Decisions on Exclusions from Section 232 Tariffs Were Not Transparent and Based on Incomplete and Inaccurate Information

FINAL REPORT NO. OIG-21-020-A
JANUARY 25, 2021



U.S. Department of Commerce
Office of Inspector General
Office of Audit and Evaluation

UNITED STATES DEPARTMENT OF COMMERCE
Office of Inspector General
Washington, D.C. 20230

January 25, 2021

MEMORANDUM FOR: Jeremy Pelter
Performing the non-exclusive functions and duties of the
Under Secretary of Commerce for Industry and Security
Bureau of Industry and Security

Diane Farrell
Acting Deputy Under Secretary of Commerce for
International Trade
International Trade Administration

FROM: Mark H. Zabarsky
Principal Assistant Inspector General for Audit and Evaluation

SUBJECT: *Decisions on Exclusions from Section 232 Tariffs Were Not Transparent and Based on Incomplete and Inaccurate Information*
Final Report No. OIG-21-020-A

Attached for your review is our final report on the audit of the Bureau of Industry and Security's (BIS's) and the International Trade Administration's (ITA's) processes and procedures for reviewing and adjudicating product exclusion requests for aluminum and steel tariffs, as prescribed by Presidential Proclamations 9704 and 9705, respectively, under the authority of Section 232 of the Trade Expansion Act of 1962, as amended. Our audit objectives were 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.

We found that

I. U.S. companies were denied exclusion requests based on incomplete and contradictory information, and

II. the Section 232 exclusion request review process lacked transparency.

We also note separate matters for your attention with respect to timeliness, completion, and communications regarding exclusion requests within an "Other Matters" section of this report.

On September 3, 2020, we received a joint response to our draft report from BIS and ITA management, which we include as appendix E of the final report. We also received technical comments. Based on the auditees' joint response and subsequent discussions, we made changes to the final report where appropriate. Overall, BIS generally concurred with all three recommendations directed to it in the draft report, while ITA generally concurred with only two

of the four recommendations directed to it in the draft report. The auditees also provided comments regarding our report's methodology and the basis of our findings, which we address in the "Summary of Agency Response and OIG Comments" section of the final report.

Pursuant to Department Administrative Order 213-5, please submit to us an action plan that addresses the recommendations in this report within 60 calendar days. This final report will be posted on OIG's website pursuant to sections 4 and 8M of the Inspector General Act of 1978, as amended (5 U.S.C. App., §§ 4 & 8M).

We appreciate the cooperation and courtesies extended to us by your staff during our audit. If you have any questions or concerns about this report, please contact me at (202) 482-3884 or Terry Storms, Division Director, at (202) 482-0055.

Attachment

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Report in Brief

January 25, 2021

Background

Section 232 of the Trade Expansion Act of 1962 (the Act), as amended, authorizes the president of the United States 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 for steel imports and one for aluminum imports. The investigations were led by the U.S. Department of Commerce Bureau of Industry and Security (BIS), and the results were published in January 2018.

The Secretary determined that the level of imports of certain steel and aluminum articles into the United States threatened to impair the national security because they adversely impacted U.S. producers and weakened the domestic economy. He recommended that import levels of steel and aluminum products be adjusted through either quotas or tariffs to increase the capacity utilization of U.S. plants producing each commodity to 80 percent.

Why We Did This Review

Our audit objectives were to determine whether (1) BIS and the International Trade Administration adhere to the processes and procedures in place to review Section 232 product exclusion requests (ERs) and (2) ER decisions are reached in a consistent and transparent manner.

BUREAU OF INDUSTRY AND SECURITY AND THE INTERNATIONAL TRADE ADMINISTRATION

Decisions on Exclusions from Section 232 Tariffs Were Not Transparent and Based on Incomplete and Inaccurate Information

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WHAT WE FOUND

We found that

I. U.S. companies were denied exclusion requests based on incomplete and contradictory information, and

II. the Section 232 exclusion request review process lacked transparency.

We also note separate matters for the auditees' attention with respect to timeliness, completion, and communications regarding exclusion requests within an "Other Matters" section of the report.

WHAT WE RECOMMEND

We recommend that the Under Secretary of Commerce for Industry and Security do the following:

1. Reexamine the Section 232 ER review process to ensure decisions are based on complete and accurate information and are transparent. At a minimum:
   a. Require an objector that indicates it has confidential business information to provide a public summary of it in its objection form.
   b. Require personnel involved in the decision making process on whether ERs are granted or denied to document the reason for changes made to decision memoranda.
   c. Protect spreadsheets that are used to track decision memoranda from unauthorized changes.

We recommend that the Under Secretary of Commerce for International Trade do the following:

2. Reexamine the Section 232 ER review process to ensure recommendations are based on complete and accurate information and are transparent. At a minimum:
   a. Ensure evaluators properly consider an objector's capacity and current plant percentage utilization when determining whether there is a sufficient U.S. supply of a product.
   b. Ensure subject matter experts are able to obtain the appropriate information needed to make an informed decision regarding the U.S. availability of a product.
   c. Comply with the requirement that the objecting firm must be able to manufacture the product within 8 weeks to meet the demand identified in the ER.
   d. Prepare and maintain complete documentation to support the rationale for determining the U.S. availability of a product.

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Cover: Herbert C. Hoover Building main entrance at 14th Street Northwest in Washington, DC. Completed in 1932, the building is named after the former Secretary of Commerce and 31st President of the United States.

Acronyms and Abbreviations

BIS	Bureau of Industry and Security
CBI	confidential business information
CBP	U.S. Customs and Border Protection
C.F.R.	Code of Federal Regulations
DASPN	Deputy Assistant Secretary for Policy and Negotiations
ER	exclusion request
HTSUS	Harmonized Tariff Schedule of the United States
ITA	International Trade Administration
SAS	Statistical Analysis System
SME	subject matter expert
U.S.C.	United States Code

Introduction

Section 232 of the Trade Expansion Act of 1962 (the Act), as amended, authorizes the president of the United States to impose tariffs on imported goods that threaten to impair U.S. national security.[1] 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 for steel imports and one for aluminum imports.[2] The investigations were led by the U.S. Department of Commerce (the Department) Bureau of Industry and Security (BIS), and the results were published in January 2018.[3]

The Secretary determined that the level of imports of certain steel and aluminum articles into the United States threatened to impair the national security because they adversely impacted U.S. producers and weakened the domestic economy. He recommended that import levels of steel and aluminum products be adjusted through either quotas or tariffs to increase the capacity utilization of U.S. plants producing each commodity to 80 percent.

Based on the Secretary's findings, in March 2018, the president issued proclamations imposing tariffs of 25 percent and 10 percent on steel and aluminum imports, respectively, from all countries except Canada and Mexico.[4] 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 (hereafter referred to as *requestors*) from paying tariffs on specific steel and aluminum articles—if they request, and are granted, relief through a formal process. This process afforded U.S. producers of these products (hereafter referred to as *objectors*) the ability to contest these exclusion requests (ERs).

On March 19, 2018, the Department published the Section 232 exclusion process interim rule in the *Federal Register*, which allowed for ERs to be granted "as appropriate" for the "import of goods not currently available in the United States in a sufficient quantity or satisfactory quality,

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[1] 19 U.S.C. § 1862.

[2] 19 U.S.C. § 1862(b) – (e). BIS conducts the investigation in accordance with 15 C.F.R. Part 705 (Effect of Imported Articles on the National Security).

[3] *See* (1) U.S. Department of Commerce Bureau of Industry and Security, January 11, 2018. *The Effect of Imports of Steel on the National Security*. Washington, DC: DOC BIS; and (2) DOC BIS, January 17, 2018. *The Effect of Imports of Aluminum on the National Security*. Washington, DC: DOC BIS. Available online at https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination (accessed April 22, 2020).

[4] Presidential Proclamation 9704 of March 8, 2018, "Adjusting Imports of Aluminum into the United States," 83 Fed. Reg. 11619, March 15, 2018; and Presidential Proclamation 9705 of March 8, 2018, "Adjusting Imports of Steel Into the United States," 83 Fed. Reg. 11625, March 15, 2018. The temporary exemption from the steel and aluminum tariffs granted to Canada and Mexico expired on June 1, 2018. 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 Presidential Proclamations 9704 and 9705, respectively.

or for other specific national security reasons."[5] Once granted, an exclusion is generally valid for 1 year or until the entire amount of the product requested has been imported. The rule was amended on September 11, 2018, in response to concerns about the process' efficiency and how it was being carried out.[6] The most notable changes to the original rule included

- procedures to rebut objections and to counter rebuttals (i.e., *rebuttals* and *surrebuttals*, respectively);
- more clearly defined criteria for assessing ERs; and
- allowing requestors to seek exclusions for imports from countries subject to quantitative limitations (quotas).

Together, these two rules govern the Section 232 ER review process.[7] Through June 12, 2019, interested parties were directed to submit ERs, objections, rebuttals, and surrebuttals, via the General Services Administration's Regulations.gov website (www.regulations.gov). Starting on June 13, 2019, ERs were handled by a different online portal that is housed within the Department.

BIS's Office of Technology Evaluation (within Export Administration) is responsible for managing the Section 232 ER review process in collaboration with the International Trade Administration's (ITA's) Enforcement and Compliance business unit.[8] BIS contract analysts and employees review ERs for compliance with its submission requirements, post them online for public review, and render the bureau's decisions after interagency consultation.[9] ITA contract evaluators and employees are responsible for evaluating and making recommendations to BIS on the disposition of ERs and related objections, rebuttals, and surrebuttals. BIS organizes the process into four phases: (1) pre-clearance, (2) post and comment, (3) evaluation and recommendation, and (4) decision. See appendix D for details about the Section 232 ER review process.

From the implementation of the process on March 19, 2018, through June 30, 2019, BIS received 105,949 ERs via the Regulations.gov website. Of the 87,873 ERs that BIS accepted for review, 54,895 of them had been decided and 32,978 of them were awaiting decisions as of June 30, 2019.[10]

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[5] 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 to Submitted Exclusion Requests for Steel and Aluminum," 83 Fed. Reg. 12106, 12109, March 19, 2018.

[6] DOC BIS, "Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum," 83 Fed. Reg. 46026, September 11, 2018.

[7] These rules are referred to separately in this report as the "March 19 rule" and the "September 11 rule."

[8] The Office of Technology Evaluation is 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. Enforcement and Compliance enforces U.S. trade remedy laws and ensures compliance with trade agreements negotiated on behalf of U.S. industries.

[9] In addition to ITA, BIS consults with U.S. Customs and Border Protection (CBP).

[10] Of the 105,949 ERs received, BIS rejected 17,086 ERs and requestors withdrew 990 ERs through June 30, 2019.

Objectives, Findings, and Recommendations

Our audit objectives were to determine whether (1) BIS and ITA adhere to the processes and procedures in place to review Section 232 product ERs and (2) ER decisions are reached in a consistent and transparent manner. We reviewed ERs submitted on Regulations.gov, which covered the period from March 19, 2018, to June 30, 2019. Appendixes A and B contain details on our overall scope and methodology as well as sampling methodology, respectively.

Regarding our first objective, we found that BIS generally adhered to its policies and procedures for reviewing ERs; however, ITA did not. ITA made recommendations using incomplete or contradictory information that resulted in ER denials even though it was unclear if the product was available from domestic U.S. suppliers in an adequate quantity or within the required timeframe. Furthermore, ITA did not consider plant capacity and percent plant utilization (percentage of plant capacity being used) in its analysis, even though BIS stated in its response to a comment to the September 11, 2018, rule published in the *Federal Register* that it would assess manufacturing capability. There is also the potential for confusion with ITA's application of the 8-week manufacturing time criterion. The lack of complete and reliable information likely affected ITA's and BIS's ability to make well-informed decisions on whether to grant or deny an ER.

Regarding our second objective, we found that ER decisions lacked transparency. As a result, it is not clear whether ERs should have been granted or denied. Specifically, both ITA and BIS did not document key decisions made during the ER review process and deviated from established records management policy and recognized internal control practices. First, ITA did not document key decisions describing their rationale for determining sufficient U.S. supply of a product. Second, BIS did not document changes made to posted decision memoranda.

Overall, the ER review process itself poses challenges for U.S. manufacturers who request exclusions. For example, if a U.S. steel producer objects to an ER, the requestor's chances of receiving an approval decline sharply. Furthermore, the intensive, time-consuming process to submit ERs and the lengthy waiting period to hear back from BIS[11] could restrict the ability of U.S. manufacturers to access key material inputs, leaving them at a competitive disadvantage. To improve the review process for subsequent ERs, both ITA and BIS need to make decisions based on complete and reliable information, increase transparency, and show accountability for their actions and decisions.

I. U.S. Companies Were Denied Exclusion Requests Based on Incomplete and Contradictory Information

The purpose of the Section 232 tariffs is to increase domestic production by restricting cheaper imports of steel and aluminum products. According to the March 19 rule, the

[11] For the 9,282 ERs with objections in the scope of our audit, the average time between an ER's online posting and its decision was 270 calendar days, which exceeds the benchmark of 106 calendar days for these ERs as established in the September 11 rule.

