



POTUS Has Authority to Fix the *De Minimis* Trade Loophole Now Facilitating Entry of Deadly Fentanyl from China and a Flood of Unfair Imports that Crush Domestic Firms

The European Union and South Africa Are Ending their De Minimis Programs

President Biden has authority to fix the *de minimis* trade loophole that now allows almost four million packages daily of imports—mainly from China—ordered online to enter the U.S. without inspection and evading taxes and tariffs, including most trade-cheating penalties and the ban on forced-labor goods. These imports crush U.S. manufacturers, workers and retailers. Buried in the daily tsunami of uninspected small-value import packages are many fake and often dangerous goods that threaten U.S. consumers, including deadly fentanyl and precursors from China. The current *de minimis* crisis results from U.S. agencies relying on interpretations of a 1930s law that predate the boom in direct-to-consumer online sales. Under existing trade and customs laws, the Administration has discretion to update the policy so that the E-Commerce platforms selling such goods, not customers, are designated as the importer-of-record responsible for meeting U.S. law. This, and requiring Formal Entry customs processes for commercial goods, would reduce the volume of small-package imports -- making it possible for Customs to inspect such goods. The European Commission decided to altogether eliminate *de minimis* to end rampant customs valuation fraud and a flood of unsafe imports. South Africa is doing the same as nations worldwide face explosive growth in fraudulent and dangerous commercial *de minimis* imports. Former President Trump had the authority to fix this problem, but sided with Amazon and express delivery firms such as FedEx and refused to do so.

Section 321 of the Tariff Act of 1930 authorizes, but does not require, Customs and Border Protection (CBP) to allow an individual to import goods on one day valued below a *de minimis* amount set by Congress (now \$800) exempt from all taxes and tariffs, including Section 301 and many other trade enforcement and penalty charges. This policy allowed American travelers abroad to bring back \$200 of souvenirs without duties or having to use detailed Customs forms. *De minimis* was never intended for mass commercial use. But now firms like Shien and Temu crush U.S. producers and skirt the ban on forced labor imports by exploiting outdated rules implementing the policy.

U.S. Customs certainly could not foresee mass direct-to-consumer online sales when it issued 1994 regulations allowing an “owner, purchaser, or consignee” of *de minimis* goods to use “Informal Entry” procedures.¹ But the decision that a purchaser can be counted as the importer, rather than the seller of the goods, means that **today 70% of U.S. *de minimis* entries arrive as commercial shipments from China**. Because even the largest online retail platforms facilitating these sales are not deemed importers, they never hit the \$800 per person per day limit. Because *de minimis* packages enter via Informal Entry customs rules, no detailed information about goods is required. The volume of U.S. *de minimis* shipments – one billion in 2023 and 1.4 billion projected for 2024 – and the lack of data makes inspection impossible, creating incentives to exploit the program to move fentanyl and other banned goods.

AN EFFECTIVE REMEDY MUST REDUCE THE VOLUME OF *DE MINIMIS* SHIPMENTS: House Republicans recently derailed a bipartisan bill that could reduce the volume of *de minimis* imports. (It excluded non-market economies with certain Section 301 trade law violations, such as China, from *de*

¹ 19 C.F.R. §143.26

minimis.) Thankfully, the Administration has authority on its own to reduce the volume of *de minimis* shipments permanently, or, at least until Congress enacts a remedy. The European Commission concluded that no version of *de minimis* can ensure trade and tax enforcement and consumer safety given today's volume of E-Commerce shipments. However, even if the U.S. were to maintain some program, simply to reduce the safety and economic threats posed by today's rules, the U.S. must greatly reduce *de minimis* shipment volume, and strengthen and automate data requirements. **With almost four million *de minimis* packages daily swamping U.S. express air delivery and mail facilities, currently it is simply impossible for almost any *de minimis* goods to be inspected.**

In contrast, for goods that come into the U.S. via containers on ships, importers or their customs brokers must file data online, including tariff code identifiers or Sectoral Industry Codes, describing the goods in each container before a ship can enter port. Such "Formal Entry" rules allow CBP, the Consumer Product Safety Commission, and other enforcement agencies co-located at U.S. ports to run risk assessments to decide what goods need inspection.² **The prospect of detection in the Formal Entry environment is a deterrence for bad actors while the *de minimis* environment incentivizes fraud.** When U.S. officials have done spot checks of *de minimis* shipments, major drug, weapons, forced-labor, counterfeit and other violations are consistently found along with fake airbags and brakes and toys and other products banned for safety reasons. **Closing the *de minimis* loophole would shut down easy access for illegal imports, which would reduce overall import volume for inspectors.**

