The Honorable Steven T. Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Ave. N.W.
Washington, DC 20220

The Honorable Russell T. Vought
Director
Office of Management and Budget
725 17th St. N.W.
Washington, DC 20503

The Honorable Mark A. Morgan
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection
1300 Pennsylvania Ave. N.W.
Washington, D.C. 20229

Dear Secretary Mnuchin, Director Vought, and Mr. Morgan:

The trade associations listed below, representing a large majority of U.S. businesses, submit this letter in response to U.S. Customs and Border Protection's ("CBP") consideration of a rule that would abolish the *de minimis* exemption for *all* goods subject to tariffs under Section 301 of the Trade Act of 1974 ("Section 301"). The commenters, who represent U.S. businesses that are active throughout the U.S. supply chain, have a substantial interest in the *de minimis* exemption, which Congress required to be increased to the current $800 amount in 2016.

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 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.

On the basis that it is unlawful and will yield negative economic outcomes, the proposed rule should not move forward. However, to the extent that CBP proceeds despite these considerations, it must engage in a full vetting of the issues, including the costs and benefits of the rule and impacts on small businesses, in a notice-and-comment rulemaking.

Introduction

Section 321 of the Tariff Act of 1930 ("Section 321"), which Congress enacted and amended "in order to avoid expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected" from small-dollar value entries, does not permit CBP to effectively invalidate its provisions through the issuance of the proposed categorical exception for goods subject to Section 301 tariffs. Although the statute permits the Secretary of the Treasury to establish exceptions to the *de minimis* exemption under defined circumstances, these circumstances are clearly *not* present here.

Specifically, CBP's proposed rule is not consistent with the general administrative-cost-saving purpose of the statute, as it would substantially increase the expense and inconvenience to the Government in a manner that is greatly disproportionate to the increased revenue to be realized and frustrate the statute's stated purpose. Nor is it "necessary for any reason to protect the revenue or to prevent unlawful importations." There is nothing specific about the broad category of goods from multiple countries subject to Section 301 tariffs, as opposed to other categories of goods, that raises the specter of small-dollar value goods being used to circumvent U.S. law. Adopting such a categorical exception here would therefore be an invitation to completely eliminate the protections of Section 321 for all goods subject to its exemption. For these reasons, CBP cannot meet the requisite statutory criteria for promulgating the proposed regulation.

But, even more importantly, CBP's proposed rule is simply bad policy. In direct conflict with Congress's findings that increasing the *de minimis* exemption threshold to $800 would provide significant economic benefits to the United States, CBP's proposed rule would saddle U.S. companies, consumers, and the Government with enormous and unnecessary expense and administrative burden associated with importing relatively small-dollar value goods. Much of this burden will fall on micro, small-, and medium-sized enterprises, many of which rely on the *de minimis* exemption to stay afloat and can ill afford increases to the cost of doing business during a global pandemic and economically challenging times. If Congress decided it was good trade and economic policy to raise the *de minimis* threshold to $800, it surely would not have intended for that policy to be undermined by subsequently reducing that threshold for all goods subject to section 301 duties. That the average cost of importing a $50 package could literally more than double overnight would have crippling effects on many businesses and likely result in substantial job losses. There are no discernible enforcement prerogatives that could possibly justify such policy outcomes.

Moreover, it would be even more alarming if CBP were to move forward with a proposed rule with this level of economic impact without providing the affected public with a meaningful opportunity to be heard.[1] Thus, to the extent that CBP determines to proceed, it must provide public pre-publication notice and opportunity for comment. The Administrative Procedure Act ("APA") makes advance notice and comment the default rule, and CBP cannot demonstrate good cause to circumvent these critical protections in this case. This is not an instance in which notice and comment would be impracticable, unnecessary, or contrary to the public interest. There is no public emergency necessitating the issuance of such a drastic rule without input from the affected parties. Nor will delay result in any harm, let alone serious harm. Rather, the effective repeal of the *de minimis* exemption would constitute a far-reaching administrative action that would impose enormous costs on importers, retailers, and consumers. An action of such magnitude, which upsets the settled economic expectations of potentially millions of affected parties, should only proceed by notice and comment.

