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Key Trade Appointees and President Trump's Approach to International Trade Policy

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President Trump has now appointed the senior members of his administration (some of whom remain subject to U.S. Senate confirmation) who will help him develop, coordinate and enforce U.S. trade policy. Examining the backgrounds of these senior trade officials in the context of the president's statements during and since the campaign provides a more informed look at what actions the president may take on trade in the first months of his presidency.

During the campaign, President Trump promised to change dramatically a variety of U.S. trade policies that have stood for decades (sometimes with bipartisan support). For example, he proposed imposing a border tax targeting specific companies, imposing across-the-board tariffs, terminating or renegotiating free trade agreements (FTAs) and labelling China a currency manipulator, as we discussed in our previous update.

In this update, we discuss President Trump's key trade appointments and the creation of a new White House entity to advise on trade—the National Trade Council (NTC). We then provide our outlook on the direction President Trump may take in regard to U.S. international trade policy.

In sum, we conclude that President Trump appears poised to follow through on at least some of his campaign promises with regard to trade actions that are intended to overturn the status quo. The president has created an entity in the NTC that he can use to control trade policy in the White House, and he has appointed the architects of his positions on the campaign trail to key trade posts. His appointees exhibit an outlook that is much tougher than previous U.S. policy towards major trading partners such as China and Mexico. The appointees, like the president himself, indicate a willingness to take more overtly aggressive measures to protect U.S. manufacturing jobs and industries, even though certain of these measures, as discussed below, create risks of adverse multilateral rulings and potential trade retaliation. In this regard, core elements of President Trump's trade policy may more closely resemble the traditional Democratic, rather than Republican, orthodoxy on trade.

Economic and Trade Policy Appointments and the New National Trade Council

President Trump has announced a series of appointments to the offices that develop, or at least coordinate and enforce, trade and finance policy in the executive branch. One key issue is the nature of the lines of authority among the entities that have a hand in trade policy. In mid-December 2016, a senior transition official indicated that the U.S. Department of Commerce (Commerce), and not the Office of the U.S. Trade Representative (USTR), would "take the lead" on U.S. trade policy, including trade negotiations. This would be a significant departure from the

prior administrations of both parties, in which USTR had the lead in trade policy, through its role in trade agreement negotiations and actions filed at the World Trade Organization (WTO).

President Trump, however, may control the substance of U.S. trade policy from the White House and then use agency heads to implement his policy choices. This interpretation gained traction when the president announced a new White House entity— the NTC—and appointed Peter Navarro to the new position of Assistant to the President and Director of Trade and Industrial Policy. The NTC apparently will replicate in trade policy the roles that the National Economic Council (NEC) and the National Security Council (NSC) play in economic and security policy, respectively. According to President Trump, the NTC will "advise the President on innovative strategies in trade negotiations, coordinate with other agencies to assess U.S. manufacturing capabilities and the defense industrial base, … help match unemployed American workers with new opportunities in the skilled manufacturing sector, … lead the Buy America, Hire America program to ensure the President's promise is fulfilled in government procurement and projects ranging from infrastructure to national defense."

A discussion about Mr. Navarro, as well as the appointees to head Commerce and USTR, and a newly created international negotiations position, is below.

- **Assistant to the President and Director of Trade and Industrial Policy, White House National Trade Council: Peter Navarro.** Mr. Navarro, 67, is currently a professor of economics and public policy at the Paul Merage School of Business, University of California, Irvine. With Wilbur Ross, he was a chief architect of the president's trade policy platform during the election campaign. President Trump, in his appointment statement, said Mr. Navarro has been "instrumental in challenging the prevailing Washington orthodoxy on so-called free trade. ... He has presciently documented the harms inflicted by globalism on American workers, and laid out a path forward to restore our middle class."

Critics have accused Mr. Navarro of "economic illiteracy," asserting that he holds abandoned economic views, such as the belief that trade is a zero-sum game. Daniel Ikenson of the Cato Institute, a libertarian economics think tank, notes that Mr. Navarro "fails to see trade as a mutually beneficial activity between willing parties, which reinforces the ties that bind." Mr. Navarro is well-known, and assailed by some, for holding strongly anti-China views. For example, *Forbes* reports that Mr. Navarro has described China as an "imperialist power that reigns over the world's leading cancer factory, its most prolific propaganda mill and the biggest police state and prison on the face of the earth." It remains to be seen whether Mr. Navarro will temper his prior positions or if they will form the basis for his service in his new role.

