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As Steel Tariff Becomes Effective, Commerce Issues Rule for Exclusions

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*By: **Catherine D. Little**, **Annie Cook** and **Mandi Moroz***

Building off of President Trump's "Made in America" campaign commitment, the Trump Administration issued a tariff on steel imports on March 8, 2018. The ***proclamation*** finds that the imposition of duties on steel articles is necessary to ensure that steel imports will not threaten national security and, effective March 23, 2018, steel imports will be subject to a twenty-five (25) percent ad valorem tariff, except for imports from Canada and Mexico. The proclamation also authorizes the Commerce Department to grant exclusions from the tariffs of affected parties (1) if the steel at issue is determined not to be produced in the U.S. in a sufficient and reasonably available amount or of a satisfactory quality; or (2) based upon specific national security considerations. The President directed the Commerce Department to promulgate regulations as necessary to set forth the procedures for an exclusion process.

Prior to the effective date of the tariff, the Department of Commerce issued an ***interim final rule (IFR)*** to outline exclusions and the exclusion application process (set forth as a supplement to 15 C.F.R. Part 705). The IFR was issued without notice and comment and became immediately effective when published on March 19, 2018. While the IFR tracks the limited exclusions in the proclamation, much remains unclear with regard to the process and the likelihood of success for industry applicants. An exclusion will only be granted on a case by case basis where an article is not produced in the U.S. in a "sufficient and reasonably available amount," is not produced in the U.S. in a "satisfactory quality," or for a "specific national security consideration." The IFR does not clarify the meaning of these terms or provide the industry with illustrative examples. The ***form*** for filing an exclusion request requires information such as the average annual consumption of the product at issue for the past two years, time involved in delivery, manufacture, and shipment of the product from a foreign suppliers, specifics about the physical properties of the product, and detailed U.S. product availability information (including attempts to qualify a US steel manufacturer or procure the steel from a US manufacturer).

The rule also establishes limits on who can request an exclusion and the scope of any exclusion. Exclusions are limited to individuals or organizations using steel articles in business activities (e.g., construction, manufacturing, or supplying steel to users). Approvals of exclusions will be specific to the individual or entity who submitted the request, unless Commerce approves a broader application of the exclusion to apply to other importers. Objections may be filed by any individual or organization, but Commerce will only consider information directly related to the submitted exclusion request.

The IFR states that “follow-on” requesters to exclusions that are approved will be taken into consideration, but signals that approval will depend on the strength of a requester’s application which may potentially set the stage for inconsistent results. Exclusion requests, objections and comments on the IFR will be public and located in the federal register docket. The rule establishes a 30 day period for individuals or organizations to file objections (from posting of the exclusion request) and a 90 day period for the Department to review and adjudicate any objections to an exclusion request. Responses approving exclusion requests will be effective within 5 days and will generally be approved for one year. Commerce estimates that it will receive tariff exclusion requests from 4,500 applicants. To date, no requests have been posted to the ***federal docket*** associated with steel import exclusions.

The Administration’s January 2017 ***Executive Memorandum*** requiring that all new and repaired pipe be made in the U.S. and the issue of steel tariffs have been the subject of much comment by the pipeline industry. Industry operators and trade groups have argued that such requirements will result in construction delays, project cancellations, higher costs and consumer impacts if they are implemented. There are major constraints on the procurement of adequate quantities of line pipe materials and equipment in the U.S., due to the unavailability of U.S. made pipe at necessary technical specifications and in time to meet market demands and/or regulatory requirements. It remains uncertain whether the Commerce Department’s IFR will resolve any of these concerns, if it will be subject to judicial challenge or whether the exclusion process will prove to be workable for industry.