



American Metals Supply Chain Institute Comments on the Section 232 Exclusion Process

The American Metals Supply Chain Institute (“AMSCI”) appreciates the opportunity to comment on the section 232 exclusion process and the administration’s recognition of the need to re-evaluate the responsiveness of the exclusion process to market demand and to other labor-related considerations.¹ This is a matter of utmost importance to AMSCI and its 60 member companies across the metals supply chain. As the only trade association representing the entire supply chain in the United States for steel, aluminum, and other metals, AMSCI holds an essential place in the manufacturing sector. AMSCI’s mission is to support policies and practices that strengthen the metals supply chain, thereby boosting the economy and enhancing the livelihoods of the men and women who earn their living in it. From this unique perspective, we respectfully request that the U.S. Department of Commerce’s Bureau of Industry and Security (“Commerce” or “BIS”) take these comments into consideration when revising the section 232 exclusion process.

I. Introduction and Summary of Comments

Section 232 has had a significant negative impact on AMSCI’s members and on millions of workers in downstream U.S. industries that consume steel and aluminum in the manufacture of value-added products in the United States. While recent refinements to the section 232 exclusion process have been welcome (*i.e.*, General Approved Exclusions), AMSCI believes that additional changes are required to shore up the metals supply chain for U.S. manufacturers and

¹ *Request for Public Comments on the Section 232 Exclusion Process*, 87 Fed. Reg. 7,777 (Dept. Commerce Feb. 10, 2022); *Proclamation 10328 of December 27, 2021, Adjusting Imports of Steel Into the United States*, 87 Fed. Reg.

workers. These changes include (1) the consideration of additional supply chain-focused criteria for granting section 232 exclusion requests, (2) providing greater clarity on U.S. Customs and Border Protection's role in the section 232 exclusion process, and (3) requiring objectors to provide evidence of their ability to manufacture the requested product within the given timeframe. These changes are consistent with the underlying objective of the section 232 process of ensuring that section 232 duties or quotas do not impede importation of goods for which the domestic supply is inadequate to meet demand. Finally, AMSCI urges BIS to resume the administration of the section 232 exclusion process even while it is considering comments on changes to the exclusion process. Further delaying decisions on pending section 232 exclusion requests will only cause greater harm to U.S. companies and the U.S. metals supply chain.

II. Consideration of Additional Criteria for Granting Section 232 Exclusion Requests

Proclamation 10328 directed Commerce to review whether the criteria currently used for making section 232 exclusion request determinations “continues to be . . . appropriate.”² The current criteria used to adjudicate section 232 exclusions are (1) whether the steel is produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality or (2) whether there are specific national security considerations that warrant granting the exclusion. As discussed below, these criteria, as currently implemented by Commerce, have proven inadequate to maintaining an adequate metals supply chain for many U.S. companies.

For example, in November 2020, S&P Global Platts reported that many major U.S. automotive producers were facing a steel supply shortage that could potentially lead to production shutdowns and reductions.³ Similarly, in September 2021, the Wall Street Journal

² *Proclamation 10328 of December 27, 2021, Adjusting Imports of Steel Into the United States*, 87 Fed. Reg. 11, 14-15 (Jan. 3, 2022) at clause 7.

³ Michael Fitzgerald, “US auto manufacturers and others facing steel shortage,” *S&P Global Platts* (Nov. 20, 2020).

reported that major metal consumers were experiencing difficulties procuring all of the steel needed to run their facilities and facing lead times as long as nine months.⁴ These shortages were occurring despite steel prices being at record highs.⁵ Reuters also published a similar report in February 2021 with examples of a U.S. aerospace parts maker having difficulties procuring cold-rolled steel and a U.S. auto and appliance parts manufacturer unable to secure enough hot-rolled steel.⁶

Given these problems with the metals supply chain and steel shortages, which are exacerbated by section 232 duties and quotas, AMSCI requests that Commerce include as an additional criterion a consideration of whether the approval of the steel/aluminum exclusion request will help alleviate supply chain constraints for domestic U.S. manufacturers. Supply chain concerns have been in the news repeatedly over the past year,⁷ and the Biden Administration has gone to great lengths to try to solve some of these issues.⁸ Adding this supply chain criterion to the factors considered in evaluating section 232 exclusion requests would be consistent with the Administration's stated goal of alleviating supply chain pressures that are adversely affecting domestic manufacturing.

In addition, Proclamation 10328 and Commerce's notice requesting comments express a concern about labor-related considerations. If the Administration is taking this concern

⁴ Austen Hufford, "High Steel Prices Have Manufacturers Scrounging for Supplies," *Wall Street Journal* (Sept. 15, 2021).

⁵ *Id.*

⁶ Rajesh Kumar Singh, "U.S. manufacturers grapple with steel shortages, soaring prices," *Reuters* (Feb. 23, 2021).

⁷ Anshu Siripurapu, "What Happened to Supply Chains in 2021?" *Council on Foreign Relations* (Dec. 13, 2021); Peter S. Goodman, "How the Supply Chain Broke, and Why It Won't Be Fixed Anytime Soon," *New York Times* (Oct. 22, 2021).

