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UPDATE – PRESIDENT TRUMP FORMALIZES GLOBAL STEEL AND ALUMINUM TARIFFS; PROVIDES POSSIBILITY OF EXEMPTIONS FOR SOME PRODUCTS AND/OR COUNTRIES

3.12.2018

[Note: This Client Alert updates the one released on March 6, 2018 after President Trump's initial announcement but before details were available in the official Proclamation.]

Exactly one week after his surprise announcement before a group of steel and aluminum industry executives to impose tariffs on “all” steel and aluminum imports in the interest of national security, President Trump followed up on March 8, 2018 with formal Proclamations to implement his decision. The Proclamations order modification of the Harmonized Tax Schedule to implement an additional ad valorem duty of 25% on imported steel articles, and 10% on aluminum articles, “with respect to goods entered, or withdrawn from warehouse for consumption” effective March 23, 2018.

CANADA AND MEXICO EXEMPT FOR NOW; OTHER COUNTRIES MAY SEEK EXEMPTIONS

Despite earlier statements from Peter Navarro, Director of Trump's National Trade Council, that no countries would be exempted, the Proclamations provide a temporary exception for both Canada and Mexico and statements made later indicate the possibility of exemptions for other countries. The proclamation on steel stated in part:

Given our shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing steel, the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of steel articles produced in the United States to Canada and Mexico, and the close relation of the economic welfare of the United States to our national security, see 19 U.S.C. 1862(d), I have determined that the necessary and

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appropriate means to address the threat to the national security posed by imports of steel articles from Canada and Mexico is to continue ongoing discussions with these countries and to exempt steel articles imports from these countries from the tariff, *at least at this time.* “ [emphasis added].

The President specifically referred to the ongoing NAFTA negotiations among the United States, Canada, and Mexico as an impetus for the temporary exclusion, amidst speculation that he may be trying to use the threat of these tariffs to leverage agreement sticking point issues such as automotive rules of origin and sunset provisions in those negotiations. “I have a feeling we’re going to make a deal on NAFTA. If we do, there won’t be any tariffs on Canada and there won’t be any on Mexico.”

During his announcement of the Proclamations, President Trump also invited other nations with a “security relationship” with the United States to discuss “alternative ways” to address the security risk of steel and aluminum imports. He stated that they should negotiate with Robert Lighthizer, U.S. Trade Representative, during the next 15 days to seek total or partial exemption. No other details were provided for seeking exemptions.

The process that has ensued for U.S. allies seeking an exemption has been extremely chaotic. Speaking directly with President Trump, Australia was apparently able to get an exemption, with the President tweeting over the weekend that “a security agreement” is in the works to avoid the tariffs. Trade representatives from the EU and Japan met with Mr. Lighthizer in Brussels did not fare so well; those discussions were deemed “frank” but “fruitless” by the EU Trade Chief, leading to “no immediate clarity”. South Korean representatives meeting at the White House to discuss negotiation with North Korea on Friday pleaded that country’s case for exemption with Defense Secretary James Mattis and National Security Advisor H. R. McMaster, and in writing to Secretary of the Treasury Mnuchin. Other countries initiating discussions about exemptions include Argentina, Britain, Brazil, and China.

Secretary Mnuchin has stated that the U.S. would like to see at least some of the exemptions dealt with before the March 23rd effective date. Larry Kudlow, who is rumored to be under consideration by the White House as the next National Economic Advisor, has expressed his confidence that the positive reaction of the markets last Friday to the announcement of exemptions “guarantees” that “all of Europe is going to wind up being exempt”, and probably Asian allies as well. In the absence of exemptions, at least some of the countries have threatened to retaliate with tariffs on U. S. imports.

PROCESS TO SEEK EXEMPTIONS FOR PRODUCTS NOT AVAILABLE DOMESTICALLY ANNOUNCED

In addition to the process described for seeking country exemptions, the Proclamations reference a process to be administered by the Commerce Secretary for American companies: (1) to exclude products made of aluminum or steel for which there is “a lack of sufficient U.S. production capacity of comparable product; or (2) “to exclude steel articles from such restrictions for specific national security-based considerations”. The Commerce Secretary has 10 days to issue the procedures for request for such exclusion. We will provide further information on those as soon as we can obtain them, and we will be glad to assist in the evaluation, preparation, and submission of any requests. It was later disclosed that date for an announcement on the process for individual product exemptions would be March 18th.

