

“CLOTHING” THE DE MINIMIS LOOPHOLE: THE STORY OF AN EXCEPTION SWALLOWING THE RULE

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INTRODUCTION

Gulbahar Haitiwaji, an engineer and member of the Chinese Uyghur minority group, received a call from her employer asking her to visit a police station in Kunlun to complete paperwork for her retirement pension.¹ Upon her arrival, she quickly discovered the employer's purported request was a trap.² Chinese authorities showed Haitiwaji a photograph of her daughter participating in a Uyghur demonstration in France and accused Haitiwaji's daughter of being a "terrorist."³ Haitiwaji was detained, a bag was placed over her head, and her ankles were chained.⁴ For five months, Chinese police officers repeatedly interrogated her, subjecting her to a variety of punishments.⁵ In one instance, she was chained to her bed for twenty days.⁶

After her initial detention, Chinese authorities transferred Haitiwaji to a "school" on the outskirts of Karamay.⁷ The facility was surrounded by barbed wire and lacked any semblance of civilized life—there were no mattresses, toilet paper, sheets, sinks, or showers.⁸ Haitiwaji's captors provided "students" a bucket to use as a toilet and constantly surveilled them as cameras lined the walls.⁹ Haitiwaji wondered if her husband and daughters knew where she was or whether she was even alive.¹⁰ Haitiwaji and her fellow detainees were subjected to eleven hours per day of Chinese language instruction, forced to shave their heads, interrogated, physically abused, and even forcibly sterilized.¹¹ "I owe it to those who languish there still to speak to you now," Haitiwaji explained to the House Select

1. Voice of America, *A Uyghur's Story: What It's Like Inside a Xinjiang 'Reeducation' Facility*, YOUTUBE (Sept. 7, 2022), <https://www.youtube.com/watch?v=ozA5UE0n600>.

2. *The Chinese Communist Party's Ongoing Uyghur Genocide: Hearing Before the H. Select Comm. on Strategic Competition Between the United States and the Chinese Communist Party*, 118th Cong. (2023) (written statement of Gulbahar Haitiwaji, camp survivor and author) [hereinafter Haitiwaji Written Testimony].

3. *Id.*

4. *The Chinese Communist Party's Ongoing Uyghur Genocide: Hearing Before the H. Select Comm. on Strategic Competition Between the United States and the Chinese Communist Party*, 118th Cong. 8 (2023) (oral statement of Gulbahar Haitiwaji, camp survivor and author).

5. Haitiwaji Written Testimony, *supra* note 2, at 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 2.

Committee on the Chinese Communist Party.¹²

Since 2014, China has arbitrarily detained more than one million Uyghurs and other Muslim minorities in the Xinjiang region.¹³ Despite first denying the existence of such camps, Chinese government officials have now acknowledged their existence but insist they are “vocational education and training centers” used to educate members of the minority group in Mandarin and Chinese laws, as well as to “nip terrorist activities in the bud.”¹⁴ A report from the United Nations High Commissioner on Human Rights found descriptions of detentions in so-called “Vocational Education and Training Centers” frequently “marked by patterns of torture or other forms of cruel, inhuman[,] or degrading treatment or punishment.”¹⁵

These “re-education” efforts frequently include forced labor.¹⁶ The U.S. Department of Labor (DOL) estimates that “100,000 Uyghurs and other ethnic minority ex-detainees in China may be working in conditions of forced labor following detention in re-education camps.”¹⁷ “[U]nder the guise of ‘poverty alleviation,’” Uyghurs are forced to work for little or no pay, are not allowed to leave, and are required to “learn Mandarin and undergo ideological indoctrination.”¹⁸ A report from the Australian Strategic Policy Institute states that between 2017 and 2019, 80,000 detained Uyghurs were sent to factories and the goods they made exported around the world.¹⁹

Forced labor conditions are not confined to the Xinjiang region.²⁰ The

12. *Id.*

13. See *Against Their Will: The Situation in Xinjiang*, BUREAU OF INT’L LAB. AFFS., DEP’T OF LAB. [hereinafter *Against Their Will*], <https://www.dol.gov/agencies/ilab/against-their-will-the-situation-in-xinjiang> (last visited May 10, 2024).

14. See THE STATE COUNCIL INFO. OFF. OF PEOPLE’S REPUBLIC OF CHINA, THE FIGHT AGAINST TERRORISM AND EXTREMISM AND HUMAN RIGHTS PROTECTION IN XINJIANG (2019), http://english.scio.gov.cn/m/2019-03/19/content_74585093.htm.

15. United Nations Off. of the High Comm’r for Hum. Rts., Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People’s Republic of China 21, 25 (Aug. 31, 2022), <https://www.ohchr.org/en/documents/country-reports/ohchr-assessment-human-rights-concerns-xinjiang-uyghur-autonomous-region>.

16. See STAFF OF CONG.-EXEC. COMM’N ON CHINA, 116TH CONG., REP. ON GLOBAL SUPPLY CHAINS, FORCED LABOR, AND THE XINJIANG UYGHUR AUTONOMOUS REGION 4–6 (Comm. Print 2020).

17. *Against Their Will*, supra note 13.

18. *Id.*

19. See VICKY XIUZHONG XU, DANIELLE CAVE, DR. JAMES LEIBOLD, KELSEY MUNRO & NATHAN RUSER, AUSTRALIAN STRATEGIC POL’Y INST., UYGHURS FOR SALE 3 (2020), https://ad-aspi.s3.ap-southeast-2.amazonaws.com/2022-10/Uyghurs_for_sale-11OCT2022.pdf?VersionId=N2JQOako7S4OTiSb6L7kKE5nY2d_LD25.

20. See *id.*

Chinese government's official data on labor transfers show that an estimated 28,000 and 32,000 people were transferred to other parts of China in 2018 and 2019 respectively, exceeding the goals of Xinjiang authorities.²¹ This exercise is lucrative for the organizers who are compensated roughly \$43 for each worker they transfer outside of Xinjiang.²² Advertisements for Uyghur workers have appeared online with one claiming the ability to supply 1,000 Uyghur workers aged sixteen to eighteen, reading, "[t]he advantages of Xinjiang workers are: semi-military style management, can withstand hardship, no loss of personnel . . . Minimum order of 100 workers!"²³

The use of Uyghur labor has been linked to several known global brands including Apple, BMW, Nike, and Volkswagen.²⁴ The DOL's Bureau of International Labor Affairs' (ILAB's) 2022 List of Goods Produced by Child Labor or Forced Labor lists "artificial flowers, Christmas decorations, coal, fish, footwear, garments, gloves, hair products, polysilicon, nails, thread/yarn, and tomato products" as goods from countries that ILAB "has reason to believe are produced by child labor or forced labor."²⁵

The U.S. government has responded by enacting the Uyghur Forced Labor Prevention Act (UFLPA).²⁶ The legislation strengthens existing prohibitions on importing goods made in whole, or in part, with forced labor under § 307 of the Tariff Act of 1930 (Tariff Act).²⁷ The UFLPA has substantially affected the behavior of U.S. firms, which are increasingly shifting their supply chains away from Xinjiang and China more generally.²⁸

21. *See id.* at 14.

22. *See id.* at 15.

23. *Id.* at 16.

24. *See id.* at 18, 27.

25. *List of Goods Produced by Child Labor or Forced Labor*, BUREAU OF INT'L LAB. AFFS., DEP'T OF LAB., <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods> (last visited May 10, 2024). This list is statutorily required to be promulgated pursuant to the Trafficking Victims Protection Reauthorization Act. *See* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 105(a)(1), (2)(C), 119 Stat. 3,558, 3,566-67 (2006).

26. *See* Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1,525, 1,525-32 (2021).

27. *See* § 1(1), 135 Stat. at 1,525 ("It is the policy of the United States . . . to strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the effective enforcement of section 307 of the Tariff Act of 1930."); *see also* 19 U.S.C. § 1307 ("All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited . . .").

28. *See* Elisabeth Braw, *Companies Are Fleeing China for Friendlier Shores*, FOREIGN POL'Y

However, goods made with Uyghur forced labor are still making their way into the U.S. market.²⁹ The continued importation of goods produced by people subjected to inhumane conditions is, in large part, aided by inadequate U.S. Customs and Border Protection (CBP) enforcement of trade laws for those imports as a result of another section of the Tariff Act—Section 321.³⁰

This Comment explores Section 321 of the Tariff Act—often referred to as the “*de minimis* threshold”—which exempts products from paying tariff duties and from being subject to formal entry procedures necessary to prevent the importation of illegal or dangerous products.³¹ Currently, the manner in which CBP enforces the law inadvertently exacerbates forced labor abuses in foreign countries; it also allows for the importation of counterfeit products that could pose public safety risks,³² impairs the United States’ efforts to re-shore or near-shore manufacturing,³³ and is exploited as a convenient channel to import narcotics like fentanyl and other dangerous substances.³⁴

However, the *de minimis* threshold does provide American industry, CBP, and consumers several important benefits. For example, the law is crucial

(Aug. 20, 2022, 10:07 AM), <https://foreignpolicy.com/2022/08/02/companies-fleeing-china-friendshoring-supply-chains/>.

29. See Sheridan Prasso, *Shein’s Cotton Tied to Chinese Region Accused of Forced Labor*, BLOOMBERG (Nov. 20, 2022, 7:00 PM), <https://www.bloomberg.com/news/features/2022-11-21/shein-s-cotton-clothes-tied-to-xinjiang-china-region-accused-of-forced-labor?embedded-checkout=true> (finding garments shipped to the United States by Shein, a popular Chinese e-commerce site, were made with cotton from China’s Xinjiang region).

30. See *id.*; 19 U.S.C. § 1321(a)(2) (providing an exemption from import duty and tax for goods not exceeding a fair retail value of \$800).

31. See CHARLES BENOIT, COAL FOR PROSPEROUS AM., SECTION 321 OF THE TARIFF ACT OF 1930 3 (2021), <https://prosperousamerica.org/wp-content/uploads/2021/11/CPA-Memo-Evolution-of-Sec-321-De-Minimis-in-Customs-Law.pdf> (explaining that Section 321 of the Tarriff Act created three separate categories of import with specific dollar thresholds which would be exempted from duties and formal customs procedures).

32. See Kenneth Rapoza, *De Minimis’ Customs Rule an End Around Uyghur Forced Labor Law, Witnesses Tell China Commission*, COAL FOR A PROSPEROUS AM. (Apr. 19, 2023), <https://prosperousamerica.org/deminimis-hearing-congressional-executive-china-commission/>.

33. See *America’s Tariff Wall on Chinese Imports Looks Increasingly Like Swiss Cheese*, ECONOMIST (Feb. 26, 2022), <https://www.economist.com/finance-and-economics/americas-tariff-wall-on-chinese-imports-looks-increasingly-like-swiss-cheese/21807816>; see also Letter from Coal. for a Prosperous Am. et. al., to Joseph R. Biden, President of the United States (Nov. 29, 2023) [hereinafter Letter from Coal. for a Prosperous Am.], <https://prosperousamerica.org/wp-content/uploads/2023/11/231129-De-Minimis-Narcotics-Coalition-Letter-FINAL.pdf> (“Along with the rise of e-commerce and mass distribution shippers, this provision has exploded in popularity creating a supercharged black-market for counterfeit products, goods produced with slave labor, hazardous materials, and illicit drugs.”).

