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111TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPT. 111–683 Part 1

FOREIGN MANUFACTURERS LEGAL ACCOUNTABILITY ACT OF 2010

DECEMBER 16, 2010.—Ordered to be printed

Mr. WAXMAN, from the Committee on Energy and Commerce, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4678]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 4678) to require foreign manufacturers of products imported into the United States to establish registered agents in the United States who are authorized to accept service of process against such manufacturers, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Foreign Manufacturers Legal Accountability Act of 2010".

SEC. 2. DEFINITIONS.

In this Act:

(1) APPLICABLE AGENCY.—The term "applicable agency" means, with respect to covered products—

(A) described in subparagraphs (A) and (B) of paragraph (3), the Food and Drug Administration;

(B) described in paragraph (3)(C), the Consumer Product Safety Commission;

(C) described in subparagraphs (D) and (E) of paragraph (3), the Environmental Protection Agency;

(D) described in paragraph (3)(F), the National Highway Traffic Safety Administration; and

(E) described in paragraph (3)(G)—

(i) the Food and Drug Administration, if the item is intended to be a component part of a product described in subparagraphs (A) or (B) of paragraph (3);

(ii) the Consumer Product Safety Commission, if the item is intended to be a component part of a product described in paragraph (3)(C);

(iii) the Environmental Protection Agency, if the item is intended to be a component part of a product described in subparagraphs (D) or (E) of paragraph (3); and

(iv) the National Highway Traffic Safety Administration, if the item is intended to be a component part of a product described in paragraph (3)(F).

(2) COMMERCE.—The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof; or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(3) COVERED PRODUCT.—The term "covered product" means any of the following:

(A) Drugs, devices, and cosmetics, as such terms are defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).

(B) A biological product, as such term is defined in section 351(i) of the Public Health Service Act (42 U.S.C. 262(i)).

(C) A consumer product, as such term is used in section 3(a) of the Consumer Product Safety Act (15 U.S.C. 2052).

(D) A chemical substance or new chemical substance, as such terms are defined in section 3 of the Toxic Substances Control Act (15 U.S.C. 2602).

(E) A pesticide, as such term is defined in section 2 of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136).

(F) A motor vehicle or motor vehicle equipment, as such terms are defined in section 30102 of title 49, United States Code.

(G) An item intended to be a component part of a product described in subparagraph (A), (B), (C), (D), (E), or (F) but is not yet a component part of such product.

(4) DISTRIBUTE IN COMMERCE.—The term "distribute in commerce" means to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.

(5) FOREIGN MANUFACTURER OR PRODUCER.—The term "foreign manufacturer or producer" does not include—

(A) a foreign manufacturer or producer of covered products that is owned or controlled, directly or indirectly, by one or more United States natural or legal persons, if—

(i) the United States natural or legal person has assets in excess of the foreign manufacturer or producer; or

(ii) the United States natural or legal person owns or controls more than one foreign manufacturer or producer of covered products and such person has assets in excess of the average assets held by each foreign manufacturer or producer; or

(B) a foreign manufacturer or producer of covered products that owns or controls, or through common ownership or control is affiliated with, directly or indirectly, one or more United States operating legal persons if the principal executive officer residing in the United States of each United States operating legal person certifies in writing to the applicable agency that such person—

(i) is responsible for any liability from a covered product of the foreign manufacturer or producer, including liability from the design, testing, assembly, manufacturing, warnings, labeling, inspection, packaging, or any other cause of action related to the covered product; and

(ii) will serve as the initial point of contact for the applicable agency in case of a voluntary or mandatory recall or other issue involving the safety of a covered product.

SEC. 3. REGISTRATION OF AGENTS OF FOREIGN MANUFACTURERS AUTHORIZED TO ACCEPT SERVICE OF PROCESS IN THE UNITED STATES.

(a) REGISTRATION.—

(1) IN GENERAL.—Beginning on the date that is 180 days after the date on which the regulations are prescribed pursuant to section 3(d) and except as provided in this subsection, the head of each applicable agency shall require foreign manufacturers and producers of covered products distributed in commerce to register an agent in the United States who is authorized to accept service of process on behalf of such manufacturer or producer for the purpose of any State or Federal regulatory proceeding or any civil action in State or Federal court related to such covered product, if such service is made in accordance with the State or Federal rules for service of process in the State in which the case or regulatory action is brought.

(2) LOCATION.—The head of each applicable agency shall require that an agent of a foreign manufacturer or producer registered under paragraph (1) be—

(A) located in a State chosen by the foreign manufacturer or producer with a substantial connection to the importation, distribution, or sale of the products of the foreign manufacturer or producer; and

(B) an individual, domestic firm, or domestic corporation that is a permanent resident of the United States.

(3) DESIGNATION BY MANUFACTURER OR PRODUCER AND ACCEPTANCE BY AGENT.—The head of each applicable agency shall, at a minimum, require a—

(A) written designation by a foreign manufacturer or producer with respect to which paragraph (1) applies—

(i) signed by an official or employee of the foreign manufacturer or producer with authority to appoint an agent;

(ii) containing the full legal name, principal place of business, and mailing address of the manufacturer or producer; and

(iii) containing a statement that the designation is valid and binding on the foreign manufacturer or producer for the purposes of this Act.

(B) written acceptance by the agent registered by a foreign manufacturer or producer with respect to which paragraph (1) applies—

(i) signed by the agent or, in the case in which a domestic firm or domestic corporation is designated as an agent, an official or employee of the firm or corporation with authority to sign for the firm or corporation;

(ii) containing the agent's full legal name, physical address, mailing address, and phone number; and

(iii) containing a statement that the agent accepts the designation and acknowledges that the duties of the agent may not be assigned to another person or entity and the duties remain in effect until withdrawn or replaced by the foreign manufacturer or producer.

(4) APPLICABILITY.—

(A) IN GENERAL.—Paragraph (1) applies only with respect to a foreign manufacturer or producer that exceeds minimum requirements established by the head of the applicable agency under this section.

(B) FACTORS.—In determining the minimum requirements for application of paragraph (1) to a foreign manufacturer or producer, the head of the applicable agency shall, at a minimum, consider the following:

(i) The value of all covered products imported from the manufacturer or producer in a calendar year.