And, additional justifications demand that CBP's proposed rule – should it be published – be accompanied by the provision of notice and opportunity for comment. Executive Order 13771 sets a default policy that rules will not be issued unless they were included on the most recent version or update of the Regulatory Agenda. The ostensible aim of this policy is to provide maximum transparency and predictability for regulated communities and the public and to ensure that rules are not rushed through the interagency process without careful consideration of costs and benefits. However, this proposed rule did not appear on the Regulatory Agenda until the Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions was released on December 9, 2020 – some three months after the proposed rule was sent to OMB – with a targeted publication date of December 2020. Such a rushed sequencing circumvents the

[1] In the recently-published Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions, CBP indicates that it has not yet determined whether it needs to conduct a regulatory flexibility analysis for this rule. Such an analysis is required for NPRMs by the Regulatory Flexibility Act.

objectives behind EO 13771 to foster transparency in rulemaking. In addition, despite the fact that the proposed rule is clearly economically significant, the Office of Management and Budget ("OMB") has thus far declined to designate the proposed rule as such, in violation of Executive Order 12866. Under EO 12866, agencies must conduct cost-benefit analyses for economically significant rules.

Finally, adoption of the rule without notice and opportunity for comment would be patently unfair to U.S. importers who were lulled into not commenting on the imposition of Section 301 tariffs on their imported goods due to the existence of the *de minimis* exemption. Importers who deal largely in goods valued at or below the statutory $800 threshold likely did not participate in proceedings to impose Section 301 tariffs on categories of goods they import because the value of those goods meant they were exempt from Section 301 tariffs under the *de minimis* exemption. By now removing that exemption well after the fact, these importers have effectively been denied the opportunity to challenge the imposition of Section 301 tariffs on their goods. Should the Government consider removing the exemption, it is critical that it provide a mechanism to allow U.S. importers whose goods have heretofore not been subject to Section 301 tariffs at the current *de minimis* level the opportunity to comment on the application of Section 301 tariffs to their imports, consistent with basic principles of due process and equity.

CBP Cannot Meet Section 321's Exacting Standard in Excepting All 301 Entries from the *De Minimis* Exemption

CBP cannot satisfy Section 321's standard with its proposed rule to eliminate the *de minimis* tariff exemption applicable to goods valued at up to $800 for all goods subject to tariffs under Section 301. Section 321 permits targeted exceptions to the *de minimis* exemption, but it does not contemplate the blanket repeal of the exemption for *all* entries subject to Section 301.

Section 321 was amended by Congress in 2015 to increase the *de minimis* tariff exemption to cover goods valued at up to $800 (an increase from the previous $200 level).[2] Based on this amendment, Section 321 of the Tariff Act of 1930, as amended, reads, in relevant part:

> **(a)** The Secretary of the Treasury, in order to avoid expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected, is hereby authorized, under such regulations as he shall prescribe, to—
> …
> **(2)** admit articles free of duty and of any tax imposed on or by reason of importation, but the aggregate fair retail value in the country of shipment of articles imported by one person on one day and exempted from the payment of duty shall not exceed an amount specified by the Secretary by regulation, but not less than—
> …
> **(C)** $800 in any other case.
> …
> **(b)** The Secretary of the Treasury is authorized by regulations to prescribe exceptions to any exemption provided for in subsection (a) whenever he finds that such action is consistent with the purpose of subsection (a) or is necessary for any reason to protect the revenue or to prevent unlawful importations.

Based on these provisions, goods valued at up to $800 are exempt from the requirements of formal entry, which includes payment of import duties and fees. Such duties and fees include, for example, "normal" most-favored-nation duties, tariffs applied under Section 301, and merchandise processing fees.

CBP's proposed rule would essentially swallow the statute's rule, which increased the exemption to an amount "not less than" $800 for affected goods. Congress's increase of the minimum exemption level was accompanied by mandatory language, instructing that the Secretary of the Treasury ("Secretary") *shall* prescribe such regulations to "admit articles free of duty and of any tax imposed on or by reason of importation" for goods valued in an amount not

[2] *See* 19 U.S.C. § 1321(a), 19 C.F.R. § 10.151, Section 901(c) of the Trade Facilitation and Trade Enforcement Act of 2015 (P.L. 114-125) ("TFTEA").

to exceed an amount specified by the Secretary *but not less than $800*. Such language indicates that the Secretary is required to maintain regulations permitting the duty-free entry of goods valued at up to some amount at or exceeding $800. That $800 was set as the minimum threshold for import duty exemption suggests that Congress envisioned the "default" position of the statute to exempt all items valued at up to $800. And, Congress recently confirmed that the "U.S. *de minimis* level continues to enjoy broad support and *any changes to this level would need to be enacted by Congress*."[3]

