

October 12, 2023

Docket: RIN 0694-AJ27
Bureau of Industry and Security
Submitted electronically to docket: BIS-2023-0021

RE: Revisions of the Section 232 Steel and Aluminum Tariff Exclusions Process

To Whom It May Concern:

The Flexible Packaging Association (FPA) is submitting comments on the above referenced proposed rule. Flexible packaging represents \$43 billion in annual sales in the U.S. and is the second largest and one of the fastest growing segments of the packaging industry. The industry employs approximately 85,000 workers and was deemed an Essential Critical Infrastructure Workforce by the Department of Homeland Security during the pandemic. This is because the industry is heavily vested in food and medical packaging; and aluminum foil is used for this type of packaging as it provides the best barrier protection needed from oxygen, light, moisture, and bacteria that food, health and hygiene, and medical supplies need to ensure stable shelf life, freshness, and sterility. It is a matter of national security that the product manufacturers that use this packaging can source it domestically. While aluminum foil is an important component of this packaging, it is only one component, as flexible packaging is made from paper, plastic, foil, or any combination thereof.

Unfortunately, the thin-gauge foil component used for this packaging cannot be sourced domestically in the quantity nor quality necessary; thus, FPA members have gotten over 5,000 exclusions, with, until recently, little to no objections. The exclusions and a streamlined process for such must remain so that package manufacturing does not move offshore, since if the package is imported, versus one component of such, it does not have the aluminum tariff attached. Domestic flexible packaging manufacturing needs to be supported and should no longer be held hostage by thin gauge aluminum foil manufacturing that does not exist in the U.S.

General Approved and Denied Exclusions

At a time when sterile packaging for food, health and hygiene, and medical equipment is more important than ever, and as consumers are suffering from the worst inflation in decades, the Administration should be looking at ways to alleviate supply chain burdens, not increase them. Thus, FPA supports the continued use of the General Approved Exclusions (GAEs) and agrees with the proposed change to the criteria for those exclusions from applications with no objections to applications with low rates of successful objections.

This will serve to verify the merits of an objection, instead of making the determination to grant the GAE solely based on any objection alone. In fact, FPA questions why the light gauge converting foil used in flexible packaging was never granted GAEs – there are no GAEs for HTS 7607.11.3000 or 7607.11.6090.

However, there are 5,594 exclusions listed in the BIS portal for HTS 7607.11.3000 and only 82 have been denied. While there are several pending exclusion requests for this HTS, the success rate is undoubtedly very high, roughly 98.5 percent. For HTS 7607.11.6090, 315 out of 2,935 total exclusion requests have been denied, a success rate of 89.2 percent. While several of the more recent denials, however, have received objections from the one supplier in the U.S., they are without merit. Because BIS's stated criteria for inclusion on the GAE list is "to reduce the number of exclusion requests for products consistently found not to be produced in the United States," these foil gauges should receive GAEs.

The capacity argument is also compelling. The sole U.S. supplier has reported a capacity of 44 million lbs. total, of which, 37 million is dedicated to light gauges. Import data for U.S. imports of HTS 7607.11.3000 and 7607.11.6090 was over 205 million kg (over 450 million lbs.), meaning the domestic supply of this product is less than 10 percent of total U.S. consumption of these products. These import data also provide a higher value figure for imports, over \$1 billion in 2022. This \$1 billion represents the customs value of the imported merchandise. The landed duty-paid value is over \$1.2 billion. These numbers support an argument that the merchandise under these HTS codes are "not produced in the United States in a sufficient and reasonably available amount" pursuant to 15 C.F.R. § Pt. 705, Supp. 1. See related discussion on objection criteria and evidence below.

Reasonable Efforts to Source in the U.S.

FPA has concerns, however, with the proposed General Denied Exclusions (GDE). Sourcing aluminum foil, particularly for food and medical contact packaging, is not something that can be done quickly. Long-term relationships and contracts must be put in place with Federal Food and Drug Administration (FDA) requirements at the forefront. Testing and certification for FDA compliance and customer specifications must be done each time new sourcing is proposed. Quality is a key factor, particularly with thin gauge foils, where any inclusions, tears, or defects render it unsuitable for packaging applications. GDEs may impede the ability of FPA members to source for an unspecified period based on potentially inapplicable prior successful objections.

DOC appears to recognize this constraint in the definition of a "substitute product," which states 'Substitute product' for purposes of this review criterion means that the steel or aluminum being produced by an objector can meet 'immediately,' i.e., paragraph (c)(6)(i) of this supplement) the quality, regulatory, or testing standards required to be used in the business activity in the United States of the user requesting the exclusion." A contract that specifies that only one producer has been tested and certified to its standards should serve as sufficient evidence for an exclusion request that no domestic producer is capable of producing a substitute product. For the same reasons, FPA does not believe the 15-day

notice period for GAEs or GDEs is sufficient and recommends that it should be at least 6 months.

