King & Spalding

Trade & Manufacturing Alert

The Administration Proposes Budget That Favors International Trade Programs And Continues To Consider Reorganization Of The Government's Trade Agencies

On February 14, 2011, President Obama sent his 2012 budget request to Congress. Consistent with the themes sounded in the President's State of the Union address, the budget provides increased funding for numerous trade programs.

The budget favors in particular the National Export Initiative, with a proposed $109 million increase in funding. The U.S. Department of Commerce ("Commerce") would receive the bulk of these funds to support manufactured exports. Commerce also expects to benefit from smaller funding increases proposed for (1) the International Trade Administration's ("ITA") Market Access group, which assists U.S. exporters; (2) ITA's Import Administration group, which administers the trade remedy laws; and (3) the Bureau of Industry and Security, which controls high-technology exports. Eliminated from Commerce's budget are the emergency steel guaranteed loan program and trade adjustment assistance ("TAA") for firms and communities. TAA for individuals and special TAA funding for training through community colleges will continue to be funded.

The Administration also requests increased funding for two programs administered by U.S. Customs and Border Protection ("Customs"): (1) cargo release functionality in Customs' Automated Commercial Environment and (2) pilot cargo screening. The Administration also proposes funding increases for the Office of the U.S. Trade Representative and the Export-Import Bank of the United States.

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The bipartisan U.S. International Trade Commission ("ITC") has requested a $5 million (6 percent) budget increase for 2012. The ITC handles a range of trade-related functions, including the adjudication of disputes under Section 337 of the Tariff Act of 1930. Among other things, Section 337 provides U.S. patent and trademark holders a means for expedited relief from imports that infringe U.S. intellectual property ("IP") rights. The ITC's Section 337 caseload has increased substantially in recent years. Nonetheless, in January 2011, the ITC Chairman, Deanna Okun, outlined a series of cut-backs in the agency's adjudication of these cases. In particular, the ITC's Office of Unfair Imports, which is staffed with IP specialists, would focus its resources in support of specific goals: (1) expeditious adjudication of cases; (2) representation of the public interest; (3) expertise on domestic industry issues; and (4) briefing IP issues where there are a limited number of respondents.

Separately, the Administration is studying options for reorganizing the government's trade functions. On January 30, 2011, the White House tasked Jeffrey D. Zients, the new U.S. Chief Performance Officer, to lead this effort. Lisa Brown, a White House official who led the Obama-Biden transition team's analysis of U.S. government operations, also will be involved. It is possible that the Administration's plans would be guided by a report issued by the Center for American Progress, which discussed consolidating certain Commerce agencies, the Office of the U.S. Trade Representative, the Small Business Administration, the Export-Import Bank of the United States, the Overseas Private Investment Corp. and the U.S. Trade and Development Agency. No timetable has been set for recommendations.

Treasury Department Does Not Identify China As A Currency Manipulator; Senate And House Bills Introduced To Make Currency Undervaluation A Countervailable Subsidy

On February 4, 2011, the U.S. Department of the Treasury issued its annual "Report to Congress on International Economic and Exchange Rate Policies" in which it concluded that "no major trading partner of the United States" qualifies as a currency manipulator. With respect to China, the report noted that "the renminbi remains substantially undervalued," but concluded that China is not a currency manipulator due to some appreciation of the renminbi ("RMB") since June 2010 and a commitment by Chinese President Hu in his January 2011 U.S. visit to "continue to promote RMB exchange rate reform and enhance RMB exchange rate flexibility." The report also emphasized that many Chinese believe that it is in their country's own interest to allow exchange rate flexibility in order to help change the pattern of growth in its economy. Under Section 3004 of the Omnibus Trade and Competitiveness Act of 1988, if the Treasury Department were to identify a country as a currency manipulator in the report, then it would be required to initiate negotiations with that country "on an expedited basis" to remedy the resulting trade imbalance. Because the Treasury Department did not identify China as a currency manipulator, no such expedited negotiations will take place.