Secretary is authorized to grant exclusions from these tariffs for products that are not produced in the U.S. in an adequate quantity or of satisfactory quality.

Of the 9,282 ERs with objections whose decisions were rendered as of June 30, 2019, we tested a randomly selected sample of 100 cases and a judgementally selected sample of 15 cases. U.S.-based companies filing an ER must clearly identify the product, and provide factual information supporting the request. An exclusion can only be granted if the item is

- not produced in the United States in a sufficient and reasonably available amount,
- not produced in the United States in a satisfactory quality, or
- required for a specific national security consideration.

We found that out of the 115 ERs that we tested, ITA recommended denial for 47 ERs (41 percent) even though the objector either did not provide the information required on the objection form, or the information provided was incomplete.[12] For example, ITA recommended denying ERs even though it was not clear that objectors had sufficient plant capacity to produce the product, or that objectors were able to meet the 8-week manufacturing time requirement.

In addition, ITA recommended denying ERs even though ITA subject matter experts (SMEs) did not have sufficient information to determine whether an objector could manufacture the product of satisfactory quality. Since BIS generally accepts ITA's recommendations regarding product availability, it is possible that BIS denied ERs based on ITA's recommendations even though it was not clear that the objector had the ability to provide the product being requested. This could result in a level of supply chain uncertainty for U.S.-based companies that consume steel and aluminum, thus possibly delaying projects or making them uneconomical. Furthermore, rendering decisions without complete or contradictory information can give the perception that the process is not fair and transparent.

A. ITA recommended denying exclusion requests even though it was not clear that objectors had sufficient plant capacity to produce the product

ITA did not consider current or future plant capacity for some cases we examined. In addition, ITA did not hold objectors accountable for the completeness and accuracy of the information submitted concerning plant capacity or percent plant utilization. In clarifying the September 11 rule to the public, BIS stated that the Department would consider objectors' current and future capacity when reviewing ERs and any rebuttals or surrebuttals. Since the amount of a product that an objector can produce within a given timeframe using its existing equipment is limited, information on a plant's current and planned usage is essential to assess whether an objector can manufacture the product in the quantity specified in the ER and in a timely manner. However, we found that in 41 of the 115 (36 percent) ERs that we reviewed, ITA recommended denying them due to sufficient U.S. supply even though objectors did not provide information on plant capacity or plant utilization. Based on the results of the survey we conducted (see

[12] All percentages are rounded to the nearest whole number.

appendix A for details), 7 of the 41 requestors surveyed whose ERs were denied reported paying the tariff because the product offered by the objector either was not available or did not meet the requestor's requirements. Examples follow:

- One requestor submitted four separate ERs. In all four cases, ITA determined that there was a sufficient U.S. supply of the product even though both objectors did not provide information on plant capacity or plant utilization percentage. While the objectors claimed that these data were confidential business information (CBI), ITA neither requested nor received this information from the objectors. ITA officials stated that the bureau does not consider plant capacity or percent plant utilization in its analysis, relying instead on the objector's assertion that it can manufacture the product covered by the ER in a timely manner.
- ITA recommended denying a requestor an exclusion because the objector asserted that it could supply the product; BIS denied the ER. However, the requestor stated that it was subsequently unable to purchase the product from the objector because its requests for price quotes went unanswered causing the requestor to pay the tariff.

B. *BIS denied exclusion requests even though objectors did not provide a summary of CBI in their objection forms*

According to the September 11 rule, companies that submit CBI as part of their rebuttals or surrebuttals must include a summary of the information in their public submissions to allow interested parties to obtain a reasonable understanding of the material. Although this information is required in rebuttals and surrebuttals, neither the rule nor BIS require an objector to include this information in the objection. Of the 115 cases that we tested, there were 66 in which objectors indicated in their objection forms[13] that they had CBI that was relevant and necessary to their submissions. However in all 66 of them, BIS denied the ERs even though objectors did not include a public summary of the CBI in their objection forms. This is especially concerning given that a requestor's only opportunity to challenge objectors' assertions is in its rebuttal. There are no additional opportunities for a requestor to rebut an objector's claims even if the CBI summary is provided in the surrebuttal.

C. *ITA recommended denying exclusion requests even though SMEs did not have sufficient information to determine if the product is produced domestically in sufficient amount or of satisfactory quality*

As part of ITA's analysis of ERs, evaluators consult SMEs on cases involving substitute products or complex situations. According to guidance provided by ITA management, SMEs should base their opinions and recommendations only on the information included in publicly available forms, narrative statements, and CBI that are submitted by requestors and objectors. When performing the analysis, SMEs should consider the

[13] Objectors indicated that they have CBI, which they considered relevant and necessary to their submission, by answering the statement below question 3g on the objection form affirmatively.

ultimate end-use of the product as well as the requestor's technical specifications, such as the product's chemical and physical properties.

Situations may arise in which SMEs need additional information because requestors and objectors make errors completing the forms or omit critical information needed for determining whether the product is manufactured domestically, in a sufficient amount, and of reasonable quality. However, ITA's policy precludes all staff, including SMEs, from contacting requestors and objectors to obtain additional information or clarification. This limitation prevents SMEs from making informed decisions when preparing their recommendations.

We found that for 2 of the 115 (2 percent) ERs that we reviewed, ITA recommended denying the ERs due to sufficient U.S. supply even though it was not clear that the product offered by the objector would meet the requestor's needs. In the first example, after comparing the chemical properties of the product in question (i.e., steel slab),[14] the SME determined that the product offered by the objector was suitable based on the inferred end-use for the slab. However, the SME noted that if the requestor had provided additional information on the product's intended end-use, ITA might have recommended approval of the requestor's ER.

In the second example, the objector was unable to meet the product's technical specifications (i.e., width of material). While the SME recommended approving the ER, ITA recommended denying it because the requestor did not explain why it was unable to use the narrower substitute product offered by the objector, even though ITA did not ask the requestor to provide this explanation.

D. ITA recommended denying exclusion requests even though it was unclear whether objectors were able to manufacture the product in a timely manner

When objecting to ERs, objectors must certify that they can manufacture the product "immediately," which is defined as "within eight weeks" in both the standard objection form and the September 11 rule. We found that in 37 of the 115 (32 percent) ERs that we reviewed, ITA recommended denying them due to sufficient U.S. supply even though it was not clear if objectors were able to meet this requirement because they included contradictory information in their objection forms, surrebuttal forms, or narrative statements. The following are examples of contradictory information:

- For ten ERs from the same requestor, objectors included conflicting information about production times in response to two different questions in their objection forms.[15] While the objectors answered one of the questions affirmatively to

[14] Steel slab is a semi-finished steel product that is created at a foundry and sent to a secondary producer where it is transformed into a finished product.

[15] In the forms "Objection Filing to Posted Section 232 Exclusion Request: Steel" and "Objection Filing to Posted Section 232 Exclusion Request: Aluminum," questions 1c and 1e ask whether the product (or a substitute) identified in the ER is currently manufactured in the United States by the objecting firm or can be made immediately (within 8 weeks). Question 3c of the same forms asks the objector to state the number of days required to manufacture the product covered by the ER from the time a binding purchase order is received.

indicate that they were able to manufacture the product within 8 weeks, the number of days provided in response to another question concerning manufacturing time exceeded that period. For these cases, despite the contradictory information, ITA decided that there was sufficient U.S. supply of the product, even though it did not confirm that the objectors were able to manufacture the product within 8 weeks.

- For two ERs, ITA determined that there was sufficient U.S. supply of a product based on one objector's assertion that it could manufacture the product in a timely manner using newly acquired equipment. While the objector claimed that it was capable of producing the product within 8 weeks, the requestor provided documentation in its rebuttal showing that it would take the objector up to 8 weeks just to receive a necessary input material needed to begin producing the product. ITA determined that since the objector stated that it was able to manufacture the product within 8 weeks, it had met the timeliness requirement, which did not take into account the additional time needed *beforehand* to obtain the input materials. Even though CBP determined that the Harmonized Tariff Schedule of the United States (HTSUS)[16] codes for the products were incorrect, BIS also relied on ITA's determinations of sufficient U.S. supply to deny the ERs and listed both reasons in the decision memoranda.
- For one ER, a requestor provided documentation in its rebuttal showing that the objector's manufacturing time for the product was between 15 and 19 weeks. Nonetheless, ITA determined there was sufficient U.S. supply of the product based on the objector's assertion that it could produce the product in a timely manner, thereby recommending the ER's denial. It also determined that the evidence included in the requestor's rebuttal was insufficient to refute the objector's assertion.

ITA officials stated that it does not consider the 8-week manufacturing requirement to be a "bright line" cut-off point. ITA considers circumstances where it believes that a manufacturing time greater than 8 weeks will reasonably address the needs of both parties. Additionally, ITA primarily relies on objectors' unverified assertions to determine if they can manufacture the product in a timely manner. Consistent with its practice of generally accepting ITA's recommendation, BIS denied the ERs. We acknowledge that on May 26, 2020, BIS issued a notice of inquiry in the *Federal Register* soliciting public comment on improving the Section 232 exclusion process.[17] Clarifying the timeliness requirement was one of several issues that was part of this inquiry. On December 14, 2020, in response to public comments, BIS issued an interim final rule to

[16] HTSUS provides the applicable tariff rates and statistical categories for all merchandise imported into the United States. HTSUS is based on the international Harmonized System—the global system of nomenclature that is used to describe most world trade in goods.

[17] DOC BIS, "Notice of Inquiry Regarding the Exclusion Process for Section 232 Steel and Aluminum Import Tariffs and Quotas," Federal Register 85, no. 101 (May 26, 2020): 31441-31442, https://www.federalregister.gov/documents/2020/05/26/2020-11173/notice-of-inquiry-regarding-the-exclusion-process-for-section-232-steel-and-aluminum-import-tariffs (accessed June 22, 2020).

amend the Section 232 exclusion process, which in part clarified the term "immediately." We discuss this further in the "Summary of Agency Response and OIG Comments" section of this final report.

II. The Section 232 Exclusion Request Review Process Lacked Transparency

The Department has stated that its process for reviewing ERs is fair and transparent.[18] Transparency can be defined as performing business and financial activities in an open and honest way, in order to inspire trust in the results of the process.[19] According to the Department's records management policy,[20] agencies must maintain adequate documentation of decisions to protect the legal and financial interests of directly affected parties. Thus, it is imperative that Department officials create and maintain adequate documentation of the ER decision-making process to show how these decisions were derived.

Despite the Department's assertions regarding transparency, we found, based on our review of 115 ERs, that ITA did not consistently document its rationale in cases where it determined that there was a sufficient U.S. supply of a product. As a result, we were unable to assess how ITA made its determinations regarding product availability. We also found evidence that BIS amended some decision memoranda and reposted them to Regulations.gov without documenting the rationale for the revision or notifying the public of the changes. These actions by ITA and BIS result in lack of transparency in the ER review process since key information about ER decisions is not maintained or documented. Stakeholders are, therefore, unable to determine how the Department made its decisions if critical elements were not included in case documentation, or documented in decision memoranda. Finally, we found that proper access controls of internal files used to manage the ER review process were lacking.

A. ITA did not consistently document the rationale for determining sufficient U.S. supply of a product

For 67 of the 115 (58 percent) ERs we reviewed, we found that ITA did not document its rationale for how it determined whether there was sufficient U.S. supply of a product identified in the ER. Our review of documentation found that ITA's internal analysis forms contain a summary of the assertions made by requestors and objectors but do not include the rationale for making final determinations on sufficient U.S. supply. Additionally, ITA did not describe the actions it took to determine which party's assertions where correct. While we found that ITA followed its internal documentation requirements, it did not comply with the Department's records management policy,

[18] DOC BIS, "Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum," 83 Fed. Reg. 46026, 46030, September 11, 2018.

[19] Cambridge Dictionary. *Definition of Transparency* [online]. dictionary.cambridge.org/us/dictionary/english/transparency (accessed March 4, 2020).

[20] DOC Office of the Secretary, June 26, 1992. *Records Management*, DAO 205-1. Washington, DC: DOC OS, section 6.01.

which requires that operating units maintain adequate records to document how key decisions were made. Examples follow:

- In two cases dealing with tinplate,[21] ITA recommended denying the ERs even though the requestor submitted information showing that it was still in the trial and qualification process[22] with the objector with respect to providing the product. While an objector submitted CBI to show that it passed the first stage of the trial, it did not indicate that the product had successfully completed the qualification stage or if additional testing was needed. BIS denied these ERs based on ITA's recommendations even though it was not clear that the quality issue had been resolved; as a result the requestor stated that it paid more than $40 million in tariffs for the imported product instead.
- For three different ERs from the same requestor related to seamless pipe,[23] the requestor provided copies of e-mail correspondence in which the objector stated that it could not meet the requestor's product technical specifications. The objector countered that it could meet the specifications and did not acknowledge the requestor's e-mail correspondence. Nonetheless, ITA determined that there was sufficient U.S. supply of the product and recommended denying the ERs. However, it did not document how it determined that the objector could produce the product given the requestor's contradictory evidence.

