International Trade Alert

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The New United States-Mexico-Canada Agreement (USMCA) Raises Canada's and Mexico's De Minimis Thresholds, but the Reciprocal Treatment Provision Poses Risks to U.S. Express Carriers and Consumers

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Key Points

- The new United States-Mexico-Canada Agreement (USMCA) would increase Mexico's and Canada's de minimis thresholds for express shipments to $117 USD and $150 CAD for duty-free entry, respectively, and $50 USD and $40 CAD for tax-free entry, respectively.
- Even with the increases, the new thresholds are significantly lower than the current U.S. de minimis of $800 USD.
- The new agreement would also permit the United States to decrease its $800 threshold to a reciprocal de minimis amount for express shipments imported from Mexico or Canada, in an amount that is no greater than the Mexican or Canadian threshold. Evidently, the United States wants this tool to entice Canada and Mexico to raise their thresholds since shipments from other countries into the United States enjoy the benefits of the higher $800 de minimis.
- If indeed the United States decides to lower its de minimis threshold to an amount that is no greater than that of Mexico or Canada, the result would be higher costs to consumers and more regulatory barriers for the express carriers that most frequently use de minimis clearance on behalf of their customers.

Under the recently-signed USMCA, Canada and Mexico would increase their de minimis levels, although the new thresholds do not come close to the U.S. $800 de minimis, which some interested parties wanted Mexico and Canada to match. Under Article 7.8 of the USMCA, the three countries have agreed that "under normal circumstances, no customs duties or taxes will be assessed" on "express shipments of a Party valued at or below a fixed amount set out under the Party's law." The fixed amounts include:

- For the United States, $800 USD

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- For Mexico, $117 USD with respect to customs duties and $50 USD with respect to taxes
- For Canada, $150 CAD with respect to customs duties and $40 CAD for taxes.[1]

If enacted, the changes should have a notable and positive impact on cross-border e-commerce transactions.[2] Canada has not updated its de minimis since 1985, and its current $20 CAD de minimis is one of the lowest de minimis amounts in the world.[3] Mexico also holds a low de minimis level of $50 USD. These updates would double the value threshold at which U.S. express shipments entering both countries could qualify for duty exemptions. As such, some commentators, including the Office of the United States Trade Representative (USTR), are labeling the change a win for business and consumers.[4]

However, others may view the result with a skeptical eye. Although the levels would rise, Canada and Mexico are going to maintain thresholds at a fraction of the $800 level at which shipments, subject to some exceptions, enter the United States without payment of duty or tax. Reportedly, U.S. negotiators proposed a $800 de minimis level for all three countries, but retailers in Canada lobbied against it. They argued that agreeing to a $800 de minimis threshold for duty- and tax-free entry would create an unfair playing field because Canadian merchants would have to collect sales tax on the products that they sold in Canada, while competing imported goods could enter the Canadian marketplace without any payment of duty or tax, thereby giving the e-commerce providers a price advantage.[5]

In addition, express shipments entering the United States from Canada or Mexico may not enjoy the benefits of a $800 de minimis level anymore. A footnote in the Article provides that each country may impose on another Party's express shipments "a reciprocal amount" that may be as low as the amount set forth in the other Party's domestic law. In other words, if Canadian law only allows for a de minimis threshold of $150 CAD for duty-free treatment, the United States can impose the same threshold against express shipments coming into the United States from Canada. Sources have indicated that USTR Ambassador Lighthizer is not pleased with Canada's and Mexico's refusal to match the United States' threshold and that, with the reciprocal treatment language, USTR is giving the countries an option—raise their de minimis thresholds or the United States will decrease its de minimis level towards them. To enact such a restriction, Congress would most likely need to provide for a statutory change during the implementation of the agreement, unless USTR and U.S. Customs and Border Protection ("CBP") rely aggressively on the authority in the de minimis statute that allows the agency to prohibit de minimis clearances when it is consistent with the purposes of the statute, there is a risk to the revenue, or for import admissibility purposes.[6]

