



July 1, 2019

MEMORANDUM FOR: Nazak Nikakhtar
Assistant Secretary for Industry and Analysis, Performing the
Non-Exclusive Duties of the Under Secretary of Commerce
for Industry and Security
Bureau of Industry and Security

Gilbert B. Kaplan
Under Secretary of Commerce for International Trade
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FROM: Carol N. Rice
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SUBJECT: *One Year Later—A Look at the Timeliness and Completion Status
of Section 232 Product Exclusion Requests*
Final Memorandum No. OIG-19-017-M

On November 5, 2018, we began an audit of the process for adjudicating product exclusion requests under Section 232 of the Trade Expansion Act of 1962 (the Act), as amended,¹ by the Bureau of Industry and Security (BIS) and the International Trade Administration (ITA).² Our audit objectives are to determine whether (1) BIS and ITA adhere to the processes and procedures in place to review Section 232 product exclusion requests and (2) exclusion request decisions are reached in a consistent and transparent manner.

This memorandum is to inform stakeholders about the number of exclusion requests received, in process, and completed as of March 3, 2019. Based on our initial data analysis, we note the following:

- I. A backlog of exclusion requests has been created during the first year the tariffs have been in effect, primarily due to three factors.
- II. Exclusion requests with objections have lower completion rates than requests without objections.

¹ 19 U.S.C. § 1862 (1962).

² BIS' Office of Technology Evaluation—the focal point within BIS for analyzing trade data, the impact of export controls on U.S. interests, and the capabilities of the U.S. industrial base to support the national defense—is responsible for managing the exclusion request process. ITA's Enforcement and Compliance unit, which enforces U.S. trade remedy laws and ensures compliance with trade agreements negotiated on behalf of U.S. industries, is responsible for evaluating and making recommendations to BIS.

- III. Exclusion requests with objections consistently miss processing deadlines, while more than half of requests with no objections meet deadlines.
- IV. The percentage of product exclusion requests rejected at pre-clearance has declined over time and averaged 15 percent between May and November 2018.

Background

Section 232 of the Act authorizes the President to impose tariffs on imported goods that threaten to impair U.S. national security. According to the Act, the Secretary of Commerce (the Secretary) provides recommendations to the President for action or inaction following a formal investigation.

In April 2017, the Secretary initiated two Section 232 investigations—one each for steel and aluminum imports. Led by BIS, the results were published in January 2018. These investigations were the first ones carried out since 2001.

Based on the Secretary's determinations, in March 2018, the President imposed tariffs of 25 percent and 10 percent on steel and aluminum imports, respectively, from all countries except Canada and Mexico.³ The Act provides no time limits for these tariffs, which are subject to Presidential discretion.

To limit potential negative domestic impacts on U.S. consumers and consuming industries, the President, in the same proclamations, authorized the Secretary to exclude directly affected U.S. parties from paying tariffs on specific steel and aluminum articles—if they request, and are granted, relief through a formal process.

See appendix A for further details about (a) the completion status of exclusion requests, (b) changes to the Section 232 exclusion review process, and (c) the timeline for decisions.

I. A Backlog of Exclusion Requests Has Been Created During the First Year the Tariffs Have Been in Effect, Primarily Due to Three Factors

BIS is responsible for managing the Section 232 product exclusion process. BIS reviews exclusion requests for compliance with its submission requirements during a pre-clearance phase⁴ and renders final decisions after interagency consultation.⁵ Three factors have contributed to the creation of the backlog in the first year of tariffs:

³ The temporary exemption from the steel and aluminum tariffs granted to Canada and Mexico expired on June 1, 2018. Between March 19, 2018, and March 3, 2019, exclusion requests for imports of steel and aluminum from these countries accounted for nearly 9 percent of total requests included in the data that we analyzed. On May 19, 2019, the President issued proclamations that permanently exclude imports of aluminum and steel products from Canada and Mexico from tariffs announced in Proclamations 9704 and 9705, respectively.