Subsequent to issuance of the report, Treasury Secretary Tim Geithner commented publicly on various occasions about the burdens placed on other economies by China's undervalued currency and tightly controlled exchange rate. Notably, in a February 7 speech in Brazil, Secretary Geithner pointed to the increasing value of the Brazilian currency and rising capital inflows into the Brazilian market as evidence that emerging economies with flexible exchange rates are being harmed by countries with deliberately undervalued currencies. At the G-20 meeting of Finance Ministers in Paris on February 18-20, Brazilian Finance Minister Guido Mantega agreed that China's undervalued currency is a problem but also suggested that international currency problems are not limited to China.

Closer to home, a bipartisan group of Senators and Representatives, increasingly frustrated by the Obama Administration's handling of the China currency issue, has again introduced legislation to address the matter. On February 10, Senators Sherrod Brown (D-OH) and Olympia Snowe (R-ME), along with Representatives Sander Levin (D-MI), Tim Murphy (R-PA), and Tim Ryan (D-OH) introduced in the Senate and in the House of Representatives the Currency Reform for Fair Trade Act of 2011. Similar to legislation that passed the

House but not the Senate last year, the bill would make prolonged currency undervaluation actionable as an export subsidy under U.S. countervailing duty law. Although the bill could potentially apply to any country that is manipulating its currency, the bill's sponsors made clear that the it is intended to combat China's currency policies and cited an economic analysis suggesting a 20-40 percent appreciation of the RMB would result in a significant improvement in the U.S. trade deficit and increased U.S. employment. More recently, the Senate Democratic leadership has made passage of this or similar legislation a priority on their legislative agenda this year.

President Obama Creates New Council On Jobs And Competitiveness; Appoints GE CEO As Chairman

In recent months, the administration's focus has shifted from stabilizing the economy in the midst of the financial crisis to creating jobs. On January 21, 2011, President Obama announced the creation of the Council on Jobs and Competitiveness. The Council was created by executive order to replace the President's Council on Jobs and Competitiveness ("PERAB"), which was headed by former Federal Reserve Chairman, Paul A. Volcker. PERAB was set to expire on February 6, 2011. President Obama named Jeffrey R. Immelt, the chief executive officer and chairman of General Electric ("GE"), to be the chairman of this new council of outside economic advisers.

The White House stated that "the council will focus on finding new ways to promote growth by investing in American business to encourage hiring, to educate and train our workers to compete globally, and to attract the best jobs and businesses to the United States." In appointing Mr. Immelt as chairman, President Obama cited his experience at GE "and his understanding of the vital role the private sector plays in creating jobs and making America competitive." Mr. Immelt was at the President's side during meetings with business leaders in Mumbai in November 2010, at which time the White House announced a number of business deals between Indian and American companies, including a $750 million order from India's Reliance Power Ltd. for GE's steam turbines. In an interview in Mumbai on November 6, 2011, Mr. Immelt stated that the President's goal of doubling American exports to more than $2 trillion in the next five years is "the right aspiration." Mr. Immelt also accompanied the President to meetings with Chinese President Hu and business leaders during Mr. Hu's visit in January.

President Obama continued his message regarding job creation at his address to the U.S. Chamber of Commerce on February 7, 2011, urging the Chamber to "hire American workers, to support the American economy, and to invest in this nation." For the government's part, he promised to support the expansion of businesses by encouraging innovation; upgrading transportation, communication, and information networks; investing in education for a trained workforce; and removing regulation and taxation barriers. President Obama, however, emphasized that businesses share responsibility with the government to continue the economic recovery, especially through domestic job creation. Those attending the address noted that the next step is for the President to offer more specific proposals and to take action.

New Members Of Congress Receive Briefing On Manufacturing, Job Creation, And Trade With China

On February 15, 2011, the Committee To Support U.S. Trade Laws ("CSUSTL"), the Conference on the Renaissance of American Manufacturing, King & Spalding, and other Washington D.C.-based organizations jointly hosted a Congressional Briefing for new members of the House of Representatives and their staff entitled

"Manufacturing, Job Creation, and Trade with China."