(ii) The quantity of all covered products imported from the manufacturer or producer in a calendar year.

(iii) The frequency of importation from the manufacturer or producer in a calendar year.

(b) REGISTRY OF AGENTS OF FOREIGN MANUFACTURERS AND CERTIFICATIONS.—

(1) IN GENERAL.—The Secretary of Commerce shall, in cooperation with each head of an applicable agency, establish and keep up to date a registry of agents registered under subsection (a), certifications submitted under section 2(5)(B), and certifications removed pursuant to subsection (e).

(2) AVAILABILITY.—The Secretary of Commerce shall make the registry established under paragraph (1) available—

(A) to the public in a searchable format through the Internet website of the Department of Commerce; and

(B) to the Commissioner responsible for U.S. Customs and Border Protection in a format prescribed by the Commissioner.

(c) CONSENT TO JURISDICTION.—

(1) IN GENERAL.—A foreign manufacturer or producer of a covered product that registers an agent under this section thereby consents to the personal jurisdiction of the State and Federal courts of the State in which the registered agent is located for the purpose of any judicial proceeding related to such covered product.

(2) RULE OF CONSTRUCTION.—Paragraph (1) shall not apply to actions brought by foreign plaintiffs where the alleged injury or damage occurred outside the United States.

(d) REGULATIONS.—

(1) IN GENERAL.—Not later than one year after the date of the enactment of this Act, the Secretary of Commerce, the Commissioner responsible for U.S. Customs and Border Protection, and each head of an applicable agency shall prescribe regulations to carry out this section.

(2) INTERAGENCY COOPERATION.—The Secretary of Commerce, the Commissioner responsible for U.S. Customs and Border Protection, and each head of an applicable agency shall cooperate and consult with one another for the purpose of—

(A) prescribing consistent regulations to the extent necessary for the effective and efficient sharing of information and establishment of systems and procedures necessary to carry out this section; and

(B) establishing minimum requirements described in subsection (a)(4), and to the extent advisable and practicable for the purpose of establishing consistent minimum requirements.

(e) CERTIFICATION REQUIREMENTS.—Upon actual knowledge or verified information that any person to whom the requirements of section 2(5)(B) applies has failed to fulfill such requirements the applicable agency shall—

(1) notify the Secretary of Commerce that the certification of such person must be removed from the registry under section 3(b); and

(2) notify such person that the related foreign manufacturer or producer must comply with section 3.

SEC. 4. PROHIBITION OF IMPORTATION OF PRODUCTS OF MANUFACTURERS WITHOUT REGISTERED AGENTS IN UNITED STATES.

(a) IN GENERAL.—Beginning on the date that is 180 days after the date the regulations required under section 3(d) are prescribed, a person may not import into the United States a covered product (or component part that will be used in the United States to manufacture a covered product) if such product (or component part) or any part of such product (or component part) was manufactured or produced outside the United States by a manufacturer or producer who does not have a registered agent described in section 3(a) whose authority is in effect on the date of the importation.

(b) ENFORCEMENT.—The Secretary of Homeland Security shall prescribe regulations to enforce the prohibition in subsection (a).

SEC. 5. REPORTING OF DEFECTS IN COVERED PRODUCTS IN FOREIGN COUNTRIES.

(a) DETERMINATION BY MANUFACTURER OR PRODUCER.—Not later than 5 working days after determining to conduct a safety recall or other safety campaign in a foreign country of a covered product that is identical or substantially similar to a covered product offered for sale in the United States, the manufacturer or producer of the covered product shall report the determination to the head of the applicable agency.

(b) DETERMINATION BY FOREIGN GOVERNMENT.—Not later than 5 working days after receiving notification that the government of a foreign country has determined that a safety recall or other safety campaign must be conducted in the foreign country of a covered product that is identical or substantially similar to a covered prod-

uct offered for sale in the United States, the manufacturer or producer of the covered product shall report the determination to the head of the applicable agency.

(c) REPORTING REQUIREMENTS.—Not later than the date described in subsection (d), the head of each applicable agency shall prescribe the contents of the notification required by this section.

(d) EFFECTIVE DATE.—Except as provided in subsection (c), this section shall take effect on the date that is one year after the date of the enactment of this Act.

SEC. 6. STUDY ON REGISTRATION OF AGENTS OF FOREIGN FOOD PRODUCERS AUTHORIZED TO ACCEPT SERVICE OF PROCESS IN THE UNITED STATES.

Not later than 1 year after the date of the enactment of this Act, the Secretary of Agriculture and the Commissioner of Food and Drugs shall jointly—

(1) complete a study on the feasibility and advisability of requiring foreign producers of food distributed in commerce to register an agent in the United States who is authorized to accept service of process on behalf of such producers for the purpose of any State or Federal regulatory proceeding or any civil action in State or Federal court related to such food products; and

(2) submit to Congress a report on the findings of the Secretary with respect to such study.

SEC. 7. STUDY ON REGISTRATION OF AGENTS OF FOREIGN MANUFACTURERS AND PRODUCERS OF COMPONENT PARTS WITHIN COVERED PRODUCTS.

Not later than 1 year after the date of the enactment of this Act, the head of each applicable agency shall—

(1) complete a study on determining feasible and advisable methods of requiring manufacturers or producers of component parts within covered products manufactured or produced outside the United States and distributed in commerce to register agents in the United States who are authorized to accept service of process on behalf of such manufacturers or producers for the purpose of any State or Federal regulatory proceeding or any civil action in State or Federal court related to such component parts; and

(2) submit to Congress a report on the findings of the head of the applicable agency with respect to the study.

SEC. 8. STUDY ON ENFORCEMENT OF UNITED STATES JUDGMENTS RELATING TO DEFECTIVE DRYWALL IMPORTED FROM CHINA.

Not later than 1 year after the date of the enactment of this Act, the Comptroller General of the United States shall—

(1) complete a study on methods to enforce judgments of any State or Federal regulatory proceeding or any civil action in State or Federal court relating to defective drywall imported from the People's Republic of China and distributed in commerce during the period 2004 through 2007 and used in residential dwellings in the United States; and

(2) submit to Congress a report on the findings of the Comptroller General with respect to the study.

