

July 11, 2019

Mr. David Maggi
Designated Agency Ethics Official
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Mr. Maggi:

I write to request information regarding the administration of President Trump's Section 232 tariff exemption process by the Department of Commerce and about potentially serious conflicts of interest for two senior Commerce Department officials responsible for the management of this program.

Thousands of companies are seeking billions of dollars' worth of exemptions from President Trump's steel and aluminum tariffs.¹ However, my investigations have revealed that the process for awarding the exemptions appears to be arbitrary, opaque, and subject to political favoritism. For instance, in August 2018, my office discovered that a subsidiary of a sanctioned Russian company controlled by Oleg Deripaska, a sanctioned Russian oligarch and a "close Putin confidant," received an exemption from aluminum tariffs – just days after President Trump met privately with President Putin in Helsinki.² In a separate investigation, my office found that the vast majority of steel tariff exemptions were going to foreign-owned companies – even though the tariffs were designed to benefit domestic producers.³

Last week, the Commerce Department Office of Inspector General (IG) released a new analysis of the exclusion process, which raised additional concerns.⁴ Under Secretary of Commerce for International Trade Gilbert Kaplan and Acting Under Secretary for Industry and Security (Performing Non-Exclusive Duties) Nazak Nikakhtar are the two of the most senior Commerce Department officials responsible for administering the Department's tariff exclusion program

¹ Business Insider, "US companies forked over a record amount in tariffs in October - \$6.2 billion! – because of Trump's trade war," Bob Bryan, <https://www.businessinsider.com/trump-trade-war-us-companies-pay-record-tariffs-2018-12>.

² Letter from Senator Elizabeth Warren to Department of Commerce Secretary Wilbur Ross, August 7, 2018, <https://www.warren.senate.gov/imo/media/doc/2018.08.07%20Letter%20to%20Commerce%20Secretary%20on%20Rusal%20America%20Tariff%20Exemptions.pdf>.

³ Letter from Senator Elizabeth Warren to Department of Commerce Secretary Wilbur Ross, October 30, 2018, <https://www.warren.senate.gov/imo/media/doc/2018.10.30%20Letter%20to%20Commerce%20Secretary%20Ross%20re%20steel%20tariff%20exemptions%20....pdf>.

⁴ U.S. Department of Commerce Office of Inspector General, "Memorandum: One Year Later—A Look at the Timeliness and Completion Status of Section 232 Product Exclusion Requests," July 1, 2019, <https://www.oig.doc.gov/OIGPublications/OIG-19-017-M.pdf>.

and both either represented or lobbied for corporations in the steel industry before assuming their leadership position within the Department. The new IG memorandum reveals that the exemption adjudication process has benefitted clients represented by their former employers. I am therefore writing to determine what if any role Mr. Kaplan and Ms. Nikakhtar have played in this program and if they have adhered to the conditions of the ethics agreements they signed as nominees.

New Inspector General Finding on the Tariff Exemption Process

On March 19, 2018, days after President Trump imposed the tariffs on steel and aluminum imports, the Commerce Department launched a tariff exclusion process through which firms could request and receive exemptions if they demonstrate that a specific product is not domestically available and presents no national security concerns.⁵ Over the last year, the Commerce Department's Bureau of Industry and Security (BIS) – now headed by Ms. Nikakhtar – has been administering this exemption process with assistance from the International Trade Administration (ITA), led by Mr. Kaplan.⁶

As a part of the exclusion process, the Commerce Department has been posting all exemption applications on a publicly accessible online database and allowing other firms – including domestic steel and aluminum suppliers – to submit objections to requests.⁷ In the first few months since the launch of the program, ITA evaluated all completed exclusion requests and made recommendations to BIS based on its findings. However, the objection process took on a more important role in how BIS makes a determination on July 31, 2018, “when ITA ceased evaluating product exclusion requests that did not receive objections.” According to the new IG analysis, “requests that do not receive objections proceed directly to the decision period at BIS; [while] requests that receive objections proceed to ITA for evaluation and recommendation before BIS makes a final decision.”⁸ Moreover, the IG found “exclusion requests with objections have lower completion rates than requests without objections” and “exclusion requests with objections consistently miss processing deadlines, while more than half of requests with no objections meet deadlines.”⁹ In other words – a company that wants to undermine an exclusion request can simply do so by submitting an objection, because doing so, regardless of the merits, will likely cause a delay in the decision and result in a rejection. In fact, the IG found that completed requests without objections were over 11 times more likely to receive an approval

