

TYPES NOT MAPPED YET July 16, 2020 | TTR not mapped yet | Robert A. Shapiro, Sean McGowan, Tony A. Anderson

# USMCA allows challenges to U.S. grants of authority given to persons of Mexico providing cross-border long-haul trucking services in the United States

The United States Mexico Canada Agreement (“USMCA” at [Annex II](#)) establishes a new mechanism for U.S. suppliers of cross-border long-haul trucking services to challenge [grants of authority](#) given to Mexican providers of cross-border long-haul trucking services in the territory of the United States - outside the border commercial zones - on the basis of [material harm](#) caused or [threatened](#) by the Mexican services. On Friday, July 10, 2020, the U.S. International Trade Commission (“ITC”) amended its regulations in 19 CFR by publishing [interim rules](#) to implement the provisions of the USMCA Implementation Act (the Act) regarding [Investigations of United States-Mexico Cross-Border Long-Haul Trucking Services](#). These interim rules are effective as of July 10, 2020 and are applicable as of July 1, 2020, the same day that the USMCA entered into effect.

This article provides an overview of the new interim rules and what is required for filing a petition for investigation under 19 CFR Part 208. The ITC is accepting written comments on the interim rules through August 10, 2020.

## Investigations Relating to Material Harm or Threat of Material Harm - 19 USC §4572 (19 CFR Part 208 Subpart B)

19 USC §4572 of the Act requires that the ITC undertake an investigation, upon filing of a petition or request, and make a determination as to whether a grant of authority to “persons of Mexico” to conduct cross-border long-haul trucking services has caused material harm or threatens material harm to U.S. suppliers of cross-border long-haul trucking services. Under the amended regulations, the term “[persons of Mexico](#)” includes: entities domiciled in Mexico, entities organized under Mexican law - including subsidiaries of U.S. companies domiciled in Mexico, or entities owned or controlled by a Mexican national, which conduct cross-border long-haul trucking services, or employ drivers who are non-United States nationals; and drivers who are Mexican nationals. If the ITC determines that there has been material harm or threat of material harm, it must recommend a remedy to the President.

### Who may file a petition?

A petition for investigation is commenced when a petition is filed by an “interested party.” The term “[interested party](#)” includes, *inter alia*: U.S. persons engaged in the provision of cross-border long-haul trucking services; a trade or business association, a majority of whose members are part of the relevant U.S. long-haul trucking services industry; or a certified or recognized union, or representative group of suppliers, operators or drivers who are part of the U.S. long-haul trucking services industry.

### What must be included in the petition?

- **Nature of the claim:** There are three types of claims:

(1) If the persons of Mexico’s request for the U.S. to grant it authority for cross-border long-haul trucking services is pending, then the interested party must claim the request threatens to cause material harm (i.e., a significant loss in the share of the U.S. market for cross-border long-haul trucking services held by persons of the U.S.).

(2) If the ITC has received and granted the persons of Mexico’s request for authority on or after the USMCA’s entered into force date, then the interested party must claim that retaining such grant of authority is causing or threatens to cause material harm to a U.S. long-haul trucking services industry.

(3) If the ITC authorized a grant of authority to the persons of Mexico before the USMCA's entered into force date and the persons of Mexico retain that authority, then the interested party must claim there has been a change in circumstances such that the persons of Mexico are causing or threaten to cause material harm to a U.S. long-haul trucking services industry.

