



**Written Testimony for the Hearing Record by
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Before The U.S. House Homeland Security Committee

Hearing On:

**Exploitation and Enforcement: Evaluating the Department of Homeland Security's Efforts
to Counter Uyghur Forced Labor**

October 19, 2023

Introduction

The rise of Shein and Temu have laid bare the limitations of U.S. Department of Homeland Security (“DHS”) forced labor enforcement actions to date.

On January 13, 2021, U.S. Customs and Border Protection (“CBP”) issued a Withhold Release Order (“WRO”)¹ against all cotton products produced in China’s Xinjiang Uyghur Autonomous Region.² This WRO included apparel and all other cotton-downstream products “produced outside the Xinjiang region that incorporate these inputs.”³ Acting DHS Secretary Ken Cuccinelli said “DHS will not tolerate forced labor of any kind in U.S. supply chains.” And on December 8, 2021, 427 members of the United States House of Representatives passed a resolution condemning the ongoing genocide and crimes against humanity being committed against Uyghurs and members of other religious and ethnic minority groups by the People’s Republic of China.⁴ Finally, on June 21, 2022, the Uyghur Forced Labor Prevention Act (UFLPA) went into effect.

Nonetheless, during this same time period, fast-fashion giant Shein’s market valuation rose over tenfold to \$66 billion as of May 2023.⁵ In the first half of 2022, Shein “eclipsed Amazon in the

¹ WROs are the legal instrument CBP uses to stop the importation of goods made in-whole or in-part with forced labor, which were prohibited by Section 307 of the Smoot Hawley Tariff Act of 1930 (19 U.S.C. §1307).

² CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang (Jan. 13, 2021), *available at* <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave>

³ *Id.*

⁴ H.Res.317 - Condemning the ongoing genocide and crimes against humanity being committed against Uyghurs and members of other religious and ethnic minority groups by the People’s Republic of China. 117th Congress (2021-2022)

⁵ Vanessa Romo, “Shein invited influencers on an all-expenses-paid trip”, NPR, June 30, 2023, *available at* <https://www.npr.org/2023/06/30/1184974003/shein-influencers-china-factory-trip-backlash>

U.S.—with 22.4 million Shein downloads versus 22 million for Amazon”.⁶ Earlier this year, Temu, a new ecommerce platform linked to one of China’s top retailers, aired repeat ads during the Super Bowl and became “the most downloaded app in the United States, surpassing Amazon and Walmart.”⁷ Temu’s valuation is now estimated at \$100 billion.⁸

Shein and Temu’s tremendous success comes in spite of widespread acknowledgement of their flouting of CBP’s WRO and the UFLPA.⁹

Simply put, the credibility of the United States is on the line.

Forced Labor Enforcement Actions against Merchandise from China Need to be Country-Wide, Not Entity Specific.

In 2015, Congress repealed the “consumptive demand” clause of the long-standing ban on forced labor imports. This clause provided an exception to the ban if comparable U.S. products were unavailable or domestic production failed to meet demand.¹⁰ Repealing this clause was good, as it removed the only material statutory barrier to enforcing the prohibition of forced labor imports.

In 2018, CBP issued two WROs. The first, on March 5, 2018, was against products from a specific Chinese corporate entity: Huizhou Mink Industrial Co. Ltd.¹¹ However CBP’s second WRO, issued on May 5, 2018, applied to “All Turkmenistan Cotton or products produced in whole or in part with Turkmenistan cotton.”¹² As Shawn MacDonald, head of Verite, a non-

⁶ Emily Dreibelbis, “Shein Unseats Amazon as Most Downloaded US Shopping App”, PC Mag, July 19, 2022, *available at* <https://www.pcmag.com/news/shein-unseats-amazon-as-most-downloaded-us-shopping-app>

⁷ Michelle Toh, “New online superstore surpasses Amazon and Walmart to become most downloaded app in US”, CNN, February 19, 2023, *available at* <https://www.cnn.com/2023/02/16/tech/temu-shopping-app-us-popularity-intl-hnk/index.html>

