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February 24, 2023

**VIA ELECTRONIC FILING**

The Honorable Gina Raimondo  
Secretary of Commerce  
U.S. Department of Commerce  
Attn: Import Administration  
APO/Dockets Unit, Room 18022  
14<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20230

Re: Aluminum Foil from the People's Republic of China: The Flexible Packaging Association's Coalition for Aluminum Foil Security's Comments Prior to the Preliminary Circumvention Decisions

Dear Secretary Raimondo,

On behalf of Flexible Packaging Association's Coalition for Aluminum Foil Security and its individual members, including Amcor Flexibles North America, Berry Global, Catty Corporation, Fres-co System USA, Inc., Novolex, ProAmpac, ProAmpac Holdings, Inc., Ampac

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Holdings, LLC, Specialty Packaging Inc., Tri-Seal Opco, LLC, Bagcraft Papercon LLC, International Converter LLC, Deluxe Produits de Papier Inc., General Packaging Products Inc., Paxxus, Inc., Tekni-Plex, Inc. and Sonoco Products Company (collectively, “FPA Coalition”), a coalition of United States importers of subject merchandise who are also major end-users, we hereby submit comments prior to the preliminary determination as to whether aluminum foil produced in Thailand and the Republic of Korea are circumventing the antidumping duty and countervailing duty Orders on Aluminum Foil from the People’s Republic of China (“Orders”).

See Certain Aluminum Foil From the People’s Republic of China: Initiation of Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders, 87 Fed. Reg. 42,702 (July 18, 2022) (“Initiation Notice”); see also Certain Aluminum Foil from the People’s Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, 83 Fed. Reg. 9,282 (Mar. 5, 2018); Certain Aluminum Foil from the People’s Republic of China: Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order, 83 Fed. Reg. 17,362 (Apr. 19, 2018); Countervailing Duty Investigation of Certain Aluminum Foil from the People’s Republic of China: Final Affirmative Determination, 83 Fed. Reg. 9,274 (Mar. 5, 2018); Certain Aluminum Foil from the People’s Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 Fed. Reg. 17360 (Apr. 19, 2018) (collectively, “China Aluminum Orders”).

These comments also respond to the February 6, 2023, letter submitted by the Aluminum Association Trade Enforcement Working Group and its individual members (hereinafter, “Petitioners”). See Letter on behalf of Petitioners to Commerce re: “Petitioners’ Comments in Advance of the Department’s Preliminary Determination” (Feb. 6, 2023) (“Petitioners’ Pre-Preliminary Comments”).

FPA Coalition adopts and incorporates by reference the arguments made by other respondents in this proceeding.

Commerce erred in self-initiating these inquiries. Now that a full record has been developed, we urge Commerce to reach negative preliminary determinations. As we explain below Commerce should reach a negative preliminary determination because 1) the statutory criteria under 19 U.S.C. § 1677J(B)(2) are not met and 2) the inquiry is not appropriate under 19 USC § 1677J(B)(1). In the event Commerce makes an affirmative determination, it should implement a certification exempting ultra-thin foil that allows for vibrant domestic packaging producers to continue U.S. manufacturing of critical end-use products.

**I. THE FACTORS UNDER 19 U.S.C. § 1677J(B)(2) DO NOT WARRANT AN AFFIRMATIVE CIRCUMVENTION FINDING BECAUSE THE PROCESSING THAT OCCURS IN SOUTH KOREA AND THAILAND IS MORE THAN MINOR OR INSIGNIFICANT**

The statute requires that Commerce satisfy five factors to make an affirmative circumvention finding:

(A) Whether the merchandise imported into the United States from Thailand or South Korea is the same class or kind as merchandise that is subject to the Orders (i.e., China);

(B) Whether before importation into the United States, such merchandise is completed or assembled in a third country from merchandise that is subject to the Orders or produced with inputs from the country under the Orders (i.e., China);

(C) Whether the process of assembly or completion in the third country is minor or insignificant;

(D) Whether the value of the merchandise produced in the country subject to the Orders is a significant portion of the total value of the merchandise exported to the United States; and

(E) Whether the action is appropriate to prevent evasion of the Orders.

