July 10, 2020

The Honorable Richard E. Ashooh  
Assistant Secretary for Export Administration  
Bureau of Industry and Security  
Department of Commerce  
1401 Constitution Avenue, NW  
Washington, DC 20230

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

Dear Assistant Secretary Ashooh:

In response to a request from the U.S. Department of Commerce (DOC), the American Iron and Steel Institute (AISI), on behalf of its U.S. producer member companies, is pleased to submit the following comments regarding the product exclusion process for the Section 232 steel import tariffs and quotas. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI also plays a lead role in the development and application of new steels and steelmaking technology. AISI is comprised of producer member companies, including both integrated and electric arc furnace steelmakers, and associate members who are suppliers to or customers of the domestic steel industry.

I. Introduction

It has now been more than two years since the DOC found that the “present quantities and circumstances of steel imports” threaten to impair U.S. national security pursuant to Section 232 of the Trade Expansion Act of 1962 and President Trump implemented tariffs and quotas to address this national security threat. The 25 percent tariff on steel imports from most countries, combined with quota arrangements with respect to imports from several others, has allowed the domestic steel industry to make a number of investments that have improved the competitiveness and reliability of the supply of domestically-produced steel. Unfortunately, the recent COVID-19 public health crisis

has caused a significant drop in demand for steel in the United States, making the
domestic steel industry even more vulnerable to renewed surges in steel imports. It is
thus critical to maintain the effectiveness of the Section 232 program given current
economic conditions and it is essential that the product exclusion process not
undermine the purpose of the Section 232 remedy on steel.

Year-to-date data through May 2020 indicates that just one-third of total steel imports
into the United States currently are from countries subject to the 25 percent tariff. This
calculation does not account for the user/importer-specific product exclusions that have
been granted, which further reduce the volume of steel imports subject to the tariff
remedy. The product exclusion process was instituted to address the narrow
circumstances where a steel product is not “produced in the United States in a sufficient
and reasonably available amount or of a satisfactory quality” or for exclusion requests
“based upon specific national security considerations.” However, it is clear that many
of the tens of thousands of exclusion requests that have been filed to date are designed
solely to undermine the Section 232 remedy, as importers have requested exclusions in
volumes that vastly exceed historical levels of steel imports generally.

It remains the position of AISI that product exclusion requests should only be granted
where they meet the narrowly-prescribed circumstances outlined in the original
product exclusion guidelines issued in March 2018. As further detailed below, any
effort to adjust or modify the Section 232 product exclusion process that may result in a
decrease in the number of steel imports subject to the remedy has the potential to
render the program ineffective and could ultimately harm U.S. national security.

II. Product Exclusion Process

In March 2018 following the Presidential Proclamation implementing the Section 232
remedy on steel imports, the Bureau of Industry and Security (BIS) issued the interim
final rule outlining the three reasons that product exclusion requests would be granted
for steel imports: (1) an article is not produced in the United States in a sufficient and
reasonably available amount; (2) an article is not produced in the United States in a
satisfactory quality; or (3) for a specific national security consideration. The product
exclusion process was designed to allow domestic steel producers the ability to review
requests and contest claims if the request did not meet the threshold for relief from the
Section 232 remedy. Later that year, DOC modified the process to allow for further

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2 Department of Commerce, “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
submission of relevant information by requestors and objectors through rebuttal and surrebuttal processes.

Over the past two years, steel importers have filed over 150,000 product exclusion requests based largely on claims of insufficient availability of certain steel products from U.S. steelmakers, despite significant continued unused capacity in the domestic industry. The quality of steel produced by U.S. steelmakers has rarely been challenged, particularly compared to similar products sourced abroad, and very few exclusions have been requested based on the grounds of national security.

AISI affirmatively believes that product exclusions on steel imports must remain requestor-specific: each exclusion request should continue to be limited for use by the U.S. entity that requested it. Each exclusion request should also be limited to one year to ensure that domestic steelmakers have the option to analyze market conditions that could warrant changes in domestic capabilities. Granting exclusions for steel products without regard to specific user needs would essentially cede entire product categories to imports that would undercut the ability of U.S. steelmakers to compete. Foreign governments could then heavily subsidize particular firms that specialize in those product categories, causing significant harm to domestic steel producers.