⁸ Chelsey Cox, “Retailers Shein and Temu violate U.S. tariff law and evade human rights reviews on imports, House report says”, CNBC, June 22, 2023, *available at* <https://www.cnbc.com/2023/06/22/shein-temu-evade-us-tariff-and-human-rights-law-on-imports-house-report.html>

⁹ *See, e.g.*, U.S.-China Economic and Security Review Commission, Issue Brief: Shein, Temu, and Chinese e-Commerce: Data Risks, Sourcing Violations, and Trade Loopholes. April 14, 2023 (“Shein cotton apparel sourcing practices appear to be in direct violation of the Uyghur Forced Labor Prevention Act.”), *available at* https://www.uscc.gov/sites/default/files/2023-04/Issue_Brief-Shein_Temu_and_Chinese_E-Commerce.pdf. *See also* U.S. House Select Committee on the Chinese Communist Party, Fast Fashion and the Uyghur Genocide: Interim Findings. June 22, 2023, *available at* <https://selectcommitteeontheccp.house.gov/media/reports/fast-fashion-and-uyghur-genocide-interim-findings> (“Key Finding 2: Temu’s business model, which relies on the de minimis provision, is to avoid bearing responsibility for compliance with the UFLPA and other prohibitions on forced labor while relying on tens of thousands of Chinese suppliers to ship goods direct to U.S. consumers.”)

¹⁰ *See* CBP, “Repeal of the Consumptive Demand Clause”, CBP Publication 2130-0316, *available at* <https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/Fact%20Sheet%20-%20Repeal%20of%20the%20Consumptive%20Demand%20Clause.pdf>

¹¹ CBP Withhold Release Orders and Findings, *available at* <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings>

¹² *Id.*

profit focused on labor and human rights abuses, told *Reuters* at the time, “This signals an important change in how CBP is approaching their authority.”¹³

The difference between these two WROs is night and day. The first WRO merely punishes a specific corporate entity, while the second WRO properly holds the sovereign – in this case, Turkmenistan – accountable for forced labor operations within its territory.

And from an execution perspective for CBP, the two WROs are also worlds apart. Concealing the involvement of a specific corporate actor early in the supply chain is trivial, but concealing the entire country of origin of a product or input is an order of magnitude more difficult.

In DHS’ lead up to the implementation of the UFLPA, the Coalition for a Prosperous America (CPA) stressed these points. In our March 10, 2022 comment to DHS’ Forced Labor Enforcement Task Force (FLETf),¹⁴ CPA pointed to statements from Chinese authorities that China would not allow the policing of its supply chains, rendering entity-specific investigations futile. When a foreign government actively obstructs forced labor investigations, CPA believes that at a minimum, WROs should apply against the entire relevant product class from that country, not just specific corporate entities. CPA pointed to the Turkmenistan WRO as the appropriate model.

Unfortunately, CPA’s recommendations were rejected by DHS when they released their Report to Congress, “Strategy for the Uyghur Forced Labor Prevention Act.” Upon publication of the FLETf Report, CPA issued a press release stating:

“The Report acknowledges that the “PRC government engages in genocide and crimes against humanity” more than once, but everything that follows in the strategy report **ensures that the PRC government is undisturbed and that importers can continue to source from China with confidence, regardless of actions by the regime there.**”¹⁵ (Emphasis added)

CPA was right. DHS’ forced labor approach was guaranteed to fail, and it has.

