

Outcome of “De Minimis” Will Have Major Effects on eCommerce Importations and the U.S. FTZ Program

Growth of eCommerce

As has been widely reported, eCommerce sales have risen dramatically in recent years.¹ COVID clearly accelerated this trend, but consumers increasingly prefer direct-to-consumer and eCommerce purchasing channels. This growing trend places strain not only on companies managing the transactions, but also on regulatory agencies responsible for enforcing international transaction regulations, primarily Customs and Border Protection (CBP) in the U.S.. **eCommerce fulfillment relies heavily on a U.S. Importation procedure known as “de minimis,”** which many eCommerce companies are increasingly utilizing to address margin erosion and capture customs duty savings.²



The U.S. De Minimis Provision

The “de minimis” provision is a Customs procedure whereby **U.S. imports under \$800**, which are imported by one person on one day, are permitted entry without the payment of duty or filing of a formal customs entry. In 2016, the Trade Facilitation and Trade Enforcement Act (TFTEA) raised the de minimis value from \$200 to \$800, which likely contributed to the growing use of this provision.³

CBP reported **771.5 million in de minimis entries in FY21**, a 21% increase from the prior year, with a total value of \$40 billion.⁴ Given the informal nature of the procedure, CBP lacks visibility into many trade data elements that would otherwise be required on formal entries.

Why U.S. FTZs Cannot Use De Minimis

While lower-value importations into the U.S. from other countries are eligible for this duty-free provision, **withdrawals into U.S. Commerce from U.S. Foreign trade zones (FTZ) are not.**⁵ As a result, many companies have established offshore distribution and fulfillment centers (typically in Canada or Mexico) or found other means to leverage the de minimis provision to avoid paying duty on orders shipped to their U.S. customers.⁶

¹ See, e.g. the May 3, 2021 article from the United Nations, "Global e-commerce jumps to \$26.7 trillion, fuelled by COVID-19". <https://news.un.org/en/story/2021/05/1091182>

² See, e.g. the August 8, 2018 article from DC Velocity, "Curse of the Internet: E-commerce creates new challenges for customs". <https://www.dcvelocity.com/articles/29967-curse-of-the-internet-e-commerce-creates-new-challenges-for-customs>

³ Id., see “The De Minimis Dilemma” section

⁴ “Trade Statistics,” U.S. Customs and Border Patrol, Updated May 2, 2022 (<https://www.cbp.gov/newsroom/stats/trade>)

⁵ This restriction stems from the Section 321 statutory language as FTZ withdrawals are not considered “importations” but rather “entries.” CBP rulings also concur with this interpretation. HQ H275567 (May 8, 2018) and HQ H282601 (September 18, 2018).

⁶ “Proposed Bill ‘Would Shut Down Shein,’ Expert Says,” Sourcing Journal, January 19, 2022 (<https://sourcingjournal.com/topics/trade/de-minimis-tariff-e-commerce-china-shein-earl-blumenauer-trade-subcommittee-bill-323561/>).

Looking Ahead

The U.S. House of Representatives recently passed legislation within the America COMPETES Act of 2022 (H.R. 4521) that **proposes to restrict the use of de minimis for goods from China**,⁷ but is silent on treatment for U.S. FTZs. Specifically, the bill would modify current statute to prohibit de minimis treatment for imports from countries that are identified as both non-market economies and violators of international intellectual property standards, in accordance with the United States Trade Representative’s priority watch list. Moreover, the proposed reforms would endow the U.S. Customs and Border Protection (CBP) with the statutory authority to collect further information on goods imported into the U.S. that receive de minimis treatment upon entry, and further, prohibit goods from importers that are currently suspended or debarred from receiving de minimis treatment.⁸

The proposed reforms to the de minimis provision in the House version of competitiveness legislation are principally motivated amidst concerns that non-market economies, namely **China**, are taking advantage of current de minimis thresholds at the expense of American businesses who are at a competitive disadvantage.⁹ Irrespective of the outcome of the ongoing conference process between the Senate and House versions of competitiveness legislation, **U.S. retailers should prepare to respond to the evolving legislative and regulatory environment** surrounding the de minimis provision, and position themselves accordingly to mitigate risk and protect enterprise value on behalf of their valued customers and shareholders.

