

The Unintended Consequences of Raising the De Minimis Level

A. Executive Summary

Last year's decision by U.S. Customs and Border Protection (CBP) to increase the U.S. de minimis threshold from \$200 to \$800 created actual and potential negative consequences for the health and safety of U.S. citizens, intellectual property rights protection, and U.S. national security. CBP should reduce the de minimis level to \$200 so that further study can be undertaken to determine whether and how the risks associated with a higher de minimis level can be managed effectively.

The De Minimis Rule: under the de minimis rule, an importer can generally import one or more shipments of merchandise into the U.S. each day, without filing a formal entry or paying taxes or duties for importations valued in the aggregate at \$800 or less. Prior to 2016, the U.S. de minimis threshold was \$200, but it was raised to \$800 under the Trade Facilitation and Trade Enforcement Act of 2015. Because a shipper does not submit entry data through CBP's automated portal when importing under the de minimis exception, information regarding these products is not collected and available for review for CBP enforcement purposes or other agencies with an interest in the information.

Negative Consequences of Raising the De Minimis Level: CBP's law enforcement and antiterrorism capabilities are significantly strained by the increase in the volume of shipments that are now generally exempt from filing. This surge in volume makes it significantly easier for drug traffickers, trade remedy duty evaders, counterfeiters, and other bad actors to "fly under the radar." By way of example, but of particular concern, is the opioid fentanyl, which is often times imported in small packages via mail service from China, and is one of the leading causes of U.S. overdose deaths. The lack of data also makes it more difficult for CBP and other agencies to target non-compliant shipments.

NAFTA and De Minimis: In the NAFTA renegotiation, USTR is pushing Canada and Mexico to raise their respective de minimis thresholds to \$800. Currently, Canada's de minimis threshold is \$20 and Mexico's is \$50 for courier shipments and \$300 for postal shipments. Canada and Mexico are opposed to an increase due to the risk of creating a "back door" for cheap imports and counterfeit products from China that would circumvent border controls. The Administration's position on de minimis also contradicts the President's objectives of reducing the U.S. trade deficit and combating China's violations of U.S. intellectual property rights.

Action Items: CBP should utilize its authority to reduce the threshold to \$200. Meanwhile, CBP and other relevant agencies should conduct a study on the risks associated with raising the de minimis threshold and if and how those risks can be managed effectively.

B. Overview of the Entry Process

Under U.S. customs law, importations can be made under one of three categories, each with varying documentation requirements:

1. Formal entries: Generally, entries valued at more than \$2,500.
2. Informal entries: Generally, entries valued at \$2,500 or less.
3. De minimis entries: Generally, entries valued at \$800 or less.

Importers that file formal entries are required to hold a customs bond and submit entry documentation, including:

- An "entry summary" (CBP Form 7501), which provides information regarding the nature of the product imported, the duty rate applicable to the product, the ultimate consignee, and manufacturer, among other details;¹
- A commercial invoice that describes the items imported and provides information regarding the value; and
- A bill of lading or air waybill.

¹ Importers are required to report the classification of the product under the U.S. Harmonized Tariff Schedule (HTSUS). The HTSUS is a schedule of products and corresponding duty rates. The HTSUS number applicable to any given product is used to determine the duty rate and is also a useful indicator for CBP of whether that item is subject to antidumping and countervailing duties, health and safety regulations, or other requirements.

Informal entries are essentially required to meet the same documentation requirements as formal entries; however, no customs bond is required, and informal entries are “liquidated” (i.e., CBP finalizes a duty determination and assessment) at the time of entry.

Much of the entry data for formal and informal entries is collected and reviewed through the Automated Commercial Environment (ACE), a \$4 billion automated system developed by CBP and other U.S. agencies with border authorities and responsibilities (e.g., FDA, DOI, CPSC) to facilitate data collection and customs clearance. Once the relevant agencies confirm that the importer has complied with all applicable laws and regulations, the merchandise is released and can enter the United States.

The entry data CBP collects is a vital element to CBP’s antiterrorism and law enforcement mission. This information allows CBP to identify imports and importers that threaten the health and safety of U.S. citizens, undermine U.S. businesses through intellectual property theft and anticompetitive trade practices, or threaten U.S. national security.

C. What is De Minimis?

Under the “de minimis” exemption, an importer can generally import one or more shipments of merchandise into the United States each day, without paying taxes or customs duties for importations valued in the aggregate at \$800 or less. In most instances, the shipper also avoids having to file a formal entry with CBP. Generally, de minimis shipments only require the presentation of a bill of lading or manifest.

Because a shipper does not submit entry data through ACE when importing under the de minimis exception, information regarding these products is not collected and available for review for CBP enforcement purposes or other agencies that may have an interest in such information.

D. When Was the U.S. De Minimis Level Raised to \$800?

The \$800 de minimis threshold is relatively new. Prior to 2016, the U.S. de minimis threshold was \$200. The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), which President Obama signed into law on February 24, 2016, provided CBP with the discretion to raise the de minimis threshold from \$200 up to no more than \$800, which CBP did on March 10, 2016.

By raising the de minimis threshold, CBP significantly increased the volume of merchandise that is not processed through ACE.

