

AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

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Testimony on "H.R. 4678, Foreign Manufacturers Legal Accountability Act"
before House Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection

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A. Introduction and Overview

Chairman Rush, Ranking Member Whitfield and Members of the Committee, good morning. My name is Marianne Rowden and I am the President and CEO of the American Association of Exporters and Importers (AAEI). AAEI appreciates the opportunity to offer its comments on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act of 2010."

It is a privilege to appear before you today at this hearing, and we are honored that the Committee has invited AAEI to provide our expertise about the impact of H.R. 4678 on international trade and the U.S. trade community. We hope that AAEI's testimony provides the Committee with a broader perspective on the ripple effects that legislation such as H.R. 4678 can have on the global trading system and U.S. companies importing products into the United States as well as those seeking to export to foreign markets as well.

AAEI has been a national voice for the international trade community in the United States since 1921. AAEI represents the entire spectrum of the international trade community across all industry sectors. Our members include manufacturers, importers, exporters, wholesalers, retailers and service providers to the industry, which is comprised of brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. Many of these enterprises are small businesses seeking to export to foreign markets. AAEI promotes fair and open trade policy. We advocate for companies engaged in international trade, supply chain security, export controls, non-tariff barriers, import safety and customs and border protection issues. AAEI is the premier trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade. We are recognized as the technical experts regarding the day-to-day facilitation of trade.

B. H.R. 4678 Will Not Enhance Product Safety

AAEI's testimony on H.R. 4678 addresses five areas of concern regarding the impact of this bill on the international trade community: 1) AAEI favors a risk management approach to product safety issues; 2) the U.S. importer of record is the entity which bears the legal responsibility for legal and regulatory action in connection with imported products; 3) recent legislation by Congress already requires many foreign manufacturers in highly-regulated industries to register with U.S. federal agencies; 4) U.S. federal agencies are working with foreign governments to monitor and prevent defective products from being exported to the United States; and 5) requiring foreign manufacturers to appoint a registered agent in the U.S. will negatively impact U.S. exporters, particularly small-medium enterprises.

AAEI believes that Congress is at its best when it enacts legislation that provides a framework and tools to achieve certain outcomes rather than mandating processes to

achieve a particular result. Congress has begun enacting legislation to deal with product safety problems resulting from imported defective products. AAEI believes that Congress should continue its work on product safety legislation for goods which pose a health or safety risk to the American public, and to let the various current pieces of legislation affect change before adding any new requirements.

1. Risk Management for Product Safety

Over the last decade, the international trade community has had to deal with a variety of risks as a result of global sourcing for the U.S. market as well as U.S. companies expanding their sales to foreign markets. These risks include ensuring the integrity of shipping containers to protect the U.S. homeland from a weapon of mass destruction being shipped through the global supply chain as well as ensuring the integrity of the product in the shipping container to protect against defective products which may harm the health and safety of the American public.

Risk management has been the policy adopted by U.S. Customs and Border Protection after the attack on 9/11 to regulate the global supply chain. Congress has ratified this policy by basing CBP's risk-based account management program, the Customs-Trade Partnership Against Terrorism (C-TPAT), in section 211 of the Secure and Accountability for Every Port Act (SAFE Port Act), P.L. 109-347 (October 13, 2006).

Congress has followed this risk management approach for product safety as well in passage of the Consumer Product Safety Improvement Act (CPSIA). Specifically, section 222 provides that:

(a) RISK ASSESSMENT METHODOLOGY.—Not later than 2 years after the date of enactment of this Act, the Commission shall develop a risk assessment methodology for the identification of shipments of consumer products that are—

(1) intended for import into the United States; and

(2) likely to include consumer products in violation of section 17(a) of the Consumer Product Safety Act (15 U.S.C. 2066(a)) or other import provisions enforced by the Commission.

See, 15 U.S.C. § 2066. The heart of risk management must be account-based management, which is essentially a pre-entry assessment of a company's risk profile and a post-entry assessment of its actual compliance with U.S. customs and product safety laws.

AAEI has designed a chart entitled "A Multi-Layered Approach to Holistic Risk Assessment" which categorizes importers by risk based on certain characteristics. For example, companies which are "ultra-low risk" are those who join public-private partnership programs (such as C-TPAT or ISA) because they work with CBP on a continual basis to ensure that their compliance level is high. Importers which import cargo from low-risk countries should be designated as low-risk, whereas importers that have high-risk characteristics or import from high-risk countries are medium-risk, and unknown importers with infrequent shipments from the highest risk countries pose the highest risk for both trade compliance and supply chain security. However, such assessments can only be made using an account-based system whereby CBP develops a risk-based methodology to create a company profile for CBP to determine the appropriate tools for the level of risk posed by the company.