SEC. 9. RELATIONSHIP WITH OTHER LAWS.

Nothing in this Act shall affect the authority of any State to establish or continue in effect a provision of State law relating to service of process or personal jurisdiction, except to the extent that such provision of law is inconsistent with the provisions of this Act, and then only to the extent of such inconsistency.

PURPOSE AND SUMMARY

H.R. 4678, the "Foreign Manufacturers Legal Accountability Act of 2010", introduced by Rep. Betty Sutton (D–OH), requires foreign manufacturers and producers that distribute in commerce certain products regulated by the Consumer Product Safety Commission (CPSC), the Environmental Protection Agency (EPA), and the Food and Drug Administration (FDA) to register an agent in the United States who is authorized to accept service of process on behalf of the foreign manufacturer or producer. Registering an agent consistent with the Act constitutes acceptance by the foreign manufacturer or producer of personal jurisdiction of the state and federal courts of the state in which the agent is located.

Under H.R. 4678, agents 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. The

CPSC, FDA, and EPA 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. The Act prohibits the importation into the United States of products from foreign manufacturers that fail to designate a registered agent.

BACKGROUND AND NEED FOR LEGISLATION

In the decade between 1998 and 2007, the import of consumer products into the United States more than doubled.[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 CPSC announced 473 recalls.[2] This was the highest level of recalls in 10 years.[3] Of those 473 recalls, 82% involved imported products.[4] Of the 389 recalls involving imported products, 74% involved products from China.[5]

Incidents involving defective imported products that attracted national attention in the past several years included: a children's craft kit containing beads coated with a chemical similar to a date rape drug;[6] toy trains coated with lead paint;[7] a contaminated blood thinning drug;[8] and drywall emitting sulfurous gases.[9]

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.[10] 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 manufac-

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[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*).

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

[5] *Id.*

[6] *Recalled Toys Contain Chemical Linked to Date-Rape Drug*, USA Today (Nov. 7, 2007) (online at *www.usatoday.com/money/industries/retail/2007–11–07–toy-recall-chemicals_N.htm*).

[7] U.S. Consumer Product Safety Commission, *RC2 Corp. Recalls Various Thomas & Friends™ Wooden Railway Toys Due to Lead Poisoning Hazard* (June 13, 2007) (online at *www.cpsc.gov/cpscpub/prerel/prhtml07/07212.html*).

[8] *Deadly Heparin Contaminant Identified*, CBS (Mar. 19, 2008) (online at *www.cbsnews.com/stories/2008/03/19/health/main3950732.shtml?tag=dsGoogleModule*).

[9] *CPSC Ties Drywall, Corrosion*, The Wall Street Journal (Nov. 24, 2009) (online at *online.wsj.com/article/SB125899409382460761.html*).

[10] 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).

turer.[11] It can take three or more months for the central authority to serve the documents on the manufacturer.[12]

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.[13] Foreign manufacturers have increasingly turned to litigating this issue to avoid being brought before U.S. courts.[14] This litigation can be costly and time consuming due to the fact specific nature of these issues.[15] The result is an increased time and expense burden for both victims injured by defective products and the judicial system.[16]

LEGISLATIVE HISTORY

On February 24, 2010, H.R. 4678, the "Foreign Manufacturers Legal Accountability Act of 2010", was introduced by Reps. Betty Sutton, Michael Turner, Linda T. Sánchez, John Conyers, Zoe Lofgren, Candice Miller, Bruce Braley, John Sarbanes, Ginny Brown-Waite, Michael Michaud, Lloyd Doggett, Walter Jones, John Duncan, Phil Hare, Dale Kildee, Bart Stupak, Joe Donnelly, Gene Green, Lee Terry, Donna Edwards, Carol Shea-Porter, James Oberstar, Tim Ryan, Paul Kanjorski, Marcy Kaptur, Steve Kagen, and John Yarmuth. The bill was referred to the Committee on Energy and Commerce, and in addition to the Committee on Ways and Means and the Committee on Agriculture. Subsequently, on February 25, 2010, the legislation was referred to the Subcommittee on Commerce, Trade, and Consumer Protection. The Subcommittee held a hearing on the legislation on June 16, 2010. At the hearing, the Subcommittee heard support for the bill from the CPSC, consumers groups, a homeowner affected by defective Chinese drywall, and a law professor with expertise on the subject of tort law. A witness representing U.S. importers and exporters expressed reservations about the bill.

COMMITTEE CONSIDERATION

On June 30, 2010, the Subcommittee on Commerce, Trade, and Consumer Protection met in open markup session to consider H.R. 4678. The Subcommittee subsequently favorably forwarded H.R. 4678 to the full Committee, amended, by a voice vote.

During Subcommittee consideration and markup, Chairman Rush offered an amendment in the nature of a substitute to H.R. 4678, which was agreed to by a voice vote. The amendment did the following: (1) limited the breadth of the consent to personal jurisdiction by making clear that it does not include wholly foreign law suits; (2) provided additional guidance to applicable agencies on setting the minimum size that foreign manufacturers or producers

[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

must exceed in order to trigger the Act's requirements; (3) set certain minimum requirements to be eligible to serve as the registered agent for a foreign manufacturer or producer and also set certain minimum requirements for documenting the designation of a registered agent; (4) clarified the Act's applicability to component part manufacturers; (5) added the National Highway Traffic Safety Administration (NHTSA) as an agency that must require foreign manufacturers to meet the requirements of the Act; (6) called 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 extended the timeframe for implementation of the Act to one year; and (7) required 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.

On July 21, 2010, the Committee on Energy and Commerce met in open markup session and considered H.R. 4678 as approved by the Subcommittee. A manager's amendment offered by Chairman Waxman was agreed to by a voice vote. The Committee also adopted an amendment offered by Mr. Melancon of Louisiana by a voice vote. Subsequently, the Committee ordered H.R. 4678 favorably reported to the House, amended, by a rollcall vote of 31 yeas—22 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list each record vote on the motion to report legislation and amendments thereto. A motion by Mr. Waxman ordering H.R. 4678 reported to the House, amended, was approved by a record vote of 31 yeas and 22 nays. The following is the recorded vote taken during Committee consideration, including the names of those members voting for and against:

COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 179

BILL: **H.R. 4678,** the "Foreign Manufacturers Legal Accountability Act of 2010".

