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Managing the Trump Administration International Trade War

Coping with Section 232 and 301 Tariffs, International Trade Litigation, Heightened Customs Enforcement, and International Trade Uncertainty

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Managing the International Trade War in the Trump Administration

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President Trump has used every resource of the U.S. government to re-order U.S. trade with the rest of the world. While the emphasis has been on trade between the United States and China, in some cases other countries or the entire world (in the case of the steel and aluminum tariffs) are the target. These tariffs go far beyond the traditional use of tariffs to raise money and impact both importers and exporters. This Administration is using the trade war both to effect the ease and use of access to the U.S. market and as a tool to change the balance of trade, intellectual property rights, and even immigration.

The measures taken by the Trump administration are protectionist in nature (making it more difficult for foreign companies, or companies importing foreign components, to sell to the United States), but with a national/economic security focus as well (an emphasis on products or foreign government actions that have potential national security implications). The tactics vary depending on the product and country at issue, including special tariffs (using Section 232 for steel and aluminum, and potential automobiles and automotive parts and Section 301 for products imported from China); negotiated quotas (often to replace Section 232 duties); traditional tariffs imposed using antidumping, countervailing duty, and safeguard measures; threats to raise tariffs on Mexico if it does not take steps to address immigration flows from persons traveling across Mexico; and increasing restrictions on foreign investment in the

United States. The general goal of the tariffs is to restrict imports and to increase foreign producers' prices to encourage consumers to buy domestically made products, thereby strengthening the U.S. manufacturing base.

Since the monetary benefit of the tariffs is not the sole purpose, it is likely the different tariffs will stay in place for the reasonably future. With the Trump Administration signaling that it might put in place new tariffs on automobiles and automotive parts, and perhaps new tariffs on Mexico (since the threatened immigration-related tariffs are only suspended), while also showing no inclination to drop special Section 301 Chinese tariffs, it is apparent that the trade war is a new fact of business life.

Many U.S. companies rely on imported parts and components, often to support substantial value added in the United States. Others rely on sourcing products to resell in the United States. To help navigate the new international trade reality, this white paper summarizes the most recent international trade developments while also providing concrete steps that companies that import into the United States can take to help deal with the international trade environment. In particular, this white paper presents a twelve-step program for companies seeking to mitigate and minimize the impact of the ongoing trade war, including concrete steps for identifying international trade risks, minimizing the potential impact of costly tariffs, seeking exclusions, and using tariff-engineering strategies to minimize the costs of the costly new tariffs. Finally, for companies that seek to take advantage of the current trade environment and are considering filing a trade action, or asserting their rights against foreign sourced competitors under existing trade measures, some options for using trade laws as an offensive weapon are covered as well.

The international trade environment is in constant flux right now, as is the enforcement of international regulations governing exports and international conduct. If you need further information, would like a step-by-step guide for filing product exclusions, would like a sample questionnaire that can be used to help determine if your company should be considering filing an international trade action, or would like a guide to coping with the aggressive enforcement of international regulations by the Trump administration, please contact the authors at +1 202.945.6149 or ghusisian@foley.com (Mr. Husisian), at +1 202.295.4043 or rhuey@foley.com (Mr. Huey), or at +1 202.295.4001 or jcscott@foley.com (Ms. Scott).

A. STEP 1: UNDERSTANDING YOUR COMPANY'S INTERNATIONAL TRADE RISKS

The first step to managing the trade war is to understand the various forms of trade risk. Such risks include tariffs, antidumping/countervailing duties, proper classifications, importer of record liabilities, and supply chain red flags that could indicate attempts to circumvent costly tariffs. These risks apply not only to importers, but also anyone who aided and abetted a trade violation (in particular those in parent-subsidiary or other similar relationships).

While the new trade remedies, such as the Section 232 and 301 duties, get all the press, it should not be forgotten that the U.S. Government always has imposed highly effective trade remedies on various forms on manufactured products, chemicals, and raw materials of concern to many U.S. importers. The most common actions result in antidumping and countervailing duty orders, which are imposed following an investigation into whether producers from selected countries have engaged in "unfair trade" (dumping products or receiving subsidies) that have caused or threaten "material injury" to a U.S. industry. Other trade remedy actions, although less common, also have been used to protect U.S. industries from time to time, including safeguard measures that can impose broad-based relief against entire categories of imports, albeit for a limited time. In most cases, the end result of these proceedings is to impose a special, additional tariff on each entry of the subject merchandise, thereby raising the cost to import the good.

The key trade remedies that importers need to understand are as follows:

1. UNDERSTANDING ANTIDUMPING AND COUNTERVAILING DUTY ACTIONS

Traditional remedies most often take the form of antidumping and countervailing duty investigations (which can be filed together). In the Trump Administration, the filing of these cases has increased sharply to take advantage of a receptive protectionist environment. These forms of international trade remedies focus on relief for individual products or related products, as identified in a petition brought before the Department of Commerce (DOC) and the International Trade Commission (ITC). Both types of cases generally are implemented through the filing of a petition by a U.S. industry that has sufficient industry support to have "standing" to file the petition, although the U.S. government can, but rarely will, self-initiate a case (which last occurred for Softwood Lumber from Canada).

"Dumping" exists when the DOC finds that goods were sold in the United States at less than "fair value," generally defined as the sales price for the identical or similar goods in the home market of the foreign company or a third market (or, in certain situations, the fully allocated cost of production for the goods with the addition of a profit margin). Countervailing duties are imposed when it is determined that a specific producer or industry, or group of producers or industries, has received a "financial contribution" that "benefits" the subject merchandise. In both cases, a special antidumping or countervailing duty is imposed if the ITC also determines that the producers of the domestic like product have either suffered material injury or are threatened with material injury by reason of the subject imports.

The remedy in either case is a tariff designed to offset the margin of dumping or subsidization determined to exist. Duties in antidumping and countervailing duty proceedings are based on the entered value of subject merchandise (depending upon the information submitted in lengthy and detailed questionnaire submissions), with the exact margin determined based upon the lengthy record submitted, including detailed sales and cost information. It is

not uncommon for calculated margins to range into the 30-40 percent range. If the non-U.S. companies that are the subject of these investigations do not fully respond to the detailed requests for information (or fail to have their information verified), the duties imposed are based upon "facts available," which is intended to be punitive. Facts-available margins often are in the high double or low triple digits; for products from "non-market economies" (such as China) also can receive margins this high, thereby effectively barring the subject imports from the U.S. market altogether.

2. UNDERSTANDING SECTION 301

Section 301 of the Trade Act of 1974 gives the U.S. Trade Representative (USTR), at the direction of the president, the ability to impose tariffs based on "an act, policy, or practice of a foreign country that is unreasonable or discriminatory and burdens or restricts U.S. commerce." This remedy is a form of safeguard available for violations of an international trade agreement, such as NAFTA. One of the remedies that can be imposed is higher tariffs on imports from the partner country, which also is granted at the discretion of the president. The remedy is current in place against half of Chinese imports at 25% (for Lists 1, 2, and 3). Further, on May 13, 2019, the USTR released another list of Chinese products, known as List 4. These new items would be subject to up to a 25% duty, with List 4 covering practically all products not already subject to Section 301 duties.

Previously, Section 301 duties were less visible to consumers (because Lists 1-3 targeted goods purchased by manufacturers, not consumers), but List 4 will directly impact consumer goods, such as iPhones, toys, and agricultural products. The proposed List 4 covers 3,805 full and partial tariff subheadings and has an approximate annual trade value of $300 billion. As a result, in the near term nearly all Chinese goods may soon be subject to Section 301 tariffs.

In addition to looking for opportunities to request a Section 301 exclusion, or to comment on the latest round of tariffs, importers should consider evaluating the types of trade strategies outlined in Section C to mute the impact of the Section 301 tariffs.

3. UNDERSTANDING SECTION 232 NATIONAL SECURITY ACTIONS

Where there is a deemed threat to national security, Section 232(b) of the Trade Expansion Act of 1962 authorizes the Secretary of Commerce to investigate imports and then take actions to limit or restrict them, or to "take such other actions as the president deems necessary to adjust the imports of such articles so that such imports will not threaten to impair the national security." To date, this provision has been used for steel and aluminum, although investigations involving uranium and automobiles/auto parts are currently ongoing.

Unlike Section 301 duties that are directed specifically at China, Section 232 tariffs are applied across the steel and aluminum industries to impact worldwide imports (except for countries that have negotiated settlements, including through the acceptance of import quotas). The tariffs are currently set at 10% for aluminum and 25% for steel. Effective May 20, 2019, steel and aluminum imports from Canada and Mexico are no longer subject to the Section 232 duties; previous negotiated settlements have exempted imports from Brazil and Korea, which are now subject to special quotas.

On May 17, 2019, President Trump announced that automobiles and certain automotive parts are being imported in such quantities and under circumstances that national security is threatened. The USTR was directed to negotiate agreements to address this threat with the European Union, Japan, and any other appropriate country. USTR will provide an update within 180 days and the Commerce Secretary is to continue monitoring imports. Based on this, any new Section 232 tariffs on foreign automotive industries have been delayed, but not dismissed.

4. UNDERSTANDING OTHER TRADE ACTIONS

Although the trade actions above are summarized in detail because they have all been invoked by the Trump Administration, for completeness – and to anticipate other future actions – the U.S. Government also has the ability to use several other forms of trade remedies:

- Section 201, or safeguard (escape clause) proceedings, are intended to give temporary, but broad-based, relief to industries suffering severe injury from a surge in imports. Under section 201, domestic industries that believe they meet this standard can petition the ITC for relief. If the ITC makes an affirmative finding, the president can discretionarily grant relief, generally for up to three years. The finding turns only on whether severe injury is occurring; there need not be any finding of an unfair trade practice. Although this remedy has not often been sought in the past, due to a concern that both Republican and Democratic presidents were hostile to using this provision, the general perception is that President Trump would be more likely to grant such relief. Nonetheless, the Trump administration has favored antidumping and countervailing duty actions rather than safeguard actions. Nonetheless, for an industry that needs broad-based relief, the safeguard action is a possibility.
- Section 122 of the Trade Act of 1974 authorizes the president to deal with "large and serious United States balance-of-payments deficits" by imposing temporary import surcharges or temporary quotas or a combination of both. This relief is limited and temporary; it can only last 150 days, and the charge cannot exceed 15 percent of the ad valorem value of the imported goods.

- From the start of his Presidency, President Trump frequently stated his belief that China is a "currency manipulator," which keys into the passage of a 2016 law permitting the president to impose remedial measures if bilateral talks with a country accused of manipulating its currency prove ineffective. Under the law, any such designation requires the U.S. Department of Treasury initiate negotiations with the country so designated to eliminate the unfair advantage, leading to the possibility of remedial measures if the talks fail. Such a designation could be used to exert pressure on China to deal with issues related to the funding of capacity expansion in areas where there is little commercial reason for such construction or other actions by the Chinese government that encourage exports to the United States. To date, this procedure has not been invoked.

Although not a pure trade measure, Section 337 proceedings target unfair trade practices, including the infringement of patent and trademark rights. Section 337 proceedings, which are most often intellectual property proceedings in another venue, can result in the complete blockage of goods at the border. In some recent cases, U.S. companies have created novel theories that would allow the ITC to reach a wide variety of conduct, thereby expanding the use of the section 337 process to address perceived unfair trade practices.

B. STEP 2: IDENTIFYING YOUR COMPANY'S INTERNATIONAL TRADE RISKS

Determining the potential duties is only the first step. The second step is determining whether your company is responsible for the payment of such duties. Measures to accomplish this include the following:

- ***Evaluate When Acting As Importer of Record.*** Although the Section 232 and 301 tariffs are aimed at foreign manufacturers, the duties imposed actually are collected from the importer of record as a percentage of the ad valorem value of each entry of the subject merchandise. The same is true for the assessment of antidumping and countervailing duties. Importers who are not paying attention to the impact of tariffs can find themselves on the hook for the full payment of these duties. Importers need to be aware of contractual arrangements where they have agreed to be the importer of record or have agreed to reimburse for the payment of any Customs & Border Protection (CBP or Customs) duties.
- ***Check Entries Carefully Against AC/CVD Orders and Section 232 and 301 Coverage.*** CBP depends upon importers of record to self-classify goods under the Section 232 and 301 rules, as well as to determine whether imports fall within the written scope of antidumping and countervailing duty measures. Failure to pay any form of duties can result in a backbill for the duties owed, interest, substantial penalties, and even the loss of import privileges. Relying on Customs brokers or freight forwarders to handle the tariffs without oversight often can be inadequate, as these third parties generally are not in a good position to determine the country

of origin or HTS classification, let alone make the difficult determination of whether a particular entry falls within the written scope of antidumping or countervailing duty orders. Once the goods have reached the customs territory of the United States, it is too late to do anything because the duties become owed upon entry. Because the liability of customs brokers is generally limited by contract to the modest value of the fee paid for the processing of the goods, companies should take steps to independently follow which goods become subject to new orders as part of their customs compliance.

- ***Be Aware of Potential Circumvention Red Flags.*** Because duty rates can be high, some less scrupulous exporters will misclassify their goods, such as by claiming different product attributes or classifications than in fact exist, by claiming an erroneous country of origin, or by transporting through third countries. Allegations of Chinese exporters using such strategies to avoid antidumping or countervailing duty orders aimed at China are common; CBP is now seeing similar strategies for Section 232 and 301 duties. Any importer noticing red flags that indicate potential circumvention should check into it before CBP does.

Even companies that are not acting as the importer of record can see a major impact from the new duties. As with any raw materials or component cost increases, these Section 232 and 301 tariffs create many issues across supply chains. Companies that rely on imported materials, or that purchase from companies that purchase imported materials, likely will see an impact from these new tariffs, including:

- Product shortages and allocation issues;
- Requests that customers accept goods from factories outside of China;
- The attempted exercise of price adjustment clauses in supply contracts;
- Unilateral demands for price increases or for price surcharges;
- Demands that customers take over responsibility for duties, including through shifting responsibility for which company acts as the importer of record;
- Claims of commercial impracticability under U.C.C. § 2-615;
- Claims of force majeure and the exercise of force majeure provisions in contracts (particularly if the force majeure clause contains broad catch-all language such as "or any other events or circumstances that may affect the Company's ability to deliver products");
- Refusals to ship product that could trigger duties; and
- Court challenges and international arbitration actions in the case of international supply contracts.

