



MEMO

SECTION 321 OF THE TARIFF ACT OF 1930

By Charles Benoit, CPA Trade Counsel

“De minimis” in customs law: How express shippers turned an administrative customs provision into an instrument of economic devastation and lawlessness at ports



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SECTION 321 OF THE TARIFF ACT OF 1930

“DE MINIMIS” IN CUSTOMS LAW: How Express Shippers Turned an Administrative Customs Provision into an Instrument of Economic Devastation and Lawlessness at Ports

Executive Summary:

- The De Minimis rule, a.k.a. Section 321, is meant to serve as an administrative tool to ensure that customs officers aren't forced to do assessments on low-value goods which would end up costing the government more money than they would generate.
- For regular imports, the law requires importers to provide Customs & Border Protection (CBP) an advance manifest of the incoming cargo describing it. But de minimis shipments, including millions of e-commerce packages, typically arrive with no advance information. The information scrawled on the packages is often incomplete and unverifiable. CBP has to process a whopping 2 million of these shipments daily and does not have the capability to detect and seize illicit and dangerous goods
- “De Minimis” is Latin for “too trivial or minor to merit consideration”.
- There are three types of import situations covered by De Minimis:
 1. “Bona fide gifts” mailed to Americans from their friends and family abroad;
 2. Articles accompanying travelers from abroad for household use; and
 3. A “catch all” anything else provision to ensure no undue burden was spent. *For most of Section 321's history, this was the lowest threshold, spending much of its life at \$1 and rising only to \$5 by the 1990s.*
- Congress raised our de minimis threshold to a whopping \$800 in 2015. For comparison, China's is 50 yuan, which is less than \$8.
- Goods eligible for de minimis treatment enter the U.S. free of duties and taxes.
- Illicit drugs, such as fentanyl, and counterfeit goods are shipped directly to U.S. consumers while evading detection.
- Express consignment companies like FedEx and UPS and e-commerce sites like Amazon and eBay are the primary actors lobbying to keep de minimis as a giant open-border backdoor.
- Congress must fix this by lowering the threshold back to \$9 (\$5, but adjusted for inflation).
- There are steps the Executive can take while waiting on Congress to stem the damage.

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Part I: De Minimis: Background and Evolution

1938 – 1995: De Minimis used as intended

When things are brought into the country, the law says our customs service – U.S. Customs & Border Protection – must assess its value, catalog its importation, and collect any applicable tariffs and taxes. This is what every country in the world does.

If we didn't make an exception to this assessment requirement, however, then customs officers would be forced to do the assessment above for every little souvenir or knick-knack brought in from abroad. Imagine being asked for copies of receipts for the snow-globe and t-shirt you brought back from Paris while standing in the customs line at the airport.

So for this reason, in 1938 Congress created the “De Minimis” rule. “De Minimis” is Latin for “too trivial or minor to merit consideration”.

It was added as Section 321 to the Tariff Act of 1930, codified in the U.S. Code at 19 U.S.C. §1321. The law's opening line states its purpose: “to avoid expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected”.

The 1938 Congress set low-dollar thresholds for three different importation scenarios, assigning a \$5 threshold for bona fide gifts and personal effects travelers brought with them, and a \$1 de minimis for any other situation:



**\$5 exemption for
“Bona fide gifts” mailed from
abroad**
19 U.S.C. §1321(a)(2)(A)



**\$5 exemption for
“articles accompanying”
travelers for “household use”**
19 U.S.C. §1321(a)(2)(B)



**\$1 *de minimis*
for “any other case”**
19 U.S.C. §1321(a)(2)(C)

1953 Amendment – Customs Integrity Preserved

In 1952, [Congress debated H.R. 5505, the “Customs Simplification Act”](#). There were proposals to increase the threshold for all three categories to \$10. Congress did increase the two \$5 exemptions to \$10, but after a strong showing of opposition from numerous business and retail groups, rejected proposals to increase the \$1 de minimis threshold at all.