CBP's proposed rule does just the opposite of that, and thus violates congressional intent. Because a majority of the goods valued at up to $800 that enter the United States are currently subject to Section 301 tariffs, CBP's proposed rule in effect eliminates the *de minimis* exemption for the precise category of goods that Congress aimed to cover with the exemption. As discussed further below, although the statute permits the Secretary to devise exceptions to the *de minimis* exemption prescribed by law under limited circumstances, the statute does not afford the Secretary the prerogative to effectively eliminate the exemption as to an entire category of goods, as the proposed rule would do. And, in any event, the limited circumstances that may permit an exception to the *de minimis* exemption are clearly *not* present here.

First, the large categorical exception provided in the proposed rule is not "consistent with the purpose of subsection (a)." 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

[3] S. Rept. 116-283.

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.

This conclusion is further supported by the fact that the statutory increase to the *de minimis* exemption threshold to $800, effectuated by Congress in TFTEA, was aimed, in large part, at further reducing the burdens borne by Government in administering the collection of duties for goods valued at up to this threshold amount. Congress quadrupled the minimum amount of the exemption based on its goal of enhancing the efficiency and cost effectiveness of the country's duty administration. 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}

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[4] U.S. Trade Representative Robert Lighthizer informed the Senate Finance Committee that in FY2018 and FY2019 there were a combined **1.2 billion *de minimis* shipments**.

[5] Report 114-114 to accompany H.R. 1907.

[6] *Id.*

expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected."

Further, there is no indication that the exception introduced in CBP's proposed rule would be "necessary for any reason to protect the revenue or to prevent unlawful importations." In particular, there is no indication that importers are somehow using entries valued at up to $800 to evade duties otherwise due, such that an exception to the *de minimis* exemption rule is required to "protect the revenue." Rather, the proposed rule would introduce a <u>new</u> revenue stream by expanding the scope of merchandise subject to formal entry and import duties. If that were enough to create an exception, the entire purpose of Section 321 would be a nullity.

Moreover, there is no indication whatsoever that all entries valued at up to $800 constitute "unlawful importations." There is no evidence that *de minimis* shipments are more susceptible to being a channel for illicit goods than higher value goods. And, in fact, splitting up a larger shipment into smaller pieces that can be entered as *de minimis* goods does not make sense from a cost perspective, since logistics costs will be multiplied by the number of shipments made.

It bears highlighting that the scope of the proposed exception itself – covering goods across thousands of tariff lines and from numerous countries subject to Section 301 tariffs both now and in the future – is inconsistent with the kinds of individualized determinations required by the statute to demonstrate the necessary conditions, discussed above, for an exception to the *de minimis* exemption. Indeed, it seems improbable, if not impossible, for CBP to demonstrate, for a scope as broad and ever-changing as would be covered by the proposed exception, that the exception is consistent with the purpose of "avoid{ing} expense and inconvenience to the Government disproportionate to the amount of revenue that would otherwise be collected" and "necessary for any reason to protect the revenue or to prevent unlawful importations." And even if the proposed rule did not cover all goods subject to Section 301 duties but rather large categories of goods within the scope of Section 301 – for example, all goods from a subset of countries or many hundreds of tariff lines from one or more countries – without the individualized determinations required by the statute, the rule would be equally problematic. Based on the requirements for an exception to the *de minimis* exemption, CBP has every reason to consider less drastic and more tailored alternatives to the proposed rule.

Should CBP proceed with this proposed rule and eliminate – categorically – the *de minimis* exemption for all goods subject to Section 301 tariffs, there is little to stop the agency from doing the same with respect to any other blanket category of goods. Congress did not mandate an exemption scheme and then quadruple the value of exempted goods, only to see the statutory exception it provided swallow the exemption whole by administrative regulation. For these reasons, the proposed rule to create an exception for goods subject to Section 301 tariffs would raise serious questions regarding the authority of CBP to act under Section 321 of the Tariff Act of 1930, as amended.

CBP's Proposed Rule Would Be Economically Devastating For Micro and Small- and Medium-Sized Enterprises and Provide No Discernible Enforcement Benefits

CBP's rule would also upset the settled expectations of the marketplace and give rise to substantial increases in costs for importers, shippers, and American consumers at a time when many are seeking to dig out from the unforeseeable and often crippling costs of a global pandemic and accompanying economic downturn.

