COALITION for a PROSPEROUS AMERICA

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TO: Bill Cassidy M.D.
United States Senator

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CARE OF:

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Dear Senators,

The Coalition for a Prosperous America (CPA) agrees with you that security programs not only enhance homeland and global security, they also provide commercial benefits. We write regarding four specific areas of customs law that are in urgent need of statutory reform. These are:

1. "Consignee entry" and "Manifest Release";
2. Duties on De Minimis shipments
3. Customs Valuation; and
4. Shipping Manifest Transparency.

1. "Consignee entry" absent a Customs Broker and "Manifest Release" for De Minimis shipments must be repealed

<u>The 1995 Rule: the Genesis of De Minimis as a Trade Loophole</u>
The entirety of our customs security apparatus, along with scores of other laws, are being undone by a regulatory action enacted shortly after passage of the Customs Mod Act of 1994.

That action was a Customs Service rule titled "Express Consignments; Formal and Informal Entries of Merchandise; Administrative Exemptions", published in the Federal Register on April 14, 1995 (F.R. Doc. 95-9192, Pages 18983-18991). [***hereinafter, "The 1995 Rule"***].

The 1995 Rule was the subject of intense litigation. The reason for the litigation was the 1995 Rule's abdication of core principles of customs law for so-called 'de minimis' shipments, specifically those entering the United States via 19 U.S.C. §1321(a)(2)(C).

Prior to this rule, the "any other case" de minimis clause – (a)(2)(C) – was never an avenue of commerce. It was, as the formal name of this provision remains titled, an "Administrative Exemption". Now, this "Administrative Exemption" is the sole-conduit for multi-billion dollar overseas retailers like SHEIN and TEMU, something never envisioned by Congress.

The 1995 Rule is the genesis of how a long-standing Administrative Exemption became, as U.S. Senators Tammy Baldwin and Bill Cassidy, M.D. correctly observe: "a trade loophole that is allowing China and other countries to undercut American manufacturers, let products made by slave labor get in the hands of U.S. consumers, and bring in illicit drugs like fentanyl into the country."[1]

The 1995 Rule transformed (a)(2)(C) into a giant avenue of commerce by abdicating two customs law principles in particular:

(1) First, that importers be subject to our jurisdiction.[2]
(2) Second, that importers be knowledgeable about the merchandise they are importing. The 'knowledge' requirement has been implemented by requiring that importers have a financial interest in the merchandise they import if a broker is not used.

These principles are codified in Section 484 of the Tariff Act of 1930. This law commands that only an Importer of Record may enter goods for consumption, and an Importer of Record can only be "the owner or purchaser of the imported goods or, when appropriately designated by the owner, purchaser, or consignee, a licensed customs broker."[3] 19 U.S.C. § 1484(a)(2)(B)

These two foundational principles were tossed aside when the 1995 Rule extended the right of entry to consignees without having to use a licensed customs broker for de minimis shipments. (Note that the important requirements of Section 484 are preserved for Informal Entry above $800, but not below the de minimis threshold. *See 19 C.F.R. §143.26(b).*)

By allowing consignees to make entry without a customs broker as Importer of Record, the 1995 Rule had the effects of:

[1] https://www.baldwin.senate.gov/news/press-releases/baldwin-cassidy-introduce-bill-to-stop-china-from-exploiting-loophole-that-undercuts-us-manufacturers-allows-fentanyl-in-us
[2] Aside from De Minimis shipments, customs regulations require that non-resident corporations obtain a customs bond and submit to U.S. jurisdiction through a local agent before they are given the right of entry. See 19 C.F.R. §141.18 – Entry by a Non-Resident Corporation.
[3] https://www.customsmobile.com/rulings/docview?doc_id=HQ%20H048943

(1) giving every foreign vendor in the world the ability to ship directly to U.S. consumers without being subject to our jurisdiction, merely by declaring their shipment as valued under $800 in their country; and

(2) doing away with the requirement that Importers of Record be owners or purchasers (those with a financial interest) or a customs broker familiar with the merchandise. This was the abolishment of the knowledge requirement.