Because ITA's analysis process is performed manually and the rationale for its recommendations are not always documented, errors can result. For example, we identified one ER in which ITA recommended approval due to insufficient U.S. supply. BIS subsequently approved the ER based on ITA's recommendation. However, we found that ITA had failed to consider two objections, which they acknowledged was an oversight. Based on our testing of cases that received objections, ITA would have recommended denying these ERs had the objections been considered.

We also identified four ERs where ITA's final recommendations conflicted with internal briefing documents used to formulate the pre-decisional recommendations. ITA acknowledged that the briefing documents did not reflect the cases' complete decision-making processes. In these cases, the lack of consistency between ITA's internal documents used to manage its analysis process creates a lack of transparency since it is unclear how ITA reached its final recommendations.

Finally, we identified an ER in which two SMEs recommended approval after concluding that welded steel pipe offered by an objector was not a suitable substitute for the

[21] Tinplate is steel sheet that has been coated with tin and is used in the production of cans for packaging food products.

[22] We consider the trial and qualification process to be similar to the production trial process which is a systematic evaluation of the manufacturing and production process to ensure that the product meets customer requirements and expectations.

[23] Seamless pipe is steel pipe—often used in the oil and gas industry—formed by casting, piercing, or extrusion, rather than by welding with a seam.

seamless pipe being requested. Despite this, ITA recommended denying the ER due to sufficient U.S. supply of the product. ITA officials were not able to explain why its final recommendation to deny was inconsistent with the SMEs' guidance.

ITA management informed us that ITA senior leadership can make changes to pre-decisional recommendations without documenting its rationale. Management told us that all recommendations are regarded as pre-decisional until approved by the Deputy Assistant Secretary for Policy and Negotiations (DASPN). According to ITA, if the pre-decisional recommendations are amended, staff modify the case documentation to support any changes without identifying or documenting them.

ITA's internal control requiring senior leadership's review of pre-decisional ER recommendations does not prevent the Deputy Assistant Secretary from changing those recommendations without additional review. Furthermore, the control is not designed appropriately since ITA does not require staff to document changes made to pre-decisional recommendations or the reason(s) for those changes. Consequently, we were not able to determine if ITA considered any information that was not included in the official records for cases when making its recommendations.

B. BIS did not document changes made to posted decision memoranda

BIS is the agency responsible for making the final decisions, via decision memoranda that are posted online, regarding whether ERs are granted or denied. BIS manually prepares decision memoranda using standard templates with boilerplate language that vary based on the decision rendered (see appendix D). However, we found that five decision memoranda that BIS issued contained incorrect language because it used the wrong template and another memorandum contained a calculation error.

We found that BIS made changes to posted decision memoranda without adequately documenting the changes in accordance with the Department's records management policy. While the decisions to grant or deny these ERs remained the same, BIS changed the *reasons* for denying several ERs without posting an *errata* (correction) or explaining why the changes were made. Additionally, BIS does not have internal controls in place to prevent or detect unauthorized changes from being made to decision memoranda before they are posted online.

For example, in two ERs, BIS used the incorrect template to generate memoranda denying ERs. In both cases, BIS denied the requests based on ITA's determination of sufficient U.S. supply of the product. However, ITA had recommended denying the ERs due to an incorrect HTSUS code. This, in turn, was incorrect because CBP had determined that the code was administrable (see appendix D for details), which contradicted ITA's final recommendations.

After we made BIS aware of these errors, it removed the incorrect language from the decision memoranda and reposted them to Regulations.gov, but maintained its original decisions denying the ERs. According to BIS' process, ERs with administrable HTSUS codes, and for which ITA has not determined there is sufficient U.S. supply of the

product, should be approved provided that there are no overriding national security concerns. Furthermore, BIS did not indicate in the two revised decision memoranda or on the website that the original decision memoranda had been amended. We also identified three ERs in which BIS made changes to posted decision memoranda to correct inaccurate language and reposted them to Regulations.gov without documenting that a change was made or authorized.

In the case in which we found a calculation error, BIS approved the ER for the import of 1 million kilograms of a steel product instead of the correct amount of 2.5 million. This error went undetected until we brought it to BIS's attention. Although the bureau posted an amended decision memorandum, it did not post an *errata* to document that a change had been made to the original decision memorandum.

Since BIS did not adequately document the changes made to these decision memoranda, stakeholders may not have been aware of any changes. This results in a lack of transparency in BIS's decision process. Amending posted decisions without notifying affected parties could adversely impact companies whose ERs are denied.

C. *Inadequate controls over exclusion request files existed*

BIS lacked adequate controls to preclude unauthorized changes of individual ER tracking files. We found that the spreadsheets used to generate the decision memoranda were not properly protected and could be changed by any staff member with access to the file. According to the U.S. Government Accountability Office's *Standards for Internal Control in the Federal Government*, application controls for computer applications are necessary to achieve validity, completeness, accuracy, and confidentiality of data that is processed.[24] Management should implement controls to limit user access to data through authorizations, such as providing a unique user identification or token to authorized users. BIS did not have such control of the files used to track decision memoranda. Any user with access to the spreadsheet could have modified it without being detected, allowing for the possibility of revising a decision memorandum without proper authorization. Additionally, a user could have edited other information contained in the spreadsheet in addition to the decision. While we found no evidence of such actions having occurred, lack of appropriate controls of ER files and folders is a risk requiring management attention. The ability to make unauthorized edits to the spreadsheets could allow an individual with access to the file to compromise the integrity and availability of sensitive information.

[24] United States Government Accountability Office, September 2014. *Standards for Internal Control in the Federal Government*, GAO-14-704G. Washington, DC: GAO, section 11.08.

Recommendations

We recommend that the Under Secretary of Commerce for Industry and Security do the following:

1. Reexamine the Section 232 ER review process to ensure decisions are based on complete and accurate information and are transparent. At a minimum:
   a. Require an objector that indicates it has CBI to provide a public summary of it in its objection form.
   b. Require personnel involved in the decision making process on whether ERs are granted or denied to document the reason for changes made to decision memoranda.
   c. Protect spreadsheets that are used to track decision memoranda from unauthorized changes.

We recommend that the Under Secretary of Commerce for International Trade do the following:

2. Reexamine the Section 232 ER review process to ensure recommendations are based on complete and accurate information and are transparent. At a minimum:
   a. Ensure evaluators properly consider an objector's capacity and current plant percentage utilization when determining whether there is a sufficient U.S. supply of a product.
   b. Ensure SMEs are able to obtain the appropriate information needed to make an informed decision regarding the U.S. availability of a product.
   c. Comply with the requirement that the objecting firm must be able to manufacture the product within 8 weeks to meet the demand identified in the ER.[25]
   d. Prepare and maintain complete documentation to support the rationale for determining the U.S. availability of a product.

[25] As explained in the "Summary of Agency Response and OIG Comments" section of this final report, we note that on December 14, 2020, BIS issued an interim final rule clarifying this requirement. Given the date of this rule, it fell outside the scope of this audit.

Other Matters

Timeliness and Completion of Section 232 Product Exclusion Requests

On July 1, 2019, we released a memorandum to inform stakeholders about the number of ERs in process and completed as of March 3, 2019, almost a year into the ER process.[26] We found that a backlog of ERs had been created in that time, and that ERs with objections consistently missed processing deadlines and had lower completion rates than those without.

We updated our analysis to incorporate ERs in process as of June 30, 2019, and found that one-third of ERs without objections were processed late, but nearly all ERs with objections were late. (See table 1.)

Table 1. Timeliness of Section 232 Exclusion Request Reviews as of June 30, 2019

Exclusion Requests …	Target Calendar Days	Exclusion Requests Processed	On Time	Late	Percent Processed Late
without objection(s)	90	45,613	30,584	15,029	33%
with objection(s)	106	9,282	401	8,881	96%

Source: OIG analysis of BIS data on ER decisions rendered from March 19, 2018, through June 30, 2019

BIS officials stated that an online portal to replace Regulations.gov—introduced on June 13, 2019—has improved ER processing for public and government users, minimizing data transfer errors and reducing lag time during interagency information transfers. We did not perform work to test the operation of the Section 232 exclusions portal.

Certain Communications by Department Officials Related to the Section 232 Exclusion Request Review Process

On October 28, 2019, we released a management alert highlighting a lack of transparency that contributed to the appearance of improper influence in deciding ERs because off-record discussions between interested parties and Department officials were not documented.[27] In response to our proposal that BIS document off-record discussions with interested parties, BIS, on November 25, 2019, instituted a policy addressing ex parte communications with the public involving ERs.[28] The policy requires BIS employees to document and publicly post all communications with interested parties regarding the merits of ERs and to direct such parties

[26] DOC Office of Inspector General, July 1, 2019. *One Year Later—A Look at the Timeliness and Completion Status of Section 232 Product Exclusion Requests*, OIG-19-017-M. Washington, DC: DOC OIG.

[27] DOC OIG, October 28, 2019. *Management Alert: Certain Communications by Department Officials Suggest Improper Influence in the Section 232 Exclusion Request Review Process*, OIG-20-003-M. Washington, DC: DOC OIG.

[28] Cordell Hull, memorandum, November 25, 2019. *Memorandum from Cordell Hull, Acting Under Secretary for Industry and Security Re: Section 232 Exclusion Requests: Communications with Interested Parties*. DOC BIS, Washington, DC.

to provide feedback and suggestions to a general e-mail mailbox rather than directly to BIS or ITA personnel. We performed no work to assess the implementation of the new policy.

Summary of Agency Response and OIG Comments

On September 3, 2020, we received a joint response to our draft report from BIS and ITA management (auditees), which we include as appendix E of this final report.[29] We also received technical comments. Based on the auditees' joint response and subsequent discussions, we made changes to the final report where appropriate. Overall, BIS generally concurred with all three recommendations directed to it in the draft report, while ITA generally concurred with only two of the four recommendations directed to it in the draft report. The auditees also provided comments regarding our report's methodology and the basis of our findings, which we address in this summary.

The auditees expressed a general concern that we based our findings on limited and dated data, thereby mischaracterizing the ER review process and overstating its deficiencies.

Regarding this concern, we do not agree that the report is misleading. We informed the auditees on multiple occasions that the scope of our audit encompassed ERs submitted on Regulations.gov from March 19, 2018, to June 13, 2019, and, as such, our findings and recommendations were based on completed cases from that period. While the data examined are more than 1 year old, the issues that we identified primarily focus on the internal processes used by the auditees to analyze information, develop recommendations, and render decisions, and are independent of the information technology system used to manage the process. We did not assess the operation of the current web-based portal that replaced Regulations.gov in June 2019 and, therefore, cannot comment on its effect on the ER review process.

We address specific points in detail below.

- **Auditees' Joint Response**. *The OIG Does Not Appear to Have Followed its Own Standards for Objectivity, Balance and Impartiality*

  - *(t)he OIG Report itself (Appendix A, on Objectives, Scope, and Methodology) admits that the OIG "judgmentally" selected 15 of the 115 sample cases based on specific criteria. Appendix B does not provide any details on the "judgmentally selected 15 cases", nor provide any indication to ascertain a reason to do so. Furthermore, Appendix B goes so far as to acknowledge that the "universe of ERs was not homogenous" and states: "we did not project the results of our testing to the universe…." implying that the sample of cases is not representative.*

    OIG Response. With respect to our methodology, we conducted this audit in compliance with generally accepted government auditing standards. Of the 115 cases included in the sample, 100 cases were randomly selected and each exclusion submitted during the period of review that met the selection criteria had an equal chance of selection. As for the judgmentally selected items, we selected these cases based on risk

[29] Subsequent to the September 3, 2020, joint response, both BIS and ITA respectively informed OIG that the "CUI/PRIV" labels could be struck from the response and that OIG could otherwise publish the joint response as is. Thus, the "CUI/PRIV" labels are struck through in the response in appendix E.

factors that we identified during the course of the audit. Selecting samples based on risk does not compromise OIG objectivity and complies with generally accepted government auditing standards. We performed the same test of attributes for the 100-case statistical sample and the 15-case judgmental sample, and we reported the consolidated findings. In response to the auditees' comments, we provide our basis for selecting the 15-case judgemental sample in appendix B.

We used accepted methods to build the 100-case sample to be representative of the case universe. However, due to the unique nature of documentation submitted with each ER, we decided to forego projecting results to the entire population in order to be conservative in describing the issues identified during testing. As a result, we included in our findings the actual exceptions that were identified. Nevertheless, the testing revealed problems in the internal processes used to develop recommendations and decisions for ERs. Our sampling methodology for the 100 cases was conducted using appropriate methodology. We decided not to project the sample results for the reasons stated above, but reported findings for the 115 cases that we tested that did not comply with the testing attributes. As indicated in table 2, combining the 100 cases selected through sampling with the 15 cases selected judgementally did not significantly affect the conclusions reached.

