THOMPSON HINE

Trump and Trade Updates – April 2017

Commerce Moves to Review China's "Nonmarket Economy" Status

4/3/17 – The Trump administration on April 3, 2017 issued a notice of initiation and request for public comment and information pertaining to whether the People's Republic of China (PRC) should continue to be treated as a nonmarket economy (NME) country under the antidumping and countervailing duty laws. The notice in the *Federal Register* indicates that this inquiry is part of the Department of Commerce's less-than-fair-value investigation of certain aluminum foil from the PRC.

The notice states that the Department of Commerce has treated the PRC as an NME country in all past antidumping duty investigations and administrative reviews. Yet, under the agreement with the PRC regarding its accession to the World Trade Organization (WTO), the PRC believes that WTO members were required to begin treating it as a market economy in December 2016. The department is conducting this inquiry in order to obtain the most recent data and information available from U.S. industry, and the notice states that U.S. law allows it to review the PRC's nonmarket economy status "at any time."

The timing of this notice is interesting, given that Chinese President Xi Jinping is traveling to the United States for talks later this week.

Draft Notice to Congress Indicates Intent to Begin Renegotiating NAFTA

4/3/17 – In a draft letter to the Senate and House of Representatives, the Trump administration appeared closer to formally announcing and notifying Congress of its intent to begin renegotiating the North American Free Trade Agreement (NAFTA). The draft notes that the "persistent U.S. deficit in goods trade with Canada and Mexico demands that this administration take swift action to revise the relationship to reflect and respond to new 21st century challenges. The NAFTA was negotiated 25 years ago and while our economy and businesses have changed considerably over that period, the NAFTA has not."

The draft includes a list of 19 specific negotiating objectives, including issues surrounding trade in goods, rules of origin, customs matters and enforcement cooperation, trade in services, government procurement, transparency and regulatory reform, the operations of state-owned and state-controlled enterprises, and trade remedies.

Regarding trade remedies, the administration's objectives include (1) seeking a safeguard mechanism to allow a temporary revocation of tariff preferences, if increased imports from NAFTA countries are a substantial cause of serious injury or threat of serious injury to the U.S. domestic industry, and (2) seeking to preserve the ability of the United States to vigorously enforce and promote its trade remedy laws. Another objective is eliminating NAFTA's separate Chapter 19 dispute settlement procedures for antidumping and countervailing duty cases, arguing that panels have ignored the appropriate standard of review and applicable law, and aberrant panel decisions have not been effectively reviewed and corrected.

Sending the draft NAFTA notice to the congressional committees of jurisdiction is required under the provisions of the Trade Promotion Authority law. Further, it appears to be part of an ongoing effort by the Trump administration to negotiate with Congress on a final, official notice that will trigger a 90-day consultation process before NAFTA negotiations can begin. The Senate, however, has yet to confirm Robert Lighthizer as U.S. trade representative, and shortly after the draft notice was leaked, the White House quickly noted that it does not yet know the "final form" the official notice will take.

Executive Order Directs Homeland Security to Develop Plan to Collect Unpaid Tariffs

4/3/17 – Asserting that importers who evade antidumping and countervailing duties in place against them expose U.S. employers to unfair competition and deprive the U.S. government of lawful revenue,

President Trump signed an executive order, “Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws,” on March 31. The order directs the secretary of Homeland Security, in consultation with the secretary of the Treasury, the secretary of Commerce and the United States trade representative, to develop an implementation plan by June 29, 2017 that would (1) require covered importers (those who, based on a risk assessment conducted by 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 (2) identify other appropriate enforcement measures.

According to the order, $2.3 billion in antidumping and countervailing duties owed to the government remained uncollected as of May 2015. President Trump stated, “I'm signing [this] executive order to ensure that we fully collect all duties imposed on foreign importers that cheat. They're cheaters. From now on, those who break the rules will face the consequences – and they'll be very severe consequences.”

Executive Order Calls for Omnibus Report on Significant Trade Deficits

4/3/17 – President Trump signed an executive order on March 31 requiring that the secretary of Commerce prepare and submit a report that examines the causes of trade deficits within 90 days (i.e., by June 29, 2017). The analysis will focus on the major causes of trade deficits, including, as applicable, differential tariffs, non-tariff barriers, injurious dumping, injurious government subsidization, intellectual property theft, forced technology transfer, denial of worker rights and labor standards, and any other form of discrimination against the commerce of the United States or other factors contributing to the deficit. The report will also assess the effects of trade relationships on the production capacity and strength of the manufacturing and defense industrial bases of the United States and on employment and wage growth in the United States, and identify imports and trade practices that may be impairing the national security of the United States.

