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NAFTA Renegotiation: USTR's Specific Objectives and What Comes Next

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Inside This Issue:

Introduction	1
Table of Areas to be Addressed in Renegotiating NAFTA	2
For More Information	7

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On July 17th, the USTR issued its specific objectives for the renegotiation of the North American Free Trade Agreement (NAFTA) as required by the Bipartisan Congressional Trade Priorities and Accountability Act of 2015. The USTR acknowledged that the NAFTA, since its entry into force in 1994, has contributed to the linking of the continent through trade and provided new market access opportunities for American farmers and ranchers. However, the USTR also stated that the NAFTA created new problems for many American workers as a result of the increase in trade deficits and closing of U.S. factories. U.S. companies doing business in Canada and Mexico, whether sourcing or marketing goods in those markets, should:

- Take note of these latest developments;
- Assess how any modifications made to the NAFTA could impact their cross-border operations;
- Consider submitting public comments on new proposals, as well as reaching out to members of Congress and other Government decision-makers to ensure that their interests are fully protected.

As we have reported previously (<http://www.polsinellioninternational.com/blog/2017/5/23/breaking-news-ustr-formally-notifies-congress-of-the-administrations-intent-to-renegotiate-nafta>) the USTR submitted formal notification to Congress of the Administration's specific negotiation objectives on May 18, 2017 following Robert Lighthizer's confirmation. The USTR subsequently requested public comments from interested parties with regard to the modernization of the NAFTA, and held a public hearing at the International Trade Commission. **The USTR received more than 12,000 written responses and heard the testimony of more than 140 witnesses during the hearing representing various industry sectors. The majority of comments that were submitted, as well as the testimony presented, reflected U.S. industries' support of the NAFTA because of increased U.S. exports to Mexico and Canada since 1994.** They also urged that negotiations should not jeopardize existing market access gains and that the key negotiating principle should be "Do No Harm" as suggested previously by USTR Lighthizer during his testimony before a House of Representatives Committee in June.

The USTR noted that its specific negotiation objectives issued on July 17 reflect the input received from Congressional, agency and industry consultations, public comments, and testimony given at the hearing, and that it will continue these consultations and will update the objectives as the negotiations proceed. **The overall goals will be to break down barriers**



to American exports through elimination of unfair subsidies, market-distorting practices by state-owned enterprises, and burdensome restrictions of intellectual property. The USTR will also seek to target the modernization of the NAFTA to reflect 21st century standards, address America's trade imbalances in North

America, and ensure that the United States obtains more open, equitable, secure, and reciprocal market access.

The following table outlines the specific negotiating objectives for key areas to be addressed in the renegotiation of the NAFTA:

<p>Trade in Goods:</p>	<ul style="list-style-type: none"> • Improve the U.S. trade balance and reduce the trade deficit with the NAFTA countries. • Maintain existing reciprocal duty-free market access for industrial goods. • Address non-tariff barriers that constrain U.S. exports of industrial goods to Canada and Mexico. • Maintain existing duty-free access to NAFTA country markets for U.S. textile and apparel. • Improve opportunities for U.S. textile and apparel, taking into account U.S. import sensitivities. • Reduce unnecessary differences in regulation, including through regulatory cooperation.
<p>Agricultural Goods:</p>	<ul style="list-style-type: none"> • Maintain existing reciprocal duty-free market access for agricultural goods. • Expand market for U.S. goods in NAFTA countries by reducing or eliminating remaining tariffs. • Eliminate non-tariff barriers (e.g., tariff rate quotas, cross subsidization, discrimination, undercutting, etc.). • Provide reasonable adjustment periods for U. S. import sensitive agricultural products. • Consulting with Congress before initiating tariff reduction negotiations. • Reduce unnecessary differences in regulation, including through regulatory cooperation.
<p>Sanitary and Phytosanitary Measures (SPS):</p>	<ul style="list-style-type: none"> • Enforceable obligations (science-based measures, import checks, equivalence, and regionalization, etc.) • Establish a mechanism to resolve barriers that block the U.S. food and agricultural exports. • Ensure that SPS measures are implemented in a transparent and non-discriminatory manner. • Improve communication, consultation, and cooperation between governments on SPS. • Provide for a mechanism for improved dialogue and cooperation to address SPS issues.
<p>Customs and Trade Facilitation:</p>	<ul style="list-style-type: none"> • Standards for implementation of WTO agreements involving trade facilitation and customs valuation. • Ensure that customs laws and regulations are posted on the Internet, designate points of contact. • Ensure that shipments are released immediately after determining compliance with applicable laws. • Provide new disciplines on timing of release, automation, and use of guarantees. • Provide for streamlined and expedited customs treatment for express delivery shipments. • Provide for a de minimis shipment value comparable to the U.S. de minimis shipment value of \$800. • Ensure that customs penalties are assessed in an impartial and transparent manner. • Import, export, and transit processes, including through supply chain integration. • Reduced import, export, and transit forms, documents, and formalities. • Enhanced harmonization of customs data requirements. • Advance rulings regarding the treatment that will be provided to a good at the time of importation. • Provide for both administrative and judicial appeal of customs decisions. • Electronic payment of duties, taxes, fees, and charges imposed on imports or exports. • Provide for the use of risk management systems for customs control and post-clearance audit procedures. • Provide for disciplines on the use of customs brokers, preshipment inspection, and reusable containers. • Establish a committee to resolve inconsistent treatment of commercial goods.
<p>Rules of Origin (ROO):</p>	<ul style="list-style-type: none"> • Update the ROO to ensure that NAFTA benefits go to items genuinely made in the US and North America. • Ensure the ROO incentivize the sourcing of goods and materials from the United States and North America. • Establish procedures that streamline the certification and verification of the ROO. • Establish procedures that promote strong enforcement, including with respect to textiles. • Ensure that eligible goods receive NAFTA benefits, prevent duty evasion, and combat customs offences.





<p>Technical Barriers to Trade (TBT):</p>	<ul style="list-style-type: none"> • Apply decisions of the WTO TBT Committee for standards, conformity, transparency, and other areas. • Require NAFTA countries to publish drafts of technical regulations and conformity assessment procedures. • Allow stakeholders in other countries to provide comments on those drafts. • Require authorities to address issues raised by stakeholders, explain how final measure achieves objectives. • Ensure national treatment of conformity assessment bodies without conditions or limitations. • Encourage the use of international conformity assessment recognition arrangements. • Establish an active TBT Chapter Committee to discuss bilateral and third party specific trade concerns, coordination of regional and multilateral activities, regulatory cooperation, and implementing Good Regulatory Practices.
<p>Good Regulatory Practices:</p>	<p>Facilitate market access and promote compatibility among U.S., Canadian, and Mexican regulations, including:</p> <ul style="list-style-type: none"> • Ensuring transparency and accountability in the development, implementation, and review of regulations; • Providing meaningful opportunities for public comment in the development of regulations; • Using impact assessments to ensure regulations are evidence-based, current, and avoid redundancies; and • Applying other good regulatory practices.
<p>Trade in Services:</p>	<p>Secure commitments from NAFTA countries to provide fair and open conditions for services trade, including:</p> <ul style="list-style-type: none"> • Rules that prohibit discrimination against foreign services suppliers; • Rules that prohibit restrictions on the number of services suppliers in the market; • Rules that prohibit requirements that cross-border services suppliers first establish a local presence; • Establish rules to help level the playing field for U.S. delivery services suppliers in the NAFTA countries; • Where any exceptions are needed, the negotiation on a negative list basis of the narrowest exceptions; • Transparency and predictability of the regulatory procedures in the NAFTA countries.
<p>Telecom:</p>	<ul style="list-style-type: none"> • Promote competitive supply of services through transparent regulation and independent regulator. • Commitments to provide network access through interconnection to physical facilities, scarce resources. • Establish provisions protecting telecommunications services suppliers' choice of technology.
<p>Financial Services:</p>	<ul style="list-style-type: none"> • Expand market opportunities for US financial service suppliers for fairer and open conditions of trade. • Improve transparency and predictability in their respective financial services regulatory procedures. • Prevent imposing measures that restrict cross-border data flows, require local computing facilities.
<p>Digital Trade in Goods and Services, Cross-Border Data Flows:</p>	<ul style="list-style-type: none"> • Commitments not to impose customs duties on digital products (e.g., software, music, video, e-books). • Eliminate non-discriminatory treatment of digital products transmitted electronically. • Guarantee that digital products won't face government-sanctioned discrimination based on origin. • Ensure that NAFTA countries don't impose restrictions on cross-border data flows. • Ensure that NAFTA countries don't require the use or installation of local computing facilities. • Establish rules to prevent governments from mandating the disclosure of computer source code.
<p>Investment:</p>	<ul style="list-style-type: none"> • Establish rules that reduce or eliminate barriers to U.S. investment in all sectors in the NAFTA countries. • Secure for U.S. investors in the NAFTA countries important rights consistent with U.S. legal principles and practice, while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors.