34. See Letter from Coal. for a Prosperous Am., *supra* note 33.

for small businesses and other U.S.-based companies that require product returns from abroad to be economically competitive.³⁵ A consortium of business groups—spearheaded by express shippers like United Parcel Service (UPS), FedEx, and Amazon—intensively lobby against any modifications.³⁶ The consortium contends the *de minimis* threshold is a “vital . . . tax exemption” that “reduces inflationary pressure and supply chain delays” and “allows CBP to concentrate limited resources where they make the most impact.”³⁷ Businesses also contend that eliminating the exemption altogether would be prohibitively expensive, raising costs to businesses and consumers alike.³⁸

The law must strike a balance to ensure the efficient facilitation of trade while preventing dangerous and unethically produced products that promote forced labor, distort trade, and harm American consumers from entering the United States in violation of existing laws.

Part I explains the *de minimis* process and how CBP’s enforcement efforts fall short, allowing goods made in whole or in part with forced labor to enter the country.³⁹ Part II offers a brief history of Section 321, starting with the legislation’s enactment.⁴⁰ Currently, Section 321 exempts goods valued under \$800 from standard tariff duties and allows CBP to apply less formal entry procedures to such goods.⁴¹ Part II explores the original congressional intent behind the exemption and how those initial objectives have been co-opted by special interests in the express shipment industry to greatly expand the threshold, thereby harming both U.S. consumer and national interests. Part III details the arguments on both sides of the *de minimis* debate, separating fact from fiction and summarizing the legislative solutions introduced in both chambers of Congress.⁴² Finally, Part IV recommends the Secretary of the Treasury issue a Notice of Proposed Rulemaking (NPRM), which would ensure effective enforcement of our trade laws under Section 321 by segmenting out the apparel sector, prohibiting the use of the

35. The Trade Guys, *De Minimis, Rules of Origin, and Breaking the Internet*, CTR. FOR STRATEGIC & INT’L STUDIES, at 7:05 (Jan. 20, 2022), <https://www.csis.org/podcasts/trade-guys/de-minimis-rules-origin-and-breaking-internet>.

36. See *De Minimis: A Vital Tax Exemption*, NAT’L FOREIGN TRADE COUNCIL, <https://www.nftc.org/de-minimis-a-vital-tax-exemption/> (last visited May 10, 2024). Representatives from Amazon, DHL, FedEx, and United Parcel Service (UPS) sit on the Board of Directors of the National Foreign Trade Council. *Board of Directors*, NAT’L FOREIGN TRADE COUNCIL, <https://www.nftc.org/about/board-of-directors/> (last visited May 10, 2024).

37. See *De Minimis: A Vital Tax Exemption*, *supra* note 36 (emphasis omitted).

38. See *id.*

39. See *infra* Part I.

40. See *infra* Part II.

41. See 19 U.S.C. § 1321(a)(2)(C).

42. See *infra* Part III.

exception absent the use of a contract carrier, and imposing additional and substantial penalties for repeat violators.⁴³

I. THE *DE MINIMIS* PROCESS

A. Current Process

De minimis is Latin for “so small or unimportant as to warrant little or no attention,”⁴⁴ yet the threshold is the subject of heated debate.⁴⁵ In Congress, members of all political affiliations have pointed out potential problems with the heightened *de minimis* threshold. Congressman Jason Smith (R-MO), Chairman of the U.S. House Ways and Means Committee, critiqued the *de minimis* threshold’s current construction, calling it a “free trade agreement for China.”⁴⁶ Similarly, Congressman Earl Blumenauer (D-OR) agreed, “this loophole is swallowing the exception in ways that are detrimental to American business and the safety of American consumers,” because CBP exercises a lesser degree of scrutiny for *de minimis* shipments compared to formal imports.⁴⁷ The private sector has also expressed concern—Kimberly Glas, CEO of the National Council of Textile Organizations (NCTO), called *de minimis* “a classic example of the government’s left hand not working in concert with the right.”⁴⁸

Over two million small parcels enter the United States every day.⁴⁹ With roughly 90% of all shipments imported into the United States falling below the \$800 threshold, *de minimis* shipments accounted for roughly 85% of total

43. See *infra* Part IV.

44. *De Minimis*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/thesaurus/de%20minimis> (last visited May 10, 2024).

45. See *Modernizing Customs Policies to Protect American Workers and Secure Supply Chains: Hearing Before the H. Subcomm. on Trade of the H. Ways & Means Comm.*, 118th Cong. 18–20 (2023) (statement of Michal Stumo, Chief Executive Officer, Coalition for a Prosperous America).

46. See *Field Hearing on Trade in America: Securing Supply Chains and Protecting the American Worker—Staten Island: Hearing Before the H. Subcomm. on Trade of the H. Ways & Means Comm.*, 118th Cong. 69 (2023) (statement of Jason Smith, Chairman, House Committee on Ways and Means) (“It appears that that loophole is almost a \$800 free trade agreement for China for any products underneath that.”).

47. See *id.* at 69 (statement of Earl Blumenauer, Ranking Member, House Committee on Ways and Means).

48. Kimberly Glas, *Forced Labor and the De Minimis Loophole: Two Sides of the Same Coin*, SOURCING J. (June 16, 2023, 4:45 PM), <https://sourcingjournal.com/topics/thought-leadership/forced-labor-de-minimis-congress-uflpa-marco-rubio-xinjiang-440546/>.

49. See Todd Owen, *Proposed Changes to De Minimis Law Threaten Supply Chains*, OLD NAT’L BANK (Oct. 3, 2023), <https://www.oldnational.com/resources/insights/proposed-changes-to-de-minimis-law-threaten-supply-chains/>.

import transactions in 2022.⁵⁰ *De minimis* shipments have increased by a staggering 410% in just seven years.⁵¹ In fiscal year (FY) 2020, over \$67 billion in packages were admitted under Section 321, exempting those imported products from applicable import duties and formal CBP scrutiny.⁵² Since 2020, as the pandemic-induced surge in e-commerce abated, the value of *de minimis* imports decreased to a little over \$46 billion in imports in FY 2022.⁵³ China is the foremost user of the provision, accounting for over \$9 billion in imports in FY 2022.⁵⁴

Many products are imported under the *de minimis* threshold using the “release from manifest” process.⁵⁵ Typically the express shipper or carrier provides the bill of lading (or a manifest listing each bill of lading), which is the sole documentation required.⁵⁶ Thus, CBP determines whether the goods can be released based solely on very limited and inadequate information.⁵⁷ Importantly, “the transmitted data often does not adequately

50. See U.S. CUSTOMS & BORDER PROT., THE E-COMMERCE AND DE MINIMIS FRAMEWORK IN THE U.S. 2 (2023), <https://www.wcoomd.org/-/media/wco/public/global/pdf/events/2023/symposium-on-e-commerce-feb-2023/session-3-usa-the-e-commerce-and-de-minimis-framework-in-the-us.pdf?la=zh-CN>.

51. See *De Minimis 101*, DEP’T OF HOMELAND SEC. OFF. OF TRADE (Apr. 5, 2023), <https://www.dhs.gov/medialibrary/assets/video/43009>.

52. See U.S. CUSTOMS & BORDER PROT., CBP-FO-2023-109920-000001 (Aug. 11, 2023) (on file with author) [hereinafter FOIA Request].

53. See *id.*

54. See *id.* (showing Chinese exports account for over 20% of all *de minimis* shipments).

55. See *Entry Type 86 Frequently Asked Questions*, U.S. CUSTOMS & BORDER PROT., <https://web.archive.org/web/20240331145049/https://www.cbp.gov/trade/trade-enforcement/tfea/section-321-programs/entry-type-86-frequently-asked-questions> (Mar. 31, 2024) (stating that the Entry Type 86 is a voluntary process and “[t]he release from manifest process will continue to be an option for filing entry on *de minimis* shipments”).

56. See *De Minimis 101*, *supra* note 51. A bill of lading “is a commercially available document issued by a carrier to a shipper, signed by the captain, agent, or owner of a vessel, furnishing written evidence regarding receipt of the goods, the conditions on which transportation is made . . . and the engagement to deliver goods at the prescribed port of destination to the lawful holder of the Bill of Lading.” *Bill of Lading Document*, U.S. CUST. & BORDER PROT. (June 20, 2023), https://help.cbp.gov/s/article/Article-758?language=en_US. A manifest “is a collection of documents, including forms, such as the cargo declaration and annotated bills of lading, that lists and describes the cargo contents of a carrier, container, or warehouse.” *What is a Manifest Hold?*, U.S. CUST. & BORDER PROT. (June 20, 2023), https://help.cbp.gov/s/article/Article-1122?language=en_US.

57. See *Test Concerning Entry of Section 321 Low-Valued Shipments Through Automated Commercial Environment (ACE)*, 84 Fed. Reg. 40,079 (Aug. 13, 2019) (indicating that U.S. Customs and Border Protection (CBP) makes a determination based exclusively on the country of origin, shipper name, address and country, ultimate consignee name and address, description of the merchandise, quantity, shipping weight, and value).

identify the entity causing the shipment to cross the border [such as the seller or manufacturer], the final recipient, or the contents of the package.”⁵⁸

CBP has the authority to seize any shipment that violates customs regulations or other related laws⁵⁹ by issuing a Withhold Release Order.⁶⁰ In the forced labor context, when investigating a specific entity, CBP must show a reasonable likelihood of forced labor, which can require tracing goods from a specific production facility all the way to a U.S. port of entry.⁶¹ Under the “release from manifest” process, this information is simply unavailable, making consistent, effective enforcement almost impossible.⁶²

In addition, the release from the manifest process does not provide CBP with the specific Harmonized Tariff Schedule of the United States (HTSUS) classification that CBP has tied to Partner Government Agency (PGA) requirements—these are import laws enforced by other government agencies, such as the Food and Drug Administration (FDA), Centers for Disease Control and Prevention, Consumer Product Safety Commission (CPSC), and Drug Enforcement Administration.⁶³ Without the HTSUS code, it is extremely difficult for CBP to ensure every imported small package that enters the country complies with federal health, public safety, and intellectual property laws.⁶⁴

Those products subject to PGA requirements are ineligible to be cleared under the “release from manifest” process.⁶⁵ In the past, imports entered the

58. U.S. CUSTOMS & BORDER PROT., DHS/CBP/PIA-059, PRIVACY IMPACT ASSESSMENT FOR THE E-COMMERCE “SECTION 321” DATA PILOT 3 (2019), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-section321-059-september2019.pdf>.

59. See 19 U.S.C. § 1499(c)(4) (permitting border protection agencies to seize and compel forfeiture of detained merchandise).

60. See Jennifer Diaz & Denise Calle, *U.S. Customs Targets Use of Forced Labor*, BLOOMBERG L. (Jan. 2021), <https://www.bloomberglaw.com/external/document/X5G8VM9S000000/commercial-professional-perspective-u-s-customs-targets-use-of-f> (stating that a Withhold Release Order “directs CBP officers at all ports of entry to withhold release of goods originating from a listed company or country”).

61. Findings of Commissioner of CBP, 19 C.F.R. § 12.42 (2023) (outlining the requirements for the issuance of a Withhold Release Order).

