CLIENT ADVISORY: THE TRUMP ADMINISTRATION'S TRADE AGENDA

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The *Trump Trade Doctrine*, coined by his advisors on trade policy, provides that any free trade agreement signed by the United States must increase GDP growth rate, decrease the trade deficit, and strengthen the U.S. manufacturing base. The *Trump Trade Doctrine* emerged during a presidential campaign that focused unprecedented attention on the impact of trade on the U.S. economy, fed by the sense of economic dislocation felt in many parts of the United States as a result of globalization. Calling for tougher enforcement of U.S. trade laws, as well as a more confrontational stance towards certain trading partners, Donald Trump successfully tapped into this sense of frustration. In highlighting the perceived failure of U.S. trade policy to protect American workers, then-candidate/now-President-elect Trump sketched out a trade agenda that will likely be quite different from that of his predecessors, and not bound by typical Republican priorities. In our estimation, this trade agenda will include:

- Increased trade enforcement, through retaliatory tariffs and trade remedies;
- The shelving of multilateral and regional trade agreements negotiated during the Obama Administration, with a focus instead on bilateral negotiations; and
- Increased attention on manufacturing industries—such as steel and autos—accompanied by a de-emphasis on the promotion of digital trade as a stand-alone sector.

We examine these predictions, as well as key personnel appointments, below.

I. Key Personnel

To date, the President-elect has announced a handful of appointments to his Administration for positions with jurisdiction over trade policy and trade enforcement. Key personnel announcements include:

Department of Commerce

Wilbur Ross, founder of the private equity firm WL Ross & Co., has been nominated to serve as Secretary of Commerce. While the Department of Commerce has jurisdiction over a broad range of domestic and international policies and issues, recent reports indicate that President-elect Trump wants Ross to play a significant role in shaping the U.S. trade agenda, a deviation from the last several decades, during which the U.S. Trade Representative has had primary authority over trade policy. Ross has significant ties to the U.S. steel industry based on his firm's distressed investments, and served as an economic adviser to President-elect Trump during the campaign. Ross co-authored a White Paper with **Peter Navarro**, posted on the Trump campaign website, which provides insight into his potential approach to trade policy and enforcement. In the White Paper, Ross and Navarro wrote that:

> "A Trump Administration will not tolerate cheating by any nation. If America's trading partners continue to cheat, a President Trump will use all available means to defend American workers and American manufacturing facilities from such cheating, including

> tariffs…Tariffs will be used not as an end game but rather as a negotiating tool to encourage our trading partners to cease cheating."[1]

National Trade Council

In late-2016, President-elect Trump announced his intended formation of the National Trade Council ("NTC") to be led by **Peter Navarro**. As indicated in the announcement, the mission of the NTC will be, "to advise the President on innovative strategies in trade negotiations, coordinate with other agencies to assess U.S. manufacturing capabilities and the defense industrial base, and help match unemployed American workers with new opportunities in the skilled manufacturing sector." The creation of the NTC will further reduce the influence of the Office of the U.S. Trade Representative ("USTR"), and combined with the large role for Wilbur Ross, potentially convert USTR's responsibility to a supporting role.

Navarro served as an economic advisor to the Trump campaign and is currently a professor at the University of California-Irvine. He is a long-standing critic of China and the U.S. trading relationship with China, and has written extensively on the subject including his 2006 book, "The Coming China Wars: Where They Will Be Fought and How They Can Be Won," as well as his 2011 book, "Death by China: Confronting the Dragon – A Global Call to Action." Navarro will likely advocate for a more confrontational approach towards China. In the aforementioned White Paper, he and Wilbur Ross explained that:

> "Our view is that China's leaders will quickly understand that they are facing strength on the trade issue in Trump…Just as these Chinese leaders have been exploiting American weakness by cheating in the trade arena, they will acknowledge the strength and resoluteness of Trump and rein in their mercantilist impulses."[2]

Special Representative for International Negotiations

Following the announced formation of the NTC, President-elect Trump also announced the appointment of his longtime attorney Jason Greenblatt as "special representative for international negotiations." In a statement announcing the appointment, Trump indicated that Greenblatt would be "assisting on international negotiations of all types, and trade deals around the world." Whether this position will complement or supplant the traditional role of USTR as lead trade negotiator remains unclear.

