

What to Expect in the USMCA (a.k.a. NAFTA 2.0)

On November 30, 2018, the United States, Mexico and Canada officially signed the United States-Mexico-Canada Agreement (USMCA), a proposed free trade agreement that, if approved by Congress and ratified by the governments of Canada and Mexico, would revise and modernize the North American Free Trade Agreement (NAFTA). Known as “NAFTA 2.0” during the trilateral negotiations, the USMCA is expected to be debated by the 116th Congress in the coming months as it considers legislation to implement the agreement. The new free trade agreement, consisting of 34 chapters and 14 side letters, retains many of NAFTA’s chapters but also makes notable changes and additions to the original trade agreement among the three countries.

Upon its entry into force, the USMCA will supersede NAFTA with “a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region,” as stated in the Preamble. The proposed USMCA will result in changes to the rules of origin for motor vehicle and agriculture products, while modernizing provisions on intellectual property rights, digital trade and trade in services. The agreement allows U.S. dairy producers further access to the Canadian dairy market, adds new obligations on currency misalignment, and includes revised provisions on government procurement and investment. It includes new chapters covering the activities of state-owned enterprises (or designated monopolies), and on anti-corruption to prevent and combat bribery. Other provisions generating debate during the negotiations were the inclusion of a sunset clause for the agreement and a

provision that allows a party to withdraw from the agreement if another party enters into a free trade agreement with a country it deems to be a non-market economy (e.g., China). What follows is an overview of key aspects of the USMCA, which updates a range of issues covered in the 25-year-old NAFTA, including new clauses affecting trade, special treatment for certain goods and sectors, and revised provisions of certain NAFTA clauses.

New Clauses Affecting Trade

Biologic market protection

As a “new generation” agreement, the USMCA will provide intellectual property protections to pharmaceutical products that are or contain a “biologic” for at least 10 years from the date of the first marketing approval. A biologic is used for the prevention, treatment or cure of a disease or condition and is or contains a virus, serum, toxin, antitoxin, vaccine, blood product, allergen or protein. These protections will keep out for 10 years generic versions of any biologic receiving a marketing approval first unless the marketing approval holder consents to the use of the data.

Labor and employment issues

The USMCA adds a chapter covering labor and employment issues, a contentious topic during the negotiations. The chapter promotes compliance with fundamental labor rights, including the protection of migrant workers, protections against sex-based workplace discrimination, the abolition of forced or compulsory labor, freedom of association and protection of the right to strike, and the

prevention and elimination of all forms of violence arising from the exercise of these rights. Certain provisions apply specifically to Mexico, such as the right to collective bargaining.

Digital trade (e-commerce)

For e-commerce, which was only in its infancy and not covered at the time of NAFTA's passage, the USMCA will "recognize the economic growth and opportunities provided by digital trade and the importance of frameworks that promote consumer confidence." The agreement holds that no USMCA country will impose duties or other charges upon the importation or exportation of electronically transmitted digital products (e.g., music, images, videos, etc.). USMCA countries will also adopt or apply consumer protection laws against fraudulent or deceptive activities to protect digital trade users' personal information and limit unsolicited commercial electronic communications.

Periodic review and sunset clause

While NAFTA was not subject to a termination date, the USMCA will be subject to a 16-year term (with the possibility to extend its term for another 16 years upon agreement by all three countries). Further, it must undergo a "joint review" six years after its entry into force; if the USMCA countries do not confirm its extension after that review, it will be reviewed annually until the end of the original term or until the 16-year extension is confirmed by all USMCA countries.

Duty-free and tax-free *de minimis* shipments

Under the chapter for customs administration and trade facilitation, the USMCA countries agreed to new duty-free and tax-free *de minimis* shipment levels under specific expedited customs procedures for express shipments. Duties and/or taxes will not be assessed on shipments equal to or less than US\$800 for the United States; US\$117 for customs duties and US\$50 for taxes for Mexico; and C\$150 for customs duties and C\$40 for taxes for Canada.

Fair market competition

The USCMA includes a chapter covering fair competition, requiring transparency and establishing obligations concerning the enforcement of each country's competition laws and administrative anti-competition investigations. The USMCA countries are also required to adopt or maintain national consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities.

Special Treatment for Certain Goods and Sectors

Automotive rules of origin

The regional value content (RVC) requirement for automobiles under the chapter on rules of origin was one of the most contentious issues addressed during the negotiations and was considered a potential deal-breaker by President Trump. In the end, the countries agreed to these changes:

- For passenger vehicles and light trucks to be considered as originating in the USMCA region and subject to preferential treatment, the USMCA requires 75 percent RVC no later than seven years after enactment of the agreement, between 40 and 45 percent labor value content, 70 percent of steel and aluminum purchases from USMCA countries, and seven essential auto parts originating from USMCA.
- For heavy trucks to be considered as originating in the USMCA region and subject to preferential treatment, the USMCA requires 70 percent RVC no later than seven years after enactment of the agreement, 70 percent of steel and aluminum purchases from USMCA countries, and 45 percent labor value content.
- For both types of vehicles, the USMCA defines three categories of auto parts: core, principal and complementary, establishing specific RVC for each category.