MOTION: A motion by Mr. Waxman to order H.R. 4678 favorably reported to the House, amended. (Final Passage)

DISPOSITION: **AGREED TO** by a roll call vote of 31 yeas to 22 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman	X			Mr. Barton		X	
Mr. Dingell	X			Mr. Hall		X	
Mr. Markey	X			Mr. Upton		X	
Mr. Boucher		X		Mr. Stearns		X	
Mr. Pallone	X			Mr. Whitfield		X	
Mr. Gordon				Mr. Shimkus		X	
Mr. Rush	X			Mr. Shadegg		X	
Ms. Eshoo	X			Mr. Blunt		X	
Mr. Stupak	X			Mr. Buyer		X	
Mr. Engel	X			Mr. Radanovich		X	
Mr. Green				Mr. Pitts		X	
Ms. DeGette	X			Ms. Bono Mack		X	
Mrs. Capps	X			Mr. Terry	X		
Mr. Doyle	X			Mr. Rogers		X	
Ms. Harman		X		Mrs. Myrick			
Ms. Schakowsky	X			Mr. Sullivan			
Mr. Gonzalez	X			Mr. Murphy of PA	X		
Mr. Inslee	X			Mr. Burgess		X	
Ms. Baldwin	X			Ms. Blackburn		X	
Mr. Ross	X			Mr. Gingrey		X	
Mr. Weiner	X			Mr. Scalise		X	
Mr. Matheson				Mr. Griffith		X	
Mr. Butterfield	X			Mr. Latta		X	
Mr. Melancon	X						
Mr. Barrow	X						
Mr. Hill		X					
Ms. Matsui	X						
Mrs. Christensen							
Ms. Castor	X						
Mr. Sarbanes	X						
Mr. Murphy of CT	X						
Mr. Space	X						
Mr. McNerney	X						
Ms. Sutton	X						
Mr. Braley	X						
Mr. Welch	X						

07/21/2010

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the oversight findings and recommendations of the Committee are reflected in the descriptive portions of this report, including the recommendation that foreign manufacturers and producers that distribute products in commerce in the United States be required to have an agent in the United States who is authorized to accept service of process.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report, including that foreign manufacturers and producers that distribute products in commerce in the United States be required to have an agent in the United States who is authorized to accept service of process.

CONSTITUTIONAL AUTHORITY STATEMENT

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires the Committee to include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 4678. The Committee finds that the constitutional authority for H.R. 4678 is provided in article I, section 8, clauses 3 and 18 of the Constitution of the United States.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 4678 would result in no new budget authority, entitlement authority, or tax expenditures or revenues.

EARMARKS AND TAX AND TARIFF BENEFITS

H.R. 4678 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI of the Rules of the House of Representatives.

FEDERAL ADVISORY COMMITTEE STATEMENT

No advisory committees were created by H.R. 4678 within the meaning of 5 U.S.C. App., section 5(b).

APPLICABILITY OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of the Congressional Accountability Act of 1985 requires a description of the application of this bill to the legislative branch where the bill relates to terms and conditions of employment or access to public services or accommodations. H.R. 4678 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3).

FEDERAL MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act of 1974 (as amended by section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement on whether the provisions of the report include unfunded mandates. In compliance with this requirement the Committee adopts as its own the estimates of federal mandates prepared by the Director of the Congressional Budget Office included herein.

COMMITTEE COST ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 4678. Clause 3(d)(3)(B) of that rule, however, provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act. The Committee adopts as its own the cost estimate on H.R. 4678 prepared by the Director of the Congressional Budget Office included herein.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In accordance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate on H.R. 4678 provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

DECEMBER 9, 2010.

Hon. HENRY A. WAXMAN,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4678, the Foreign Manufacturers Legal Accountability Act of 2010.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 4678—Foreign Manufacturers Legal Accountability Act of 2010

H.R. 4678 would require certain foreign manufacturers to register an agent in the United States that would be authorized to accept notice of a regulatory proceeding or civil action. The bill also would require those foreign manufacturers and producers to report any voluntary or mandatory recalls or other safety campaigns involving affected products to the appropriate regulatory agency.

Several agencies, including the Food and Drug Administration (FDA), the Consumer Product Safety Commission, the Environmental Protection Agency, and the National Highway Traffic Safety Administration, would be required to develop regulations to carry out the new requirements. For example, the FDA would be responsible for implementing the registration and reporting requirements relating to imported drugs.

Further, the bill would prohibit foreign goods from being imported if the affected manufacturer fails to designate such an agent. We assume that the Customs and Border Patrol (CBP), in coordination with the other affected agencies, would be primarily responsible for enforcing those new prohibitions.

The bill also would require the International Trade Administration to develop a registry of agents that would be made available to the public and would require agencies to prepare various reports for the Congress related to the registration of agents for foreign manufacturers and other topics related to imported goods.

Impact on the Federal Budget

Based on information from the affected agencies, CBO estimates that implementing H.R. 4678 would cost about $170 million over the 2011–2015 period, assuming appropriation of the necessary amounts, to develop and enforce the new regulations, to create the registry of agents, and to prepare reports. CBO expects that most of those costs would be incurred by CBP and FDA for administration and enforcement activities.

Enacting H.R. 4678 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

Intergovernmental and private-sector impact

H.R. 4678 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

H.R. 4678 would impose private-sector mandates as defined in UMRA by requiring manufacturers in the United States with foreign locations or subsidiaries to register agents in the United States and to report on any safety campaigns resulting from the recall of products covered by the legislation. Based on information from industry sources about the cost of hiring or appointing registered agents and on the small incremental difference between current safety standards for consumer products and the legislation's requirement, CBO estimates that the cost to comply with those mandates would not be significant.

