



June 25, 2020

Joseph L. Barloon, General Counsel
Office of the U.S. Trade Representative
600 17th St. NW
Washington, DC 20508
Via email contactustr@ustr.eop.gov

Janice Kaye, Designated Agency Ethics Official
Office of the U.S. Trade Representative
600 17th St. NW
Washington, DC 20508
Via email jkaye@ustr.eop.gov

Dear Mr. Barloon and Ms. Kaye:

Campaign Legal Center (“CLC”) respectfully writes to request a review of two employees of the Office of the U.S. Trade Representative (“USTR”) for possible violations of the Standards of Ethical Conduct for Employees of the Executive Branch (“Standards of Conduct”).

While employed as Deputy Assistant U.S. Trade Representatives for American Competitiveness and Enterprise, Jason Bernstein and Fred Fischer helped negotiate the rules of origin provisions of the U.S.-Mexico-Canada Agreement (“USMCA”) that would impact the ability of certain industries, including automakers, to comply with trade rules that allow goods to receive favorable tariff treatment.¹ Despite their employment with the federal government, Bernstein and Fischer established a consulting firm, Autovisory, to advise automakers on how to comply with the new rules, and solicited business for their venture.²

¹ Ryan Beene, Jenny Leonard & Bill Allison, *U.S. Trade Officials Sought Consulting Work on Rules They Wrote*, BLOOMBERG (June 14, 2020), <https://www.bloomberg.com/amp/news/articles/2020-06-15/u-s-trade-officials-sought-consulting-work-on-rules-they-wrote>.

² *Id.*; Archive of autovisory.com, ARCHIVE.ORG (last visited June 25, 2020).

The solicitation of clients for this consulting venture appears to violate the ethics rules and Office of Government Ethics (“OGE”) precedent related to consulting services of government employees. Public servants are entrusted with immense power to exert for the public good—not for personal gain in the private sector. We request that your offices conduct a review to ensure Bernstein and Fischer comply with all federal ethics requirements that apply during and after their employment with USTR.

Executive Branch Employees Are Prohibited from Using Their Office for Private Gain

Pursuant to the Standards of Conduct, “[a]n employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including . . . persons with whom the employee has or seeks employment or business relations.”³

To prevent financial conflicts of interest, an employee who seeks post-government employment opportunities while still employed by the executive branch is at the very least bound by recusal requirements.⁴ Unless authorized by the Designated Agency Ethics Official (“DAEO”), “the employee may not participate personally and substantially in a particular matter that, to the employee’s knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom the employee is seeking employment.”⁵

However, recusal will not resolve certain conflicts of interest. For example, recusal will not resolve conflicts from employment opportunities if the activity “would require the employee’s disqualification from matters so central or critical to the performance of his official duties that the employee’s ability to perform the duties of his position would be materially impaired.”⁶ In addition, OGE has found that “even if the head of an office reasonably can

(webpage attached as Exhibit A).

³ 5 C.F.R. § 2635.702.

⁴ 5 C.F.R. § 2635.602.

⁵ 5 C.F.R. § 2635.604(a)(1). Even if the employee properly recuses, they still may violate the Standards of Conduct by “engag[ing] in outside employment or any other outside activity that conflicts with his official duties.” 5 C.F.R. § 2635.802. Additionally, if an employee is participating in a particular matter involving specific parties, where one of the parties is or is represented by “a business, contractual or other financial relationship that involves other than a routine consumer transaction,” he must evaluate whether that participation would raise questions about the employee’s impartiality. 5 C.F.R. § 2635.502(a)(2); (b)(1)(i).

