JONES DAY

COMMENTARY

NOVEMBER 2018

IN SHORT

The Situation: The United States, Canada, and Mexico recently reached an agreement in principle to revise and replace the North American Free Trade Agreement ("NAFTA") with the United States-Mexico-Canada Agreement ("USMCA").

The Result: While the USMCA maintains the status quo in many respects, certain key changes could significantly impact companies trading in the North American market. For example, the trade pact could create new industry-specific obligations that present unique challenges for businesses seeking to avoid tariffs and effectively operate in this new terrain.

Looking Ahead: Companies should evaluate their rights and obligations under the USMCA and adopt proper modifications to their supply chain logistics to adapt to the new rules.

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On September 30, 2018, the United States, Mexico, and Canada reached an agreement in principle to revise and replace NAFTA with the USMCA. Although the parties each signed the agreement on November 30, 2018, the USMCA will not take effect until the signatories complete their respective domestic implementation requirements, a process that may not be complete until mid- to late 2019 or even 2020.

The Trump administration now has 60 days to submit a memorandum to Congress detailing what changes to existing law would be required to implement the USMCA's provisions. In addition, the administration must submit a final text of the agreement and a draft statement detailing any administrative action proposed to implement the trade pact at least 30 days before a bill seeking to enact the USMCA into law is formally introduced.

> "The current version of the USMCA is not the final word. Contentious disagreement may produce further modifications during the approval process, so interested parties must continue to be diligent as the process moves forward."

Summary of Notable Changes

Country of Origin: An Emphasis on Supply Chain Localization for Automobiles. The USMCA would impose more stringent origination requirements for automakers seeking to avoid tariffs on their products. To obtain a certificate of origin, automakers must verify that the content percentage of the vehicle produced in North America satisfies a specified content ("Regional Content Value" or "RCV") depending on the classification of vehicle, and that a certain percentage of the labor involved in producing the car is compensated at or above a threshold rate, currently the equivalent of $16.00 ("Labor Content Value" or "LCV"). The LCV requirement is a new feature of the USMCA.

Dispute Resolution. As our colleagues previously explained in more detail, the USMCA sharply curtails the procedure that enables Canadian, Mexican, and U.S. investors to bring arbitration against the Canadian, Mexican, and U.S. governments for violations of guarantees of national treatment, most-favored-nation treatment, the minimum standard of treatment, and protection against unlawful expropriation. The USMCA also would eliminate investor-state dispute settlement involving Canada or Canadian investors altogether, forcing U.S. and Canadian investors with investments in the respective host state to seek relief in that state's domestic courts, whereas Canadian or Mexican investors with investments in the respective host state can soon seek relief under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which is set to enter into force on December 30, 2018.

Access to the Canadian Dairy Market. The USMCA effectively eliminates certain aspects of Canada's milk class pricing system for certain milk ingredients. As a result, American milk producers would be able to supply approximately 3.6 percent of Canada's roughly $16 billion annual domestic dairy market. This represents an upward departure from the existing one percent market access that American firms currently have under NAFTA. Moreover, if Canada's total exports surpass certain thresholds, Canada would be required to impose export duties on milk protein concentrates and skim milk powder.

Sunset Clause. The USMCA contains a 16-year sunset clause pursuant to which the agreement will automatically terminate unless the parties all agree to extend for another 16 years. The deal also provides for a periodic review every six years, at which point the parties can decide to extend the trade pact.

Intellectual Property. The USMCA provides extensive intellectual property protections, including: (i) increasing patent protection for biologic drugs in Canada and Mexico from eight to 10 years; and (ii) imposing a minimum copyright term of life for the author plus 70 years (which is an increase of 20 years from NAFTA).

Currency. The USMCA imposes requirements regarding currency manipulation. For example, under the USMCA, the parties would be required to "achieve and maintain a market-determined exchange rate regime" and to "refrain from competitive devaluation," although activities by the parties' "exchange rate or fiscal or monetary authority" are exempted.

Government Procurement. The USMCA includes provisions that potentially could reduce Canada's access to certain U.S. government procurement projects.

Rules of Origin. Other provisions of the USMCA impact rules of origin related to chemical products, televisions and electronic products, arabic gum, and products incorporating fiber optics, titanium, and steel.

THREE KEY TAKEAWAYS

1. The USMCA would, among other things, limit the viability of arbitration as a form of alternative dispute resolution, enhance access to foreign markets for certain industries, and create new industry-specific obligations that present unique challenges for businesses seeking to avoid tariffs and to effectively operate in this new terrain.

2. Companies should consider adopting strategic modifications to their supply chain logistics to capitalize on increased industry access to foreign markets for certain industries and products.

3. The current version of the USMCA is not the final word. Contentious disagreement may produce further modifications during the approval process, so interested parties must continue to be diligent as the process moves forward.

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