



July 10, 2020

The Honorable Wilbur Ross
Secretary
Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

RE: BIS-2020-0012, RIN 0694-XC058 Notice of Inquiry Regarding the Exclusion Process for Section 232 Steel and Aluminum Import Tariffs and Quotas

Dear Secretary Ross,

The Coalition of American Metal Manufacturers and Users (“CAMMU” or “the Coalition”) is pleased to offer the following comments on the Department of Commerce’s (“Department”) Bureau of Industry and Security (BIS)’s Exclusion Process for Section 232 Steel and Aluminum Import Tariffs and Quotas. These comments follow the filing of a Notice of Inquiry seeking comments on the exclusion process.¹ While we recognize efforts made by BIS to improve the exclusion process, CAMMU members remain concerned that denials of requests by BIS lack transparency, objectors are not held accountable for their statements and claims, and the review period lasts much longer than the 90 days maximum stated by BIS in its March 2018 Federal Register notice announcing the exclusion process.

CAMMU is a broad organization of U.S. businesses and trade associations representing over 30,000 companies and over one million American workers in the manufacturing sector and the downstream supply chains of a wide variety of industries including aerospace, agriculture, appliance, automotive, consumer goods, construction, defense, electrical, food equipment, medical, and recreational industries, among others.²

CAMMU previously submitted comments to the BIS to provide information and the experience of our members so that the Commerce Department could address problems with the exclusion process. Unfortunately, numerous problems continue to plague the exclusion process, resulting in U.S. manufacturers being unable to obtain essential steel and aluminum inputs, thus injuring thousands of American businesses. This is a critical problem, particularly as U.S. manufacturers are attempting to recover from the economic harm caused by the COVID-19 pandemic.

¹ Notice of Inquiry Regarding the Exclusion Process for Section 232 Steel and Aluminum Import Tariffs and Quotas, 85 Fed. Reg. 31,441 (March 26, 2020) <https://www.federalregister.gov/documents/2020/05/26/2020-11173/notice-of-inquiry-regarding-the-exclusion-process-for-section-232-steel-and-aluminum-import-tariffs>. (Hereinafter “Notice of Inquiry.”)

² CAMMU members include: American Institute for International Steel, Associated Builders and Contractors, Industrial Fasteners Institute, the Hands-On Science Partnership, the National Tooling & Machining Association, North American Association of Food Equipment Manufacturers, the Precision Machined Products Association, and the Precision Metalforming Association.

CAMMU does not believe that the exclusion process alone can solve the economic harm caused by the Section 232 steel tariffs experienced by U.S. steel- and aluminum-using manufacturers since they were imposed in March 2018. CAMMU continues to urge the Trump Administration to terminate the Section 232 tariffs and quotas on steel and aluminum products. More than two years after imposition of the tariffs, U.S. steel producers continue to face structural and technological challenges that tariffs simply cannot resolve by taxing the domestic steel industry's customers. U.S. steel- and aluminum using manufacturers, who employ millions of more Americans than the steel producers, have paid billions of dollars in tariffs over the past two years, money that could have been used to hire more American workers, and invest in capital equipment and research & development, critical elements for the manufacturing sector to recover from the recession caused by the COVID-19 pandemic.

Short of terminating the tariffs, it is essential for U.S. manufacturers that changes be made to the product exclusion process to make it more fair and transparent, and to eliminate the delays that are common for companies who file for a product to be excluded from the Section 232 tariffs on steel and aluminum.

1. Comments Regarding the Exclusion Process for Section 232 Steel and Aluminum Import Tariffs and Quotas

As of July 6, 2020, through the online 232 Exclusion Portal, BIS had received 91,149 exclusion requests for steel and aluminum products from U.S. businesses, with 30,463 listed as "pending." One importer who belongs to a CAMMU member trade association has been waiting for a decision on its exclusion request since August 2019, which still pales in comparison to some exemptions pending for more than 600 days, even without an objection.

The delays in obtaining information on whether Commerce will grant exclusions has caused significant problems for U.S. manufacturers. If manufacturers cannot determine the price and/or delivery time for an important input like steel and aluminum, their customers may choose to source the part from an overseas competitor who is able to charge less because they are paying world prices for steel and aluminum instead of the increased prices paid by U.S. manufacturers as a result of the Section 232 tariffs.

