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## Administration Releases Summary of NAFTA Renegotiation Objectives

7.18.2017

**Background.** The Trump Administration after threatening to withdraw from the North American Free Trade Agreement (NAFTA) on several occasions instead decided to favor a renegotiation of NAFTA. Following established procedures notice was given to Congress on May 18, 2017 setting off a 90 day period for consultations with Congress before negotiations could begin. Public comments were solicited due June 12, 2017 and public hearings were held starting June 27, 2017 where groups and individuals submitted comments. The time table required the administration to release their negotiating objectives by July 17, 2017. This document summarizes and comments on these objectives which should give guidance to those affected by NAFTA as to the administration's plans going forward. Additional opportunities to comment through Congressional hearings and informal meetings and submissions to the administration are available. Negotiations can begin any time after August 16, 2017.

**Summary.** The Administration's introduction to the report indicates that President Trump has maintained his fundamental position from his campaign that the U.S. must work to break down barriers to American exports and to reduce trade deficits. This is made clear where the administration states that "the new NAFTA will be modernized to reflect 21st century standards and will reflect a fairer deal, addressing America's persistent trade imbalances in North America". The introduction goes on to state that the new NAFTA "... will ensure that the United States obtains more open, equitable, secure and reciprocal market access..." The Administration is also borrowing heavily from the now defunct TPP, implementing digital commerce rules, rules covering State Owned Enterprises (SOE), including an energy provisions and ramping up environmental and labor standards that were included in NAFTA.

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**Specific Negotiating Objectives for initiation of NAFTA Negotiations.** The following contains some commentary concerning the proposed objectives for the NAFTA renegotiation:

1. **Trade in Goods.** The administration lists its main objective “To improve the U.S. trade balance and reduce the trade deficit with NAFTA countries”. This could be done in many ways. However it is indicated that the administration wishes to maintain existing reciprocal duty free market access, so this is not intended to result in reinstatement of pre-NAFTA tariffs but by increasing U.S. exports by elimination non-tariff barriers. This would include efforts to promote greater regulatory compatibility
2. **Sanitary and Phytosanitary Measures.** The focus would be on ways to resolve unwarranted barriers that block the export of U.S food and agricultural products and developing new and enforceable rules that ensure science based enforcement methods that are transparent and predictable and non-discriminatory
3. **Customs.** Trade Facilitation and Rules of Origin. In regard to customs and trade facilitation the focus is on transparency of customs laws and regulations to insure shipments are released immediately after compliance with customs formality and eliminating customs formality’s for express shipments below \$800. Efforts would be made to increase automation and reduce customs formalities and enhance harmonization, increase use of electronic payments
4. **Rules of Origin.** Rules of origin are one of the most important parts of any trade agreement. They insure that the benefits are reserved for the member countries and not third countries that are shipping through these countries or providing low value imports incorporated into export goods. There have been accusations of Chinese goods that are sold at low value and/or “dumped” into Mexico that come into the US under NAFTA. The administration’s position is to “Update and strengthen” the rules of origin to ensure that “the benefits of NAFTA go to products genuinely made in the United States and North America. Concerning autos, the current rules of origin call for 62.5% a number that the NAFTA auto industries have lived with. Some groups advocate for an even higher rule. In the Transpacific Partnership (TPP) the rules were lowered which concerned many US and Mexican auto parts producers. Certainty in the rules of origin it is important to insure that no disruptions affect NAFTA supply chains.
5. **Technical Barriers to Trade.** This would focus on non-tariff barriers caused by technical standards. The goal would be to insure conformity and transparency of technical standards in each of the NAFTA countries. This would include publication of drafts of proposed regulations and insurance of “national treatment”, where by importers are treated the same as nationals of the country imposing the regulations.
6. **Investment.** The investment objectives are written mostly in terms of U.S goals to reduce or eliminate barriers to US investment in “all sectors” of NAFTA countries. At the same time the US wants to ensure that NAFTA country investors in the US are not accorded greater substantive rights than domestic investors. This could signal a change in the current NAFTA investor state arbitration provisions which allow parties in all three countries to by-pass the local court systems and resolve investment disputes involving government action through private arbitrators from the three member states.