⁶ 5 C.F.R. § 2635.802.

recuse from a matter affecting an entity with which he has a consulting arrangement, there still could be an appearance that the entity is benefiting from the employee's official position: depending on the circumstances, one might reasonably question, for instance, whether subordinates involved in the matter would feel subtle pressure to favor the entity with which their supervisor has a substantial business relationship.”⁷

Executive branch employees are also responsible for “endeavor[ing] to avoid any actions creating the appearance that they are violating the law or the ethical standards” set out in the Standards of Conduct.⁸ OGE advises that “some outside consulting relationships may involve a subject matter that is so closely related to an employee's official work that the overlap would give rise to an appearance that the employee took advantage of his official position to obtain the outside consulting opportunity or that the employee is providing insights obtained on the job only to those willing to pay.”⁹

Bernstein And Fischer Began Soliciting Business for their Post-Employment Consulting Venture While Still Employed by the Executive Branch

During their tenure at USTR, Bernstein and Fischer helped negotiate new rules of origin under USMCA.¹⁰ These new rules altered prior North American Free Trade Agreement (“NAFTA”) requirements for what percentage of the components of certain goods, including cars, must have originated in the signatory countries in order to qualify for special tariff treatment. USMCA will enter into force on July 1, 2020.¹¹

The new rules negotiated by Bernstein and Fischer are particularly challenging to navigate for the auto manufacturing industry. Auto manufacturing supply chains are complex and run through multiple countries, and the rules of origin for what qualifies car and auto parts as made in North America (and therefore exempt from paying tariffs when

⁷ Memorandum from Marilyn L. Glynn (“OGE Memo”), Acting Director OGE to Designated Agency Officials, DO-04-011, at 14, [https://www.oge.gov/web/oge.nsf/Legal%20Advisories/43EDA713B915401285257E96005FBD%20C1/\\$FILE/do-04-011.pdf?open](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/43EDA713B915401285257E96005FBD%20C1/$FILE/do-04-011.pdf?open) (May 27, 2004).

⁸ 5 C.F.R. § 2635.101(b)(14).

⁹ OGE Memo at 14, *supra* note 7.

¹⁰ Beene, Leonard & Allison, *supra* note 1.

¹¹ U.S. CUSTOMS & BORDER PROTECTION, U.S.-Mexico-Canada Agreement (USMCA) Overview, <https://www.cbp.gov/trade/priority-issues/trade-agreements/free-trade-agreements/USMCA#:~:text=The%20rules%20of%20origin%20for,least%20%2416%20USD%20per%20hour.&text=This%20information%20will%20be%20used%20in%20CBP's%20calculation%20of%20Labor%20Value%20Content> (last visited June 23, 2020).

entering the U.S.) are more stringent than for other goods.¹² Officials from USTR apparently met with auto industry executives last year to discuss transition plans that would allow grace periods of up to five years after enactment before automakers are required to comply due to the complexities.¹³

While still employed by USTR, Bernstein and Fischer created a consulting firm called Autovisory designed to assist private sector auto manufacturers comply with these new trade rules.¹⁴

As early as March 2020, Bernstein and Fischer expressed to auto industry officials that they were planning to leave USTR.¹⁵ In early June, and possibly prior to that, Bernstein and Fischer began actively soliciting business from auto industry companies and trade associations for future business upon leaving government.¹⁶ Fischer wrote in an email to an auto industry representative: “As you know, Jason [Bernstein] and I are looking to leave USTR, and we would like to assist companies directly with their USMCA implementation needs.”¹⁷ The correspondence also highlighted their “extensive relationships within the U.S. Government, with the governments of Canada and Mexico, and throughout the automotive industry.”¹⁸

The email went on to refer the recipient to “our website,” [autovisory.com](https://www.autovisory.com).¹⁹ The now-inactive website said that Autovisory, in addition to advising on other free trade agreements, “helps companies comply with the new USMCA rules of origin.”²⁰ The website also said that Bernstein and Fischer “led the team” that developed USMCA’s rules of origin.²¹ More importantly, Bernstein and Fischer advertised their ability to represent clients before USTR on the implementation of the rules of origin. The website stated under their government relations services that “[w]e assist companies by working with relevant government policymakers and regulators on USMCA implementation”²²

¹² Jenny Leonard, *Trump White House wants direct control over where cars are made*, *L.A. Times* (Oct. 30, 2019), <https://www.latimes.com/business/story/2019-10-30/trump-white-house-direct-control-where-cars-are-made>

¹³ *Id.*

¹⁴ Beene, Leonard & Allison, *supra* note 1.

¹⁵ *Id.*

¹⁶ Exhibit A, *supra* note 2.

¹⁷ Beene, Leonard & Allison, *supra* note 1.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Exhibit A, *supra* note 2.