Current de minimis policies facilitate a direct-to-consumer business model that leverages the market and regulatory efficiency of a made-to-order fulfillment strategy.¹⁰ Proposed reforms to the de minimis provision, either in the form of a reduction

in the current de minimis threshold or other more substantive modifications, **may require some U.S. retailers to reevaluate their day-to-day operations and broader strategic ambitions**. It will prove critical for U.S. retailers to carefully monitor actions taken by the Biden Administration and Congress with regard to U.S. international trade and tariff policy, such that they are better positioned to mitigate risks to their operations in real-time. Additionally, U.S. retailers must proactively engage with their respective suppliers, and work to **develop a contingency plan that accounts for future potential changes** to the de minimis provision. This will ensure that both parties are adequately prepared to reconfigure their supply chains and modify key business processes to remain compliant with new regulatory requirements governing de minimis treatment in the U.S. as they are promulgated.

If this bill in its current form becomes law, effectively **the only types of transactions that would not have access to the de minimis provision are importations from China and withdrawals from U.S. FTZs**. For some retailers operating in U.S. FTZs, from a customs and duty perspective this potential result incentivizes them to offshore their distribution operations, often to Canada or Mexico.

The lack of FTZ access to the de minimis provision is not a new problem; however, the dramatic rise in eCommerce fulfillment combined with the opportunity for Congress to correct the statutory limitation has prioritized this issue for U.S. retailers and U.S. economic development champions.



⁷ This legislation specifically prohibits goods from countries that are both non-market economies and on the U.S. Trade Representative’s (U.S.STR) Priority Watch List. "Will Congress Find Compromise on China Competitiveness Legislation? Sixteen Top Issues for the House-Senate Conference Committee", The National Law Review, February 23, 2022 (<https://www.natlawreview.com/article/will-congress-find-compromise-china-competitiveness-legislation-sixteen-top-issues>).

⁸ "Understanding the America Competes Act of 2022 - What Upcoming Major Changes to International Trade Law Should You Know About?", Lexology, February 7, 2022 (<https://www.lexology.com/library/detail.aspx?g=cdf14301-3330-496f-96af-f17d9e2e25a0>).

⁹ Id.

¹⁰ "DUTY-FREE DTC: THE PROS, CONS AND OUTLOOK FOR THE DE MINIMIS PROVISIO", Laufer Group International via Sourcing Journal, January 12, 2021 (<https://lgi.laufer.com/news/duty-free-dtc-the-pros-cons-and-outlook-for-the-de-minimis-provisio/>).



— **HOW FTI CAN HELP**

Changes to de minimis have the potential to dramatically shift the location from which hundreds of millions of shipments destined for U.S. consumers originate. If the law continues to preclude U.S. FTZs from utilizing it for U.S. warehouse withdrawals, U.S. retailers may be incentivized to move offshore (to any country other than China, which would also be restricted).

If the new de minimis provision does allow for access for U.S. FTZs, it is likely the U.S. would experience a sharp increase in investment and FTZ designation for eCommerce fulfillment warehouses and similar distribution centers.

FTI Consulting is closely monitoring this issue and assisting our clients by:

- Exploring strategic approaches and **supply chain scenario modelling**
- Educating them on the **ramifications of the proposed law**, regardless of their FTZ operator status
- Designing a **multifaceted engagement plan** that incorporates supply chain, procurement, customs,
- Consulting on FTZ tax and government affairs
- **Planning commercial scenarios** based on potential outcomes in Congress
- Assisting them in **advocacy efforts**, to the extent they want to engage directly or through an association

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