



**WRITTEN SUBMISSION OF THE NATIONAL FOREIGN TRADE COUNCIL ON BEHALF OF
THE TARIFF REFORM COALITION**

**Comments Regarding the Notice of Proposed Rule Regarding Revisions of the Section
232 Steel and Aluminum Tariff Exclusions Process**

**BIS-2023-0021
FR Docket No. 230810-0188
RIN 0694-AJ27**

October 12, 2023

INTRODUCTION

The National Foreign Trade Council (“NFTC”) is pleased to provide the comments below on behalf of the Tariff Reform Coalition in response to the Bureau of Industry and Security (“BIS”) Federal Register notice *Revisions of the Section 232 Steel and Aluminum Tariff Exclusions Process* (88 Fed. Reg. 58525, (August 28, 2023)) seeking comments on a proposed rule implementing changes to the Section 232 exclusion process.

About the Tariff Reform Coalition

The Tariff Reform Coalition (“the Coalition”) is a broad-based coalition of more than 100 companies and associations, led by the NFTC, which is dedicated to working with the Administration and Congress to ensure greater oversight and review of the Executive Branch’s use of tariff authority. The Coalition brings together a broad array of U.S. manufacturers, retailers, agricultural and food producers, and other supply chain stakeholders who have been adversely affected by the increasing use of tariffs in pursuit of various policy objectives. We welcome the opportunity to provide input on the impacts caused by the tariffs imposed under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862) (“Section 232 tariffs”) and Section 301 of the Trade Act of 1974 (19 U.S.C. 2411 et seq.) (“Section 301 tariffs”).

About NFTC

The NFTC is a broad-based business association for leadership, expertise, and influence on international tax and trade policy issues. We believe trade and tax policies should foster fair access to the opportunities of the global economy and advance global commerce for good. Leveraging its broad membership, expertise, and influence, the NFTC contributes to a greater

understanding of the critical role an open, rules-based international economy plays in the success of American businesses, entrepreneurs and workers and shared global prosperity.

COMMENTS ON PROPOSED RULE

Presidential Proclamations 9704 and 9705 of March 8, 2018 (“Proclamations”) imposed additional tariffs to adjust imports of certain steel and aluminum products. The Proclamations authorized the Secretary of Commerce to grant exclusions from the duties upon request of affected parties if the steel or aluminum articles are determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality or based upon specific national security considerations.¹ BIS has published a proposed rule-making changes that the Department of Commerce believes will further improve the Section 232 exclusions process. Many of these changes proposed in this rule are a direct response to industries’ comments, including the NFTC, in response to BIS’s March 2022 request for input on how to improve the Section 232 exclusion process and we thank the agency for its willingness to adopt new provisions based on our input. We are pleased to provide the comments below on the proposed rule in response to BIS’s request for public comments.

A. Proposed Changes Affecting Exclusion Requests

1. Changes to Criteria for General Approved Exclusions

TRC members are pleased that BIS has recognized that its current standard for evaluating General Approved Exclusions (GAEs), which has focused primarily on whether a product covered by a GAE has received objections, has allowed meritless objections to block BIS from granting GAEs. The TRC agrees that changes are necessary to improve the fairness and efficiency of the GAE review process. TRC members support BIS’s proposed change to the GAE review criteria allowing consideration only of the number of substantiated objections. A low rate of successful objections for specific 10-digit HTSUS classification codes demonstrates that U.S. industry does not produce the products or subproducts in question in a sufficient and reasonably available amount or of a satisfactory quality. Enabling BIS to grant more GAEs by requiring objectors to substantiate their claims they can supply the products in question will not only reduce the number of individual exclusion requests BIS must review (which BIS estimates could fall by up to twenty percent), it provides much-needed flexibility for U.S. companies that must rely on these imported products without causing harm to domestic producers.

Access to GAEs is particularly useful for small, family-owned businesses, which report that domestic steel and aluminum suppliers often are unwilling to quote or fulfill orders because they do not meet minimum order requirements. Small companies – particularly those in underserved areas – are less able to hold significant quantities of material in inventory and do not have the resources to invest the extensive time and money required to find suppliers who will timely fulfill their orders. In many instances, domestic producers have indicated to Commerce they are capable of producing a particular product when opposing an exclusion request only to refuse to

¹ 83 FR 12106 (03/19/2018).

sell the material in a small quantity when it is subsequently requested. Where domestic producers are unable or unwilling to provide products covered by the Section 232 duties, a GAE is an appropriate tool to streamline the process for both requesters and BIS reviewers.