In signing the order, the president stated that he was “ordering the first-ever comprehensive review of America’s trade deficits and all violations of trade rules that harm the United States and the workers of the United States.” The executive order states that “For many years, the United States has not obtained the full scope of benefits anticipated under a number of international trade agreements or from participating in the World Trade Organization. The United States[’] annual trade deficit in goods exceeds $700 billion, and the overall trade deficit exceeded $500 billion in 2016.” In announcing the order, President Trump stated that, “We're going to investigate all trade abuses, and, based on those findings, we will take necessary and lawful action to end those many abuses.”

Secretary of Commerce Wilbur Ross has indicated that the study will focus on the countries primarily responsible for the U.S. trade deficit: China, Japan, Germany, Mexico, Ireland, Vietnam, Italy, South Korea, Malaysia, India, Thailand, France, Switzerland, Taiwan, Indonesia and Canada.

Trump Administration Announces Nominations for Top CBP and BIS Positions

4/5/17 – President Trump has announced the nomination of Kevin McAleenan for commissioner of U.S. Customs and Border Protection (CBP). McAleenan became acting commissioner of CBP on January 20, 2017 and previously served as deputy commissioner from November 2014 until his appointment to acting commissioner. In this role, he served as CBP’s chief operating officer and senior career official. McAleenan has previously held several leadership positions at CBP and one of its legacy agencies, the U.S. Customs Service. From 2006 to 2008, he served as the area port director of Los Angeles International Airport (LAX), directing CBP’s border security operations at LAX and 17 other airport facilities in one of CBP’s largest field commands. In December 2011, McAleenan was named acting assistant commissioner of CBP’s Office of Field Operations. In this position, he led agency operations to secure the U.S. border while expediting lawful trade and travel at 329 ports of entry in the United States

and 70 international locations in more than 40 countries. McAleenan has been a member of the U.S. government's Senior Executive Service since 2006. Prior to government service, he practiced law in California. He received his Juris Doctor from the University of Chicago Law School and his Bachelor of Arts from Amherst College.

The president also announced the nomination of Mira Ricardel to serve as undersecretary of Commerce for Export Administration and to oversee the Bureau of Industry and Security (BIS). Ricardel currently serves as a special assistant to the president and associate director for presidential personnel. She has had an extensive career in the national security arena in both the public and private sectors. Within the Department of Defense, Ricardel held the positions of acting assistant secretary of Defense and principal deputy assistant secretary of Defense for International Security Policy and deputy assistant secretary of Defense for Eurasia for the George W. Bush administration. She also served as legislative assistant for arms control and foreign policy to former Senator Bob Dole. From 2006 to 2015, Ricardel held senior leadership positions within Boeing Defense Space and Security, most recently as vice president, International Business Development, Network & Space Systems. She received a Bachelor of Science in Foreign Service from Georgetown University and completed doctoral course work at the Fletcher School of Law and Diplomacy.

U.S. & China Establish "100-Day Plan" on Trade

4/10/17 – President Trump hosted Chinese President Xi Jinping late last week for a series of meetings regarding multiple issues, including the state of the bilateral relationship between the United States and China. On the trade front, the two presidents agreed to elevate existing bilateral talks to reflect the importance of making progress on issues. In doing so, they established a new cabinet-level framework for negotiations, the United States-China Comprehensive Dialogue, which will have four pillars: the Diplomatic and Security Dialogue; the Comprehensive Economic Dialogue; the Law Enforcement and Cybersecurity Dialogue; and the Social and Cultural Issues Dialogue.

In his meetings with President Xi, President Trump noted the challenges caused by the Chinese government's intervention in its economy and raised serious concerns about the impact of China's industrial, agricultural, technological and cybersecurity policies on U.S. jobs and exports. Trump reportedly underscored the need for China to take concrete steps to level the playing field for American workers, stressing repeatedly the need for reciprocal market access.

