

# CLIENT ALERTS

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## President Trump Announces Tariffs on Steel and Aluminum Imports

3.6.2018

President Trump announced on March 1 his plan to levy tariffs of 25% and 10% respectively on steel and aluminum imports. His surprise announcement came during a “listening session” at the White House with U.S. steel and aluminum company CEOs and in advance of a briefing scheduled with Chinese officials on the impending actions. He described the measures as providing the opportunity for the U.S. to “re-grow” the steel and aluminum industries, which “have been decimated by decades of unfair trade and bad policy with countries from around the world.” Trump only stated the amount of the tariffs; that they would be in effect “for a long period of time”; and that he would sign off on them next week. He did not explain whether they would apply to all exporting countries and/or to all categories of products. The White House provided no other details.

Trump made clear that he is serious about fulfilling his campaign promises to protect the U.S. steel industry, despite the well-publicized lack of support for his plan by many of his top advisors, in particular his Director of the National Economic Council, Gary Cohn. A former Goldman Sachs officer, Cohn has been the most strident voice for free trade in the White House. (Rumors that Cohn has threatened to resign over this decision, as well as overall adverse reaction from Wall Street and pro-trade Republicans in the Congress may result in this decision being “walked back” in the coming week, at least in part.)

In several appearances on the Sunday morning talk shows, White House Trade Advisor Peter Navarro, Director of the White House Office of Trade and Manufacturing Policy, indicated that the final proclamation would be issued this coming week or the week after, after review by White House legal counsels. At the time, he confirmed that the president would not exclude any country from the across the board tariff of 25% on steel and 10% on aluminum. “As soon as he starts exempting countries, he has to raise the tariff on everybody else”, he stated. However, he said

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that the process for individual product exemption contained in the Commerce Department report (discussed below) could be implemented.

Commerce Secretary Ross provided no additional clarification. “Whatever [President Trump’s] final decision is, is what will happen,” Mr. Ross said on NBC’s “Meet the Press.” “What he has said he has said. If he says something different, it’ll be something different.” “If he for some reason should change his mind, then it will change”.

### **EXECUTIVE AUTHORITY TO IMPOSE TARIFFS**

Although Article I of the United States Constitution gives Congress rather than the President the power to impose tariffs and regulate international commerce, it also enables Congress to delegate that power legislatively. Section 232 of the infrequently-used Trade Expansion Act of 1962 provides: if the Secretary of Commerce [currently Wilbur Ross, a former steel executive] “finds that an article is being imported into the US in such quantities or under such circumstances as to threaten to impair the national security”, then “the President is authorized to take such action as he deems necessary to adjust the imports of such articles”. Only two Section 232 investigations (out of 26 initiated in total since 1962) have resulted in any trade adjustment action by the President: 1) the Iranian oil embargo of 1979; and 2) the Libyan oil embargo of 1982.

### **COMMERCE SECRETARY RECOMMENDATION**

Commerce Secretary Ross issued findings on February 16, 2018 that the quantities and circumstances of steel and aluminum imports do “threaten to impair the national security”; and that anti-dumping and other countervailing provisions currently in place should be supplemented to raise U.S. production to at least 80% of capacity. These findings were in response to President Trump’s April 2017 order to investigate the impact on the U.S. of global overcapacity of steel and aluminum. (The trade community was surprised when President Trump decided to use this rarely used law to seek higher tariffs on steel and aluminum, particularly since the U. S. has objected to China’s assertions of national security interests as a pretext for blocking access to Chinese markets.)

### **RECOMMENDATIONS FOR STEEL**

The Commerce Department steel report gave three alternative recommendations to the president:

- **Global Tariff:** A tariff of 24 percent or more on all imports of all of the covered steel products from all countries.
- **Targeted Tariff and Global Quota:** A tariff of 53 percent or higher on covered steel imports from 12 countries (Brazil, China, Costa Rica, Egypt, India, Malaysia, Korea, Russia, South Africa, Thailand, Turkey, and Vietnam). All other countries would be subject to a quota that limits their imports to 100 percent of their 2017 exports to the United States.
- **Global Quota:** A global quota that would limit imports from all countries to 63 percent of their total 2017 exports into the United States (on a country-by-country basis).

