

Management Alert



The President Giveth and The President Taketh Away: Exemptions and Exclusions to the Trump Steel Tariff

By Anthony LaPlaca

Country-Specific “Exemptions”

Last week Seyfarth Shaw published an [alert](#) concerning the 25% global tariff on imported steel articles, which commenced at midnight on March 23, 2018, and which *would* have applied to the importation of raw steel materials from anywhere other than Canada and Mexico. Twelve hours before the tariff went into effect, the administration granted a temporary reprieve for five additional countries, many of which are major exporters of items covered by the Presidential Proclamation on Adjusting Imports of Steel into the U.S. At least until May 1, 2018, steel articles imported from the European Union, Australia, Brazil, Argentina, and South Korea will be excluded from the tariff.

The new country-specific exemptions come after weeks of intense lobbying by foreign leaders and free trade groups, denouncing the imposition of tariffs as a “race to the bottom” that would be detrimental to the economic interests of both sides.¹ U.S. Trade Representative Robert Lighthizer first publicized the administration’s decision to exempt additional trade allies while testifying before the Senate Finance Committee on March 22.² When pressed by Senator Wyden, Mr. Lighthizer testified that the imposition of tariffs would be “paused,” while these five countries negotiate the terms of existing trade deals with the administration. Under the current configuration, Russia, China, Turkey, and, somewhat surprisingly, Japan are the exporters that will be hit hardest by the tariff.³

Product-Specific “Exclusions”

Whereas tariff exemptions are country-specific and depend on the progress of negotiations with trade allies, tariff *exclusions* correlate to specific *articles* covered by the Proclamation. This alert highlights the important distinction between “articles” covered by the Proclamation and finished products that fall outside of its scope; and explains the process for applying for a tariff exclusion under the interim rule published by the Department of Commerce on March 19, 2018.⁴

1. BBC News, *U.S. Steel Tariffs: Germany’s Merkel Calls for EU Exemption*, Mar. 9, 2018, available at: <http://www.bbc.com/news/world-us-canada-43340203>

2. A link to the 2.5-hour testimony is available online at: <https://www.c-span.org/video/?442748-1/us-trade-representative-lighthizer-testifies-steel-aluminum-tariffs>

3. Michael Birnbaum, *E.U., Brazil, South Korea and Others Get Temporary Exemptions from Trump’s Steel Tariffs*, Washington Post, Mar. 22, 2018, available at: https://www.washingtonpost.com/world/europe/eu-brazil-south-korea-and-others-get-temporary-exemptions-from-trumps-steel-tariffs/2018/03/22/9d0fac5a-2de4-11e8-8dc9-3b51e028b845_story.html?utm_term=.10b5d8b9cbeb

4. 15 C.F.R. § 705 (Mar. 19, 2018)

Steel Articles Versus Finished Products

Steel importers should take note of the critical distinction between *articles* and *finished products*. The Trump tariff applies to a broad list of “steel articles” set forth in the Harmonized Tariff Schedule (HTSUS) that went into effect on March 1, 2018.⁵ By limiting its application to articles, the tariff is aimed toward raw steel materials, the intentional dumping of which is perceived by the administration to undermine the market and prejudice domestic suppliers of cast iron, pig iron, and steel alloys.

Finished steel products are items that are “substantially transformed” prior to their importation into the United States. An article is substantially transformed any time it emerges from a manufacturing process with a new or distinct name, character, or use.⁶ One prime example of a “finished product” is fabricated structural steel and iron angles used for vertical construction projects, which is coded under Section 7308 of the HTSUS.⁷ Section 7308, which is *not* listed in the Trump Proclamation, governs: “Structures (excluding prefabricated buildings of heading 9406) and parts of structures (for example, bridges and bridge sections, lock gates, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, shutters, balustrades, pillars and columns) of iron or steel; plates, rods, angles, shapes, sections, tubes and the like, *prepared for use in structures*, of iron or steel.”⁸ Thus, the manufactured products most typically used for structural steel in vertical construction are not likely subject to the tariff because they have been fully fabricated for their intended use in another country, prior to importation.