- **Secretary of Commerce: Wilbur Ross.** Mr. Ross, 79, heads a private equity firm he founded, WL Ross & Co. LLC. He previously served as executive managing director of boutique investment banking firm Rothschild Inc. for 24 years. With Mr. Navarro, he was a chief architect of President Trump's trade policy platform during the election. Mr. Ross is known primarily for acquiring and then restructuring companies in mature economic sectors like steel, coal and textiles. Mr. Ross is familiar with U.S. trade remedies, as his investments often were premised on newly acquired companies receiving trade relief, e.g., his firm's acquisition of LTV Steel benefitted from the imposition of high trade-

remedy tariffs on imported steel. Mr. Ross appears to have less experience with the high-tech, services and IP sectors that now drive much of U.S. economic growth.

Mr. Ross has supported the president's plan to use tariffs and "all available means" to protect U.S. manufacturing jobs against unfair trade practices by foreign countries. On November 30, 2016, after his appointment was announced, he was widely quoted as referring to the Trans-Pacific Partnership (TPP) as "a flawed agreement" that "is not going to happen."

- **U.S. Trade Representative: Robert Lighthizer.** Mr. Lighthizer, 69, was an early supporter of President Trump and helped run the transition team focusing on trade. After a stint as chief of staff of the U.S. Senate Committee on Finance, he served as Deputy USTR during the Reagan administration. Since leaving USTR in the 1980s for private practice at a large New York-based law firm, Mr. Lighthizer has built a reputation for aggressive use of U.S. trade remedies laws to impose tariffs on imports that compete with domestic U.S. manufacturing industries, primarily in the steel sector. Mr. Lighthizer represented U.S. Steel for decades in the company's campaign to restrict dumped and subsidized steel imports from China, Korea and other major steel producing countries.

In choosing Mr. Lighthizer, President Trump lauded Mr. Lighthizer's USTR experience in the 1980s negotiating agreements that the president said "protect some of the most important sectors of our economy." During the Reagan administration, Mr. Lighthizer negotiated so-called voluntary restraint agreements in which trading partners agreed to restrict the volume of their steel exports to the United States, as a way to protect U.S. industries from low-priced import competition. These types of agreements later fell out of favor for a variety of reasons. They are largely constrained by new multilateral trade rules implemented in 1995 after the Uruguay Round of trade negotiations established the WTO.

Mr. Lighthizer enjoys at least some bipartisan support. A number of Democratic members of Congress have expressed satisfaction with Mr. Lighthizer's appointment but are worried that Mr. Lighthizer's authority could be undermined by some of President Trump's other cabinet picks, whose positions they believe are at odds with the president's campaign promises on trade. For example, Rep. Peter DeFazio (D-OR) said in an early January 2016 press conference that "Lighthizer obviously is not in the same category at all than Wilbur Ross or Tillerson or many of his other appointments who are adamant long-term free traders. I think there's some hope in working with him; he's certainly cut from a very different cloth than any other special trade representative in my 30 years here in Washington, D.C." This reaction from a Democrat highlights just how far President Trump's stated approach to trade policy seems to have diverged from more recent Republican Party free-trade orthodoxy.

- **Special Representative for International Negotiations: Jason Greenblatt.** This is a newly created position. President Trump has said that Mr. Greenblatt's responsibilities will include trade negotiations but has not indicated how Mr. .Greenblatt would mesh with USTR, Commerce and other agencies. Mr. Greenblatt has worked for the president since 1997. He currently serves as executive vice president and chief legal officer to the Trump Organization. According to Mr. Greenblatt's appointment announcement, "for the past two decades, he has represented President-elect Trump and his family in diverse legal and business affairs, concentrating on all aspects of domestic and worldwide real estate development and other businesses … [and] served as one of the President-elect's

principal advisers on the U.S.-Israel relationship during the campaign." Greenblatt has no public background in trade policy or negotiations, so it is difficult to predict his policy impact, if any, on execution of the president's trade program.

The Likely Trump Administration Trade Initiatives and Potential Obstacles

President Trump has focused on a series of potential trade actions that revolve around his campaign's central themes of restoring U.S. manufacturing jobs and targeting what he perceives as unfair trade practices by key U.S. trading partners, such as China and Mexico. As we reported in a previous update, the president has pledged to terminate and/or renegotiate major trade agreements, including the North American Free Trade Agreement (NAFTA) and the Trans-Pacific Partnership (TPP); label China a currency manipulator; impose across-the-board tariffs against imports from China and Mexico; take action against unfair trade practices under Section 301 of the Trade Act of 1974; and self-initiate U.S. trade remedy proceedings and WTO disputes. In addition, President Trump repeatedly has said that he will seek to impose border taxes against U.S. companies that move production overseas. He has invoked the threat of a border tax as a means to encourage companies to maintain production in the United States and shift overseas production to the United States.