The Solicitation of Private Sector Business While Still in Office Appears to Violate the Standards of Conduct

Bernstein and Fischer appear to violate the Standards of Conduct for several reasons. First, they created a consulting firm that advertises their roles as “trade advisor[s] and chief negotiator[s] on rules of origin and customs procedures” and offers services to help “companies comply with the new USMCA rules of origin.”²³ They used their positions as lead negotiators on these rules to attract clients for their post-government venture—all while they were still executive branch employees. The Standards of Conduct prohibits a government employee from “us[ing] his public office for his own private gain,” which is exactly what occurred here.

Second, Bernstein and Fischer cannot avoid a violation by recusing from future matters involving the rules of origin. Bernstein and Fischer claimed in correspondence with potential clients that they had recused from matters relating to USMCA’s auto industry rules of origin. However, their roles at USTR appear closely related to implementing the rules of origin that they helped develop. It is not clear what official matters Bernstein and Fischer could perform if they are recused from implementation of the rules. Recusal “would require the employee’s disqualification from matters so central or critical to the performance of his official duties that the employee’s ability to perform the duties of his position would be materially impaired.” As a result, the adequacy of any recusal is highly questionable.

Third, even if the recusal could prevent an actual conflict, Bernstein and Fischer engaged in conduct that *appears* to create a conflict of interest. OGE advises that “some outside consulting relationships may involve a subject matter that is so closely related to an employee’s official work that the overlap would give rise to an appearance that the employee took advantage of his official position”²⁴ The Autovisory website emphasizes and exploits the overlap between the official duties of Bernstein and Fischer and their consulting services.

Finally, Bernstein and Fischer publicly stated that they anticipate leaving government and representing clients before USTR on matters where they participated personally and substantially while in government. Their actions could violate post-employment restrictions, including under 18 U.S.C. § 207.

²³ *Id.*

²⁴ OGE Memo at 14, *supra* note 7.

The Designated Agency Ethics Official is Responsible for Taking Appropriate Action to Resolve Conflicts of Interest and the Appearance of Conflicts of Interest

Pursuant to 5 C.F.R. § 2638.104, the USTR DAEO is responsible for “[t]aking appropriate action to resolve conflicts of interest and the appearance of conflicts of interest, through recusals, directed divestitures, waivers, authorizations, reassignments, and other appropriate means.”²⁵ The DAEO is also responsible for “[p]roviding advice and counseling to prospective and current employees regarding government ethics laws and regulations, and providing former employees with advice and counseling regarding post-employment restrictions applicable to them.”²⁶

As explained in detail above, the reports of the business venture of Bernstein and Fischer suggest that they have violated the Standards of Conduct and intend to possibly violate post-employment restrictions. Even if Bernstein and Fischer recently recused themselves of matters involving the rules of origin, this does not resolve the conflict under 5 C.F.R. § 2635.802(b). Moreover, if they end their employment with USTR, their company’s website indicates that they will represent clients before USTR on rules of origin matters in violation of 18 U.S.C. § 207.

Accordingly, CLC requests that the USTR’s Office of General Counsel and DAEO review their conflicts of interest and take the appropriate steps to resolve the conflicts, including but not limited to:

- advising Bernstein and Fischer to not solicit clients for their trade industry consulting firm while employed with USTR in compliance with the Standards of Conduct;
- advising Bernstein and Fischer that they cannot appear before USTR representing clients on matters related to their work on USMCA in compliance with the post-employment restrictions of 18 U.S.C. § 207; and
- referring this matter to the DOJ or other appropriate body for enforcement of any violations of the ethics laws and rules.

Conclusion

CLC respectfully asks that you review the creation of the consulting firm and the solicitation of business by Bernstein and Fischer. With this conduct, they appear to have violated not only the letter of the Standards of

²⁵ 5 C.F.R. § 2638.104(c)(6).

²⁶ 5 C.F.R. § 2638.104(c)(4).

Conduct, but the spirit of the executive branch ethics rules that ensure public service remains a public trust. Thank you for your consideration.