In the Notice of Inquiry, BIS requested comments on the efficiency and transparency of the process employed, indicating specific areas of primary concern. CAMMU's comments on specific topics are below.

a. The information sought on the exclusion request, objection, rebuttal, and surrebuttal forms;

The process for populating fields should be updated to allow for additional commentary on the specifics of specialized materials. Commerce should review all commentary in addition to the standard request information prior to rejecting a request. CAMMU also encourages Commerce to continue to require certain types of information that promote fairness and transparency, as indicated in paragraphs 3(e), (f), (h), (j), and (k), below.

b. Expanding or restricting eligibility requirements for requestors and objectors;

The current qualifications for filing a product exclusion is limited to qualified applicants to only individuals and organizations who use steel or aluminum, meaning that trade associations cannot file on behalf of their members, many of whom use an identical item. This limitation and the product requirement described below in paragraph 2(h) are particularly harmful to small businesses that often do not have the

resources needed to submit exclusion applications for the products that are not available from domestic sources and therefore must be imported.

In addition, this duplicative process creates a clear and overwhelming burden on the BIS staff tasked with reviewing identical requests and will continue to lead to unnecessary delays slowing down the review process. Overall, these two requirements have led to an inundation of filings, which is neither fair to requestors nor an efficient use of time and resources for BIS.

Permitting trade associations to submit requests on behalf of affected members would help to address the unreasonableness and inefficiency of the current exclusion process and would reduce the burden, particularly on small businesses.

c. *The Section 232 Exclusions Portal;*

CAMMU members report that the new portal is difficult to use. Requests cannot be saved as “drafts” and do not allow for editing. If an exclusion request is returned for additional information, the requestor must fully recreate a new request. Members report that obtaining downloadable information regarding the status of exclusions, quantities, etc. was much easier when the portal used an excel spreadsheet format.

d. *The requirements set forth in Federal Register Notices, 83 FR 12106, 83 FR 46026, and 84 FR 26751;*

CAMMU has no specific comments.

e. *The factors considered in rendering decisions on exclusion requests;*

CAMMU requests that BIS more thoroughly consider whether the information presented by objectors is factual and confirmable in rendering decisions on product exclusion requests. Specifically, it should be verified that companies who file objections actually have the capacity and ability to produce the requested product in the time required by the company that filed the request. Unfortunately, there are numerous examples of BIS denying product exclusion requests based on objections from domestic steel producers that claim they have the “capacity” to make and supply the requested product but do not accept a purchase order. These objectors often provide no evidence that they can actually supply the steel or aluminum with the specifications requested by the applicant despite their attestation in the affirmative. CAMMU members have requested quotes from domestic steel producers who objected to an exclusion request, only to be told that the steel or aluminum is unavailable, again, despite the objection filed.

Requestors have provided to BIS no-quote letters from domestic steel producers and other evidence showing that they could not obtain the steel or aluminum product in the required quality and quantity from the objector or other domestic producers, but have had their product exclusion requests denied on the basis of an unsubstantiated objection.

CAMMU recommends that, just as companies filing product exclusion requests are required to provide detailed information on their purchases, BIS should require objectors to present detailed information on the products they produce and their immediate or near term availability for purchase by U.S. steel- and aluminum-using manufacturers. BIS should place significant weight on the objector’s factual response in rendering a decision on an exclusion request. Denying a product exclusion to an applicant if that product is unavailable from U.S. domestic producers despite their claims undermines the integrity of the exclusion process.

f. *The information published with decisions;*

CAMMU believes that information published by BIS in rendering denials to product exclusion requests is insufficient. Currently, decisions rejecting product exclusion requests provide no specific substantive information about the reason the request was denied. There are numerous cases where documentation was provided to BIS by an applicant seeking an exclusion for the product showing that the product was not available for purchase from a U.S. producer, only to have that exclusion denied with no explanation.

BIS should provide basic information to the applicant when it denies an exclusion request so that the applicant can understand the reason for the denial as part of due process. Currently, this lack of transparency has created a perception by many applicants that the process is unfair and weighted against applicants.

g. *The BIS website guidance and training videos;*

CAMMU has no specific comments on the BIS website guidance and training videos.

h. *The definition of “product” governing when separate exclusion requests must be submitted;*

The Second Interim Rule for “Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and the Filing of Objections to Submitted” states that “[approved] exclusions will be made on a product basis and will be limited to the individual or organization that submitted the specific exclusion request to apply to additional importers.”³ The BIS requirement that a product exclusion, if granted, is exclusive to the company that filed the exclusion request has created a massive burden for all participants in the exclusion process, from companies who apply for exclusions to the BIS staff that must review each application.

