

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

June 28, 2010

To: Subcommittee on Commerce, Trade, and Consumer Protection Members
Fr: Subcommittee on Commerce, Trade, and Consumer Protection Staff
Re: Subcommittee Markup on June 30, 2010

On Wednesday, June 30, 2010, at 9:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Commerce, Trade, and Consumer Protection will meet in open markup session to consider the following bills:

- **H.R. 4501**, the “Guarantee of a Legitimate Deal Act of 2009”;
- **H.R. 2480**, the “Truth in Fur Labeling Act of 2009”;
- **H.R. 5156**, the “Clean Energy Technology Manufacturing and Export Assistance Act of 2010”;
- **H.R. 1796**, the “Residential Carbon Monoxide Poisoning Prevention Act”;
and
- **H.R. 4678**, the “Foreign Manufacturer Legal Accountability Act of 2010”.

I. H.R. 4501, THE “GUARANTEE OF A LEGITIMATE DEAL ACT OF 2009”

A. Background

The industry for mail-in gold (and other precious metals) is a new and rapidly growing branch of the used jewelry buying industry. In a mail-in transaction, customers mail their jewelry to a mail-in gold company, which appraises the value of the precious metals and makes the customer an offer by sending the customer a check by mail. The customer generally has a limited number of days to reject the offer, and if the customer

does not reject the request within that number of days, the company will consider the offer accepted.¹ The company then melts down the jewelry for sale as bullion.²

The rapid growth of the mail-in gold industry has been driven in large part by the increasing price of gold. In the past three years, the price of gold has nearly doubled, from just over \$600 per ounce in 2007 to approximately \$1,200 an ounce in 2010.³

The mail-in gold industry has drawn scrutiny over its business practices after widespread complaints from consumers who claimed that they did not receive a fair payment for their jewelry. *The Consumerist* and *Consumer Reports* conducted a test comparing the offers of three mail-in gold companies for identical pieces of jewelry in 2009. The companies offered between 11% and 29% of the jewelry's actual value based on the price of gold.⁴ ABC's *Good Morning America* and CBS's *Inside Edition* each conducted similar tests, receiving offers under 20% of the actual value of the jewelry sent to mail-in gold companies.⁵

In addition to low payments, delayed checks and lost packages have been the basis of numerous consumer complaints. The Better Business Bureau of Southeast Florida and the Caribbean has reported that of the 324 complaints concerning Cash4Gold over the past 36 months, a pattern of allegations is apparent: valuables shipped to Cash4Gold that the company never reported as arriving, offers that consumers said were lower than what the company's ads had led them to expect, and checks arriving by mail too late to cancel a transaction.⁶

The United States Postal Service Office of Inspector General conducted an investigation of more than 1,300 loss claims covering 18 months in 2008 and 2009 on mail addressed to Cash4Gold, finding no irregularities in its Postal Services' mail processing.⁷ Because many consumers have experienced the loss of their jewelry, the mail-in gold companies have been criticized for inadequately insuring the shipping packages provided to consumers. With respect to the delayed checks issue, consumers

¹ Cash4Gold.com, Terms and Conditions (online at www.cash4gold.com/wp-content/themes/theme_cash4gold_black/terms-conditions.php) (accessed May 9, 2010); GoldKit.com, Terms and Conditions (www.goldkit.com/terms_and_conditions.asp) (accessed May 9, 2010).

² *Cash4Gold's Rush*, Florida Trend (May 1, 2009) (online at www.floridatrend.com/article.asp?page=2&aID=51067).

³ GoldPrice.com, Gold Price History (www.goldprice.org/gold-price-history.html) (accessed May 7, 2010).

⁴ *Cashing in Gold? Here's the Catch*, Consumer Reports Magazine (Nov. 2009).

⁵ *Cash4Gold's Super Bowl Ad*, Inside Edition, (Feb 4, 2009) (online at <http://www.insideedition.com/news.aspx?storyID=2588>); *Gold Rush: People Rush to Sell Gold Instead of Finding It*, ABCNews.com (March 20, 2009) (online at abcnews.go.com/GMA/story?id=7125707&page=1).

⁶ *The Article Cash4Gold Doesn't Want You to Read*, The Consumerist (Sep. 2, 2009) (online at consumerist.com/2009/09/the-article-cash4gold-doesnt-want-you-to-read.html); Better Business Bureau, Reliability Report for Cash4Gold (online at www.seflorida.bbb.org/Business-Report/Cash-4-Gold--16000679) (accessed May 10, 2010).

⁷ United States Postal Service Office of Director General, Southeast Area Field Office. Case #09IMI1529IM18IM, "Cash4Gold, South Florida P&DC, Pembroke Pines, FL 33028, Mail Theft."

are advised that they have a certain number of days from issuance of the checks to reject the offer and cancel. Consumers have reported delays in receiving their checks. These delays in the delivery of checks have prevented some consumers from rejecting an offer made by a mail-in gold company before the company melted down their jewelry.

