CLIENT ALERT

United States, Canada, and Mexico Reach Deal to Replace NAFTA with Updated United States-Mexico-Canada Agreement

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On October 1, 2018, the United States, Canada, and Mexico announced that the three countries have reached a deal to replace the North American Free Trade Agreement ("NAFTA"). The new deal, named the United States-Mexico-Canada Agreement ("USMCA"), includes updated and new provisions on rules of origin, market access, intellectual property, digital trade, dispute settlement, labor, and the environment. President Trump announced that he expects to sign the treaty in November and then send it to Congress for ratification. It is unlikely that Congress will ratify the USMCA before January, and ratification could potentially be impacted by the results of the midterm elections.

Revised Provisions in the USMCA

The new agreement contains several updated provisions and new provisions that were not contained in NAFTA, including the following:

- **Autos:** On rules of origin, autos must now contain at least 75 percent content made in North America, where NAFTA required 62.5 percent, in order to receive duty-free treatment. In addition, new labor provisions include a requirement that 40 percent of auto content be made by workers whose pay averages at least $16 per hour in order to receive duty-free treatment within North America. The new rules of origin will be implemented in phases over three years, with the possibility of an extension to five years.

- **Intellectual Property:** The new deal extends intellectual property protections for biologic drugs by extending the period of data protection from five or eight years to 10 years. It expands copyright protection to a minimum of the life of the author plus 70 years, and 75 years for copyrights not based on the life of a person.

- **Digital Trade:** USMCA includes new digital trade provisions including a prohibition on customs duties and other discriminatory measures on electronic products such as music, video, e-books, and software. The digital trade chapter also contains rules around data transfer and localization to ensure cross-border data transfers and to limit data localization and storage requirements.

- **Dispute Settlement:** USMCA also contains changes to the various dispute settlement procedures in place under NAFTA. While USMCA largely incorporates NAFTA's Chapter 19 mechanism for anti-dumping and countervailing duty complaints and Chapter 20 state-to-state dispute mechanism, NAFTA's investor-state dispute mechanism will be phased out over three years for disputes between the U.S. and Canada, and will remain in place for disputes between the U.S. and Mexico only for "direct expropriations" and for government contracts in "covered sectors," including oil and gas, power generation, telecommunications, transportation, and infrastructure.

- **Currency:** USMCA contains a chapter on "Macroeconomic Policies and Exchange Rate Matters" in which the three countries agree "to achieve and maintain a market-determined exchange rate regime." The parties also commit to transparency on currency-related issues, including publicly disclosing, on a monthly basis, currency reserves data and interventions in foreign exchange markets. This chapter will serve as a model for what the Trump administration will seek in negotiating trade agreements with countries about which the U.S. Treasury Department has expressed exchange rate concerns, such as Japan and China.

- **Review and Extension:** USMCA does not contain a sunset provision, but instead will have a 16-year term, with a review and option for extension after six years.

- **"Non-market" Economy Country FTAs:** USMCA requires the parties to notify each other of any intent to negotiate a free trade agreement with a "non-market" economy country, the goals of the negotiations, and (at least 30 days before signature) the text of any agreement. In the event that one party signs an agreement with a "non-market" economy country, a party may terminate USMCA and make a new agreement that excludes the party that signed the "non-market" economy country FTA. This provision appears to be intended to discourage Canada and Mexico from engaging in FTA negotiations with China.

Side Letters on Section 232 Tariffs

USMCA does not directly address the current tariffs on steel and aluminum that the Trump administration imposed earlier this year pursuant to Section 232 of the Trade Act of 1974 ("Section 232") or the retaliatory tariffs imposed by Canada and Mexico on certain U.S. products. However, the United States did agree in side letters that it will not impose further tariffs or import restrictions on Canada or Mexico for at least 60 days following the imposition of any measure related to the national security-related trade actions under Section 232. This agreement is intended to allow the parties to negotiate a solution prior to the imposition of the tariffs. The U.S. also agreed to exclude 2.6 million autos each, all light trucks, and $32.4 billion and $108 billion in auto parts, respectively, from Canada and Mexico from potential tariffs resulting from the Section 232 auto trade action. This maximum is well above the current export capacity for both countries.

Next Steps

President Trump has stated that he expects to sign the treaty in November and send it to Congress for ratification. Congress is likely to take up the USMCA in the new year, meaning that the composition of the new Congress may impact the agreement's fate.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

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