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Trump Administration Forecast – How Can President Trump Deliver on His Campaign Promises Regarding Trade?

12.21.2016

Major changes to U.S. trade policy, such as withdrawal from NAFTA, were among the most prominent of Donald Trump's campaign promises. Now that he is the President-elect, it is most appropriate to examine current law to ascertain whether he can deliver on those campaign promises. Since the President-elect's official government website makes no mention of trade,[1] however, we must refer to the campaign's official website for his "7 Point Plan" for "Free Trade." [2] For convenience, we quote each of the campaign's seven points (in italics), and then analyze each point of the promised trade plan.

1) *"Withdraw from the Trans-Pacific-Partnership [“TPP”], which has not been ratified."* Although the U.S. Government signed the TPP on February 4, 2016, along with 11 other countries – Canada, Mexico, Chile, Peru, Japan, Australia, New Zealand, Singapore, Malaysia, Vietnam, and Brunei – the Obama Administration did not submit it to the Senate for ratification under the Treaty clause of the Constitution.[3] Still, "ratification" of the TPP could have been achieved through implementing legislation authorized under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 ("BCTPAA"),[4] but that did not happen. Thus, President-elect Trump can either cease U.S. involvement in TPP for lack of an implementing statute, or he can notify the other signatories that the U.S. will not become a Party to the TPP.

2) *"Appoint tough and smart trade negotiators"* Since the U.S. Trade Representative ("USTR") is the chief U.S. official responsible for international trade negotiations, and since the USTR and his/her senior officials are Presidential appointees, the new President will have the authority to appoint, with Senate confirmation,[5] senior trade negotiators, which means that the campaign promise can be kept -- in principle.

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3) *“Direct the Secretary of Commerce to identify every violation of trade agreements a foreign country is currently using to harm our workers, and also direct all appropriate agencies to use every tool under American and international law to end these abuses.”* It is not clear whether the term “trade agreements” is limited to Free Trade Agreements (“FTA”), which the U.S. has with 20 countries,[6] or includes obligations under the World Trade Organization (“WTO”), which the U.S. promoted and joined in 1995 following passage of the Uruguay Round Agreements Act.[7] In either case, fulfilling this promise would be an enormous task. For example, current law would require, e.g., intensive, complex investigations under the antidumping and countervailing duty (“AD/CVD”) statutes by the Commerce Department’s International Trade Administration (“ITA”) and the U.S. International Trade Commission (“USITC” or “ITC”), which is an independent agency. In addition, although Sections 201 and 301 of the Trade Act of 1974[8] authorize the President to take certain remedial measures if imports threaten or cause serious injury to a domestic industry, those authorities, too, require intensive administrative investigations before the President can act.

4) *“Tell NAFTA partners that we intend to immediately renegotiate the terms of that agreement to get a better deal for our workers. If they don’t agree to a renegotiation, we will submit notice that the U.S. intends to withdraw from the deal. Eliminate Mexico’s one-side backdoor tariff through the VAT and end sweatshops in Mexico that undercut U.S. workers.”* As we explained in the Butzel Long Client Alert titled “Could President-Elect Trump Withdraw from NAFTA?” (Nov. 17, 2016), the U.S. can withdraw from NAFTA, provided that it gives six-months notice to the other Parties. Of course, since NAFTA membership required amendments of various U.S. statutes through the NAFTA Implementation Act, withdrawal would also require changes to the U.S. Code, which, in turn, would require Congressional action. As for elimination of a Mexican tariff and closure of “sweatshops in Mexico,” those steps would require action by the Mexican government.

5) *“Instruct the Treasury Secretary to label China a currency manipulator.”* The Secretary of the Treasury cannot simply “label” China a currency manipulator. Instead, the Secretary must first analyze the exchange rate policies of certain countries, such as China, in consultation with the International Monetary Fund, before making a finding of currency manipulation.[9]

6) *“Instruct the U.S. Trade Representative to bring trade cases against China, both in this country and at the WTO. China’s unfair subsidy behavior is prohibited by the terms of its entrance to the WTO.”* While the USTR has the authority to file trade cases against China at the WTO, bringing trade cases against Chinese companies in the U.S. would require petitions filed by either an “interested party” or the Secretary of Commerce, but not the USTR.

7) *“Use every lawful presidential power to remedy trade disputes if China does not stop its illegal activities, including its theft of American trade secrets – including the application of tariffs consistent with Section[s] 201 and 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962.”* As stated above, the President has available remedies under Sections 201 and 301 of the Trade Act of 1974. As for Section 232 of the Trade Expansion Act of 1962,[10] it empowers the Secretary of Commerce to conduct investigations to determine whether articles are being imported into the United States in such quantities or under such circumstances as to threaten to impair national security. Then, on the

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basis of a report by the Secretary, the President has authority to take action to “adjust imports” of the article in question.

CONCLUSION

While President-elect Trump could deliver on many of his trade-related campaign promises shortly after he takes office, other promises cannot be fulfilled quickly because they will require investigations in accordance with statutorily dictated procedures or, for cases brought against China at the WTO, the successful outcome of proceedings conducted under WTO rules.

Ira E. Hoffman

202.454.2849

hoffmani@butzel.com

Cynthia J. Haffey

313.983.7434

haffey@butzel.com

[1] See www.greatagain.gov (last visited Dec. 18, 2016).

[2] See www.donaldjtrump.com/policies/trade (last visited Dec. 18, 2016).

[3] U.S. Const., art. II, § 2, cl. 2 (requiring approval by a 2/3 vote in the Senate).

[4] Pub. L. No. 114-26, title I, 129 Stat. 319 at 320-361 (codified at 19 U.S.C. §§ 4201-4210) (constituting new “Trade Promotion Authority” (“TPA”), or “fast track” consideration, under certain circumstances).

[5] See 19 U.S.C. § 2171.

[6] The 20 countries with which the U.S. has FTAs are the following: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore.

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[7] Pub. L. No. 103-465, 19 U.S.C. §§ 3511 *et seq.* (1994).

[8] See 19 U.S.C. §§ 2251, 2411.

[9] See 22 U.S.C. § 5304. See also 19 U.S.C. § 4421.

[10] 19 U.S.C. § 1862.