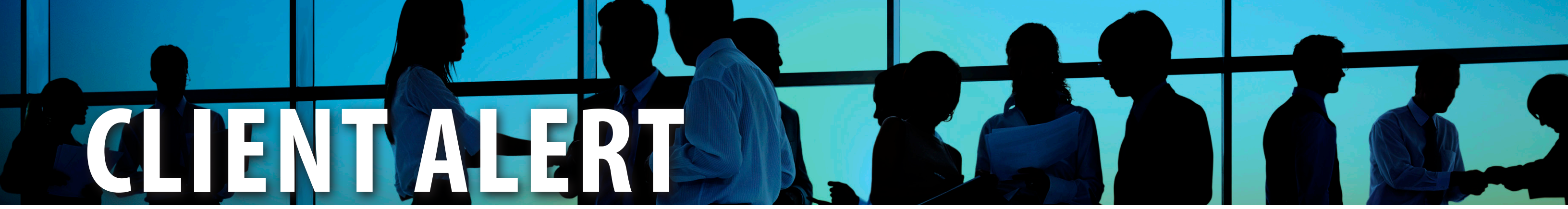


PRESIDENT TRUMP ANNOUNCES STEEL AND ALUMINUM TARIFFS WITH EXEMPTIONS FOR CANADA AND MEXICO

by Bruce Thelen, Dan Ujczo and Brenda Swick

President Donald Trump surprised even his own senior staff on March 1 when he announced his intention to impose global tariffs of 25% on steel and 10% on aluminum. He followed that with statements that there would be no exemptions for any country, even close allies like Canada, and that the tariffs would be in place "for a long period of time". The President promised to act promptly and carried through with his promise when he signed two presidential proclamations on March 8 imposing tariffs on steel and on aluminum under the authority of Section 232 of the Trade Expansion Act of 1962. But despite earlier statements that there would be no exemptions, the proclamations provide a conditional exemption for steel and aluminum products from Canada and Mexico, substantially softening the impact within the NAFTA region, at least for the time being.

The proclamations also opened the door to other countries that have important security relationships with the United States to obtain an exemption or modification of the tariffs by discussing alternative ways to address threats to U.S. national security caused by steel and aluminum imports from those countries.

Another door was opened to requests for exclusions from the tariffs by affected parties in the United States in cases of insufficient U.S. capacity or in cases involving specific national security considerations. Procedures for exclusion requests are due to be issued by the US Department of Commerce no later than March 18.

What does all of this mean for affected firms? And what should they do now?

Scope and Application of the Tariffs

The tariffs have a broad scope and users of steel and aluminum will need to determine whether they or those in their supply chains are the importers of record of any steel or aluminum products covered by the proclamations. The tariffs will be effective with respect to all goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018.

The steel tariffs of 25% cover a wide range of steel products, classified under the Harmonized Tariff Schedule (HTS) 6 digit levels 7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90.

The aluminum tariffs of 10% cover products falling under HTS headings for (a) unwrought aluminum (HTS 7601); (b) aluminum bars, rods, and profiles (HTS 7604); (c) aluminum wire (HTS 7605); (d) aluminum plate, sheet, strip, and foil (flat rolled products) (HTS 7606 and 7607); (e) aluminum tubes and pipes and tube and pipe fitting (HTS 7608 and 7609); and (f) aluminum castings and forgings (HTS 7616.99.51.60 and 7616.99.51.70). The proclamation does not however cover bauxite or alumina feedstock; nor does it cover aluminum waste and scrap or aluminum powders or flakes.

Many of the products covered by the proclamation are also subject to antidumping and countervailing duty orders for steel and aluminum products from China and other countries. Although the proclamations do not address the issue, Section 232 duties will presumably be imposed in addition to any applicable antidumping and countervailing duties.

Commerce's Section 232 Review

Section 232 of the Trade Expansion Act of 1962 established a rarely-used procedure that grants broad authority to the President to act against imports that threaten to impair national security. The Act does not set out a specific definition of "national security". It does however contemplate that factors beyond traditional national defense considerations that may weaken the internal economy, such as impact of foreign competition on domestic industries, may be taken into account in the determining whether national security is impaired.

In April 2017, Secretary of Commerce Wilbur Ross initiated investigations under the Act to determine the effect of imported steel and aluminum on national security. Consistent with past practice, the Secretary determined that "national security" for purposes of Section 232 includes "the general welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government."