This folly is discussed at length in the litigation surrounding the 1995 Rule, as well as in the official comments published as part of the 1995 Rule.[4]

1995 Rule and "Release on Manifest"

All shipments aside from de minimis, including Informal Entries above the de minimis threshold, are required to submit an Entry Summary on CBP Form 7501. The Entry Summary is the most vital document for enforcing customs laws, and the hundreds of laws of dozens of Partner Government Agencies. The Entry Summary provides critical information about the financial transaction underlying the import, as well as essential data about the merchandise including the name of the supplier and the Harmonized Tariff Schedule of the United States ("HTSUS" or "HTS") number.

In contrast, manifests contain little of this information, as they are focused on the movement of the shipment, not the underlying financial transaction. Similarly, the Air Cargo Advance Screening (ACAS) program "evaluates air shipments for threats to aviation."[5] It is not in any manner a substitute for an Entry Summary, although it is sometimes misrepresented as such.

The 1995 Rule rejected the requirement for Entry Summaries' essential data. This was explicit, as comments published alongside the 1995 Rule warned of the dire consequences, pleading with Customs to at least require an HTSUS number on the shipping manifest.

Customs responded in the 1995 Rule comments as follows: "Regarding a requirement for HTSUS numbers on low-value entries, Customs does not feel that there is sufficient reason to require such merchandise identification when other required manifest information is adequate to enforce these provisions."

That was wrong. Brenda Smith, the former U.S. Customs and Border Protection (CBP) EAC of the Office of Trade (2014 – 2021), stated as follows at a Washington International Trade

[4] See, e.g., from Final Rule docket: "Customs has historically required the person making entry not only to be knowledgeable about and accountable for the facts relating to an importation but also to submit documentation to substantiate that knowledge

[5] https://www.cbp.gov/sites/default/files/assets/documents/2019-Nov/ACAS-IG-v3_20190702a-4.pdf

Association panel on June 3, 2022: "Cargo [manifest] descriptions are lousy. CBP still needs that [Harmonized Tariff System] number. Neither the government nor consumers right now has visibility into third party shipments to make good decisions about risks. We don't know who is exporting those goods or where they are coming from in many cases."

In a complete reversal of Customs' thinking in the 1995 Rule, CBP warned last month that:

- "The overwhelming volume of small packages and lack of actionable data limit CBP's ability to identify and interdict high-risk shipments that may contain narcotics, merchandise that poses a risk to public safety, counterfeits, or other contraband."; and
- In FY 2022, CBP cleared over 685 million de minimis shipments with insufficient data to properly determine risk."

Without an Entry Summary, the imports are not even recorded in official U.S. Census data. This reason was why in part the *Wall Street Journal* published a front page cover article titled "The $67 Billion Tariff Loophole That's Undermining U.S. Trade Policy" and a subsequent article titled "The Tiny Trade Loophole That Understates the Trade Deficit With China".

Lack of Responsibility and Accountability for Consignee Entries

The following language has been repeated in the "E-Commerce Strategy" section of CBP's annual Travel and Trade Report since 2018, and remains in the 2022 report published last month:

> In addition to the exponential growth in small package volume and the associated risks, this growth has created **a paradigm shift in the traditional roles and responsibilities associated with importing into the U.S**. Legacy supply chain roles within the e-commerce industry are evolving to meet consumer demand with some sales platforms now acting as logistics providers, marketing platforms handling e-payments, and start-ups racing to meet consumer demand. Associated with the challenge is **a new class of importers—everyday consumers who are unfamiliar with trade laws and requirements. The consumer now initiates most imports, presenting CBP with additional challenges**.[6]

Consumers are not being held accountable for purchasing contraband – no one is. This April, Brandon Lord, executive director of CBP's Trade Policy and Programs Directorate, stated at CBP's Trade Facilitation and Cargo Security Summit that "it's so easy to sell directly to U.S. consumers from overseas and mail the merchandise to them. And there's zero incentive as that

[6] CBP Travel and Trade Report for Fiscal Year 2022, published June 2023, available at: https://www.cbp.gov/document/annual-report/cbp-trade-and-travel-fiscal-year-2022-report

foreign shipper, or foreign seller, to learn the requirements to enter the United States."[7] This is plainly true, and why it should not be allowed.