⁴ During pre-clearance, BIS reviews exclusion requests to ensure that they meet the requirements specified by the regulations, such as verifying that the form is complete.

⁵ Post-clearance includes a post and comment period, an evaluation and recommendation period, and a decision period.

A. BIS underestimated the number of requests

Prior to the implementation of the exclusion process, BIS estimated it would receive only 4,500 exclusion requests (and 1,500 objections) for both steel and aluminum tariffs. As of March 3, 2019, firms have submitted more than 78,000 exclusion requests (or more than 17 times the estimate). Appendix A includes the completion status of exclusion requests submitted.

B. BIS temporarily suspended exclusion request processing

The Section 232 exclusion request adjudication process has undergone a number of changes since its initial implementation on March 19, 2018 (see appendix A for a summary of major changes). The first rule only provided for the submission of exclusion requests and objections to requests before the decision period. Products admitted into the United States after the exclusion requests' posting date were eligible for a refund on tariffs paid.⁶

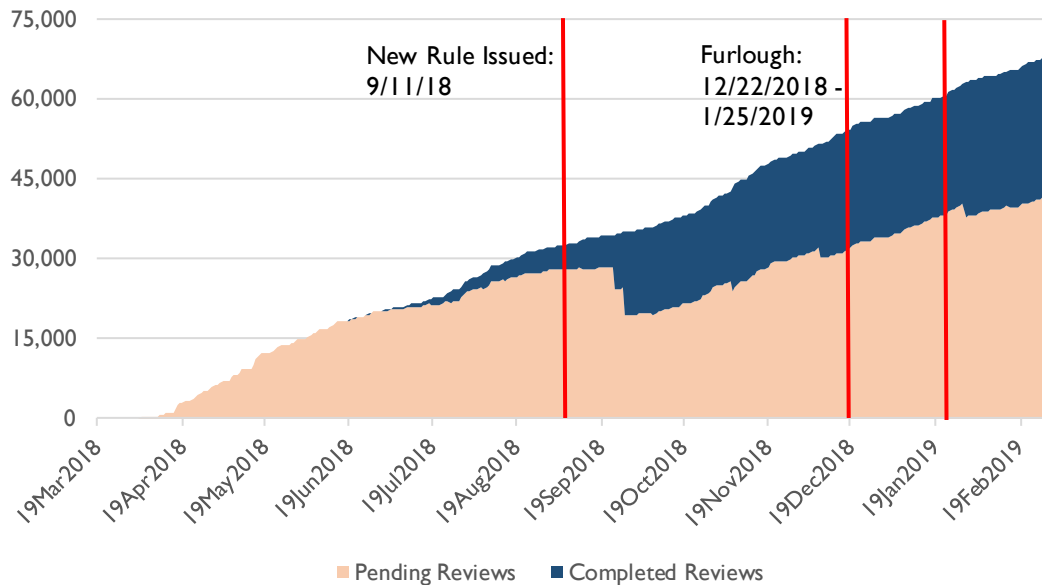
In response to comments received on this rule—and the Department's experience with managing the exclusion process—BIS added a rebuttal and surrebuttal (counter-rebuttal) procedure to make the process more equitable. This change did not take effect until the new interim rule was published in the *Federal Register* on September 11, 2018. However, BIS decided on July 26, 2018, to suspend almost 7,000 requests with objections, so that the comment periods could be reopened to allow for rebuttals and surrebuttals. As a result, the number of pending requests increased.

C. Exclusion requests received during the government furlough were not processed

The total number of pending exclusion requests increased during the government furlough, which occurred between December 22, 2018, and January 25, 2019. During that period, the number of exclusion requests pending grew almost 19 percent (from almost 33,000 to more than 39,000 requests). Figure 1 shows the numbers of exclusion requests pending and completed (the latter signifying that a signed decision memorandum has been issued) between March 19, 2018, and March 3, 2019.

⁶ The posting date is the date BIS uploads an exclusion request to www.regulations.gov for public review, and after which objections to requests may be submitted.