Table 2. Breakdown of Cases With Exceptions by Type of Sample

Finding	Description of Cases With Exceptions	Exceptions - Combined Sample (115 cases)	Exceptions - Statistical Sample (100 cases)	Exceptions – Judgemental Sample (15 cases)
I. Introduction	U.S. Companies Were Denied Exclusion Requests Based on Incomplete and Contradictory Information	47 (41%)	43 (43%)	4 (27%)
I.A	ITA Recommended Denying Exclusion Requests Even Though It Was Not Clear that Objectors Had Sufficient Plant Capacity to Produce the Product	41 (36%)	37 (37%)	4 (27%)
I.B	BIS Denied Exclusion Requests Even Though Objectors Did Not Provide a Summary of CBI in Their Objection Forms	66 (57%)	62 (62%)	4 (27%)
I.C	ITA Recommended Denying Exclusion Requests Even Though SMEs Did Not Have Sufficient Information to Determine if the Product Is Produced Domestically in Sufficient Amount or of Satisfactory Quality	3 (3%)	2 (2%)	1 (7%)
I.D	ITA Recommended Denying Exclusion Requests Even Though It Was Unclear Whether Objectors Were Able to Manufacture the Product in a Timely Manner	37 (32%)	34 (34%)	3 (20%)

Finding	Description of Cases With Exceptions	Exceptions - Combined Sample (115 cases)	Exceptions - Statistical Sample (100 cases)	Exceptions – Judgemental Sample (15 cases)
II.A	ITA Did Not Consistently Document the Rationale for Determining Sufficient U.S. Supply of a Product	67 (58%)	64 (64%)	3 (20%)
II.B	BIS Did Not Document Changes Made to Posted Decision Memoranda	6 (5%)	6 (6%)	0 (0%)

Source: OIG analysis of ITA and BIS cases that were sampled; all percentages are rounded

- *OIG's conclusions depend in part on information gathered through two online surveys (described on page 16) – one in August 2019 of 58 requestors for which exclusion requests were denied, and one in November 2019 of 177 objectors. Selected examples drawn from the survey results are used to support certain conclusions made by the OIG in the report. However, the OIG provides no details regarding these surveys, such as the questions asked, the particular companies that were queried and those that responded, and details of the responses. Further, there is no indication that the OIG attempted to corroborate the information provided by the requestors, nor whether the OIG sought the corresponding objectors' feedback. ITA raised questions about the objectivity of these surveys during the course of the OIG's audit, but the OIG did not address these questions in its final report.*

  OIG Response. As stated in appendix A, in August 2019, we e-mailed 93 survey requests to the 58 companies included in our samples whose ERs were denied by BIS.[30] We received 24 responses, which represents a 26 percent response rate (total responses/total surveys sent). Also in November 2019, we e-mailed 177 survey requests to 37 firms who objected to ERs that were subsequently denied by BIS and were tested in our sample. We received 36 responses, which represents a 20 percent response rate (total responses/total surveys sent) of firms surveyed. As we explained to the auditees during the June 17, 2020, exit conference, we did not verify the information provided in survey responses because the report's findings are based on the detailed testing of the sample of ERs. We surveyed the interested parties in order to assess the effect and learn more about their experiences with the program. The survey responses, which did not constitute the basis of our findings, only augmented the findings of the detailed testing of our sample and functioned much like responses in an interview. In the interest of transparency, we include both survey instruments as appendix C.

- **Auditees' Joint Response**. *The OIG Mischaracterized ITA's Process for Formulating its Recommendations to BIS, Resulting in Incorrect Assessments of ITA's Transparency Obligations: In its draft report on pages 9–10, the OIG faults ITA for failing to document changes in staff recommendations to ITA's Deputy Assistant Secretary for Policy and Negotiations (DASPN), prior to a decision by the DASPN. The OIG asserts that "the control is not designed appropriately since ITA does not require staff to document changes made to initial recommendations or the reason(s) for those changes."*

[30] Several companies received more than one survey because they had submitted multiple ERs.

This criticism reflects a misunderstanding of the process by which ITA develops its recommendation for BIS. In fact, the process contains only two decision points. First, the DASPN makes a decision based on a deliberative/pre-decisional staff recommendation. The second decision point is BIS's decision based on ITA's recommendation (as well as any other information that BIS considers). Everything prior to the DASPN decision is internal deliberation and the deliberative/pre- decisional staff recommendation is subject to a review of the facts by the DASPN. The OIG's inference that there is a series of recommendations in ITA preceding the recommendation to the DASPN is factually incorrect. ITA's decision making process is reasonable and there is no legal basis for requiring Commerce to chronicle additional layers of concurrence transmittals or recommendations.

OIG Response. We did not suggest that there are multiple ITA recommendations. Rather, we make the point that the rationale for why an initial recommendation is modified, for any reason and at any point in time, should be documented whether or not it is considered "pre-decisional." We do not believe it is appropriate for the deciding official to be able to modify a "deliberative" recommendation without documenting the reason for the change. This is especially important if decisions ignore or overturn previous analyses, SME guidance, or precedents. ITA's statement that the current internal control is appropriate demonstrates a lack of understanding of internal control and the Department's records management policy requiring the maintenance of working files containing substantive information on a significantly important issue or case rather than our mischaracterization of their practice. For clarification in this final report, we replaced the term "initial recommendation" with "pre-decisional recommendation."

- **Auditees' Joint Response**. *The OIG Misstated the Facts of Individual Cases*

  - *The OIG states that ITA "did not take into account the additional time needed beforehand to obtain the input materials" and supposedly therefore inappropriately recommended denying an exclusion request. However, Commerce's regulations specify that the review criterion is production time (see section (c)(6)(i) September 11, 2018 IFR), not overall delivery time. Lead time and shipment time are not part of the manufacturing time, so ITA appropriately excluded the time to obtain the input materials from its calculation.*

    OIG Response. We disagree with this characterization. We acknowledge that the September 2018 regulation only referenced production time, but it did not define it. While the Department is not required to take lead time or shipment time in its calculations, we believe it would be beneficial to do so to assist with consistent evaluations of when a product is considered "immediately" available. Without it, a reader of the regulation might assume that the objector has all of the necessary inputs, equipment, and staff, to manufacture the product within 8 weeks. To do otherwise, may result in varying interpretations of the 8-week timeframe and potentially inconsistent ITA recommendations.

    Concern about the interpretation of the 8-week period was evident in the September 2018 regulation notice's comment section. In this section, BIS' addressed concerns regarding the time period needed by the objector to manufacture the product. BIS determined that an 8-week time period for producing the requested goods was appropriate and did not feel that the time period needed to be lengthened or shortened.

In addition, the following two questions are posed in the objection form for both steel and aluminum products:

> **Question 1c:** Is the [steel/aluminum] product type identified in the Exclusion Request currently manufactured by your organization in the United States, or can it immediately be made (within 8 weeks) by your organization, in a company-owned plant in the United States? If "Yes" identify the location(s) of your [steel/aluminum] production facilities in the United States.
>
> **Question 1e:** Does this organization currently manufacture, or can immediately manufacture (within 8 weeks), in a company-owned plant located in the United States a substitute product for the identified [steel/aluminum] product that has similar form, fit, function, and performance? If "Yes" identify the location(s) of your steel production facilities in the United States, current plant capacity and utilization.

We note that on May 26, 2020, BIS issued a notice of inquiry in the *Federal Register* requesting public comments on the Section 232 ER process. One of the areas for which BIS sought comments was clarifying the term "reasonably available." On December 14, 2020, in response to public comments, BIS issued an interim rule to amend the Section 232 ER process. In part, the rule clarified the term "immediately" with respect to a product's availability to take into account product delivery time from a foreign supplier. Specifically, the clarification requires that an objector be able to deliver the requested amount of the product within 8 weeks or, if that is not possible, by a date earlier than the time required for the requestor to obtain the product from a named foreign supplier. The rule also requires that both the requestor and objector provide supplemental evidence on product delivery times. We believe these clarifications to the 8-week timeliness provision, which we raised in our report, will enhance the transparency of exclusion request decisions by setting expectations for both requestors and objectors and allowing for consistent interpretations of product availability by ITA's evaluators.

- *The OIG states: "For one ER, a requestor provided documentation in its rebuttal showing that the objector's manufacturing time for the product was between 15 and 19 weeks." However, ITA reviewed each of the 37 cases the OIG reviewed for Section D and was unable to identify the evidence described by the OIG in this example.*

  OIG Response. We discussed this particular case with ITA officials during the audit. In those discussion and communications, ITA officials did not assert that we had misstated or misrepresented the facts of the case. On October 4, 2019, we met with ITA officials to follow-up on cases about which we had questions (including the one referenced above). We received ITA's written response to our questions on November 1, 2019, in which ITA officials explained that it did not find the requestor's evidence showing that the objector's manufacturing time of 15 to 19 weeks for the requested product to be persuasive because the price quotation the requestor submitted in its rebuttal was heavily redacted. ITA determined that because the objector certified that it was able to manufacture the requested product in 8 weeks and because the requestor failed to

provide an unredacted version of this information, the objector met the timeliness requirement despite evidence to the contrary provided by the requestor.

- **Auditees' Joint Response**. *The OIG Mischaracterizes the Intent of the Remedy and Exclusion Process*

  - *The OIG states that "the review process itself poses challenges for U.S. manufacturers who request exclusions" and that exclusions "should be granted for products that are not produced in the U.S. in an adequate quantity or of satisfactory quality." The President imposed a remedy based on the finding of a threat to national security, and authorized the Secretary to grant exclusions under specified conditions. The default position is thus that importers of the specified steel and aluminum products will pay the assigned duties, not that they should expect to be granted an exclusion to these duties.*

    OIG Response. The first statement is our conclusion based on our testing and on the fact that U.S. manufacturers need to go through an exclusion process to seek relief from additional duties on products that previously were not subject to them. With respect to the second statement, we have amended the language in the report consistent with language contained in the applicable presidential proclamations.

  - *The OIG also writes that "if a U.S. steel producer objects to an ER, the Requestor's chances of receiving an approval decline sharply." This statement is highly misleading because it implies this is a systemic error and not an inherent feature of the remedy. As the exclusion process functions by allowing domestic manufacturers to identify their capabilities to provide the requested products, objections represent a success of the President's remedy—a U.S. manufacturer showing their ability to provide a product that would otherwise be imported—not a failure.*

    OIG Response. The statement is based on our observations. BIS and ITA make the implication about systemic error, but we do not comment on what the cause is; we just note what we have found based on our analysis of completed cases through June 30, 2019. Of the 45,613 cases *without* objections, 37,381 (82 percent) were approved. Conversely, of the 9,282 cases *with* objections, only 1,517 (16 percent) were approved.

ITA Response to OIG Recommendations to Which ITA Does Not Concur

- *Recommendation 2a: Ensure evaluators properly consider an objector's capacity and current plant percentage utilization when determining whether there is a sufficient U.S. supply of a product*

  ITA Response. "ITA does not concur. Overall plant capacity and capacity utilization data are not sufficiently detailed indicators of a company's ability to produce a particular product, nor its ability to produce a given order in a particular period of time. As such, Commerce's regulation does not reference capacity or capacity utilization as criteria required for review of exclusion requests (see section (c)(6)(i) of September 11, 2018, IFR). The fields requesting plant capacity and capacity utilization were included by BIS on the objection form for statistical and economic analysis purposes. In the new recommendation memoranda template (discussed above), ITA will clarify that the data on plant capacity and capacity utilization are not the basis of ITA's analysis."

OIG Response. We acknowledge ITA's comment that plant capacity and capacity utilization data are not sufficiently detailed indicators of an objector's capabilities to manufacture the product in question. However, we believe that it could be useful when considered in combination with other factors in light of the fact that BIS stated the following in response to public comment (b)(4) made in response to the draft of the September 11, 2018, regulation:

> The Department is reviewing exclusion applications from domestic industry, and related objections (and will do the same for rebuttals/surrebuttals), on a case-by-case basis in a fair and transparent process. **The Department will assess whether manufacturing capability can meet the technical parameters for the specific article in question, including if idle capacity is being brought back online as well as new capacity.**[31]

In a September 29, 2020, meeting with ITA's and BIS's management, we learned that ITA's recommendation memorandum to BIS would be revised to list the factors used by ITA in its analysis. We subsequently requested and received a template of the revised ITA recommendation and verified that it contained sections that will list the factors used in determining the recommendation. These sections will provide analysis of the record for each ER with respect to the product's quality, quantity, and timeliness. In addition, a section is available for ITA to provide the rationale for its recommendation to BIS. We also learned that the ITA recommendation memorandum would be attached as an appendix to the final BIS decision.

