

# International Trade Alert

April 4, 2017

## Key Points

- On March 31, President Trump signed two Executive Orders (EOs) that address trade. The first EO addresses increased enforcement of U.S. trade and customs laws and specifically calls for plans and strategies to combat the underpayment of antidumping and countervailing duties and the importation of inadmissible and counterfeit merchandise. The first EO also orders the Department of Justice (DOJ) and the Department of Homeland Security (DHS) to prioritize the prosecution of significant trade law offenses.
- The second EO highlights the need for free and fair trade, the enforcement of trade laws and economic growth and requires a country-by-country report of U.S. trading partners with which the United States has a significant trade deficit, including assessments of the causes of trade deficits and their effect on production capacity, employment and national security.



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## President Trump Issues Two Executive Orders on Trade and Customs Enforcement, and Trade Deficits

President Trump signed two EOs addressing trade on Friday, March 31: one addressing trade and customs enforcement, including the collection of antidumping and countervailing duties (AD/CVD), and a second requesting an omnibus report on significant trade deficits. While the EOs represent another of the administration's major forays into trade, they set the table for increased enforcement of U.S. trade laws and scrutiny of U.S. trading partners.

### Trade and Customs Enforcement EO

The first EO, titled "Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws," addresses a number of trade enforcement issues that have been the focus of President Trump's trade policy. First, the EO addresses the undercollection of AD/CVD. Second, the EO instructs DHS and Customs and Border Protection (CBP) to develop a plan to combat violations of trade and customs laws and prevent the importation of inadmissible merchandise, as well as to increase intellectual property rights protections, which was also addressed in the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). Third, the EO calls on the DOJ, in consultation with DHS, to prioritize the prosecution of significant trade law offenses.

## **Trade Remedy Evasion**

Citing \$2.3 billion in uncollected AD/CVD as of May 2015, the EO instructs DHS to develop enhanced bonding requirements for certain importers and to make other improvements to the enforcement of U.S. trade remedy laws. The undercollection of AD/CVD has been the subject of congressional interest over the past decade and has resulted in the enactment of new trade remedy evasion provisions under Title IV of TFTEA, which is more commonly referred to as the “Enforce & Protect Act.” We expect that the plan will involve provisions from TFTEA requiring CBP to implement a new procedure to investigate allegations of trade remedy evasion. In addition, CBP will likely rely on Section 115 of TFTEA, which requires CBP to establish bonding requirements for importers based on CBP risk assessments.

The EO calls on DHS and the Department of Commerce, among others, to develop a plan within 90 days to provide security through bonds and other enforcement measures for importers who are subject to AD/CVD and who (i) are new importers, (ii) have not fully paid applicable AD/CVD or (iii) have failed to timely pay AD/CVD. While it is unclear what the new additional bonding requirements will look like, there is some historical precedent for enhanced bonding requirements.

CBP attempted to apply similar bonding requirements in the mid-2000s, but suffered setbacks at the U.S. Court of International Trade and the World Trade Organization (WTO). In particular, CBP imposed enhanced bonding requirements on shrimp subject to trade remedy orders starting in 2005. Under the program, importers were required to post a bond—in addition to tender cash deposits for estimated AD/CVD—that represented approximately double the amount of AD/CVD cash deposit due on the entry. The U.S. Court of International Trade, however, found that the requirements violated U.S. law. The WTO also found that the enhanced bonding requirements violated the United States’ obligations under the WTO.

The EO also calls for DHS to identify other enforcement measures that could be part of the plan to address trade remedy evasion. We expect that DHS will heavily involve the Trade Remedy Enforcement Division within CBP’s Office of International Trade to develop this part of the plan. We expect that the plan will use existing authority for the division to investigate allegations of evasion of AD/CVD and issue Trade Alerts directing a closer inspection of merchandise by port personnel. The plan may also involve the new, judicially reviewable evasion petition procedure that CBP must undertake should it receive such petitions from interested parties, although that process has been criticized by domestic industry.

