



Billing Code 3290-F0

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. USTR-2020-0001]

Procedures to Consider Retention or Withdrawal of the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for comments.

SUMMARY: On January 23, 2018, the President imposed a safeguard measure on imports of certain solar products pursuant to a Section 201 investigation. On February 14, 2018, the U.S. Trade Representative established procedures for interested persons to request product-specific exclusions from application of the safeguard measure and comment on the submitted requests. Based on the requests and comments received, the U.S. Trade Representative granted certain requests on June 13, 2019, including a request to exclude from the safeguard measure bifacial solar panels that consist only of bifacial solar cells. This notice establishes procedures for interested persons to submit comments, and respond to comments, on whether the U.S. Trade Representative should maintain the exclusion of bifacial solar panels from the safeguard measure, withdraw the exclusion, or take some other action within his authority with respect to this exclusion.

DATES:

February 17, 2020, at 11:59 p.m. EST: Submission of comments on whether the U.S.

Trade Representative should maintain the exclusion of bifacial solar panels from the safeguard measure, withdraw the exclusion, or take some other action within his authority with respect to this exclusion.

February 27, 2020, at 11:59 p.m. EST: Submission of responses to comments.

FOR FURTHER INFORMATION CONTACT: Victor Mroczka, Office of WTO and Multilateral Affairs, at vmroczka@ustr.eop.gov or (202) 395-9450, or Dax Terrill, Office of General Counsel, at Dax.Terrill@ustr.eop.gov or (202) 395-4739.

SUPPLEMENTARY INFORMATION:

A. Background

On January 23, 2018, the President issued Proclamation 9693 (83 FR 3541) to impose a safeguard measure under section 201 of the Trade Act of 1974 (19 U.S.C. 2251) with respect to certain crystalline silicon photovoltaic (CSPV) cells and other products (CSPV products) containing these cells. The Proclamation directed the U.S. Trade Representative to establish procedures for interested persons to request product-specific exclusions from the safeguard measure. It also authorized the U.S. Trade Representative, after consultation with the Secretaries of Commerce and Energy, to exclude products by modifying the Harmonized Tariff Schedule of the United States (HTSUS) with publication of a determination in the *Federal Register* to exclude such products.

On February 14, 2018, the U.S. Trade Representative issued a notice setting out the procedures to request a product exclusion and opened a public docket. *See* 83 FR 6670 (the February 2018 notice). Under the February 2018 notice, requests for exclusion were to identify the particular product in terms of its physical characteristics (such as dimensions, wattage, material composition, or other distinguishing characteristics) that differentiate it from other products subject to the safeguard measure. The February 2018 notice provided that the U.S. Trade Representative would not consider requests identifying the product at issue in terms of the identity of the producer, importer, or

ultimate consumer; the country of origin; or trademarks or tradenames. The notice also confirmed that the U.S. Trade Representative would only grant exclusions that did not undermine the objectives of the safeguard measure.

Based on the February 2018 notice, the Office of the U.S. Trade Representative (USTR) received 48 product exclusion requests and 213 subsequent comments responding to the various requests. The exclusion requests generally fell into seven categories, one of which concerned bifacial solar panels.

On September 19, 2018, and June 13, 2019, the U.S. Trade Representative granted certain product exclusion requests and modified the HTSUS accordingly. *See* 83 FR 47393 and 84 FR 27684. The notice published on June 13, 2019 (the June 2019 notice) excluded from application of the safeguard measure “bifacial solar panels that absorb light and generate electricity on each side of the panel and that consist of only bifacial solar cells that absorb light and generate electricity on each side of the cells.”

On October 9, 2019, the U.S. Trade Representative concluded, based on an evaluation of newly available information and after consultation with the Secretaries of Commerce and Energy, that maintaining the exclusion would undermine the objectives of the safeguard measure. Accordingly, the U.S. Trade Representative published a notice withdrawing the exclusion of bifacial solar panels, effective as of October 28, 2019. *See* 84 FR 54244.

On October 21, 2019, Invenergy Renewables LLC filed a complaint with the U.S. Court of International Trade alleging that USTR failed to provide notice and comment required under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq*, before withdrawing the exclusion of bifacial solar panels. Invenergy filed a motion for a

preliminary injunction to prevent the withdrawal from entering into effect. The Court issued a preliminary injunction on December 5, 2019, enjoining the U.S. Trade Representative from withdrawing the exclusion on bifacial solar panels from the safeguard measure. If the U.S. Trade Representative determines after receipt of comments pursuant to this notice that it would be appropriate to withdraw the bifacial exclusion or take some other action with respect to this exclusion, the U.S. Trade Representative will request that the Court lift the injunction.

B. Comments on the Retention or Withdrawal of the Exclusion of Bifacial Solar Panels

USTR is concerned that: (1) the bifacial solar panel exclusion will result in significant increases in imports of bifacial solar panels and therefore will undermine the objectives of the safeguard measure; (2) the precise definition of bifacial solar panels excluded from the safeguard measure may require clarification; and (3) the exclusion in the June 2019 notice is broader than the category of products described in the exclusion requests submitted as of March 16, 2018.

For these reasons, USTR is seeking public comment on whether the U.S. Trade Representative should maintain the exclusion of bifacial solar panels from the safeguard measure, withdraw the exclusion, or take some other action within his authority with respect to this exclusion.

The U.S. Trade Representative specifically requests information or views regarding the following, with sufficient evidence to support a particular position:

- Global and United States production and production capacity for bifacial solar panels prior to and following the exclusion of these products in the June 2019 notice, along

with any information on expected changes in production and production capacity for the remaining term of the safeguard measure (*i.e.*, until February 6, 2022).

