

On September 30, 2018, the US, Mexico and Canada announced the successful conclusion of talks to replace the North American Free Trade Agreement (NAFTA). The US-Mexico-Canada Agreement (USMCA) contains a number of chapters not included in the original deal, including sections on digital commerce, currency policies and state-owned enterprises (SOEs). Other standard chapters – such as Intellectual Property, Rules of Origin, and Sanitary and Phytosanitary (SPS) Measures – have also been updated to reflect the 21st century economy. Companies operating in North America must now closely examine the deal to determine how it could impact their supply chains.

What Is New?

The Office of the US Trade Representative (USTR), which led negotiations on behalf of the Trump Administration, has characterized the new agreement as a “plus-ed up” version of the Trans-Pacific Partnership, adding this deal will serve as the “model” for future trade agreements negotiated by the US.

Companies operating in North America must closely examine USMCA to ensure they understand the impact of its changes on trade across the continent, which could range from domestic content requirements to legal recourses available for disputes to customs procedures and much more. These changes include the following:

- **Digital Commerce.** USMCA contains provisions on digital trade, an issue not previously discussed in NAFTA. One provision would ban data localization requirements, or laws that regulate the collection, storage and international transmission of data collected within the country. Notably, USMCA does not exempt financial services firms from this prohibition. More in line with American policy, USMCA also contains language that would not hold internet companies liable for content posted from third parties. Another provision would establish that companies wanting to do e-business need not have a physical presence in a jurisdiction to operate there.
- **Rules of Origin.** USMCA tightens rules of origin for a variety of “steel intensive goods,” including – but not limited to – autos and auto parts. USMCA requires a 75% domestic content for auto inputs manufactured in North America in order for automobiles to qualify for preferential, duty-free treatment. This represents an increase from the current 62.5% requirement in NAFTA. Other, non-automotive steel goods would also be subject to more stringent requirements aimed at incentivizing the use of steel produced in North America.
- **Addressing China’s Trade Practices and Policies.** USMCA includes a number of provisions seemingly aimed not at North America, but eastward toward China. A first-ever for the US, USMCA addresses currency manipulation and monetary policy in the core text of a trade agreement, including requirements related to transparency in foreign exchange activity that would be subject to the deal’s state-to-state dispute settlement mechanism.

USMCA also contains a clause relevant to future free trade agreement negotiations with non-market economies, most notably China. USMCA would require the parties to give three-month notice to the other parties if they seek to enter into new trade agreement negotiations with a non-market economy. The clause also provides that “Entry by any Party into a free trade agreement with a non-market country, shall allow the other Parties to terminate this Agreement on six-month notice and replace this Agreement with an agreement as between them (bilateral agreement).” Essentially, this provision would provide the US with a review mechanism should Canada or Mexico decide to seek a trade agreement with China, an act that could change the dynamic of trade among the North American partners.
- **Customs Procedures.** The agreement modernizes and streamlines customs procedures among the three countries, which has the potential to save companies time and money as they transport goods across North American supply chains. USMCA also increases *de minimis* levels, or the value amount below which shipments will be exempted from customs duties or taxes. The US set its *de minimis* level at US\$800, in accordance with existing law. Mexico and Canada agreed to set their *de minimis* levels at US\$117 and C\$150, respectively, for customs duties only; their *de minimis* levels for tax purposes remain low, at US\$50 for Mexico and C\$150 for Canada.
- **Investor-State Dispute Settlement (ISDS).** USMCA would phase out ISDS between the US and Canada. *Vis-à-vis* the US and Mexico, ISDS protections currently in NAFTA would be preserved for five sectors: (1) oil and gas, (2) power generation services, (3) telecommunication services, (4) transportation services and (5) the management of ownership of infrastructure. The elimination of the provision for Canada and the pared back protections for specific investments in Mexico are likely viewed as a victory by US Trade Representative Robert Lighthizer, who continually expressed his belief that ISDS allows corporations to undercut a country’s sovereignty and encourages outsourcing. However, this change could have an impact on US business support for the deal, as some sectors (such as chemicals and mining) are unhappy they were not included among the five sectors.

- **Oil and Gas Industry.** USMCA (like NAFTA) will continue to prohibit tariffs on raw and refined oil and gas products. USMCA would also seek to harmonize customs procedures. This includes allowing for alternative documentation that certifies natural gas and oil have originated in Canada or Mexico upon entering the US. The agreement no longer includes the so-called “proportionality clause,” which placed certain limitations on the ability of the three parties to constrain the export of energy products.
- **Pharmaceutical Industry.** Canada agreed to a 10-year protection period for biologic drugs. The 10-year period goes beyond the maximum eight years that Canada agreed to in the Trans-Pacific Partnership, but is below the 12-year exclusivity period currently found in US law.
- **Future Review.** Instead of the so-called “sunset” provision reportedly pursued by US negotiators originally, USMCA includes a six-year review mechanism and provides for a 16-year extension of the deal if no parties object.

What Is Next?

US President Donald Trump, Canadian Prime Minister Justin Trudeau and outgoing Mexican President Enrique Peña Nieto are expected to formally sign the agreement on November 30, at which point it must be approved under each party’s domestic procedures. In the US, Congress will ultimately decide USMCA’s fate. Trade agreements are not treaties under US law and, therefore, are not “self-executing.” Instead, trade agreements must be approved by both chambers of Congress and signed into law by the President through implementing legislation under a process known as Trade Promotion Authority (TPA). The attached flowchart sets out timeline for congressional consideration of USMCA under TPA.

Trump Administration officials say they do not plan to transmit USMCA’s implementing legislation to Congress until early next year, putting USMCA’s fate in the hands of the new Congress (the 116th session). If Republicans maintain control of both chambers, they will likely advance USMCA on the President’s schedule. However, USMCA could face some uncertainty if Democrats win a majority in either the House or the Senate and wish to further scrutinize the deal as negotiated by Trump officials. While some Democratic lawmakers have expressed concerns with aspects of the deal, Trump Administration officials point to USMCA’s strengthened labor and rules of origin provisions as appealing to the left. Regardless, President Trump could initiate withdrawal from the original NAFTA deal in an effort to hasten congressional approval of the replacement deal.

How We Can Help

We can assist companies in examining their supply chains for potential USMCA impacts, particularly if higher domestic content requirements involve affected inputs imported from abroad. Our lawyers and policy experts can also provide advice as USMCA moves through the domestic review process. US domestic companies will have opportunities to comment directly on chapters that benefit or disadvantage their operations to Trump officials or through their members of Congress, who must ultimately implement USMCA into US law. We are well-positioned to provide strategic advice and practical assistance.

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Actual/Prospective Timeline US-Mexico-Canada Agreement (USMCA) Under TPA