⁵ U.S. Department of Commerce, “U.S. Department of Commerce Announces Steel and Aluminum Tariff Exclusion Process,” press release, March 18, 2018, <https://www.commerce.gov/news/press-releases/2018/03/us-department-commerce-announces-steel-and-aluminum-tariff-exclusion>.

⁶ U.S. Department of Commerce Bureau of Industry and Security, “About the Bureau of Industry and Security,” <https://www.bis.doc.gov/index.php/about-bis>; International Trade Administration, “Gilbert B. Kaplan,” <https://www.trade.gov/press/bios/kaplan.asp>; U.S. Department of Commerce, “U.S. Department of Commerce Announces Steel and Aluminum Tariff Exclusion Process,” press release, March 18, 2018, <https://www.commerce.gov/news/press-releases/2018/03/us-department-commerce-announces-steel-and-aluminum-tariff-exclusion>.

⁷ The Commerce Department posted exclusion requests, objections, rebuttals and subrebuttals on www.regulations.gov from the launch of the program until June 21, 2019 but has since transitioned to using a new portal: <https://www.commerce.gov/page/section-232-investigations>.

⁸ U.S. Department of Commerce Office of Inspector General, “Memorandum: One Year Later—A Look at the Timeliness and Completion Status of Section 232 Product Exclusion Requests,” July 1, 2019, <https://www.oig.doc.gov/OIGPublications/OIG-19-017-M.pdf>.

⁹ *Id.*

than requests that received an objection and that less than half a percent of requests with an objection received an approval.¹⁰

This process is troubling because the reliance on objections as a key decision factor in exemption approvals appears to benefit clients of Mr. Kaplan and Ms. Nikakhtar's former employers.

Conflict of Interest Concerns Related to Ms. Nikakhtar and Mr. Kaplan

Ms. Nikakhtar, who joined the Commerce Department in March 2018 as the Assistant Secretary for Industry and Analysis within ITA, now serves as the Acting Under Secretary for Industry and Security (BIS) – the agency responsible for managing the exclusion process. Prior to joining the Administration, Ms. Nikakhtar was a partner at Cassidy Levy Kent – an international trade law firm where she worked from August 2015 to March 2018 – focusing on a range of international trade law matters and “represent[ing] clients before the U.S. Department of Commerce.”¹¹ Her former employer counts U.S. Steel among its clients,¹² which, as of April 11, 2019, has submitted more objections to exclusion requests than any other organization (3,548), almost 20% of all the steel objections put together.¹³

Mr. Kaplan joined the Department on March 20, 2018¹⁴ as the head of ITA – a day after the launch of the tariff exclusion process – where he oversees the unit responsible “for providing technical analyses and personnel support to [BIS] for product exclusion requests.”¹⁵ Prior to joining the administration, Mr. Kaplan spent almost two decades representing and lobbying congress on behalf of the steel industry on a range of trade matters. He was lobbying as recently as September 2016, on behalf of corporations like Zekelman Industries – a steel manufacturing company that paid Mr. Kaplan's firm almost \$3.5 million “to enlist [his] services in pressing Congress and federal agencies – including Commerce – to craft, implement, and enforce additional restrictions on Chinese steel imports.”¹⁶ Zekelman Industries has also filed almost 400

¹⁰ As of March 3, 2019, BIS had received over 79,000 exclusion requests – at least 26,300 of which went through the entire adjudication process. Of the 1,362 completed requests (with objections) – only 89 were approved, and of the 24,976 completed requests (without objection) – 19,023 were approved.

