Market Trends 2017/18: U.S. Tariff Policies

A Lexis Practice Advisor® Practice Note by
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Since January 2018, the present U.S. administration has imposed a series of tariff policies (U.S. Tariff Policies) that potentially have a wide range of consequences to domestic and international trade and the capital markets. In a period marked by increased globalization and international trade, the uncertainties brought about by aggressive tariff policies are leaving companies and investors wary of the direct and indirect consequences of such measures. As U.S. Tariff Policies continue to evolve, and as uncertainty looms, companies must disclose the effects of these policies on their businesses. This article identifies disclosures related to U.S. Tariff Policies that offer more detailed discussions on the actual and potential effects for the particular registrants and concludes with recommendations on how to enhance disclosures on U.S. Tariff Policies moving forward. The company name, its industry, and the type of filing are also provided in each sample disclosure for reference.

In January 2018, the U.S. administration imposed tariffs on solar panels produced outside of the United States, adversely affecting renewable energy companies. Shortly thereafter, the Office of the U.S. Trade Representative (USTR) announced tariffs on foreign washing machines. Perhaps most notably, in March 2018, President Trump signed an order imposing a 25% tariff on steel and a 10% tariff on aluminum imports. As a consequence of the steel and aluminum tariffs, some economists and business leaders have warned of job losses, impacts on industrial competitiveness, and higher costs for businesses and consumers. For example, in July 2018, Coca-Cola reported U.S. tariffs as a factor leading to increased costs of the product. President Trump has hiked tariffs on goods and services from China, Canada, Mexico, and Europe, prompting a wave of retaliation that has the potential to negatively impact American exports of everything from pork and soybeans to Levi's jeans. Some U.S. Tariff Policies may incite "tariff wars" between the United States and various countries throughout the world, which may negatively impact shipping and trading products within and outside the United States.

On March 22, 2018, President Trump signed a memorandum instructing the USTR to impose tariffs on $50 billion worth of Chinese goods. By April 2018, the USTR published a list of over 1,300 Chinese goods that would be subject to levies, including, but not limited to, televisions, weapons, satellites, aircraft parts, and batteries. By July 2018, the first tranche of tariffs on $34 billion worth of Chinese goods took effect. Thereafter, the present U.S. administration threatened to levy an additional $200 billion of Chinese goods. Similarly, in July 2018, President Trump threatened to enact tariffs against European Union (EU) cars. Most recently, in August 2018, President Trump authorized double tariffs on aluminum and steel against Turkey.

As a response, in August 2018, the Chinese government announced up to 25% tariffs on $16 billion worth of U.S. goods that went into effect August 23, 2018. China listed over 5,000 products that would be levied, including meat, coffee, alcohol, minerals, chemicals, furniture, and auto parts. Similarly, the European Commission proposed retaliatory tariffs on imports of U.S. steel, apparel, textile, footwear, corn, and bourbon. In July 2018, Mexico and Canada imposed over $3 billion and $13 billion, respectively, in levies on U.S. exports. Although the present U.S. administration reasons that U.S. Tariff Policies are necessary to protect manufacturers in the United States, these policies can exacerbate trade tensions with other nations and prompt retaliatory trade measures. For a discussion of the effects of certain policies of the current U.S. administration in other contexts, see Market Trends 2017/18: High Yield Debt Offerings — Market Outlook, Clean and Renewable Energy Industry Practice Guide — Regulatory Trends, and Market Trends 2017/18: Mezzanine Financing — Market Outlook.

DISCLOSURES ON U.S. TARIFF POLICIES CONTAINED IN THE RISK FACTORS SECTION

Item 503(c) (17 C.F.R. § 229.503) of Regulation S-K requires that a registrant provide a description of the material risks that impact a business and how these risks affect the registrant or an investment in the securities being offered. The disclosure should be written in plain English and should not be generic. For further information, see Market Trends 2016/17: Risk Factors, Risk Factor Drafting for a Registration Statement, and Top 10 Practice Tips: Risk Factors. Below are some examples of U.S. Tariff Policies disclosures contained in the Risk Factor section of offering documents and periodic filings:

- ***"If significant tariffs or other restrictions are placed on Chinese imports or any related counter-measures are taken by China, our revenue and results of operations may be materially harmed***.