However, the template states that ITA does not examine the production capacity of a company or industry as a whole when determining whether a company meets the quantity criteria. While we believe these intended actions involving the revised ITA recommendation template provide more transparency for the reasons behind each ER decision, it does not, however, respond to recommendation 2a or comport with BIS' response to public comment (b)(4) made in response to the draft of the September 11, 2018, regulation.

- *Recommendation 2b: Ensure SMEs are able to obtain the appropriate information needed to make an informed decision regarding the U.S. availability of a product*

ITA Response. "ITA does not concur. This recommendation appears to be based on the premise that subject matter experts (SMEs) should have the ability to selectively contact outside parties to seek additional information and/or ask questions of those parties. As Commerce's regulations state (*see,* section (c)(6)(i) of September 11, 2018 IFR), '[t]he U.S. Department of Commerce reviews an exclusion request based on the information included in the exclusion request, any objections to an exclusion request, any rebuttals to the objections made by an individual or organization that submitted the exclusion request, and any surrebuttals.' The regulations do not suggest that Commerce is expected to take account of information other than that in the documents filed by parties, except for specific national security considerations in consultation with other government agencies (see section (c)(6)(iii) of September 11, 2018 IFR). Commerce has determined that it is fair to place the

[31] Emphasis added. See Federal Register 83 (September 11, 2018): 46030.

burden on the requestors to submit all relevant information in their initial requests, particularly given the large number of exclusion requests submitted.

The OIG recommends that ITA incorporate an additional process for supplementing the record, determined on a case-by-case basis by the SME. If we were to implement such a procedure on a structured basis, it would be impractical and require additional time and resources to gather supplemental information on such a scale. On the other hand, to have an unstructured process such as that suggested by the OIG, which would rely on an individual SME to discuss her or his questions directly with an outside party, would potentially compromise impartiality and consistency, introduce unfairness and subjectivity into the process, and create additional risks to transparency."

OIG Response. We did not suggest that SMEs be the ones who selectively contact interested parties to gather additional information. Rather, we recommended that ITA establish a process whereby SMEs are able to obtain sufficient information to develop a recommendation when interested parties make conflicting statements or when SMEs need additional information to make a more informed recommendation to ITA. As we stated in the report, evaluators consult SMEs on cases involving substitute products or complex situations. An SME's knowledge and expertise about the products in question may be critical to determine whether objectors can meet the product criteria specified in ERs. Therefore, we reiterate our recommendation.

Appendix A: Objectives, Scope, and Methodology

The objectives of our audit were 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. We reviewed ERs submitted from March 19, 2018, through June 30, 2019, on Regulations.gov.

To accomplish our objectives, we performed the following:

- Reviewed and examined applicable laws, regulations, statutes, and other criteria, including:
  - 19 U.S.C. § 1862, Safeguarding national security
  - 83 Fed. Reg. 11619, "Proclamation 9704 of March 8, 2018 – Adjusting Imports of Aluminum Into the United States"
  - 83 Fed. Reg. 11625, "Proclamation 9705 of March 8, 2018 – Adjusting Imports of Steel Into the United States"
  - 15 C.F.R. Appendix Supplement No. 1 to Part 705 – Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamation 9705 of March 8, 2018 Adjusting Imports of Steel Articles Into the United States
  - 15 C.F.R. Appendix Supplement No. 2 to Part 705 – Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamation 9704 of March 8, 2018, to Adjusting Imports of Aluminum Into the United States
  - BIS contracts to process the intake and pre-screening of ERs, managing them online, and handling interagency input[32]
  - ITA contract to perform analysis of ERs and all relevant documentation[33]
- Conducted interviews with the following individuals at BIS and ITA headquarters in Washington, DC:
  - Deputy Assistant Secretary for Export Administration, BIS
  - Deputy Assistant Secretary for Policy and Negotiations, ITA
  - Director of the 232 Product Exclusion Team, ITA
  - BIS contracting officer representative overseeing the contracts used for the ER review process

[32] *BIS Contract GS-35F-470CA: BIS Export Administration Support Services* (September 20, 2018); *Base Contract DOCSS1301-16-CQ0002 Order No. SS135117NC0735: Task Order for Staff Augmentation for Office of Under Secretary and Office of the Assistant Secretary for Export Administration (BIS)* (September 25, 2017).

[33] *ITA Contract SS1301-16-CQ-0004: Task Order: Staff Augmentation for Section 232 Exclusions Team for International Trade Administration/Enforcement & Compliance* (May 8, 2018) and *Amendment/Modification of Contract* (June 18, 2018).

  - BIS and ITA contract staff employed in the ER review process
  - Representatives of requestors and objectors to follow-up on their survey responses
- Reviewed cumulative data presented in spreadsheets provided by BIS and ITA to monitor ERs throughout the process.
- Reviewed and accessed Regulations.gov to retrieve documentation associated with ERs that we tested.
- Performed substantive testing on a combined sample of 115 ER cases with objections for which decisions had been submitted on Regulations.gov between March 19, 2018, and June 30, 2019, out of a universe of 9,282. We used statistical methods to randomly select 100 cases (see appendix B for additional details on the statistical samples) and judgmentally selected 15 cases based on specific criteria. We did not project the results of our testing to the aforementioned universe. We examined all public documents associated with each ER including the requests themselves, objections, rebuttals, surrebuttals, any CBI submitted by the parties, any guidance provided by SMEs, and internal tracking documents used by ITA and BIS to manage the ER review process.
- Conducted an online survey in August 2019 of 58 requestors from our sample whose ERs were denied. The surveys pertained to 93 ERs and solicited feedback on the requestors' overall experiences with the ER review process and whether they sourced their requested products domestically. We received 24 responses (41 percent response rate).
- Conducted an online survey in November 2019 of 177 objectors that were derived from our testing sample to obtain their overall experience of the ER review process. We received 36 responses (20 percent response rate).

We gained an understanding of internal control significant within the context of the audit objective through interviews with relevant officials and a review of available documentation about the ER review process. As a result, we identified internal control deficiencies with respect to documenting supervisory review of ITA recommendations and controlling access to electronic files where BIS decision are recorded. We report them in findings II.A. and II.C., respectively. During our fieldwork, no incidents of fraud, illegal acts, or abuse were detected within our audit.

We assessed the reliability of computer-generated data by interviewing agency officials knowledgeable about the data and by obtaining corroborating evidence. We determined that the data was not sufficiently reliable in certain areas but was in other areas for the purposes of this report. Data reliability varied between BIS and ITA due to the data entry mechanism. BIS was a primary source of data used due to the higher level of confidence. We could not rely on the ITA data provided with a high level of confidence. However, the ITA data was reliable enough to use as background and verification of certain trends in the data.

We conducted our review from November 2018 to January 2020 under the authority of the Inspector General Act of 1978, as amended (5 U.S.C. App.), and Department Organization Order 10-13, dated April 26, 2013. We performed our fieldwork at Department headquarters in Washington, DC.

We conducted this performance audit in accordance with generally accepted government auditing standards.[34] Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[34] This audit was conducted in accordance with the 2011 revision of the Government Accountability Office's *Government Auditing Standards*. See GAO, December 2011. *Government Auditing Standards*, GAO-12-331G. Washington, DC: GAO. The 2018 revision of the Government Accountability Office's *Government Auditing Standards* applies to performance audits beginning on or after July 1, 2019.

Appendix B: Sampling Scope and Methodology

We used computer-processed data to evaluate ER timeliness and draw samples of ERs with and without objections. Specifically, we obtained internal working files from BIS and ITA and raw files from the Federal Docket Management System—a document management system that provides records of comments on proposed federal rules that are posted on Regulations.gov. These files included the following:

- BIS decision tracking sheet, which is a spreadsheet that tracks ER decisions.
- BIS status sheet, a spreadsheet that tracks the progress of ERs under review.
- A data download of 105,949 ERs, including objections and rebuttals, from the Federal Docket Management System and Regulations.gov.
- Metadata download of the 105,949 ERs from the Federal Docket Management System and Regulations.gov, data that includes information about public comments and posted documents on ERs.
- Excel spreadsheets maintained by BIS containing the dates that BIS sent ERs to ITA for analysis and the dates ITA submitted its final recommendations to BIS.
- ITA tracker data, which contains a record for each internal review conducted by ITA, including, according to ITA, the date received from BIS and completed by ITA.

To conduct our analysis, we loaded all data in SAS[35] and merged the records by the exclusion identification number (e.g., BIS-2018-0006-0001) to get a complete case history of each ER. During this process, we worked with BIS and ITA staff to ensure that we were accurately capturing the records for each ER.

To prepare our analysis, we assessed whether the data were sufficiently reliable by performing reasonableness tests, such as identifying missing data, calculation errors, data outside valid timeframes, data outside designated values, negative values in positive-only fields, and duplicate records. Regarding the first five data sources listed, we identified only minor exceptions and resolved them with assistance from BIS personnel. Additionally, using the same five data sources, we tested a random sample of 100 ERs by comparing the fields within our data to the source documents stored in Regulations.gov. The data matched except for slight differences in the date signed field in BIS's decision tracking sheet (i.e., a variance of +/- 1 day on average), which occurred 13 percent of the time. As a result, we did not rely on the date signed field from this document but considered the data otherwise reliable for testing.

We followed a similar process for the ITA tracker data, performing reasonableness tests and reviewing the source data. We identified numerous exceptions within the data, such as duplicate requests, numerous dates outside of valid ranges, and illogical values in fields. Although we worked with ITA personnel to resolve these specific issues, their presence suggests the risk of additional problems within the data. For example, although electronic

[35] SAS (or *Statistical Analysis System*) is a software suite that can mine, alter, manage, and retrieve data from a variety of sources and perform statistical analyses on them.

testing can identify an invalid date from *before* or *after* the period of review, it would not detect errant dates from *within* the period of review. As a result, we only use the ITA tracker data to assess the number of days for ITA's review and present results with caveats. Given the data issues we identified, we have less than full assurance about its reliability.

In addition to the sample used to test the reliability of the data described previously mentioned, we developed two other stratified random samples. One sample was a set of ERs that allowed us to perform in-depth analysis of the ER review process and the other allowed us to verify the duration of the public comment period. We performed all randomization, selection, and estimation using SAS.

The first sample included 50 ERs with objections that BIS completed on or before March 3, 2019, and 50 ERs with objections that BIS completed between March 4, 2019, and June 30, 2019. The reason for the separate periods is that the initial scope of the audit was from program inception until March 3, 2019. After releasing the interim memo regarding the timeliness of the process, we modified the scope to include all ERs submitted to Regulations.gov as of June 30, 2019. After this scope change, we pulled an additional 50 ERs from the latter period and treated them as a separate strata (weighting accordingly). We selected this number of ERs to ensure that sampling results would have no worse than a 90 percent level of confidence and 10 percent margin of error, assuming no worse than a 25 percent failure rate.

We did not project the results of our testing to the universe because we determined that the universe of ERs was not homogenous. Each case has many variables, and individual ERs are not similar. For instance, some of the decisions for cases were reached before BIS added the rebuttal and surrebuttal process (and only had objections). Additional variances include attributes such as the number of objections, rebuttals, and surrebuttals received; whether the firm submitted CBI; whether a SME was consulted; the type and nature of the product covered by the ER; and the reason for denial (e.g., incorrect HTSUS code, sufficient U.S. supply, or quota country).

Finally, we judgementally selected a sample of 15 cases with objections for which an SME was consulted and whose decisions were rendered between March 19, 2018, and June 30, 2019. We performed the same substantive testing of attributes as for the randomly selected 100 cases.

Appendix C: Survey Methodology and Questionnaires

As part of our review, we conducted an online survey of firms associated with the ERs selected in our testing samples. In August 2019, we e-mailed 93 survey requests to 58 companies whose ERs were denied by BIS. The surveys solicited feedback on the requestors' overall experiences with the ER review process and whether they purchased their requested products from U.S. manufacturers. We received 24 responses, which represents a 26 percent response rate of firms surveyed. In November 2019, we e-mailed 177 survey requests to firms who objected to ERs that BIS denied to obtain their overall experience of the ER review process. We received 36 responses, which represents a 20 percent response rate. The survey questions, including answer choices, are provided here for requestors and objectors, respectively.

Questionnaire — Requestor

Question 1: Exclusion Request Number

Question 2: Company Name

Question 3: How easy/difficult was it to complete the exclusion request form?

1. Very easy
2. Easy
3. Neither easy nor difficult
4. Difficult
5. Very difficult

Question 4: Was the reason for the denial of this exclusion request clearly explained in the BIS Decision Memorandum for this case?

1. Yes
2. No

Question 5: Did your company chose to pay the tariff or purchase the product from a domestic (U.S.) supplier?

1. Paid the tariff - Did not purchase the product from a U.S. supplier
2. Purchased the product from a U.S. supplier

Question 6: Did the U.S. product meet the technical specifications included in the exclusion request?