62. See Test Concerning Entry of Section 321 Low-Valued Shipments Through Automated Commercial Environment (ACE), 84 Fed. Reg. at 40,080 (listing the information provided under the “release from manifest” process, which is inadequate for CBP to show a good is made in whole, or in part, using forced labor by “a reasonable likelihood”).

63. See *De Minimis 101*, *supra* note 51 (explaining how the lack of identifying Harmonized Tariff Schedule of the United States classifications can impair CBP enforcement efforts).

64. See *id.*

65. See Test Concerning Entry of Section 321 Low-Valued Shipments Through

United States under the appropriate informal or formal entry process, and importers were required to file a Type 11 or Type 01 entry.⁶⁶ These imports require additional data, which is transmitted to the partner government agencies to ensure compliance with health and safety laws.⁶⁷ In 2019, however, CBP created the Entry Type 86 Test to “provide a less complex entry and release process for Section 321 low-valued shipments” and “expedite the clearance of compliant Section 321 low-valued shipments.”⁶⁸ Roughly 43% of *de minimis* imports use the Entry Type 86 Test, a wholly voluntary method for importation.⁶⁹ The test requires information like the ten-digit HTSUS code, the bill of lading or the air waybill number, entry number, planned port of entry, shipper name, address, country, consignee name and address, country of origin, quantity, fair retail value in the country of shipment, and Importer of Record number of the owner, purchaser, or broker when designated by the consignee.⁷⁰ More data may be required depending on whether the shipment is subject to PGA data reporting requirements.⁷¹ The problem? CBP has reported “a lot of misclassification, . . . seeing values at zero or a dollar” and mis-manifesting.⁷² “We encountered silencers and [Intellectual Property Rights (IPR) violations], pharmaceuticals, [and] a lot of agriculture violations,” CBP’s Program Manager for the Cargo Conveyance and Security Division in the Office of Field Operations, James Moore, said.⁷³ “[I]t is very concerning for us, and we really want to make sure that we are highlighting that there are some expectations with Entry Type 86,” Moore said.⁷⁴

In an attempt to address some of those informational gaps, CBP established the Section 321 Data Pilot.⁷⁵ The *voluntary* program—consisting of participants like Amazon, eBay, and Zulily; carriers like FedEx, UPS, and DHL; and logistics providers like BoxC Logistics, XB Fulfillment, and

Automated Commercial Environment (ACE), 84 Fed. Reg. at 40,080.

66. See *De Minimis 101*, *supra* note 51.

67. *Id.*

68. See Test Concerning Entry of Section 321 Low-Valued Shipments Through Automated Commercial Environment (ACE), 84 Fed. Reg. at 40,080.

69. *De Minimis 101*, *supra* note 51.

70. See Test Concerning Entry of Section 321 Low-Valued Shipments Through Automated Commercial Environment (ACE), 84 Fed. Reg. at 40,082.

71. See *De Minimis 101*, *supra* note 51.

72. *Id.*; Kathleen Franklin, *Moving Targets*, U.S. CUSTOMS & BORDER PROT. (Jan. 4, 2022), <https://www.cbp.gov/frontline/cbp-agriculture-specialists> (indicating that the practice of mis-manifesting makes it difficult to target violations because “[m]eat might be mis-manifested as ‘tee-shirts’” or “a shipment of ‘vases’ could turn out to be eels”).

73. *De Minimis 101*, *supra* note 51.

74. *Id.*

75. See *id.*

PreClear—collects extensive information including, seller identification, shipment initiator information, shipper information, an enhanced product description, the link to product listing, product picture, merchandise or product quality and weight, the listed price on marketplace, HTSUS number, security scan images, consignee information, final deliver to information, and buyer information.⁷⁶ In FY 2022, there were 161 million Section 321 Data Pilot transmissions.⁷⁷

The more information CBP has the better;⁷⁸ additional data provides a better understanding of the risk profile an individual import poses and allows the agency to prioritize areas for enforcement.⁷⁹

B. *The Apparel Sector’s Use of De Minimis*

The apparel sector is uniquely subject to labor abuses.⁸⁰ Some say “[v]irtually the entire apparel and footwear industry is tainted by forced Uyghur and Turkic Muslim [labor]” due in part to the region’s stranglehold on global cotton output, which accounts for more than 20% of the global market share.⁸¹ China is “the world’s central hub for making clothing.”⁸² From picking the cotton—a notoriously labor-intensive process—to producing the yarn and manufacturing the finished apparel, Uyghur labor is closely intertwined with all steps of production.⁸³

A report from the Select Committee on the Chinese Communist Party found that two Chinese companies with business models reliant on the *de minimis* threshold—Shein and Temu—account for approximately 600,000 packages shipped to the United States every day utilizing the *de minimis* threshold.⁸⁴ Annually, that number equates to 210 million packages sent to the United States without paying duties or being appropriately scrutinized

76. See FOIA Request, *supra* note 52, at 1; Section 321 Data Pilot, 84 Fed. Reg. 35,405 (July 23, 2019).

77. See *De Minimis 101*, *supra* note 51.

78. See *id.*

79. See *id.*

80. See *Apparel and Textile Industry*, END UYGHUR FORCED LAB., <https://enduyghurforcedlabour.org/fashion/> (last visited May 10, 2024).

81. See *id.*

82. Peter Goodman, Vivian Wang & Elizabeth Paton, *Global Brands Find It Hard to Untangle Themselves from Xinjiang Cotton*, N.Y. TIMES (July 2, 2021), <https://www.nytimes.com/2021/04/06/business/xinjiang-china-cotton-brands.html>.

83. See Adrian Zenz, *Coercive Labor in the Cotton Harvest in the Xinjiang Uyghur Autonomous Region and Uzbekistan*, COMMUNIST & POST-COMMUNIST STUD., June 2023, at 1, 18–19.

84. See STAFF OF H. SELECT COMM. ON THE CHINESE COMMUNIST PARTY, 118TH CONG., REP. ON FAST FASHION AND THE UYGHUR GENOCIDE: INTERIM FINDINGS 5–6 (Comm. Print 2023).

for forced labor abuses, IPR violations, public safety risks, or for the importation of other contraband.⁸⁵ In FY 2023, more than 1 billion packages worth more than \$50 billion were shipped to the United States utilizing the *de minimis* threshold.⁸⁶ Therefore, Shein and Temu—two companies—account for over 30% of all *de minimis* shipments into the United States.⁸⁷

The apparel industry is also normally subject to “the stiffest tariffs.”⁸⁸ In 2018, “[t]he average tariffs on the dutiable portions were 18.7% for knitted or crocheted clothing, and 15.8% for non-knitted or crocheted items—the two highest average rates out of [ninety-eight] broad import categories.”⁸⁹ In addition, the recent explosion in *de minimis* volume is attributable, at least in part, to the development of business strategies built around the threshold.⁹⁰ Such systems allow companies like Shein to undercut U.S.-based brick-and-mortar retail locations and reduce CBP scrutiny.⁹¹ The apparel industry is the best example of a sector that represents high costs in terms of lost duties, heightened risk for improper imports, and a profound drain on CBP resources. These disproportionate disadvantages stand in direct contrast to the threshold’s stated purpose because the agency must sift through a deluge of small packages, impairing CBP’s ability to prioritize high risk imports and, therefore, do its job.

II. HISTORY OF SECTION 321 OF THE TARIFF ACT OF 1930

A. *The Passage of De Minimis*

One of CBP’s stated mission priorities is to “[e]nable fair, competitive and compliant trade and enforce U.S. laws to ensure safety, prosperity[,] and

85. *See id.* at 6.

86. Press Release, U.S. Customs & Border Prot., *De Minimis* Shipment Worth Over \$11 Million Stopped by Louisville CBP (Mar. 11, 2024), <https://www.cbp.gov/newsroom/local-media-release/de-minimis-shipment-worth-over-11-million-stopped-louisville-cbp>.

87. *See* STAFF OF H. SELECT COMM. ON THE CHINESE COMMUNIST PARTY, 118TH CONG., REP. ON FAST FASHION AND THE UYGHUR GENOCIDE: INTERIM FINDINGS 4 (Comm. Print 2023).

88. Drew Desilver, *U.S. Tariffs Vary A Lot, but the Highest Duties Tend to Be on Imported Clothing*, PEW RSCH. CTR. (Mar. 28, 2018), <https://www.pewresearch.org/short-reads/2018/03/28/u-s-tariffs-vary-a-lot-but-the-highest-duties-tend-to-be-on-imported-clothing/>.

89. *Id.*

90. *See* Ana Swanson & Claire Fu, *Congress Spotlights ‘Serious’ Forced Labor Concerns with Chinese Shopping Sites*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2023/06/22/business/economy/shein-temu-forced-labor-china.html> (“Temu and Shein are building empires around the *de minimis* loophole in our import rules: dodging import taxes and evading scrutiny on the millions of goods they sell to Americans.”).

91. *See id.*

economic security for the American people.”⁹² CBP frequently balances the speedy and efficient facilitation of trade with effective screening.⁹³ Embodying this idea, coupled with the understanding that CBP resources are better allocated to high-risk areas rather than assessing every low-value product imported into the country, Congress enacted Section 321.⁹⁴

In 1938, with the passage of the Customs Administrative Act, Congress established the *de minimis* threshold as we know it.⁹⁵ The law created three separate categories of imports with specific dollar thresholds that would be exempted from duties and formal customs procedures.⁹⁶ There was a \$5 threshold for “bona fide gifts” mailed from abroad, a \$5 exemption for “articles accompanying” travelers for “household use,” and—most crucially for this Comment—a \$1 threshold for “any other case.”⁹⁷

The Customs Administrative Act “authorize[d] existing practices under which collectors of customs disregard differences of less than \$1 between the total duties or taxes deposited or tentatively assessed and the amount of duties actually accruing.”⁹⁸ It also gave the “collectors” a great deal of authority “to admit articles free when the expense and inconvenience of collecting duty would be disproportionate to the amount of such duty.”⁹⁹

B. Congressional Hesitation to Increase the Threshold

In 1952, there were growing calls to increase the threshold.¹⁰⁰ When Congress debated the Customs Simplification Act, one proposal suggested increasing the threshold for all three categories to \$10.¹⁰¹ One comment from the National Retail Dry Goods Association, now known as the National Retail Federation, highlights the double standard the increased threshold would create that currently threatens the continued survival of

92. *About CBP*, U.S. CUSTOMS & BORDER PROT. (Jan. 23, 2024), <https://www.cbp.gov/about>.

93. *See id.*

94. *See* U.S. CUSTOMS & BORDER PROT., CBP PUBL'N NO. 0941-0919, SECTION 321 PROGRAMS (2019), https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Section-321-Data-Pilot-vs-Entry-Type-86-Test_v1-1.pdf.

95. *See* Customs Administrative Act of 1938, Pub. L. No. 75-721, 52 Stat. 1077 (codified as amended at 19 U.S.C. § 1321).

96. *See* BENOIT, *supra* note 31, at 3. The “any other case” category is the category at issue in this Comment.

97. *Id.*

98. H.R. REP. NO. 75-1429, at 3 (1937).

99. *Id.*

100. *See* BENOIT, *supra* note 31, at 3.

