H.R. 4678, FOREIGN MANUFACTURERS LEGAL ACCOUNTABILITY ACT, AND H.R. 5156, CLEAN ENERGY TECHNOLOGY MANUFACTURING AND EXPORT ASSISTANCE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

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WITNESSES

H.R. 4678, FOREIGN MANUFACTURERS LEGAL ACCOUNTABILITY ACT, AND H.R. 5156, CLEAN ENERGY TECHNOLOGY MANUFACTURING AND EXPORT ASSISTANCE ACT

WEDNESDAY, JUNE 16, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2322, Rayburn House Office Building, Hon. Bobby L. Rush [chairman of the subcommittee] presiding.

Present: Representatives Rush, Sarbanes, Sutton, Stupak, Barrow, Matsui, Braley, Dingell, Stearns, Whitfield, Terry, Murphy, Gingrey, Scalise, and Latta.

Also Present: Representatives Sánchez and Turner.

Staff Present: Angelle Kwemo, Counsel; Felipe Mendoza, Counsel; Michelle Ash, Chief Counsel, Commerce, Trade, & Consumer Protection; Peter Ketcham-Colwill, Special Assistant; Althea Gregory, Intern; and Elizabeth Letter, Special Assistant.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. The subcommittee on Commerce, Trade and Consumer Protection will now come to order.

The purpose of today's hearing is to hear testimony on two bills, H.R. 4876, the Foreign Manufacturers Legal Accountability Act, and H.R. 5156, the Clean Energy and Technology Manufacturing and Export Assistance Act.

The chair recognizes himself for 5 minutes for an opening statement.

I want to thank the members of the subcommittee for participating in this important legislative hearing. As I stated before, we will be considering two important bills.

The first bill deals with products manufactured overseas that are flooding the U.S. market and aren't safe for American consumers. And the second bill deals with access to global markets by American manufacturing new products. Both bills aim at protecting American jobs and American consumers. And I would be remiss if I didn't commend Congresswoman Betty Sutton and Congresswoman Doris Matsui for attempting to lean on both of these very critical issues for the safety of the American people.

Last year we were saddened by the tragedies caused by the toxic effects of Chinese drywall on consumers. The victims sometimes from areas still reeling from the aftermath of Hurricane Katrina, finding themselves suffering as a result of serious health problems.

More saddening is the fact that it is very difficult, if not impossible, to hold accountable the foreign manufacturers of those products. H.R. 4876, the Foreign Manufacturers Legal Accountability Act, will fix that loophole and allow suppliers of foreign-made products to be sued for defects in those products used here on U.S. soil. And I must also say that while the U.S. market is open to global manufacturers, the contrary is not always the case.

Our next bill illustrates the need for green technology and the need for necessary remedies. Last year, the subcommittee held a hearing on how to increase the export of green technology products. We heard about the challenges U.S. manufacturers are facing in overseas markets despite the fact that U.S. technology is unquestionably one of the best.

We all agree that clean energy is a vast, untapped market. There is a large world demand for U.S. goods. But our market share in 2008 dropped in from 14 to 9 percent. Even emerging economies are rising and trying to replace the U.S. in its current position as global leader in manufactured goods. It will happen if we don't assert our long-recognized and long-held leadership on this particular matter.

H.R. 5156, the Clean Technology Manufacturing and Export Assistance Act will help our industry do that and will strengthen the manufacturing industry's capacity and also provide them with the tools they need to boost their exports.

We have, on several occasions, highlighted the importance of having a strong domestic policy to allow the manufacturing industries to be confident enough to penetrate the international markets. We are all aware that the events currently taking place in the Gulf of Mexico is another real concern. It reinforces the need for environmentally friendly technologies. This is where our future lies.

As I said before, and I will repeat it again, we must seize every opportunity or fall drastically behind. And I want to thank all of the witnesses again for being here, and I look forward to your testimony on the bills we are considering today.

And now I am going to recognize the ranking member for 5 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY

Mr. WHITFIELD. Chairman Rush, thank you very much and we certainly appreciate the witnesses being with us here this morning as we explore two pieces of legislation that I think all of us would agree have great intentions, and I think it's important because this legislation is so important that we listen to some experts today about some concerns that certainly I have about this legislation, although I agree with the intent of the legislation.

For example, on 4678, which holds foreign manufacturers accountable in the U.S. for selling products that comply with our safety standards and require them to have an agent for service of

process, I don't really have any problem with that. But I think we have to explore, for example, in 2002, the Congress passed the Public Health Security and Bioterrorism Act, and under that Act, under certain circumstances, certain companies had to have registered agents. The U.S. Customs law already requires agents for companies that do business in the U.S. in certain instances.

We are signatory to the Foreign Sovereign Immunity Act, and we know that in many countries around the world like China, a lot of those companies are owned by the government and it raises the issue even if you have a service of process you obtain the judgment can you really collect on it, because of sovereign unity and so forth. And then we have the Hague Convention on the Service Abroad of Judicial and Extra Judicial Act and what will the impact of this have on that?

So we have a lot of mechanisms already in place through the government to ensure the people of America that we are dealing and consuming and using safe products. Now, I am not saying that those are enough. But I also know that if we adopt this kind of legislation, we might also expect that other countries may also adopt it, which could have some negative impact on our small exporters that are trying to open up foreign markets, and I know that President Obama, one of his goals is to significantly increase our exports.

So all of these are issues that I think we have an opportunity to work together here, but I think it is important that we explore the ramifications of this legislation. And so we look forward to the witnesses' testimony on that issue.

On the clean energy technology manufacturing export assistance fund, I think all of us are certainly interested in exporting green technology or clean technology, and I know already the Department of Commerce has an extensive assistance program to encourage exports of U.S. products. And it appears that this legislation would simply be carving out clean energy technology, which is fine.

But as I was reading this legislation, just to give you an example of one thing I was concerned about because I am from a coal State. Coal still provides 51 percent of all electricity produced in America, and I don't think anyone believes that renewable energies or wind power or anything else, I guess they are one in the same, over the immediate term will come close to providing our electricity needs.

But if this bill became law, for example, I would like to see some assistance given to carbon capture sequestration technology because China is using more coal every day than the United States even thinks about. And right now, they are just burning coal, low-grade coal, and polluting the environment and if we can export clean coal technology to them, that would be great.

But as I read this legislation, it says to be eligible for this program, the project or the entity has to do one of the following: Generate electricity. Well, carbon capture sequestration does not generate electricity but it removes carbon dioxide. Second thing, substantially increases the energy efficiency of buildings, industry, or agricultural processes. Well, I am not sure that carbon capture sequestration would meet that criteria, or it substantially increases the energy efficiency of the transportation system.

So those are some questions that I think we need to explore because this is very important legislation, it has great goals, and I think we have an opportunity here to explore a lot of these issues and come up with a proposal that all of us can agree to. I yield back my 14 seconds.

[The prepared statement of Mr. Whitfield follows:]

Statement of the Honorable Ed Whitfield
Ranking Member,
Subcommittee on Commerce, Trade, and Consumer Protection
Hearing on H.R. 4678, the Foreign Manufacturers Legal Accountability Act, and
H.R. 5156

- H.R. 4678 seeks to hold foreign manufacturers accountable in the U.S. for selling products that comply with our safety standards. That is a worthy goal I believe we all share.

- Reading this legislation, I do have concerns whether this is the best policy approach that will achieve the desired result while at the same time not inflicting harm on US companies.

- This legislation prohibits foreign manufacturers from introducing, selling, or holding to sell or distribute merchandise in commerce unless the manufacturer has a registered agent in the United States authorized to accept service of process for all civil and regulatory matters in State and Federal courts.

- It is my understanding that the importer or customs broker is often the manufacturer of record under the Consumer Product Safety Act and certain liability attaches to that role.

- I will be interested to learn from our witnesses what improvement a registered agent will provide over current law? Is there a mechanism to force foreign manufacturers to appear in court and abide by judgments?

- The good multinational companies will likely comply voluntarily, but it is easy to imagine the fly-by-night night companies that manufacture shoddy products in foreign countries may simply disappear and reconstitute themselves to sell under a new company name.

- If the registered agent is the importer or customs broker, it is not clear how the registered agent will be selected by manufacturers that use multiple importers or brokers.

- Turning to H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act of 2010", this legislation provides a new $75 million promotion and assistance program for "clean" energy within the Department of Commerce's International Trade Administration.

- I do find it interesting that we are having a hearing on this proposal, after a series of hearings we've held in the Subcommittee on Energy and Environment, looking at so-called "green" jobs.

- I know that the President and others have touted green jobs as a tremendous opportunity for the United States, but I am not as optimistic, and in fact there was a study conducted by a university in Spain, which itself has promoted a green jobs economy, which showed an actual loss of traditional jobs for new green jobs created, and which forecast that for every 4 jobs created in the renewable energy sector, the United States should expect to lose nine jobs.

- While I want to see U.S. innovation rewarded through growth of commercially viable technologies I do believe the approach in this legislation presents serious concerns because it appears to put the cart before the horse.

- The biggest obstacle to increasing our exports of new energy technology is making sure foreign markets are truly open to U.S. manufacturers. The Administration recognizes this and I commend them for focusing their energies on opening these markets and ensuring strong protections for intellectual property exist and are enforced.

- Until tariffs and preferences in some countries for their own domestic manufacturers are eliminated, all our promotion efforts will be in vain.

- If our companies can increase their exports through expanded market access, this new legislation will be justified. However, to gain foreign market access, we will be called on to reciprocate and open our energy markets. As a result, our current domestic markets will likely

face stiffer competition which could limit job growth. Such outcomes must be carefully evaluated.

- With that said, the goal to increase exports is best achieved through continued efforts to negotiate free trade agreements or ensuring our existing agreements with our trade partners permit equal access.

- My concern with this program is that it appears to subsidize the efforts of businesses that want to export their goods. Traditionally, private enterprises must develop these competencies internally or contract expert consultants to provide these services. Viable companies can and will invest in their export capabilities and should not rely upon taxpayer funded subsidies.

- Further, while more government jobs would be created at taxpayer expense, it would likely displace private sector professionals that provide the same or similar services.

- Finally, if we are concerned about long term job growth, we have to be concerned with the overall trade picture and how sensitive issues such as the transfer of intellectual property to developing countries affects America's long term competitiveness.

- I yield back.

Mr. RUSH. The chair thanks the gentleman.

The chair recognizes the gentlelady from Ohio, Ms. Sutton, for 2 minutes.

OPENING STATEMENT OF HON. BETTY SUTTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Ms. SUTTON. I thank the chairman for holding this hearing, and I think both of these pieces of legislation are important. I am proud to be the sponsor of H.R. 4678 along with 61 cosponsors from both sides of the aisle.

I am going to keep my remarks limited to that at this point.

Every year many Americans are injured, sometimes fatally, by dangerous products that have been manufactured abroad and imported into the United States. Recent examples include toxic drywall, faulty infant cribs, lead paint in children's toys and defective tires. These products not only hurt American consumers, they hurt American businesses.

U.S. manufacturers are responsible for insuring that the products that they put on the market are safe, yet it is extremely difficult for injured parties to hold foreign manufacturers accountable because they are unable to serve process or establish jurisdiction. As a result, American consumers and businesses are forced to engage in cost-prohibitive and time-consuming international legal battles rarely receiving the redress they deserve.

The Foreign Manufactures Legal Accountability Act would require foreign manufacturers doing business in the U.S. to identify a registered agent authorized to accept service of process on behalf of that manufacturer. Registering an agent would constitute an acceptance of jurisdiction of the State in which the agent is located. This bipartisan bill would help protect American consumers and businesses from defective products manufactured abroad, would level the playing field for American manufacturers, and provide U.S. consumers with the necessary tools to seek proper redress.

And I want to thank my colleague and cosponsor Representative Mike Turner who is here this morning for his work and support on this legislation.

I also want to thank Representative Linda Sánchez for her leadership and work on this issue, and she may be joining us as well.

I look forward to hearing from the witnesses and to working through whatever concerns that the ranking member may have to a solution on this very, very important work.

At the end of the day, this is about fairness and justice. American consumers and businesses deserve both, and this legislation will help us achieve that.

Mr. RUSH. The chair now recognizes the gentleman from Ohio, Mr. Latta, for 2 minutes.

OPENING STATEMENT OF HON. ROBERT E. LATTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. LATTA. Thank you, Mr. Chairman, Ranking Member Whitfield. Thank you for holding this hearing today on these two pieces of legislation both related to manufacturing. My congressional district is heavily based in manufacturing, and I am constantly advo-

cating for ways to assist these manufacturers to remain in business and to continue producing goods.

According to the National Association of Manufacturers, my district is the largest manufacturing district in the State of Ohio, the 20th largest in Congress. When I was first elected in December of 2007, I represented the ninth largest manufacturing district, and in two years it dropped to 20th. The current unemployment rate in Ohio is just under 11 percent, and there are many counties in my district that have over 12 percent unemployment.

In looking at these two pieces of legislation, the subcommittee needs to ensure that it does nothing to hinder further economic growth to put further restrictions on U.S. manufacturers. It is important that Americans have safe products for use and that companies comply with U.S. safety standards. However, I have several concerns with H.R. 4678 and that will have unintended consequences on American manufacturers.

They are concerns that under this bill the U.S. companies that have contracted with foreign manufacturers for parts will be the ones responsible for establishing a registered agent on behalf of the foreign supplier. In addition, I have concerns that other nations will reciprocate similar laws that would impose additional compliance regulations or liability exposure to U.S. exporters abroad.

The manufacturers in my district can not withstand either of these scenarios. Many of these companies are still holding on by their fingernails in this troubled economy and will not be able to withstand further government mandates or increased exposure to liability. I have concerns that this legislation could inadvertently lead to an increase in lawsuits on our manufacturers.

My district is also home to many facilities relating to alternative energy sources. Clean energy technology manufacturing is an important piece of the puzzle for America's energy independence. As with all of our manufacturing products, exporting is a key to the U.S. to remain a world leader. However, I do have concerns with H.R. 5156 and its creation of another new government program administered by the International Trade Administration within the Department of Commerce. At a time when our national debt is skyrocketing, I do not believe in expanding our government but should be trying to limit it.

There are also concerns that this new grant program duplicates other programs that have already been created through the energy stimulus bills.

I look forward to the hearing today.

Mr. RUSH. The chair now recognizes Mrs. Matsui for 2 minutes.

OPENING STATEMENT OF HON. DORIS O. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. MATSUI. Thank you, Mr. Chairman, and thank you for calling today's hearing.

I, first of all, want to applaud my good friend, Betty Sutton, for introducing H.R. 4678, and I support her legislation. I would also like to thank the witnesses for being with us here today. And I particularly want to welcome our witness from the Sacramento area, Jack Crawford, CEO of Jadoo Power.

Under Jack's leadership, Jadoo Power is a leader in manufacturing clean energy technologies and providing hybrid fuel cell power for military, government, and commercial applications. Jack has a wealth of expertise in the clean energy sector, and I look forward to hearing from him today.

As he can attest, the Sacramento region is well positioned to be a leader in producing clean energy technologies with more than 110 clean tech companies that focus on production of fuel cell technology, biofuels, solar, wind energy, and others.

To continue growth, the U.S. clean energy sector, particularly small and medium-sized firms, need manufacturing expert assistance to boost their competitiveness in the international marketplace. In fact, our Nation's clean tech industry is lagging behind many of its competitors in exports, including Germany and China. This is simply unacceptable. The U.S. must be a leader in manufacturing and exporting clean technologies. That is why I, along with Chairmen Rush and Dingell and Representative Eshoo, introduced H.R. 5156, a bill to boost the competitiveness of American-made clean tech products both here in the United States and around the world.

The bill will create a fund to develop and sustain a national clean energy technology export strategy to provide U.S. clean tech firms with expert assistance and finding and navigating foreign markets to sell their goods and services to new customers.

The President has laid out a laudable goal to double U.S. exports over the next 5 years, and this legislation will ensure clean energy exports are at the forefront of the national export strategy. The bill will also strengthen America's domestic clean tech manufacturing industry.

Ultimately, H.R. 5156 will enhance our standing in the race to be the global leader in clean energy. The BP oil spill only underscores the need for leadership in the clean energy market, and this spill has sent a strong message that America is serious about being the leader in producing and exporting these technologies.

I look forward to working with my colleagues on the committee to achieve this goal, and I thank you, again Mr. Chairman, for holding today's hearing.

Mr. RUSH. Dr. Gingrey is recognized for 2 minutes.

OPENING STATEMENT OF HON. PHIL GINGREY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. GINGREY. I want to thank you for holding today's hearing on two pieces of legislation, H.R. 4678 and 5156, to allow us to hold a discussion on important issues facing consumers as we strive to create jobs. I believe that both of these bills are well intentioned as they attempt to assist consumers and improve the clean technology trade deficit that we currently face.

Unfortunately, I believe that both bills will have unintended consequences that could prevent them from accomplishing their respective goals.

Mr. CHAIRMAN, H.R. 4678 seeks to rectify the problems that have been associated with foreign product recalls. While I am saddened by what has occurred to the victims—one of whom is on our first

panel of witnesses—I fear that H.R. 4678 will not fully address the underlying issue.

The purpose of this legislation is to hold foreign manufacturers responsible for the products that come to the United States. However, unintended consequences many times domestic companies contracting with foreign manufacturers will likely be responsible for establishing registered agents, thereby putting American companies at risk as opposed to their foreign counterparts.

I have similar concerns with H.R. 5156. During the budget window of this bill, we provide $75 million in funding instead of tackling two of the biggest problems with our clean technology trade deficit.

Mr. Chairman, the first deals with the raw materials available domestically to support innovation in clean technology. The minerals needed to commercially manufacture these products are either not abundantly available in U.S. or current policies prevent them from being mined properly.

The other problem is the issue of trade. Without access to markets, without burdensome tariffs, we will continue to trail our competitors when it comes to clean technology products. Unfortunately, I do not believe that H.R. 5156 will ultimately alleviate the trade deficit that we face in this area.

Mr. Chairman, despite my concern about these bills though, I do look forward to hearing from both panels of witnesses so they can provide us with their expertise on these matters.

Mr. RUSH. The chair now recognizes the chairman emeritus for the full committee, the gentleman from Michigan, Mr. Dingell, for 5 minutes.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Mr. Chairman, I thank you. I commend you for holding today's hearings on H.R. 4678, the Foreign Manufacturers Legal Accountability Act, and H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act.

The former will help ensure foreign manufacturers are held accountable for injuries their products may cause to American public health and safety. And the latter will bolster the Nation's exports in the growing sector of green technology. Both are important, and I support efforts such as these and will welcome the input of our witnesses.

Before concluding my remarks, I wish to say a few words in support of H.R. 5156 which you, Mr. Chairman, Congresswoman Matsui, and I are original sponsors.

There is broad agreement that the United States lags behind other nations in terms of exports. Whereas exports can now account for 49 percent of Germany's GDP, they account for only 9 to 13 percent of our own. More alarmingly, while Germany exported $19.6 billion in clean technologies and services between 2004 and 2008, the United States exported only 7.7 billion.

In brief, the United States consumes far more than it produces and in so doing, is squandering not only our valuable resources, our moneys, but our opportunity to be a leader in green technology ex-

ports. H.R. 5156, by establishing a modest support mechanism for the export of such technologies by U.S. manufacturers will significantly help remedy this matter.

Moreover, the tax revenue generated from these exports will pay more than the bill's cost over a 5-year period. The bill should enjoy bipartisan support and must be recognized as a critical component of our Nation's economic recovery.

And to return to H.R. 4678, it should be noted that had such legislation been in effect, our troubles with the matter of Toyota vehicles and their safety consequences would have been handled much easier.

Mr. Chairman, I thank you, and I yield back the balance of my time.

Mr. RUSH. The chair recognizes the gentleman from Louisiana, Mr. Scalise.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. I would like to focus my comments on H.R. 4678, the Foreign Manufacturers Legal Accountability Act, a bill that is relevant to my State and district because of the problems we are experiencing with toxic drywall.

To date the Consumer Product Safety Commission has received over 3,300 incident reports related to toxic Chinese drywall from 37 States. Twenty percent of these reports are from Louisiana, which is second only to Florida. And my office continues to receive complaints from constituents affected by toxic drywall.

Last week, a resident of New Orleans contacted my office at a loss for what steps to take or what to do for help. Like many others, her family was forced to move out of her home because of toxic Chinese drywall, and they can no longer afford to pay the mortgage on the home they aren't occupying while paying rent for temporary housing at the same time.

The CPSC has been investigating toxic Chinese drywall for over a year and a half, and it has sufficient evidence that toxic Chinese drywall manufactured by Chinese companies is responsible for the severe damage we have seen in thousands of American homes. Last month, the Commission even identified 10 drywall manufacturers whose products emitted high levels of hydrogen sulfite in laboratory testing. Unfortunately, no action has been taken against these companies.

We must hold the manufacturers of toxic Chinese drywall accountable, and I have continued to push for this including requesting that the Department of Homeland Security pursue any and all options available to the department including the seizing of assets being shipped into the United States against those entities that manufacture toxic Chinese drywall and have been found liable for the damages associated with the contaminated products.

These foreign manufacturers bear responsibility for serious damage for thousands of homes across the country and have caused homeowners significant financial hardship and in some cases, physical harm. Even more concerning is that they have done so without repercussion. We must take action to hold accountable those who

are responsible for the damages caused by toxic Chinese drywall until they settle with the affected victims or comply with the rulings of U.S. courts.

Given the challenges we are facing in doing this, I am pleased to see some of my colleagues recognizing this issue. The goals of H.R. 4678 are good, but I do have questions about whether its implementation will accomplish its intentions. While it can be argued that this bill would make it easier to prosecute foreign manufacturers in the U.S., foreign courts would still be under no obligation to enforce such judgements. We would still be dependent on the good will of foreign courts to enforce those judgments.

My constituents and others around the country who have been affected by toxic Chinese drywalls deserve answers and solutions, and this subcommittee must work with the intergovernmental task force on problem drywall to help deliver that.

Mr. RUSH. The chair now recognizes the gentleman from Georgia, Mr. Barrow of Georgia for 2 minutes.

Mr. BARROW. I thank the chairman, and I will waive opening.

Mr. RUSH. The chair now recognizes Mr. Braley for 2 minutes.

OPENING STATEMENT OF HON. BRUCE L. BRALEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. BRALEY. Thank you, Mr. Chairman, for this important hearing.

And as chairman of the Populist Caucus, I am proud that the bill known as H.R. 4678, the Foreign Manufacturers Legal Accountability Act, is part of our America Jobs First platform. This bill requires foreign manufacturers doing business in the United States to identify a registered agent authorized to accept service of process on behalf of the manufacturer.

And one of the reasons I support this legislation is because unlike a lot of people at this hearing, I have actually tried to hold foreign manufacturers accountable for their defective products in U.S. State courts. It is virtually impossible. There are companies marketing products in this country who put the word "U.S.A." in their company logo and put out publications that say "in an industry dominated by foreign competition, we are proud of the fact that our products are manufactured right here in the United States," and yet when those products gave rise to a defect and suit was pursued, they turned around and said these products, in fact, were not made in the United States. They were made in China. Which then dumps you into the bottomless pit of attempting to get suit on an entity that may be a part of the Chinese government who is manufacturing that defective product.

So you can imagine how difficult it is when you have to translate that document into the native language of the country of where the suit is being served, then get help from a government entity that may be unwilling to subject its manufacturers to liability in U.S. courts. And after all of those delays, nothing happens.

And I have heard some of my colleagues express concerns about U.S. companies being exposed to increased litigation. They are not well founded concerns because the reality is right now in many States if you cannot find the manufacturer of a defective product and hold them accountable, then some of the immunity that goes

to the distributors of those products, if the manufacturer is available and can be pursued in that State court go out the window and then the U.S. distributors and manufacturers are the one on the hook.

So this bill actually is a great thing for U.S. manufacturers. It levels the playing field and gives them the same opportunities to compete with foreign manufacturers that U.S. companies have.

That is why I support it. And I yield back.

Mr. RUSH. The chair now recognizes the gentleman from Florida, Mr. Stearns, for 2 minutes.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Mr. Chairman, thank you very much.

Having chaired this committee when the Republicans were in the majority, we tried to wrestle with this problem of reciprocity between countries where there is fraud, abuse, and incompetence and intentional mislabeling and things like that. Mr. Braley mentioned some of the problems. We were never able to get to the point where we were able to get together a bill that would deal with this very serious problem. It affects not only manufacturing, but also the Internet, how to go after people that are fraudulent on the Internet or basing their companies outside the United States. So I think the bill is well intended. I think the hearing will be worthwhile listening to.

But I have to tell you that I don't think the problem that Mr. Braley talked about is going to be solved here because this agent is going to like a cardboard agent where he will deliver all of these documents that are in English, and he will just dead file them.

I think this registered agent will be there, but I think we might even have to explore other ways to have reciprocities between countries because that is the larger issue because a lot of these countries are going to just stonewall us.

Can we hold foreign manufacturers accountable for harmful products? Foreign courts are under no obligation to enforce U.S. judgements. So I welcome this hearing, Mr. Chairman. I look forward to what they have to say.

I just conclude with H.R. 5156, the Manufacturing and Export Assistance Act, clean energy technology. This is going to cost us money. This is questionable. I would think all of this, Mr. Chairman, was in the cap-and-trade which passed out of the House. Perhaps it is also in the stimulus bill. So, you know, I think we have to realize that if we didn't get everything together in that cap-and-trade I would be very surprised. There were hundreds of amendments and we discussed it for weeks. So I think a lot of it was there.

I just conclude where are you going to get all of this clean energy technologies bit parts from.