The following statement from the National Retail Dry Goods Association¹, reproduced in part below, is representative of comments received by Congress:

In addition to the above we must hire expert help to man our stores, promote the sale of goods, for after all the economy of this country prospers not because of the goods our factories produce, but rather upon what is sold across the counters of our stores.

Now, once we have the store, the merchandise and the staff, we are ready to do business. However, then comes the burden of taxes that are levied by the Federal, State, and local governments. Many States and many municipalities have sales taxes. Then, too, when we import foreign-made goods we must pay duty upon them before we can offer them for sale.

Contrast this situation with that of the foreign operator, if this bill is adopted. According to section 321 of H. R. 5505, a foreign operator, no doubt from a country that has been the recipient of billions in aid, partially paid by the taxes upon American retailers, can advertise and sell in this country goods selling for \$10 a shipment and mail them to our customers duty-free. The irony of this situation is that we would find some of the tax dollars we have paid being used to damage us.

A European operator could place an advertisement in a newspaper or magazine in the United States and offer to sell gloves, handbags, slippers, blouses, skirts, sweaters, perfumes, costume jewelry, cosmetics, and a host of other items. These items could be priced upward of \$10. Realize that the advertiser does not maintain any quarters in this country. He does not pay any real-estate, income,

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or other taxes. He does not pay any duties. He does not maintain a selling force. His only expense would be the advertisement.

The members of the National Retail Dry Goods Association feel that this type of competition should not be permitted and we are hopeful that your committee will delete this harmful section. An amendment to the House bill was considered by some to remove the harmful features of section 321. This amendment would prevent C. O. D. shipments under this bill. But, gentlemen, I can assure you that any American consumer who could buy for \$10 a sweater that an American retailer could not offer for less than \$18 or \$19 would not be discouraged by the bar against C. O. D. shipments.

We sincerely believe that this section is unfair, unjust, and places upon one segment of our economy a double load. The retailer would be forced to help pay the bill for foreign aid and then be placed in jeopardy by foreign competition created by this legislation.

In closing, let me urge your serious consideration of this appeal. The members of our association sincerely hope that the committee will delete section 321 of H. R. 5505.

DRUG, CHEMICAL AND ALLIED TRADES SECTION,
NEW YORK BOARD OF TRADE, INC.,
New York, N. Y., April 22, 1952.

Congress heeded the warnings, and in 1953, amended the statute as follows:

¹ *An Act to Amend Certain Administrative Provisions of the Tariff Act of 1930 and Related Laws, and for Other Purposes: Hearing on H.R. 5505 Before the S. Comm. on Finance, 82d Cong. 56 (1952)*

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 hereby authorized under such regulations as he shall prescribe, to admit articles free of duty and of any tax imposed on or by reason of importation, but the aggregate value of articles imported by one person on one day and exempted from payment of duty shall not exceed –

(A) “\$10 in the case of articles sent as bona fide gifts from persons in foreign countries to persons in the United States”, or

(B) “\$10 in the case of articles accompanying, and for the personal or household use of, persons arriving in the United States”; or

(C) “\$1 in any other case.”²

While the thresholds have changed, the statute remains structured the same today.

1974 – Gifts sent from insular possessions increased from \$10 to \$20

Section 610 of The Trade Act of 1974 amended de minimis by raising the gifts and accompanying articles thresholds from \$10 to \$20 for bona fide gifts sent from persons in the Virgin Islands, Guam, and American Samoa to persons in the United States.

1978 – 1994: De minimis at \$5

In 1978, citing inflation adjustments, Congress increased the de minimis threshold from \$1 to \$5.³

As of 1993, the “low value” thresholds stood at \$50 for bona fide gifts from abroad, \$25 for souvenirs brought back, and just \$5 for anything else.