Sincerely,

_____/s/____

Kedric L. Payne
General Counsel and Senior Director,
Ethics

_____/s/____

Delaney N. Marsco
Legal Counsel, Ethics

EXHIBIT A

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AUTOVISORY

Automotive Trade Advisory

Autovisory provides world-class automotive trade advisory services to help companies solve international trade, FTA compliance, supply chain optimization, government relations, and other challenges. Autovisory specializes in helping companies comply with the new USMCA rules of origin. We also specialize in helping companies maximize business opportunities and minimize risks from international trade negotiations and trade agreements.



International
Trade



FTA
Compliance



Supply Chain
Optimization



Government
Relations



Strategy
and Insights

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Autovisory Advantage

Services That Pay For Themselves

Unlike one-size-fits-all consulting services, Autovisory is focused on helping companies address international trade concerns. We have the hands-on experience, specialized knowledge, and unique capabilities to provide world-class, cost-efficient solutions to solve your company's trade challenges.

Autovisory offers targeted, personalized services that deliver an immediate return on investment. Our services effectively pay for themselves by improving trade compliance, lowering certification costs, reducing liability exposure, maximizing resources, optimizing supply chains, increasing sales opportunities, and enhancing competitiveness.



**Improve Trade
Compliance**



**Lower
Costs**



**Reduce
Liability
Exposure**



**Maximize
Resources**



**Optimize
Supply Chains**



**Enhance
Competitiveness**

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Experience

Leadership

Jason Bernstein and Fred Fischer are the founding partners of Autovisory. They have more than 40 years of combined automotive and trade experience. Mr. Bernstein and Mr. Fischer led the team that helped develop the [United States-Mexico-Canada Agreement \(USMCA\)](#) [automotive](#)



Jason Bernstein

Jason Bernstein most recently served as a senior trade advisor and chief negotiator on rules of origin and customs procedures. Jason has more than 20 years of leadership experience in international trade and customs-related issues, including successfully resolving customs and rules of origin concerns in the automotive and other industries.



Fred Fischer

Fred Fischer most recently served as a senior automotive industry trade advisor and chief automotive trade negotiator. Fred has more than 20 years of leadership experience in the areas of international trade and automotive policy, including successfully resolving trade concerns in the automotive and other industries.



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WHAT WE DO

Overview

Autovisory provides a range of advisory services helping companies solve trade-related business challenges, improve competitiveness, and reduce risk. Our services include free trade agreement (FTA) compliance, supply chain optimization, government relations, strategy and insights, and bespoke services.



Autovisory provides a range of services to help companies solve trade-related business challenges, improve competitiveness, and reduce risk. These services include free trade agreement (FTA) compliance, supply chain localization, government relations, strategy and insights, and bespoke services.

We have the expertise to help companies implement strategic and operational changes necessary to comply with the new USMCA rules. Our services include understanding the new rules of origin, assisting with classification and origin certifications, creating an effective compliance regime, and working with suppliers to enhance compliance.



Supply Chain Optimization

Autovisory helps companies make informed supply chain changes that are aligned with the new USMCA rules, including changes that are a result of the effects of COVID-19. We also work with companies to analyze supply chain trends to find further ways to increase compliance with USMCA rules, promote domestic sourcing, and reduce risks from unanticipated supply chain changes.



Government Relations

We assist companies by working with relevant government policymakers and regulators on USMCA implementation in the United States, Canada, Mexico. We also advise companies on ways to improve relationships and market access under existing and future trade agreements and help inform ongoing U.S. trade negotiations with the United Kingdom, European Union, Japan, China and beyond.



Strategy and Insights

Autovisory helps companies understand and decipher the current trade environment and ongoing trade negotiations and provide research, analysis, and strategic guidance to help inform corporate decisions and direction.



Bespoke Services

We provide a range of cost-efficient customized services targeted at resolving trade-related concerns.

Clients

Automotive and More

Autovisory engages with light vehicle producers, heavy truck producers, equipment producers, parts suppliers, other manufacturers, and associated service providers. We provide a [range of services](#) to help companies solve trade-related business challenges, improve competitiveness, and reduce risk. Contact us today for a [no-obligation consultation](#).



