
THE GLOBAL TRADE LAW JOURNAL

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Editor's Note: Welcome!

Victoria Prussen Spears

President Biden Creates a National Security Program That Will Impact Outbound U.S. Investments Involving “Countries of Concern”

Shawn B. Cooley, Timothy C. Welch, Nathan Cunningham, Christina Carone, and William Looney

CFIUS Increases Its Scrutiny of Foreign Investment in the United States

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The Importance of Focusing on Antiboycott Enforcement

Jen Fernandez, Andrew Shoyer, and Kayla M. Scott

Foreign Investors Should Consider Treaty Protections When Structuring Their Investments Abroad

Michael G. Jacobson, Maria A. Arboleda, and Orlando F. Cabrera C.

Sanctions and Export Controls Voluntary Disclosures: Key Takeaways from Federal Tri-Seal Compliance Note

David Mortlock, Britt Mosman, Michael J. Gottlieb, William J. Stellmach, and Joshua Nelson

U.S. Agencies Update Nuclear-Related Export Controls—Including for China

Barbara D. Linney, Melissa B. Mannino, Lana Muranovic, and James K. Perry

BIS Proposes Changes to Section 232 Exclusion Process

Leah Scarpelli, Mario A. Torrico, and David R. Hamill

A Recent (Non-Uyghur) Forced Labor Preclusion Federal Circuit Decision and Its Potential Impact on U.S. Exporters and Importers

David P. Glick, Robert M. Glick, Joseph K. Kutner, and Heather Hedges

Unfulfilled Commitments on Social Issues Create Risks for Your Company

David A. Johnson and Keran Bhat

European Union Trade Sanctions on Russia

Konstantin Bureiko, Alan Kartashkin, Jane Shvets, and Anastasia Magia

New Dutch Export Controls on Advanced Semiconductor Manufacturing Equipment

Lourdes Catrain, Stephanie Seeuws, Matthijs Dols, and Y. Alp Ozturk

African Forum on Business and Human Rights: Here's What Companies Need to Know

Daniel Feldman, Mosa Mkhize, and Hannah Edmonds-Camara

The Evaluation of the German FDI Regime—Cornerstones of Potential Revisions Revealed

Mirko von Bieberstein and Ingrid Schmitt

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- 7 Editor’s Note: Welcome!**
Victoria Prussen Spears
- 11 President Biden Creates a National Security Program That Will Impact Outbound U.S. Investments Involving “Countries of Concern”**
Shawn B. Cooley, Timothy C. Welch, Nathan Cunningham, Christina Carone, and William Looney
- 19 CFIUS Increases Its Scrutiny of Foreign Investment in the United States**
Geoffrey M. Goodale and Lauren E. Wyszomierski
- 27 The Importance of Focusing on Antiboycott Enforcement**
Jen Fernandez, Andrew Shoyer, and Kayla M. Scott
- 33 Foreign Investors Should Consider Treaty Protections When Structuring Their Investments Abroad**
Michael G. Jacobson, Maria A. Arboleda, and Orlando F. Cabrera C.
- 41 Sanctions and Export Controls Voluntary Disclosures: Key Takeaways from Federal Tri-Seal Compliance Note**
David Mortlock, Britt Mosman, Michael J. Gottlieb, William J. Stellmach, and Joshua Nelson
- 47 U.S. Agencies Update Nuclear-Related Export Controls—Including for China**
Barbara D. Linney, Melissa B. Mannino, Lana Muranovic, and James K. Perry
- 51 BIS Proposes Changes to Section 232 Exclusion Process**
Leah Scarpelli, Mario A. Torrico, and David R. Hamill
- 55 A Recent (Non-Uyghur Forced Labor Prevention Act) Federal Circuit Decision and Its Potential Impact on UFLPA Enforcement Efforts**
Ted Murphy, Aaron M. Applebaum, Elyssa R. Kutner, and Heather Hedges
- 59 How Misaligned Commitments on Social Issues Create Risks for Your Company**
Tanya C. Nesbitt and Kerem Bilge

- 65 European Union Trade Sanctions on Russia**
Konstantin Bureiko, Alan Kartashkin, Jane Shvets, and Anastasia Magid
- 79 New Dutch Export Controls on Advanced Semiconductor Manufacturing Equipment**
Lourdes Catrain, Stephanie Seeuws, Matthijs Dols, and Y. Alp Ozturk
- 83 African Forum on Business and Human Rights: Here's What Companies Need to Know**
Daniel Feldman, Mosa Mkhize, and Hannah Edmonds-Camara
- 89 The Evaluation of the German FDI Regime—Cornerstones of Potential Revisions Revealed**
Mirko von Bieberstein and Lukas Nigl

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BIS Proposes Changes to Section 232 Exclusion Process

Leah Scarpelli, Mario A. Torrico, and David R. Hamill*

In this article, the authors discuss key changes to the Section 232 exclusion process proposed by the U.S. Department of Commerce.

The Bureau of Industry and Security (BIS) of the U.S. Department of Commerce (DOC) issued a proposed rule to revise certain aspects of the process to request exclusions from the Section 232 steel and aluminum tariffs.

Some of the key changes in the proposed rule¹ include:

1. A modification of the criteria for General Approved Exclusions (GAEs),
2. The creation of a General Denied Exclusions (GDEs) process,
3. Modification of certification language and requirement for evidence of sourcing attempts in exclusion requests, and
4. Introduction of new certification language on objection forms.

This article discusses key changes to the Section 232 exclusion process proposed by the BIS. Some of the proposed changes will make it easier to obtain a 232 exclusion, while others, such as the certification requirements, will make obtaining 232 exclusions more challenging.

Key Proposed Changes

Modification of the Criteria for GAEs

GAEs are a process by which all products classified under a specific Harmonized Tariff Schedule of the United States (HTSUS) subheadings are excluded from the Section 232 quota limits or additional tariffs. Under the existing rule, the criteria for determining if an HTSUS code qualifies for GAE-treatment is whether

the code received no objections. Because the process was prone to abuse through the submission of frivolous objections (which, in effect, made those HTSUS ineligible for GAE treatment), the DOC is proposing to modify this criterion.

Instead, the new rule proposes to focus on the number of substantiated objections. The DOC has not made clear what type of evidence will be required to substantiate an objection. According to the DOC, low rates of successful objections for 10-digit HTSUS subheadings indicate that the U.S. industry does not produce the products or subproducts in question in a sufficient and reasonably available amount or of a satisfactory quality.

Creation of GDE Process

The BIS next proposes the creation of a GDE process—similar to the GAE process—that would identify steel and aluminum articles for which no request for an exclusion from the 232 tariffs would be granted or considered by the BIS.

The BIS proposed the imposition of a GDE process on certain HTSUS subheadings if, among other things, there are very high rates of successful substantiated objections. Similar to the GAE process, the proposed rule seeks to deter parties from making frivolous objections that would unfairly target certain HTSUS subheadings for GDE-treatment.

New GDEs will be identified following an analysis of substantiated objections and exclusion requests that have generally been consistently denied. As with the process for GAEs, the DOC has not identified its criteria for substantiating an objection.

Also similar to GAEs, the BIS would periodically publish notices in the Federal Register soliciting public comments on potential removals, revisions, or additions of GDEs. The BIS has not yet identified any specific HTSUS subheadings that would be subject to GDE treatment.

Modification of Certification Language and Evidence of “Sourcing Attempts” in Exclusion Requests

One of the most notable changes proposed by BIS is the introduction of new certification requirements for exclusion requests. Namely, requestors would be required to certify that:

- (1) They have first made reasonable efforts to source their product from the United States, and
- (2) If unsuccessful, that they made reasonable efforts to source their product from an “identified partnered country”—i.e., Argentina, Australia, Brazil, Canada, the European Union, Japan, Mexico, South Korea, and the United Kingdom.

The new certification requirements would be in addition to current volume certification requirements, which mandate requesters to certify that they “expect to consume, sell, or otherwise use the total volume of product . . . within the next calendar year.”

In addition, the proposed rule would require requesters to file evidence of their certified “sourcing attempts.” Any such sourcing attempts would need to have been made within 12 months from the date of the submission of the request.

This change would make the submission of exclusion requests more burdensome for requesters, particularly for products that are already known to not be produced or otherwise available in the United States.

Introduction of New Certification Language on Objection Forms

The proposed rule also seeks to introduce certification language to further ensure objectors can supply comparable quality and quantity steel or aluminum and make it “immediately available to requestors.” Currently, the term “immediately available” is defined as aluminum or steel that can be manufactured either “within eight weeks” from the receipt of a binding purchase order, or, if that is not possible, by a date earlier than the time required for the requester to obtain the entire quantity of the product from its foreign supplier.

In addition, objectors would need to file evidence that it has commercially sold the same product as that which is being requested within the past 12 months, or evidence that it has engaged in sales discussions with this requesting company or another company requesting the same product within the past 12 months.

If this evidence is not provided with the objection submission, the objection will be rejected.

Notes

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1. <https://www.federalregister.gov/documents/2023/08/28/2023-18328/revisions-of-the-section-232-steel-and-aluminum-tariff-exclusions-process>.