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Could President-Elect Trump Kill NAFTA?

During his campaign for presidency, President-elect Donald Trump frequently called the North American Free Trade Agreement “the worst trade deal in history.” He promised the American people that he would renegotiate or withdraw from NAFTA and raise tariffs on imports from Mexico and Canada. NAFTA is a free trade agreement signed by Canada, Mexico and the United States, creating a trilateral trade bloc in North America. In the aftermath of the election, Americans with international business interests may be wondering whether President-elect Trump has the legal authority to unilaterally withdraw the U.S. from NAFTA and how to prepare for that scenario.

Mr. Trump’s transition team has sketched out his plan for the first 200 days of his presidency. According to post-election memorandum and video, the president-elect intends to push for substantial changes to NAFTA and trade relations between the United States, Canada and Mexico.

Mr. Trump’s 200-Day Plan

On the first day of his administration, Mr. Trump intends to begin his NAFTA reform efforts by ordering the Department of Commerce and International Trade Commission to study the possible ramifications of withdrawing from NAFTA. A U.S. Trade Representative could subsequently notify Mexico and Canada that the U.S. plans to propose changes to NAFTA. Mr. Trump has indicated that these changes would include measures on country of origin labeling, environmental and safety standards, and currency manipulation. By day 200, he will consider officially withdrawing from NAFTA and negotiating bilateral trade agreements with Mexico and Canada.

Legal Authority to Withdraw from NAFTA

Technically, U.S. trade agreements are not treaties. They are congressional-executive agreements approved by a majority vote of each house of Congress. Pursuant to the Omnibus Trade and Competitiveness Act of 1988 and the Trade Act of 1974 ("Trade Act"), Congress authorized the president to negotiate and enter into free trade agreements with approval from both houses of Congress. Under this authority, NAFTA was approved by Congress in 1993 and took effect on January 1, 1994.

If Mr. Trump decides to withdraw the United States from NAFTA, he can invoke Article 2205 of that agreement, which allows any member to withdraw six (6) months after giving written notice to the other parties. While NAFTA does not specify who must give notice on behalf of the U.S., it is generally accepted that the president is authorized to give notice of the intent to terminate a trade agreement under the U.S. Constitution.

It is an open question whether Mr. Trump will be able to withdraw the U.S. from NAFTA without congressional approval. There are two prior cases in which U.S. presidents terminated a treaty by executive decree: Jimmy Carter's executive termination of the Sino-American Mutual Defense Treaty with Taiwan in 1979 and George W. Bush's withdrawal in 2001 from the Anti-Ballistic Missile Treaty. In each case, when the president's authority was legally challenged, the court dismissed the case as a "non-justiciable political decision." However, such cases dealt with treaties and not congressional-executive agreements such as NAFTA. Nevertheless, Section 125(b) of the Trade Act does give the president additional statutory authority to revoke any earlier presidential proclamations reducing U.S. tariffs under a free trade agreement.

Tariff Implications Following Withdrawal from NAFTA

If the United States withdraws from NAFTA after providing the requisite six months' notice, tariffs would not rise automatically. Following withdrawal, Mr. Trump would be required to issue a new proclamation imposing tariffs on goods imported from Mexico and Canada at the preferential rates granted to most-favored nations (approximately 3.5% on most items).

If Mr. Trump wishes to impose additional duties on goods from Mexico and Canada, he can invoke Section 125(c) of the Trade Act, which provides the president with authority to raise duties after terminating a trade agreement, subject to certain caps. If the president wishes to raise tariffs more significantly, he may be able to do so by invoking other acts of Congress on grounds of unfair trade practices or national security.

The American business community should note, however, that these changes will not take effect immediately. Existing U.S. tariff levels will remain in effect for one (1) year after the termination of a trade agreement, pursuant to Section 125(c) of the Trade Act.

Likely Scenario Going Forward

U.S. withdrawal from NAFTA is not imminent, as Mr. Trump will have to provide six months' written notice to the other parties to the treaty. Moreover, Mr. Trump has frequently stated that his primary goal is to renegotiate the terms of NAFTA before considering withdrawal from the agreement. Certain presidential actions, such as sanctioning U.S. companies moving production to Mexico or Canada, would require congressional approval.

The Mexican and Canadian governments are scheduled to meet with the future Trump administration to discuss these issues. We will continue to monitor the progress of Mr. Trump's trade reform. For specific guidance, please contact [Jan de Beer](#), [Katherine Berkley](#) or [Chanhee Han](#) in Frost Brown Todd's Regulated Business Practice Group, [International Trade Compliance Service Team](#).

This article was originally posted on FBT's International Services Group blog page.

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