



# CLIENT ALERT

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## INTERNATIONAL TRADE

### THE “NEWEST” “NEW NAFTA”: INITIAL CONSIDERATIONS AS THE USMCA COMES INTO FORCE

by Daniel D. Ujcz

#### Summary

The United States, Canada and Mexico signed a “Protocol of Amendments” to the United States-Mexico-Canada Agreement (“USMCA” or “new NAFTA”) on December 10, 2019 that clears the way for passage in the Democrat-led U.S. House of Representatives by the end of the 2019 legislative year, and the U.S. Senate and Parliament of Canada by mid-January/early-February 2020. Pursuant to the terms of the USMCA, the agreement then will come into force ninety (90) days after all three parties finalize their ratification processes. As a result, the USMCA likely will come into force in May 2020.

The USMCA that emerged over the closing weeks of 2019 is significantly different than the agreement signed by the three countries in late 2018. With these changes coming into force over the coming months, companies should engage on USMCA over the coming weeks/months to determine and prepare for impacts. Dickinson Wright is closely monitoring and briefing on all of these issues and can provide guidance as needed.

#### Timing and Tempo

The immediate next step in the U.S. process, as prescribed by the Trade Promotion Authority Act of 2015 (aka “fast track”), is for the President to submit the USMCA implementing legislation to the House Ways and Means Committee and the Senate Finance Committee. We anticipate having the implementing bill by the close of this week (December 13). There is an informal, unofficial process known as “mock mark-up” that would allow any last minute changes before the implementing bill is formally submitted to the two committees, where it then cannot be amended. However, it is likely that the House of Representatives will waive mock-mark up and proceed quickly to a vote on December 19, 2019, the day after the House is expected to impeach the President. Meanwhile, the Senate Finance committee has indicated that it will proceed with mock-mark up, suggest any changes, and consider the bill following the impeachment trial, which will likely end in mid-January. While legislative calendars are always in flux, the fast track legislation requires automatic discharge of the bills from committees within 15 days. The full votes in each Chamber then must occur within 90 days of the formal introduction of the implementing bill. We expect passage of the implementing bill in both chambers of the U.S. Congress well before the expiry of that 90 day period; however, as a backstop, mid-late March 2020 would be the latest for approval by the U.S. Congress, absent any major surprises.

Meanwhile, Mexico previously approved the USMCA and its Senate will approve the new Protocol of Amendments as soon as possible (perhaps this weekend). Canada’s Parliament returns to session on January 27, 2020 and Canada likely will ratify and implement the agreement around the same time of the U.S. Senate. The USMCA therefore will receive

approval from each country’s legislative bodies no later than the first quarter of 2020 and USMCA will come into force as early as May 2020 (potentially no later than early Summer 2020 if there are any delays).

#### The “New” Targets and Topics In USMCA

The implementing bill issued this week will be the first viewing of the entirety of the changes to USMCA and warrants close inspection. The United States Trade Representative (USTR) has issued the next of the new changes. (<https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf>). Dickinson Wright also has received briefings on several key changes, including:

- **70% Steel Threshold**—The USMCA requires automotive original equipment manufacturers (OEMs) to certify that 70% of the steel utilized in its supply chain for a particular vehicle model is derived from North America. The new changes strengthen that standard by now requiring that, within 7 years, this standard will require that 70% of all steel be “melted and poured” in North America. This likely will change the purchasing decisions by procurement officials that purchase steel from companies that import slab into North America and substantially transform that product to be “North American-made.” The new standard will require procurement from those entities that actually melt and pour the steel, start to finish, in North America.
- **Labor Enforcement**—The new changes have established a new “rapid response” dispute resolution process for labor violations in areas of collective bargaining and freedom of association. Upon an allegation of violations in these areas, the parties have approximately two months to reach a mutual resolution. If not, a new labor dispute resolution panel will be convened, which may include the deployment of “monitors” (aka “inspectors”) to investigate the allegation and produce a report. Companies will be permitted to respond and redress the alleged violations. However, penalties may be imposed including the loss of USMCA duty-free treatment for the goods at that facility and, upon the finding of a third violation, barring the goods from entry. Further, there will now be a presumption that labor violations substantially impact trade (thereby removing a common defense of companies/countries when such claims are asserted) and station labor attache’s in Mexico. Moreover, technical assistance and benchmarking of Mexico’s implementation of its domestic labor reforms will be instituted. The domestic labor reforms in Mexico, coupled with the changes in USMCA, require all companies doing business in Mexico to closely follow their employment/labor-management/HR changes and potentially conduct internal HR audits to ensure compliance with these new provisions. Dickinson Wright has programs that can assist in these areas.
- **Dispute Resolution**—State to State dispute resolution will be improved to prevent “panel blocking” and establish new rules of evidence. State to state dispute resolution was largely unused in the original NAFTA due to its weaknesses and the proliferation of disputes under the World Trade Organization (WTO). However,

with WTO dispute resolution largely in stall-out mode, these improvements in North American dispute resolution could be an additional incentive to investment and trade within North America.

- **Pharmaceuticals**—Major “wins” for pharmaceutical companies including 10 year market exclusivity protection for biologics and other significant intellectual property protections for pharmaceuticals have been removed. This was a key demand of progressive and moderate Democrats and the White House obliged.
- **Environment**—There are several significant changes to environmental issues dealing with flora and fauna issues and regional wastewater projects (e.g., in San Diego-Tijuana). These are significant changes in terms of strengthening monitoring of environmental issues and providing financial resources for regional projects. However, in contrast to the call of 100 or so progressive Democrats, there is no express reference to climate change.

## Tenor and Tone

The largest “win” in the USMCA is a “whew” that there is an agreement for North American trade. The U.S. did not “rip up” NAFTA, nor is USMCA just a “rebrand”. This is a renovation that includes (1) putting fresh paint on approximately 60 percent of the language in the original NAFTA; (2) upgrading the fixtures and appliances to include digital technology improvements, intellectual property protections, and modernizing borders for entry of goods; and (3) knocking down walls in terms of new approaches to North American auto rules of origin, steel, labor, environment, and dealing with China and other state-owned economies. The USMCA will be a new way of doing business in North America. Companies should prepare for the adjustment phase as disruption becomes transformation.

There will be opposition to the USMCA from certain labor groups (e.g., aerospace machinists), environmentalists (e.g., Sierra Club), and others. However, AFL-CIO leadership has endorsed USMCA and business and other stakeholders that may be on the outside as a result of the changes (e.g., pharmaceuticals) may see wins in areas outside of USMCA such as in the White House delaying action on domestic prescription drugs, advancing pension reform bills, and others. There are the votes for ratification in the U.S. and the time is now for companies to begin full preparations and implementation.

Dickinson Wright’s comprehensive, all-practice-groups approach to USMCA will provide ongoing updates and analysis ranging from automotive to employment to trade and much more.

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