**Figure 1. Exclusion Requests Pending and Completed
(March 19, 2018–March 3, 2019)**



Source: OIG analysis of BIS data

II. Exclusion Requests with Objections Have Lower Completion Rates Than Requests Without Objections

Requests that do not receive objections proceed directly⁷ to the decision period⁸ at BIS; requests that receive objections proceed to ITA for evaluation and recommendation before BIS makes a final decision. Of the more than 50,000 exclusion requests accepted in pre-clearance as of March 3, 2019, there are considerable differences in completion rates and processing times for requests *without* objections (more than 70 percent of requests) versus those *with* objections (less than 30 percent of requests). The majority of exclusion requests *without* objections have been completed.

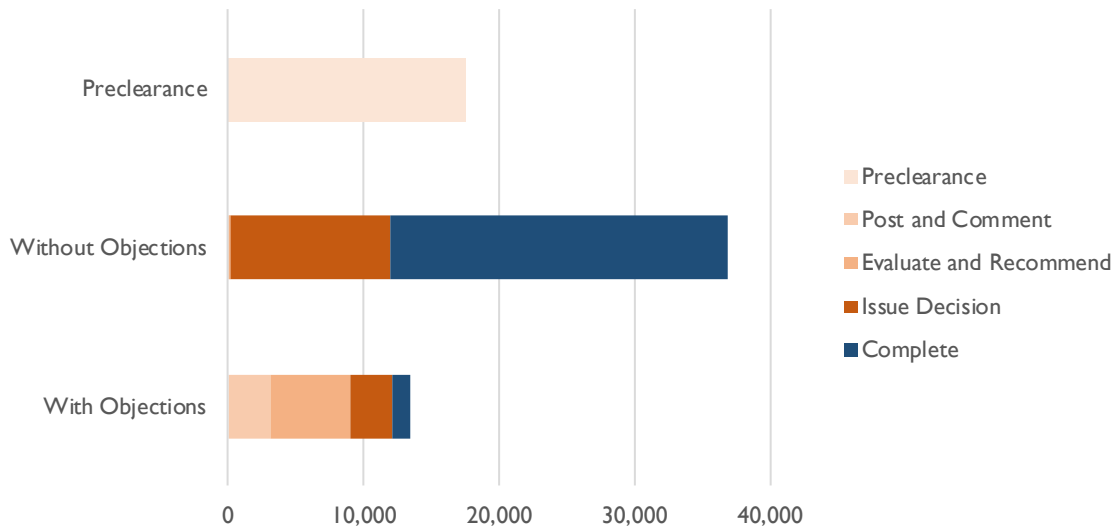
However, the majority of those *with* objections have not been completed. Figure 2 shows that the majority of exclusion requests with objections are still in the post and comment, evaluation and recommendation,⁹ or decision period of the process. By contrast, exclusion requests without objections are either in the decision period or completed.

⁷ On July 31, 2018, ITA ceased evaluating product exclusion requests that did not receive objections; these requests then went directly to the decision period.

⁸ In this phase, BIS renders decisions after considering (1) ITA’s recommendation (if the request received an objection), (2) whether U.S. Customs and Border Protection (CBP) is able to administer the exclusions, and (3) the national security justification for the exclusions based on the submissions and interagency feedback. The potential decisions are approval or denial, based on lack of U.S. availability or national security. BIS may also approve with modifications.

⁹ During this period, ITA is responsible for evaluating and making recommendations to BIS on the disposition of exclusion requests and related objections and rebuttals based on the “demand unmet by domestic production” criterion.