In his January 2018 reports to the President, the Secretary concluded that the present quantities and circumstances of both steel and aluminum imports were "weakening our internal economy" and threatened to impair national security as defined in Section 232. In the case of steel imports, the Secretary determined that the only effective means of removing the threat of impairment was to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated capacity. In the case of aluminum imports the Secretary determined that removal of the threat required a reduction of imports to a level that will provide the opportunity for U.S. primary aluminum producers to restart idled capacity and utilize 80 percent of production capacity.

Commerce's Section 232 Recommendations and the President's Proclamations

In the steel investigation, the Secretary made two alternative recommendations to achieve the stated objective. The first was either a global tariff of 24 percent or a worldwide quota of 63 percent of 2017 aluminum import levels, applied on a country and steel product basis. The second alternative was a tariff of 53 percent on imports of steel from Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica, with all other countries limited to 100 percent of their 2017 import volumes.

In his steel proclamation, President Trump followed the first recommended alternative of a global tariff, but raised the tariff rate from the recommended 24 percent to 25 percent and excluded Mexico and Canada.

Similarly, in the aluminum investigation, the Secretary made two alternative recommendations to achieve the stated objective. The first was either a global tariff of 7.7 percent or a worldwide quota of 86.7

percent of 2017 aluminum import levels. The second alternative was a tariff of 23.6 percent on aluminum imports from China, Hong Kong, Russia, Venezuela and Vietnam, with all other countries limited to 100 percent of their 2017 import volumes. These five countries were selected because they are the source of substantial imports due to overcapacity or are potential unreliable suppliers or likely sources of transshipped aluminum from China.

President Trump's aluminum proclamation followed the first recommended alternative of a global tariff, but at 10 percent rather than the recommended 7.7 percent rate. As with the steel tariff, the aluminum tariff will not apply to Canada or Mexico.

Country Exemptions Subject to Further Negotiations

In both the steel and aluminum reports, Commerce Secretary Ross noted that the President could grant an exemption from the tariffs or quotas based on an overriding economic or security interest of the United States. The potential steel exemption would be limited to 100 percent of each exempted country's 2017 imports to prevent exempted countries from producing additional steel for export to the United States or encouraging other countries to seek to transship steel to the United States through the exempted countries. The potential aluminum exemption would be limited to the amount of prior imports from the exempted country or might exempt all imports from that country. Aluminum exemptions could also be conditioned on a willingness to work with the United States to address global excess capacity and other challenges facing the U.S. aluminum industry. The reports note that an exemption of any country from the tariffs would however require a reduction of any quota or an increase in the tariff applied to non-exempt countries to offset the effect of the exempted imports.

In President Trump's proclamations, there was no increase in the tariff rates from his previously announced levels to offset the effect of the exempted imports from Canada and Mexico. But the exemption of those countries is not absolute. The President's proclamations state that Canada and Mexico present a special case considering shared commitments in national security concerns and in addressing excess capacity in the steel and aluminum industries, as well as physical proximity, economic integration, exports of U.S. steel and aluminum to those countries and the close relation of U.S. economic welfare to our national security. Given those factors, the President determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel and aluminum from Canada and Mexico is to continue ongoing discussions and exempt steel and aluminum imports from those countries from the tariff "at least at this time." Besides this linkage to the current renegotiation of the North American Free Trade Agreement, the proclamations also express an expectation that Canada and Mexico will act to prevent transshipment of steel and aluminum through their countries.

While no other countries were granted exemptions in the proclamations, the President stated that any country with which the United States has a security relationship is welcome to discuss alternative ways to address the threatened impairment of the national security caused by imports from that country. If a satisfactory alternative is agreed, an exemption or modification of the tariff maybe granted.

Exclusions of Products

In his reports to the President, Commerce Secretary Ross recommended an appeal process by which affected U.S. parties could seek an exclusion from the tariff or quota. Exclusions would be granted based on a demonstrated lack of sufficient U.S. production capacity of comparable products or on specific national security considerations. All appeals would be subject to a public comment period and would be led by the Commerce Department in coordination with the Defense Department and other appropriate agencies. In general, appeals would be resolved within 90 days of filing of a completed application and may be granted for a limited period or granted subject to termination if the conditions for the exclusion change. As in the case of country exemptions, the Secretary would consider whether any exclusion requires that the quota or tariff on the remaining products needs to be adjusted to ensure that the stated objectives are achieved.

In President Trump's proclamations, he authorized relief from the duties for steel and aluminum articles that are not produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality, as well as in cases involving specific national security considerations. Requests for exclusion must be made by a directly affected party located in the United States. Decisions on requests will be made by the Commerce Secretary, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the United States Trade Representative, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and such other senior Executive Branch officials as the Secretary deems appropriate. The proclamations directed the Commerce Secretary to issue procedures for requests for exclusions by March 18.

