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May 9, 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-2018-0005
<u>Written Comments of the Electronic Transactions Association</u>

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 notice published on April 6, 2018,[1] which requires that comments be submitted no later than May 11, 2018. Accordingly, these comments are timely.

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 HTSUS 8470.50.00 (cash registers and point-of-sale terminals, collectively "**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;[2] and (ii) would cause disproportionate economic harm to U.S. interests, including small- or medium-size businesses and consumers.

C. Discussion

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[1] *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) ("**USTR's Section 301 Notice**"). On April 18, 2018, ETA submitted a timely request to appear and testify at the hearing on May 15, 2018. These comments supplement the summary of testimony submitted with the April 18 request.

[2] *See* Findings of the Investigation Into China's Acts, Policies, and Practices Related to Technology Transfere, 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**").

These comments explain why the ETA opposes the imposition of an additional 25 percent tariff against cash registers and point of sale terminals.[3]

1. The ETA Supports the Administration's Goals But Respectfully Urges Removing Cash Registers and Point-of-Sale Terminals From Any Increased Tariff

Like the administration and other 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 cash registers and point-of-sale terminals. 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 cash registers and point-of-sale terminals be removed from any increase in tariffs.

2. Cash Registers And Point-Of-Sale Terminals Should Be Excluded From Any Tariff

ETA members power the U.S. economy by providing secure and reliable payments technology. Cash registers and point-of-service terminals 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 cash registers and point-of-sale terminals in the United States. This impacts their availability, because some business will be unable to purchase the Devices. For those that do, they will pass on such costs to consumers, which results in higher prices to U.S. consumers. Yet the increased tariffs will have little impact, if any, in effecting a change in China's discriminatory policies. Significantly, 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). Finally, POS terminals are necessary to continue moving the economy towards digital / electronic payments.

a. <u>Retail Sales Drive The U.S. Economy – Increased Tariffs Would Hurt Such Sales</u>

At a macro-economic level, increased tariffs make the Devices more expensive. This affects trade flows, which reduces the availability of the goods in the U.S. market. A reduction in supply with constant demand results in increased prices. Those increased prices will either be paid by the retailers who require the Devices, passed on to the ultimate consumer, or forgone altogether should the retailer elect not to purchase the Device at all (which would result in longer lines at check-outs, for example). When the goods are purchased, a spike in pricing independent from typical inflationary pricing pressures results in increased

[3] *See* USTR's Section 301 Notice at 10 (Section E - 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.").

retail prices for consumers as retailers seek to recoup their additional costs. Ultimately this hurts our economy and has the significant potential not only to dampen retail sales and but increase inflationary pressures. Accordingly, this action directly and negatively impacts a key component of our consumer-driven economy.

b. Sales Are Increasing in Asia and Elsewhere – Increased Tariffs Will Have Little Impact On Encouraging China To Eliminate Its Acts, Policies, And Practices

While the tariff impacts U.S. prices, it will not be practicable or effective in obtaining the elimination of China's acts, policies, and practices identified in USTR's Section 301 Findings. Based on recent data, in 2016 manufacturers worldwide shipped 54.2 million payment card authorization terminals with integrated chip and/or magnetic stripe card readers.[4] Only 5 million of these devices were shipped to the U.S. market, which represents less than 10 percent of worldwide market share.[5] Significantly, The Asia-Pacific region has seen an ***uptick*** in worldwide market share for the Devices and a ***28.3 percent*** increase in units.[6] 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.[7] 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 Devices 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 cash registers and point-of-sale terminals. Rather Chinese manufacturers are already shifting production to alternative markets. Finally, assuming an average price for each cash register and point-of-sale terminal of one hundred dollars ($100), the inclusion of these Devices on the list of products subject to the proposed additional duties accounts for less than one-quarter of one percent of the overall impact on China.[8] The overall impact of including these products is *de minimus* and does nothing to influence China. But it has huge ramifications on businesses here at home.

c. Small- and Medium-Size Businesses – Increased Tariffs Will Cause Disproportionate Economic Harm to Such Businesses and Consumers

Significantly, small- and medium-size businesses will be adversely impacted by imposition of the increased tariffs on cash registers and point-of-sale terminals. Part of the decline in sales of the Devices to the United States may be attributable to the fact that "[l]arge retailers had already upgraded their POS terminals in

[4] The Nilson Report, Issue 1114 (July 2017) at 1 (the leading publication covering payment systems worldwide).

[5] *Id.* at 10 (Chart showing POS Terminal Shipments by Region for 2016).

[6] *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")

[7] *Id.*

[8] Assume an average price of $100 per cash register or point-of-sale terminal and total U.S. annual imports of 5,000,000. This results in imports valued at $500,000,000. A 25 percent *ad valorem* tariff generates $125,000,000 in revenue. The $125,000,000 value is 0.25% of the proposed $50 billion in tariffs proposed by the administration. Note: this is a conservatively high percentage. The average price for the Devices may be lower depending on the specific devices purchased during the relevant period, and this assumes all imports are from China (whereas a very limited number – less than five percent – may be from other countries).