B. Summary of the Legislation

On January 21, 2009, Representative Anthony D. Weiner (D-NY) introduced H.R. 4501, a bill to require certain policies from businesses that purchase precious metals from consumers. The bill requires online purchasers of precious metals to wait until receiving an affirmative acceptance of the amount offered before melting down a consumer's jewelry. Purchasers of online precious metals are required to promptly return jewelry to a consumer if the consumer declines the amount offered. In addition, the bill sets a standard for the amount of insurance provided by online purchasers of precious metals on shipments of jewelry or precious metals to consumers.

The Subcommittee on Commerce, Trade, and Consumer Protection held a legislative hearing on H.R. 4501 on May 13, 2010, at which testimony was heard from the Federal Trade Commission (FTC), a consumer advocate, and an industry trade association. Based on testimony and discussions since that time, a manager's amendment in the nature of a substitute likely will be offered that makes several changes to the bill to address concerns raised by the FTC and the Committee minority. The manager's amendment will include provisions to strengthen the bill's consumer protections by covering purchasers of precious metals that do not maintain an internet website and giving the FTC discretionary rulemaking authority.

II. H.R. 2480, THE "TRUTH IN FUR LABELING ACT OF 2009"

A. Background

The labeling of fur products is currently regulated by the Fur Products Labeling Act of 1951, which requires that fur manufactured for use as attire have labels indicating the animal name and the country of origin.⁸ Apparel with less than \$150 worth of fur is exempted from these requirements. Under this Act, states are not preempted from passing additional or stricter regulations concerning the labeling of fur products.⁹

⁸ 15 U.S.C. §§ 69-69j. The law also requires labeling of the manufacturer name, whether the fur is natural or dyed, and whether the fur is used or damaged.

⁹ *Id.* At this point five states – Delaware, Massachusetts, New Jersey, New York, and Wisconsin – have fur labeling laws that require all fur apparel to be labeled. *See* 76 Del. Laws, c. 297, § 1.; M.G.L. 94-277a; P.L.2009, c.156 (C.56:14-1 et seq.); G.B.S. § 399-aaa; Wis. Stats. s.100.35. California currently has legislation pending that would create requirements for fur labeling. California Assembly Member Ted W. Lieu, *Fur Labeling Bill Receives Bipartisan Support on Assembly Floor* (Apr. 5, 2010) (online at democrats.assembly.ca.gov/members/a53/Pressroom/Press/20100405AD53PR01.aspx).

The Federal Trade Commission enforces the Fur Products Labeling Act, and pursuant to this Act, produces the Fur Products Name Guide that defines how fur products may be listed on the label.¹⁰ This guide has been criticized as outdated and inaccurate.¹¹

In today's manufacturing of fur apparel, roughly 14% of products trimmed with animal fur go unlabeled because they fall below the \$150 threshold set by current federal law.¹² In addition, an investigation by the Humane Society found real fur that was labeled as faux fur and other furs that were mislabeled.¹³

B. Summary of the Legislation

H.R. 2480, the "Truth in Fur Labeling Act of 2009", introduced by Reps. James P. Moran (D-VA) and Mary Bono Mack (R-CA) on May 19, 2009, amends the Fur Products Labeling Act to require all fur apparel to have labels, not just those products valued at over \$150. It also instructs FTC to update its Fur Products Name Guide. H.R. 2480 is a bipartisan bill and currently has 169 cosponsors. A companion bill, S. 1076, has been introduced in the Senate.

The Subcommittee on Commerce, Trade, and Consumer Protection held a legislative hearing on H.R. 2480 on May 13, 2010, at which testimony was heard from the FTC, an animal rights advocate, and a representative from the industry association.

A manager's amendment may be offered at subcommittee markup that strikes section 4 of H.R. 2480, leaving the bill silent on the question of preemption.

III. H.R. 5156, THE "CLEAN ENERGY TECHNOLOGY MANUFACTURING AND EXPORT ASSISTANCE ACT OF 2010"

In 2007, the green technology industry in the United States generated more than 9 million jobs and revenue of about \$1 trillion, according to one estimate.¹⁴ On March 4,

¹⁰ 16 C.F.R. 301.

¹¹ Humane Society Legislative Fund, *Fact Sheet: Support the Truth in Fur Labeling Act S.1076 / H.R. 2480*, (online at www.hslf.org/pdfs/fur-labeling-fact-sheet-tafa.pdf) (accessed May 10, 2010).

¹² The Humane Society of the United States, *Congress Calls for Truth in Fur Labeling In Response to Ongoing Misrepresentation* (May 20, 2009) (online at www.hsus.org/press_and_publications/press_releases/congress_calls_for_truth_in_fur_labeling_052009.html).