  If significant tariffs or other restrictions are placed on Chinese imports or any related counter-measures are taken by China, our revenue and results of operations may be materially harmed. The Trump Administration has signaled that it may alter trade agreements and terms between China and the United States, including limiting trade with China and/or imposing a tariff on imports from China. In March 2018, President Trump imposed a 25% tariff on steel imports and a 10% tariff on aluminum imports and announced additional tariffs on goods imported from China specifically, as well as certain other countries. The materials subject to these tariffs to date do not impact our raw material costs. However, if further tariffs are imposed on a broader range of imports, or if further retaliatory trade measures are taken by China or other countries in response to additional tariffs, we may be required to raise our prices, which may result in the loss of customers and harm our reputation and operating performance." Sonos Inc., Form S-1 filed July 6, 2018 (SIC 3651—Household Audio & Video Equipment)

- ***"New tariffs on steel imports could result in increased steel prices and adversely affect our results of operations.***

  On March 1, 2018, President Trump announced his administration's intention to place a 25% tariff on imports of steel into the United States. Although the parameters and timing of any such tariff are not known as of the date of this filing, such a tariff, if enacted, could result in both increased steel prices and a decreased available supply of steel. We may not be able to pass such price increases on to our customers and may not be able to secure adequate alternative sources of steel on a timely basis. Either of these occurrences could adversely affect our results of operations and financial condition." NCI Building Systems Inc., Form 10-Q filed June 7, 2018 (SIC 3448—Prefabricated Metal Buildings & Components)

- ***"Changes to trade regulation, quotas, duties or tariffs, caused by the changing U.S. and geopolitical environments or otherwise, may increase our costs and materially adversely affect our business.***

  "Recent activity by the Trump administration has led to the imposition of tariffs on certain imported steel and aluminum. The implementation of these tariffs, as well as the imposition of additional tariffs or quotas or changes to certain trade agreements, could, among other things, increase the costs of the materials used by our suppliers to produce new revenue equipment or increase the price of fuel. Such cost increases for our revenue equipment suppliers would likely be passed on to us, and to the extent fuel prices increase, we may not be able to fully recover such increases through rate increases or our fuel surcharge program, either of which could have a material adverse effect on our business." US Xpress Enterprises Inc., Form 424B4 filed June 15, 2018 (SIC 4213—Trucking (Except Local))

- ***"We purchase a significant amount of our products from suppliers in Pacific Rim countries and we are subject to the economic risks associated with inherent changes in the social, political, regulatory and economic conditions not only in these countries, but also in other countries we do business in, including our own.***

  […] The Trump Administration has also recently introduced tariffs on China, with China imposing retaliatory tariffs on certain products from the United States. President Trump has also publicly stated that he may seek to impose additional tariffs, duties, border taxes or other similar assessments on products imported from China and other countries…. Such tariffs, duties, border taxes or other assessments imposed on the products we import into the United States will increase the total cost of these products and may decrease demand for such products. In addition, we may not be able to fully pass the added cost of such tariffs, taxes, duties or assessments on to our customers, which may adversely affect our business, financial condition and results of operations." Voxx International Corp., Form 10-K filed May 14, 2018 (SIC 5065—Wholesale—Electronic Parts & Equipment, Not Elsewhere Classified)

- ***"U.S. government actions with regard to the solar energy sector or international trade could materially harm our business, financial condition and results of operations.***

  […] On January 23, 2018, President Donald Trump signed a proclamation establishing tariffs on certain solar equipment manufactured outside of the U.S., and his administration has subsequently announced its intention to levy tariffs on additional classes of products. Such tariffs could have a negative impact on the overall demand for solar products in the U.S., and for our products in particular. Unless we obtain exemptions or take other actions to avoid them, such tariffs will apply to our microinverters and other products. If the tariffs are applied specifically to products that we or our commercial partners import, such tariffs could hurt the demand for these products and materially harm our business, financial condition and results of operations. We are seeking exemptions from those tariffs. There is no guarantee that we will be successful in obtaining such exemptions or any actions that we may pursue with respect to the organization and operation of our business to effectively mitigate the effects of any tariffs that apply to our business. If we are not able to avoid or mitigate the effects of such tariffs, the tariffs (or mitigating actions we might take) could result in material additional costs to us and our suppliers, and our results of operations could be negatively impacted as a result. Enphase Energy, Inc., Form 10-Q filed August 6, 2018, 2018 (SIC 3674—Semiconductors & Related Devices)

- ***"A change in the existing regulatory environment could negatively affect our operations and financial performance.***