According to *International Trade Today*, Lord asked the shippers in the audience: "When you take a package on behalf of somebody from overseas, do they understand the requirements that need to be met in order to enter the United States? And if they don't, what kind of steps do you need to take to educate them?"

This is all absurd, and represents the complete neutering of our rule of law. It is the result of consignee-entry absent a customs broker.

Congress does not need to reinvent the wheel to correct this. Simply repeal the 1995 Rule and ensure consignees are required to use licensed customs brokers for entries. The cost of using a broker is trivial compared to hiring a bookkeeper or tax filer, something all businesses must do for basic legal compliance. Express shippers like FedEx, UPS and DHL have in-house brokerages to seamlessly offer this service when required by law.

Anything less than repeal of Consignee Entry is embracing anarchy and lawlessness.

<u>Even voluntary enhanced data pilots prove fruitless</u>

In CBP's E-Commerce Strategy, much hope over the last several years has been placed on two voluntary data-submission pilots for de minimis: the Section 321 Data Pilot, and Type 86 entry. Both programs are entirely voluntary platforms to electronically submit additional data elements to CBP.

When launching the Section 321 Data Pilot in 2019, Laurie Dempsey, CBP's Director of Intellectual Property Rights and E-Commerce, warned that de minimis shipments "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."[8]

Dempsey's report continued: "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.**"[9] (Emphasis added)

[7] Mara Lee, "Type 86 Test Revealing Compliance Weaknesses in Small Packages", INTERNATIONAL TRADE TODAY, April 17, 2023, *available at* https://internationaltradetoday.com/article/2023/04/17/type-86-test-revealing-compliance-weaknesses-in-small-packages-2304170052

[8] CBP Section 321 Data Pilot's Privacy Impact Assessment, September 26, 2019 *available* at https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-section321-059-september2019.pdf

[9] *Id.*

The hope for the pilots was to provide additional data elements for CBP to push back against the tide of anarchy.

These programs have been a failure, because there is no way to police millions of small package shipments per day. In April, 2023, at CBP's Trade Facilitation and Cargo Security Summit, the former port director at JFK Airport who oversaw approximately one-third of de minimis entries into the United States, Sal Ingrassia, gave candid warnings to the audience. As reported by *International Trade Today*:

> Ingrassia said ports identified de minimis shipments to examine, and reported to the de minimis working group what they learned. "One quarter of what we looked at had some type of violation," he said. "It was alarming to see we had so many violations." He said a large number of the violations were either an HTS misclassification "or unmanifested merchandise in the shipment, meaning that we had an e-commerce package or shipment with three items in it. Only one item was declared. That's a real problem for us when we're talking about entry Type 86."
>
> Also, for another 25% of the packages, CBP asked the company to hold the package so CBP could inspect it, and when CBP got there, the package had already been released.[10]

The failure of these pilots should act as ample encouragement for Congress to repeal the 1995 Rule.

Partner Government Agencies Cannot Fulfill Responsibilities on De Minimis Shipments

The FDA abandones responsibilities. In the litigation leading up to the 1995 Rule, customs brokers warned that Partner Government Agencies like the Food and Drug Administration (FDA) would not be able to do their job vis-à-vis products under their jurisdiction.[11]

Sure enough, the policy changes in the 1995 Rule caused FDA to abandon its pre-import notification requirements for food in air-tight containers, cosmetics, and more if the foreign vendor merely manifested the shipment as under $800, as valued in their country.[12] This remains the case today. Testimony submitted by the Personal Care Products Council in 2021 cited data stating that the cosmetics industry loses more money to counterfeit products than any other industry, with losses topping $5.4 billion, and that these sales "very likely do not meet FDA's

[10] Mara Lee, "Type 86 Test Revealing Compliance Weaknesses in Small Packages", INTERNATIONAL TRADE TODAY, April 17, 2023, *available at* https://internationaltradetoday.com/article/2023/04/17/type-86-test-revealing-compliance-weaknesses-in-small-packages-2304170052
[11] *National Customs Brokers & Forwarders Ass'n of America, Inc. v. United States*, 861 F.Supp. 121, 125 (1994)
[12] CSMS #94-001260, FDA Low Value Shipments

safety, efficacy, and labeling requirements."[13] The FDA's CFSAN Adverse Event Reporting System logged 12,000 reported cases of adverse effects to counterfeit cosmetics between January 2018 and March 2020.[14]