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### COMMERCE RECOMMENDATIONS FOR ALUMINUM

The aluminum report proposes these three potential remedial actions:

- **Global Tariff:** A tariff of at least 7.7 on all imports of all of the identified aluminum products from all countries.
- **Targeted Tariff and Global Quota:** A tariff of 23.5 percent or more on all covered aluminum imports from China, Russia, Hong Kong, Venezuela and Vietnam. All other countries would be subject to a quota that limits their imports to 100 percent of 2017 imports.
- **Global Quota:** A global quota that would limit imports from all countries to 86.7 percent of their total 2017 exports to the United States (on a country-by-country basis).

While the President's announcement did not appear to adopt any of these recommendations specifically, past Supreme Court cases have allowed the President flexibility in determining appropriate relief.

### PRODUCTS INCLUDED POTENTIALLY

Until the release of further details, U.S. importers and purchasers of the involved products may find the lists of categories of steel and aluminum products included in the Commerce Department investigation to be informative, with the caveat that President Trump has not made clear whether he intends to apply the tariffs to all of them.

#### STEEL

The product scope covers steel mill products ("steel"), which are defined at the Harmonized System ("HS") 6-digit level as: 720610 through 721650, 721699 through 730110, 730210, 730240 through 730290, and 730410 through 730690, including any subsequent revisions to these HS codes. The following discontinued HS codes have been included for purposes of reporting historical data (prior to 2007): 722520, 722693, 722694, 722910, 730410, 730421, 730610, 730620, and 730660.

These steel products are all produced by U.S. steel companies and support various applications across the defense, critical infrastructure, and commercial sectors. Generally, these products fall into one of the following five product categories (including but not limited to):

(i) **Carbon and Alloy Flat Product (Flat Products):** Produced by rolling semi-finished steel through varying sets of rolls. Includes sheets, strips, and plates.

Flat products are covered under the following 6-digit HS codes: 720810, 720825, 720826, 720827, 720836, 720837, 720838, 720839, 720840, 720851, 720852, 720853, 720854, 720890, 720915, 720916, 720917, 720918, 720925, 720926, 720927, 720928, 720990, 721011, 721012, 721020, 721030, 721041, 721049, 721050, 721061, 721069, 721070, 721090, 721113, 721114, 721119, 721123, 721129, 721190, 721210, 721220, 721230, 721240, 721250, 721260, 722511, 722519, 722530, 722540, 722550, 722591, 722592, 722599, 722611, 722619, 722691, 722692, 722693, 722694, 722699

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(2) Carbon and Alloy Long Products (Long Products): Steel products that fall outside the flat products category. Includes bars, rails, rods, and beams.

Long products are covered under the following 6-digit HS codes: 721310, 721320, 721391, 721399, 721410, 721420, 721430, 721491, 721499, 721510, 721550, 721590, 721610, 721621, 721622, 721631, 721632, 721633, 721640, 721650, 721699, 721710, 721720, 721730, 721790, 722520, 722620, 722710, 722720, 722790, 722810, 722820, 722830, 722840, 722850, 722860, 722870, 722880, 722910, 722920, 722990, 730110, 730210, 730240, 730290

(3) Carbon and Alloy Pipe and Tube Products (Pipe and Tube Products): Either seamless or welded pipe and tube products. Some of these products may include stainless as well as alloy other than stainless.