Office of the U.S. Trade Representative

In the final major trade-related personnel announcement of the transition, **Robert Lighthizer** was nominated to serve as U.S. Trade Representative. Lighthizer is a Washington, D.C.-based trade lawyer who has represented U.S. Steel in trade proceedings for many years. He served as Deputy U.S. Trade Representative under Ronald Reagan, and prior to that chief of staff on the Senate Finance Committee, and as such has a deep understanding of the trade policy and trade enforcement process. Lighthizer has

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1 Peter Navarro and Wilbur Ross, *Scoring the Trump Economic Plan: Trade, Regulatory, & Energy Policy Impacts* at 16-17 (Sept. 29, 2016), https://assets.donaldjtrump.com/Trump_Economic_Plan.pdf ("Navarro / Ross White Paper").

2 Navarro / Ross White Paper at 21.

also been a long-time critic of China's trade practices, and in testimony to Congress in 2010 called for a "significantly more aggressive" approach in U.S. trade policy towards China.[3]

II. Enforcement Actions

Tariffs for Offshoring

In a series of statements during the campaign and tweets subsequent to his election, President-elect Trump threatened to impose a 35-percent tariff on any U.S. company that offshores its operations and then exports goods back to the U.S. In furtherance of this commitment, Trump has indicated that, in his first 100 days in office, he will introduce a measure to Congress that will impose such tariffs to discourage companies from laying off workers and shifting production overseas. It is, however, an open question as to whether or not a Congress controlled by historically free-trade oriented Republicans would pass such legislation.

Retaliatory Tariffs

Candidate Trump regularly promised during his campaign to impose unilateral tariffs against countries he believed were trading unfairly with the United States. While the application of tariffs generally falls within the purview of Congress, there are certain tools available for unilateral application by the President which the Trump Administration may utilize.

The first, which is discussed on the Trump campaign website, is Section 301 of the Trade Act of 1974 ("Section 301"). Section 301 provides authority for the President to take unilateral actions where it is determined that a foreign country is denying U.S. rights under a trade agreement or is otherwise engaging in unjustifiable practices that restrict or burden U.S. commerce.[4] During the 1980s and early 1990s, the United States used Section 301 extensively against Japan to protect domestic industries. In implementing the World Trade Organization Agreement in 1995, the U.S. government indicated through a Statement of Administrative Action its intention to apply Section 301 duties only after WTO findings that the U.S. trading partner had violated WTO rules. Such Statements are not legally binding on subsequent Administrations. Moreover, there is no limitation on USTR applying Section 301 in the absence of WTO findings.

Section 201 of the Trade Act of 1974 ("Section 201") is another unilateral tariff highlighted on the Trump campaign website. Section 201 authorizes the President to instate temporary trade barriers, known as safeguards, to protect domestic industries that have been injured or threatened by increased imports.[5] Four of the last six U.S. presidents implemented safeguards at least once to protect and restore injured

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[3] Robert E. Lighthizer, Testimony before the U.S.-China Economic and Security Review Commission: Evaluating China's Role in the World Trade Organization Over the Past Decade (June 9, 2010), http://www.uscc.gov/sites/default/files/6.9.10Lighthizer.pdf.

[4] 19 U.S.C. § 2411.

[5] *Id.* § 2251.

or threatened domestic industries.[6] The WTO has, however, ruled against every U.S. safeguard implemented since its founding in 1994.

Trade Remedies

Throughout his campaign, President-elect Trump promised to increase the use of U.S. trade remedy laws in order to target what he described as unfair subsidies benefitting foreign manufacturers. As a result, it is likely that the Trump Administration will aggressively pursue antidumping and countervailing duty orders. Given the President-elect's campaign promises along with his nominee for Secretary of Commerce, it is also likely that the Department of Commerce will self-initiate antidumping or countervailing duty proceedings, rather than rely on petitions filed by U.S. domestic industry. Finally, it is also likely that the Trump Administration will refuse to grant China Market Economy status for purposes of U.S. antidumping law.

III. Free Trade Agreements

Pre-existing Free Trade Agreements

President-elect Trump has harshly criticized the United States' pre-existing free trade agreements, and pointedly declared the **North American Free Trade Agreement** ("NAFTA") the "single worst trade deal ever approved." The aforementioned White Paper posted on the Trump campaign website indicated that if elected Trump would renegotiate all prior trade deals "according to the principles of the Trump Trade Doctrine, i.e., any deal must increase the GDP growth rate, decrease the trade deficit, and strengthen the U.S. manufacturing base."[7] To date, the President-elect has only spoken about his desire to renegotiate NAFTA, however, the White Paper also highlights perceived concerns with the **U.S.-Korea Free Trade Agreement** ("KORUS"), stating that, as a result of KORUS, the U.S. has lost 95,000 jobs and America's trade deficit with South Korea nearly doubled within three years.[8] Moreover, the paper contends that, as a result of KORUS, "[w]orkers in the U.S. auto industry, particularly in states like Michigan, Ohio, and Indiana, have been particularly hard hit."[9]