¹³ *Id.*

¹⁴ American Solar Energy Society and Management Information Service, Inc., *Green Collar Jobs in the U.S. and Colorado; Economic Drivers for the 21st Century*, viii (Jan. 2009). ASES's definition of the renewable energy and energy efficiency industry includes "wind, photovoltaics, solar thermal, hydroelectric power, geothermal, biomass (ethanol, biodiesel, and biomass power), and fuel cells and hydrogen" as well as energy service companies, the recycling, reuse, and manufacturing sector, and

2008, the AFL-CIO Executive Council stated that “[i]nvestments must be used to identify, develop and capture cutting-edge technologies and to manufacture and build these technologies here for domestic use and export.”¹⁵

Despite widespread recognition of the importance of exports for our economy, the United States is still behind many of our international competitors. The International Trade Administration (ITA) issued a report on the environmental technology industry indicating that, in 2008, U.S. exports in the environmental technology sector amounted to \$43.8 billion.¹⁶ The United States had a little less than 9% of the non-U.S. market in exports. On March 19, 2009, the President said, “[W]e 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.”¹⁷ There is an undeniable need to strengthen the U.S. clean technology manufacturers by lowering their production costs and by giving them more robust export assistance.

H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act of 2010, will create a fund administered by ITA to help boost U.S. clean energy technology firms here and abroad. Its purpose is to ensure that clean energy technology firms, including 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 promote policies that reduce production costs and encourage innovation, investment, and productivity, as well as to implement a national clean energy technology export strategy.

Under H.R. 5156, assistance provided by the Secretary will include educating U.S. clean energy technology firms about the export process and opportunities in foreign markets, and helping them to navigate in those markets. The Secretary will report to Congress after five years, assessing the program’s success in increasing the competitiveness of the U.S. in emerging markets and assisting U.S. businesses (particularly small- and medium-sized firms) with exports, and looking at its impact on job-creation.

H.R. 5156 was introduced by Rep. Doris O. Matsui (D-CA) on April 27, 2010. The bill was referred to the Subcommittee on Commerce, Trade, and Consumer Protection on April 28, 2010. The Subcommittee held a legislative hearing on H.R. 5156 on Wednesday, June 16, 2010.

portions of other industries in which only a portion of the output is classified as within the energy efficiency sector. *Id.* at 3.

¹⁵ AFL-CIO, Executive Council Statement, *Greening the Economy* (March 4, 2008).

¹⁶ International Trade Administration, *Environmental Technologies Industries, FY 2010 Industry Assessment*, 2.

¹⁷ The White House, *Remarks by the President at the Edison Electric Vehicle Technical Center* (Mar. 19, 2009).

At the markup, Chairman Rush is expected to offer a manager's amendment that will include a change to the definition of 'clean energy technology', a clarification of the bill's original intent that the fund created by the bill is not a grant-making program, and language concerning domestic job creation and small businesses.

IV. H.R. 1796, THE "RESIDENTIAL CARBON MONOXIDE POISONING PREVENTION ACT"

Carbon monoxide is a colorless, odorless, invisible gas found in combustion fumes, such as from cars and trucks, stoves, lanterns, burned coal and wood, gas ranges, heating systems, and portable generators.¹⁸ In semi-enclosed or enclosed spaces carbon monoxide can build up and poison people occupying those spaces.¹⁹

Early symptoms of exposure to low-to-moderate levels of carbon monoxide may be similar to other illnesses, including the flu.²⁰ But the consequences of carbon monoxide exposure can be tragic. Rapid high-level exposure can cause victims to become mentally confused and to lose muscle control without first experiencing milder symptoms, and such victims will likely die if not rescued.²¹ Indeed, more than 400 people die each year from carbon monoxide poisoning.²² In addition, each year more than 20,000 people visit the emergency room due to carbon monoxide poisoning and over 4,000 are hospitalized.²³ Certain populations are more susceptible to the effects of carbon monoxide poisoning, including infants and people with chronic heart disease or respiratory problems.²⁴ Fatality rates are highest among those age 65 years and older.²⁵

H.R. 1796, the "Residential Carbon Monoxide Poisoning Prevention Act", would take several steps to prevent carbon monoxide poisoning. First, it would require the Consumer Product Safety Commission (CPSC) to adopt the existing voluntary industry standard for carbon monoxide alarms as a mandatory consumer product safety standard. The bill would make it unlawful for manufacturers or distributors to import or distribute any new residential carbon monoxide detector that does not comply with the standard. Second, the bill would require a warning label and a pictogram to be printed on all portable generators advising consumers of the carbon monoxide hazard posed by

¹⁸ U.S. Centers for Disease Control and Prevention, *Carbon Monoxide Poisoning: Fact Sheet* (online at www.cdc.gov/co/faqs.htm).

