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WHITE PAPER

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The American Agenda on Trade: What's Happened and What's Next?

The Trump Administration's early actions on trade policy largely reflect the "America First" agenda candidate Trump promoted during the 2016 campaign. For example, a March Executive Order initiated efforts to identify and potentially take action targeting countries that significantly contribute to the U.S. trade deficit and two subsequent Executive Orders call for the review of current trade agreements for possible abuses and for the establishment of a White House Office of Trade and Manufacturing Policy, which is tasked with defending and serving American workers and domestic manufacturers. In addition, higher antidumping duty rates, more antidumping and countervailing duty cases, and other, less frequently used, trade remedies recently were initiated and could be considered in the future—but might face court and other challenges. It also is likely that President Trump's preference for bilateral over multinational trade agreements will affect ongoing and future negotiations and renegotiations pertaining to such agreements. Companies relying on imports should monitor these developments and consider their potential impact on supply chain issues. At the same time, companies, including, in particular, those adversely affected by imports, should become engaged as the Trump Administration develops its trade policy.

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President Trump spoke about international trade issues at length during his campaign, criticizing free trade agreements and the trade policies of many of the United States' trading partners. He threatened to impose steep tariffs on goods from Mexico and China and to withdraw from the Trans-Pacific Partnership ("TPP") and the North American Free Trade Agreement ("NAFTA"). He also vowed to combat currency manipulation, which he blamed for the United States' growing trade deficit.

In his first few months in office, President Trump acted to address some of these issues and initiated investigations or studies to address others, but he did not impose additional tariffs apart from those imposed as a result of ongoing anti-dumping and countervailing duty investigations, and he did not name China a currency manipulator. In addition, as discussed in further detail below, instead of withdrawing from NAFTA, President Trump recently notified Congress of his intention to renegotiate the agreement. Given the expressed policy agenda and the ongoing investigations and studies, additional tariffs may be on the horizon, but actions thus far seem modest compared to statements during the campaign. This was particularly evident in President Trump's recent budget proposal, which did not include significant increases in funding to U.S. government agencies tasked with trade enforcement. Below, we will examine trade policy activities in the first months of the Trump Administration, as well as review developments related to trade remedies and trade agreements. Finally, we will discuss how multinational companies can participate in shaping trade policy and proactively prepare for potential changes in U.S. trade policy.

TRADE POLICY REFLECTS "AMERICA FIRST" THEME

The March 1, 2017, Trade Policy Agenda sent by the United States Trade Representative ("USTR") to Congress provided a glimpse into the Trump Administration's trade policy goals, setting out four major objectives:

- Defending U.S. national sovereignty over trade policy;
- Strictly enforcing U.S. trade laws;
- Encouraging other countries to open markets to U.S. exports; and
- Negotiating "new and better" trade deals.

Additionally, since his inauguration, President Trump has signed a number of executive memoranda and Executive Orders. These reflect the general themes of the new administration's trade policy—concern over the U.S. trade deficit and an emphasis on protecting U.S. jobs and manufacturing, while enforcing existing trade remedy laws.

For example, on March 31, 2017, President Trump signed Executive Order 13786, which directs the Secretary of Commerce and the USTR, in consultation with the secretaries of the Departments of State, Treasury, Defense, Agriculture, and Homeland Security, to, within 90 days, prepare a report identifying major trading partners with which the United States had a significant trading deficit in 2016. According to the Executive Order, the report must: (i) assess the major causes of the trade deficit; (ii) assess whether the trading partner is imposing unequal burdens on or unfairly discriminating against the commerce of the United States; (iii) assess the effects of the trade relationship on U.S. manufacturing and defense industrial bases; (iv) assess the effects of the trade relationship on U.S. employment and wage growth; and (v) identify imports and trade practices that may be impairing U.S. national security.

It remains unclear what, if any, action will result from the report prepared in response to the Executive Order. That being said, any such action likely will target countries that significantly contribute to the trade deficit, including China, Japan, Germany, Mexico, Ireland, Vietnam, Italy, South Korea, Malaysia, India, Thailand, France, Switzerland, Taiwan, Indonesia, Canada, Israel, and Russia. The United States currently has or is in negotiations relating to trade agreements with certain of these countries; it is unclear how those agreements and negotiations would factor into any action taken to combat the trade deficits with those countries, but we may know more closer to or after the 90-day report period, which is June 29. 2017.