<p>Intellectual Property (IPR):</p>	<p>Promote adequate and effective protection of intellectual property rights, including:</p> <ul style="list-style-type: none"> • Ensure accelerated and full implementation of the WTO TRIPS Agreement. • Ensure provisions governing IPR reflect a standard of protection similar to that found in U.S. law. • Provide strong protection and enforcement for new and emerging technologies. • Provide protection and enforcement for new methods of transmitting and distributing products with IPR. • Prevent discrimination re availability, acquisition, scope, maintenance, use, and enforcement of IPR. • Ensure standards of protection and enforcement that keep pace with technological developments. • Ensure that owners can control the use of their IPR through the Internet and global communication media. • Ensure that owners can prevent the unauthorized use of their works. • Strong enforcement of IPR (requiring civil, administrative, and criminal enforcement mechanisms). • Prevent or eliminate government involvement in the violation of IPR, including cybertheft and piracy. • Secure fair, equitable, and nondiscriminatory market access opportunities for US persons relying on IPR. • Respect the Declaration on the TRIPS Agreement and Public Health. • Ensure that trade agreements foster innovation and promote access to medicines. • Prevent the improper use of a country's system for protecting or recognizing geographical indications, including failing to ensure transparency and procedural fairness and protecting generic terms.
<p>Transparency:</p>	<p>Commit each Party to provide levels of transparency, participation, and accountability in the development of regulations and other government decisions, including:</p> <ul style="list-style-type: none"> • Publishing laws, regulations, rulings, and other procedures that affect trade and investment; • Opportunities for stakeholder comment on measures before they are adopted and finalized; and • Sufficient period of time between final publication of measures and their entry into force. • Standards to ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are nondiscriminatory, and provide full market access for United States products.
<p>State-Owned and Controlled Enterprises (SOEs):</p>	<ul style="list-style-type: none"> • Define SOEs on the basis of government ownership or control, including through minority shareholding. • Retain the ability to support SOEs engaged in providing domestic public services. • Ensure that SOEs accord non-discriminatory treatment for the purchase and sale of goods and services. • Ensure that SOEs act in accordance with commercial considerations with respect to purchases and sales. • Ensure that strong subsidy disciplines apply to SOEs, beyond those in the WTO SCM Agreement. • Require that SOEs not cause harm to another Party through provision of subsidies. • Require that SOEs not cause harm to the domestic industry of another Party via subsidized SOE investment. • Ensure impartial regulation of SOEs, designated monopolies, and private companies. • Provide jurisdiction to courts over commercial activities of foreign SOEs (i.e., limited sovereign immunity). • Allow Parties to request information on government ownership, control, and government support. • Develop mechanism per Annex 5 of the WTO SCM Agreement to overcome evidentiary problems associated with litigation on SOEs.
<p>Competition Policy:</p>	<ul style="list-style-type: none"> • Rules that prohibit anticompetitive business conduct, fraudulent and deceptive commercial activities. • Establish or affirm basic rules for procedural fairness on competition law enforcement. • Promote cooperation on competition enforcement-related matters.
<p>Labor:</p>	<ul style="list-style-type: none"> • Bring the labor provisions into the core of the Agreement rather than in a side agreement. • Adopt and maintain internationally recognized core labor standards as recognized in the ILO Declaration • Laws minimum wages, hours of work, and occupational safety and health. • Rules against waiving or derogating from internationally recognized core labor standards. • Rules that will ensure that NAFTA countries do not fail to effectively enforce their labor laws. • Prohibit trade in goods produced by forced labor, regardless of whether source country is a NAFTA country. • Provide access to fair, equitable, and transparent administrative and judicial proceedings. • Ensure that labor obligations are subject to NAFTA dispute settlement mechanisms. • Stakeholder participation, including through public advisory committees. • Process for the public to raise concerns directly with NAFTA governments. • Establish or maintain a senior-level Labor Committee, which will meet regularly to oversee implementation of labor commitments, and include a mechanism for cooperation and coordination on labor issues, including opportunities for stakeholder input in identifying areas of cooperation.