¹¹ Cassidy Levy Kent “NAZAK NIKAKHTAR, Partner” accessed through Internet Archive on July 3, 2019, <https://web.archive.org/web/20180202213147/https://www.cassidylevy.com/people/Nazak-Nikakhtar>; Cassidy Levy Kent, “Cassidy Levy Kent Swells Its Legal and Economic Team,” <https://www.cassidylevy.com/news/cassidy-levy-kent-swells-its-legal-and-economic-team>.

¹² See examples: U.S. Court of International Trade, “Slip Op. 19-24,” February 26, 2019, https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/Vol_53_No_6_SlipOp.pdf; U.S. Court of International Trade “Slip Op. 19-1,” January 2, 2019, <https://www.cit.uscourts.gov/sites/cit/files/19-01.pdf>; U.S. Court of International Trade, “Slip Op. 19-73,” <https://www.cit.uscourts.gov/sites/cit/files/19-73.pdf>.

¹³ Mercatus Center, “Tariff Exclusion Requests: A One-Year Update,” Christine McDaniel, April 11, 2019, <https://www.mercatus.org/bridge/commentary/tariff-exclusion-requests-one-year-update>.

¹⁴ International Trade Administration, “Gilbert B. Kaplan,” <https://www.trade.gov/press/bios/kaplan.asp>.

¹⁵ Senate Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, “Hearing to conduct oversight of the Bureau of Industry and Security, the International Trade Administration, and the United States International Trade Commission,” September 6, 2018, <https://www.appropriations.senate.gov/imo/media/doc/090618%20-%20Nikakhtar%20Testimony.pdf>.

¹⁶ Daily Beast, “President Trump Pegs a Former Trade Lobbyist to Lead Trade Policy,” Lachlan Markay, May 05, 2017, <https://www.thedailybeast.com/president-trump-pegs-a-former-trade-lobbyist-to-lead-trade-policy>; U.S. Senate Lobbying Database, “Lobbying Report: King & Spalding,” November 21, 2016,

objections – for over 800 million kilograms of potential steel imports.¹⁷ In previous years, Mr. Kaplan also represented the Aluminum Extrusions Fair Trade Committee,¹⁸ a coalition of U.S. aluminum extruders,¹⁹ and the Ad Hoc Coalition for Fair Pipe Imports from the People’s Republic of China,²⁰ a coalition of domestic steel producers.²¹ Moreover, Mr. Kaplan’s former employer received tens of thousands of dollars in 2018 from AK Steel Corporation – another major steel manufacturer that has submitted thousands of objections to steel exclusion requests²² – to lobby the Commerce Department on “issues related to Section 232 tariffs on steel imports.”²³

Following her nomination to be the Under Secretary for Industry and Security, Ms. Nikakhtar signed an ethics agreement in which she pledged to “not participate personally and substantially in any particular matter involving specific parties in which [she] knows Cassidy Levy Kent, LLP, is a party or represents a party” through March 2020.²⁴ Similarly, Mr. Kaplan signed an agreement on May 26, 2017 in which he pledged to “not participate personally and substantially in any particular matter” involving his former employer King & Spalding or any of the firm’s clients for one year. He also agreed to “not participate personally and substantially in any particular matter” that would have “a direct and predictable effect on the ability or willingness of King & Spalding to provide” a “fixed monthly retirement payment” that he is scheduled to receive through 2025.²⁵

It is disturbing that, the head of ITA and the Acting head of BIS are former industry insiders who either represented or lobbied for companies in the steel industry and that these two individuals are now responsible for steel tariff decisions worth millions of dollars that involve former clients or clients of their previous employers. In order to help me understand the scope of Mr. Kaplan’s and Ms. Nikakhtar’s ethics agreements, and the extent to which they have been

<https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=9E6AC207-61EF-47A0-935F-84F49371A135&filingTypeID=73>.