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2015 to meet the EMV card liability shift.[9] Many small businesses still had not upgraded to EMV terminals by the end of 2016."[10] The result is that, as small- and medium-size businesses move to upgrade to new Devices, any increase to the price of such cash registers and point-of-sale terminals will disproportionately impact them. With this in mind, ETA references the written comments submitted into the record at regulations.gov by Marc Sherman from Vermont.[11] Mr. Sherman describes himself as a retailer and small business owner. He employs "up to 25 staff members including several high school and college students who are in their very first job." Concerned about the proposed tariffs, he warns that, "my business, my employees and my customers can not [sic] absorb more cost increases" and he cautions that a combination of "slimmer margins" and the increased tariffs could "jeapordiz[e] the viability of my business." The ETA is keenly concerned about small retailers like Mr. Sherman.[12] Given existing data, it is precisely small- and medium-size businesses that need to purchase new cash registers and point-of-sale terminals and, therefore, precisely small- and medium-size business that will be adversely impacted by the proposed increase. The administration recognizes the importance of such businesses, which 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] Immediately on the heels of celebrating such entrepreneurs,[14] USTR and the administration will consider these written comments and testimony and decide whether to maintain the proposed measures on cash registers and point-of-sale terminals. As you do so, please recall the President's clear statement in his proclamation lauding small busineses: "my Administration will continue to implement a pro-growth agenda based on policies that ***champion*** small business creation and growth, giving more Americans the opportunity to start, scale, and succeed in businesses of their own."[15] The proposed tariff increases on cash registers and point-of-sale terminals 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.

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[9] 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.

[10] *Id.*

[11] *See* USTR-2018-0005-0250, Tracking Number 1k2-92r5-momt.

[12] The ETA is equally concerned about the impact on larger retailers and notes the summary testimony provided by the National Retail Federation ("**NRF**") and the Retail Industry Leaders Association ("**RILA**"), both of which argue against imposing a measure that results in higher prices for U.S. consumers. *See* NRF summary testimony at USTR-2018-0005-0328, Tracking Number 1k2-92r9-pzu1 ("The tariffs will result in increased costs which will be passed along to the retailer and then ultimately the consumer.") and RILA summary testimony at USTR-2018-0005-0275, Tracking Number 1k2-92r8-pq4v ("We agree that punishing American working families with higher prices on household basics like clothing, shoes, electronics, and home goods is not a solution.").

[13] 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) ("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.").

[14] *Id.* ("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.")

[15] *Id.* (emphasis added).

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d. <u>Realistically There Are No Alternative Sources of Supply Other Than China – Increased Tariffs Will Be Passed On To Customers On a 1:1 Basis</u>

Based on information provided by our members, 95 percent to 100 percent of our members' products are manufactured in China.[16] The products are manufactured primarily using a mixture of U.S. ***<u>as well as European</u>*** intellectual property. Shifting production to the United States is not an option, not only because of increased labor and other costs, but because of a lack of secondary facilities and infrastructure to support production of these specific 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 to four months, and a shift to a third country market for production would take roughly 12 to 18 months. The costs associated with doing so would be in the millions of dollars per manufacturing line, 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 is the complex EMV certification and approval requirements. This process would generate perhaps millions of dollars in internal engineering expense per manufacturing ETA member to certify different hardware. In short, the 25 percent increased tariff may trigger ***<u>consideration</u>*** of a shift in production. But 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 (in the long term and for the foreseeable future). All of these costs would be passed on directly to the retailer who purchases the product, as the margins in the industry prevent such increased costs from being absorbed by the manufacturer, and it is expected that the increased costs paid by the retailer would similarly be passed on to the U.S. consumer for the same reason. So 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 U.S. consumers would ultimately bear the tariff in the form of increased prices. In addition, U.S. consumers likely would see impacts with new store openings in the form of longer lines, *e.g.*, if retailers decide in a new store to have only 4 lanes of checkout rather than 5 because of the increased cost of the cash registers or point-of-sale terminals.

[16] For the perhaps five percent or less of products not sourced in China, in general our members report that the products are not positioned appropriately for the U.S. market (for example, such products have more expensive "chip and PIN" card readers which come at a premium price that is not generally marketable in the United States other than to limited market segments, have increased incidents of product quality issues in the field, or struggle to provide basic U.S. requirements, *e.g.*, EMV solutions).

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D. Conclusion

As proposed, raising the cost of cash registers and point-of-sale terminals by 25 percent will cause severe economic harm to U.S. companies, particularly small and medium-size businesses. It will result ultimately in a tax on U.S. consumers. And it will have no discernible impact on China's acts, policies or practices and account and accounts for less than one-quarter of one percent of the overall proposed tariff. For these reasons, the ETA urges that HTS 8470.50.00 (cash registers and point-of-sale terminals) be excluded from any proposed tariff increase.

Respectfully submitted,

Jason Oxman
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Electronic Transactions Association