101. *See id.*

certain domestic industries:

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, or other taxes. He does not pay any duties. He does not maintain a selling force. His only expense would be the advertisement.¹⁰²

The National Retail Federation was not alone in its staunch opposition.¹⁰³ Stakeholders expressed their pointed concerns with how the increased threshold would benefit those countries with lower paid labor, leading to the outflow of jobs and domestic manufacturing capabilities. Mr. John G. Lerch—an attorney who appeared on behalf of several industries and as counsel to the Rubber Manufacturers Association, Inc.—stated, “if this provision is enacted into law with the reduced labor cost of foreign countries, it can be anticipated that great inroads will be made [by foreign competitors] in certain [U.S.] industries.”¹⁰⁴ Mr. Lerch stated, “I am told that a skilled laborer [in Great Britain] gets about—the ratio is about [one] to [four]; in other words, [four] hours for [one] here.”¹⁰⁵ The labor rates in Japan? “[Y]ou might say 1 to 25.”¹⁰⁶

Stakeholders were also worried about the effect it would have on domestic industry.¹⁰⁷ Senator Edward Martin (R-PA) pointed out the impact the change would have on small businesses in “some little towns.”¹⁰⁸ Mr. Lerch said, “in Pennsylvania we have 17,000 small industries, and that is really the backbone of our economy.”¹⁰⁹

Crucially, concerns mounted relating to the effect mail-order businesses could have on domestic industry.¹¹⁰ The President and Counsel for the American Watch Association submitted written testimony, arguing that “what we have stated concerning the direct purchase of watches by consumers from

102. *Customs Simplification Act: Hearing on H.R. 5505 Before the S. Comm. on Fin.*, 82d Cong. 110–11 (1952).

103. *See id.* at 162.

104. *Id.* at 149–50, 162.

105. *Id.* at 163.

106. *Id.*

107. *See id.*

108. *Id.*

109. *Id.* Mr. Lerch continued, “those importations destroy certain ones of those [and] affects the economy quite considerably I am for the freedom of trade all over the world in order to aid in peace, that is fine; but, on the other hand . . . we have got to keep our people employed.” *Id.*

110. *See id.* at 162.

foreign suppliers applies with equal force to thousands of other items which could be imported [under the exception].”¹¹¹ They continued, “[t]he business of all of the regular domestic manufacturers and producers, importers, wholesalers, and retail dealers [handling] such items, and hundreds of others, unquestionably would be adversely affected”¹¹² This worry was also reflected by the House Ways and Means Committee, which stated in a report on the proposed increased threshold: “It is the desire of the committee that the Secretary of the Treasury shall exercise his authority . . . [to ensure] the section will not be subjected to abuses by mail-order businesses”¹¹³ While the bill did prohibit the use of *de minimis* for cash on delivery (COD) transactions, Harry Radcliffe, the Executive Vice President of the National Council of American Importers, said that did not go far enough as “there might be mail-order business, not necessarily on the basis of [COD]” and argued that the “section needs clarification because we do not believe that a loophole like that should go without being plugged up.”¹¹⁴ Unfortunately, the loophole was left unplugged, and Mr. Radcliffe’s worry was never addressed, leading to the current situation where foreign direct-to-consumer businesses maintain an advantage over those companies with American footprints.

Ultimately, in the 1953 amendment, Congress sided with domestic industry, increasing the thresholds for bona fide gifts and “articles accompanying, and for the personal or household use” of individuals arriving in the United States to \$10, while leaving the threshold for the “any other case” category at \$1.¹¹⁵

C. *The Eventual Heightening of the Threshold*

The \$1 *de minimis* threshold was left in place until 1978 when it was increased to \$5 to “take account of inflation and increased costs in collection.”¹¹⁶ The House report stated, “[s]ince the express purpose of [S]ection 321 is to reduce administrative costs which are disproportionate to the revenue produced and to improve administrative efficiency, dollar limitations should be raised to accomplish this purpose in today’s economy.”¹¹⁷

The threshold was increased again in 1994 with the passage of the Customs Modernization Act—expanding the *de minimis* level for “any other

111. *Id.* at 56.

112. *Id.*

113. H.R. REP. NO. 82-1089, at 13 (1951).

114. *Customs Simplification Act: Hearing on H.R. 5505 Before the S. Comm. on Fin.*, 82d Cong. 196 (1952).

115. *See id.*; Customs Simplification Act of 1953, Pub. L. No. 83-243, § 13, 67 Stat. 507, 515–16.

116. S. REP. NO. 95-778, at 28–29 (1978).

117. H.R. REP. NO. 95-621, at 3–4 (1977).

case” to \$200.¹¹⁸ The increase was again necessitated by “inflation” as “the current amounts are not sufficiently high to permit the Secretary to meet the statutory goal of limiting expense to the Government disproportionate to the revenue that is collected.”¹¹⁹

Potentially more important, the law’s implementing regulations allowed express shippers acting as consignees “to make entry of low-value exempt merchandise.”¹²⁰ These regulations did away with the longstanding requirement that importers engage a customs broker.¹²¹ The implementing regulations—which the National Customs Brokers and Forwarders Association of America (NCBFAA) argued were arbitrary and capricious, allegedly conflicting with the statute—were upheld, in large part, due to the Treasury Secretary’s broad authority to issue rules under the statute.¹²² In addition, the NCBFAA argued that CBP “abrogated its responsibility to enforce laws relevant to the entry of merchandise into this country” when it promulgated regulations pursuant to the *de minimis* threshold.¹²³ While the NCBFAA was ultimately unsuccessful, its worries foreshadowed the problems to come, claiming “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 [It] will hinder the [FDA’s] enforcement capabilities as well.”¹²⁴

D. Increase to \$800

The aforementioned warnings were ignored, and Congress increased the threshold to \$800 in 2016 with the passage of the Trade Facilitation and Trade Enforcement Act (TFTEA).¹²⁵ The \$800 threshold is by far the highest of any U.S. trading partner: China (~\$6.50); Mexico (~\$50); and

118. See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 651, 107 Stat. 2,057, 2,170, 2,209 (1993) (“Customs Modernization”) (codified as amended at 19 U.S.C. § 1321(a)(1)(C)).

119. Express Consignments; Formal and Informal Entries of Merchandise; Administrative Exemptions, 60 Fed. Reg. 18,983, 18,984 (Apr. 14, 1995).

120. BENOIT, *supra* note 31, at 6 (quoting Nat’l Customs Brokers & Forwarders Ass’n v. United States, 18 Ct. Int’l Trade 754, 756 (1994)). A consignee is the person(s) “named in a bill to whom or to whose order the bill promises delivery.” *Consignee*, BLACK’S LAW DICTIONARY (10th ed. 2014).

121. See *Nat’l Customs Brokers & Forwarders Ass’n*, 18 Ct. Int’l Trade at 762.

122. See *id.* at 761–63.

123. See *id.* at 765.

124. *Id.* at 761.

125. See Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 901, 130 Stat. 122, 223 (2016) (codified at 19 U.S.C. § 1321(a)(1)(C)).

United Kingdom (~\$168).¹²⁶ The increase was largely pushed forward with extensive support from the express shipping community.¹²⁷ In a Senate Finance Hearing, Mary Ann Comstock, Brokerage Compliance Manager for UPS, called *de minimis* “the most important [issue for] UPS.”¹²⁸ Senator John Thune (R-SD) argued, “[w]hat 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.”¹²⁹ He said, “[t]his 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.”¹³⁰ Senator Thune seems to signal the end of traditional retailers, arguing, “[t]hese companies understand what millions of American entrepreneurs understand: The Internet truly is the shipping lane of the 21st century.”¹³¹

UPS pushed for wrenching the *de minimis* loophole open even further, advocating for it to be indexed to inflation—something that Senators Ron Wyden (D-OR) and Thune supported.¹³² UPS argued that “the increase offers significant benefits to CBP.”¹³³

Yet, in the House report, David Aguilar, the Deputy Commissioner of CBP at the time, rebutted that proposition, stating, “[f]rom an operational standpoint, [] raising the *de minimis* to \$1,000 or whatever it would be, does not really impact us operationally. [The] same amount of work basically will go into collecting either the \$200 or the \$1000. So, from an operational standpoint, it would stay neutral.”¹³⁴

The House report highlights additional benefits. It states, “[t]his legislation will not have a negative impact on security, as manifest information is required for all shipments, regardless of value. Manifest information for each shipment

126. See GEORGE SERLETIS, U.S. INT’L TRADE COMM’N, U.S. SECTION 321 IMPORTS SURGE WITH RISING E-COMMERCE SHIPMENTS FROM CHINA 1 (2023).

127. See generally *The Trade Facilitation and Trade Enforcement Act of 2013: Hearing on S. 662 Before the S. Comm. on Fin.*, 113th Cong. 6–8, 10–11, 14 (2013) (providing witness statements from three entities in the shipping community).

128. *Id.* at 10–11.

129. 162 CONG. REC. 1,805 (2016).

130. *Id.*

131. *Id.*

132. See *The Trade Facilitation and Trade Enforcement Act of 2013: Hearing on S. 662 Before the S. Comm. on Fin.*, 113th Cong. 30 (2013) (statement of Mary Ann Comstock, Brokerage Compliance Manager, UPS Supply Chain Solutions).

133. *Id.* at 11.

134. *Supporting Economic Growth and Job Creation Through Customs Trade Modernization, Facilitation, and Enforcement: Hearing Before the House Ways and Means Subcomm. on Trade*, 112th Cong. 69–70 (2012) (statement of David Aguilar).

is analyzed for security threats and subject to CBP risk assessment and targeting prior to arrival in the United States.”¹³⁵ The report continued, “because this change applies only to smaller and low-value shipments, there is no risk of a spike in commercial violations as a result of the change.”¹³⁶

The *de minimis* threshold, once only applicable to low-value goods, now inconceivably applies to a vast number of imports after being wrenched open by private interests.¹³⁷ Thankfully, the TFTEA provides authority for the Treasury Secretary to issue rules closing the loophole and returning the functionality of the *de minimis* threshold to its original purpose.

E. Treasury Secretary’s Authority to Issue Rules

Given the lack of information that CBP can use to understand risk and prioritize areas for enforcement, it is incumbent upon the Treasury Secretary to leverage her broad discretion under the law to issue new rules, fill gaps in the statute, obtain more information from importers, and crack down on goods that pose problems related to human rights, intellectual property, and consumer health and safety.¹³⁸

The TFTEA, passed in 2016, amended the *de minimis* threshold and raised it to \$800.¹³⁹ The last line of the codified legislation provides that “[t]he Secretary of the Treasury is authorized by regulations to prescribe exceptions to any exemption . . . whenever he finds that such action is consistent with the purpose . . . or is necessary for any reason to protect the revenue or to prevent unlawful importations.”¹⁴⁰ This language gives the Secretary broad authority to issue rules making changes to the legislation to deal with the unlawful imports that have been reported.

The explicit language of the statute follows similar language from Senate and House reports previously updating the threshold. In 1951, when Congress debated whether it should increase the *de minimis* threshold, it expressed its desire to give the Secretary the power to “reduce the allowable amounts and to prescribe exceptions when necessary to protect the revenue”

135. H.R. REP NO. 114-114, pt. 1, at 92 (2015).

136. *Id.* at 92–93.

137. See FOIA Request, *supra* note 52 (stating that over \$67 billion worth of imports entered the United States under the *de minimis* exception in Fiscal Year 2020).