Light Vehicle
Producers



Heavy Truck
Producers



Equipment
Producers



Parts
Suppliers



Service
Providers

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Services



Guidance and Advice

Autovisory works with senior management and internal teams to understand the specific challenges the new USMCA rules present to company operations, develops customized solutions, and helps **implement changes necessary to ensure compliance with the new rules.**



Understanding Rules of Origin

We help companies **understand and interpret the new USMCA rules, regulations, and guidelines**, and explain key differences with the NAFTA rules.

Autovisory assists companies with the **preparation of origin certifications and answers technical questions concerning tariff classifications, methodologies, and calculations**, methodologies, and calculations related to the USMCA's new Regional Value Content (RVC), Core Parts, Labor Value Content (LVC), and Steel and Aluminum requirements.

We work with companies to help **solve USMCA compliance issues before they occur**, reducing compliance costs and resolving any problems with audits or verifications.



Alternative Staging Plans

Draft plans need to be submitted by July 1, 2020. Autovisory assists with the **preparation and submission of alternative staging plans** needed to transition to the USMCA rules. Autovisory also works with companies throughout the petition, review, and modification process for such plans to **help ensure their approval**.



Supplier Outreach

We work with companies to ensure that auto parts suppliers have a thorough understanding of the new USMCA rules. We also work with suppliers to **increase solicitation response rates and ensure that suppliers can provide the documentation necessary to meet the USMCA's new record keeping requirements**.



Supply Chain Optimization

Autovisory helps companies **make informed supply chain changes that are aligned with the new USMCA rules, including as a result of COVID-19**. We also work with companies to analyze supply chain trends to find further ways to increase compliance with USMCA rules, promote domestic sourcing, and reduce risks from unanticipated supply chain changes.



Government Relations

We assist companies by working with relevant government policymakers and regulators on USMCA implementation in the United States, Canada, and Mexico. We also advise companies on ways to **improve relationships and market access under existing and future trade agreements** and help inform ongoing U.S. trade negotiations with the [United Kingdom](#), [European Union](#), [Japan](#), [China](#) and beyond.



Monitoring and Reporting

Autovisory monitors changes in USMCA rules of origin regulations and advises companies on ways to **reduce compliance risk from changes to regulations** in the United States, Canada, or Mexico.



Bespoke Services

We provide a range of cost-efficient **customized services targeted at resolving specific trade or compliance concerns**.

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Solutions

Project Solutions

Autovisory provides solutions to address business challenges on a project basis. Projects include implementing strategic and operational changes necessary to comply with the new USMCA rules. For example, we help companies develop internal certification processes, compliance procedures, supplier outreach, supply chain localization, and more. Contact us today for a [no-obligation consultation](#).

Outsource Solutions

Autovisory provides functional role outsource solutions for companies to add immediate trade expertise to customs, procurement, management, and government affairs teams. Our expertise can be integrated into company operations without the time or expense associated with in-house hiring. Our outsource solutions provide a high level of experience, in shorter time, with less risk, and greater return on investment. Contact us today for a [no-obligation consultation](#).

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FOCUS

International Trade

Autovisory specializes in helping companies overcome the many business challenges created by the transition from NAFTA to USMCA. Autovisory also advises companies on ways to improve relationships and market access under existing trade agreements. We also help inform policymakers of company concerns during international trade discussions and trade agreement negotiations to maximize the benefits and minimize the risks from ongoing trade negotiations with the [United Kingdom](#), [European Union](#), [Japan](#), [China](#) and beyond.

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U.S.-Mexico-Canada Agreement (USMCA)

USMCA Rules of Origin

The New USMCA Rules Become Effective on July 1, 2020. The USMCA represents the most significant change in North American trade rules in 25 years. The changes to the automotive rules of origin and origin procedures present significant business challenges for vehicle manufacturers, automotive suppliers, and other companies. **Failure to understand and comply with these new rules could expose companies to tariffs, high compliance costs, and reduced competitiveness.**

This agreement is referred to differently by each signatory. In the United States, it is referred to as *United States–Mexico–Canada Agreement (USMCA)*. In Canada, it is referred to as the *Canada–United States–Mexico Agreement (CUSMA)* in English and the *Accord Canada–États-Unis–Mexique (ACEUM)* in French. In Mexico, it is referred to as the *Tratado entre México, Estados Unidos y Canadá (T-MEC)*.



