

ONE HUNDRED ELEVENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

June 11, 2010

To: Members of the Subcommittee on Commerce, Trade, and Consumer Protection

Fr: Subcommittee on Commerce, Trade, and Consumer Protection Staff

Re: Hearing on H.R. 4678, the “Foreign Manufacturers Legal Accountability Act” and H.R. 5156, the “Clean Energy Technology Manufacturing and Export Assistance Act”

On Wednesday, June 16, 2010, at 10:00 a.m. in room 2322 of the Rayburn House Office Building, the Subcommittee on Commerce, Trade, and Consumer Protection will hold a hearing on H.R. 4678, the “Foreign Manufacturers Legal Accountability Act,” and H.R. 5156, the “Clean Energy Technology Manufacturing and Export Assistance Act.”

I. H.R. 4678, FOREIGN MANUFACTURER LEGAL ACCOUNTABILITY ACT

The import of consumer products into the United States more than doubled in the decade between 1998 and 2007.¹ This sharp rise in imported consumer products has been accompanied by an overall increase in product recalls and a disproportionate increase in the share of product recalls involving imported products – particularly products from China.

In 2007, the Consumer Product Safety Commission (CPSC) announced 473 recalls.² This was the highest level of recalls in ten years.³ Of those 473 recalls, 389 (82%) involved

¹ U.S. Consumer Product Safety Commission, *Import Safety Strategy* (July 2008) (online at www.cpsc.gov/BUSINFO/importsafety.pdf).

² *Id.*

³ U.S. Consumer Product Safety Commission, *2011 Performance Budget Request* (Feb. 2010) (online at www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2011plan.pdf).

imported products.⁴ Of the 389 recalls involving imported products, 288 (74%) involved products from China.⁵ Among the defective imported products grabbing national attention in the past several years were: a children's craft kit containing beads coated with a chemical similar to a date rape drug; toy trains coated with lead paint; a contaminated blood thinning drug; and drywall emitting sulfurous gases.

While the CPSC has been working to bolster its surveillance of imported products and working with foreign governments to improve compliance with U.S. safety standards, holding foreign manufacturers accountable for injuries caused by defective products that make it into the hands of American consumers remains a problem. Victims trying to sue foreign manufacturers for injuries caused by defective products face significant obstacles with respect to providing service of process (notice about the litigation required to be given to the defendant) and establishing jurisdiction over foreign manufacturers in U.S. courts.

The Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters – of which the United States and many of its major trading partners, including China, are parties – provides a means of serving process on foreign manufacturers in their home countries.⁶ However, this method can be time consuming and costly, because all the legal documents must be translated into the foreign manufacturer's native language and then provided to a governmental central authority, which in turn attempts to serve the documents on the manufacturer.⁷ It can take three or more months for the central authority to serve the documents on the manufacturer.⁸

In addition, even if a victim successfully serves process on a foreign manufacturer, the manufacturer will likely challenge the exercise of personal jurisdiction over it by a U.S. court. Under well-established Constitutional Due Process principles, before a U.S. court can exercise personal jurisdiction over a defendant it must consider: 1) the defendant's purposeful minimum contacts with the state in which the court sits, and 2) fairness to the defendant of being subjected to jurisdiction in that state's courts.⁹ Foreign manufacturers have increasingly turned to litigating this issue to avoid being hauled into U.S. courts.¹⁰ This litigation can be costly and

⁴ U.S. Consumer Product Safety Commission, *Import Safety Strategy* (July 2008) (online at www.cpsc.gov/BUSINFO/importsafety.pdf).

⁵ *Id.*

⁶ Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, Testimony of Louise Ellen Teitz, *Leveling the Playing Field and Protecting Americans*, 111th Cong. (May 19, 2009).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

time-consuming due to these issues.¹¹ The result is an increased time and expense burden for both victims injured by defective products and the judicial system.¹²

H.R. 4678, the Foreign Manufacturer Legal Accountability Act of 2010, introduced by Representative Sutton on February 24, 2010, requires foreign manufacturers and producers that import products into the United States to designate a registered agent who is authorized to accept service of process here in the United States. The agent would have to be registered in a state with a substantial connection to the importation, distribution, or sale of products of the foreign manufacturer or producer. CPSC, the Food and Drug Administration, and the Environmental Protection Agency would each be required to determine, based on the value or quantity of goods manufactured or produced, which foreign manufacturers and producers under their respective authority would be required to designate a registered agent. Registering an agent consistent with the Act constitutes acceptance by the manufacturer of personal jurisdiction of the state and federal courts of the state in which the agent is located. Finally, the Act prohibits the importation into the United States of products from foreign manufacturers that fail to designate a registered agent.