  […] In 2018, President Trump announced he would impose tariffs of 25% on steel imports and 10% on aluminum imports. As consumers of steel and aluminum in some of our Air & Liquid Processing segment products, our costs could be significantly impacted if the tariffs are imposed, potentially reducing our margins and risking loss of market share to foreign competitors not subject to similar tariffs. In addition, in the ordinary course of business, one of our U.S. subsidiaries purchases intercompany steel produced by another subsidiary located in Canada, which also exports steel to customers in the U.S. Canada is temporarily exempted from the proposed tariffs. If this exemption is not made permanent, we could lose margin and/or market share for the related business. Uncertainties regarding the scope of the proposed tariffs could also pose potential risk to the cost of certain intercompany value-added intermediary product transfers." Ampco Pittsburgh Corp., Form 10-K filed March 16, 2018 (SIC 3561—Pumps & Pumping Equipment)

- ***"INSW conducts its operations internationally, which subjects it to changing economic, political and governmental conditions abroad that may adversely affect its business.***

[…] There is currently significant uncertainty about the future relationship between the United States, China and other exporting countries, including with respect to trade policies, treaties, government regulations and tariffs. For example, on January 23, 2017, President Trump signed an executive order withdrawing the United States from the Trans-Pacific Partnership, a global trade agreement intended to include the United States, Canada, Mexico, Peru and a number of Asian countries. Further, President Trump has called for substantial changes to foreign trade policy with China and has recently raised, and has proposed to further raise in the future, tariffs on several Chinese goods in order to reverse what he perceives as unfair trade practices that have negatively impacted U.S. businesses. Increasing trade protectionism may cause an increase in the cost of goods exported from regions globally, particularly the Asia-Pacific region, the length of time required to transport goods and the risks associated with exporting goods. Such increases may significantly affect the quantity of goods to be shipped, shipping time schedules, voyage costs and other associated costs." International Seaways, Inc., Form 10-Q filed August 8, 2018 (SIC – Industry 4400 Water Transportation)

- ***"Changes to United States tax, tariff and import/export regulations may have a negative effect on global economic conditions, financial markets and our business.***

  There have been ongoing discussions and commentary regarding potential significant changes to the United States trade policies, treaties, tariffs and taxes, including trade policies and tariffs regarding China. The current administration, along with Congress, has created significant uncertainty about the future relationship between the United States and other countries with respect to the trade policies, treaties, taxes, government regulations and tariffs that would be applicable. It is unclear what changes might be considered or implemented and what response to any such changes may be by the governments of other countries. These changes have created significant uncertainty about the future relationship between the United States and China, as well as other countries, including with respect to the trade policies, treaties, government regulations and tariffs that could apply to trade between the United States and other nations. These developments, or the perception that any of them could occur, may have a material adverse effect on global economic conditions and the stability of global financial markets, and may significantly reduce global trade and, in particular, trade between these nations and the United States. Any of these factors could depress economic activity and restrict our access to suppliers or customers and have a material adverse effect on our business, financial condition and results of operations and affect our strategy in China and elsewhere around the world." Arista Networks, Inc., Form 10-Q filed August 8, 2018 (SIC 3576 Computer Communications Equipment).

- ***"Our business is subject to risks related to the larger automotive ecosystem, including interest rates, consumer demand, global supply chain challenges and other macroeconomic issues.***

  […] President Trump recently imposed a 25% tariff on imports of steel, and a 10% tariff on imports of aluminum, into the United States, with certain exceptions. These tariffs are likely to increase the cost of manufacturing automobiles in the United States. President Trump has also called for the imposition of a substantial tariff on the importation into the United States of European automobiles, which represent a material portion of the new vehicles sold in the United States. Each of these policies could materially increase the cost to U.S. consumers of new automobiles and thereby decrease the number of new vehicle sales in the United States, which could have a material adverse impact on our business, results of operations, financial condition and prospects." Truecar, Inc., Form 10-Q filed August 9, 2018 (SIC 7370—Services—Computer Programming, Data Processing, Etc.)

DISCLOSURES ON U.S. TARIFF POLICIES INCLUDED IN THE MD&A SECTION

Item 303(a) (17 C.F.R. § 229.303) of Regulation S-K requires a discussion of a company's financial condition and changes in financial condition and results of operations, as well as a discussion of any known trends or factors that management believes to be important to the company's results of operations. This includes known trends, commitments, events, or uncertainties that will likely have a material impact on the company's business. The

MD&A discussion should not include merely generic or boilerplate disclosures. It should reflect how particular facts and circumstances affect the company and its business. For further information, see Management's Discussion and Analysis of Financial Condition and Results of Operations and Management's Discussion and Analysis Section Drafting Checklist.