The bill also would impose a private-sector mandate on importers and manufacturers by prohibiting them from importing certain products or components if those imports come from a foreign manufacturer that does not have a registered agent in the United States. Currently, industry standards do not require manufacturers to know the origin of imported components or parts used to manufacture most goods. The cost of the mandate would include the cost of tracking the origin of imports and their components and any net loss in income resulting from purchasing imports from foreign manufacturers that comply with the bill. Based on information from industry experts on the cost of obtaining that additional information and on the number of manufacturers that would be affected, CBO estimates that the cost of this mandate would probably be substantial.

In total, CBO estimates that the cost of complying with the mandates in the bill would probably exceed the annual threshold for private-sector mandates established in UMRA ($141 million in 2010, adjusted annually for inflation).

CBO staff contacts

The staff contacts for this estimate are Susan Willie (for federal costs), and Marin Randall, Jimmy Jim, and Samuel Wice (for the private-sector impact). This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section designates that the short title of the Act as the "Foreign Manufacturer Legal Accountability Act of 2010".

Section 2. Definitions

This section defines the terms "applicable agency", "commerce", "covered product", and "distribute in commerce". It also defines by exclusion the term "foreign manufacturer or producer".

The definition of "foreign manufacturer or producer" is intended to address concerns by industry stakeholders about including within the scope of the Act foreign manufacturers and producers related to an entity located in the United States. These stakeholders contended that the presence of a related entity over which a U.S. court already has jurisdiction means there is a responsible party located here who can be held accountable in place of the foreign manufacturer or producer in the event of damage or injury from a covered product, such that it was unnecessary to require the foreign manufacturer to register an agent and consent to jurisdiction. The definition, in general terms, removes from the scope of the Act two types of U.S. entities that distribute in commerce covered products from a foreign manufacturer to which they are related: (1) a foreign manufacturer that distributes a covered product through its U.S. parent; and (2) a foreign manufacturer that distributes a covered product through its U.S. subsidiary.

The exemption, however, is not unqualified. It is the view of the Committee that it would be unwise to exempt these categories of manufacturers entirely from the provisions of the Act without securing specific, credible assurance that consumers injured by dangerous or defective products made by such manufacturers can hold someone in the United States responsible. The exemption is only available to a foreign manufacturer with a U.S. parent that is a going concern, and not merely a shell. The exclusion attempts to capture only operating companies by requiring that the level of assets held by the parent exceed those of the foreign manufacturer, or exceed an average of the assets held by each foreign manufacturer related to the parent. The Committee believes that if the parent possesses more in assets than a subsidiary then it is in well-enough condition to settle a judgment. The exemption also is only available to a foreign manufacturer with a U.S. subsidiary that will certify to the applicable agency that it is responsible for any liability related to a covered product of the foreign manufacturer and will be responsive in the event of a recall.

While the Committee was sympathetic to the concerns of these industry stakeholders, it also is aware that U.S. subsidiaries of foreign manufacturers that distribute covered products have argued against responding to consumers in U.S. courts on the grounds that

only the foreign entity is the appropriate entity to respond.[17] The definition in the bill ensures that if a U.S. subsidiary is unwilling to provide a certification of responsibility for actions of the related foreign manufacturer, then the related foreign manufacturer will have to comply with the registration and consent requirements of the Act and be treated like any other foreign or domestic manufacturer doing business in the United States.

The definition of "applicable agency" was expanded during Subcommittee consideration to include the National Highway Traffic Safety Administration (NHTSA). While foreign manufacturers of motor vehicles and motor vehicle equipment are required to designate an agent for service of process and notices pursuant to 49 U.S.C. 30164, designation of an agent under that statute does not constitute acceptance of jurisdiction of U.S. courts by the manufacturer. Additionally, some courts have held that the designation of an agent under that statute is for the limited purpose of federal regulatory proceedings.[18] The Committee has included NHTSA here to eliminate barriers for injured consumers to accessing and fully utilizing agents designated by these manufacturers, and so there is no inconsistency with respect to the role of registered agents across the agencies with responsibilities for consumer protection.

Section 3. Registration of agents of foreign manufacturers authorized to accept service of process in the United States

Section 3(a) requires foreign manufacturers and producers that send covered products to the United States for distribution in commerce to designate a registered agent who is authorized to accept service of process on behalf of the manufacturer or producer here in the United States for state or federal regulatory proceedings or civil actions in state or federal court related to a covered product. This subsection also sets out the requirements for the designation of an agent, including selection of the location, who may serve as an agent, and the minimum documentation that an applicable agency must require for a valid designation. Finally, this subsection provides guidance to applicable agencies on setting the minimum level of import activity that foreign manufacturers or producers under their respective authority must exceed in order to be

[17] See, e.g., Defendant Toyota Motor Sales USA, Inc.'s, Response to Plaintiffs' Special Interrogatory Set No. One, *Ezal v. Martin Resorts, Inc. and Toyota Motor Sales USA, Inc.*, (Aug. 6, 2009) (stating: "PREFATORY STATEMENT: Toyota Motor Sales, U.S.A., Inc. is the authorized importer and distributor of Toyota motor vehicles in certain geographic areas of the continental United States. Toyota Motor Sales, U.S.A., Inc. does not design, test, manufacture or assemble Toyota vehicles in the ordinary course of its business, and Toyota Motor Sales, U.S.A., Inc. was not responsible for the design, manufacture, assembly or developmental testing of the 2005 Toyota Camry in this case. Therefore, Toyota Motor Sales, U.S.A., Inc. does not have sufficient information or documents to respond completely and accurately to many of these interrogatories. Such interrogatories should be addressed to Toyota Motor Corporation. Toyota Motor Corporation, located in Japan, was responsible for the overall design and developmental testing of the 2005 Camry").