E. Why Was the U.S. De Minimis Level Raised to \$800?

In TFTEA, Congress noted that its intent behind the change was to reduce costs to the private sector and to facilitate trade. However, the statutory provision that Congress amended through TFTEA states that the Secretary of the Treasury is authorized (i.e., not required) to raise the de minimis threshold up to \$800 in certain circumstances “in order to avoid expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected.”

Proponents of increasing the de minimis threshold were primarily large online retailers and express delivery service providers.

F. What Have Been the Consequences of Raising the U.S. De Minimis Level?

While increasing the de minimis threshold facilitates imports by reducing costs, it has also led to unintended negative consequences. While CBP has the right to require that a formal entry be filed on any shipment as it finds appropriate, **CBP’s law enforcement and antiterrorism capabilities are significantly strained by the increase in the volume of shipments that are now generally exempted from being filed through ACE due to the de minimis level increase.**

According [to a recent article in American Shipper](#), a five-day interagency operation conducted by CBP and other agencies at New York’s JFK Airport found that **a whopping 43 percent of shipments they inspected were non-compliant.** And in another recent interview with *American Shipper*, Acting CBP Commissioner, Kevin McAleenan noted that:

“what we need to continue to work on is those shipments that are now under the de minimis threshold, which again was raised \$600 from \$200, where there’s a participating government interest, whether there might be an IPR (intellectual property rights) concern, or – really critically as we hear from so many states in the United States now with our opioid epidemic – could contain some sort of narcotic, especially synthetic opioid, which is high potency and could harm our communities. We’ve got to be able to get enough information at the right stage to be able to fully secure against those risks, and that’s where we’ve got to work with those different supply chain players and come up with a strategy that works to address that.”

Proponents of increasing the de minimis threshold argue that raising the threshold from \$200 to \$800 did not affect the amount of circumvention, because someone who wants to circumvent U.S. laws and regulations will always declare a shipment’s value to be less than whatever the threshold happens to be. Acting Commissioner McAleenan’s recent statement and the results from the operation at JFK cast substantial doubt on that assertion. There are several reasons why the amount of circumvention has likely increased since the de minimis threshold was raised.

First, for de minimis shipments, CBP reviews the bill of lading or manifest submitted for the entry and conducts inspections on a case-by-case basis, based on the credibility and consistency of the information provided in such documentation, including the product description and value. Certain factors, when viewed together, can arouse CBP’s suspicion and result in further inspection of a shipment. For instance, heavy packages and luxury items with a declared value of \$200 would suggest an importer error or attempt to avoid duties or restrictions. **The new \$800 de minimis level provides importers more leeway to under declare value in order to avoid duties and regulations, without arousing suspicions.**

Furthermore, the 400% increase in de minimis value vastly increases the volume of shipments subject to reduced scrutiny and expedited procedures, which significantly strains CBP personnel’s valiant efforts to enforce the law. As a result, **this surge in volume makes it significantly easier for drug traffickers, ADD/CVD evaders, counterfeiters, and other bad actors to “fly under the radar,” as demonstrated by the results of the JFK operation.**

Finally, CBP and other agencies such as FDA and Fish & Wildlife cannot collect data on de minimis shipments, which makes it more difficult for them to design risk-based strategies to target non-compliant shipments. **This lack of data will make it harder for CBP to combat shipments of counterfeit products, such as counterfeit children’s products, as well as shipments of fentanyl.** Fentanyl is imported primarily from China, is typically shipped in very small packages, and is one of the leading causes of U.S. overdose deaths.

Thus, the new de minimis level increases the risks of harm to the health and safety of U.S. consumers and of IPR infringement to U.S. companies, and it makes the U.S. less secure.

G. What is Happening on De Minimis in the Renegotiation of NAFTA?

In TFTEA, Congress also encouraged the Office of the United States Trade Representative (USTR) to push other countries in bilateral, regional, and multilateral fora to raise their de minimis thresholds. In its July 17, 2017 submission to Congress that set out its objectives for the renegotiation of NAFTA, USTR indicated that one of its objectives was to secure agreement from Canada and Mexico to raise their respective de minimis thresholds to \$800. Currently, Canada’s de minimis threshold is \$20 and Mexico’s is \$50 for courier shipments and \$300 for postal shipments.

Canada and Mexico have expressed opposition to increasing their de minimis thresholds for several reasons, including the risk that it would create a “back door” for cheap imports from China sold on Alibaba and other websites that would circumvent their respective border controls. They have also expressed surprise with the Administration’s position since the higher de minimis threshold makes it easier for China to ship low-quality, counterfeit, and otherwise illegal products into the United States. **In addition, the Administration’s position on de minimis appears to contradict the President’s stance in favor of reducing the U.S. trade deficit and against China’s failure to protect the intellectual property rights of U.S. companies.**

H. What Actions Should the United States Government Take on De Minimis?

Given the actual and potential unintended economic, health, and safety consequences of raising the U.S. de minimis threshold to \$800, **CBP should utilize the discretion afforded to it under U.S. law to reduce the threshold to \$200.** At the same time, CBP and other relevant agencies should conduct a study on the potential increased risks of raising the de minimis threshold and whether and how those risks can be managed in a cost effective manner. Lastly, the United States should stop advocating that other nations raise their de minimis thresholds until our own border authorities can determine whether it is possible to manage these risks successfully.

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