Pipe and Tube products are covered under the following 6-digit HS codes:

730410, 730419, 730421, 730423, 730429, 730431, 730439, 730451, 730459, 730490, 730511, 730512, 730519, 730520, 730531, 730539, 730590, 730610, 730619, 730620, 730629, 730630, 730650, 730660, 730661, 730669, 730690

(4) Carbon and Alloy Semi-finished Products (Semi-finished Products): The initial, intermediate solid forms of molten steel, to be re-heated and further forged, rolled, shaped, or otherwise worked into finished steel products. Includes blooms, billets, slabs, ingots, and steel for castings.

Semi-finished products are covered under the following 6-digit HS codes:

720610, 720690, 720711, 720712, 720719, 720720, 722410, 722490

(5) Stainless Products: Steel products, in flat-rolled, long, pipe and tube, and semi-finished forms, containing at minimum 10.5 percent chromium and, by weight, 1.2 percent or less of carbon, offering better corrosion resistance than other steel.

Stainless steel products are covered under the following 6-digit HS codes: 721810, 721891, 721899, 721911, 721912, 721913, 721914, 721921, 721922, 721923, 721924, 721931, 721932, 721933, 721934, 721935, 721990, 722011, 722012, 722020, 722090, 722100, 722211, 722219, 722220, 722230, 722240, 722300, 730411, 730422, 730424, 730441, 730449, 730611, 730621, and 73064

### ALUMINUM:

**Table 2 –Harmonized Tariff Schedule For Aluminum Products**

HTS Code	Description
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7601	
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Unwrought aluminum

7604

Aluminum bars, rods and profiles

7605

Aluminum wire

7606

Aluminum plates, sheets, and strip, of a thickness exceeding 0.2mm\*

7607

Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2mm

7608

Aluminum tubes and pipes

7609

Aluminum tube and pipe fittings

7616.99.51.60

Other articles of aluminum: castings

7616.99.51.70

Other articles of aluminum: forgings

\*Note: This category includes can sheet for aluminum can packaging.

(The Commerce Department's Section 232 investigation and Recommendation does not include: 1) bauxite or alumina, which are feedstocks for production of primary (unwrought) aluminum; 2) aluminum waste and scrap (HTS 7602); and 3) aluminum powders and flakes (HTS 7603) as these represent different industrial sectors.)

### DEPARTMENT OF DEFENSE RESPONSE TO COMMERCE DEPARTMENT RECOMMENDATIONS

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The Department of Defense (DoD) issued a Response on February 22, 2018 to the Commerce Secretary's findings that the steel and aluminum industries are "vital to U.S. defense requirements and critical infrastructure" and that "excessive imports are weakening the [U.S.] internal economy and threaten to impair national security." While the Defense memo "concurred" with Commerce's conclusion that "Imports of foreign steel and aluminum products impair the national security," it cautioned that U.S. military requirements for both steel and aluminum represent only about 3% of U.S. production, and that therefore "DoD does not believe that the findings in the report impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements."

The DoD memo, which was signed by Secretary James Mattis, further warned "about the negative impact on our key allies regarding the recommended options" in the Commerce Report, and recommended that "targeted tariffs are more preferable than a global quota or a global tariff" in "addressing "the underlying issue of Chinese transshipment."

Even with regard to those preferred options, the DoD memo cautioned the Administration to involve management and labor leaders so that "they may understand that these tariffs and quotas are conditional", and second, to proceed separately with steel and aluminum to take advantage of any deterrent effect. The memo emphatically concludes: "It is critical that we reinforce to our key allies that these actions are focused on correcting Chinese overproduction and countering their attempts to circumvent existing antidumping tariffs – not the bilateral U.S. relationship".

Since the intent of section 232 is to protect the national security, this pushback from the DoD could be strong ammunition for those who might oppose this action and challenge it administratively and in the courts.

### RESPONSE TO PRESIDENT'S ANNOUNCEMENT

The response to President Trump's surprise announcement was swift, widespread, and mostly negative. The Dow closed down 420 points on Friday, March 2nd and opened 100 points lower on Monday, March 5th. While the domestic steel and aluminum industries, labor unions and Democrats representing Rust Belt states applauded, numerous Hill Republicans, including close allies of the President, loudly criticized the move, expressing concern that it will severely undercut the momentum of the recent tax cuts. Senate Finance Chairman Orin Hatch tweeted: "Whoever advised [President Trump] on this should be reprimanded ...".