Here are some examples of U.S. Tariff Policies disclosures in the MD&A section of recent filings:

- ***Business Trends***
  - "However, in April 2018, in response to the tariffs imposed by the Trump administration, China announced an additional retaliatory tariff on ethanol imports of 15%, bringing the total tariff up to 45%. Brazilian demand from the U.S. ethanol has remained relatively steady, despite a tariff imposed in 2017, due to the price of corn relative to sugar cane as a feedstock and high gasoline prices within Brazil. Any decrease in U.S. ethanol exports could adversely impact the market price of ethanol unless domestic demand increases or foreign markets are developed. Our margins have also been, and could continue to be, negatively impacted due to lower market prices for distillers' grains due to lower export demand, largely due to Chinese tariffs, and oversupply in the domestic market, along with increased corn and soybean availability." Granite Falls Energy, LLC, Form 10-Q filed June 14, 2018 (SIC 2860—Industrial Organic Chemicals)
  - "On March 8, 2018, the Trump Administration signed an order that will impose an import tariff of 25% on steel. While we and our suppliers have locked in pricing for certain raw materials required to support our anticipated business activity during 2018, we anticipate that the tariff could result in an increase in our cost of sales, beginning as early as the second quarter. We expect to have success in passing through some, if not all, increases in raw material costs directly resulting from the tariff to our customers, however there can be no assurance that we will be able to do so." NCS Multistage Holdings, Inc., Form 10-K filed March 9, 2018 (SIC 1389—Oil & Gas Field Services, Not Elsewhere Classified)
- ***Overview***
  - "In March 2018, President Trump signed proclamations to impose tariffs on steel and aluminum imports per the US Trade Expansion Act of 1962 increasing the price for steel and aluminum in the United States that could impact client spending and affect the profitability of our fixed-price construction projects." Aecom, Form 10-Q filed August 8, 2018 (SIC 8711—Services—Engineering Services)
  - "On July 6, 2018, the Trump Administration imposed 25% tariffs on a variety of imports from China, including Varian radiotherapy systems manufactured in China and certain components we import into the U.S. for our manufacturing and service activities. The Administration has also proposed two additional lists of products from China on which to impose tariffs; the first of these proposed lists involves 25% tariffs and the second involves 10% tariffs. We expect our imports into the U.S. to be impacted less by these two proposed tariff lists than by the tariff list that was already imposed. China has responded to the new and proposed U.S. tariffs by announcing two lists of products from the U.S. that are or, may in the future, be subject to new tariffs upon import to China. One round of Chinese retaliatory tariffs went into effect on July 6, 2018. Our products are not impacted by these tariffs. Our exports to China are, however, impacted by the second Chinese list, which has not taken effect yet. Any tariffs imposed by the United States and China that include Varian technology could increase the cost of our products and adversely impact the competitiveness of our products and our operational results in the future." Varian Medical Systems Inc., Form 10-Q filed August 7, 2018 (SIC 3845—Electromedical & Electrotherapeutic Apparatus)
  - "In March 2018, President Trump signed a proclamation imposing a 25% global tariff on imports of certain steel products, effective March 31, 2018. Generally, we are experiencing signs of some increase in domestic demand for metallurgical coal as a result of the proclamations. Our export customers also include foreign

steel producers who may be negatively affected by the tariffs to the extent their production is imported into the U.S. Some countries have also threatened retaliatory tariffs on U.S. products including metallurgical coal. At this time, it is too early to know the impact these tariffs will have on longer-term demand or pricing, if any." Ramaco Resources Inc., Form 10-Q filed August 6, 2018 (SIC 1220—Bituminous Coal & Lignite Mining)

- ***Industry Factors That May Affect Future Operating Results***

  o "Net ethanol exports of U.S. ethanol in calendar year 2017 were 33% higher than exports during 2016. However, the expectations for net ethanol exports in 2018 are less optimistic and are unlikely to surpass 2017. After China made a surprise return to the market in the fourth quarter of calendar 2017, in response to the tariffs imposed by the Trump administration, the Chinese reversed course. During March 2018, China imposed an additional retaliatory tariff on ethanol imports of 15%, bringing the total tariff up to 45%. Brazilian demand from the U.S. remained steady. Management currently anticipates, at least in the short term, exports to Brazil will remain steady despite the tariff imposed in 2017. High gasoline prices and low ethanol supplies within Brazil should continue to support the flows from the U.S. to that country. Despite China's National Development and Reform Commission, the National Energy Board and 15 other state departments efforts to expand the use and production of biofuels containing up to 10% ethanol by 2020, political considerations will predominate in the short run. China had been one of the top 3 importers of U.S. ethanol during the past 6 months. But there is now no assurance that the recently issued joint plan will lead to increased imports of U.S. ethanol by China. But any eventual increase in exports to China could have a positive impact on the ethanol market." Lincolnway Energy, LLC, Form 10-Q filed May 11, 2018 (SIC 2860—Industrial Organic Chemicals)