To avoid these types of issues, importers should consider their arrangements with business partners to determine if risk can be shifted or shared. Measures along these lines include the following:

- ***Conduct a Risk Assessment Review of Critical Supply Contracts that May Be Impacted.*** Companies impacted by the new duties should work with sales and procurement teams to identify key long-term contracts and purchase orders that are or will be impacted by the new tariffs. Specific contract terms to examine include provisions that pertain to: (a) raw materials increases and any applicable pricing formulas; (b) other requests for cost increases; (c) force majeure; (d) notice requirements; and (e) termination rights.
- ***Establish Contingency Measures in Long-Term Supply Agreements.*** Companies highly reliant on imported goods need to evaluate whether their long-term contracts cover the contingency of which party acts as the importer of record, the delivery terms (terms like CIF and FOB can impact who is responsible for paying for duties), whether reimbursement of duties occurs, whether the possibility of increasing tariffs is even addressed, and whether the parties have the right to terminate the contract based upon the imposition of unanticipated duties. Force majeure clauses may or may not meet legal requirements for contract termination on the basis of unanticipated duties. Companies finding themselves unexpectedly paying Section 232 or 301 duties should evaluate whether they have legal options to update their contractual terms, particularly as contracts come up for renewal.
- ***Investigate Alternative Sources of Supply.*** Duties are based upon the country of manufacture, not whether the products are directly exported from China. If there are alternate sources available, the company may work to line up and qualify a replacement supplier. But this may not be feasible if the goods are specially manufactured products that require testing and a lengthy validation process. The company should ascertain how much product it has in stock and identify when an interruption in supply would cause a shutdown in the manufacturing line. The company can then determine whether its best course of action is to acquiesce to the payment of the new duties, proceed with qualifying an alternate supplier, or take other steps to minimize the duty payments.
- ***Negotiate Solutions with Business Partners.*** In most cases, business partners, customers, and other impacted companies are reluctant to assume increased tariffs. This can leave the importer of record "holding the bag," needing to pay the additional duties unless some alternative solution is found. Many companies are finding their contracts do not allow them to pass on the duties, meaning that negotiated solutions, often based upon preserving the value of long-standing business arrangements, are needed. Where this does not work, litigation unfortunately may be the next threatened step. The strength of any attempt to shift duties often is fact-dependent and requires individual analysis.

Companies should update their procurement and sales teams regarding these developments and their potential impact across the manufacturing supply chain. Companies may want to proactively conduct a review and risk assessment of all Section 301 lists for a variety of reasons, including determining whether they should comment on potential new duties; seek product-specific exclusions where such openings are still available; and evaluate whether

they should see alternative commercial and supply arrangements to avoid duties. Otherwise, companies should consider seeking exemptions or exclusions, or implementing the types of supply chain strategies outlined in the next section.

C. STEP 3: SEEKING GENERAL SECTION 301 HTS EXEMPTIONS

On May 17, 2019, USTR announced the procedure for the public hearing and public comment on the proposed List 4.[1] Any written comments are due June 17th.

Receiving an HTS exemption would remove the HTS from List 4 and benefit *any* importer of a product with that tariff classification. This is distinct from a product-specific exclusion, where only the applicant receives the benefit of no tariff and must reapply for the exclusion yearly.

For Lists 1-3 (particularly Lists 2 and 3), it was difficult to receive HTS exemption. At this point, it is not clear how many HTS exemptions will be granted. On the one hand, the point of List 4 is to provide nearly full coverage of remaining Chinese imports – a goal that is arguably undermined if there are a large number of exclusions. On the other hand, the remaining items on List 4 are ones that were chosen specifically to avoid duties for Lists 1-3, presumably because they were viewed as more sensitive, targeted consumer goods, or would disproportionately harm the U.S. economy. Depending on how flexible USTR is, the number of HTS exemptions granted may be large or small.

Comments can relate to any aspect of the proposed action, including: (1) the specific tariff subheadings and whether those listed should be retained or removed (or others added); (2) the level of increase, if any, of the duty; and (3) the appropriate aggregate level of trade to be covered by the additional duties.

For an HTS exemption, USTR is requesting that comments address whether imposing increased, or any, duties on a product would be "practicable or effective to obtain the elimination of China's acts, policies, and practices" and whether imposing these duties would cause "disproportionate harm to U.S. interests, including small- or medium- size businesses or consumers." In addition to these arguments, we also recommend that comments address whether the exemption of certain HTS tariff lines would foster national security goals (supporting energy independence, defense industries, and other important industrial goals), the amount of downstream U.S. production supported by given imports, the likely impact on the

[1] *See* Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 96 (May 17, 2019) https://www.govinfo.gov/content/pkg/FR-2019-05-17/pdf/2019-10191.pdf.

U.S. industrial base, whether the goods are produced by any U.S. producers in any appreciable quantities, and any other factors that support public policy arguments as to why any given tariff line should be excluded from the proposed List 4 tariffs.

The comments must be submitted on www.regulations.gov under the docket number USTR-2019-0004 by clicking "comment now!"

D. STEP 4: SEEKING PRODUCT-SPECIFIC SECTION 301 EXCLUSIONS

Under the Section 301 process, special tariffs are imposed on entire categories of merchandise, as defined by the 10-digit harmonized tariff system code. Many U.S. companies, however, have argued that their particular imports are not available from U.S. producers – or even from sources other than China – and thus should be exempted. Others have argued that their own products are not appropriate targets for retaliation.

To handle these complaints, the USTR has in the past established recourses for U.S. importers and consumers. Although the List 1 and 2 Section 301 exclusions process is over, the USTR has announced that there will likely be a similar process set up for Lists 3 and 4. Importers should monitor the USTR Section 301 website to be aware when these new exclusion opportunities are made available.[2] If they are, it is highly likely that the exclusions process will mirror the one previously used for Lists 1 and 2, as described below.

1. UNDERSTANDING THE SECTION 301 EXCLUSIONS PROCESS

The Lists 1 and 2 exclusions process is the model of how a Lists 3 and 4 exclusions process likely will function. For Lists 1 and 2, U.S. companies could petition the government for specific products to be exempted from the duties. According to the USTR, the government was "providing an opportunity for the public to request exclusion of a particular product from the additional duties to address situations that warrant excluding a particular product within a subheading, but not the tariff subheading as a whole."[3]

[2] USTR, "Section 301 Exclusion Process," https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-china/section-301-exclusion-process.

[3] *See* Press Release, Office of the United States Trade Representative, "USTR Releases Product Exclusion Process for Chinese Products Subject to Section 301 Tariffs," (July 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/ustr-releases-product-exclusion.

Like the Section 232 exclusions process, the Section 301 process required exclusions requests on a company-specific basis for specific products (although trade associations also could file). Unlike the Section 232 process, however, the process was open only for a limited time. Exclusions for Lists 1 and 2 are closed. The exclusion process for List 3 is likely to begin in June or July and will be a product-by-product process. USTR published its proposed 301 Exclusion Request Form in the Federal Register on May 21, 2019.[4] The exclusion's grant or denial largely depends on whether the product can be found domestically or in a third country, whether the additional duty will result in severe economic harm, and whether the product is of strategic importance or related to the "Made in China 2025" program. List 4 will likely have a similar, if not identical, process.

When the USTR issues an exclusion, it is granted for one year and applies retroactively. This means that companies filing exclusions requests while actively importing the product should carefully keep track of all entries, since they may need to seek a refund on an individual-entry basis of any Section 301 tariffs paid should the exclusion request succeed. Importers may need to protest liquidation if they have not yet heard back on their exclusions requests.

Companies that import products from China should carefully review the various lists of products to determine whether their imports are covered by the imposed or prospective tariff lists. Companies also should evaluate whether they have valid reasons to seek an exclusion, as detailed in the next section.

2. SUBMITTING AN EXCLUSIONS REQUEST

Assuming that the prior exclusions model is followed, both individual companies and trade associations will be able to submit requests for exclusions. Requests can be made based upon public or confidential information; if confidential information is submitted then the request must also submit a public version (with only the latter being posted on Regulations.gov). Only one product can be addressed per exclusions request. The file name must include the ten-digit subheading of the HTS number applicable and the name and person of the company or person submitting the request. Any exclusion request "must specifically identify a particular product, and provide supporting data and the rationale for the requested exclusion." Specifically, the request "must include the following information":

- The ten-digit subheading of the HTS number applicable to the exclusion request.

[4] *See* USTR, "Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation- Form to Request Exclusion of Product," 84 Fed. Reg. 98 (May 21, 2019), https://www.govinfo.gov/content/pkg/FR-2019-05-21/pdf/2019-10482.pdf.

- Identification of the particular product "in terms of the physical characteristics (*e.g.*, dimensions, material composition, or other characteristics) that distinguish it from other products within the covered 8-digit subheading."
- The "annual quantity and value of the Chinese-origin product that the requester" or trade association purchased "in each of the last three years."
- A certification that the information submitted is complete and correct.[5]

In addition, each exclusion request "should address the following factors":

- Whether the particular product is available only from China. In addressing this factor, requesters should address specifically whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries.
- Whether the imposition of additional duties on the particular product would cause severe economic harm to the requester or other U.S. interests.
- Whether the particular product is strategically important or related to "Made in China 2025" or other Chinese industrial programs.[6]

The stated factors are not the only ones that submitting companies should highlight. Potential winning arguments can include: (1) the lack of any U.S. or non-Chinese suppliers of certain components; (2) the need to import specialized forms of the merchandise that are not reasonably available from other sources (such as material made with dedicated tools and dyes); (3) a national security interest in the use of the product imported from China; (4) the support of large downstream U.S. value added by the Chinese imports; (5) the support of a large amount of downstream product exports, the lack of any connection of the particular Chinese imports with any of the alleged Chinese intellectual property intrusions; (6) arguments that the particular imports are not "strategically important or related to the 'Made in China 2025'" industrial policy; and (7) any demonstrable economic hardship flowing from the tariffs, particularly for small- and medium-sized firms.

Notably, the USTR specifically states that it "will not consider requests that identify the product at issue in terms of the identity of the producer, importer, ultimate consumer, actual use or chief use, or trademarks or tradenames."[7] These restrictions make it difficult or impossible to argue that companies that import from affiliates, subsidiaries, or joint ventures located in China should be exempted solely because the company brings over branded products or those that it has tailored to its own use in downstream production. Instead, companies

[5] *Id.*

[6] *Id.*

[7] *Id.*

need to develop information grounded in the general product characteristics to support an exclusions request.

USTR has a request form on the USTR website under "Enforcement/Section 301 investigations" and on regulations.gov in the "Supporting Documents" section; the form can also be found on the USTR website. It is likely an updated version of this form will be used for Lists 3 and 4. The USTR "strongly encourages interested persons to use the form to submit requests."

After a request is posted on regulations.gov, interested parties will have fourteen days to file a response. After the fourteen-day response period has ended, interested parties will then have an additional seven days to reply to those initial response submissions, either in support of or opposition to the request. No timing is set as to when the USTR will respond, other than a promise that the "USTR will periodically announce decisions on pending requests."

3. SEEKING CLARIFICATION

According to the Federal Register notice, companies seeking further information should contact USTR Assistant General Counsel Arthur Tsao or Director of Industrial Goods Justin Hoffmann at (202) 395–5725 or Traderemedy@cbp.dhs.gov for Customs-related questions. U.S. Customs also has issued guidance to help importers determine how to deal with the tariffs. According to CBP guidance (which will likely apply to future exclusions):

- Any Section 301 tariffs are entirely in addition to normal tariff duties.
- The additional tariffs are imposed by reporting two tariff classifications: the normal tariff found under chapters 1-97 of the Harmonized Tariff Schedule and an additional tariff to account for the Section 301 tariffs.
- The application of the duties is based upon the country of origin of the goods (*i.e.*, where they were last substantially transformed), not the country of export. This means that the duties cover any Chinese goods even if they are first shipped to another country.
- Any goods that are entered into a foreign trade zone generally must be admitted using "privileged foreign status" pursuant to 19 C.F.R. 146.41, meaning that the products will be subject to any applicable duty rates or quantitative limitations related to the classification. This is to prevent companies from using foreign trade zones to try to evade any payment of the Section 301 duties.[8]

[8] *See* U.S. Customs & Border Protection, "Section 301 Trade Remedies to be Assessed on Certain Products from China effective July 6, 2018," https://www.cbp.gov/trade/programs-administration/entry-summary/section-301-trade-remedies-be-assessed-certain-products-china-effective-july-6-2018.

- Unlike with the Section 232 duties, duty drawback is possible for Section 301 duties.

E. STEP 5: SEEKING PRODUCT-SPECIFIC SECTION 232 EXCLUSIONS

On March 23, 2018, companies that rely on imported steel and aluminum were confronted with new special tariffs of 25 percent on all imports of steel and tariffs of 10 percent on all imports of aluminum. Apart from recent negotiated exclusions of coverage for Canada and Mexico, as well as prior negotiated exclusions for Brazil and South Korea, coverage of these duties is worldwide.

These measures created a great deal of uncertainty for consumers of these products. To help address fears of shortages, DOC announced an exemptions process. Pursuant to the ongoing exclusions process, U.S. consumers of steel products can seek exclusions where: (1) steel and aluminum products are not available domestically; (2) domestic production is insufficient to satisfy domestic consumption; or (3) specific national security needs otherwise require an exemption. These are the *only* arguments that the DOC will consider.

1. HOW THE EXCLUSIONS PROCESS FUNCTIONS

DOC has established an exclusions process, which consists of two parts: (1) a Federal Register notice explaining the process; and (2) an exclusions submission form (tailored for steel and for aluminum).

The exclusions process is limited to "parties in the United States," *i.e.*, "[o]nly individuals or organizations using [steel or aluminum] articles … in business activities … in the United States may submit exclusion requests." The rationale is that consumers are the entities that "contribute to [the] economic welfare through business activities in the United States." Foreign steel and aluminum makers, and other entities that do not consume these products, may not file because "[a]llowing individuals or organizations not engaged in business activities in the United States to seek exclusion requests could undermine the adjustment of imports that the president determined was necessary to address the threat to national security posed by the current import" levels of steel and aluminum.

Exclusion requests are granted, "as appropriate," for the "import of goods not currently available in the United States in a sufficient quantity or satisfactory quality, or for other specific national security reasons." No other basis exists for granting an exclusion request. The first two categories are intended to encompass situations where the U.S. industry cannot benefit from an exclusion. The last is intended to deal with situations where the consumer manufactures goods that have a national security impact (*e.g.*, defense articles or critical infrastructure), or industries of national importance such as energy.

The U.S. industries may object, and submit rebuttal information, within 30 days of the placement of the exclusion request on the U.S. exclusions website. Any individual or entity objecting needs to "provide factual information on the production capabilities at steel or aluminum manufacturing facilities that they operate in the United States; the availability and delivery time of the products that they manufacture relative to the specific steel or aluminum product that is subject to an exclusion request; and discussion on the suitability of its product for the application or applications identified by the exclusion requestor." Pursuant to requests by applicants, a rebuttal period is now provided to respond to objections.

