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United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

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April 19, 2018

The Honorable Wilbur L. Ross
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Improvements to the Process for Product Exclusions from Section 232 Tariffs on Imported Articles of Steel and Aluminum

Dear Secretary Ross:

We write to urge certain improvements to the process that the Department of Commerce (“DOC”) has instated for product exclusions from the tariffs imposed on imported articles of steel and aluminum under Section 232 of the Trade Expansion Act of 1962 and Proclamations 9704 and 9705 of March 8, 2018, as amended. We are concerned that, to date, the product exclusion process has lacked (i) basic due process and procedural fairness for stakeholders, especially American small businesses, and (ii) appropriate mechanisms to prevent the Section 232 tariffs and product exclusion process from being abused for anticompetitive purposes.

On March 19, 2018, DOC published in the Federal Register an interim final rule setting forth processes for parties to submit requests for product exclusions from the Section 232 tariffs and to submit objections to such requests. Invoking “emergency processing” authority, the interim final rule indicates that DOC bypassed the clearance procedures normally required for collections of information. Congress enacted those clearance procedures for important purposes — including to minimize the paperwork burden for individuals and small businesses and to strengthen decisionmaking — and the fact that DOC opted not to adhere to those requirements heightens the risk that due process and procedural fairness will be compromised.

Pursuant to the interim final rule, DOC published forms for submitting product exclusion requests and objections. Those forms require petitioners and objectors alike to submit a substantial amount of information at a minute level of detail, such as “a full description of the properties of the steel [or aluminum] product [the petitioner] seeks to import, including chemical composition, dimensions, strength, toughness, ductility, magnetic permeability, surface finish, coatings” and “other relevant data” and, for objections, “a full technical description of the properties of the product [the objector] manufactures relative to the specifications provided in the Exclusion Request.” By our count, the forms collect information on more than 70 attributes of each steel or aluminum product, with an additional form apparently required in every instance in which a single attribute differs between products. By design, this process increases the burden on businesses that purchase or produce products with even minor variations. Furthermore, the process appears to bar small businesses from relying on trade associations to consolidate product

information and make submissions on behalf of multiple businesses.

With the Section 232 tariffs already in effect as of March 23, 2018, the request and objection forms force petitioners and objectors to choose between expediting their submissions, which can be denied for any inaccurate or incomplete information, and enduring unwarranted tariff charges or product exclusions for lengthier periods of time. Moreover, although the interim final rule authorizes DOC to “approve[] a broader application of [a] product based exclusion request to apply to additional importers,” DOC has not described the circumstances in which it will approve a broader product exclusion or how importers may request such an exclusion. This ambiguity is especially problematic for small businesses that otherwise could consolidate their requests or objections efficiently.

Several additional aspects of due process and procedural fairness in the product exclusion process appear to suffer from a lack of clarity. DOC has not (i) established a clear process for protecting business proprietary information or indicated how it intends to reconcile the need to protect such information with the interest in allowing parties to address adverse evidence; (ii) indicated how DOC will ensure that parties are given an opportunity to address any ex parte communications that DOC may have with other parties to a proceeding; (iii) specified how DOC intends to address purchasers and producers of customized articles for which the required information may be unavailable until the article has been purchased; (iv) whether and how DOC will inform petitioners and objectors that it has issued a determination; (v) whether and how DOC will communicate the dispositive reasons for its determinations; and (vi) whether and how DOC intends to ensure it issues consistent determinations across similarly-situated petitioners and objectors.

Finally, while Proclamations 9710 and 9711 of March 22, 2018 provided for approved product exclusions to be retroactive, this relief is available only as of the date when DOC posted the corresponding exclusion request for public comment. As of April 18, 2018, petitioners had submitted more than 3,800 requests for steel product exclusions, yet DOC had posted fewer than 100 of those requests. The significant delays in publicly posting product exclusion requests risk serious and permanent financial harm to many petitioners that, even in DOC’s judgment, should not be subject to the Section 232 tariffs. More generally, it is critical that DOC dedicate the resources necessary to complete the product exclusions process expeditiously.

The competition policy implications of the Section 232 tariffs and the petitioner- and product-specific exclusion process raise concerns as well, especially for niche products available from only a small number of suppliers globally. We request that you coordinate with the Department of Justice and Federal Trade Commission to ensure that effective mechanisms are in place to deter and to redress any anticompetitive conduct in the market for products that are subject to the Section 232 tariffs and product exclusion process. Such mechanisms should include readily available channels for the public to report perceived anticompetitive behavior in respect of such products and prompt review of those reports by the appropriate authorities.

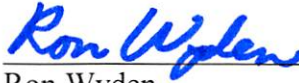
Given the public interest in an expedient product exclusion process that offers due process and procedural fairness, we urge you to implement improvements to each area of concern outlined above as soon as practicable. We stand ready to assist as appropriate and request, within two weeks, your response to our concerns and a description of your plans and

progress to address those concerns.

Sincerely,



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Chairman
Senate Committee on Finance



Ron Wyden
Ranking Member
Senate Committee on Finance

CC: The Honorable Jeff Sessions
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