



New Trade Rules and Import Compliance Trends on the E-Commerce Horizon

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Introduction

Since the advent of electronic commerce (“e-commerce”) platforms, regulators and legislators around the world have been grappling with new customs compliance and security risks, as well as the environmental, social, and corporate governance (“ESG”) concerns that arise from the cross-border movement of goods purchased through these platforms. In the United States, the response has been the proposal of new laws to address these issues. Companies with cross-border e-commerce transactions should be aware of these proposed changes and anticipate the impact to their businesses to mitigate potentially adverse consequences.

Even before the COVID-19 pandemic shuttered brick-and-mortar storefronts, forcing consumers to find alternative ways to shop, the volume of electronic commerce (“e-commerce”) transactions was growing rapidly, quickly becoming a primary method (if not the primary method) of transacting retail purchases for many businesses. According to the U.S. Census Bureau, retail e-commerce sales in the United States in 2021 was estimated at \$870.8 billion, an increase of 14.2 percent over 2020, and accounted for 13.2 percent of total sales transactions in the U.S.¹

Not surprisingly, the volume of cross-border e-commerce trade also increased significantly. In FY 2021, U.S. Customs and Border Protection (“CBP”), the federal agency charged with enforcing U.S. trade laws at the border, reported that 771.5 million import shipments were informally entered into the United States claiming the de minimis exemption provision of 19 U.S.C. 1321 (“section 321”), which are generally attributable to e-commerce transactions. This rise in the use of the section 321 exemption represented an increase of over 21 percent from the prior fiscal year.² To put this number into perspective, there were only 36.9 million traditional formal entry summaries filed to import goods into the United States.

The increase in e-commerce imports is attributable in large part to the passage of the Trade Facilitation and Trade Enforcement Act of 2015 (“TFTEA”). One feature of the TFTEA was to increase the section 321 de minimis value exemption threshold – that is, the value of a shipment of goods imported by one person in one day that generally may be brought into the U.S. free of duties and taxes without the need to file formal customs entries – from \$200 to \$800. As a result, this made individual parcel shipments

directly between businesses and consumers, or “B2C” transactions, more attractive from a duty cost perspective than wholesale bulk volume import shipments.

However, while e-commerce trade generally poses security risks similar to containerized shipments, authorities’ capacity to manage the risk and inspect the goods may be more challenging under informal import procedures, often creating complexities not contemplated under traditional trade laws and regulations. Against this backdrop of increased e-commerce trade volume and risk, importers seeking to navigate trade rules may find themselves in an ever-evolving landscape as new laws are enacted and additional regulatory changes loom on the horizon to address these challenges.

Background – Imports via E-commerce

According to the World Trade Organization (“WTO”), e-commerce is the “production, distribution, marketing, sale or delivery of goods and services by electronic means” between enterprises, households, individuals, governments and other public or private organizations.³ E-commerce platforms and retailers both facilitate the discovery and the purchase of products by consumers globally without the need to physically visit a retail store, and allows vendors the opportunity to reach a broader and more diverse customer base while reducing local inventory footprints.

United States customs laws generally require the importer of record to file the necessary entry paperwork, post a surety bond, pay duties owed, and arrange for the examination and release of the imported goods by CBP. This is generally referred to as “formal entry.” However, B2C e-commerce imports into the United States are generally completed through the “informal entry” process, which does not require the same entry formalities nor the posting of a customs bond.⁴ Informal entries apply to goods valued less than \$2,500 and may be used for both personal and commercial importations with certain limitations – e.g., informal entries may not be used for commercial importations of goods subject to quota, antidumping or countervailing duties. In addition, to reduce the administrative burden imposed on CBP in collecting duties and fees associated with low-value shipments, some goods can be admitted into the United States free of duty and taxes under the section 321 de minimis

¹ Source: U.S. Department of Commerce, U.S. Census Bureau News (May 19, 2022).

