May 18, 2018

Brad Botwin
Director, Industrial Studies
Office of Technology Evaluation
Bureau of Industry and Security
U.S. Department of Commerce
1401 Constitution Avenue, NW
Room 1093
Washington, DC 20230

Re: Comments of the Beer Institute on Requirements for Submissions Requesting Exclusions, BIS-2018-0002

Dear Mr. Botwin,

The Beer Institute appreciates the opportunity to comment on the Department’s interim final rule concerning the requirements for submissions requesting exclusions from certain steel and aluminum tariffs imposed pursuant to Presidential proclamations.¹

This comment addresses several important aspects of the interim final rule. In particular, the Beer Institute is concerned that the interim final rule imposes an unnecessary burden on our members because it (i) does not permit trade associations to submit exclusion requests or statements in support of other parties’ request; (ii) does not permit parties to submit exclusion requests with respect to a class of imported products; and (iii)

provides inadequate guidance with respect to the Department’s treatment of confidential information.

In addition, the Beer Institute urges the Department to work with the Department of Justice and the Federal Trade Commission to ensure that effective mechanisms are in place to deter and redress any anticompetitive conduct in the market related to the Section 232 tariffs, including anticompetitive conduct relating to the Midwest Premium, and the impact of such conduct in artificially increasing aluminum prices for all metal, including non-tariffed products.

I. Background on the Beer Institute and the U.S. Beer Industry

The Beer Institute, based in Washington, D.C., is a national trade association for the American brewing industry, representing both large and small brewers, as well as importers and industry suppliers. The organization, founded in 1862 as the U.S. Brewers Association and reorganized as the Beer Institute in 1986, represents the beer industry before Congress, state legislatures and public forums across the country. The Beer Institute is committed to developing sound public policy, focusing on community involvement and personal responsibility.

The U.S. beer industry is responsible for billions of dollars that flow each year through channels of American trade and commerce, representing nearly two percent of U.S. GDP. From agricultural products, can manufacturing, bottling, food processing, food stores and general retail, to wholesaling, construction and real estate, brewers, along with their
wholesale and retail partners, directly or indirectly employ 1.75 million Americans who earn nearly $79 billion in wages and benefits.

II. The Department’s Final Rule Should Promote Efficient and Secure Participation by Affected Parties in the Department’s Product Exclusion Process

The Department’s interim final rule risks discouraging participation by U.S. importers and users of aluminum.

First, the interim final rule does not permit trade associations to file exclusion requests or submissions in support of other parties’ exclusion requests. These limitations prevent an obvious efficiency in the administration of the Department’s exclusion process, increasing the burden on our members and members of other trade associations. When multiple parties import like products for similar domestic production uses (e.g., the importation of aluminum inputs for use in the production of aluminum cans), trade associations such as the Beer Institute should be allowed to file exclusion requests with respect to such products.

The Department should amend its final rule to permit such requests, e.g., for exclusions of a class of like imported products.

In addition, while the interim final rule provides an opportunity for any individual or organization in the United States to file objections to exclusion requests, it does not provide a similar opportunity for such persons to make submissions in support of other parties’ exclusion requests. The Department should amend its final rule to permit such filings. In this connection, the Beer Institute strongly supports the exclusion requests made
by Ball Metal Beverage Container Corp. for imports of certain aluminum products.

Second, the Beer Institute shares the concerns that the Chairman and the Ranking Member of the Senate Finance Committee expressed in their April 19, 2018 letter to Secretary Ross, that the process contemplated by the interim final rule may (i) fail to establish basic due process and procedural fairness; and (ii) be vulnerable to abuse for anticompetitive purposes. ² As Chairman Hatch and Ranking Member Wyden correctly noted, the interim final rule creates an effective “bar {on} small businesses from relying on trade associations to consolidate product information and make submissions on behalf of multiple businesses.” They note additional burdens on participation as well. The fact that the exclusion request form “collects information on more than 70 attributes of each steel or aluminum product, with an additional form apparently required in every instance in which a single attribute differs between products” has the effect of “increas{ing} the burden on businesses that purchase or produce products with even minor variations.”

The apparently contradictory information on the Department’s exclusion request form, which states both that “ranges ... are allowed” and that “[a] separate Exclusion Request must be submitted for each aluminum

² Letter from Senator Orrin G. Hatch and Senator Ron Wyden to Secretary of Commerce Wilbur L. Ross, Improvements to the Process for Product Exclusions from Section 232 Tariffs on Imported Articles of Steel and Aluminum (Apr. 19, 2018).
product by physical dimension," creates confusion, increases the regulatory burden, and discourages participation.

The Department should modify its product exclusion process to alleviate these burdens and promote industry participation. Allowing trade associations to submit consolidated requests would reduce costs to affected companies, promote a speedier resolution of exclusion requests, and more efficiently allocate Bureau of Industry and Security and other Department resources. It is an obvious component of any solution to the problems that Chairman Hatch and Ranking Member Wyden identified in their letter.

Likewise, the Department’s interim final rule discourages participation by failing to provide sufficient guidance on how the Department will protect confidential or business proprietary information. With respect to such information, the interim final rule states only that organizations "should so indicate in the appropriate field of the relevant form." But our member companies and many others that might wish to participate in the exclusion process require additional procedural detail to ensure that their sensitive information – which will often be necessary to prepare a materially complete and compelling request – is adequately protected from unnecessary public disclosure.