If CBP had issued the same WRO for Chinese forced-labor cotton that it had for Turkmenistan – i.e., country-wide instead of confined to a specific region or set of corporate entities – then Shein and likely Temu would not exist in the United States today, or at best would be trivial actors. For

¹³ Sebastian Malo, “U.S. bans imports of slave-picked cotton from Turkmenistan”, *Reuters*, May 24, 2018, available at <https://www.reuters.com/article/us-usa-trafficking-turkmenistan-idUSKCN1IP3UB>

¹⁴ CPA Public Comment Letter Regarding Implementation Of The Uyghur Forced Labor Prevention Act, March 14, 2022, available at <https://prosperousamerica.org/cpa-public-comment-letter-regarding-implementation-of-the-uyghur-forced-labor-prevention-act/>

¹⁵ CPA Statement On Implementation Of Uyghur Forced Labor Prevention Act, June 24, 2022, available at <https://prosperousamerica.org/cpa-statement-on-implementation-of-uyghur-forced-labor-prevention-act/>

CBP, denying entry of cotton apparel products shipped from China can be nearly-automatic. But forcing CBP to link the shipment's merchandise to a specific corporate entity or direct shipment from a specific region within China doomed enforcement from the start. This point will be expanded upon below.

Finally, it should be noted that the UFLPA's rebuttable presumption is entirely consistent with country-wide WROs. Indeed, CBP has already done so using the underlying forced labor authority in Section 307 of the Tariff Act of 1930. On November 1, 2019, CBP issued a WRO for "Tobacco produced in Malawi and products containing tobacco produced in Malawi", but subsequently excluded three corporate entities who demonstrated that their Malawi tobacco products were not made in part with forced labor.

There is nothing stopping DHS from taking the same approach for China as it has for Turkmenistan and Malawi. DHS should do so, issuing country-wide WROs for the relevant product class where there is a forced labor finding.

DHS Enforcement Strategies Are Meaningless Thanks To De Minimis

Regular Imports versus De Minimis: It is imperative to understand the distinction in customs law between formal and informal entry on the one hand (aka, 'normal imports' – anything import not arriving with de minimis treatment), and de minimis entry on the other (aka, lawless imports). De minimis imports are lawless because they allow vendors completely beyond our jurisdiction to ship directly to American households.

Strategies that have merit for formal and informal entry are inevitably completely undermined by de minimis. Country-wide WROs will be extremely effective for regular imports, but more easily avoided if entered via de minimis.

Background: Where did de minimis come from?

In Fiscal Year 2022, U.S. Customs and Border Protection (CBP) processed more than \$3.35 trillion worth of imported goods, an astonishing increase of 19.5% over the prior year. However, \$3.35 trillion is an undercounting of imports. Unfortunately, not even CBP knows the total value. That's due entirely to de minimis. De minimis is one of the three types of "consumption entry", a term CBP uses for imported merchandise for use in United States commerce. The other two types of consumption entry are "formal entry" (required for merchandise \$2,500 and over) and

“informal entry” (available for most merchandise valued at less than \$2,500). Our \$3.35 trillion tally includes formal and informal entry, but not merchandise imported via de minimis.¹⁶

This is because de minimis is an ungovernable break in our customs controls, where over two million shipments per day enter the United States with little to no scrutiny. Most arrive without digital data, offering only a word or two written on the package to give a hint as to what’s inside. It would take an army of investigators to even attempt to inspect these shipments.

CBP is flagging the problem in their own muted manner, warning in March 2023: “The overwhelming volume of small packages and lack of actionable data impacts 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.”¹⁷

We know that the majority of de minimis shipments are shipped directly from China and Hong Kong, but after that, it gets murky. The next largest origin country is Canada, but due to the lack of data on de minimis shipments, we do not know the merchandise country of origin for most of those shipments from Canada.

Examining the development of the de minimis fiasco offers a foundation for understanding other negative customs policies that frustrate Congressional expectations in issues such as product safety, narcotics laws, and forced labor laws.

Why Congress created ‘de minimis’

When goods are brought into the country, the law says the customs officers must record merchandise’s value, catalog its importation by way of an ‘Entry’ form and ‘Entry Summary’, and collect any applicable tariffs and taxes. If customs law did not make an exception to this requirement for trivial items, however, customs officers would be forced to do the assessment 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. Nobody wants that.

This is why, 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.”

