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BLOG

Prospective Tariffs on Goods from Mexico, Canada, and China

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Since well before the November 6 election, President-elect Trump and his team have been discussing the imposition of tariffs on certain trade partners. The scope of possibilities ranges from all imports being subject to a 10% to 20% additional tariff, to the imposition of a 60% tariff on imports from China, to tariffs on vehicles from Mexico reaching as high as 100% to 200%.

In understanding what is practical, it helps to understand the triggers behind the threats for sanctions and the multiple sources of legal authority that could support the imposition of tariffs. As with past practice, President-elect Trump often uses the threat of tariffs as a means through which to negotiate a resolution to a problem. It would seem, from recent events, that the threat to impose tariffs on Mexico, Canada, and China is first and foremost a tool to negotiate a resolution to issues other than the trade balance. Both Mexican President Claudia Sheinbaum Pardo and Canadian Prime Minister Justin Trudeau have held discussions with President-elect Trump (November 27 and November 29, respectively). We expect more dialogue between these trading partners leading up the January 20 Inauguration.

While we are primarily focused on the potential for tariffs on Mexico in this writing, we would be remiss not to address the links between China and Mexico – and Mexico and Canada through the United States Mexico Canada Agreement (USMCA). We note that in messages on Truth Social and X on November 25, President-elect Trump stated that he intends to impose an additional 10% tariff on all goods from China in an effort to encourage China to take steps to reduce the production of drugs being sent to the United States, in particular fentanyl, which is alleged to be manufactured by Mexican cartels using chemicals imported from China. This would be in addition to any standard import duties and other additional tariffs that may already apply. In the same thread, President-elect Trump also stated that he intends to sign all necessary documents to institute a 25% tariff on all goods from Mexico and Canada, for reasons related to migration and to the fentanyl that the President-elect attributes to persons entering the United States from these countries.

DOES THE PRESIDENT-ELECT HAVE THE AUTHORITY TO INSTITUTE ANY ADDITIONAL TARIFFS?

Technically, Congress has the authority to enact tariffs. Over the years, however, Congress has delegated that authority to the presidency via several statutes, some of which President-elect Trump utilized in the past to

effectuate additional tariffs on goods, including the Section 301 tariffs on goods from China. The statutory authorities available to President-elect Trump upon entering office are:

- **Section 232:** Section 232 of the Trade Expansion Act of 1962 grants the president broad power to adjust imports, including by way of tariffs, if they are found to be a threat to U.S. national security. Section 232 tariffs were imposed on certain imports of aluminum and steel, effective beginning in 2018, during the President-elect's former presidency. He is less likely to utilize this statute for broad tariffs as it requires designation of specific products as threats to national security.

- **Section 301:** Section 301(b) of the Trade Act of 1974 gives the president broad authority to take all appropriate action, including retaliatory tariffs, in response to an act by a foreign government that is unjustifiable or unreasonable, and that burdens or restricts U.S. commerce. Section 301 tariffs were imposed on certain Chinese-origin goods, also effective beginning in 2018, during the President-elect's former presidency. While he could easily use this statute to institute broader tariffs, an investigation and long notice-and-comment periods are required.

- **International Emergency Economic Powers Act (IEEPA):** The IEEPA provides broad presidential authority, with very few limitations, to deal with international economic emergencies relating to unusual and extraordinary threats. Because of the minimal procedural requirements associated with this Act, it is a likely avenue through which the President may pursue the imposition of tariffs. In his first administration, President-elect Trump threatened to use the IEEPA to enact tariffs against Mexico but did not ultimately enact such tariffs as the countries negotiated a deal on migration. President Biden also used the IEEPA to protect imports of solar products from Cambodia, Malaysia, Thailand, and Vietnam from antidumping and countervailing duties for a two-year period. The IEEPA would allow President-elect Trump to institute tariffs on day one.

- **Section 122:** Pursuant to Section 122 of the Trade Act of 1974, and because of the president's balance-of-payments authority, the president may impose an additional 15% tariff on imports for 150 days "[w]henever fundamental international payments problems require special import measures to restrict imports—(1) to deal with large and serious United States balance-of-payments deficits, (2) to prevent an imminent and significant depreciation of the dollar in foreign exchange markets." This provision is less likely to be considered, given the limitation on the timeframe within which an additional tariff may apply.

- **Section 338:** Section 338 of the Tariff Act of 1930 allows the president to impose tariffs up to 50% on any country that discriminates against U.S. products and/or to block imports completely for any country that increases its discrimination against U.S. products. This provision is also less likely to be considered, given that it has not been used for more than 70 years.

Thus, it is clear that the President-elect has multiple mechanisms by which he can move forward with tariffs.

WHAT CHALLENGES MAY THE PRESIDENT-ELECT AND HIS ADMINISTRATION FACE IF TARIFFS ARE INSTITUTED?

To the extent that tariffs are imposed (whether broad or specific to certain goods from certain countries), we can anticipate litigation surrounding claims of due process violations of the Administrative Procedure Act and other statutory violations. If that were the case, it could take years to litigate—while the tariffs continue being collected. In fact, in September 2020, litigation was initiated when Section 301 tariffs were issued on specific goods from China, and remains ongoing to this day. Of particular note, approximately 6,000 importers filed challenges to the List 3, 4A, and 4B tariffs.