See 19 U.S.C. § 1677j(b) (2020) (emphasis added). Record evidence disproves Petitioners' argument that the fourth and fifth factors are satisfied. See generally Petitioners' Pre-Preliminary Comments.

We begin with the fourth factor and turn to the fifth factor in Section II. In determining whether the processing in Korea and Thailand is "minor or insignificant," 19 U.S.C. § 1677j(b)(2) requires Commerce to evaluate the following five factors:

- (A) the level of investment in the foreign country,
- (B) the level of research and development in the foreign country,
- (C) the nature of the production process in the foreign country,
- (D) the extent of production facilities in the foreign country, and
- (E) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.

See id. at § 1677j(b)(2). The FPA Coalition highlights two key conclusions from the record so far. First, Korean and Thai producers have demonstrated that they have made major investments in Korea and Thailand. Second, when starting the value-added analysis from casting, it is evident that manufacturing in Korea and Thailand is not minor or insignificant compared to manufacturing in China.

Additionally, when evaluating whether action is appropriate to prevent evasion of an Order, pursuant to Section 781(b)(1)(E) of the Act, Commerce is to examine the factors under Section 781(b)(3), which states:

In determining whether to include merchandise assembled or completed in a foreign country in a countervailing duty order or antidumping duty order or finding under {section 781(b)(1)}, the administering authority shall take into account such factors as:

- (A) The pattern of trade, including sourcing patterns,
- (B) Whether the manufacturer or exporter of the merchandise described in paragraph (1)(B) is affiliated with the person who uses the merchandise described in paragraph (1)(B) to assemble or complete

in the foreign country the merchandise that is subsequently imported into the United States, and

- (C) Whether imports into the foreign country of the merchandise described in paragraph (1)(B) have increased after the initiation of the investigation which resulted in the issuance of such order or finding.

The Statement of Administrative Action mirrors the statutory language. See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. 1 (1994) (“SAA” at 894).

In this case, no Korean foil producer is affiliated with any Chinese foil or sheet/strip producer. See Letter on Behalf of Korean Producers to Commerce re: Korean Producers’ Comment Regarding Preliminary Determination at 42 (Feb. 10, 2023) (“Korean Producers’ Preliminary Comments”) (citing record evidence that the Korean producers “had no affiliations with any Chinese manufacturers”) (Public Version). Therefore, with respect to Korea, imposing measures would not be appropriate where 781(b)(3)(B) is not satisfied.<sup>1</sup> Commerce recently confirmed it must consider all of the 781(b)(3) factors and that the SAA’s separate reference that “no single factor will be controlling” refers to 781(b)(2) and not to 781(b)(3). See Issues and Decision Memorandum for the Final Negative Determination of Circumvention of the Antidumping Duty Order on Certain Welded Carbon Steel Standard Pipes and Tubes from India at 9 (Feb. 22, 2023) (ACCESS barcode 4344493-02).

**A. Korean and Thai Producers Demonstrated that Korea and Thailand Both Have Major Processing Facilities that Transform Aluminum Inputs**

Both Korean and Thai producers provided evidence that their production is not minor or insignificant. Beginning with the Korean producers, Commerce now has evidence that aside from

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<sup>1</sup> FPA does concede that other factors are established for Korea or that measures are appropriate with respect to Thailand for the reasons explained in the pre-preliminary comments filed by the Thai producers.

virgin aluminum smelting which does not exist in the aluminum foil industries in Korea, Thailand or the U.S., Korean producers are substantially reliant on aluminum casting conducted in Korea not China. See Korean Producers' Pre-Preliminary Comments at 25 (Feb. 10, 2023) (Public Version).