[18] See *Richardson v. Volkswagenwerk, A.G.*, No. 77–0702–CV–W–1–S–4 (W.D. Mo., Apr. 14, 1982) (stating: "Contrary to plaintiffs' argument, three reasons lead to the conclusion that VWAG's designation of VWOA as an agent under 15 U.S.C. § 1399(e) [now 49 U.S.C. 30164] is limited to service of documents by, of and from the United States Secretary of Transportation. . . . Finally, this Court's decision that 15 U.S.C. § 1399(e) is not a proper method for service of process in common law actions is supported by the wisdom of other courts which have addressed the same issue. Utsey v. VWAG, No. 80–1620–9 (D.S.C.Sept. 18, 1981); Hamilton v. VWAG, Nos. 81–01–L, 80–594–D (D.N.H.June 10, 1981); Pasquale v. Genovese, 428 A.2d 1126 (Vt.1981); Sipes v. American Honda Motor Co., 608 S.W.2d 125 (Mo.App.1980); Fields v. Peyer, 75 Wis.2d 644, 250 N.W.2d 311 (1977); VWAG v. McCurdy, 340 So.2d 544 (Fla.App. 1976); Rubino v. Celeste Motors, Inc., No. 72–CV–350 (N.D.N.Y. Oct. 11, 1974)").

required to register an agent under the Act. The Committee heard concerns that requiring an agent for service of process in the United States would violate U.S. international obligations as a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. These concerns, however, are misplaced. The Hague Convention on Service, as the title makes clear, relates to service *abroad*. This Act relates to service within the territorial boundaries of the United States. The Hague Conference's own explanatory documents make clear that the Convention only applies when "a document is to be transmitted from one State party to the Convention to another State party for service *in the latter (the law of the forum State determines whether or not a document has to be transmitted abroad for service in the other State*—the Convention is non-mandatory)."[19] The Committee has determined that service of process does not need to be transmitted abroad under the circumstances provided for under this Act.

Section 3(b) requires the Secretary of Commerce in cooperation with the applicable agencies to establish a searchable Internet database containing information about the agent registered by a foreign manufacturer or producer, U.S. entities that have submitted certifications of responsibility and liability for their foreign related entities, and U.S. entities that have had their certifications of responsibility and liability removed for failure to fulfill their responsibility or liability obligations. The Secretary of Commerce is also required to provide this information to the Commissioner of Customs and Border Protection.

Section 3(c) provides that a foreign manufacturer or producer that registers an agent consistent with the Act consents to the jurisdiction of the state and federal courts of the state in which the agent for service of process is located for the purpose of any judicial proceeding related to a covered product. This consent ensures that injured consumers have access to a court in the United States to bring claims related to a covered product. For example, a foreign manufacturer that exports bicycle helmets subject to regulation by the CPSC must register an agent with the CPSC. If a person in the United States is injured in a bicycle accident and claims that the helmet was defective, then that company would have consented to the jurisdiction of the courts in the state where the agent is located. The scope of consent extends only to the covered product that allegedly caused the plaintiff's injury. A foreign manufacturer that exports bicycle helmets into the United States does not, by virtue of registering an agent with the CPSC, generally consent to jurisdiction related to claims involving products that are not covered by the Act.

That a foreign manufacturer has consented to the jurisdiction of the courts in one state, however, does not mean that injured consumers can only bring suit in that state. It is the Committee's intent that injured consumers can continue to pursue their claims in any state they wish. The difference is that the foreign manufacturer can contest the exercise of jurisdiction by courts in states other than the one where the registered agent is located. It is the

[19] Hague Conference on Private International Law, Outline: Hague Service Convention (Nov. 2009) (online at *www.hcch.net/upload/outline14e.pdf*).

Committee's view that establishing the floor of at least one state where consumers can seek judicial relief brings United States and foreign manufacturers closer to competing on a level field because there is no doubt that a U.S.-based manufacturer will always be subject to the jurisdiction of courts of at least one state. This subsection also provides that the consent does not extend to civil actions brought by foreign plaintiffs where the injury or damage from a covered product occurred outside the United States.

The Committee heard concerns that requiring foreign manufacturers to submit to the jurisdiction of U.S. courts would lead to retaliation by other countries against U.S. manufacturers that do business abroad. These concerns are also misplaced. The problem of establishing jurisdiction over foreign manufacturers is one of American law. Our constitutional principles require measuring minimum contacts with a given state to establish jurisdiction. Most other countries follow the general rule of tort law that the forum is governed by *lex loci delecti*—the law of the place of the wrong.[20]

Section 3(d) requires the departments and agencies with responsibilities under the Act to prescribe regulations no later than one year after enactment and that the departments and agencies work together so that the Act is implemented as effectively and consistently as possible.

Section 3(e) requires applicable agencies to remove the certifications of U.S. entities that fail to fulfill the responsibility or liability obligations that served as the assurance for exempting their related foreign manufacture from having to register an agent and consent to the jurisdiction of U.S. courts.

Section 4. Prohibition of importation of products of manufacturers without registered agents in United States

This section bans the importation of covered products from foreign manufacturers and producers that fail to register an agent consistent with the Act.

Section 5. Reporting of defects in covered products in foreign countries

This section requires a foreign manufacturer or producer of a covered product to report within five business days to the applicable agency any voluntary or mandatory recalls or other safety campaigns concerning a product that is identical or substantially similar to a covered product sold in the United States.

Section 6. Study on registration of agents of foreign food producers authorized to accept service of process in the United States

This section calls on the U.S. Department of Agriculture and the FDA to complete a study to determine the feasibility of requiring foreign producers of food exported to the United States to register an agent in the United States for service process.

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[20] House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, Testimony of Prof. Andrew Popper, *Hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act" and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act,"* 111th Cong. (June 16, 2010).

Section 7. Study on registration of agents of foreign manufacturers and producers of component parts within covered products

This section calls on the head of each applicable agency to complete a study to determine the feasibility of requiring foreign manufacturers and producers of component parts included in fully assembled products exported to the United States to register an agent in the United States for service of process.

Section 8. Study on enforcement of United States judgments relating to defective drywall imported from China

This section calls on the U.S. Government Accountability Office, GAO, to study potential methods for enforcing judgments by U.S. courts against Chinese drywall manufacturers that exported defective drywall to the United States between 2004 and 2007.

Section 9. Relationship with other laws

This section leaves intact state laws concerning service of process and personal jurisdiction, and the authority of states to enact such laws, to the extent that they are not inconsistent with the Act and then only to the extent of the inconsistency.

