

Submitted via Federal Rulemaking Portal at <http://www.regulations.gov>

May 18, 2018

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Director, Industrial Studies, Office of Technology Evaluation

Bureau of Industry and Security

U.S. Department of Commerce

1401 Constitution Avenue NW, Room 1093

Washington, DC 20230

**Subject: Comments on the Interim Final 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 Exclusion Requests for Steel and Aluminum**

Dear Mr. Botwin:

The American Petroleum Institute (API), American Exploration & Production Council (AXPC), American Gas Association (AGA), Association of Oil Pipe Lines (AOPL), GPA Midstream Association, Independent Petroleum Association of America (IPAA), Interstate Natural Gas Association of America (INGAA), Petroleum Equipment & Services Association (PESA) and US Oil & Gas Association (USOGA) welcome the opportunity to respond to the Request for Comments on the Interim Final 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 Exclusion Requests for Steel and Aluminum (hereafter referred to as the “Interim Final Rule” or “IFR”). Together, the signatory trade associations (hereafter, “the Associations”) represent the vast majority of the oil and natural gas industry in the United States, across exploration and production (the “upstream”), transportation (the “midstream”) and manufacturing/refining (the “downstream”).

We strongly urge the Department of Commerce to finalize its Rule as soon as possible to minimize disruptions to business and to American job creation, and to realize the Administration’s goal of achieving “energy dominance,” which necessarily relies on complex interwoven global supply chains of specialty steel and other products. Impediments to developing, transporting, refining and distributing domestic oil and gas resources could reduce supplies of critical fuels used by consumers, the U.S. military, and manufacturers, which could have the unintended consequence of negatively affecting the national security upon which these tariffs are premised.

Please see below for a set of the Associations’ recommendations for revisions to the Interim Final Rule and the justification for these recommended changes.

**1. Retrospective and Prospective Relief:**

**Recommendation: As a matter of fairness and good policy, the Final Rule should make clear that exclusions that are granted apply both retrospectively (specifically, that relief is made retroactive to the date of the company’s binding “signed purchase order” or to March 8, 2018, whichever is earlier) and prospectively (specifically, that relief is granted for a minimum of five years, subject to renewal thereafter).**

- As the Interim Final Rule is drafted, it is not clear whether the grant of an exclusion would apply both retrospectively and prospectively – i.e., to entries that had occurred on or after March 22, 2018 – or only prospectively.
- The Final Rule should make clear that exclusions granted apply both retrospectively and prospectively. Otherwise, an applicant’s entitlement to relief would depend entirely on the happenstance of timing of [i] the arrival of a shipment of subject goods at a port in the United States relative to [ii] the date of Commerce’s decision. Further, the failure to apply relief retrospectively could have costly consequences, including delaying shipments unnecessarily and thus forcing the U.S. buyer to incur the expense of extended storage outside the United States.

**2. Metrics for Determining US Domestic Capacity to Meet Demand.**

**(2a) Recommendation for Metrics to Determine Sufficient Quantities: The Department of Commerce should define and release metrics that will be used to determine whether US steel manufacturers have the capacity to meet demand in order to provide greater clarity on how Commerce will make its determination regarding production in the United States in a sufficient and reasonably available amount.**

- The Interim Final Rule identifies three bases for granting an application for exclusion: [i] the article is not produced in the United States in a sufficient and reasonably available amount, [ii] the article is not produced in the United States in a satisfactory quality, and [iii] the presence of specific national security considerations.
- Regarding [i], the IFR does not identify the criteria Commerce will apply in determining whether an article is not produced in the United States in a sufficient and reasonably available amount, which raises the following questions:
  - To what extent will Commerce take into account quantities demanded by users of the article other than the applicant itself?
  - To what extent will Commerce verify the potential for U.S. manufacturers to increase capacity and/or capacity utilization?
  - How does Commerce intend to deal with multiple exclusion requests where each individual request might be fulfilled from U.S. domestic parties but the total of such requests exceeds current U.S. capacity?
  - What is the timeframe that Commerce will use to determine if a U.S. domestic party is capable of producing the specific product? Is it within the period of the particular exclusion request (i.e. one year)?
  - Will Commerce take into account product prices and the conflicting impacts of such prices on U.S. domestic steel producers and users in determining whether there could be sufficient domestic capacity?
- The Department of Commerce should define the minimum quantity thresholds that US steel manufacturers must meet:
  - Steel manufacturers that file objections on the basis that future capacity will materialize within one year should be required to submit a detailed timeline and supporting material to support their assertion.
  - At a minimum the supporting material should include: 1) current and future forecasted plant capacity; 2) detailed outline of regulatory approvals, including local permitting requirements and estimated approval times, necessary to expand the existing facility or construct a new facility; and 3) projected construction schedule.
- The Department of Commerce should also factor in the following features of the steel manufacturing market:

- The Department of Commerce’s consideration of US steel manufacturers’ capacity needs to account for the fact that no facility is able to achieve 100% capacity due to the downtime between production runs of different kinds of pipe and tubular products and because certain pipe takes longer to produce, it is difficult for companies to achieve their theoretical or nominal capacity.
- Also, since facilities produce a variety of products, the capacity at the facility will have to be split across several products over any given period of time and the actual available capacity to make a given product will only be a portion of the total nominal capacity. For example, facilities that have API 5L certifications often also produce several steel pipe and tube products other than line pipe, and so only a fraction of the total capacity will be devoted to line pipe.
- If the Department does not more clearly define the criteria under which it will grant exclusions in consideration of the issues identified above, US businesses may waste countless hours and other resources in preparing exclusion requests that may have been deemed proper but for the Department’s failure to articulate administrable guidelines. In addition, taxpayer resources will have been wasted in the Department’s consideration of such requests.
  - The Associations also believe that any final agency decisions rendered with unclear or unarticulated criteria would be arbitrary, capricious, and subject to challenge in the Court of International Trade or other forum.
- The Associations are concerned that in objections to exclusion requests, objectors will argue that unspecific claims of capacity coming on-line at an unspecified future date should be sufficient to deny product exclusion requests. However, Secretary Ross has already stated in comments before the House Ways & Means Committee on March 22, 2018 that, “In order to not grant an exclusion, we will be looking for demonstrated manufacturing capability meeting the technical parameters for the specific article in question. This could include idled capacity that is being brought back online as a committed thing -- not as a prospect, not as a possibility -- but as a commitment by the U.S. company as well as [one that] will include new, expanded capabilities.” We expect the Department to follow Secretary Ross’s parameters as it considers objections to exclusion requests.

**Recommendations for Metrics to Determine Sufficient Quality:**

**(2b) The Department of Commerce should define and release metrics that will be used to determine whether US steel manufacturers have the capacity to meet demand in order to provide greater clarity on how Commerce will make its determination regarding production in the United States in a satisfactory quality.**

- The IFR does not identify the criteria Commerce will apply in determining whether an article is not produced in the United States in a satisfactory quality, which raises the following questions and concerns:
  - Product and quality standards vary, and manufacturers will and do argue that the quality and standards of their product, if not identical to those of an imported product, are “equivalent.”
  - In the experience of many of the Associations’ members, there are times such claims are warranted, and at other times they are not.
  - The question of satisfactory quality necessarily will depend on the needs of each particular user. As a general matter, the user will be in the best position to identify the product quality requirements for any given project (see below).

**(2c) The Department of Commerce Final Rule should also allow for companies to seek product exclusions on the basis of internal quality assurance standards.**

- As outlined in Section 2.k of the exclusion request form, the exclusion process seeks information on the standards organizations that have set specifications for the product type that is the subject of the exclusion request. Presumably, the purpose of this request is to help identify the specific steel product under consideration and to help determine if similar or substitute products are available from U.S. domestic producers.
- The Associations' member companies, however, frequently purchase steel products produced under their own internal quality assurance standards that differ from and may go beyond requirements in given recognized standards, such as ASTM.
- President Trump's March 22, 2018 Proclamation 9711 amends Clause 3 of Presidential Proclamation 9705 (March 8, 2018) to clarify that relief from the steel tariffs "may be provided to directly affected parties on a party-to-party basis taking into account the regional availability of the particular articles, the ability to transport articles within the United States, **and any other factors as the Secretary deems appropriate**" [emphasis added]. The Associations therefore recommend the Interim Final Rule clarify that an acceptable justification for approval of a product exclusion application is that there is no U.S. domestic party that produces or plans to produce a specific product that meets a company's internal quality assurance standards.
- The Associations therefore recommend that the Interim Final Rule be amended to specify how Commerce will determine whether, in the case of highly specialized products, a domestic product's quality/standard is equivalent to the quality/standard of the foreign import. The Final Rule should explain the weight that Commerce will give to a user's stated needs regarding product quality in making its determination whether to grant an exclusion application.
- The Department of Commerce should define the minimum quality thresholds that US steel manufacturers must meet:
  - Exclusions to be approved on the basis of comparative performance standards.
  - For products that are available from both domestic and international sources, companies should be allowed to submit data as part of the exclusion application process identifying the companies' performance needs and comparing the performance of the domestic product vs. the international product.
  - Exclusions should be granted on the basis of documentation that a specific product is needed in order to meet a specific performance standard as determined by the user, who is in the best position to identify the product quality requirements for any given project.
  - Exclusions should be granted on the basis that a company's corporate approved Quality Assurance standards exceed regulatory or industry approved standards. The performance related information mentioned in the previous bullet should be allowed for use in instances an applicant wants to seek an exemption based on internally developed Quality Assurance standards.
  - The Department of Commerce should also protect company business confidential information regarding internal quality standards with safeguards consistent with #3 above.