Textile and apparel goods

The USMCA updates the original NAFTA chapter on textile and apparel goods by addressing these issues :

- Handmade, traditional folkloric and indigenous handicraft goods will receive duty-free treatment if they satisfy stated criteria.
- A process has been established to review and allow revision to the rules of origin based on the supply availability of fibers, yarns or fabrics in USMCA countries.
- A special verification procedure will allow USMCA country customs authorities to request a visit to an exporter or producer to review the company's qualification for USMCA preferential treatment and/or to review ongoing or past customs violations concerning textile and apparel goods.
- A *de minimis* rule now applies for certain goods that do not satisfy the applicable change in tariff classification required for an USMCA-originating good:
 - Goods classified under Chapters 50 and 60 and heading 96.19 of the HTS: weight of non-originating materials will not exceed 10 percent of the total weight (where the elastomeric content may not exceed 7 percent).
 - Goods classified under Chapters 61 to 63 of the HTS: weight of non-originating fibers or yarns will not exceed 10 percent of the total weight (where the elastomeric content may not exceed 7 percent).
 - Treatment of goods arranged in sets qualify as originating if all items qualify as originating or if the value of the non-originating items does not exceed 10 percent of the total value.

Agriculture

One of the more significant achievements of the USMCA negotiations was the countries' agreement to "relax" certain agricultural rules and permit cross-border access of certain agricultural goods:

- U.S. access to Canadian dairy and sugar products increases through tariff rate quotas (TRQs) granting duty-free access to several products, including fluid cream, sour cream, ice cream, milk beverages, skim milk powder, butter, cream and cream powder, cheese, whole milk powder, dried yogurt, sour cream, whey, products of milk constituents and concentrated milk.
- Canada grants access to its market under pre-established TRQs and new TRQs for certain U.S. dairy

products, chicken, turkey, eggs, egg products, broiler hatching eggs and chicks.

Revised Provisions of Certain NAFTA Clauses

Investor-state arbitration

The USMCA significantly curtails the existing private investor-state dispute settlement mechanism under NAFTA's Chapter 11. The availability of investor-state arbitration under the USMCA's investment protection chapter is limited to Mexico and the United States; Canada is excluded. Upon implementation, the USMCA contains these revisions:

- Investor-state arbitration remains available for a period of three years after the USMCA's implementation for legacy investment claims (i.e., investments made under NAFTA from 1994 until its termination).
- The new investor-state dispute settlement mechanism will only be available for claims between the United States and Mexico and for disputes arising from government contracts involving the exploration, extraction, refining, transportation, distribution or sale of natural gas and oil; the supply of power generation services; the supply of telecommunications; the supply of transportation services; and the ownership or management of infrastructure. The new text substantially reduces the scope of arbitration available for investments that are not "covered government contracts."
- The United States and Mexico are encouraged to resolve investor-state conflicts through consultations, negotiations and other non-binding procedures.
- Investor-state arbitration claims are limited to alleged violations of:
 - national treatment (including fair and equitable treatment, as well as full protection and security) and most-favored nation principles (equal treatment as people and entities of other non-party nations);
 - expropriation and compensation; and
 - investment disputes related to covered government contracts.

Financial services are specifically excluded from the scope of this revised chapter.

Certification of origin and verification procedures

The USMCA modifies the original text of NAFTA requirements for certifying the origin of goods to claim preferential treatment:

- Importers will be able to certify the origin of a good. Each country will determine the specific requirements that must be satisfied by an importer to issue certifications of origin.
 - The NAFTA certificate of origin will cease to exist as a prescribed format and will be replaced by a declaration of origin on an invoice or any other document, which requires certain information such as imports, exporters'/producers' names and addresses, and a description and HS Tariff Classification of the good. The certification of origin may be completed and submitted electronically.
 - The USMCA makes clear that preferential treatment will not be rejected if the invoice is issued in a territory other than the USMCA countries. The certification of origin, however, must be declared in a document issued in the United States, Mexico or Canada.
 - Specific country-of-origin verification procedures are established for textile and apparel goods.
- An electronic system established by each country to facilitate applying for, maintaining and reviewing the database of trademarks and industrial designs.
 - A database of internet domain name (country-code, top-level, domain (ccTLD) names) registrants and dispute settlement remedies to address the bad-faith registry of domain names identical or confusingly similar to trademarks.
 - Clear rules for the recognition and protection of geographic indications (i.e., identifying a good as originating in a specific territory, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin) and transparency provisions for opposing this protection, including the possibility for trademark holders to oppose a geographic indication if it creates confusion with an existing trademark.
 - Improved efficiency in the marketing approval process for pharmaceuticals and adjustments on patent terms based on that marketing approval process.
 - A minimum 70-year term for copyright protection after the author's death, and a minimum 75-year term for related rights (such as those traditionally granted to performers, producers of sound recordings and broadcasting organizations).

Trade remedies

This revised NAFTA chapter – which covers antidumping, countervailing duty and safeguard investigations and binational panel appeals – now requires each country's cooperation in stopping the evasion of trade remedy duties through the enforcement of or assisting in the enforcement of these duty payments by sharing customs information and/or conducting related verification procedures.

Intellectual property

The USMCA increases and broadens the original NAFTA chapter's protections related to intellectual property, including geographic indications, patents, trademarks, copyrights and matters involving internet service providers. Updates include provisions for:

- The registration of scent marks.

This chapter highlights an "exception" giving each member country the right to protect public health and, in particular, to promote access to medicines for all. In doing so, it addresses certain exceptions in case of national health emergencies or other emergencies, including crises related to HIV/AIDS, tuberculosis, malaria and other epidemics.

While this alert provides an overview of what are generally considered to be the most significant elements and impacts of the USMCA, it by no means covers all of the nuanced revisions and updates to the original NAFTA text, nor does it include a discussion of all of the USMCA's new provisions. [A full chapter-by-chapter searchable text of the USMCA](#) is available on the Office of the U.S. Trade Representative's web site.

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