



Statement of the E-Merchants Trade Council, Inc.

Customs Modernization Act of 2021 “Discussion Draft”

November 18, 2021

The E-Merchants Trade Council, Inc. (EMTC) appreciates the opportunity to comment on the “Discussion Draft” of the Customs Modernization Act of 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. Policy Objectives: What is Customs Modernization?

EMTC believes that any legislation seeking to modernize the administration of the customs laws of the United States needs to set out any changes in 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. EMTC cites these statutes to highlight the importance for Congress to state the policy objectives of the legislation.

We understand that the primary policy objectives of the Customs Modernization Act of 2021 are to prevent trade-based money laundering, increase supply chain visibility and to provide enhanced protection against intellectual property violations. Congress should address a more fundamental policy objective of “what is customs modernization?” EMTC believes the policy objective of customs modernization should be to support trade facilitation given the competitive advantages this affords the US, and for targeted risk management techniques to be introduced through entity-based risk

management rather than an entry transaction-based system. This would allow for a better assessment of the control environment which would be more effective in verifying the integrity of the supply chain.

EMTC's recommendation is based on our experience with previous laws passed to increase visibility in the supply chain, such as the Lacey 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. Customs Modernization Requires a New Statutory Framework

Too many customs administrations focus on revenue protection through a transaction-based system for each shipment of goods that crosses the border for importation. Customs duties are indirect taxes levied on shipments, where certain elements are required to be provided at a certain period in time to assure finality (e.g., description, HTS classification, declared value, quantity). However, it's arguable if this is effective as a means of managing all the interventions that happen at the border including money laundering or IPR infringement given there is no review of the control environment nor the likelihood of the entity to manage risk effectively with a view to producing accurate determinations/entries.

Although CBP has moved to a partial account-based management system for the largest traders (e.g., the top 1,000 importers) through its Centers for Excellence and Expertise (CEEs) organized by industry, each importation stands on its own as a separate entry or declaration serving as a basis for compliance purposes – that is, CBP may take administrative action on each and every entry.

In order for true account-based management to garner administrative efficiencies and economies of scale, the indirect tax regime needs to resemble the direct tax regime, and it needs to be redesigned to accommodate micro and small-medium size enterprises (MSMEs) and their cross-border business. For example, in the direct tax regime, MSMEs pay taxes periodically and send employee withholdings with a final reconciliation by filing a tax return at the end of the calendar or fiscal year. Legal authority for a reconciliation program currently exists to allow importers to file entries with the best available information. EMTC believes that Congress should adopt a similar regime for indirect tax by replacing 19 U.S. § 1484 (Entry of Merchandise) with a statute that:

- authorizes CBP to create an account for all Importers of Record (IOR), Licensed Customs Brokers (LCBs), and any other entity making a declaration for the importation of merchandise (e.g., e-commerce marketplace platform, non-resident importer) into the United States;
- permits the filing of a security filing under 19 C.F.R. § 149.1 for the release and entry of merchandise provided that the IOR, LCB or declarant satisfies customs bond requirements to protect the revenue of the United States; and

- allows the filing of a periodic statement or tax return on a monthly or quarterly basis, depending on CBP’s risk assessment of the entity, with a reconciliation of any import transactions (maintained by the filer in a ledger) occurring during the period covered by the statement.

For MSMEs who import merchandise through e-commerce marketplace platforms and utilize the Administrative Exemptions (*de minimis*) under 19 U.S.C. § 1321, EMTC recommends that Congress create a simplified process that includes:

- an E-commerce Center for Excellence and Expertise to manage the accounts of MSMEs, e-commerce marketplace platforms, freight forwarders, and other entities participating in shipments under section 1321.
- an account-based management system that is applied to a defined supply chain rather than a single entity in the supply chain.
- private sector data management systems that utilize the most appropriate secure technology to maintain, store and make the right data available to CBP and PGAs which is relevant for risk assessment of admissibility and compliance. This would follow the pattern of previous customs legislation with balanced provisions (*e.g.*, the Trade Act of 2002). A provision for the use of Machine Learning (ML) and Artificial Intelligence (AI) as acceptable methods for making Customs decisions in areas including but not limited to classification and origin.
- a “trusted trader” program based on ISO-type e-commerce certification covering the entities in the defined supply chain account based on three (3) levels of risk depending on the participants’ role in the supply chain to be used when seeking simplified process under section 1321.
 - Low Risk: where the seller, the buyer and other entities (*e.g.*, e-commerce marketplace platforms, freight forwarders, carriers) are all certified “trusted traders.”
 - Medium Risk: where the seller, the buyer and other entities (*e.g.*, e-commerce marketplace platforms, freight forwarders, carriers) are “known” entities and have a profile in the E-Commerce Center for Excellence and Expertise based on previous shipments.
 - High Risk: where the seller, the buyer and other entities (*e.g.*, e-commerce marketplace platforms, freight forwarders, carriers) are “unknown” entities with no profile in the E-Commerce Center for Excellence and Expertise and the merchandise is regulated by a PGA.
- permits merchandise regulated by federal agencies who participate in the International Trade Data System under 19 U.S. C. § 1411 (electronic data interchange system or “single window”) to be imported under simplified processes in section 1321 provided such merchandise is certified on a periodic basis by CBP and the Participating Government Agency (PGA) regulating that merchandise so that products under the same HTS and PGA rule are covered.
- a supply chain risk management system whereby:

- a barcode is applied to packages primarily for tracking and tracing. Some barcodes may include additional information indicating approved participants, product and assigned risk;
- the barcode is scanned at time of import or export to identify anomalies against actual physical shipment presented; and
- any change to the defined elements requires a new barcode.