Figure 2. Status of Exclusion Requests by Review Period and Objection Status (as of March 3, 2019)



Source: OIG analysis of BIS data

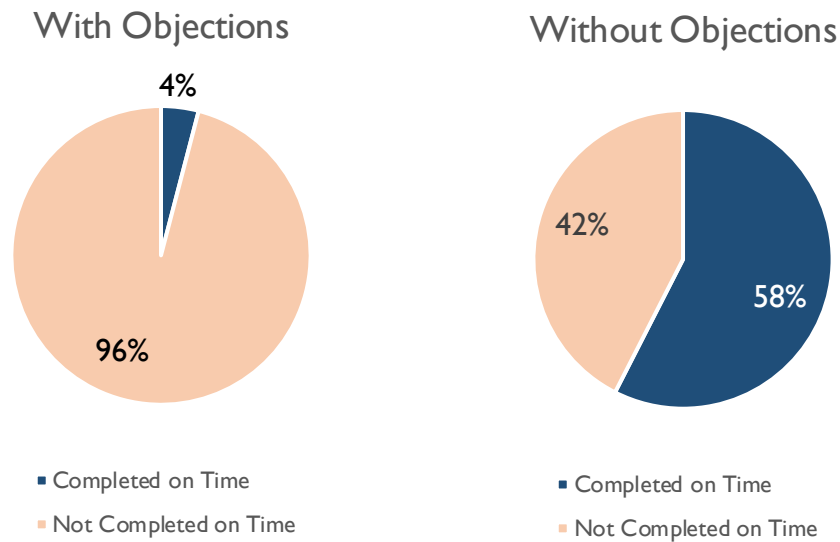
III. Exclusion Requests with Objections Consistently Miss Processing Deadlines, While More Than Half of Requests with No Objections Meet Deadlines

A. The timeliness of exclusion request reviews, based on objections

Of requests submitted between March and October 2018, BIS has completed almost 60 percent without objections within 90 days. On the other hand, most requests with objections are not completed within the maximum 106-day period specified in the September 11, 2018, rule.¹⁰ BIS only issued decisions within 106 days of posting for four percent of exclusion requests with objections from March through October 2018. Figure 3 shows the timeliness of exclusion request decisions by objection status.

¹⁰ To calculate timeliness, we compared the number of days from the time the request was posted for public comment on www.regulations.gov until the day it was completed (or until March 3, 2019, for incomplete requests) with the 90-day regulation for requests without objections and the 106-day regulation for requests with objections. We credited BIS 35 days for requests that were incomplete during the lapse in government appropriations from December 22, 2018, to January 25, 2019. Additionally, we adjusted our calculation to account for the number of days the 7,000 suspended requests were on hold.

Figure 3. Timeliness of Exclusion Request Decisions by Objection Status (March 19–October 31, 2018)



Source: OIG analysis of BIS data

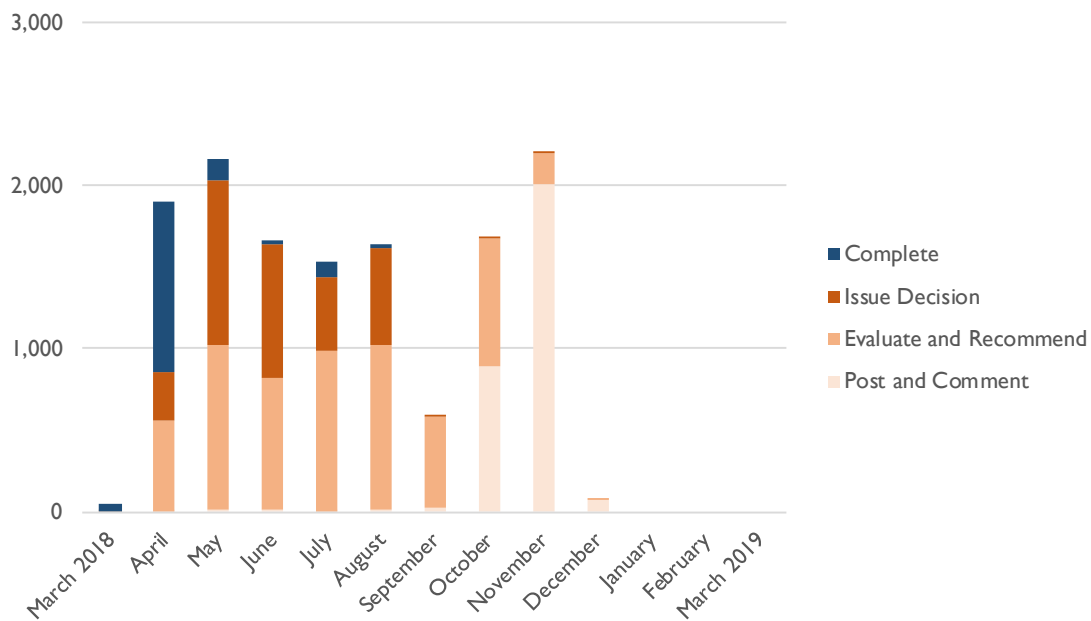
B. The status of exclusion request decisions, based on objections