Decisions regarding exclusions are made by the Bureau of Industry and Security (BIS) with the DOC, which is the entity that generally oversees the Export Administration Regulations (export controls on commercial/dual use products). Most of the decisions have taken longer than the 90-day scheduled announced by the agency due to the large number of applications overwhelming the agency.

BIS grants exclusions only based upon strong evidence supporting the claim that the product is not available domestically/available in sufficient quantities or that there is a specific national security rationale for a claimed exemption. Companies providing exclusion requests need to consider carefully what type of support they can submit to distinguish their submissions from the flood of exclusion requests. Strong support for any claimed need for an exemption will likely be the key to securing a favorable exclusion decision.

Generally, BIS has deferred to U.S. industry objections. Statistics show less than one percent of steel exclusions were granted if the US objected and less than three percent of aluminum exclusions.[9]

2. HOW TO MAKE AN EXCLUSION FILING

The information to be submitted primarily is found in a form located here: https://www.regulations.gov/document?D=BIS-2018-0006-0001. These forms and supplements are "primarily focused on the availability of the product in the United States," with information about availability of the product abroad only being tangentially important to the extent it illuminates U.S. national security considerations. The submission must "clearly identify, and provide support for," the argument that the "article is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security consideration." Submitters should not include confidential information in the exclusion form because the

[9] *See* Section 232 Steel and Aluminum Exclusion Data, https://quantgov.org/tariff-exclusion/.

exclusion requests will be released to the public. If it is relevant to the Secretary's consideration, then there are special procedures to allow separate submission of such information.

Submitters can provide no more than 25 pages of support, both for the initial request and for any rebuttal. Submitters must provide exclusion requests in electronic form and submit them at www.regulations.gov.

3. WHAT DO EXCLUSIONS LOOK LIKE?

Exclusions will be made on a product basis, based on the physical characteristics of the excluded products and will be issued only to the "individual or organization that submitted the specific exclusion request, unless BIS approves a broader application of the product" to apply to additional importers. Exclusions generally will not be issued in blanket form. In other words, if Company A receives an exemption for a given product, Company B will not be able to rely on that exclusion, even if it is importing the same type of steel.

There are procedures for minimizing the work created by numerous customers requesting exclusions for the same or similar products. Follow-on requesters can reference exclusion requests already approved, as "[o]ther individuals or organizations that wish to submit an exclusion request for a steel or aluminum product that has already been the subject of an approved exclusion request may submit an exclusion under this supplement."

If an original exclusion application is denied, BIS will consider a new exclusion if it provides "new or different information in an attempt to meet the criteria for approving an exclusion request for that product." Unless the submitter submits significant new information, it is unlikely BIS will reconsider its earlier denial.

The exclusions are effective five days after they are published on regulations.gov and are typically limited to one year. The company is able to re-apply for the same exclusion after it has lapsed.

F. STEP 6: IMPLEMENTING TARIFF MANAGEMENT STRATEGIES

If exemptions and exclusions do not work, then companies need to take a nuanced approach to managing tariffs based upon their own individual supply chains and sourcing patterns. Tariff management consists of managing each input of the product, its country of origin, its manufacturing location, and its potential tariffs and duties. The goal is to avoid the application of the duties in the first place by taking the products out of the scope of coverage of the new remedies.

Questions to ask when evaluating your supply chain include the following:

- Was a risk assessment completed for critical supply contracts that may be impacted?
- Do you know each input of the product, its country of origin and manufacturing location, HTS classification, and its potential tariffs and duties?
- Who is the importer of record and who will subsequently be paying the duties if they are shifted contractually?
- Are there contingency measures in long-term supply agreements to allow changes in pricing or withdrawal from the deal to deal with unexpected sharp changes in costs and the new tariffs?
- How long until any long-term arrangement ends to allow changes in the pricing structure?
- What is the expected cost of the new duties? Can they be shifted to any other party or will they be borne entirely by the importer?

Based on the answers to these questions, importers will be able to determine their risk exposure and whether it makes sense to continue to pay the duties (and hope they go away soon, an increasingly remote prospect), to invest in major changes to their supply chains, or to engage in the type of "tariff engineering" strategies outlined below.

In some cases, it may be possible to change the HTS number of the good, which can impact the duty paid. Importers should examine whether the HTS classifications they have historically used are the best options. In some cases, importers are finding that new HTS numbers better reflect the good as imported and also happen to avoid duties. Given the expansion of the Section 301 duties to cover nearly all trade with China, the utility of this strategy is diminishing.

Tariff engineering, however, remains a potent potential coping method for the Section 301 tariffs. The Section 301 duties extend broadly and cover both goods directly imported into the United States and those first exported to another country and then shipped to the United States. Notably, this includes Chinese-origin goods used in the manufacture of downstream products, *unless* the goods are sufficiently transformed in an intermediate country that they take on a new country of origin. Tariff engineering accordingly is a method used to alter the product's country of origin by changing the source of key components or determining how to precisely determine where substantial transformation occurs (and to take this step out of China).

To determine a product's country of origin, CBP does not apply a single country-of-origin rule. As a general matter, many Free Trade Agreements (such as NAFTA) require that each signatory use a tariff-shift analysis to determine country of origin, as this is viewed as a more objective standard and less susceptible to manipulation by each country's regulatory authority. Thus, for purposes of determining whether normal Customs principles apply, the starting

point is whether the production within a NAFTA country has satisfied whatever tariff-shift rules are applicable for that good.

CBP also has determined, however, that it will not apply a tariff-shift analysis for purposes of Section 232 or 301 duties. According to CBP, the different test is required because Section 232 and 301 duties are analogous to antidumping duties, countervailing duties, or safeguard measures, where substantial transformation rules are applied. CBP accordingly has stated that "[w]hen determining the country of origin for purposes of applying current trade remedies under Section 301, Section 232, and Section 201, the substantial transformation analysis is applicable."[10]

Pursuant to this ruling, you can have a different country of origin for NAFTA and for Section 301 purposes. In HQ ruling H300226, the manufacturer was importing motor parts into Mexico for assembly.[11] CBP found the assembly was sufficient to satisfy the NAFTA marking rule, requiring that the good be marked a "product of Mexico." After applying the substantial transformation test to the same product, however, CBP concluded that the Mexican assembly operations were not sufficient to confer the country of origin for purposes of Section 301. So the final article was, at one and the same time, a product of China (meaning the exporter had to pay Section 301 duties) even though the good also needed to be marked "made in Mexico" pursuant to a traditional NAFTA analysis for country-of-origin marking purposes and for purposes of determining what normal tariff rates should apply.

Substantial transformation means the product must be transformed into an entirely new and distinct item to have a new country of origin. Courts have determined the mere assembly of foreign component parts does not constitute a substantial transformation if the inputs had a predetermined use at the time of importation.[12] A product is substantially transformed when, as part of a significant manufacturing process, the component parts lose their identity and become an integral part of an entirely new article.

Under the *Energizer Battery* approach, the following are the key considerations for determining country of origin:

- where the key components that give the product its essential attributes are manufactured or extracted;
- where the bulk of the value added occurs;
- where the assembly occurs;

[10] *See* Customs HQ Ruling H301619 (Nov. 6, 2018).

[11] *See* Customs HQ Ruling H300226 (Sept. 13, 2018).

[12] *See* Energizer Battery Inc. v. United States, 190 F. Supp. 3d 1308 (Ct. Intl. Trade 2016).

- whether the goods are merely assembled from a set of components that define the final outcome of the assembly (predetermined use);
- the amount of time the assembly takes; and
- the amount of skill the assembly takes.

In applying these rules, it is important to note that they apply in both directions. In other words, one way of changing the country of origin is to originate the parts and components from a third country, where the parts and components are the essential attributes of the final product. In this scenario, the assembly would remain in China while the parts and components would be manufactured in another country, such as Vietnam, but the product would remain Vietnamese because there was insufficient processing/assembly in China to confer a new country of origin. Another way to get a non-Chinese country of origin would be to procure the inputs from China but then conduct sufficient downstream production in a third country like Vietnam. Although the parts and components are from China, if there is sufficient downstream production in Vietnam, which creates a new article of commerce, then the country of origin would shift to Vietnam. In either scenario, the fact that the country of origin is not China would indicate that no Section 301 duties are due.

Beyond these general rules, it is essential to evaluate each supply chain decision based on its own facts. By changing the country of origin of critical inputs, engaging in substantial manufacturing and substantially transforming a product, and carefully evaluating whether the current HTS code is the best option, importers may be able to successfully avoid the new tariffs. Similar strategies work for antidumping/countervailing duties. If your company is being impacted by the Section 232 and 301 tariffs, you can contact the authors to discuss the application of the rules, and the potential for tariff engineering, for your operations.

G. STEP 7: MONITORING POSSIBLE LIABILITY FOR ANTIDUMPING, COUNTERVAILING DUTY, AND SAFEGUARD TARIFFS

Antidumping and countervailing duty orders can appear for new products at any time. It is not uncommon for importers of a product newly covered by such orders to find themselves stuck when a case is filed, particularly if they are contractually obligated to continue to purchase the foreign product despite the prospect of sharply higher duties. In some cases, companies have imported goods, only to find out – after entry – that they are subject to antidumping or countervailing duties. Since it is not possible to get duty drawback for these types of tariffs, there is no alternative but to pay the unexpected (and often quite costly) extra tariffs.

To avoid this from happening, here are some precautionary steps companies should take to be certain they are on top of this form of international trade risk:

- ***Monitor Import Statistics and Trade Rumors.*** Sometimes, trade filings come out of nowhere, through the filing of a petition that was impossible to predict. In many cases, however, there are signs a case is coming – industry rumors, articles in industry publications, or trade patterns compatible with a finding of material injury "by reason of" imports of a given product. Cases are especially likely to be filed when imports from key foreign countries are increasing, when average unit values for such products are declining, and when the U.S. industry is suffering from declining profitability or increasing losses. Especially for industries where trade remedy filings are common, it can be useful to pay attention to trends that potentially indicate the filing of an action. Data regarding import trends, including the average unit value of imports and the quantity of imports, broken down by country and Harmonized Tariff System classification, is available on the ITC Data web website.[13]
- ***Evaluate When Acting As Importer of Record.*** Although trade remedy actions are aimed at foreign manufacturers and exporters, the duties imposed actually are collected from the importer of record as a percentage of the ad valorem (value) of each entry of the subject merchandise. Importers who are not paying attention to the release of new orders can find they have inadvertently imported goods now subject to extra duties – in some cases, at rates that exceed the value of the good itself (*i.e.*, where duty rates exceed 100 percent). Companies need to be aware of contractual arrangements where they have agreed to be the importer of record, particularly for goods like chemicals, iron, and steel products where trade filings are common.
- ***Establish Contingency Measures in Long-Term Supply Agreements.*** Companies highly reliant on imported goods need to evaluate whether their long-term contracts cover the contingency of which party acts as the importer of record, the delivery terms (terms of delivery like CIF and FOB can impact who is responsible for paying for duties), whether reimbursement of duties occurs, whether the possibility of increasing tariffs is even addressed, and whether the parties have the right to terminate the contract based upon the imposition of unanticipated duties. Force majeure clauses may or may not meet legal requirements for contract termination on the basis of unanticipated duties. Companies concerned about unexpected duties are better served by drafting tariff-specific contingency measures.
- ***Check Entries Carefully Against Orders.*** As noted, every time a new trade remedy is imposed, there are always importers surprised by the unanticipated duties. Relying on customs brokers or freight forwarders to handle this situation often can be inadequate, as these third parties generally are not given the responsibility of knowing what products are planned for importation. Once the goods have reached the customs territory of the United States, it is too late to do anything because duty drawback is not available for antidumping and countervailing duties. It also is not uncommon to have customs brokers miss the imposition of new

[13] *See* ITC Data Web, https://dataweb.usitc.gov/scripts/user_set.asp.

antidumping or countervailing duties, even though this task does fall within their contractual responsibilities. Because the liability of customs brokers is generally limited by contract to the modest value of the fee paid for the processing of the goods, companies should take steps to independently follow which goods become subject to new orders as part of their customs compliance.

- ***Know the Correct Classification of Entries.*** Duties for antidumping and countervailing duty tariffs are imposed based upon the physical description of the merchandise, not the HTS classification, which is given for convenience only. If CBP determines goods should have been declared to be subject to an antidumping duty order, it will impose the duties even if the HTS classification declared or believed to be true indicated otherwise. In any situation where entries are in a gray area, importers should pay special attention to get the classification correct and determine whether the good falls within the scope of the order. Some orders have complicated scopes that can make classification, such as the aluminum extrusions order (which is the subject of more than 110 scope determinations by the DOC). If certainty is not possible through self-classification, importers should consider filing a request for a scope ruling, which results in the DOC issuing a definitive ruling as to whether the goods are within the scope of an order.
- ***Be Aware of Potential Circumvention Red Flags.*** Because duty rates can be high, some less scrupulous exporters will misclassify their goods, such as by claiming different product attributes or classifications than in fact exist, by claiming an erroneous country of origin, or otherwise. Duties are paid, however, by the importer of record not the manufacturer. Any importer noticing red flags that indicate potential circumvention should check into it before CBP does.
- ***Establish a Monitoring System and Vigorously Participate in Administrative Reviews.*** Foreign companies that export subject merchandise need to be especially careful. Under DOC rules, the two largest foreign exporters generally are chosen to be "mandatory respondents" in administrative reviews. Administrative reviews are conducted annually and involve the submission of new data by the foreign producer to reset the antidumping or countervailing duty margins. Sophisticated foreign companies operating under an order can construct detailed monitoring systems that allow them to sell at close to non-dumped prices in the United States, thereby allowing them to maintain or even lower the operative antidumping margin assessed against their entries.

H. STEP 8: UPDATING YOUR CBP COMPLIANCE PROCEDURES

While new tariffs are understandably receiving a lot of attention, it should not be forgotten that normal CBP penalties have more than doubled over the last three years (approaching $1 billion annually). With CBP both monitoring import patterns for evasion of the Section 232 and 301 duties, and continuing to emphasize enforcement of the Customs laws, we expect

that this trend will continue. Thus, even companies not subject to Section 232 and 301 duties should be strongly considering implementing or reviewing existing Customs compliance measures if they are frequent importers.