The goal of the briefing was to engage in a robust discussion with new members of Congress and their staff on ways Congress can assist in rejuvenating American manufacturing. The primary topics addressed changes that needed to be made to U.S. tax, trade, regulatory, and other laws and policies that would contribute to the growth of domestic manufacturing capacity and job creation. Also discussed were the national security implications of U.S. dependence on foreign manufactured goods. This briefing was a follow-up to the Conference on the Renaissance of American Manufacturing that was held at the National Press Club in Washington D.C. in September 2010.

Congressman Frank Wolf (R-VA), Congressman and Co-Chairman of the Manufacturing Caucus Donald Manzullo (R-IL), Congresswoman Betty Sutton (D-OH), Congressman Mike Michaud (D-ME), and Congressman Dana Rohrabacher (R-CA) spoke at the briefing. Other speakers included Gilbert B. Kaplan, President of CSUSTL and international trade partner at King & Spalding; Reau Berry, President, JTB Furniture Manufacturing; Lynn Brown, Senior Vice President, Hydro Aluminum; Daniel Slane, Vice-Chairman, U.S.-China Economic Security Commission; Ralph Gomory, former Senior Vice President of IBM and Professor, NYU Stern School of Business; Robert Lighthizer, former Deputy USTR; and Linda Andros, Legislative Counsel, United Steelworkers Union.

Approximately 100 people attended the congressional briefing, fifty-five of whom were Representatives and congressional staff. Of the congressional staff, almost 50 percent attended on behalf of new Representatives. The other attendees included government officials, business leaders, and policy makers.

International Trade Bar And Federal Circuit Confirm Tough Stance On Fraud In Trade Remedy Proceedings

The issue of fraud committed in trade cases handled by Commerce recently has garnered much-needed attention by both the international trade bar and the courts. On February 2, 2011, the Customs and International Trade Bar Association held a seminar in Washington, D.C. entitled "Trust but Verify: Fraud in Agency Trade Proceedings," during which two federal judges, officials from the U.S. government, and members of the trade bar spoke about the fraud in agency proceedings. Representatives of U.S. producers reported that fraud is occurring ever more frequently in cases before Commerce. The panel considered means within existing federal law to address the issue, including possible application of the federal False Claims Act and provisions concerned with Customs fraud.

Five days later, in *Home Products International, Inc. v. United States*, App. No. 2101-1184, the U.S. Court of Appeals for the Federal Circuit reversed the U.S. Court of International Trade ("CIT") with directions to remand a case to Commerce because newly discovered evidence indicated that the agency's proceedings were tainted by material fraud. (*See* http://www.cafc.uscourts.gov/images/stories/opinions-orders/10-1184.pdf.)

Home Products International concerned an appeal of Commerce's final results in the second administrative review of the antidumping duty order on *Ironing Tables from China*. During the review, a Chinese producer named Since Hardware submitted false documentation in order to establish understated production costs for ironing tables it had exported to the United States. Because the fraud was not discovered and thus Since Hardware's calculated production costs were improperly low, it was assigned a *de minimis* dumping margin. Since

Hardware stood to benefit from its false submissions in two ways: the *de minimis* margin would have caused U.S. imports of ironing tables produced by Since Hardware that were covered by the second review to be assessed no dumping duties, and future entries of ironing tables produced by Since Hardware would be charged no cash deposits.

Although it did not yet know of the fraud, Home Products International, a U.S. producer of ironing tables, appealed the second review final results to the CIT. Before the CIT had issued its decision, Commerce issued the final results of the third administrative review. In that review, Commerce finally discovered Since Hardware's fraud. Significantly, Commerce also concluded that Since Hardware had committed the same fraud in the second review.