In his comments on the meetings, Secretary of State Rex Tillerson stated that "The chief goal of our trade policies is the prosperity of the American worker. To that end, we will pursue economic engagement with China that prioritizes the economic well-being of the American people." In addition to the four pillars of dialogue listed above, Secretary of the Treasury Steven Mnuchin raised another "dialogue" that he and Secretary of Commerce Wilbur Ross will lead, which "will be focused on trade, investment, and other economic opportunities between both countries." Mnuchin indicated that this dialogue will focus on a more balanced economic relationship, specifically on trade.

Gilbert Kaplan Formally Nominated as Undersecretary of Commerce

4/12/17 - President Trump has now formally nominated Gilbert B. Kaplan to serve as undersecretary of Commerce for international trade. Kaplan is currently a partner at King & Spalding, where he works on antidumping (AD) and countervailing duty (CVD) cases as well as Section 337 cases. According to his bio, Kaplan "filed and prosecuted the first successful countervailing duty (anti-subsidy) case ever against China, in 2007."

Kaplan served in several senior positions in the Reagan administration, including as deputy assistant secretary and first acting assistant secretary of Commerce for import administration, where he supervised over 500 trade remedy cases. Prior to that, he was the director of the Office of Investigations at the

Department of Commerce, in charge of day-to-day trade remedy law administration. Kaplan's bio also states that he was the principal spokesman for the administration on legislative and congressional issues related to AD, CVD and Section 232 national security import relief laws. From 2010 to 2012, he served as the first president of the Committee to Support U.S. Trade Laws, "an organization of companies, trade associations, unions and individuals dedicated to preserving and enhancing the U.S. trade remedy laws."

President Trump Will Not Label China a Currency Manipulator

4/13/17 – President Trump indicated in an interview with the *Wall Street Journal* on April 12, 2017 that his administration will not label China a currency manipulator. Despite repeated campaign statements that he would do so upon taking office, Trump said in the interview that, "They're not manipulators," and indicated that the Treasury Department will not list China as a currency manipulator in its semi-annual report due to be released on April 15. In the interview, he stated that he did not want this issue to hinder efforts to obtain China's cooperation in addressing increasingly aggressive actions by North Korea.

Labeling a country a currency manipulator triggers an investigation by the Treasury Department and can lead to tariffs or other economically punitive measures. However, most economists agree that for the past several years China has not been devaluing its currency but, in fact, has raised the value of the yuan. Senate Minority Leader Chuck Schumer immediately criticized the president, stating that Trump's "failure to name China a currency manipulator is symptomatic of a lack of real, tough action on trade against China."

President Trump Signs "Buy American and Hire American" Executive Order

4/18/17 – President Trump has signed an executive order seeking stricter enforcement of federal procurement policies and revamping the H-1B guest-worker visa program. In remarks on signing the order, Trump stated, "With this action, we are sending a powerful signal to the world: We're going to defend our workers, protect our jobs, and finally put America first."

For "Buy American," the executive order:

- Instructs every agency and department to conduct comprehensive assessments aimed at cracking down on weak monitoring, enforcement, and compliance efforts in order to strengthen Buy American policies.
- Targets waivers and exceptions that have allowed foreign goods unfair advantages in U.S. government procurement.
- Orders that America's involvement in the World Trade Organization's Agreement on Government Procurement and other trade deals be reviewed to ensure they meet the president's standards.
- For the first time, requires that the Buy American bidding process must take into account unfair trade practices.
- Promotes American-made steel by affirming the "melted and poured" standard for steel production in the United States.

Commerce Secretary Wilbur Ross is tasked with reviewing all agency findings under this section of the executive order and providing a report to President Trump by November 23, 2017 recommending how to "close those loopholes" and identify flagrant use of unfair trade practices by foreign trading partners. An official stated that this report will serve as "a blueprint for additional executive and regulatory actions to further strengthen Buy American, as well as guide possible legislative proposals."

For “Hire American,” the executive order:

- Calls on the executive branch to fully enforce the laws governing the entry of foreign workers into the U.S. economy to promote rising wages and more employment.
- Directs federal agencies to propose reforms to the H-1B program in order shift the program back to its original intent and prevent the displacement of American workers.

The president has particularly focused on alleged abuses of the H-1B program, asserting that, instead of allowing U.S. companies access to highly skilled foreign workers in fields where U.S. workers cannot fulfill demand, the program is being used to hire lower paid foreign workers to displace U.S. workers from entry-level jobs.

“This historic action declares that the policy of our government is to aggressively promote and use American-made goods and to ensure that American labor is hired to do the job,” stated President Trump.