It is worth noting that Congress did not push back significantly on the Section 301 tariffs during the President-elect's first administration, and we would not expect significant objection while the Republicans maintain control of Congress. However, Congressional involvement may intensify following the mid-term elections. Likewise, during the Biden Administration, the Supreme Court has indicated skepticism for the President's broad use of executive power without Congressional approval, and that position could continue in the second Trump administration.

TO THE EXTENT THAT THE TARIFFS ARE INSTITUTED, HOW QUICKLY WILL THEY BECOME EFFECTIVE?

As indicated above, the effective date of any tariffs depends largely on the statutory authority relied upon by a president. As we noted, Section 301 has a lengthier ramp-up process than any action pursuant to IEEPA. It could also be that President-elect Trump decides to initiate the tariffs at a lower rate and gradually increase them over time in an effort to encourage the affected industry to transition manufacturing operations to the United States. To the extent that the tariffs are directly tied to Mexican President Sheinbaum's role in stemming immigration into the United States or controlling the flow of narcotics trafficking and other cartel-related activity, we would expect those tariffs to remain a negotiating tool. We note that the November 27 call between President-elect Trump and President Sheinbaum focused on those topics—and that she pushed back, citing U.S. demand for illicit drugs and the U.S. supply to Mexico of illegal weapons.

WOULD THE ADDITIONAL TARIFFS VIOLATE THE UNITED STATES MEXICO CANADA AGREEMENT FOR THOSE GOODS THAT QUALIFY FOR BENEFICIAL TREATMENT AND, THUS, ARE ELIGIBLE FOR MITIGATED OR ELIMINATED STANDARD DUTIES UPON IMPORTATION?

Generally speaking, free trade agreements are designed with the intention to address barriers to trade, including the elimination of duties and tariffs. For instance, Section 2.4 of the USMCA explicitly states, in part, that "no Party shall increase any existing customs duty, or adopt any new customs duty, on an originating good" within the territories of the Agreement. Other provisions of the Agreement speak to the effort to eliminate and/or mitigate duties and tariffs. Thus, imposing blanket tariffs on goods from Mexico and Canada would arguably violate the Agreement.

That said, the USMCA contains provisions that provide the parties with certain exceptions. For instance, Section 10.2 of the USMCA states that any party to the Agreement can take emergency actions on goods from any party within the territory if the "imports from a Party considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports." Some of this language is similar to those statutory provisions that otherwise provide the presidency with authority to impose additional tariffs on goods. It is arguable that an additional 25% tariff on all goods from Mexico and Canada, as well as an additional 10% tariff on all goods from China, may not be justifiable.

While the USMCA is up for mandatory review in July 2026, practically speaking, any party within the USMCA could violate the terms and seek an imposition of tariffs or other barriers to trade in the interim. Any party could also seek to pull out of the Agreement—which would trigger a 10-year transition period. One may presume that there will be heavy negotiations of the USMCA leading up to the July 2026 sunset provision.

WHAT, IF ANY, RETALIATORY ACTIONS CAN OTHER COUNTRIES TAKE IN RESPONSE TO ANY ISSUANCE OF TARIFFS BY THE UNITED STATES?

On November 26, it was suggested by President Sheinbaum that Mexico may retaliate against the United States with tariffs of its own imposed on U.S. goods. It has been reported that Canada is also considering retaliatory tariffs to the extent that the United States moves forward with the 25% tariff. Further, and as indicated under the discussion related to the USMCA, certainly any party to the Agreement could violate its terms.

DOES THE FAR OFFER GOVERNMENT CONTRACTORS RELIEF TO THE ADDITIONAL TARIFFS?

Government contractors should review the terms of their contracts to see what relevant Federal Acquistion Regulation (FAR) clauses are included in their contracts.

- **Potential Tax Relief under FAR 52.229-3:** FAR 52.229-3 may eliminate the increased costs risk related to the new tariffs in at least some fixed-price contracts. This clause is prescribed for fixed-priced contracts or solicitations if the contract is to be performed in the U.S. and is expected to exceed the simplified acquisition threshold (SAT) FAR 2.101, 29.401-3. For example, the SAT limit for 2024 is $250,000. FAR 2.101. The inclusion of FAR 52.229-3 (Federal, State and Local Taxes) in a fixed-price contract allows contractors to request a price increase for after-imposed taxes that a contractor is "required to pay or bear as the result of legislative, judicial, or

administrative action taking effect after the contract date." Covered taxes include "any new or increased Federal excise tax or duty," FAR 52.229-3(a), which likely includes the new tariffs. FAR 52.229-3(c) states: "The contract price shall be increased by the amount of any after-imposed Federal tax, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency reserve or otherwise." FAR 52.229-3 provides that the tax must be implemented after the date set for bid opening or, for a negotiated contract or modification, after the effective date of the contract or modification. Therefore, contractors preparing to submit bids for the new year should pay particular attention to the tariff rates and public notices before finalizing their bids. Contractors must be ready to submit such tariff-related increased cost requests because FAR 52.229-3(g) requires contractors to "promptly notify the Contracting Officer of all matters relating to any Federal excise tax or duty that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs." As soon as a contractor determines that the newly imposed tariffs "reasonably may" affect its pricing, it should promptly notify the relevant contracting officer. Contractors preparing new bid proposals also should account for likely tariff-based cost increases in their bids prior to submission. *See* FAR 52.229-3.