For example, when the Office of the U.S. Trade Representative (USTR) issued notice of its proposed determination in its Section 301 investigation of
Chinese IPR practices, it provided that submitters of comments containing business confidential information should name the files according to a specified prefix; mark as such any pages containing business confidential information; and certify in writing that disclosure of the information would endanger trade secrets or profitability. The USTR notice also specified that commenters should contact a USTR Tech Transfer Section 301 hotline to discuss alternative arrangements “if these procedures are not sufficient to protect business confidential information or otherwise protect business interests.” While not as extensive as the robust regulatory framework that the Department uses to protect business proprietary information in the administration of antidumping and countervailing duty investigations and orders, the protections that USTR afforded in its notice are the minimal protections necessary to provide reasonable security and predictability to affected companies concerning the use of their sensitive information.

Accordingly, the Beer Institute urges the Department to adopt comparable policies in its final rule to avoid a chilling effect on participation by U.S. importers and users of aluminum.

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5 Id. at 14909.
III. The Department Should Account for Apparent Distortions in the Midwest Premium That Are Artificially Increasing Prices for Aluminum Users

In addition to improving the product exclusion process, the Department should work with other agencies to address potentially anticompetitive activities in the aluminum market that are driving up the Midwest Premium, and thus the prices that aluminum users pay for their supplies.

In recent years, the aluminum market has been subject to price manipulation that has cost the beer industry and other aluminum users billions of dollars in excess costs. The most recent manipulation involved the London Metals Exchange (LME) warehouse system. Smelters use the system to sell excess stock when there is oversupply, and users turn to it in times of extreme shortage. The industry also uses the so-called LME price for aluminum as a reference price in supply contracts. An aluminum user pays the LME price plus a physical market premium, which in the United States is referred to as the “Midwest Premium.”

Starting in 2010, the LME system took a serious turn. Owners of LME warehouses began to stockpile primary aluminum by paying aluminum smelters to overproduce in an already oversupplied market. These stocks

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6 The Midwest Premium is assessed by a global energy, metals and petrochemicals information provider called Platts. It is intended to reflect the full logistical cost of sourcing metal from the most viable supply hubs whether they be regional producers, LME warehousing hubs, or the best-located major off-shore suppliers. Logistical costs that are factored into the Midwest Premium include storage rates, FOT rates, inland transit rates, ocean freight, port handling, duties, finance costs, insurance, and LME spreads.
were sold through the LME instead of on the physical market. Aluminum sold through the LME would then go into storage in an LME warehouse. A second troubling practice was the payment of financial incentives to warrant holders whose metal was already stored in LME warehouses. The combined impact of these practices was to eliminate the LME system as a market of last resort for aluminum users. The increased queues created an artificial shortage and had a dramatic effect on the price that aluminum users paid to access aluminum supply in the physical market.

In November 2014, the U.S. Senate Permanent Subcommittee on Investigations issued a report on the involvement of Wall Street banks in physical commodities markets, including aluminum. The report’s key findings included “troubling issues involving conflicts of interest, market distortions, and the potential to gain unfair trading advantages” by Wall Street banks, which “likely added billions of dollars in costs to a wide range of aluminum users, from beverage makers to car manufacturers to defense companies that make warships for the Navy.”

In the wake of the PSI report, the LME instituted reforms that led to a dramatic fall in the Midwest Premium. However, in the time since the Administration announced its Section 232 remedy, this trend has reversed. The Midwest Premium has spiked again, in a way that appears disconnected from market fundamentals. For example, while duties are a logistical cost,

the Midwest Premium increased in a manner that assumes that metal from all countries, including domestically-produced metal, is subject to the tariffs.

The Department should take this possible manipulation into account in its administration of the Section 232 remedy.

First, the Department should keep in mind the negative impact that restrictions on supply will have on our industry and other aluminum users. We have just exited a period in which artificial restrictions in the market distorted prices and hurt the beer industry, the non-alcoholic beverage industry, and other aluminum users. Domestic aluminum users face higher costs because of the Section 232 tariffs that necessarily lead to lost sales. Lost sales means lost government revenue and job losses, not only in the brewing industry, but also in retail and other downstream industries.

Second, when market manipulation causes the Midwest Premium to spike, the U.S. market becomes more attractive to global aluminum suppliers, which draws additional supply into the market, undermining the Department’s Section 232 remedy. Therefore, if the Department is concerned about addressing increased imports of aluminum, it should follow the suggestion of Chairman Hatch and Ranking Member Wyden to “coordinate with the Department of Justice and Federal Trade Commission to ensure that effective mechanisms are in place to deter and to redress any anticompetitive conduct in the market for products that are subject to the Section 232 tariffs and product exclusion process,” including “mechanisms . . . for the public to
report perceived anticompetitive behavior in respect of such products and prompt review of those reports by the appropriate authorities.\textsuperscript{8}

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The Beer Institute reiterates its appreciation for the opportunity to comment on the Department’s interim final rule and looks forward to working with the Department to ensure that the exclusion request process is fair, inclusive, and effective.

\textsuperscript{8} Hatch-Wyden letter at 2.