Hearing and Request for Comments on U.S. Trade Deficit

The Department of Commerce and United States Trade Representative will hold a public hearing and seek written comments to assist in the analysis called for in Executive Order 13786 (see our prior update, “Executive Order Calls for Omnibus Report on Significant Trade Deficits”). The trading partners with which the United States had a significant trade deficit in goods in 2016 were Canada, China, the European Union, India, Indonesia, Japan, Korea, Malaysia, Mexico, Switzerland, Taiwan, Thailand and Vietnam.

The schedule and deadlines are as follows:

- Wednesday, May 10, 2017, 11:59 p.m. EDT – deadline for interested persons to submit written comments. Also, this is the deadline for requests to appear at the hearing, which must include a summary of your testimony.
- Thursday, May 18, 2017, 9:30 a.m. EDT – public hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, D.C.

Trump Administration Undergoing Interagency Review of Iran Deal

4/20/17 – On April 18, 2017, the U.S. Department of State certified to House Speaker Paul Ryan that Iran is compliant through April 18th with its commitments under the Joint Comprehensive Plan of Action (JCPOA). However, Secretary Tillerson raised concerns about Iran's role as a state sponsor of terrorism and alerted Congress to an effort directed by the president to evaluate whether continuing to lift sanctions would be in U.S. national security interests.

"Iran remains a leading state sponsor of terror, through many platforms and methods. President Donald J. Trump has directed a National Security Council-led interagency review of the Joint Comprehensive Plan of Action that will evaluate whether suspension of sanctions related to Iran pursuant to the JCPOA is vital to the national security interests of the United States."

In further comments after releasing the letter, the secretary strongly rebuked the deal, stating that, "This deal represents the same failed approach of the past." He added that it "fails to achieve the objective of a non-nuclear Iran" and "only delays their goal of becoming a nuclear state."

The full text of the letter:

> The Honorable Paul D. Ryan
> Speaker of the House of Representatives
> Washington, DC 20515
>
> Dear Mr. Speaker:
>
> This letter certifies that the conditions of Section 135(d)(6) of the Atomic Energy Act of 1954 (AEA), as amended, including as amended by the Iran Nuclear Agreement Review Act of 2015 (Public Law 114-17), enacted May 22, 2015, are met as of April 18, 2017.
>
> Notwithstanding, Iran remains a leading state sponsor of terror through many platforms and methods. President Donald J. Trump has directed a National Security Council-led interagency review of the Joint Comprehensive Plan of Action (JCPOA) that will evaluate whether suspension of sanctions related to Iran pursuant to the JCPOA is vital to the national security interests of the United States. When the interagency review is completed, the administration looks forward to working with Congress on this issue.
>
> Sincerely,
>
> Rex W. Tillerson

CRS Issues Report on the Border Adjustment Tax

4/25/17 – With the Trump administration preparing to release its tax reform plan in the next several weeks, the Congressional Research Service (CRS) has just released a timely report on the border adjustment tax (BAT). The report offers an analysis of House Speaker Paul Ryan's proposal of a destination-based cash flow tax (DBCFT), a type of national consumption tax, as part of the "A Better Way" tax reform blueprint. One component of the DBCFT proposal is the implementation of a BAT which has generated considerable interest since the November presidential election.

The report states that although there are many important issues surrounding a BAT that require careful consideration, the response of exchange rates is one that has received much attention. "Standard economic theory predicts that under certain conditions exchange rates would react to a BAT in a way that would leave exports and imports unchanged. That is, exchange rate movements would offset the effects of the tax, leaving the U.S. trade balance unaltered. Some observers, however, have speculated that such a response may not occur in a timely fashion or that exchange rate movements may not completely offset the tax. If either of these two situations were to occur, or if impact across industries was asymmetric, there could be implications for U.S. businesses and consumers, and as a result, the U.S. trade balance." The CRS report provides a basic framework for understanding how and why exchange rates could respond to a BAT.

The report concludes that replacing the current corporate income tax system with a DBCFT with a BAT would be an "unprecedented shift in U.S. tax policy." While such a change would bring uncertainty, CRS analysts stated that "economists tend to agree that any tax-induced advantage for U.S. exports or tax-induced costs on U.S. imports would be offset by adjustments to the exchange-rate value of the dollar. In other words, if the dollar appreciation occurs as economic theory predicts, there should be no changes in the trade balance resulting from tax.