THE ADMINISTRATION HAS AUTHORITY TO END THE *DE MINIMIS* CRISIS: The relevant statute only *authorizes* CBP to provide *de minimis* treatment. The statute does not *require* CPB to exempt imports below the threshold value set by Congress from customs duties, nor does it entitle any importer to *de minimis* eligibility.³ The statute also explicitly states that CBP may deny *de minimis* treatment when it is "necessary for any reason to protect the revenue or to prevent unlawful importations."⁴ Specifically, Section 321 of the Tariff Act of 1930 states as follows:

The Secretary of the Treasury, in order to avoid expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected, **is authorized**, under such regulations as he shall prescribe, to admit articles free of duty and of any tax {if they are below the *de minimis* threshold}.⁵ (emphasis added)

That Congress did not opt to limit or alter this broad discretion when it increased the *de minimis* threshold limit from \$200 to \$800 in a 2015 rewrite of U.S. customs law is notable. If Congress had intended to narrow executive discretion with respect to what types of imports valued below the new threshold should be qualified for *de minimis*, this would have been the legislative vehicle to do so.

Moreover, nothing in existing law requires that *de minimis* imports be allowed to enter the U.S. through Informal Entry and evade normal Customs inspections and filings precisely identifying the good and its source. Rather, the *de minimis* provision provides CBP with discretion to waive Formal Entry for certain imports. CBP regulations specifically state that the agency may "require a formal

² Testimony of Lori Wallach, "Buyer Beware: Fake and Unsafe Products," Subcommittee on Consumer Protection and Commerce of the House Energy and Commerce Committee, Mar. 4, 2020, <https://docs.house.gov/meetings/IF/IF17/20200304/110735/HHRG-116-IF17-Wstate-WallachL-20200304.pdf>

³ 19 U.S.C. §1321(a)

⁴ 19 U.S.C. §1321(b) ("The Secretary of the Treasury is authorized by regulations to prescribe exceptions to any exemption provided for in subsection (a) whenever he finds that such action is consistent with the purpose of subsection (a) or is necessary for any reason to protect the revenue or to prevent unlawful importations.")

⁵ 19 U.S.C. §1321(a)(2)

consumption or appraisal entry for any merchandise if deemed necessary for import admissibility enforcement purposes; revenue protection; or the efficient conduct of customs business.”⁶

In 1994, CBP issued regulations allowing an “owner, purchaser, or consignee” of *de minimis* goods to bring them in via “Informal Entry.” Not requiring formal customs forms, tariffs or taxes made sense for a returning American tourist bringing \$200 or less of purchases from overseas home on the plane or these being shipped to their homes. In 2002, before the online sales boom, in a letter ruling for Sears, Customs affirmed that a U.S. consumer could count as the importer of goods bought via a catalogue or online and sent from outside the U.S., rather than the firm selling the goods.⁷ Unfortunately, in the current era of mass online direct-to-consumer E-Commerce retail, these outdated agency decisions and interpretations have facilitated the world’s largest retailers dodging U.S. taxes, tariffs, and trade laws, U.S. consumers being exposed to a flood of uninspected and often dangerous goods and criminals having an easy way to bring in illicit drugs and other goods without detection by U.S. law enforcement.

The president can use the discretion in the statutes to order Treasury to promulgate new regulations that designate as the importer-of-record any firm, including online platforms, that facilitate sales of goods from outside the U.S. shipped to a U.S. consumer directly or destined for a fulfillment center here or in Mexico and Canada that serves U.S. consumers. With the firms, not their customers, designated as the importer, online platforms and catalogues would exceed their daily \$800 exemption in the first seconds of every day. However, small businesses, artisans, and other small-scale sellers from overseas would still be able to use *de minimis* if their shipments did not exceed \$800 per day. The president could also instruct the Department of Homeland Security and CBP to require Formal Entry or at least online filing of more granular customs data about *de minimis* shipments as well as other measures to ensure more professional and secure processes, such as requiring the use of customs brokerage services so accurate data is filed or the posting of surety, which is a special bond to cover any tariffs that may be required.

WHAT WILL NOT FIX THE PROBLEM

Changing the threshold level for *de minimis* will not remedy the problems. Few in Congress focused on the 2015 customs bill through which online retailers and express delivery interests pushed to raise the U.S. threshold from \$200 to \$800. The EU, Canada, Mexico, China, and most nations worldwide have much lower *de minimis* levels. Yet now countries with lower thresholds are ending *de minimis* altogether. That is because the dramatic changes in trade patterns, with the explosion of ecommerce, makes *de minimis* an uncontrollable avenue for fraud with bad actors exploiting the overwhelming flood of packages to cheat on product valuations and slip in fentanyl and other illicit products.