An additional concern is that the DOJ increasingly is bringing actions seeking criminal penalties for Customs matters. The DOJ has done so both by using statutory provisions related to Customs matters (entering goods into the United States via fraud, gross negligence or negligence,[14] entry of goods that are falsely classified,[15] and entry of goods by means of false statements)[16] and through non-Customs provisions as well (the use of federal provisions regarding the obstruction of justice,[17] the federal conspiracy statute,[18] money laundering,[19] smuggling,[20] and aiding and abetting).[21] Further, as explored in detail below, the U.S. government increasingly has been relying on the False Claims Act (FCA) to address shortfalls in duty collections.[22] The use of these non-Customs provisions is notable for supporting higher criminal penalties. For example, while each count of falsely classifying goods under 18 U.S.C. § 541 is punishable by up to two years in prison, violations of the smuggling provisions in 18 U.S.C. § 545, obstructions of justice pursuant to 18 U.S.C. § 1519, and money laundering pursuant to 18 U.S.C. § 1956 can be punished by up to twenty years in prison.

The net result is both increasingly broad tools to combat willful CBP violations and higher potential penalties. Notably, the U.S. government has become willing to pursue liability for

[14] 19 U.S.C. § 1592 (2011).

[15] 18 U.S.C. § 541 (1994).

[16] 18 U.S.C. § 542 (1996).

[17] 18 U.S.C. § 1519 (2002) ("Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, … any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States … or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.").

[18] 18 U.S.C. § 371 (1994).

[19] 18 U.S.C. § 1956 (2016), 18 U.S.C. § 1957 (2012).

[20] 18 U.S.C. § 545 (2006).

[21] 18 U.S.C. § 2 (1951).

[22] 31 U.S.C. §§ 3729-33 (2009-2010).

individuals as well. It is our expectation that the increasing use of criminal penalties and hefty civil penalties, including for individuals, will continue to increase.

In addition, Congress enacted the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) (signed into law on February 24, 2016), which represents the largest change in Customs rules since the Customs Mod Act in 1993.[23] Among other changes, TFTEA: (1) improves intellectual property rights protection rules; (2) establishes a new Intellectual Property Rights Coordination Center to consolidate oversight of IP-related Customs issues and to coordinate IP investigations to identify producers, smugglers, or distributors of infringing merchandise; (3) expands substitution drawback of duties while increasing the time periods for claiming drawback; and (4) mandates increased cooperation among agencies and consultation with Congress on the progress made by the agency in implementing the law and improving CBP transparency, accountability, and coordination in enforcement efforts. CBP has published interim final regulations implementing a new structure that contains Centers of Excellence and Expertise, which moves certain responsibilities from port directors to a more industry-specific structure as a means of harmonizing treatment of imports at different ports.[24]

TFTEA also includes the Enforce Act and Protect Act within Title IV, Section 421 of the TFTEA. The Enforce Act and Protect Act establishes a formal process for CBP to investigate allegations of evasion of antidumping and countervailing duty (AD/CVD) orders. As developed in detail below, these provisions offer an opportunity for U.S. companies to combat evasion of AD/CVD orders. The presence of these procedures, however, also increase the stakes for non-compliance.

For all these reasons, it is prudent for any company that regularly acts as the importer of record to have a comprehensive Customs compliance program in place, especially if the company regularly relies on free-trade preferences, imports from Mexico, China, Brazil, India, and other countries known for Customs evasion, has large import volumes, or otherwise engages in the types of importation patterns that tend to draw CBP attention. To implement such a program, we recommend that importers consider the following compliance points:

[23] *See* H.R. 644,114th Cong. (2016), https://www.gpo.gov/fdsys/pkg/BILLS-114hr644enr/pdf/BILLS-114hr644enr.pdf.

[24] *See* U.S. Customs & Border Protection, Regulatory Implementation of the Centers of Excellence and Expertise, 81 Fed. Reg. 92,978 (Dec. 20, 2016).

1. FOCUS ON CUSTOMS COMPLIANCE HOT SPOTS

As a starting point, we recommend that companies consider CBP priorities in recent years and whether these priorities are covered in their compliance programs. In particular, we are seeing that the following areas are seeing significant attention from CBP:

Informed Compliance Letters. A recent development is the issuance of "informed compliance" letters by CBP. These letters often are issued to major U.S. importers to encourage them to review their recent entries and determine if they have treated entries correctly where they acted as the importer of record. These letters often are sent to major importers who have not been audited in the past decade or that are viewed as being at a higher risk for violations.

The receipt of an informed compliance notification letter means CBP has reviewed the data of an importer of record and likely identified specific problems with its import transactions, putting the company at an increased risk of a comprehensive audit. According to CBP officials, the expectation is that companies that receive these letters will soon be the subject of a "focused assessment" or other type of CBP audit in the near future. The letters thus are a way of encouraging major importers to enhance their compliance and file voluntary self-disclosures in anticipation of the audit.

To provide further encouragement, CBP has indicated that companies that do not follow up with a voluntary self-disclosure can expect any subsequently discovered violations will be subject to higher-than-normal penalties. The letters warn not only of potential monetary penalties, but also the prospect of seizure or forfeiture of imported merchandise.

While the letters do not change the operative level of care expected of all importers (who are required to exercise "reasonable care" in the execution of their Customs obligations), the letters serve as a warning shot that the company needs to get its Customs house in order. Further, with major importers increasingly receiving such letters, an even better compliance best practice is for companies to implement the types of actions that are required when such a letter is received, rather than waiting for the actual receipt of such a letter.

Best practices in such a situation include the following:

- preparing for a CBP audit;
- reviewing its Customs compliance policies;
- reviewing the care taken by its Customs brokers;
- conducting a risk assessment, including with regard to the issues identified in the letter;
- determining if its classifications are correct and supported by the product attributes;
- determining whether any post-entry adjustments are needed;

- determining whether free trade preferences are supported by FTA certificates of origin and appropriate regional content;
- evaluating whether off-invoice items such as royalties and assists are appropriately recognized; and
- considering whether there are any other issues in the company's import data to indicate compliance failures and penalty risks.

While the assessment should start with the issues identified in the letter, the review should be comprehensive. CBP auditors have the authority to examine any areas where compliance may be lacking. If issues are found, the company should consider whether the issues are systemic. If the entries are too numerous to make a quick evaluation, statistical sampling can be used to help evaluate the scope of potential issues and the potential risk exposure. Further, the review also should cover the rigor of the importer's compliance measures and training, as these are evaluated by CBP in an audit. Any errors should be documented and a plan put in place to strengthen the company's compliance procedures and internal controls to prevent their recurrence.

The company also should strongly consider filing a prior disclosure. This can be accomplished using an initial marker, which merely informs CBP that an investigation of potential compliance lapses is ongoing. This locks in voluntary disclosure credit while buying time to complete a thorough investigation and to provide a subsequent full report.

Trade Security Issues. Since September 11, the enhancement of border security has been a priority of CBP, not only for immigration and visits to the United States, but also with regard to the movement of goods. We expect these efforts will accelerate under the new administration as part of the anticipated Trump administration national security initiative. This likely will mean changes in the frequency of searches of incoming cargo, potentially impacting the time of clearance, especially at busy ports. It may also mean changes in the operation of, or eligibility to use, the C-TPAT program, a voluntary program that allows certified importers, carriers, consolidators, licensed Customs brokers, and manufacturers to enjoy expedited processing and transit times at the border, reduced number of CBP examinations, and other benefits of being a trusted CBP partner.[25]

Forced Labor in China and Other Countries. In 2016, Customs issued nationwide orders instructing U.S. ports to detain certain products produced by forced labor in China. The authority for these orders is found in 19 U.S.C. § 1307 (known as section 307), which authorizes CBP to issue orders prohibiting importation of merchandise mined, produced, or manufactured, wholly or in part, by forced labor. Although section 307 has been in place for years, the TFTEA enhanced the efficacy of the provision by removing certain restrictions on

[25] *See* CBP, "C-TPAT: Customs-Trade Partnership Against Terrorism" (2016), https://www.cbp.gov/border-security/ports-entry/cargo-security/c-tpat-Customs-trade-partnership-against-terrorism.

when the provision could be applied, thereby removing a loophole which provided that the provision only could be applied if the "consumptive demand" for those goods in the United States exceeded domestic production. Under the revised law, any interested party (including competitors and public interest groups) may request that CBP investigate whether an import was produced using forced labor in another country. If the investigation proves the charges, then any products found to be made in whole or in part using forced labor are subject to exclusion or seizure.

CBP has been making the blockage of goods produced by forced labor a priority, as shown by CBP outreach on the program[26] and frequent press releases announcing detention orders for violations.[27] As explored in detail in the companion white paper on international regulatory issues, the Departments of Homeland Security, State, and Treasury also have issued an unusual three-agency warning regarding North Korean forced labor in particular and the sourcing of goods that may have initially come from China or been produced by North Korean laborers who are sent abroad by the North Korean government. We expect this focus on barring goods made with forced labor will increase, making it imperative that companies that import from China in particular, but from other parts of the world as well, put in place enhanced due diligence and supply chain compliance measures, as described below.

Supply Chain Due Diligence. As explored in detail in the companion white paper to this one ("Managing the Aggressive Enforcement of International Regulations by the Trump Administration: Compliance Best Practices for Companies that Source, Operate, or Sell Abroad"; available on request from the authors), the Department of Homeland Security (which includes CBP), and the Departments of State and Treasury, have issued FAQs and a special advisory regarding the need for supply chain compliance and due diligence. To cope with the enhanced U.S. Government expectations for supply chain compliance, we recommend that frequent importers expand their Customs compliance measures to include procedures for vetting and clearing suppliers, to ensure that they are not importing goods made using forced labor, goods sourced from embargoed countries, governments or persons, goods that violate U.S. intellectual property requirements, and other ways in which suppliers can trigger CBP scrutiny.

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[26] *See* CBP, "Forced Labor" (2017), https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations.

[27] *See CBP,* "CBP Commissioner Issues Detention Order on Stevia Produced in China with Forced Labor" (2016), https://www.cbp.gov/newsroom/national-media-release/cbp-commissioner-issues-detention-order-stevia-produced-china-forced; CBP, CBP Commissioner Issues Detention Order on Potassium Products Produced in China with Forced Labor (2016), https://www.cbp.gov/newsroom/national-media-release/cbp-commissioner-issues-detention-order-potassium-products-produced (2016); CBP, CBP Commissioner Issues Detention Order on Chemical, Fiber Products Produced by Forced Labor in China (2016), https://www.cbp.gov/newsroom/national-media-release/cbp-commissioner-issues-detention-order-chemical-fiber-products.

In determining what type of supply chain due diligence, it is useful to consider the key details regarding the steps one company took when it found supply chain issues. In the ELF Cosmetics penalty notice, OFAC imposed a seven-figure penalty. The penalty assessed, however, would have been much larger if OFAC had not given ELF Cosmetics mitigation credit when it took the following compliance steps:

> ELF stated the company has terminated the conduct which led to the apparent violations and has taken the following steps to minimize the risk of recurrence of similar conduct in the future:
>
> - Implemented supply chain audits that verify the country of origin of goods and services used in ELF's products;
> - Adopted new procedures to require suppliers to sign certificates of compliance stating that they will comply with all U.S. export controls and trade sanctions;
> - Conducted an enhanced supplier audit that included verification of payment information related to production materials and the review of supplier bank statements;
> - Engaged outside counsel to provide additional training for key employees in the United States and in China regarding U.S. sanctions regulations and other relevant U.S. laws and regulations; and
> - Held mandatory training on U.S. sanctions regulations for employees and suppliers in China and implemented additional mandatory trainings for new employees, as well as, regular refresher training for current employees and suppliers based in China.[28]

To underscore the compliance message, OFAC added a compliance warning, stating as follows:

> This enforcement action highlights the risks for companies that do not conduct full-spectrum supply chain due diligence when sourcing products from overseas, particularly in a region in which the DPRK, as well as other comprehensively sanctioned countries or regions, is known to export goods. OFAC encourages companies to develop, implement, and maintain a risk-based approach to sanctions compliance and to implement processes and procedures to identify and mitigate areas of risks. Such steps could include, but are not limited to, implement-

[28] OFAC, "Enforcement Information for January 31, 2019," https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190131_elf.pdf.

ing supply chain audits with country-of-origin verification; conducting mandatory OFAC sanctions training for suppliers; and routinely and frequently performing audits of suppliers.[29]

Importers should incorporate similar supply chain compliance measures into their own Customs compliance policies.

Revenue Collection Issues. Although post 9/11 border security concerns have somewhat eclipsed what was long considered the main role of Customs – the collection of tariffs – tariff collection still remains a core function of CBP. In particular, we are seeing a renewed emphasis by CBP on the issues of:

- The classification of goods.
- The appropriate valuation of goods, especially with regard to off-invoice items (royalties and assists, and so forth).
- The correct country of origin.
- The importer maintaining the appropriate support for regional content and maintaining free trade agreement certificates of origin at the time of importation.
- The declaration of the correct country of origin based upon the appropriate rules of substantial transformation or tariff shifts (*e.g.*, for NAFTA).
- The declaration of any payment of antidumping and countervailing duty tariffs.

Importers should review the way in which these issues are handled to ensure they are occurring in a compliant fashion. If the company's compliance program has not been updated in the last few years, a review that includes whether these issues are sufficiently covered likely will be a good use of compliance resources.

2. IMPLEMENT CUSTOMS COMPLIANCE BEST PRACTICES

Second, frequent importers should evaluate whether they need to enhance their compliance measures in the following ways:

- ***Enhance/Implement a Customs Compliance Program.*** It is surprising that even some large importers do not have a Customs compliance program in place, or have compliances measures that are dated or are not well adapted to current import patterns. Since the existence and effectiveness of a compliance program is one of the first items tested by CBP in an audit, a pro-active review of the compliance program is the starting point for enhanced Customs compliance.

[29] *Id.*

- ***Conduct a Classification and Valuation Review.*** Importers should regularly review the items they commonly import and confirm the accuracy of HTS classifications. These classifications should be maintained in a tariff classification database that is available to Customs brokers or any other party responsible for ensuring correct entry. Importers also should review the methodologies that are used to calculate the ad valorem value of entries, paying particular attention to transactions with affiliates and to whether the valuation includes all off-invoice items, such as royalties and assists.
- ***Conduct an Antidumping and Countervailing Duties Product Review.*** The collection of full AD/CVD tariffs and the prevention of circumvention of the hundreds of AD/CVD orders currently in effect is a priority of CBP. The TFTEA gives CBP the tools to fight antidumping and countervailing duty evasion, as discussed above. Companies importing goods subject to these orders should carefully review their entries to ensure they are occurring in good order with the payment of full duties, consistent declaration of the correct country of origin and coverage by the orders, and so forth. Importers should confirm their judgment that goods being declared as not being subject to AD/CVD orders are correctly classified. Where importing goods are covered by antidumping duty orders, importers should confirm they are in a position to certify that they have not entered into an agreement to receive, and have not in fact received, any reimbursement of antidumping duties. The importer should confirm it is consistently following this requirement, as any failure to provide the required certification will lead both CBP and DOC to presume reimbursement, thereby doubling the duties to be imposed.[30]
- ***Evaluate FTA Claims.*** Importers should review any FTA or duty preference program instructions to determine their accuracy. Common issues to confirm are whether the regional content requirements are met, whether required certificates of origin are at hand at the time of entry, and that all required documentation to support claimed free-trade preferences is maintained for the appropriate period of time.
- ***Coordinate with Freight Forwarders and Customs Brokers.*** Importers should engage with their freight forwarders and Customs brokers to determine whether Customs requirements are being consistently followed and should coordinate required recordkeeping. Although it is acceptable to delegate responsibility for import responsibilities to third parties, from a CBP perspective the ultimate responsibility for the handling of entries is on the importer of record.
- ***Conduct a Customs Audit.*** Larger importers, or importers that have not been chosen for an audit in recent years, should consider performing a Customs audit. A good starting point is found in the "best practices of compliant companies" on the

[30] *See* CBP, "Guidance for Reimbursement Certificates," https://www.cbp.gov/document/guidance/guidance-reimbursement-certificates.

