PREPARING FOR POTENTIAL US TARIFFS: KEY DATES AND STRATEGIC CONSIDERATIONS

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The United States has signaled the possibility of imposing a 25% tariff on all imports from Canada and Mexico. Recent announcements by President Donald Trump suggest these tariffs could take effect as soon as **February 1, 2025**, and the Administration's broader focus on trade deficits and protectionism further underscores the need for businesses to prepare to act quickly.

The "**America First Trade Policy**" executive order, issued on January 20, 2025, directs an investigation into the causes of US trade deficits and their economic and national security implications. The order raises the possibility of additional measures, including supplemental tariffs, as the administration seeks to address these deficits. The investigation will culminate in a report due on **April 1, 2025**, which could provide the impetus for further trade actions or heightened scrutiny on imports, including those from Canada.

Understanding the Tariffs

Although details about the tariffs remain limited, the Trump Administration has announced plans for a 25% across-the-board tariff, with no exemptions specified at this time. US importers are generally responsible for paying tariffs, meaning many US buyers of Canadian goods may seek lower prices to, at least partially, offset these additional costs.

The Canadian government has announced plans for retaliatory tariffs on US goods entering Canada. This retaliation could further disrupt supply chains and raise costs for Canadian businesses reliant on US imports.

Furthermore, US importers—including Canadian companies acting as importers—will be required to post customs bonds for goods subject to tariffs when these goods are imported into the US. The minimum bond required is typically USD $50,000, and businesses should engage customs brokers and surety companies to secure these bonds.

How Your Business Can Prepare

1. Monitor Key Dates and Plan for Uncertainty

- **February 1, 2025**: President Trump has identified this as a possible implementation date for the tariffs. Businesses should be prepared for immediate impacts on pricing, supply chains, and trade relationships.
- **April 1, 2025**: The America First Trade Policy executive order mandates an investigation into US trade deficits, with findings potentially leading to additional tariffs or trade measures. Businesses should develop contingency plans in advance of this date.

Although goods-in-transit have historically been excluded from surtaxes (including Canada's China surtaxes on electric vehicles, and the surtaxes on the United States arising from the previous round of US tariffs in 2018), there is no obligation on Canada to exclude goods-in-transit from the surtaxes.

Furthermore, section 53 of the Customs Tariff, which provides the legal foundation for Canada's tariff retaliation measures, permits the retroactive imposition of duties. Such retroactive duties would pose significant challenges, as neither U.S. exporters nor Canadian importers would have had the opportunity to mitigate or reduce their exposure by adjusting import levels after the surtax was implemented.

2. Engage with Customers and Suppliers

- Negotiate Duty Liability in Advance: Proactively communicate with customers and suppliers to establish clarity on who will bear the responsibility for tariffs if imposed. This may involve renegotiating existing agreements to ensure there is no ambiguity about duty liability.
- Focus on Shorter-Dated Contracts: Given the potential for frequent changes in tariff policies, businesses should aim to negotiate shorter-term contracts. This allows greater flexibility to adjust terms in response to new tariffs or regulatory changes.
- Preempt Pricing Disputes: Address potential pricing impacts of tariffs during negotiations to minimize disputes. By setting expectations and clarifying responsibilities upfront, businesses can reduce the risk of disruptions to supply chains and customer relationships.

Engaging with trade partners early will help ensure smoother operations and prevent costly disputes down the road.

3. Review Contracts and Incoterms

Businesses should carefully review contract terms and Incoterm usage (discussed below) in their contracts to understand who will be liable for duties and tariffs. Adjusting Incoterms or renegotiating contracts to align with new tariff risks may be prudent.

- **Understand Incoterms and Duty Liability**: Contracts often use Incoterms (International Commercial Terms) to define the responsibilities of buyers and sellers in cross-border transactions. Certain Incoterms may shift the liability for customs duties and tariffs. For example:

  - **Delivered Duty Paid (DDP)**: The seller is responsible for paying all customs duties, including any applicable tariffs. Canadian exporters using this term may bear the direct cost of US tariffs.
  - **Free on Board (FOB) or Ex Works (EXW)**: The buyer assumes responsibility for importing the goods and paying duties. Under these terms, US importers would typically absorb the 25% tariffs.
  - **Cost, Insurance, and Freight (CIF)**: The seller covers costs up to the arrival of the goods at the port, but the buyer is responsible for customs duties and tariffs.
- **Anticipate Potential Termination or Disputes**: Buyers or sellers may seek to terminate agreements or adjust terms if tariffs significantly impact costs. Parties should carefully review their contracts to consider whether tariffs may be considered a *force majeure* event, and contracts should be reviewed for clauses that allow price adjustments or terminations in such scenarios.
- **Negotiate duty remission or drawback terms into future contracts**: The party liable for paying any tariffs may consider incorporating terms into future contracts contemplating remission or drawback of duties paid if new US tariffs are imposed.

