

**Before the United States Department of Commerce
Bureau of Industry and Security**

May 18, 2018

**American Fuel & Petrochemical Manufacturers' Comments on the
Department of Commerce's Interim Final Rule on the Steel and
Aluminum Exclusion Request Process**

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I. EXECUTIVE SUMMARY

The American Fuel & Petrochemical Manufacturers (“AFPM”) has several concerns with the Section 232 exclusion process currently administered by the U.S. Department of Commerce (“Department”). There are multiple deficiencies with the substantive criteria used to file and evaluate exclusion requests. There are also several procedural and enforcement shortcomings embedded in the process. The Department must correct these problems in issuing the final rule, including the following:

- The Department’s exclusion process is too narrowly focused on *company-specific* exclusions tied to specific and *detailed product descriptions*. Product exclusions should be granted broadly for a product, regardless of source, supplier, or country of-origin. Product exclusions should also broadly cover similar products.
- The Department must better define the criteria used to evaluate and grant exclusion requests, including relevant U.S. demand and U.S. capacity considerations and constraints. This is particularly critical for the steel and aluminum consuming needs of the fuel and petrochemical industries, which often rely on highly specialized quality steel and aluminum not available domestically.
- The Department must also improve the procedures used to review and process exclusion requests. The entire process is complicated, confusing, and suffers from needless delays. This has caused a huge backlog of unprocessed exclusion requests. The Department must streamline and improve the exclusion process to ensure timely and efficient consideration and disposition of all exclusion requests as quickly as possible, and certainly within 90 days. Furthermore, it must implement effective procedures to protect confidential information.

- Finally, the Department must clarify several important enforcement issues, including that the effective date of the exclusion is *retroactive* to the date an exclusion request was filed. The Department should also not arbitrarily limit exclusions to one year. It should instead provide a five-year period for exclusions. The Department must also address multiple other enforcement issues, including the specific documentation that must be presented at the time the merchandise is imported.

II. INTRODUCTION

AFPM submits these comments in response to the U.S. Department of Commerce’s (“the Department”) *Interim Final Rule*, which specifies the process and requirements for parties in the United States to submit requests for exclusion from the Section 232 tariffs on imported steel and aluminum.¹

AFPM represents high-tech American manufacturers that supply 96 percent of the refined petroleum products made in the United States, such as gasoline, diesel, jet fuel, as well as petrochemical building blocks that are used in manufacturing supply chains throughout the world. Importantly, and as discussed in more detail below, AFPM’s members maintain manufacturing facilities and operations that are reliant upon high quality and specialized steel and aluminum infrastructure. The association’s members are responsible for the employment of over 3 million Americans in 33 states and contribute nearly \$600 billion to the U.S. economy.

¹ See *Requirements for Submissions Requesting Exclusions from Remedies in Presidential Proclamations Adjusting Imports of Steel and Aluminum*, 83 Fed. Reg. 12106 (March 19, 2018) (“*Interim Final Rule*” or “*IFR*”), available at: <https://www.gpo.gov/fdsys/pkg/FR-2018-03-19/pdf/2018-05761.pdf>

The refineries and petrochemical manufacturing facilities require highly specialized steel and aluminum products to build, maintain, and modernize their facilities. In addition, these facilities rely on midstream infrastructure and complex supply chains to move crude oil, natural gas, Natural Gas Liquids (NGLs), and other feedstocks to their facilities from producing areas in the United States and around the world. These facilities turn raw materials into refined products and petrochemicals, which are then shipped to domestic and international markets where they supply energy or are used as inputs to produce the many products that consumers rely on for their daily lives.

AFPM members are investing billions of dollars in the midstream sector, building, expanding and modernizing the energy infrastructure network needed to safely and efficiently move and store increasing volumes of America's energy resources. This midstream infrastructure requires highly specialized steel and aluminum products of which there is currently a limited domestic supply. To maintain dependability and consistency of competitive feedstocks, it is essential that exclusions include materials used to transport those feedstocks safely and economically.

AFPM has several overarching concerns with the Department's exclusion process as set forth in the *Interim Final Rule*. First, the Department's exclusion process is narrowly focused on the submission of company-specific exclusion requests tied to very specific products. The Department's exclusion process should allow broader product exclusions covering a range of similar products and it should permit all users of the same product category to obtain the exclusion. The Department and the U.S. Trade Representative relied on such a product-based

exclusion process as part of the Section 201 steel safeguard proceedings more than a decade ago.² It should do so again now.

