

# KIRKLAND ALERT

April 6, 2017

## Trump Administration Sets “America First” Trade Agenda in Motion

Last week, the Trump administration took several steps to begin implementation of its “America First” international trade agenda. We note three actions in particular:

First, President Trump signed an executive order directing the Secretary of Commerce and the U.S. Trade Representative (“USTR”), in conjunction with other agencies, to issue a report within 90 days identifying foreign trade partners with which the United States has a significant trade deficit;

Second, President Trump signed an executive order instructing the Department of Homeland Security and other agencies to increase enforcement of collection of unpaid antidumping and countervailing duties; and

Finally, the USTR sent a draft letter to Congress outlining some of the changes the United States will seek as part of its proposed renegotiation of the *North American Free Trade Agreement* (“NAFTA”).

**Press reports indicate that Commerce Secretary Ross has identified the following 16 countries as being the primary focus of study: Canada, China, France, Germany, India, Indonesia, Ireland, Italy, Japan, Malaysia, Mexico, South Korea, Switzerland, Taiwan, Thailand and Vietnam.**

### Report on Trade Deficits

The forthcoming report on trade deficits aims to identify their causes, which may be a precursor to retaliatory trade action by the U.S. government.

#### *Identifying Unfair Trade Practices*

The executive order on trade deficits requires an “Omnibus Report on Significant Trade Deficits” (“Report”) identifying “foreign trade partners” with which the United States has a “significant trade deficit” and experienced “discriminatory trade practices.”<sup>1</sup> The Report is to assess the major causes of the trade deficit, including (i) “differential” tariffs; (ii) non-tariff barriers; (iii) injurious dumping; (iv) injurious government subsidization; (v) intellectual property theft; (vi) forced technology transfer; (vii) denial of workers’ rights and labor standards; and (viii) “any other form of discrimination” against the commerce of the United States.

The executive order itself does not identify any particular trading partners with which the United States has a trade deficit. However, press reports indicate that Commerce Secretary Ross has identified the following 16 countries as being the primary focus of study: Canada, China, France, Germany, India, Indonesia, Ireland, Italy, Japan, Malaysia, Mexico, South Korea, Switzerland, Taiwan, Thailand and Vietnam.

### *Deploying a Potent Trade Arsenal*

The President has broad authority to impose or increase import duties and put in place quotas and other restrictions with similar effect to counter foreign trade policies perceived to be unfair to the United States. The Report appears aimed at reaching the factual findings that establish a predicate for undertaking remedial measures. For example:

- The Report is to identify countries with which the United States has a “significant trade deficit.” Section 122 of the Trade Act of 1974 authorizes the President to temporarily impose duty surcharges of up to 15% for 150 days on countries with which the United States has a large or persistent balance-of-payments deficit.<sup>2</sup>
- The Report is to identify countries that are “unfairly discriminating in fact.” Section 301 of the Trade Act of 1974 authorizes the President to increase tariffs on various products exported from a particular country found to have violated a trade agreement or to have trade practices that are discriminatory or unreasonable.<sup>3</sup> As discussed in our [Kirkland Alert on the March 1, 2017 National Trade Policy Agenda](#), the Administration may seek to pursue such measures unilaterally even without first seeking recourse bilaterally, or multilaterally at the World Trade Organization (“WTO”).
- The Report is to “identify imports and trade practices that may be impairing the national security of the United States.” Under Section 232 of the Trade Expansion Act of 1962, the President has authority to impose duties on articles whose import is determined by the Commerce Department to pose a threat to national security.<sup>4</sup>
- The Report is to “assess the effects of the trade relationship” on U.S. (i) “employment and wage growth” and (ii) “the production capacity and strength of the manufacturing and defense industrial bases.” These criteria can form the basis for the imposition of antidumping and countervailing duties (“AD/CVD”) on particular products from specified countries.<sup>5</sup>

The Administration may use the Report’s findings to formally launch trade actions or, at the very least, use the results to generate leverage in bilateral trade negotiations. The Executive Order was issued just one week before President Trump meets for the first time with China’s President Xi Jinping, the foreign trading partner with which the United States has the largest trade deficit.

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### **Increased Enforcement of Unpaid Import Duty Collection**

The executive order on collection and enforcement of AD/CVD duties and violations of trade and customs laws was issued on the basis that in recent years over \$2 billion in such duties has gone uncollected.<sup>6</sup> The order directs the Bureau of Customs and Border Protection (“CBP”) and other relevant agencies to enhance exist-

ing mechanisms that foster payment of AD/CVD duties by requiring importers without a record of prior imports or with a record of not paying AD/CVD duties promptly, to post an increased bond or other form of security before they can enter merchandise into the United States.

The order also directs CBP to prepare a plan to counter violations of other trade and customs laws through new methods, and it directs the Attorney General to make customs and trade prosecution a “high priority.” In addition, the order directs the U.S. government to share information regarding imported counterfeit products with U.S. intellectual property rights holders in order to help identify and deter such imports. This may result in increased litigation and prosecution of intellectual property infringement. Importers should expect increased enforcement, bearing in mind that these laws include criminal prosecution authority.

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## NAFTA Reconsidered

The letter from USTR to the House Ways and Means Committee states that the President “intends to initiate negotiations” related to the NAFTA, in accordance with the statutory requirement that the President give Congress 90 days’ notice before commencing any trade negotiations.<sup>7</sup> It offers detailed insight into the Administration’s priorities and objectives with respect to renegotiating the NAFTA, including:

- Implementation of a renewed “safeguard” mechanism permitting revocation of preferential duty rates if import surges are a substantial cause of serious injury or threat of serious injury to U.S. industry;
- Adjustment to the rules of origin, arising from a concern that there is “circumvention” enabling goods from outside the NAFTA region to receive preferential duty rates;
- Elimination of the Agreement’s AD/CVD dispute resolution mechanism, given a concern that those arbitral panels have not duly applied the applicable law and legal standards; and
- Pursuit of commitments by the parties to enforce labor and environmental laws, given a concern that not doing so distorts competitive advantage to the detriment of U.S. industry.

## Some Key Takeaways

These developments seem to be the starting point of a broader effort to make fundamental changes in the management of U.S. international trade policy. As this broader effort takes shape, we would recommend that our clients and friends note the following in particular:

- Companies engaged in import-export involving the United States market should pay attention to the findings of the upcoming trade deficits report, as it has the potential to lead to increased import duties or other similar trade restrictions.
- Commercial engagements with companies reliant on U.S. imports are increasingly vulnerable to higher duties, which increase operating costs and enforcement actions.
- The Trump Administration seems intent on seeking more flexibility to impose tariffs and to create trade rules for areas not previously addressed by the NAFTA.

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The United States, the EU and other countries scrutinize or regulate international business activities to advance priority national security, foreign policy and other objectives. If not addressed effectively, such governmental scrutiny or regulation can adversely impact business strategy and investment decisions, lead to significant individual and corporate civil and criminal penalties, and may even result in imprisonment for responsible persons.

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<sup>1</sup> [\*Omnibus Report on Significant Trade Deficits\*](#), Mar. 31, 2017.

<sup>2</sup> 19 U.S.C. § 2132.

<sup>3</sup> 19 U.S.C. § 2411.

<sup>4</sup> 19 U.S.C. § 1862.

<sup>5</sup> 19 U.S.C. § 1671 et seq.

<sup>6</sup> [\*Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws\*](#), Mar. 31, 2017.

<sup>7</sup> [\*Draft letter from Stephen Vaughn, Acting U.S. Trade Representative, to U.S. Senate/U.S. House of Representatives\*](#).

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