138. See BENOFF, *supra* note 31, at 11–12; 19 U.S.C. § 1321(b) (authorizing the Secretary of the Treasury to promulgate regulations relating to the *de minimis* exemption).

139. See Press Release, U.S. Customs & Border Prot., *De Minimis Value Increases to \$800* (Mar. 11, 2016), <https://www.cbp.gov/newsroom/national-media-release/de-minimis-value-increases-800>; Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125 § 901, 130 Stat. 122, 223 (2016) (codified at 19 U.S.C. § 1321(a)(1)(C)).

140. 19 U.S.C. § 1321(b).

to avoid spreading CBP’s human resources too thin.¹⁴¹ The Committee on Ways and Means went on to deputize the Secretary of the Treasury with authority to ensure Section 321 would “not be subjected to abuses by mail-order businesses engaging in the direct shipment of dutiable articles to purchasers in the United States.”¹⁴²

In addition, congressional misunderstandings have become evident over time. First, in 2016, Congress mistakenly believed that the increased threshold “would . . . free [CBP] up to focus on high-risk shipments if these amounts were made to be consistent.”¹⁴³ The House Ways and Means Committee incorrectly assumed manifest information would be adequate.¹⁴⁴ Second, the representatives believed shipments using the *de minimis* threshold would be truly *de minimis*.¹⁴⁵ “Simplifying and streamlining the entry process for these low-value shipments will help to stimulate the economy, facilitate legitimate trade, and free CBP resources to focus enforcement efforts on high-risk trade.”¹⁴⁶ The years following the increase have borne a different reality.

CBP has begun formulating an NPRM that will “integrate results from the 321 Data Pilot and the Type 86 Test into a new Section 321 entry process.”¹⁴⁷ “The NPRM will implement new data requirements for *de minimis* shipments choosing to use the enhanced entry process, clarify eligibility requirements, and address trade liability.”¹⁴⁸ Unfortunately, these proposed regulations will focus solely on what a future, expedited Type 86 Test would look like.¹⁴⁹

The Department of Homeland Security (DHS) has also taken several steps to address problems borne from *de minimis*. First, CBP announced it will issue advisories of noncompliance to those “entry filers” providing limited identifiers.¹⁵⁰ The advisory aims to address “vague” cargo descriptions that

141. See H.R. REP. NO. 82-1089, at 12 (1951).

142. *Id.* at 13.

143. H.R. REP. NO. 114-114, pt. 1, at 92 (2015).

144. *Id.* (arguing “[t]his legislation will not have a negative impact on security, as manifest information is required for all shipments, regardless of value”).

145. See *id.* at 92–93 (assuming incorrectly that “because this change applies only to smaller and low-value shipments, there is no risk of a spike in commercial violations as a result of the change”).

146. *Id.* at 93.

147. *De Minimis 101*, *supra* note 51.

148. *Id.*

149. See *id.* (Christine Hogue, CBP’s E-Commerce and Small Business Branch Chief, explaining that the notice of proposed rulemaking (NPRM) will propose an updated, expedited Type 86 test, adding that *de minimis* shipments will still be released off the manifest).

150. See U.S. CUSTOMS & BORDER PROT., CSMS# 60011750, ANNOUNCEMENT OF VAGUE MERCHANDISE DESCRIPTION CARGO MESSAGES (2024).

simply state “gift” or “parts.”¹⁵¹ Second, DHS outlined a plan aimed at “combat[ing] illicit trade and level[ing] the playing field for the American textile industry.”¹⁵² The enforcement plan includes “[c]racking down on small package shipments . . . by improving screening of packages claiming the Section 321 *de minimis* exemption for textile, UFLPA, and other violations.”¹⁵³ According to DHS, the implementation of the plan has already begun; the Department launched fifteen Trade Special Operations “that focus on physical inspection of small shipments and cargo.”¹⁵⁴ While the plan—“a strong step forward”—received commendation from NCTO’s President and CEO, Kimberly Glas,¹⁵⁵ concerns related to enforcement remain, which necessitate regulatory action. To effectively enforce the nation’s trade laws, more information must be shared with CBP beyond a rudimentary obligation to provide more than a “vague” description of cargo. In addition, CBP must be deputized with the ability to impose material consequences to disincentive repeat offenders. CBP’s willingness to issue new regulations and its candid admission that the *de minimis* threshold is not working as intended present a unique opportunity to solve numerous challenges.¹⁵⁶

III. BENEFITS AND DISADVANTAGES OF SECTION 321

A. Benefits

The *de minimis* threshold creates a variety of important benefits for American consumers, domestic manufacturers, and foreign suppliers. First,

151. *Id.*

152. Press Release, U.S. Dep’t of Homeland Sec., New DHS Textile Enforcement Actions Crack Down on Illicit Trade to Support 500,000 American Textile Jobs (Apr. 5, 2024), <https://www.dhs.gov/news/2024/04/05/new-dhs-textile-enforcement-actions-crack-down-illicit-trade-support-500000>.

153. *Id.*

154. *Id.*

155. *NCTO Praises DHS Textile and Apparel Enforcement Plan as a Critical Step to Combatting Pervasive Customs Fraud & Predatory Trade Practices*, NAT’L COUNCIL OF TEXTILE ORGS. (Apr. 5, 2024), <http://www.ncto.org/ncto-praises-dhs-textile-and-apparel-enforcement-plan-as-a-critical-step-to-combatting-pervasive-customs-fraud-predatory-trade-practices/>.

156. *See* Press Release, U.S. Customs & Border Prot., Readout of Secretary of Homeland Security Alejandro N. Mayorkas’ Meeting with the National Council of Textile Organizations (Jan. 30, 2024), <https://www.dhs.gov/news/2024/01/30/readout-secretary-homeland-security-alejandro-n-mayorkas-meeting-national-council> (stating that the Department of Homeland Security (DHS) is undertaking an interagency review to, among other things, make “a determination whether current trade law provides adequate authorities to solve” potential *de minimis* exception exploitation).

access to imports increases Americans’ purchasing power.¹⁵⁷ Simply, the *de minimis* threshold eliminates import taxes for various consumer products, resulting in lower costs for American consumers.¹⁵⁸ A 1993 study conducted by the U.S. International Trade Commission (ITC) estimated that American consumers lost \$11.6 billion—the equivalent of \$23.1 billion in 2021—due to “significant” U.S. import barriers increasing product prices.¹⁵⁹ Twenty-one years later, in 2014, ITC found that reducing tariff barriers with measures like Section 321 and bilateral trade agreements saved American consumers \$13.5 billion—\$15.45 billion in 2021 dollars.¹⁶⁰

Reductions in trade barriers primarily benefit the poor and middle class as they spend a larger share of their respective incomes on tradeable goods.¹⁶¹ Since 1960, families making below the median income have had steady growth in consumption.¹⁶² In fact, according to a study conducted by Bruce Sacerdote, “[t]he number of cars per household with below median income has doubled since 1980[,] and the number of bedrooms per household has grown 10[0%] despite decreases in household size.”¹⁶³ In addition, a strong U.S. economy depends on international trade—“[e]very \$1 billion in exports of U.S. goods and services supports more than 5,000 U.S. jobs.”¹⁶⁴

Trade, bolstered by the reduction of trade barriers and the historic prioritization of reciprocity, continues to support roughly forty million American

157. *The Benefits of International Trade*, U.S. CHAMBER OF COM. (Jan. 15, 2021), <https://www.uschamber.com/international/trade-agreements/the-benefits-of-international-trade>.

158. *Id.*

159. Scott Lincicome & Alfredo Carrillo Obregon, *The (Updated) Case for Free Trade*, CATO INST. (Apr. 19, 2022), <https://www.cato.org/policy-analysis/updated-case-free-trade> (citing U.S. INT’L TRADE COMM’N, PUBL’N NO. 2699, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS 8–9, tbl. 2 (1993), https://www.usitc.gov/publications/332/pub_2699.pdf).

160. TAMAR KHACHATURIAN, DAVID RIKER, RAVINDER UBEE, ANDRE BARBE, ANDREA BORON, LAURA BLOODGOOD, ET AL., U.S. INT’L TRADE COMM., PUBL’N NO. 4614, ECONOMIC IMPACT OF TRADE AGREEMENTS IMPLEMENTED UNDER TRADE AUTHORITIES PROCEDURES 23 (2016), <https://www.usitc.gov/publications/332/pub4614.pdf>.

161. Daniel R. Carroll & Sewon Hur, *On the Heterogeneous Welfare Gains and Losses from Trade 1* (Fed. Rsrv. Bank of Cleveland, Working Paper No. 19-06R2, 2019), <https://doi.org/10.26509/frbc-wp-201906r2>.

162. Bruce Sacerdote, *Fifty Years of Growth in American Consumption, Income, and Wages 8* (Nat’l Bureau of Econ. Rsch., Working Paper No. 23292, 2017), <http://www.nber.org/papers/w23292>.

163. *Id.* at 1.

164. *Trade Promotion Authority*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/trade-topics/trade-promotion-authority> (last visited May 10, 2024).

jobs.¹⁶⁵ “In 2012, exports of U.S. goods and services supported an estimated 9.8 million American jobs, including 25[%] of all manufacturing jobs.”¹⁶⁶ Roughly 60% of all goods imported into the United States are intermediate goods or raw materials used to produce finished products.¹⁶⁷ These goods are necessary for domestic manufacturers and support American industry.

B. Disadvantages

The *de minimis* threshold is not without its well-documented issues. Elected officials of all political stripes, as well as domestic industry, have highlighted problems with the current threshold and are pushing for *de minimis* reform.¹⁶⁸

CBP claims *de minimis* shipments are screened like any other goods entering the United States.¹⁶⁹ Brandon Lord, CBP’s Executive Director of Trade Policy and Programs, stated, “[t]here [is] a misconception that we don’t target or screen *de minimis*—it’s not true.”¹⁷⁰ However, the risk-based approach CBP implements is stymied by the lack of adequate information, which impairs the agency’s ability to prioritize high risk shipments due to the sheer volume of small packages the *de minimis* threshold ushers into the United States.¹⁷¹ Simply, the importation of goods using the *de minimis*

165. See TRADE PARTNERSHIP WORLDWIDE LLC, THE IMPACT OF TRADE ON U.S. AND STATE-LEVEL EMPLOYMENT: 2020 UPDATE 2 (2020), https://tradepartnership.com/wp-content/uploads/2020/10/Trade_and_American_Jobs_2020.pdf.

166. Trade Promotion Authority, *supra* note 164.

167. *The Benefits of International Trade*, *supra* note 157.

168. See *infra* Part III.C.

169. See Ashley Bodden, *Customs Claims De Minimis Is Not a ‘Loophole’*, BARNES/RICHARDSON GLOB. TRADE L. (Apr. 28, 2023), <https://www.barnesrichardson.com/customs-claims-de-minimis-is-not-a-loophole>.

170. *CBP Explains De Minimis Not a Loophole*, GREEN WORLDWIDE LOGISTICS (Apr. 28, 2023), <https://www.greenworldwide.com/cbp-explains-de-minimis-not-a-loophole>.

171. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-692, INTELLECTUAL PROPERTY: CBP HAS TAKEN STEPS TO COMBAT COUNTERFEIT GOODS IN SMALL PACKAGES BUT COULD STREAMLINE ENFORCEMENT 21–22 (2020) (stating that European Union and U.S. customs officials reported that “the large volume of small packages presents a challenge given their agencies’ limited resources” and that the customs officials “often do not receive significant, actionable data about the contents of small packages in the express carrier or international mail environments”); *De Minimis 101*, *supra* note 51 (statement of James Moore, CPB Program Manager for the Cargo Conveyance and Security Division in the Office of Field Operations, explaining that the volume represents a significant challenge for CBP); *Exploitation and Enforcement Part II: Improving Enforcement in Countering Uyghur Forced Labor: Hearing Before the Oversight, Investigations, and Accountability Subcomm. of the H. Homeland Sec. Comm.*, 118th Cong. (2024) (statement of Eric Choy, Executive Director, Trade Remedy Law Enforcement Directorate, Office of Trade, U.S. Customs and Border Protection) (stating “when we’re

threshold does not generate the necessary information to ensure imports comply with the more than 500 laws passed to protect the health and safety of the American consumer, the economic competitiveness of domestic industry, and the promotion of human rights abroad.¹⁷²

Effective CBP enforcement prohibiting the importation of goods produced with forced labor, restricting the entry of goods violating intellectual property protections, and enforcing requirements meant to keep illicit substances out of American communities rely heavily on information submitted on CBP’s Form 7501 (or entry summary).¹⁷³ The entry summary requires importers provide only minimal information including country of origin, entry date, name of the ultimate consignee, and a broad description of the merchandise.¹⁷⁴ *De minimis* shipments require only a shipping manifest¹⁷⁵—a document that is unhelpful when CBP must understand if the toy inside contains lead paint.¹⁷⁶

Agencies tasked with overseeing certain imports have been forced to abdicate their responsibilities.¹⁷⁷ In 2017, FDA “identified five categories of regulated products which could be released by CBP without notification to FDA for the purposes of determining entry admissibility, if they were valued at or below the then *de minimis* level of \$200” because FDA could not effectively enforce the law given the inadequate information produced by exporters.¹⁷⁸ Similarly, CPSC admitted its risk-based approach was impaired by the lack of crucial information.¹⁷⁹

De minimis also incentivizes the offshoring of industrial capabilities and American jobs, running directly counter to the current administration’s promotion of “worker-centered” trade.¹⁸⁰ Companies are opting to build

looking at the challenges in the *de minimis* environment, a lot of it goes back to the lack of information that we gather”).

172. See Charles Benoit, *Falsehoods & Facts: The Truth About De Minimis*, COAL. FOR PROSPEROUS AM. (Aug. 14, 2023), <https://prosperousamerica.org/falsehoods-facts-the-truth-about-de-minimis/>.

173. *Id.* (explaining that Form 7501 allows for the automatic assessment of goods).

174. *Id.*

175. See *supra* notes 55–58 and accompanying text (discussing the procedural aspects of the *de minimis* threshold and highlighting the deficiencies in CBP’s screening process).

176. See Benoit, *supra* note 172.

177. See, e.g., U.S. CUSTOMS & BORDER PROT., CSMS# 17-000388, UPDATE TO FOOD & DRUG ADMINISTRATION RELATED LOW-VALUE SHIPMENTS (2017) (discussing the release of *de minimis* products without notifying the Food and Drug Administration).

178. *Id.*

179. See Benoit, *supra* note 172 (stating the Consumer Product Safety Commission “cannot effectively screen [*de minimis*] shipments”).

180. See *id.* (discussing offshoring as a strategy to avoid taxation); OFF. OF THE U.S.

and expand e-commerce distribution operations, many times directly across the U.S. border in Canada or Mexico.¹⁸¹ Relying on cheap—and sometimes forced—labor, foreign companies like Shein and Temu have displaced traditional, brick-and-mortar American apparel companies due to the foreign companies’ ability to offer low prices.¹⁸² The *de minimis* threshold helps these Chinese companies sell directly to the U.S. consumer, sometimes in breach of U.S. trade law.¹⁸³ The Chinese e-commerce giants Shein and Temu have been found to have imported products made in whole or in part with forced labor, have violated intellectual property protections, and have sold products that pose various health and safety measures to American consumers.¹⁸⁴ According to an interim report from the Select Committee on the Chinese Communist Party, Shein and Temu account for “more than 30% of all packages shipped to the United States daily under the [*de minimis*] provision.”¹⁸⁵ A *Bloomberg News* investigation found that garments Shein shipped to the United States were made with cotton from China’s Xinjiang region.¹⁸⁶ In addition, “Temu [admitted it] does not have any system to ensure compliance with the [UFLPA].”¹⁸⁷ These companies consistently flout U.S. trade laws and global norms while displacing hard working American producers.¹⁸⁸ CBP’s own John Leonard joked at a conference that China has

TRADE REP., 2021 TRADE POLICY AGENDA AND 2020 ANNUAL REPORT 2 (2021) (asserting the administration’s priority of worker-centered trade).

181. See, e.g., Press Release, Maersk, Maersk Opens New Warehouse Facility in Tijuana, Mexico for Cross-Border Capabilities (Mar. 21, 2024), <https://www.maersk.com/news/articles/2024/03/21/maersk-opens-new-warehouse-facility-in-tijuana-mexico> (indicating “it could operate fulfillment or e-fulfillment operations into the United States, leveraging the Section 321 Shipment Type for e-commerce shipments”) (endnote omitted).

182. Sabrina Escobar, *How the World’s Most Popular Shopping App Is Quietly Upending Retail*, BARRON’S (June 26, 2023), https://www.barrons.com/articles/shein-clothing-shopping-retail-challenger-16d512db?utm_source=flipboard&utm_content=user%2FBarrons.

183. Katherine Masters, *Focus: Key Trade Loophole Keeps Cheap Chinese Products Flowing to US*, REUTERS (Aug. 4, 2023), <https://www.reuters.com/business/retail-consumer/key-trade-loophole-keeps-cheap-chinese-products-flowing-us-2023-08-04/>.

184. See Prasso, *supra* note 29.

185. STAFF OF H. SELECT COMM. ON THE CHINESE COMMUNIST PARTY, 118TH CONG., REP. ON FAST FASHION AND THE UYGHUR GENOCIDE: INTERIM FINDINGS 2 (Comm. Print 2023).

186. Prasso, *supra* note 29.

187. STAFF OF H. SELECT COMM. ON THE CHINESE COMMUNIST PARTY, 118TH CONG., REP. ON FAST FASHION AND THE UYGHUR GENOCIDE: INTERIM FINDINGS 2 (Comm. Print 2023).

188. See Swanson & Fu, *supra* note 60 (highlighting Temu’s and Shein’s rising popularity and market share despite the risk that their supply chains involved forced labor).

a free trade agreement with the United States—“it’s called [*de minimis*].”¹⁸⁹

In addition, the sheer volume of imports impairs CBP’s efforts to interdict noncompliant imports.¹⁹⁰ With CBP resources stretched thin, its enforcement strategy relies on a risk-based approach where the agency—leveraging analytical tools—can identify and screen the riskiest of imports.¹⁹¹ While business groups and express shippers argue the threshold allows CBP to save time screening the low-value, low-risk imports, and better utilize their resources at high-risk crossings like the border, this assertion is simply wishful thinking.¹⁹² CBP itself identified the increased volume of imports utilizing the *de minimis* threshold as problematic given staffing and resources have largely stayed at the same level.¹⁹³

C. Congressional Options

1. Import Security and Fairness Act

Congressmen Earl Blumenauer (D-OR) and Neal Dunn (R-FL) as well as Senators Marco Rubio (R-FL) and Sherrod Brown (D-OH) introduced the Import Security and Fairness Act (ISFA) in an attempt to address the issues arising from an increasingly used, and recently expanded, *de minimis* threshold.¹⁹⁴ The legislation would make two major changes.¹⁹⁵ First, it would prohibit goods from countries that are both (1) non-market economies and (2) listed on the USTR Priority Watch List (a list of countries known to be repeat violators of intellectual property protections) from entering the United States under the *de minimis* threshold.¹⁹⁶ Second, the ISFA would

189. See @Mara, TWITTER (Sep. 18, 2022, 7:03 PM), <https://twitter.com/mararhymessarah/status/1571998357975093249>.

190. STAFF OF H. SELECT COMM. ON THE CHINESE COMMUNIST PARTY, 118TH CONG., REP. ON FAST FASHION AND THE UYGHUR GENOCIDE: INTERIM FINDINGS 5 (Comm. Print 2023).

191. U.S. CUSTOMS & BORDER PROT., CBP PUBL’N NO. 2127-0216, CBP TRADE ENFORCEMENT—OPERATIONAL APPROACH (2016).

192. See *De Minimis 101*, *supra* note 51 (explaining how the recent rise in the volume of shipments utilizing the *de minimis* threshold poses risks similar to any other type of risk coming into the United States and has presented a significant challenge for CBP).

193. See *id.*

194. H.R. 4148, 118th Cong. (2023); S. 2004, 118th Cong. (2023); see Press Release, Office of U.S. Sen. Marco Rubio, Rubio, Brown Introduce Import Security and Fairness Act (June 16, 2023), <https://www.rubio.senate.gov/rubio-brown-introduce-import-security-and-fairness-act/>.

195. H.R. 4148.

196. *Id.*

require CBP to collect additional information on all *de minimis* shipments entering the United States and would prohibit “[b]ad [a]ctors” from using the exception.¹⁹⁷ The required information is largely left up to the discretion of the Treasury Department, but the bill does mention “information regarding the offer for sale or purchase, or the subsequent sale, purchase, transportation, importation or warehousing” of such articles, or “information relating to the offering of the article for sale or purchase in the United States through a commercial or marketing platform, including an electronic commercial or marketing platform.”¹⁹⁸ In addition, the legislation imposes civil penalties for violators—a \$5,000 for first time offenders and \$10,000 fine for second time offenders.¹⁹⁹

2. *De Minimis Reciprocity Act*

The *De Minimis Reciprocity Act* (DRA), introduced by Senators Bill Cassidy (R-LA) and Tammy Baldwin (D-WI), approaches the *de minimis* threshold a little differently.²⁰⁰ First and foremost, the DRA would bar Chinese products from using the *de minimis* threshold.²⁰¹ The legislation tasks the Secretary of Treasury with annually formulating a list of non-eligible countries.²⁰² The Act would also match the U.S. *de minimis* threshold with that of individual trading partners.²⁰³ For example, because Canada’s threshold is CAD \$150 (roughly \$110 in U.S. currency), goods imported from Canada to the United States would have to fall below CAD \$150 in value to benefit from the U.S. *de minimis* provision.²⁰⁴ In addition, the DRA requires imports benefiting from *de minimis* privileges to be imported to the United States by a contract carrier who will in turn provide the United States with data related to

197. Press Release, Office of U.S. Rep. Earl Blumenauer, Chairman Blumenauer Unveils New Legislation to Fix Import Loophole, Level Playing Field, and Boost Oversight (Jan. 18, 2022), <https://blumenauer.house.gov/media-center/press-releases/chairman-blumenauer-unveils-new-legislation-to-fix-import-loophole-level-playing-field-and-boost-oversight>.

