CLIENT MEMORANDUM

The New Administration: International Trade

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With Donald Trump's election, his supporters now expect him to act on the issues that were key to his victory as the candidate of "real change," particularly the promise to return manufacturing jobs back to the Rust Belt states. He blamed the lost jobs on poorly negotiated free trade agreements like the North American Free Trade Agreement ("NAFTA") and the Trans-Pacific Partnership ("TPP"). At a more general level, Trump identified "accountability" as his goal in trade policy, rather than "protectionism." According to Trump, his administration would focus on trade enforcement and, at least for a significant initial period, would not seek to negotiate new trade agreements. Furthermore, when and if such agreements are pursued, they would probably be on a bilateral rather than a multilateral basis.

I. Campaign Commitments

More specifically, Trump articulated his "7 Point Plan to Rebuild the American Economy by Fighting for Free Trade," in a speech at the Alumisource factory in Monessen, Pennsylvania in June 2016. Trump's plan further outlined his vision to "negotiate fair trade deals that create American jobs, increase American wages, and reduce America's trade deficit," as follows:

1. Withdraw from the TPP (which has not yet been ratified).

2. Appoint tough, smart trade negotiators to fight on behalf of American workers.

3. Direct the Secretary of Commerce to identify every violation of current trade agreements a foreign country is currently using to harm U.S. workers, and direct all appropriate government agencies to use every tool available under American and international law to end these abuses.

4. Inform NAFTA partners that the United States intends to renegotiate immediately the terms of that agreement in order to get a better deal for American workers. If they do not agree to such renegotiation, the Trump administration will submit notice that the United States intends to withdraw from NAFTA.

5. Counter Mexico's "one-sided" tariffs on U.S. exports through a United States-imposed VAT and end sweatshops in Mexico that undercut wages of United States workers.

6. Instruct the Treasury Secretary to label China a currency manipulator.

7. Instruct the United States Trade Representative to bring trade cases against China, both in this country and at the World Trade Organization ("WTO"). China's unfair subsidy behavior is prohibited by the terms of its accession to the WTO.

8. Use every lawful presidential power to remedy trade disputes if China does not stop its illegal activities, including its theft of American trade secrets. Include the application of tariffs consistent with Sections 201 and 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962.

In addition, various comments made during his campaign indicate that Trump supports:

- Eliminating the Export-Import Bank
- Taxing imports from U.S.-based companies that move production out of the United States
- Imposing "Buy America" requirements on government procurement
- Taxing of foreign production (imports) over domestic production

II. Administration Appointees

The two trade-related Trump cabinet-level appointments that have been announced as of December 21 are Wilbur Ross for Secretary of Commerce and Steven Mnuchin for Secretary of the Treasury. The President-elect has also announced he will nominate Todd Ricketts, an owner of the Chicago Cubs and a businessman, whose brother is the governor of Nebraska, to be Deputy Secretary of Commerce.

As has been widely reported, Wilbur Ross is an investor who has purchased and turned around a variety of troubled U.S. companies, with a focus on steel and the manufacturing sector. In that process he has aggressively utilized U.S. trade remedy laws on behalf of his companies to respond to what he has characterized as pervasive foreign dumping (selling exports at less than fair value), government subsidization, intellectual property theft, and excessive import volumes that threaten U.S. companies. He has spoken out against what he characterizes as unfair trade practices by China and other major U.S. trading partners.

Consistent with these past positions, since the President-elect announced his intention to nominate Ross for the Commerce Department position, Ross has given interviews in which he has expressed the need for reducing China's trade surplus and has criticized regional trade agreements as being disadvantageous to the United States.

Reporting on Steven Mnuchin as nominee to be Secretary of the Treasury has been extensive, including his background as an investment banker and fund manager. Mnuchin's public statements since his nomination announcement have focused on tax issues, but he has also acknowledged that he will have chief responsibility for implementing Trump's campaign commitments regarding currency manipulation. In that regard, Mnuchin has indicated that:

- The Trump administration will review Chinese actions to determine whether the United States should initiate trade enforcement actions against China. This would include both trade remedies and taking cases to the WTO.
- The Treasury Department will make a determination as to whether China is a currency manipulator, which is a step back from Trump's campaign statement that China will be declared a currency manipulator.