This new reciprocal floor, which is actually lower than the $200 de minimis level that the United States had from 1993-2016, poses several concerns if implemented.[7] It would lead to more duties and taxes on low-value goods, costs that ultimately would fall on the consumer. The e-commerce and express carrier industries would lose the high de minimis threshold, for which they lobbied for several years and on which they heavily rely, with respect to two of the United States' biggest trading partners. Plus, express carriers would have a new operational and compliance challenge on their hands, as they would have to administer multiple de minimis levels on incoming express shipments while CBP would be in a position to enforce compliance and

impose penalties. These types of country-specific changes would significantly impede the U.S. importing community's ability to facilitate trade and use trade facilitative mechanisms—like de minimis—when they can. It would also mean higher costs to consumers and businesses, who could otherwise use de minimis to save money. In all, the changes, while positive to some degree, carry negative implications.

The extension of *de minimis* under the USMCA has other limitations, although they are not unique as they already exist under U.S. law. The text clarifies that shipments shall not qualify for the exemption if they are carried out to evade duties or taxes (i.e., improperly split into several, low-value shipments) or avoid applicable regulations. As noted above, U.S. law has similar restrictions on the use of *de minimis* (e.g., certain articles subject to other government agency requirements (U.S. Food and Drug Administration, etc.) and shipments which are separated into several lots from one order/contract for the express purpose of securing free entry do not qualify) and, in recent times, CBP has more aggressively enforced these limitations. In addition, the statement that the parties shall provide for the use of *de minimis* under "normal circumstances" indicates that the three countries would hold some discretion regarding what shipments/articles are "normal" and may enter under *de minimis* treatment. For example, under current U.S. law, CBP has exempted certain articles, such as alcoholic beverages, cigars and cigarettes containing tobacco, from the *de minimis* exception.

All in all, while many sources are touting the USMCA de minimis agreement as a win for trade, it has potential costs – at least in the short term until Mexico and Canada both raise their de minimis thresholds to $800. If the United States decides to implement reciprocal treatment, it would hurt U.S. consumers, who would have the extra duties and taxes passed onto them, and express carriers, since they rely on the higher threshold to facilitate express shipments on behalf of their customers. Of course, the United States could continue to employ the $800 threshold for Mexico and Canada, but we suspect that the administration might use it as a mechanism to force Canada's and Mexico's hand.

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[1] See USTR, United States-Mexico-Canada Agreement Text, Chapter 7, Customs and Trade Facilitation, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/07%20Customs%20%20and%20Trade%20Facilitation.pdf (last visited on Oct. 24, 2018).

[2] *In addition to the change in de minimis threshold, Article 7.8.2 provides that each "Party shall adopt or maintain procedures that apply fewer customs formalities than those applied under formal entry procedures, to shipments valued at less than $2,500, provided that the shipments do not form part of a series of importations […]." This change is another win for the trade community, as it means that all three countries have to maintain informal entry procedures.*

[3] See Katie Dangerfield, *Canada's duty-free limits may change with the new NAFTA deal – here's how*, available at https://globalnews.ca/news/4413587/canada-duty-free-limits-nafta/.

[4] *Office of the U.S. Trade Representative, United States-Mexico-Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement, available at* https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/october/united-states–mexico–canada-trade-fa-1*; See id.*

[5] *Retail Council of Canada, De Minimis: Ensure a level playing field for retailers in Canada, available at* https://www.retailcouncil.org/levelplayingfield.

[6] *See 19 U.S.C. Section 1321(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 to protect the revenue or to prevent unlawful importations.").*

[7] *See 19 U.S.C. Section 1321(a), as enacted in 1993 (North American Free Trade Agreement Act, P.L. 103-182) and 2016 (Trade Facilitation and Trade Enforcement Act of 2015, P.L. 114-125).*