CBP and CPSC have developed an account-based risk management program, the Importer Self-Assessment (ISA) for Product Safety. CBP has found a correlation between companies

with good internal controls and highly compliance rate with U.S. customs laws. It is this correlation which forms the foundation of ISA, and can support the development of account-based management programs. Companies join ISA in order to be removed from the annual Focused Assessment audit pool so that they can devote the resources necessary (e.g., compliance personnel) to conduct the periodic self-audits required by ISA. ISA requires companies to document these periodic audits. Unfortunately, only two companies have been accepted into the ISA for product safety program. AAEL supports ISA's risk-based analysis of companies' business processes, and supports the development of "risk assessment" methodologies, such as those required by the CPSIA, for product safety.

2. Role of the U.S. Importer of Record

Under U.S. customs law, the U.S importer of record (i.e., the owner or purchaser of the goods) is the entity which has the legal responsibility to ensure that the goods are entered with "reasonable care" and in compliance with all federal laws. See, 19 U.S.C. § 1484(a). Only entities who can demonstrate their right to make entry, that is show that they have a financial interest in the goods as an owner, purchaser (or in some cases, a license customs broker on behalf of an importer) have the right to make entry.¹

As the owner of the merchandise, the U.S. importer is the entity over whom the United States exercises legal jurisdiction since generally enforcement actions by federal agencies relating to the imported goods are by their nature *in rem* actions (i.e., actions against the goods). Moreover, implementation of H.R. 4678 would require CBP to develop another complex layer of regulations to determine who the actual manufacturer is for purposes of appointing a registered agent. We believe that such determinations may be difficult to make depending on the particular manufacturing process (e.g., mixtures and compounds) or the variety of commercial relationships (e.g., third-party contract manufacturing).

3. Legislation Already Requires Registration of Foreign Manufactures in High Risk Industries

In 2002, Congress enacted the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act), which President Bush signed into law June 12, 2002. The Bioterrorism Act was passed to protect the U.S. food and drug supply from an act of terrorism. In order to make the food supply more secure, Congress mandated that "any facility engaged in manufacturing, processing, packing, or holding food for consumption in the United States" be registered with the Secretary of Health and Human Services (through the Food and Drug Administration). See, section 305 of the CPSIA. In addition to the registration requirement, the statute also mandates:

for a foreign facility, the owner, operator, or agent in charge of the facility shall submit a registration to the Secretary and shall include with the registration the name of the United States agent for the facility.

See, 21 U.S.C. § 350d(a)(1)(B).

¹ CBP has issued a number of Headquarters Ruling Letters (HRL) concerning who has the right to make entry. See, HRL 222020 dated August 1, 1990; HRL 223904 dated November 4, 1992; HRL 224015 date November 18, 1992; HRL 225357 dated December 22, 1994; HRL 114894 dated June 20, 1997; HRL 115110 dated November 2, 2000; HRL 115808 dated October 8, 2002; HRL 115805 dated January 7, 2003; HRL 116024 dated August 14, 2003; HRL W563380 dated May 27, 2006.

Similarly, the Bioterrorism Act requires foreign manufacturers of drugs and medical devices to register as well:

(1) Any establishment within any foreign country engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or device that is imported or offered for import into the United States shall, through electronic means in accordance with the criteria of the Secretary—

(A) upon first engaging in any such activity, immediately register with the Secretary the name and place of business of the establishment, the name of the United States agent for the establishment, the name of each importer of such drug or device in the United States that is known to the establishment, and the name of each person who imports or offers for import such drug or device to the United States for purposes of importation; and

(B) each establishment subject to the requirements of subparagraph (A) shall thereafter—

(i) with respect to drugs, register with the Secretary on or before December 31 of each year; and

(ii) with respect to devices, register with the Secretary during the period beginning on October 1 and ending on December 31 of each year.

21 U.S.C. § 360(i).

Since federal law already requires the registration of foreign manufacturers of food, drugs, and devices, we believe that H.R. 4678 is unnecessary and would simply duplicate existing federal law.

Instead of requiring the registration of foreign manufacturers, Congress decided to take a different approach for consumer products:

(1) GENERAL CONFORMITY CERTIFICATION.—Except as provided in paragraphs (2) and (3), every manufacturer of a product which is subject to a consumer product safety rule under this Act or similar rule, ban, standard, or regulation under any other Act enforced by the Commission and which is imported for consumption or warehousing or distributed in commerce (and the private labeler of such product if such product bears a private label) shall issue a certificate which—

(A) shall certify, based on a test of each product or upon a reasonable testing program, that such product complies with all rules, bans, standards, or regulations applicable to the product under this Act or any other Act enforced by the Commission; and

(B) shall specify each such rule, ban, standard, or regulation applicable to the product.

15 U.S.C. § 2063(a). Thus, Congress chose to require a certification regime rather than require the registration of foreign manufacturers because it was concerned with the prevention of defective products entering into the commerce of the United States, rather than post-entry recall.

Because chemicals are used in a wide variety of industries, they are regulated by multiple federal agencies (e.g., EPA, FDA). In the case of chemicals used in the production of pharmaceuticals (e.g., active pharmaceutical ingredients), the chemicals company may be subject to the Bioterrorism Act. For imported chemicals subject to the Toxic Substances

Control Act (TSCA), the certificate serves as a product declaration to identify whether the chemical is listed in EPA's inventory. Therefore, we believe that enactment of H.R. 4678 would be disruptive to the existing regulatory regime for this highly regulated industry.