It is estimated that the impact of the proposed rule on the express industry alone would be at least $400 million annually, with other companies and associations estimating annual impacts on them of between $140 million and $1.5 billion. Much of this additional cost and paperwork burden will fall on the shoulders of micro and small- and medium-sized enterprises ("MSMEs"). These businesses, many of which are struggling to survive in the midst of the pandemic, can ill afford such additional increases to the cost of doing business. In fact, many MSMEs rely on the *de minimis* exemption to stay afloat. For this reason, prior to the passage of TFTEA in 2016, Congress found that "*modernizing international customs is critical for United States businesses of all sizes, as well as consumers and the economic growth of the United States and that higher thresholds for the value of articles that may be entered informally and free of duty provide significant economic benefits to the United States*."[7]

To illustrate, under Section 321, there are no additional costs incurred when an MSME imports a package valued at $50. However, under the proposed rule, that same $50 package would, on average, be subject to duties and fees upwards of $60, more than the cost of the goods themselves. These include:

(1) MFN duties (average 2%) of $1.00;

(2) Section 301 duties (up to 25%) of $12.50;

(3) a Merchandise Processing Fee of $27.23; and

(4) a Broker Fee of $20.

Accordingly, a package that would have cost $50 to import would now cost $110.73, or over 120% more. In a November 5, 2020 letter to OMB Administrator Ray, the American Association of Exporters and Importers estimated that there are approximately 4.6 million MSME sellers using e-commerce platforms and retailers that sell physical products in the United States. If each of them were to import just one $50 package per year, the aggregate additional costs associated with importation that would be imposed by the proposed rule would amount to

[7] Report 114-45 to accompany S. 1269.

$279,358,000. And again, this is based on just one package per company. <u>The actual impact is likely to be much greater</u>.

Importantly, some of the goods – specifically, those valued at up to $200 – that would be subject to import duties under the proposed rule will have never been subject to formal entry and import duties since, even prior to the increase in the *de minimis* threshold through TFTEA, these goods were exempt. To encumber companies with such imports with potentially massive increases in the cost of doing business during these economically challenging times makes little if any sense. And, considering that some of these companies import personal protective equipment and hand sanitizer, and that these companies may need to increase the cost of such goods to compensate for the increased costs of these imports, the proposed rule will also hurt vulnerable consumers.

In addition to harming businesses and consumers, the proposed rule would pose serious enforcement issues for CBP. Specifically, the change is likely to have the perverse and unintended impact of leading shippers to utilize post, as it will be the path of least enforcement resistance. And, due to the sheer volume of shipments and lack of foreign post compliance with requirements to provide advance electronic data, it will be significantly more difficult for CBP to enforce this rule in the postal environment than express. Accordingly, the proposed rule will further diminish CBP's ability to enforce relevant laws.

To the extent that CBP's goal concerning the proposed rule is to combat customs fraud and/or collect additional data on imports, other mechanisms are available to the agency that are more tailored to, and more effective in, addressing this goal. Of course, it is <u>already a crime</u> to commit customs fraud, and American companies also want to ensure that they are not disadvantaged by those who don't play by the rules. These conditions foster an environment of monitoring and compliance among private firms. Moreover, in the process leading up to the passage of TFTEA, Congress found that the amendment to increase the *de minimis* exemption value to $800 would "not have a negative impact on security, as manifest information is required for all shipments, regardless of value. Manifest information for each shipment is analyzed for security threats and subject to CBP risk assessment and targeting prior to arrival in the United States. … {B}ecause 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."[8]

Moreover, CBP has a robust targeting system to detect fraud and attempts to enter illicit goods, regardless of the value of the shipment. Whenever CBP has any doubt about the legitimacy of a shipment, a simple request to the express carrier will result in all available information on the shipment being provided electronically, to include purchase orders, invoices, and other logistics documents. Once a shipper is caught engaging in fraud or other illegal activities, the shipper will immediately be placed on CBP's high risk list and be required to undergo formal entry for each of its shipments. To enhance its information gathering capabilities, CBP has even launched a Section 321 Data Pilot to collect additional data on shipments arriving by air, ocean, truck, or rail that will enable CBP to "perform more effective and efficient targeted screening" with the goal of interdicting illicit and dangerous products from entering the United States.[9] Industry is working closely with CBP in that pilot project to ensure that CBP gets access to actionable data from the appropriate parties.