<p>Environment:</p>	<ul style="list-style-type: none"> • Bring the environment provisions into the core of the Agreement rather than in a side agreement. • Strong environment obligations are subject to the main NAFTA dispute settlement mechanism. • No waiving or derogating from the environment law protections. • Ensure that NAFTA countries do not fail to effectively enforce their environment laws. • Implement obligations under select Multilateral Environment Agreements (MEAs), including the CITES. • Establish a means for stakeholder participation, including commitments for public advisory committees. • Establish a process for the public to raise concerns directly with its government. • Access to fair, equitable and transparent administrative and judicial proceedings for enforcement. • Provide appropriate sanctions or remedies for violations. • Framework evaluating cooperative activities that support implementation of commitments. • Framework for public participation in evaluating cooperating activities. • Establish or maintain a senior-level Environment Committee to oversee implementation. • Combat illegal fishing, unreported, and unregulated (IUU). • Establish rules to prohibit harmful fisheries subsidies. • Promote sustainable fisheries management and long-term conservation of marine species. • Protect and conserve flora and fauna and ecosystems, combat wildlife trafficking.
<p>Anti-Corruption:</p>	<ul style="list-style-type: none"> • Criminalize government corruption. • Take steps to discourage corruption. • Provide adequate penalties and enforcement tools for prosecution of persons suspected of corruption. • Require companies to maintain accurate books and records. • Encourage the establishment codes of conduct to encourage high ethical standards among public officials. • Require parties to disallow the deduction of corrupt payments for income tax purposes.
<p>Trade Remedies:</p>	<ul style="list-style-type: none"> • Preserve the ability of the US to enforce rigorously its trade laws (e.g., AD/CVD and safeguard laws). • Eliminate the NAFTA global safeguard exclusion. • Eliminate the Chapter 19 dispute settlement mechanism. • Seek a separate domestic industry provision for perishable and seasonal products in AD/CVD proceedings. • Exclude state-owned enterprises as part of the domestic industry in AD/CVD proceedings. • Facilitate the ability to impose measures based on third country dumping. • Promote cooperation among the trade remedies administrators of the NAFTA countries. • Procedures to address AD/CVD duty evasion, including the verification visits. • Establish transparency and due process obligations reflected in U.S. AD/CVD laws, regulations, and practice. • Early warning import monitoring system for agreed sensitive products from non-NAFTA countries.
<p>Government Procurement:</p>	<ul style="list-style-type: none"> • Increase opportunities for U.S. firms to sell U.S. products and services into the NAFTA countries. • Fair, transparent, predictable, and non-discriminatory rules to govern government procurement. • Exclude sub-federal coverage (state and local governments) from the commitments being negotiated. • Keep in place domestic preferential purchasing programs. • Maintain broad exceptions for government procurement in national security, safety, IPR, etc. • Provide for labor, environmental, and other criteria to be included in contracting requirements.
<p>Small and Medium-Sized Enterprises (SMEs):</p>	<ul style="list-style-type: none"> • Commitment to provide information resources to help SMEs navigate FTA requirements. • Cooperate on SME issues of mutual interest. • Establish an SME Committee to ensure that the needs of SMEs are considered.
<p>Energy:</p>	<p>Preserve and strengthen investment, market access, and state-owned enterprise disciplines benefitting energy production and transmission and support North American energy security and independence, while promoting continuing energy market-opening reforms.</p>