⁸ "The Biden-Harris Plan to Revitalize American Manufacturing and Secure Critical Supply Chains in 2022," *The White House* (Feb. 24, 2022); "FACT SHEET: Biden-Harris Administration Announces Supply Chain Disruptions Task Force to Address Short-Term Supply Chain Discontinuities," *The White House* (June 8, 2021).

seriously, it should provide an opportunity for applicants for section 232 exclusions to address the potential impact on U.S. employment and wages from the requested section 232 exclusion. The U.S. steel and aluminum consuming industries employ well in excess of 20 million workers in the United States.⁹ The denial of section 232 exclusion requests has led to substantial losses of American jobs and the postponement of expansion plans. For example, as a result of repeated section 232 exclusion request denials, Allegheny Technologies, a U.S. manufacturer headquartered in Pittsburgh, Pennsylvania, with manufacturing operations in Alabama, California, Connecticut, Massachusetts, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Washington, and Wisconsin, was forced to close one of its facilities, laying off around 70 workers,¹⁰ and also restructure its operations, which led to the loss of another 400 employees.¹¹ JSW Steel similarly was forced to postpone indefinitely some of its plans to invest \$500 million and create 500 jobs in Baytown, Texas manufacturing hot-rolled steel plate and large diameter pipes.¹² Overall, studies have estimated that the section 232 tariffs have cost the U.S. economy approximately 75,000 jobs.¹³

Given the U.S. job losses directly attributable to the section 232 exclusion process and related denials, Commerce should consider the potential effects on downstream U.S. employment when evaluating a section 232 exclusion request.

⁹ Kadee Russ and Lydia Cox, “Steel Tariffs and U.S. Jobs Revisited,” *Econofact* (Feb. 6, 2020) (noting that there are more than 12 million jobs in industries that use steel in their production process); Frank Fuhrig, “Quick Reads: A Bad Deal for American Industry” *The Bridge* (Aug. 7, 2020) (noting that there are nearly 10.7 million jobs in major aluminum consuming industries).

¹⁰ Jacob Tierney, “Allegheny Technologies to close Beaver County steel plant, citing Trump’s tariffs,” *TRIB Live* (Mar. 31, 2020).

¹¹ Patricia Sabatini, “ATI restructuring to cost some 180 jobs in the Pittsburgh region,” *Pittsburgh Post-Gazette* (Dec. 2, 2020).

¹² Bryan Gruley and Joe Deaux, “The Biggest Fan of Trump’s Steel Tariffs is Suing Over Them,” *Bloomberg* (Feb. 12, 2020).

¹³ Kadee Russ and Lydia Cox, “Steel Tariffs and U.S. Jobs Revisited,” *Econofact* (Feb. 6, 2020).

III. Clarity Regarding U.S. Customs and Border Protection's Role in the Section 232 Exclusion Process

Although the initial proclamation setting forth the section 232 exclusion process (Proclamation 9705) only described a limited role for CBP,¹⁴ CBP must sign off on any proposed exclusion and once an exclusion has been granted, CBP has the final say on whether any imported product will receive the benefit of an exclusion. Experience has shown that CBP's role in consideration of exclusion requests and implementing approved exclusions has hampered the effectiveness of the exclusion process. Poor communication between Commerce and CBP, administrative red tape, and confusion on the part of CBP over the scope of exclusions have combined to create bureaucratic bottlenecks in the exclusion approval and implementation process.

In certain instances, exclusions that have been approved by Commerce have later been rejected by CBP for use on imports of qualifying merchandise with no clear explanation from CBP of the reason for the denial. In other cases, CBP has rejected usage of the exclusion due to minor differences between the exclusion and the mill test certificate even when those differences have no impact on the correct Harmonized Tariff Schedule ("HTS") classification. For example, there have been cases where the exclusion may list tensile strength, but the mill test certificate does not, and the HTS also does not set a tensile strength. Similarly, there have been cases where the tensile strength or elongation listed on the exclusion request may be slightly different than that recorded on the mill test certificate, but neither are required by the HTS classification. However, CBP has taken the position in these cases that the exclusion does not apply. In other

¹⁴ *Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018) at clause 3.

words, CBP has imposed requirements above and beyond what has been codified by Commerce and there is no process under which the exclusion requestor can remedy the situation.

CBP's role and decision-making in regard to exclusions lacks transparency and procedures and timelines for resolving issues. There is no administrative process or prescribed procedures for parties to follow in instances where Commerce has approved an exclusion, but CBP is failing to honor the exclusion on imports of the excluded merchandise. This has greatly undermined the value and the effectiveness of the exclusion process to the detriment of U.S. steel and aluminum consumers and U.S. manufacturers of value-added steel and aluminum products. Domestic manufacturers have invested time and expense in securing exclusions from Commerce only to be faced with the prospect of further delay and unnecessary litigation. Commerce thus needs to define CBP's role in the process more clearly and work proactively with CBP to ensure an effective and transparent process for implementing approved exclusions at the border. Simply providing a CBP phone number or e-mail address to contact when these situations arise is not sufficient. Commerce needs to be more proactively involved in these discussions when CBP is failing to give effect to an exclusion approved by Commerce and should consider establishing an inter-agency team to address and quickly resolve issues around the implementation of approved exclusions.