Similarly, FPA has concerns over the proposed certifications regarding U.S. sourcing as well as with U.S. trading partners. FPA members currently only have one supplier of thin gauge foil in the U.S., and they do not supply the thinnest of the needed thicknesses. For example, as stated previously, since the Section 232 exclusionary process was put in place, FPA members have been granted approximately five thousand exemptions without objections. Recently, however, the single U.S. supplier has started objecting to all applications, without any evidence that the needed material can be supplied or be supplied in the quantity or quality necessary.

One example of this was a recent promise to one FPA member over the summer to supply more than their current allocation. The member agreed and ordered additional foil to fulfill a large customer order. The P.O. was placed on 7/9/23 and confirmed for delivery on 8/29/23. The delivery, however, was split in two and only half delivered on 8/29. The other half was postponed for 9/12/23 but was delayed again until 10/23/23. The delivery date to the end customer was supposed to be early October, so was missed. In addition, all of the delivered foil had to be rejected due to pin holes resulting in a loss of sales of \$600,000. The end customer has also stated their intention to move part of their business to a competitor due to poor performance with late and short deliveries caused by the quality of the foil. FPA has heard similar stories from numerous members.

Thus, while there is a rebuttal process to provide further evidence that the objections from the single U.S. manufacturer are unwarranted, it is cumbersome and not timely when money and jobs are on the line. FPA members, many of which are small businesses, are not in a position where they can lose customers. While the bigger companies can move their operations offshore to remain competitive and not lose customers, it defeats the entire purpose of the Section 232 tariffs, which is to keep production in the U.S. and decrease our reliance on imports for security reasons. The short-sighted application of these tariffs and the exclusionary process puts the supply chain at greater risk as the entire package and not just one component is now coming in from offshore. Simply put, the lack of capacity and quality of foil from the one domestic supplier is putting the entire flexible packaging industry in the U.S. at high risk.

In addition, with the small amount of thin gauge aluminum foil available domestically, the capacity can change quickly. Take for example the current automobile strike. Given that thicker gauges of aluminum foil are routinely used for electric vehicles, recently the domestic supplier has added capacity to roll thinner converting gauges; however, this will again change rapidly once the automobile and auto parts manufacturing returns to pre-strike levels. And as evidenced by the above example, the added capacity is not making quality thin gauge foil. As the Aluminum Association Trade Enforcement Working Group stated in a recent brief on a related duty case: "The domestic industry is not legally required to produce every product within the scope of an antidumping or countervailing duty order." Thus, packaging companies have and will continue to be left stranded based on the whims of one U.S. supplier, and domestic packaging jobs will continue to move offshore

to remain competitive. The risk to the supply chain and no guarantee of redundancy, given the time and resources it takes to qualify new sources, is just too great.

Under the proposed rule changes, what evidence would members now be required to provide upfront to prove they have – and will continue to try – to source from the domestic supplier? What more evidence does the DOC need to attest to the fact that the domestic supplier has not, and to this day, is still not sufficiently able to meet the U.S. flexible packaging members' needs? Further, providing this information upfront, in any format, may deter suppliers from open and honest sourcing practices, knowing that this information may be used against them in the process. Even if the supply that is needed was manufactured domestically, most FPA members attempt to source it regardless of price, quantity, and/or quality? These concerns and safeguards addressing new evidence requirement are not outlined in the proposed rule, and without these details, FPA cannot support new requirements for exclusion applicants. If DOC decides to move forward with new certification and evidence requirements, these should apply only to new exclusion requests covering items that have not been previously granted. Renewals have already gone through the exclusion review process, including multiple "open objection periods," and have been granted.

FPA also objects to the requirement to show evidence of attempting to source from countries where the U.S. has security agreements. Again, what evidence? Should FPA members be required to attempt to source from countries that do not manufacture the thin gauge aluminum foil? At any price? Regardless of the quantity and quality? Again, this is ripe for manipulation by suppliers and significantly constrains domestic producers from competition. In the case of one of the partner countries, S. Korea, this proposed rulemaking results in the absurd with FPA members getting an exclusion from the DOC to the Section 232 tariffs only to be hit with new duties on aluminum foil imposed by DOC, irrespective of S. Korea's noted preferred status. Again, 1.) given the time it takes to qualify aluminum foil for packaging products; 2.) the continued supply chain constraints and lack of domestic quantity and quality; and 3.) the fact that these products can come in tariff and duty-free from our trading partners, more domestic aluminum converting jobs will move offshore if this change is mandated.