² Source: U.S. Customs and Border Protection Web site, Newsroom Trade Statistics section (May 16, 2022).

³ Source: World Trade Organization Web site, Electronic Commerce section (September 25, 1998). There are several, sometimes overlapping, definitions of the term e-commerce used throughout the world, including a narrower definition by the Organisation for Economic Co-operation and Development (“OECD”). As this article focuses on trade and customs issues, we rely on the WTO definition.

⁴ Given the low value of most e-commerce goods, importers generally use the informal entry process to bring goods into the U.S. However, CBP has the discretion to require importers to follow formal entry procedures.

value exemption provided that the aggregate fair retail value in the country of shipment of goods imported by one person on one day does not exceed \$800.⁵

Recently Enacted Legislation and Legislative Proposals

The explosion of e-commerce imports into the U.S. has created significant enforcement challenges for authorities. In June 2018, the World Customs Organization (“WCO”), recognizing the significant growth in cross-border e-commerce transactions in physical goods, published the “WCO Cross-Border E-Commerce Framework of Standards.”⁶ The report noted:

E-Commerce, in particular Business-to-Consumer (B2C) and Consumer-to-Consumer (C2C) transactions, is presenting a number of new challenges to governments and businesses alike. This fast-evolving trading environment requires comprehensive and well-considered solutions from all stakeholders, including Customs authorities, to manage growing volumes, to overcome the lack of global standards and guidelines, and to address associated risks... The lack of global standards for effective management of cross-border E-Commerce has an impact on trade facilitation, safety and security, and compliance. Therefore, global standards appear to be essential in better leveraging this new channel of trade as a new engine of global economic growth.

Faced with the increased risk e-commerce importations pose in the U.S., CBP and lawmakers have actively sought to address these challenges in part by placing additional safeguards around the use of the section 321 de minimis exemption, particularly where use of the exemption may potentially circumvent laws intended to address national security, public health and consumer safety. Below are some of the legislative proposals introduced in Congress as well as a discussion of recently-enacted laws that may have a significant impact on cross-border e-commerce trade.

Import Security and Fairness Act

The Import Security and Fairness Act (H.R. 6412), introduced in the U.S. House of Representatives in January 2022, would prohibit importers from receiving section 321 de minimis treatment if the country of origin

of the goods is a country both (1) identified as a non-market economy (e.g., China and Vietnam) and (2) included on the United States Trade Representative’s (“USTR”) Priority Watch List of countries alleged to violate intellectual property standards.⁷ The House bill would also simplify CBP’s requirements for processing detained imported goods that receive section 321 de minimis treatment (including the ability for CBP to deem the goods abandoned under certain circumstances) and provide CBP with statutory authority to collect additional information regarding all imports that receive section 321 de minimis treatment upon importation, specifically pointing to articles offered for sale or purchased in the U.S. through e-commerce platforms. In addition, the Act would prohibit importers that have been suspended or debarred from receiving section 321 de minimis treatment for their imported goods.

As with many of the legislative proposals discussed below, this Act if passed would have a significant impact on importers of Chinese-origin goods purchased via e-commerce platforms, in particular companies utilizing close-to-market warehouses in Canada and Mexico that ship Chinese-origin goods directly to e-commerce customers. Given that goods sold via e-commerce platforms are imported via an informal entry process, the “importer” in most e-commerce transactions is generally the end customer. However, the burden and cost of ensuring that the section 321 exemption is not declared on Chinese-origin goods and compliance with the recordkeeping requirements will likely fall on the e-commerce platform operator since that party may be in the best position to disclose



⁵ See 19 U.S.C. § 1321.

⁶ Source: World Customs Organization, “Cross-Border E-Commerce Framework Standards” (June 2018).

⁷ See 19 U.S.C. § 2242(g)(3).

information to the government in accordance with the bill's requirements. As a result, e-commerce platforms should be prepared to implement screening and document-retention processes to ensure regulatory compliance with the provisions of the bill.