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[8] Report 114-114 to accompany H.R. 1907.

[9] *See* https://www.cbp.gov/newsroom/national-media-release/cbp-and-trade-partners-are-taking-action-secure-ecommerce-supply.

Finally, to the extent that CBP is concerned about counterfeit and IP-infringing goods, there are much more suitable ways to address these challenges than halting the importation of low-value shipments all together, an approach which is both draconian and misguided. Rather than potentially cutting off billions of dollars' worth of trade with American businesses and consumers by making imports cost-prohibitive, CBP and the Administration could work with Congress to reform laws related to copyright and trademark infringement and strengthen CBP's enforcement capabilities and resources focused on identifying and stopping illegal shipments.

Based on the above, there are simply no enforcement objectives that would be better served by CBP's proposed rule than laws, mechanisms, and other tools that either are already available to the agency or could be by developing new tools in partnership with Congress. For these reasons, CBP's proposed rule constitutes a series of policy missteps that should be avoided for the benefit of private enterprise, especially MSMEs, vulnerable consumers, and government enforcement efforts.

Should CBP Proceed With the Proposed Rule It Must Provide Notice and Opportunity for Comment

Should CBP proceed with the proposed rule, despite its inconsistency with Section 321 and accompanying negative policy consequences, as discussed above, CBP must provide notice and opportunity for comment.

The Administrative Procedure Act makes advance notice and comment the default rule.[10] There is no specific statutory authority that would permit Treasury and CBP to proceed without advance notice and a reasonable period for public comment. First, the proposed changes to the *de*

[10] 5 U.S.C. § 553.

minimis rule do not touch on the "foreign affairs function of the United States" within the meaning of 5 U.S.C. § 553(a)(1). The foreign affairs function exception "is quite narrow."[11] Courts have concluded that the foreign affairs exception does not apply to "routine change{s} to the tariff rates imposed on imported goods by the United States," which do not "involve diplomatic functions, military functions, or other sensitive areas of foreign policy."[12] In this specific context, that means that changes to a de minimis tariff rule do not fall within the foreign affairs exception to Section 553's notice-and-comment requirement.[13] Therefore, the only possible avenue for dispensing with notice-and-comment rulemaking is the APA's "good cause" exception , which provides that an agency can do so only if it explicitly finds (and states in writing its reasons for finding) that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[14] This "good cause" exception "is to be narrowly construed and only reluctantly countenanced."[15]The use of these exceptions should be limited to truly "emergency situations."[16]

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[11] *Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255, 1289 (Ct. Int'l Trade 2019; *see id*. at 1289–90.

[12] *Id*.

[13] *See Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 634 F. Supp. 419, 423 (Ct. Int'l Trade 1986) ("A de minimis rule would not 'clearly and directly' involve a 'foreign affairs function' under section 553(a)(1)."); *NEXTEEL Co. v. United States*, 355 F. Supp. 3d 1336, 1356 (Ct. Int'l Trade 2019) ("The de minimis standard need{s} to be promulgated in accordance with the notice and comment provisions of the Administrative Procedure Act").

[14] 5 U.S.C § 553(b)(B).

[15] *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012). The narrow statutory circumstances permitting emergency regulation are exceptions are "not 'escape clauses' that may be arbitrarily utilized at the agency's whim." *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

[16] *Id.*; *see also Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) ("The exception excuses notice and comment in emergency situations, or where delay could result in serious harm").

As a general matter, effective repeal of the *de minimis* exemption is a far-reaching administrative action that, based on our estimates, could impose billions of dollars in costs on importers, retailers, and the buying public. Countless affected parties have set up importation mechanisms and their sales and marketing in reliance on the current *de minimis* rule. Indeed, the *de minimis* rule has existed for some <u>90 years</u> – introduced in the Tariff Act of 1930 – and has been subject to only occasional Congressional enhancements, most recently being increased to the current $800 threshold by Congress just five years ago. Changes to this longstanding scheme should not be undertaken without providing affected parties an opportunity to fully apprise the Administration of the impact of repealing the *de minimis* rule for Section 301 entries.

