PUBLICATION

Summary of Possible Changes in U.S. Trade Policy During President Trump's First 100 Days

January 18, 2017

Baker Donelson's Trade and Compliance attorneys are pleased to introduce a quarterly series of client alerts that address how trade and compliance matters in the new administration could affect your business, as well as how you can prepare your business with thoughtful and timely planning. Our series will highlight key developments that will affect outbound and inbound trade, including potential higher tariffs, stepped up enforcement of dumping and subsidies law and significant changes to sanctions and export control laws.

Summary of Possible Changes in U.S. Trade Policy During President Trump's First 100 Days
Our first alert, "President Trump's First 100 Days," provides a brief summary of the changes that may be expected during the President's first days in office. During his campaign, President Trump promised to renegotiate, and if unsuccessful, to withdraw from North American Free Trade Agreement (NAFTA); to withdraw from the proposed Trans-Pacific Partnership Agreement (TPP); to get tough with China, including threatening imposition of a 45 percent tariff on all Chinese goods and labeling China a currency manipulator; to impose a 35 percent duty on U.S. companies that relocate their manufacturing facilities abroad; and to "use every tool under American and international law to end [foreign trade] abuses immediately." In early December, his transition team said that he was considering up to a ten percent general tariff on imports. In addition, the President-elect has promised to reconsider the lifting of sanctions against Iran and Cuba, in addition to suggesting a change of policy toward Russia.

Yet, as the President-elect's cabinet falls into place, it is still unclear exactly what a Trump administration means for international trade. However, there are four areas in which businesses should be anticipating changes:

1. enhanced enforcement of existing trade law and retaliatory tariffs;
2. possible renegotiation of NAFTA and a shifting of negotiation priorities from large regional trade agreements to smaller bilateral trade agreements;
3. possible imposition of an import or border adjustment tax; and
4. tightening of sanctions and export control laws with regard to some countries and relaxation of these laws with regard to others.

Enforcement and Retaliatory Tariffs

President-elect Trump is likely to take advantage of existing trade laws to bring enforcement actions against China and other countries. Antidumping and countervailing duty investigations are likely to continue to increase. Additionally, under the 2015 Trade Facilitation and Trade Enforcement Act (TFTEA), the Commerce Department and Customs and Border Protection (CBP) have considerably more power that will make it easier for domestic producers to bring antidumping and countervailing duty cases, including new powers to bring enforcement actions for evading antidumping and countervailing duties. Further, under the 2015 Trade Preferences Extension Act, the Department of Commerce now has increased latitude when using "adverse facts available," which will likely increase antidumping and countervailing duty rates. Under a Trump

administration, the Commerce Department may also begin to self-initiate dumping and subsidies investigations, which could mean an uptick in cases.

Additionally, there is the possibility that President-elect Trump will initiate temporary tariff hikes on products from certain countries. At the beginning of his administration, President George W. Bush initiated such tariffs on certain steel products. Although the tariffs (called "safeguards") were ultimately successfully challenged at the World Trade Organization (WTO), they caused a significant shakeup in the steel industry and other industries dependent on steel while they were in place. Given President-elect Trump's cabinet appointments, the use of similar safeguards during his administration is a very real possibility. In addition, the President may use Section 301 to unilaterally raise tariffs. Although Section 301 has not been used in this way since the creation of the WTO, it is possible that the President could initiate a retaliatory tariff against another country if the U.S. determines that the country has violated the terms of a trade agreement.

Free Trade Agreements

Businesses that claim preferential tariff rates under NAFTA should be particularly aware of changes that may occur should NAFTA be renegotiated. Although withdrawal from NAFTA is unlikely because its tariffs are statutory in nature and would likely require an Act of Congress to change, renegotiation of NAFTA could include other changes, such as termination of the Chapter 11 investor-state dispute settlement mechanism on which several investors rely and the termination of Chapter 19 binational panels used to bring challenges in dumping and subsidies cases. Further, changes in tariff rates and stricter rules of origin are not out of the question if renegotiation does occur. While several Presidents have promised in the past to renegotiate NAFTA, including President Obama, and while several changes may benefit the U.S., such as modernization of NAFTA's rather stringent verification procedures, renegotiation could also lead to additional trade hindrances that could hurt business that rely on the Agreement.

Furthermore, business should not count on either the TPP or the Transatlantic Trade and Investment Partnership (TTIP) to be ratified soon. Rather than concluding large regional trade agreements, it is more likely that the Trump administration will pursue the negotiation of much smaller, bilateral trade agreements. While there has been discussion of pursuing a bilateral trade agreement with a post-Brexit United Kingdom, business should know that such an agreement is unlikely to be concluded in the next four years since the United Kingdom is not in a position to enter into trade agreements until it has withdrawn from the European Union, which it cannot do for at least another two years.

Import Taxes

In recent weeks, Capitol Hill has been rife with discussion of a possible tax of up to ten percent on imports or, alternatively, a border adjustment tax that would tax U.S. companies' imports while exempting exports. The former was put forward by President Trump's team in December while the House Ways & Means Committee has floated the latter as a possibility since last summer. Although it is unclear what will become of either proposal, both would have a significant impact on the ability of U.S. manufacturers to acquire intermediate goods from foreign countries. Both proposals are vulnerable to legal challenge, particularly a ten percent general import tax, which would be a particularly clear violation of tariff commitments that the United States has made to other WTO members. Importers would be wise to watch the issue.

Sanctions and Export Controls

As is the case with any administration, sanctions and export control laws are shaped by the direction of U.S. foreign policy. As a result, changes are likely to numerous sanctions programs, particularly with regard to Iran, Cuba and Russia. President Trump continues to make his disapproval of the Iran nuclear deal, or Joint

Comprehensive Plan of Action (JCPOA), very clear. While it is less clear that the sanctions relief afforded under the Iran deal will be removed, there is certainly reason to be flexible when conducting business with Iran. The same is true with Cuba, the relaxation of sanctions against which President-elect Trump has called "one-sided." Because changes to both the Iran Transactions and Sanctions Regulations (ITSR) and the Cuban Asset Control Regulations (CACR) were created by executive action, it would be very easy for the new administration to remove the exceptions allowing for U.S. business activity. With regard to Russia, however, sanctions could possibly be relaxed. Although it is unclear whether President Trump would include sanctions relief as part of his promise to reset United States-Russia relations, the possibility could reopen recently closed opportunities for U.S. businesses.