The limited extent of the Korean producers' production in China is not a coincidence. “{E}ach of the six Korean Producers has been manufacturing aluminum foil for more than 30 years and, in the case of Lotte, for 55 years.” Id. at 6. The Korean Producers estimated that their adjusted investment totaled well over \$1 billion USD. See id. at 9. Korean producers' investment over decades reflects the fact that the “Korean aluminum foil industry is a direct competitor of the Chinese aluminum foil industry” as opposed to a pawn of Chinese industry as Petitioners would like Commerce to believe. Korean Producers' Pre-Preliminary Comments at 7. Aluminum foil production in Korean is anything but minor or insignificant.

Similarly, Thai production has benefited from major investment. For example, Dingsheng reported in the confidential version of its brief that it has made substantial investment in its facilities in Thailand, including a substantial recent investment on a new casting line that will allow for the company to create aluminum foil from ingot. See Letter on Behalf of Dingsheng to Commerce re: Thai Ding Li New Materials Co., Ltd. and Dingheng New Materials Co., Ltd. Pre-Preliminary Comments in Aluminum Foil from the People's Republic of China: Circumvention Inquiry from Thailand at 7 (Feb. 21, 2023) (Business Proprietary Version). Such investment may seem small compared to the estimated 4.5 billion dollar cost of building new smelting facilities, an investment not made by a single U.S. foil producer, but such investment is not minor or insignificant. See Comments on Behalf of the FPA Coalition to Commerce re: Comments on Initiation and Rebuttal Factual Information at Ex. 4 (Sept. 16, 2022) (“FPA's Initial Comments”).

Additionally, any comparison to costs in China must take into account, as explained below, that neither U.S., Korean nor Thai foil producers smelt their own virgin aluminum that is necessary for ultra-thin foil production.

**B. Minor Processing/Value Added Analysis Should Not Start from Casting Because It Is Not Conducted by Any of The Domestic Aluminum Foil Producers**

Commerce should not include the metal content in its price valuation analysis because U.S. aluminum foil producers, like Korean and Thai producers, do not smelt primary aluminum. See FPA's Initial Comments at 10-11. As the FPA Coalition explained in its prior comments, domestic aluminum producers only begin with casting. See id. at 11-12. The reality of domestic producers' processes is unrebutted.

Once Commerce analyzes the cost of aluminum foil production beginning with casting and/or rolling, the extensive nature of processing in Korean and Thailand becomes apparent. The cost of aluminum metal content is merely a pass-through cost that distorts the total production cost if measured incorrectly. The FPA Coalition refers Commerce to detailed production methods and diagrams that it supplied which explain how smelting is disconnected from later casting and rolling that is performed. See FPA's Initial Comments at 12-15.

**II. THE CIRCUMVENTION INQUIRY OF ALUMINUM FOIL IS NOT APPROPRIATE UNDER 19 USC § 1677J(B)(1)**

FPA Coalition members are packaging converters – they coat, laminate, and print aluminum foil and combinations of foil, paper and plastic to make flexible packaging that is used for a variety of products. Commerce's self-initiated aluminum foil anticircumvention inquiries are not appropriate because they threaten a thriving U.S. industry that is reliant on ultra-thin foil that is not produced by the domestic industry. As explained below, products that FPA members create

are critical to the U.S. economy and the ultra-thin foil it relies on is not widely available from U.S. producers.

Additionally, as discussed in the Certain Welded Carbon Steel Standard Pipes and Tubes from India circumvention inquiry, where each of the factors under subsection (E) are not present, the statute states that Commerce may determine that action is not appropriate. See Mem. from James Maeder to Abdelali Elouaradia re: Issues and Decision Memorandum for the Final Negative Determination of Circumvention of the Antidumping Duty Order on Certain Welded Carbon Steel Standard Pipes and Tubes from India at cmt. 1 (Feb. 22, 2023) (A-533-502). Given that production in Korea and Thailand is not minor or insignificant, and the circumvention inquiry is damaging to the U.S. ultra-thin foil consuming industry, the statutory factors are not all met here, and a “not appropriate” finding is required by statute.

