

# **Commerce Department Issues Rules for Applications for Exclusion of Steel and Aluminum Products From Upcoming Tariff – Ten Key Points for Consideration in Filing Requests for, or Objections to Requests for, Exclusion.**

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As has been widely reported, on March 8, 2018 President Trump signed two Presidential Proclamations imposing tariffs on a wide range of aluminum (Presidential Proclamation 9704) and steel (Presidential Proclamation 9705) products to be imported into the United States. The Proclamations added additional duties of 10% and 25%, respectively, on such products. Both such Proclamations, however, created two escape provisions, appealing to two different constituencies. The first escape provision was directed to foreign governments “with which [the United States] ha[s] a security relationship” who believe that their country should be excluded from the effects of the Proclamations altogether. The Proclamations are clear that only the affected governments are authorized to seek national exclusion.

The second escape provision was granted to designated steel or aluminum articles.

The two Presidential Proclamations delegate exclusion authority for steel and aluminum products to the Secretary of Commerce, in consultation with the Secretaries of State, Treasury, Defense, and with the United States Trade Representative, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Affairs, and other unidentified members of the Executive Branch.

On March 19, the Commerce Department published an “interim final rule” governing the process by which such exclusions shall be requested and, as importantly, how objections to the exclusions shall be raised. The processes are largely the same for both classes of goods, but there are some differences in how the goods for which exclusion is requested are to be described, which differ in the two industries. These rules will govern until a final rule is issued. Interested parties may also comment on the interim rules.

We detail below the most important factors governing requests for exclusions from the assessments, or objections to such requests.

1. *Who is responsible for the management of applications to exclude countries from tariff assessments; and who is responsible for managing product exclusions?*

The President has delegated to the United States Trade Representative the management of requests to exclude specific countries from the effects of the Proclamations, and he has delegated to the Secretary of Commerce product-specific exclusions.

2. *Who may file for an exclusion, and who may object to a request for exclusion?*

Both Proclamations state that “only individuals or organizations using [steel or aluminum] articles identified in [the] Presidential Proclamation[s] in business activities ... in the United States may submit exclusion requests.” Presumably this will exclude trade associations and Chambers of Commerce from participation. The governmental instructions here are fairly clear. Foreign producers of steel or aluminum products have no standing to seek exclusion. Only their U.S. customers may apply. Therefore, while foreign producers of such products may not seek exclusion from the tariff assessments, their related U.S. affiliates or unrelated customers may.

3. *How and when are exclusion requests to be made, and what is the length of such requests?*

The regulations provide that a request for exclusion may be made at any time, which makes sense because some time will be required to determine the effect of an assessment on any given product. However, once a request for exclusion is made, any U.S. interest objecting to such a request has 30 days from the date of the posting of the exclusion request on the government website to file its statement of opposition. Both the request to exclude and the objection must be submitted through the governmental web portal, and neither the request for the exclusion nor the opposition to the exclusion can be more than 25 pages in length, inclusive of exhibits but exclusive of the drop down forms that must be completed when requesting the exclusion. An opposition to an exclusion

request must specifically identify the request to which the objection relates. No confidential or classified information can be included in either the request for exclusion or in any statement of opposition. Exclusion requests must be made on a product-specific basis, identified with the degree of specificity required in the 10 digit Harmonized Tariff Schedule subheading number (e.g. a steel product would have to be identified, for example as “galvanized sheet, one half inch in thickness”). Articles falling into more than one HTS designation will require separate requests.

4. What is the standard to be applied in any decision to grant or deny a request for an exclusion?

The standard is fairly narrow. The requestor will have to show that the merchandise is not produced in the United States “in sufficient and reasonably available amount or of a satisfactory quality” to meet U.S. needs, or that the request to exclude articles is “based on specific national security considerations.”

5. Who may benefit from an exclusion?

If an exclusion is granted it will extend only to the person who requested and received the exclusion. So if both Company A and B import a designated article of steel, and Company A has been granted an exclusion, it does not extend to Company B. In such circumstances Company B would be able to file an independent request for exclusion, and the Commerce Department has indicated that it would take the exclusion granted to Company A into consideration, but is not bound by the exclusion in considering the Company B request.

6. May a U.S. company file more than one exclusion request?

Yes. There is nothing in the Interim Regulations that appear to limit the number of exclusion requests that any one party may file. The applicant for exclusion must only demonstrate that, as to any such article, it meets the standard identified in Points 2 and 4, above.

7. If Company A has filed a request for an exclusion and Company B has objected, does Company A have a right to reply to the arguments raised in the objections to exclusion by Company B?

No. The interim regulations speak only of a request for an exclusion and a right of objection. No right of reply is mentioned.

8. What is the length of the expected review period and, if an exclusion is granted, when will the grant of exclusion take effect?

The Commerce Department has said that it will “normally” resolve a request to exclude within 90 days from the date of the request for exclusion. If an exclusion request is granted, it will take effect five days after the date of publication of the exclusion decision on the Commerce Department website.

9. What is the duration of an exclusion, if granted?

Exclusions are expected to be one year in duration.

10. What is the effective Date of the Interim Rule?

March 19, 2018. The Interim Rule is now in effect.

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