198. H.R. 4148.

199. *See id.*

200. *See* S. 1969, 118th Cong. (2023).

201. *See* Press Release, U.S. Sen. Tammy Baldwin, Baldwin, Cassidy Introduce Bill to Stop China from Exploiting Loophole that Undercuts U.S. Manufacturers, Allows Fentanyl in U.S. (June 14, 2023), <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>.

202. S. 1969.

203. *See* Press Release, U.S. Sen. Tammy Baldwin, *supra* note 201.

204. INT’L TRADE ADMIN., CANADA—COUNTRY COMMERCIAL GUIDE (2022), <https://www.trade.gov/country-commercial-guides/canada-import-tariffs>.

the imported items.²⁰⁵ The information would include the heading or subheading of the HTSUS, country of origin, country of manufacture, shipper of record, importer of record, a description of the article, and the “fair market value” of the items.²⁰⁶ This type of information would improve CBP’s ability to assess the relative risk of imports, identify noncompliant imports, and ultimately ensure those imports do not infect the domestic market.

Legislative fixes have proven evasive due to an effective lobbying campaign spearheaded by express shippers, the complex nature of the *de minimis* issue, and the current political environment and resulting legislative paralysis. For instance, neither the ISFA nor the DRA have yet been enacted into law.²⁰⁷ Further, both Congressional options present problems. While the ISFA would substantially increase the burden of CBP to ensure the newly required information was accurate, the DRA’s *de minimis* reciprocity idea is a clear violation of the United States’ obligations of nondiscrimination as a World Trade Organization member.²⁰⁸

IV. RECOMMENDATIONS

A. Treasury Should Segment Out Textile and Apparel

The Treasury Secretary should leverage their clear, preexisting authority under the TFTEA to issue an NPRM that solely regulates imports of textiles and apparel utilizing the *de minimis* threshold.²⁰⁹ An NPRM would announce the Treasury Department’s plan to reform the *de minimis* importation process starting with the textile and apparel sectors²¹⁰ and would be particularly

205. See S. 1969.

206. *Id.*

207. See *H.R. 4148: Import Security and Fairness Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/118/hr4148> (last visited May 10, 2024) (indicating that the Bill has been introduced and “is in the first stage of the legislative process”); *S. 1969: De Minimis Reciprocity Act of 2023*, GOVTRACK, <https://www.govtrack.us/congress/bills/118/s1969> (last visited May 10, 2024) (same).

208. See *Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited May 10, 2024) (explaining that, under World Trade Organization (WTO) agreements, “most-favoured-nation” status prohibits countries from discriminating between their WTO trading partners).

209. See *supra* Part II.E (discussing the rulemaking authority of the Treasury Secretary under the Trade Facilitation and Trade Enforcement Act). If the Treasury Department finds segmenting out the apparel industry unsound either due to legal constraints or reputational concerns, it may opt to prioritize goods subject to the highest tariffs, which will ultimately include most apparel products. See Desilver, *supra* note 88 (“In general, the stiffest tariffs are levied on apparel and clothing.”).

210. See OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011) (stating

advantageous for the Treasury Department because it would allow industry to help define critical terms, thereby helping the Department formulate the proposed rule.²¹¹ Focusing on the textile and apparel industries would prioritize two sectors associated with heightened violations, provide important information for the agency to use when implementing a broader Section 321 reform effort, and ensure the known advantages of *de minimis* treatment for imports are not eliminated wholesale across industries.

The final rule resulting from the NPRM would ensure imports are adhering to U.S. law, produce instant domestic economic benefits, and serve geostrategic efforts in the Western Hemisphere.

First, as Shein and Temu's direct-to-consumer approach evades duties, domestic retailers like Gap, H&M, and David's Bridal continue to pay steep taxes at the border.²¹² For example, the three aforementioned companies paid \$700 million, \$205 million, and \$19.5 million, respectively, in import duties in 2022.²¹³ This comes as the square meter equivalent of textile and apparel imports increased by 55% between 2010 and 2022.²¹⁴ These payments put American domestic retailers at a severe disadvantage to foreign, online-only retailers and incentivize them to offshore jobs and capabilities.

Second, the *de minimis* threshold's current structure benefits Chinese producers to the detriment of domestic manufacturers.²¹⁵ Over the past twenty-five years, apparel manufacturing saw the steepest drop in employment

that the purpose of issuing an NPRM is to “announce[] and explain[] the agency’s plan to address a problem or accomplish a goal”).

211. *See id.*; *see also* 5 U.S.C. § 553(c) (requiring that agencies provide interested parties a period for public comment after the agency publishes an NPRM).

212. *See* STAFF OF H. S. COMM. ON THE CHINESE COMMUNIST PARTY, 118TH CONG., REP. ON FAST FASHION AND THE UYGHUR GENOCIDE: INTERIM FINDINGS 7 (Comm. Print 2023).

213. *See id.* Jim Marcum, CEO of David's Bridal, explained that the “*de minimis* rule ‘played a significant role’ in the financial strain that led the company to file for bankruptcy in April.” Jordyn Holman, *U.S. Retailers Say an Old Trade Law Puts Them at a Disadvantage*, N.Y. TIMES (Nov. 4, 2023), <https://www.nytimes.com/2023/11/04/business/dealbook/us-retailers-say-an-old-trade-law-puts-them-at-a-disadvantage.html?searchResultPosition=1>.

214. *DHS Secretary Mandates Enforcement ‘Action Plan’ For Customs Violations*, WORLD TRADE ONLINE (Feb. 5, 2024), <https://insidetrade-com.proxywcl.wrlc.org/daily-news/dhs-secretary-mandates-enforcement-action-plan-customs-violations> (relying on data from *Data Visualization: U.S. Textile and Apparel Imports by Month*, INT’L TRADE ADMIN., <https://www.trade.gov/data-visualization/us-textile-and-apparel-imports-month> (last visited May 10, 2024)).

215. *See generally* Jordyn Holman, *Where Textile Mills Thrived, Remnants Battle for Survival*, N.Y. TIMES (Jan. 29, 2024), <https://www.nytimes.com/2024/01/21/business/economy/textile-mills-carolina-trade-de-minimis.html>.

of any manufacturing industry—85%.²¹⁶ Similarly, employment in textile mills decreased by 76%.²¹⁷ The apparel industry is particularly sensitive to pricing dynamics, making small differences in costs to retailers consequential.²¹⁸ William Lucas, General Manager of Eagle Sportswear, an apparel producer located in Middlesex, North Carolina, said: “It’s just hard to compete with [foreign] companies utilizing the *de minimis* exception].”²¹⁹

Third, the Biden Administration has prioritized the Central American region for U.S. investments, in part, to “boost[] economic opportunity” and “address the root causes of migration.”²²⁰ The region, a leading exporter of apparel to the United States, is also foundational to the administration’s goals of de-risking global supply chains.²²¹ Central American countries like Honduras and Guatemala are also “inextricably linked [to the United States] through a textile and apparel co-production chain under the US-Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) [generating] \$12.6 [billion] in annual two-way trade in the sector and support[ing] 1 [million] workers in the [United States] and the region.”²²²

Fourth, by prioritizing finished apparel products, the price of most manufacturing inputs likely will not be significantly affected.²²³ U.S. firms intensively use intermediate input goods in their manufacturing processes.²²⁴

216. *Employment in Apparel Manufacturing Decreased 85 Percent over Last 25 Years*, U.S. Bureau of Lab. Stats.: The Economics Daily (Feb. 1, 2017), <https://www.bls.gov/opub/ted/2017/employment-in-apparel-manufacturing-decreased-85-percent-over-last-25-years.htm>.

217. *Id.*

218. Holman, *supra* note 215.

219. *Id.*

220. U.S. NAT’L SEC. COUNCIL, U.S. STRATEGY FOR ADDRESSING THE ROOT CAUSES OF MIGRATION IN CENTRAL AMERICA 2 (2021).

221. See Ryan C. Berg & Henry Ziemer, *Advancing U.S. Nearshoring Priorities in Central America with Special Economic Zones*, CTR. FOR STRATEGIC & INT’L STUDIES, <https://features.csis.org/US-nearshoring-in-central-america-with-SEZs/> (last visited May 10, 2024) (explaining that global supply chains have recently been put at risk by the COVID-19 Pandemic and Russia’s invasion of Ukraine).

222. Hannah Abdulla, *New U.S.-Honduras Partnership to Bolster Nearshoring Vision*, JUST STYLE (Aug. 24, 2022), <https://www.just-style.com/uncategorized/new-us-honduras-partnership-to-bolster-nearshoring-vision/>.

223. See Joseph Parilla, *How US States Rely on the NAFTA Supply Chain*, BROOKINGS (Mar. 30, 2017), <https://www.brookings.edu/articles/how-u-s-states-rely-on-the-nafta-supply-chain/> (explaining that while importing intermediate goods may increase transportation costs, risk supply-chain disruptions, and displace domestic production and jobs, prioritizing finished apparel improves product quality and lowers product cost, making firms more competitive and supporting domestic jobs and wages).

224. *Id.* (finding that “[i]n 2015, intermediate goods imports accounted for 43 percent of total U.S. goods imports”).

According to Fernando Leibovici, a Federal Reserve economist, on average, intermediate inputs account for 64% of the total value of production on average, and 22% of total intermediate inputs expenditure comes from abroad.²²⁵ To the extent domestic manufacturers source intermediate inputs using the *de minimis* threshold, limiting the reform to finished apparel products would leave them largely unaffected.

The current structure of the *de minimis* threshold perpetuates foreign forced labor abuses and impairs the United States' efforts to "de-risk" global supply chains and support domestic industry.²²⁶ Segmenting out the textile and apparel industries from other sectors would allow the Treasury Department to "catch" the worst offenders and glean insights as to the effectiveness of the changes that could inform future actions.

B. Only Allow "Contract Carriers" to Utilize the Threshold

The foremost problem facing CBP is the lack of accurate, complete data from which the agency can prioritize screening based on risk.²²⁷ In a January 2024 hearing, Eric Choy, Executive Director of the Trade Remedy Law Enforcement Directorate in CBP's Office of Trade, admitted that many of the "challenges within the *de minimis* environment . . . [go] back to the lack of information that we gather as compared to traditional shipments that come in through our ports of entry."²²⁸ Mr. Choy explained that CBP is looking "into the [*de minimis*] environment to see what additional information elements . . . would be helpful . . . to understand who . . . the parties [are] within the shipment, what's inside the box, and who the customers are."²²⁹ He went on to say "that kind of expanded information and data for each of

225. Fernando Leibovici, *How Could Higher Tariffs Affect American Manufacturers*, FED. RSRV. BANK OF ST. LOUIS: ON THE ECONOMY BLOG (July 12, 2018), <https://www.stlouisfed.org/on-the-economy/2018/july/how-higher-tariffs-affect-american-manufacturers>.

226. See Ji Siqu, *Why China Hopes the US Won't Touch a Century-old Trade Rule Affecting Imports Under US \$800*, S. CHINA MORNING POST (Feb. 3, 2024, 10:00 PM), <https://www.scmp.com/news/china/article/3250797/why-china-hopes-us-wont-touch-century-old-trade-rule-affecting-imports-under-us800> (describing the rise of e-commerce exports from China and the criticisms that the *de minimis* rule allows products produced using forced labor to enter the United States).