If a product is not available in the United States for one company, it is not available to its competitors, therefore, BIS should issue exclusions product wide, as is the case with the Section 301 exclusion investigations conducted by USTR. If USTR can utilize a product wide exclusion process having already rendered over 45,000 decisions on requests, the Commerce Department can do the same. The requirement that each product exclusion is company-specific is unnecessary and is one of the primary reasons why there are thousands more exclusion requests than predicted by the Commerce Department.

In addition, the requirement that applicants file a separate request for each different measurement of a product that fall under the same HTS code (for example, where a product length or other measurement might vary per production) is unnecessary and burdensome. An applicant should have the ability to file an exclusion request for a certain range of length or measurements that fall within the HTS code instead of requiring separate exclusion requests for every potential length or measurement of that product.

CAMMU recommends that BIS allow companies to file a single unified exclusion request application. Applicants should have the ability to group products with small variations in length and width in one exclusion application. The single, unified request should apply to the specific product’s chemistry, and

³ Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum, 83 Fed. Reg. 12,106, 12,107 (March 19, 2018). (Hereinafter “Second Interim Rule”).

would cover a grouping of products within a similar size range. This would eliminate the unnecessary burden that the above requirements currently impose on manufacturers, not to mention ease the burden on BIS by eliminating duplicative filings.

- i. *Incorporation of steel and aluminum derivative products into the product exclusion process.*

Even prior to the COVID-19 pandemic, there is little evidence to show that domestic steel and aluminum producers used the protection of Section 232 tariffs to invest in new technologies to improve their product quality, increase the manufactured products available, or to significantly bring online sufficient capacity. Thus the Section 232 tariffs have simply been a tax on imports that shift any perceived injury to producers into actual injury for industrial users of the subject materials.

Imposing tariffs on derivatives of steel or aluminum is an admission the Section 232 tariffs did not serve their intended purpose, but did cause injury to users of steel and aluminum. CAMMU is concerned that imposing tariffs on derivatives will further shift the injury until the Administration is left with no choice but to tariff the end consumer product and all its inputs, rendering the item too costly for American consumers.

2. CAMMU’s Comments on “Potential Revisions to the Exclusion Process” per the Notice of Inquiry

The following are CAMMU’s comments on certain proposed revisions to the product exclusion process that were listed in the Commerce Department’s Notice of Inquiry Regarding the Exclusion Process for Section 232 Steel and Aluminum Import Tariffs and Quotas.

- a. *One-year blanket approvals of exclusion requests for product types that have received no objections as of a baseline date;*

As noted, the current process for companies applying for a product exclusion where, if granted, the exclusion only applies to the product and to the company that filed the exclusion, has created a massive burden for all participants in the exclusion process, from companies who apply for exclusions to the BIS staff that must review each application.

CAMMU strongly supports BIS granting one-year blanket approvals of exclusion requests for product types that have received no objections as of a baseline date; however, BIS should further specify that the word “objections” means *substantive* objections. Without specifying that an objection must be substantive to prevent one-year blanket approvals, the process would incentivize objectors to submit boilerplate, duplicative objections in order to prevent the automatic granting of an exclusion request under the one-year blanket approval provision.

Akin to frivolous lawsuits, the filings of non-substantive objections simply to create the appearance of available domestic capacity is an abuse of the process and should be investigated by BIS. The 232 Exclusion Portal and the docket before it include countless objections filed where the producer clearly copied and pasted the information from one objection to another, particularly in the early stages of the exclusion process. Therefore, the Department should invoke the one-year blanket approval if none of the objections submitted are substantive in nature.

- b. *One-year blanket denials of exclusion requests for product types that have received 100 percent objection rates and have never been granted as of a baseline date;*

As with the above, one-year blanket denials of exclusion requests for product types that have received 100 percent objection rates could perpetuate an abuse of the system, *unless* the blanket denial only applies when those objections are substantive and the review comprehensive. If the objections are not required to be substantive, there is nothing to stop producers from filing boilerplate, unsubstantiated objections to reach the 100% mark to prevent BIS from even considering an exclusion request.

CAMMU would strongly suggest that, should BIS move forward, Commerce must provide a transparent justification for the 100 percent objection rate. Without knowing why BIS denied a request, U.S. industrial users of the subject material cannot submit a comprehensive request addressing specific concerns raised by BIS in denying a request for similar products. Without transparency and specific reasons for denial, CAMMU would oppose this change.