**(2d) Recommendation for Metrics to Determine “National Security Considerations:” The Department of Commerce should define “national security” for product exclusion requests in a way that recognizes the importance of economic factors be included for a specific national security consideration.**

- The exclusion request form identifies U.S. national security requirements as “critical infrastructure or national defense systems”. As drafted, the Interim Final Rule implies that these two criteria alone are the only national security justifications that may be made for a product exclusion request.
- The Associations urge that in its consideration of product exclusion requests, the Department of Commerce consider a broader definition of “national security” for determining exclusion requests that mirrors the language of USC Sec. 1862 (d), which states that “...In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security...”
- In issuing his proclamation on March 8, President Trump recognized “the close relation of the economic welfare of the United States to our national security” as a factor in excluding Canada and Mexico from the steel and aluminum tariffs. A strong, growing economy is the engine for propelling our national defense base, including our steel industry, forward.
- The fuel for that engine is energy. U.S. oil and natural gas producers today are producing more energy at home than ever in our history. Hydrocarbon (oil and natural gas and natural gas liquids, or NGLs) production in 2017 reached a new high of 52.36 Quad Btu – exceeding the previous high of 52.27 Quad Btu in 2015. This is the highest production on record since 1949 – according to EIA data. Accordingly, certain imported steel products (such as certain pipe and tubes), depending on the details, might qualify for exclusion from the 232 tariffs if necessary so that safe, secure infrastructure will continue to exist for U.S. oil and natural gas producers to use to bring their products to the market.
- We expect the Department of Commerce to recognize the importance the oil and natural gas industry and to consider petitions for relief from the US oil and natural gas industry in the spirit of President Trump’s March 28, 2017 Executive Order (EO) entitled “Promoting Energy Independence and Economic Growth.” That EO states that “[i]t is in the national interest to...avoid regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation” and that regulatory actions that “unduly burden the development of domestic energy resources” be suspended, revised, or rescinded.

**3. Eligibility to Apply for Exclusions.**

**Recommendations:**

**(3a) It is our interpretation that the Interim Final Rule allows the Department of Commerce to accept petitions from contractors and distributors that supply others with steel; we recommend that the Final Rule continue to allow these entities to file petitions as eligible “individuals or organizations using steel in business activities.”**

- It is important for the Department of Commerce to accept petitions from contractors and distributors from whom companies buy steel, as these entities work with numerous clients and customers that are the companies that need to procure steel needs for various oil and natural gas projects.

**(3b) The Department of Commerce should accept petitions from entities that are not the importer of record for products.**

- It is also important that the Department of Commerce accept petitions from entities that are not the importer of record so that companies can submit petitions on behalf of their ultimate procurement needs that may be imported by other entities within their supply chains.
  - For example, companies that are end-consumers of steel finished in US mills may have quality criteria that dictate where the semi-finished steel is sourced. The semi-finished steel suppliers may face the same stringent quality auditing processes as the facilities that will finish the steel.

**4. Confidential Business Information:**

**Recommendation: The Department of Commerce in the Final Rule should define for petitioners the safeguards that Commerce will implement to protect business confidential information that is identified as such by petitioners. At a minimum, such procedures should be the same safeguards as those that are used by Commerce when receiving petitions for anti-dumping/counter-vailing duties (AD/CVD).**

**5. Granting Relief for Purchases Made Before Tariffs were Implemented.**

**Recommendation: The parameters of the Department of Commerce Final Rule should allow for granting relief for products purchased before implementation of Section 232 tariffs, defined as any “signed purchase order” dated before March 8, 2018.**

- The Associations’ member companies made decisions and allocated capital in business transactions that pre-date the *Presidential Proclamation on Adjusting Imports of Steel into the United States* and the *Presidential Proclamation on Adjusting Imports of Aluminum into the United States* on March 8, 2018 in which the President stated “I have decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles” and “I have decided to adjust the imports of aluminum articles by imposing a 10 percent ad valorem tariff on aluminum articles.” The Department of Commerce should grant automatic relief to companies seeking relief for purchases of imported steel and imported aluminum that were made through a signed purchase order prior to March 8, 2018.
- Given that companies who signed contracts before March 8 acquired protectable property interests under those contracts at that time, any attempt by the Department to assess tariffs on products imported under those contracts could constitute a regulatory taking, entitling affected companies to appropriate monetary relief.