¹⁷ Mercatus Center, “Tariff Exclusion Requests: A One-Year Update,” Christine McDaniel, April 11, 2019, <https://www.mercatus.org/bridge/commentary/tariff-exclusion-requests-one-year-update>.

¹⁸ U.S. Senate Lobbying Database, “Lobbying Report – King & Spalding LLP” January 20, 2011, <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=B2847066-6EF6-49E7-9DFD-4AA654B106A6&filingTypeID=78>.

¹⁹ Aluminum Extruders Council. “China Import Update – September 7, 2010,” http://aec.podi.com/pdfs/fair_trade/AECChinaImportUpdateSeptember72010.cfm.

²⁰ U.S. Senate Lobbying Database, “Lobbying Report – King & Spalding, LLP” January 21, 2009, <http://disclosures.house.gov/ld/pdfform.aspx?id=300133986>.

²¹ Federal Register, “Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China,” June 5, 2008, https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2007/Circular%20Welded%20Carbon-quality%20Steel%20Pipe%20from%20China/Final/circular_welded_final_ita_determination.pdf.

²² Mercatus Center, “Tariff Exclusion Requests: A One-Year Update,” Christine McDaniel, April 11, 2019, <https://www.mercatus.org/bridge/commentary/tariff-exclusion-requests-one-year-update>

²³ Senate Lobbying Database, “Lobbying Database: King & Spalding,” July 20, 2018, <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=31780BB9-CD08-4E3D-91E0-F53EA1530D83&filingTypeID=60>.


²⁴ Office of Government Ethics, Letter from Ms. Nazakhtar Nikakhtar to Mr. David Maggi, March 29, 2019, [https://extapps2.oge.gov/201/Presiden.nsf/D35E7FC33C6D9BFD852583E20027DBEB/\\$FILE/Nikakhtar.%20Nazahtar%20%20finalEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/D35E7FC33C6D9BFD852583E20027DBEB/$FILE/Nikakhtar.%20Nazahtar%20%20finalEA.pdf).

²⁵ Office of Government Ethics, Letter from Mr. Gilbert Kaplan to Mr. David Maggi, May 26, 2017, [https://extapps2.oge.gov/201/Presiden.nsf/3476F7B86B9FE0E985258132002BFCCB/\\$FILE/Kaplan.%20Gilbert%20B.%20%20finalEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/3476F7B86B9FE0E985258132002BFCCB/$FILE/Kaplan.%20Gilbert%20B.%20%20finalEA.pdf).

adhering to them and avoiding potential conflicts of interest in administering the Section 232 Product Exclusion Requests program, I ask that you provide answers to the following questions no later than July 25, 2019.

1. To what extent do the ethics agreements signed by Ms. Nikakhtar and Mr. Kaplan cover their current participation in the administration of and decision-making process for the Section 232 tariff exclusion program? What actions by these individuals are allowed as part of these agreements? What actions are barred?
2. Have either Ms. Nikakhtar or Mr. Kaplan had to recuse themselves from participating in particular matters involving their former employees or clients since joining the Commerce Department? If so, please provide a description of each recusal and any documents related to these recusals.
3. Have either Ms. Nikakhtar or Mr. Kaplan ever requested and/or received a written waiver from their ethics agreement pursuant to 18 U.S.C. § 208(b)(1)? If so, please provide copies of these waivers.
4. Mr. Kaplan's ethics agreement signed in May 2017 indicated that he would "not participate personally and substantially in any particular matter" involving his former clients for one year. That recusal requirement appeared to end in May 2018, one year after it was signed.
 - a. Has Mr. Kaplan extended that agreement, or is he currently allowed to "participate personally and substantially in any particular matter" involving his former clients or clients of his former employer?
 - b. If he is allowed to participate in these matters, has he done so? Please provide a list of instances in which Mr. Kaplan participated in particular matters involving his former clients or clients of his former employer.

Sincerely,



Elizabeth Warren
United States Senator

CC: Inspector General Peggy E. Gustafson
U.S. Department of Commerce
Office of Inspector General
1401 Constitution Avenue N.W.
Washington, DC 20230