¹⁶ Josh Zumbrun, “The Tiny Loophole That Understates the Trade Deficit With China”, WSJ, June 17, 2022, available at <https://www.wsj.com/articles/the-tiny-loophole-that-understates-the-trade-deficit-with-china-11655458201>

¹⁷ <https://www.cbp.gov/sites/default/files/assets/documents/2023-Mar/NGF%20E-Commerce%20Task%20Issue%20Paper%20March%202023.pdf>

Crucially, this is the reason merchandise imported via de minimis is admitted “free of duty and of any tax” – because no entry was assessed to begin with. The assumption was that any revenue gained would not be worth the officer’s time at performing the assessment. This clearly no longer holds true.

To this day, 19 U.S.C. §1321 is titled “Administrative exemptions”. This is yet another clear indicator that Congress never intended de minimis to be a channel for import commerce consisting of millions of packages per day. And it is why it is appropriately called a “loophole”, one that was enabled not by Congress but by regulatory rule-making, as will be discussed below.

The Three Different Types of De Minimis Entry

Congress created three separate types of de minimis entry covering two different scenarios, and a catch all. They are still enumerated in the law today:

1. 19 U.S.C. §1321(a)(2)(A): **“Bona fide gifts”** shipped from abroad;
2. 19 U.S.C. §1321(a)(2)(B): **“articles accompanying”** travelers for “household use”; and
3. 19 U.S.C. §1321(a)(2)(C): **“any other case”**.

Originally, in 1938, Congress assigned a \$5 threshold for bona fide gifts and personal effects travelers brought with them, and a \$1 de minimis for “any other case”. “Any other case”, (a)(2)(C), was never meant to be a channel of any meaningful volume of goods. Yet today, the “anything else” category is what is being used to waive through millions of shipments per day! Having been lightly touched since its 1938 inception, as of 1994, the de minimis thresholds stood at \$50 for bona fide gifts from abroad, \$25 for souvenirs brought back, and just \$5 for anything else.

1994: Birth of the De Minimis Loophole via Customs Rule-making

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 NAFTA: the Customs Modernization Act, or “Mod Act.” The Mod Act increased the bona fide gift threshold from \$50 to \$100; “accompanying articles” from \$25 to \$200 for; and a tremendous increase from \$5 to \$200 for de minimis. In the legislative record, however, Congress focused on the first two categories, but not the “in any other case” increase to \$200 alongside the “accompanying articles” increase.

Besides the raise from \$5 to \$200, the other transformative change happened not from the 1994 Mod Act, but when U.S. Customs service drafted their subsequent implementing regulations that allowed any “consignee” to import merchandise, without even the use of a customs broker. 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. It is telling that an organization so involved in the legislative process was stunned by the subsequent interim regulations.¹⁸

Customs brokers were alarmed because the norm around the world was that only owners, purchasers, or a customs broker hired by the owner or purchaser could do an importation. This is the norm because importers are expected to be knowledgeable about the merchandise they are importing. They are expected to be able to answer customs officers' questions. This norm is U.S. law, 19 U.S.C. §1484, except for de minimis. Allowing "consignees" to perform import entries meant that parcel carriers (e.g. mail carriers and express couriers) could perform imports despite having no knowledge of the merchandise beyond what is written on the declaration.

The NCBFAA filed an emergency lawsuit, claiming that the U.S. Customs Service was violating statute with these regulations. Multiple reasons were cited, but importantly from a policy perspective was the fact that the law (19 U.S.C. §1484) mandated that "only an owner, purchase, or licensed broker may make entry of merchandise."¹⁹ Doing away with this requirement for de minimis shipments would lead to a host of grave issues.

NCBFAA cautioned that "Customs is abrogating its responsibility to enforce certain laws and is providing opportunities for their violation."²⁰ 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."²¹

NCBFAA warned the court and the country as follows:

Specifically, plaintiff points out ... 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.²²

¹⁸ National Customs Brokers & Forwarders Ass'n of America, Inc. v. United States, 861 F.Supp. 121, 125 (1994)

¹⁹ *Id.*, 128.