1994 – De Minimis increased to \$200; Express Shippers Cause Rupture

NAFTA went into effect on January 1, 1994, and was a high profile legislative event. It thus largely overshadowed another monumental piece of legislation that was passed alongside: the Customs Modernization Act, or “Mod Act”.

The Mod Act increased the bona fide gift threshold from \$50 to \$100; from \$25 to \$200 for accompanying articles; and a shocking increase from \$5 to \$200 for de minimis.

Foreign Vendors Now Favored Over Grandma in the Old Country

The Mod Act’s increase of de minimis from \$5 to \$200 created a truly bizarre situation vis-à-vis the bona fide gift category. Thanks to this amendment, anyone in the United States is free to buy, for example, a jacket from a foreign vendor valued up to \$200 free of any taxes or tariffs. However, if a family member

² (Public Law 243, Chapter 397) August 8, 1953

³ S. Rep. No. 95-778, at 28-29 (May 2, 1978).

living abroad sent you that same jacket, the gift would be subject to taxes and tariffs. It makes no sense that foreign vendors' sales are favored over bona fide gifts from friends and family abroad.

Express Shippers Get a Victory in Implementing Regulations; Litigation Ensues

Besides the raise from \$5 to \$200, the second big change happened under the radar, when the U.S. Customs service was writing their implementing regulations.

The National Customs Brokers and Forwarders Association of America ("NCBFAA"), founded in 1897, is the trade association representing the customs brokers' profession and was very involved in the development of the Mod Act. They were thus very alarmed when following the Mod Act's passage, implementing regulations were written to "allow consignees to make entry of low value exempt merchandise" without having to engage a customs brokers, as had traditionally been the case.⁴ Express shippers acted as "consignees" when bringing goods across the border.

The NCBFAA thus filed a lawsuit, claiming that the U.S. Customs Service had gone too far with these regulations, because the law (19 U.S.C. §1484) mandated that "only an owner, purchase, or licensed broker may make entry of merchandise."⁵ NCBFAA cautioned that "Customs is abrogating its responsibility to enforce certain laws and is providing opportunities for their violation."⁶

While NCBFAA's lawsuit was against the U.S. Customs Service, the express shippers joined as defendant-intervenors. The federal court that heard the challenge understood the consequential nature of the case, writing "With regard to [the express shippers], resolution of this matter will define their frontier in this industry."⁷

NCBFAA warned the court and the country as follows:

Specifically, plaintiff points out that §§ 128.24(e) and (d), respectively, of the proposed regulations allow entry of shipments valued at amounts up to \$200 through summary manifest information, that is, without any requirement of a Harmonized Tariff Schedule of the United States (HTSUS) subheading number, and exempt these shipments from the requirement of filing an entry summary. Plaintiff contends that this lax entry procedure will create difficulties for Customs relative to the enforcement of visa requirements for apparel, intellectual property rights for patents and copyrights, and antidumping and counter-vailing duty orders. Plaintiff contends that the proposed changes will hinder the Food and Drug Administration's enforcement capabilities as well.⁸

⁴ [*National Customs Brokers & Forwarders Ass'n of America, Inc. v. United States*](#), 861 F.Supp. 121, 125 (1994)

⁵ *Id.*, 128.

⁶ *Id.*

⁷ *Id.*, 126.

⁸ *Id.*, 129.

Because the implementing regulations appeared to conflict with the statute, NCBFAA asked the court to declare the proposed interim regulations as ultra vires and void, and also their development as arbitrary, capricious, an abuse of discretion, and not in accordance with the Administrative Procedures Act.

Unfortunately, the court found that the Secretary of the Treasury had broad rule-making authority governing de minimis shipments, and thus ruled against the NCBFAA.

FDA Abandons Oversight Role for 5 Product Categories

As recorded by the court in the NCBFAA lawsuit, the customs brokers warned that allowing express shippers to act as importers for foreign merchants would “hinder the Food and Drug Administration’s enforcement capabilities as well”⁹.