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7. **Intellectual Property (IP).** This is an area that needs to be updated in NAFTA, and is designed to provide increased protection particularly for emerging technologies. The U.S. will likely focus on Mexican enforcement of IP rights within Mexico.
8. **Transparency.** The goals would seek to commit each country to provide the same levels of transparency, participation, accountability in development of regulations and government action that exist in the U.S. at the federal level, including sufficient time for public comment.
9. **Trade Remedies.** This section makes it clear that the agreement does not restrict the ability to enforce antidumping, countervailing and safeguard laws. Under the existing NAFTA, Mexico and Canada are generally exempted from duties and quotas imposed on a worldwide basis under section 201 – the so called “safeguard” law that allows the president to take such action when imports are increasing and causing material injury to US producers. Thus, the so called NAFTA global safeguards exclusion would be eliminated potentially exposing more Mexican and Canadian products to duties and quotas in the future. The proposal would also eliminate the existing Chapter 19 dispute settlement mechanism that provides special procedures for review of antidumping and countervailing duties cases by tri- national panels in cases of NAFTA countries, which differs from the procedures applied to other countries. Other proposed technical changes would make it easier for U.S. domestic companies to prevail in antidumping and countervailing duty cases by allowing for perishable and season products to be considered as a separate industry for injury purposes and excluding state owned enterprises as part of the domestic industry.
10. **Government Procurement.** The focus is on increasing opportunities for US firms to sell to government in NAFTA countries through fair and transparent rules. At the same time the NAFTA exception to buy American procurement provisions in the US would be excluded at the state and local government level and certain buy American preference programs would be permitted at the federal level in the cases of transportation services, food assistance and farm support and key defense department procurements. Mexico never applied exceptions to sub federal governments.
11. **Good Regulatory Practices.** The administration intention is to have reciprocal regulation procedures across the board with NAFTA member countries. For example, allow for standardized procedures and times for the public to review and comment on proposed regulation before approval by the lawmakers. This should be a non-contentious issue during the negotiations.
12. **Trade in Services,** Including Telecommunications and Financial Services. Currently, the US holds a trade surplus in terms of services with Mexico (\$7 Billion – 2016). Its main objective is to maintain that position and further secure open and fair conditions for service providers. Resistance to this objectives may be brought by Mexican service providers, particularly in the telecommunications sector, who have for some time enjoyed virtually unchallenged competition. On Financial Services, the US is seeking greater access to NAFTA countries for US financial service suppliers, expanding market opportunities, improving transparency, and refraining from imposing restrictions on cross-border data flows.
13. **Digital Trade in Goods and Services and Cross-Border Data Flows.** The objective is to agree that no duties shall be placed on digital products and secure non-discriminatory treatment of digital products transmitted electronically. Furthermore, the intent is to establish rules that ensure that

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the NAFTA countries do not impose measures that restrict cross-border data flows and do not require the use or installation of local computing facilities. Finally, it seeks to prevent compulsory or mandated disclosure of computer source code.