Our analysis suggests that, particularly with the guidance and input of the key trade policy and economic nominees discussed above, President Trump appears poised to follow through on at least some of these promises. Some actions, particularly those for which the executive branch has authority independent of Congressional authorization, may be easier for the president to implement. Each of the proposed actions faces obstacles, whether from opposing domestic interests, potential inconsistency with U.S. obligations under existing trade agreements, or foreign government retaliatory trade measures. We briefly analyze each of the major proposed actions, potential obstacles to their implementation and their potential impact (negative or otherwise) on U.S. industries.

1. Border Taxes. On a number of occasions, President Trump has said he would impose a "border tax" on imports of companies that shift production to another country. The president has not clarified precisely what he means by a "border tax." Some observers have questioned whether he is referring to a tariff or to a border adjustment tax (BAT). The distinction is important to the president's legal authority to impose the measure and its consistency under the multilateral trade agreements to which the U.S. is a party. A tariff is a charge collected at the border by U.S. Customs and Border Protection when a good is imported. The charge usually is calculated as a percentage of the import's value. Generally, the level of tariffs that the United States is permitted to impose on imports (normally what is called the "bound" tariff rate) is subject to agreed multilateral commitments set forth in the Uruguay Round agreements or FTAs and implemented in U.S. law.

A BAT is an entirely different type of measure and would fundamentally change how the U.S. government taxes imports and exports. If the U.S. tax regime were altered to include a BAT, companies would no longer be able to deduct the cost of their imported goods, while the sales of their exports would no longer be subject to U.S. tax. The economic impact of a BAT is to make imported products more expensive and exported products less expensive. In this regard, a BAT presumably could serve the president's goal of punishing companies that shift production for

U.S. consumption abroad, while at the same time rewarding companies that maintain production (and manufacturing jobs) in the United States.

A simpler, more case-specific "border tax" that targets the imports of a single company, while less complex than a broad overhaul of the U.S. tax system, would be more difficult for the president's administration to defend. Viewed in the context of trade remedies law and policy, shifting production out of the United States is not a sufficient condition for imposing a remedy that could be characterized as an additional import tariff. Other provisions of U.S. trade laws, such as Section 301 for example, might ostensibly provide justification for action, but these trade laws generally provide authority to impose a remedy to combat unfair conduct by a foreign *country*, not allegedly harmful conduct by a *U.S. producer* who chooses to move production to a foreign country to take advantage of lower labor costs or other economic advantages.

Regarding a more comprehensive "border tax adjustment," House Republicans have introduced a tax reform package that includes a BAT. The so-called GOP Tax Reform Blueprint would, among other things, eliminate the deduction for the cost of imported goods and exempt sales of exported goods. Speaker of the House Paul Ryan has proposed the BAT (instead of across-the-board tariffs) as a means of accomplishing administration goals without starting a trade war. It is not yet clear whether the "Blueprint" is supported by Senate Republicans or the incoming administration, although the president has publicly expressed some reservations. Moreover, depending upon application and operation, a BAT would potentially run afoul of U.S. commitments under multilateral trade agreements that prohibit government measures that provide benefits specifically to exports or treat domestically produced products more favorably than imported products.

2. Termination and renegotiation of trade agreements. President Trump has proposed to renegotiate NAFTA and terminate it if Mexico and Canada refuse U.S. demands. In addition, he has proposed to withdraw from the TPP. In each case President Trump has significant authority to lead the negotiations (or re-negotiations), but his ability to implement and apply revised agreements is greatly circumscribed by a web of existing U.S. statutes as well as by Congressional authority to approve any new or revised agreements.

With regard to NAFTA, President Trump's emphasis likely will be on attempts to renegotiate, in order to avoid the economic disruption that outright termination would cause to many U.S. businesses. But the President's rhetoric indicates he seeks a "rebalancing" of NAFTA that is weighted far more heavily toward what he sees as U.S. interests. Thus, renegotiation may not be entirely feasible, as it would require a willingness by Mexico and Canada to engage and a willingness by Mr. Trump to make concessions to achieve his goals in the negotiation. If frustration of President Trump's negotiation effort were to lead him to push for outright termination of NAFTA, and the U.S. Congress ultimately agreed to implement that termination by amending the wide range of U.S. laws that were previously enacted under NAFTA, the resulting effects on the U.S. economy would likely be chaotic and severe. For this reason, outright termination of NAFTA seems highly unlikely, while modification or "rebalancing" of NAFTA's provisions presents a more realistic scenario.