Customs website;[31] Customs specialists can help design a tailored audit that reflects the importer's individual risk profile, goods imported, country sourcing of goods, and other patterns of importation.

Importers should also consider whether there are Customs strategies that can minimize duties. These include the following:

- ***Consider Holding Products in a Bonded Warehouse.*** Bonded warehouses are buildings or secured locations in which products with duties can be stored or altered without paying the duties for a maximum of five years. If the products are exported, destroyed under CBP supervision, or withdrawn from consumption in the US, no duty is owed on the products.
- ***Duty Drawback***. A duty drawback is a refund or remission of a customs duty, fee, or internal revenue tax previously imposed. The refunds occur when the product is exported from the United States or destroyed. This is a complex process, as it involves imports and exports, but for certain types of transactions it can offer real duty savings.
- ***Foreign Trade Zone (FTZ).*** A foreign trade zone is a secured location in or near CBP ports where no tariffs apply while the product sits in the FTZ. The product can be stored, exhibited, assembled, manufactured, or processed in this zone without any duties being applied.
- ***Temporary Importation Under Bond***. An importer may post a bond for twice the amount of the duties and then must export or destroy the imported items within a specified time or pay damages. Depending on the type of transaction, using a TIB may lead to duty savings.

3. EVALUATE CUSTOMS HOUSEKEEPING ISSUES

Third, importers should look into the following housekeeping issues that can lead to compliance lapses and, potentially, costly penalties:

Data Collection

- ***Request ITRAC Data.*** It is a good idea periodically to request an Importer Trade Activity (ITRAC) Report from CBP for the last five years as a way of gathering a copy of all data held by CBP regarding entries for the company as an importer of record. Such information can be used for compliance purposes and, in the event

[31] *See* CBP, Best Practices of Compliant Companies (2013), https://www.cbp.gov/document/forms/best-practices-compliant-companies.

of a Customs-focused assessment or voluntary self-disclosure, as a complete record of all imports where the company acted as importer of record. Since CBP is transitioning to the Automated Commercial Environment (ACE) in 2017, ITRAC data will eventually be discontinued, making it important to gather a copy of the ITRAC data while it is still available.

- ***Request Census Bureau Data.*** The Export Administration Regulations (EAR) require that exporters maintain certain information regarding exports for a period of five years after the time of exportation. To help comply with this requirement, it is a good idea to request Census Bureau data for the prior twelve months once a year.
- ***Sign up for ACE.*** Importers that have not signed up for ACE should do so. Advantages include the elimination of paper entry summaries, decreased administrative costs, enhanced ACE report capabilities, and remote location filings for entry summaries.

Bond Issues

- ***Bond Sufficiency.*** CBP monitors the sufficiency of continuous entry bonds to determine if the bond covers likely import activity. CBP determinations of inadequacy can result in increases in the bond amount over a short period of time (15 days). Failure to comply can result in CBP declaring the bond insufficient, thereby forcing the use of more expensive single entry bonds.
- ***Listing Multiple Principals on the Same Bond.*** Companies should consider whether it makes sense to include multiple entities on the same bond. While doing so allows for bond savings, each entity is jointly and severally liable and responsible for paying any claim regardless of which entity is at fault. Any one of the entities can terminate the bond at any time, which can cause problems if the management of the bond is not coordinated.

Customs Broker Dealings

- ***Customs Broker Powers of Attorney.*** Although it is common to grant a Customs powers of attorney to Customs brokers, these grants should be monitored to ensure they are accurate and there are no unnecessary legacy authorizations in place. Reviewing ACE or ITRAC data allows for the ready identification of all Customs brokers who have made entries on behalf of an importer of record by reviewing the filer codes on the entries. Any unneeded powers of attorney should be revoked.

Entry Clearance Items

- ***Update Names and Addresses on File with CBP.*** Under new procedures, CBP now maintains an importer-of-record program that seeks to more closely monitor companies that import, as a means of preventing fly-by-night importers who seek to evade duties (particularly antidumping and countervailing duties). CBP uses

name and contact information from Form 5106 to communicate with importers. Importers should review the information on file with CBP to ensure the accuracy of all information and that it meets new importer tracking requirements.

- ***Manifest Confidential Treatment.*** Much of the information filed as part of the entry process is available for review by companies such as PIERS and Panjiva, which gather it together and sell it, including to competitors. By filing a government confidentiality request and keeping it up to date, importers can take steps to keep import data confidential.
- ***Confirm your Reconciliation Items.*** Companies that participate in CBP's Reconciliation Prototype Program should ensure they (or their Customs brokers) are appropriately flagging entries, as CBP will no longer allow a blanket flag as of January 14, 2017. A monitoring program can help ensure the reconciliation process occurs appropriately, with reconciliation being used to reflect post-importation value additions and adjustments for such items as retroactive transfer price adjustments, assists, royalties, and other value elements that are unknown at the time of entry.
- ***Partner Government Agencies (PGAs).*** There are at least sixteen partner government agencies, ranging from the Department of Agriculture to the Department of Commerce to the Environmental Protection Agency that work with CBP to effectuate specialty requirements, such as for the importation of food and medicine, and a wide range of other products.[32] Importers who are impacted by these specialty requirements should ensure that they are adhering to all regulations issued by the partner agencies and effectuated as they impact cross-border transactions through CBP regulations and control.
- ***Updated Certificates of Origin.*** FTAs, including NAFTA, often impose a requirement to have Certificates of Origin for anticipated duty preference claims. If these Certificates of Origin are not in hand at the time of entry, then the entry is not eligible for duty preference, even if the rules of the FTA otherwise are met. Importers should work with their Customs brokers to ensure they have all required Certificates of Origin on hand.
- ***Steel Entry Requirements.*** In 2016, CBP instituted special procedures for the more than 100 steel products covered by antidumping and countervailing duty orders. These "live entry" procedures are designed to require the filing of electronic paperwork and upfront duties before the release of steel products subject to these orders. Importers of steel products should ensure they are correctly classifying steel entries, declaring the goods to be covered by these orders where appropriate, and that they are adhering to the "live entry" procedures.
- ***Trademark and Trade Name Protections.*** As noted above, CBP has the ability to help bar entries that violate trademarks and trade names that are registered with

[32] *See* CBP, "Partner Government Agencies (PGAs) Involved with BIEC," https://www.cbp.gov/trade/trade-community/border-interagency-executive-council-biec/partner-government-agencies-pgas-involved-biec.

the CBP. Companies that believe they are seeing infringing imports should consider taking steps to protect their intellectual property through the registration process or should consider whether seeking section 337 import protections is appropriate.

4. EVALUATE EXPORT COMPLIANCE

Fourth, companies that frequently export should take into account that CBP also administers the EAR and the ITAR as these regulations impact physical exports. Since the EAR includes commercial, U.S.-origin goods, practically all exports of goods trigger some export-related responsibilities. Some of the key items where compliance measures are called for are as follows:

- ***Destination Control Statement (DCS).*** Exports require a Destination Control Statement, which appears on export documentation. The language being used should be reviewed to ensure it meets current regulatory requirements, even for EAR99 products, and that the exporter is consistently carrying out any DCS-related responsibilities.
- ***Denied Parties Screening/End Use/End User Controls.*** OFAC and BIS restrict exports to certain persons who have been determined to have taken actions contrary to U.S. foreign policy. Exporters should confirm they maintain screening protocols that are consistently followed to prevent such dealings. Companies should also ensure that they consistently follow up on red flags indicating that goods are potentially being used/diverted for use by inappropriate end users or for inappropriate end uses, such as for the support of terrorism or the proliferation of weapons of mass destruction.
- ***Controlled Goods.*** Exporters should be certain they have not fallen into "EAR99 mode," automatically classifying all exports as EAR99 where they are, in fact, controlled under the ITAR or the EAR. Even commercial goods can become subject to the ITAR, for example, if they are modified to meet military specifications or for military use. Companies that have not undertaken a classification review in recent years should consider performing one, particularly if they are known to export goods that are controlled by the ITAR or are on the U.S. Munitions List, or controlled by the EAR and have an Export Control Classification Number (ECCN).
- ***Recordkeeping.*** All exports require some element of recordkeeping, especially if the goods are controlled under either the ITAR or the EAR. Exporters should coordinate with their Customs brokers to determine whether all required export-related documentation is being kept for the required regulatory periods.

5. CONDUCT TRAINING

This step is short but important: importers should train all compliance stakeholders annually on Customs requirements. This allows updating all relevant personnel regarding changes to CBP regulations, which often change, especially in the current environment when CBP is reflecting new statutory changes. Relevant personnel to consider training include persons in charge of Customs compliance, procurement personnel, and persons in the shipping/logistics departments.

I. STEP 9: ADDRESSING SUPPLY CHAIN COMPLIANCE RISK

As noted above, CBP is emphasizing stopping goods that benefited from forced labor (adult and children alike) from entering the United States. With enhanced section 307 giving CBP the tools to block more imports, companies should be pro-active in monitoring and auditing suppliers for lapses that could lead to costly detentions by CBP. Measures to consider implementing include the following:

- ***Monitor U.S. Government Intelligence.*** The U.S. Department of Labor, in consultation with the U.S. Departments of State and Homeland Security, publishes an annual list of products believed to be produced by forced labor. The Departments of Homeland Security, State, and Treasury also have issued a special advisory regarding countries where such exports are likely to occur, including such commonly used supply sources as China, Russia, and Taiwan. Importers should monitor these lists to see if the U.S. government is flagging products they commonly import or countries from which they commonly source.
- ***Conduct a Supply Chain Audit and Perform Supplier Due Diligence.*** Because the forced labor provisions are designed, by definition, to bring in outside parties, it seldom is a good idea to wait for any CBP inquiry, as it often will not be possible to put together a response within a tight timeframe where third parties are involved. Waiting until receiving a notice from CBP of a potential violation risks seizures, loss of the goods, penalties, lost business, and public relations issues. Pro-active due diligence on the supply chain will allow the importer to assess the risk of a violation, determine the types of products most likely to be implicated, identify suppliers and countries of concern, allow for the creation of an audit schedule of suppliers, and generally gather information to disprove any allegation of the use of forced labor. Visits to supplier sites and gathering knowledge about the sub-suppliers that also form a part of the supply chain can also forestall problems down the road.
- ***Follow up on Red Flags.*** Importers that source from countries of concern, such as China, should monitor suppliers for potential red flags that might indicate

sourcing issues. Importers that discover or reasonably suspect the use of forced labor should shift to alternative sources.

- ***Implement a Compliance Program.*** All importers should have a comprehensive Customs/import compliance policy; any companies that do not should implement one. The program should be reviewed to ensure it addresses supply chain management, including provisions for limiting the potential for human trafficking and forced labor in the supply chain.
- ***Gather Certifications.*** Importers should review all supplier agreements to confirm they contain an affirmative certification that the supplier is: (1) aware of the company's Customs/import compliance policy; (2) abides by its terms; (3) specifically is not using any form of forced labor; (4) will cooperate with any investigation of same by the importer; and (5) will be punished if these provisions are violated, including through the requirement to cover the costs of an investigation and the termination of the supply arrangement.
- ***Conduct Training***. Importers should incorporate training regarding forced labor requirements into Customs/import training not only for persons who directly handle import transactions, but also for employees who work directly with the company's supply chain.
- ***Consider Joining the Customs-Trade Partnership against Terrorism (C-TPAT) Program.*** C-TPAT is a voluntary supply chain security program, where companies work with CBP to improve the security of private companies' supply chains. Although the provision is aimed at terrorism, becoming part of C-TPAT helps shore up the reliability and accountability of the company's supply chain.
- ***Review Government Contracts.*** Finally, government contractors should be aware that they have a potential second source of liability, which is Executive Order 13,627. That Executive Order, implemented into the Federal Acquisition Regulation, prohibits U.S. government agencies from acquiring products produced by forced or indentured child labor, while also implementing the requirement for government contractors to certify they neither use nor source from companies that use forced labor. The penalties for violating this prohibition include termination of the government contract, debarment, and civil and criminal punishment.

Further information is available in our white paper on Managing the Aggressive Enforcement of International Regulations by the Trump Administration: Compliance Best Practices for Companies that Source, Operate, or Sell Abroad (available by request from the authors).

J. STEP 10: HARNESSING CBP AS A TOOL TO FIGHT UNFAIR TRADE

Needless to say, the current trade environment described above is one where companies impacted by foreign competition have more prospects for relief than at any other time in the history of the United States. The options for companies that believe they are being hurt by

unfair trade varies depending on whether the good already is covered by an antidumping or countervailing duty order or whether the producer is contemplating bringing a new action. For products covered under existing orders, constant vigilance regarding whether foreign competitors are taking steps to circumvent orders is necessary. Some common ways in which circumvention occurs is by mismarking the country of origin, transshipping goods through third countries, conducting minor processing of goods in a third country and claiming the good was substantially transformed and became a product of the third country, and shipping components into the United States for only minor assembly in so-called "screwdriver" factories. In some cases, companies have added trace amounts of nonessential components to try to take a product just slightly outside of the scope of the relevant order. Exporters in some cases are adopting similar tactics to try to avoid Section 232 and 301 duties.

Monitoring this kind of activity is important for companies looking to capitalize fully on increased tariffs intended to diminish foreign competition. Information regarding imports can be gotten for a fee from commercial services, such as PIERS or Panjiva. If it appears duties are not being appropriately paid by competitors, this can be brought to the attention of DOC through a request for an anti-circumvention inquiry (for antidumping and countervailing duties) or to CBP using its own procedures designed to prevent underpayment of duties.