Raw steel materials that will be rolled, forged, hot-worked, formed, shaped, welded, or drilled in this country, such as to change the character of the article, are likely subject to the tariff. Such articles include things like steel ingots,⁹ railway and track construction materials,¹⁰ and stainless steel tubes and pipe.¹¹ Builders and manufacturers who rely upon these inputs in the greater production scheme will suffer the brunt of the tariff, especially those companies that already entrenched in fixed-price contracts that lack a cost-escalation clause.¹²

Applying for a Tariff Exclusion: Procedure and Grounds for Exclusion

To alleviate the impact of the Trump steel tariff, importers may simply reshape their procurement strategy and elect to obtain steel, in whole or to a greater extent, from countries that are exempt from the Proclamation. This boils down to a pure business decision that depends on the type, quantity, and relative supply of the item being imported, as well as other considerations such as transportation costs.

One potential avenue for obtaining relief from tariffs is to seek an exclusion with the Department of Commerce’s Bureau of Industry and Security (BIS). On March 19, 2018, Commerce published an Interim Rule, which authorizes “individuals or organizations using steel articles identified in Proclamation 9705 in business activities (e.g., construction, manufacturing, or supplying steel to users) in the United States” to submit a request for exclusion to BIS.¹³ Notably, this interim rule is open to public comments for those who wish to weigh in on the exclusion procedures or suggest changes to the process. The deadline for public comments on the interim rule is May 18, 2018.

5. The official HTSUS in effect as of the date of President Trump’s proclamation can be found online at: <https://www.usitc.gov/tata/hts/index.htm>. The steel articles covered by the Proclamation are in Chapter 72 and include the following 6-digit levels: 7206.10 through 7216:50; 7216.99 through 7301:10; 7302:10; 7302.40 through 7302.90; and 7304.10 through 7306.90.

6. The substantial transformation test originated in the Supreme Court’s decision in *Anheuser-Busch Brewing Ass’n v. United States*, 207 U.S. 556, 562 (1908) (deciding whether imported corks were “articles manufactured or produced in the United States” for purposes of assessing duties). This test is used in a number of contexts to determine the place of manufacturing. *Jacobs Equipment Co. v. United States*, 574 F.2d 1040 (10th Cir. 1978) (assessing whether the act of welding a hoist to a truck constituted “manufacturing” for purpose of excise tax).

7. To identify the proper coding for common items used in structural steel erection (i.e. angles, flanges, and beams), Seyfarth Shaw consulted with Mr. Sid Dickerson, an expert with over 40 years of experience in the structural steel industry, who has unique insight into the coding process under the HTSUS. Mr. Dickerson is the President of Dickerson Enterprises, Inc., which is based in Austin, Texas, and specializes in structural steel fabrication, engineering, estimating, planning, field erection, and project management for industrial, energy, and infrastructure projects nationwide.

8. HTSUS Section 7308.

9. HTSUS Section 7206.

10. HTSUS Section 7302.

11. HTSUS Section 7304.

12. A cost escalation clause, also known as a price adjustment clause, is a contractual mechanism for shifting the risk of foreseeable increases in the cost of labor or material inputs for construction. With respect to steel, a good example of a cost escalation clause is located at Part 252.216-7000 of the Defense Federal Acquisition Regulation Supplement (DFARS), titled “Economic Price Adjustment.”

13. *Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum*, 83 Fed. Reg. 53 (Mar. 19, 2018).

Below is a brief summary of the protocol that contractors and manufacturers must follow to obtain a tariff exclusion from BIS.

How and where are exclusion requests filed?

Exclusion requests must be submitted in electronic form, using standard form BIS-2018-0006, a copy of which is available online.¹⁴ The exclusion request should be submitted to BIS through the federal rulemaking portal.¹⁵ All exclusion requests are accessible by the general public, subject to limited clawback of certain personal identifier information, such as social security numbers and employer identifier numbers, as well as classified information and qualified proprietary or confidential business information.¹⁶

What information must be included with the exclusion request?

The exclusion request must specify the following information: (i) the requester's name, date of submission, and 10-digit HTSUS reporting number for which an exclusion is sought; (ii) the relevant business activities that the requester is engaged in in the United States and which justify its request; and (iii) the grounds supporting the exclusion request. Exclusion requests are limited in length to 25 pages, including all exhibits and attachments.¹⁷

The Interim Rule reiterates the limited grounds for exclusion identified in the Proclamation, stating: "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."¹⁸ While commenters on the interim rule are free to solicit broader substantive bases for exclusions, obtaining more expansive exclusions will be an uphill battle.

