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Biden on Trade & Investment

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Soon after the January 2021 inauguration, President-elect Biden will announce his trade agenda. Many of the major trade issues which have been a focus of the Trump Administration, such as import tariffs, export restrictions, new and heightened economic sanctions, and inbound investment controls could shift in ways which impact U.S. and non-U.S. companies. The United States will continue to focus on China trade issues, investment by Chinese entities, protecting U.S. technology, and prohibiting imports made with forced labor. Importers, exporters, and manufacturers will need to be prepared to adjust operations. The incoming administration is expected to announce, if not implement, its priorities in its first months. This GT Alert discusses the expected trade and inbound foreign investment agenda, as well as the likely impact of such potential changes on U.S. companies.

Based on President-elect Biden's recent comments, certain trade policies are already apparent. Below, we address anticipated policies and resulting expected changes in turn.

Impacting Importers: Domestic Manufacturing, China, Steel and Aluminum, and Forced Labor:

- Biden's priority is to focus on domestic issues first including enhancing **Buy America** policies.
- Regarding the **Section 301** tariffs against **China** by the Trump Administration, Biden has pledged that his administration will not make any "immediate moves" and accordingly, the tariffs are expected to remain in place in the near term. An open question is the status of the numerous exclusions approved by USTR for specific products which are expiring on Dec. 31, 2020, prior to Biden's inauguration. Biden has made clear that before any decision on the Section 301 tariffs, he will review China's compliance with the Phase One Trade Deal.
- With Biden's focus on spurring investments in domestic manufacturing, it is uncertain whether he will lift the additional tariffs on **steel and aluminum** that Trump imposed pursuant

to Section 232 of the Trade Expansion Act of 1962 and whether he will move forward with other pending Section 232 cases.

- Biden will support U.S. Customs and Border Protection recent Withhold Release Orders on products made with **forced labor** and the agency's focus on the **Xinjiang** region of China, as well as pending Congressional legislation, the **Uyghur** Forced Labor Prevention Act and the Uyghur Forced Labor Disclosure Act, prohibiting the importation of products from the region.

- The Biden Administration will likely focus on bolstering multilateral trade regimes such as the **World Trade Organization (WTO)**, and working with allies, such as the European Union, Japan, and the United Kingdom, and establishing partnerships with other countries to focus on issues such as stopping China's unfair trade and forced labor practices, and protecting the environment, including mitigating climate change.

- Biden has stated that the United States should be setting trade policy rather than sitting on the sidelines. This was said with regard to the recently signed **Regional Comprehensive Economic Pact (RCEP)** signed by 15 countries in the Indo-Pacific region, including China.

- It is not anticipated that the Biden Administration will sign any new trade agreements in the near future. In addition, any new trade deals may include increased labor and environmental standards. It is unclear at this time whether the Biden Administration will continue ongoing trade negotiations with the United Kingdom and Kenya.

- Biden will work to repair the **U.S.-E.U**. relationship. There are several substantive issues to address including the long running Airbus-Boeing dispute and additional tariffs on products imposed by both sides, and the **Digital Services Tax** on specific products imposed by France, for which invoices have recently begun to be sent to U.S. companies.

- Biden has also announced an intention to pursue a "**Carbon Adjustment** Fee," to be levied on goods from countries with high carbon emissions.

Economic Sanctions

The Trump Administration was particularly active in using **economic sanctions** as a foreign policy tool, enacting a host of sanctions measures against a wide variety of countries, entities, and individuals. However, a number of these new sanctions met with bipartisan approval, and only in select cases is it expected that the Biden Administration will roll back certain Trump-era sanctions frameworks.

- President-elect Biden has indicated his intent to re-align with allies and work on a multilateral basis to set policy vis-a-vis China. For purposes of China-specific economic sanctions and export restrictions imposed by the Trump Administration, while revocation or a lessening of existing restrictions is not expected, the future foreign policy of the Biden Administration may result in notably fewer targeted sanctions aimed at Chinese entities such as **Huawei.**

- With regard to Trump-era economic sanctions against **Hong Kong,** barring an unexpected improvement in Sino-U.S. relations and/or a relaxation of China's increasingly assertive policy towards Hong Kong, it is not expected that President Biden will repeal the Trump Administration's Hong Kong sanctions, and Hong Kong may even become subject to additional U.S. sanctions measures.