A final tool to consider is the False Claims Act, which is a way by which private persons can file a claim on behalf of the U.S. government, alleging the U.S. government is being deprived of revenue due to the circumvention of orders. If such circumvention is determined to exist, the result can be penalties two or four times the duties, taxes, and fees of which the United States was deprived, or equal to the domestic value of the imported merchandise. Liability for treble damages and penalties ranging from $10,781 to a maximum of $21,563 per violation are also available. With duties potentially running into the triple-digit range, the amount of potential duties can quickly rise. In addition, whistleblower provisions may allow the recovery of up to 30 percent of any recovery made by the government, depending on whether the government intervenes to take over the case. If it does, the ongoing work from the whistleblower is low, as the case will be prosecuted to its end by the government, with the whistleblower potentially receiving a large bounty at the conclusion of the investigation.

The ability to file antidumping, countervailing duty, safeguard, and other trade remedy actions to address imports perceived to be unfairly traded is addressed below. Two other remedies, both available at CBP, also merit special discussion.

Fighting Evasion of AD/CVD Orders. CBP always has possessed the ability to investigate the potential evasion of antidumping and countervailing duty orders. Yet the system clearly was not working: a General Accounting Office study titled "Antidumping and Countervail-

ing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk" found that between 2001 and 2014 CBP failed to collect $2.3 billion in AD/CVD duties.[33]

Further, the perception has long existed that certain importers (often from China, but from other countries as well) are gaming the system by mis-declaring the country of origin of goods, transshipping the goods to hide the country of origin, misclassifying goods as non-subject merchandise when it actually fell under the scope of an order, and other tactics designed to avoid paying antidumping and countervailing duties. Further, the process of CBP's investigation often was viewed as being opaque, giving no insight to interested parties regarding the conduct or outcome of any investigation. With CBP not being subject to any rigorous deadlines, and with its results not being subject to judicial review, companies believing they were being victimized by the circumvention of antidumping and countervailing duty orders pressed Congress for change.

The result was the enactment of the TFTEA and the issuance of regulations establishing a formal process for investigations into possible AD/CVD evasion. Interim regulations (effective as of August 22, 2016, but still subject to change in the final regulations) now allow private parties to make AD/CVD evasion allegations and participate in CBP's investigation, which now must be completed on a set deadline. Under the new law, U.S. producers, wholesalers, and unions (among others) of the same or similar products covered by antidumping and countervailing duty orders can file an allegation that an importer has entered the merchandise subject to the order through evasion. CBP even provides a website to report such concerns, CBP e-Allegations Report Trade Violations at https://eallegations.cbp.gov/Home/Index2. The law allows the DOC and the ITC to submit evidence of evasion as well. CBP is then required to investigate the allegation to determine its accuracy. Likelihood of material injury is the standard the domestic injury needs to prove at the ITC – and it is largely measured by volume, price, and impact.

Under the new procedures, CBP can investigate:

- Transshipping merchandise through third countries for purposes of changing the country of origin, even where the merchandise was not substantially transformed in the third country.
- Falsely or incorrectly reporting shipping and entry documentation or engaging in false sales to underpay duties.

[33] *See* U.S. Gov't Accountability Off., GAO-08751, "Antidumping and Countervailing Duties: CBP Action Needed to Reduce Processing Errors and Mitigate Nonpayment Risk" (2016), http://www.gao.gov/assets/680/678419.pdf.

- Falsely labeling or reporting the merchandise's physical characteristics, or misclassifying it as non-subject merchandise.[34]

CBP must determine whether to initiate an investigation within 15 business days of receiving an allegation that entries, made within one year of the allegation, have been evading antidumping or countervailing duties. Suspension of liquidation of entries can occur within 90 days of initiation if CBP determines there is a reasonable suspicion of evasion. The full investigation occurs over 300 days (360 for complicated cases) and includes the right of parties on both sides of the issue to provide factual information, rebut information put on the record, and submit written briefing.

Where evasion is found, CBP can take action to remedy the evasion, including by:

- Identifying the applicable duty assessment rate or cash deposit rate.
- Extending the period for liquidating the unliquidated entries of covered merchandise that entered before the initiation of the investigation.
- Requiring importers of covered merchandise to post enhanced cash deposits and assess duties on the covered merchandise.
- Taking such additional enforcement measures as CBP deems appropriate.

CBP can refer the matter to U.S. Immigration and Customs Enforcement (ICE) for possible civil or criminal investigation.

If an interested party disagrees with CBP's determination, the party may request an internal review by the CBP commissioner, followed by a potential appeal to the U.S. Court of International Trade, which will determine whether CBP followed the proper procedures, whether its actions are consistent with the statutory and regulatory procedures, and whether its determination was arbitrary, capricious, or an abuse of discretion. CBP has stated, however, that judicial review is unavailable for any decision to not initiate an investigation – a position that eventually will be challenged in court.

While these new procedures offer enhanced protections for companies that believe they are being victimized by AD/CVD evasion, they also could prove problematic for importers, who could be accused of duty evasion. Some of the steps that importers can take to minimize the risk include:

- Requesting that foreign suppliers act as importers of record.

[34] *See* U.S. Customs & Boarder Protection, "Investigation of Claims of Evasion of Antidumping and Countervailing Duties," 81 Fed. Reg. 56,477 (Aug. 22, 2016).

- Putting in place contractual provisions regarding the responsibility for paying any duties.
- Carefully evaluating the classification of goods imported, not just against the presumed HTS classification, but also against the physical descriptions of potentially applicable subject merchandise covered by antidumping and countervailing duty orders.
- Verifying that import records are accurate.
- Keeping all appropriate import documentation, including any information relating to the physical attributes of all entries.

Importers should also promptly respond to any CBP Form 29 Notice of Action regarding an increase in duties owed, as the underpayment of duties can be quite substantial when antidumping and countervailing duty tariffs are involved.

Intellectual Property Protections. Another area where CBP can be used to fight unfairly traded imports is with regard to trademarks and copyrights. Many U.S. companies are unaware that it is possible to register these IP protections with CBP at a low cost, which covers a twenty-year term. Registration requires that the brand owner provide information regarding how authorized shipments generally occur, including the place of manufacture, the name and address of each foreign entity authorized or licensed to use the trademark, a brief description regarding the authorized use, and information regarding affiliates authorized to use the mark abroad.

Once registration occurs, CBP will flag shipments of counterfeit products that fall outside the expected import profile. This has the twin advantages of allowing ready entry for authorized goods while allowing CBP to hold goods that appear to be unauthorized, until such time as CBP can contact the owner of the recorded intellectual property to confirm whether the entry is authorized. Unauthorized goods are destroyed by CBP or released to the authorized owner of the intellectual property for an additional fee. Through this process the authorized owner not only can bar infringing goods, but can also gain valuable information regarding which retailers and distributors are selling counterfeit goods.

If these measures do not work, filing a Section 337 unfair trade remedies also is an option. Further information is available here: https://www.foley.com/en/insights/publications/2018/07/new-types-of-section-337-investigations-at-the-int.

K. STEP 11: CONSIDER FILING A FALSE CLAIMS ACT (FCA) ACTION

Another tool that can be used to fight the underpayment of duties is the FCA. Since the passage of the 1986 amendments to the law, the FCA (codified at 31 U.S.C. §§ 3729-33) has become a vigorous tool to fight lost government revenue, as shown by the fact that in 2014

the DOJ recovered nearly $6 billion from FCA cases. Each successful prosecution of an FCA claim enables the potential collection of treble damages, plus penalties and an additional fine of up to $11,000 per false claim.

The FCA provides a mechanism whereby individuals can file lawsuits regarding claims that persons and companies have defrauded governmental programs. Since the law includes a qui tam provision that allows persons who are not affiliated with the government (relators) to bring cases on behalf of the U.S. government, and to receive a portion of any recovered damages, activity under the FCA largely is driven by private actors bringing cases, with the DOJ becoming involved thereafter.

The FCA increasingly is being used in the Customs area. The Third Circuit Court of Appeals, among other courts, has confirmed the FCA appropriately can be used for the knowing evasion of Customs duties. For example, in *United States v. Toyo Ink Manufacturing*, the president of a domestic producer of a violet pigment brought an FCA action against a Japanese competitor, alleging the evasion of antidumping and countervailing duties through false claims that Japan and Mexico were the countries of origin, when China and India (two countries under orders) were appropriate. Toyo settled the matter, agreeing to pay $45 million, plus interest, without admitting fault, resulting in a payment to the original relator of almost $8 million (as well as a likely commercial benefit to the U.S. business).[35] In addition to securing favorable outcomes like this, the use of the FCA process also potentially brings Customs issues to the attention of CBP, which can assess its own penalties for the same conduct. For these reasons, the use of FCA claims for Customs violations is expected to continue to rise with the new administration, making FCA claims a regular part of Customs enforcement.

L. STEP 12: CONSIDER BRINGING A TRADE ACTION

Where products are not covered by an existing order, for all the reasons listed above the environment has never been more receptive for companies seeking import relief. Of all the trade remedy actions listed above, the most common by far are antidumping and countervailing duty actions. These cases generally are initiated after a detailed petition is filed by manufacturers, producers, or wholesalers in the United States of the same or similar products; by a certified union or recognized union or group of workers in the United States of the same or similar products; by a trade or business association whose members manufacture, produce, or wholesale the same or similar products in the United States; or by an association of these groups.

[35] *See* DOJ Press Release: Japanese-Based Toyo Ink and Affiliates in New Jersey and Illinois Settle False Claims Allegation for $45 Million (Dec. 17, 2012), https://www.justice.gov/opa/pr/japanese-based-toyo-ink-and-affiliates-new-jersey-and-illinois-settle-false-claims-allegation.

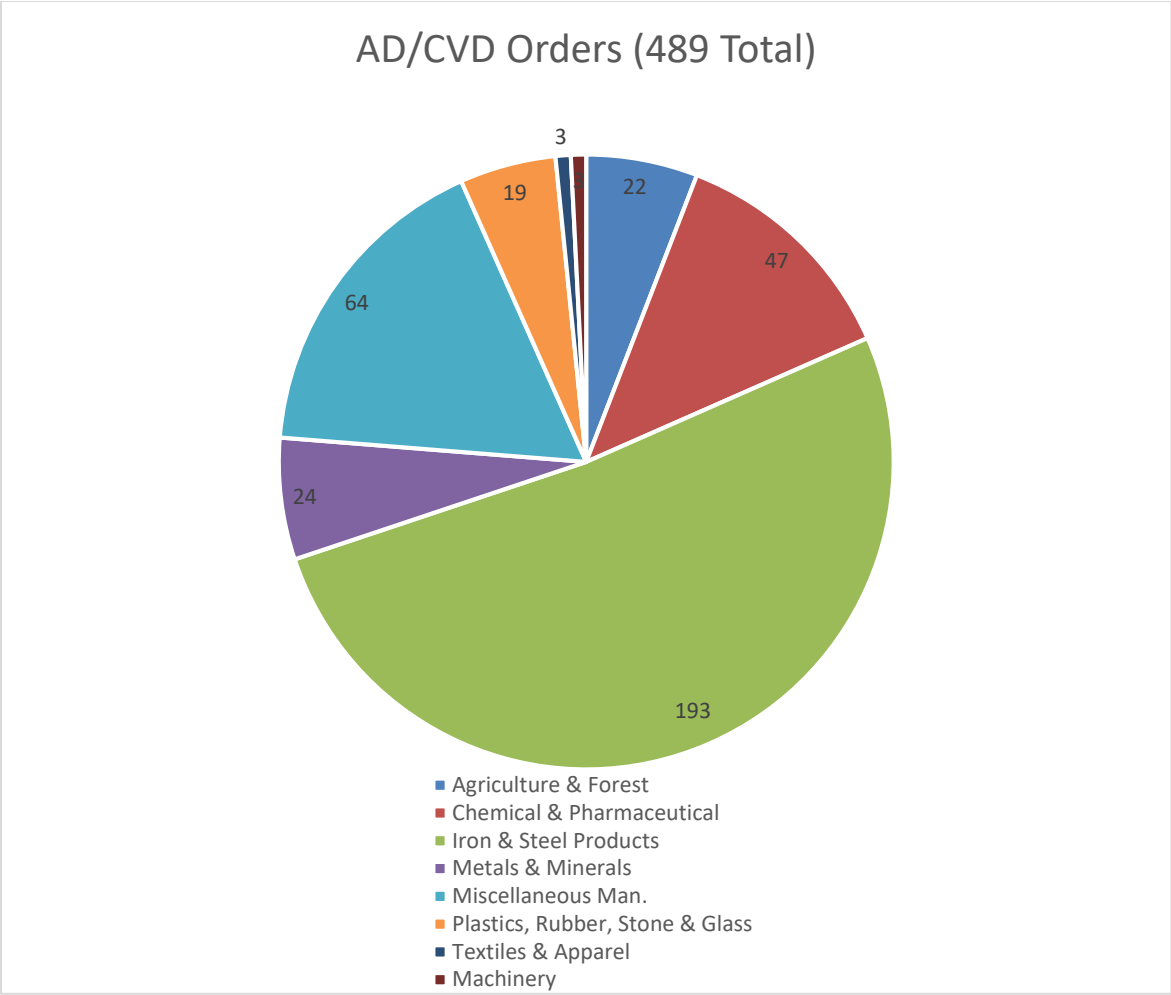
Antidumping and countervailing duty measures are a good remedy for U.S. companies that believe they have been impacted by unfair trade because they generally last for fifteen years or more (until sunsetted), impose asymmetrical costs (it is far more costly to defend an action than it is to bring it), and generally result in high margins. The timing of bringing an action is entirely within the discretion of the U.S. industry, which can choose the best time to file. Further, the trade agencies even will review a draft petition and give feedback on how it can be improved.

The effectiveness of trade remedies generally depends on four factors: (1) the breadth of the filing (product scope); (2) whether the filing captures all likely sources of import competition (*i.e.*, both current countries providing competition and those likely to move in if an order is imposed); (3) the margins achieved; and (4) the length of time the relief is in place. Carefully crafting a petition to include the appropriate scope and countries is important for achieving effective trade relief.

The margin calculated (which is the primary determinant of the deterrent effect of orders) is difficult to predict in advance, as it depends upon the data submitted, the degree of cooperation of the respondent, and whether the DOC verifies that the submitted data is accurate in all material respects. In nearly all cases, however, the Department finds a sufficiently large margin (*i.e.*, greater than de minimis) and it issues an affirmative final determination. The battle then moves to the ITC, where it is necessary to show material injury. As a result, the most important consideration in filing a petition is whether a strong case can be mounted that the U.S. industry is: (1) suffering from material injury or the threat of future material injury; and (2) that the injury is "by reason of" subject imports. Determining this causal connection exists requires examining import trends (pricing and quantity) over the prior three years and other information related to the impact that subject imports are having on the domestic industry producing the like product.