On December 20, Trump's spokesman announced that the President-elect was meeting with Jovita Carranza as his potential nominee for United States Trade Representative ("USTR"). Carranza is a relatively unknown former official at the Small Business Administration ("SBA") under President George W. Bush. Prior to her appointment SBA, she spent six years at UPS as president of Latin American and Caribbean operations and later vice president of air operations. During Trump's campaign, she was a member of Trump's National Hispanic Advisory Council who ran a successful call center targeting Hispanic voters in North Carolina out of her home.

Carranza has made few statements on trade. The only relevant statements discovered thus far are from a speech she made as a UPS executive in Peru at the APEC Transportation Minister-Industry Symposium in 2002. During the speech, she made the case for "open markets and global trade." In addition, she published a brief article in *Hispanic Engineer & Information Technology* magazine in 2004, in which she concluded that "a community that embraces globalization, technology, education, and sustainable development is a community that will stand strong in the world economy."

Three other names that have been mentioned prominently for USTR are: Daniel DiMicco, former chairman of Nucor Corporation, a large United States steel company; Robert Lighthizer, a partner at the [law firm] Skadden; and U.S. Representative Charles Boustany (R-LA). DiMicco is heading the USTR transition team and has for many years voiced his strong support for aggressive use of U.S. trade remedy laws and his view that the United States is being manipulated in its trade relationships by China and other "mercantilist" countries. DiMicco's nomination would be seen as a strong signal that U.S. trade policy will be significantly more confrontational than has been the case for decades.

Lighthizer has served in the office of USTR in prior Republican administrations. As a private attorney, he has been counsel to United States steel companies seeking dumping, subsidy, and other trade remedies against imports. Boustany will not be returning to Congress in 2017. He has been a strong supporter of TPP, and of trade agreements in general, but has stated he does not feel his historic positions are inconsistent with Trump's approach to trade policy. If Trump nominates Boustany, who has strong relationships with House Republican leadership and has served on the House Ways and Means Committee, it will be a signal of a more moderate approach to trade policy.

If Carranza is the USTR nominee, which appears likely at this time, Trump will be sending a number of signals regarding trade policy in his administration. First, he has chosen someone who is not known widely in the trade community either in the United States or among U.S. trading partners. This indicates that Trump intends to place primary leadership for trade issues in Wilbur Ross as Secretary of Commerce, which would be consistent with Trump's economic nationalist approach to trade. Carranza as USTR will be the "face" of the Trump administration to other countries, since her past support of globalization and open trade will help allay some of the concerns of the international community. Second, her nomination will leave open the question of what role Gary Cohn, Trump's choice to chair the National Economic Council in the White House, will play on trade issues. During the first years of the Obama Administration, Deputy National Security Advisor Michael Froman, who later became USTR, kept a tight hold on trade policy from within the White House.

III. Likely Changes

The overwhelming consensus among those close to Trump, congressional sources, and the media appears to be that, as to trade policy, the President-elect will proceed on a path that is consistent with his campaign positions. This consensus appears to be supported by a November 8, 2016 "action plan" on trade policy that was drafted for the use of the Trump presidential transition team. The plan confirms a determination to take the following steps early in the Trump administration:

- **Renegotiate NAFTA:** Formally notify Canada and Mexico to trigger renegotiation of NAFTA.
    - In conjunction with this notification, the President is required under U.S. law to request that the Commerce Department and the International Trade Commission report on the potential impacts of withdrawal from NAFTA on "the middle class, manufacturing and service sector workers and foreign direct investment into the United States." The report should also identify what changes in U.S. law would be needed to implement such a withdrawal.
    - If the report indicates that withdrawal from NAFTA would result in "substantial" benefits for U.S. industries and workers, Trump's USTR would formally notify Canada and Mexico of its request for negotiations regarding "immigration, currency manipulation, increased labor and environmental standards, trucking

safety rules and other areas of concern, resolution of the softwood lumber conflict, and the WTO ruling against the United States country-of-origin rules for beef and pork from Canada."

