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Client Alert

International Trade & Litigation Practice Group

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President Trump Signs Two Executive Orders On Trade: *Enhanced Duty Collection And Report On Trade Deficits*

For more information, contact:

J. Michael Taylor
+1 202 626 2385
jmtaylor@kslaw.com

Stephen J. Orava
+1 202 661 7937
sorava@kslaw.com

Stephen A. Jones
+1 202 626 2950
sjones@kslaw.com

Jeffrey M. Telep
+1 202 626 2390
jtelep@kslaw.com

Bonnie B. Byers
+1 202 626 5507
bbyers@kslaw.com

Patrick J. Togni
+1 202 626 2958
ptogni@kslaw.com

Clinton R. Long
+1 202 626 2622
clong@kslaw.com

King & Spalding
Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

On March 31, 2017, President Donald Trump signed two executive orders on key issues related to international trade: (1) a Presidential Executive Order on Establishing Enhanced Collection and Enforcement of Antidumping ("AD") and Countervailing Duties ("CVD") and Violations of Trade and Customs Laws ("Enhanced AD/CVD Collection & Enforcement Executive Order"); and (2) a Presidential Executive Order Regarding the Omnibus Report on Significant Trade Deficits ("Omnibus Report On Significant Trade Deficits Executive Order").

President Trump discussed both orders in a ceremony at the Oval Office late on Friday, March 31. The President was accompanied by Vice President Mike Pence, U.S. Department of Commerce Secretary Wilbur L. Ross, Jr., and Dr. Peter Navarro of the White House National Trade Council. In his remarks, President Trump recalled traveling during the presidential campaign to "the cities and towns devastated by unfair trade policies," and he elaborated that trade is "probably one of the major reasons I'm here today." The President remembered seeing "the shuttered factories" and spending "time with the laid-off factory workers," explaining that "these voiceless Americans now have a voice in the White House. Under my administration, the theft of American prosperity will end. We're going to defend our industry and create a level playing field for the American worker—finally."

In his brief remarks at Friday's signing ceremony, Commerce Secretary Ross stated that, "[i]f anyone had any doubt about the President's resolve to fix the trade problems, these two executive orders should end that speculation now and for all time. This marks the beginning of a totally new chapter in the American trade relationship with our partners overseas."

THE ENHANCED AD/CVD COLLECTION & ENFORCEMENT EXECUTIVE ORDER

The first of President Trump's executive orders begins by targeting "importers that unlawfully evade AD and CVD duties," who "expose United States employers to unfair competition and deprive the Federal Government of lawful revenue." The executive order notes that approximately $2.3 billion in AD and CVD duties remain uncollected by U.S. Customs and Border Protection ("CBP" or "Customs"), in many cases "from importers that lack assets in the United States." Thus, the executive order directs that it is now the "policy of the United States to impose appropriate bonding requirements, based on risk assessments, on entries of articles subject to" AD and CVD duties, "when necessary to protect the revenue of the United States."

The Enhanced AD/CVD Collection & Enforcement Executive Order, however, extends beyond the AD and CVD laws. In fact, it issues three directives, all of which address AD and CVD enforcement, but only the first of which is restricted to AD and CVD issues.

First, the executive order provides a 90-day period for the development of a plan to ensure the collection of AD and CVD duties from new importers and from importers that previously have not timely or fully paid AD and CVD duties. More specifically, the executive order instructs the Secretary of Homeland Security (in consultation with the Secretary of the Treasury, the Secretary of Commerce, and the United States Trade Representative ("USTR")) to "develop a plan that would require covered importers that, based on a risk assessment conducted by CBP, 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." The Secretary of Homeland Security, also (and significantly), is directed to identify within the plan "other appropriate enforcement measures." The implementation plan must be completed within 90 days (or by June 29, 2017).

The executive order broadly defines the term "covered importer" as an importer of articles subject to AD or CVD duties for which Customs (1) has no record of previous imports by the importer; (2) has a record of the importer's failure to fully pay AD or CVD duties; or (3) has a record of the importer's failure to pay AD or CVD duties in a timely manner. The executive order also requires that the plan "be consistent with" current federal law regarding bond adjustments that may be made through an importer risk assessment program (19 U.S.C. § 4321) and that may otherwise be required in CBP's discretion (19 U.S.C. § 1623).