EXPLANATION OF AMENDMENTS

During Committee consideration of H.R. 4678, Chairman Waxman offered an amendment that excluded from the requirements of the bill: (1) foreign manufacturers and producers owned or controlled by a U.S. person or business that maintains a certain level of assets; and (2) foreign manufacturers and producers with related entities located in the United States so long as the related U.S. entity certifies that it is responsible for liabilities related to the covered product and will act as a point of contact in the event of a recall or other issue concerning the safety of a covered product. The Waxman amendment also eliminated the requirement that the written agent designation submitted by the foreign manufacturer or producer include the trade or brand names or other identifying information under which the covered product would be sold in the United States. The amendment also clarified that the effective date for the requirement to register an agent was to follow the publication of regulations implementing the Act. The Committee agreed to the Waxman amendment by a voice vote.

The Committee considered an amendment by Mr. Braley of Iowa calling on GAO to study potential methods for enforcing judgments by U.S. courts against Chinese drywall manufacturers. The Committee agreed to the Braley amendment by a voice vote.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

H.R. 4678, as reported by the Committee, makes no change to existing law.

DISSENTING VIEWS

We, the undersigned Members of the Committee on Energy and Commerce, oppose the passage of H.R. 4678 and submit the following comments to express our concerns with this legislation.

The Foreign Manufacturers Legal Accountability Act, H.R. 4678, while born of good intentions, will result in nothing but harm to American businesses and the American consumer. Not only will it severely disrupt supply chains, potentially violate our international trade agreements, and open our domestic industries to retaliatory actions, but it does nothing to achieve the Majority's stated goal: aiding consumers in obtaining damages from foreign manufacturers for product liability. Even if a consumer obtains a judgment under this purportedly easier procedure, there is less incentive for a foreign court to enforce a U.S. judgment when the treaty procedures (to which we are a party) have been circumvented. That alone may render this bill anti-consumer: a consumer will still spend considerable resources obtaining a judgment only to find parties are less likely to enforce the judgment and must spend additional funds to comply with treaty procedures.

The bill's proponents deem this legislation as necessary because it has proven difficult for U.S. plaintiffs to hold foreign manufacturers accountable. While recognizing the existence of the Hague Service Convention (to which 59 nations, including China, are signatories)[1], they cite testimony of a law professor from a 2009 Senate Judiciary Committee hearing to support their conclusion that it can take "three or more months" to serve process documents on a foreign manufacturer. However, a Special Commission convened by The Hague in 2009 to review the Convention's operation concluded that "the Convention is both efficient and effective—statistical data shows that 66% of requests are executed within 2 months."[2] The Special Commission further "confirmed 'wide use and effectiveness, as well as the absence of major practical difficulties.'"[3]

The oft-cited example for the policy need for this legislation is the defective drywall imported from China during the building boom when U.S. manufactured drywall was in short supply. However, in this case, existing process was successful: at least one Chinese drywall manufacturer was served and a default judgment was achieved in Federal court.

The bill's proponents also note that even if a victim is successful in serving process on a foreign manufacturer, the manufacturer will challenge personal jurisdiction of the U.S. court. An objection

[1] *See* Hague Convention of the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Feb. 10, 1969, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

[2] Hague Conference on Private International Law, *Outline Hague Service Convention*, 1 (Nov. 2009) *http://www.hcch.net/upload/outline14e.pdf.*

[3] *Id.* at 2.

to personal jurisdiction is founded in the Fifth Amendment of the U.S. Constitution and courts have found that foreign nationals are afforded the same equal protection of the laws as U.S. citizens. Due process extends to the definition of in personam jurisdiction and to whether minimum contacts exist for a court to claim jurisdiction over a foreign defendant. This bill, however, would strip foreign nationals of their due process right to object to personal jurisdiction by mandating consent to the personal jurisdiction of U.S. courts.

In addition to violating Constitutional protections, H.R. 4678 may also violate our World Trade Organization (WTO) obligations. As a party to numerous WTO agreements, the U.S. has pledged to not treat foreign trading partners differently than domestic producers. This bill creates a potential national treatment violation by imposing legal obligations on foreign trading partners that do not apply to domestic producers. U.S. manufacturers are not required to incorporate and, as a result, there are no legal obligations on domestic manufacturers to identify an agent for service of process. Further, a U.S. manufacturer may argue that it does not have sufficient minimum contacts to be subject to the jurisdiction of another State's courts. Conversely, H.R. 4678 places a legal obligation on foreign manufacturers to designate an agent and, by the act of designating an agent, denies foreign manufacturers the right to argue they do not have minimum contacts with a State to be subject to its jurisdiction.

Below we detail a number of specific objections.

SECTION-BY-SECTION

Section 2. Definitions

Section 2, paragraph (2) defines "commerce" in a circular manner. Under H.R. 4678, "The term 'commerce' means trade, traffic, commerce, or transportation . . . which affects trade, traffic, commerce, or transportation." While there is precedent for this definition in the Magnusson-Moss Warranty Act, there are certainly more recent and more logical definitions at Congress's disposal.

Section 2, paragraph (3)(G) defines a "covered product" to include not just a finished product, but a component part to be assembled into a finished product. This extends to not only pre-made components but also to raw materials imported from a foreign mine or ingredients used for pharmaceutical products or drug testing, notwithstanding existing requirements for foreign drug manufacturers to register with the Food and Drug Administration.

This extension of a covered product to include component parts in combination with a definition of "commerce" so broad it captures research and development could have a significant chilling effect on emerging industries reliant on the global economy, such as clean energy technology. On the same day the Committee acted on H.R. 4678, the Committee also considered and reported H.R. 5156, a new $75 million program within the International Trade Administration dedicated to growing the clean energy technology industry and the export of such technology. H.R. 4678 would severely undercut the effectiveness of such programs and viability of such industries for several reasons. Forcing foreign manufacturers or importers of components, including raw materials (i.e., a component in-

tended to be assembled in the U.S.), to individually register and submit to U.S. jurisdiction will likely restrict the supply of necessary materials. This could also have serious consequences in the research and development of new drugs as many ingredients are imported. If such imports are restricted, it will necessarily impact the research into and development of new drugs, raising the costs to U.S. consumers. It remains unclear whether the requirement in this legislation for the relevant agency to promulgate minimum size guidelines determining which manufacturers will be required to register will in fact exempt the very manufacturers cited as the impetus for this legislation.