¹⁹ *Id.*

²⁰ Consumer Product Safety Commission, *Carbon Monoxide Questions and Answers* (online at www.cpsc.gov/cpscpub/pubs/466.html).

²¹ *Id.*

²² *Id.*

²³ U.S. Centers for Disease Control and Prevention, *Carbon Monoxide Poisoning: Fact Sheet* (online at www.cdc.gov/co/faqs.htm).

²⁴ *Id.*

²⁵ *Id.*

incorrect use of the generator. Finally, the bill would establish a grant program to assist states in carrying out carbon monoxide alarm programs.

H.R. 1796 was introduced on March 30, 2009, by Rep. Jim Matheson (D-UT). The bill was referred to the Subcommittee on Commerce, Trade, and Consumer Protection and a legislative hearing on H.R. 1796 was held on March 18, 2010.

At markup, Chairman Rush is likely to offer an amendment in the nature of a substitute that makes several substantive and technical changes to H.R. 1796. Under the amendment, the CPSC is required to adopt both of the existing voluntary industry standards that apply to different types of carbon monoxide alarms. The amendment also allows for automatic updating of the standards. In addition, the amendment would no longer impose a specific design for portable generator warning labels, and instead would call on the CPSC to study the possibility of requiring the warning labels to include another language in addition to English. Finally, the amendment would strengthen the eligibility criteria for the grant program to encourage states to adopt laws that require the installation of carbon monoxide alarms in a broader range of homes, and would expand the allowable uses of the grant funds to include the purchase of the alarms for certain vulnerable populations.

V. H.R. 4678, THE “FOREIGN MANUFACTURER LEGAL ACCOUNTABILITY ACT OF 2010”

H.R. 4678 is intended to hold foreign manufacturers and producers who send dangerous products to the United States accountable for the injuries and damage they cause. In the decade between 1998 and 2007, the import of consumer products into the United States more than doubled.²⁶ 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, CPSC announced 473 recalls.²⁷ This was the highest level of recalls in 10 years.²⁸ Of those 473 recalls, 389 (82%) involved imported products.²⁹ Of the 389 recalls involving imported products, 288 (74%) involved products from China.³⁰ Defective imported products incidents that attracted national attention in the past several years included: a children’s craft kit containing beads coated with a chemical similar to a

²⁶ U.S. Consumer Product Safety Commission, *Import Safety Strategy* (July 2008) (online at www.cpsc.gov/BUSINFO/importsafety.pdf).

²⁷ *Id.*

²⁸ U.S. Consumer Product Safety Commission, *2011 Performance Budget Request* (Feb. 2010) (online at www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2011plan.pdf).

²⁹ U.S. Consumer Product Safety Commission, *Import Safety Strategy* (July 2008) (online at www.cpsc.gov/BUSINFO/importsafety.pdf).

³⁰ *Id.*

date rape drug; toy trains coated with lead paint; a contaminated blood thinning drug; and drywall emitting sulfurous gases.

Holding foreign manufacturers accountable for injuries caused by defective products that make it into the hands of American consumers has proven difficult. 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.³¹ This method, however, 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.³² It can take three or more months for the central authority to serve the documents on the manufacturer.³³

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.³⁴ Foreign manufacturers have increasingly turned to litigating this issue to avoid being brought before U.S. courts.³⁵ This litigation can be costly and time consuming due to the fact specific nature of these issues.³⁶ The result is an increased time and expense burden for both victims injured by defective products and the judicial system.³⁷

H.R. 4678 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

³¹ 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).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

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 was introduced by Rep. Betty Sutton (D-OH) on February 24, 2010. The bill was referred to the Subcommittee on Commerce, Trade, and Consumer Protection and a legislative hearing on H.R. 4678 was held on June 16, 2010.

At markup, Chairman Rush is expected to offer an amendment in the nature of a substitute that makes several substantive and technical changes to the bill. The amendment does the following: (1) limits the breadth of the consent to personal jurisdiction by making clear that it does not include wholly foreign law suits; (2) provides additional guidance to applicable agencies on setting the minimum size that foreign manufacturers or producers must exceed in order to trigger the Act's requirements; (3) sets certain minimum requirements to be eligible to serve as the registered agent for a foreign manufacturer or producer and also sets certain minimum requirements for documenting the designation of a registered agent; (4) clarifies the Act's applicability to component part manufacturers; (5) includes the National Highway Traffic Safety Administration among the agencies that must require foreign manufacturers to meet the requirements of the Act; (6) calls on all the agencies with responsibilities under the Act to cooperate with each other to establish consistent regulations to carry out the Act in an effective and efficient manner and extends the timeframe for implementation of the Act to one year; and (7) requires foreign manufacturers and producers to report to the applicable agency any safety campaigns or recalls in other countries for products also sold in the United States.