1. Yes
2. No

Question 7: Was the U.S. supplier able to provide the product in the quantity covered by the exclusion request?

1. Yes
2. No

Question 8: Was the U.S. supplier able to manufacture the product in the quantity requested within eight weeks or less?

1. Yes
2. No
3. If "No," How many weeks did it take for the domestic supplier to manufacture the product?

Question 9: Were there any quality issues or problems with the product?

1. Yes
2. No
3. If "Yes," please explain

Question 10: If your company chose to pay the tariff instead of sourcing the product from a U.S. supplier, what was the reason (Please select all that apply)?

1. Price of the product offered by the U.S. supplier
2. Product was not available from a domestic supplier
3. Manufacturing considerations (i.e. supplier qualification process)
4. Quality of the product did not meet specifications
5. Other (please specify)

Question 11: If your company attempted to purchase the product from a U.S. supplier and was unable, what was the reason?

Question 12: Has your company submitted other exclusion requests?

1. Yes
2. No

Question 13: For other exclusion requests submitted, please indicate the approximate percentage of products for which your company chose to pay the tariff and/or purchase the product from a domestic (U.S.) supplier?

1. Percentage of requests where my company paid the Tariff - did not purchase the product from a U.S. supplier
2. Percentage of requests where my company purchased the product from a U.S. supplier

Question 14: Please estimate the percentage of products the domestic supplier was able to manufacture within eight weeks or less.

Question 15: Please estimate the percentage of products purchased from domestic suppliers with quality issues or problems.

Question 16: Please estimate the percentage of the requested quantity the supplier was able to provide.

Question 17: Please estimate the percentage of products that met the technical specifications included in the exclusion request.

Question 18: Do you have any comments about other exclusion requests your company has submitted?

Question 19: Do you believe that the Section 232 exclusion request process is fair?

1. Yes
2. No

Question 20: Do you believe that the Section 232 exclusion request process is transparent?

1. Yes
2. No

Question 21: How has your company been affected by the tariff?

Question 22: Do you have other questions, comments or concerns?

Questionnaire — Objector

Question 1: Exclusion Request Number

Question 2: Company Name – Requestor

Question 3: Company Name – Objector

Question 4: How easy/difficult was it to complete the objection form?

1. Very easy
2. Easy
3. Neither easy nor difficult
4. Difficult
5. Very difficult

Question 5: Did the firm that submitted the exclusion request purchase the product from your company?

1. Yes
2. No
3. If "No," please explain

Question 6: If the requestor did not purchase the product described in the exclusion request from your company, what was the reason (check all that apply)?

1. Requestor never inquired about purchasing the product
2. Product did not meet the requestor's specifications
3. Manufacturing/delivery time was too long
4. Not able to supply quantity requested
5. Price/cost issues (price was too high)
6. Do not know
7. Other Reason (please specify – 100 character maximum)

Question 7: Did the product your firm manufactured meet the technical specifications included in the exclusion request?

1. Yes
2. No

Question 8: Was your company able to manufacture the product in the quantity included in the exclusion request?

1. Yes
2. No

Question 9: Was your company able to manufacture the product in the quantity requested within eight weeks?

1. Yes
2. No
3. If "No," how many weeks did it take for your firm to manufacture the product?

Question 10: Did the requestor report any quality issues or problems with the product?

1. Yes
2. No
3. If "Yes," please explain

Question 11: Has your company objected to other exclusion requests submitted by the same requesting firm?

1. Yes
2. No

Question 12: For other exclusion requests your company objected to that were submitted by the same requestor, please indicate the approximate percentage of products the requestor purchased from your company.

1. Percentage of requests where the requestor purchased the product
2. Percentage of requests where the requestor did not purchase the product

Question 13: Please estimate the percentage of products your firm was able to manufacture within eight weeks or less.

Question14: Please estimate the percentage of products that the requestor reported had quality issues or problems.

Question15: Please estimate the percentage of the requested quantity your firm was able to manufacture.

Question16: Please estimate the percentage of products manufactured that met the requestor's technical specifications included in the exclusion request.

Question 17: Do you have any comments about other exclusion requests your firm has objected to?

Question 18: Do you believe that the Section 232 exclusion request process is fair?

1. Yes
2. No

Question 19: Do you believe that the Section 232 exclusion request process is transparent?

1. Yes
2. No

Question 20: How has your company been affected by the tariff?

Question 21: Do you have other questions, comments or concerns?

Appendix D: The Section 232 Exclusion Request Review Process

ERs are made based on the 10-digit HTSUS code and the specific physical characteristics of the excluded products (e.g., dimensions or chemical composition). Requestors submit ERs in electronic form, with no time limit for pre-clearance review.[36] However, once accepted, BIS posts the ER for public review and the following timeline (in calendar days) applies:

1. Public comment period to file an objection to an ER – 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 ER, objections, rebuttals, and surrebuttals – 30 days
5. Review and decision – 30 days

Reviews of ERs with objections, rebuttals, and surrebuttals should be completed within 104 days with an additional day each for approving the rebuttals and surrebuttals for a total of 106 days.[37] For ERs without objection, the review should be completed within 90 days.[38] If granted, an exclusion generally lasts for 1 year or until the entire amount of the product requested has been imported. Only products admitted into the United States after the date the ER was posted online at the start of the process are eligible for a refund on any tariffs paid. If denied, the requestor must continue to pay the tariffs on the imported product.

BIS is responsible for managing the Section 232 ER review process in collaboration with ITA. BIS reviews ERs for compliance with its submission requirements and renders its decisions after interagency consultation. ITA is responsible for evaluating and making recommendations to BIS on whether to grant or deny ERs to which domestic aluminum or steel producers object. The following is the current ER review process, which conformed to the process that was used during our fieldwork (see figure D-1).

Pre-Clearance (BIS): No time limit

U.S.-based individuals or organizations submit ERs for specific steel or aluminum products on an electronic platform. Once submitted, CBP validates the accuracy of the HTSUS code and

[36] From March 19, 2018, until June 12, 2019, ERs were posted on Regulations.gov. Starting on June 13, 2019, BIS began managing the ER review process through the Department's new 232 Exclusions Portal (accessible via https://www.commerce.gov/page/section-232-investigations), which replaced the previous website.

[37] 83 Fed. Reg. 46026, 46053, 46060, & 46064.

[38] 83 Fed. Reg. 12106 & 12111.

determines whether it can administer the ER at U.S. ports of entry.[39] If the code is accurate, BIS conducts a preliminary screening of the ER.

BIS contracted with two firms to perform administrative and data entry activities, such as processing ERs, objections, rebuttals and surrebuttals, and reviewing ERs for completeness and correctness.[40] Prior to February 11, 2019, CBP's determination occurred *after* the evaluation and recommendation phase but before the decision phase. If accepted, BIS uploads the ER to the public-facing electronic platform, which initiates the regulatory timeframes. If CBP determines the tariff classification is incorrect, or if BIS determines the submission is incorrect or incomplete, BIS rejects the ER and communicates this action to the requestor via e-mail.

Post and Comment (BIS): Up to 44 days

Within the first 30 days of posting an ER, steel or aluminum producers in the United States may file objections against it. BIS contract employees review objections for completeness and post them to the public-facing electronic platform. If no objections are received, the ER proceeds directly to the decision phase and is approved barring any national security concerns. If objections are received, but no rebuttals or surrebuttals, BIS refers the ER and objections to ITA for technical evaluation once the 30-day comment period closes. If rebuttals and surrebuttals are received, BIS contract employees review those documents for completeness and post them to the public-facing electronic platform if approved. Rebuttals are due 7 days after the last objection is posted, and surrebuttals are due 7 days after the last rebuttal is posted. BIS also analyzes the ER for national security concerns during this phase.

Evaluation and Recommendation (ITA): 30 days

Once the post and comment period is closed, BIS refers an ER that receives objections and any related rebuttals and surrebuttals to ITA to review and evaluate it based on its technical merits (see figure D-1 for details). ITA employs a contractor to perform this analysis using internal ITA guidance. The contract specified roles for project managers, administrative specialists, researchers, and evaluators—the latter two being responsible for conducting the technical analyses.[41] ITA contract staff examines the ER, objection(s), rebuttal(s), surrebuttal(s), and any related documents to determine whether

- an identical or substitute product is available in the United States;

[39] CBP determines whether it can administer an ER by validating the relevant HTSUS code to ensure customs officers can identify the product and collect the tariff at U.S. ports of entry.

[40] *BIS Contract DOCSS1301-16-CQ0002: Task Order for Staff Augmentation for Office of Under Secretary and Office of the Assistant Secretary for Export Administration (BIS), Base Contract; and BIS Contract GS-35F-470CA: Bureau of Industry and Security (BIS) Export Administration Support Services*. Completeness includes whether, for example, specific product dimensions, the quantity of product required (stated in kilograms) under a 1-year exclusion, or a full description of the properties of the product the requestor seeks to import is provided.

[41] ITA Contract SS1301-16-CQ-004: Task Order for Staff Augmentation for Section 232 Exclusions Team for ITA/[Enforcement and Compliance] (Base, MOD 1, and MOD 2). The initial task order provided for 1 project manager, 1 administrative specialist, and 25 researcher/evaluators. ITA amended the contract to add a program manager and an additional 24 researcher/evaluators on June 18, 2018.

- production of such product is planned by the objector(s); and,
- the product is manufactured within the 8-week regulatory timeframe.

Evaluators consult SMEs to address cases involving identical and substitute products, or complex technical situations. Four SMEs were available for consultation during the scope of our audit: two materials research engineers, a former International Trade Commission employee, and a then-ITA employee, each with more than 20 years' experience in the steel industry. According to internal ITA policy, evaluators and SMEs may only consider information submitted by interested parties when developing their pre-decisional recommendations.

ITA direct-hire employees (or Departmental detailees) supervise, review, and approve the work of the contract employees. Once the work is completed, the Director of the Section 232 Team briefs the analyses and pre-decisional recommendations to the DASPN. If the DASPN approves, ITA transmits the final recommendation memoranda to BIS for consideration.

Issue Decision (BIS): 30 days

BIS renders decisions after considering (1) ITA's recommendation (if the ER received an objection), (2) whether CBP is able to administer the exclusions, and (3) the national security justification for the ERs based in part on interagency feedback.[42] The Deputy Assistant Secretary for Export Administration issues the actual decision, which may include one or more of the following:

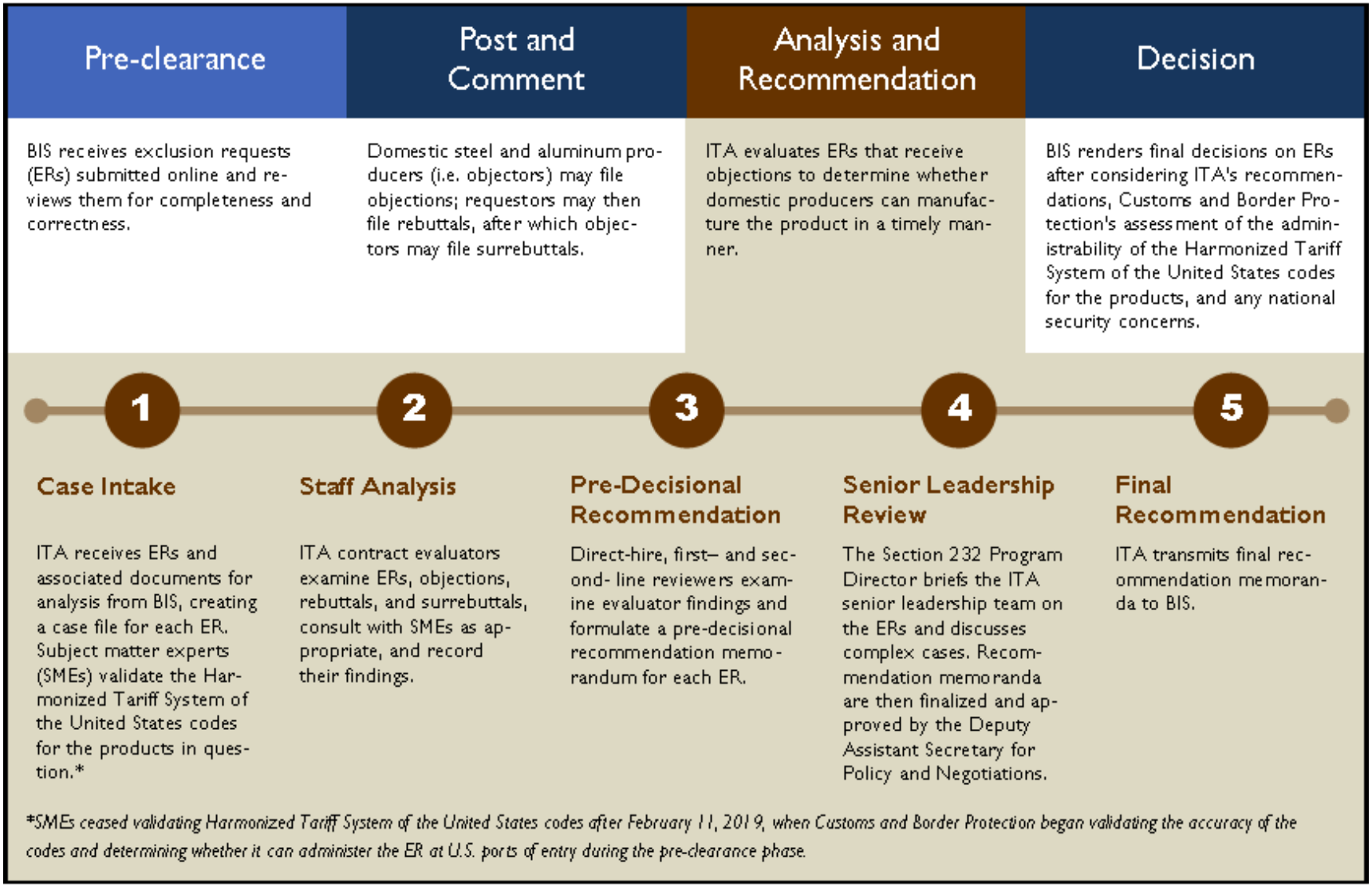
- Approved or denied based on U.S. availability
- Approved or denied based on national security
- Approved with modifications
- Denied because CBP cannot administer the exclusion[43]

BIS approves ERs that do not receive objections if CBP determines that the HTSUS code provided by the requestor can be administered at U.S. ports of entry, and there are no national security concerns associated with the product. It also relies on ITA's recommendation regarding product availability when making decisions on ERs. Each ER receives its own decision and is posted on the public electronic platform. The decision is also conveyed to CBP so that it can exempt products covered under an ER at U.S. ports of entry. The issuance of a decision concludes the ER review process.