Nearly any product can be the subject of a trade remedy action. Cases have been brought on products with a great deal of trade (softwood lumber, steel, and semiconductors) and small (wire hangers and specialty chemical products). A summary of the 489 existing antidumping and countervailing duty orders (up by over 100 from a year ago) (taken from the ITC website[36]) is as follows:

[36] Current ITC statistics regarding current antidumping and countervailing duty orders are available by download (in Excel format) at the following website: https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations.htm.

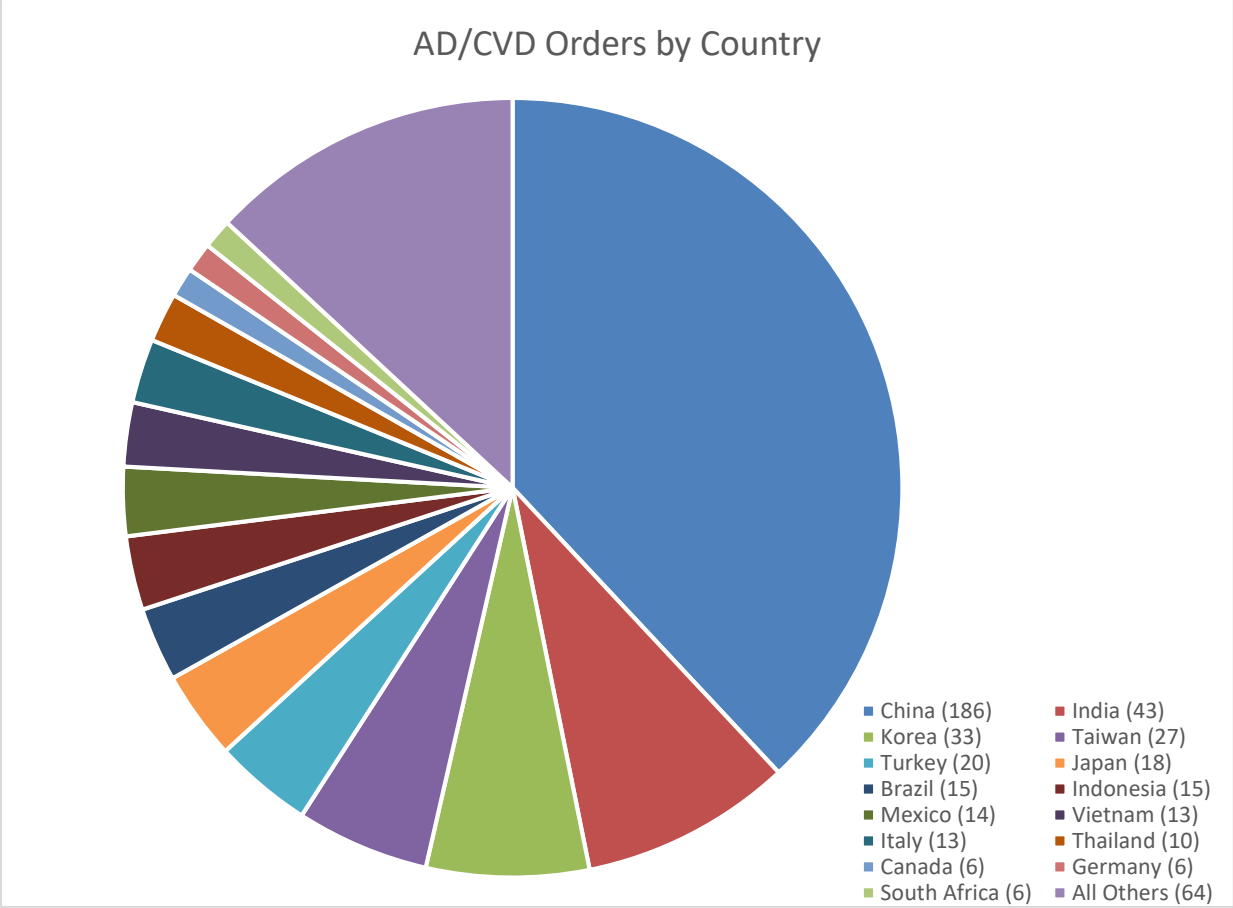


Although cases involving iron, steel, and immediately downstream steel products (*e.g.*, pipe and tube) dominate, antidumping and countervailing duty actions are found for numerous product types. Basically, any industry where imports of a given product are sharply increasing, especially where prices are being driven down by these increasing imports, potentially is at risk of a trade filing.

Regarding the countries that are most often the subject of trade actions, China currently has 186 antidumping and countervailing duty orders in place, which far exceeds the totals for any other country. The duties imposed often range into the high double or low triple digits. With China being both the largest U.S. trade partner and the largest contributor to the U.S. trade deficit in goods (over $500 billion annually), and with President Trump attacking both

China's supposed unfair trade practices and its admittance into the WTO (which was a "colossal" mistake in the words of President Trump), it is widely expected China will continue to be a focus of trade remedies.

This does not mean exporters from other countries can breathe a sigh of relief. As shown by this summary of ITC data,[37] a total of 41 countries have antidumping or countervailing duty orders in place against them:



Once a decision is made to bring a case against one country, it is relatively simple to add additional countries. This is because petitions are put together for a group of countries, with the proceedings moving forward on a unified basis at the ITC. Although proceedings at the DOC are conducted separately for each mandatory respondent from each country, there still

[37] Current ITC statistics regarding current antidumping and countervailing duty orders is available by download (in Excel format) at the following website: https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations.htm.

are strong efficiencies in bringing multiple cases at once even on the DOC side. Bringing multiple cases also can make it easier to show material injury (by increasing the percentage of the U.S. market where there is competition with subject imports) and can avoid the problem of having a "leaky order," whereby producers from countries not targeted in the antidumping or countervailing duty investigation rush in to fill the trade gap that can arise when subject producers withdraw from the U.S. market following the imposition of orders on the originally targeted countries.

Preparing a petition is a lot of work. The petition must contain detailed responses to a large number of questions relating to the existence and amount of dumping and/or subsidization, the identities of known manufacturers and importers, and detailed information regarding how subject imports allegedly have harmed U.S. producers of the domestic like product. One advantage of the process, however, is a draft petition can be submitted in advance of filing to both the DOC and the ITC, which will follow up with detailed comments and requests for information to fill in any perceived gaps in the petition. This is a huge advantage, akin to a company being able to provide an advance copy of its brief to a judge for comments regarding the strengths of the anticipated arguments.

The determination as to whether a case should be brought is a complicated one, and depends on close evaluation of the level of imports, their pricing, trends in import quantities and their pricing, and other factors bearing on whether there is a case for material injury or the threat thereof. Detailed information also needs to be provided regarding the potential antidumping duty margin, which is evaluated at the DOC.

For a detailed questionnaire to assess the strength of your case, please contact the authors of this white paper at +1 202.945.6149 or ghusisian@foley.com or at +1 202.295.4043 or rhuey@foley.com or at +1 202.295.4001 or jcscott@foley.com.

CONCLUSIONS

As outlined above, there are numerous ways to mitigate the effects of the current tariff structure, but they come with their own challenges. In sum:

- Be proactive by staying up-to-date with the ever-changing tariff regimes;
- Consider whether you should participate in the Section 301 List 3 and List 4 HTS exemption and product-specific exclusion processes;
- Ensure you know your suppliers, the origin of each component, the proper harmonized tariff schedule classification, and whether your goods are subject to the special Section 232 and 301 duties;
- Be cognizant of when your firm is obligated to act as the importer of record and the impact on the cost of importing goods;

- Evaluate your Customs risk factors and implement a Customs compliance program; and
- Consider and weigh all your options, including the possibility of bringing a trade action if you believe you are impacted by unfair trade.

* * *

International trade in the current environment is fraught with risk. Foley attorneys in the Foley International Trade & National Security practice can help. Further information is available by contacting the authors at +1 202.945.6149 or ghusisian@foley.com (Mr. Husisian) or at +1 202.295.4043 or rhuey@foley.com (Mr. Huey) or at +1 202.295.4001 or jcscott@foley.com (Ms. Scott). Also, please contact the authors if you would like a copy of the companion white paper to this one, Managing the Aggressive Enforcement of International Regulations by the Trump Administration: Compliance Best Practices for Companies that Source, Operate, or Sell Abroad.

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Gregory Husisian is a partner and litigation attorney with Foley & Lardner LLP. Mr. Husisian is chair of the firm's International Trade and National Security Practice, focusing on both international trade and international regulatory issues. He also is compliance counsel to numerous clients, covering all forms of regulatory risk-management.

Before entering private practice, Mr. Husisian clerked for the Honorable Jerry E. Smith of the Fifth Circuit Court of Appeals.

INTERNATIONAL REGULATORY COUNSELING

Mr. Husisian regularly counsels clients regarding international regulatory issues posed by the Office of Foreign Assets Control (OFAC) and other economic sanctions, export controls issues posed by the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), and anticorruption issues posed by the Foreign Corrupt Practices Act (FCPA) and other anticorruption laws. He also represents companies with national security concerns in acquisitions before the Committee on Foreign Investment in the United States (CFIUS).

As a member of the Foley Government Enforcement Defense & Investigations Practice, the co-chair of the Foley Automotive Team, and a member of the Foley International Team, Mr. Husisian's practice encompasses all aspects of international regulation of exports and international conduct, including counseling, compliance, training, investigations, and enforcement actions/self-disclosures.

Mr. Husisian has authored a guide to international compliance best practices and risk-assessment toolkits designed to help multinational companies identify and manage their international regulatory risk. These items are available on request by emailing Mr. Husisian.

COMPLIANCE & REGULATORY RISK MANAGEMENT

Mr. Husisian regularly counsels clients regarding compliance and regulatory risk-management across the broad range of international and domestic regulatory regimes, including through the conduct of comprehensive risk assessments, the creation of

codes of conduct and compliance policies, the construction of internal controls and standard compliance operating procedures, and the establishment of national and international compliance and risk management departments. Mr. Husisian has conducted compliance audits and training at numerous companies in the United States, South America, Europe, and Asia.

INTERNATIONAL TRADE

Mr. Husisian has more than 25 years of experience representing clients in international trade litigation, including regarding antidumping and countervailing duty proceedings, section 232 national security reviews, and GSP issues before the U.S. Trade Representative. His international trade litigation experience includes many of the largest international trade matters, including numerous carbon, electrical, and stainless steel products; a wide range of chemical and mineral products; and numerous consumer goods. He represents clients in appeals before the Court of International Trade and the Court of Appeals for the Federal Circuit, as well as in cases before NAFTA Panels.

Mr. Husisian also counsels clients regarding Customs & Border Protection classification issues, protests, audits, self-disclosures, and responses to Customs subpoenas and requests for information.

THOUGHT LEADERSHIP

A frequent author, Mr. Husisian is the co-author of the first published treatise on the FCPA and is the author of an in-depth treatise on U.S. Regulation of Exports and International Conduct, published by Thomson/West. The latter treatise is the first comprehensive treatment of the complex regulations that apply to multinational corporations that sell and operate abroad, and includes extensive coverage of dual-use export controls, munitions export controls, economic sanctions, the FCPA, and the antiboycott regulations. He has published or been quoted in more than 200 articles on international trade and international regulatory issues and is the Country Reporter for U.S. trade law for the Journal of International Trade Law & Regulation.

EDUCATION

Mr. Husisian graduated from Cornell University (B.A., double major, economics and government, with honors in law and public policy, 1987). He received his J.D. from Cornell Law School in 1990, where he graduated *magna cum laude* and was elected to the Order of the Coif. He was the managing editor of the *Cornell Law Review* and the national editor of the *Harvard Journal of Law & Public Policy*.

ADMISSIONS

Mr. Husisian is admitted to practice in the District of Columbia, the Court of Appeals for the Federal Circuit, and the Court of International Trade.

EXPERIENCE

INTERNATIONAL TRADE

Mr. Husisian has represented foreign and domestic companies in dozens of major international trade proceedings, including antidumping and countervailing duty matters. A selection of his most recent representations includes:

- **Section 301 China Tariffs.** Represented numerous companies opposing inclusion of HTS tariff lines or seeking exemption.
- **Section 232 National Security Tariffs**. Represented users of various steel and other products opposing imposition of Section 232 tariffs on particular tariff lines or seeking product-specific exclusions.
- **Customs Counseling**. Counseled numerous companies on managing supply chains, sourcing, and measures to minimize liability under section 232 and 301 tariffs.
- **International Trade Commission Investigation**. Lead counsel for Japanese steel producer in the ITC investigations regarding Grain-Oriented Electrical Steel from Japan, successfully achieving a negative determination and no imposition of duties
- **International Trade Commission Investigation**. Lead counsel for importer of Silica Bricks from China in ITC investigation,

successfully achieving a negative determination and no imposition of duties

- **Department of Commerce Investigation**. Represented major Japanese steel company in investigation of hot-rolled steel, achieving low margins that allowed the continued participation of the respondent in the U.S market

ECONOMIC SANCTIONS

Mr. Husisian represents U.S. and foreign companies in all matters related to economic sanctions, including counseling, licensing, compliance, training, and internal investigations and self-disclosures. Representative recent matters include:

- **OFAC Investigation**. Led large internal investigation for major European insurance company into potential OFAC issues in Cuba, Iran, Sudan, and Syria
- **OFAC Investigation**. Led internal investigation in Mexico for automotive company regarding potential dealings with specially designated persons and related anticorruption issues
- **OFAC Internal Investigation**. Led internal investigation for multinational automotive company into apparent sales into Iran from its foreign subsidiaries, in potential violation of regulations
- **OFAC Licensing**. Secured licenses for a multinational insurance company allowing the provision of global insurance policies, including for persons stationed in Cuba, Iran, and Sudan
- **OFAC Licensing**. Secured licenses for large provider of on-line courses, allowing provision of courses to Iranian students
- **OFAC Compliance**. Prepared economic sanctions compliance policies and internal controls for numerous companies operating in the United States, Europe, Latin America, and Asia to minimize the risk of violations of U.S. and EU economic sanctions regulations

EXPORT CONTROLS (ITAR, EAR, NUCLEAR)

Mr. Husisian represents U.S. and foreign companies in all matters related to the ITAR, EAR, and nuclear controls, including counseling, classification reviews, classification requests, licensing, compliance, training, and internal investigations and self-disclosures. Representative recent matters include:

- **Export Controls Classification Reviews and International Investigation**. Led classification review and investigation into potential EAR violations at large petroleum products supplier
- **Export Controls Classification Reviews**. Led classification reviews to determine export status of ITAR- and EAR-controlled goods, information, software, and technology for numerous manufacturers and software companies
- **Export Controls Internal Investigation and Voluntary Self-Disclosure**. Led internal investigations into the potential unlicensed export of defense articles appearing on the U.S. Munitions List and the Commerce Control List for numerous manufacturers and defense contractors, resulting in the filing of voluntary self-disclosures with the State Department's Directorate of Defense Trade Controls and the Commerce Department's Bureau of Industry and Security
- **Nuclear Export Controls Internal Investigation and Voluntary Self-Disclosure**. Conducted internal investigation and prepared voluntary self-disclosure for exporter covered by the Nuclear Regulatory Commission's nuclear export controls
- **ITAR Compliance**. Prepared export controls compliance policies and technology control plans for defense contractors subject to the International Traffic in Arms Regulations (ITAR)
- **EAR Compliance**. Prepared export controls compliance policies for companies producing and exporting goods covered by the Commerce Control List and subject to controls under the Export Administration Regulations (EAR)

ANTICORRUPTION/FOREIGN CORRUPT PRACTICES ACT (FCPA)

Mr. Husisian represents U.S. and foreign companies in all matters related to the FCPA and other anticorruption regimes, including counseling, compliance, training, and internal investigations. Representative recent matters include:

- **Foreign Corrupt Practices Act Internal Investigations**. Conducted numerous internal investigations into alleged FCPA and anticorruption violations in China and Latin America for multiple automotive companies
- **FCPA Compliance**. Prepared anticorruption, FCPA, anti-kickback, and Gifts, Meals, Entertainment & Travel compliance policies and internal controls for companies operating in the United States, Europe, Latin America, and Asia to minimize the risk of violations of anticorruption laws
- **FCPA DOJ Opinion Release**. Prepared DOJ Opinion Request for multinational company seeking to hire director with ties to foreign government

COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES

- **Represented U.S. and Foreign Companies in CFIUS Proceedings**. Represented numerous companies in CFIUS proceedings, including receiving approval for sale of company engaged in providing firearm ballistics analysis for the U.S., state, and local governments and numerous sales of defense contractors to acquirers in Europe and Asia
- **Represented U.S. Company being acquired by Chinese company in CFIUS Proceedings**. Represented a U.S. defense contractor that produces EAR-controlled, 600-series military goods before CFIUS, receiving first approval of 600-series defense contractor to a Chinese owner

ANTI-BOYCOTT

- **Anti-Boycott Investigation and Voluntary Self-Disclosure**. Conducted an internal investigation into potential violations of U.S. anti-boycott regulations and filed a voluntary self-disclosure with the U.S. Commerce Department's Office of Anti-Boycott Compliance
- **Anti-Boycott Compliance.** Prepared anti-boycott compliance policies for multinational corporations in a variety of industries, including a Fortune 100 energy company, a manufacturer of industrial equipment, and numerous automotive suppliers

PUBLICATIONS

TREATISES, TEXTBOOKS, AND WHITE PAPERS

- Mr. Husisian is the author or co-author of four white papers on the topic of "Coping Strategies for a Changing International Trade Environment." Intended to help clients comply with issues relating to international trade, international regulatory issues, and international mergers, acquisition, and investments, these white papers are available on request from the author and are as follows:
  - *Managing the Trump Administration International Trade War: Coping with Section 232 and 301 Tariffs, International Trade Litigation, Heightened Customs Enforcement, and International Trade Uncertainty*
  - *Managing the Aggressive Enforcement of International Regulations by the Trump Administration: Compliance Best Practices for Companies that Source, Operate, or Sell Abroad*
  - *Managing International Mergers, Acquisitions, and Investments in the Trump Administration*
  - *Coping with Compliance Best Practices for Companies that Sell, Operate, or Source Abroad: An International Compliance Guide for High-Risk Regulations*
- In addition, Mr. Husisian is the author of multiple treatises on international regulatory and international trade issues. These treatises include:
  - *U.S. Regulation of Exports and International Conduct,* in *International Trade: Statutes and Strategies* (Thomson/West). This 2700-page treatise includes chapters covering: "U.S. Export Controls," "U.S. Sanctions," "U.S. Export Controls and Sanctions Risk Management and Compliance," "The Foreign Corrupt Practices Act," "The Foreign Corrupt Practices Act Risk Management and Compliance," and "U.S. Anti-Boycott Regulations."

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PRESENTATIONS

Mr. Husisian is an experienced speaker who has presented at over 100 conferences and webinars on international regulatory, international trade, and compliance issues, covering topics such as international trade, antidumping and countervailing duty proceedings, President Trump's international trade strategies, export controls, economic sanctions, the FCPA, and general compliance. Some of his most recent presentations include:

- "Managing the International Supply Chain & Sellers: Executing New U.S. Government Expectations for Suppliers & Business Partners" (Chicago, Milwaukee, and Dallas)
- "Does It Satisfy Deemed Export Requirements Under 734.13(b) of the EAR?", *American Conference Institute* (Chicago, Il)
- "International Trade Issues in the Trump Administration," *Tampa Steel Conference* (Tampa, FL)
- "Anticipating and Controlling International Trade Risk under the Trump Administration," *Danish-American Business Forum* (Copenhagen)
- "International Trade & Investment Under the Trump Administration: Risks and Opportunities"
- "Compliance & Risk Management: Best Practices for Operating at Home and Abroad"
- "Changing Landscape of International Trade—Risks and Opportunities" (Chicago, IL and Milwaukee, WI)
- "Coping with U.S. International Regulations," *Danish-American Business Forum* (Copenhagen)
- "Regulation of Exports and International Conduct," *Foro Automotriz Querétaro* (Querétaro Mexico)
- "International Distribution: How (And When) to Conduct an Internal Investigation"
- "Anticipating and Controlling International Trade Risk Under the Trump Administration: Considerations for PE Funds"
- "Navigating the Conflict Minerals Rules"
- "Dealing with Third-Party Risk in International Transactions" (Chicago, IL and Milwaukee, WI)
- "International Regulatory Issues for the Fashion Industry," *Custom-Made Fashion Industry Assoc.* (Miami, FL)
- "The Changing U.S. Cuba Landscape: Managing Risks and Opportunities" (webcast)
- "U.S. Enforcement Trends Impacting Latin American Financial Services Companies" (Miami, FL)
- "Dealing with Third-Party Risk Overseas" (Chicago, IL and Milwaukee, WI)
- "Navigating the Conflict Minerals Rules" (Chicago, IL and Milwaukee, WI)
- "Compliance and Regulatory Risk Management: Coping with the Aggressive Enforcement of U.S. Laws at Home and Abroad," *Original Equipment Suppliers Assoc*. (Troy, MI)
- "Practical Suggestions for Internal Risk Assessment for FCPA, OFAC, and AML" (webcast)
- "The Extra-Territorial Application of U.S. Law: Export Controls, Sanctions, and the FCPA" (Aalborg, Denmark)
- "Webcast Q&A on Practical Suggestions for Internal Risk Assessment for FCPA, OFAC, and AML" (webcast)
- "Coping with International Enforcement Actions: Investigation and Compliance Strategies," *Danish-American Business Forum* (Copenhagen, Denmark)
- "Business Development or Bribery: New Standards, New Challenges Under the FCPA"
- "Surviving OFAC Sanctions: New Rules and Risks for Operating Overseas"
- "Cross-Border Trade Laws: A Strategy for Survival," *ACC Europe and Transparency International* (Vienna, Austria)

- "Export Controls & Economic Sanctions: New Rules, New Risks, New Realities" (Milwaukee, WI)
- "Key Strategies and Considerations for Doing Business in the Americas"
- "Business Development or Bribery: New Standards, New Challenges Under the FCPA" (Milwaukee, WI and Chicago, IL)
- "Export Diversion and End-Use Monitoring," *Automotive Industry Action Group* (Troy, MI)
- "A Twelve Step Program for International Compliance," *Association of Corporate Counsel* (Livonia, MI)
- "FCPA, Export Control, and Economic Sanctions: Enforcement Trends and Compliance," *Original Equipment Suppliers Assoc.* Legal Council (Troy, MI)
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- "Coping with U.S. Regulation of Exports' International Conduct" (Livonia, MI)
- "Strategies for Working with Law Firms on International Compliance and Enforcement Actions," *BDO International Forensics Conference* (New York, New York) (Keynote Speaker)
- "Foreign Corrupt Practices Act: Overview, Developments, and Red Flags" (Chicago, IL and Milwaukee, WI)
- "Regulations, Enforcement Trends and Compliance Practices for Today's Environment: A Focus on NHTSA, Export Controls, Antitrust and FCPA," *Original Equipment Suppliers Assoc.* (Troy, MI)
- "Coping with U.S. Regulation of Exports and International Conduct," *Original Equipment Suppliers Assoc*. (Troy, MI)
- "U.S. Export Controls and Economic Sanctions Compliance" (Livonia, MI, Waltham, MA, and Milwaukee, WI)
- "Key Strategies and Considerations for Doing Business in the Americas: Restrictions on Trade With Cuba and Other Sanctioned Countries" (Miami, FL)
- "The Role of EU Trade Associations in the Initiation and Resolution of Trade Disputes" (Brussels, Belgium)
- "Export Controls for Government Contractors" (Livonia, MI, Boston, MA, and Milwaukee, WI)
- "The Long Arm of U.S. Law: Avoiding FCPA Liability for the Overseas Conduct of Dealers and Franchisees" (Milwaukee, WI and Chicago, IL)
- "Coping with U.S. Export Controls and Sanctions in the Latin American Market" (Miami, FL)
- "Current Trends in FCPA Enforcement and Compliance" (Milwaukee, WI and Chicago, IL)
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- "Establishment of an Effective FCPA Compliance Program," *D.C. Bar Assoc*. (Washington, D.C.)
- "The Opportunities of Trade & Challenges of Corruption: Working with Emerging Economies," *George Washington University School of Business* (Washington, D.C.)
- "The Future of U.S. Export Controls and Sanctions," *IDCC*
- "Conducting an Effective Internal Investigation of Suspected FCPA Violations," *American Conference Institute* (New York, New York)
- "FCPA Compliance Strategies for High-Tech Companies," *Practicing Law Institute* (San Jose, CA)
- "FCPA Compliance for Pharmaceutical and Life Sciences Companies," *American Conference Institute* (New York, New York)

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Robert Huey, an international trade and transactions lawyer, is a partner with Foley & Lardner LLP and a member of the Transactional & Securities and International Practices and Automotive, Energy, Health Care, and Manufacturing Industry Teams. Mr. Huey's practice focuses on international trade and transaction matters for clients in Europe, Asia and South America. He has appeared before numerous international trade regulatory agencies.

RELEVANT EXPERIENCE

- Represented commercial and governmental interests in many major international trade disputes over the last twenty-five years, including automobiles, steel, machinery and equipment, consumer goods, electronic and electric products, raw materials, and semiconductors;
- Represented commercial interests in the formation and the dissolution of major joint ventures in the United States, and acquisitions and sales of investments;
- Represented commercial interests in successfully resolving disputes between Tier II, Tier I and OEMs in the automobile industry;
- Represented commercial and government interests in various matters, including the Buy America provisions of the American Recovery and Reinvestment Act of 2009, fair and unfair trade laws, mandatory licensing of intellectual property and negotiations of trade agreements;
- Represented commercial interests to successfully resolve the false marking of their product by a distributor; and
- Represented commercial interests in investigations of alleged criminal antitrust violations.

RECOGNITION

In recognition of his experience, Mr. Huey has been Peer Review Rated as AV® Preeminent™, the highest performance rating in Martindale-Hubbell's peer review rating system.

EDUCATION

Mr. Huey earned his LL.B. from the University of Virginia School of Law (1967). He earned his B.A. from Hobart & William Smith College (*cum laude*, 1964), where he was a member of Phi Beta Kappa.

ADMISSIONS

Mr. Huey is admitted to practice in New York, the District of Columbia, and before the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade.

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Jenlain Scott is an associate with Foley & Lardner LLP. She is a member of the firm's Business Litigation & Dispute Resolution Practice. *Jenlain is admitted to practice only in Maryland. She is practicing under the supervision of a member of the D.C. Bar.*

Ms. Scott has worked on a variety of international regulatory and trade matters. She regularly counsels clients regarding international issues, including antidumping proceedings, Customs issues, and CFIUS national security matters.

Prior to joining the firm, Jenlain worked as a summer associate in Foley's Washington, D.C., office, where she worked on the SCOTUS case for *Oil State v. Green's Energy*. As a law student, she interned with the International Prisoner Transfer Unit of the Department of Justice and Transparency International. She also worked as a law clerk at a prominent law firm in Washington and as a research assistant at Georgetown Law's *Annual Review of Criminal Procedure*. In addition, Jenlain has served as a public policy intern for the Western Hemisphere Bureau of the U.S. Department of State.

EDUCATION

Jenlain earned her law degree from Georgetown University Law Center (J.D., *cum laude*, 2018). During this time, she served at *Georgetown Journal of Gender and the Law*, Women's Legal Alliance, and was a guest presenter at the ACCE High School.

Jenlain received her undergraduate degrees in international affairs and geography, with a minor in Spanish, from George Washington University (B.A., *summa cum laude*, 2014), where she also earned a master's certificate in geographic information systems. She was a member of Gamma Theta Upsilon and Order of Omega honor societies and Delta Gamma fraternity. She studied abroad at Oxford University, Catholic University of Argentina, and Latin University of Costa Rica.

COMMUNITY ENGAGEMENT

Jenlain was a member of the Georgetown Law International Women's Human Rights Clinic, where

she drafted a brief for the Zimbabwe Constitutional Court challenging women's custody rights under Zimbabwean law.

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Jenlain is admitted to practice only in Maryland. She is practicing under the supervision of a member of the D.C. Bar.

PUBLICATIONS

Jenlain writes frequently on international trade, international regulatory, and compliance issues. Her authored and co-authored works include multiple white papers and presentations providing practical compliance advice to companies impacted by international trade and regulatory issues. These include:

- "Managing the Trump Administration International Trade War: Coping with Section 232 and 301 Tariffs, International Trade Litigation, Heightened Customs Enforcement, and International Trade Uncertainty" (2019) (available upon request)
- "Managing the Aggressive Enforcement of International Regulations by the Trump Administration: Compliance Best Practices for Companies that Source, Operate, or Sell Abroad" (2019) (available upon request)
- "OFAC Emphasizes Need for Supply Chain Due Diligence and International Compliance: Compliance Guidance for Multinational Organizations" (2019)
- "Strategies for Coping with and Mitigating Costly Section 232 and 301 Tariffs" (2019)
- "Growing Lasting Business Relationships: Managing the United States Trade War" (2019)
- "In-House: SEC Enforcement Actions Against Compliance Officers" (chapter in *Storming the Gatekeepers: When Compliance Officers and In-House Lawyers Are at Risk 2017* (2017)).

LANGUAGES

Jenlain is proficient in Spanish.