CARMICHAEL INTERNATIONAL SERVICE
An APL Logistics Company

MEMO TO CLIENTS

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NEWS IN BRIEF

OMB Clarifies Instructions on Requirement of 2-for-1 Repeals for New Regulations

The Office of Management and Budget (OMB) has issued interim guidelines to government agencies about exemptions to the executive order requiring a repeal of 2 regulations for every new regulation issued. The requirement will apply to only significant regulations. Regulations that are required by law are not subject to the order. Also there are exemptions for new regulations that address critical health and safety matters.

A copy of the OMB guidelines can be found at: https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017.

BAT and NAFTA

There are many questions on the Trump administration's plans for a Border Adjustment Tax and its plans for NAFTA. We have received a write up on these issues from the Law Firm of Pisani and Rolle LLP with what we found to be a good appraisal of the issues. The following article is being shared in our memo to clients with their permission:

Adios NAFTA?

Today, White House Press Secretary Sean Spicer announced that a plan was developing to tax imports from countries which run a trade deficit with the United States, like Mexico. Spicer indicated that the import tax could help pay for the border wall. No details were released as to whether this would be a 20% import duty collected by U.S. Customs and Border Protection (CBP) or some other kind of tax collected by another government agency, such as the IRS, and the devil is always in the (as of now - unreleased) details. That said, it seems likely that the Press Secretary was referring to the Border Adjustment Tax ("BAT") concept that has been gaining favor with Republicans in Washington, DC for some time as a way to simplify the tax code. Importantly, the BAT is not yet law - although it does seem likely to pass since the Republicans control Congress and the Executive Branch.

Briefly stated, corporate income tax rates would drop from 35% to 20% under various versions of the BAT. Hence, the White House would be able to say that it has cut corporate income tax rates.

At the same time, revenue and profits from export sales would not be taxed under the BAT. Thus, if a corporation had $100m in export sales and it cost $80m to make or buy the goods that were exported, the corporation's income taxes on the $100m in sales would be $0 under the BAT. Today, by contrast, the profit of $20m is taxed at 35%.

Turning to BAT treatment of imports, if the corporation has $100m in domestic sales and it cost $80m to obtain the imported goods that were sold domestically, then the corporation would pay $20m in taxes (20% tax on the $100m in sales). This effectively makes U.S. taxpayers (not Mexican exporters) pay an "import tax" of 20% on the $80m in imports since today the income tax rate (which is at the higher 35%) is assessed only on the $20m in profit, or $6.67m.

While the above illustration is admittedly over simplistic, the key point is that companies who predominantly import would face an increase in corporate income taxes under the BAT - even at the lower rate. The BAT also seems to tie in to the comments made by Press Secretary Spicer in terms of matching the 20% "tax" that would be applied to Mexican products.

As to whether it is time to say "adios" to NAFTA, much remains to be seen. So far, and despite rising tensions with Mexico, no party to the NAFTA has given the required notice (6 months) under Article 2205 of the NAFTA and while renegotiations may happen in the near future, the topics to be discussed appear more focused on tightening the NAFTA rules of origin and revising dispute settlement procedures, not abandoning the agreement outright. To be sure, a 20% CBP collected import duty (as opposed to income tax like the BAT described earlier) would run afoul of NAFTA and likely result in at least a mini-trade war with Mexico responding in kind with a tax on U.S. origin products imported into Mexico. Many also

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question whether the BAT would be compliant with U.S. World Trade Organization ("WTO") and NAFTA obligations, but sorting that out through existing dispute settlement procedures will likely take years - during which time the BAT would likely remain in place.

Even if the U.S. (or Mexico, for that matter) were to withdraw from NAFTA, other free trade agreements (besides the Trans Pacific Partnership) have not, at least publicly, been on the White House target list. For some, but clearly not all, companies, the absence of NAFTA would not mean the absence of free trade. Moving production from Mexico to one of these countries may not, of course, always be feasible or desirable.

CBP Issues Additional Guidance for Goods Returned Under 9801

U.S. Customs and Border Protection has issued additional guidance on documentation that may be required for shipments that are returned to the U.S. (within 3 years of exportation in CSMS message). CBP will want proof that the goods were exported within 3 years of the return. CBP may also request a declaration from the foreign shipper that the products were not advanced in value or condition while outside the United. States. If a shipment that left the United States stayed in the custody of the carrier, a statement from the carrier certifying that the shipment stayed in its custody can be accepted in lieu of a declaration from a foreign shipper.

U.S. goods that were out of the country for more than 3 years still qualify for duty free treatment. If the product is not marked to show U.S. origin, a manufacturer's affidavit may be required.

A copy of CSMS # 17-000046 can be found at: https://apps.cbp.gov/csms/viewmssg.asp?Recid=22450&page=&srch_argv=9801&srchtype=&btype=&sortby=&sby=.

By **Todd Boice**, *President*