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Note that the effective date of these tariffs is March 23rd. It is important if you have shipments on the water or at the pier and that they be formally entered for customs purposes before this date. This must be a formal consumption entry, not an "immediate" entry. If you have products for which you would like to seek exemption or if you need more information on the customs entry procedures, you can contact us for further information.

We expect that many U.S. companies will be interested in seeking one or more exclusions under this process, so time will be of the essence. Even before the process is formalized, potential applicants should start assessing (and documenting) the steel and aluminum products they purchase against the Department of Commerce lists (see our Client Alert of March 6, 2018), where they are purchased from, and the practical availability of domestically sourced alternatives.

WIDESPREAD CONGRESSIONAL OPPOSITION; LEGISLATIVE RESPONSE UNLIKELY

The President's formalization of the steel and aluminum tariffs came in spite of widespread opposition from other countries, much of the business community, and many Hill Republicans, including Speaker of the House Paul Ryan (WI), and Senators John McCain (AZ), Orin Hatch (UT), Robert Corker (TN), John Cornyn (TX), Lisa Murkowski (AK), Joni Ernst (IA), and Ron Johnson (WI). Many were angered and alarmed by the potentially far-reaching and "unintended" consequences of the President's invocation of a national security rationale as the basis for such action, citing the Department of Defense's memorandum (see March 6, 2018 Client Alert) as a contradiction of such an expansive response.

Senator Jeff Flake (R-AZ) announced that he would be introducing legislation to block the tariffs; Mike Lee (R-UT) had introduced a bill in January that would require Congressional approval of major trade policy initiatives, but most Senators seem pessimistic that they would ever garner enough support to overcome a veto at this point. In the absence of that, Senator Coryn passed the baton to the judicial branch, observing that "tariffs will have to go through the usual litigation process, either the WTO [World Trade Organization] or the courts to see how this works."

POSSIBLE JUDICIAL RESPONSES?

Both China and the EU have threatened to appeal the U.S. action to the WTO, but the outcome there is far from clear given the lack of precedent of any country invoking the national security rationale before. Nor is it clear that President Trump would not use an adverse determination by that body as a reason to pull the U.S. out of the WTO rather than abide by such findings. In any event, WTO cases often take many months to adjudicate.

U.S. companies and or trade associations looking at judicial remedies are exploring options in the United States Court of International Trade (USCIT) and elsewhere. The USCIT has jurisdiction over civil actions against the U.S., its officers and /or its agencies arising out of any law pertaining to international trade. It has the power to grant any appropriate relief, including money judgments, writs of mandamus, and/or injunctive relief. Potential plaintiffs could allege that the President has exceeded his statutory authority, and argue that the national security rationale is belied by the Department of Defense memo. Using some of the recent federal court decisions on the travel bans, numerous

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statements by the President and the White House that the tariffs are really meant to benefit Trump's steelworker base members and/or to drive stalled NAFTA negotiations may also be helpful.

INTERIM STEPS

To deal with the continuing uncertainty around the implementation of the tariffs, we recommend (In addition to the suggestions set out [ABOVE]) that any company who deals with steel and or aluminum products familiarize themselves with any agreements it may have involving either the procurement or the provision of such products to ascertain:

- What is the description of the products? Amounts? Prices? HTS classifications?
- What are the express provisions on tariffs? Any reference to changes? Contingency provisions
- Who is the importer of record?
- Who pays the duties? Any reimbursement provisions?
- Look at delivery terms – any tariff-related provisions?
- Any termination rights?
- Does force majeure cover?

The implementation of these tariffs continues to be fast-breaking and unpredictable. We invite you to contact us to keep up with further developments, how they may affect your business, and further steps you may need to take in response.

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