- **Identify Petitioner and the basis for the claim that petitioner is representative of a U.S. long-haul trucking services industry.** Each petitioner will need to provide proof of its status as an "interested party." In addition, the petition will need to include: descriptions of any sub-markets that are represented (e.g., geographic area represented); names, addresses and contact information of all parties represented in the petition; an estimate of the percentage of the U.S. long-haul trucking services industry as a whole, or of the claimed sub-market of the United States market, accounted for by the petitioning suppliers, operators and/or drivers and the basis for claiming that such suppliers, operators and/or drivers are representative of an industry; and names, physical addresses, email addresses and telephone numbers of all other domestic entities (e.g., representative groups of suppliers, operators or drivers) known to the petitioner who are part of the U.S. long-haul trucking services industry or the specific sub-market.
- **The specific grant of authority at issue.** Petitioner must identify the particular grant of authority that is being challenged and which of the three "nature of claims" categories above that the grant falls under.
- **Identification of, and support for claim of, a Change in Circumstances under Nature of Claim #3 above.** The petition must include information regarding any increase in services supplied by the person of Mexico grantee of authority, information regarding any changed circumstances and an explanation of how the changed circumstances cause or threaten to cause material harm to the U.S. long-haul trucking services industry. This explanation must be supported by available data and information.
- **Additional required data and information.** Petitioners must include (to the extent available) three years of data and information (preferably from governmental or other sources) regarding: volume/tonnage of merchandise transported by the industry; employment, wages, hours of service and working conditions relating to the industry as a whole (or the sub-market on whose behalf the petition is filed); for cargo originating in Mexico, provide the principal ports of entry along the border and the principal U.S. destinations; for cargo originating in the U.S., provide the principal places of loading and principal destinations in Mexico; data regarding whether there has been or is a threat of a significant loss in the share of the U.S. market as a whole, or in the claimed specific sub-market, to persons of Mexico; and any other relevant information (including pricing information) and any evidence of cross-border long-haul trucking services lost to persons of Mexico in the market as a whole or in the claimed specific sub-market.
- **Cause of injury.** Petitioner must include a list and description of the causes believed to be resulting in the material harm, or threat thereof, and a statement regarding the extent to which one or more grants of authority are believed to be such a cause of material harm or the threat thereof to the U.S. industry as a whole or in a sub-market thereof. Causes of injury must be supported by data and information.
- **Description of the relief sought.** Petitioner must state what relief it is looking for.
- **Certification.** Anyone submitting factual information in a petition must certify that the information is accurate and complete.

### What happens next?

Upon receipt of a new petition, the ITC will review and initiate an investigation and will publish notification of the petition in the Federal Register. A confidential version of the petition will be provided to the U.S. Trade Representative and the Secretary of Transportation. Under 19 CFR 201.6, examples of confidential business information may include information which concerns or relates to trade secrets; operations; sales; shipments; identification of customers and inventories; amount or source of any income, profits, losses or expenditures; or other information of commercial value, the disclosure of which is likely to cause substantial harm to the competitive position of the person. A public version of the petition (that the petitioner provides) will be made available on the Electronic Document Information System. A public hearing will be held and interested parties will be permitted to present evidence and respond to presentations of other parties.

### Determination, reporting and relief

The ITC is required to make a determination 120 days after initiation of the investigation - 150 days if the petition issues are deemed to be extraordinarily complicated. The ITC must make its report to the President 60 days after the determination. At the same time, the ITC will make the report public with the exception of business proprietary information. Not later than 30 days after the date on which the President receives a report of the ITC in which the ITC's determination under §4572 of this title [i.e., 19 CFR 208 Subpart B] is affirmative or which contains a determination that the President may treat as affirmative, the President shall (unless not in the national economic interest of the U.S. or would cause serious harm to the national security of the U.S.), issue an order to the Secretary of Transportation specifying the relief to be provided (e.g., denial, limitation, restriction or revocation of grant of authority) and directing the relief to be carried out for a period of up to two years.



## Investigations Relating to Extension of Relief - 19 USC §4574 (19 CFR Part 208 Subpart C)

19 USC §4574 of the Act requires that the ITC, at the request of the President or an interested party, undertake an investigation and make a determination as to whether an extension of the above-referenced relief granted by the President is necessary to prevent or remedy material harm. Requests for extension must be filed between 270 days and 240 days before the expiration date of a granted petition. The “additional required data and information” set out above will need to be updated for inclusion with the extension request. ITC will provide its report to the President no later than 60 days prior to the expiration date of the original petition.

Thompson Coburn's International Trade and Transportation Groups will continue to monitor this and other related trade and transportation developments. Please contact any of the authors listed below with any questions about the specific issues raised above or any other U.S. trade and transportation matters impacting your business.

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