So I think it is worthwhile to have these hearings on these two bills. I just think that perhaps when we mark this up, we might have to make it a little bit stronger.

Mr. RUSH. At this time I am going to entertain a unanimous consent request that two members who are not members of the sub-

committee for the purposes of this hearing. And those individuals are Ms. Sánchez of California and Mr. Turner of Ohio.

Hearing no objections. So ordered.

I will recognize Ms. Sánchez recognized for 2 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. SÁNCHEZ. Thank you, Mr. Chairman, and distinguished members of the committee, and I appreciate you allowing me to participate with the subcommittee today. And I apologize. I am not going to be able to stay for the entire time, but the committee I serve on is currently holding a hearing as well.

I want to share my support for the Foreign Manufacturers Legal Accountability Act that was introduced by my good friend, Congresswoman Sutton from Ohio. I am an original cosponsor of this piece of legislation, and I introduced similar legislation in the last session of Congress, and we held hearings on that in the Judiciary Committee as well.

I have long been alarmed by the steady stream of toxic or defective foreign manufactured foods or products that harm U.S. families every year. Beyond the risks that these products pose to our health and welfare, I am also concerned that many foreign manufacturers have gained an unfair advantage over U.S. manufacturers by avoiding liability for the injuries and deaths that their products cause.

Because of the difficulties associated with serving process on and establishing jurisdiction over foreign manufacturers, many Americans that are harmed by defective foreign-made products have no recourse. They literally never get their day in court.

The Foreign Manufacturers Legal Accountability Act amends current law to facilitate service of process on foreign manufacturers. Quite simply, it just requires manufacturers who want to put their goods in our stream of commerce to establish a registered agent in the United States who then can be served process.

That simple requirement just making sure that they are servable if injuries should arise will level the playing field for U.S. manufacturers by eliminating the unfair competitive advantage enjoyed by foreign manufacturers. This would essentially put them on equal footing making sure that all companies, whether foreign or domestic, are held accountable for the harm that they cause to American consumers.

I want to thank the chairman for calling this hearing, and I am pleased that the subcommittee has taken the time to discuss H.R. 4678.

And again, I appreciate the invitation to come. And I yield back my time.

Mr. RUSH. I now recognize Mr. Terry.

OPENING STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. TERRY. I appreciate that.

I am concerned. I am also going to discuss the Foreign Manufacturers Legal Accountability Act as one of the original sponsors and worked a little bit with Ms. Sutton on this.

I think this is an important piece of legislation in protecting American consumers from defective goods manufactured outside the United States in the sense that if they don't have any presence within the United States, there may be very little ability for the victim to be compensated or justice to occur which then falls then mostly on the taxpayers instead of the foreign entity. And all this does, and Cliff is correct, the gentleman from Florida, that this doesn't really correct that problem but you can't get to the second hurdle and the third hurdle in this process without being able to effectively hand the petition to a representative of that country. And so this is just setting up the first step here.

We do need to continue the dialogue on this. But this seems to be kind of the first step, the easy, noncontroversial, or for the most part, the least controversial part of the process.

I want to thank the chairman for holding the hearing on this matter. I am anxious to hear from the witnesses and their input.

And I yield back.

Mr. RUSH. Mr. Murphy.

OPENING STATEMENT OF HON. TIM MURPHY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. MURPHY. Thank you, Mr. Chairman. We have now reached a point where China is the largest foreign holder of U.S. debt at $900 billion, and more than 2.3 million manufacturing jobs have been displaced to Chinese companies that sell products like drywall that causes terrible illness, lead in toys, and fungus in diapers and toxins in baby bottles.

I am thankful we are having a hearing on how to hold better manufactures of a harmful product liable, but the larger issue is, how we are going to pursue policies that are going to invigorate American manufacturing in a fair playing field. And if we are going to tame an economic dragon like China, it is not going to be about lofty theories or more government spending, but how to make sure that it is a level playing field. I know that along with Congressman Tim Ryan of Ohio, he and I have introduced H.R. 2378, the Currency Reform Fair Trade Act, which stops some of the unfair trade practices of China, particularly some of their currency manipulation, which we consider vital.

As we are looking at legislation that tries to find ways to help promote American businesses, I believe that often times we do not need American businesses to get more ideas on how to wade through complex trade laws, but make sure that we have trade laws that are fair and they are fairly enforced. Recently the Steel Caucus, which I am vice chair, has pushed for and been successful in getting some findings where China has dumped pipe and in the past steel, rolled steel in unfair trade practices. This is what manufacturers want to see. But we also want to make sure we have a system whereby we are not setting up laws here such as cap-and-trade and light bulb laws which basically turn our jobs over to China.

I am looking forward to hearing some insight today from this panel today to make sure we do have fair trade laws and make sure what we are doing. Not just to tell American companies how to wade through this complexity but make sure they are able to use their ingenuity, their creativity and their manufacturing skills to bring back American jobs.

And I yield back. Thank you.

Mr. RUSH. The chair now recognizes the gentleman from Ohio, Mr. Turner, for 2 minutes.

OPENING STATEMENT OF HON. MICHAEL R. TURNER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. TURNER. Thank you, Chairman Rush and Ranking Member Whitfield. I thank you for allowing me to participate in today's hearing on H.R. 4678, the Foreign Manufacturers Accountability Act of 2010. I am an original cosponsor of H.R. 4678, and I want to thank my Ohio colleague, Betty Sutton, for her hard work on this important piece of legislation. Representative Sutton has been a steadfast advocate for her community and for manufactures in Ohio.

I also want to thank the U.S. Chamber of Commerce, who has been working with both my office and Representative Sutton's office on H.R. 4678, and I look forward to the continued collaboration as we move forward with this important legislation. The Chamber has expressed concern about a provision that may permit jurisdiction in U.S. courts for non- U.S. matters it is an unintended consequence and both Betty Sutton and I are looking at language that could adjust that.

In this hearing I know there could be other unintended consequences, and I look forward to those being addressed. But mostly I appreciate the manner in which Representative Sutton has worked on this in a bipartisan manner and worked with the Chamber to ensure that the bill will protect consumers while at the same time avoid jurisdiction in U.S. courts concerning matters that have not caused injuries in the United States.

The State of Ohio has faced many challenges as it transitions from being a manufacturing-based economy. Many of our local manufacturers have worked to remain competitive but find themselves in an uphill battle with foreign manufacturers because of unfair trade practices. One way in which foreign manufacturers are given an unfair advantage is by their ability to often times avoid the American judicial system. Because service of process in establishing jurisdiction is difficult with these products, maintaining a registered agent in the U.S. will assist American consumers in their ability to redress injuries. How does it do this? By establishing agents, it allows U.S. courts to have jurisdiction over the foreign entity and thereby allow them to render a judgment including the issue of seizing assets.

And it will also help level the playing field for domestic manufacturers as they also have to avail themselves of the American judicial system. I want to thank you again for the opportunity to participate and for holding this important hearing. I look forward to reading the testimony from the witnesses today and hearing the

comments and working with Congresswoman Sutton for drafting this important legislation.

Mr. RUSH. The chair thanks all of the members of the subcommittee for their opening statements.

It is now time for us to hear from the policy experts, our witnesses who have been invited to testify before this hearing. And let me again welcome you and thank you so much for extending your valuable time to this subcommittee.

And I want to introduce you all beginning on my left, Mr. Jeremy Baskin, who is with the Office of the General Counsel for the U.S. Consumer Product Safety Commission. Seated next to Mr. Baskin is Ms. Ami Gadhia. She is a policy counsel for the Consumers Union. Next to Ms. Gadhia is Mr. Bill Morgan. He is the victim of defective Chinese drywall. And seated next to Mr. Morgan is Professor Andrew Popper, and Professor Popper is a professor of law at the American University in Washington. And next to Professor Popper is Marianne Rowden. She is the President and CEO of the American Association of Exporters and Importers, or the AAEI.

The chair again welcomes you. And it is the practice of this committee that all of the witnesses be sworn in.

So will you please stand and raise your hands.

Let the record reflect that all of the witnesses have responded in the affirmative.

And now we will have 5 minutes of opening testimony from our witnesses beginning with you, Mr. Baskin.

STATEMENT OF JEREMY BASKIN, OFFICE OF THE GENERAL COUNSEL, UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; AMI GADHIA, POLICY COUNSEL, CONSUMERS UNION; BILL MORGAN, VICTIM OF DEFECTIVE CHINESE DRYWALL; ANDREW POPPER, PROFESSOR OF LAW, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW; MARIANNE ROWDEN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS (AAEI)

STATEMENT OF JEREMY BASKIN

Mr. BASKIN. Good morning, Chairman Rush, Ranking Member Whitfield. My name is Jeremy Baskin. I am the general attorney who works with the import surveillance division of the Office of Compliance of the U.S. Consumer Product Safety Commission.

I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's efforts in the area of import surveillance and H.R. 4678, the Foreign Manufacturers Legal Accountability Act. Before I begin, let me first note that the testimony that I give this morning is mine and has not been reviewed or approved by the Commission and may not necessarily represent the views of the Commission.

From 1998 to 2007, the volume of consumer products imported into the United States increased over 100 percent. During that time period, imports from China nearly quadrupled and now constitute over 40 percent of all consumer goods. The shift in specific product areas has been more pronounced.

In 2002, approximately 60 percent of toys purchased in the United States were imported from China and Hong Kong. By 2008, that number had risen to almost 80 percent of the U.S. market.

In response to the rapid increase in consumer product imports, the CPSC has taken several steps to inspect products entering the country to ensure that they comply with applicable safety standards. In 2008, the Commission announced its import safety initiative and established a new import surveillance division within the Office of Compliance. The establishment of this new division allowed the CPSC to collocate permanent full-time compliance investigators at key ports of entry of the United States.

In 2009, the division had 10 full-time employees, FTEs, dedicated to port surveillance. That number is scheduled to rise to 14 FTEs by the end of fiscal year 2010 and 19 by fiscal year 2011. In addition, the division can call on the resources of the entire Office of Compliance which has over 100 FTEs when necessary.

The CPSC has also sought to enhance its relationship with larger agency partners such as the Department of Homeland Security. Through the operation guardian program, CPSC partners with U.S. Customs and Border Protection, CBP, staff in order to leverage joint resources. In addition, CPSC recently assigned two FTEs to CBP's new commercial targeting and analysis center, called to CTAC, and executed a memorandum of understanding with CBP that allows the agency direct access to pre-arrival cargo data. This allows CPSC inspectors to target suspect shipments before they arrive, and most importantly, before potentially dangerous goods can enter the U.S. stream of commerce.

We have also conducted training programs with CBP to educate both government personnel and the importing community on CPSC and CBP product detention and seizure authorities. So far, the results of these initiatives are encouraging.

In fiscal year 2007, CPSC collected approximately 750 samples of suspect products entering our country. In fiscal year 2009, the number more than doubled to almost 1,600. At the same time, we started to see a commensurate decrease in the number of voluntary recalls from 5,063 in fiscal year 2008 to 466 in fiscal year 2009.

In most cases, CPSC has been able to work with domestic partners of foreign manufacturers such as importers or retailers on enforcement activities to obtain relief for consumers without resorting to adjudicative proceedings. In a few cases, however, the lack of a registered agent for service of process has hindered the Commission's ability to develop information that would help us provide relief to consumers.

One example of this is the CPSC's effort to provide relief to U.S. homeowners impacted by problem drywall imported from China. In a number of cases, CPSC staff attempted to send requests for information to Chinese drywall manufacturers only to have these requests returned to the Commission refused and unopened.

The lack of registered agent for service of process has also been recognized by Chinese industry groups and some local lawyers in China have provided legal advice seeking to exploit this situation. Thankfully this type of sentiment appears to be rare. However it is foreseeable that additional attempts to stymy or obstruct commission efforts to obtain information voluntarily from manufactur-

ers outside of U.S. legal jurisdiction and that could occur in the future.

Any such recalcitrance could impede commission efforts to assist consumers with potentially defective consumer products. Additional authority allowing CPSC to require that foreign manufacturers designate a U.S. registered agent for service of process could be helpful in some cases, particularly those involving administrative requests for documents or information.

On January 15, 2010, CPSC chairman Inez M. Tenenbaum noted in a statement accompanying a report to Congress that helpful changes to existing statutes might include service of process requirements for foreign manufacturers so the agency can more easily pursue recalls.

Currently, any action against an identifiable foreign manufacturer would require service of process using The Hague convention.

As the subcommittee moves forward however some additional direction would be helpful with regard to the range in size of manufacturers that would be subject to the registration process. In addition, it might also be helpful to involve the import safety working group in this process to ensure that appropriate jurisdictional and operational details are addressed.

Mr. Chairman, thank you again for the opportunity to testify. I would be happy to answer any questions at this time.

[The prepared statement of Mr. Baskin follows:]

Statement of
Jeremy Baskin
Import Surveillance Division
Office of Compliance
U.S. Consumer Product Safety Commission

Before the
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection

Legislative Hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act"

June 16, 2010

Good morning, Chairman Rush, Ranking Member Whitfield, and Members of the Subcommittee on Commerce, Trade and Consumer Protection. My name is Jeremy Baskin, and I am a general attorney who works with the Import Surveillance Division of the Office of Compliance at the U.S. Consumer Product Safety Commission (CPSC).

I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's efforts in the area of import surveillance and H.R. 4678, the "Foreign Manufacturers Legal Accountability Act." The testimony that I will give this morning is mine, and has not been reviewed or approved by the Commission and may not necessarily represent the views of the Commission.

I. CPSC Efforts to Increase Oversight of Imported Products

From 1998 to 2007, the value of consumer products imported into the United States increased over 100 percent. During that time period, imports from China nearly quadrupled – and now constitute over 40 percent of all imported consumer goods. The shift in specific product areas has been more pronounced. In 2002, approximately 60 percent of toys purchased in the U.S. were imported from China and Hong Kong. By 2008, that number had risen to almost 80 percent of the U.S. market.

In response to the rapid increase in consumer product imports, the CPSC has taken several steps to inspect products entering this country to ensure that they comply with applicable product safety standards. In 2008, the Commission announced its Import Safety Initiative and established a new Import Surveillance Division within the Office of Compliance. The establishment of this new Division allowed the CPSC to co-locate permanent, full-time compliance investigators at key ports of entry into the United States. In 2009, the Division had ten full time employees (FTEs) dedicated to port surveillance; that number is scheduled to rise to fourteen FTEs by the end of fiscal year (FY) 2010, and nineteen FTEs in FY 2011. In addition, the Division can call on the resources of the entire Office of Compliance, which has over one hundred other FTEs, when necessary.

The CPSC has also sought to enhance its relationships with larger agency partners, such as the Department of Homeland Security. Through the Operation Guardian program, CPSC partners with U.S. Customs and Border Protection (CBP) staff in order to leverage joint resources. In addition, CPSC recently assigned two FTEs to CBP's new Commercial Targeting and Analysis Center (CTAC) and executed a Memorandum of Understanding with CBP that allows the agency direct access to pre-arrival cargo data. This allows CPSC inspectors to target suspect shipments before they arrive and – most importantly – before potentially dangerous goods can enter the U.S. stream of commerce. We have also conducted training programs with CBP to educate both government personnel and the importing community on CPSC and CBP product detention and seizure authorities.

So far, the results of these initiatives are encouraging. In FY 2007, the CPSC collected approximately 750 samples of suspect products entering our country. In FY 2009, that number more than doubled to almost 1600. At the same time, we started to see a commensurate decrease in the number of voluntary recalls from 563 in FY 2008 to 466 in FY 2009.

II. Working with Foreign Manufacturers

In most cases, CPSC has been able to work with domestic partners of foreign manufacturers, such as importers or retailers, on enforcement activities to obtain relief for consumers without resorting to adjudicative proceedings. One example of this is a $50,000 settlement with a Hong Kong corporation with offices in the United States that imported toys manufactured in China that violated the Commission's lead paint ban.

In a few cases, however, the lack of a registered agent for service of process has hindered the Commission's ability to develop information that would help us to provide relief to consumers. One example of this is the CPSC's efforts to provide relief to U.S. homeowners impacted by problem drywall imported from China. In a number of cases, CPSC staff has attempted to send requests for information to Chinese drywall manufacturers, only to have these requested returned to the Commission – refused and unopened.

The lack of a registered agent for service of process has also been recognized by Chinese industry groups, and some local lawyers in China have provided legal advice seeking to exploit this situation. In fact, the Chinese Building Material Industry website, in discussing U.S. court judgments, recently featured the following advice from a local attorney:

> How shall these building materials companies face the litigation and sentence of the U.S. court? If these companies don't have any business operation in the United States, and refuse to pay the compensation, then it's impossible to implement the sentence by the federal court.[1]

This type of sentiment appears rare. However, it is foreseeable that additional attempts to stymie or obstruct Commission efforts to obtain information voluntarily from manufacturers outside of U.S. legal jurisdiction could occur in the future. Any such recalcitrance could impede Commission efforts to assist consumers with potentially defective consumer products.

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[1] http://www.jiancai.com/info/detail/56-84591.html (translated on June 7, 2010).

III. H.R. 4678, the Foreign Manufacturers Legal Accountability Act

Additional authority allowing the CPSC to require foreign manufacturers designate a U.S. registered agent for service of process could be helpful in some cases – particularly those involving administrative requests for documents or information. On January 15, 2010, CPSC Chairman Inez M. Tenenbaum noted in a statement accompanying a report to Congress on the progress of implementing the Consumer Product Safety Improvement Act of 2008 that helpful changes to existing statutes might include "service of process requirements for foreign manufacturers so the agency can more easily pursue recalls." Currently, any action against an identifiable foreign manufacturer would require service of process using the Hague Convention.

As the Subcommittee moves forward, however, some additional direction would be helpful with regard to the range and size of manufacturers that would be subject to the registration process. In addition, it might also be helpful to involve the Import Safety Working Group in this process to ensure that appropriate jurisdictional and operational details are addressed.

* * * * *

Mr. Chairman, thank you again for the opportunity to testify on H.R. 4678 and the Commission's overall efforts to increase oversight of imported consumer products. I would be happy to answer any questions at this time.

Mr. RUSH. Thank you, the chair now recognizes Ms. Gadhia for 5 minutes.

STATEMENT OF AMI GADHIA

Ms. GADHIA. Thank you, good morning, Chairman Rush, Ranking Member Whitfield, and members of the subcommittee. My name is Ami Gadhia, and I'm policy counsel with Consumers Union, the nonprofit publisher of Consumer Reports Magazine. We appreciate the opportunity to testify the today in support of the Foreign Manufacturers Legal Accountability Act. I offer my testimony on behalf of both CU and the Consumer Federation of America. My full comments are contained in my written testimony, but I will summarize them briefly here.

H.R. 4678 is necessary to ensure that consumers who are harmed by unsafe products can obtain redress no matter where the product is manufactured. It will also create a level playing field for all manufacturers, both domestic and foreign, by holding the responsible party accountable when consumers are injured. CUA and CFA have long fought for legislation and regulation that will result in safer products on our store shelves. But in the event that an unsafe product makes it into the marketplace, consumers should be able to pursue all remedies for the harm they suffer whether the manufacturer of the unsafe product is a foreign company or a domestic one.

The products that Americans use every day are increasingly being manufactured overseas. According to the Toy Industry Association in 2007, toys made in China made up 70 to 80 percent of the toys sold in the U.S.

Of the products recalled by the CPSC since 2006, more than 75 percent of products were manufactured outside of the U.S.

We have too many frightening examples in recent years of dangerous or deadly foreign made products melamine, which is toxic to animals, was blended into pet food to give artificially high protein readings. Diethylene glycol, potentially lethal to humans, was substituted for its higher cost cousin glycerin, in the manufacture of toothpaste. Tires were manufactured with either a minimal or missing gum layer needed to prevent catastrophic tread separation. Toxic lead paint was substituted for the paint that was originally approved for popular children's toys presumably to save money.

These are all cases were unscrupulous business practices have jeopardized the health and safety of the consumer.

This legislation would assist our Federal agencies as well in their ability to recall consumer products manufactured by foreign entities.

The following example is illustrative in May 2001, the CPSC recalled a home soda machine manufactured by Drinkmaker of Sweden. Components inside the soda machine broke apart and went flying, and there were reports of lacerations, fractures and contusions caused by the machine. However, the manufacturer, Drinkmaker of Sweden AB, either could not be contacted by the Commission or would not cooperate with the voluntary recall. Fortunately, a responsible company, the Soft Drink Company of Seattle, Washington, agreed to conduct the recall of these machines with the CPSC and to repair the Drinkmaker.

It is untenable, however, to have a system of accountability that relies upon this kind of altruistic and rare behavior. By requiring that foreign manufacturers have registered agents in the U.S., H.R. 4678 will make considerable strides in assisting CPSC, FDA and EPA in holding the appropriate entities responsible for the products that they introduce and sell to U.S. consumers.

If foreign entities have the benefit of selling products and making profits from sales in the U.S., they should be accountable if the product causes harm.

While in some instances, U.S. retailers and other entities have shouldered the burden of the foreign manufacturers for the products they sell, this cannot be relied upon and is not always fair.

Domestic manufacturers who make safe products should not be undercut by foreign manufacturers who are not prioritizing safety. If a foreign manufacturer knows that they cannot be held responsible in U.S. Courts for the dangerous products they sell, this knowledge has a likely significant impact upon the manufacturing decisions. Did they use the stronger more expensive component? Do they ensure that the product meets safety standards? Holding manufacturing entities accountable in our civil justice system acts as an important deterrent to unethical and potentially harmful business conduct.

Deterring wrongful conduct is a significant attribute of our civil justice system and it does not make sense that foreign manufacturers who sell products in the U.S. Should be outside that system.

We have a modest suggestion for an improvement to the bill. In section 3(a)(3) of H.R. 4678, the minimum size of the foreign manufacturer is left to the discretion of the applicable agency. At a minimum, the heads of each agency must coordinate the definition of which companies would fall under the bill's scope, and ideally there will be a consistent definition. It would be confusing and counterintuitive if a manufacturer were to produce some products that fall under the scope of this bill and some products that do not.

Further, a consumer could be killed or seriously hurt by a product made by a manufacturer of any size. Our groups understand that it may be necessary to make a determination about which manufacturers fall under the bill but ensuring that consumers can obtain redress should be prioritized.

We want to prevent companies from purposely using the size limits to evade responsibility to purchasers and users.

Finally, we oppose efforts to weaken aspects of this legislation including efforts to shift cases from State to Federal courts. Efforts to limit access to State courts have negative consequences for consumers. Corporations that violate State laws are less likely to be held accountable for their wrongdoing when a Federal Court hears the case rather than's State court. Further corporations now seek to avoid responsibility under State law as States enact laws expanding consumer and environmental protections.

When a case is based solely on a violation of State law as many product liability cases are, no compelling reason exists for stripping State courts of the ability of enforce that State law.

Consumers Union and Consumer Federation of America support the Foreign Manufacturers Legal Accountability Act and we look

forward to working with you to ensure that this bill becomes law. Thank you.

[The prepared statement of Ms. Gadhia follows:]

Statement of

Ami V. Gadhia

Policy Counsel

Consumers Union

Before the

Subcommittee on Commerce, Trade, and Consumer Protection

of the House Energy and Commerce Committee

Regarding H.R. 4678, the Foreign Manufacturers Legal Accountability Act

June 16, 2010

I. Introduction

Chairman Rush, Ranking Member Whitfield, and Members of the Subcommittee, my name is Ami Gadhia, Policy Counsel with Consumers Union, he non-profit publisher of *Consumer Reports*® magazine.[1] We appreciate the opportunity to testify in support of the Foreign Manufacturers Legal Accountability Act of 2010. I offer my testimony today on behalf of both CU and the Consumer Federation of America (CFA).[2]

H.R. 4678 is necessary to ensure the fairness of our civil justice system and to ensure that consumers who are harmed by unsafe products can obtain redress no matter where the product is manufactured. It will also create a level playing field for all manufacturers – both domestic and foreign – by holding the responsible party accountable when consumers are injured.

CU and CFA have long fought for legislation and regulation that will result in safer products on our store shelves, and that will require importers of record to post a bond to ensure accountability for recalls and defective products. In the event that an unsafe product makes it into the marketplace, however, consumers should be able to pursue all remedies for the harm they suffer, whether the manufacturer of the unsafe product is a foreign company or a domestic one. This legislation will help consumers to pursue remedies against foreign manufacturers and producers of unsafe products.

II. Importance of the Foreign Manufacturers Legal Accountability Act

The Foreign Manufacturers Legal Accountability Act directs the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC) , and the Environmental Protection Agency (EPA), with respect to products under each agency's jurisdiction, to require foreign manufacturers and producers of such products, in excess of a minimum value or quantity, to establish a registered agent in the United States who is authorized to accept service of process on their behalf for the purpose of all civil and regulatory actions in state and federal courts. The Act further requires the registered agent to be located in a state with a substantial connection to the importation, distribution, or sale of the products and directs the Secretary of Commerce to establish, maintain, and make available to the public a registry of such agents. The Act also prohibits importation into the United States of a covered product or component part if the product or any part of the product was manufactured or produced outside the United States by a manufacturer or

[1] Consumers Union of United States, Inc., publisher of Consumer Reports®, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications and services have a combined paid circulation of approximately 8.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of Consumer Reports®, its other publications and services, fees, noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

[2] Consumer Federation of America (CFA) a non-profit association of more than 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance the consumer interest through advocacy and education.

producer who does not have a registered agent whose authority is in effect on the date of the importation.