President Trump's nomination of Robert Lighthizer for USTR also signals the importance of trade remedy enforcement for his administration. Mr. Lighthizer's long career in private law practice has focused on representing U.S. interests, and particularly the steel industry, in trade remedy cases. Mr. Lighthizer was confirmed by the U.S. Senate on May 12, 2017, and sworn in as USTR on May 15, 2017. He will play a significant role in future trade negotiations, particularly the renegotiation of NAFTA, discussed below.

President Trump signed two Executive Orders on April 29, 2017, reflecting his "America First" trade policy theme. The first directed a review of trade agreements for possible abuses. The Executive Order provides the Secretary of Commerce with 180 days to conduct a review of whether such agreements have been economically beneficial to the United States. The second established a new Office of Trade and Manufacturing Policy ("OTMP") within the White House. This office replaces the National Trade Council within the White House, which was announced on December 21, 2016, and established when President Trump took office. President Trump tasked the OTMP with defending and serving "American workers and domestic manufacturers while advising the President on policies to increase economic growth, decrease the trade deficit, and strengthen the United States manufacturing and defense industrial bases."

We also have seen the "America First" agenda applied in the context of the Committee on Foreign Investment in the United States ("CFIUS") review process. CFIUS reviews the impact of transactions on national security when foreign parties will acquire control over U.S. businesses. CFIUS, under the Trump Administration, appears willing to also consider the impact that such transactions would have on U.S. manufacturing and jobs.

Given these recent changes in trade policy, multinational companies with U.S. trading partners should closely monitor trade remedies cases and the Administration's investigations to determine whether to alter supply chain sourcing decisions. And, both multinational and U.S. companies may want to engage with the Administration to help shape the developing policy in their favor.

TRADE REMEDIES ON THE RISE

Antidumping and Countervailing Duties

While President Obama recognized the need for improvement in the area by signing the Trade Preferences Extension of 2015, trade remedies enforcement to promote U.S. jobs and manufacturing has been central to President Trump's trade agenda to date. In a highly unusual step, Peter Navarro of the White House's previous National Trade Council sent a "Recommendation for Action" to Secretary of Commerce Wilbur Ross encouraging the Department of Commerce to apply the new "particular market situation" rules to calculate antidumping duty rates in the investigation of Oil Country Tubular Goods ("OCTG") from Korea. The Trade Preferences Extension of 2015 authorized the new methodology, which allows the Department of Commerce to take particular market situations into account when calculating dumping margins. Applying it for the first time, the Department of Commerce concluded that the prices for the hot-rolled steel and electricity used to produce the OCTG were distorted, leading to higher duty rates under the new methodology. The Korean producers challenged the Department of Commerce's action at the U.S. Court of International Trade ("CIT") and the CIT issued an injunction on May 15, 2017, to prevent liquidation of entries of products subject to the antidumping duties pending further review. Use of the new "particular market situation" law reflects a new approach that could yield higher antidumping duty margins.

We also may see the Trump Administration self-initiating new trade remedies cases. In the meantime, the favorable political climate may be contributing to an increase in antidumping and countervailing duty petitions brought by various U.S. industries over the last few months. In particular, compared to a total of 17 petitions during 2016, many of which focused on steel products, from March to May 2017, eight petitions have been filed covering a wide range of products, including: (i) silicon metal; (ii) aluminum foil; (iii) biodiesel; (iv) carbon and alloy steel wire rod; (v) carton-closing staples; (vi) tool chests and cabinets; (vii) cold-drawn mechanical tubing of carbon and alloy steel; and (viii) 100- to 150-seat large civil aircraft.

President Trump's statements regarding increased trade law enforcement may have emboldened the U.S. industries bringing these cases. Indeed, on March 31, 2017, President Trump signed an Executive Order to enhance collection of antidumping and countervailing duties. The Executive Order: (i) indicates that the policy of the United States is to impose appropriate bonding requirements, based on risk assessments, on entries of articles subject to antidumping and countervailing duties, when necessary to protect the revenue of the United States; and (ii) directs the Secretary of Homeland Security, in consultation with the Secretaries of the Treasury and Commerce and the USTR, to develop a plan within 90 days that would require covered importers that, based on a risk assessment conducted by U.S. Customs and Border Protection, pose a risk to the revenue of the United States, to provide security for antidumping and countervailing duty liability through bonds and other legal measures, and also would identify other appropriate enforcement measures.