In either example, neither the final product nor its components ever reach a U.S. citizen and there is thus no need for a U.S. citizen to be able to sue such suppliers. If a need should arise, U.S. citizens may find recourse through our judicial system utilizing the procedures of The Hague Treaty to which we have been a party for nearly 50 years.

Finally, if we make it burdensome for foreign manufacturers to export their products to the U.S. by requiring the designation of an agent and registration with the applicable Federal agency, and by opening the door to vicarious liability, some manufacturers may withdraw from the U.S. market. Decreased supply means decreased competition, which in turn means higher prices for U.S. consumers.

Section 3. Registration of agents of foreign manufacturers authorized to accept service of process in the United States

The new requirements and restrictions of H.R. 4678 may violate our obligations under various international treaties. The Majority, however, notes that ". . . [the Hague Service Convention] relates to service *abroad*." If a defendant neither resides in the forum nor has sufficient contacts in the forum, the only reasonably certain way of serving process is by serving the defendant where he or she resides—in these instances, abroad. Rule 4 of the Federal Rules of Civil Procedure in fact references the established treaty procedures by permitting service of a foreign defendant "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." Also, while the Majority concludes that the Committee "determined that service of process does not need to be transmitted abroad," this Committee does not have the authority to change civil suit procedures.

Section 3(b) requires the Department of Commerce to maintain a public, searchable database of every manufacturer or component part manufacturer and their designated agent for every single import that enters the U.S. Such a database would be vast in its size and scope and was not vetted in the Committee. Second, this program is not compatible with the Department's mission statement:

> *The Department of Commerce promotes job creation, economic growth, sustainable development, and improved living standards for all Americans, by working in partnership with business, universities, communities, and workers to:*

> *1. Build for the future and promote U.S. competitiveness in the global marketplace, by strengthening and safeguarding the nation's economic infrastructure;*
>
> *2. Keep America competitive with cutting-edge science and technology and an unrivaled information base; and,*
>
> *3. Provide effective management and stewardship of our nation's resources and assets to ensure sustainable economic opportunities*.[4]

Section 3(c) requires foreign manufacturers, by the act of designating an agent, to consent to the personal jurisdiction of courts. In so doing, this eliminates a foreign manufacturer's ability to argue it does not have sufficient contacts with a State. Further, it disregards whether any party can reasonably anticipate being hauled into U.S. State court. For reasons noted above, this is a violation of the Due Process Clause.

Additionally, Section 3(c) states that such consent shall be "for the purpose of any judicial proceeding related to such covered product." Without any limitation, a manufacturer could be pulled into a lawsuit for any reason—regardless of whether the suit relates to a product defect.

Both of these troubling aspects pose a risk to domestic manufacturers should foreign countries choose to adopt mirror legislation as a retaliatory measure. The Majority dismisses this concern as "without merit;" however, trade press reports indicate both the European Union and Canada are already examining H.R. 4678 for inconsistencies with the General Agreement on Tariffs and Trade and for its impact on supply chains.[5]

Section 4. Prohibition of importation of products of manufacturers without registered agents in United States

The Committee did not address Section 4 at markup due to lack of jurisdiction. However, the section remains in the legislation. Section 4 bans the import of covered products, component parts intended for assembly into a covered product if the "product (or component part) or part of such product (or component part)" was produced by a foreign manufacturer who fails to designate or maintain an agent for service of process. The inclusion of the term "any part" extends the import ban to products that are not defined in Section 2 as a "covered product." In effect, this means that while manufacturers of parts are not required to designate an agent under Section 2, they may not export to the U.S. unless they do so under Section 4. For example, if a computer manufacturer imports motherboards for assembly into a computer here in the U.S., the motherboard manufacturer must designate an agent because it is a "covered product" under Section 2. Under Section 4, the import of those motherboards would be banned if the manufacturer of the transistors already installed on the motherboards has not also designated an agent. Further, it is unclear how far down the line this definition applies; the term "any part" could be interpreted to mean even

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[4] Department of Commerce, *Strategic Plan for 1997–2002*, 1 (visited Jun. 3, 2010) *http://www.osec.doc.gov/bmi/budget/strtgc/Aintro.pdf*.

[5] *Ways and Means Examining Foreign Manufacturers Bill for WTO Issues*, INSIDE U.S. TRADE (June 25, 2010).

the lead soldering (or even the lead itself) and thus if the manufacturers of the soldering and lead do not register agents, the motherboard may be banned from importation. At markup, Committee counsel was unable to clarify the definition of "any part" within this section.

Beyond the technical problems with section 4, this section may violate Article XI of the General Agreement on Tariffs and Trade as an illegal prohibition on trade.[6]

Conclusion

This legislation is a disincentive for foreign manufacturers of all products, but particularly component parts, to export to the U.S. market. This could result in a grave disruption in supply chains across the board. H.R. 4678 potentially violates our international agreement obligations by treating foreign companies differently from U.S. companies and institutes an importation ban based on something other than duties or taxes.

For those foreign companies that choose to continue exporting to the U.S., this bill creates a potentially overwhelming administrative burden for U.S. companies. Many companies have thousands, if not tens of thousands of suppliers. Our retailers and manufacturers will incur the cost of checking on each vendor to ensure the products are legally entered into the U.S. with no net benefit to consumers.

Further, creating regulatory burdens for domestic companies who source products from foreign manufacturers is a job killer, not a jobs program. This legislation creates far more problems for U.S. businesses than it will ever resolve regarding foreign manufacturers. For these and the reasons enumerated above, we, the undersigned, cannot support H.R. 4678.

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CLIFF STEARNS.
JOSEPH R. PITTS.
ED WHITFIELD.
PHIL GINGREY.
ROBERT E. LATTA.
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[6] General Agreement on Tariffs and Trade, Jan. 1, 1948, 55 U.N.T.S. 224 *http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.*

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences [sic] or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.