Overall, most requests submitted on www.regulations.gov between March and September 2018 that did not receive objection(s) have been completed—with a decision memorandum posted to the website. And almost all requests submitted in October and November 2018 are either in the decision period or complete. Most requests submitted from December 2018 through March 3, 2019, are in the pre-clearance phase.

By contrast, BIS has not completed most exclusion requests with objections, as shown in figure 4. BIS has completed more than 50 percent of accepted exclusion requests with objections that were submitted between March and April 2018. For requests submitted between May and September 2018, 95 percent are either in the evaluation and recommendation or decision period of the process. For requests submitted after September 2018, almost none have made it to the decision period. Similar to requests without objections, almost all requests submitted from December 1, 2018, through March 3, 2019, are in the pre-clearance phase and therefore not shown in the figure.¹¹

¹¹ Requests in the pre-clearance phase are not included in figure 4 because firms do not have the opportunity to object to requests until they are finished with pre-clearance and into the post and comment period.

Figure 4. Review Status by Request Submission Month and Period—with Objections (March 19, 2018–March 3, 2019)



Source: OIG analysis of BIS data

IV. The Percentage of Product Exclusion Requests Rejected at Pre-Clearance Has Declined Over Time and Averaged 15 Percent Between May and November 2018

More than 10,000 exclusion requests have been rejected during pre-clearance. In the beginning, specifically during the months of March and April 2018, BIS rejected 27 percent (more than 2,000) of the requests submitted at the pre-clearance phase. Rejections at pre-clearance declined thereafter, averaging 15 percent between May and November 2018. Submissions rejected at the pre-clearance phase can be resubmitted once any deficiencies are corrected.

Next Steps in Our Audit

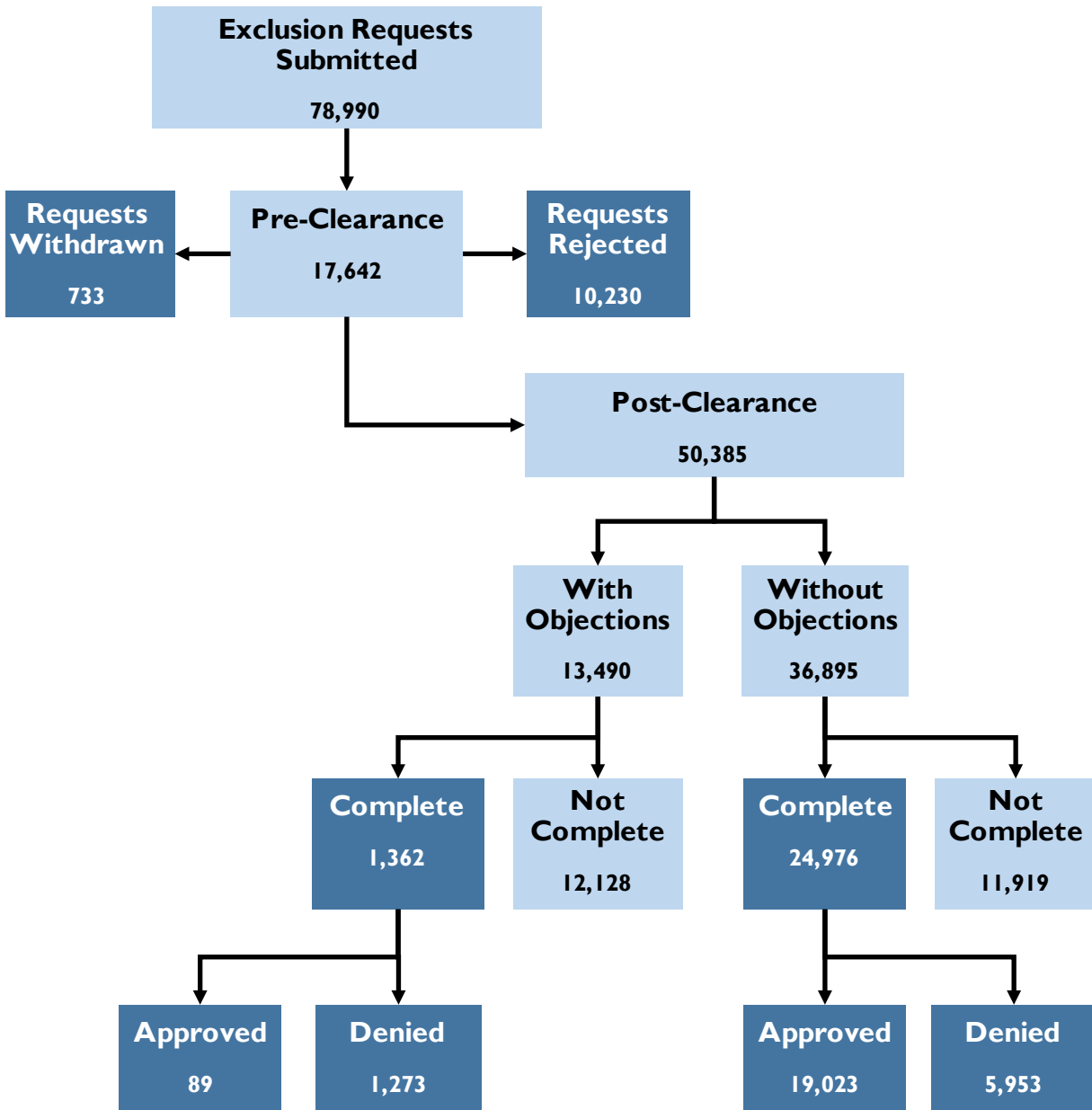
Information in this memorandum will be included in a later report, which will contain recommendations, along with any Departmental actions taken in response to this memorandum. The final report will extend the range of Section 232 data analyzed to June 12, 2019, the last day before which BIS implemented an online portal to process exclusion request submissions. We met with BIS and ITA representatives on June 25, 2019, to discuss both the contents of this memorandum as well as our future audit report. We are not requesting a formal response to this memorandum. This memorandum will be posted on OIG’s website pursuant to section 8M of the Inspector General Act of 1978, as amended.

If you have any questions, please contact me at (202) 482-6020, or Terry Storms, Division Director, at (202) 482-0055.

Appendix A.
Further Details on the Section 232 Exclusion Review Process

Completion status of exclusion requests

**Figure A-I. Completion Status of Exclusion Requests Submitted
 (as of March 3, 2019)**



Source: OIG analysis of BIS data

Changes to the Section 232 exclusion review process

On March 19, 2018, the Department published the Section 232 exclusion process interim rule in the *Federal Register*. Under the rule, exclusion requests are to be granted, “as appropriate,” for the “import of goods not currently available in the United States in a sufficient quantity or satisfactory quality, or for other specific national security reasons.”¹² The rule also provides that parties may submit objections to any exclusion within 30 days after the exclusion request is posted on www.regulations.gov.¹³

In response to public comments and Congressional concerns regarding the efficiency and consistency of the exclusion process, on September 11, 2018, BIS amended the rule governing the Section 232 exclusion process.¹⁴ The most notable changes included the addition of a rebuttal and surrebuttal procedure; more clearly defined criteria for approving or denying exclusion requests; and allowing requesters to seek exclusions to import from countries subject to quantitative limitations (quotas).