14. **State-Owned and Controlled Enterprises.** The focus of this objective is to establish a clear basis for the identification and level the playing field (non-discriminatory treatment) for SOEs in the NAFTA countries. The objective is to seek and promote a strong adherence to the standards set out in the World Trade Organization (WTO)' Agreement on Subsidies and Countervailing Measures. This is a particular concern for certain US industries that claim to be subject to unfair competition arising from treatment provided by SOE to domestic companies in the NAFTA countries. It will also subject the commercial activities performed by SOEs to jurisdiction to the local courts waiving any immunity that may correspond. Finally, emphasis will be placed in having access to information concerning the government's ownership and control over the SOEs.
15. **Competition Policy.** Not much change in this area. The objective is to maintain rules that prohibit anti-competitive business conduct, establish or affirm rules for procedural fairness, and promote cooperation on competition enforcement related matters.
16. **Labor.** The objectives of this section are particularly tailored to Mexico. It is sought that that the side agreement that contemplated labor standards (North American Agreement on Labor Cooperation (NAALC) be moved to the core of the Agreement. The ultimate goal is that Mexico adopt more competitive salaries that would deter US companies setting up operation because of low labor costs. Furthermore, labor laws in NAFTA countries shall be such that occupational safety and health are up to par with international standards, again this mainly aimed at Mexico. This could prove to be a thorny sticking point in the negotiations. Other specific changes include:
  - Require NAFTA countries to adopt core labor standards as recognized in the ILO Declarations.
  - Freedom of association
  - Elimination of compulsory labor (prohibition shall extend to non NAFTA countries)
  - Abolition of child labor (prohibition shall extend to non NAFTA countries)
  - Elimination of discrimination
  - Require NAFTA countries to have laws governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
  - Provide access to fair administrative and judicial proceedings. This could mean further amendments to Mexico Labor Law and regulations.
  - Require that labor obligations shall be subject to the same dispute settlement mechanism that applies to other obligations of the Agreement.
17. **Environment.** The section has many of the same similarities and challenges of the Labor section, at its inception, it was mainly aimed towards Mexico. It is also seeks to move the North American Agreement on Environmental Cooperation (NAAEC) to the core of the Agreement. The objective is to level the playing field for all three countries by reciprocating the same environmental regulations in all three countries and ensuring access to fair administrative and judicial

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proceedings. This entails that environmental obligations will be subject to the same dispute mechanism as the rest of NAFTA provisions.

18. **Anti-corruption.** The section provides for the adoption of measures to criminalize and discourage corruption and provide adequate penalties and effective enforcement. Unlike most of the objectives, this section provides more details as to specific measures that will be sought. These include: (i) adoption of requirements of companies to maintain accurate books and records; (ii) establishing codes of conduct; (iii) disallowing the deduction of corrupt payments for income tax purposes. On its face all of the proposed measures are already adopted in all countries, however, what is lacking (particularly in Mexico) is its effective enforcement.
19. **Small and Medium Size Enterprises (SME).** This section should not be an issue for the NAFTA countries. In general, the US is asking for information resources to help SMEs meet NAFTA requirements and establish an SME Committee to ensure SME are considered in new commercial opportunities.
20. **Energy.** This objective seeks to open further market access to the energy sectors and restrain alleged State Owned Enterprises (SOE) discriminatory or unfair practices. This is a sector that Mexico carved out of the original 1994 deal. Mexico has since amended its constitution to open the energy sector so this provides new opportunities that did not exist at the time of the original NAFTA.
21. **Dispute Settlement.** This section calls for the early identification and settlement of disputes through consultation and other dispute settlement options. The dispute settlement process shall be transparent in that parties' submissions will be made public, hearings will be accessible to the public, final determinations be made public; and ensuring that non-governmental entities have a right to request written submissions to the panel.
22. **General Provisions.** The intent is to include a general exception (catch all provision) that the US could use alleging specific domestic objectives, health, safety and essential security among others. Depending on the actual scope of this provision, it may serve to by-pass other agreement obligations.
23. **Currency.** The Administration is proposing the implementation of a currency control mechanism that would prevent NAFTA countries from engaging in currency manipulation schemes to gain an unfair competitive advantage. It is more likely that the intent of the provision is to set a precedent for future trade agreements with US Asian and European partners. The latter since neither Mexico nor Canada have been specifically accused of engaging in such practices.

**Conclusion.** The Administration's NAFTA objectives are still very general. Some may be cause for concern. Future opportunities exist for involvement by affected companies. Butzel Long's NAFTA experts are available to assist you.

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