**A. Ultra-Thin Foil is a Unique Product with Critical End Uses**

Imposing restrictive trade measures pursuant to Commerce’s self-initiated anticircumvention inquiries would not be appropriate under the statute because it would threaten the viability of U.S. industry reliant on ultra-thin foil. As explained in FPA’s Initial Comments, the kind of aluminum foil exported from Korea and Thailand includes a gauge that is not widely available in the United States – namely, high purity, light gauge foils less than or equal to 0.025 mm and more specifically product of 0.0003 inches or less used in ultra-thin foil applications. See FPA’s Initial Comments at 30. To name just a few examples, ultra-thin foil allows FPA Coalition members to create building materials, like insulation facer on construction materials that promote energy conservation, medical products found in doctors’ offices and hospitals, such as medical blister packs and medical device packaging and consumer products like sandwich packaging and gift wrap. See id. at FPA Coalition Fact Sheet.

**B. The Domestic Industry Has for Years Had Low Or Non-Existent Production of Ultra-Thin Foil**

The FPA Coalition has already reported that to the best of its knowledge only two U.S. mills have the technical capability to produce ultra-thin foil, yet those companies have quality control problems and very limited volume. See id. at 40. This is confirmed by the fact that, for several years, not a single U.S. foil producers has objected to Section 232 exclusion requests on the basis that ultra-thin foil is available domestically. See FPA's Initial Comments at 42. Despite years of trade relief from the China Aluminum Orders, the domestic industry is not able to support the U.S. ultra-thin foil consuming manufacturing industry. See id. at 37-41. In combination with the fact that that U.S. converter/packaging industry is reliant on ultra-thin foil, imposing trade measures pursuant to these self-initiated anticircumvention inquires would be inappropriate because such measures would cause disproportionate harm the U.S. economy by restricting imports of ultra-thin foil that the domestic industry has already proven it will not make, notwithstanding years of antidumping and countervailing duties, Section 301 duties, and Section 232 duties.

**III. IF COMMERCE REACHES AN AFFIRMATIVE DETERMINATION, COMMERCE SHOULD IMPLEMENT A ROBUST CERTIFICATION SCHEME AT THE PRELIMINARY STAGE**

**A. Commerce Should Act Consistent with Past Practice to Exempt Ultra-Thin Foil Based on End Use Certificates**

In the unlikely event that Commerce reaches an affirmative preliminary determination, it should exempt ultra-thin foil that is used by packaging manufacturers and domestic manufacturers converting the foil for other uses. Such a certification regime would help limit damage to FPA Coalition members.

Precedent exists for a certification regime that includes end-use factors. The 2021 revision of Commerce's circumvention regulations envisioned a flexible approach in the use of certification mechanisms in connection with circumvention findings. See Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. 52,300, 52,353 (Sept. 20, 2021) ("Final Rule"). Commerce stated that "the most important factor is that Commerce has the flexibility to apply a remedy in accordance with a circumvention determination on a case-by-case basis which it finds to be appropriate given the facts on the record and its policies and practices." Id. There are at least two examples of such certification regimes.

First, in its Final Rule, Commerce itself cited to the Steel Concrete Reinforcing Bar from Mexico case as an example. See id. at n. 190; Steel Concrete Reinforcing Bar from Mexico Final Affirmative Determination of Circumvention of the Antidumping Duty Order, 85 Fed. Reg. 34,705, 34,706 (Jun. 8, 2020). In that determination Commerce required certifications from importers to exclude a category of merchandise produced for an identified construction project and produced according to an engineer's structural design consistent with an industry standard. This was implemented in paragraph 7 of CSMS 0084401 (Mar. 24, 2020) (requiring the importer to certify that "{t}he imports of hooked rebar have been sold in connection with a specific, identified construction project and produced according to an engineer's structural design, consistent with industry standards"). Whether the imported article actually went to the identified construction project cannot be confirmed without post-importation facts. Thus, this certification regime exempted product based on how that product was used after importation.