A. Many Consumer Products are made by Foreign Manufacturers and have been the Subject of Recalls

This law is important for several reasons. First, more and more consumer products are being made abroad. Whether the products are toys, drywall, dog food, pharmaceuticals or toothpaste, the consumer products that Americans use everyday are increasingly being manufactured overseas. For example, according to the Toy Industry Association, in 2007, toys made in China made up 70 to 80 percent of the toys sold in the United States.[3]

In 2009, the CPSC recalled 465 products; 563 products in 2008; 472 in 2007; and 467 in 2006. In 2006, of products recalled, 24% were manufactured in the United States; in 2007, 18 % were manufactured in the United States; in 2008, 17%; and in 2009, 22% were made in the United States.[4] This means that more than 75 percent of products recalled since 2006 were manufactured outside of the United States.

Unfortunately products made overseas have posed great risks to consumers. In 2006, Consumers Union testified about these issues:

> High profile recalls of 2006 involved safety problems with Chinese imports were characterized by deceptive or dishonest business practices in an effort to cut costs. Melamine, which is toxic to animals, was blended into pet food to give artificially high protein readings. Diethylene glycol, potentially lethal to humans, was substituted for its higher-cost cousin, glycerin, in the manufacture of toothpaste. Tires were surreptitiously manufactured with either a minimal or missing gum layer needed to prevent catastrophic tread separation. Toxic lead paint was substituted for the paint that was originally approved for popular children's toys, presumably to save money. These are all cases where unscrupulous business practices have jeopardized the health and safety of the consumer.[5]

Agencies in the U.S. government were able to recall these products, which is critical for getting the unsafe products off of store shelves and out of consumer's hands. These recalls also focused our nation's attention on product safety and highlighted the weaknesses of our product safety system. Our federal agencies with jurisdiction over these products, including the CPSC, the FDA, and NHTSA, were in need of increased authority and increased resources to prevent these problems and to protect American consumers.

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[3] "As More Toys Are Recalled, Trail Ends in China," by Eric S. Lipton and David Barboza, *NY Times*, June 19, 2007.

[4] This information was provided by the U.S. Consumer Product Safety Commission. It is on file with CU and CFA.

[5] Testimony of Don Mays, Senior Director, Product Safety Planning & Technical Administration, Consumers Union, "Ensuring the Safety of Chinese Imports: Oversight and Analysis of the Federal Response" Before the U.S. Senate Committee on Commerce, Science, &Transportation, July 18, 2006.

B. Previous Legislative Efforts Have Not Focused on Bringing Foreign Manufacturers Into Our Civil Justice System

Regarding the CPSC, Congress acted and passed the Consumer Product Safety Improvement Act in August of 2008. Consumer groups supported this law and hailed its passage as the most significant improvements to the CPSC since the agency was established in the 1970's. The Consumer Product Safety Improvement Act of 2008 is making consumer products safer by requiring that toys and infant products be tested before they are sold, and by banning lead and phthalates in toys. The law also creates the first comprehensive, publicly accessible consumer complaint database, gives the CPSC the resources it needs to protect the public, increases civil penalties that CPSC can assess against violators of CPSC laws, and protects whistleblowers who report product safety defects.

While this law has made great strides in improving product safety, and will continue to do so as its implementation continues, the CPSIA focuses on improving safety by requiring that children's products subject to mandatory standards be tested to ensure compliance with the standard. The law does not address bringing foreign manufacturers into our civil justice system. However, to fully protect consumers from unsafe products, wherever they are made, American consumers must be able to hold manufacturers accountable when they are harmed – no matter where the products are made.

C. This Legislation Would Improve Regulatory Efforts to Protect Consumers From Unsafe Products

This legislation would positively impact an agency's ability to recall consumer products manufactured by foreign entities when the manufacturer does not have a registered agent in the United States. From what we know, the CPSC, for example, has been able to conduct recalls of products made by foreign manufacturers in many circumstances. CPSC has been able to collaborate with foreign entities to get unsafe products off the shelves. The CPSC has also been able to find creative ways to ensure that products are recalled when the foreign manufacture has not agreed to a recall. But our federal agencies need a formal and consistent method to protect U.S. consumers against dangerous products when those products are made by a foreign manufacturer.

The need for legislation is illustrated by the following example. In May of 2001, CPSC recalled a home soda machine manufactured by Drinkmaker of Sweden. According to CPSC's press release,[6] there were three reports of injuries caused by this product: a 7-year-old boy required hospitalizations due to lacerations; a 44-year old man suffered multiple fractures and lacerations to his right hand; and a 52- year old man suffered lacerations, fractures and contusions. Components inside the soda machine broke apart and posed serious risks of laceration to those individuals struck by flying broken parts. However, the manufacturer, Drinkmaker of Sweden AB, either could not be contacted by the Commission or would not cooperate with the voluntary recall.

Fortunately, a responsible company, The Soft Drink Company of Seattle Washington, agreed to conduct the recall of these machines with CPSC and also agreed to offer the remedy for consumers, which was to repair the Drinkmaker. In this case, the CPSC effectively worked with a U.S. company that stepped up to the plate to accept responsibility for the safety of these products. However, it is untenable to have a system of accountability that relies upon this kind of altruistic

[6] CPSC Press Release, "CPSC, Drinkmaker of Sweden AB Announce Recall of Home Soda Machines," May 10, 2001, available on the web at http://www.cpsc.gov/CPSCPUB/PREREL/prhtml01/01151.html.

and rare behavior. We must have a system that enables the federal government to protect U.S. citizens consistently. By requiring that foreign manufacturers must have registered agents in the United States, H.R. 4678 will make considerable strides in assisting CPSC, FDA and EPA to hold the appropriate entities responsible for the products they introduce and sell to U.S. consumers.

D. Fairness and Accountability

If foreign entities have the benefit of selling products and making profits from sales in the U.S., they should be accountable if the product causes harm. While in some instances, U.S. retailers and other entities have shouldered the burden of the foreign manufacturers for products they sell, this cannot be relied upon and is not always fair. H.R. 4678 will place responsibility on the appropriate entity. Importantly, this bill does not eliminate responsibility or liability for domestic manufacturers or retailers if they share responsibility for the product. Fairness dictates that responsible entities should be accountable and this law strives to accomplish that.

In addition, the fact that foreign entities without contacts in the Unites States cannot be held accountable for the unsafe product they sell to American consumers has significant adverse effects upon the consumers who are injured by those products, as well as domestic manufacturers who make safe products. Consumers who are injured by products, no matter where they are made, deserve legal redress when they suffer harm. Domestic manufacturers who make safe products should not be undercut by foreign manufacturers who are not prioritizing safety. Our current system fails to provide this important protection to our citizens at great costs to individuals and to our society.

E. Deterrence

If a foreign manufacturer knows that they cannot be held responsible in U.S. courts for the products they sell, this knowledge has a likely significant impact upon their manufacturing decisions. Do they use the stronger, more expensive component? Do they ensure that the product meets the safety standards? Do they prioritize safety if they know they are not accountable to U.S. consumers in U.S. courts? Holding manufacturing entities accountable in our civil justice system acts as an important deterrent to unethical and potentially harmful business conduct. Deterring wrongful conduct is a significant attribute of our civil justice system and it does not make sense that foreign manufacturers who sell products in the U.S. should be outside of that system.

III. Modest Suggestions for Improvement

Our groups support this bill and its proposed method for ensuring that manufacturers are held responsible for the products they sell in the United States. This bill includes products regulated by the U.S. Consumer Product Safety Commission, the Food and Drug Administration and the Environmental Protection Agency. We support the inclusion of products under the authority of these three agencies but also suggest that the National Highway Traffic Safety Administration be included in the scope of this legislation. In 2007, tires manufactured in China were recalled because they posed significant hazards to consumers.[7] The company sold its tires through a small family owned importer in New Jersey but the company not only denied that the tires were hazardous but

[7] "Chinese Tire Recall to Start Monday," *CNN*, June 28, 2007, at http://money.cnn.com/2007/06/27/autos/chinese_tire_recall/index.htm and "Chinese Tires Are Ordered Recalled," by Andrew Martin, *NY Times*, June 26, 2007.

also lacked the funds to cover the costs of the recall. Thus, issues involving foreign manufacturers can involve automobile parts and we suggest that products regulated by NHTSA be included within the scope of this legislation.

In Section 3(a)(3) of H.R. 4678, the minimum size of the foreign manufacturer is left to the discretion of the head of the applicable agency with jurisdiction over the specific product. At a minimum, the heads of each agency must coordinate the definition of which companies would fall under the bill's scope and ideally there will be a consistent definition. It would be confusing and counterintuitive if a manufacturer were to produce some products that fall under the scope of this bill and some products that do not. Further, a consumer could be killed or seriously hurt by a product made by a manufacturer of any size. Our groups understand that it may be necessary to make a determination about which manufacturers fall within the bill based upon, but ensuring that consumers can obtain redress should be prioritized. We want to prevent companies from purposefully using the size limits to evade responsibility to purchasers and users of their products.

IV. Trade Implications

Some concerns have been raised about whether the Foreign Manufacturers Legal Accountability Act violates World Trade Organization (WTO) agreements. WTO violations occur when foreign entities are treated differently than domestic ones under U.S. laws. This legislation seeks to do the opposite. This legislation actually creates an equal playing field by holding all manufacturers, no matter where there are based, responsible for the safety of the products they sell in the United States. Manufacturers as well as the products produced and sold in the U.S. would be treated equally under this legislation.

V. We Oppose Efforts to Weaken This Legislation

We oppose efforts to weaken aspects of this legislation, including efforts to shift cases from state to federal courts that benefit from the provisions of this bill. Efforts to limit consumer's access to state courts have negative consequences for consumers. Corporations that violate state laws are less likely to be held accountable for their wrongdoing when a federal court hears the case rather than a state court. Further, corporations now seek to avoid responsibility under state law as states enact laws expanding consumer and environmental protections. When a case is based solely on a violation of state law, as many product liability cases are, no compelling reason exists for stripping state courts of the ability to enforce that state law. In addition, state courts should be given the opportunity to develop their own state law in emerging areas by hearing these types of cases.[8]

VI. Conclusion

Consumers Union and Consumer Federation of America support the Foreign Manufacturers Legal Accountability Act. This law is necessary to ensure the fairness of our civil justice system and to ensure that consumers who are harmed by unsafe products can obtain redress no matter where the product is manufactured. This legislation creates an equal playing field for all manufacturers by holding the responsible party accountable. We look forward to working with you to ensure that this bill becomes law.

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[8] Based on the principles of federalism, federal law discourages federal judges from expanding liability under state law.

Mr. RUSH. The chair now recognizes Mr. Morgan for 5 minutes.

STATEMENT OF WILLIAM MORGAN

Mr. MORGAN. Chairman Rush members of the subcommittee, thank you for allowing me to come here and testify. Thank you for allowing me the opportunity to come here and share my experiences with you here this morning. My name is Bill Morgan. I'm a retired police officer after having served the City of Newport News, Virginia for 24 years. My wife, Deborah, is a school teacher. She and I have been married 27 years. We have two daughters and our first grandchild was born a couple of weeks ago.

My wife and I bought our dream home in July 2006. It was a beautiful home on a corner lot in Williamsburg, Virginia with a big yard. Both Debbie and I fell in love with the home. It was the perfect home for our family. We paid a little under $400,000 for the home.

After my wife experienced multiple episodes of nose bleeds and headaches and after our house had a series of failures with the air conditioning and electrical systems, we discovered our had been built with defective drywall imported from China. We learned that this drywall contains high amounts of sulfur and that corrosive sulphur gases were circulating in our home corroding our electrical and mechanical equipment. My home was built with almost 200 sheets of 4 foot by 12 feet Chinese drywall.

After a hearing in front of Judge Eldon Fallin in New Orleans earlier this year, he found that the electrical and mechanical systems in my home had been completely destroyed and needed to be replaced. The only solution to this extensive damage is to strip my house back down to the studs and completely rebuild it. I can't afford that.

The corrosive gases have also damaged my computers, televisions and other electrical and electronic devices in my home. We were scared for our family's health and concerned about the risk of fire. We moved out of the house in June, 2009 last year. Since having to abandon our dream home, I've been unable to pay the rent on the place where we are currently living and my mortgage. I have lost my home in foreclosure, and I have had to file for personal bankruptcy.

The company that manufactured the drywall in my home was called Taishan. This company is located outside of Beijing in China. Although the Chinese company sent enough drywall into Norfolk, Virginia to build several hundred homes, it has refused to take any responsibility for its defective product. In the complaint that was filed on my behalf, it was necessary to have a lawsuit translated into Mandarin with special process service flying to China utilizing a time consuming and expensive process.

The Foreign Manufacturers Legal Accountability Act would streamline this process and give victims of defective foreign products a more speedy and equitable procedure to have their claims addressed. My lawyers have advised me that they spent well in excess of $150,000 serving foreign drywall manufacturers for victims like myself.

It's not unusual for these foreign authorities to sit on the lawsuits for 6 months before serving them on the defendant manufac-

turers. The average American, like myself, cannot afford this expensive time consuming and frustrating procedure.

Foreign manufacturers should not be allowed to sell products which destroy homes and make people sick with impunity. Unless these companies require to make themselves amenable to being sued in U.S. Court, they should not be allowed to sell their products here.

U.S. businesses are required to abide by our laws and foreign businesses that profit off of U.S. consumers should do so as well.

I look forward to answering any questions you folks may have, and thank you for allowing me to come here and share this experience with you here today.

[The prepared statement of Mr. Morgan follows:]

Testimony of William Morgan
Chinese drywall victim
6148 South Mayfair Circle
Williamsburg, VA 23188

Before the
Committee on Commerce, Trade and Consumer Protection
Of the
U.S. Congressional Committee on Energy and Commerce

Hearing on
"Foreign Manufacturers Legal Accountability Act"
Rayburn House office building room 2322

June 16, 2010
10:00 AM

Chairman Rush, and members of the subcommittee, thank you for allowing me the opportunity to share my experience with you this morning.

My name is Bill Morgan. I am a retired police officer having served the city of Newport News for 24 years. My wife Debra is a teacher. She and I have been married for 27 years and have two daughters and our first grandchild was born a couple of weeks ago.

My wife and I bought our dream home in July 2006. Our home was beautiful--on corner lot with a big yard in Williamsburg Virginia. Both Debra and I fell in love with it as the perfect home for our family. We paid a little under $400,000 for the home.

After my wife experienced multiple episodes of nosebleeds and headaches, and after our house had a series of failures with the air-conditioning and electrical systems, we discovered that our home had been built with defective drywall imported from China. We learned that this drywall contains high amounts of sulfur, and that corrosive sulfur gases were circulating in our home corroding electrical and mechanical equipment.

My house was built with almost 200 sheets, 4' x 12', of this Chinese drywall. After a hearing in front of Judge Eldon Fallon in New Orleans earlier this year, he found that the electrical and mechanical systems in my home had been completely destroyed and needed to be replaced. The only solution to this extensive damage is to strip my house back down to the studs, and rebuild it. I can't afford that. The corrosive gases have also damaged my computers and televisions and other electronic and electrical devices.

We were scared for our family's health, and concerned about the risk of fire. We moved out of the house in June of 2009. Since having to abandon our dream home, I have been unable to pay both the rent on the place where living now and my mortgage. I've lost my home in foreclosure, and I had to file for personal bankruptcy.

The company that manufactured the drywall in my home is called Taishan (pronounced "tie-shan".) This company is located outside of Beijing in China. Although this Chinese company sent enough drywall into Norfolk Virginia to build several hundred homes, it has refused to take responsibility for its defective product. In the Complaint that was filed on my behalf, it was necessary to have a lawsuit translated into Mandarin, with special process servers flying to China utilizing a time-consuming and expensive playbook.

The "Foreign Manufacturers Legal Accountability Act" would streamline this process, and give victims of defective foreign products a more speedy and equitable procedure to have their claims addressed. My lawyers have advised me that they've spent well in excess of $150,000 serving foreign drywall manufactures for victims like myself, and that future service costs are expected to double that number. Even after these expensive translations, it is not unusual for the foreign authorities to sit on the lawsuits for six months before serving them on the defendant manufacturer. The average American cannot afford this expensive, time-consuming and frustrating procedure.

Foreign manufacturers should not be allowed to sell products which destroy homes and make people sick with impunity. Unless these companies are required to make themselves amenable to being sued in a US court, they should not be allowed to sell their products here. US businesses are required to abide by our laws and foreign businesses that profit off US consumers should do so as well. I look forward to answering any questions you may have about my experience, and thank you again for allowing me the opportunity to testify this morning.

Mr. RUSH. The Chair recognizes Mr. Popper for 5 minutes.

STATEMENT OF ANDREW POPPER

Mr. POPPER. I thank you, Mr. Chairman, and a special hello to Congresswoman Sutton from my alma mater Baldwin-Wallace in Berea, Ohio.

H.R. 4678 is a straightforward appropriate essential step. It is, as far as I can tell, constitutionally sound, beneficial to consumers, beneficial to U.S. businesses and consistent with the laws and practices in many of our trading partners. It is as far as all of the witnesses seem to understand, a way to level the playing field. It strips foreign manufacturers of an unfair advantage. It closes an understandable loophole in our legal system. And that is not a loophole that is illegitimate. There is a constitutional basis for it. But there is also an answer for it. And the answer is this legislation.

It begins at least in terms of how we think about these things with the obvious need, and I don't think any of us could say it better than Mr. Morgan just did. When you place into the stream of commerce millions of products, and we are talking about millions of products with toxic levels of lead, drywall that is destroying a home and a family, cribs that present a risk of strangulation, aqua dots that are coated with date rape drug as part of their paint, contaminated toothpaste and seafood and honey and pet food, you got a problem.

And you might want to think that there are nice ways to get around this or our existing system of laws will account for it, but you really need to take the bull by the horns here.

This is a very wise, very simple piece of legislation. The idea of designating an individual for service of process, and by that designation, establishing consent is, as I think we all said, it's a logical, simple, appropriate and constitutional approach.

Imagine the scenario that was just presented by Mr. Morgan repeated over and over and over again. The majority of our most common pharmaceutical products are manufactured abroad, crash helmets, manufactured abroad, and the list, as you see from my testimony, goes on and on and on.

Here is a bill that deals with the problem finally of the difficulty of haling into court—an interesting term—a foreign entity that otherwise has a minimum contact and reasonability basis for resisting service of process.

Here is a bill that actually solves the problem.

And we all recognize what the problem is. If you don't have an agent or officer in this country, if you don't own property or have a representative in the United States, it becomes difficult under our current system, under our current jurisprudence to establish in persona jurisdiction. Now with one simple bill that mimics legislation in other fields that seems fair that seems a legitimate quid pro quo, a condition for doing business in the United States that is mimicked in many other areas, you solve the problem.

There were other solutions that people thought of, the aggregate of contacts suggestion that comes from the concurring opinion and the plurality opinion in Asahi is a legitimate answer. It's just complicated.

This is simple. This is right. And this is the moment to do it.

You have foreign producers who are creating a risk and are now being given a simple choice. I like to think of this legislation in terms of that word. This is choice. This is party autonomy. You don't have to do business here. If you choose to do business here, then you're subject to our laws. If we are lucky enough under the other legislation that is being considered or in any other area to have our wonderful manufacturing community able to market its goods abroad, do you think that they would get a free pass from other countries? China has just adopted a comprehensive tort law with strict liability, punitive damages, do you think that China is going to recognize a minimum contacts theory and not impose on our companies who do business there the same responsibility that we ought to be imposing on companies who do business in the United States?

I don't think so. I don't think so.

On the question of trade, and on the question of whether this creates an unfair advantage, there was a case involving artificial Christmas trees that catch on fire in the United States District Court about 2 years ago. And that product was manufactured in China. And the court held as follows, in this age of WTO and GATT, it is only reasonable that companies that distribute allegedly defective products to regional distributors in this country anticipate being haled into court.

Well, of course it's reasonable. Of course it's normal, it is a condition of doing business here. And yet a loophole exists. Close the loophole. It's not that complicated. This is leveling the playing field. This is getting rid of a free pass that we are giving foreign manufacturers, a free pass that our manufacturers don't get.

The law of the land in this country, the law of the land in virtually every common law country is lex loci delicti. You apply the law to the place of the wrong. The place of the wrong is here. This is where the manufacturer is harmed. Give the manufacturer the access to our courts, give the harmed individual access to our courts and let our system of justice work.

This is good legislation. It's going to produce fair result. It isn't perfect. No legislation is. The Constitution isn't perfect. That's why we keep amending it.

I ask that you give consideration to this bill. Thank you.

[The prepared statement of Mr. Popper follows:]

Testimony of Andrew F. Popper

Professor of Law

American University, Washington College of Law

Before the Committee on Energy and Commerce

United States House of Representatives

111th Congress, Second Session

June 16, 2010

H.R. 4678

The Foreign Manufacturers Legal Accountability Act

Professor Andrew F. Popper
American University
Washington College of Law
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016
202.274.4233
apopper@wcl.american.edu

I welcome the opportunity to testify on H.R. 4678, *The Foreign Manufacturers Legal Accountability Act* and am honored by your invitation.

I am a faculty member at the American University, Washington College of Law and have taught torts and administrative law for the last 31 years. I have written and spoken in those fields on a number of occasions and have submitted my resume to the Committee.

After review and analysis, H.R. 4678 strikes me as a strong bill that is constitutionally sound, beneficial to consumers, beneficial to U.S. businesses, and consistent with the domestic laws and practices of many of our major trading partners. It levels the civil liability landscape, stripping foreign manufacturers of an unfair advantage. It addresses a powerful but understandable loophole in our legal system, facilitating access to the courts by injured consumers.

By making possible litigation against those who place into the stream of commerce dangerous, defective, and even deadly goods, the bill triggers corrective justice incentive mechanisms of the tort system. When you create the realistic possibility for liability, you activate incentives to make safer and more efficient products.

H.R. 4678 is a simple, elegant, appropriate, and essential step forward. I believe this bill will make good law and effectuate a positive, highly beneficial change in the civil justice system.

This statement begins with a simple summary of the bill. Next, I address the nature of the problem and the necessity for the legislation. In the following section, I discuss some of the procedural and jurisdictional challenges in this field and the way in which the bill meets those challenges. The next section raises briefly the constitutional

minimum contacts and reasonability requirements and concludes that the bill is constitutionally sound. Thereafter, I discuss the conformity of this legislation to current trade law.

I. A Simple Summary

There are three central features in this bill:

1. Designation of an agent for service of process. H.R. 4678 requires foreign manufacturers of certain products and component parts[1] to designate a registered U.S. agent to accept service of process for civil or regulatory actions. The agent should be located in a state where the manufacturer has a substantial connection either through importation, distribution, or sale of its products. The bill prohibits importation of products or components manufactured by companies who fail to designate a registered agent within 180 days of the regulation.

2. Delineation of affected products or component parts. Three federal agencies[2] will determine those products and component parts subject to the terms of the bill. Each agency will also establish the minimum quantity or value required to trigger the terms of the bill.

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[1] The products or components affected by this bill include drugs, devices, and cosmetics, as defined by § 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321); biological products as defined by § 351(i) of the Public Health Service Act (42 U.S.C. 262(i)); consumer products as defined by § 3(a) of the Consumer Product Safety Act (15 U.S.C. 2052); chemical substances as defined by § 3 of the Toxic Substances Control Act (15 U.S.C. 2602); and pesticides as defined by § 2 of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136).

[2] Food and Drug Administration, Consumer Product Safety Commission, and Environmental Protection Agency.

3. Consent to the jurisdiction of state and federal courts. Establishment of a registered agent in a state constitutes *consent* to jurisdiction by the foreign manufacturer in the courts of that state and in federal courts.

II. The Nature of the Problem and the Need for Legislation

Foreign manufacturers and distributors of defective goods sold in the United States should be liable for the harm they cause. When sellers place millions of toys in the stream of commerce with toxic levels of lead, children's play-beads containing deadly drugs, and poorly designed cribs that to give rise to the prospect of infant strangulation, they must be held accountable.

Freed of the obligations, incentives, and corrective justice effect of the domestic civil justice system – the tort system – to make products safe, foreign manufacturers and distributors have created an intolerable risk to U.S. consumers and placed a grossly unfair burden on domestic distributors and retailers.

Consider this scenario: failing to exercise that reasonable level of care demanded of every U.S. manufacturer, a foreign producer exports to the U.S. a child's toy, pharmaceutical product (*e.g.*, heparin), motorcycle crash helmet, building materials, animal food (for house pets or livestock), or seafood (for human consumption). As a direct and proximate result of using the product, a U.S. consumer suffers an injury or dies. The consumer (or the grieving family) attempts to hold accountable in a U.S. court the foreign producer only to learn that while our legal system would impose liability on any U.S. company under these circumstances, a foreign producer cannot be sued – *i.e.*, cannot be "haled" into court.

It is both the current state of the law – and wholly unacceptable – that a foreign producer cannot readily be held accountable in the above scenario even if (a) the product was unquestionably dangerous and defective, (b) the harm to the victim was foreseeable, and (c) the foreign producer has sold large numbers of these products in the U.S. in the past.

H.R. 4678 provides a logical, necessary, and constitutionally sound response that will help close this gaping loophole in our civil justice system.

I started writing – and first testified – about this several years ago.[3] At the time, as I focused on the frustrating nature of the jurisdictional and constitutional issues, I began to explore the magnitude of the problem. How often did the above scenario take place? What was – and is – the magnitude of the problem?

Here is my conclusion: Conservatively, there are tens of millions of defective, dangerous, and in some instances deadly goods produced abroad for sale in U.S. markets. Well over 80% of the products regulated by the Consumer Product Safety Commission are manufactured abroad – and many of those producers are not subject to tort liability regardless of the fact that their products are dangerous and are likely to be sold in the U.S.