Second, the *procedures* for requesting, approving, and commenting on the exclusion requests are cumbersome, complicated, and ill-defined. The Department must streamline and improve the process. It must also better define the criteria and standards by which it will approve exclusions, and it must take steps to protect proprietary data from public disclosure.

There are other problems that need to be addressed and corrected in the final rule, including the likely complications of U.S. Customs and Border Protection (“CBP”) enforcement and the limited duration of the exclusions once granted. We discuss below our concerns and recommendations.

III. RECOMMENDATIONS FOR IMPROVING THE EXCLUSION PROCESS

A. Product Exclusions must not be Company-Specific but Should Apply Broadly to All Products from All Sources Meeting the Exclusion Requirements

The *Interim Final Rule* (“*IFR*”) limits product exclusions “to the individual or organizations that submitted the specific exclusion request, unless the Department approves a broader application of the product-based exclusion[.]” *See IFR* at 12112. The *Exclusion Request Form* requires identification of (1) the country of origin, (2) the country of export, and (3) the manufacturer and supplier of the merchandise sought to be excluded.³ Thus, the *IFR* limits exclusions to specific supply chains tied to individual suppliers in specific countries.

² See Presidential Proclamation 7529, *To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products*, 3 CFR 7529 (March 11, 2002), Section 15 (1) to (8) (“Presidential Proclamation 7529”) available at: <https://www.gpo.gov/fdsys/pkg/CFR-2003-title3-vol1/pdf/CFR-2003-title3-vol1-proc7529.pdf>.

³ See Request for Exclusion from Remedies: Section 232 National Security Investigation of Steel Imports, OMB Control Number: 0694-0139, (“*Exclusion Request Form*,” or “*OMB Form 0694-0139*”) at Box 4.d, available at: <https://www.bis.doc.gov/index.php/forms-documents/steel/2200-exclusion-request-steel/file>.

Such a company-specific exclusion scheme is unduly restrictive, arbitrary, and ignores commercial realities. Under this system, the Department may grant an exclusion for a specific product for some companies/end-users, but unreasonably deny it for others for the identical product. This is arbitrary, particularly if the exemption is based upon “short supply” considerations or a general lack of U.S. availability. A “product” exclusion should be granted for “the product” itself, regardless of supplier or country of origin.

Moreover, individualized product exclusions needlessly complicate the process. Multiple parties will submit duplicative filings for the same product, which multiplies exclusion requests. Indeed, as of May 16, 2018, there have already been more than 8,000 applications for steel exclusion requests and more than 1,600 aluminum exclusion requests, many for identical products).⁴ This increases the burden on requesters and the Department, and creates needless enforcement and compliance issues at the border, as suppliers, importers, and end-users must determine how to monitor, segregate, track, and report all such supply chain details to CBP at the time of entry.

Product exclusions should be broadly considered and granted on a product-specific basis, regardless of source, manufacturer, country-of-origin, or supply chain. The Department should use an exclusion process similar to the one used during the Section 201 safeguard measures on imported steel in 2002.⁵ Exclusion requests were not tied to specific supply chains,

⁴ See the Bureau of Industry and Security Exclusion Requests for Steel Imports, *Docket Number BIS-2018-0006*, available at: <https://www.regulations.gov/docket?D=BIS-2018-0006>; See the Bureau of Industry and Security Exclusion Requests for Aluminum Imports, *Docket Number BIS-2018-0002*, available at: <https://www.regulations.gov/docket?D=BIS-2018-0002>. Note that these are actual exclusion requests filed. There have been additional “comments” filed as well.

⁵ The Department reviewed requests from companies to determine whether to exclude specific products from the safeguard provision on steel imports. The government received approximately 1,200 requests for certain steel products to be excluded during the first round of the exclusion request process, and it approved about 700 of them. See, U.S. International Trade Commission, *Harmonized Tariff Schedule (2003) U.S. Notes*, pages 44 – 148, available at: <https://www.usitc.gov/tata/hts/archive/0310/0310c99.pdf>; and the fact sheet is available at:

manufacturers, or countries. Requests were submitted by any interested party for a specific product. The request also covered specific merchandise within the 10-digit HTSUS code.⁶ The exclusion thus applied to all sources as a blanket exclusion regardless of country of origin, importer, supplier, or supply chain.

B. Product Exclusions Must not be Limited to Overly Specific Product Characteristics but Should Cover Broad Categories of Similar Products

The *IFR* also narrowly limits product exclusions to very specific, hyper-technical product criteria, including “chemistry by percentage breakdown” and other undefined “critical” dimensions. *See IFR* at 12110. The Exclusion Form specifies that a separate exclusion form must be submitted on each distinct type and dimension of the product to be imported, and it further notes that dimensional information may not include a “range of products and/or sizes.” *See OMB Form 0694-0139* at Introduction and Box 3.b.⁷

Thus, requesters may not submit a single exclusion request covering very similar products. They must instead submit multiple requests even for very similar products. This approach again is not feasible, as exclusions may be granted for some products but arbitrarily denied for other very similar products with no meaningful commercial distinction. Such narrow product exclusions are particularly problematic in the refining and petrochemical manufacturing

http://lobby.la.psu.edu/_107th/097_Steel_Safeguard/Agency_Activities/USTR/USTR_Commerce_Fact_sheet_updated.pdf

⁶ Once granted, the Harmonized Tariff Schedule provisions were modified (with an Annex) to exclude the particular product from the safeguard remedy. *See* Presidential Proclamation 7529, 3 CFR 7529. *See Trade Policy Staff Committee; Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel*, 66 Fed. Reg. 54321, 54322-54323, available at: http://lobby.la.psu.edu/_107th/097_Steel_Safeguard/Agency_Activities/USTR/USTR_information_on_product_exclusion.htm

⁷ Specifically, Box 3.b of *OMB Form 0694-0139* states that “a separate Exclusion Request must be submitted for each for each steel product by physical dimension.” Furthermore, the introduction of *OMB Form 0694-0139* states that a requester must only provide information for “the single type of steel product it requires using a 10-digit HTS code, including its specific dimensions.”

industries. For example, there might be an exclusion request for certain steel pipes or tubes that are identical in all respects, other than diameter differences, but the Department requires separate exclusion requests for such very similar products with similar or identical end uses.⁸

Moreover, requiring such detailed product-specific exclusions further complicates the exclusion process as multiple forms must be filed by parties and reviewed by the Department for very similar products. Basing exclusions on such detailed criteria further compounds the enforcement and compliance issues noted above associated with multiple requests based upon supply chain considerations. This is particularly problematic for CBP enforcement based on detailed product-specific dimensions and chemistry. Also, as noted later in these comments, requiring such detailed reporting of dimensional information and chemistry content publicly reveals sensitive confidential and proprietary information to competitors.

Thus, the Department should clarify in its final rule that a single exclusion form may be submitted for similar products, and it should allow reasonable ranging of chemistry and dimensions (including width, height, length, diameter, thickness, et cetera) based upon standard industry practice. At a minimum, the Department must specifically identify, define, and quantify what it considers to be the so-called “critical” dimensions for various categories of products, including those various types of steel and aluminum supplied to the oil, gas, refining and petrochemical manufacturing industries, and it must do so in a manner that allows exclusions for similar types of products.

⁸ For instance, carbon and alloy pipe and tube products under 7304.59.6000 HTSUS have lengths that range from 5.5 meters to 13.5 meters. However, the requester would need to submit an individual exclusion request form for any pipe and tube product with a different dimension. See product exclusion request forms for 7304.59.6000 HTSUS in docket number BIS-2018-0006, available at: <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&s=7304596000&dc t=N%2BFR%2BPR%2BO&D=BIS-2018-0006>

C. The Department Must Clarify and Define the Relevant Criteria Used to Grant Exclusions Including Demand and Capacity Considerations

The Department does not clearly define the criteria to qualify for exclusion. The *IFR* states only that exclusions will be granted if an article: (1) is not produced in the U.S. in a sufficient and reasonably available amount; (2) is not produced in the U.S. in a satisfactory quality; or (3) for a specific national security consideration. *See IFR* at 12110. The Department must better define these criteria.

In particular, the Department should elaborate how it will determine whether domestic steel or aluminum manufacturers have the capacity to meet demand. This is particularly critical for the steel and aluminum consuming needs of the fuel and petrochemical industries, as well as the oil and gas industry.

There is a significant expansion of petrochemical capacity underway, involving over \$130 billion in investment. This expansion is expected to drive more manufacturing investment in the United States over the next decade. This expansion depends upon a dependable and cost-competitive supply of steel and aluminum. Adding to steel and aluminum costs will certainly place petrochemical companies at a competitive disadvantage when compared to expansions taking place overseas.

The U.S. refining and petrochemical industries rely on midstream infrastructure to support the transportation and storage of their feedstocks and products. As U.S. oil and petrochemical production has increased, thousands of miles of new pipeline have been added. For example, from 2010 to 2016, crude oil and NGL pipeline mileage increased by more than 25 percent. With U.S. oil and NGL production projected to grow by more than 15 percent and 20 percent, respectively, over the next decade, significant new investments are needed to ensure that these resources can be tapped to fuel our growing economy. The International Trade

Commission (“ITC”) has acknowledged that demand for oil and gas-related products has grown in recent years.⁹ The refining and petrochemical manufacturing industries are well positioned to increase production and their use of additional oil and gas, but to do so will require a cost-competitive supply of the materials used in our infrastructure. Unfortunately, the demand for infrastructure supporting oil and gas production is increasing faster than the capacity of domestic producers of specialized steel and aluminum produced in the United States.¹⁰ Therefore, the oil and gas industry cannot rely solely on specialized steel and aluminum produced by the domestic industry.

The Department must consider these important demand trends during the exclusion process. There must be minimum capacity thresholds for accepting any domestic steel and aluminum industry objection. Domestic producers that object based on estimated future capacity steel and aluminum must be required to verify and document such claims. At a minimum, they must submit a detailed timeline and supporting material to substantiate any such assertion that the domestic industry has existing or future capacity to meet demand. Supporting material must include: (1) current and future forecasted plant capacity; (2) a detailed outline of regulatory

⁹ See International Trade Commission decision in *Certain Oil Country Tubular Goods from India, Korea, the Philippines, Taiwan, Thailand, Turkey, Ukraine, and Vietnam*, Investigation Nos. 701-TA-499-500 , 731-TA-1215-1217, and 1219-1223 (Final), September 2014, at II-1.

¹⁰ For example, 5L Pipeline Steel is used for the transmission of oil and gas to any type of collection and distribution facility. 5L pipeline steel is simply not made in the U.S. much anymore, and it is not readily available. Yet this specific type of pipeline steel is often required to be used in specific projects based on specific U.S. Government regulations. In particular, operators of hazardous liquid pipelines, which transport crude oil, petroleum products, and volatile liquids, are subject to the Department of Transportation’s Office of Pipeline Safety regulations. In addition, in accordance with the National Institute of Standards and Technology (NIST) standards, the line pipe industry must comply with pipeline safety procedures. For instance, the U.S. operates over 2.5 million miles of natural gas, petroleum, and volatile liquids. The production of advanced manufacturing of steel and tubular goods surpassed design code regulations and methodologies, thus having the pipeline industry adopted a “Zero Tolerance” policy for pipeline failures.

approvals, including local permitting requirements and estimated approval times to expand an existing facility or construct a new facility; and finally (3) projected construction schedule.

Furthermore, the Department must grant “categorical” exclusions for products it determines are simply not available in the U.S. (*i.e.* a blanket exclusion for the specific product not produced in the U.S.).¹¹ Any domestic industry objections to categorical exclusions must be accompanied by specific evidence demonstrating when domestic capacity is projected to come on line.

The Department must also determine how it will compare the quality of a domestic product to the quality of the imported product—specifically for highly-specialized products. Companies must be allowed to submit information identifying their performance needs, and the Department must compare the performance between both the domestic and imported product. The Department should issue exclusions on the basis of a specific product’s necessity to meet a specific performance standard.

Further, the Department must allow exclusions for lack of domestic availability based on internal quality assurance standards. In doing so, the Department should consider the performance needs of a specific company and whether a company’s corporate approved “quality assurance” standards exceed regulatory or industry approved standards, and the inability of domestic producers to meet those standards.

D. The Department Must Improve Procedures to Review and Process Exclusion Requests

¹¹ This is particularly important in the oil and gas industries, as most deepwater wells use chrome tubing for wellbore integrity and reliability. These specialized products are only produced in Japan. The average deepwater well uses between 10 – 15 different HTS categories of such chrome tubing products. Therefore, blanket categorical exclusions are needed to avoid project delays and minimize cost increases for such projects.

The Department must address the multiple deficiencies in the *process* and *procedures* for considering exclusion requests highlighted below. The entire process has been implemented hastily and inconsistently, leading to considerable complications and confusion. The Department must streamline and improve the process and it must better define the criteria and standards by which it will approve exclusions. We discuss this below.

1. *Backlog of Requests/Timely Release of Information*

There is a huge backlog of exclusion requests already submitted. As noted above, the Department has already received over 8,000 exclusion requests for steel products and over 1,600 exclusion requests for aluminum products, respectively. But, the Department has only officially accepted and “posted” for public comment approximately a third of them.¹² The number of exclusion requests will increase over the next few months, further exacerbating this backlog of unprocessed exclusion requests.

Much of this backlog is attributable to the duplicative filings required by the product-specific and customer-specific filing requirements. The Department can alleviate much of this backlog by adopting AFPM’s suggestion to consider product exclusions based on broader product groupings, regardless of source and supply chain.

This aside, the Department must streamline its process. The Department is simply not equipped to handle the crushing volume of exclusion requests, particularly with the details reported in the forms. The forms must be simplified, and the information requested must be streamlined and grouped (including, as noted above, the dimensional and chemistry information requested in boxes 3.a, 3.b, and 3.c).

¹² Indeed, as of May 16, 2018, the Department has received 8,013 steel exclusion requests, but it has only “posted” 3,263 of them for public comment. Similarly, in the aluminum investigation, the Department has received 1,618 exclusion requests but “posted” for public comment only 262 of them.

The Department must impose stricter and more certain deadlines for its own actions. The *IFR* states only that the Department “normally” will not take more than 90 days to complete its review of the forms and issue its decision. *See IFR* at 12111. Yet, this 90-day clock does not start to run until the form is officially “posted” for public comment, and the *IFR* contains no specific deadline for the Department to “post” the submissions. *See id.*¹³ Without such a deadline, the Department can indefinitely extend the 90-day period. The Department must establish a specific deadline of no more than 14 days to take action to “post” or reject a comment for review. Regardless of the specific 90-day target set by the *IFR* for the Department to act, the Department must endeavor to take final action on all exclusion requests sooner than 90 days if possible, particularly if it has all required information from all parties.

2. *Filing of Objections/Responses Thereto*

The Department must clarify several issues regarding the process for parties to file “objections” to exclusion requests. The *IFR* states only that “any individual or organization in the United States” may file an objection to an exclusion request within 30 days. *IFR* at 12111. The *IFR* says very little else about the nature of or criteria for lodging the objection, other than it should “clearly identify, and provide support for, its opposition” to the exclusion. *Id.* The *OMB Objection Form* provides some additional requirements (including production capabilities in the U.S. relative to the exclusion request production), but it simply allows the objector to assert that it makes “similar” merchandise. *See OMB Objection Form* at 1.a and 3.g.

The *IFR* forms and procedures leave many questions unanswered about the objection process. AFPM requests that the Department clarify or resolve the following issues:

¹³ This is consistent with footnote (7) of Presidential Proclamation 9711 dated March 22, 2018, which notes that any relief granted will be effective as of the date a comment is “posted.” *See Presidential Proclamation Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 13361, (March 22, 2018) at 13364 n. 7 (“Presidential Proclamation 9711”) available at: <https://www.gpo.gov/fdsys/pkg/FR-2018-03-28/pdf/2018-06425.pdf>.

- **Rebuttal Comments** – The *IFR* does not indicate whether requesters may “rebut” or respond to objections. Requesters must have the ability as a matter of procedural due process to respond to objections. The Department should therefore provide requesters a 15-day period to respond to any objections.
- **Failure to Object**: The *IFR* does not indicate what happens if there is no objection filed to a request within 30 days. The Department should make clear in the final rule that the failure of any party to object to an exclusion request should result in automatic approval of the request, and the approval should be issued within 15 days of the end of the 30-day period.
- **Objections based on Ability to Produce--Specificity**: The objector must ensure that it can produce the precise product described in the exclusion form, and not merely similar products.
- **Objection based on future Capacity**: Any objection based on an anticipated capacity coming on line must provide specific evidence of when such capacity will come on line, and that it can and actually will make the exact same product that is the subject of the exclusion.

3. *The Department Must Ensure Transparency and Consistency*

The Department must improve procedures for reviewing, rejecting, and commenting upon exclusion requests. The *IFR* states only that certain exclusion requests “that do not satisfy the reporting requirements . . . will be denied.” *IFR* at 12110. The Department has not clarified exactly how it will make these determinations, or how it will notify the parties of whether and when exclusion forms “satisfy the reporting requirements.”

The Department has been inconsistent and non-transparent in processing and posting the forms. It has also been inconsistent and non-transparent in determining which forms “satisfy” reporting requirements and which forms do not. Some forms are accepted and posted even though they are inconsistent with the Department’s detailed reporting specifications.¹⁴

¹⁴ For example, the Department advises that requesters provide dimensions for a single product and only provide ranges of measurement “when needed” for such product while at the same time requiring that dimensional information must be for a “single product and a single size—not a range of products and sizes (*e.g.*, 19mm da.

The Department must adopt objective and transparent standards and guidelines for completing and submitting the forms and curing deficiencies when refileing the forms. The Department should summarize and post on its web page all deficiencies applicable to specific filings, and it should integrate and incorporate those into official publications to provide guidance to all parties as to the types of deficiencies that will lead to the denial of an exclusion request. A good starting point would be to develop and post a list of specific filing “guidelines” and “frequently asked questions.”

4. *The Department Must Broaden Eligibility to Request Exclusions*

The *IFR* limits those who are eligible to request exclusions only to certain “individual organizations using steel in business activities . . . in the United States.” *IFR* at 12110. This definition excludes foreign producers and exporters of steel and aluminum from filing exclusion requests. The Department should allow all affected foreign producers and/or exporters of steel and aluminum to prepare and submit exclusion requests for their own merchandise. The producers and exporters of steel and aluminum often have the most detailed information about the merchandise for which an exclusion is requested, including chemistry, standards, dimensions, availability, quantities, etc. Foreign producers and exporters of steel and aluminum must often be consulted for this information by U.S. importers and end-users. Allowing such foreign producers and exporters to submit exclusion requests on their own behalf will streamline the process. This would be consistent with the Section 201 exclusion process, which allowed foreign producers to seek exclusions.

Rebar—not 19, 22, 25, and 29mm). *See OMB Form 0694-0139* at Introduction and Box 3.b. The Department has already “posted” requests with dimension ranges that are larger than the ranges exemplified in Box 3.b. In one instance the Department “posted” a request for aluminum alloyed plate with a thickness between 7mm to 102mm, and width between 1219mm – 1537mm. *See Request for Exclusion from Remedies Section 232 Security Investigation of Aluminum Imports, Mendel Metals- Plate HTS 7606123030, Docket Number BIS-2018-0002-0020*, available at: <https://www.regulations.gov/document?D=BIS-2018-0002-0020>.

In addition, the Department should also allow other interested parties representing the interests of domestic end-users of steel and aluminum to file exclusion requests. Specifically, the Department should allow trade associations representing domestic end-users to prepare and submit exclusion requests on behalf of its members. This would allow certain users to coordinate similar exclusion requests, thereby alleviating some of the duplicative filings. Allowing trade associations to file exclusion requests could also save time and resources for smaller end-users.

5. *The Department Must Clarify Reporting of Data “Ranges”*

The Department must clarify confusing and inconsistent aspects of its exclusion forms. In particular, the forms are vague and contradictory regarding dimensional and other such “ranges” for specific products. Box 2.j specifically states that certain types of “ranges” are “allowed,” and any such “range” used must be defined based on “end points in the range.” *See OMB Form 0694-0139 at Box 2.j.*¹⁵ However, the form also confusingly states that dimensional information must only be provided for each “single” product and “single size,” and such information must not include “a range of products or sizes.” *See id* at Box 3.b.

The Department must clarify what it means regarding the permissible use of ranges. It should do so with specific examples, including illustrative examples clearly demonstrating the outer bounds of any impermissible range for each such physical dimension (*e.g.*, width range generally may not exceed 100 mm; thickness range may not exceed 50 mm, etc.).

6. *The Department Must Protect Confidential Data*

¹⁵ The form itself also specifically requires the reporting of various “Minimum” and “Maximum” percentages for chemistry content, dimensions (*i.e.* width, thickness, height, length), and mechanical properties (*i.e.*, tensile strength, yield strength, ductility, etc.). *See id.* at Boxes 3.a, 3.b, and 3.c.

The exclusion process fails to protect confidential business information, which is valuable intellectual property. The *IFR* states that all exclusion requests and objections will be made available for public inspection and copying. *See IFR* at 12110. While companies may indicate on the exclusion request form that they have relevant proprietary information, neither the *IFR* nor the exclusion request form clearly specifies how a company may provide such confidential business information to the Department without revealing it. Under the current process, those requesting exclusions must choose between disclosing proprietary information to their competitors or submitting incomplete applications that risk rejection.

The Department must provide clear guidance for submitting and protecting proprietary information as part of the exclusion process. It must identify which data points will be protected from public disclosure under FOIA and other legal mechanisms. At a minimum, this must include confidential business information regarding customer-specific proprietary grades, chemistry content, dimensions, tolerances, performance standards, and proprietary end-use applications. It should also include confidential business information about import and sales quantities, and the identities of importers and others in the importation and distribution chain. Disclosure of this information could place domestic fuel and petrochemical manufacturers at a competitive disadvantage by allowing foreign competitors access to this sensitive information and, potentially, our intellectual property. This is particularly problematic given the very detailed nature of the information required to be reported in the forms.

The Department should encourage companies to protect proprietary information through a separate “proprietary” application that will not be disclosed to the public. The Department has much experience (in trade remedy proceedings) in protecting confidential business information through the use of “protective orders.” It should establish a similar process where parties may

submit a “confidential” version of an exclusion request and a separate redacted “public” version which is released to the public at large. This is standard practice for other agencies that are charged with protecting confidential business information (*e.g.*, the U.S. Environmental Protection Agency).

E. The Department Must Take Steps to Clarify and Simplify Enforcement

The *IFR* and the exclusion process raise a host of enforcement issues. This includes questions about the effective date and duration of exclusions, CBP enforcement, and other similar issues.

1. *The Department Must Clarify the Effective Date for Exclusions*

The *IFR* is silent as to the actual effective date of exclusions that may be granted. The Presidential Proclamation states that relief for any granted exclusion request “shall be retroactive to the date the request for exclusion was posted for public comment.”¹⁶

Thus, exclusions (once granted) appear to apply only to imports of a specific product arriving *after* the request was posted for public comment. This means merchandise imported *prior* to the posting of the request will not receive the benefits of the exclusion, even if the exclusion is ultimately granted. This creates huge disadvantages for those seeking and obtaining exclusions because any merchandise on the water (or about to be shipped) remains subject to potential duties until the forms are posted, regardless of eligibility for exclusion. This is particularly problematic given the huge backlog of exclusion requests (as already noted above) and the incredibly long time that it is taking for the Department to review and post

¹⁶ See Presidential Proclamation 9711, 83 Fed. Reg. 13361, at 13364 n. 7.

exclusion requests.¹⁷ The Department’s actions are nullifying exclusions for many interested parties during the approval process.

The Department must take action to “post” all forms as soon as possible. Forms should be “posted” for public review immediately—indeed as soon as they are filed. This way the parties will receive the benefit of an exclusion request as soon as possible.¹⁸

Regardless, the Department should take whatever actions are necessary in implementing any final rule to make the effective date retroactive to the date a party *filed* its forms. Also, the Department should take additional actions to make any exclusion filed in the first year of this process retroactive to the date the duties initially took effect (*e.g.*, March 23, 2018). Doing so provides more certainty and fairness, particularly during the first year of this process where there has been such a steep learning curve for both the Department and those submitting requests. Parties should not be unfairly penalized simply because of the time it is taking to review and post comments during the first year when multiple issues are being sorted out by the parties and the Department.

2. *The Department Must Clarify Enforcement of Exclusions*

The *IFR* and exclusion process create many CBP enforcement issues. As noted earlier, the detailed and individualized nature of the exclusion requests (*i.e.*, product specificity and supply chain specificity) virtually ensures that compliance and enforcement of any such exclusion will be complicated. AFPM’s earlier suggestions (*i.e.*, making product exclusions (1) product-specific rather than supply-chain specific and (2) applicable to similar products) would

¹⁷ Indeed, it has already been more than six weeks since this process started, and the Department has still not posted the vast majority of exclusion requests.

¹⁸ Parties could continue to refine or revise data after “posting” the forms if required to do so by the Department. This way the parties would at least receive the benefit of exclusions to which they are otherwise entitled.

alleviate many such CBP enforcement issues. The Department should therefore adopt these revisions to its exclusion process to ensure smoother enforcement by CBP.

In addition, the Department should clarify in any final rule other details to facilitate enforcement by CBP and the parties. This should include, for example, regulatory and other changes to help facilitate enforcement. It should also include identification of documents parties will be expected to provide to CBP to clear merchandise through customs with minimum disruption. This should include, *inter alia*, the following items:

- **Amendments to Entry Forms**: The Department should recommend changes to CBP entry forms to allow easier enforcement. This might include creation of a separate line item on the 7501 form to declare such duties, similar to the way CBP enforces the collection of antidumping and countervailing duties.
- **Entry Documentation**: The Department should also specify in any final rule documents required to be produced at entry by each party in the supply chain to create predictability and to help simplify the process for importing excluded merchandise without delay or duties. This might include, for example, mill test certificates, origin certificates, export licenses, etc.