What is the deadline to file an exclusion request and when will I receive a decision?

Under the Interim Rule, there is no time limit for submitting exclusion requests.¹⁹ Of course, as a practical matter, companies must plan around their project schedule to allow the administrative process to run its course. Without providing any guarantees, the Interim Rule states that "the review period normally will not exceed 90 days, including adjudication and objections submitted on exclusion requests."²⁰

Who decides my exclusion request?

BIS is the ultimate arbiter of exclusion requests, subject to input from other federal agencies, including the U.S. International Trade Commission and U.S. Customs and Border Protection (CBP).²¹ The Interim Rule provides that BIS will coordinate with CBP to implement any approved exclusion request at the relevant bonded warehouse.

The Interim Rule allows third parties (such as competitors or advocacy groups) to intervene in any exclusion request by filing written objections within 30 days after the exclusion request is posted.²² When deciding the request, BIS will take into consideration arguments in the objections that are "directly related to the submitted exclusion request that is subject of the objection."²³ The final disposition of the request must address the comments set forth in any objection.

14. <https://www.bis.doc.gov/index.php/232-steel>.

15. <http://www.regulations.gov>.

16. Interim Rule, Part 705(b)(3).

17. *Id.* Part 705(e).

18. *Id.* Part 705(c)(5).

19. *Id.* Part 705(c)(4).

20. *Id.* Part 705(f)(3).

21. *Id.*

22. *Id.* Part 705(d)(3) (authorizing objections from "[a]ny individual or organization in the United States.")

23. *Id.* Part 705(d)(1).

When does an approved exclusion request go into effect and what does it cover?

Once approved, an exclusion takes effect within 5 business days of publication in the federal rulemaking portal.²⁴

In the event BIS grants an exclusion request, the exclusion is limited to the individual or organization that submitted the request, unless otherwise indicated. For example, if Company A gets approval to import railway track construction materials from China, Company B is not, per se, exempt from the tariff until it obtains an exclusion of its own. The Interim Rule further provides that “[s]eparate exclusion requests must also be submitted for products falling in more than one 10-digit HTSUS subheading.”²⁵

How long does the exclusion last?

An approved exclusion presumptively lasts for a period of one year, unless otherwise extended by BIS. As written, the Interim Rule does not establish any distinct or separate procedure for renewing an approved exclusion.

Conclusion: What to Expect Next

The 25% tariff on steel articles will remain in limbo for as long as trade negotiations continue between the administration and the major exporters. What was supposed to be a “global” tariff has, to a large extent, been swallowed by exclusions to the general rule. Steel articles from Canada and Mexico are likely exempt from the tariff until the President obtains new NAFTA terms that are to his liking (or makes the tariff permanent if he doesn’t get his way). Although the administration has temporarily exempted the European Union, Australia, Brazil, Argentina, and South Korea through May 1, 2018, it is distinctly possible that it will extend the exemptions indefinitely if it does not reach new trade deals with these countries in the next month. In short, other than China and Russia, it is extremely difficult to predict which exporters are subject to the tariff in the long run.

Contractors who depend on steel imports should first determine whether the imported articles are covered by the relevant sections of the HTSUS. Any steel item that will be substantially transformed in this country will likely be subject to the 25% cost increase. Any item that is a finished product that has undergone all manufacturing process is not likely covered by the Proclamation. Importers should take caution to verify, before estimating and procurement, whether the specific imported items should be coded under the HTSUS sections identified in footnote 5 of this memo.

The Interim Rule governing exclusions to the tariff is not set in stone. Any U.S. citizen or company may electronically submit written comments that will be published in the federal rulemaking database and considered by Commerce in determining the terms of the final rule. For the time being, however, the protocols outlined in this bulletin will govern any exclusion request.

Seyfarth Shaw will be regularly monitoring developments in the tariff scheme as applied to steel and is always available to address questions, provide strategy recommendations, or navigate the process for exclusion requests. [Anthony LaPlaca](#) is an associate in the firm’s Washington, D.C. office. If you have any questions, you can contact Anthony LaPlaca at alaplaca@seyfarth.com or any Seyfarth Construction attorney on our [website](#).

24. *Id.* Part 705(f)(2).

25. *Id.* Part 705(c)(2).

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