Domestic steelmakers are not seeking significant changes to the current system for granting exclusion requests. However, the burden of proof that an exclusion is warranted must remain on the user/importer requesting the exclusion. The current process lays out the narrow framework that importers must meet in order to merit an exclusion from the Section 232 remedy; this should not be expanded beyond its current application. Exclusions should only be granted if the requested product is not produced in the United States in sufficient volumes or quality, or where there is a compelling and well-documented national security need for the exclusion, including specific documentation from the government agency or military service requiring the use of the imported product. AISI strongly supports DOC continuing to collect detailed information in the submissions that will allow DOC to assess the specific justification for each exclusion request.

III. Concerns on Requests for Excessive Volumes

One area where AISI believes DOC could enhance and tighten the application of the product exclusion process is with regard to the significant volume of steel imports requested for exclusion. DOC should not allow individual entities to submit requests for exclusions in volumes that exceed their historical annual consumption of the specific steel products. From March 2018 to March 2020, over 206 million metric tons of steel
import volume was requested for exclusion from the steel Section 232 measures,\(^3\) for an annual average import volume of 103 million metric tons. However, the annual average volume of all steel imports into the United States during the years 2015-2017 was just 33.2 million metric tons,\(^4\) so importers have requested exclusions for over three times the total volume of steel imports in each year. In fact, in the two years in which the Section 232 program has been in effect, users/importers have consistently requested more import volume to be excluded from the Section 232 remedy than the entire annual consumption of steel in the United States in each year from 2015 to 2019.\(^5\)

The problem of repeated product exclusion requests that vastly exceed annual import volumes and consumption trends could be mitigated by DOC implementing a certification requirement for importers to document recent consumption trends in the exclusion request application. Requestors should be required to provide the following documentation alongside their exclusion request: (1) historic consumption data for the steel product subject to the request, including annual data from three prior years; (2) ability to consume the requested product, with historic product mix for the relevant production facility; and (3) a certification that the requested quantity does not exceed historic consumption or requestor’s processing ability by more than five percent.

If the user/importer requests an exclusion for volume above historic levels, DOC should also require a detailed explanation of market conditions that justify excessive levels of requested volumes. DOC should also require that requestors make a good faith showing of the need for the product in the requested quantity during the requested time period, such as a ratified contract, statement of refusal to supply the product by a domestic steel producer, or other relevant documentation. DOC should require documentation alongside the exclusion request application that demonstrates the unsuccessful effort undertaken to source the product domestically. Additionally, if users/importers seek an exclusion request based on national security considerations, DOC should require certification that such a need exists and cannot be supplied domestically, such as a contract with a government agency or military branch. If requestors continue to over-load the exclusions system with unrealistic and wildly-inflated volume requests, the burden must fall on those same entities to provide

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detailed data on recent import and consumption trends to validate the need for such exclusions from the Section 232 remedy.

IV. Immediately Available

The current system laid out by DOC on eligibility requirements for requestors and objectors should remain in place. The relevant information required to complete the request and objection (as well as the rebuttal and surrebuttal) submission forms should only be completed by the user/importer requesting the exclusion or the steelmaker that has the capacity to produce the desired product. However, the current eight-week timeframe for determining immediate availability from domestic steelmakers is unreasonable. DOC should expand the definition of “immediately available” to reflect current market conditions that may exist, including backlogs. Order books for domestic steelmakers often fill up three-to-four months ahead of time, so the current framework does not take commercial considerations necessary for adjustments into account.

DOC should also consider different levels of processing and finishing times involved, as well as the volume requested, in determining what is “immediately available.” For instance, requests for semi-finished steel products could be subject to a shorter time period, while certain downstream finished steel products, such as corrosion resistant steel, should have longer time periods for determining immediate availability. Requests for larger volumes should also have longer lead times given the requirements involved in producing larger volumes of steel.

AISI therefore recommends that DOC update the regulations to reflect an immediate availability definition of between 12 (for semi-finished products) and 16 weeks (for more processed downstream finished products), which falls more in line with comparable availability of steel imports. If the rationale for an exclusion request is insufficient available time because the domestic steel industry cannot deliver the requested product with a short lead-time, then DOC should require requestors to provide documented evidence that the imported product can be produced and delivered within the timeframe that domestic steelmakers allegedly cannot.