3. Areas of Concern Regarding Discussion Draft

Under the current Discussion Draft of the Customs Modernization Act of 2021, EMTC believes that there are a number of proposed statutory changes that are problematic from a legal and/or operational perspective:

- 19 U.S.C. § 1321: The bill would focus some of these new authorities on low-value shipments in particular, allowing CBP to undermine the benefits of *de minimis* clearance without actually altering the current \$800 threshold. In fact, the bill would give CBP the authority to turn the current U.S. import process on its head by making *de minimis* shipments more onerous to clear than formal entries.

CBP will have a very difficult time dealing with the scale of shipments if companies have to submit information to CBP to determine whether a product is eligible for *de minimis*.

- The bill defaults to the “intermediary model” for regulatory compliance by expanding liability to the market platforms as “agents” without clearly defining their regulatory responsibilities within the statutory scheme, pulling every entity in the supply chain through data submissions (or data availability to CBP) and recordkeeping. A transaction-based system will not work due to the scale of e-commerce, and we need to envision an account-based risk model scaled appropriately for e-commerce.
- 19 U.S.C. § 1415: Allowing CBP to use the Importer Security Filing (ISF) or the Air Cargo Advanced Screening (ACAS) data (promulgated under 19 C.F.R. § 122.48) for security purposes was a compromise reached between the trade community and CBP under the SAFE Port Act as U.S. importers do not necessarily generate the data used for the ISF (i.e., it is generated by the foreign manufacturer, foreign seller, exporter or other unrelated third-party). Therefore, importers should not be penalized for data outside their control, especially since the data may change between the filing of the ISF and the customs entry.

However, we have concerns about the use of ISF data currently submitted under 19 U.S.C. § 1415 “prior to the arrival or departure of the cargo” beyond general admissibility purposes as it is collected by CBP precisely because it is “reasonably necessary to ensure cargo safety and security pursuant to those laws enforced and administered by the Customs Service”. 19 U.S.C. § 1415(a)(1) and (2). If the ISF data is used as the release filing for admissibility, as suggested above, it can be used for any “lawful purpose” as CBP can issue a “hold” order at port of lading if there is a problem with the shipment. We propose that any transaction data discrepancy can be reconciled in the importer’s periodic tax return as suggested above.

While we acknowledge that the e-commerce marketplace platforms have an important role in a cross-border transaction, that role varies depending on the sales arrangement and/or logistics of the shipment. However, it is important to know that e-commerce marketplace platforms have contractual and regulatory obligations and restrictions regarding data collection. For example, Title 47 U.S.C. § 230 was enacted to shield nascent passive online platforms from liability as a publisher if any of that content was defamatory.

- 19 U.S.C. § 1592: Similarly, the bill would expand CBP's enforcement tools in troubling ways, including: (1) compulsory demands by CBP officials for a wide variety of records (and summons for persons to appear before CBP under oath); (2) expanded bases for customs fraud liability; and (3) a virtually limitless ability to penalize all supply chain participants for IPR violations.

Removing "gross negligence" deprives CBP of an enforcement tool for escalated enforcement action appropriate for entities with repeat violations that are more egregious than simple negligence. "Gross negligence" has always been part of the statutory scheme for penalties since the Tariff Act of 1930 and removing an intermediate level of civil penalty may push more cases into civil fraud. Given it is difficult for CBP to prove the necessary intent to sustain a civil fraud case, the only available remedy is negligence. However, the proposed penalties are too high for simple negligence. An increase in fraud cases that were previously considered gross negligence will impede the prosecution of intended fraud, theft of IPR and money laundering cases.

- 19 U.S.C. § 1628a: Every trade bill enacted for two decades has added more enforcement tools for CBP, but none of them have resulted in significant reduction of counterfeits. Enhanced intellectual property rights protection and enforcement needs a more holistic and systemic approach. EMTC proposes enhancing the capability of the IPR registry system to utilize new technologies (e.g., blockchain, artificial intelligence) that provide "real time" data to trace and anticipate counterfeit shipments to aid CBP enforcement.
- 19 U.S.C. § 4320(b): EMTC believes that using government procurement and export control concepts like "suspension" and "debarment" converts the customs statutory scheme into a *de facto* "general import license" regime where entities will need to get permission from the CBP to import merchandise. This will impede the growth of global trade and the US. Economy.

Unlike the export license regulations where the licensing system is the risk management system for national security purposes, the import regime is designed for revenue collection, and more recently, supply chain security. When the United States suspends either the export privileges of an entity or debar an entity from doing business with the United States Government, such sanctions do not bar the entity from engaging in business at all. The sanction of suspending import privileges has been reserved only for those entities that seek to circumvent the antidumping and countervailing duties on specific merchandise. Therefore, EMTC urges Congress to limit the use of such a draconian sanction.

In addition to providing no guardrails to cabin the proposed expansions of CBP authority, the bill would come with no facilitations. In short, the bill amounts to "enforcement-only" legislation without the modernization or reimagining of the U.S. customs process envisioned by CBP's 21st Century Customs Framework (21CCF) effort.

4. Conclusion

In summary, EMTC believes that Customs Modernization should encompass a wide review of the effectiveness of the existing transaction-based system to allow for much greater efficiency in the customs management process. It should also ensure that all the statutory provisions are internally consistent to connect all the entities in the supply chain and clearly define their regulatory responsibilities to CBP. This bill presents a good opportunity to pilot an account-based system for e-commerce because CBP will have a difficult time managing the large and growing scale of direct-to- consumer e-commerce shipments.

EMTC appreciates the opportunity to comment on the Customs Modernization Act of 2021, and we are happy to discuss the ideas expressed above in more detail.