227. See U.S. CUSTOMS & BORDER PROT., COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE GOVERNMENT ISSUE PAPER: E-COMMERCE (2022).

228. *Exploitation and Enforcement Part II: Improving Enforcement in Countering Uyghur Forced Labor: Hearing Before the Oversight, Investigations, and Accountability Subcomm. of the H. Homeland Sec. Comm.*, 118th Cong. (2024) (statement of Eric Choy, Executive Director, Trade Remedy Law Enforcement Directorate, Office of Trade, U.S. Customs and Border Protection).

229. *Id.*

the shipments that comes in would give us greater flexibility . . . and greater access for our targeting systems to identify risk factors and be able to stop specific shipments coming in at our ports of entry.”²³⁰

Fortunately, one major channel of import already possesses that data: contract carriers.²³¹ As Senators Baldwin and Cassidy proposed in the DRA, the Treasury Secretary should require all imports of apparel seeking to utilize the *de minimis* threshold to be imported by a contract carrier.²³² Further, the NPRM should indicate that the final rule would mandate the contract carrier collect and provide CBP with specific information for every package entering the United States, including: the ten-digit HTSUS number, country of origin, country of manufacture if it is different from the country of origin, shipper or record, importer of record, importer of record, description of the article, website URL to the product description, and the fair market value in the United States.²³³

However, the Treasury Department should not adopt the definition of “contract carrier” that is provided in the DRA: “a private entity . . . organized under the laws of the United States or any jurisdiction within the United States; and . . . ships small packages into the United States by air or land.”²³⁴ Defining “contract carrier” this broadly would allow anyone—including foreign firms that establish a U.S. subsidiary—to exploit a well-intentioned, but ineffective, piece of legislation. Instead, this Comment argues that “contract carrier” should be defined as “an entity with a beneficial owner who is a U.S. person and which is organized under the laws of the United States; and ships small packages into the United States by air or land.”

First, as part of an NPRM focused on the textile and apparel sectors, this definition would prevent those imports using the U.S. Postal Service (USPS) from benefitting from the *de minimis* threshold. This is an important development as USPS is not a law enforcement agency and does not have the know-how or capacity to effectively enforce our nation’s technical trade laws.²³⁵ Further, it seems that USPS does not track *de minimis* shipments

230. *Id.*

231. See Dana Mattioli, *Amazon Scooped up Data From Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020, 9:51 PM), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015> (finding Amazon collects vast amounts of data on its third-party sellers).

232. See S. 1969, 118th Cong. § 2(2)(c)(3)(A) (2023).

233. See § 2(2)(c)(3)(B).

234. § 2(2)(c)(3)(D).

235. See *Our Scope*, U.S. POSTAL INSPECTION SERV., <https://www.uspis.gov/about/what-we-do> (last visited May 10, 2024) (highlighting that the main goal of the U.S. Postal Inspection Service is to protect mail workers, post office premises, mail fraud, and identity theft); OFF. OF INSPECTOR GEN., U.S. POSTAL SERV., REP. NO. 22-178-R23, U.S. POSTAL SERVICE’S

because a request from the China Select Committee asking for records and data related to *de minimis* shipments has been left unfilled.²³⁶

Second, this change would shift the enforcement burden away from CBP. While the Section 321 pilot and Entry Type 86 entries have allowed CBP to better focus enforcement efforts, this increase of information, paired with new technologies already being deployed across the agency,²³⁷ will allow the agency to keep the *de minimis* threshold in place while further narrowing their enforcement focus.

Lastly, the contract carriers are in the best position to provide the required data. This approach has been instituted in the European Union (EU) with great success.²³⁸ The Import Control System 2 (ICS2)—the EU’s large-scale “advance cargo information and risk management platform,” which aims “to protect against security and safety threats” from the global e-commerce business model—requires air carriers, freight forwarders, express couriers, and postal operators to present EU customs officials with a broad range of data prior to the goods arriving at the EU border.²³⁹ The ICS2 program, “prepared in close collaboration between the European Commission, Member States’ customs authorities, and business[,] . . . provides improved data quality, improved customs risk management and a better risk-based approach to customs risk mitigation measures and external border controls.”²⁴⁰ ICS2 has forced contract carriers to mandate customers using its shipping services to disclose the required information prior to their products being shipped.²⁴¹ The change has successfully shifted the burden

RESPONSE TO MAIL THEFT (2023) (noting that the U.S. Postal Inspection Service faces challenges with staffing).

236. See Press Release, Select Comm. on the Chinese Communist Party, Gallagher, Comer Request Chinese Shipment Data from USPS Postmaster (June 28, 2023), <http://selectcommitteeontheccp.house.gov/media/press-releases/gallagher-comer-request-chinese-shipment-data-usps-postmaster> (asking the U.S. Postal Service to provide data on PRC-origin shipments that might use *de minimis* entry).

237. See, e.g., Press Release, U.S. Customs & Border Prot., CBP Leverages Blockchain Innovation to Protect American Business (Feb. 28, 2020), <https://www.cbp.gov/newsroom/national-media-release/cbp-leverages-blockchain-innovation-protect-american-business> (announcing that CBP “is testing innovative blockchain solutions and specifications to enhance the agency’s ability to protect American businesses from intellectual property rights (IPR) theft”).

238. See Press Release, European Comm’n, Import Control System 2 (ICS2)—Release 2: New Rules for Inbound Air Shipments to the EU Went Live on 1 March 2023 (Mar. 9, 2023, 9:00 AM), <https://www.prnewswire.com/news-releases/import-control-system-2-ics2--release-2-new-rules-for-inbound-air-shipments-to-the-eu-went-live-on-1-march-2023-301765506.html>.

239. *Id.*

240. *Id.*

241. See, e.g., *Preparing for EU’s Import Control System 2 (ICS2) Release 2 Scheduled for March 1,*

from European customs agents onto the express shippers that will continue to benefit from the *de minimis* threshold.²⁴² With the explosion of *de minimis* imports, CBP resources are already strained. This change should help alleviate that strain and allow CBP to fully realize its risk-assessment strategy.

C. *Disincentivize Violations with Substantial Penalties*

To ensure compliance with the new regulations, the Treasury Department should impose substantial penalties for repeat violators who exploit the *de minimis* threshold to violate U.S. law. The principles underlying the Type 86 Test and Pilot Program promote the idea that more data allows CBP to narrow its focus and prioritize certain imports; however, the data is often incorrect.²⁴³ At CBP’s Trade Facilitation and Cargo Security Summit in April 2023, Sal Ingrassia, the Director of Field Operations in CBP’s Miami-Tampa Field Office said, “we still have a lot of concerns” due to the data often being inaccurate.²⁴⁴ Twenty-five percent of *de minimis* shipments had some type of violation; “[i]t was alarming to see we had so many violations.”²⁴⁵ Violations ranged from HTSUS misclassifications to unmanifested merchandise.²⁴⁶ CPB’s Brandon Lord contended the reason for so many violations is due to there being “zero incentive as that foreign shipper, or foreign seller, to learn the requirements to enter the United States.”²⁴⁷

Currently, pursuant to the Customs Modernization Act, the importer is responsible for using “reasonable care” to enter, classify, and value the goods and provide any other information necessary to enable CBP to “properly assess duties,” “collect accurate statistics,” and “determine whether any other applicable” legal requirements are met.²⁴⁸ In a *Frequently Asked Questions* webpage from September 2023, in response to “[h]ow will CBP validate the ‘one shipment, per person, per day, not to exceed \$800’ requirement,” CBP answered, “[our] expectation for all filers and self-filers participating in the

2023, UNITED PARCEL SERV. SUPPLY CHAIN SOLS., <https://www.ups.com/us/en/supplychain/resources/news-and-market-updates/import-control-system-2.page> (last visited May 10, 2024).

242. *See id.*

243. *See* U.S. CUSTOMS & BORDER PROT., *supra* note 227 (stating that there are “1 billion shipments with insufficient data to properly determine risk”).

244. *See* Mara Lee, *Type 86 Test Revealing Compliance Weaknesses in Small Packages*, INT’L TRADE TODAY (Apr. 17, 2023), <https://internationaltradetoday.com/news/2023/04/17/Type-86-Test-Revealing-Compliance-Weaknesses-in-Small-Packages-2304170052>.

245. *Id.*

246. *See id.*

247. *Id.*

248. 19 U.S.C. § 1484(a)(1).

test to exercise reasonable care, and fulfill their responsibility of complying with the statutory limitation for [*de minimis*] pursuant to 19 [U.S.C. §] 1321.”²⁴⁹ Foreign sellers are currently judgment-proof as there is no accountability for providing inaccurate data.

The Treasury Department should introduce legal accountability for foreign companies who want to benefit from the duty-free treatment the *de minimis* threshold affords. Similar to Representative Blumenauer’s proposal in the ISFA, Treasury should penalize “[a]ny person who violates the regulations,” making them liable for a civil penalty of \$5,000 for the first violation and \$10,000 for the second violation.²⁵⁰ If a person or entity violates the regulations a third time, the Treasury Department should place that person on a newly created list of “Debarred and Suspended” parties—a list to be developed and administered by the Treasury Secretary. Utilizing the *de minimis* threshold is a privilege as it grants duty-free treatment to imports and provides a more streamlined importation procedure. Inclusion on the list will deny that entity’s use of the *de minimis* threshold, providing an important “stick” to deter wrongful behavior. Instead, to import goods into the United States, a party on the “Debarred and Suspended” list will have to go through formal entry proceedings ensuring their goods are in full compliance with U.S. law.

CONCLUSION

The explosion of e-commerce and the raising of the *de minimis* threshold has made CBP’s job of enforcing forced labor, intellectual property, and public safety laws almost impossible. Fortunately, the Department of Treasury has been afforded broad authority to promulgate regulations to “protect the revenue or to prevent unlawful importations.”²⁵¹ The Treasury Secretary should immediately promulgate new regulations, narrowly focused on the textile and apparel sectors, to limit *de minimis* shipments to “contract carriers,” mandate such carriers disclose additional information prior to a shipments arrival at the U.S. border, and impose substantial penalties on repeat offenders. Such a change would not only better enforce the laws on the books but would positively affect U.S. policy priorities related to human

249. *Entry Type 86 Frequently Asked Questions*, U.S. CUSTOMS & BORDER PROT., <https://web.archive.org/web/20240331145049/https://www.cbp.gov/trade/trade-enforcement/tfea/section-321-programs/entry-type-86-frequently-asked-questions> (Sept. 11, 2023).

250. H.R. 4148, 118th Cong. § (3)(C)(4) (2023); *see also* Press Release, Off. of Senator Sherrod Brown, Brown, Rubio, Blumenauer, Dunn Introduce Bipartisan, Bicameral Bill to Protect Ohio Businesses from Unfair Trade Regulations (June 15, 2023), <https://www.brown.senate.gov/newsroom/press/release/sherrod-brown-rubio-blumenauer-dunn-introduce-bipartisan-bicameral-bill-protect-ohio-businesses-from-unfair-trade-regulations>.

251. 19 U.S.C. § 1321(b).

rights, narcotic interdiction, domestic manufacturing, and de-risking global supply chains. Every day, those like Gulbahar Haitiwaji take extraordinary risks to speak out about forced labor abuses; the least the United States can do is effectively enforce the laws already on the books.