

# CLIENT ALERTS

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## Section 232 Steel and Aluminum Tariff Product Exclusion Process – Should You Reconsider?

1.10.2019

This month marks the one year anniversary of the beginning of President Trump's tariffs wars. His announcement of "safeguard" tariffs on washing machines and solar panels that were largely aimed at goods from China, turned out to be only the first round of tariffs intended to address perceived trade imbalances globally. Section 232 tariffs on steel and aluminum followed shortly thereafter, and then three "tranches" of Section 301 tariffs on \$250B of Chinese goods -- all largely remain in place today with no end in sight. (See Butzel Long Client Alerts dated July 9, June 21, June 15, and April 4, 2018.)

Once the government shutdown ends, however, U.S. companies that import steel or aluminum products subject to the Trump administration tariffs will continue to have the opportunity to apply for product exclusions. (This is an option that is no longer available for products subject to the Section 301 tariffs – See Client Alert dated January 2, 2019.)

The Section 232 steel and aluminum tariff product exclusion process was first implemented in March 2018 to provide limited relief where a product is either not made in the U.S. at all, or the U.S.-made equivalent is not available in sufficient quantity or is not of satisfactory quality. Every company/person seeking an exclusion under the 232 process is required to file a separate application for each and every product. The product exclusion process has been the subject of heavy criticism by would-be users –shortly after details of the process were announced, a Department of Commerce official admitted that the process had been designed to minimize the number of exclusions granted.

Initially, steel and aluminum purchasers were slow to embrace the product exclusion process because of optimism that the tariffs would be temporary and/or lifted for most countries besides China and because of the burdensomeness inherent in

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the process. Nevertheless, users filed over 42,000 exclusion requests for steel products (7500 for aluminum) in 2018, and exclusions have been granted for approximately 15,000 of the 19,000 steel applications (900 of 1100 for aluminum) that have been processed to date.

The Commerce Department has since attempted to improve the process, in large part due to pressure from Congress, first by adding some staff to review and process the applications. In September, the Bureau of Industry and Security (BIS) issued an interim final rule on behalf of Commerce Secretary Wilbur Ross in response to comments about transparency and due process that it had received.

Importantly, the interim final rule added a rebuttal and sur-rebuttal process where objections to an application are received. (Roughly 1/3 of applications are objected to; overwhelmingly by a handful of U.S. metal manufacturers; previously applications to which an objection had been filed were routinely denied.) The interim final rule also attempted to provide some insight into the decision-making process employed by Commerce's Bureau of Industry and Security. (Of particular interest is the participation of the International Trade Administration in the evaluation of U.S. product availability to meet the requestor's product need.)

The interim final rule also introduced an expedited approval path for requests that do not receive any objections in the first month of publication. Additionally, for those of you who have filed applications that have been denied, the interim final rule describes a way to challenge that outcome; i.e., although there is no official "appeal" process, parties can file a new request adding or clarifying information in support of their request. [Note: The Butzel Tariff Team has successfully refiled and obtained exclusions on behalf of clients.]

Late last year Commerce also announced a new portal in 2019 "that will streamline the process for external parties" by allowing them to view all documents for a given request in one place. Potential users were given the opportunity to try out the new portal (on location only) at the BIS offices in Washington DC on two specified days in December 2018. No further information on the results of the testing or when the portal will be in place has been made available.

Bipartisan members of Congress have brought continued pressure on the Commerce Department to further improve the "broken" exclusion process, especially the long delays in processing. The General Accounting Office recently granted a request by three Senators to undertake a review of the process in 2019. The GAO anticipated that it would not have the requisite staff for that review available until sometime after the first quarter.

While the 232 product exclusion process remains challenging, and the chances of getting a positive decision are still uncertain, here are some good reasons to re-consider filing if your products are involved:

- Currently, there is no indication that these tariffs are going away any time soon. Canada, Mexico, Japan, and the EU are each involved in separate discussions with the Trump Administration that may result in some relief eventually.

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- The publication of the Interim Final Rule in September and the decisions that have been released so far have provided us some insight and experience that are valuable in future filings.
- Objections by US manufacturers can be anticipated and proactively dealt with in many situations.
- It is possible to determine how identical or nearly-identical products have been treated.
- An exclusion is generally valid for one year from the date it is granted; and retroactive to the date the application was posted on the Commerce website, which under current timing amounts to an additional 3-6 months. There is also a possibility that the “validity period” could be longer than 12 months, depending on circumstances.

The Butzel Tariff Team is able to assist with all facets of the 232 Product Exclusion Process, including review of treatment of similar products, preparation and filing of applications, monitoring of applications, review of and response to objections and implementation of granted exclusions. Additionally, Butzel attorneys can assist in contacting Congressional representatives regarding filed application status and other related matters.

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