As the two Trump-era U.S. *de minimis* enhanced data pilot programs and EU data experiments have shown, requiring more information without dramatically reducing the volume of shipments also will not remedy the problem. Overwhelmed by the *de minimis* shipment flood, in 2021 the EU began to require mandatory customs declarations for all shipments. The findings fueled the decision to end *de minimis* altogether.⁸ In six months, there were 220 million import declarations for traditional trade valued at 1,250 billion Euros. E-commerce imports represented 490 million customs declarations

⁶ 19 C.F.R. §143.22 and §145.12(a)

⁷ U.S. Customs Ruling 115828, Dec. 2, 2002, <https://rulings.cbp.gov/ruling/115828>

⁸ See https://taxation-customs.ec.europa.eu/document/download/6efba674-45ab-4112-8065-1b0ac834db16_en?filename=Customs%20Reform%20Factsheet.pdf and Helen Reid, “Germany backs ending EU tax break that helps Shein and Temu,” *Reuters*, May 23, 2024, <https://www.reuters.com/markets/europe/germany-backs-ending-eu-tax-break-that-helps-shein-temu-keep-price+s-low-2024-05-23/>

valued at 4.8 billion Euros. Even with greater customs information required, *de minimis* trade was twice the number of transactions for only 0.4 % of the value.⁹

For Customs, however, e-commerce means an exponential and unmanageable flow of millions of small individual consignments to be controlled and checked for fiscal and non-fiscal requirements. Many “buyers” and “sellers” on digital platforms have limited knowledge of customs regulations and are generally unknown to customs authorities. The declared value of B2C shipments is frequently incomplete or inaccurate, often intentionally, with many falling below the “*de minimis*” value threshold of €150 for customs duties.... Evidence also suggests that the probability that small consignments will contain non-compliant or dangerous goods is very high. It is not only that checking each parcel is impossible; it is that even checking all those that are identified as presenting a risk is unmanageable. This is a major game changer for Customs’ capacity to protect citizens and the financial interests of the EU and its Member States.

That is also why the *de minimis* bill that the House Ways and Means GOP marked up in April 2024 is so cynical. The bill excludes *de minimis* treatment for goods that are subject to any U.S. trade-law violation determination or penalty. Yet, with millions of small-value packages flooding express delivery and mail facilities every day, even with the added information the bill requires on such packages, it would be impossible to inspect for fraudulent declarations. As soon as the list of tariff codes excluded from *de minimis* is listed, those seeking to evade the law will simply list another code.

THERE IS BROAD SUPPORT FOR CLOSING THE LOOPHOLE

The coalition demanding an end to *de minimis* is unusually diverse. It includes the National Association of Police Organizations and groups representing families who have lost members to Chinese fentanyl delivered right to their doorsteps nationwide. Unions and domestic manufacturing interests want the loophole closed as it is crushing them with a flood of trade-cheating Chinese imports that evade Section 301 penalties, the ban on forced labor goods, and taxes and tariffs. Consumer and faith groups want it closed to end circumvention of the Uyghur Forced Labor Prevention Act and end the flood of dangerous imports. Domestic retailers, including increasingly larger ones, realize they are getting clobbered by this loophole and want it closed. Former USTR Lighthizer recently told a group of House Democrats that ending *de minimis* would be a Day One act were there a second Trump term.

The only interests that oppose a fix are Amazon; Chinese online importers like Shein and Temu; and FedEx, DHL, and UPS. If they challenge executive action, cases would take years to conclude. This is especially the case because the underlying statute provides explicit discretion for the executive branch to take action related to *de minimis* to stop unlawful imports and to exempt categories of goods, which makes executive action less susceptible to injunction. In contrast, the relief to so many people and the fix of so many problems could be immediate.

Finally, the claim that closing the *de minimis* loophole would raise consumer prices is a red herring. If U.S. law were enforced and trade-cheating fines imposed on these goods, tariffs are calculated on the landed price, not the retail price. So, for instance a 25% fine on Nike sneakers with a landed price of \$12-16 that retail for \$200 would only increase in price to \$204 if U.S. law were enforced. Industry lobbyists trying to protect the loophole claim consumers would suffer – for instance paying \$50 more for the shoes. That is false.

⁹ Wise Persons Group on the Reform of the EU Customs Union, Putting More Union in the European Customs: Ten proposals to make the EU Customs Union fit for a Geopolitical Europe, Mar. 2022, at 19. https://taxation-customs.ec.europa.eu/document/download/e5326383-2e8d-4d0e-9025-ddf262e9df6e_en?filename=TAX-20-002-Future%20customs-REPORT_BIS_v5%20%28WEB%29.pdf