While this hearing is devoted to the legal issues raised and the powerful and

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[3] Popper, "Defective Foreign Products in the United States: Issues and Discussion," 37 PRODUCT SAFETY AND LIABILITY REPORTER 45, January, 2009; Popper, "Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Goods," 36 PRODUCT SAFETY AND LIABILITY REPORTER 219 (No. 9, March 3, 2008); Popper, "Holding Foreign Manufacturers Accountable for Defective Products," Before the United States House of Representatives, 110th Congress, 1st Session, Committee on the Judiciary, Sub-Committee on Commercial and Administrative Law, November 15, 2007, published at http://judiciary.house.gov/oversight.aspx?ID=395.

simple wisdom of the proposed legislative resolution under the bill, consider some of the goods produced abroad that have been recalled in the last two years:[4]

> (Designed for children): Daiso children's jewelry (China) excessive levels of lead; Wendy Bellissimo Hidden Hills Collection Cribs (China) crib-slat strangling hazard; Mini Chef Complete Toy Kitchens (Thailand) choking hazard; MindWare's Animal Tracking Explorer Kit (China) no warning about calcium hydroxide; The Adventure Play Set (China) weak chains; Camouflage Pajama Sets (Vietnam) excessive levels of lead; Playsafe Spinning Quad Merry-Go-Rounds (China) unsafe seating design; "Hip Charm" Key (China) excessive levels of lead; Ardine Cribs (China and Vietnam) head injury/potential stangulation; Cadence-Lea and Trio-Lea Girl's Sandals (China) choking hazard; 2nd Nature Built to Grow Cribs (Slovenia) strangulation hazard; "Thunder Wolf" Remote Controlled Indoor Helicopters (China) fire hazzard; Jackets from Coolibar (China) strangulation; Taggies™ Sleep'n Play Infant Garments (China) choking hazard; "It's a Girl Thing" Bracelets (China) excessive levels of lead; LaJolla Boat Bed and Pirates of the Caribbean Twin Trundle Beds (China) strangulation; Children's Necklaces with Ballet Shoes Charms (China) excessive levels of lead; Children's Charm Craft Kits (China) excessive levels of lead; "Faded Glory" Lip Gloss (China) excessive levels of lead; It's My Binky's Personalized Pacifier (Maylasia) choking hazard; Bright Starts Ring Rattles (China) choking incidents; Classic Horseshoe Magnets (China) excessive levels of lead; U-shaped Magnets Bar Magnets (China) excessive levels of lead.
>
> (Products for general use): The Topsy-Turvy Deluxe Tomato Planters (China) instablity; SoundStation2W Wireless Conference Phones (China) fire risk; "Remy" shag rugs (India) fire risk; HP Fax 1010 and 1010xi Machines (China) fire risks; Shopko and Boscov TV stands (China) instability; Dirt Devil Vacuums Power Brush Attachment Tools (China) shatter hazzard; Santorini Chairs (Taiwan) faulty welding/chair collapse; Arctic Cat All-Terrain Vehicles (Taiwan) defective speed control mechanism; All-Terrain Vehicles from KYMCO and Kawasaki (Taiwan) design/loss of control of the vehicle; Paintball Gun Remote Line Adapters from Real Action Paintball (China) overtightening could cause an explosion; SLA90 Youth All-Terrain Vehicles (China) lacked front brakes, a manual fuel shut-off, and proper padding; Amsterdam Bicycles (Taiwan) faulty chain derailer; Infra-Red Sauna Rooms (China) overheating hazard; Bosch Hammer Drills (Malaysia) operates in off" position; Crafters Square Hot Melt Mini Glue Guns (China) fire risk; Bench Scale Adapters (China) fire hazard; Cuddly Comfort Pillows (China) pillows contain small metal fragments.

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[4] *Id.* This list was presented in a white paper I delivered at an American Association for Justice/American University, Washington College of Law program, *Dangerous Products: From Lead Toys to Tainted Drugs, A Discussion for Consumer Protection Professionals and the Media*, Washington, DC, November 14, 2008.

This list barely scratches the surface of the problem. The child's toy, Aqua Dots, was recalled after it was alleged to be contaminated with a "date rape" drug. Litigants in Florida allege that Chinese drywall installed in their homes is dangerous, malodorous, and contaminated with high levels of sulfur. There are allegations regarding contaminated toothpaste, seafood, pet food, honey, and claims regarding product integrity deficiencies in steel pipes and automobile tires. While countries outside the U.S. claim they can insure product safety, the record suggests a very different result.[5]

Every U.S. manufacturer of any product is subject to the U.S. rule of law, the U.S. civil justice system, and U.S. regulatory mandates. That foreign entities and individuals profit from the sale of goods – on occasion, dangerous or even deadly defective goods – and are somehow outside this system is offensive, dangerous, and unfair. It is time to put an end to this injustice.

III. H.R. 4678: A Simple, Elegant, Appropriate, and Essential Change

H.R. 4678 provides a remarkably elegant and simple solution to the jurisdictional and constitutional challenges that have thwarted scores of victims in the past.

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[5] After the tainted pet food debacle a few years ago, China, the source of tens of millions of dangerous goods, claimed it would implement 10,000 new safety regulations. As of the date of this testimony, many of those regulations are not in place. *More Legislation to Combat Shoddy Products*, FINANCIAL TIMES, January 9, 2008. http://www.legalinfo.gov.cn/english/News1/content/2009-01/20/content_1024166.htm?node=7604; *Chinese Officials Dealing With New Pesticide Tainted Food Crop*, March 3, 2010, http://chinadigitaltimes.net/2010/03/chinese-officials-dealing-with-new-pesticide-tainted-food-crop/; *Melamine Reprise: Who Knew What When?*, http://chinadigitaltimes.net/2010/01/melamine-reprise-who-knew-what-when/, January 2010.

We all recognize the legal issue: assertion of jurisdiction over an individual or entity presents a challenge when the entity's contacts with state are limited or minimal. Not surprisingly, many foreign manufacturers do not have an officer, agent, representative, employee, office, or property (indicia of more than minimal contact) in a particular state where their products cause harm. At present, such manufacturers cannot readily be haled into court if their contacts fail to meet the constitutionally compelled "minimum contacts" requirement. Notwithstanding the presence of a citizen injured by an overtly defective product manufactured by a known (but foreign) defendant, U.S. courts have, to date, been unreliable fora.

In the absence of the ingenious solution presented in H.R. 4678, access to justice is limited or denied. To hale a foreign manufacturer into court, a victim must show that the foreign entity has "purposefully established 'minimum contacts' in the forum State."[6] In addition, the assertion of judicial power must be consistent with notions of fair play and substantial justice, fundamental fairness, and reasonability – for the defendant. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*.[7] This test requires courts to assess the burdens the defendant faces in having to defend a claim in the U.S., including an assessment of whether the defendant "purposefully availed" itself of the rights and obligations of the forum state.[8] Foreseeable presence of a product alone is unlikely to meet these requirements.[9]

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[6] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1984).

[7] 480 U.S. 102, 113 (1987); *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

[8] *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987); *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

[9] *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

Justice O'Connor's plurality opinion in *Asahi* requires contacts that go beyond the "mere act of placing the product into the stream" of commerce such as advertising, marketing, or designing a product for the forum state.[10] Justice Brennan concurred in *Asahi,* suggesting a more fundamental "stream of commerce" approach – a simple notion involving the foreseeable presence of the product – but his view has not been followed in most state courts. In the void created by *Asahi* and similar cases, courts are – at best – unsure about the most basic exercise of power over foreign manufacturers who produce goods that harm U.S. consumers.

Do not accept the assertion that the constitutional and jurisdictional riddle presented by the *Asahi* case is insoluble.

First, in what has become a rather well-known footnote, Justice O'Connor speculated whether "Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits."[11] The footnote simply posed the question and could be seen as an invitation to the Congress to solve the jurisdictional and constitutional question by a legislative declaration that the minimum contacts/reasonability/fairness requirements are met when there is an aggregation of national contacts (though the approach was limited to federal courts). The aggregation of national contacts approach requires definitions of the volume of activity. It is *not* the basis of H.R. 4678.

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[10] *Asahi,* at 111-112.

[11] *Asahi* at 113.

H.R. 4678 is in part predicated on a more fundamental notion – choice or party autonomy.[12] If a foreign producer chooses to sell products in the U.S., as a condition of doing business, the producer or its domestic distributor must consent to the jurisdiction of the U.S. courts and designate a registered agent for service of process. Consent to jurisdiction, much like agreements regarding the body of law to apply in a particular contractual transaction, is common, understandable, and effective.[13]

This is a wonderful step forward both in protecting consumers and leveling the playing field in this area.

IV. HR 4678: A Constitutionally Sound Proposal

Foreign manufacturers are subject to the jurisdiction of domestic courts if there are sufficient minimum contacts with the forum state and if the proceeding comports with our notions of fairness, justice, and reasonability. While *Asahi* requires judges to take into account the unique burdens a defendant faces in a foreign legal system, if a manufacturer reaps the benefits of a distribution network, it should not be able thereafter

[12] The "choice" aspect of this bill is not absolute since it is coupled with the notion of meaningful contacts. However, for large producers and distributors, this can be akin to generalized notions of party autonomy. Support for the notion of party autonomy is not a matter of controversy. See, Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 Am. J. Comp. L. 543 (2005) Michael Whincop & Mary Keyes, *Putting the "Private' Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 Melb. U. L. Rev. 515, 542 (1997); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L.J. 51, 52 (1992).

[13] In the automobile safety area, the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. 30164, requires non-U.S. manufacturers selling vehicles in the United States to designate a permanent resident of the U.S. as an agent for service of process and for purposes of administrative and judicial proceedings that might result if the product turns out to be problematic. A clarification of those rules issued in August, 2005 (Fed. Reg. August 8, 2005, vol. 70, no. 151).

to deny the forum court's jurisdiction.[14]

At their core, these dual requirements (minimum contacts and fairness) involve notice and a relationship with a forum state. Designation of an agent in a state where there are substantial contacts (as mandated by H.R. 4678) meets those requirements.

In the absence of H.R. 4678, the problems with the current state of the law will remain unsolved. Two years ago, I studied dozens of case where jurisdiction was denied even though the products in question were made with the purpose of being sold in the U.S.[15] While there are some cases that find it "fundamentally unfair" to allow a foreign manufacturer to insulate itself from the jurisdiction of the court solely by the use of a distributor, they are not the norm.[16]

The minimum contacts puzzle is not complicated. The more a defendant purposefully avails itself of the rights and obligations of the forum state, maintains facilities, bank accounts, owns property, pays taxes, has employees, agents, advertizes, establishes communication with consumers online or otherwise, the less minimum the contact become. All these features infer notice and "relationship" with the forum state – and H.R. 4678 actually *requires* both.

Constitutional concerns are often framed in terms of two other terms: service of

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[14] This paragraph and much of materials in this section are drawn heavily from my articles, Popper, "Defective Foreign Products in the United States: Issues and Discussion," 37 PRODUCT SAFETY AND LIABILITY REPORTER 45, January, 2009; Popper, "Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Goods," 36 PRODUCT SAFETY AND LIABILITY REPORTER 219 (No. 9, March 3, 2008).

[15] *Id.*

[16] *Saia v. Scripto-Tokai*, 366 Ill. App. 3d 419; 851 N.E.2d 693 (2006), *cert. denied* 550 U.S. 934 (2007); *Cunningham v. Subaru of America, Inc.*, 631 F. Supp. 132, 136 (D. Kan. 1986) (finding avoidance of accountability "fundamentally unfair" for certain foreign manufacturers who produce goods designed for sale and sold in the U.S.).

process and reasonability. On its face, H.R. 4678 provides s statutory solution for service of process. As to a reasonability assessments based on the Fifth Amendment and Fourteenth Amendments,[17] one approach is to look at the policies underlying the statutes, the interests of the state, the ease of litigating a claim, and fundamental fairness. A state's interest in having a producer or distributor of defective goods held accountable, particularly when the producer has an agent in the state and has consented to the jurisdiction of the state, seems a straightforward matter.

Some courts have simplified the reasonability matter and held that once purposeful availment is found, the reasonability requirement is satisfied ("reasonableness . . . is presumed once the court finds purposeful availment. . .")[18] Consent to jurisdiction imposed by law and the presence of a registered agent in the state would satisfy the reasonableness analysis. However, without H.R. 4678, the reasonability calculus becomes complex.

Typical of reasonability cases is *Bou-matic, v. Ollimac Dairy*[19] which relied on seven factors to assess reasonability: 1) The extent of purposeful interjection; 2) the

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[17] Fifth Amendment (for federal) and Fourteenth Amendment (for state) considerations still apply. The question becomes whether those considerations are addressed in a statute that mandates an agent for service of process and requires consent to jurisdiction.

[18] *Bou-matic v. Ollimac Dairy*, U.S. District Court, Eastern District of California, 2006 U.S. Dist. LEXIS 14543, March 15, 2006 citing *Ballard v. Savage*, 65 F.3d 1495, 1500 (1995), which cites *Sher v. Johnson,* 911 F.2d 1357, 1364 (9th Cir.1990) ("once a court finds purposeful availment, it must presume that jurisdiction would be reasonable"). The *Bou-Matic* court noted that, "[w]hen such a presumption operates, the burden of proving unreasonableness shifts to defendant. . . who must "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (citing) *Ballard*, 65 F.3d at 1500 (and quoting *Burger King*, 471 U.S. at 477, supra, note 6)).

[19] *Id.*

burden on the defendant to defend in the chosen forum; 3) conflict with interests of the sovereignty of the defendant's state; 4) the foreign state's interest in the dispute; 5) the most efficient forum for judicial resolution of the dispute; 6) the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and 7) the existence of an alternative forum.[20] The court also noted that one must look broadly to the connections the manufacturer has with the United States, not just to the forum state.[21] H.R. 4678 would greatly simplify this type of inquiry.

H.R. 4678 can be analogized to various registration statutes.[22] While such statutes often facilitate service of process, they have not always resolved *in personam* jurisdiction,[23] and have been only part of a fairness/reasonability due process analysis.[24]

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[20] Id. at 13.

[21] Id. at 16.

[22] *E.g.,* National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30164; 49 U.S.C. § 10330 (requires every interstate carrier subject to the jurisdiction of the Interstate Commerce Commission to designate an agent for service of process in each state which it operates in); Foreign Corporation Act, Minn.Stat. § 303 *et seq.*; Tex. Bus.Corp. Act Ann. art. 8.10(A); 10 Del.Code § 3114 (upheld, *Armstrong v. Pomerance,* 423 A.2d 174 (Del.1980). *Cf.* various state single-act motorist statutes, e.g. *Hess v. Palowski,* 274 U.S. 352 (1927) (discussing what was then Mass.Stat.1923, c. 431, § 2).

[23] *See e.g., Applewhite v. Metro Aviation, Inc.,* 875 F.2d 491, 494 (5th Cir. 1989) (service was proper but did not resolve personal jurisdiction.) *but cf. Burnham v. Superior Court,* 495 U.S. 604 (1990) (personal service of process over an individual is sufficient for personal jurisdiction).

[24] *See,* Sean K. Hornbeck, *Comment, Transnational Litigation and Persornal Jurisdiction over Foreign Defendants,* 59 ALB.L.REV. 1389, 1433-1436 (1996) ("Unless otherwise indicated, courts will read statutes containing such service provisions as including an authorization for a national contacts test.") *and* ("The Ninth Circuit construed "worldwide" or national service of process provisions as legislatively authorizing both service abroad and the use of a national contacts tests for purposes of asserting personal jurisdiction over foreign defendants.") (internal citations omitted). (citing *Go-Video, Inc. v. Akai Elec. Co., Ltd.,* 885 F.2d 1406 (9th Cir. 1989) (upheld a statutes authorizing international service of process using a "national contacts" approach); Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Jurisdiction Over Nonresident Alien Defendants,* 41 WAKE FOREST L.REV. 1, 21, FN (2006) (discussion of personal jurisdiction issues).

However, a designated agent plus a legislative declaration of consent to jurisdiction provides a solid basis for declaring satisfied the reasonability requirement, even when characterized as simple registration.[25] An entity that consents to jurisdiction gives up right to challenge it, even if compelled to consent[26] by statute.[27]

V. H.R 4678: Consistent with Globalization and with the Legal Systems of U.S. Trading Partners

In *Jones & Pointe v. Boto*,[28] a foreign manufacturer sold artificial Christmas trees in Virginia, derived profits from those sales, and maintained a website that invited inquiries regarding the products in question.[29] This information was available to any person and the design of the website inferred no limitations on the areas where the site

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[25] There is some disagreement about the effect on *in personam* of simple registration statutes. *Compare Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) ("One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State.") *and Shapiro v. Southeastern Greyhound Lines*, 155 F.2d 135, 136 (6th Cir. 1946) ("Service upon an agent so designated in conformity with a valid state statute constitutes consent to be sued . . . The fact that the consent was given under a valid federal statute rather than under a state statute does not detract from the force and legal effect of that consent."), *with Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) ("the mere act of registering an agent [. . .] does not act as consent" and fact that Learjet sold 1% of national business in Texas not enough to establish *general* jurisdiction) *and Ratliff v. Cooper Laboratories, Inc.* 444 F.2d 745 (4th Cir. 1971), *cert. denied* 404 U.S. 948 (1971) ("The principles of due process require a firmer foundation than mere compliance with state domestication statutes.").

[26] *See Knowlton supra* note *25* at 1200 ("The designation of an agent, in accordance with federal law, also operates as consent to the personal jurisdiction of the Minnesota courts.")

[27] *See Knowlton supra* note 25, at 1199-1200 ("Such consent is a valid basis of personal jurisdiction, and resort to minimum contacts or due-process analysis to justify the jurisdiction is unnecessary.") (quoting *Ins. Co. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee,* 456 U.S. 694 (1982)).

[28] 498 F. Supp. 2d 822, 829 (E.D. Pa. 2007).

[29] Id. at 829.

was to be accessed or the products sold. Accordingly, the court held that "in this age of WTO and GATT [the General Agreement on Tariffs and Trade] one can expect further globalization of commerce, *and it is only reasonable that companies that distribute allegedly defective products through regional distributors in this country. . . anticipate being haled into court by plaintiffs in their home states* [emphasis added]."[30] H.R. 4678 resolves the question of "home state" and is fully consistent with evolving trends and expectations in our increasingly globalized economy.[31]

In terms of the WTO[32], H.R. 4678 does not create an undue barrier or obstacle to trade. It imposes on foreign manufacturers the same responsibilities and obligations of domestic sellers and producers. The WTO concept of trade without discrimination requires a somewhat level playing field for domestic and non-domestic market participants and H.R.4678 does just that.

Moreover, while I do not teach in the international trade area, it appears that many of the primary U.S. trading partners (including China and most of Latin America) do not give U.S. companies doing business in their countries a "free pass" from their legal systems.[33] It is only logical, therefore, that foreign companies within the U.S. are

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[30] Id. at 831 (citing *Barone v. Rich Brothers Fireworks*, 25 F.3d 610, 615 (8th Cir. 1994).

[31] I discuss some of the special challenges plaintiffs face when trying to pursue claims against foreign defendant in my article in the *Product Safety and Liability Reporter* (supra, note 3) For this testimony, I will only note that Central Authority established by the Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters is the likely means of serving process on a foreign defendant (there are other mechanisms, e.g., letters rogatory, that are unreliable at best). Time, costs, and inconvenience plague this process. The ability to secure service of process through a domestic designated agent set forth in H.R. 4678 should ease some of the burden on injured U.S. consumers.

[32] For general information about the World Trade Organization, see, www.wto.org

[33] Yu Shanshan, *Psst. China Has Tort Laws. Oh, And They Are Relevant For Foreigners*, April 1,

likewise subject to the jurisdiction of U.S. courts.

More than a century ago, the Supreme Court recognized that the U.S. legal system did not operate in isolation.[34] As the 19th Century drew to a close, an international vision of commerce emerged. Part of that vision, however, was the understanding that there are rules to follow both in terms of international law and the country-by-country application of domestic law predicated, *inter alia*, on protecting the "rights of [a country's] own citizens or of other persons who are under the protection of its laws."[35] H.R. achieves precisely that objective: without creating any unusual burdens, it gives U.S. consumers access to the civil justice system.

The short of it is that H.R. 4678 aligns the U.S. with our trading partners. It does not create unique or extraordinary trade barriers. Moreover, the general rule in tort law in almost every country regarding forum is *lex loci delecti* – the law of the place of the wrong. H.R. 4678 is fully consistent with this construct.

VI. Conclusion

H.R. 4678 is important not only in terms of injured consumers but in terms of

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2010, http://www.beijingtoday.com.cn/tag/tort-law (on the application of China's New Tort law); Peter Neumann and Calvin Ding, *China's New Tort Law: Dawn of the Product Liability Era,* http://chinabusinessreview.net/public/1003/neumann.html, June 2010; John F. Molloy, *Conference Report, Miami Conference Summary of Presentations*, 20 Ariz. J. INT'L & COMP. LAW 47, 59-63 (2003) (describing the strategic and practical considerations relevant to U.S. companies sued in Latin America countries)

[34] *Hilton v. Guyot*, 159 U.S. 113 (1895).

[35] "But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 164.

U.S. business interests. When foreign entities (through their products) are in the U.S. and are outside the reach of the U.S. court system, a market distortion occurs. Quite simply, foreign entities (and their domestic distributors) are at a distinct cost advantage over their domestic competitors who must both avoid liability by exercising higher levels of care and must insure against the chance of product failure.

In other areas of law (*e.g.,* antitrust[36]) entities located abroad that affect and cause harm to interests within the U.S. bear responsibility for those consequences in U.S. courts. Entities doing business here – selling goods directly to consumers – should also be no less accountable in our courts.

H.R. 4678 levels the playing field and protects consumers. It is constitutionally sound and consistent with trade law. It is a straightforward and essential change, giving injured persons access to the civil justice system.

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I have had the honor of testifying on matters pertaining to tort law and tort reform on many occasions over the last 25 years. Almost every bill I considered during that time raised troubling questions about the protection of consumers. My testimony supporting H.R. 4678 is a first for me.

This is good legislation that will produce fair and just results. I ask respectfully

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[36] *See generally*, Article 5(3) of the Brussels I Regulation applicable to EU countries. *See*, Boast and Pennington, *Extraterritorial Application of U.S. Antitrust Law: An Overview*, http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/05/boast.pdf; Roger Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California,* 34 VA. J. INT'L L. 213 (1993)

that you adopt H.R. 4678.[37]

[37] My great thanks to American University, Washington College of Law students Katie Leesman, Lucia Rich, Jon Stroud, and Allyson Valadez for their invaluable assistance. AFP

Mr. RUSH. Ms. Rowden, you are recognized for 5 minutes.

STATEMENT OF MARIANNE ROWDEN

Ms. ROWDEN. Thank you, Chairman Rush, Ranking Member Whitfield, and members of the subcommittee, my name is Marianne Rowden, and I'm president and CEO of the American Association of Exporters and Importers. AAEI has been the voice of the International Trade Community since 1921, and we represent the entire spectrum of the trade community. AAEI greatly appreciates the opportunity to testify today. Our written testimony submitted for the record raises five points, but I would like to concentrate on two fundamental issues.

Since enactment of the Consumer Product Safety Improvement Act, product safety has become an integral part of trade compliance. This new responsibility follows the trade community adopting new practices to enhance supply chain security since 9/11.

Our experience over the last decade has been that regulating goods produced outside of the United States requires two things: First a wholistic risk management system; and two, implementation of product safety legislation, which would eliminate the need for H.R. 4678.

Let's turn to the chart entitled A Multi-Layered Approach to Wholistic Risk Management.

This chart categorizes companies based on risk characteristics. This solution will allow the government to spend its limited resources efficiently and effectively to prevent defective products from entering the commerce of the United States, secure the homeland and increase trade compliance.

We would like to highlight the companies who joined CPSC's voluntary partnership program with CBP, the importer self-assessment program for product safety would fall into the ultra low risk category as a result of their demonstrated commitment to ensuring the integrity of their imported products and the safety of U.S. consumers.

This wholistic risk management approach is critical to the implementation of product safety laws enacted by Congress. First, without information about the integrity of imported products, we will continue to see defective products. AAEI is working with CBP, FDA, CPSC and other Federal agencies to leverage the data already collected by CBP to assess risk.

Congress has chosen different methods for dealing with risks posed by different products. For consumer products, Congress has directed CPSC to require certifications demonstrating that the product meets applicable safety standards.

For food drugs and devices, Congress chose to require foreign manufacturers to register with FDA because of the risks posed to the public health by potential bad actors seeking to compromise the integrity of these products.

These laws need time for implementation and evaluation of their effectiveness before adding more legislative requirements.

Finally, AAEI remains concerned that if Congress chooses to pass H.R. 4678, similar requirements will be placed on U.S. companies exporting to foreign markets. We believe it will be difficult for small U.S. companies to expand export opportunities and create

jobs in the United States if they are required to appoint a registered agent in foreign countries to defend lawsuits.

We thank you for the opportunity to testify today, and I'm happy to answer the subcommittee's questions.

[The prepared statement of Ms. Rowden follows:]

AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

1050 17th Street, N.W., Suite 810
Washington, DC 20036

Statement of Marianne Rowden
President & CEO, American Association of Exporters and Importers

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

June 16, 2010

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. AAEI 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).

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[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.