## **Increased Enforcement of Violations of Trade and Customs Laws**

The EO also addresses increased enforcement of violations of U.S. trade and customs laws, with a focus on the importation of inadmissible and counterfeit merchandise. The EO directs DHS to develop a strategy for combating violations of trade and customs laws and “for enabling interdiction and disposal, including through methods other than seizure” of inadmissible merchandise.

With respect to intellectual property rights, the EO requests that DHS take “all appropriate steps, including rulemaking” to ensure that CBP can share with rights holders “any information necessary to determine whether there has been an IPR infringement or violation.” CBP already has the authority to share

information about counterfeit and piratical products with rights holders after seizure, and it also amended its regulations in 2015 to promote the sharing of information regarding suspect counterfeit marks with trademark owners prior to seizure [read more here]. Further, TFTEA expanded CBP's authority to share information prior to seizure beyond counterfeit trademarks to piratical copyrights and circumvention devices that are suspected of infringing the Digital Millennium Copyright Act. CBP previously indicated that these regulatory changes are under way, and the EO may expedite the issuance of those regulations. The EO's portion on intellectual property rights also directs DHS to ensure that CBP can share with rights holders "any information regarding merchandise voluntarily abandoned" prior to seizure if CBP reasonably believes that the successful importation of the merchandise would have violated U.S. trade laws.

Since the issuance of the EO, CBP has published a fact sheet indicating that it is leading DHS's efforts to implement the provisions set forth in the EO and that, within 90 days, CBP will develop implementation plans (i) to provide security for AD/CVD liability through bonds; and (ii) to enable the interdiction and disposal of violative goods, with the ability to share information regarding voluntarily abandoned merchandise with intellectual property rights owners.

### **Priority Prosecution for Trade Law Violations**

Finally, the EO orders DOJ and DHS to prioritize the prosecution of violations of trade laws. As a result of the EO, we would expect to see an increased number of cases, both criminal and civil, for U.S. trade and customs law violations, especially as it relates to the evasion of trade remedy orders and the importation of potentially counterfeit goods. Importers should expect to see increased civil, and possibly criminal, prosecutions from an emboldened CBP, especially with respect to customs and trade offenses in Titles 18 and 19 of the U.S. Code.

### **Trade Deficit Report**

The second EO requests a country-by-country report on the causes of U.S. trade deficits. The EO asserts that the United States' annual trade deficit in goods exceeds \$700 billion and that the overall trade deficit exceeded \$500 billion in 2016. The EO highlights the need for "free and fair trade," the enforcement of trade laws and economic growth. The EO also asserts that the United States has not obtained the full scope of benefits anticipated from numerous international trade agreements and participation in the WTO.

Specifically, the EO requires that, within 90 days, the Secretary of Commerce and the United States Trade Representative must submit a report to the President that will identify foreign trading partners with which the United States had a significant trade deficit in goods in 2016. The report must assess the major causes of the trade deficit, such as differential tariffs, non-tariff barriers, dumping, government subsidization, intellectual property theft, and denial of worker rights and labor standards. The report must also make a determination as to whether the identified trading partner is "imposing unequal burdens" or "unfairly discriminating against" the commerce of the United States. Additionally, the report must assess the effects of the identified trade relationships on the production capacity of the manufacturing and defense industries, as well as employment and wage growth in the United States. Lastly, the report must identify imports and trade practices that may be impairing the national security of the United States. President Trump could use the data from this report to address trade deficits with U.S. trading partners.

## Contact Information

If you have any questions concerning this alert, please contact:

**Lars-Erik A. Hjelm**

[lhjelm@akingump.com](mailto:lhjelm@akingump.com)

+1 202.887.4175

Washington, D.C.

**Hal S. Shapiro**

[hshapiro@akingump.com](mailto:hshapiro@akingump.com)

+1 202.887.4053

Washington, D.C.

**Jean-Rene Broussard**

[jbroussard@akingump.com](mailto:jbroussard@akingump.com)

+1 202.887.4072

Washington, D.C.

**Suzanne Kane**

[skane@akingump.com](mailto:skane@akingump.com)

+1 202.887.4037

Washington, D.C.