2. Certification and Evidence of Sourcing Attempts

BIS is proposing modifications to the existing certification on the Exclusion Request Form that would require requesters to certify and provide evidence that they have made reasonable efforts in the past 12 months to source their product from the United States or from a country with which the Section 232 duties have been replaced with an alternate means to address the threat to the national security under Section 232. In particular, BIS is seeking comments regarding the appropriate form and substance of evidence that must be provided by requestors to support their certification of such sourcing attempts. TRC members believe that evidence of efforts to source the product should not be too demanding on parties seeking exclusion. Emails, lack of a response to an email, failure to provide quotes, etc. should be sufficient and a requesting party should not have to exhaustively search for products from all possible suppliers in the U.S. and every foreign country.

TRC members have expressed concerns regarding the proposed certification and evidence requirement regarding sourcing attempts in the U.S. or with U.S. trading partners. Where production capacity for a specific product does not exist, it will be difficult to generate any form of evidence of a sourcing attempt. Forcing importers to contact companies that they know do not produce the product in question just to obtain written evidence of a widely known fact burdens both exclusion requesters and the firms that must respond to the sourcing request. Further, having to provide this information, in any format, may deter suppliers from engaging in open and honest sourcing practices, knowing that any information they provide may be used against them in the process.

BIS should also consider that changing suppliers is a complex, expensive and time-consuming process, depending on the type of product and end use. For example, some aluminum extruders use as many as 250 unique profiles (extrusion shapes) in their manufacturing process. To move the dies that are used to extrude those aluminum profiles would cost at least \$7,500 per die alone. For products that are highly regulated for safety reasons, the raw material supplier is routinely specified in the contract based on testing performed to the customer's requirements. During the term of a contract, raw material suppliers typically cannot be changed without agreement from the customer and any potential new supplier must undergo a qualification testing and approval process that can take 12-18 months. BIS appears to recognize this constraint in the definition of a "substitute product," which states "'Substitute product' for purposes of this review criterion means that the steel or aluminum being produced by an objector can meet 'immediately,' i.e., paragraph (c)(6)(i) of this supplement) the quality, regulatory, or testing standards required to be used in the business activity in the United States of the user requesting the exclusion." A contract that specifies that only one producer has been tested and certified to its standards should serve as sufficient evidence for an exclusion request that no domestic producer is capable of producing a substitute product.

Finally, TRC members recommend that the requirement to provide evidence of sourcing attempts should not apply to renewals of previously granted exclusions. Renewals have gone through the exclusion review process, including multiple "open objection periods," and have been granted. Applying the proposed certification and evidence requirements to renewals will make the process more cumbersome for all parties (submitters, objectors, and reviewers). If BIS decides to move forward with new certification and evidence requirements, these should apply only for new exclusion requests covering items that have not been previously granted.

2. Enabling Exclusion Requests To Cover Multiple Sizes

BIS has requested comments on a change that would consolidate multiple sizes of a specific product within a single 10-digit HTS number allow for relief for sizes with no objection. The TRC's previous comments from April 2022 encouraged the Department to allow a single exclusion request to cover multiple sizes of the same product. The TRC applauds the Department for addressing this issue and supports incorporating this provision into the final rule.

B. Proposed Changes Affecting Exclusion Objections

1. Creation of General Denied Exclusion

BIS proposes to introduce a new General Denied Exclusions (GDE) process. GDEs would be issued for products for HTSUS classification codes (or subproducts) that have had very high rates of successful, substantiated objections. New GDEs would be identified following an analysis of substantiated objections and exclusion requests that have generally been consistently denied.

TRC members are concerned that the proposed GDE process does not allow for sufficient flexibility to ensure that exclusions are available for any product not produced in the U.S. in sufficient quantities or of sufficient quality to meet the needs of U.S. importers. BIS has indicated that once a GDE becomes effective, the Section 232 Exclusion Portal will prohibit persons from being able to submit exclusion requests for these identified GDEs and GDEs will remain in place indefinitely. While the Department of Commerce *may* remove or revise a GDE at any time via a Federal Register notice, there is no process to enable an importer to request modification of a GDE based on evidence of changed market circumstances. TRC members believe the GDE process as proposed is too rigid to effectively account for dynamic market changes. If a U.S. domestic producer closes, changes its product mix, is acquired by a downstream user for exclusive supply, or undergoes any other change that limits the availability of a product covered by a GDE, there would be no ability for importers to seek an exclusion until BIS removed the product from the GDE list.

