worldwide demand (making an actual shift less likely), would result in increased internal certification and approval expenses (in the short term), and would result in an estimated 10 to 15 percent year-on-year cost increase due to various factors and depending on which products lines are moved within Asia (in the long term and for the foreseeable future).

Accordingly, there is very little risk posed to Chinese contract manufacturers of including the Devices on List 3. Doing so would have very little impact on their decisions, if any, and would certainly ***not*** result in increased bargaining leverage that would somehow encourage such Chinese manufacturers to lobby the Chinese government to change its policies regarding intellectual property.

3. Keeping the Devices on List 3 Has A Huge Negative Impact on the United States

The Devices are critically important to the U.S. economy. ETA members power the U.S. economy by providing secure and reliable payments technology. Last year ETA members processed nearly seven trillion dollars in electronic payments on behalf of our merchant customers. More than 70 percent of the U.S. GDP is retail spending in the United States. And more than 70 percent of retail spending is done by consumers via electronic payments. The Devices enable U.S. consumers to purchase products securely and cost-effectively. In turn, this helps to drive the U.S. economy. The proposed tariffs will dramatically increase the price of POS Products and Parts in the United States. This impacts their availability which, in turn, negatively impacts U.S. consumers. This is why the Devices – and their exclusion from List 3 – is so important.

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[6] EMV® is a global standard for credit and debit payment cards based on chip card technology and refers to the card schemes Europay, Mastercard, and Visa, which are the original card schemes that developed it.

[7] On average, ETA members advise that the cost of shifting production to the United States, if even possible, would result in approximately 25 to 30 percent additional expense, at a minimum.

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a. Keeping the POS Products on List 3 Continues a Security Gap Among Smaller Retailers, Like Gas Stations, and Delays the Shift to EMV Technology

As the margins in the industry prevent the 25 percent additional duties from being absorbed by the manufacturer, the increased costs of including the Devices on List 3 would be passed on directly to the retailer who wants to purchase the product. This places the retailer in a very difficult position. Either the retailer forgoes purchasing the POS Product or attempts to pass on the increased costs to the U.S. consumer. As explained above, most large retailers have upgraded and are now using the EMV chip-card certification, whereas most small- and medium-sized businesses have not.

The security risk posed by not having EMV chip-card readers is perhaps most readily apparent when one drives to the pump.[8] Gas stations originally had until October 1, 2017, to ensure that their pumps accept chip-embedded cards. Because of the high costs of conversion and for other reasons, however, that deadline was extended in December 2016. Now gas stations have until October 1, 2020, to install chip technology payment terminals.[9] If a customer uses a chip card at a pump that does not process chip transactions after that date, the gas station will bear the costs of the fraud. So now is when gas stations are trying to upgrade their security protections. Gas stations are just one example of the myriad small- and medium-sized business that are wrestling with the need and expense of upgrading to EMV-enabled POS terminals. Accordingly, now is precisely the time gas stations – and other when small- and medium-sized business – can most ill-afford to have POS Products included on List 3.[10] Adding 25 percent to the cost of the Devices forces many small- and medium-sized businesses to push-off implementing the EMV upgrade, which harms us all given the existing security gap.

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[8] Robin Sidel, "Credit-Card Fraudsters Pump Gas Stations for Profit Credit-Card Fraudsters Pump Gas Stations for Profit," Wall Street Journal (Sept. 3, 2015), available at: << https://www.wsj.com/articles/credit-card-fraudsters-pump-gas-stations-for-profit-1441253132 >> (describing the "gaping hole" in gas station security).

[9] Robin Sidel, "Card Companies Give Gas Stations Three Extra Years to Install Chip Technology," Wall Street Journal (Dec. 1, 2016), available at: << https://www.wsj.com/articles/visa-gives-gas-stations-three-extra-years-to-install-chip-card-equipment-1480600735?ns=prod/accounts-wsj>>.

[10] The same reasoning applies to certain Parts. For example, replacing a circuit board with a replacement Part could upgrade an existing POS terminals' security protocol without the need and expense of replacing the entire unit.

b. Keeping the Parts on List 3 Threatens U.S. Jobs

For those who have a malfunctioning POS Product,[11] increased costs would make it uneconomical to fix such devices. As ETA members support repair facilities in the United States, an increase in the cost of parts necessary to make such repairs has a direct relationship to a decrease in the demand for such repairs. A decrease in the demand for repairs results in a decrease in the number of jobs in that industry. So if the demand for repairs declines, the need for repair jobs will similarly decline. In other words, there is a direct correlation between increased costs of repair components and job elimination in that market. Lost U.S. jobs does not advance the interests of the administration, particularly when typically such jobs are located in more economically challenged areas throughout the United States as opposed to major metropolitan centers.

c. Keeping The Devices on List 3 Makes It Harder For Small Businesses To Succeed

The administration understands that when small businesses succeed, America succeeds.[12] However, an additional 25 percent duty on the Devices will hamper the ability of small- and medium-sized businesses to succeed. Small- and medium-sized businesses employ 48 percent of our nation's labor force and are responsible for creating two-out-of-three net new, private-sector jobs in the United States.[13] In order to get paid, such enterprises in the Business-to-Consumer ("**B to C**") marketplace need POS Products. And they need Parts to fix their devices when they break. The President's clear message is "to implement a pro-growth agenda based on policies that ***champion*** small business creation and growth, giving more Americans the opportunity to start,

[11] In addition, note that POS Terminals (HTSUS 8470.50.00 - cash registers and point-of-sale terminals) were removed from List 1 for many of the same reason articulated herein. In short, the interagency Section 301 Committee decided – correctly in ETA's view – that such items should not be subject to 25 percent additional duties. It would make little sense to use List 3 now to make the parts necessary to repairing such essential devices so expensive that it is uneconomical for U.S. workers in the United States to repair them.

[12] Presidential Proclamation 9730 of April 27, 2018, 83 Fed. Reg. 19425 (May 2, 2018) (declaring April 29 through May 5, 2018, as National Small Business Week, 2018) ("This week, we celebrate all the entrepreneurs who have taken a risk to start and grow a small business. They are driven by a belief that they can do something better, smarter, and more efficient than what has been done before. They make our neighborhoods vibrant places to live and work. They invest in their neighbors and employ millions of Americans. ***When they succeed, we all succeed***.") (emphasis added).

[13] *Id.* ("For this reason, my Administration worked with the Congress to enact a tax relief plan that provides small businesses with hundreds of billions in additional tax cuts. Moreover, we remain focused on eliminating unnecessary and unduly burdensome regulations, which hurt hardworking Americans. Across the Nation, we are enabling entrepreneurs to invest more of their time and hard-earned profits into growing their businesses and delivering better value for American consumers.").

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scale, and succeed in businesses of their own."[14] Keeping the Devices on List 3 is not a policy that champions small business creation and growth – it impairs it. And, realistically, if the proposed measures are imposed, unfortunately ETA members are in no position to avoid an adverse impact on U.S. small businesses.

D. Conclusion

If the Devices remain on List 3 as proposed, likely production would remain in China, the increased tariff would not be practicable or effective to curb or eliminate the acts, policies, and practices identified in USTR's Section 301 Findings, U.S. small businesses would suffer disproportionate economic harm, and – where such businesses are able to pass on the costs – U.S. consumers would ultimately bear the tariff in the form of increased prices. For these reasons, the ETA urges that the Devices be excluded from any proposed tariff increase.

Respectfully submitted,

Jason Oxman
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[14] *Id.* (emphasis added).