The NCBFAA were referring to the fact that goods regulated by the FDA are subject to extra importation requirements, including the obvious requirement that the FDA be notified about the importation.

Rather than exclude goods subject to FDA regulation from being eligible for de minimis treatment, the FDA went the opposite route, and simply abandoned its oversight role for five categories of goods. They did this not via properly promulgated regulation, but through the functional equivalent of an e-mail, using CBP’s Cargo Systems Messaging Service (CSMS). The FDA announced to importers via CSMS that the following five categories of goods were no longer subject to the agency’s importation notification requirements:

1. Cosmetics
2. Flatware (including eating and/or cooking utensils)
3. Radiation emitting non-medical devices (e.g., microwaves)
4. Biological samples for lab testing
5. Food in air tight containers intended to be stored at room temperature¹⁰

This dereliction of duty continues to this day for millions of shipments from around the world, and mostly from China.

2015: De Minimis Raised From \$200 to a Catastrophic \$800

Express shippers and e-commerce platforms were able to accomplish a catastrophic coup in 2015, where they successfully raised the de minimis threshold from \$200 to \$800. This was a provision tucked into the Trade Facilitation and Trade Enforcement Act of 2015 (“TFTEA”). TFTEA did include a number of improvements to our anti-dumping and countervailing duty laws, and thus earned support from businesses and groups who typically favor strong trade enforcement (e.g. large metals companies). Disappointingly, large traditional brick and mortar retailers who should have been a primary opponent

⁹ [*National Customs Brokers & Forwarders Ass'n of America, Inc. v. United States*](#), 861 F.Supp. 121, 125 (1994)

¹⁰ FDA CSMS #94-001260, “FDA Low Value Shipments”)

of increasing de minimis had by this point flipped, viewing Amazon's e-commerce approach as the future and worthy of emulation.

Both express shippers and e-commerce platforms were [acknowledged by Senator John Thune of South Dakota when he discusses his proposal](#):

The conference report before us includes a provision that I authored with Ranking Member Wyden that would update the so-called de minimis threshold for imports from \$200 per product to \$800 per product. The bill also includes an amendment that Senator Bennet and I offered at the Finance Committee, calling on our trading partners to follow our lead in this area. What this simply means is that if someone starts a small business selling goods on the Internet and he or she needs to import a component part in order to make a product, we are going to significantly reduce the paperwork and cost involved in doing so. This is the reason that online marketplaces such as Etsy and eBay, as well as express shippers like UPS and FedEx, are so supportive of this legislation. These companies understand what millions of American entrepreneurs understand: The Internet truly is the shipping lane of the 21st century.

This bill will empower more Americans to engage in global commerce both through the Internet and through more traditional means.¹¹

Senator Thune was not wrong: the cost to order products through the internet went down, and indeed more Americans were engaging directly with vendors outside the United States than ever before.

Raising the threshold to \$800 transformed the nature of international trade in America

U.S. Customs & Border Protection (CBP) itself acknowledges that raising the de minimis threshold changed the very nature of international trade.

Under the traditional paradigm, entire businesses would be dedicated to contracting at the wholesale level with foreign manufacturers, entering into supply contracts, importing particular products by the container-load, and then distributing those products to domestic retailers. This made regulating commerce fairly straight forward. Large shipments would be consigned to a single purchaser, and typically consist of the same or similar goods. Manifests were usually one-page.

Under the new paradigm, that same shipping container has individual packages destined for hundreds of individual customers who are fulfilling the legal role of "importer", though they don't even realize it.

¹¹ 162 Cong. Rec. S841 (daily ed. Feb. 11, 2016) (Statement of Sen. Thune).

The new paradigm is extremely problematic for CBP, because they face a comparable work load whether a bill of lading represents an entire shipping container or one individual package.