²⁰ *Id.*

²¹ *Id.*, 126.

²² *Id.*, 129.

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. The above prediction is precisely what has transpired.

The Final Rule Docket Also Accurately Predicted the Many Calamities of De Minimis

Following the lawsuit, on April 14, 1995, the Customs Service published its Final Rule (60 FR 18983) in the Federal Register, and here too, the docket was filled with commentators who accurately predicted the myriad of problems.²³

FDA Abandons Oversight Role for Food, Cosmetics, and More

Just as the NCBFAA predicted, FDA concluded that it should simply abandon oversight for various imports it is supposed to monitor, including room-temperature food stored in air-tight containers and cosmetics.²⁴ The FDA's dereliction of duty continues to this day for millions of shipments from around the world, most of which originate from China.

2015: De Minimis Rises from \$200 to \$800 without debate

Express shippers and e-commerce platforms were able to accomplish a legislative coup in 2015, when 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. Unfortunately, as in 1994, this change from \$200 to \$800 did not face Congressional scrutiny, and was obscured by other customs issues. Congress cannot let this happen again as it takes up customs policy.

A note about de minimis monetary thresholds

Because de minimis is now associated with e-commerce, it is often erroneously assumed that the \$800 limit refers to a U.S. retail price. But because de minimis was never meant to be an avenue of commerce, the U.S. retail price is actually irrelevant in determining whether the \$800 threshold has been met. Instead, per 19 U.S.C. § 1321(a)(2), the \$800 is the "fair retail value in the country of shipment" – not of America.

"Consignee Entry" Combined with an \$800 De Minimis threshold transformed the nature of international trade and e-commerce in America.

Under the traditional trade paradigm, importers were typically wholesalers or large retailers, importing particular products by the container-load and then distributing those products domestically. Essentially, merchandise was almost always shipped in bulk. This made regulating

²³ 60 FR 18983, <https://www.federalregister.gov/documents/1994/06/13/94-14255/express-consignments-formal-and-informal-entries-of-merchandise-administrative-exemptions>

²⁴ FDA CSMS #94-001260, "FDA Low Value Shipments")

and policing import commerce fairly straight forward. **Conversely, with de minimis' consignee entry, that same shipping container may now have as many as 5,000 individual shipments, all small packages going to individual Americans.**

China's SHEIN and Temu are now the most downloaded e-commerce apps in the United States, and their operations are almost entirely outside the country. Mailbox sized shipments are sent directly from abroad, and imported via de minimis entry with little documentation. SHEIN is now larger than The Gap, and the United States misses out not only on revenue from duties, but also the over twenty-percent corporate income tax rate The Gap is subject to as they are displaced by SHEIN. This 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.²⁵ (Emphasis added)

²⁵ 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>

CBP's Trade Director on De minimis: "Zero incentive ... to learn the requirements": In April 2023, at CBP's Trade Facilitation and Cargo Security Summit, CBP's executive director of the trade policy and programs directorate, Brandon Lord, stated this truth about de minimis plainly: "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 foreign shipper, or foreign seller, to learn the requirements to enter the United States."²⁶

De Minimis is destroying lawful retailers and gutting U.S. communities

Zero incentive flows from zero liability due to zero U.S. presence.²⁷ Zero U.S. presence means zero U.S. income tax. Why should any retailer have a presence in the United States? Thanks to de minimis, all brands are incentivized to move off-shore to a tax haven, face zero liability for what they sell, and pay zero duties or income taxes. De minimis is authorized anarchy destroying our society. It harms every part of American society: producers, distributors, retailers.