Other Trade Remedies

In addition to increased activity relating to antidumping and countervailing duties, the first few months of the Trump Administration have included the first Section 201 case since President Bush imposed a safeguard measure on steel in 2002 (which, as noted below, was terminated in 2003 after a successful World Trade Organization ("WTO") challenge) and the first Section 232 cases since 2001.

Section 201 of the Trade Act of 1974. On April 26, 2017, Suniva, Inc. filed a petition under Section 201 of the Trade Act of 1974 ("Section 201") requesting a global safeguard against crystalline silicon photovoltaic cells and modules manufactured outside the United States. Under Section 201, domestic industries seriously injured or threatened with serious injury by increased imports may petition the U.S. International Trade Commission ("USITC") for import relief. Following such a petition, the USITC determines whether an article is being imported in such increased quantities that it is a substantial cause of serious injury, or threat thereof, to the U.S. industry producing the imported article. If the USITC makes an affirmative determination, it recommends to the President relief that would prevent or remedy the injury and facilitate industry adjustment to import competition. Such relief usually involves higher tariffs on imports of the product from all countries, quotas, or tariff-rate quotas. The President makes the final decision whether to provide relief and the amount of such relief. Importantly, unlike the antidumping and countervailing duty laws, Section 201 does not require a finding of an unfair trade practice. That being said, the injury showing under Section 201 is more difficult, given that it requires that the injury or threatened injury be serious and that the increased imports must be a substantial cause (important and not less than any other cause) of the serious injury or threat thereof.

In the current trade climate, more industries may bring additional Section 201 cases targeting global imports. While the injury showing may be more difficult, the remedy is much broader, although generally it lasts for no more than three years. Also, the Trump Administration may self-initiate Section 201 cases just as it can self-initiate antidumping and countervailing duty cases.

Section 232 of the Trade Expansion Act of 1962. On April 20, 2017, and April 27, 2017, President Trump signed memoranda for the Secretary of Commerce stating that the Department of Commerce had initiated investigations under Section 232 of the Trade Expansion Act of 1962 ("Section 232") to determine the effects on U.S. national security of steel and aluminum imports, respectively. Such investigations were initiated in light of the large volumes of excess global steel and aluminum production and capacity—much of which results from foreign government subsidies—which distort the U.S. and global steel and aluminum markets. In addition to these investigations, Secretary of Commerce Wilbur Ross recently indicated that the Department of Commerce is considering a Section 232 investigation of semiconductors due to their "huge defense implications," including their use in military hardware and proliferation in devices throughout the economy.

As we previously reported in the January 2017 *Commentary* "Potential U.S. Trade and Foreign Direct Investment Ramifications of the Trump Election", Section 232 authorizes the Department of Commerce to investigate whether imports pose a threat to U.S. national security. During the investigations, the Secretary of Commerce must consult with the Secretary of Defense and may hold hearings or otherwise solicit information and advice. Section 232 investigations include consideration of: (i) domestic production needed for projected national defense requirements; (ii) domestic industry's capacity to meet those requirements; (iii) related human and material resources; (iv) the importation of goods in terms of their quantities and use; (v) the close relation of national economic welfare to U.S. national security; (vi) loss of skills or investment, substantial unemployment, and decrease in government revenue; and (vii) the impact of foreign competition on specific domestic industries and the impact of displacement of any domestic products by excessive imports.

The Secretary of Commerce has 270 days to present the findings of the Department of Commerce's investigations with respect to the effect of the importation of steel and aluminum in such quantities or under such circumstances on U.S. national security, and, based on such findings, the recommendations of the Secretary of Commerce for action or inaction. That being said, President Trump has stated that the investigation into steel could be completed in as little as 50 days. If the President concurs with the findings of the Secretary of Commerce after a Section 232 investigation, the President has 90 days to determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust imports of steel and aluminum and their derivatives so that

such imports will not threaten to impair U.S. national security. The President has broad discretion to impose trade remedies under Section 232. Such remedies could include increased tariffs and quotas on imports of steel and aluminum into the United States. It is unclear at this point whether such remedies would be imposed only on imports of steel and aluminum as raw materials or whether the remedies also would be imposed on derivatives of steel and aluminum, such as imported products for which foreign-produced steel or aluminum is the sole or substantially the main component.