Business sectors that warned of increased consumer prices and job losses as a result included Construction, Automotive, Energy and Beer. Other sectors, such as Agriculture, expressed concern about the effects of retaliation threatened by affected countries.

Canada, which exports 90% of its steel production to the U.S., denounced the move as "unacceptable"; The EU Chairman termed it "stupid" and promised to propose "countermeasures" within a few days. French President Macron called the tariffs "economic nationalism" and urged World Trade Organization action by the EU. China announced limitations on imports of certain U.S. agricultural products if the impact of the proposed tariffs on China were to exceed \$10B.

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### POTENTIAL IMPACT ON EXISTING TRADE AGREEMENTS

The World Trade Organization immediately expressed concern about President Trump's proposal, warning of the "real" potential for escalation. Of perhaps greatest concern is the invocation by the U.S. of the "national security" rationale for its action, potentially lowering the bar for every other WTO member to invoke the same rationale for protecting certain industries or products.

Additionally, in a tweet on March 5th, President Trump implicated the already problematic ongoing NAFTA negotiations by suggesting that Canada and Mexico might obtain more favorable tariff terms if they were to yield on some of the impasse issues (such as automotive rules of origin).

### WHAT CAN BE DONE NOW

Although any formal challenge to the tariffs must wait until the final proclamation is issued, numerous interested/affected parties may have standing to contest them either administratively or judicially. We will continue to explore these opportunities as facts develop. According to 19 U.S.C. §1862(c)(1)(B), the President must implement whatever action he decides to take **within 15 days** of his determination.

The appeal process referenced by Peter Navarro on Sunday that is set out in the Commerce reports is a 90 day process in which companies could request exclusion for specific products. We believe the basis for exemptions (which were not specified in the reports) may include: (1) no production or short supply in the U.S; and/or (2) products that have no military or defense use. We will advise you if and when this process is established.

In the meantime, there is no Congressional approval of any type required for the President to exercise his Section 232 authority to impose the planned tariffs. Nonetheless, if Republicans are not successful in persuading Trump to change course, they may act legislatively to rein him in. Any legislative solution would need to be veto-proof. Numerous affected industry groups (such as MEMA) are continuing and/or stepping up lobbying efforts (in which we are participating) to solidify the existing opposition in Congress and to communicate the need for alternative approaches to the President.

One potential opportunity for strong Congressional opposition among the GOP majority to pressure the White House is in response to the Administration's previously pro-forma request for a three year extension of the President's "Fast Track" trade authority that would allow him to negotiate trade deals with limited Congressional oversight until 2021. Extension of such authority (which otherwise expires on July 1 of this year) is automatic unless either chamber of Congress passes a resolution to the contrary.

Businesses should also be aware of a "miscellaneous tariffs" bill that was unanimously passed by the House in January and is pending in the Senate. The purpose of that legislation is to eliminate tariffs that were enacted to protect industries that no longer exist in the U.S. The International Trade Commission, working with the Commerce Department, apparently developed the list of products based on applications submitted to it by companies. This could also be leverage that Congress might use to bargain with the President on the section 232 tariffs.

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We will keep you advised of further developments, particularly regarding the appeals process. In the meantime, we are actively participating in lobbying efforts to solidify the existing opposition in Congress and to communicate the need for alternative approaches to the President. Should you wish to actively participate in these efforts please let us know.

For companies that export, the possibility of retaliatory tariffs by our trading partners should be kept in mind. In response to questions about this, President Trump indicated that if Europe were to retaliate against U.S. exports, he could raise the tariff on imported European vehicles, thus further expanding the possible consequences for U.S. auto industry and its suppliers.

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