De minimis guts municipal and county governments of jobs and income as their retailers, big and small, close. So far in 2023, "[a]t least twenty major retailers have said they will close U.S. stores in 2023, a combined total of 3,193 locations."²⁸ Even the National Retail Federation, which has a severe bias against any friction at the border for imported merchandise, agrees there's a problem. In July, NRF Vice President & Deputy General Counsel Ceara Flake wrote:

Criticism of the UFLPA frequently arises from the fact that de minimis shipments, which are often smaller scale direct-to-consumer shipments of goods purchased online, are not subject to import duty and may enter without the filing of a formal entry. **This trade rule gives an unfair advantage to foreign ecommerce companies, including those that might employ forced labor.**²⁹
(Emphasis added)

The U.S. House Select Committee on the CCP found that "Temu and Shein alone are likely responsible for more than 30 percent of all packages shipped to the United States daily under the

²⁶ 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>

²⁷ De minimis supporters will protest the assertion of zero liability, and it is correct that for countries with U.S. extradition agreements, there is technically a legal path to liability. To understand what that looks like, and why it should be dismissed as an assurance, consider how it took over five years for the United States to arrange extradition of a single, notorious high-profile e-commerce marijuana seed dealer selling into the United States from Canada. See Jeremy Hainsworth, "Canada's 'Prince of Pot' ordered extradited to US", NBC NEWS (May 10, 2010), available at <https://www.nbcnews.com/id/wbna37067430>

²⁸ Dominick Reuter, "Nearly 3,200 stores are closing across the US in 2023. Here's the full list." INSIDER. (Sept. 26, 2023), available at <https://www.businessinsider.com/stores-closing-in-2023-list>

²⁹ Ceara Flake, "NRF General Counsels Forum enabled peer-to-peer discussions on pressing retail topics", NRF.com, July 13, 2023, archived at https://web.archive.org/web/20230000000000*/https://nrf.com/blog/nrf-general-counsels-forum-enabled-peer-peer-discussions-pressing-retail-topics

de minimis provision, and likely nearly half of all de minimis shipments to the U.S. from China.”³⁰ Sometimes, Temu and Shein are spoken of as “exploiting” de minimis. But the fact is, the platforms are using de minimis entirely in the manner conceived of by its supporters.

U.S.-based e-commerce platforms may have been temporary beneficiaries of de minimis, as it allowed their platforms to retail merchandise consequence and duty-free in a manner unavailable to brick and mortar retailers. But Shein and Temu’s success has caused even NRF to belatedly acknowledge how de minimis undermines the rule of law.

Leading U.S. retailers may be tempted to believe that they can continue their transition from a mostly brick and mortar based business to an e-commerce based ‘platform’ while convincing Congress to exclude their foreign website competition, but this too is folly.

Close one, and another website or app will take its place. Last month, TikTok officially launched its U.S. e-commerce service with over 200,000 vendors enrolled, and sales available from within its app, which already has 150 million users in the United States.³¹ A review by *Bloomberg* found that almost all the vendors were from China and that counterfeits were rampant.³²

The sole U.S.-based winner from de minimis anarchy is express shippers, who have enjoyed record profits by displacing traditional importer-wholesalers. Simply put, their businesses will continue to be profitable even after de minimis is repealed, as will U.S.-based ecommerce platforms, and the short-term marginal extra profits of de minimis supporters is not worth sacrificing our morals and society.

De Minimis entries provide no useful data

For all entries *other than de minimis*, the importer of record must be U.S.-based or hire a licensed U.S. customs broker (who must be a U.S. citizen). The importer must file an “Entry Summary” on CBP Form 7501 for the shipment. The Entry Summary provides the critical information CBP needs to enforce the over 500 laws for which it has enforcement responsibilities.