What to do now

The imposition of Section 232 tariffs will have far-reaching effects not only within industries utilizing steel and aluminum, but also in unrelated sectors that may be the subject of retaliatory action by other countries. Here are some points to review in evaluating the impact of the tariffs and potential actions to mitigate the effect going forward.

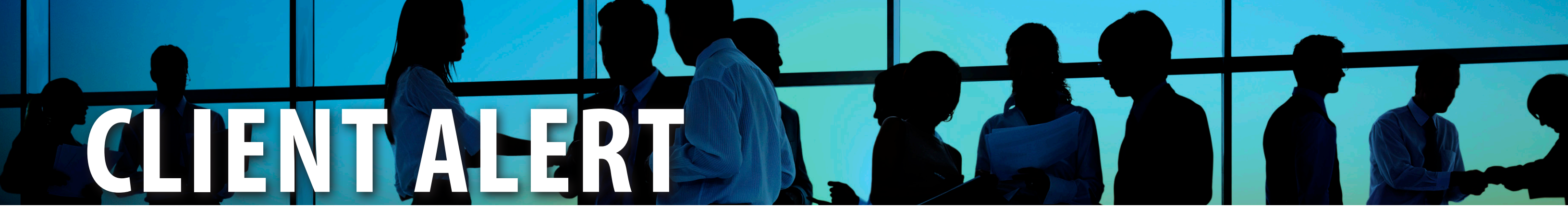
-- First, evaluate imported products against the scope of the proclamations.

The products covered by the proclamations are described by reference to their tariff classifications. The affected classifications are indicated above. If the classification of your product is not listed, it will not be subject to the Section 232 tariffs and you can stop reading. If it is listed, the following points may be relevant.

-- Review contracts for the purchase or sale of affected steel or aluminum products.

Contracts may include price adjustment provisions that could be a basis to shift the burden of the tariffs between buyer and seller. Note however that general concepts of force majeure may not be applicable in these circumstances.

-- Consider whether the production process can be modified.



For example, would it be possible to import secondary aluminum production based on recycled scrap which is not the subject of the aluminum proclamation? Or is it feasible to utilize aluminum or steel sourced from the U.S. or an exempt country in the production of downstream products outside the U.S.?

-- Determine whether grounds exist to seek an exclusion.

The grounds for exclusion are limited and any appeal seeking an exclusion will need to be supported by substantial supporting evidence that demonstrates either the lack of sufficient US production capacity of comparable products or national security-based considerations. Commerce's broad interpretation of "national security" should allow arguments based on a broader set of factors than just national defense.

-- Consider possible movement of sourcing to a country that is not covered by the proclamations, currently only Canada and Mexico

Note that transshipment of non-exempt steel or aluminum products to an exempt country will not avoid the impact of the tariffs and may expose the importer to penalties for attempts to circumvent the tariffs if the actual country of origin is not declared.

-- Investigate whether exports of steel or aluminum products are eligible for duty refund

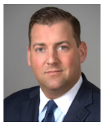
Under U.S. customs law, ordinary duties paid on imported goods that are later exported or used in goods that are exported may be subject to a refund, referred to as drawback. The rules governing drawback are complex and exports to a NAFTA country are subject to special rules. The potential treatment of Section 232 duties for drawback purposes is not clear. Customs regulations specify certain duties that are and are not subject to drawback. While antidumping and countervailing duties are expressly excluded, the regulations do not explicitly address Section 232 duties. Note also that many supply contracts provide for assignment of drawback rights by the supplier to the purchaser.

-- Monitor retaliatory actions proposed by other countries

Potential retaliation by other countries is expected to be structured to exert political pressure on key members of Congress. Toward that end, high-profile products in sectors unrelated to steel and aluminum that are made in the districts of targeted Congressmen and Senators are potential candidates for retaliatory action. Potential product targets include, among others, steel and aluminum made in the U.S., automobiles, furniture and cherries (Michigan), bourbon (Kentucky), motorcycles and cranberries (Wisconsin), citrus products (Florida, California), retail products such as clothing, and soybeans and other agricultural products. These actions could be caught up in challenges at the World Trade Organization and in the courts. Lobbying will be intense.

FOR MORE INFORMATION CONTACT:

Bruce C. Thelen is a Member in Dickinson Wright's Detroit office. He can be reached at 313.223.3624 or bthelen@dickinsonwright.com



Daniel D. Ujczo is an Of Counsel in Dickinson Wright's Columbus office. He can be reached at 614.744.2579 or dujczo@dickinsonwright.com

Brenda C. Swick is a Partner in Dickinson Wright's Toronto office. She can be reached at 416.594.4052 or bswick@dickinsonwright.com