Pending Free Trade Agreements

In a video released on YouTube following his election, President-elect Trump indicated that on the first day of his presidency he will issue a notification of intent to withdraw the United States from the **Trans-Pacific Partnership Agreement**. Trump was critical of the TPP throughout the campaign, calling it a "disaster" and pledging to focus instead on "fair bilateral trade deals that bring jobs and industry back to America." With more than 20 chapters, TPP touches on an array of issues (intellectual property, investment, labor and the environment, among others) as well as industries (financial services, telecommunications, textiles and apparel), and established a new standard for digital trade policies in

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6 *See* Office of Investigations, U.S. Int'l Trade Comm'n, *Import Injury Investigations Case Statistics (FY 1980-2008)*, Tables 14-15 (Feb. 2010), https://www.usitc.gov/trade_remedy/documents/historical_case_stats.pdf.

7 Navarro / Ross White Paper at 17.

8 *Id.*

9 *Id.*

the Asia-Pacific region. TPP's chapter on electronic commerce ("e-commerce") was of particular significance, as it was the first effort of its kind to establish rules for Internet and e-commerce in a free trade agreement.[10] We discuss the potential implications on digital trade of U.S. withdrawal from TPP in Section IV, below.

Although President-elect Trump has not specifically criticized the **Transatlantic Trade and Investment Partnership** ("TTIP") agreement with Europe, it is hard to imagine that his Administration will continue with negotiations—at least at the outset of the Administration—given his general opposition to regional free trade agreements. Even prior to the Presidential election in the U.S., TTIP negotiations stalled out in part due to disagreements between the U.S. and European Union ("EU") on data flows and privacy issues. U.S. negotiators criticized the EU for failing to present a unified proposal on data flows, while certain EU member states expressed associated privacy concerns.

Data flows were also a point of tension in negotiations surrounding the **Trade in Services Agreement** ("TiSA"). TiSA has been negotiated among 23 of the world's more market-oriented countries. Members of the 23-party negotiations canceled the December 5 ministerial meeting after coming to the conclusion that a deal could not be finalized prior to the close of the Obama Administration. TiSA generally seeks to expand on and modernize the WTO's 1994 General Agreement on Trade in Services ("GATS") by increasing market access for more than a dozen services sectors. TiSA also sought to facilitate cross-border data flows and rules covering data localization among nearly 50 countries. While President-elect Trump has not signaled direct opposition to TiSA, the agreement seeks to apply many of the services rules contained within TPP.

IV. Implications for Digital Trade

The Obama Administration sought to integrate digital commerce more directly into international trade law. Both TPP and TTIP contain e-commerce chapters, the goal of which is to achieve unanimity on the treatment of issues central to digital trade such as data flows and digital services. It is an open question where the Trump Administration will place digital trade as a priority within its trade agenda.

De-emphasizing digital trade could manifest itself in various ways. Without TTIP, the EU has fewer incentives to moderate its intensifying scrutiny of U.S. technology companies, and the U.S. government will have one less forum in which to bargain on behalf of those companies. The EU may, therefore, have the ability to shape digital trade in ways that significantly change how U.S. technology companies operate in the EU market. As free trade agreements are unlikely to serve as a mechanism for codifying protection of cross-border data flows, other bilateral and multilateral fora will become more important. The EU-U.S. Privacy Shield will gain in prominence, along with the APEC Cross-Border Privacy Rules. To date, Canada, Japan, Mexico and the U.S. have made the APEC rules effective in their countries by designating entities to monitor companies' compliance with the principles. Hong Kong, Singapore, and South Korea are reportedly exploring the same step. Finally, there is potential for the WTO to take a more active role on digital trade. Plans for an e-commerce treaty at the WTO are expected to be decided on during the next Ministerial Conference in Argentina next year. This past July, seven WTO

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10 Medium Blog, *TPP Made in America, Chapter 14: Electronic Commerce*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 5, 2015), https://medium.com/the-trans-pacific-partnership/electronic-commerce-87766c98a068#.wguwgfg4d.

members—including China, the EU, and the U.S.—introduced a series of papers outlining concepts for a future e-commerce agreement.

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For further information on the trade agenda in the Trump Administration and its potential implications for your company, please contact **Tricia Paoletta** at +1 (202) 730-1314 or tpaoletta@hwglaw.com, **William Leahy** at +1 (202) 730-1358 or wleahy@hwglaw.com, or the HWG lawyer with whom you regularly work.

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