V. Decisions and Repeated Requests

In the request for comments, DOC included annexes detailing exclusion requests for steel products that received no opposition during the objection window (Annex 1) and exclusion requests for steel products that received objections for every request filed (Annex 3). While AISI understands the rationale for consideration of blanket approvals or blanket denials, this amendment could inadvertently harm the domestic steel industry. One of the foundations of the Section 232 program is to promote investment
in key market segments and domestic steelmakers have increased investments to align steelmaking capacity to better serve the domestic market. Granting certain blanket approvals on products that may not have received objections in the past would limit the opportunity for domestic steelmakers to fulfill market demand from customers. Just because a domestic steelmaker objected to or did not object to an exclusion request in the past does not predict current or future market considerations and should not hamper the ability of the domestic industry to adapt to changing market conditions. In its September 2018 improvements to the product exclusion system, DOC already expedited the process to grant exclusions to requests that have received no objections within the 30-day objection window and granting these approvals promptly should continue to be a priority moving forward.

DOC should also put in place restrictions to limit users/importers from repeatedly requesting an exclusion on a product that has been recently denied. At a minimum, requestors should be required to wait at least one year from DOC’s decision date before refiling substantially the same exclusion request, and any requests in conflict with this rule should be subject to an immediate rejection of the request – i.e., not posting the exclusion request on the portal. DOC could maintain a list of products that would be subject to immediate denial and the date at which such exclusion requests would once again be considered.

DOC should also consider prohibiting requestors from submitting duplicate exclusion requests for products that are identical, except for minor, non-meaningful distinctions outside of routine specification differences.

Additionally, in circumstances where DOC issues a procedural denial because of an error by the requestor in the original exclusion request, and then the requestor re-submits the request with corrected information, DOC should only grant retroactive relief to the date of the revised filing request. It is our understanding that the current practice is to honor the original date of the requestor’s filing, but the resubmission is a new exclusion request and the retroactivity should only apply to that period.

VI. Requestor and Objector Eligibility

In terms of eligibility, DOC should continue to only allow “individuals or organizations using steel articles identified in Proclamation 9705 in business activities (e.g., construction, manufacturing or supplying steel to users) in the United States” to submit product exclusion requests. Since our position remains that each exclusion request should be considered at the requestor-level and not the product level, it is important

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that only specific steel consumers remain authorized to file exclusion requests. Similarly, DOC should also maintain the current practice of eligible objectors.

VII. Section 232 Product Exclusion Portal

The Section 232 product exclusion portal, which began operation in June 2019, has offered several improvements over the prior Regulations.gov system for monitoring and filing product exclusion requests. However, several additional enhancements could be implemented that would improve the usability for all interested stakeholders. AISI has provided detailed feedback\(^7\) to DOC on the operability of the exclusions portal in December 2018 and August 2019 and we listed several ideas to streamline the portal, which include:

1. Providing augmented tracking capability for users to better track submissions;
2. Including a built-in export function;
3. Adding the ability to save draft submissions;
4. Identifying due dates for submissions instead of days remaining;
5. Establishing separate steel and aluminum portals;
6. Providing for the ability to withdraw submissions seamlessly in the portal; and
7. Providing a system status indicator when/if the portal is down for routine maintenance.

We remain committed to working with DOC to ensure that these items are addressed, which would enhance the functionality for all users, including steel users/importers, domestic steelmakers, and government officials.

VIII. Conclusion

The intent of the Section 232 product exclusion process is to address situations in the U.S. market where products are needed that (1) cannot be supplied domestically because no domestic production exists; (2) cannot be supplied to meet necessary (and legitimate) quality specifications; or (3) where special national security considerations should be taken into account to grant an exclusion to the Section 232 remedy. It is important that any changes DOC implements during this review process take a narrow approach to ensure the integrity of the Section 232 program at large. The burden must

\(^7\) See Letter from Kevin M. Dempsey to Deputy Assistant Secretary for Export Administration Matthew S. Borman on Comments on User Testing of the New Commerce 232 Exclusion Process Portal, December 14, 2018; and Letter from Kevin M. Dempsey to Assistant Secretary for Industry and Analysis Nazak Nikakhtar on Comments on the New Commerce Department Section 232 Exclusions Portal, August 9, 2019.
continue to be placed on the requestor of the exclusion request, particularly given current weak steel market conditions in the United States. Domestic steel producers are ready, willing and able to fulfill the needs and obligations of steel consumers in this country, as we have shown for the past two years through repeated submissions in the product exclusion process.

Thank you for the opportunity to provide detailed feedback to DOC on the Section 232 product exclusion process. We appreciate the continued efforts by you and your team to ensure that product exclusion process is a fair and equitable process that ensures the continued effectiveness of the Section 232 remedy on steel.

Sincerely,

Kevin M. Dempsey
Interim President and Chief Executive Officer