Allowing 90 days for completion of the implementation plan will require prompt action by Customs, Commerce, and USTR officials, who will need to consider how importer-specific risk assessments should be conducted. The requirements to provide for enhanced security on entries by "covered importers" (*e.g.*, through revised bonding procedures) also allows for the use of other legal measures (possibly even new registration requirements) and enhanced enforcement.

Second, including but going beyond the AD and CVD laws, the executive order provides a 90-day period for the development and implementation of a strategy and plan for "combating violations of United States trade and customs laws for goods," including with respect to the interdiction and disposal of inadmissible merchandise. With respect to this directive, to ensure "timely and efficient enforcement of laws affecting Intellectual Property Rights (IPR) holders," additional steps (including through rulemaking) shall be taken by the Departments of Homeland Security and Treasury to allow for the sharing of information by Customs with those IPR holders. Such shared information should include "any information necessary to determine whether there has been an IPR infringement or violation" and any information concerning merchandise abandoned before seizure when Customs believes the merchandise would have violated IPRs, had it been imported. In practice, this should help promote information sharing between IPR holders and Customs, by permitting Customs to release information that it previously has not been able to provide to IPR holders.

Third, the executive order instructs the Attorney General (in consultation with the Secretary of Homeland Security) to focus on violations of the trade laws. Specifically, the executive order provides that the Attorney General "shall develop recommended prosecution practices and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecuting significant offenses related to violations of trade laws." Thus, violations of the trade laws should receive new focus by the U.S. Attorney offices supporting each port of entry, as built around to-be-developed recommended prosecution practices specific to trade cases. Also, the direction for the Attorney General to allocate "appropriate resources" to Federal prosecutors should have the real-world impact of providing additional attention and focus on the criminal penalty issues associated with those cases that Immigration and Customs Enforcement ("ICE") officials develop against importers (and their agents) who violate the trade laws.

THE OMNIBUS REPORT ON SIGNIFICANT TRADE DEFICITS EXECUTIVE ORDER

The second executive order that President Trump signed on Friday is prefaced on a policy statement that "free and fair trade is critical to the Nation's prosperity, national security, and foreign policy." The executive order explains that "[f]or 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." As evidence of the harmful effects of the status quo, the order explains that the annual trade deficit in goods exceeded $700 billion in 2016.

To equip "policy makers and the persons representing the United States in trade negotiations" with "current and comprehensive information regarding unfair trade practices and the causes of United States trade deficits," the executive order requires the Secretary of Commerce and USTR – in consultation with the heads of other executive departments or agencies with relevant expertise (including the Secretaries of State, Treasury, Defense, Agriculture, and Homeland Security) – to prepare an Omnibus Report on Significant Trade Deficits (the "Report"). The Report must be submitted to President Trump within 90 days of the Order (or by June 29, 2017).

The Report shall "identify those foreign trading partners with which the United States had a significant trade deficit in 2016." The Report also shall:

- "Assess the major causes of the trade deficit, 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;"

- "Assess whether the trading partner is, directly or indirectly, imposing unequal burdens on, or unfairly discriminating in fact against, the commerce of the United States by law, regulation, or practice and thereby placing the commerce of the United States at an unfair disadvantage;"

- "Assess the effects of the trade relationship on the production capacity and strength of the manufacturing and defense industrial bases of the United States;"

- "Assess the effects of the trade relationship 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."

The executive order does not define "significant trade deficit," but publicly available data indicate that the 2016 U.S. trade deficit (in goods) is attributable, among others, to China ($347 billion), Japan ($69 billion), Germany ($65 billion), Mexico ($63 billion), and Canada ($11 billion). In preparing the Report, Commerce and USTR "may hold public meetings" and solicit comments from stakeholders "including manufacturers, workers, consumers, service providers, farmers, and ranchers." Thus, interested parties from U.S. manufacturing, agriculture, and other sectors should take steps now to prepare for this opportunity.

In sum, Friday's executive orders should provide for more robust AD and CVD duty collection and enhanced bonding requirements on imports of subject merchandise, as bolstered by additional customs and IPR enforcement at the border. The Omnibus Report on Significant Trade Deficits also will provide U.S. manufacturers, farmers, and other segments of the U.S. economy with the opportunity to comment on country-specific issues concerning their industries and markets, and it may emerge as an important tool for the Trump Administration's future trade policy actions.