Autovisory's USMCA Advisory Services

Autovisory develops and implements detailed technical roadmaps for all USMCA requirements with comprehensive and easy to follow checklists and execution plans. Our services streamline procedures, increase compliance, reduce risks, and save companies significant time and money. Autovisory can also develop compliance plans in coordination with supply chain changes as a result of COVID-19, new technologies, or other factors. Contact us today for a [no-obligation consultation](#).



Regulatory
Guidance



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Keeping
Requirements



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Calculators



Entry &
Post-Entry
Requirements



Verification
Checklists



Advance
Customs
Rulings



Supplier
Training
Manuals

USMCA Rules Become Effective on July 1, 2020

The changes to the rules of origin are layered, complex, and time-consuming and contain many new requirements (see below). **Failure to meet even one of the rules could mean that a company fails to meet them all.** Autovisory provides trade advisory services to help companies proactively manage the challenges of USMCA compliance and minimize compliance costs and risk.

New Requirements



Elimination
of Tracing



Core Parts
Requirement



Steel
Requirement



Aluminum
Requirement



LVC
Requirement



Certification
&
Verification
Procedures



Customs
Compliance
Regulations



Alternative
Staging
Regime

Higher RVCs



Passenger
Vehicles



Light
Trucks



Heavy
Trucks



Auto
Parts

US – UK Trade Negotiations

The US and UK Formally Launched Negotiations for a Free Trade Agreement on May 5, 2020. The United States and the United Kingdom are negotiating a new comprehensive high-standards agreement that will significantly impact the commercial relationship between the two countries. **These negotiations will present new challenges and opportunities for companies.**

Trade Advisory Services

Autovisory provides automotive trade advisory services to help inform policymakers of interests and concerns in bilateral discussions and as new trade agreements are being negotiated. We guide your company through these negotiations and help maximize the benefits and minimize the risks from future agreements. Contact us today for a [no-obligation consultation](#).

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US – EU Trade

US – EU Trade Negotiations

Informal Discussions Are Ongoing. On July 25, 2018, the United States and the European Union issued a [joint statement](#) in Washington, DC announcing the formation of an Executive Working Group that will seek to reduce transatlantic barriers to trade, including by working to eliminate non-auto industrial tariffs and non-tariff barriers. In January 2019, the United States released a [Summary of Specific Negotiating Objectives](#). Since then, high-level bilateral discussions have continued with an effort toward seeking a broader and more comprehensive agreement. **These negotiations will present new challenges and opportunities for companies.**

Trade Advisory Services

Autovisory provides automotive trade advisory services to help inform policymakers of interests and concerns in bilateral discussions and as new trade agreements are being negotiated. We guide your company through these negotiations and help maximize the benefits and minimize the risks from future agreements. Contact us today for a [no-obligation consultation](#).

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US – Japan Trade

US – Japan Trade Negotiations

“Phase 2” Negotiations Are Now Underway. On October 17, 2019, the United States and Japan signed the U.S.-Japan Trade Agreement and U.S.-Japan Digital Trade Agreements. [These agreements](#) were implemented on January 1, 2020, and were narrowly focused on certain agricultural and industrial products and digital trade. “Phase 2” of these **negotiations are expected to lead to additional agreements covering a broad range of sectors and issues, including automotive goods.** These negotiations will present new challenges and opportunities for companies.

Trade Advisory Services

Autovisory provides automotive trade advisory services to help inform policymakers of interests and concerns in bilateral discussions and as new trade agreements are being negotiated. We guide your company through these negotiations and help maximize the benefits and minimize the risks from future agreements. Contact us today for a [no-obligation consultation](#).

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US – China Trade

US – China Trade Negotiations

US-China Discussions And Negotiations Are Ongoing. The U.S.-China trade relationship is complicated and extremely important to many businesses, especially those with a global footprint or globalized supply chains. The United States and China continue bilateral discussions and negotiations covering a broad range of issues and sectors. **These negotiations will present new challenges and new opportunities for companies.**

Trade Advisory Services

<https://autovisory.com/>

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