Objector Certification

Lastly, FPA supports the certification by objectors that they can supply the comparable quality and quantity that is "immediately available" (defined as "within eight weeks" of purchase or, if that is not possible, within a shorter period than it would take a requester to obtain the products from its foreign supplier). FPA believes that this requirement would reduce cases where objections to an exclusion were granted, but the objector fails to deliver on supplying the materials (see the example above). FPA believes that two other requirements are needed. One, on the delivery side, the objector should have to provide evidence of on-time delivery as well. Even if the objector does supply the material, if they do not supply it on time, it puts the applicant at a competitive disadvantage. Also, the objector should have to make the same certification as to quality. A record of materials meeting the purchaser's specification is equally, if not more important, than on-time

delivery of such. Objectors should have to provide evidence and certify both before having the objection granted.

Conclusion

As FPA stated in numerous letters and its testimony to the DOC, there has never been sufficient supply in the U.S. of aluminum foil for flexible packaging, which is why imports are necessary. FPA believes, as should DOC, that there is a great national security issue with procuring and importing finished goods with aluminum foil. It is preferable to import the aluminum foil component and manufacture the finished package on U.S. soil. However, to support the domestic packaging industry in the U.S., DOC must recognize that not all aluminum, nor all aluminum foil, is created equal. To continue to place unwarranted tariffs and duties on ultra-thin foil, plus arduous processes to gain exemptions, merely serves to drive jobs offshore. In the ensuing years of aluminum tariffs, instead of production moving back to the U.S., it simply has moved to other parts of the world. Flexible packaging manufacturers have in some cases moved away from foil, substituting with non-foil barrier structures, which also does nothing to assist the aluminum industry in the U.S. given that there is not enough supply or quality of the foil to meet flexible packaging manufacturers' needs in the U.S.

FPA supports efforts to protect domestic manufacturing and ensure national security. However, aluminum foil used by the flexible packaging industry is not manufactured in the U.S. in the quantities and qualities needed. Since domestic producers made strategic decisions not to participate in the thin gauge aluminum foil market, they cannot now blame imports for filling a void that is decades old. Failure to invest, and quality lapses, including gauge, width, and lack of appropriate alloys, all contribute to the fact that the U.S. producers of aluminum foil are not able to serve the U.S. flexible packaging industry. Flexible packaging manufacturers purchase all the domestic supply of thin gauge foil available and simply have nowhere to turn but to source the rest (the vast majority) of the aluminum foil they need through imports.

For these reasons, FPA suggests that unless and until the DOC can show evidence that aluminum foil for the U.S. flexible packaging industry is manufactured in the U.S. in the quantity and quality needed, these tariffs should be suspended in their entirety. This action would immediately free up billions of dollars of working capital for American companies, sustaining and creating thousands of jobs in the U.S., and would provide relief to manufacturers that have no choice but to import to continue to provide for the public demand. Keep in mind, these are products that you and I use every day – including hermetically sealed food and beverage products such as candy, salty snacks, yogurt, beverages, and infant formula; and health and hygiene items and pharmaceuticals, such as aspirin, shampoo, shaving cream, and yes, even flexible packaging for COVID-19 antibody test kits.

Aluminum foil is also used by the flexible packaging industry to ensure sterility and efficacy for medical device packaging, enabling the products packaged, such as absorbable sutures, human tissue, and artificial joints, to maintain their efficacy at the time of use. Even

packaging for pet food uses flexible packaging to deliver fresh and healthy meals to a variety of animals. Carryout, take-out food containers, and e-commerce delivery are also heavily supported by the flexible packaging industry. Thus, the flexible packaging industry is vital to the supply chain when addressing the needs of U.S. consumers and it is a matter of national security that this packaging, even if one of the components is imported, is still manufactured domestically.

FPA supports efforts to protect domestic manufacturing; however, any such efforts must consider the impact and consequences on all U.S. manufacturing industries. The DOC should find ways to improve our country's competitiveness. Everybody loses in unfair trade cases, especially the U.S. consumer. Until there is enough converting of aluminum foil in the quantities and quality that our manufacturers need through domestic suppliers, FPA members should not continue to be saddled with the cost and administrative burdens that the current tariffs, exclusionary process, and continued new duties impose.

Respectfully submitted:

A handwritten signature in blue ink, appearing to read "Alison A. Keane". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Alison A. Keane, Esq., CAE, IOM
President and CEO