As mentioned above, highly regulated products, such as those regulated by the Food and Drug Administration require long-term relationships and contracts that reflect compliance with regulated testing and certification requirements. Even when exclusion requests may have been denied for some products, there still needs to be a process available to requesters to bring new facts or special circumstances to BIS in an exclusion request for consideration. Without this

ability, GDEs may impede the ability of TRC members to source for an indefinite period based on potentially inapplicable prior successful objections. TRC members recommend against the use of GDCs, however if BIS decides to implement them, issuance of a GDE should be considered guidance to requesters that an exclusion request is unlikely to succeed, but requesters should not be completely blocked from requesting exclusions. Similarly, BIS should create some form of a petition process or annual automatic review for GDEs, including a window for providing public comments, to ensure that importers have an opportunity to present new data about the availability of domestic products.

TRC members are also concerned that the 15-day notice period for GDEs is not sufficient for importers to adapt their supply chains. TRC members would ideally need a transition period of at least 6 months to find alternative sources of supply.

2. Certification and Evidence of Ability to Supply Immediately

TRC members support the proposal to require new certification language on the objection form to ensure objectors can supply comparable quality and quantity steel or aluminum and make it “immediately available” (defined as “within eight weeks” of purchase or, if that’s not possible, within a shorter period than it would take a requester to obtain the products from its foreign supplier). BIS is also proposing to require an objector to submit evidence that it has commercially sold the product as that which is being requested within the last 12 months or evidence that it has engaged in sales discussions with this requesting company or another company requesting the same product within the last 12 months. TRC members believe that the additional certification and evidence requirement could help to reduce cases where objectors block an exclusion request, but then refuse to sell to the requestor or fail to deliver on supplying the materials on time.

BIS is seeking comments regarding the appropriate form and substance of evidence that must be provided by objectors to support their certification of such sales discussions. TRC members suggest the following elements regarding appropriate evidence:

- Objections by U.S. manufacturers are often supported only by basic marketing materials (e.g., websites or brochures). Given the specialized nature of certain products subject to exclusion requests, general marketing materials often do not provide sufficient details to demonstrate that an objector can produce the specific product associated with the exclusion request. Indeed, the supporting materials frequently pertain to merchandise that is materially different from the merchandise subject to the exclusion request. BIS should clarify that general marketing materials are not sufficient evidence of domestic production.
- TRC members report cases where objections have been filed but when the objecting party is contacted about supplying the product, the objecting party indicates that they are not actually willing to undertake the manufacturing necessary. BIS should require objectors to provide factual support for claims that they make regarding their capability and willingness to manufacture merchandise in the quality and quantity of the request to which they object. For example, BIS should require objectors to demonstrate the

capability, capacity, timing and commitment to produce the merchandise in question will ensure that the exclusions process more accurately reflects prevailing market conditions and prevents objecting parties from blocking exclusions for products that objectors cannot or will not deliver to customers.

- The evidence required from an objector should include evidence of on-time delivery (within eight weeks) to other recent customers and the objector should have to provide a record of materials meeting the purchaser's specifications for quality available in current inventory.
- TRC members agree with other commenters that a party opposing an exclusion request should be required to provide transparent information on its pricing, including whether the price at which goods would be offered for sale incorporates a tariff payment or the equivalent (i.e., in the case of aluminum, application of the Midwest Premium Duty Paid price). We understand that continued reliance on the Midwest Premium Duty Paid price for virtually all aluminum contracts is effectively subjecting all aluminum sold in the U.S. to Section 232 duties, even if the material was domestically produced or covered by an exclusion or alternative measure agreed upon by the United States to address the threat to national security of imports from certain countries.

Thank you for the opportunity to present our comments. If you have any questions regarding our comments, please contact Tiffany Smith, Vice President of Global Trade Policy (tsmith@nftc.org or 202-464-2020).

Sincerely,

A handwritten signature in black ink that reads "Tiffany Smith". The signature is written in a cursive, flowing style with a large, prominent "T" and "S".

Tiffany Smith
Vice President Global Trade Policy