[42] BIS consults with other parts of the U.S. government to determine whether to grant an exclusion request based on specific national security considerations.

[43] Decision memoranda for exclusion requests denied solely due to the administrability of the HTSUS code are no longer posted (except in rare circumstances) because the administrability review was moved to the start of the process in February 2019. BIS instead rejects any exclusion requests with HTSUS code issues and sends an e-mail detailing any corrections to the requestor.

Figure D-1. Detailed Process of ITA's Evaluation and Recommendation Phase



Source: OIG analysis of BIS and ITA documentation

Appendix E: Agency Response

UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

September 3, 2020

MEMORANDUM FOR: Mark H. Zabarsky
Principal Assistant Inspector General for Audit and Evaluation
Office of Inspector General

FROM: Cordell A. Hull C.A.H.
Acting Under Secretary of Commerce for Industry and Security
Bureau of Industry and Security

Joseph C. Semsar J.C.S.
Deputy Under Secretary for International Trade, Performing the non-exclusive functions and duties of the Under Secretary for International Trade
International Trade Administration

SUBJECT: Response to Draft OIG Report: Decisions on Exclusions from Section 232 Tariffs Were Not Transparent and Based on Incomplete and Inaccurate Information

We appreciate the opportunity to comment on the Office of the Inspector General's draft audit report on the Bureau of Industry and Security's and the International Trade Administration's processes and procedures for reviewing and adjudicating product exclusion requests for aluminum and steel tariffs, as prescribed by Presidential Proclamations 9704 and 9705, respectively, under the authority of Section 232 of the Trade Expansion Act of 1962, as amended. We have reviewed the draft report's analysis and conclusions and carefully considered its recommendations. Our comments are included in the attached.

September 3, 2020

~~CUI/PRIV~~

Department of Commerce
Bureau of Industry and Security & International Trade Administration Comments to the Office of Inspector General (OIG) Draft Audit Report Entitled *Decisions on Exclusions from Section 232 Tariffs Were Not Transparent and Based on Incomplete and Inaccurate Information*

General Comments

The Bureau of Industry and Security (BIS) and the International Trade Administration (ITA) appreciate the opportunity to review and comment on the Office of the Inspector General's (OIG's) draft audit report on our bureaus' processes and procedures for reviewing and adjudicating product exclusion requests for aluminum and steel tariffs, as prescribed by Presidential Proclamations 9704 and 9705, respectively, under the authority of Section 232 of the Trade Expansion Act of 1962, as amended. BIS and ITA management and staff take great pride in the quality of their work and work product, as well as the incredible effort it took to establish this program in such a short timeframe and with limited financial and human resources. BIS and ITA have made a number of enhancements to the exclusion process and we welcome this opportunity for your office to provide us with constructive feedback on how our processes can be further improved. Indeed, we plan to introduce several improvements to the exclusion process that address the OIG's recommendations. That said, we are also concerned that the report contains numerous errors that led you to misrepresent the process and overstate its deficiencies.

BIS established the exclusion request process in March 2018 to address each and every exclusion request in a fair, objective, and well-reasoned manner. Under this process, for every exclusion request that is contested (*i.e.*, a domestic producer submits an objection to the exclusion request), ITA formulates a recommendation to BIS on whether to grant the exclusion request based on whether a domestic substitute of suitable quality, quantity, and production time is available. BIS then makes the final decision based on ITA's recommendation. In doing so, BIS may take into account national security considerations and other policy-related concerns that are beyond ITA's purview.

Since the tariffs were imposed in March 2018, there have been over 225,000 product exclusion requests submitted to the Department of Commerce (Commerce). That translates to an average of more than 250 requests submitted every single day, including weekends, since the program began. ITA received no new staff or funding to administer its responsibilities in evaluating the tens of thousands of exclusion requests objected to by U.S. producers.

Over time, and with the benefit of experience, BIS and ITA have introduced numerous improvements to the process for handling exclusion requests. For example, in September 2018, we added the possibility of rebuttal by the party requesting the exclusion and surrebuttals by objecting U.S producers. In June 2019, we established a dedicated online portal for submitting and checking on the status of individual exclusion requests, which significantly streamlined and improved the exclusions process for external parties by replacing the data collection point with

web-based forms, which has enhanced transparency, data integrity, and quality controls.[1] We have also scaled up operations to increase the speed and efficiency of processing exclusion requests. During the OIG review period, ITA provided an average of about 800 recommendations to BIS per month. Since April 1, 2020, ITA has provided an average of over 4,000 recommendations to BIS per month. By explicitly not taking into account these improvements and the online portal, the draft OIG report presents a misleading picture of the current state of the exclusions process, using data well over a year old and from the prior system that relied on regulations.gov.

We plan to continue improving the process, taking into account lessons learned in the past two years, as well as the OIG's recommendations. In particular:

- *Publication of Future ITA Recommendations:* Currently, when BIS makes a decision on a pending exclusion request, BIS's decision is made public, but the ITA recommendation memorandum that supports BIS's decision is not. This has contributed to a perception that the 232 exclusion process is insufficiently transparent. To address these concerns, ITA is modifying the format and content of its recommendation memoranda to present the analysis supporting its technical recommendations in a manner suitable for public release. ITA plans for such revised memoranda to be provided as an appendix to BIS's decisions. Publicly providing future ITA recommendation memoranda directly addresses OIG recommendation two.

- *Clarification of Basis for ITA Recommendations:* To assess the available quantity and timeliness of domestic substitutes, ITA relies on the objector's sworn representations regarding its current ability to produce the requested product (which appear in Section 1 and Section 3a). However, the OIG report raises the question of why ITA does not instead rely on other data in the objection form to make these assessments (*i.e.*, data collected in Section 1 of the objection form regarding an objecting producer's overall production capacity, and Section 3 regarding the objector's production and delivery timing for potential future orders). The answer is that this information is collected for statistical purposes only, and in any event is less relevant than the objector's sworn representations regarding its ability to produce the requested product itself.

  ITA plans to revise the format and content of its recommendation memoranda to BIS, to explicitly identify the basis for ITA's recommendations and the reasons for considering (or not considering) certain information – including when certain information is not taken

[1] When the Section 232 program was established, all exclusion requests were submitted through *regulations.gov* – the same generic online platform for public comments on regulations. Although the 232 exclusions process worked on *regulations.gov*, BIS concluded that a specifically designed web-based portal would be easier and more efficient for both outside parties and Commerce. BIS and ITA developed the Portal to streamline the exclusions process for external parties, including importers and domestic manufacturers, by replacing the data collection point with web-based forms, which has enhanced transparency, data integrity and quality controls. The Portal allows 232 submitters to easily view all exclusion request, objection, rebuttal, and surrebuttal documents in one, web-based system. In addition, external parties are able to track submission deadlines in this same system, allowing for better collaboration between BIS, ITA and CBP, the government agencies processing 232 exclusion requests.

~~CUI/PRIV~~

into account because it is collected for statistical purposes only, or is not relevant to ITA's determination. As discussed above, the recommendation memoranda will be made public. These changes to ITA recommendation memoranda directly address OIG recommendation two.

- *Clarifying the "Eight-Week Rule"*: Commerce's regulations (section (c)(6)(i) of September 11, 2018 IFR) state that an exclusion will be granted if the particular product is not available "immediately" from an objecting U.S. producer. The regulations define "immediately" to mean the product is currently being produced or could be produced within eight weeks. Commerce has interpreted this regulatory criterion not in a vacuum, but in consideration of the period of time in which a foreign exporter could provide the product for which an exclusion is requested. Commerce is examining a potential corresponding clarification to this rule, which will resolve the misperception of a disconnect between Commerce's practice and the regulation itself. This will address OIG recommendation two.

- *Elimination of Backlog of Exclusion Requests*: As of August 28, 2020, ITA eliminated its backlog of exclusion requests, so that every requestor can receive a decision in a timely manner.

- *Change Control Board*: The Change Control Board (CCB) provides oversight and authorization by recording, evaluating, and approving changes affecting 232 processing. Approved changes are reflected in process documentation and communicated to the team regularly.

- *Addition of Generally Approved Exclusions*: BIS has identified a set of Harmonized Tariff Schedule of the United States (HTSUS) codes for which domestic manufacturers did not object in the first two years of the exclusion process, indicating that no domestic capability exists for these products. Commerce is examining whether it may be able to provide blanket exclusions for these products, thereby allowing companies to import products tariff-free without needing to file exclusion requests.

- *Clarifying of Product Definition*: Commerce's regulations (84 FR 46026, section (c)(2)) currently require that a requester file separate requests based on "distinct critical dimensions." Commerce is examining a potential clarification to this rule that would remove the word "distinct." This will allow requesters with broad product range requests to consolidate multiple distinct products into a single filing based on their minimum and maximum acceptable ranges within a specified tariff provision, reducing the number of requests they are required to file.

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Thus, BIS and ITA are committed to proactively improving the Section 232 exclusion request process, and these improvements are informed to some extent by the OIG's findings.

The OIG Report's Conclusions are Premised on Limited, Dated Data and Misunderstandings

As noted above, we are concerned that the OIG report is premised on limited, dated data that led the OIG to mischaracterize the process and overstate its present deficiencies. Although the OIG's report will be issued in late 2020, it is based exclusively upon a sample of determinations made by Commerce during the period from March 19, 2018 to June 30, 2019 – more than one year ago, and in a much earlier stage of the Section 232 exclusion process. Moreover, the sample of determinations covers only 115 exclusion requests – less than half of the average number of such requests that are submitted to Commerce *on a single day*. The OIG Report (Appendix B) even goes so far as to acknowledge that the "universe of ERs was not homogenous" and states: "we did not project the results of our testing to the universe," implying that the sample of cases is not representative. Furthermore, 15 of the 115 samples were selected in a manner that the OIG itself describes as "judgmental" – *i.e.*, not objective or random, but rather to support the OIG's arguments. Accordingly, the OIG report is based upon an inappropriately narrow, outdated, and biased information set.

Several other methodological shortcomings and factual statements undercut the OIG's analysis. For example:

- *The OIG Does Not Appear to Have Followed its Own Standards for Objectivity, Balance and Impartiality:* According to the draft report (page 17, fn. 30), the audit was conducted in accordance with the 2011 revision of the Government Accountability Office's *Government Auditing Standards*. Objectivity and impartiality are hallmarks of the GAO audit standards (paras 1.19, 3.04). According to these standards, recommendations will be impartial and viewed as impartial by reasonable and informed third parties (para 3.04). However, as noted above, the OIG Report itself (Appendix A, on Objectives, Scope, and Methodology) admits that the OIG "judgmentally" selected 15 of the 115 sample cases based on specific criteria. Appendix B does not provide any details on the "judgmentally selected 15 cases", nor provide any indication to ascertain a reason to do so. Furthermore, Appendix B goes so far as to acknowledge that the "universe of ERs was not homogenous" and states: "we did not project the results of our testing to the universe…." implying that the sample of cases is not representative.

