PUBLICATION

How Should Businesses Prepare for the Second 100 Days of the Trump Administration?

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

Our first alert, "Summary of Possible Changes in the U.S. Trade Policy During President Trump's First 100 Days," provided a brief summary of the Trump Administration's expected first 100 days of trade. Having just reached the milestone of 100 days into the Administration, the question is not what did President Trump promise and what did he do; the question is how should businesses prepare for the future?

What Do We Know After the First 100 Days?

Regulatory Approach:

In its first 100 days, the Trump Administration has implemented some regulatory changes to continue its predecessors' decade-long efforts to streamline regulatory requirements for exporters and importers. One such project will modernize and streamline procedures and required government paperwork for exporters and importers while eliminating redundant requirements. This process began in 2006 under George W. Bush, and in 2014, President Obama signed an Executive Order creating the new system called the Automated Commercial Environment or ACE. Continuing this trend under President Trump, the U.S. Census Bureau just issued a Final Rule amending the regulations and implementing a system of tracking numbers to help businesses track shipments that undergo scheduling or port changes more efficiently. While these changes are in line with President Trump's pledge to slash overly-burdensome regulations for businesses, they do not represent a break from the policies of his predecessors. Rather, these measures are a continuation of efforts that stretch back three presidential terms. The President has chosen to stay the course on this practical initiative, as well as on more controversial issues like relations with Cuba, Iran and China (so far), and keeping this continuity in our global markets is good for business.

A New Policy Shop:

This week President Trump created a new office, the Office of Trade and Manufacturing Policy or "OTMP." The new office will synchronize the Administration's trade enforcement and promotion actions, enforce Buy American, Hire American policies throughout the government, liaise on behalf of the White House with the Commerce Department and advise the President on "policies to increase economic growth, decrease the trade deficit, and strengthen the United States manufacturing and defense industrial bases." This new office will essentially replace Trump's previously established National Trade Council.

Trade Agreements:

While the Trump Administration did remove the United States from the 12 nation Trans-Pacific Partnership (TPP), which the United States Trade Representatives negotiated for the last ten years, it has not taken any measurable steps on the North American Free Trade Agreement (NAFTA). In order to actually make changes to the NAFTA, the Administration must formally notify Congress 90 days before it begins negotiating. In addition, it must provide specific plans regarding proposed changes. President Trump has indicated that he wants to address trade issues on a bilateral or trilateral basis. It can be assumed that he believes he can get the better deal for American companies with such negotiations. However, here are a few things that complicate the issue. When the USTR negotiated the TPP, it was able to leverage the deal. If Country A wanted something in return for agreeing to a particular provision, there were 11 other countries that could make it happen. In other words, the U.S. was able to win concessions by giving Country A something from Country B, while itself giving up nothing. This type of negotiation is not possible in bilateral or trilateral negotiations. Thus, whether the Administration will be able to tackle the same issues without third country leverage and actually implement alternative agreements remains to be seen.

Meanwhile, the Commerce Department recently determined that new countervailing duties on Canadian softwood lumber are warranted because of Canadian government subsidies. The new duties, although fitting with the Administration's promise to enforce our trade laws, were in the queue long before President Trump took office. The decision sounds good for the U.S., as we are implementing U.S. trade laws and paying back U.S. injured parties will actually be paid from the duties our government collects from the Canadians. However, it isn't the Canadians who actually will be paying those duties. The softwood lumber duty costs will be passed on to the U.S. importers of the Canadian lumber and the downstream customers – the homebuilders and the home buyers. Home prices will increase. Yet, the Canadian government has indicated that it won't even be hurt by the duties. Therefore, the duties may hurt U.S. consumers more than the foreign supplier. The point is that, notably, the situation illustrates there are winners and losers on both sides of the border for each trade issue. Perhaps it could be better to add these topics into the NAFTA for market predictability for businesses going forward.

So how can companies doing business in the United States move forward without a clear vision of U.S. trade policy over the next few years? Stay the course, but formulate alternatives you can use, if needed. Here are some questions you can ask to assist in creating alternative plans:

- Consider where your products and component parts come from. What if duties increase for those items? Can you buy them in the U.S.? Do you have other sources? How quickly can you get what you need and how much inventory do you keep?
- Are you foreign-owned? Consider your product's country of origin. Is it substantially transformed in the U.S.? Where is the technology and engineering coming from? Could you manufacture in the U.S. and take advantage of Trump's potential tax plan if it comes to fruition?
- Are you going to need foreign workers? How are you going to get them if the immigration rules change?
- Do you export? Ensure you are screening your customers and complying with the Treasury Department's sanctions requirements and prohibitions. The Administration promises more enforcement regarding U.S. and foreign parties that violate U.S. export and Office of Foreign Assets Control's sanction requirements. Understand U.S. jurisdiction over your products and services, including the potential jurisdiction over the exports of any foreign subsidiaries.

The new Administration also promises an uptick in other types of trade enforcement, and it might surprise some to find out that the U.S. has jurisdiction over U.S. content products and technology with U.S. content all over the world. The Commerce Department controls and licenses the shipments of U.S. commercial products globally, and the State Department governs not only U.S. military goods and technology, but also the actions of U.S. entities providing defense services and facilitating the manufacture, sale and export of foreign defense products worldwide. For all U.S. persons there are prohibitions on certain end-users and end-uses globally, and there are even controls on managing certain foreign subsidiary business. The point is that there are old rules and new rules and the regulators are watching more closely. So, be sure to know the rules that apply to you.

If you have any questions about this alert, please contact any member of our Firm's Trade Group.