SIDLEY

Top 10 Recent U.S. Trade and Investment Policy Developments

U.S. trade and investment policy continues to evolve rapidly and the pace has not slowed down in the new year. Over the past two months, the Trump administration has been active on a wide range of trade issues. The administration released a number of trade-related presidential proclamations, executive orders and regulations, and the President has signed major legislation with trade implications. We have selected 10 significant developments.

1. **The Trump Administration Issued a New Executive Order on Importer of Record Criteria.** On January 31, 2020, the Trump administration issued an executive order intended to implement the administration's policy to prevent the circumvention of U.S. laws and the avoidance of U.S. duties, taxes and fees in e-commerce transactions. The executive order directs certain actions recommended by the Department of Homeland Security (DHS) in its recent report to the President on "Combating Trafficking in Counterfeit and Pirated Goods," released on January 24. The speed with which the administration has begun to implement DHS's recommendations demonstrates its commitment to taking swift and decisive action on the issues raised in the DHS report.

   The January 31 executive order directs DHS to "issue a notice of proposed rulemaking to establish criteria importers must meet in order to obtain an importer of record number." The criteria must include that persons debarred or suspended by U.S. Customs and Border Protection (CBP) for trade violations are ineligible to obtain an importer of record number during the period of their debarment or suspension.

   CBP must ensure that express consignment operators, carriers, hub facilities and licensed customs brokers notify the agency of any attempt by ineligible persons to re-establish business activity requiring an importer-of-record number. CBP must also consider disciplinary measures to ensure that express consignment operators, carriers, hub facilities and licensed customs brokers do not facilitate business activity for ineligible importers. Per the executive order, these disciplinary measures may include limiting participation in CBP trusted trader programs, taking action with regard to a facility's operating privileges or suspending or revoking a customs broker's license.

   Finally, the executive order requires enhanced enforcement efforts, including publication of enforcement efforts and increased criminal and civil enforcement against parties accused of import violations.

2. **President Trump Signed the United States-Mexico-Canada Agreement Implementing Legislation Into Law.** On January 29, President Donald Trump signed the United States-Mexico-Canada Agreement (USMCA) implementing legislation into law. Under the USMCA Protocol, the USMCA is scheduled to take effect on the first day

of the third month after the last country notifies the others that it has completed its domestic procedures for ratification. Mexico completed its process in December; the United States completed the ratification process on January 29. Canada has begun its domestic process and is widely anticipated to ratify the USMCA in the spring. As a result, USMCA could go into effect as early as July 1. Companies with significant North American operations, particularly those taking advantage of North American Free Trade Agreement benefits, should review USMCA and the U.S. implementing legislation to determine how the new agreement may affect their activities for the remainder of 2020 and beyond. For more information, see Sidley's previous Update on the USMCA.

3. **The Trump Administration Imposed New Section 232 Tariffs on Derivative Aluminum and Steel Articles.** On January 24, President Trump issued a proclamation imposing additional duties of 10 percent and 25 percent on "derivative aluminum articles" and "derivative steel articles," respectively, under Section 232 of the Trade Expansion Act of 1962, as amended. These additional duties go into effect February 8, 2020.

   The President initially imposed additional duties of 10 percent on aluminum imports and 25 percent on steel imports beginning on March 23, 2018, after the U.S. Department of Commerce (Commerce) found that such articles were being imported into the United States in such quantities as to threaten to impact U.S. national security. According to the January 24, 2020, proclamation, Commerce advised the President that neither the domestic steel industry nor the domestic aluminum industry had achieved the original aim of stable capacity utilization over 80 percent. The proclamation notes that domestic industry may not have achieved the target capacity utilization because of the significant increase in imports of certain derivative aluminum and steel articles since March 2018.

   Consequently, the President will expand the scope of Section 232 duties on aluminum and steel to include certain derivative articles identified in two annexes to the proclamation (see Annex I (aluminum) and Annex II (steel)). At present, the scope of "derivative" articles appears to be narrow. For aluminum, it covers certain stranded wire, cables, plaited bands and the like; bumper stampings of aluminum (for use in certain motor vehicles); and body stampings for tractors suitable for agricultural use. For steel, it covers certain nails, tacks, drawing pins, corrugated nails, staples and similar articles; bumper stampings of steel (for use in certain motor vehicles); and body stampings of steel for tractors suitable for agricultural use.

   The proclamation exempts articles from countries that had previously negotiated exemption agreements with the United States. As a result, the additional 10 percent duties applicable to derivative aluminum articles do not apply to articles from Argentina, Australia, Canada and Mexico; the additional 25 percent duties applicable to derivative steel articles do not apply to articles from Argentina, Australia, Brazil, Canada, Mexico and South Korea. The proclamation also provides for a product exclusion process.