- c. *Time-limited annual or semi-annual windows during which all product-specific exclusion requests and corresponding objections may be submitted and decided;*

BIS should continue to accept exclusion requests on an open and rolling basis. Especially during these times of uncertainty with a constantly changing landscape, manufacturers need the ability to seek relief more than ever. A more structured process with specific deadlines for decision-making will allow BIS to manage its volume while providing requesters with certainty surrounding an already opaque process. Many steel- and aluminum-using manufacturers are supporting the effort to respond to the COVID-19 pandemic by increasing their production of medical device components or by converting their facilities to produce products needed to fight the pandemic. These manufacturers often require specialty metals only produced in Europe.

- d. *Issuing an interim denial memo to requestors who receive a partial approval of their exclusion request until they purchase the domestically available portion of their requested quantity;*

CAMMU respectfully recommends that the Commerce Department consider an alternative to issuing an interim denial memo. CAMMU is concerned that interim decisions often operate under a presumption of finality, which negatively implicates the due process rights of those affected by them and adds to the continued uncertainty for U.S. industrial users of the steel or aluminum. Were BIS to impose a transparent process with timelines for decision-making, it would not need to consider issuing interim denial memos.

- e. *Requiring requestors to make a good faith showing of the need for the product in the requested amount, as well as that the product will in fact be imported in the quality and amount, and during the time period which they attest in the exclusion request (e.g. a ratified contract, a statement of refusal to supply the product by a domestic producer);*

See below.

- f. *Requiring objectors to submit factual evidence that they can in fact manufacture the product in the quality and amount, and during the time period, to which they attest in the objection;*

This comment pertains to points 3(e) and (f).

CAMMU strongly supports requiring objectors to “submit factual evidence that they can in fact manufacture the product in the quality and amount, and during the time period, to which they attest in

the objection.” This requirement, in fact, is already imbedded in the Department’s exclusion request and objection forms. However, the requirements will only foster transparency and expediency if the Department enforces this requirement in practice. When submitting a product exclusion application, requestors are required to make a good faith showing of the need for a product in a certain requested quantity and also that the product will be imported in the quantity requested and in the time period alleged in the exclusion request. If the applicant does not provide this information, the product exclusion request is denied. BIS should equally ensure that an objector provide factual evidence proving that they can in fact produce the product in the requisite quality and quantity within the time period identified by the requestor. However, as described in paragraph 2(e), above, this requirement for objectors is not, in practice, being adequately enforced.

CAMMU strongly encourages BIS to require that product exclusion objectors provide evidence that they can make the product and encourages the Department to stringently enforce this requirement.

- g. *Setting a limit on the total quantity of product that a single company could be granted an exclusion for based on an objective standard, such as a specified percentage increase over a three year average;*

CAMMU does not support “setting a limit on the total quantity of product that a single company could be granted an exclusion for based on an objective standard, such as a specified percentage increase over a three year average.” Commerce has already created stringent requirements for applicants to prove that the product they seek an exclusion for is needed and not available from domestic producers. There is no evidence to suggest that applicants for product exclusions are stockpiling inventory or trying to “game” the system. Limiting the quantity of a product would be counter to the stated objective of having an exclusion process: to ensure that manufacturers can obtain products that are not produced in the United States. Under the current circumstances created by the COVID-19 pandemic, where reduced cash flow is a major concern for most manufacturers, a requestor is not likely to request an exclusion for a product to put in inventory. Commerce cannot be in the business of regulating U.S. manufacturers’ ability to service their customers’ needs.

- h. *Requiring that requestors citing national security reasons as a basis for an exclusion request provide specific, articulable and verifiable facts supporting such assertion (e.g., a Department of Defense contract requiring the product; a letter of concurrence from the head of a U.S. government agency or department that national security necessitates that the product be obtained in the quality, quantity and time frame requested);*

The BIS exclusion request form already requires requestors citing national security reasons as a basis for an exclusion request to provide facts supporting such assertion. As discussed above in paragraph 3(f), CAMMU supports this provision as it provides clarity and transparency to the process, and encourages the Department to continue enforcing this requirement. Many specialty metals used by manufacturers in the aerospace and defense sectors have specific tolerances and chemical characteristics not manufactured domestically. To address this, the Defense Federal Acquisition Regulations (DFARs) includes a list of qualifying countries permitted to supply metal or other materials to U.S. defense contractors. BIS should similarly follow this national security guideline from the Department of Defense (DoD) and approve exclusion requests based on DoD contract requirements and DFARs protocols.