H.R. 4678 is a bipartisan bill and currently has 61 cosponsors. A companion bill, S. 1606, has been introduced in the Senate.

II. H.R. 5156, CLEAN ENERGY TECHNOLOGY MANUFACTURING AND EXPORT ASSISTANCE ACT

In 2007, the green technology industry in the U.S. employed 9.1 million U.S. workers on revenue of about \$1 trillion, according to one estimate.¹³ In March 04, 2008, AFL-CIO Executive Council stated that “investments must be used to identify, develop and capture cutting edge technologies and to manufacture and build these technologies here for domestic use and export.”¹⁴

Despite this widespread recognition of the importance of exports for our economy, the U.S. is still behind many of our international competitors. According to a Senate Report dated

¹¹ *Id.*

¹² *Id.*

¹³ American Solar Energy Society, *Defining, Estimating, and Forecasting the Renewable Energy and Energy Efficiency Industries in the United States and Colorado* (Dec. 2008) (online at www.ases.org/images/stories/ASES/pdfs/CO_Jobs_Final_Report_December2008.pdf). The ASES definition of the renewable energy sector “includes photovoltaic, wind, solar, biomass/bio-fuel, hydropower, geothermal, fuel-cells, energy conservation and efficiency products, electric/hybrid vehicles, energy efficiency buildings technology services, makers and installers of energy efficient products and technology, HVAC systems, and computer controls and systems, among others.”

¹⁴ AFL-CIO, *Greening the Economy: A Climate Change and Jobs Strategy that Works for All*, (online at www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec03042008m.cfm).

December 2009, the U.S. Clean technology industry exports about \$7.7 billion in products and services between 2004 and 2008, while China exported \$22.7 billion and Germany \$19.6 billion.¹⁵ Also, at present, only six out of the 30 global companies that lead in this sector are American-owned. On March 19, 2009, the President said, “we can make the investments that would allow us to become the world’s leading exporter of renewable energy. We can let the jobs of tomorrow be created abroad, or we can create those jobs right here in America and lay the foundation for lasting prosperity.”¹⁶ There is an undeniable need to strengthen the U.S. clean technology manufacturing industry by lowering their production cost and by giving them more robust export assistance.

H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act, will create a fund administered by International Trade Administration (ITA) within the Department of Commerce to help bolster U.S. clean technology¹⁷ firms here and abroad. Its purpose is to ensure clean energy technology firms, including clean technology parts suppliers and engineers and design firms, have the information and assistance they need to be competitive domestically and globally. The fund will be used to assist U.S. clean technology firms to reduce production costs and to encourage innovation, investment, and productivity. Such assistance also includes educating those firms about the export process and opportunities in foreign markets and helping them to navigate in those markets.

H.R. 5156 will require ITA to develop and implement a national clean export technology strategy and report to Congress after five years of the implementation of the program on the success of the program. The report will also include ways to increase competitiveness in emerging markets, and look at its impact on jobs creation, particularly in small- and medium-size firms.

III. WITNESSES

Panel I:

Jeremy Baskin

Office of the General Counsel

U.S. Consumer Product Safety Commission

¹⁵United States Senate Special report Major Opportunities and Challenges to U.S. Exports of environmental goods, p. 6. (online at wyden.senate.gov/download/?id=b2191551-7ee7-4408-923f-68a8beac105a).

¹⁶ The White House, *Remarks by the President at the Edison Electric Vehicle Technical Center* (Mar. 19, 2009).

¹⁷ Green technology as defined in H.R. 2454, The American Clean Energy and Security Act of 2009, which passed the House in June 2009. See House Committee on Energy and Commerce, *American Clean Energy and Security Act of 2009*, 111th Cong. (2009) (H. Rept. 111-137, Part I).

Ami Gadhia
Policy Counsel
Consumers Union

Bill Morgan
Victim of defective Chinese drywall

Andrew Popper
Professor of Law
American University Washington College of Law

Marianne Rowden
President and Chief Executive Officer
American Association of Exporters and Importers (AAEI)

Panel II:

The Honorable Mary Saunders
Deputy Assistant Secretary for Manufacturing and Services
U.S. Department of Commerce

Deborah Wince-Smith
President and Chief Executive Officer
Council on Competitiveness

Owen E. Herrnstadt
Director of Trade and Globalization
International Association of Machinists & Aerospace Workers.

Jack Crawford Jr.
Chief Executive Officer
Jadoo Power

Anthony Kim
Policy Analyst
Heritage Foundation