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Proposals to De Minimis Customs Rules Spike US Importer Interest

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While Congress is reexamining the de minimis customs rules, US importers should prepare for potential changes and optimize their operations and compliance programs in conformity with the evolving landscape, say KPMG practitioners.

The US customs *de minimis* rule, found in §321 of the Tariff Act of 1930, is currently being reexamined by Congress due to concerns about its potentially negative impact on domestic industries and possibility for abuse. The rule exempts small-value parcel shipments from duties, taxes, and the standard customs formalities. The current threshold is set at $800, which means goods can be imported by one person on one day into the US with a value of $800 or less without being subject to duties or taxes, nor are importers of these goods generally subject to formal filing requirements at the time of entry. Notably, many countries do not have a *de minimis* threshold or have very low thresholds compared to that of the US. The *de minimis* rule has significantly facilitated supply chain models that benefit companies that can offer direct delivery to customers in the US from foreign locations while reducing their costs, simplifying the import process, and speeding up the delivery of goods.

One significant factor influencing the reexamination of the *de minimis* rule is the US's contentious trading relationship with China, which has been a major source of low-value, high-volume imports into the United States. Critics argue that the *de minimis* rule operates as a loophole that can be exploited to circumvent trade restrictions and tariffs, thereby undermining US trade policy and hurting domestic industries. Some

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labor unions and domestic business groups have derisively referred to the *de minimis* provision as a *de facto* free trade agreement with China.

There are presently three bills pending in committees of both chambers of Congress that propose changes to the customs *de minimis* exception. These bills, if enacted, will introduce significant changes to the *de minimis* rules including, but not limited to, potential reductions to the value threshold, prohibitions for shipments from certain countries (including China), additional documentation and information requirements, and new civil fines for non-compliance.

Background — §321

The Tariff Act of 1930 was amended in 1938 to include §321 as an administrative exemption to allow the US Customs Service (now known as the US Customs and Border Protection or "CBP") to forgo the collection of duties, fees, and taxes on low value shipments to avoid "expense and inconvenience of collecting the duty accruing [on imported merchandise]… disproportionate to the amount of such duty." Section 321 can only be claimed once per day per importer (typically, the US end-consumer) and may be admitted into the US using the informal entry procedures provided by 19 U.S.C. 1498 rather than under the ordinary entry formalities under 19 U.S.C. 1484 generally associated with declaring imported commercial goods into the US.

The general allowable *de minimis* value threshold has increased over time, from $5 at the time §321 was initially implemented in 1938, to $200 with the passage of the Customs Modernization Act in 1994, and then again significantly increased in 2016 to $800 with the passage of the Trade Facilitation and Trade Enforcement Act ("TFTEA"). The latest increase to the *de minimis* threshold to $800 under TFTEA was spurred by the significant spike in online purchases and direct parcel deliveries from foreign locations to US consumers during the previous decade, coupled with a concern that limited CBP resources were dedicating disproportionate administrative effort on these low value shipments. Following the change under TFTEA, the volume of *de minimis* shipments increased from approximately 410 million shipments in fiscal year ("FY") 2018 to approximately 771 million shipments in FY 2021. *De minimis* imports from China accounted for most of this growth, including more than 446 million shipments in FY 2021 alone (US Customs and Border Protection, ***Newsroom Trade Statistics*** (Dec. 2, 2023)).

The significant increase in the *de minimis* value threshold from $200 to $800 had a profound impact on distribution models for imported goods. For example, for imported apparel and footwear that generally carry duty rates ranging as high as 32%, or for imported Chinese goods subject to 25% tariffs, those goods can be entered duty-free if shipped below the $800 value threshold. This is a significant benefit to consumers and businesses alike. In addition, foreign businesses no longer need a physical presence – either brick-and-mortar stores or distribution facilities – in the US to be able to reach US consumers with their duty-free products. Contrast that with the higher costs associated with importing wholesale goods in bulk, paying duties and brokerage fees per shipment, and warehousing the goods before reselling to retailers, and it becomes clear why the *de minimis* exception can be so valuable.