Because Entry Summaries are not provided for de minimis shipments, CBP has no visibility into the parties to the transaction and very little useful data. A shipping manifest is all that is needed, and the shipping manifest merely declares from where a shipment (*not* the merchandise inside

³⁰ U.S. House Select Committee on the Chinese Communist Party, Fast Fashion and the Uyghur Genocide: Interim Findings. June 22, 2023, available at <https://selectcommitteeontheccp.house.gov/media/reports/fast-fashion-and-uyghur-genocide-interim-findings>

³¹ Sapna Maheshwari, TikTok Popularizes Products. Can It Sell Them, Too? NY Times. Sept. 12, 2023, available at <https://www.nytimes.com/2023/09/12/business/tiktok-shop-e-commerce.html>

³² Alex Barinka, TikTok’s New Amazon Copycat Is Full of Cheap Chinese Goods, BLOOMBERG, Sept. 7, 2023, available at <https://www.bloomberg.com/news/articles/2023-09-07/tiktok-shop-full-of-cheap-goods-is-live-for-some-us-app-users>

the shipment) originated and where it is being delivered, and a short, plain-language description of the merchandise (e.g., “bag”).

CBP stated in June 2023 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.
- In FY 2022, CBP cleared over **685 million de minimis shipments with insufficient data to properly determine risk.**³³

CBP’s “Enhanced Data” Pilots are Failures

For four years now, CBP has offered two voluntary ‘enhanced data’ pilot projects for de minimis shipments. One, known as the Section 321 data pilot, gave ‘fast lane’ de minimis privileges to the big three express shippers (FedEx, UPS, DHL), three big U.S. e-commerce platforms (Amazon, eBay, and Zulily), and three large logistics providers. While CBP recently began soliciting additional participants, the ongoing extension of this pilot is inherently anti-competitive. The other data pilot, which is indefinite, is known as “Type 86 Entry”. Type 86 Entry is entirely voluntary, but it does allow shippers – including foreign vendors – to provide the data elements that would normally be required on an Entry Summary, including country of origin.

Predictably, the data is junk. As reported by *International Trade Today* this April:

Almost half of de minimis shipments last year were covered either by the Type 86 entry test or the Section 321 data pilot program, CBP said, but that doesn’t mean that the government has a good grasp on what merchandise is entering in small packages.

Sal Ingrassia, whose time as port director at the JFK Airport had him overseeing about one-third of the de minimis entries to the U.S., told an audience at CBP’s Trade Facilitation and Cargo Security Summit April 17 that while the agency is glad brokers are providing Harmonized Tariff Schedule [HTS] codes in the Type 86 test, “we still have a lot of concerns,” because they’re finding the data is often not correct.

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

³³ CBP Commercial Customs Operations Advisory Committee, Government Issue Paper, E-Commerce Task Force. June 2023. Available at <https://www.cbp.gov/sites/default/files/assets/documents/2023-Jun/NGFE-C~1.PDF>

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. Ingrassia said that may not have always been deliberate, since Type 86 shipments are released immediately unless CBP puts a hold on any, and some of the releases may have happened before the company knew there was a request to present the package. But a non-presentation rate of 25% is problematic for the agency.

Ingrassia asked rhetorically: “How can we run a system like entry Type 86 without having correct information?”³⁴

De minimis has bred such routine lawlessness at our ports that even fentanyl shippers are opting to voluntarily enroll in Type 86 de minimis entry:

[CBP Trade Director] Lord said that members of his team, along with CBP broker management officials, recently visited nearly a dozen different brokers who had filed more than one Type 86 entry for a package that CBP discovered contained fentanyl.

“Our attitude is: Type 86 still requires reasonable care,” he said. He told brokers they will be seeing more times when CBP tells brokers that what they filed as a Type 86 will need to be a formal entry, “because we’re seeing fentanyl like I mentioned, or because we’re seeing other issues of noncompliance.”

De Minimis and Fentanyl

This Committee has received, and continues to receive, ample testimony on the devastation of the fentanyl epidemic. Last week, Majority Members of this Committee issued their Phase 3 Interim Report on the crisis at the southern border. Section 1 of this Report studied trends in seizures along the southern border, finding that the increase of surveillance technology at official land-border ports was driving smuggling areas between ports. The Report made this important observation:

³⁴ 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>

While it is true that most of the fentanyl seized by CBP is intercepted at official ports of entry, this is because those facilities are equipped for that very purpose. Naturally, seizures will be higher in locations designed to seize drugs.³⁵

The same is true for our commercial shipment ports. By far the most secure are our ocean vessel ports, where shipments arrive virtually entirely by way of ‘formal entry’. Formal entry shipments are the least likely to contain contraband or counterfeits. And for ocean vessels, CBP receives detailed shipping manifests far in advance of the cargo’s arrival. Indeed, ocean shipping vessel manifests are even made freely available online – something that is long overdue to be replicated via other modes of transport.