Since 1980,[1] the Department of Commerce has conducted 14 Section 232 investigations covering a wide array of products, including antifriction bearings, uranium, crude oil and petroleum products, ceramic semiconductor packaging, and, most recently, iron ore and semifinished steel. The majority of those investigations found that imports of the products in question did not threaten to impair national security. In a few cases, the Department of Commerce found that imports of the products in question threatened to impair national security, but that no action was necessary to adjust imports. In a few other cases, imports of the products in question were found to threaten to impair national security and the President embargoed imports of those products into the United States—e.g., crude oil from Libya and oil from Iran. In one case, the President found that imports of chromium, manganese, and silicon ferroalloys and related materials did not threaten to impair national security, but accepted the Department of Commerce's recommendations to take certain other actions.[2]

Potential Challenges

Any of the above-described trade remedies actions could face: (i) court challenges by adversely affected parties; (ii) action by affected trading partners before the WTO; and (iii) retaliatory actions by trading partners. For example, with respect to (ii), the last U.S. Section 201 safeguard measure on steel, which was imposed by President Bush in 2002, was terminated in 2003 after a successful WTO challenge. However, a successful WTO challenge following imposition of any of the above-described trade remedies actions does not require a change in U.S. law. Instead, the successful party would be authorized to impose compensatory measures in response to the action taken by the United States. As many multinational companies that rely on the global supply chain may remember, President Trump threatened to withdraw the United States from the WTO during his campaign. And, since President Trump took office, the Administration has stated that it may ignore decisions by the WTO that it views as threatening to U.S. sovereignty. With that in mind, the impact of any successful WTO challenge to trade remedies imposed by the Trump Administration is, at this point, unclear.

TRADE AGREEMENTS: CHANGE TO A BILATERAL FOCUS

Not surprisingly, as we previously reported in the aforementioned January 2017 *Commentary*, one of the first trade actions President Trump took was to withdraw the United States from the TPP, making the withdrawal official on January 30, 2017. Withdrawal likely would have happened regardless of the outcome of the election in part because it had become fairly clear that Congress would not approve the trade agreement. Additionally, the United States currently has free trade agreements with six of the TPP countries and may negotiate agreements with others. President Trump has indicated that he prefers bilateral, as opposed to multilateral negotiations, because he believes that bilateral negotiations are preferable to promote U.S. interests. Indeed, during the first meeting between President Trump and another world leader, he discussed negotiating a trade agreement with Prime Minister Abe of Japan.

As we also previously reported in the January 2017 *Commentary*, although President Trump has not publicly discussed the Transatlantic Trade and Investment Partnership ("TTIP"), which is being negotiated with the European Union, as much as the TPP, TTIP is unlikely to move forward at this point given President Trump's emphasis on bilateral agreements and the potential United Kingdom exit from the European Union. In that regard, President Trump has expressed interest in negotiating a bilateral agreement with the United Kingdom.

During his campaign, President Trump criticized NAFTA, vowing to withdraw the United States from the agreement. Most trade practitioners agree that President Trump could legally withdraw from NAFTA without support from the U.S. Congress. However, after reports that President Trump was prepared to sign an Executive Order withdrawing from NAFTA during the first week of May, many trade groups and others expressed concern and disagreement with that step. For example, agricultural groups expressed concern over the potential disruption

of their substantial trade with Canada and Mexico. In addition, according to a study from the Center for Automotive Research, "[a]ny move by the United States to withdraw from NAFTA or to otherwise restrict automotive vehicle, parts and components trade within North America will result in higher costs to producers, lower returns for investors, fewer choices for consumers and a less competitive U.S. automotive and supplier industry."