A Multi-Layered Approach t
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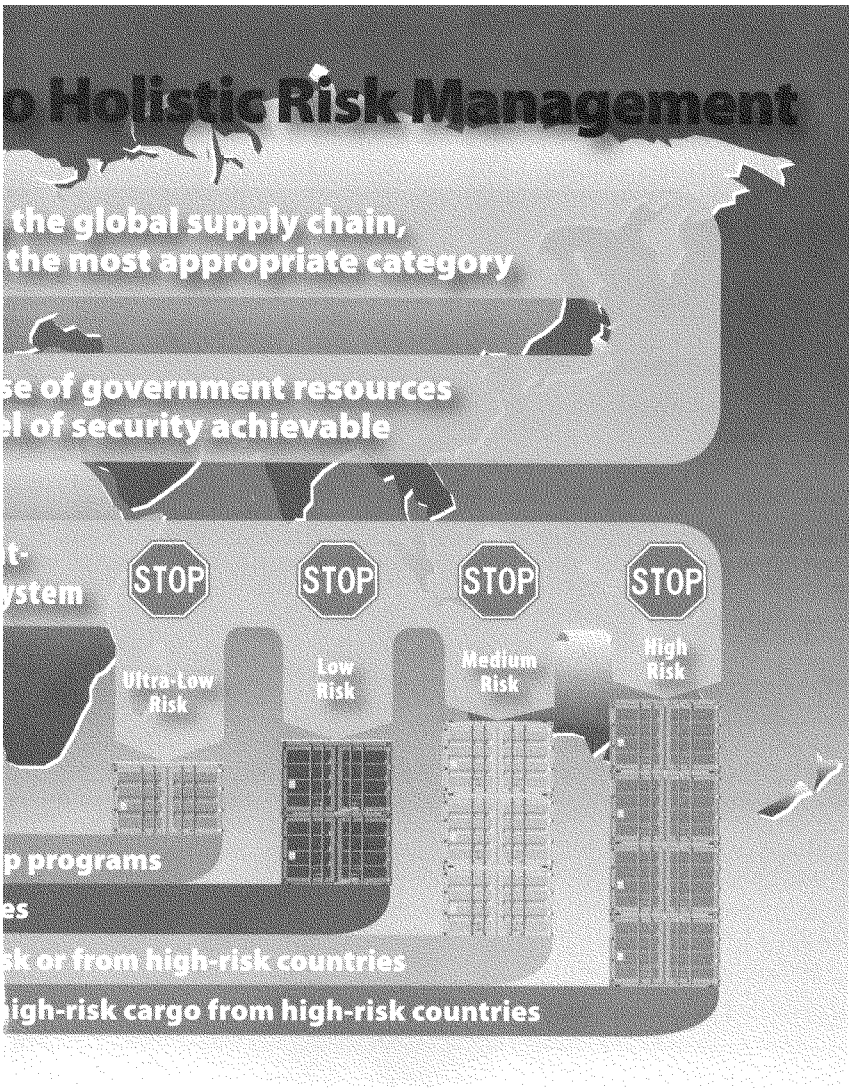
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Mr. RUSH. The chair thanks all of the witnesses for their opening statements. And the chair now recognizes himself for 5 minutes for the purposes of questioning the witnesses.

Mr. Morgan, I must begin with you, your story of you and your family, the tragedy that you had to endure was heart wrenching. There is not one of us that wasn't moved by your story that you provided us. And I want to thank you for your willingness to share your story with us today. The story of defective Chinese drywall in what you thought was your dream home has, you said, made your life turned upside down, forced into bankruptcy and forced you to lose your home. And I can't think of anything that would be as horrible as having someone to lose their home under these kind of circumstances.

Your story demonstrates quite clearly to all of us that the expense of foreign defective products on the American consumer can be enormous and can be life altering.

We are not only moved emotionally, but we are also outraged by what happened to you and your family, and what is happening to not only you and your family but to thousands of other American consumers who are victims of this defective drywall, and other products, I might add, foreign manufactured and defective that come in from overseas.

We are just very, very moved by the results that Americans have to suffer from the circumstances.

I guess this might be kind of an interesting elementary question, but can you share how you feel about that and say why you support this legislation?

Mr. MORGAN. Yes, sir. I bear no ill will to China or the companies, 14 months ago, my life was perfect. We had no concerns, no issues, and in 14 months, I'm here today talking with you good ladies and gentlemen. Just hold them accountable like anybody else in this country. I don't think they should be placed on a higher standard. Just put them, hold them accountable like everybody that does business in this country is. As a police officer, my wife being a school teacher, we always had to obey the rules. It's just our nature. And I think that is probably the most frustrating thing is they are not being made to obey the rules of doing business in this country.

Mr. RUSH. Since your story has been made known to the public, have you been able to identify or share your stories with other American citizens who have had a similar story?

Mr. MORGAN. Yes, sir. And my story is very typical. The sad thing is it took almost 2 years for our home to start to display the problems. In other words, we built it brand new in 2006 and it was around 2008 we started experiencing the problems with the electrical systems, the air conditioning, my wife had the nose bleeds the coughing, the headaches, all those types of things. And the homes that were built last year, there are a lot of people that have it in their homes and they don't know it yet. Anything I can do, and that's one reason I wanted to come here today, anything I can do to bring awareness to this, it's hurtful to sit and tell people that I've had to file bankruptcy. May 17th my home went into foreclosure.

My wife and I were always the type of people, our mortgage check was there on the first because we were afraid if it was a day late they were going to come take the house. Here again, we have always done what we're supposed to do, and that's just what I hope anybody that does business with this country will be held to the same standards as those of us that live here and work here.

Mr. RUSH. Again, I want to thank you and members of this committee, our hearts go out to you and we are highly motivated to solve this problem.

Mr. MORGAN. Thank you, chairman.

Mr. RUSH. The chair is extending this time now, the chair now recognizes Mr. Whitfield for 5 minutes.

Mr. WHITFIELD. Thank you very much, and thank you all for your testimony.

When we talk about safety of products in the U.S., of course one part of it is we have a mechanism where we can recall certain items and then what this legislation really is about is giving an individual or a legal entity an opportunity to get a defending party into court. And let's take Mr. Morgan's example, and Mr. Morgan, I also would like to convey my very much concern about you and your family and what has happened to you and other people caught in the same circumstance.

But if this law had been in effect, the one that we are talking about, and Mr. Popper, if we if we were able to serve, get the service of process on the Chinese company that provided this drywall and if we obtained a judgment in a court in the U.S., whether Federal or State, whatever, how difficult would it be to actually obtain the funds to collect to the judgment?

Mr. POPPER. I guess the best way to answer that would be to say that you would never get to that question unless this legislation is adopted. Because you would never get to having that manufacturer in court.

Mr. WHITFIELD. I understand that. If we are going to try to really help people like Mr. Morgan, we can help get service of process very easily. But what can we do to collect on the judgment? In his case for example?

Mr. POPPER. The potential of liability changes behavior. The potential for civil liability is one of the most powerful forces in the American economy. Selling a product in the United States and knowing that you don't get a free pass or a dodge but that you can be haled into court and that you can haled, found liable, I think, creates an incentive that is worthwhile. That is the whole theory behind the tort system. That is the corrective justice effect. I don't mean to avoid your question. But you start with the fact, you asked me how this could happen or how this could be avoided? That is one way. The second way is we position——

Mr. WHITFIELD. How do we collect the money?

Mr. POPPER. You go after the manufacturer and if the manufacturer doesn't cough up the money on the judgment, or if the manufacturer makes it difficult to secure that judgment under The Hague convention, then you have to go after the distributor. But you don't get to do any of that right now. None of those, none of those values are there.

To be clear, this legislation doesn't solve every problem in the civil litigation system when you're dealing with a foreign manufacturer. It does give you a valid starting point. This bill wasn't designed, as I read it to facilitate the collection of foreign judgments. It allows for the entry of the judgment. Now potentially, you have got a judgment creditor, you have a company that is in trouble, you have an enforcement mechanism through the Department of Homeland Security——

Mr. WHITFIELD. Mr. Popper, thank you, I appreciate that. I only have 1 minute and 50 seconds left. Thank you for that.

But the importer of this product, Mr. Baskin, this tainted wallboard that was used in Mr. Morgan's house, would there be any mechanism through a treaty or otherwise that a lawsuit could have been filed against the importer or the distributor of the product in the U.S.?

Mr. BASKIN. The importer is responsible for obligations that the Tariff Act puts on him with regard to importation, but the importer would not necessarily be responsible for paying money damages.

Mr. WHITFIELD. Mr. Morgan did your employers sue the importer of the product?

Mr. MORGAN. Not yet, no, sir.

Mr. WHITFIELD. Have they had talked to you about doing that?

Mr. MORGAN. Yes, sir, I know all things are being looked at, and I would have to defer any additional questions like that to them.

Mr. WHITFIELD. So they have not made a final decision yet. OK. But they are looking in it.

One other question I would like to ask, and I'm not an expert in this certainly, but some experts have told us that this legislation may run afoul of WTO requirements for similar treatment of foreign and domestic products that if the bill passed foreign manufacturers would face the penalty of exclusion of their goods from commerce for failure to have a registered agent and thereby accepting the specific jurisdiction of the State court. However domestic manufacturers do not face this significant penalty of banishment from commerce for any similar violation.

Is there any argument there that WTO would look at this as a discriminatory type action?

Mr. BASKIN. I would have to defer to Customs and International Trade Commission for an answer like that. CPSC wouldn't be in a position to answer that.

Mr. WHITFIELD. But Mr. Popper, you had indicated that recently China had changed their tort law. Is that correct?

Mr. POPPER. My understanding, and it is in my testimony that China adopted a new, what they call a new tort law to take effect July 1, 2010.

Mr. WHITFIELD. Have you had an opportunity to look at that yet? That law?

Mr. POPPER. It has been in the making for 8 years, and I have looked at the components parts of it that are available online. I haven't read it in its native tongue.

Mr. WHITFIELD. May I ask one other question and I know we have other people.

But Mr. Baskin, does the Consumer Product Safety Commission have a position on this bill?

Mr. BASKIN. Yes. We support the concepts of the bill. But as I noted in my testimony, there are some issues that we would have with regard to the range and size of manufacturers that would be subject to the process.

Mr. WHITFIELD. You do support the concept?

Mr. BASKIN. Yes.

Mr. RUSH. Thank you. Ms. Sutton is recognized for 5 minutes.

Ms. SUTTON. Thank you, Mr. Chairman.

Mr. Baskin, in your testimony, you stated that earlier this year Chairman Tenenbaum sent a letter to Congress, and in the letter noted that helpful changes to the existing statutes might include a service of process requirements for foreign manufacturers so that the agency can more easily pursue recalls, is that correct?

Mr. BASKIN. Yes.

Ms. SUTTON. And so this legislation could be helpful to the Consumer Product Safety Commission as well as to providing redress for injured consumers, correct.

Mr. BASKIN. Yes.

Ms. SUTTON. Ms. Gadhia, thank you very much for your testimony as well.

The CPSC has a number of tools as we have heard here today intended to prevent unsafe consumer products from entering the market. And you testified that this bill will make considerable strides in assisting CPSC and other agencies in holding appropriate entities responsible for products that they introduced and sell to our consumers.

Could you elaborate about how this would work together and complement the CPSC's activities?

Ms. GADHIA. Absolutely. As has been noted, there are mechanisms on the front end such as the CPSIA and other statutes in place that hold all manufacturers to certain safety standards that their products have to meet before they are sold in the U.S.

And there are mechanisms once those parts come to our borders, through the good work of CBP and Department of Homeland Security to screen those products. But there are two issues with regards to that, one, not every company is going to follow the safety standards. You're going to have unscrupulous products, manufacturers and products, dangerous products coming through. And with the resources that CBP and others have, they are not able to screen every single one of the products at the border.

So the end result for a variety of reasons is that there are going to be dangerous products on the market, despite everyone's efforts. And so this is yet another mechanism on the other side of things to address the harm when it does occur and allows consumers when they are injured and go through the devastating circumstances that Mr. Morgan and his family have gone through to try to begin to obtain some redress for that.

Ms. SUTTON. Thank you. And of course, Professor Popper, you were just explaining the benefits of also having this kind of legislation pass so that we can give an incentive to those who produce products to make them safe. Would you like to elaborate on that and how this is a useful tool up front as well as providing redress?

Mr. POPPER. I think that there is no question that the potential for liability changes behavior. It means both making sure in the

production process that you have exercised reasonable care and that in the distribution and sale process you provide adequate information and warning. You know that liability is down the road. Whether as has been suggested, you may have difficulty selecting the judgment is a very separate question.

The other piece of this is that once you interject the CPSC into the equation and the way the consumer product safety improvement legislations worked is, you end up with findings of regulatory violations where you don't have the collection of judgments a problem. Those findings become facts that constitute a violation, they constitute a breach of a duty of care and they are readily imported into our legal system. It's the way U.S. manufacturers function. They work both the front end and back end. It's what creates safer products. Why not do that with foreign manufacturers? It seems fair to me.

Ms. SUTTON. I appreciate that very much. Mr. Morgan, thank you so much for being here and for testifying for sharing your experience with the committee in an effort to try and improve the situation for others.

I'm very sorry to hear about what has happened to your family. I'm sorry to hear about the toll that it has taken and the time that you have had to deal with in pursuing some kind of effort at recourse.

To the questions that some of my colleagues have raised about enforcement, I have some ideas about enforcement too so I look forward to pursuing those.

But I just, I'm struck and I think that it was professor Popper who indicated that your words frankly summarize it when you say foreign manufacturers should not be allowed to sell products which destroy homes and make people sick with impunity or the list of any of these other products that come into our stream of commerce, and frankly it will improve safety of products not just for American consumers, but for all consumers. And so I would advise and encourage folks to look at the list of items, Professor Popper, that is contained in your testimony I believe about things that are coming in to this country.

And I don't have much time left, but I would just because I'm not very familiar, Ms. Rowden, with exactly with your entity that you are representing but I believe you said you represent the international trading community in the United States. And you support what I believe you described as fair and open trade policies, did you all support, did your organization support then things like NAFTA and CAFTA and NPTR?

Ms. ROWDEN. Yes, traditionally, we have supported free trade agreements.

Ms. SUTTON. So you support all those things?

Ms. ROWDEN. Yes.

Mr. RUSH. The chair now recognizes Commander Murphy.

Mr. MURPHY. Thank you, Mr. Chairman and thank you to the panel. Professor Popper, a question for you, I just want to make sure I have a proper summary of your testimony, so if we use these products, you can be poisoned, strangled, choked, fall, crash, burned, bruised, cut or die but you can't sue?

Mr. POPPER. That's correct.

Mr. MURPHY. Then given that, then I have a couple of follow-up questions there. And you pointed out that when one has to face the responsibility of litigation or the chance of litigation, it is a motivator for companies to make sure they keep an eye on their products because they are going to be held responsible for that.

Does that add to the cost of products made in America such that products made in other countries that don't bear that responsibility use that as a mechanism to actually undercut the cost of products and sell them cheaper in the United States?

Mr. POPPER. I'm not sure I understand exactly your question, but I believe in my testimony what I stated in the written portion of it was that foreign manufacturers who are freed of this responsibility bear lower costs because they don't have to observe the due care responsibilities and they bear lower insurance costs and companies in the United States do have to observe due care responsibilities, do have to observe statutory obligations, do have to ensure against harm, and do spend more money. Consequently, the U.S. companies are definitely at a disadvantage.

Mr. MURPHY. That is what I wanted to know if you have any kind of dollar figure percent figure you have that it is one of those things that foreign companies may actually, we know they manipulate currency, they do a number of other things to subsidize or manipulate taxes, but I'm wondering along these lines too if we have any kind of dollar figure of what it is that they may by bypassing us actually undercut the cost of products.

Mr. POPPER. It's actually a very wonderful question, and it's very volatile because it is what is referred to in the United States from time to time as the tort tax. If you listen in the tort reform debate to people who don't necessarily agree with me on some of the issues, and they complain about the imposition of liability what they do is they place a percentage number on what it costs to produce good and safe products in this country and comply with our tort system. And I'm going to estimate that it is somewhere in the neighborhood of 15 to 20 percent.

Mr. MURPHY. But that is a significant number——

Mr. POPPER. Massive.

Mr. MURPHY. And companies are saying we will just build in China and send it over here, and we don't have to pay that extra 15 to 20 percent and we manipulate currency which puts another 40 percent savings on, it's hard to compete with those countries.

Mr. POPPER. It's hard to compete with those countries and with those products so long as those products are not subject to the U.S. legal system.

Mr. MURPHY. Thank you. Mr. Baskin, I have a question, too, on your testimony. Does the Consumer Product Safety Commission have sufficient personnel to screen these products before they even get over here?

Mr. BASKIN. That would be a question that would be outside of my range of knowledge here.

Mr. MURPHY. I know you mentioned about the number of people who were involved in this and you have increased the number of screening, which is good news, but, even before they enter our ports, or I don't know where you feel that it's more important to check them before they leave the country of origin or when they

come to our country, it's one of those areas that in order to protect consumer safety, if someone from your agency could get back to us because it's an important question to know what we would need to do with that.

Mr. BASKIN. Certainly, certainly.

Mr. MURPHY. Can someone also answer the question of what happens to U.S. Products in a foreign country? So if we sent something to a foreign country and it is deemed to be unsafe or some other problem, what happens to those products from foreign countries, anybody know?

Mr. POPPER. I will just give you a quick answer.

Footnote 33 in my written testimony, I refer to a couple of pieces, one on the new Chinese tort law, and the other a piece pertaining to South and Central America and the imposition of liability on U.S. companies doing business in foreign countries. And the record varies. But for the most part, I have come to stand behind lex loci delicti. If you're in another country and you commit a wrong, the idea that the United States State Department is going to come in and bail you out when you're being subjected to civil liability, as far as I know, doesn't happen.

Mr. MURPHY. One final question then, do the importers of products in this country, do they mislabel products in terms of country of origin, content, anything else? Is that showing up anywhere, Mr. Baskin, in your findings?

Mr. BASKIN. That is always an issue. I have spent some time in Customs, and that is always a violation that customs would find. It would be no less applicable to CPSC.

Mr. MURPHY. Thank you very much.

Mr. RUSH. The chair now recognizes Mr. Braley for 5 minutes.

Mr. BRALEY. Mr. Morgan, I had the opportunity at the height of the Chinese drywall publicity to inspect some homes in Delray Beach, Florida, and I got to see first hand exactly what you were describing in your home, the corrosive effect on the wiring and the materials, the overwhelming smell of sulfur in there. And it was eye opening for me because the homeowners were devastated about what was happening to homes that they put a lot of money and were very proud of. And then I went back to Iowa where I live, and I was sick for about the next 6 weeks with respiratory problems.

Have you or your family had any types of health-related problems because of being exposed to this Chinese drywall that we were talking about?

Mr. MORGAN. Yes, sir, my wife experienced nose bleeds for a long time, persistent coughing and headaches. After we moved out of the Chinese drywall house into our rental home she had nose bleeds for 2 days and she hasn't had one since.

Mr. BRALEY. You're the perfect example of what foreign manufacturers who aren't subject to having a registered agent available in the United States do manipulate and that is they know that the long period and cost of trying to hold them accountable for what whatever they do, people will get frustrated and give up because at some point you have to move on with your life and you can't wait for that magic solution when you have got bills to pay and people are pushing you into bankruptcy. Has that been your experience?

Mr. MORGAN. Yes, sir, I mean just the cost just to do the translation, you know, $150,000, to myself or people like me it might as well be $1 million. It's just money that we don't have, we can't afford, and being a police officer, I hate to say in public, thank goodness for attorneys. They have been a real lifesaver for us in trying to get some of our life back. It's just been a maddening process. It really has.

Mr. BRALEY. Mr. Popper I want to follow up with you. I have a very clear memory of a front line program talking about the trade imbalance between China and the United States, and they showed the Port of Long Beach with shipping container after shipping container come in with finished consumer products, a lot of them electronics, you name it, coming in and then they showed what was leaving the Port of Long Beach and it was recycled scrap metal and cardboard. That was the extent of what was going on in terms of the bulk of the shipping coming in and out of that port.

And you talked about the practical aspects of enforcing a judgment against a foreign manufacturer.

When you have got a judgment, all it is is a piece of paper. It means nothing whether you're suing a domestic manufacturer or foreign, but it gives you the right to enforce a judgment, and if you have got assets available in the United States, through a domestic manufacturer, you pursue that. If they refuse to pay, or if they are not insured, you can levy on those assets, you can attach them, you can have them sold, and then those proceeds can be used to satisfy a judgment, correct?

Mr. POPPER. That is correct.

Mr. BRALEY. The same thing applies with foreign goods that would be in this country coming in through our ports that are owned by a foreign manufacturer, those are tangible assets that if need be, could be levied upon to satisfy a judgment if you can trace them back to the owner of the manufacturer, and they are doing business in the stream of commerce in the United States, right?

Mr. POPPER. That is correct.

Mr. BRALEY. So it is not like we are developing a remedy without a payoff. It's just that it's very difficult, given the relationships with these foreign manufacturers and their ability sometimes to hide their assets overseas that makes it difficult for people who have been injured by these defective products to actually get a payout at the end.

Mr. POPPER. Yes.

Mr. BRALEY. Would you agree with that?

Mr. POPPER. I would agree with that.

Mr. BRALEY. Ms. Gadhia, one of the things I want to talk to you about is why this is so important? Because when you talk about something as massive as what we've seen with Chinese drywall, the average individual consumer, by themselves, are typically powerless against these large foreign manufacturers many of whom are hard to identify, because when you go into your Lowes or your Home Depot, they may have a product there that looks on the surface like it's a domestic product, and in reality, it was imported by a distributor, and being sold under their name rather than the original manufacturer. Why is it so important to consumers that we move forward on this legislation?

Ms. GADHIA. It's incredibly important because, first of all, I think consumers have an expectation, and rightfully so, that the products that come into their homes regardless of where they come from are safe and it's only fair to domestic manufacturers that the rules that they play by should also apply to foreign manufacturers.

You also need a mechanism that works on the other end of this entire supply chain in this system, where when you have got standards in place and you have got border protection in place, but you still have unsafe products coming through, sometimes you have a situation where you didn't know that this product was going to be problematic. I don't think anybody could have foreseen that you would have a children's toy with a chemical on it that turned to the date rape drug. I don't think you could have foreseen years ago that you would have sulfur coming out of drywall and causing these kinds of horrific problems. You have a lag time between these products coming in sometimes and the problems they cause, and you need that redress on the other side for consumers to be able to be made whole.

Mr. BRALEY. Thank you. I yield back, Mr. Chairman.

Mr. RUSH. The chair recognizes Mr. Sarbanes now for 5 minutes.

Mr. SARBANES. Thank you, Mr. Chairman. Thank you to the witnesses for their testimony.

I always feel at these hearings, and in particular, committee, that I'm always sitting here saying you mean we don't already do that? Whatever the topic is, whether it's regulating chemicals, or in this case, whether consumers are going to have recourse when these foreign manufactured products come into the country, because I think the average American probably expects that this is already being done.

And in that respect, I want to thank Congresswoman Sutton for this legislation because I think as four out of five of you testified, it makes absolute common sense to pursue it.

I once argued in the Fourth Circuit a case on minimum contact. So I'm very familiar with the frustration, of a case called Eloquent Machine Corporation. And we were down to trying to make the case that faxes and other communications that were coming into the State of Maryland were sufficient to establish minimum contact for the purpose of exercising personal jurisdiction, I don't know if you're familiar with that case or not. But in any event, it makes absolute sense to try to fill this, or close this loophole as you have described it. And I wondered, though, if you could, Mr. Popper, respond to Ms. Rowden's arguments about whether we sort of don't need to go there yet, but it's really just a matter of improving the oversight through CPSC and other measures that we can take and that this is just kind of a extra layer that is unnecessary at this time. If you could respond to that, I would appreciate it.

Mr. POPPER. I think about 2–1/2 years ago when we started learning about the problems with pet food and the entire country seemed to mobilize around the issue, your question was answered. Were you dealing with isolated incidents, isolated problems and you had a solid regulatory structure in place, it might be worth waiting to allow that system to mature.

I think that is not the case. I think you are looking at a remarkably broad problem when you're talking about 80 percent or more

of the goods regulated by CPSC, the vast number of our pharmaceutical products, goods throughout the United States that we use in good faith. You started out your comment about why don't we already do this, I think as a country, one of the best things about us is that we operate in good faith, we operate in trust. We believe that when we buy a product sold by a reputable seller that we can rely on its safety and its efficacy. And we have learned with foreign manufactured products we can't do that. The regulatory system needs to be bolstered. The civil liability system needs to be bolstered.

I certainly understand the desire to maximize our trade position. I think that is correct at every level. But requiring companies doing business in the United States, whether they are domestic or foreign, to follow the same set of laws strikes me as not inconsistent with that goal. It strikes me as perfectly consistent with it.

And from my perspective as a law professor, I thank you for saying lawyers are, from time to time, heroes. They are. But you can be a good lawyer and representing a client who has a serious problem and run into exactly what you ran into in the Fourth Circuit, and there is nothing you can do about it. And when that happens, the concerns that we might have about some of our trading partners being miffed about the impositional liability strike me as not particularly the dominant concerns that one ought to have.

Mr. SARBANES. I appreciate it, and I think, Ms. Gadhia, you made the point that even a very rigorous regulatory oversight regime doesn't mean that you're going to completely be able to prevent harmful products from coming into the stream of commerce.

Ms. GADHIA. Correct.

Mr. SARBANES. And you need other ways to create deterrence and/or create some remedy or recourse should that happen.

Ms. GADHIA. That is absolutely correct. And in addition, as I mentioned in my testimony, this type of registered agent can also help agencies like the CPSC that are trying to conduct recalls within that regulatory scheme to do so in a proper fashion.