  In addition, the OIG's conclusions depend in part on information gathered through two online surveys (described on page 16) – one in August 2019 of 58 requestors for which exclusion requests were denied, and one in November 2019 of 177 objectors. Selected examples drawn from the survey results are used to support certain conclusions made by the OIG in the report. However, the OIG provides no details regarding these surveys, such as the questions asked, the particular companies that were queried and those that responded, and details of the responses. Further, there is no indication that the OIG attempted to corroborate the information provided by the requestors, nor whether the OIG sought the corresponding

objectors' feedback. ITA raised questions about the objectivity of these surveys during the course of the OIG's audit, but the OIG did not address these questions in its final report.

- *The OIG Mischaracterized ITA's Process for Formulating its Recommendations to BIS, Resulting in Incorrect Assessments of ITA's Transparency Obligations*: In its draft report on pages 9-10, the OIG faults ITA for failing to document changes in staff recommendations to ITA's Deputy Assistant Secretary for Policy and Negotiations (DASPN), prior to a decision by the DASPN. The OIG asserts that "the control is not designed appropriately since ITA does not require staff to document changes made to initial recommendations or the reason(s) for those changes."

  This criticism reflects a misunderstanding of the process by which ITA develops its recommendation for BIS. In fact, the process contains only two decision points. First, the DASPN makes a decision based on a deliberative/pre-decisional staff recommendation. The second decision point is BIS's decision based on ITA's recommendation (as well as any other information that BIS considers). Everything prior to the DASPN decision is internal deliberation and the deliberative/pre-decisional staff recommendation is subject to a review of the facts by the DASPN. The OIG's inference that there is a series of recommendations in ITA preceding the recommendation to the DASPN is factually incorrect. ITA's decision making process is reasonable and there is no legal basis for requiring Commerce to chronicle additional layers of concurrence transmittals or recommendations.

- *The OIG Misstated the Facts of Individual Cases:* On numerous occasions in the draft OIG report, the OIG either omitted or misstated particular facts of cases, resulting in erroneous conclusions. For example:

  - The OIG states that ITA "did not take into account the additional time needed beforehand to obtain the input materials" and supposedly therefore inappropriately recommended denying an exclusion request. However, Commerce's regulations specify that the review criterion is production time (*see* section (c)(6)(i) September 11, 2018 IFR), not overall delivery time. Lead time and shipment time are not part of the manufacturing time, so ITA appropriately excluded the time to obtain the input materials from its calculation.

  - The OIG states: "For one ER, a requestor provided documentation in its rebuttal showing that the objector's manufacturing time for the product was between 15 and 19 weeks." However, ITA reviewed each of the 37 cases the OIG reviewed for Section D and was unable to identify the evidence described by the OIG in this example.

- *The OIG Mischaracterizes the Intent of the Remedy and Exclusion Process*: Several portions of the draft OIG report imply that companies should expect to be granted an exclusion to the remedy imposed by the President. This results in statements in the

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draft report that suggest the remedy itself is an undue burden, which is not within the scope of the OIG's investigation. For example:

- The OIG states that "the review process itself poses challenges for U.S. manufacturers who request exclusions" and that exclusions "should be granted for products that are not produced in the U.S. in an adequate quantity or of satisfactory quality." The President imposed a remedy based on the finding of a threat to national security, and authorized the Secretary to grant exclusions under specified conditions. The default position is thus that importers of the specified steel and aluminum products will pay the assigned duties, not that they should expect to be granted an exclusion to these duties.

- The OIG also writes that "if a U.S. steel producer objects to an ER, the Requestor's chances of receiving an approval decline sharply." This statement is highly misleading because it implies this is a systemic error and not an inherent feature of the remedy. As the exclusion process functions by allowing domestic manufacturers to identify their capabilities to provide the requested products, objections represent a success of the President's remedy—a U.S. manufacturer showing their ability to provide a product that would otherwise be imported—not a failure.

There are numerous other examples of OIG misstatement of facts, as detailed further below. These flaws raise serious questions about the accuracy and integrity of the OIG report.

Agency Response to OIG Recommendations

Recommendation 1 (for the Acting Under Secretary of Commerce for Industry and Security): Reexamine the Section 232 ER review process to ensure decisions are based on complete and accurate information and are transparent.

- *Recommendation 1A: Require an objector that indicates it has CBI to provide a public summary of it in its objection form.*

BIS Response: BIS concurs generally with this recommendation. BIS notes that providing a public summary of any optional Confidential Business Information (CBI) has never been a requirement for filing either exclusion requests or objections as laid out in the Interim Final Rules, as acknowledged by the OIG. Thus, BIS had no authority to demand such information as a requirement from objectors.

However, BIS agrees that the additional perceived transparency granted by public summaries of CBI for exclusion requests and objections would benefit the 232 Exclusions Process. BIS and ITA will assess and seek the resources needed to design and implement programmatic changes to the 232 Portal.

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- *Recommendation 1B: Require personnel involved in the decision-making process on whether ERs are granted or denied to document the reason for changes made to decision memoranda.*

BIS Response: BIS concurs that greater documentation of changes to Posted Decision Memoranda will improve the transparency and reliability of the 232 exclusions process. BIS has thus already created a Decision Memorandum Change Log to document any such changes (including their effective date and rationale) to Posted Decision Memoranda. BIS also reaffirms its existing policy to directly alert requestors through their Point of Contact of any changes that affect their final Posted Decisions. BIS notes that it only modifies Posted Decision Memoranda if necessary to correct technical errors including missing or incorrect information and incorrect Decision Memorandum Templates. BIS informs requestors of any change that affected their final Posted Decision (*i.e.*, granted or denied). BIS also undertakes internal reviews to ensure that all Posted Decisions are accurate in both Regulations.gov and the 232 Exclusions Portal, a challenge given the size, scope, complexity, and rate of speed of the 232 exclusions process. The OIG cites only five specific cases of incorrect Posted Decision Memoranda - a near-insignificant fraction of the more than 150,000 Posted Decisions even accounting for the other errors previously detected and corrected by BIS. BIS also notes that some of these errors can be attributed to the available tools at its disposal - particularly the Federal Docket Management System (FDMS) underlying Regulations.gov, which was not built to handle the rate or volume of exclusion requests submitted through the 232 exclusions process.

- *Recommendation 1C: Protect spreadsheets that are used to track decision memoranda from unauthorized changes.*

BIS Response: BIS concurs generally with the recommendation to strengthen controls on its tracking files, data spreadsheets, and other decision-making documents related to the 232 exclusions process. BIS has implemented password-protection on all decision-making files (including tracking sheets and inter-agency transfer sheets) associated with the 232 exclusions process. BIS will also examine its internal permissions lists within the 232 Exclusions Portal to ensure that access is properly regulated and controlled in the 232 exclusions process.

BIS does not agree that it had no technical controls over its documentation. Files were accessible only to cleared personnel and stored in protected system locations on the Department of Commerce Shared Drive or SharePoint. Several documents already possessed password protection, including master files such as the Steel and Aluminum Full Data Sheets. The 232 Exclusions Portal which launched on June 13, 2019, further added additional controls through strict access permissions and user logs in both the internal SharePoint as well as the 232 Exclusions Portal itself. BIS notes that the OIG acknowledged that there is no evidence of unauthorized manipulation of any of these files.

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BIS also notes that it already installed some process controls over the generating and posting of Decision Memoranda. BIS generates Decision Memoranda by semi-automatically inserting the data fields from a signed Decision Sheet from the Deputy Assistant Secretary into a PDF Decision Template. BIS then performs a Decision Memo quality assurance/quality control process ("QAQC") to check for any discrepancies between the Decision Memoranda and the signed Decision Sheet. This QAQC is generally performed by separate individuals than those generating the Decision Memoranda. The Decision Memoranda are then uploaded by another separate group of individuals also instructed to flag any discrepancies between their documents and the internal status of a filing in the 232 Exclusions Portal.

Recommendation 2 (for the Deputy Under Secretary of Commerce for International Trade, Performing the Non-Exclusive Functions and Duties of the Under Secretary for International Trade): Reexamine the Section 232 ER review process to ensure recommendations are based on complete and accurate information and are transparent.

ITA Response: ITA generally concurs. Over the entire duration of the Section 232 program, ITA has looked for and implemented refinements to its procedures – and both bureaus have proactively and expeditiously developed improvements to the efficiency, transparency and integrity of the Section 232 exclusion process. Such improvements – ranging from simple adjustments to analytical techniques, to changes in the way findings are expressed in memos, to major system replacements – are continually ongoing and include creation of a new portal, publication of ITA's recommendations to BIS, clarification of ITA's recommendations, clarification of the "Eight-Week Rule," and other process improvements to promote efficiency.

At a minimum:

- *Recommendation 2a: Ensure evaluators properly consider an objector's capacity and current plant percentage utilization when determining whether there is a sufficient U.S. supply of a product.*

ITA Response: ITA does not concur. Overall plant capacity and capacity utilization data are not sufficiently detailed indicators of a company's ability to produce a particular product, nor its ability to produce a given order in a particular period of time. As such, Commerce's regulation does not reference capacity or capacity utilization as criteria required for review of exclusion requests (*see* section (c)(6)(i) of September 11, 2018, IFR). The fields requesting plant capacity and capacity utilization were included by BIS on the objection form for statistical and economic analysis purposes. In the new recommendation memoranda template (discussed above), ITA will clarify that the data on plant capacity and capacity utilization are not the basis of ITA's analysis.

- *Recommendation 2b: Ensure SMEs are able to obtain the appropriate information needed to make an informed decision regarding the U.S. availability of a product.*

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ITA Response: ITA does not concur. This recommendation appears to be based on the premise that subject matter experts (SMEs) should have the ability to selectively contact outside parties to seek additional information and/or ask questions of those parties. As Commerce's regulations state (*see,* section (c)(6)(i) of September 11, 2018 IFR), "[t]he U.S. Department of Commerce reviews an exclusion request based on the information included in the exclusion request, any objections to an exclusion request, any rebuttals to the objections made by an individual or organization that submitted the exclusion request, and any surrebuttals." The regulations do not suggest that Commerce is expected to take account of information other than that in the documents filed by parties, except for specific national security considerations in consultation with other government agencies (*see* section (c)(6)(iii) of September 11, 2018 IFR). Commerce has determined that it is fair to place the burden on the requesters to submit all relevant information in their initial requests, particularly given the large number of exclusion requests submitted.

The OIG recommends that ITA incorporate an additional process for supplementing the record, determined on a case-by-case basis by the SME. If we were to implement such a procedure on a structured basis, it would be impractical and require additional time and resources to gather supplemental information on such a scale. On the other hand, to have an unstructured process such as that suggested by the OIG, which would rely on an individual SME to discuss her or his questions directly with an outside party, would potentially compromise impartiality and consistency, introduce unfairness and subjectivity into the process, and create additional risks to transparency.

BIS and ITA have both adopted policies to eliminate any unofficial contacts on the merits of exclusion requests between internal decision-makers at Commerce and requestors / objectors in order to prevent undue influence (or the perception thereof) of requestors / objectors on the 232 exclusions process. BIS and ITA only consider information provided in the public record on Regulations.gov or the 232 Exclusions Portal as well as any associated CBI submitted through formal specified channels when adjudicating an exclusion request. This policy aligns with legal guidance as well as the OIG Management Alert OIG-20-003-M of October 28, 2019.

- *Recommendation 2c: Comply with the requirement that the objecting firm must be able to manufacture the product within 8 weeks to meet the demand identified in the ER.*

ITA Response: ITA generally concurs. ITA has consistently required that an objecting firm must be able to produce the product within eight weeks, although it has never read this requirement in a vacuum. Accordingly, as ITA has previously indicated to the OIG, in circumstances in which the foreign exporter of the product for which an exclusion has been requested would take longer than eight weeks to deliver the product to the United States, ITA has recommended finding that a domestic producer's production time of more than eight weeks meets the criteria for immediate availability when it is shorter than the foreign exporter's estimated timetable. Such an interpretation of the regulation is reasonable and consistent with the purpose of that

regulatory requirement, which is to ensure that the product is produced in the United States in a sufficient and reasonably available amount. Regardless, recognizing that the construct of the regulation has created confusion, BIS is examining how it can clarify the timeliness provisions applied to reviewing exclusion requests (as noted above).

- *Recommendation 2d: Prepare and maintain complete documentation to support the rationale for determining the U.S. availability of a product.*

ITA Response: ITA generally concurs. The documents submitted by the requestor and objector are used to make the recommendation and ITA relies solely on that information to make its recommendation. As we explained numerous times to the OIG, ITA stays within the "four corners" of the information provided by all parties participating in the case – a practice that contributes to the transparency of the process. ITA creates a recommendation memo and an ITA analysis form for each case it evaluates. In addition, if any subject matter expertise is needed, that guidance is documented and is now housed in a SharePoint site. Those documents support the rationale for determining the U.S. availability of the product. Further, as noted above, to address any transparency and clarity concerns, ITA is modifying the format and content of its recommendation memoranda to present the analysis supporting its technical recommendations in a manner suitable for public release. ITA plans for such revised memoranda to be provided as an appendix to BIS' decisions.