4. Mitigate the Duties by Considering Transfer-Pricing Arrangements

Value for duty and transfer-pricing agreements can help manage duty costs by establishing a lower value for the goods on importation. By reducing the underlying base value of the goods on which the tariff would be applied, companies may be able to minimize and mitigate the extent of the duties.

- **Consult with US Counsel Regarding Transfer-Pricing Arrangements**: Canadian exporters may wish to consult with competent US counsel to structure sales to the United States to flow through a US affiliate as a first sale before that US affiliate ultimately sells the goods to the final US customer. If the first sale is a bona fide arm's length transaction for export, and the US affiliate incurs costs in the United States, such as selling, general and administrative expenses, it may be possible to reduce the value for duty payable by relying on the lower-priced first sale. US importers can request advance rulings from US Customs and Border Protection (CBP) to confirm eligibility for this valuation method.
- **Value for Duty and Transfer-Pricing Arrangements for Canadian Importers**: Canadian importers may be able to structure importations in a similar manner to minimize duties through a value-for-duty optimization strategy by relying on an appropriate transfer price.

Tailoring such complex arrangements with legal counsel can optimize duty payment and provide greater pricing certainty for customers.

5. Engage with Governments

Engaging with governments on both sides of the border is an important step to explore for mitigating the impacts of potential tariffs. By leveraging advocacy efforts and exploring available financial assistance programs, Canadian businesses may be able to influence policymaking, secure exemptions, and/or access other support to offset increased costs. Collaborative approaches through industry groups can maximize the effectiveness of these efforts.

- **Obtain Government Support**: Canadian businesses should consider how they can work with provincial and federal governments to secure financial support, such as subsidies or funding programs.
- **Collaborate with Industry Associations**: Businesses should consider collaborating with industry associations to amplify advocacy efforts and engage policymakers collectively.
- **Work with US Affiliates and Customers**: Businesses should consider how to partner with US affiliates or customers to seek tariff exemptions, particularly for goods vital to US consumers or industries.

There are indications that the Government of Canada intends to provide a stimulus package to help Canadian businesses if the United states imposes tariffs on Canadian goods, with the scale of the relief to vary based on the scope and quantum of the tariffs.[1]

6. Diversify Markets

Businesses heavily reliant on US trade should explore opportunities to expand into other markets and deepen relationships with existing non-US partners. Federal and provincial support programs may assist with market diversification initiatives. Canada is extraordinarily well-positioned for tariff-free access to Europe under the CETA and to many Asian countries under the CPTPP as well as its bilateral trade agreement with South Korea, and numerous South American countries.[2]

Canadian businesses may also want to strengthen their domestic market presence. Protecting domestic market share might involve initiating trade complaints against unfair foreign competition under Canadian trade laws, particularly if faced with US exports that are not subject to retaliatory tariffs. In sectors whether there are significant interprovincial trade barriers, the decreased US market access may provide a catalyst to remove impediments and increase efficiencies of trade within Canada.

Conclusions and Key Takeaways

To prepare for potential 25% tariffs on Canadian exports to the United States, as well as other potential measures arising from the **America First Trade Policy**, businesses should:

- **Monitor key dates**, including February 1 and April 1, 2025, to anticipate disruptions and implement contingency plans.
- **Engage with customers and suppliers** to clarify duty liability, negotiate shorter-dated contracts, and

avoid pricing disputes.
- **Review contracts and Incoterms** to determine tariff responsibilities and ensure clarity on duty liability.
- **Optimize transfer-pricing arrangements** to reduce duty costs.
- **Advocate with governments** to secure financial support or exemptions.
- **Diversify trade** to reduce dependency on the US market and safeguard domestic opportunities.

The McMillan LLP international trade team is available to help your business navigate these potential tariffs and develop strategies to minimize their impact.

McMillan Vantage, a full-service, national public affairs firm can assist with government engagement regarding tariff support and mitigation.

Please contact us for assistance with contract reviews, trade compliance, or advocacy efforts.

[1] "Ottawa planning pandemic-level relief for workers, businesses if Trump imposes tariffs, sources say", Globe and Mail, January 28, 2025.
[2] Canada's Trade and Investment Agreements.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.