Dispute Settlement:	<ul style="list-style-type: none"> • Encourage the early identification and settlement of disputes through consultation and other mechanisms. • Establish a dispute settlement mechanism that is effective and timely. • Panel determinations are based on the provisions of the Agreement, submissions of the parties. • Panel determinations are provided in a reasoned manner. • Establish a dispute settlement process that is transparent. • Have provisions that encourage compliance with the obligations of the Agreement.
General Provisions:	Include general exceptions that allow for the protection of legitimate U.S. domestic objectives, including the protection of health or safety and essential security, among others.
Currency:	Through an appropriate mechanism, ensure that the NAFTA countries avoid manipulating exchange rates in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage.

The specific negotiation objectives reflect many (but not all) of the items on the wish lists of various U.S. industry sectors, as reflected in the public comments and testimony provided to the USTR. Even though the USTR’s list would maintain existing reciprocal duty-free market access for trade in goods (including agricultural products), **there was no specific mention of the application of the “do no harm” principle for the jobs, businesses and industries that currently depend upon that trade with Canada and Mexico that was previously discussed** by USTR Lighthizer. Many voices across various industry sectors urged the Administration to maintain current NAFTA benefits while at the same time modernizing and enhancing provisions of the agreement in a way that would avoid disrupting the ny contemplated changes to the rules of origin to avoid undermining demand for U.S. exports, increasing U.S. manufacturing costs or other unintended consequences.

In addition, the proposal **to eliminate the Chapter 19 dispute panels from the NAFTA will likely be an issue of contention for both Canada and Mexico.** This issue was hotly contested during the initial negotiations of the Agreement with Canada more than 25 years ago, and Canada will likely push for Chapter 19 to remain in the Agreement in view of the ongoing software lumber antidumping dispute. Mexico’s Economy Minister Ildefonso Guajardo also noted that the push to eliminate Chapter 19 from the Agreement as well as NAFTA’s safeguard exclusion will be tough for the U.S. to push through.

The formal renegotiation process with Canada and Mexico could begin as early as mid-August. **It is very likely that the negotiations could continue through Mexico’s presidential election in July 2018. Upon concluding the formal negotiations with Canada and Mexico, the resulting agreement will ultimately be submitted to Congress for approval.** Because the President currently has what is known as “Trade Promotion Authority,” Congress must consider the renegotiated agreement, work with the Administration on drafting the implementing legislation, and vote without making any additional amendments to the agreement itself.

As noted above, U.S. companies doing business in Canada and Mexico should continue to:

- **Stay abreast of new developments as they arise**
- **Reach out to members of Congress and other key government decision-makers**
- **Assess how proposed changes to the NAFTA may impact their products and supply chains**
- **Consider submitting public comments and providing testimony as to how proposed changes to the NAFTA could affect their operations**
- **Ensure that their interests are considered and protected throughout this process.**

For more information, including assistance in the above efforts, please contact the author or your Polsinelli attorney.



For More Information

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