Mr. SARBANES. I have got 15 seconds. One last question for you Mr. Popper. And that is you spoke a little bit about what other countries have in place. Can you speak about what is happening with Chinese products going into certain other countries in terms of the way they are handling, because China has obviously been a focus of our discussion here.

I mean, are we sort of in good or bad company, however, you might want to characterize it, in terms of the way we are equipped to handle these products coming in from China when we look at other countries or are others ahead of us on that?

Mr. POPPER. To the best of my knowledge, we provide a remarkably generous environment for foreign manufacturers by not imposing liability. I believe in the EU countries and in Latin America and in South America they are treated the same as their domestic companies. And so I think what we are doing is both domestically and internationally leveling the playing field.

And if I might add just in terms of the regulatory obligations, keep in mind that as effective as regulatory systems are, they do not provide individual personal injury remedies. They provide a regulatory recourse, that affects the broad population, but the indi-

vidual affected adversely by the violation of a safety regulation doesn't have recourse before the agency. The agency isn't an Article 3 court. It doesn't provide those remedies.

Mr. RUSH. The chair now recognizes Mr. Stupak for 5 minutes.

Mr. STUPAK. Thank you, Mr. Chairman, thank you all for your testimony. Mr. Morgan, sorry, about your problems there and unfortunately your problems are duplicated many times throughout this country. Just a question though, you said you had your house built, right.

Mr. MORGAN. Yes, sir.

Mr. STUPAK. Did your builder charge you the going rate for drywall or did you get a lesser cost.

Mr. MORGAN. I don't know. I would like to know what the cost difference was.

Mr. STUPAK. I would like know that too. You might have a perfect claim right there against your builder.

Let me ask Mr. Baskin or Ms. Gadhia, what happens when products come into the United States like this drywall, let's say, come came in right now from China high in sulfur, what would happen to it? You discover it at the border.

Mr. BASKIN. Luckily it's not. So that is a good thing in that——

Mr. STUPAK. But if it did, what would happen.

Mr. BASKIN. If it did, it could be detained at the border.

Mr. STUPAK. It sits there, right.

Mr. BASKIN. Yes.

Mr. STUPAK. Why don't we shove it back to the shipper?

Mr. MORGAN. The authorities allow that eventually.

Mr. STUPAK. They do?

Mr. BASKIN. Yes.

Mr. STUPAK. Well, then we had the inferior steel coming in from China, we had a couple of schools collapse in California because of inferior steel, they are telling us they have no authority to return it. In other words, it comes in, if they test the steel, it doesn't have the proper strength, they set it aside, tag it, set it aside, and it sits there, or whoever ordered it comes, picks it up, they are told they can't use it, say, for construction of a school, but it sits there or they take it use it for some other use in theory. So while you have authority to detain it, do you have specific authority to send it back to China.

Mr. BASKIN. I don't know about the steel situation.

Mr. STUPAK. How about drywall? Right now if bad drywall came in, you had the right to detain it at the border I agree with you, but do you have a right to send it back to China? And if so, who pays for it.

Mr. BASKIN. Good questions all. I would have to defer an answer to that, get that question in writing and we can get back to you on that.

Mr. STUPAK. Ms. Gadhia, you indicated, and Mr. Sarbanes, that the registered agent could help in a recall. How would a registered agent help in a recall underneath this legislation.

Ms. GADHIA. The border would help is that you have got an entity here in the U.S. that should the agency need to get information from the agency about the scope of the product and when it was manufactured, the dates that they believe the defective product

was manufactured, where the product went, how it was distributed, you have got an actual agent here that is, as the agent for service, of process, a contact domestically for the agency so they aren't trying to chase an entity overseas.

Mr. STUPAK. But sure but 4647 just requires you to have a registered agent here to accept process. You don't have to know anything about the product. You just have to be able to accept process so you don't have to send it to China and try to chase someone down where the central government holds it for 6 months before they give it to the manufacturer. How would a registered agent help? There would have to be more in the legislation wouldn't there to be able to really help in a recall.

Ms. GADHIA. I think what it would do is it gives the agency one more option, one more entity to try to get that information from rather than sending it to China and having it sent back.

Mr. STUPAK. I agree if you're going to bring a lawsuit, you have a person or individual or entity you serve the process to and that manufacturer in this case is drywall would be considered served, but I don't know if I have a registered agent how that would help in a recall because they are not required to know manufacturing location, physical location, they just have to be a registered agent for a company, right?

Ms. GADHIA. I might defer on the details of what the CPSC would be looking for as far as information the recall process to the agency. But I think it would depend on the case. It would depend on in some situations the agent for service of process might be an entity that has that information. In some cases you're right it could be simply and agent that accepts the paperwork.

Mr. STUPAK. So in this legislation shouldn't we expand the role of the registered agent more than just a person or entity that accepts service? Shouldn't they have greater knowledge of at least, if it's going to help in a recall.

Ms. GADHIA. I think it could certainly help to do that, to expand it.

Mr. STUPAK. So do you suggest we put that in this legislation.

Ms. GADHIA. I would respectfully take a minute to, I would respectfully respond that I would think about that a bit and get back to you on the record, if that's all right.

Mr. STUPAK. Please do. Mr. Chair, when we are in Oversight and Investigations, we see this all the time, whether it's melamine or whatever it might be, and a registered agent doesn't do anything to help you. In fact, all it is is a point of contact here in the United States.

Ms. Rowden, why doesn't the American Association of Exporters and Importers just volunteer to be the registered agent for all these importers?

Ms. ROWDEN. Oh, gosh.

Mr. STUPAK. Oh, gosh? I mean——

Ms. ROWDEN. Our members are importers and exporters of goods. Often it is the U.S. importer who has the legal responsibility under U.S. customs law to deal with product safety and also will ensure——

Mr. STUPAK. Are you saying that the importers are certifying that the product is safe when they bring it in this country.

Ms. ROWDEN. They have the obligation to make sure that that product meets all U.S. laws.

Mr. STUPAK. Really? Under what law is that.

Ms. ROWDEN. All laws, not only U.S. Customs law, the FDA——

Mr. STUPAK. So Mr. Morgan should just sue the importer.

Ms. ROWDEN. He can. The question is I'm not a trial attorney, but whether that would, the causation would be there for the U.S. importer to be liable. I just don't know.

Mr. STUPAK. So the fact that they may have it, it's not real liability that Mr. Morgan could look to the importer of this drywall and say aha, you imported this, you had a responsibility and duty to make sure it met U.S. standards and if not, therefore, Mr. or Ms. Importer, you are subject to our courts and jurisdiction.

Ms. ROWDEN. Certainly, the U.S. importer is subject to U.S. law as a U.S. entity. They are subject to all the regulatory requirements.

Mr. STUPAK. But doesn't the law require them to knowingly know that they imported a defective product, and the burden of proof is really on Mr. Morgan, not on that importer to show that.

Ms. ROWDEN. That would be a normal trial law.

Mr. STUPAK. So it's really useless. But going back to my question. Why wouldn't you just be the registered agent? All you're doing accepting process, so therefore you could cut down on all the expenses, the fear of Congress putting forth regulations that you fear in your statement here, it could be resolved by your agency, just being the registered agent. All you're doing is accepting process and we could short circuit this, get right to the court and see who has liability here.

Ms. ROWDEN. But our association has no commercial relationship with foreign manufacturers.

Mr. STUPAK. You don't have to have a commercial relationship. All you have to be is a person who is present in the United States over usually the age of 21 and be willing to accept the process. You don't have to be an attorney or anything. All you have to be is a person, you are a point of contact to begin that process so Mr. Morgan doesn't have to run all over China to find his manufacturer.

Ms. ROWDEN. It is not our role as a trade association to serve as that function, because that is a legal function.

Mr. STUPAK. Well, if you're trying to promote trade, why wouldn't you do that? Because you're promoting trade, you're providing a service for people importing or exporting in. I would think that would be the service you would want to do.

Ms. ROWDEN. I doubt that our membership would support that.

Mr. STUPAK. I doubt that too, but good argument. I yield back, thank you.

Mr. ROSS. The chair thanks the members, and also the chair thanks the witnesses for your outstanding and extraordinary contribution to this hearing. And with that in mind, again we thank you for the valuable time, you allowed us to utilize your valuable time.

This first panel now is dismissed. Thank you very much for coming. And Godspeed to each and every one of you.

Mr. Morgan, this committee does stand in support of you and your family. Thank you very much.

Will the second panel please be seated.

We certainly want to welcome members of the second panel to this subcommittee hearing. And again, I want you to reemphasize to you how extraordinarily grateful we are for your sacrifice of your time and energy to be here to help make a contribution to the hearings that the subcommittee has to deliberate on the important matters. And I want to recognize each and every one of you by name.

And to the members of the subcommittee on my left, is Mary Saunders. She is the assistant Secretary for manufacturing and services for the international trade administration. Seated next to Ms. Saunders is Ms. Deborah Wince-Smith. She is president and CEO of the council on competitiveness.

And next to Ms. Wince-Smith is Mr. Owen E. Herrnstadt. Mr. Herrnstadt is the director of trade and globalization for the international association of machinists and aerospace workers.

And then next to Mr. Herrnstadt is Mr. Jack Crawford Junior. He is the chief executive officer of Jadoo Power.

And Mr. Anthony Kim is seated next to Mr. Crawford. He is the policy analyst for Heritage Foundation.

Again, welcome to each and every one of you. It is the customary tradition of this committee to swear in the witnesses. So would you please stand and raise your right hand.

Mr. RUSH. Let the record reflect that all of the witnesses answered in the affirmative.

We will begin with you, Ms. Saunders. You have 5 minutes for an opening statement.

STATEMENT OF HON. MARY SAUNDERS, DEPUTY ASSISTANT SECRETARY FOR MANUFACTURING AND SERVICES, UNITED STATES DEPARTMENT OF COMMERCE; DEBORAH WINCE-SMITH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, COUNCIL ON COMPETITIVENESS; OWEN E. HERRNSTADT, DIRECTOR OF TRADE AND GLOBALIZATION, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS; JACK CRAWFORD, JR., CHIEF EXECUTIVE OFFICER, JADOO POWER; ANTHONY KIM, POLICY ANALYST, HERITAGE FOUNDATION

STATEMENT OF MARY SAUNDERS

Ms. SAUNDERS. Chairman Rush, Ranking Member Whitfield, thank you for the opportunity to speak to you today about the important topic of clean energy technology and export assistance.

As you are well aware, clean energy is one of the greatest economic opportunities of the 21st century, and promoting the development, production and energy efficiency technologies and services is the highest priority for the Department of Commerce. These technologies are important to economic growth in the United States and locally.

At the International Trade Administration or ITA, we have identified significant overseas market opportunities for U.S. firms in these technologies surfaces areas.

For the record, I will not be commenting on H.R. 5156, but rather, my testimony will provide a prospective on the issues, challenges and opportunities within the clean energy technology and

services sector today, as well as highlight some of the many programs that ITA has put in place to support U.S. industry competitiveness on this front.

ITA is the lead export promotion agency in the Federal Government. Our mission is to create prosperity by strengthening the competitiveness of the U.S. industry, promoting trade and investment, and ensuring fair trade compliance with trade laws and agreements that enhance the ability of U.S. firms and workers to compete in the global marketplace on a level playing field.

At his State of the Union Address this year, President Obama announced the National Export Initiative, or NEI, with the goal to double U.S. exports in years in support 2 million jobs. The President also emphasized that the Nation that leads the clean energy economy will be the Nation that leads the global economy.

Clean energy technologies are a key way to meet global and economic development needs, mitigate climate change and capture the high value of innovation of jobs that this sector offers. Within ITA, we are responding to the NEI and to the President's emphasis on clean energy by hiring trade specialists in emerging growth markets, supporting small and medium size enterprises to broaden their exposure to international markets and developing outreach and trade mission programs to improve exports in high growth replacement clean energy.

U.S. clean energy technologies and services companies face fierce competition in international markets. I want to highlight three factors that have a strong effect on international competitors: The strength of the domestic industry, the availability of international markets that offer U.S. companies a fair opportunity to compete, and the ability of U.S. companies to access the resources and master the skills required to export.

The United States currently has a relatively small share of manufacturing capacity for clean energy-related industries. Nevertheless, there are clear opportunities for the U.S. To lead the world in high technology for clean energy manufacturing. We can leverage the R&D and innovation being pursued by companies, universities, and the Department of Energy national labs.

Just turned on the microphone. Sorry.

U.S. clean energy exports cannot increase if protection and rules and policies prevent open competition. Many countries have adopted policies that make it more difficult for foreign firms to compete in their markets. These include favoring their domestic industry through preferential tendering criteria and burdensome certification requirements.

In addition, concerns regarding adequate protection of intellectual property rights hamper some firms from entering foreign markets.

Intense foreign competition from State-owned enterprises poses another challenge for U.S. companies, particularly in the civil nuclear sector.

And the final challenge to increasing clean energy technology exports that must be addressed is the willingness of U.S. firms to export. In the clean energy sector in particular, companies face challenges to exporting that are not market or policy based but are internal to that particular company's knowledge and comfort with the

export process. Issues include a shortage of available capital or financing, complex domestic and foreign regulatory requirements, lack of knowledge, and comfort in local financial institutions to finance innovative clean energy products and difficulty in finding a local partner or distributor.

ITA has multiple clean energy initiatives to support the President's NEI and works in close collaboration with other agency partners. We have initiatives focusing on sustainable manufacturing energy efficiency for U.S. companies as well as a civil nuclear trade initiative that identifies the sector's most pressing trade challenges and opportunities and coordinates public and private sector efforts to address them.

We are leading a trade promotion coordinated committee effort to develop an export strategy for renewable energy and energy efficiency technologies and Secretary Locke recently established a renewable energy and energy efficiency advisory committee for industry to advise the Department directly on pressing trade promotion activities.

ITA is actively promoting U.S. Clean energy solutions in overseas markets through trade events, foreign buyer programs at major renewable energy trade shows. We have brought delegations from all over the world to these events. We have organized numerous trade missions focused on clean energy.

Most recently, the Secretary led a clean energy business development mission to Hong Kong, other cities in China and Indonesia. We have a number of reports and helpful resources, and I have brought copies of several of them. They provide a useful resource for small and medium-sized enterprises in the clean energy technology industry.

And we recently released a small renewable energy assessment report on Indonesia and have continued to hold informational webinars on diverse topics.

Lastly, I wanted to highlight the market development cooperative program which allows nonprofit groups or universities to propose projects to develop global markets for specific technologies. Last year, we awarded three awards in the clean energy sector. This year we have received numerous applications for MDCP rewards and are currently reviewing them.

In closing, I would like to thank you, Chairman Rush, Ranking Member Whitfield, and members of the subcommittee for the opportunity to highlight what ITA is doing to help U.S. Companies compete in markets for clean emergency technologies and for all kinds of U.S. goods and services around the world.

Expanding opportunities to export clean energy technologies will not only maintain the competitiveness of U.S. companies, but will create jobs and generate economic growth. In addition, it will increase the reliability of our energy supply.

American businesses have the technology, the expertise and the experience to help countries around the world reach their climate and energy goals and this an extraordinary opportunity and a win-win for everyone.

I welcome any questions you might have.

[The prepared statement of Ms. Saunders follows:]

MARY SAUNDERS
PRINCIPAL DEPUTY ASSISTANT SECRETARY
FOR MANUFACTURING AND SERVICES,
MANUFACTURING AND SERVICES
INTERNATIONAL TRADE ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE
TESTIMONY BEFORE THE
HOUSE COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE AND CONSUMER PROTECTION
for a hearing entitled
"Clean Energy Technology Export Assistance"
June 16, 2010

Introduction

Chairman Rush, Ranking Member Whitfield, and members of the Subcommittee, thank you for the opportunity to speak before you today about the important topic of clean energy technology export assistance.

As you are well aware, clean energy is one of the greatest economic opportunities of the 21st century, and promoting the development, production, and deployment of clean energy and energy efficiency technologies and services remains a high priority at the U.S. Department of Commerce. These technologies are important to economic growth in the United States and globally. At the International Trade Administration – otherwise known as ITA – we have identified significant overseas market opportunities for U.S. firms in these technology and services areas.

For the record, I will not be commenting on H.R. 5156, but rather my testimony will provide a perspective on the issues, challenges, and opportunities within the clean energy technologies and services sector today, as well as highlight some of the many programs ITA has put in place to support U.S. enterprises competing for market opportunities associated with the deployment of these technologies and services around the world.

ITA is the lead export promotion agency in the Federal government. The mission of ITA is to create prosperity by strengthening the competitiveness of U.S. industry, promoting trade and investment, and ensuring fair trade and compliance with trade laws and agreements that enhance the ability of U.S. firms and workers to compete in the global marketplace on a level playing field. This mission is critical to enhancing America's global competitiveness and expanding commercial opportunities for American manufacturers, farmers, and service workers throughout the world.

ITA's four units are dedicated to expanding export opportunities through a variety of means: 1) The U.S. and Foreign Commercial Service (US&FCS) designs and executes programs that provide companies with practical advice and assistance for exporting; 2) Market Access and Compliance (MAC) focuses on opening foreign markets, monitoring and working with the

Office of the U.S. Trade Representative to enforce trade agreements, strengthening intellectual property rights enforcement, and further reducing or eliminating barriers to trade and investment overseas; 3) Manufacturing and Services (MAS), the unit where I work, provides industry expertise, research and policy analysis used by policy makers to develop and implement domestic and international policies that enhance the global competitiveness of U.S. firms; and 4) Import Administration (IA) identifies, monitors, and works with the U.S. Trade Representative to address unfair foreign subsidization that impedes U.S. exporters' ability to compete in foreign markets, as well as assisting U.S. exporters involved in foreign antidumping cases that may limit U.S. exports.

Within MAS, we provide coverage of all industrial sectors. In-depth coverage of the clean energy sector is a priority. Our Office of Energy and Environmental Industries provides industry expertise and trade policy support for a variety of clean energy technologies and services, including renewable energy, clean coal, energy efficiency, nuclear power, smart grid, and environmental technologies.

Our work to promote clean energy technologies and services focuses on four areas: first, as the government's industry advocate, we make sure that industry's views are taken into account when policymakers formulate economic and trade policy; second, we help U.S. business represent their views at international meetings affecting the clean energy technologies industry; third, we coordinate with industry to eliminate trade barriers; and fourth, we undertake industry, economic, and trade policy analysis on issues impacting the global competitiveness of the U.S. clean energy technologies and service industries.

The President's National Export Initiative

At his State of the Union Address this year, President Obama announced the National Export Initiative or "NEI" with the goal to help double U.S. exports in 5 years and support 2 million jobs. Since the NEI was announced, the President has signed an Executive Order and formed an Export Promotion Cabinet that consists of top leaders throughout the Administration, including from the Departments of Commerce, Labor, State, and Agriculture, the Export-Import Bank, the Office of the U.S. Trade Representative, and the Small Business Administration. The NEI focuses on expanding trade opportunities for U.S. companies, particularly small- and medium-sized enterprises, increasing access to credit for U.S. businesses, and enforcing existing trade laws and obligations.

In addition, in that same State of the Union Address, the President emphasized that "The Nation that leads the clean energy economy will be the nation that leads the global economy." The President has come out in strong support of clean energy technologies as a way to meet global energy and economic development needs, mitigate climate change, and capture the high-value engineering, innovation, and jobs this sector offers.

Within ITA, we are responding to the NEI and to the President's emphasis on clean energy by hiring trade specialists in emerging growth markets, supporting small- and medium- sized enterprises to broaden their exposure to international markets, and developing outreach and trade mission programs to improve exports in high-growth sectors like clean energy.

Specifically, the Department of Commerce and the Department of Energy are co-leading an interagency effort to draft a National Renewable Energy and Energy Efficiency Export Strategy with the goal of doubling exports in these two sectors by 2015. The Strategy will coordinate U.S. government programs to better support U.S. clean energy companies wishing to compete abroad. The Strategy will focus on increasing exports in electricity generation and demand response, including goods and services related to renewable energy, large-scale storage, and energy efficiency. A Federal Register Notice has been issued requesting input from private businesses, trade associations, academia, labor organizations, non-governmental organizations, and other stakeholders.

Global Challenges and Opportunities

President Obama has set a goal of the United States becoming the leading exporter of clean energy technologies. Specifically, he has called for new policies to "advance a cleaner environment, a stronger response to the challenge of climate change and more sustainable natural resources and energy supplies." Reaching this goal requires effort by both industry and government. It is a priority of the Obama Administration and of the Department of Commerce to continue strengthening U.S. competitiveness in this sector and enhance the ability of U.S. firms to export clean energy technologies. However, we have a lot of work to do to meet that goal.

For example, the United States is, overall, the world's largest producer of electricity from wind. Solar installations are increasing as well. However, we currently import roughly three times the renewable energy equipment, such as wind and solar, as we export. GE installed the largest percentage of wind turbine capacity in the United States in 2009, but faces increasing competition from European and Asian companies.

There is a lot we don't know. These statistics do not chart our trade in services. This is a crucial blind spot that needs remedy. While manufacturing clearly needs to be part of the discussion, the United States is a leader in highly skilled services which make up a greater proportion of renewable energy jobs than manufacturing.

With great challenges come great opportunities. Global demand for clean energy technologies is growing rapidly, as are export opportunities for U.S. companies. And exports of clean energy technologies, like any export, will also benefit the U.S. economy by creating and sustaining jobs here at home and by increasing revenues. For instance, global investment in renewable energy and energy efficiency was $145 billion in 2009, having increased every year since 2002. Governments have allocated an additional $180 billion to renewable energy and energy efficiency in the stimulus bills that were passed by many countries last year.

Looking forward, the potential global market for civil nuclear goods and services is valued at $400 billion over next 15 years. The projected demand for U.S. clean coal technology equipment in key global markets which utilize coal for power generation is estimated at $36 billion through 2030. And, according to some reports, the projected global smart grid market is expected to increase from $90 billion in 2010 to $171 billion in 2014. The Department of Energy estimates that $40 billion per year in increased exports of clean energy technologies

would generate up to 750,000 green jobs by 2020. Our ability to realize this potential depends on achieving U.S. leadership in the field.

The U.S. Clean Energy Industry and Factors Affecting their Competitiveness

U.S. clean energy technologies companies face fierce competition in international markets.

Beyond macroeconomic issues of labor prices, currency valuation, health expenses, etc., three other factors have a strong effect on international competitiveness: (1) the strength of the domestic industry, (2) the availability of international markets that offer U.S. companies a fair opportunity to compete, and (3) the ability of U.S. companies to access the resources and master the skills required of exporting.

I will discuss each in turn.

1. Creating a Strong Domestic Industry

A strong domestic industry is a prerequisite for exports. The United States is in fierce competition for new markets in developed countries as well as in developing countries, such as China and India, which have set ambitious national targets for ramping up clean energy. Enforced national targets or renewable portfolio standards give companies certainty in the long-term presence of demand.

The United States has a relatively small share of worldwide manufacturing capacity for clean energy-related industries such as wind and solar. In 2008, the United States had 16% of global wind manufacturing capacity and 6% of global solar manufacturing capacity. Nevertheless, there is a clear opportunity for the United States to lead the world in high-technology, clean energy manufacturing. The R&D and innovations being pursued by companies, universities, and the Department of Energy's national labs will be key to that leadership role.

The American Recovery and Reinvestment Act (ARRA) provides significant support for advancing clean energy technologies within the United States - a total of $36.7 billion of federal funds. These investments, most of which are matched by the award recipients, serve to stimulate our economy, develop new jobs in our manufacturing, service, and R&D sectors, and foster further clean energy investments by the private sector.

Approximately seventy percent of our nation's Clean Energy Stimulus Program is allocated to energy efficiency, renewable energy, and smart grid development and deployment. Specifically, $16.8 billion of stimulus funds have gone towards energy efficiency and renewable energy programs, $4 billion is allocated for renewable energy loan guarantees, $4.5 billion is directed to developing and deploying a fully-integrated smart grid system throughout the United States, and $3.4 billion has been allocated to advance the commercial deployment of carbon capture and storage (CCS) technologies. In addition, the $2.3 billion manufacturing tax credit included in the American Recovery and Reinvestment Act (ARRA) was an important step for the U.S. federal government to provide national incentives that compete with foreign competitors.

To ensure that the United States continues to foster the emergence of smart grid technologies, the Administration has established a Subcommittee of the National Science and Technology Council's Committee on Technology to coordinate agency involvement in this issue and develop a comprehensive policy framework.

2. Opening Overseas Markets

Despite the flood of news about fast-growing clean energy technology opportunities in foreign markets, U.S. clean energy technology exports cannot increase if protectionist rules and policies prevent open competition.

The connection between clean energy technologies and green jobs has led many countries, developing and developed alike, to adopt policies that make it more difficult for foreign firms to compete in their markets. Many countries – either implicitly or explicitly – favor their domestic industry through preferential tendering criteria (China) and burdensome certification requirements (Korea, Japan). In addition, concerns regarding adequate protection of intellectual property rights also hamper some firms from entering foreign markets. This is an area particularly critical to new, small- and medium-sized clean energy companies whose survival might depend on a small number of critical patents.

Intense foreign competition from state-owned enterprises poses another challenge for U.S. companies, primarily in the civil nuclear sector. Foreign firms have enjoyed significant government support, ranging from direct government ownership and management, to concessionary financing, industrial coordination, support for manufacturers and nuclear liability protection. Also, for the civil nuclear industry, a lack of an effective global nuclear liability regime poses significant concerns.

3. Firm-Level Export Challenges

The final challenge to increasing clean energy technology exports that must be addressed is the willingness of U.S. clean energy firms to export. The Economist recently reported that only 4% of all U.S. companies export.

