Statement of the E-Merchants Trade Council, Inc.

House Ways and Means Trade Subcommittee Hearing on Supporting U.S. Workers, Businesses, and the Environment in the Face of Unfair Chinese Trade Practices

December 16, 2021

On behalf of the E-Merchants Trade Council, Inc. (EMTC), I am Marianne Rowden, CEO of EMTC and respectfully submit this statement for the record. EMTC appreciates the opportunity to comment concerning the topics covered in the hearing on "Supporting U.S. Workers, Businesses, and the Environment in the Face of Unfair Chinese Trade Practices" held on December 2, 2021.

EMTC was formed in July 2021 to represent the interests of the e-commerce industry by creating a global community of micro, small and medium size enterprise (MSMEs) e-sellers, marketplace platforms, and service providers to resolve trade, tax and transportation challenges. EMTC's advocacy mission is to support national and international policies that simplify cross-border transactions of physical and digital goods. EMTC facilitates dialogue among the E-Merchant worldwide community and global regulators.

1. Trade Policy Concerning Unfair Chinese Trade Practices

EMTC applauds the Trade Subcommittee for holding this hearing on "Supporting U.S. Workers, Businesses, and the Environment in the Face of Unfair Chinese Trade Practices." We recommend that the Trade Subcommittee hold more hearings, roundtable discussions, and town hall meetings throughout the United States to receive testimony, comments and input from as many stakeholders as possible since the United States' trade relationship with China affects every segment of American society.

We understand that the Trade Subcommittee is concerned about the significant impact of China's myriad and ongoing unfair trade practices, and we do not underestimate the challenge posed by these policies and practices. However, EMTC has observed a trend that U.S. trade policy (and legislation) appears to be more China-centric rather than address changes in a dynamic global economy.

EMTC believes that any trade legislation seeking to counter China's unfair trade practices should modernize the administration of the customs laws of the United States to address the risks of trading with China by setting out the policy objectives of the legislation as the last major change to the Tariff Act of 1930, P.L. 71-361, 46 Stat. 490 (June 17, 1930), was the Customs Modernization Act enacted as Title IV of the North American Free Trade Agreement (NAFTA), P.L. 103-182, 107 Stat. 2057 (December 8, 1993). In 2020, the United States negotiated an updated agreement, the United States-Mexico-Canada Agreement (USMCA), to replace NAFTA. See, P.L. 116-113, 134 Stat. 11 (January 29, 2020).

Global trade volumes have increased and evolved since 1993, and the Congress has enacted a series of laws after the attacks of September 11, 2001, designed to balance the needs of the U.S Government to collect data for supply chain security and the need to facilitate legitimate trade. See, Trade Act of 2002, P.L. 107-210, 116 Stat. 933 (August 6, 2002); the Security and Accountability for Every (SAFE) Port Act of 2006, P.L. 109-347, 120 Stat. 1884 (October 13, 2006); Implementing Recommendations of the 9/11

Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (August 3, 2007); and the Trade Facilitation and Trade Enforcement Act of 2015, P.L. 114-125, 130 Stat. 122 (February 24, 2016). However, none of these laws were a holistic revision of the statutory framework that has been in place since the Tariff Act of 1930.

We understand that the primary subject of the Trade Subcommittee's hearing on December 2nd is countering China's unfair trade practices. To accomplish this, EMTC recommends focusing on creating a risk management framework that:

- increases supply chain visibility;
- supports trade facilitation by simplifying cross-border transactions given the competitive advantages this affords the U.S.; and
- targets risk management techniques to be introduced through entity-based risk management rather than an entry transaction-based system.

This type of regime would allow for a better assessment of the control environment which would be more effective in verifying the integrity of the supply chain, particularly for trade with China.

