Prepared by OFW Law as a courtesy for members of AFOA, NIOP, and NOPA. For questions, please contact Denise Calle (dcalle@ofwlaw.com) or John Dillard (jdillard@ofwlaw.com)

A frequent question is how tariffs are implemented or revised. This document, the 2nd of a 3-part series, breaks down the possible statutory authority used by the Executive Branch to implement tariffs. Part 1 – U.S. Tariffs 101 - was previously disseminated. Part 3 will discuss basic strategies to mitigate tariff liability.

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Legal Mechanisms for Tariff Implementation

The procedural framework for implementing trade remedy tariffs varies significantly based on the statutory authority invoked; some of which require congressional approval, or an investigative period and others do not. Tariffs that do not require congressional approval or investigation periods can be implemented very quickly. While we don't know the regulatory pathway the new Trump administration will employ, recent news coverage and President Trump's 2019 swift tariff actions make clear that tariffs will likely be effective within the first quarter of 2025 if the International Emergency Economic Powers Act (IEEPA) is invoked.

The key statutory authorities for presidential imposition of tariffs on U.S. imports are listed below followed by a summary of the countries that may face tariff increases.

Who has the authority to impose tariffs?

The U.S. Constitution grants Congress the authority to set tariffs and regulate foreign commerce under Article I, Section 8. Historically, Congress directly set tariff rates, but since the 1930s, it has increasingly delegated this power to the president, with specific limitations and conditions.

Which laws allow for tariffs?

- **International Emergency Economic Powers Act (IEEPA) – 50 USC §§ 1701-1710**

New tariffs are likely to be implemented quickly under the International Emergency Economic Powers Act (IEEPA).[1] IEEPA allows the President to regulate imports by declaring a national emergency involving an "unusual and extraordinary threat" to U.S. national security, foreign policy, or economy. This method would not require a preliminary executive branch investigation, report, or hearing.

The only procedural requirements are *consulting* with Congress before and *reporting* after the action, which could be done expeditiously as no Congressional approval is needed. Congress retains authority to terminate the declared national emergency by passing a joint resolution, but this resolution would be subject to the President's veto.

To date, no president has imposed tariffs invoking the authority of IEEPA. The 2019 retaliatory tariffs against Mexico were invoked under IEEPA and were set to become effective less than two weeks after

[1] IEEPA is typically used to imposed export controls, embargoes, and sanctions on countries and individuals, as well as to block imports from designated countries and acquisitions made by designated foreign nationals.

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the national emergency declaration was issued: Trump declared a national emergency on May 30, 2019, with tariffs scheduled to begin on June 10, 2019. Ultimately the tariffs were rescinded after the Mexican government pledged to cooperate.

- **Section 301 tariffs – Relief from Unfair Trade Practices – 19 USC §§ 2411-2420**

Section 301 authorizes the U.S. Trade Representative (USTR) to initiate investigations into foreign practices that unfairly burden U.S. commerce. If these practices are deemed 'unreasonable or discriminatory,' the USTR can impose trade restrictions, such as tariffs, as a form of unilateral retaliation. President Trump set a precedent by using Section 301 of the Trade Act of 1974 to impose tariffs on goods from China and the European Union.

- **Section 232 tariffs – National Security Investigations – 19 USC § 1862**

Under Section 232 of the Trade Expansion Act of 1962, the Department of Commerce can conduct investigations to determine if certain imports impair U.S. national security. If such investigations result in an affirmative determination, the President is authorized to impose import restrictions. During his first term, President Trump initiated eight Section 232 investigations and ultimately imposed tariffs on steel and aluminum from certain countries as a result of two of these investigations.

- **Section 201 tariffs – Safeguard Actions – 19 USC § 2551**

Section 201 of the Trade Act of 1974 ("Safeguard" actions) provides temporary import relief to U.S. industries through tariffs or quotas, allowing the domestic industries to either become competitive against imports or transition resources elsewhere. Safeguard protections can be implemented if the U.S. International Trade Commission (ITC) findings that increased imports substantially cause serious injury to U.S. manufacturers. President Trump implemented two notable safeguards: a four-year measure on crystalline silicon photovoltaic cells/modules and a three-year measure on large residential washing machines; both were based on ITC injury findings and remedy recommendations.

- **Section 122 tariffs – Balance-of-Payment Authority – 19 USC § 2132**

Section 122 of the Trade Act of 1974 empowers the President - without congressional approval - to impose quotas and tariffs of as much as 15% for up to 150 days against one or more countries that have “large and serious” balance-of-payment surpluses with the U.S. After the maximum period of 150 days, Congress must approve the continuation of the tariff which may be extended for any desired period. To date, no president has invoked Section 122 to impose tariffs. Imports from countries with significant current account surpluses, like China, would be possible targets for this measure.

- **Section 338 tariffs – Discrimination by Foreign Countries – 19 USC § 1338**

Section 338 of the Trade Act of 1930 authorizes the President to impose duties up to 50% on imports from countries that discriminate against U.S. commerce through unreasonable charges or regulations. If discrimination persists, imports may be blocked entirely. Investigations can be initiated by the ITC or through private petitions to the ITC. This provision has not been used since 1949.

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What Countries Could be Targeted for Tariffs?

Based on President-elect Trump's statements since the 2024 election, the following tariffs are under consideration:

- An additional 25% tariff on all articles imported into the United States from Canada and Mexico.[2] The proposed tariffs on Canada and Mexico are intended to address critical national security concerns, specifically targeting heightened levels of illegal immigration and fentanyl flows across both borders—issues President-elect Trump characterized as credible emergencies.

- An additional 10% tariff on *all* articles imported from China.[3] Trump maintained these tariffs are a punitive measure aimed at stopping the flow of fentanyl from China (mainly through Mexico) into the U.S.

- President-elect Trump has identified the European Union as a key focus for addressing trade imbalances. He has threatened to impose tariffs on the EU unless they increase their imports of U.S. goods, particularly oil and gas.

- BRICS countries (comprising Brazil, Russia, India, China, and countries in the Middle East and Africa) have been threatened with 100% tariffs if they try to replace the U.S. dollar with another currency.

- India and Brazil-origin goods could be assessed reciprocal tariffs since both countries have high tariffs assessed on U.S. exports;

President-elect Trump proposed a universal tariff of 10-20% on *all* imports into the U.S. *regardless of the product or origin*. This is part of his broader protectionist trade policy aimed at fostering job growth, reducing the federal deficit, and benefiting domestic businesses. President-elect Trump recently dismissed rumors that his proposed universal tariffs would be limited in scope. He doubled down on his stance that all imports would be subject to the tariff. This means that if this threat is carried out, the universal tariff would apply broadly, without exceptions for specific products or countries.

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We trust this information is useful. If you have any questions, please do not hesitate to contact Denise Calle (dcalle@ofwlaw.com) or John Dillard (jdillard@ofwlaw.com).

[2] Anticipate contentious re-negotiations of USMCA and threats of tariffs; There will likely be more domestics content requirement benefiting US manufacturers and enforcement (CBP audits) on tariff evasion of Chinese goods passed through Mexico.

[3] This will likely be in addition to the current 7.5%-25% tariff currently levied against many Chinese-origin goods. It is unclear if Chinese inputs used in finished goods made outside of China will be impacted by the additional duties.

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