In the clean energy sector in particular, companies face challenges to exporting that are not market or policy-based, but are internal to that particular company's knowledge and comfort with the export process. Many companies face a shortage of available capital or financing, which hampers their ability to increase their manufacturing capacity to meet global market demands. Complex domestic and foreign regulatory requirements also pose issues for companies. Local financial institutions that traditionally facilitate deals involving U.S. exports lack the knowledge and comfort to finance innovative clean energy products. Many U.S. companies, particularly small and medium-sized companies, struggle to understand the local customs and business culture in foreign markets. Likewise, many companies find it difficult to find a local partner or distributor without a keen understanding of local companies' ability. Finally, small companies frequently lack a basic understanding of the export process. Often these companies do not understand foreign tariff systems, currency conversion, or patenting

requirements. Fear of intellectual property rights violations in particular can hinder U.S. clean energy companies from seeking opportunities overseas.

ITA's Role in Supporting U.S. Competitiveness through Exports and Various Clean Energy Initiatives

1. Clean Energy Initiatives

ITA has multiple clean energy initiatives in place and has organized industry promotional events and released a number of publications or educational materials to support exporters. We also engage in bilateral, regional and multilateral negotiations. Recent examples of programs administered by ITA that support the clean energy industry, either directly or indirectly, include the following:

- Last year, ITA launched an **Energy Efficiency Initiative** (EEI) to assist U.S. manufacturers to improve the energy efficiency of their operations as well as to promote the development and deployment of energy efficient technologies. The EEI is focused on the industrial energy efficiency and comprises three pillars— 1) market development, 2) trade policy and promotion, and 3) outreach and resource development. The EEI targets America's eight high-energy consuming industries—Aluminum, Metal Casting, Forestry Products, Mining, Chemicals, Petroleum Refining, Glass, and Steel.

- Activities to date include an *Energy Efficiency in Manufacturing Road Show* to Toledo, Ohio and a Forum on Energy Efficiency in Manufacturing in Washington, DC both of which I hosted last fall; a *Checklist for Corporate Efficiency*; a Department paper on the global competitiveness of the industrial energy efficiency technologies sector (being developed), a primer on financing options, a smart grid webinar series; and a recent Smart Grid Manufacturers Forum in St. Paul on June 9th organized in partnership with DOE, the State of Minnesota and the University of Minnesota.

- We administer a **Civil Nuclear Trade Initiative** the goal of which is to strengthen the competitiveness of the U.S. nuclear industry as it endeavors to rebuild its manufacturing base by capturing opportunities abroad. The Initiative, developed and administered by MAS, identifies the industry's most pressing trade challenges and opportunities and coordinates public and private sector efforts to address them. As part of this initiative, ITA Under Secretary Francisco Sanchez will be leading approximately ten U.S. civil nuclear companies on a trade policy mission to Poland, Czech Republic and Slovakia in mid July (11-17).

- ITA recently held a **Green Financing Roundtable** (May 21st) which brought together stakeholders and relevant government agencies to improve awareness of existing green finance market space, trends, opportunities, and obstacles facing U.S. financial services firms investing in wind, solar, biofuel, biomass and waste, energy-efficient technologies and other emerging energy options.

- We have organized several events aimed at both informing industry of the latest developments in the international climate change negotiations and eliciting their feedback (i.e., recent **national climate change webinar** hosted by Secretary Locke).

- We also have established an **interagency Working Group on Renewable Energy and Energy Efficiency under the TPCC**, as noted earlier, to focus on coordinating export promotion activities of the U.S. Government within these sectors. In April, this working group agreed to draft a national strategy to help double U.S. exports in those two key sectors. In addition to an in-depth look at the global competitiveness of these sectors, the ensuing report will contain commitments by USG agencies relating to these sectors. We have published a Federal Register Notice requesting public comments.

- Secretary Locke recently established a **Renewable Energy and Energy Efficiency Industry Advisory Committee** in order for industry to advise the Department directly on pressing trade promotion and policy issues.

- **ExporTech** was developed and is delivered in partnership with Manufacturing Extension Program (NIST-MEP.) It is designed to assist new-to-export companies, primarily in manufacturing, with developing an international growth plan customized to the businesses specific exporting objectives. Since its inception, the initiative has seen a 600 percent increase from three programs in 2007 to 21 in 2010. To date over 200 companies in 18 states have participated in ExporTech programs. The ExporTech program enables small and medium-sized companies, including clean energy firms, to accelerate or expand their growth in to new markets and to create and refine an international growth strategy.

- **Sustainable Manufacturing Initiative** – ITA's Sustainable Manufacturing Initiative addresses green technology implementation as a component of business competitiveness. The Initiative encourages U.S. companies to use sustainable practices that improve their bottom line. This can make them more competitive in the global marketplace, and therefore, potentially more interested in exporting. A component of this Initiative is SMART – Sustainable Manufacturing American Regional Tours. ITA has held 7 "SMART" TOURS (Seattle, Rochester, Grand Rapids, St. Louis, Seattle, Atlanta, and Beltsville) – The next SMART tour, which will focus on energy efficiency in the forest products sector, will be held in September in Richmond, VA. NIST-MEP centers have between an integral partner on this front.

- **Manufacture America** - This summer, Nicole Lamb-Hale, Assistant Secretary for Manufacturing and Services, will lead a series of road shows to help demonstrate U.S. Government resources to help manufacturers retool their facilities to engage the growth industries of the 21st century, creating and preserving jobs in some of the hardest hit communities around the country. The road shows will help link manufacturers to global demands that provide export opportunities, such as clean energy, and meet President Obama's goal of doubling exports in five years. NIST-MEP centers will also provide a supporting role here.

2. Industry Promotional Events

ITA is actively promoting U.S. clean energy solutions in overseas markets. We have held trade events and foreign buyer programs at major renewable energy trade shows and brought delegations from all over the world to these events. ITA's aggressive clean energy technology promotion program includes over 90 trade events held worldwide last year and many more planned for the rest of 2010. These are in addition to the day-to-day services we offer U.S. companies, such as tailored matchmaking and consulting services, international company profiles, and international partnership searches. We now have a new Green Tech website that aggregates all of our export promotion programs in a single place, providing easy industry access (www.buyusa.gov/green)

In the past year, ITA has held International Buyer Program (IBP) events at two major energy trade shows. The IBP hosted nearly 1100 delegates at the 2010 Offshore Technology Conference in Houston, Texas and 13 delegates at the 2010 Electric Power Show. In December, an IBP will be held at Power Gen International in Orlando, Florida, the largest power generation trade show in the world. In May 2011, ITA will hold an IBP event at the American Wind Energy Association Windpower Conference & Expo in Anaheim, California.

ITA has also organized trade missions focused on clean energy: Solar Energy Trade Missions to India (March 2009 and February 2010) with 14 companies participating; Energy Efficiency Trade Mission to India (November 2009), led by Deputy Chief of Staff Rick Wade, with 16 companies participating; and most recently, the Secretary-led Clean Energy Business Development Mission to Hong Kong, and other cities in China and Indonesia (May 2010), focusing on solar, wind, power generation and distribution/smart grid, green building, and energy information services, with 24 companies participating.

Last year, ITA also led a Clean Energy Policy Mission to Indonesia focusing on geothermal and other forms of renewable energy. We also organized a five-city Green Build Road Show -- to Pittsburgh, Denver, San Francisco, San Jose, and Phoenix -- to help U.S. companies take advantage of the $975 billion construction market in Europe.

During the December 2009 Copenhagen negotiations on climate change, we hosted "Bright Green," an exhibition of U.S. technology that can help fight climate change, and are likely to host a similar event at the next UNFCCC meeting in Cancun. We hosted a U.S. industry promotional event at the IAEA General Conference in Vienna last fall with the U.S. civil nuclear power industry. We expect to host this program again this September.

3. Publications and Educational Materials

As I mentioned earlier, in support of the President's National Export Initiative, we are working with our interagency partners to develop a National Renewable Energy and Energy Efficiency Export Strategy. We are also working on a competitiveness report on small modular nuclear reactors. We have ramped up our efforts to promote the commercialization and export of clean energy technologies through increased outreach to industry on best practices and markets, technical assistance and capacity-building events, and helping develop trade policies that promote cleaner technologies.

In 2009, ITA released a number of reports and helpful resources including a *Checklist for Corporate Energy Efficiency* and a *Trade Finance Guide*, which serves as a useful resource for small- and medium-sized enterprises (SMEs) in the green technology industry. We also have published clean energy exporters' guides for China and India, providing valuable planning information to companies interested in exporting green technologies to these growing markets. The guides contain market overviews, analyses of the clean energy markets in these countries, market opportunities for trade and investment through 2020, and resources available to U.S. businesses to help enter these markets. We recently released a smaller renewable energy market assessment report on Indonesia and have continued to hold informational webinars on topics as diverse as smart grid and biomass funding opportunities.

4. Domestic Regulatory Program

The role of MAS's Regulatory Affairs Program is to represent the competitiveness interests of U.S. companies and industries in the Federal regulatory review process. MAS conducts economic analyses to support regulatory reform and reviews cost-benefit analyses prepared by other Federal agencies. MAS's primary value added arises from its unique industry and international trade expertise.

The MAS Regulatory Affairs Program has participated in interagency discussions for almost three dozen rules since the program started in 2006, including rules from the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and the Department of Homeland Security (DHS). Through this program, we continue to review key rulemakings that could potentially affect the export competitiveness of the U.S. clean energy and other industries.

5. Bilateral, Regional & Multilateral Dialogues

ITA has also been active in organizing events to spur the exchange of best practices with foreign governments and foreign industry. Such programs have ranged in focus from helping trading partners reduce greenhouse gas emissions in cement manufacturing to explaining what investment framework has been developed to attract investment to the renewable energy and energy efficiency sectors.

ITA has worked on clean energy issues under the U.S.-EU Framework for Advancing Transatlantic Economic Integration and the U.S.-Brazil Commercial Dialogue, and assesses the impact of foreign regulations, such as the European directive on energy-using products, on U.S. interests. We have many similar commercial dialogues with other countries including China, India and others.

Along with the Department of State and other agencies, ITA works within the G-8, G-20 and the Asia-Pacific Economic Cooperation forum, where climate change is becoming a priority issue, to represent the interests of the United States, with a focus on economic and industrial concerns. ITA monitors foreign government climate- and energy-related programs and proposals for potential countervailable or WTO-inconsistent subsidies.

6. Market Development Cooperator Program

Lastly, I wanted to highlight the Market Development Cooperator Program, which MAS manages. The program allows non-profit groups or universities to propose projects to open up foreign markets to U.S. exports. In 2009, we awarded three MDCP awards in the clean energy sector. This year, the Department has received numerous applications for MDCP awards and is currently reviewing them.

The MDCP has been an effective means to promote U.S. exports abroad, especially in the clean energy sector. One particular example I'd like to highlight is the International District Energy Association (IDEA), which has partnered with the Department as a cooperator in the MDCP since 2005. Our MDCP awards to IDEA during this time have contributed to the export of $263 million of U.S. clean energy technologies, principally to Middle East markets.

Conclusion

In closing, I would like to thank you Chairman Rush, ranking Member Whitfield, and Members of the Subcommittee for the opportunity to highlight what ITA is doing to help U.S. companies compete in markets for clean energy technologies and for all kinds of U.S. goods and services around the world. I would like to make one final point, however, before answering any questions you might have:

Expanding opportunities to export clean energy technologies will not only maintain the competitiveness of U.S. companies, but will create jobs and generate economic growth. In addition, it will increase the reliability of our energy supply. American businesses have the technology, the expertise and the experience to help countries around the world reach their climate and energy goals. It is an extraordinary opportunity and a win-win for everyone.

Thank you for your time today. I welcome any questions you may have.

Mr. RUSH. The chair recognizes Ms. Wince-Smith for 5 minutes.

STATEMENT OF DEBORAH WINCE-SMITH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, COUNCIL ON COMPETITIVENESS

Ms. WINCE-SMITH. Chairman Rush, thank you for inviting me to testify today on the Clean Energy Technology Manufacturing and Export Assistance Act. This legislation acknowledges the pivotal role that the emerging clean energy industry will play in ensuring America's economic competitiveness and in our national security going forward.

The growth and vitality of this industry depends upon the development of a robust domestic market coupled to access to a burgeoning global market for these essential technologies and services that will take us to a low carbon economy, energy security, and addressing climate change.

Since 1986, the Council on Competitiveness has brought forth creative solutions to America's most pressing competitiveness challenges. Comprised of leaders from industry, academia and organized labor, the Council is unique in its abilities to build synergies and consensus across a wide span of organizations and interests.

Next week on June 23rd, our chairman, Samuel Allen, the CEO and chairman of John Deere Corporation, will be launching with our members a new flagship initiative on U.S. manufacturing competitiveness in the 21st century. I submit for the record a summary of this initiative.

The Council, with our partners in government and the private sector, will deliver a national manufacturing strategy to the administration and Congress at a national summit in 2011. And energy and the clean energy revolution will be at the heart of this agenda.

Our energy security innovation and sustainability initiative where we outlined a very robust plan last September, clearly supports an alliance with the objectives of the Clean Energy Technology Manufacturing and Export Assistance Act.

As the 20th century drew to a close, rising global competition, the opening of global markets, challenged U.S. manufacturers raising concern about the export of U.S.-made goods, offshoring of our manufacturing production, the loss of skilled U.S. manufacturing jobs, and a rising account deficit, currency manipulation and distortion. With the growing strength and consumer demand of the emerging economies, competitors such as China, India, South Korea, and Brazil, now there are many that feel that U.S. manufacturing will spiral into further decline.

The Council believes that no Nation can be a technology and economic leader without a robust multi-sector manufacturing capacity. And the stakes are extremely high. Our roadmap for energy security sustainability and competitiveness highlighted that revenue in just three clean energy sectors—wind, solar and biofuels—is projected to nearly triple over the next decade and markets for clean technologies and their attendant services will expand exponentially.

These markets and the jobs and economic growth that will bring our country to the forefront require a set of enabling policies and programs in research and development, in manufacturing and commercial deployment here in America. So we believe that H.R. 5156

is an important policy step in addressing this challenge, and I am pleased to be here today to voice our support for this proposal and legislation.

But there are many more policy steps required to ensure a vibrant ecosystem that supports America's capacity. For next generation R&D, and battery storage, carbon capture sequestration, and nuclear reactors, to increasing energy productivity and efficiency. We must engage in this intense global competition in Asia, Europe, the Middle East and the Americas.

As an example of what is at stake, within the past decade, the United States has fallen from first to fifth among top solar manufacturing companies and now imports solar cells from the EU and Asia. China now is doing assembly work for solar cells in the United States.

I cannot emphasize enough the importance of taking a systems approach to our energy sustainability and economic policies. We have to understand the linkage between policies and how we integrate them into a holistic strategy, everything from domestic tasks and fiscal policies to regulatory issues to, of course, global standards and trade policy.

Let me highlight quickly four areas in our energy sustainability report that captures the essence of what you are trying to accomplish in this legislation with respect to expanding U.S. exports.

The first is that we must remove tariffs and non-tariff barriers for sustainable energy products and services while not creating a dual track for preferential trade liberalization. We have to ensure that tariff reduction and removal of barriers are transparent, reciprocal, and provide access to all national markets where strong worker and consumer protections are provided.

Two, we have to ensure intellectual property rights for all industrial products and services, copyrights and sustainable energy solutions are protected. This is a huge issue with China, India, and Brazil and other parts of the world.

Three, we must ensure our continued U.S. technological leadership for the breakthroughs and commercializations. The Council has proposed that we need a long-term stable source of funding. And in the future, we argue that 30 percent of any revenue from carbon pricing should be allocated to R&D including the demonstration of clean energy technologies.

And four, to insure that the technologies of tomorrow will be manufactured in the United States, we should allocate 40 percent of revenues derived from any future carbon pricing program to manufacturing initiatives, Federal, State or local clean manufacturing zones, pilot projects as well as immediate expensing and depreciation of the costs of retooling for production and qualified products, and dedicating high-performance computing assets to the clean energy manufacturing revolution.

In conclusion, Mr. Chairman, the Council believes that the transformation to a low-carbon economy will unleash American innovation, it will create new industries, revitalize and rebuild manufacturing jobs across our Nation and keep and grow high-skilled jobs for this generation and the next. But we have to come together around an integrated manufacturing policy and to accelerate this

growth, stewardship, and security for all. Thank you, and I am welcome to answer any questions.

[The prepared statement of Ms. Wince-Smith follows:]

Statement by
Deborah Wince-Smith
President
U.S. Council on Competitiveness
before the
House Subcommittee on Commerce, Trade, and Consumer Protection
June 16, 2010

Introduction

Chairman Rush, Congressman Whitfield and other distinguished members of the subcommittee, thank you for inviting me to testify today on the "Clean Energy Technology Manufacturing and Export Assistance Act". This legislation acknowledges the important role that the emerging clean energy industry will play in ensuring America's economic competitiveness and national security going forward. The health of this industry depends upon the development of a robust domestic market and access to a burgeoning global market for these essential technologies and services.

It is critical that the United States create the right conditions for breakthrough innovations across the manufacturing eco-system, especially in the field of clean energy. Perhaps more importantly, we need to ensure the environment exists here for manufacturing at scale in order to create high-value jobs and enhance our national prosperity.

Council on Competitiveness

I'd like to start by providing a little background about the Council on Competitiveness - who we are, and how we operate.

Since 1986, the Council has brought forth creative solutions to America's most pressing competitiveness challenges. Composed of leaders from industry, academia and organized labor, the Council is unique in its ability to build synergies and consensus across a wide span of organizations and interests. Our scope of issues reflects many factors that affect our nation's ability to compete; ranging from the business environment, innovation, advancing key enabling technologies, building a world-class workforce and igniting regional innovation through entrepreneurship.

By leveraging its exceptional convening power, the Council attracts the best minds, at the right time to the right issues. Not representing a singular interest, the Council operates at the level of the national interest, taking a systems approach in framing problems and developing solutions. The Council proactively engages all perspectives and forges critical partnerships with stakeholders in the public and private sectors.

The Council is fortunate to have some of America's top leaders serve on our Board of Directors:

- Our Chairman is Samuel R. Allen, Chairman & CEO, Deere & Company
- Our Industry Vice Chair is Michael J. Splinter, Chairman, President & CEO, Applied Materials, Inc.
- Our University Vice Chair is Shirley Ann Jackson, President, Rensselaer Polytechnic Institute
- Our Labor Vice Chair is Edward J. McElroy, Chief Executive Officer, ULLICO Inc.
- Our Chairman Emeritus is Charles O. Holliday, Jr., Former Chairman, DuPont

The Council continues to be at the forefront in tackling the key challenges facing U.S. competitiveness. Next week, on June 23rd, we will formally launch a new flagship initiative on U.S. Manufacturing Competitiveness in the 21st century and I submit for the record a summary of this initiative. The Council will prepare and deliver a National Manufacturing Strategy to the Administration, the Congress and its members at a national summit convened in late 2011. With the advice, participation and buy-in from a wide range of stakeholders – this strategy will energize a vibrant, diversified and technologically advanced manufacturing value web, resulting in American jobs, economic growth, energy sustainability and national security.

The manufacturing initiative will build on the Council's other initiatives and our long-standing focus on technology and innovation to drive productivity and competitive advantage:

- The National Innovation Initiative, 2004
- Energy Security, Innovation and Sustainability Initiative, 2009
- Technology Leadership and Strategy Initiative, on-going
- High Performance Computing Initiative, on-going
- Skills and Workforce Initiative, on-going

Today, I will speak directly to our new manufacturing initiative and the findings of our Energy Security, Innovation and Sustainability Initiative which support the objectives of the "Clean Energy Technology Manufacturing and Export Assistance Act".

U.S Manufacturing Competitiveness in the 21st Century

As the 20th century drew to a close, rising global competition and the broad opening of global markets challenged U.S. manufacturers. As a result, there has been continuing concern about the export of U.S. made goods, off-shoring of U.S. manufacturing production and the loss of U.S. manufacturing jobs. With the growing strength of newly-developing low-cost competitors such as China, India, South Korea and Brazil, there are many who fear that U.S. manufacturing will spiral into further decline. Others believe that the U.S. can improve national prosperity through service industries alone without a robust manufacturing sector.

The Council believes that no nation can be a technology and economic leader without a robust multi-sector manufacturing capacity. The global competitive landscape for manufacturing is undergoing a transformational shift that will reshape the drivers of

trade, economic growth, job creation, national prosperity and national security. Manufacturing is and will continue to be an essential path for attracting and retaining high value investments, spurring innovation, increasing exports and creating high value jobs. Developed and emerging nations are in heated competition to create the most compelling opportunities to innovate, build a highly-skilled workforce, improve standards of living and enhance national security.

Strong export growth will enable the United States to maintain acceptable economic growth rates, improve productivity, encourage innovation and create good-paying jobs. Exports of manufactured goods from the U.S. grew at an average annual pace of almost 9 percent between 2002 and 2008 demonstrating there is considerable worldwide demand for U.S. goods. Yet, the U.S. share of world manufactured exports, as of 2008, dropped to only 9.2 percent, down from almost 14 percent in 2000.[1] The most dramatic change was the rise of China to overtake the United States as a leading exporter of manufactured products. This is a worrisome trend especially in clean energy and other advanced technologies. Just consider that the following are no longer manufactured in the United States at a time when we are transitioning to a low carbon world:

- Lithium-ion, lithium polymer and NiMH batteries for cell phones, portable consumer electronics, laptops and power tools
- Advanced rechargeable batteries for hybrid vehicles
- Crystalline and polycrystalline silicon solar cells, inverters and power semiconductors for solar panels

Higher employee wages and exports go hand-in-hand. Employees in the most trade-intensive industries—where combined exports and imports amount to at least 70 percent of their domestic industrial output—earn an annual compensation package that averages about $86,000. This is 47 percent more than average compensation in the least trade-engaged sectors of manufacturing.[2]

Long-term national and economic security in the United States critically depends on our having innovative and agile manufacturing capabilities. Current economic conditions and energy security challenges have only heightened the need to accelerate competitive advantages for U.S. manufacturing companies in the global marketplace. Manufacturers will maintain their global leadership position through technological differentiation, not through labor cost advantage.

21st century manufacturing spans ideas, products and services; well beyond the production of only goods as in the 20th century. This post-industrial manufacturing ecosystem represents a complex and highly integrated globalized value web. This web includes cutting-edge science and technology, innovation, talent, sustainable design, systems engineering, supply chain excellence and a wide range of smart services; as well as energy efficient, sustainable and low carbon manufacturing.

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[1] *Facts about Modern Manufacturing 8th Edition*, MAPI/National Association of Manufacturers, 2009.
[2] Ibid

Rising energy demand, climate volatility and resource challenges require transformational manufacturing technologies and systems. Other nations are vying for market share in green manufacturing and clean energy industries. To drive economic growth, competitiveness and job creation, America must regain market leadership for technologies lost to other regions and also lead the world in energy efficient, sustainable and low carbon manufacturing. The examples of U.S. generated technologies creating value and jobs elsewhere are growing: ceramic oxides, semiconductor memory devices and production equipment, lithium ion batteries, flat panel displays, videocassette recorders and interactive electronic games.

The global challenges demand that we act now and not allow further erosion and atrophy of the U.S. industrial base. America must craft and mount a strategic response to provide jobs for our citizens in the 21st century. We need an engaged and skilled workforce, rapid deployment of frontier science and technology, deep pools of risk capital, a more global market oriented capital cost structure and regulatory environment, and 21st century physical and virtual infrastructures that will drive America's competitive advantage.

American public officials, opinion leaders and investors also need to understand and vigorously support these changes if we are to regain and retain our international leadership position. If America fails to adapt, we risk losing this critical underpinning of our economy and failing to reap the value from the investments in next generation energy technologies. America's edge lies with forward looking, high-value manufacturing that looks well beyond traditional assembly and fabrication of products.

The Critical and Transformational Role of HPC in Manufacturing
The use of high performance computing for modeling, simulation, and analysis has already provided a competitive advantage for many of the manufacturing Fortune 50.

These companies employ in-house advanced computing and have access to high performance computing hardware, software, and technical resources through partnerships with national laboratories. Many of these companies recommend that adoption of modeling, simulation, and advanced computing be accelerated throughout the U.S. manufacturing sector. For example, Pioneer Hi-Bred, a DuPont company, uses HPC to manage and analyze massive amounts of molecular, plant, environmental and farm management data, allowing them to make product development decisions much faster than by using traditional experiments and testing alone. For Pioneer, the result has been faster improvement in new seed products, staying ahead of the competition, a major jump in innovation and productivity, and the ability to help meet some of the world's most pressing demands regarding the availability of food, feed, fuel, and materials.

A substantial effort toward wider adoption of modeling and simulation requires the commitment of intellectual capital, computer hardware and software for complex problem solving, and other resources from among the diverse advanced computing assets spread across the nation's regions, states, and advanced computing centers. This truly

successful national initiative will leverage these vital resources from a new public-private partnership to bolster the U.S. manufacturing sector.

To these ends, the federal government should issue a "call to action" to U.S. manufacturing sector leaders and create a national manufacturing initiative enabled by advanced computing. These leaders in advanced computer-enabled design and manufacturing should be asked to leverage their expertise in modeling, simulation, and analysis and partner with the federal government to improve U.S. manufacturing competitiveness. The outcome of this call to action will be to accelerate and broaden the use of modeling and simulation, to increase penetration of these tools into smaller companies (pushing these tools further down into the supply chain), to solve the biggest complex problems with the latest techniques, and compete through innovation.