De minimis shipments arranged via e-commerce tend to arrive by express courier or mail or by logistics companies via air cargo or truck. A high volume of small packages with little-to-no advance manifest information. In CBP’s *Strategy to Combat Opioids*, the agency stated as follows:

The advent of e-commerce has added another layer of complexity to this problem. Illicit opioids can now be purchased online from the comfort of one’s home. Opioids entering the country through express consignment or international mail have a substantially higher purity level than the opioids entering along the Southwest Border.³⁶

The fact that fentanyl is even entering through CBP’s enhanced de minimis data pilots should serve as an alarm. Shut it all down. As stated earlier, de minimis offers zero societal benefit. Shutting down smuggling over the southern border, both through and between ports, is an imperative that we are making progress on through investments. Shutting down de minimis now, either by way of regulation from the Administration or by statute from Congress.

How to Repeal De Minimis

Much attention is paid to the increase of the de minimis threshold from \$200 to \$800 in 2016, but the truth is the vast majority of shipments declare a value far below \$200. Furthermore, the monetary limit is unthread to the U.S. transaction price, and instead is tied to the “fair value” *in the country of shipment*. This goes back to how de minimis was never intended to be an avenue

³⁵ House Committee on Homeland Security majority, [Interim Report on the third phase of the Committee’s comprehensive oversight investigation into the crisis at the Southwest border](https://homeland.house.gov/wp-content/uploads/2023/10/Phase-3-Report.pdf), pg. 16. October 10, 2023, available at <https://homeland.house.gov/wp-content/uploads/2023/10/Phase-3-Report.pdf>

³⁶ CBP, [Strategy to Combat Opioids](https://www.cbp.gov/sites/default/files/assets/documents/2021-May/CBP-Opioid-Strategy.pdf), May 2021, available at <https://www.cbp.gov/sites/default/files/assets/documents/2021-May/CBP-Opioid-Strategy.pdf>

of commerce. CPA discussed the details of how de minimis came to be, and how to repeal it, in a submission to the U.S. Senate Committee on Finance in July.³⁷ This submission also discusses de minimis' total undermining of consumer safety laws, from children's toys to cosmetics.

False Assertions from De Minimis Supporters, and even CBP's Office of Trade

Express shippers, primarily by way of certain trade associations, have invested heavily in distorting the truth about de minimis shipments. Their assertions routinely are baseless, provided without citation. In August, CBP published a "Falsehoods & Facts" webpage directly rebutting these assertions, with supporting citations. To the extent the Committee has questions about assertions they have heard in support of de minimis, we encourage the Committee to visit this webpage: <https://prosperousamerica.org/falsehoods-facts-the-truth-about-de-minimis/>.

Finally, it should be noted that in October, 2022, CBP's Office of Trade published a slide presentation stating that the "Total Value" of de minimis shipments in the agency's fiscal year 2021 was \$39,876,651,152. This is incorrect, and the true number is unknowable. This figure represents only the value of de minimis shipments for which electronic information was provided, which is a minority of total shipments. While CBP confirmed this error to CPA in an email, the Office of Trade has declined our public calls to correct the document. This incorrect figure has become an important part of the advocacy from de minimis supporters, suggesting that the value of de minimis shipments is going down or negligible. This is addressed in more detail at the CPA Falsehoods & Facts webpage above.

³⁷ CPA Submission to the U.S. Senate Committee on Finance, July 11, 2023, *available at* <https://prosperousamerica.org/wp-content/uploads/2023/08/230711-CPA-ltr-Customs-Reform.pdf>