The Consumer Products Safety Commission (CPSC) Says It And Other Agencies Can't Do Their Job. In its e-Commerce Assessment Report, CPSC wrote:

- that for de minimis shipments, "due to a lack of data, the level of risk associated with these shipments is largely unknown."
- "Many agencies anticipate challenges in processing additional data from CBP's Entry Type 86 pilot program."
- CPSC "anticipates that it will benefit little from [Entry Type 86] and will continue to experience the data and targeting challenges described above."[15]

CPSC stated that its "current staffing model is focused on optimizing resources in the traditional import environment, with a concentration on larger commercial shipments; and the model was not designed to address de minimis shipments. Because importers are not required to submit a traditional Entry filing for de minimis eCommerce, [CPSC] currently has limited data available to identify and risk-assess these parcels. Furthermore, growing numbers of these shipments are entering the United States through express courier and international mail facilities (IMFs), where CPSC does not have staff."[16]

Common sense should illustrate the problem. When an American retailer, whether brick & mortar or online, places an order from overseas for a bulk order of a child's toy, it is feasible for CPSC to sample one of those toys in a lab per its statutory requirements. When a consumer orders an individual child's toy directly from an overseas retailer shipped to their house, there is no prospect of inspection.

A GAO Report from October, 2022, found that CPSC has been unable to address "specific requirements to (1) examine a sample of de minimis shipments and (2) develop performance metrics for its efforts to reduce noncompliant de minimis shipments."[17]

Neither CPSC, the FDA, nor any other agency should be criticized for the Sisyphean task of policing de minimis shipments. This is a problem Congress must resolve.

<u>Conclusion on Consignee Entry and Manifest Release</u>

[13] https://www.personalcarecouncil.org/testimony/testimony-of-meredith-simpson-before-house-judiciary-subcommittee-on-courts-intellectual-property-and-the-internet-virtual-hearing-on-the-shop-safe-act/
[14] https://beautybusinessjournal.com/how-are-beauty-brands-defending-against-counterfeit-cosmetics/
[15] https://www.cpsc.gov/s3fs-public/CPSC-e-Commerce-Assessment-Report.pdf
[16] *Id.*
[17] https://www.gao.gov/assets/gao-23-105445.pdf

While the 1995 Rule is old, the reason its use grew dramatically in recent years was not merely because of the increase from $200 to $800 in 2016. Rather, the imposition of additional Section 301 tariffs on merchandise from China acted as a major financial incentive to restructure consumer goods shipments away from more efficient bulk containerized shipments to less efficient individually packaged shipments manifested as below the de minimis threshold.

Nothing in the Mod Act foreshadowed the policy changes in the 1995 Rule. Congress should undo the 1995 Rule. Ensure that consignees can only make entry with a licensed customs broker for de minimis shipments. And require proper entry summaries.

Repealing the 1995 Rule will enhance homeland and global security, while also providing commercial benefits by drastically reducing counterfeits and other contraband, and streamlining logistics at ports by taking away the incentives from breaking up more efficient bulk shipments into thousands of small consumer shipments.

2. Duties on De Minimis Shipments

The rationale for de minimis remains plainly stated at the beginning of Section 321 of the Tariff Act of 1930, which is "to avoid expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected."

This continues to make sense for the first two categories of de minimis: Sec. 321(a)(2)(A), "bona fide gifts", and Sec. 321(a)(2)(B), "articles accompanying persons arriving in the United States".

But plainly – excruciatingly so – the 1995 Rule turned Sec. (a)(2)(C) from an unnoticed Administrative Exemption into an extraordinary and new "expense and inconvenience to the Government".

As shown above, CBP staff, through successive Administrations, as well as other agencies, have stated clearly that the lack of data of de minimis shipments is a major problem allowing bad actors to act with impunity. And so far in the 118th Congress, Senate Finance Committee members have introduced two bills reforming de minimis, both of which would mandate HTSUS numbers for de minimis shipments.