As a legal matter, the proposed rule does not – and cannot – satisfy the statutory good cause criteria. Notice and comment are not "impracticable" in this case. "{A} situation is 'impracticable' when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required" in 5 U.S.C. § 553(b)."[17] "{D}eadlines in and of themselves do not generally provide a basis for invoking good cause on the ground of impracticability."[18] This is especially true of self-imposed, artificial deadlines for action. Courts regularly conclude that an "emergency of the [government's] own making" does not constitute good cause.[19] Thus, a change in administration is insufficient, in itself, to invoke good cause**.** That

[17] *See* Attorney General's Manual on the Administrative Procedure Act at 30.

[18] *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1381 (Fed. Cir. 2017); *Woods Psychiatric Inst. v. United States*, 20 Cl. Ct. 324, 333 (1990), aff'd, 925 F.2d 1454 (Fed. Cir. 1991) ("Nor does the mere existence of deadlines for agency action, . . . by itself, constitute good cause to circumvent the rulemaking procedures").

[19] *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004); *see also Levesque v. Block*, 723 F.2d 175, 184 (1st Cir.1983) (concluding imminence of self-imposed deadline did not qualify as good cause to dispense with notice-and-comment before issuing final rule); *Council of the S. Mtns.*,

the proposed rule will cover all goods subject to Section 301 duties also strongly suggests that the true purpose of the rule is not to address an emergency but rather to undermine the *de minimis* exemption.[20]

Nor could the Administration find that notice and comment is "unnecessary" in this case. The "unnecessary" exception is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."[21] The regulatory impact of an effective repeal of the *de minimis* rule is substantial here, both in terms of the number of imports affected and the sheer dollar impact of the change. There is nothing routine about this proposed change.

And likewise, the "public interest" exception could not be satisfied in this case. That exception "is met only in the rare circumstance when ordinary procedures – generally presumed to serve the public interest – would in fact *harm that interest*."[22] Notice and comment would serve a critical public function here: to allow the government to make a decision that is fully informed by the significant impact of the change. Not only is the public interest exception not implicated

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Inc. v. Donovan, 653 F.2d 573, 581 (D.C.Cir.1981) (noting, among other things, that circumstances creating exigency "were beyond the agency's control").

[20] This reasoning would be equally valid even if the proposed rule did not cover all goods subject to Section 301 duties, but rather large categories of goods within the scope of Section 301, without requiring individualized determinations to be made.

[21] *Mack Trucks*, 682 F.3d at 94 (quoting *Util. Solid Waste Activities Grp.*, 236 F.3d at 755). *See also* Attorney General's Manual on the Administrative Procedure Act at 30 ("'Unnecessary' refers to the issuance of a minor rule or amendment in which the public is not particularly interested").

[22] *Mack Trucks*, 682 F.3d at 95; id. ("The question is not whether dispensing with notice and comment would be contrary to the public interest, but whether providing notice and comment would be contrary to the public interest"). *See also* Attorney General's Manual on the Administrative Procedure Act at 30 ("'Public interest' connotes a situation in which the interest of the public would be defeated by any requirement of advance notice").

here but, quite the contrary, it is very much in the public interest to permit a reasonable time for public comment on such a significant rule. It should not be rushed.

Dispensing with notice and comment would also permit CBP to avoid preparing a regulatory flexibility analysis, which is a basic requirement of notice-and-comment rulemaking. Section 603(a) of the Regulatory Flexibility Act provides that:

> "{w}henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities."

Failure to undertake an analysis of the rule's impacts on small entities would deprive CBP of a complete understanding of the costs of the rule on small businesses and consumers. Because the proposed rule would have a large negative impact on potentially millions of American micro-enterprises and small businesses, it is critical that the Administration conduct an initial regulatory flexibility analysis as part of the process for developing a proposed rule. Such an analysis would, no doubt, provide further evidence that the rule would hurt millions of small businesses in the midst of a global pandemic and not otherwise be justified. Rushing the issuance of the rule would deprive the public of this critical analysis, which would further expose the costs and flaws of CBP's proposed approach.

Additional Justifications Demand the Provision of Notice and Opportunity for Comment Should CBP Proceed With the Proposed Rule

Given the significant economic impacts of the exception being contemplated, the Administration should take its time and conduct a careful and robust analysis as it determines whether to propose a rule. In addition to adhering to the requirements of the APA and Regulatory Flexibility Act, discussed above, additional justifications demand the provision of notice and opportunity for comment should CBP proceed with the proposed rule.