4. **The United States and China Concluded a Phase One Agreement.** On January 15, the United States and China signed an agreement officially called the Economic and Trade Agreement Between the United States of America and the People's Republic of China (the Phase One agreement). Under the Phase One agreement, China agreed that over the next two years, it will purchase $200 billion more of U.S. manufactured articles, agricultural goods, energy products and services than it did in 2017. China also agreed to certain provisions that should lead to greater market access for U.S. agricultural products and for U.S. financial services companies. In exchange, the United States has suspended the imposition of certain duties previously announced on Chinese imports under Section 301 of the Trade Act of 1974. Specifically, the United States suspended the imposition of additional duties on List 4B products and agreed to reduce the duties applicable to List 4A products.

   The Phase One agreement establishes a multilevel dispute resolution mechanism that allows the complaining party to suspend an obligation under the agreement or to adopt "a remedial measure" (e.g., increased duties) and prevents the other party from adopting a countermeasure or otherwise challenging the measure if it believes that the complaining party is acting in "good faith." If the other party believes that the complaining party is not acting in good faith, then the remedy is to withdraw from the agreement.

   President Trump has said that the additional duties on Lists 1, 2, 3 and 4A will remain in place until a Phase Two agreement is concluded with China. The Phase Two agreement will presumably address underlying bilateral issues that remain unresolved, such as China's government subsidies. The administration has not announced a timeline for the Phase Two negotiations, which are unlikely to be completed before the presidential election this November.

5. **Treasury Released New CFIUS Regulations.** On January 13, the U.S. Department of the Treasury (Treasury) issued final and interim regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). FIRRMA expanded the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to review foreign investments and mitigate potential national security concerns. The final regulations largely track the proposed regulations issued in September 17, 2019, although Treasury has made some refinements and added clarifying examples. The final CFIUS regulations will go into effect on February 13, 2020. For more information and key takeaways, see Sidley's previous Update on the final regulations.

6. **The Trump Administration Imposed New Iran Secondary Sanctions.** On January 10, the Trump administration issued Executive Order 13902, "Imposing Sanctions with

Respect to Additional Sectors of Iran." The executive order authorizes the Secretary of the Treasury to impose sanctions on (i) persons operating in the construction, mining, manufacturing or textiles sectors of the Iranian economy, (ii) persons who knowingly engage in significant transactions in Iran involving those sectors and (iii) foreign financial institutions that facilitate such transactions. Notably, Executive Order 13902 authorizes what is known as secondary sanctions, which apply even in situations where the transactions or activities occur entirely outside the United States and where there is no other jurisdictional nexus to the United States. While these sectors covered by Executive Order 13902 align with existing secondary sanctions on Iran, they significantly expand the scope of the activity in these sectors subject to potential sanctions. For example, while existing authority authorized sanctions related to activity in the automotive manufacturing industry in Iran, the new sanctions authorize sanctions related to any manufacturing activity in Iran.

The executive order was issued in the wake of the escalation of tensions between the United States and Iran. According to Executive Order 13902, the intention of the new sanctions on Iran is to "deny the Iranian government revenues, including revenues derived from the export of products from key sectors of Iran's economy, that may be used to fund and support its nuclear program, missile development, terrorism and terrorist proxy networks, and malign regional influence."

Treasury's Office of Foreign Assets Control (OFAC) has stated in an FAQ that there will be a 90-day wind-down period expiring on April 9. During this period, persons engaged in transactions that could otherwise be sanctioned under Executive Order 13902 can "wind down those transactions without exposure to sanctions under" that executive order. While OFAC will provide companies time to terminate sanctionable transactions with Iran, the implication is that after April 9, the Trump administration intends to begin taking action with respect to entities that transact with the Iranian construction, mining, manufacturing or textiles sectors.

7. **Commerce Released an Export Interim Rule on Geospatial Imagery Software.** On January 6, Commerce's Bureau of Industry and Security (BIS) published an interim final rule, with immediate effect, placing export controls on certain "geospatial imagery 'software' 'specially designed' for training a Deep Convolutional Neural Network to automate the analysis of geospatial imagery and point clouds." Software meeting all of the listed criteria now requires a license for export to all destinations except Canada. This license requirement extends to releases of software source code to foreign nationals inside the United States.

   A number of terms used in the new regulation remain undefined, including the scope of "geospatial imagery." Controlling software for satellite-generated imagery appears to be the primary motivation behind the new control; however, there is no explicit textual basis that would exclude data collected from ground-based cameras and sensors from the scope of "geospatial imagery." Until BIS issues clarification, certain autonomous vehicle software may be subject to strict export controls.