Table A-I provides a chronology of the establishment and refinement of the exclusion request process:

Table A-I. Section 232 Exclusion Request Process Highlights

Date	Action
January 11, 2018	Secretary issues Section 232 Report on Steel Imports.
January 17, 2018	Secretary issues Section 232 Report on Aluminum Imports.
March 8, 2018	President issues Proclamations 9704 and 9705, whereby he imposes a 25 percent tariff on steel and 10 percent tariff on aluminum articles, respectively, imported from almost all countries except Canada and Mexico, as well as authorizing an undetermined product exclusion process (effective March 23, 2018).
March 19, 2018	BIS publishes an interim final rule in the <i>Federal Register</i> establishing the process used to adjudicate product-based exclusions as authorized by the President. For approved requests, relief is retroactive to the date the BIS posts the request for relief on www.regulations.gov .
July 26, 2018	BIS suspends reviews of almost 7,000 exclusion requests previously accepted until publication of a new rule implementing a planned rebuttal and surrebuttal process.
July 31, 2018	ITA ceases evaluation and recommendation of product exclusion requests that are without objections, which generally are approved subject to CBP determination that it can administer the exclusion and national security vetting.

¹² DOC BIS, “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 the Filing of Objections Submitted to Exclusion Requests for Steel and Aluminum,” 83 Fed. Reg. 12106, 12109, March 19, 2018.

¹³ *Id.* at 12111.

¹⁴ DOC BIS, “Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum,” 83 Fed. Reg. 46026, September 11, 2018.

Date	Action
August 29, 2018	President issues Proclamation 9777, which authorizes the Secretary to grant relief from any import restrictions on steel, including quotas and additional duties (tariff) previously imposed for which there is a lack of sufficient domestic production of comparable products, or for specific national security-based considerations.
September 11, 2018	BIS publishes an interim rule in the <i>Federal Register</i> that (1) adds a rebuttal and surrebuttal procedure, (2) more clearly defines the criteria for approving and denying exclusion requests, and (3) allows requesters to seek exclusions to imports from countries subject to quotas.
February 11, 2019	BIS revises the timeline of the CBP review process to occur during the pre-clearance phase rather than the decision period.
May 19, 2019	The President issues proclamations that exclude imports of aluminum and steel products from Canada and Mexico from tariffs announced in Proclamations 9704 and 9705, respectively.

Source: OIG analysis of BIS reports, proclamations, and *Federal Register* notices

Timeline for decisions

Exclusion request decisions are made on a product basis (per the 10-digit Harmonized Tariff Schedule of the United States Code) and based on the specific physical characteristics of the product (e.g., dimensions or chemical composition).¹⁵ Requestors submit requests in electronic form at www.regulations.gov, with no timeline for pre-clearance review. However, once BIS accepts an exclusion request, BIS posts the application for public view on www.regulations.gov and the following timeline applies:

1. Public comment period to file an objection to an exclusion request—**30 days**
2. Rebuttal period to respond to an objection (after September 11, 2018)—**7 days**
3. Surrebuttal period to respond to a rebuttal (after September 11, 2018)—**7 days**
4. Evaluation of the request, objections, rebuttals, and surrebuttals—**30 days**
5. Review and decision—**30 days**

According to this timeline, adjudication of exclusion request submissions with objections, rebuttals, and surrebuttals should be completed within 104 days¹⁶—with an additional day each for approving the rebuttals and surrebuttals for a total of 106 days. For exclusion submissions without objection, the March 19, 2018, interim final rule provides that adjudication should be completed within 90 days.¹⁷

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¹⁵ The Harmonized Tariff Schedule of the United States—which provides the applicable tariff rates and statistical categories for all merchandise imported into the United States—is based on the International Harmonized System, the global system of nomenclature that is used to describe most world trade in goods.

¹⁶ 83 Fed. Reg. 46026, 46053, 46060 & 46064.

¹⁷ 83 Fed. Reg. 12106, 12111-12.