This is how Laurie Dempsey, CBP's Director of Intellectual Property Rights, described the situation in 2019:

TFTEA's change to the de minimis value, however, caused a dramatic increase in the volume of shipments making use of de minimis entry procedures. These procedures provide fewer data elements for CBP to use to effectively identify and target high-risk shipments, including for narcotics, counter-proliferation, and health and safety risks. The dramatic increase in shipments has left CBP with less information about a greater number of shipments.

The increasing use of new and changing industry business models, particularly in the e-commerce environment, further exacerbates this information gap. Entities receiving goods in the United States, which CBP previously believed to have limited financial interest in a shipment, are now critical players with increasing influence in how low-value goods move around the world.

This shift in the roles of parties to the transaction has not been accompanied by a change in responsibilities from a regulatory or policy perspective. Moreover, the advent of just-in-time delivery, along with contract manufacturing and online payment processing, has given merchants more flexibility and greater access to markets once limited by location. Free trade agreements have also allowed new routes for goods from all over the world to cross borders more easily.

CBP is concerned that the proliferation of new and changing business models, particularly in the e-commerce environment, and the increase in small packages, is permitting bad actors to operate with relative impunity.¹² (Emphasis added)

Quantifying the damage difficult due to missing hard data

Because so little data is gathered on imports via de minimis, we don't have any historical information. We don't know the value of goods coming in, and we don't even know the quantity of de minimis shipments for any year prior to CBP's Fiscal Year 2020. That's the first year Customs reported a number, and it was a staggering 768 million. And Fiscal Year 2021 is on set to *double* that number. American producers and retailers are subjected to a new level of job-destroying competition.

De minimis shipments can arrive in any of the "modes" for international shipments:

¹² U.S. Department of Homeland Security, "Privacy Impact Assessment for the E-Commerce "Section 321" Data Pilot", DHS/CBP/PIA-059 (September 26, 2019), page 2, *available at* <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-section321-059-september2019.pdf>

1. **Ocean freight**
2. **Air cargo** (148 million de minimis shipments in FY2020, a 219% increase)
3. **Truck** (94 million de minimis shipments in FY2020, a 123% increase)
4. **Rail**
5. **Express-consignment** (FedEx, UPS, DHL, etc.)
 - An Express Consignment Carrier Facility (ECCF) refers to a specialized facility that has been authorized by the port director to handle the inspection and clearance of express consignment shipments.
 - Currently there are ECCFs at LAX, SFO, JFK, ORD, MIA, and CVG.
 - 144 million total express shipments in FY2019.
6. **International mail:**
 - Note there are seven facilities where CBP receives international mail shipments (so-called International Mail Facilities): over fifty percent of international mail arrives in the U.S. at JFK airport.¹³
 - In FY2019, CBP received 463 million total international mail shipments.

While precise measurements are not available, express consignment and international mail shipments are the most likely to be declared under \$800 and thus receive de minimis treatment.

Most counterfeits are from China and arrive into the United States via Express Consignment and International Mail

According to CBP:

Over 90 percent of all intellectual property seizures occur in the international mail and express environments.

The People's Republic of China (mainland China and Hong Kong) remained the primary source economy for seized counterfeit and pirated goods, accounting for 83 percent of all IPR seizures and 92 percent of the estimated MSRP value of all IPR seizures.¹⁴

Most countries' de minimis level is far lower than that of the United States

First, it must be acknowledged that virtually all Americans would consider purchases approaching \$800 to be quite significant.

This view is shared by most of the world, which sets de minimis levels far lower than the United States. For example, Mexico's threshold is \$50 while China's is only 50 yuan, which is less than \$8.

¹³ CBP Trade and Travel Fiscal Year 2020 Report, page 17, *available at* <https://www.cbp.gov/document/annual-report/cbp-trade-and-travel-fiscal-year-2020-report>

¹⁴ CBP Media Release, "\$115K of Counterfeit Items Seized by CBP Officers in Louisville" (August 19, 2020), *available at* <https://www.cbp.gov/newsroom/local-media-release/115k-counterfeit-items-seized-cbp-officers-louisville>

There are developed countries with higher de minimis thresholds for customs purposes, for example Canada at \$150CAD – a concession as part of USMCA.¹⁵ However, these countries' de minimis thresholds in customs haven't had the same penetrating e-commerce commercial effect as in the United States, because the countries maintain much lower de minimis thresholds for tax purposes. Canada's national sales tax must be collected by foreign vendors who sell to Canadians for transactions over just \$40CAD.