Although the rule took immediate effect, BIS has encouraged industry to submit comments to further refine and clarify the new license requirements in the final rule. BIS is accepting comments until March 6, 2020.

8. **The State Department Announced Amendments to the ITAR.** On December 26, 2019, the U.S. Department of State's Directorate of Defense Trade Controls (DDTC) announced an interim final rule (the Interim Rule) amending the International Traffic in Arms Regulations (ITAR). The long-awaited Interim Rule provides a definition of activities that are not exports, re-exports, retransfers or temporary imports, which most notably includes electronic transmission and storage of properly secured unclassified technical data via foreign communications infrastructure. As a result, no prior DDTC approval will be required for such data transmission and storage. This change more closely aligns ITAR requirements with the Export Administration regulations with regard to the offshore transmission and storage of electronic technical data and is expected to significantly reduce export control compliance burdens for U.S. industry.

   Once the Interim Rule goes into effect, companies will no longer need to obtain a license for the secure transmission or storage of ITAR unclassified technical data outside the United States provided the following requirements are met: (i) The data sent, taken or stored abroad is unclassified; (ii) the data is secured using end-to-end encryption; (iii) the data is secured using cryptographic procedures and controls in accordance with certain standards provided in the regulation; and (iv) the data is not intentionally sent to a person or stored in either an ITAR §126.1 prohibited country (including China) or the Russian Federation. The Interim Rule also clarifies that authorization for a release of technical data to a foreign person is required in order to provide access information (such as decryption keys, network access codes or passwords) to that foreign person.

   The Final Rule will become effective on March 25, 2020. The DDTC accepted comments on the Interim Rule throughout January; as a result, the Final Rule may include minor differences from the Interim Rule.

9. **The United States Imposed Sanctions on Russian Energy Export Pipeline Projects under the 2020 NDAA.** On December 20, 2019, the United States enacted the National Defense Authorization Act for the Fiscal Year of 2020 (NDAA). Section 7503 of the NDAA imposes mandatory sanctions on parties engaged in certain activities related to Russian energy export pipelines, including the Nord Stream 2 pipeline project. The sanctions target vessels engaged in pipe-laying at depths of 100 feet or more below sea level for the relevant pipelines, as well as any non-U.S. person who knowingly provides

such vessels or facilitates a transaction to provide those vessels. The Secretary of State must submit an initial report to Congress identifying the vessels and persons described above no later than 60 days after December 20, 2019 (i.e., by February 18, 2020).

Persons (including natural persons, corporate entities and their corporate officers and principal shareholders) risk visa bans and "blocking" if they owned, sold, leased or provided vessels engaged in pipe-laying at depths of 100 feet or more below sea level on the relevant projects. The NDAA gives parties 30 days to engage in good-faith efforts to wind down their activity and provides certain exceptions to the sanctions, including an exception for persons providing provisions intended for safety and care of the crew, the protection of human life aboard the vessel or the maintenance of the vessel.

Parties that continue to do business with entities designated under the NDAA sanctions may also face a risk of secondary sanctions imposed under the Countering America's Adversaries Through Sanctions Act (CAATSA). Section 228(a) of CAATSA requires the President to sanction any foreign person who knowingly facilitates a significant transaction or transactions for, or on behalf of, "any person subject to sanctions imposed by the United States with respect to the Russian Federation." None of the relevant U.S. agencies have clarified whether this phrase will include persons designated under the NDAA Nord Stream 2 sanctions.

10. **The Department of Justice Issued a New Voluntary Self-Disclosure Policy for Export Control and Sanctions Violations.** On December 13, 2019, the Department of Justice (DOJ) announced a revised policy regarding voluntary self-disclosures of export control and sanctions violations (the VSD Policy). The VSD Policy encourages companies to voluntarily disclose all potentially criminal export control and sanctions violations directly to the DOJ's National Security Division (NSD). The new policy includes three key differences from the NSD's previous guidance:

(1) The VSD Policy clarifies the benefits of voluntary self-disclosure. Absent aggravating factors, DOJ will apply a presumption of nonprosecution and no fine for companies that voluntarily disclose, fully cooperate and remediate. If the company fulfills those criteria but has aggravating factors, DOJ will recommend a fine at least 50 percent lower than otherwise available and will not require a monitor.

(2) The VSD Policy clarifies that companies must disclose potentially willful conduct to the DOJ to qualify for the benefits under the VSD Policy. Disclosure made solely to regulatory agencies will not suffice.

(3) The VSD Policy defines certain terms to conform to the Foreign Corrupt Practices Act Corporate Enforcement Policy — although major differences remain between the two voluntary self-disclosure policies.