The ability of foreign vendors to sell directly to consumers, and to do so without needing to consider the duty burden to the purchaser, has changed how companies conduct business internationally. Some

companies have set up distribution/fulfillment centers across the border in Canada and Mexico to export their low-value shipments to American consumers directly, duty-free. Although Foreign Trade Zones ("FTZ") within the US are also generally considered to be outside of the customs territory of the United States, CBP has determined that withdrawals of low-value shipments from the FTZ directly to the consumer were not eligible to avoid duty under the §321 de minimis rule (*See* CBP Headquarters Rulings HQ H275567 (May 8, 2018) and HQ H282601 (Sept. 18, 2018)). Moreover, companies using Mexico as a distribution hub often benefit from lower operation and labor costs. These cost savings may often be passed on to the consumer, resulting in more competitive pricing and greater product selection for consumers.

While these shipments enjoy duty-free entry at faster speeds, critics argue that the sheer volume of small parcel shipments make individual inspection of every package nearly impossible. The lack of potential oversight creates the opportunity for these shipments to bypass compliance with anti-forced labor requirements, intellectual property controls, and drug enforcement. Between 2018-2021, CBP seized over 400,000 *de minimis* shipments, over 9% of which were narcotics related (US Customs and Border Protection, *Section 321 De Minimis Shipments Fiscal Year 2018 to 2021 Statistics*, CBP Publication No. 2036-1022 (May 2, 2022)). CBP has also had to develop strategies to combat the import of fentanyl and other illicit drugs being shipped in small parcels, specifically as a result of ballooning the volume of *de minimis* imports (US Customs and Border Protection, CBP Strategy to Combat Fentanyl and Other Synthetic Drugs (October 2023)).

Proposed *De Minimis* Legislation

There are currently three bills pending in Congress concerning the *de minimis* rule: S. 1969 ("De Minimis Reciprocity Act of 2023"), S. 2004 ("Import Security and Fairness Act"), and H.R. 4148 (also the "Import Security and Fairness Act" which mirrors S. 2004). If enacted, the proposed bills could increase an importer's compliance requirements and costs in several ways:

1. **Per-country de minimis thresholds**: S. 1969 proposes the establishment of a "per country" *de minimis* dollar amount threshold, not to exceed $800, taking into account the reciprocal dollar amount threshold for each respective country for *de minimis* entries from the U.S. This would mean that the value of goods that can be imported duty-free would vary depending on the country of origin of the imported goods, potentially increasing the duty costs for goods from certain countries.
2. **Contract carrier requirement**: S. 1969 would also require that goods eligible for *de minimis* treatment be transported by a US "contract carrier." Contract carriers would be responsible for collecting duties and taxes owed, as well as specific import data, and remitting these to CBP. This could potentially increase the administrative burden and costs for importers because they would need to ensure that they are working with compliant carriers and that all necessary duties, taxes, and information are properly remitted.
3. **Prohibition of de minimis treatment for certain countries**: S. 1969, S. 2004, and H.R. 4148 propose to prohibit the *de minimis* duty-free or tax-free treatment for goods from certain countries. S. 1969 requires the Secretary of the Treasury to publish a "prohibited" list of countries based on several factors, but mandates that China and Russia be included on said list. S. 2004 and

H.R. 4148 prohibits *de minimis* treatment if the country of origin of the imported good, or the country from which the goods is shipped, is considered a "non-market economy" country and is a country included on the US Trade Representative's "priority watch list." This could potentially increase costs for importers that source goods from these countries, as they would no longer be able to import these goods duty-free or tax-free.

4. **Additional documentation requirements**: S. 2004 and H.R. 4148 also mandate the submission of necessary documentation or information, and certifications of accuracy, to CBP to determine if the goods qualify for the *de minimis* exemption. The bill provides that this could include information and documentation that describes the goods, Harmonized Tariff Schedule of the United States ("HTSUS") classification, country of origin, etc., and information regarding how the articles are purchased, sold, subsequently sold, imported, or warehoused, including whether the articles are offered for purchase and sale in the US through a commercial or marketing platform such as an e-commerce platform. Responsible parties for the transmission of said information would need to ensure that they have systems in place to collect and submit import information accurately, potentially resulting in increased administrative costs for low-value shipments.
5. **Civil penalties for non-compliance**: S. 2004 and H.R. 4148 also impose civil penalties on any person for violations, with fines of $5,000 for the first violation and $10,000 for each subsequent violation. Civil penalties could increase the risk for importers, as they could face significant fines for non-compliance, thus increasing their potential costs.