- i. *Clarifying that the domestic product is “reasonably available” if it can be manufactured and delivered in a time period that is equal to or less than that of the imported product, as provided by requestor in its exclusion request;*

Because “reasonably available” can only be proved after the fact, steel/aluminum suppliers may still fail to deliver a product on time, or simply choose not to respond to a request for quote. This creates problems for U.S. steel- and aluminum-using manufacturers who then do not have the raw material needed to produce parts on customer deadlines. In addition, metals suppliers often must be qualified by the original equipment manufacturer (OEM) before the manufacturer of highly engineered products for safety-critical industries can use them. There is a difference between whether the product can be sourced domestically and if our members’ customers will allow us to substitute suppliers. Even if the customer is willing to consider a substitution, there are substantial costs in qualifying a new supplier.

- j. *Requiring that requestors, at the time of submission of their exclusion requests, demonstrate that they have tried to purchase this product domestically;*

See below.

- k. *In the rebuttal/surrebuttal phase, requiring that both requestor and objector demonstrate in their filings that they have attempted to negotiate in good faith an agreement on the said product (i.e., producing legitimate commercial correspondence);*

Points 3(j) and (k) are similar to points 3(e) and (f) above. These requirements already exist under the current exclusion request process. In practice, providing evidence of good faith negotiations by providing email communications, letters of intent, etc. should be enough to show that a requestor has tried to purchase the product domestically and that an objector could not deliver the product in the quality and quantity needed. Similarly, “no quotes” and non-responses by producers should also serve as adequate proof that domestic producers cannot supply the product for an exclusion to be approved. There are numerous examples where this type of information has been provided by a requestor, but the requestor still received a denial based on “sufficient domestic capacity”. However, as previously stated, simply stating that a producer has the capacity to manufacture a product is not adequate grounds for denial of a request. Capacity to manufacture a product is different than the ability to deliver the product on the specified timeframe required by steel- and aluminum-using manufacturers and their customers. CAMMU believes its members have already taken these steps, including by “producing legitimate commercial correspondence,” yet those submissions are still often denied.

Additional Recommendation: Implementing a presumption of approval if a decision is not rendered by BIS within 90 days of submission.

CAMMU respectfully submits an additional recommendation to strengthen the Section 232 product exclusion process. Combined with adequate transparency, BIS can easily achieve many of its intended goals by simply setting a firm deadline for reviewing requests. In its March 2018 Federal Register Notice announcing the exclusion process, BIS stated that, “the review period normally will not exceed 90 days, including adjudication of objections submitted on exclusion requests.”

As noted, as of March 2020, the average time that an applicant must wait from submission to decision in cases in which no objections were filed was 125.6 days for steel exclusion requests and 156.5 days for aluminum exclusion requests. These delays were significantly exacerbated in instances in which one or more objections are filed. The average time from submission to decision in cases where an objection was

filed was 294.5 days for steel exclusion requests and 294.6 days for aluminum exclusion requests. The time that BIS is taking to render decisions on exclusion requests is unreasonable, and serves to prevent manufacturers from efficiently and successfully conducting business. In fact, steel-using and aluminum-using manufacturers are experiencing economic harm by the delays in obtaining a decision by BIS on an exclusion request.

CAMMU recommends that the Commerce Department implement a presumption of approval and the automatic issuance of an approval letter for use with U.S. customs officials if a decision is not rendered within 90 days of submission. This revision would ensure that the process is conducted fairly and efficiently and help relieve the administrative burden on BIS. More importantly, a set timeline that conforms to the initial proposal published in the Federal Register will provide certainty for the thousands of manufacturers often left in limbo by a seemingly endless exclusion process, which lacks transparency.

Conclusion:

The Coalition of American Metal Manufacturers and Users appreciates the opportunity to comment on, and provide recommendations to improve, the Department's Section 232 steel and aluminum product exclusion process. It is essential that the process of applying for exclusions from the Section 232 tariffs be conducted in an improved and expeditious manner to minimize the burden for affected businesses. CAMMU encourages the Department to implement the recommendations contained in these comments to help improve the transparency and fairness of the exclusion process.



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