**6. Covering Multiple Products in a Single Petition.**

**Recommendation: The Department of Commerce should amend the Final Rule and the form for petitions so that multiple products covered by the same 10-digit HTSUS code to be covered together in a single petition/application.**

- The IFR requires a company to file a separate application for each separate “product,” with small distinctions, such as physical dimensions or differences in coatings or other features, necessitating separate notices, even though all of the relevant products may be classified under the same 10-digit HTSUS code. This is unduly burdensome and inefficient. The Final Rule should allow

multiple products covered by the same 10-digit HTSUS code to be covered together in a single application.

- The Department of Commerce could still break out and enumerate the number of petitions, distinguished by physical dimensions or differences in coatings or other features, for the purposes of depicting the total quantity of petitions for similar products.

## **7. Length of Exclusion.**

**Recommendation:** The Department of Commerce should amend the Interim Final Rule so as to explicitly provide for exclusion periods of five years, subject to renewal thereafter, and for the length of specific projects as discussed in submitted exclusion requests where U.S. domestic parties cannot demonstrate sufficient capacity to meet the long-term requirements as set forth in an individual exclusion request or multiple exclusion requests for the same specific product. We also recommend that US manufacturers be provided the opportunity, regarding any exclusions granted, to prove that they have developed new capacity to meet quantity and/or quality specifications of entities granted petitions.

- The Interim Final Rule notes that product exclusions generally will be approved for one year. While one year is an easily definable time period, it does not necessarily reflect the reality of business planning, particularly where long-term, large-scale investments and purchasing contracts are involved, such as are typical in the oil and natural gas industry.
  - For example, companies generally classify their suppliers into a multitiered list, such as acceptable, approved, and preferred. Each of these tiers indicates the compliance with quality standards based on years of experience with a supplier's product.
  - Even after a supplier adds new capacity, additional time is needed for purchasers of steel to technically qualify these new mills/lines. Adding a new supplier to an approved manufacturers list is a lengthy process, taking as long as three years as a company wants to be assured of a supplier's ability to manufacture a product to a given standard consistently. As such, a company will purchase a limited quantity of product from a new supplier over several years before entrusting it to produce a full order.
- A process that generally involves granting only one-year product exclusions would impede the Associations' member companies' ability to plan for the long term by introducing significant uncertainties as to when, whether, where, and at what price the Associations' member companies can purchase the steel inputs needed to bring U.S. oil and natural gas projects to fruition.
- As drafted, the Interim Final Rule provides that exclusions ordinarily will be valid for one year at a time, subject to applications for renewal. One year is too short given the needs of the U.S. consumers that will rely on these exclusions. Projects for which U.S. companies must rely on imported steel due to lack of U.S.-based supply in adequate quantities or of required quality tend to be multi-year projects. Providing exclusions for only one year at a time does not accord with the commercial realities that guide purchasing decisions and gives rise to a great deal of uncertainty. A five-year length of exclusion for products is required in order to accommodate project planning and to reflect the reality of the long lead time from purchase order to delivery of products. Five years is necessary for large-scale capital projects, for which purchase orders for large procurement are often made more than three years before products are delivered and for

which any unexpected delays can further extend the timeline from purchase order to product delivery.

**8. Categorical Relief.**

**Recommendation: The Department of Commerce should grant categorical exclusions (i.e., granting exclusions for all petitioners) for products it determines are not available in the United States; objections to categorical exclusions must provide evidence of when capacity is anticipated to come on line.**

- The Interim Final Rule as drafted states, “Approved exclusions will be made on a product basis and will be limited to the individual or organization that submitted the specific exclusion request, unless Commerce approves a broader application of the product based exclusion request to apply to additional importers.” In certain cases, however, the product in question simply is not manufactured in the United States or is manufactured in such small quantities as to be incapable of meeting the demands of numerous different users of that product. In such cases, Commerce should not limit applicability of the exclusion as indicated but should make the exclusion available to all actual or potential users of the product in the United States, without requiring each such user to submit a separate application.
- Even once capacity comes online, exclusions should still be available until companies are able to establish the new capacity’s ability to manufacture the product to buyers’ quality standards.

