

BLOG POST

Steel and Aluminum Tariffs Alert: The Exclusion Process Begins

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The Department of Commerce's (DOC) Bureau of Industry and Security (BIS) today published an interim final rule in the Federal Register and released a new form governing requests to exclude products from the new Section 232 tariffs on imports of steel and aluminum ("the rule"). The rule is effective immediately.

Companies need to consider both commenting on the rule (in order to address problems with the DOC procedures) and submitting exclusion requests.

The exclusion process is inherently public and political, and effective requests will need to integrate legal, communications, and policy tools. The Policy Resolution Group at Bracewell stands ready to assist with both comments on the interim final rule and exclusion requests. Interested companies should contact Josh Zive (Joshua.Zive@Bracewell.com) or Paul Nathanson (Paul.Nathanson@Bracewell.com).

Here are some of the most significant questions and answers surrounding the rule:

Q: Can I comment on the rule?

A: Yes. Comments on the interim final rule are accepted via [regulations.gov](https://www.regulations.gov). Comments must be submitted by May 18, 2018. (Please let us know if you need assistance in commenting on the rule).

Q: Are exclusion requests made public?

A: Yes. All petitions, objections, comments, and other materials related to exclusion requests will be made public. Business confidential information can be redacted, with notation, from BIS forms. It is not clear from the rule or from BIS guidance how this information will be obtained or treated by BIS after submission of the initial requests.

Q: Who can submit exclusion requests?

A: Any individuals or organizations using steel or aluminum articles subject to the new tariffs in “business activities.” BIS provides examples of business activities as “construction, manufacturing, or supplying [steel/aluminum] to users.”

Q: Who can object to exclusion requests?

A: Any individual or organization can file an objection, although it is unclear whether BIS will consider all objections properly filed. The BIS webpage states that “if your organization manufactures steel products in the United States and wishes to object to an existing Exclusion Request, within 30 days of the posting of the related Exclusion Request” (emphasis added, and identical language is included in aluminum guidance). However, neither the objection form nor the published regulations include this type of definitive language. BIS could resolve this ambiguity in subsequent changes to the rule.

Q: Is there a deadline to submit exclusion requests?

A: No, requests can be submitted at any time.

Q: What must be included in an exclusion request?

A: The rule states that requests are limited to 25 total pages (including attachments and exhibits, but not including the DOC form), and states that:

“An exclusion request must specify the business activities in the United States within which the requester is engaged that authorize the individual or organization to submit an exclusion request. The request should clearly identify, and provide support for, the basis upon which the exclusion is sought.”

The BIS webpage further states that:

“For an Exclusion Request to be considered, the exclusion requester must provide factual information on 1) the single type of steel product they require using a 10-digit HTSUS code, including its specific dimension; 2) the quantity of product required (stated in kilograms) under a one-year exclusion; 3) a full description of the properties of the steel product it seeks to import, including chemical composition, dimensions, strength, toughness, ductility, magnetic permeability, surface finish, coatings, and other relevant data.”

Q: Will DOC have a standard for evaluating exclusion requests?

A: The rule states that:

“An exclusion will only be granted if an article is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security consideration.”

It is important to note that the price of alternatives products is not identified as important factor to be considered by BIS.

Q: What happens after submission of a request?

A: The request is posted electronically by BIS at regulations.gov and any person or organization can submit objections, for any reason, for 30 days after the request is posted. BIS will then post a response to the exclusion request that must include specific responses “to any of the objections” to the request. If an exclusion is granted, it will be effective five days after the response to the request is posted at regulations.gov. Approved exclusions will generally be effective for a period of one year.

Q: How long will BIS take to consider requests?

A: BIS states that the review period will “normally not exceed 90 days,” including the time required to adjudicate objections. This standard is described in aspirational, and non-enforceable, language.

Q: Can I rely on an exclusion submitted by another company?

A: No. Exclusions will only apply to the individual or organization that requested the exclusion.

Q: If I pay the higher tariffs while an exclusion request is pending, will I receive a refund if my request is approved?

A: BIS does not address this retroactivity issue, although a number of companies and organizations have raised this concern.