Perhaps due, at least in part, to such concerns and disagreement, the United States is now in renegotiation mode. On May 18, 2017, USTR Robert Lighthizer sent a letter to Congress officially informing Congress of the Trump Administration's intent to renegotiate NAFTA, thereby starting a 90-day clock during which USTR will consult with Members of Congress and the public regarding the best strategy for renegotiating NAFTA, which will assist in drafting a more detailed list of negotiating priorities. The 2015 Trade Priorities and Accountability Act establishes the framework for such consultations and requires the negotiating priorities to be made public 30 days before negotiations begin. By following the procedures of trade promotion authority, President Trump will have the benefit of what was previously called "fast track"—requiring that Congress vote on the renegotiated agreement without amendment.

The USTR recently issued a Federal Register notice inviting parties to comment on and participate in a hearing relating to U.S. negotiating objectives regarding the modernization of NAFTA. Written comments are due June 12, 2017, and the hearing will be held on June 27, 2017. Parties that would like to testify at the hearing must provide written notification of their intention to do so by June 12, 2017.

Both Canada and Mexico have stated that they would renegotiate NAFTA, and many items were renegotiated as part of the TPP, to which Canada, Mexico, and the United States were signatories. We expect the renegotiation process, which could begin as early as August 16, 2017, to be complex given that the respective legislative bodies in each country also would need to approve amendments to the agreement. With USTR Robert Lighthizer now in place, we also expect the renegotiation process to move forward quickly. In that regard, Mr. Lighthizer's letter to Congress indicated that USTR hopes to conclude negotiations with "timely and substantive" results. In additional public remarks, Mr. Lighthizer said that the Trump Administration's intent is to conclude negotiations this year.

The May 18, 2017, notice to Congress states that the objective of the renegotiation is "to support higher-paying jobs in the United States" and improve opportunities for the United States under the agreement. The specific topics listed for "new provisions" are: intellectual property rights, regulatory practices, state-owned enterprises, services, customs procedures, sanitary and phytosanitary measures, labor, environment, small and medium enterprises, and establishing effective implementation and aggressive enforcement. Interestingly, the NAFTA rules of origin are not included in these new provisions, nor is dispute resolution under Chapter 19 of NAFTA. However, we expect the parties will take up both of these topics. Rules of origin for important products, such as automobiles, were discussed at part of the TPP negotiations, and the NAFTA parties may use those discussions as a basis for the renegotiations.

In comments made on May 18, 2017, and in keeping with a Trump Administration preference for bilateral negotiations, USTR Robert Lighthizer noted that many of the negotiations would be bilateral because many of the issues are bilateral, but that the end goal is to have a trilateral agreement. One thing is clear—the renegotiations will be a dialogue, not a monologue. Both Canada and Mexico have issues to address: sugar trade for Mexico and lumber trade for Canada, among others. Canada also has indicated a desire to modernize the NAFTA labor and environment chapters.

HOW TO PREPARE FOR THE FUTURE

Companies that rely on imports into the United States should follow these swiftly moving developments and monitor their impact on supply chain issues. Companies that import from China, Mexico, or other countries that contribute significantly to the United States' trade deficit may be particularly susceptible to changes in their cost of goods in the future. Additionally, companies that import steel, aluminum, solar panels, or any items currently or potentially subject to trade remedies proceedings may see increased costs for these imported goods and may need to explore alternative supply sources.

The "America First" trade policy agenda, as revealed over the last few months, focuses on protecting U.S. manufacturing and jobs and assisting U.S. companies injured by imports into the United States. The Administration appears to be willing to

engage with U.S. companies to better understand the nature and extent of how those companies are being injured. With that in mind, U.S. companies being injured by imports, particularly those in the industries identified above, should become engaged as the Trump Administration develops and implements its trade policy. In particular, companies trading with Canada and Mexico may want to comment and appear at the hearing to help craft the United States' NAFTA negotiating priorities. Also, parties may consider: (i) taking advantage of opportunities provided by the Administration to comment on, and participate in any hearings associated with, the above-described Section 232 investigations; and (ii) engaging with the Administration on issues associated with trade remedies enforcement and the trade deficit.

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ENDNOTES

1 Prior to 1980, the Department of the Treasury conducted Section 232 investigations.

2 Those recommendations were to: (i) begin a ten-year program to upgrade National Defense Stockpile ore into high-carbon ferrochromium and high-carbon ferromanganese; and (ii) remove certain ferroalloy imports from eligibility for duty-free entry under the Generalized System of Preferences.