**9. Application Rebuttal Process:**

**Recommendation: The Final Rule should provide an even-handed, reciprocal process that allows interested parties to respond to objections.**

- The IFR currently provides an unbalanced rebuttal process under which any interested party may respond to applications, but neither the applicant nor other parties are permitted a response
- A rebuttal process is consistent with Due Process and responsible administrative decision making. The Final Rule should provide:
  - A limitation on rebuttals to potentially aggrieved domestic manufacturers of specific articles sought to be excluded, plus a response by the applicant;
  - In the alternative, if rebuttals are not limited to domestic manufacturers, a response by an interested party.
- Without such changes to the rebuttal process, the Department of Commerce risks finalizing actions without a complete record that may be arbitrary and capricious, unfairly biased against U.S. businesses that rely on imported articles, and that may actually exacerbate risks to national security.

**10. Transparency:**

**(10a) Recommendation: The Final Rule should make the Department of Commerce’s proceedings more transparent by making all petitions, objections, comments and final rulings visible and easy to access.**

- To date, the website where documentation is posted is not easy to navigate nor fully transparent.
- The Department of Commerce should be required under the Final Rule to post all filings on specific applications within five business days or be prohibited from using non-publicly posted information in its final determinations.



**(10b) Recommendation: The Final Rule should make public the Department of Commerce’s metrics for determining US domestic capacity to meet demand, i.e., the criteria that are used to assess capacity in terms of quantity, quality, national security and any other additional consideration.**

- The Associations reincorporate their arguments under Section 2 of this comment letter. Without this information, companies will be unable to adequately prepare exclusion requests pursuant to one of the Department’s stated criteria for granting exclusions, which could result in arbitrary and capricious final agency decision making subject to challenge in the Court of International Trade or other forum.

#### **11. Review of Decisions**

**Recommendation: The Final Rule must articulate fair administrative and judicial review procedures for exclusion determinations.**

- Final action by the Department of Commerce should be immediately appealable to an appropriate administrative appellate body, and/or the Court of International Trade.
- Predictable, expeditious review of exclusion determinations is essential to minimizing business and supply chain disruptions, without which national security may be jeopardized.
- The Department should make every effort and establish a goal to complete its review and render a determination in less than the 90 day objective identified in the IFR in order to minimize business and cost uncertainty.
- While the Associations believe the Court of International Trade may be the appropriate forum for some appeals, there are clear exceptions to the Court’s jurisdiction where Presidential Proclamations involve matters other than tariffs, such as national security. *See, e.g., Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (Presidential licensing scheme under Section 232 properly challenged in Article III courts because it was “a regulatory measure enacted for the protection of national security” and jurisdiction therefore “predicated on 28 U.S.C. §§ 1331 or 1340.”).

Sincerely,



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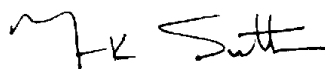
*Oil & Natural Gas Industry Response to Request for Public Comments on IFR for Exclusions from Section 232 Import Restrictions*



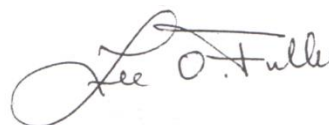
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*Enclosure: Oil & Natural Gas Industry Recommended Metrics for Granting Relief from Section 232 Import Restrictions*

**Oil & Natural Gas Industry Recommended Metrics for Granting Relief from Section 232 Import Restrictions**

**1. For Determining Quantity Capacity of US Domestic Steel Manufacturing:**

- a. Require US manufacturers to submit detailed timeline and supporting material for promises of future capacity
- b. Require US manufacturers to specify:
  - i. Current and future forecasted plant capacity
  - ii. Detailed outline to get regulatory approvals
  - iii. Projected construction schedule

**2. For Determining Quality Capacity of US Domestic Steel Manufacturing:**

- a. Evaluate on basis of companies' own performance standards
- b. Evaluate on basis of company's corporate approved Quality Assurance standards that exceed regulatory or industry approved standards
- c. Grant when companies compare domestic product to international product and show only international product meets companies' standards

**3. For Meeting National Security Requirements:**

- a. Recognize importance of oil and natural gas industry to US economy
- b. Align with President Trump's March 28, 2017 Executive Order (EO) "to...avoid regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation"