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Client Alert

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How to Prepare for the Significant Changes to U.S. Trade Policy under President Donald Trump

On Tuesday, November 8, 2016, Donald Trump was elected President of the United States after a campaign in which he repeatedly criticized long-standing principles of U.S. trade policy. Mr. Trump's victory is likely to lead to a significantly different trade policy agenda for the United States – one that is generally more favorable to domestic manufacturing than any U.S. policy of the last 25 years. These changes are expected to provide significant opportunities and challenges for companies that are affected, positively or negatively, by international trade rules.

As explained further below, the following are critical issues for U.S. and multinational companies to consider going forward under a new Trump Administration:

- Will a more aggressive posture with respect to China improve U.S. market conditions for competing domestic products, increase market opening opportunities in China, escalate the risk of retaliation for exports to China, and/or increase barriers to sourcing of key inputs from China?
- How will NAFTA be changed and what will be the scope of the impact on integrated North American supply chains and on investments in Mexico and Canada?
- What will be the scope and timing of new policies to increase the relief for U.S. manufacturing affected by unfairly priced (e.g., dumped and subsidized) imports, how/when will additional tariffs be imposed, and will they be sustainable in the face of WTO and other legal challenges?

For more information, contact:

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

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

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

Bonnie B. Byers
+1 202 626 5507
bbyers@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

- What will be the target of enforcement activities and will these activities have a positive impact on market access for exports of goods, services, and technology, or will such activities result in negative impacts from potential retaliation by trading partners?
- How will potential off-shoring be impacted and will there be opportunities and commercial incentives to bring manufacturing activities back to the United States?
- What will the impact of new policies and trade negotiating priorities be on trade with other geographic regions, including Latin America and Europe (including post-Brexit)?

Mr. Trump's trade policies remain a work in progress, and major personnel decisions within the Administration will have a significant impact on how those policies are implemented. Any company that is affected by U.S. trade policy, however, should be monitoring and preparing for the dramatic changes that could soon take effect.

The Trump Campaign Represented A Dramatic Challenge To What Had Been A Bipartisan Consensus On Most Trade Issues

To understand the potential significance of a Trump Administration, it is critical to appreciate that since the end of the Cold War there has generally been a strong consensus with respect to U.S. trade policy. Although there have been disagreements on the margins, U.S. trade policy has generally been guided by the following basic principles: (1) the benefits provided by the global trading system to American consumers outweighed any harm to U.S. workers; (2) trade disputes between the United States and its major partners should be resolved through negotiations, or in the formal dispute settlement process at the WTO; (3) the United States should play a leading role in multilateral negotiations for new trade deals, such as the Trans-Pacific Partnership ("TPP"); and (4) major trade agreements involving the United States, such as the North American Free Trade Agreement ("NAFTA"), were intended to last for the foreseeable future.

Since the beginning of his campaign, Mr. Trump challenged all four of these principles. He insisted that the U.S. economy had been badly served by trade deals that were seen as granting more favorable terms to countries like China and Mexico. He argued that, instead, the United States should use all of the leverage provided by its large economy to press its trading partners for more favorable trading terms. Mr. Trump maintained that the United States should generally avoid multilateral trade deals like NAFTA and the TPP. And he asserted that, if elected President, he would insist on renegotiating NAFTA – and may withdraw from it completely.

One other point should be made here. Under U.S. law, the President generally has broad discretionary power over many aspects of trade policy. Among other things, the Executive Branch negotiates new trade deals, represents the United States in WTO litigation (and decides whether to comply with adverse WTO decisions), enforces U.S. antidumping ("AD") and countervailing duty ("CVD") laws, and has broad power to limit imports that threaten to impair the national security. Thus, even without the involvement of Congress, Mr. Trump will have significant power to implement many of the changes he has suggested.

Examples Of How A Trump Administration Could Change U.S. Trade Policy

Given that Mr. Trump's expressed views on trade are so different from the consensus that has dominated U.S. trade policy for the last quarter century, it is difficult to formulate a complete list of the many ways that he could alter the U.S. approach to trade and globalization. Here are a few examples, however, of ways in which U.S. trade policy seems likely to change.