4. U.S. Working with Foreign Governments

In addition to the foreign manufacturer registration requirement under the Bioterrorism Act of 2002, Congress empowered the Secretary of Health and Human Services to engage with foreign governments to prevent defective products from being imported into the United States. Specifically, the statute states that:

(3) The Secretary is authorized to enter into cooperative arrangements with officials of foreign countries to ensure that adequate and effective means are available for purposes of determining, from time to time, whether drugs or devices manufactured, prepared, propagated, compounded, or processed by an establishment described in paragraph (1), if imported or offered for import into the United States, shall be refused admission on any of the grounds set forth in section 381(a) of this title.

21 U.S.C. § 360(i)(3).

As a result of the product safety issues resulting from imported products with melamine, the United States has embarked on a number of bilateral and multi-lateral arrangements to cooperate on product safety, such as through the Security and Prosperity Partnership of North America, the U.S.-China Strategic Economic Dialogue (SED), the U.S. – European Union (EU) High Level Regulatory Cooperation Forum, the Transatlantic Economic Council, and the Global Health Security Initiative. See, Import Safety - Action Plan Update issued by the President's Interagency Working Group on Product Safety (July 2008), which may be found at <http://archive.hhs.gov/importsafety/report/actionupdate/actionplanupdate.pdf>.

A number of federal agencies (e.g., CPSC, FDA, and HHS) have entered into memoranda of understanding (MOU) with their counterparts in the People's Republic of China to cooperate on product safety matters. Within the U.S. government, CBP has recently signed an MOU to allow CPSC personnel to access CBP commercial automated systems for import safety risk assessments. AAEI believes that this collaborative work among government agencies should continue.

5. Impact on U.S. Exporters

AAEI is particularly concerned about the impact H.R. 4678 would have on U.S. exporters if this bill is enacted by Congress. The President has made it a priority to double U.S. exports over the next five years, particularly through his National Export Initiative. In particular, the Administration seeks to increase exports among small-medium size enterprises since these are the companies which generate the most job growth.

If the United States enacts H.R. 4678 requiring foreign manufacturers to appoint a registered agent to receive service of process, we must anticipate that our trading partners will enact similar measures. It will be difficult and expensive for American SMEs to maintain registered agents in all the foreign markets to which it exports. Moreover, having a registered agent in foreign markets increase the likelihood that these companies will be subject to litigation before foreign courts in countries with legal proceedings which are less transparent than the United States. SMEs have fewer resources to dedicate to trade

compliance, and having to maintain a registered agent in other countries will simply add another disincentive to export to foreign markets due to a lower return on investment because of the risks associated with potential foreign litigation. For these reasons, AAEI believes that the policy underlying H.R. 4678 is ultimately counter-productive to the goals of U.S. trade policy.

Finally, we raise certain other legal issues which the Committee should consider before voting on H.R. 4678. In particular, we note that the United States either has existing statutes or is a signatory to a number of international treaties which may be affected by this bill:

- Foreign Sovereign Immunities Act: We note that many foreign companies are owned, in whole or in part, by the government (e.g., Airbus, China). While U.S. law has recognized "commercial activity" as a general exception to jurisdictional immunity of a foreign state, this Committee should be aware that our trading partners may react negatively if H.R. 4678 is passed.
- Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters: This treaty provides for signatory countries to designate a "central authority" to accept service of process from a foreign person or entity on behalf of a domestic individual or entity. (See, also, the Inter-American Convention on Letters Rogatory.)
- Hague Convention on Foreign Judgments in Civil and Commercial Matters: We note that the United States is not a signatory to this treaty, which has not been widely accepted and thus is not considered "international law" due to lack of accession by many countries. Nonetheless, even if H.R. 4678 was enacted and foreign manufacturers appointed registered agents, there is no method by which a judgment for money damages rendered in a U.S. court could be enforced against a foreign corporation with assets outside the United States. (See, however, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration, which the U.S. is a signatory. See, also, Foreign Judgments Act.)

We do not believe that this is an exhaustive list of potential legal issues which may arise if Congress enacted H.R. 4678. Rather, AAEI believes that there are a myriad of policy reasons noted above to dissuade this Committee from moving forward with this legislation.

C. Conclusion

In conclusion, we wish to thank the House Energy and Commerce Subcommittee on Trade, Commerce, and Consumer Protection for its invitation to provide our observations, comments, and suggestions on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act." We greatly appreciate the Committee's consideration of this bill to deal with the consequences of defective products. We hope that our testimony will provide practical ideas for the Committee to explore in developing legislation on product safety, and we are happy to answer any additional questions you may have or provide further clarification and information on any of the ideas described in our testimony today. AAEI looks forward to working with this Committee concerning product safety issues.