After the final results in the third review were issued, Home Products sought to amend its complaint in the appeal of the second review to include new allegations of fraud by Since Hardware. Home Products also asked the CIT to remand the second review to Commerce with directions that Commerce reconsider Since Hardware's second review dumping margin in light of the newly discovered evidence of fraud. The government, however, opposed the motion, arguing that the newly discovered evidence of fraud was "irrelevant" because it was not on the original record of the second review. The CIT denied Home Product's request, stating that it "must avoid the temptation to consult extra-record facts and evidence unfolding in subsequent, ever-evolving administrative reviews of antidumping orders." Home Products appealed the CIT's decision to the Court of Appeals.

The Federal Circuit found that the CIT abused its discretion when denying Home Product's request for a remand, reasoning that administrative agencies "possess inherent authority to reconsider their decisions," and that that authority is "even more fundamental when … it is exercised to protect the integrity of its own proceedings from fraud." *Home Products*, App. No. 2101-1184 at page 13. In reaching its decision, the Federal Circuit labeled as "strange" the government's argument "that nothing in the antidumping statute instructs Commerce to conduct administrative reviews to uncover fraud." *Home Products*, App. No. 2101-1184 at 10 and 14. The second review final results have been remanded to Commerce.

News of Note

United States Trade Representative Testifies Before House Ways And Means Committee

On February 9, 2011, United States Trade Representative Ron Kirk testified at the House Committee on Ways and Means hearing on President Obama's trade policy agenda. Major issues of interest to members of the Committee included the anticipated timeline for pending free trade agreements with Korea, Colombia, and Panama; the renewal of the TAA program; and enforcement issues with China, particularly related to currency undervaluation and intellectual property rights enforcement. Ambassador Kirk stated that the President hopes to obtain congressional approval of the Korea-U.S. agreement this spring, and that the President has authorized Ambassador Kirk to intensify efforts to resolve "serious issues" that remain with the Colombia and Panama agreements, which are principally related to labor rights. No timeline was established by the Administration for resolving any outstanding issues and submitting the three pending free trade agreements to Congress. Ambassador Kirk also urged Congress to renew the TAA program, and pledged that the Administration would continue to "hold trade partners accountable," including China.

China To Issue New Supporting Policies For Wind Power Industry

Several Chinese government agencies are joining forces to finalize a series of policies for the wind power industry to support large-scale wind power enterprises and large-sized wind turbine projects. The new policies, covering government grants, tax intensives, financing supports, *etc.*, are expected to be released after the annual meeting of the People's Congress of China in March. An official from the Ministry of Science and Technology indicates that, during the "12th Five Year" period (*i.e.*, 2011-2015), the Chinese government will give priorities to the development of 3-5 MW onshore and 5-10 MW offshore wind turbines. Furthermore, as announced at China's National Energy Work Meeting held in January, China will vigorously support and speed up offshore wind power constructions in the next few years.

Congress Still Deadlocked Over Extensions Of The Trade Adjustment Assistance Program, The Andean Trade Promotion And Drug Enforcement Act, And The Generalized System Of Preferences

Congress appears to be deadlocked with respect to the extension of three important trade programs: TAA, the Andean Trade Promotion and Drug Enforcement Act ("ATPDEA"), and the Generalized System Of Preferences ("GSP"). Efforts by congressional Democrats to extend the TAA and the ATPDEA failed when legislation to extend both programs was pulled from the House floor without a vote days before the programs expired on February 13. The Republican leadership cited the high cost of the TAA program as the primary reason for the bill's removal from the House voting calendar. Although the proposed extension of ATPDEA was less controversial, its linkage to TAA sealed its fate, at least for the time being.

Senate Democrats have introduced legislation that would extend both GSP and TAA until June 30, 2012. GSP expired at the end of 2010 when Senator Sessions (R-AL) placed a hold on the GSP extension legislation over a dispute regarding imports of sleeping bags from Bangladesh. The proposed new TAA/GSP extension legislation purports to address Senator Sessions' previous objections, but the proposed legislation does not have sufficient support to pass the Senate.

Renewal of these programs will require Democrats and Republicans in both the House and Senate to find an acceptable compromise. The serious differences between the two parties and between the House and the Senate, however, suggest that the program extensions may not be passed for a considerable period of time.

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