EMTC's recommendation is based on our experience with previous laws passed to increase visibility in the supply chain, such as the Lacy Act Amendments passed as part of the Food, Conservation, and Energy Act of 2008, P.L. 110-246, 122 Stat. 2952 (June 18, 2008) and Conflict Minerals included in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 111-203, 124 Stat. 2213 (July 21, 2010). Neither of these laws achieved their policy objectives. In the case of the Lacey Act Amendments, the most significant enforcement action was the criminal enforcement agreement against Gibson Guitar Corp. with a penalty of $300,000, $50,000 payment to the National Fish and Wildlife Foundation, and civil forfeiture of $261,844 worth of Madagascar ebony. In the case of the ban on importation of Conflict Minerals from Democratic Republic of the Congo, several companies instead found that their products contain North Korean gold. See, Dozens of Firms Report N. Korea Gold in Supply Lines, Wall Street Journal (June 4, 2014); Banned North Korean gold taints U.S. products reported in MarketWatch (June 5, 2014). Any U.S. law designed to keep certain commodities out of the U.S. ultimately fails because these are sourcing issues, rather than supply chain issues.

2. Section 321 *De Minimis* is Not a Tariff Loophole

EMTC is concerned about testimony presented to the Trade Subcommittee characterizing goods imported under 19 U.S.C. § 1321 as an informal entry for merchandise valued below $800 as a "tariff loophole."[1] EMTC believes that the better policy for U.S. leadership position is to get other countries to raise their *de minimis* threshold, as the U.S. accomplished in the USMCA, rather than to lower the U.S. *de minimis*.

a. Section 321 has been part of the statutory structure for a long time

Title 19 U.S.C. § 1321 on Administrative Exemptions has been part of the customs statute since the Tariff Act of 1930. Specifically, the *de minimis* threshold under 19 U.S.C. § 1321(a)(2)(C) for articles free of duty

[1] See, Testimony of Kimberly Glas, President & CEO, National Council of Textile Organizations submitted to the House Ways and Means Trade Subcommittee for the Hearing on Supporting U.S. Workers, Businesses, and the Environment in the Face of Unfair Chinese Trade Practices at 11. The testimony can be found at: https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Witness1KimGlasTestimony.pdf.

"in any other case" was initially set at $1 and periodically raised by Congress – first, to $5 in 1978, and $200 in 1993 as part of the Customs Modernization Act, Title IV of NAFTA.[2] Congress increased the *de minimis* to $800 recently in the Trade Facilitation and Trade Enforcement Act of 2015, P.L. 114-125, 130 Stat. 223. As these amendments demonstrate, Congress has raised the *de minimis* every few decades taking into account the erosion of purchasing power as a result of inflation. EMTC believes this level for *de minimis* is appropriate given reports of inflation at over 6% for 2021.

b. Congress made a deliberate policy choice in raising the *De minimis* in TFTEA

Rather than a "tariff loophole," raising the *de minimis* was a deliberate policy choice by Congress which specifically set out its findings for raising the *de minimis* to $800 in TFTEA:

> SEC. 901. *DE MINIMIS* VALUE.
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> (a) FINDINGS.—Congress makes the following findings:
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> (1) Modernizing international customs is critical for United States businesses of all sizes, consumers in the United States, and the economic growth of the United States.
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> (2) Higher thresholds for the value of articles that may be entered informally and free of duty provide significant economic benefits to businesses and consumers in the United States and the economy of the United States through costs savings and reductions in trade transaction costs.
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> (b) SENSE OF CONGRESS.—It is the sense of Congress that the United States Trade Representative should encourage other countries, through bilateral, regional, and multilateral fora, to establish commercially meaningful *de minimis* values for express and postal shipments that are exempt from customs duties and taxes and from certain entry documentation requirements, as appropriate.

H.R. Conf. Rep. No. 376, 114th Cong, 1st Sess. 103 (2015).

c. Congress should not engage in such policy reversals when MSMEs have relied on that policy to build and grow their business

We recognize that Congress has plenary authority to set trade policy and tax rates:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States

U.S. Const. art. I, § 8, cl. 1. However, EMTC is alarmed by the possibility of Congress revisiting *de minimis* and lowering the threshold under 19 U.S.C. § 1321(a)(2)(C) as such policy instability makes it very difficult for companies to plan when they have organized their business operations based on the $800 threshold level. It is precisely because Congress has only increased the *de minimis* threshold infrequently every few decades that makes the possibility of a change after only five (5) years from passage of TFTEA in 2016 greatly concerning to the trade community, particularly e-commerce marketplace platforms, e-sellers and companies that provide trade and transportation services to e-commerce companies.