- **Economic Price Adjustments:** If the tax clauses discussed above are not prescribed in the existing contracts or otherwise are unavailing – e.g., where increased costs result indirectly from domestic suppliers due to secondary market effects – the FAR's Economic Price Adjustment (EPA) clauses may also provide contractors with an alternative remedy. This type of clause is included in fixed-price contracts "for upward and downward revision of the stated contract price upon the occurrence of specified contingencies." FAR 16.203-1(a). Increased prices that occur as a result of a tariff may fall within the scope of an EPA, but the aggregate of increases allowed under an EPA is usually limited to 10% of the original unit price, depending on the nature of the contract. *See e.g.*, FAR 52.216-2. Contractors also should be mindful that they are required to promptly notify the Contracting Officer, in some cases no later than 60 days, of the cost increase. FAR 52.216-4. Not all fixed-price contracts contain EPA clauses. For those that do not, the contractor may consider negotiating a contract modification with the Contracting Officer to address the uncertainties in the market related to expected new tariffs. Note that the Defense Federal Acquisition Regulation Supplements, and those of other federal agencies, have their own FAR supplements with specific EPA clauses pertaining to contracts with those agencies.

- **Shortages and Delays:** The new tariffs may lead to shortages and schedule delays due to the inability to obtain necessary goods and materials. Fixed-price contracts typically include changes clauses, which allow a contractor to recover under an EPA for increased costs resulting from government action, such as modifying specifications or services to be performed, changing the method of shipment, packing, or time and place of delivery or performance. *See e.g.*, FAR 52.243-1, FAR 52.243-3. None of the modifications identified in the changes clauses, however, address the imposition of new tariffs. Therefore, it will be difficult for contractors to demonstrate that the new tariffs would qualify as a constructive change entitling them to submit an EPA for increased costs.

  Should the new tariffs result in schedule delays in fixed-price supply and service contracts, contractors may be able to prevent termination or default by showing the tariff-related delays were "excusable delays" under the Default clause contained in FAR 52.249-8(c), which states that "the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor." The clause provides a list of examples that would entitle a contractor to an excusable delay, which includes "acts of Government in either its sovereign or contractual capacity." FAR 52.249-8(c)(2). Thus, if a contractor can successfully argue that the tariff-related schedule delays were excusable because they were unforeseeable and outside of its control, it may be able to obtain a schedule extension and prevent the government from terminating the contract for default as a result of such delays.

WHAT CAN AFFECTED PARTIES DO TO PREPARE FOR AN ONSLAUGHT OF ADDITIONAL TARIFFS—PARTICULARLY ON CHINA?

Since the first Trump Administration, and as a result of the COVID pandemic, U.S. businesses have moved away from sole-sourcing from China. The trend toward re-shoring/on-shoring or "friend shoring" will continue during the second administration. Since the trend began, importers and other members of the supply chain have been doing a number of things:

- Accelerating shipment of goods currently under contract.
- Conducting cost-benefit analyses and origin reviews to determine whether there is an opportunity to shift manufacturing operations to another country such that the origin of the product was legally something other than China. This would be an avenue for parties to pursue to the extent that the proposed tariffs do come to fruition in the next presidency. This has moved production to locations like Thailand, Vietnam, Cambodia, Mexico, and South America. Even with the threat of tariffs on Mexico, we expect that more manufacturing will shift to Mexico and the United States.
- Reviewing tariff classifications such that the 10-digit code associated with a given product legally should be a code that is not subject to tariffs directed at specific products. This would not be available to affected parties to the extent that broad tariffs are issued on a per-country basis.
- Implementing duty-savings strategies in an effort to legally reduce the Customs value required to be declared at the time of importation such that the duties and tariffs applied to the value are mitigated.
- Considering participation in industry association lobbying and communicative efforts with the U.S. government related to the effective dates and scope of any prospective tariffs, to the extent able.
- If part of the process, participating in any notice-and-comment period as it relates to any potential tariffs.
- Reviewing their existing contracts for relevant contract clauses that may provide relief from duties and tariffs, including clauses related to potential tax relief, equitable price adjustments, changes and excusable delays. Contractors also are considering how to factor the increased costs associated with new tariffs into their prospective bid proposals and contract amendments.

The next few weeks will be telling as to what to expect and we will continue to update this briefing accordingly. For example, as of December 3, China has announced its own retaliatory sanctions by imposing an export ban to the United States of critical minerals including gallium, germanium, and antimony. These are a continuation of prior Chinese restrictions that began in 2023 – but this time apply only to exports to the United States.

10+ Min Read

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