America COMPETES Act of 2022 and U.S. Innovation and Competition Act of 2021

The America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength (COMPETES) Act of 2022 (H.R. 4521), which was passed by the U.S. House of Representatives earlier this year contained provisions addressing the U.S.-China trading relationship as well as other general trade measures that would directly impact e-commerce importers and platforms. For example, the trade title of the America COMPETES Act – the “American Worker and Trade Competitiveness Act” – similar to the Import Security and Fairness Act, would prohibit importers from receiving section 321 de minimis treatment if the country of origin of the goods is a country both (1) identified as a non-market economy and (2) included on the USTR’s Priority Watch List of countries; modify the section 321 de minimis provision by giving CBP authority to collect additional information on imports that receive de minimis treatment; simplify CBP’s requirements for processing good that receive de minimis treatment and detained by CBP; and impose civil penalties for failing to provide such documentation or information to CBP. The information required to be provided to CBP could include commercial transaction documentation, subsequent sale and purchase information, and information related to transportation, importation, and warehousing, including the sale of the goods in the U.S. through e-commerce platforms. The U.S. Senate also passed a version of the bill but substituted it with language from the Senate’s previously-passed U.S. Innovation and Competition Act of 2021 (“USICA”) (S.1260) which notably did not include provisions addressing section 321. These bills are currently undergoing procedural steps in Congress to resolve their differences.

If the provisions in the “American Worker and Trade Competitiveness Act” were to be enacted into law, however, Chinese-origin goods would no longer be permitted to be imported into the U.S. without the payment of duties and fees. In addition, CBP would

have increased visibility to small packages from non-market economies, which in turn may lead to higher compliance with U.S. customs laws, as foreign companies that may have historically been able to avoid paying duties (such as the Section 301 tariffs on Chinese-origin goods) would be under heightened governmental scrutiny. Importers should continue to monitor the progress of this legislation and be aware of the potential impact on their operations moving forward, such as bolstering internal recordkeeping procedures in anticipation of potential CBP requests for information and audits.

Similar to the Import Security and Fairness Act, the burden and cost of ensuring that the section 321 exemption is not declared on Chinese-origin goods and the collection and maintenance of information that will be provided to CBP will likely fall on the e-commerce platform operator. As a result, e-commerce platforms will be expected to screen the imported goods to ensure that the section 321 exemption is not declared and implement recordkeeping procedures in line with the bill.

Forced Labor Laws

The U.S. has a long history of addressing the importation of goods produced with forced labor dating back to the McKinley Tariff Act of 1890, which prohibited the import of goods manufactured with convict labor, and the implementation of Section 307 of the Tariff Act of 1930, which made it illegal to import goods into the U.S. produced by forced labor. In August 2017, the Countering America’s Adversaries Through Sanctions Act (“CAATSA”) was signed into law and created the legal presumption that any goods produced in North Korea were made with forced labor and thus, prohibited from entry into the U.S.⁸

Similarly, there has been growing concern that goods produced in the Xinjiang Uyghur Autonomous Region of China are made using forced labor. In January 2021, CBP issued a Withhold Release Order (“WRO”) against cotton and tomato products produced in the Xinjiang region, announcing that it would detain such products produced in whole or in part in that region – for example, apparel, textiles, canned tomatoes, and tomato sauce. In addition, CBP has issued other, more targeted WROs against specific entities and goods produced in the Xinjiang region.⁹

⁸ H.R. 3364 – Countering America’s Adversaries Through Sanctions Act - <https://www.congress.gov/bill/115th-congress/house-bill/3364/actions?KWICView=false> (accessed May 23, 2022).