However, once HTSUS numbers are being electronically submitted to CBP along with merchandise country of origin information, any expense or inconvenience in calculating duties disappears. It becomes an automated function, and there remains no excuse for not assessing duties.

Refusing to collect duties on shipments where the overseas vendor merely declares the value of their shipment as less than $800 *in their country* is without any justification. It penalizes

American businesses, whether retailers, or wholesaler-distributors, who pay income tax in addition to duties, in favor of foreign vendors outside our jurisdiction.

Consider SHEIN vs. The Gap. SHEIN had $15.7B in revenue (2021) vs. The Gap's $16.67B (2022), making them direct competitors. The Gap pays the average fourteen percent Column 1 tariff on apparel, and then in addition paid an effective U.S. income tax rate of 20.74% in 2022. SHEIN and other overseas platforms that rely on de minimis pay nothing. Clothing retailer American Eagle has pointed out the blatant unfairness of de minimis.

U.S. Free Trade Zone (FTZ) warehouse operators have complained about the unfairness of de minimis. Indeed, they are losing business to bonded warehouses in Canada and Mexico which are able to originate de minimis shipments while U.S. FTZ warehouses cannot. American businesses at every state of the supply chain suffer under U.S. de minimis policy. But the solution of letting FTZ warehouses originate duty free de minimis shipments is as clear a step in the proverbial 'race to the bottom' that has ever been suggested.

If U.S. FTZ operators are able to originate de minimis shipments, then U.S. bonded warehouses will want the same treatment. Every Amazon fulfillment center will also want this privilege, otherwise they, too, will face discrimination. Policy folly all the way down.

Repeating the e-commerce sales tax mistake. E-Commerce was propelled in part due to an artificial advantage vis-à-vis brick and mortar retailers: due to U.S. Supreme Court precedent, they did not have to collect state and county sales tax in jurisdictions where they did not have a physical presence. This was patently unfair, but at least the excuse of a Supreme Court decision was an offer. With de minimis, we have the exact same tax unfairness, but no judicial excuse. Furthermore, with de minimis it's arguably worse, as de minimis is even leading to the offshoring of our e-commerce platforms and warehouses, in addition to our traditional retailers! Only in America could a policy of outsourcing warehouses and e-commerce sales take hold.

For the reasons above, Congress should repeal duty-free entry under Section 321(a)(2)(C)

3. Customs Valuation

Congress should reinstate prior statutory provisions relating to customs valuation. When the United States signed on to the General Agreement on Tariffs and Trade in 1947, our tariffs were increasingly converted from specific tariffs (e.g., $ per kg) to *ad valorem* tariffs, a percentage of the import transaction price.

A key pillar of support for this policy was the Bretton Woods monetary system, where foreign currencies were fixed to the U.S. dollar, making exchange rates more stable. Since the collapse

of that system, our ad valorem tariffs have been unfairly compromised by the undervaluation of foreign currencies.

In the past, customs law had provisions enabling customs officers to use alternative valuation methods when neither the foreign value nor the export value could be satisfactorily ascertained. 19 U.S.C. §1402 enabled the use of "United States Value" or an American Selling Price to be used instead. These provisions should be returned.

Similarly, the requirement for "Certified Invoices" as existed under 19 U.S.C. §1482, should be resumed, at least for non-FTA countries. This required that invoices be certified by the U.S. consular district in which the merchandise was manufactured or purchased. This would be an extraordinary tool in combating pervasive customs under-valuation, at no cost to the U.S. government, as the certification cost is borne by the importer.

4. Shipping Manifest Transparency

On May 25, 2023, the U.S. House Ways & Means Trade Subcommittee held a hearing on Modernizing Customs Policies to Protect American Workers and Secure Supply Chains. Michael Kanko, C.E.O. of ImportGenuis, testified to the importance of expanding shipping manifest transparency.

Currently, the United States only discloses manifest details for ocean vessels, while Mexico discloses manifest data for all imports, regardless of the mode of transport. This data is invaluable for the commercial sector in supporting trade enforcement. The United States should match Mexico in shipping manifest transparency.

Sincerely,

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