[2] See list of legislative amendments for 19 U.S.C. § 1321 at https://uscode.house.gov/view.xhtml?path=/prelim@title19/chapter4&edition=prelim.

Since the passage of TFTEA in 2016, the trade community faced the prospect of lowering the *de minimis* threshold under 19 U.S.C. § 1321(a)(2)(C) twice. First, during the negotiation of the USMCA in 2019, the Administration negotiated to raise the *de minimis* threshold for imports to Mexico (to $117) and Canada (to $150), but included a footnote:

> Notwithstanding the amounts set out under this subparagraph, a Party may impose a reciprocal amount that is lower for shipments from another Party if the amount provided for under that other Party's law is lower than that of the Party.

USMCA Ch. 7 Customs Administration and Trade Facilitation, Article 7.8.1(f) Express Shipments, footnote 3 at 7-7.[3] As a result of the trade community's advocacy efforts, Congress wrote a letter to the U.S. Trade Representative stating:

> We strongly oppose any effort by the Executive Branch to lower the current $800 *de minimis* threshold through USMCA implementing bill, including any amendment to 19 U.S.C. 1321 that would grant the Executive Branch additional authority to decrease or eliminate the threshold.
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> The U.S. *de minimis* threshold is a policy recently set by Congress, which raised the threshold from $200 in 2016. The current *de minimis* threshold still enjoys wide bipartisan support in Congress and throughout the manufacturing, retail, logistics, and e-commerce landscapes. In our view, it is neither necessary, appropriate, nor desirable to change this policy in U.S. law as part of the implementation of USMCA's requirements. In fact, we consider that such an effort would amount to an override of Congressional authority by the Executive Branch, and thus would be entirely appropriate.

Letter from the Congress of the United States to Ambassador Robert E. Lighthizer, U.S. Trade Representative dated October 18, 2019.[4]

Second, in September 2020, CBP submitted a proposed rule "Excepting Merchandise Subject to Section 301 Duties from the Customs *De minimis* Exemption" to the Office of Management and Budget (OMB), posted in the Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions.[5] The proposal would have nullified Congress' policy decision to exempt merchandise valued less than $800 from customs duties by imposing duties on all goods subject to section 301 duties.

In January 2021, several trade associations submitted a letter to Treasury, OMB, and CBP opposing the proposed rule. Specifically, the trade associations asserted that:

> As explained herein, the commenters respectfully submit that CBP's proposed rule – which would adopt a categorical exception to the *de minimis* exemption that has the effect of eliminating entirely that exemption for all Section 301 entries – cannot be justified under

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[3] See https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/07_Customs_Administration_and_Trade_Facilitation.pdf

[4] See letter at: https://schweikert.house.gov/sites/schweikert.house.gov/files/2019-10-18%20de%20minimis%20threshold%20letter.%20Schweikert.%20Kind.pdf

[5] See the OMB Regulatory Review of the proposed rule at: https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=1515-AE57

existing statutory authority and would effectively nullify Congress's express desire to permit liberal entry of relatively small value goods. The rule would also upset well-settled market expectations and impose enormous costs and administrative burdens on American businesses, consumers, and the government itself that far outweigh whatever benefit CBP seeks from this proposal. It therefore represents bad policy.