- With respect to economic sanctions, the Biden Administration is expected to revisit the U.S. relationship with **Iran**, perhaps including U.S. participation in the **Joint Comprehensive Plan of Action (JCPOA)** with Iran. The JCPOA, also known as the Iran Nuclear Deal, was the 2015 joint agreement between Iran and the P5+1 (the United States, China, France, Russia, and the United Kingdom) which resulted in reduced sanctions against Iran. The Trump Administration withdrew from the JCPOA in 2018, resulting in a "snap-back" of sanctions, and has also imposed additional sanctions against Iran beyond those that resumed in 2018. Although Biden criticized the withdrawal from the JCPOA at the time, the potential for a U.S. return to the agreement gives the Biden administration leverage in any negotiations with Iran. Accordingly, the Biden administration will be unlikely to reenter the JCPOA without additional commitments from Iran.

- In the short term, the Biden Administration will likely continue the **Cuba-related** policy of the Obama Administration, which made inroads in paring back the long-standing U.S. embargo against **Cuba**. Under President Trump, the United States reinstated a number of sanctions that had been lifted under President Obama. It appears unlikely that the new Biden Administration will impose additional sanctions against Cuba, and there is a possibility that U.S. sanctions policy toward Cuba will return to the Obama-era baseline. Because the Cuba embargo is largely a statutory regime, congressional approval would be required to lift the embargo in its entirety.

- The Trump Administration maintained, and in some cases expanded, the U.S. sanctions against **Russia** that were first implemented under the Obama Administration. Absent a substantial improvement in U.S.-Russia relations, it is unlikely that the Biden Administration will significantly ease the Russia sanctions.

- The deteriorating political situation in **Venezuela** led the Trump Administration to establish a range of sanctions designed to destabilize the regime of Venezuelan President Nicolás Maduro. These measures generally met with bipartisan approval, and as such it is unlikely the Biden Administration will significantly alter the Venezuela sanctions unless a democratically elected leader replaces Maduro.

Export Controls

The Biden administration is expected to continue to leverage export controls on new and critical technologies to China and may review recent regulatory changes in export controls on firearms and ammunition.

- The Biden Administration is expected to continue to implement export controls on emerging and foundational technologies and related items, particularly regarding exports to China. The President-elect may be more likely to consult and work with allies to implement stronger controls to keep cutting edge technology out of China.

- Biden has announced that the recent trend of moving authority for export control for certain **firearms and ammunition** from the Department of State under the International Traffic in Arms Regulations (ITAR) to the Department of Commerce under the Export Administration Regulations (EAR) should stop and even be reversed.

Foreign Investment Regulation (CFIUS)

The **Committee on Foreign Investment in the United States (CFIUS)** process underwent significant reform under the Trump Administration, and it is not expected to change. FIRRMA was enacted through legislation, as opposed to Executive Order, and passed with bipartisan support in Congress. The regulatory changes to CFIUS were completed in 2020, including:

- a shift away from the pilot program mandatory declaration requirement based in part on the U.S. business's industry NAICS codes to one based on the export controls of the goods or software the U.S. business produces, designs, tests, manufactures, fabricates, or develops.
- The extension of CFIUS jurisdiction over transactions purely involving **real estate** as well as a real estate transaction declaration process.
- CFIUS also put in place filing fees based on the value of the transaction being notified to the Committee.

Under the Biden Administration, continued activity in terms of CFIUS declarations and full filings, both mandatory and voluntary is expected. There will likely be continuity with respect to the heightened scrutiny CFIUS has displayed in its review process, particularly transactions with any touchpoints related to China, Hong Kong, or sanctioned countries. In the recent past, CFIUS has demonstrated a more aggressive stance with respect to non-notified transactions (transactions which were concluded without submitting notifications to CFIUS), including proactive investigatory efforts and related enforcement activity (directed filings). These trends are likely to continue under the Biden Administration, and it will remain necessary to analyze any transaction involving a non-U.S. buyer/minority investor to determine whether a CFIUS filing is required or advisable.

Conclusion

At least some of the issues addressed above are expected to be at the forefront of the first few months of the Biden Administration's actions. We will continue to monitor these developments and will issue updates to this Alert accordingly.

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