Despite the increase in administrative enforcement actions toward goods from the Xinjiang region, U.S. lawmakers continued to have concerns regarding the alleged forced labor activity in the region. In response, the Uyghur Forced Labor Prevention Act (“UFLPA”) was signed into law on December 23, 2021 and entered into force on June 21, 2022. Among other things, the UFLPA, similar to CAATSA, establishes a rebuttable presumption that the importation of any goods, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang region, or produced by certain entities, is prohibited by Section 307 and that such goods are not entitled to entry to the United States. The presumption applies unless CBP determines that the importer of record can establish that the goods were not produced using forced labor.

The UFLPA also requires an interagency Forced Labor Enforcement Task Force to develop and submit to Congress a strategy for supporting CBP’s enforcement of Section 307 with respect to goods produced with forced labor in China. The U.S. Department of Homeland Security (“DHS”), on behalf of the Task Force, issued a Notice Seeking Public Comments in the Federal Register on January 24, 2022 to invite the public to comment on the implementation of the UFLPA and methods and measures to prevent the importation of goods produced using forced labor for China specifically from XUAR.¹⁰

While the comment period closed in March 2022 with approximately 180 public comments submitted, importers should monitor how the UFLPA is ultimately implemented. This may include the potential that CBP will require importers to file formal entries for all goods associated with the Xinjiang region including low value shipments that would otherwise be entered under section 321; conduct additional supply chain tracing and due diligence; and implementing tools to provide greater clarity to ensure that goods are not mined, produced, or manufactured in the Xinjiang region. Given that China is the U.S.’s primary trading partner by volume and value of goods, enforcement of the law is expected to have a broad and significant impact on e-commerce trade.

Importers should proactively manage the forced labor risks in their supply chains by:

- Identifying high-risk suppliers, particularly those in China
- Review internal policies against standards published by the International Labour Organization of the United Nations addressing indicators of forced labor
- Discuss with suppliers to understand their practices and identify potential areas of risk
- Develop management plans to proactively manage identified risks

Slave-Free Business Certification Act

A bill related to the UFLPA was recently introduced in the U.S. Senate calling for the adoption of the “Slave-Free Business Certification Act of 2022” (S.3578), which would require businesses with annual gross receipts greater than \$500 million to audit their supply chains for forced labor and make related disclosures. This audit would require, among other things, worker and management interviews, production of corroborating information, and related reporting. Even for companies that currently conduct supply chain audits, the Act would impose significant additional compliance and disclosure requirements; and failure to comply with the Act would subject companies to potentially substantial penalties. Similar to the UFLPA, this Act would increase the due diligence expected of importers, which could significantly impact e-commerce importers who currently do not retain such documentation, particularly since those importations are generally conducted via the informal entry process.



⁹ Source: U.S. Customs and Border Protection Web site, Forced Labor section (accessed May 20, 2022).

¹⁰ Notice Seeking Public Comments on Methods To Prevent the Importation of Goods Mined, Produced, or Manufactured With Forced Labor in the People’s Republic of China, Especially in the Xinjiang Uyghur Autonomous Region, Into the United States, 87 FR 3567 (Jan. 23, 2022).

INFORM and SHOP SAFE Acts

According to DHS, “[t]he rapid growth of e-commerce has revolutionized the way goods are bought and sold, allowing for counterfeit and pirated goods to flood our borders and penetrate our communities and homes. Illicit goods trafficked to American consumers by e-commerce platforms and online third-party marketplaces threaten public health and safety, as well as national security.”¹¹ In response to these concerns, two bills have been introduced in Congress to combat the increase in illicit e-commerce transactions. The Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (“INFORM Consumers Act”) (S.936) would require online marketplaces to collect, verify, and disclose and inform consumers about high-volume third-party sellers of consumer products. The disclosure would include, among other things, the seller’s full name, physical address, and whether the seller also engages in the manufacturing, importing, or reselling of consumer products – information that may not generally be collected by e-commerce platforms and could be a burdensome undertaking.