A More Aggressive Approach To China. For over a year, Mr. Trump has insisted that U.S. policymakers have made a mistake by not putting more pressure on China to change certain policies that – in Mr. Trump's opinion – are distorting global markets and putting U.S. workers at a disadvantage. It is likely that a Trump Administration will take a more aggressive approach in dealing with China. Among other things, Mr. Trump has said that he will declare China to be a currency manipulator, which will likely trigger negotiations over that issue. He may also increase enforcement actions to ensure that China is playing by the existing WTO rules and to facilitate greater market access for U.S. goods and services and greater protection of U.S. intellectual property and technology. He will also be likely to continue treating China as a non-market economy for purposes of the AD laws – a policy that provides for a dumping margin analysis that takes into account that home market prices in China are affected by government intervention – even though China insists that such treatment must change in December 2016. The Trump Administration may also use the Committee on Foreign Investment in the United States to aggressively police efforts by Chinese investors to purchase U.S. assets.

The End Of NAFTA? Since its approval in 1993, NAFTA has governed trade relations among the United States, Canada, and Mexico. Mr. Trump, however, consistently has derided NAFTA as a deal that places U.S. workers and businesses at a disadvantage. He has stated that he will either renegotiate NAFTA or cause the United States to withdraw from it completely. Under either scenario, it seems clear that the rules of trade within North America could soon change dramatically.

Stricter Enforcement Of U.S. Trade Laws. For years, U.S. manufacturers have relied on AD and CVD litigation to seek tariffs on dumped and subsidized imports. Through appointments and policy directives at the Department of Commerce and the U.S. International Trade Commission ("ITC"), a Trump Administration could encourage more litigation to address unfairly priced (e.g., dumped and subsidized) imports. Indeed, the Administration could decide to self-initiate such litigation without waiting for domestic producers to do so, which could potentially provide some protection from the often-cited threats of retaliation. The President also has broad discretionary power to grant "safeguard" relief in situations where the ITC finds that imports have been a substantial cause of serious injury to a domestic industry. There have been no major cases seeking global safeguard relief since a 2001 case on steel, in large part because domestic producers doubted the President's willingness to grant relief. That may change under a Trump Administration.

Opposing Decisions To Offshore Production. During his campaign, Mr. Trump repeatedly criticized companies that shifted manufacturing from the United States to Mexico or other countries – and in some instances threatened to impose tariffs on production that is sent offshore. While it is not clear what legal authority Mr. Trump would use in implementing this idea, an aggressive and determined U.S. Administration could put significant pressure on companies trying to decide whether to shift production outside the United States.

Challenging The WTO Dispute Settlement System. With rare exceptions, the United States has generally complied with adverse decisions in the WTO dispute settlement system – even when the U.S. government outspokenly criticized those decisions. In a July 2016 interview, Mr. Trump raised the possibility that the United States might pull out of the WTO if it sought to interfere with his proposals to impose tariffs on companies that move American production to other countries. In fact, given that the United States historically has lost more cases at the WTO than any other country, it seems likely that the Trump Administration will face significant push-back from the WTO if he tries to implement an aggressive new trade policy. At the same time, WTO Members will have to decide whether pressuring the Trump Administration could precipitate even bigger disputes, which could undermine support for the WTO – or even lead to a U.S. departure from that organization.

A New Approach to Trade Negotiations. Since the end of the Cold War, the United States has signed a number of multilateral free trade agreements, from the agreements that created the WTO, to NAFTA, to the recent TPP. In recent years, the United States has been in the process of negotiating a free trade agreement with the European Union. Mr. Trump, however, has expressed major skepticism of such agreements, and has indicated that he prefers bilateral negotiations. He has specifically promised to renegotiate NAFTA and pull out of the TPP. On the other hand, he may be more open to negotiations with a single country. For example, given Mr. Trump's outspoken support for the "Brexit" vote a few months ago, he may consider negotiating a free trade agreement with the United Kingdom.

Preparing For A Trump Administration On Trade

As the above examples show, a Trump Administration could lead to sweeping changes in trade policy – both in the United States and around the world. Companies with significant exposure to the effects of trade policy – from U.S. manufacturers who compete with imports to multinational companies with global supply chains – should recognize the potential for such changes and develop a game plan to respond to what will likely be a very different U.S. trade policy.

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