Part II: What can be done to solve the de minimis calamity?

The predictable result of our \$800 de minimis threshold is a calamity putting U.S. producers and traditional retailers out of business and destroying jobs. Our permissiveness is also causing lawlessness at the ports, allowing a tidal wave of counterfeit and dangerous goods to flood in.

Fortunately, this can be fixed easily by Congress, and also by the President using existing authority.

Congress must lower the threshold to \$9: the last real de minimis level, adjusted for inflation

The point of de minimis is that government revenue agents should not waste their time doing customs assessments on trivial little items of so little value that the cost to perform the assessment is greater than the revenue that would result.

If municipalities and counties can collect sales taxes on virtually every retail transaction, then the same should be true of CBP.

Congress should adjust the de minimis threshold to \$9, which is what \$5 in 1995 equals today. It also happens to be an amount that aligns with what most Americans understand to be a "de minimis" threshold.

Any other legislative measure risks normalizing de minimis treatment as a channel of international commerce. This cannot be allowed to stand.

The Treasury Secretary has existing authority to end abuse of de minimis

The structure and thresholds of de minimis are set out in 19 U.S.C. §1321(a). The subsequent subsection provides the Secretary of the Treasury all the authority needed to end abuses and safeguard government revenue:

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

¹⁵ Canada Border Services Agency, Customs Notice 20-18 (May 2, 2020), *available at* <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-18-eng.html>

consistent with the purpose of subsection (a) or is necessary for any reason to protect the revenue or to prevent unlawful importations.

19 U.S.C. §1321(b)

Merchandise from Priority Watch List countries should be ineligible for de minimis treatment

Put simply, if merchandise originates from a country on [USTR's Priority Watch List](#), then that merchandise should be ineligible for de minimis treatment.

Every year, as required by Congress, USTR publishes a report listing “trading partners that do not adequately or effectively protect and enforce intellectual property (IP) rights”. This is known as USTR’s “Special 301 Report”. Within the countries identified on USTR’s Special 301 Report, the statute requires USTR to identify a “**Priority Watch List**” grouping. These are the countries “that have the most onerous or egregious acts, policies, or practices” – see 19 U.S.C. § 2242(b). In the 2021 report, nine countries were on the list: Argentina, Chile, China, India, Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela.

Denying de minimis treatment to merchandise for these countries would deal an exceptional blow to trafficking in counterfeits and other IP infringing goods.

In November 2020, CPA submitted a petition for rule-making to the Treasury Secretary asking for this rule. It continues to be evaluated by the Department.

Goods subject to any trade remedies, including Section 301, should be ineligible for de minimis treatment

Fortunately, goods subject to anti-dumping or countervailing duties (AD/CVD) are already excluded from de minimis treatment. The practical effect though is limited, because the majority of AD/CVD orders in effect at any given time are overwhelmingly focused on non-consumer, high cost goods that are not typically imported pursuant to de minimis.

Banning goods subject to trade remedies actions from de minimis treatment is common sense. However, the trade remedy that would be most applicable – Section 301 of the Trade Act of 1974 – is not currently considered. This means that thousands of Made-in-China goods currently subject to 301 tariffs can nonetheless be easily imported, tariff-free, if the vendor claims the value is less than \$800.

This is an obvious, inexcusable loophole. In 2020, CBP submitted a fix to OMB¹⁶ to close this glaring loophole, however it was defeated by representatives of express shippers.

¹⁶ See Excepting Merchandise Subject to Section 301 Duties from the Customs De Minimis Exemption, RIN: 1515-AE57