Similarly, the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act (“SHOP SAFE Act of 2021”) (S.1843) would require e-commerce platforms to make efforts to screen for sellers that are likely to sell counterfeit goods. The SHOP SAFE Act would require e-commerce platforms to verify the identity, principal place of business, and contact information of third-party sellers; require sellers to verify and attest to the authenticity of their goods, contractually agree not to sell or promote counterfeit goods, and have a registered agent or verified address for service of process in the U.S.; and require platforms to proactively screen goods for counterfeit trademarks and implement policies to remove and ban repeat offenders from the platform. Essentially, the bill is a significant departure from current e-commerce transactions and makes the e-commerce platform liable for the illicit activity of its sellers. Should these bills or similar provisions be enacted into law, e-commerce platforms will be expected to exercise additional due diligence, such as through seller onboarding questionnaires, changes to contractual obligations placed on the sellers, and active monitoring of goods

offered for sale, to ensure that counterfeit goods are not sold on their platforms and increase data collection processes over the sellers serviced on their systems.¹²

OECD Task Force on Countering Illicit Trade

Recognizing the heightened risk of counterfeit and pirated goods being sold through e-commerce platforms, the Organisation for Economic Co-operation and Development (“OECD”) Task Force on Countering Illicit Trade (“TF-CIT”) was created to work with governments to identify the full range of such risks and threats to the global economy, for example those involving health, safety and the environment. The TF-CIT recently issued a report addressing government and industry-specific measures to address counterfeiting among online platforms and the methods to address these challenges including increased transparency, streamlined procedures, and co-operation between government and industry.¹³ Importers and e-commerce platforms should review the TF-CIT’s published studies and consider if processes can be implemented to address the task force’s concerns and mitigate the risks associated with e-commerce transactions such as through private-public partnerships and cooperation with the maritime and shipping industries to increase supply chain visibility.

De Minimis Threshold Under USMCA

When the United States-Mexico-Canada Agreement (“USMCA”) was enacted in 2018, Mexico and Canada’s de minimis thresholds were increased, albeit to an amount significantly less than the U.S.’s threshold of \$800. Article 7.8 of the USMCA, however, which addresses rules around express shipments, provides that the countries “may impose a reciprocal amount that is lower for shipments from another [country] if the amount provided for under that other [country’s] domestic law is lower than that of the [country]”. In other words, if Mexico’s domestic law only allows for a de minimis threshold of \$117 USD for duty-free treatment, the U.S. can impose the same value limit for express shipments coming into the U.S. from Mexico. While there has been no indication of the U.S.’s intent to enforce this reciprocal arrangement, U.S. importers should be aware of this potential as additional duties and fees could be incurred.

¹¹ Source: U.S. Department of Homeland Security Web site, Combating Trafficking in Counterfeit and Pirated Goods (accessed May 23, 2022).

¹² Similar provisions to S.936 and S.1843 are found in the House version of H.R.4521. Notably, however, the USICA passed by the Senate does not contain similar provisions.

¹³ Source: Organisation for Economic Co-operation and Development Web site, Illicit Trade section (accessed May 23, 2007).

Conclusion

The rapid evolution of e-commerce sales transactions has increased the volume of small-parcel imports into the U.S. As a result, the landscape of trade enforcement is quickly changing to respond to the associated risks, which is likely to come in the form of increased scrutiny of imports at the border, supply chain due diligence, and additional information gathering and disclosure requirements by e-commerce platforms. Many of these changes naturally align with corporate ESG policies, particularly those pertaining to forced labor and workers' rights. Nonetheless, all importers, but particularly those currently utilizing informal entry

processes and/or claiming the section 321 de minimis exemption, are encouraged to monitor these changes in the law and consider the impact to their business and ensure regulatory compliance and avoid potentially hefty penalties. Depending on a business's particular situation and needs, this may be achieved through the implementation of process and systems changes and the development or bolstering of internal procedures while keeping the specific requirements of the proposed laws in mind.



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