The Department must clarify in any final rule how it will instruct and assist CBP in enforcing and administering exclusion requests, including whether it will adopt any type of import licensing system.

The Department should also address how it will enforce and administer product exclusions simultaneously with country exemptions, particularly given the current temporary nature of some of the country exemptions. Importantly, if country exemptions are tied to quotas (or any other type of import restriction), the Department must work with the U.S. Trade Representative (USTR) and CBP to ensure it develops a workable solution to simultaneously monitor and enforce product exclusions, country exemptions, and any quotas used to enforce country exemptions.

In particular, AFPM notes that South Korea agreed to rigorous and strict quotas for certain steel imports as part of its country exemption.¹⁹ These strict quotas – which appear to have been reached already for many categories of products during 2018—mean that end-users who rely on specialized or specific types of merchandise from South Korea subject to the quotas (or other countries who may similarly agree to stringent quotas) may be foreclosed completely from obtaining needed materials once the quotas are reached, particularly if those materials are not readily available from domestic sources. The Department should therefore allow interested parties who are unable to obtain such materials from exempted countries and subjected to such quotas to use the Section 232 exclusion process to request an exclusion from the quotas for “short supply” or similar reasons regarding lack of domestic availability. Otherwise, once a quota is reached, and interested party may simply be unable to obtain the needed material.

3. *The Department Must Not Limit Exclusions to One Year*

The *IFR* states that “exclusions will generally be approved for one year.” *See IFR* at 12111. This is simply too short of a time frame, particularly given the time it is taking for the Department to process, review, and approve the forms. The Department should establish longer time frames for an exclusion based on typical lead times to obtain reliable sources of supply, and typical time frames for project development. This is particularly true for projects in the refining and petrochemical manufacturing industries, where project development efforts often take much longer than one year.

¹⁹ *See* Presidential Proclamation 9740 Amending Presidential Proclamation 9711, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 20683 (April 30, 2018), available at: <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-3/>; *See* Presidential Proclamation 9739 Amending Presidential Proclamation 9710, *Adjusting Imports of Aluminum into the United States*, 83 Fed Reg. 20677 (April 30, 2018), available at: <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states-3/>.

In this regard, as noted earlier, certain types of steel products used in the fuel, petrochemical, oil and gas industries are simply not available at all domestically, nor will the domestic industry be able to produce or otherwise supply these types of products within the reasonably foreseeable future, and certainly not within one year.²⁰ Longer exclusion periods are needed to avoid delays and uncertainty in project development and to minimize cost increases that may impact a project. At a minimum, the Department should establish a *five-year* exclusion time frame as the benchmark for any approved exclusion upon a showing of lack of domestic capacity or availability. Doing so provides more certainty for end-users and suppliers.

If domestic steel and aluminum producers believe a five-year exclusion undermines the goal of incentivizing new domestic capacity, then the domestic industry must provide detailed and verifiable evidence of when and how they will generate capacity to supply the excluded products.²¹ But the Department should establish the five-year exemption as the normal benchmark exclusion time period, subject only to a detailed showing that the domestic industry has capacity or can generate that capacity within that time period.

Moreover, creating a five-year exclusion time period reduces the burdens on all parties (including the Department) that would be necessitated to complete, process, and review additional repetitive and duplicative exclusions forms each year if exclusions are limited to one year.

²⁰ This includes, for example, chrome tubing used for wellbore integrity and reliability purposes. These types of products are only produced in Japan, and the average deepwater well uses between 10-15 different types of HTS coded chrome tubing products.

²¹ As noted previously, this includes detailed supporting materials on forecasted plant capacity, outlines of regulatory approvals, construction schedule, etc.

IV. CONCLUSION

AFPM respectfully requests that the Department revise the *IFR* and issue a final rule consistent with the above comments. As made clear in the above comments, there remains much uncertainty in the process and it would be highly beneficial for all interested parties for the Department to clarify the rules and procedures expeditiously to provide more certainty for all parties in this process.

Please contact the undersigned at (202) 457-0480 should you have any questions or need any additional information.

Sincerely,

A handwritten signature in blue ink that reads "Rob Benedict". The signature is written in a cursive style with a large initial "R" and "B".

Rob Benedict
Director, Transportation & Infrastructure