While it is always challenging to predict the timing and final details of pending legislation, it is notable that all three of these bills are co-sponsored by both Democrats and Republicans, which is a rare show of bipartisanship these days. There have also been public expressions of support in both chambers of Congress in support of changing the current de minimis rule, with prominent legislators, expressing concern that it is being used as a loophole for China. In September of this year, House Ways and Means Committee Chair, Rep. Jason Smith (R-MO), said changing the terms of "de minimis is something that we are going to have a lot of fruitful discussions on, we are doing that with the Senate. It's a very bipartisan concern." Last November, Raja Krishnamoorthi (D-IL), the top Democrat on the House Select Committee on China, publicly stated that he hopes the proposed de minimis changes become law. There have also been public expressions from unions and trade groups representing domestic manufacturing referring to de minimis as a back-door free trade agreement with China. The Coalition for a Prosperous America, joined by organizations that advocate for opiate addicts and police organizations, has also requested the White House to delink e-commerce transactions from §321 because the de minimis entry process allows the entry of illicit drugs and counterfeit goods undetected.

While this may suggest to some that it is only a matter of time before some modification of §321 becomes law, it remains unclear whether that will materialize and what a final bill will actually look like. Although it is likely the bill will include some form of restriction on goods from China.

Preparing for Change

Importers can take several steps to prepare for these potential changes to the *de minimis* rules to mitigate potential disruption, including anticipated increases to import duties and compliance costs:

Stay Informed / Engage: It is crucial to stay updated on the progress of these bills in Congress. This can be done by regularly checking the official Congressional and committee websites, subscribing to trade newsletters, or working with trade professionals. Importers can also engage with trade associations and advocacy groups to voice their point of view and potentially influence the passage of any legislation.

Evaluate Current Operations: If the *de minimis* thresholds are lowered or the duty-free or tax-free treatment is prohibited for certain countries, importers could face increased duty expenses, compliance costs or slower customs clearance times than before. US importers should evaluate their current operations and supply chains to determine the impact of the changes to import operations. Evaluating an import supply chain may include identifying the countries of origin for imported goods, the value of the imports, and whether the business is currently benefiting from the *de minimis* exemption; and then start planning for these potential cost increases now, which could include renegotiating contracts, adjusting pricing, or exploring alternative sourcing options.

Compliance Programs: Importers should consider implementing or strengthening their compliance programs to ensure that they are prepared for the potential new regulations, including potentially new data and documentation requirements, and thereby can avoid civil penalties for non-compliance. Steps could include regular audits, employee training, and establishing procedures for collecting and submitting the necessary documentation or information to CBP.

Duty Mitigation Techniques – As businesses consider how to mitigate the potential increase in customs duty costs, a variety of duty savings opportunities can help mitigate the impact of any change to the *de minimis* rule. Methods to reduce the customs value basis of imported goods such as the "First Sale for Export" method or unbundling non-dutiable costs from customs value should be explored. Other avenues, such as claiming tariff preferences under free trade agreements, seeking §301 tariff exclusions, and/or sourcing goods that might impact the country of origin of imported goods may also directly reduce the duty owed on imported products.

Conclusion

Since the passage of TFTEA, the *de minimis* exception has been a significant factor in shaping the landscape of US import operations. The current review and potential changes to this rule reflect the evolving dynamics of international trade policy and competing domestic interests, and the need to balance the benefits of simplified import processes with the protection of domestic industries. While the effort to modify the §321 *de minimis* rules has both bicameral and bipartisan support, there are also some headwinds suggesting the changes may not be immediate. Current events have forced new priorities upon Congress such as funding the government and the conflicts in Ukraine and Israel. There is also a continued looming concern with inflation, and thus Congress may be inclined to delay action to avoid seemingly contributing to higher import costs, effectively increasing tariffs if the *de minimis* benefit is reduced and/or eliminated. There is also pushback from powerful e-commerce platforms who benefit greatly from the existing *de minimis* rule.

Nonetheless, while potential changes may introduce new challenges, they also present opportunities for businesses to anticipate changes and optimize their operations and compliance programs in conformity

with the evolving landscape. Importers should stay informed about the pending legislation, prepare for potential changes, and consider engaging with international trade and customs specialists to navigate these changes successfully (i.e., to optimize the benefit and/or manage disruption). The future of the *de minimis* rule remains uncertain, but what is clear is that it has become an additional trade policy lever with China, one that continues to gain significant interest by US businesses on both sides of the debate.

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