First, CBP did not provide advance notice of this proposed rule to the trades, other supply chain actors, and the general public. While CBP sent the proposed rule to OMB on September 2, 2020, the rule did not appear on the Regulatory Agenda until the *Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions* was released by OMB on December 9, 2020, with a targeted publication date of December 2020. Under Executive Order 13771, the default policy is that rules will not be issued unless they were included on the most recent version or update of the Agenda.[23] This policy is meant to provide maximum transparency and predictability for regulated communities and the public and to ensure that rules are not rushed through the process without careful consideration of costs and benefits. Given current circumstances – including CBP's stated intent to issue the proposed rule in December – placing the proposed rule on the Agenda more than three months after CBP sent the rule to OMB for review and during the same month that CBP proposed to issue the rule clearly circumvents the objectives of the policy behind EO 13771. It also suggests an intention to rush the rule through to completion without undertaking the analysis that would normally be required under OMB procedures, as discussed further below.

Fast-tracking this particular rule without following normal procedures would be particularly problematic due to the massive economic impacts, discussed above, and which in and of themselves raise a second procedural irregularity. The proposed rule is clearly economically significant pursuant to OMB's rules. Yet, OMB has thus far declined to make the appropriate designation of economic significance.

Under Executive Order 12866, if the annual effect of a significant proposed regulatory action on the U.S. economy is likely to be $100 million or more "or adversely affect in a material

[23] Executive Order 13771 – Reducing Regulation and Controlling Regulatory Costs (February 3, 2017), section 3(c).

way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities," the agency is required to conduct a cost-benefit analysis to inform decision-making.[24] Given the data presented in this letter and by other stakeholders over the past few months, OMB should reverse its initial determination on economic significance,[25] designate the proposed rule as economically significant, and require CBP to conduct a thorough cost-benefit analysis as it contemplates a potential rule that would accompany any proposed rule the agency may issue for public comment. We are confident that such an analysis will reveal that any benefits of such a rule would not justify the costs, and that the rule would be bad policy and should not move forward.

Additionally, there are other due process considerations that demand CBP provide notice and opportunity for comment should it proceed with the proposed rule. Specifically, the Government has recognized that the proposed imposition of Section 301 tariffs on imports requires advance notice and opportunity for comment.[26] However, many of the companies whose imported goods would be subject to Section 301 tariffs (among other duties and fees) under the proposed rule had no reason to provide comments when the Government initially proposed such duties since, at the time, Section 301 tariffs did not apply to goods valued at up to $800. In recent years, the Government has proposed and/or applied Section 301 tariffs in response to a range of alleged

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[24] Executive Order 12866 – Regulatory Planning and Review (September 30, 1993), sections 3(f)(1) and 6(a)(C).

[25] *See* https://www.reginfo.gov/public/do/eoDetails?rrid=131074.

[26] *See, e.g.*, *Notice of Determination and Request for Comments Concerning Action Pursuant to Section 301: France's Digital Services Tax*, 84 Fed. Reg. 66,956 (December 6, 2019), *Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 14,906 (April 6, 2018).

foreign country actions, from China's practices related to technology transfer, IP, and innovation and Europe's subsidization of Airbus, to France's digital services tax and Vietnam's undervaluation of its currency, among others.

For CBP to now deny affected companies notice and opportunity to comment on the application of Section 301 tariffs to their imported goods would amount to a patent injustice and deprive these companies of basic due process. Accordingly, should CBP proceed with the proposed rule, it should ensure that the Government provides a mechanism that permits these affected companies with an opportunity to provide comments on inclusion of specific HTS subheadings and products within the scope of particular Section 301 actions.

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We thank you for considering carefully our concerns regarding CBP's proposed rule. Should you have any questions or concerns about the content of this letter, please do not hesitate to contact the undersigned.

American Association of Exporters and Importers
Coalition of Services Industries
Express Association of America
Information Technology Industry Council
Internet Association
National Retail Federation
U.S. Chamber of Commerce

Cc:

Michael R. Pence, Vice President of the United States
Larry Kudlow, Director, National Economic Council
Ambassador Robert E. Lighthizer, U.S. Trade Representative
Jovita Carranza, Administrator, Small Business Administration
Paul J. Ray, Administrator, Office of Information and Regulatory Affairs, Office of Management of Budget