With regard to TPP, the president has complete authority to withdraw from the negotiation. One should note that China is not a member of the agreement. Indeed, many experts believe that TPP,

along with NAFTA, serve U.S. economic and security interests in checking China's growth and domination of Pacific markets. Given the tough-on-China bent of the incoming administration, this may be the same conclusion ultimately reached by the president and his new trade advisers.

3. Designation of China as currency manipulator. President Trump has the power to take this action on his own, through the U.S. Department of the Treasury's longstanding (and recently enhanced) currency evaluation process. The president can order the Secretary of the Treasury to designate China as a currency manipulator, which would trigger a process for the president to enter discussions with China on actions to readjust its currency and possibly impose penalties if those discussions fail.

Under its longstanding approach, the U.S. Treasury Department analyzes several criteria to decide if foreign countries' actions, with regard to their currency, are unfair, including examining whether there is a disproportionate trade surplus with the United States, whether there is a disproportionate current-account surplus, and whether there are sizable purchases of foreign assets as a result of currency intervention. In the Treasury Department's most recent semi-annual report (issued in October 2016), it concluded that China met only one of the three criteria—the trade-surplus criterion. The Treasury Department noted that China, rather than trying to weaken the yuan to gain an advantage, sold an estimated $570 billion in foreign-exchange assets from August 2015 to August 2016 in an effort to prevent a rapid decline in the currency.

With a new Treasury Secretary, President Trump may seek to alter the longstanding criteria that the Treasury Department has applied in its analysis of currency manipulation. Revisions to specific numerical thresholds or the addition (or deletion) of particular criteria could provide the president with a basis to issue a designation against China, although we expect that the president's trade advisers would take into account the impact that such a designation would have, including the potential for retaliatory trade measures imposed by China on U.S. products.

4. Across-the-board tariffs. President Trump has proposed imposing a tariff on all imports of all goods from all sources. At various times, he has proposed an across-the-board tariff ranging from 10-45%. He also has proposed targeting only specific countries, such as China and Mexico. As discussed below, however, U.S. commitments under multilateral trade agreements make such actions difficult to implement without provoking claims by U.S. trading partners that this represents a serious violation of trade rules that would entitle foreign countries to retaliate with their own punitive tariffs or other barriers to market entry, in turn harming U.S. exporters. Moreover, the potential for substantial additional costs for U.S. companies that rely on foreign inputs, caused by the imposition of new import tariffs, raises the potential for significant domestic opposition to such action.

As noted above, Article II of the WTO General Agreement on Tariffs & Trade 1994 (GATT 1994) provides for agreed "bound" tariff rates (rates that the United States and all WTO member countries have committed to set as maximum tariff rates). A new across-the-board tariff at the levels proposed by President Trump would exceed at least some of these "bound" rates, leading to claims by U.S. trading partners that the action violates Article II. Moreover, were the United States to impose the across-the-board tariffs on only one country, or a subset of WTO member countries, these WTO members would likely claim that the tariffs violate not only Article II but also Article I, which sets forth the Most Favored Nation (MFN) obligation, a foundational element of the existing multilateral trade agreements scheme. (Note that similar rules exist in

bilateral and plurilateral free trade agreements to which the United States is a party, e.g., NAFTA.)

If President Trump and his trade advisers conclude that imposing additional tariffs is necessary to address particular foreign unfair trade practices such as dumping, subsidization or the rapid flooding of markets with products, the existing WTO agreements provide remedial measures, including additional tariffs, that member countries are permitted to take. But these measures are subject to strict procedural requirements that require evidence of the particular unfair trade practices and the particular harm that such practices are causing to U.S. domestic industries. President Trump may choose to pursue such actions on a product-by-product basis under existing U.S. antidumping, countervailing duty and safeguards laws. This approach would allow the president and his advisers to defend against claims that the actions are inconsistent with multilateral trade agreements.