  - If the report indicates that withdrawal would have negative impacts that would outweigh positive impacts, it is not clear what direction the Trump administration would take. Trump has so far been somewhat less explicit and determined regarding the future of NAFTA than with regard to TPP, so he has some flexibility to extend negotiations, or to use other lawful means to effect changes in the Canada or Mexico trade relationships short of total withdrawal, including trade remedies (imposition of penalty duties resulting from dumping or subsidies) and "escape clause" restrictions (quotas based on injurious volumes of imports). On balance, it appears more likely than not that Trump, faced with a report showing substantial predicted negative impacts, would take one of these more limited actions and "spin" them as fulfilling his NAFTA campaign pledge.

- **Expand authority to combat currency manipulation:** Trump has indicated that he will send Congress legislation giving the Treasury Department authority to impose "enforceable measures to protect against currency manipulation." No other details on this legislation are available, but it could take the form of bipartisan proposals made during the current Congress that would trigger penalty duties on countries identified as currency manipulators if they failed to take steps to correct alleged exchange rate imbalances.

- **Expand CFIUS authority:** Make changes in the "Exon-Florio" law that authorizes the President to review and approve, modify or reject foreign acquisitions of U.S. businesses on national security grounds, a process implemented by the Committee on Foreign Investment in the United States ("CFIUS").

  - Add "food security" to the list of possible national security concerns that should be taken into account during these reviews.

  - Take into consideration whether the home country of the potential acquirer would permit a U.S. company to purchase a similar business in that country. The plan makes clear that this proposal is aimed primarily at China but it would have universal application.

- **Withdraw from TPP.** On November 21, in a short video message on social media, Trump listed a number of actions he expects to take on "day one" of his presidency. The most specific promise was that President Trump will issue notification of U.S. withdrawal from TPP. Trump's unconditional opposition to TPP leaves virtually no possibility that it will be brought up for a vote in the current lame duck session of Congress.

- **Focus on smaller-scale trade agreements.**

- **Leave open the possibility of further negotiations on the Trans-Atlantic Trade and Investment Partnership between the United States and the European Union.**

- **Act against China's unfair trade practices.**

This is an ambitious agenda. Beyond immediate withdrawal from TPP, it will take some time to implement, probably well beyond the crucial "first 100 days" of the Trump administration. However, it is expected that most of these measures or proposals will be announced very soon after the January 20 inauguration and that Trump will pressure Congress to move forward quickly on those items for which he requests action.

IV. Conclusions and Recommendations

The incoming administration and Congress have rejected traditional notions of trade liberalization and globalism, at least rhetorically. Whether or not the Trump administration actually takes actions that are seriously trade-restrictive, it seems clear it will not be an advocate for traditional free-trade goals. This situation indicates the need for businesses engaged in global trade to consider a number of actions:

- **Messaging.** It is important that businesses at risk in the new climate send clear and direct messages to the new administration and Congress as to the value they bring to the U.S. economy, the jobs they create directly or indirectly, and the consequences they as U.S. employers will face from future trade restrictions. On the other hand, companies threatened by foreign competition, particularly in situations involving unfair trade practices by those competitors, should develop messaging that will support action by a new administration receptive to addressing their specific concerns.

- **Outreach to Trump Transition and Administration.** As an interim step, a business able to prepare its message in time should consider contacting the appropriate Trump transition team to present its case or, if possible, simply introduce itself to the team, since team members often end up staffing the agencies for which they are responsible. After the inauguration on January 20, it will be important to identify the specific offices within the executive branch, including White House staff, that can affect issues of concern, and seek to brief them.

- **Outreach to Congress.** It is important to act early to establish relationships with congressional leadership, key committee members, and new members of Congress, along with their staffs. This will be an excellent way in which to gauge the inherent risk or opportunity for one's particular business and to identify early potential allies or opponents.

- **Outreach to Third Parties.** The "think tank community" will be active in providing analysis and reaction to the Trump transition and "first 100 days" initiatives, and the congressional responses to those initiatives, and much of their work could be helpful to potentially affected businesses. Establishing and reinforcing good relationships at these institutions will become crucial. Third parties also include industry trade associations, which can increase the reach and impact of key messaging through their own outreach.

Dealing with the Trump administration and the new Congress on trade will be an evolving situation that requires the ability to anticipate developments, create alternative approaches, and adapt quickly to changing conditions.

If you have any questions regarding this memorandum, please contact David Mortlock (202-303-1136; dmortlock@willkie.com), Russell L. Smith (202-303-1116; rsmith@willkie.com) or the attorney with whom you regularly work.

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