- ***Results of Operations***

  o "Subsequent to year end, tariffs on imported steel announced by President Trump have created volatility in the price of steel and other imported components, and the price of steel has increased significantly during 2018. Due in part to volatile transportation and energy costs, we may incur higher commodity costs in fiscal 2019." Virco MFG Corporation, Form 10-K filed April 27, 2018 (SIC 2531—Public Building & Related Furniture)

  o "On January 22, 2018, President Trump signed an executive order that adds significant import tariff, or tax, on certain solar panels that are brought into the U.S. TEC's 600 MW solar project investment is not affected as its supplier uses a type of technology that is exempt from the tariff." Tampa Electric Co., Form 10-K filed February 12, 2018 (SIC 4911—Electric Services)

- ***Our Current Economic Environment***

  o "On March 8, 2018, President Trump signed a proclamation imposing a 25% tariff on all imported steel products for an indefinite amount of time under Section 232 of the Trade Expansion Act of 1962. Tariff exemptions were granted for steel imports from Canada, Mexico, Australia, Argentina, South Korea, Brazil and the member countries of the European Union through April 30, 2018. The tariff exemptions have been extended 30 days for Canada, Mexico and the member countries of the European Union. A permanent tariff exemption was granted to South Korea effective May 1, 2018, and agreements in principle have been reached with Australia, Argentina and Brazil. We expect these actions to increase steel costs and decrease supply availability. Prior to the announcement, we had already experienced domestic price increases and limited steel availability since the beginning of 2018." Northwest Pipe Co., Form 10-Q filed May 3, 2018 (SIC 3317—Steel Pipe & Tubes)

MARKET OUTLOOK

U.S. Tariff Policies Disclosure Enhancements

With trade tensions building, and the actual and potential effects of U.S. Tariff Policies manifesting in many companies, it is important that companies consider the impact of such policies on their businesses, results of operations, and future prospects. We recommend that as companies are preparing their disclosures, they consider the following:

1. **Ascertain if the company is or is reasonably likely to be affected by U.S. Tariff Policies.** A company should be sensitive to the possibility that the U.S. Tariff Policies may affect its business. It should consider including a disclosure that it is dealing with the type of goods that have already been or will likely be levied on by virtue of the U.S. Tariff Policies.

2. **Identify the effects on the business.** A company should identify the aspects of its business that are affected or are expected to be affected by U.S. Tariff Policies. It should specify whether the impact of such policies is or is expected to be beneficial or detrimental to the company's business, to particular lines of business, to particular products, and in which specific locations. Effects should be described qualitatively and, where possible, quantified. Some questions to consider include the following:

    - Does the company deal with goods or services that are or will likely be burdened by U.S. Tariff Policies (i.e., steel, aluminum, solar panels)?
    - Does the company deal with goods or services that are or will likely be benefitted by U.S. Tariff Policies?
    - Does the company transact with countries that are or will likely be the subjects of the U.S. Tariff Policies?
    - Which segment(s) of the company's businesses, assets, and people will be affected by the U.S. Tariff Policies?
    - Can the impact be assessed? If so, can the impact be quantified?

3. **Provide a plan to manage risks.** If the company will be affected by the U.S. Tariff Policies, it should also disclose how it intends to mitigate the negative effects or to maintain the benefits arising from the policies. The plan should consider the timeframe when President Trump will be up for reelection, and if he chooses to run for reelection and wins, point out how he intends to continue, discontinue, intensify, or soften the U.S. Tariff Policies.

Overall, many of the consequences of U.S. Tariff Policies are difficult to ascertain at this juncture. This has led to increased uncertainty relating to, and potential conflicts arising from, the U.S. Administration's global trade policies. Companies need to stay vigilant and keep their stakeholders well-informed as to the potential risks that the U.S. Tariff Policies may bring about. For further information on the disclosure obligations of public companies in general, see Duties to Disclose and Update Disclosure and Public Company Periodic Reporting and Disclosure Obligations.

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