One untested approach, likely to raise objections by U.S. trading partners, would involve President Trump attempting to justify across-the-board tariffs as permissible under the "national security" exception of Article XXI of GATT 1994. As written, this exception is self-designating, which means that the U.S. government could unilaterally claim that it applies. But the negotiating history of the WTO agreements and GATT 1994 plainly show that Article XXI was never intended to serve as a justification for the imposition of across-the-board import tariffs. In addition to the challenge of explaining to U.S. trading partners in the WTO why the need for across-the-board tariffs was a matter of "national security," the administration of President Trump would potentially face the unwelcome prospect of a resulting expansion of the use of Article XXI to justify "national security" trade measures by other WTO members, including Russia and China.

5. Actions under Section 301 of the Trade Act of 1974. Section 301 allows the U.S. government to investigate alleged unfair trade practices by a foreign country. Where certain conditions are met, Section 301 authorizes the president to negotiate with the foreign country and take action against the foreign unfair trade practice. Specifically, it authorizes the president to take appropriate action, including retaliation, to obtain the removal of any act, policy or practice of a foreign government that violates an international trade agreement or is unjustified, unreasonable or discriminatory, and that burdens or restricts U.S. commerce. Congress granted the president broad authority with regard to the nature and extent of the actions that may be taken in retaliation. Indeed, an argument could be made that, were the executive branch to comply with the statute's procedural requirements, it could impose crushing retaliatory measures, such as across-the-board tariffs. Moreover, the USTR can self-initiate Section 301 investigations.

For these reasons, Section 301 would appear to be the perfect tool for the incoming administration. But when the United States joined the WTO, it amended Section 301 so that, if the alleged unfair trade practice falls within the scope of an international trade agreement that has a dispute settlement mechanism, e.g., the WTO and NAFTA, the action must be challenged under the applicable agreement and not through unilateral action. This means that, for all practical purposes, international trade disputes with a WTO member must, or at least should, be addressed at the WTO and not under Section 301. One notable exception may be currency manipulation. Many experts argue that the scope of the WTO agreements, broad as such agreements are, does not cover currency manipulation. The United States thus arguably could target China's alleged currency manipulation using the investigative and retaliatory tool of

Section 301. The challenge for the incoming administration would be to find a way to impose retaliation on China in a way that does not violate U.S. obligations under the WTO agreements, i.e., retaliate in a non-trade context or otherwise be subject to a WTO challenge by China.

6. Self-initiation of trade remedy cases and WTO disputes. Under current U.S. law, the administration has authority to "self-initiate" trade remedy proceedings and WTO dispute settlement challenges, i.e., commence actions before receiving a formal petition from an aggrieved U.S. domestic industry. In practice, however, self-initiation—particularly in the trade remedies context—is rarely used, because such cases rely in any event on the active participation and support of the U.S. domestic industry whose interests are being protected. The relevant WTO agreements (e.g., Art. 5.6 of the WTO Antidumping Agreement) provide that the government may self-initiate such investigations only where the government already has "sufficient evidence of dumping, injury {to a domestic industry} and a causal link {between the two}." Such evidence normally resides in the hands of the affected U.S. industry.

Consequently, trade remedy investigations and WTO disputes usually are initiated by a process in which an affected U.S. company or industry petitions the administration for redress, either formally or informally. In most trade remedy investigations, the affected domestic industry submits to the Commerce Department and the International Trade Commission (ITC) a formal petition containing detailed data, testimony and other documentary evidence supporting imposition of new tariffs. Commerce and the ITC examine the petition and either accept it, or reject it and provide guidance on how to ensure that a future petition contains a sufficient level of detail and evidence to meet the requirements of the WTO agreements and the implementing U.S. law. In the case of WTO disputes, the affected U.S. company or industry consults with USTR to provide information relevant to establishing the violation as well as the need for a WTO remedy, essential information for providing a sufficiently strong negotiating position for the USTR in its consultations with the target country.

In both contexts, the U.S. agencies involved are charged with assisting U.S. industries and generally do so. Thus, although self-initiation is fully within the control of the administration, the administrative burden of compiling a sufficiently documented case to justify self-initiation, without the active participation and support of the affected domestic industry, is significant.

Conclusion

As President Trump and his new trade and economic policy advisers begin to weigh the benefits, costs and consequences of the various trade proposals floated during the campaign, the incoming administration may ultimately find that a less overtly aggressive approach is more effective. The new administration may decide instead to pursue new bilateral trade deals with longstanding allies such as the United Kingdom and Japan, increase the pressure on China while preserving relationships with traditional major trading partners and aggressively pursue new trade remedy petitions and WTO actions where supported by the domestic industry—while reconsidering measures that may raise legal issues under existing multilateral trade agreements and which could invite severe retaliatory actions by U.S. trading partners to the detriment of U.S. industries.