Second, in the Solar Cells from China anticircumvention inquiries preliminary determination, Commerce required certification of use of the solar cells after importation in order to determine if the goods are subject to duties. See, e.g., Letter from Eric B. Greynolds to the File

re: Placement of Customs and Border Protection (CBP) Messages on Record of Proceedings (Feb. 17, 2023) (A-570-979) (requiring the importer to certify, at the time of importation, that the solar cells or modules “will be utilized in the United States by no later than 180 days after the earlier of 06/06/2024, or the date the emergency described in Presidential Proclamation 10414 is terminated”). There, whether imported articles are subject or not subject to antidumping or countervailing duties at the time of importation depends on the timing of the end use of the imported article long after importation, confirming that post-importation use of merchandise can be the subject of a certification and can be relied upon by DOC and CBP to determine applicability of duties.

In sum, should Commerce reach an affirmative preliminary determination, it should exempt ultra-thin foil destined for use by domestic manufacturers converting the foil for packaging or similar uses. A certification could be utilized to ensure that the ultra-thin foil qualifies for the exemption based on how it is used after importation, consistent with Commerce’s precedent cited above.

**B. THERE IS NO BASIS TO PROHIBIT USE OF CHINESE PRIMARY OR SCRAP ALUMINUM THAT IS PROCESSED INTO FOIL IN KOREA OR THAILAND**

FPA urged Commerce to release certifications in draft form for interested party input. FPA Comments at 46. We reiterate our request to comment on draft certifications before they are effective, in the event there is an affirmative preliminary determination.

In the event of a preliminary affirmative determination, when crafting the certifications that are typical in circumvention proceedings, and separate from whether ultra-thin foil is exempt from any additional duties, Commerce will need to decide what specific inputs from China can and cannot be processed in Korean and Thailand. FPA submitted un rebutted factual information

highlighting the importance of machine time in how foil is produced and establishing that nearly 80 percent of the machine time to process 6 mm aluminum hot band to ultra-thin foil occurs from the step of annealing 0.279 mm foil stock and then continuing to roll-reduce, double, separate/slit and finish annealing to reach the final ultra-thin foil. See FPA's Initial Comments at Ex. 2. Therefore, one possible place for Commerce to "draw the line" would be to permit unannealed Chinese foil stock of greater than 0.279 mm to be used to process into foil in Korea and Thailand. There is no factual basis to prohibit the use of Chinese aluminum metal generally.

#### IV. CONCLUSION

For the reasons stated above, Commerce should reach a negative preliminary determination on basis that such a conclusion is required by statute. Production of aluminum foil in Korea and Thailand is not minor or insignificant and the anticircumvention inquiries are not appropriate.

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Copies of this document have been served in accordance with the attached certificate of service. Please contact the undersigned if you have any further questions regarding this matter.

Respectfully submitted,



Jeffrey S. Grimson

Kristin H. Mowry

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*Counsel to Flexible Packaging Association's  
Coalition for Aluminum Foil Security*

**Public Certificate of Service**  
**Aluminum Foil from the People's Republic of China: Anti-Circumvention Inquiry With  
Respect to South Korea and Thailand**  
**A-570-053 CIRC – From Thailand and South Korea**

I, Jeffrey S. Grimson, certify that a copy of the attached submission was served this 24<sup>th</sup> day of February 2023 by electronic mail on the following parties:

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Jeffrey S. Grimson

## REPRESENTATIVE CERTIFICATION

I, Jeffrey S. Grimson, with Mowry & Grimson, PLLC, counsel to The Flexible Packaging Association's Coalition for Aluminum Foil Security, certify that I have read the attached submission pursuant to the circumvention inquiries on the antidumping duty order on certain aluminum foil from the People's Republic of China (A-570-053 CIRC- From Thailand; A-570-053 CIRC- From Korea). In my capacity as counsel of this submission, I certify that the information contained in this submission is accurate and complete to the best of my knowledge. I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government. In addition, I am aware that, even if this submission may be withdrawn from the record of the circumvention proceeding, the U.S. Department of Commerce may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that a copy of this signed certification will be filed with this submission to the U.S. Department of Commerce.

Signature:



Date:

2/24/23