NAFTA Renegotiation Faces a Lengthy, Uncertain Future

On May 18, 2017, United States Trade Representative (USTR) Robert Lighthizer notified Congress that he is seeking to renegotiate the North American Free Trade Agreement (NAFTA). The notification triggers a 90-day consultation period with Congress and the public to determine U.S. negotiating objectives, followed by formal negotiations with Canada and Mexico. This update briefly describes the steps for NAFTA renegotiation that lie ahead and some of the thornier issues likely to arise.

Renegotiation Process

U.S. law requires a 90-day consultation period between the administration and Congress prior to initiating new trade negotiations. Trade Promotion Authority (TPA), which we covered in an earlier update, requires the administration to consult with Congress and set forth how it will meet certain congressionally defined objectives in the negotiations, such as reducing and eliminating tariff barriers. The USTR must publish a “detailed and comprehensive summary of the specific objectives” of the negotiations at least 30 days prior to initiation of formal negotiations with the trading partners. The administration has stated that it intends to complete the congressional consultation period by August 2017 and the NAFTA renegotiation by the end of this year. This is an extraordinarily ambitious timetable that almost certainly will not be realized.

The USTR’s public notice indicates that the administration has not begun to withdraw from NAFTA or terminate it, which were promises made during the 2016 presidential campaign; rather, it intends to renegotiate the agreement. NAFTA provisions allow parties to withdraw from the agreement six months after providing notice to the other trading partners. The administration, however, has not invoked these provisions. Instead, the USTR describes NAFTA as “outdated” and in need of “modernization.” This strikes a much different tone than used by President Trump and his staff during the campaign, in which they repeatedly disparaged NAFTA, calling it the “worst trade deal” in U.S. history.

The Trump administration continues to threaten to withdraw from NAFTA if Canada and Mexico do not agree to more favorable terms. However, complete withdrawal from NAFTA, as opposed to renegotiation, is problematic under U.S. law because NAFTA was enacted as a congressional-executive agreement rather than a formal treaty. Congress enacted specific changes to U.S. domestic laws to permit the U.S. to meet its NAFTA obligations. If the Trump administration decides unilaterally to withdraw from NAFTA, congressional action would nevertheless be required to undo a complex web of statutory provisions in U.S. law that implemented NAFTA.

Scope of NAFTA Renegotiation

The NAFTA terms identified for renegotiation or for inclusion in a revised agreement remain unclear. However, such terms presumably will become more focused after the Trump administration consults with Congress and the public, and as the formal negotiations progress. Ambassador Lighthizer has identified a litany of areas which he contends require modernization, including: digital trade, intellectual property rights, regulatory practices, state-owned enterprises, services, customs procedures, sanitary and phytosanitary measures, labor, environment, and small and medium enterprises. Most of these are already identified in TPA as required objectives for the president to strive for in international trade negotiations.

Ambassador Lighthizer claims that NAFTA has been good for the U.S. agriculture industry, but bad for U.S. manufacturers. This view is consistent with President Trump’s insistence that NAFTA has caused U.S. companies to outsource jobs to Mexico to the detriment of U.S. manufacturing. While no concrete proposals have been made, the Trump administration’s focus on manufacturing is likely to result in negotiations that could discourage, or complicate, cross-border investment among NAFTA countries.

Rules of origin also could be renegotiated, with the potential for a very broad (or very modest) impact on U.S. importers and companies with operations among the NAFTA countries. NAFTA provides specific rules of origin for products undergoing processing before shipment among Canada, Mexico and the United States. Such rules are the foundation for duty-free preferential treatment in the movement of goods among the three NAFTA countries. For example, NAFTA’s regional content rules establish whether certain products can benefit from preferential NAFTA tariff rates; these content rules, which vary widely by industry and product, may come under renewed scrutiny in the renegotiations.

Regulatory harmonization also is a goal for major U.S. domestic industries. Automakers in the United States, for instance, see the renegotiation as an opportunity to push for common standards among NAFTA markets. Supply chains in the automobile industry often span manufacturing in all three NAFTA markets, making regulatory harmonization attractive to automakers and parts suppliers. The pharmaceutical and agribusiness industries could also seek regulatory harmonization through the negotiations.

Public Participation in the Process
The USTR issued on May 23, 2017 a notice seeking public comments on “matters relevant to the modernization of NAFTA in order to inform development of U.S. negotiating positions.” The USTR requested that the comments address the following, among other topics:

- general and product-specific negotiating objectives for Canada and Mexico in the context of a NAFTA modernization;
- the economic costs and benefits to U.S. producers and consumers of the removal of any remaining tariffs and the removal or reduction of non-tariff barriers on articles traded with Canada and Mexico;
- the treatment of specific goods (described by particular tariff number), including product-specific import or export interests or barriers;
- modifications to rules of origin or origin procedures for NAFTA qualifying goods; and
- labor, environment, government procurement, investment, intellectual property rights, digital trade and trade in services.

Public comments on these subjects should be submitted to the USTR no later than June 12, 2017. The USTR has also scheduled a public hearing on June 27, 2017, where interested members of the public may testify in person on the NAFTA renegotiations. The public testimony and written submissions, along with congressional input over the coming months, will be important factors in how the USTR prioritizes its negotiating objectives when the NAFTA parties sit down at the table in the fall.

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