- Projections for the production and importation into the United States of bifacial solar panels for the remaining term of the safeguard measure.
- Import data and entry documentation to establish the level of bifacial solar panels imported into the United States prior to and following the exclusion of these products in the June 2019 notice.
- Projections of demand for bifacial solar panels by companies building or planning to build solar facilities or otherwise to install bifacial solar panels.
- Contracts, purchase orders, or other agreements that establish sales or other transactions, including those between suppliers and customers, regarding bifacial solar panels that have been or will be imported into the United States and such agreements regarding bifacial solar panels that have been or will be produced in the United States.
- Production cost and price differential between the manufacture and distribution of monofacial and bifacial solar panels.
- Substitutability or competitiveness between monofacial and bifacial solar panels in the United States.
- Domestic production and production capacity of bifacial solar cells or bifacial solar panels in the United States.
- Whether the U.S. Trade Representative should modify the exclusion to implement a tariff-rate quota (TRQ) on the importation of bifacial solar panels that enter with no additional duty and, if so, the level (*e.g.*, in megawatts) of that TRQ.

- The potential impact, if any, on the domestic workforce and economy in general should the exclusion be withdrawn.
- Any other information or data that interested persons consider relevant to the U.S. Trade Representative's evaluation.

C. Responses to Comments on the Exclusion of Bifacial Solar Panels

After the submission of comments on whether the U.S. Trade Representative should maintain the exclusion of bifacial solar panels from the safeguard measure, withdraw the exclusion, or take some other action within his authority with respect to this exclusion, interested persons will have an opportunity to respond to comments. Interested persons can view the submitted comments on www.regulations.gov by entering docket number USTR-2020-0001 in the search field on the home page.

Responses to comments should indicate whether they support or oppose a particular view and provide reasons for that position. As with the initial round of comments, responses should address the information or factors identified above with sufficient evidence to support or oppose the particular view in question. If a supporter or opponent of a particular view fails to provide evidence in its control that is relevant to one of the factors listed above, USTR may conclude, that the omitted evidence would not support the supporter or opponent's position.

D. Consultation with Other Government Agencies

As with the initial determination to exclude bifacial solar panels from the safeguard measure, the U.S. Trade Representative will consult with the Secretaries of Commerce and Energy regarding the comments, responses, and supporting evidence

received in response to this notice to determine what, if any, action to take regarding the exclusion of bifacial solar panels from the safeguard measure.

E. No Other Exclusion Determinations, Additional Requests for Exclusion, or Additional Requests for Withdrawal of Exclusions

At this time, USTR is not evaluating any other exclusion determinations and is not accepting additional requests for exclusion from the safeguard measure or requests to withdraw exclusions. USTR will continue monitoring developments in the U.S. market for CSPV products and, if warranted, provide for additional exclusion requests at a future date.

F. Submission Instructions

USTR seeks comments and responses to comments with respect to the issues described in Sections B and C through a public comment process. To be assured of consideration, you must submit written comments by 11:59 pm EST on February 17, 2020, and any written responses to those comments by 11:59 pm EST on February 27, 2020. All comments must be in English and must identify on the reference line of the first page of the submission “Comments or Responses on the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products.”

We strongly encourage commenters to make on-line submissions using the www.regulations.gov website. To submit comments via www.regulations.gov, enter docket number USTR-2020-0001 on the home page and click ‘search.’ The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice and click on the link entitled ‘comment now!’ For further information on using www.regulations.gov, please consult the resources provided on the

website by clicking ‘how to use regulations.gov’ on the bottom of the home page. We will not accept hand-delivered submissions.

The www.regulations.gov website allows users to provide comments by filling in a ‘type comment’ field, or by attaching a document using an ‘upload file’ field. We prefer that you provide comments as an attached document in Microsoft Word (.doc) or Adobe Acrobat (.pdf) format. If the submission is in another file format, please indicate the name of the software application in the ‘type comment’ field. File names should reflect the name of the person or entity submitting the comments. Please do not attach separate cover letters to electronic submissions; rather please, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the comment itself, rather than submitting them as separate files.

Comments or responses based on this notice may entail the submission of business confidential information. In that event, the submitter must provide both a public version for publication and a confidential version. The file name for the business confidential version should begin with the characters ‘BC.’ The first page of the confidential version, and each subsequent page that actually contains business confidential information, must be clearly marked ‘BUSINESS CONFIDENTIAL’ on the top of the page. Moreover, the submission should clearly indicate, via brackets, highlighting, or other means, the specific information that is business confidential. The submitter also must certify that the information is business confidential and would not customarily be released to the public.

As indicated above, a submitter that provides a version containing business confidential information also must provide a public version of the submission with the relevant information redacted. The file name of the public version should begin with the character 'P.' The 'BC' and 'P' should be followed by the name of the person or entity submitting the comments. Submissions that do not contain business confidential information should have a file name identifying the person or entity submitting the comments.

We emphasize that submitters are strongly encouraged to file comments through www.regulations.gov. You must make arrangements for any alternative method of submission with Yvonne Jamison at (202) 395-9666 in advance of transmitting a comment. You can find general information about USTR at www.ustr.gov.

As noted, we will publish non-confidential versions of submissions in the docket for public inspection. You can view submissions on www.regulations.gov by entering the relevant docket number in the search field on the home page.

Jeffrey Gerrish,

Deputy United States Trade Representative,

Office of the U.S. Trade Representative.

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