Letter to Secretary of Treasury Steven Mnuchin, OMB Director Russell Vought, and Senior Official Performing the Duties of CBP Commissioner Mark Morgan.[6]

Based on the arguments put forward by the trade associations in its letter to the agencies, the proposed rule was withdrawn.

d. The administrative costs of filing formal entries on low value shipments will often exceed the declared value of the shipment making it uneconomical

An additional reason why Congress has periodically raised the *de minimis* threshold is that the administrative costs of CBP processing entries for such low value shipments outweigh any duties collected. Again, the trade associations opposing CBP's proposed rule "Excepting Merchandise Subject to Section 301 Duties from the Customs *De minimis* Exemption" cited this policy extensively:

> Whereas the statute identifies clearly the purpose of the *de minimis* exemption as "avoid{ing} expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected," the proposed rule would result in a substantial increase to the expense and inconvenience to the Government relative to the amount of duties collected. In particular, it is estimated that the Government would be responsible for processing entries for, and collecting import duties on, many hundreds of millions of additional packages per year.[4] This would require significant additional administrative expense that is simply not justified by the potential amount of additional duties collected on a per shipment basis for the entries that would be covered by the proposed rule.
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> In the lead up to TFTEA's passage, Congress noted specifically that increasing the value of the *de minimis* exemption would "simplify the customs entry process and offer significant benefits to CBP and the trade community" by inter alia "significantly reduc{ing} paperwork burdens for low value shipments."[5] Congress also found that maintaining the *de minimis* exemption level at $200 was "not practical, especially considering the government resources that would be freed up to focus on high-risk shipments."[6] In light of Congress's explicit consideration of governmental resources in increasing the *de minimis* threshold level to $800, it cannot be said that CBP's proposed exception, which would inarguably increase the Government's burden, is consistent with the principle of "avoid{ing} expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected."

[6] See letter at: https://aaei.org/wp-content/uploads/2021/01/AAEI-Multi-Association-Section-321-Comment-Letter.pdf

See Letter to Secretary of Treasury Steven Mnuchin, OMB Director Russell Vought, and Senior Official Performing the Duties of CBP Commissioner Mark Morgan at 8-9 (footnotes omitted).[7]

Administrative costs for processing low value shipments not only falls on the government, but also affects the private sector as well. Since formal entries require more paperwork, a customs bond, and other formalities, the cost/benefit analysis does not justify handling such shipments. These cost/benefit tradeoffs greatly affect direct-to-consumer (DTC) shipments that is the mainstay of the e-commerce industry which is predominantly comprised of micro and small-medium size enterprises. Complexity and costs are trade barriers to MSMEs engaging in global trade. Small businesses account for approximately 45% of the GDP, and employ nearly 50% of workers according to the Small Business Administration, Office of Advocacy.

e. Most *De Minimis* shipments enter through the postal service, which will continue to be a compliance challenge

EMTC would remind the Committee that more shipments are imported under the *de minimis* through the U.S. Postal Service than through commercial carriers. The foreign seller (or shipper) can make the decision to us the local postal service for a variety of reasons, including cheaper costs, fewer documentation requirements, simpler trade rules, and access to global networks through the Universal Postal Union agreements. Lowering the *de minimis* on commercial shipments only further disadvantages the commercial carriers, which offer greater data visibility, security controls, tracking services, and both internal and government partnership initiatives on stopping illicit goods. Therefore, EMTC strongly believes that Congress should not revisit lowering the *de minimis* level, as it would further harm those commercial actors providing the greatest level of support and partnership with the U.S. government in stopping illicit shipments.

3. Conclusion

In summary, EMTC believes that the Trade Subcommittee should carefully consider whether it is good policy to revisit the *de minimis* under 19 U.S.C. § 1321(a)(2)(C). We believe that a wiser policy would be for Congress to consider how to improve risk management in Customs Modernization legislation to replace the existing transaction-based system with an account-based system to connect all the entities in the supply chain and clearly define their regulatory responsibilities to CBP.

EMTC appreciates the opportunity to comment on the testimony presented at the hearing on Supporting U.S. Workers, Businesses, and the Environment in the Face of Unfair Chinese Trade Practices, and we are happy to discuss the ideas expressed above in more detail.

[7] See letter at: https://aaei.org/wp-content/uploads/2021/01/AAEI-Multi-Association-Section-321-Comment-Letter.pdf