IV. Requiring Objectors to Provide Evidence of Ability to Supply the Requested Product

Commerce is seeking comments on the overall transparency of the process and whether to require evidence supporting claims made in an objection.¹⁵ AMSCI fully supports Commerce

¹⁵ *Request for Public Comments on the Section 232 Exclusion Process*, 87 Fed. Reg. 7,777, 7,778 (Dep't Commerce Feb. 10, 2022).

requiring current and objective evidence supporting claims made in an objection or sur-rebuttal filing.

Too often, Commerce has accepted at face value claims by certain domestic steel producers that they are able to supply domestic steel products that are the subject of an exclusion within a certain timeframe, without requiring objective and verifiable documentation.¹⁶ Consequently, Commerce has continued to reject the vast majority of exclusions that receive objections without a full consideration of the facts of the individual exclusion request. In some cases, Commerce has rejected exclusions even when the exclusion requestor submitted substantial documentation and evidence demonstrating that domestic producers are unwilling or unable to supply the specific steel product for which exclusion is being requested. Commerce has also rejected exclusions in situations where the objector either confirmed it was unable to produce the product in less time than it would take to import or failed to respond to the question about how long it would take to supply the product. This has led to costly litigation and settlements that resulted in refunds of millions of dollars in unlawfully denied exclusions.¹⁷ Requiring objectors to provide evidence that they can actually supply the product being requested in less time than it would take to import the material is not an onerous requirement and is consistent with the regulations. Doing so would also reduce the supply chain bottlenecks created when valid exclusion requests are denied and would potentially save Commerce significant administrative resources and litigation costs.

¹⁶ “Decisions on Exclusions from Section 232 Tariffs Were Not Transparent and Based on Incomplete and Inaccurate Information,” *U.S. Department of Commerce, Office of Inspector General, Office of Audit and Evaluation* (Jan. 25, 2021); “Steel and Aluminum Tariffs: Commerce Should Update Public Guidance to Reflect Changes in the Exclusion Process,” *United States Government Accountability Office* (Dec. 2021).

¹⁷ See e.g., *JSW Steel (USA) Inc. v. United States*, CIT Ct. No. 19-133; *Borusan Mannesmann Pipe U.S. Inc. v. United States*, CIT Ct. No. 20-12; *NLMK Indiana, LLC et al v. United States*, CIT Ct. No. 20-50; *North American Interpipe, Inc. v. United States*, CIT Ct. No. 20-3825.

V. Commerce Should Continue to Administer Section 232 Exclusions While It Considers Comments on The Exclusion Process

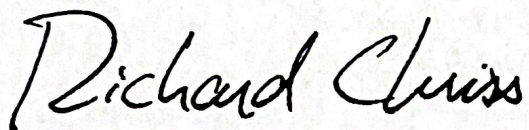
A recent trade press article suggests that Commerce has paused the section 232 exclusion process while it considers comments on the process.¹⁸ According to that article, Commerce has not approved a section 232 exclusion request since December 17, 2021, and the last exclusion denied was on October 29, 2021.¹⁹ AMSCI respectfully requests that Commerce continue to administer the exclusion process and continue to approve section 232 exclusion decisions while it considers revisions to the exclusion process. Failing to consider and approve the thousands of pending section 232 exclusion requests can only serve to exacerbate current supply chain issues. Failing to approve even unopposed exclusion requests, which previously were granted within 30-60 days adds significant uncertainty to the marketplace and forces requestors and importers to have to pay significant section 232 duties that will not be refunded until many months later. The goal of the exclusion process is to permit parties to file exclusion requests and receive approvals in advance of the arrival of the goods so they will not need to pay the section 232 duties upon entry. When the approval of exclusion requests is delayed, parties have no choice but to cancel or delay needed transactions or else pay the section 232 duties upon entry and then when the exclusion is finally approved, request the retroactive application of the exclusions, and seek a refund from CBP via the post summary correction or protest process. This retroactive process places a significant administrative and cash flow burden on the importer and unnecessarily adds to CBP's administrative burden. As Commerce may be aware, the process of receiving retroactive refunds from CBP after Commerce has approved an exclusion has been plagued with

¹⁸ Mara Lee, "BIS Hasn't Granted or Denied a Section 232 Exclusion in Months," *International Trade Today* (Mar. 15, 2022).

¹⁹ *Id.*

very long delays as CBP has thousands of post summary corrections and protests to process. While retroactive approval of exclusions is unavoidable in some cases, it makes no sense to add to the problem by halting the existing exclusion approval process while Commerce considers administrative changes. Instead of creating more potential problems for the metals supply chain, Commerce should continue to administer section 232 exclusion requests as it did prior to December 17, 2021, and issue section 232 decision memoranda on those exclusions that have been decided.

Sincerely,

A handwritten signature in black ink that reads "Richard Chriss". The signature is written in a cursive, flowing style.

Richard Chriss
President
American Metals Supply Chain Institute
March 25, 2022