Through the national laboratory system, the federal government offers the greatest scientific and engineering resources, computer assets, and research software to be deployed for the initiative. Importantly, while the United States and Japan are the only significant manufacturers of HPC machines - an incredible advantage that must be utilized for economic growth – china is not far behind . To succeed, the initiative should also call upon, bring together, and leverage (all of) the nation's most advanced computing resources—state to state, region to region, center to center.

Modeling and simulation are critical tools needed by manufacturers of all sizes. These tools are especially valuable for the design, development and deployment of clean energy technologies and offer firms a significant cost advantage.

Energy Security, Innovation and Sustainability

The Council believes that energy security and sustainability are two of the defining and intertwined challenges of our time. For virtually every country, access to affordable energy is a basic need for economic growth, social development, improved standards of living, and increasingly for national security. However, neither an affordable nor a reliable supply of energy is a given for any country. As committee members well know, even as a nation with an immense wealth of natural resources, we face soaring energy demand, price volatility, and supply instability. At the same time, pressure is mounting around the world to mitigate greenhouse gas emissions from fossil fuels—with the prospect of a 45% increase in emissions by 2030, driven almost entirely by developing countries.[3]

Without access to cost-effective cleaner energy solutions, developing economies will have no alternative but to increase their dependence on the most rudimentary fossil-fuel technologies, contributing significantly to increased pollution and environmental damage. To summarize, the current trajectory of global energy trends is unsustainable—environmentally, socially and economically. They are impacting:

[3] International Energy Agency, *World Energy Outlook 2008,* IEA/OECD, Paris (2008).

- the fundamental ability of American industry to compete in the global economy
- the political ability of our government to play an international leadership role
- the capacity of our military to carry out its missions

Energy security and sustainability are now first-tier economic, national security, and competitiveness concerns. It is, therefore, inevitable that the world will undergo a systems transformation in the way we use and produce energy. As this country moves toward sustainable energy policies and programs, the Council does not believe there is an unavoidable trade-off among economic growth, energy savings, and environmental interests. Indeed, the pending systems transformation offers an opportunity to integrate energy security, sustainability, and competitiveness.

We also know that we have a tremendous opportunity before us. In fact, these challenges have created a perfect storm for innovation. We can move to a new era of technological advances, market opportunity, and industrial transformation if we can successfully unleash the investment and innovation potential of the private sector to meet the challenges and seize the opportunities arising from these new public-private partnerships.

We must be poised to deploy new ideas and innovations that come from the significant new investment in energy research into scalable products, goods and services. Research must be viewed as encompassing basic, applied, development and test beds. If we do not have in place the infrastructure to reap value from our investment, you can rest assured another country will. And when that happens, the jobs and intellectual property will be lost; as well as the component subsystems leading to a hollowing out of the innovation enterprise.

As we enter a new era of technological innovation, driven by the twin challenges of energy security and climate change, we must be vigilant in ensuring that we support these nascent industries here at home. We do not want to repeat the errors of our past when despite having achieved scientific and technology breakthroughs in liquid crystal, plasma and other flat panel display technologies, we ceded market leadership to countries like Japan and Korea, as they rapidly scaled up their high quality manufacturing ability and captured the global display market.

We have learned that we cannot divorce our investments in R&D from our efforts to support each stage of the manufacturing continuum. We must design-in manufacturing considerations upfront in the innovation process. We must ensure that we have the appropriate regulatory and financing framework in place to allow our entrepreneurs to move agilely from testing and pilots to manufacturing and large scale system deployment.

Clean Energy Technology Manufacturing

"U.S. manufacturing of clean energy technologies lags behind its international competitors on almost all fronts. The United States is outpaced by at least one of its Asian competitors in the production of solar cells, wind turbines, and components for

nuclear power plants, and currently has no domestic high-speed rail manufacturing capacity. The United States is also in danger of falling behind in the development of CCS and advanced vehicle technology and is already a laggard in the production of advance batteries for hybrid and electric vehicles."[4]

H.R. 5156 is an important policy step in addressing these challenges and I am pleased to be here today to voice our support for this proposal. But there are many more policy steps required to ensure a vibrant eco-system that fully supports America's capacity to create, make and market essential clean energy technologies to the world.

The Council's views on the energy-competitiveness relationship have been well-defined over the past few years. We see energy as the lifeblood of our economy and we believe that America's competitiveness cannot be separated from energy issues.

In developing new industries to supply the sustainable energy and related services needed here and abroad, America can drive economic growth, create millions of new jobs and enhance the competitiveness and prosperity of the entire nation.

The United States must invest, create, commercialize and market the new products and services of the low-carbon energy future. We must actively engage in the intense global competition well underway in Asia, Europe, the Middle East and the Americas to capture the economic value, jobs and global market share for these new industries and infrastructure.

As an example of what is at stake, within the past decade the United States has fallen from first to fifth among top solar manufacturing countries and now imports solar cells from the European Union and Asia.

Revenue in just three clean energy sectors—wind, solar and biofuels—is projected to nearly triple over the next decade, from $145 billion in 2008 to $343 billion in 2019.[5] Markets for clean technologies like carbon capture and sequestration for coal plants will expand exponentially as demand for this abundant energy resource continues to grow.

These markets and the employment and economic growth they bring can be ours if we act now with the right set of policies and programs to catalyze research and development (R&D), investment, manufacturing and commercial deployment.

In July 2007, the Council on Competitiveness launched the Energy Security, Innovation & Sustainability (ESIS) Initiative in recognition of the critical linkages among these three issues and their profound impact on future U.S. productivity, standard of living and global market success.

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[4] *Rising Tigers, Sleeping Giant: Asian Nations Set to Dominate the Clean Energy Race by Out-Investing the United States.* Breakthrough Institute and Information Technology and Innovation Foundation, November 2009.

[5] *Clean Energy Trends*, Clean Edge, April 2010

Drawing upon over a year's work of inquiry and real-time research and analysis, and in anticipation of the new administration, the Council issued *Prioritize: A 100-Day Energy Action Plan for the 44th President of the United States* in September 2008. The plan identified six "pillars" as integral to U.S. energy transformation and as top priorities for presidential action upon taking office.

At that time, the Council stressed that the action plan recommended in *Prioritize* marked the beginning, not the end, of a concerted commitment to ensure the United States achieves energy security in a sustainable manner, while ensuring the competitiveness of its workers, industries and economy.

In September 2009, at a National Energy Summit that the Council convened here in Washington, D.C., we released *Drive: A Comprehensive Roadmap to Achieve Energy Security, Sustainability and Competitiveness. Drive* builds upon the energy action plan in *Prioritize* and sets forth the next set of integrated building blocks for America's energy transformation, sustainability and competitiveness in a low-carbon world.

I cannot emphasize enough the importance of taking a systems approach to our energy, sustainability and economic policies.

Let me also flag for the Committee a select number of our recommendations that bear directly upon the intent of HR 5156, that would in fact complement and enhance the efficacy of the provisions of this legislation. With respect to accessing to global markets the Council recommends that we:

1. **Remove tariffs and non-tariff barriers for sustainable energy products and services** while not creating a dual track for preferential trade liberalization. The World Trade Organization should re-launch the Doha Round of trade talks with the leadership of the Group of Twenty (G-20) Finance Ministers and Central Bank Governors to ensure that tariff reductions and removal of non-tariff barriers are transparent, reciprocal and provide access to all national markets, where strong worker and consumer protections are provided.

2. **Assure intellectual property rights (IPR) for all industrial products and services, copyrights and sustainable energy solutions.** The Secretary of State should coordinate with the U.S. Trade Representative to obtain strong IPR protection for all international R&D cooperative programs and technology transfer agreements for sustainable energy and carbon mitigation.

3. **To ensure continued U.S. technological leadership.** We need to guarantee a long-term, stable source of funding. In the future, 30 percent of any revenue from carbon pricing should be allocated to R&D, including the demonstration of clean energy technologies. Three technologies—energy storage including batteries, carbon capture and storage and advanced nuclear reactors—are enabling technologies that are critical to develop if we are to fully exploit our renewable, coal and nuclear resources.

Several demonstrations at commercial scale of each technology should be fast tracked with set dates for timely completion.

4. **To ensure that the technologies of tomorrow will be manufactured in the United States**, a steady stream of financing support should be provided, including 40 percent of the revenues derived from any future carbon pricing program. Supported programs should include: federal, state or local clean manufacturing initiatives; the creation of clean energy development zones; financial assistance for the first two to three commercial manufacturing facilities for energy technologies; the expensing of the costs of retooling for production of qualified products, equipment or energy options; operating Regional Manufacturing Centers to promote advanced manufacturing technology; and dedicating a high performance computing (HPC) center for clean energy manufacturing.

We believe that the recommendations presented in *Drive* will unleash a new era of American innovation, create new industries, revitalize and re-build manufacturing jobs across our nation, keep and grow high-skilled jobs for this generation and the next and accelerate economic prosperity for all Americans as we lead global growth, environmental stewardship and security.

Conclusion

Thank you again for this opportunity to provide testimony on this important topic for American manufacturing competitiveness. We support the intent of the "Clean Energy Technology Manufacturing and Export Assistance Act", while recognizing there is a lot more to be done. It is critical that the United States create the right conditions for breakthrough innovations across the manufacturing eco-system, especially in the field of clean energy. Perhaps more importantly, we need to ensure the environment exists here for manufacturing at scale in order to create high-value jobs and enhance our national prosperity.

Attachment 1: Council on Competitiveness U.S. Manufacturing Competitiveness Initiative Overview

Council on Competitiveness

1500 K Street, NW
Suite 850
Washington, D.C. 20005
T 202 682 4292
F 202 682 5150
Compete.org

U.S. Manufacturing Competitiveness Initiative

For American Jobs, Growth and Security

Vision for U.S. Manufacturing in the 21st Century

The United States needs a vision and goals for manufacturing. We must seek to generate multiples of high-value jobs as American products—synonymous with high quality, lean and green manufacturing—are in high demand around the world. The United States will enjoy the highest level of labor, capital and resource productivity among the world's leading economies, ensuring a sustained competitive advantage in the global economy. Vibrant regional innovation ecosystems and smart networks of lean and agile small manufacturers will drive the U.S. manufacturing sector. By 2020, the United States will be the decisive leader in frontier research in new process technologies and manufacturing productivity, including advanced modeling and simulation. Clean and advanced manufacturing technologies will be widely deployed across the economy, as the risk and cost to commercialize and produce them at scale has been substantially reduced.

Initiative Goal

At a national summit convened in 2011, deliver to the Administration and the Congress a realistic and comprehensive solutions roadmap—with the advice, participation and buy-in from a wide range of stakeholders—that will energize a vibrant, diversified and technologically advanced manufacturing value chain, resulting in American jobs, economic growth and energy and national security.

Initiative Core Premises

Manufacturing, long a cornerstone of U.S. competitiveness, faces intense and accelerating competition from all corners of the globe. The U.S. share of the global market for manufactured exports declined from 19 percent in 2000 to 14 percent in 2007, while the Chinese share rose from 7 percent to 17 percent.[1]

The manufacturing ecosystem represents a value stream that spans from ideas to products. 21st century manufacturing goes well beyond production of saleable objects. It also includes cutting-edge science and technology, sustainable design and systems engineering, supply chain excellence and a wide range of smart services—as well as lean and green production.

Manufacturing is being reshaped by new forces. Half of middle class consumers will live outside the United States by 2030.[2] The rise of new consumers and capabilities in emerging economies will challenge American preeminence. The fast pace of technological change doubled the topple rate for established companies in the 20 years to the mid-1990s,[3] and today's global innovation networks diffuse frontier research and technology allowing competitors to leapfrog their competition.

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[1] *Facts about Modern Manufacturing 8th Edition*, MAPI/National Association of Manufacturers, 2009.
[2] *The Expanding Middle: The Exploding Middle Class and Falling Global Inequality*, Goldman Sachs, 2008.
[3] Huyett, William I. and S. Patrick Viguerie. "Extreme Competition," McKinsey Quarterly, February 2005.

Rising energy demand, climate volatility and resource challenges require transformational manufacturing technologies and systems. Other nations are vying for market share in green manufacturing and clean energy industries. To drive economic growth, competitiveness and job creation, America must regain market leadership for technologies lost to other regions and also lead the world in energy efficient, sustainable and low carbon manufacturing.

The global challenges demand that we act now. America must craft and mount a strategic response to provide jobs for our citizens in the 21st century. We need an engaged and skilled workforce, rapid deployment of frontier science and technology, deep pools of risk capital, and 21st century physical and virtual infrastructures that will drive America's competitive advantage.

Initiative Leadership

CEO-Level Leadership Council and Steering Committee
The Committee, led by Council Chairman Samuel R. Allen, is comprised of chief executives from industry, academia, organized labor and national laboratories, and will frame the critical questions, provide the strategic direction and create the policy solutions that will ensure a vibrant, resilient and sustainable manufacturing base upon which America will grow.

Council Board

Samuel R. Allen, Chairman and CEO, Deere & Company; Chairman, Council on Competitiveness

Michael R. Splinter, Chairman, President and CEO, Applied Materials, Inc.; Industry Vice Chair, Council on Competitiveness

Shirley Ann Jackson, President, Rensselaer Polytechnic Institute; University Vice Chair, Council on Competitiveness

Edward J. McElroy, CEO, ULLICO, Inc.; Labor Vice Chair, Council on Competitiveness

Charles O. Holliday, Jr., Former Chairman, DuPont; Chairman Emeritus, Council on Competitiveness

Deborah L. Wince-Smith, President and CEO, Council on Competitiveness

Industry Lead

James H. Quigley, Chairman and CEO, Deloitte Touche Tohmatsu; Executive Committee Member, Council on Competitiveness

Academia Lead

Susan Hockfield, President, Massachusetts Institute of Technology; Executive Committee Member, Council on Competitiveness

Labor Lead

William P. Hite, President, United Association of Pipe Fitters and Plumbers; Executive Committee Member, Council on Competitiveness

National Laboratories Lead

George H. Miller, Director, Lawrence Livermore National Laboratory; Executive Committee Member, Council on Competitiveness

Executive and Expert Advisors
An equally diverse and expert Advisory Committee is being formed to help shape the substantive aspects of the project, as well as provide ongoing counsel and support to Steering Committee Policy Solutions Groups and Council staff.

Distinguished Member and Affiliate Partners
As a broad-based, non-partisan organization committed to advancing U.S. competitiveness in the global economy, the Council cultivates partnerships with leading national organizations on issues of mutual concern. In bridging the interests and insights of many, the Council brings multi-disciplinary analysis and systems thinking to its work. The Council is proud to be partnering with several distinguished organizations on the U.S. Manufacturing Competitiveness Initiative.

Public Sector Engagement
Policies affecting the U.S. manufacturing environment emanate from many quarters of the executive and legislative branch. To foster a holistic and integrated policy roadmap, the Council is proactively engaging policymakers from across the Administration and Congress in the launch of this Initiative. Congressional staff from both parties have agreed to serve as advisors to the Council to ensure that the forthcoming recommendations are aligned with Committee jurisdiction and legislative timelines.

2010 Calendar of Events

June 23, 2010	Public Release of Council/Deloitte CEO Survey: Ranking Manufacturing Competitiveness by Country
	National Launch of Initiative, Council Executive Committee Meeting and Inaugural Manufacturing Steering Committee Meeting
October/November 2010	Steering Committee Meeting; Scenarios Released and Develop Preliminary Recommendations
December 8-9, 2010	Council Leadership Unveils Initial Findings and Steering Committee Recommendations
January 2011	CEO-Led Policy Solution Groups Commence Work
October 2011	Steering Committee Meeting and Release of Comprehensive Solutions Roadmap at National Manufacturing Summit
January 2012	Final Proceedings

Why the Council

Since 1987, the Council has brought forth creative solutions to America's most pressing competitiveness challenges. Composed of leaders from industry, academia and organized labor, the Council is unique in its ability to build synergies and consensus across a wide span of organizations and interests. By leveraging its exceptional convening power, the Council attracts the best minds, at the right time to the right issues. Not representing a singular interest, the Council operates at the level of the national interest, taking a systems approach in framing the problem and developing solutions. The Council proactively engages all perspectives and forges critical partnerships with stakeholders in the public and private sectors.

U.S. Manufacturing Competitiveness Initiative
Structure

Compete.
Council on Competitiveness

1500 K Street, NW
Suite 850
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Compete.org

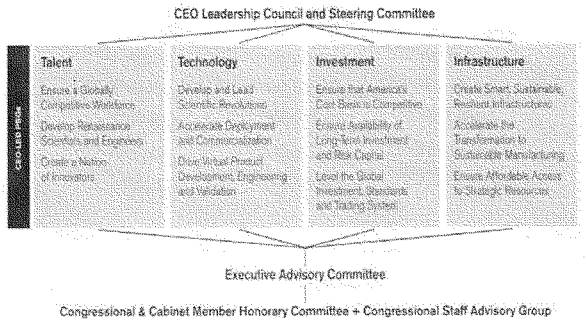
Goals

The Initiative will bring together a cross-section of America's top private sector leaders to:

- Develop a shared vision for 21st century manufacturing across the entire manufacturing value chain.
- Sharpen our understanding of changes within the global economic environment and how they are impacting U.S. manufacturing competitiveness.
- Create and advocate for a comprehensive set of policy solutions that will make the United States the most fertile and attractive environment for high-value manufacturing.

Why? America's national and economic security—and our ability to create wealth and new jobs—depend upon a robust and adaptive manufacturing ecosystem that supports the generation and translation of ideas into high-value goods and services that serve U.S. and global markets. Manufacturing accounts for the majority of the research and development and productivity growth in the U.S. economy, and contributes a large share to total gross domestic product. The United States cannot be a global economic and technological leader, nor fully recover from recent economic crises, absent a strong manufacturing base.

Process



A CEO-Level Leadership Council and Steering Committee—comprised of chief executives from industry, academia, organized labor and national laboratories—will frame the critical questions, provide the strategic direction, and develop a comprehensive set of actions to ensure a vibrant manufacturing base for America's future over the next 24 months.

Members of the Steering Committee will organize and lead Policy Solution Groups (PSGs) to develop recommendations that address specific elements of the manufacturing ecosystem—including talent, technology, investment and infrastructure. Each PSG will study discrete issues and produce an interim and final report for the Steering Committee—that will, in turn, summarize key findings and policy recommendations. The Steering Committee will integrate all of the PSG reports and findings into a final plan that they will present at a National Manufacturing Competitiveness Summit in 2011. CEO chairs will dedicate appropriate staff and executive support to the task.

The Steering Committee will also receive support and advice from an Executive Advisory Committee composed of manufacturing and thought leaders from business, academia, labor and non-governmental organizations.

Mr. RUSH. Thank you very much.
Mr. Herrnstadt.

STATEMENT OF OWEN E. HERRNSTADT, DIRECTOR OF TRADE AND GLOBALIZATION, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

Mr. HERRNSTADT. Thank you, Mr. Chairman.

The International Association of Machinists & Aerospace Workers is one of the largest manufacturing unions in the United States representing thousands of workers who produce goods for exports every day. We strongly believe in the importance of the clean energy industry and we welcome the opportunity to appear before you today.

Support for domestic manufacturing goods related to clean energy is a critical component for our economic recovery, and it is urgently needed. U.S. workers continue to be mired in the economic crisis while the official unemployment rate hovers at around 10 percent, the unofficial unemployment rate is approaching 20 percent. Some 8½ million workers have lost their jobs since December 2007 with a significant number directly working in manufacturing.

Today, there are over 15 million workers who are unemployed. Almost half of all of those who are unemployed have been without work for over 6 months.

The IEM continues to argue for the adoption of comprehensive policies that will address this jobs crisis. In order to be effective, we urge that these policies establish a framework for rebuilding our manufacturing base and ensuring its sustainability for the future.

H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act of 2010 represents one element of an overall program that is so desperately needed. If enacted, the bill would assist U.S. companies in exporting clean energy products and services. The bill would also require the Secretary of Commerce to submit a report to Congress which would assess the extent to which the program has been successful in creating jobs in the United States.

While H.R. 5156 represents an incredibly important step towards addressing the need to support manufacturing jobs in the clean energy sector, we urge an even more aggressive approach to ensure that Federal support for companies to export clean energy technology and services does, in fact, result in the creation or maintenance of jobs here at home.

A direct verifiable requirement that Federal support for clean energy exports results in the creation of U.S. jobs is essential. It appears that some companies are only too willing to produce clean energy goods and equipment in other countries. For example, as reported in The Washington Post, BP announced this spring that it would be laying off 320 workers and closing its solar panel manufacturing plant in Frederick, Maryland, the final step in moving its solar business out of the United States to facilities in China, India and other countries. In making the announcement, BP's CEO stated that BP was "moving to where we can manufacture cheaply."

We offer four specific suggestions for moving ahead and for building on H.R. 5156.

One, detailed employment impact statements should be a required factor in any decisionmaking process for government assistance. The employment impact statements would contain information pertaining to employment that would be mandated, created, or lost if the program in question were approved. We also suggest that capital equipment related to production as well as goods to be exported must be domestically made and contain domestic materials.

Strong domestic content requirements uniformly implemented and enforced could be specifically contained in current legislation.

Export assistance should also be sought by the U.S. Export-Import Bank who has also developed expertise in these areas.

And last but not least, domestic production for exports must be based on a fair and level field of global competition.

Clean energy exporters must be able to prosper, and they can only do so if they are able and are able to compete fairly. That means trade barriers removed when dealing with countries like China. Those barriers must be challenged and removed. Demands for transfer of technology and production in return for market access must also be curtailed. Currency manipulation must be formally recognized and addressed, and relatedly subsidies to the industry by other countries like China should also be challenged in a number of forums, including trade complaints.

As mentioned at the outset, U.S. manufacturing workers are in a crisis and not, coincidentally, so is our country's economy. Promoting U.S. clean energy companies to export domestically manufactured goods with U.S.-made materials and products represents one important solution to this crisis.

Again, we very much appreciate the opportunity to appear before you today and we would obviously be happy to answer any further questions.

[The prepared statement of Mr. Herrnstadt follows:]

TESTIMONY OF
OWEN E. HERRNSTADT, DIRECTOR OF TRADE AND GLOBALIZATION
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
BEFORE THE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
JUNE 16, 2010

Introduction

The International Association of Machinists and Aerospace Workers, (IAM) AFL-CIO, represents several hundred thousand active and retired members throughout North America.[1] Our members work in a variety of industries including aerospace, manufacturing, electronics, defense, transportation, shipbuilding, and woodworking to name a few. Our members also work in the energy sector manufacturing equipment and products. We have argued for many years that the health of our economy rests on our ability to develop technology that can contribute to domestic manufacturing opportunities. Clean energy and all of the goods and services related to the industry can serve as a significant factor in providing much needed manufacturing jobs to U.S. workers. Given our unique position as one of the largest manufacturing unions in the U.S., representing thousands of workers who produce goods for exports and as a firm supporter in the importance of the clean energy sector, we welcome the opportunity to appear before you today.

Support for domestic manufacturing goods related to clean energy is a critical component for our economic recovery. It is urgently needed. U.S. workers continue to be mired in the economic crisis. While the official unemployment rate hovers at around 10 percent, the unofficial unemployment rate is approaching 20 percent. Over 8.5 million workers have lost their jobs since December 2007, with a significant number directly working in manufacturing. Today, there are over 15 million workers who are unemployed. Almost half of all of those who are unemployed have been without work for over six months.

The IAM has urged the Administration and Congress to adopt comprehensive policies that address this job crisis. In order to be effective, these policies must go well beyond a band-aid approach: they must establish a framework for rebuilding our manufacturing base and ensuring its sustainability for the future. H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act of 2010, represents one element of an overall program that is desperately needed. If enacted, the Bill would assist U.S. companies in exporting clean energy products and services. The Bill would also require the Secretary of Commerce to submit a report to Congress which would assess, "the extent to which the program...has been successful in creating jobs in the United States."

While H.R. 5156 represents an important step toward addressing the need to support manufacturing jobs in the clean energy sector, we urge an even more aggressive approach to ensure that federal support for companies to export clean energy technology and services does in fact result in the creation or maintenance of jobs here at home. A direct, verifiable requirement that federal support for clean energy exports results in the creation of U.S. jobs is essential, since it appears that some companies are only too willing to produce clean energy goods and equipment in other countries. For example, BP, announced this spring that it would be laying off 320 workers and closing, "its solar-panel manufacturing

[1] Portions of this testimony are taken from the witnesses' article, "Green Jobs With Strings Attached", Economic Policy Institute, 12/2/2009.

plant in Frederick (Maryland), the final step in moving its solar business out of the United States to facilities in China, India and other countries..."[2] In making the announcement, BP's CEO, Tony Hayward stated that BP was "moving to where we can manufacture cheaply."[3]

As concluded by the Investigative Reporting Workshop (IRW), "[M]oney from the 2009 stimulus bill to help support the renewable energy industry continues to flow overseas..."[4] The IRW had previously reported about an announcement by a consortium of American and Chinese companies, "to build a $1.5 billion wind farm in Texas, using imported Chinese wind turbines". The IRW report noted that with respect to this project, "[C]ompany officials said they planned to collect $450 million in stimulus grants for the project."[5]

Federal incentives such as those provided by the H.R. 5156 could result in convincing companies in the clean energy industry to build and maintain domestic production to export goods, but only if that support is directly tied to domestic job creation. We are especially concerned that some companies could receive support for the export of capital equipment to other countries, while other exports could contain significant percentages of non-domestically produced parts, components, or materials. Transferring production equipment to other countries, and reinforcing foreign supply chains can, if not properly reviewed, result in creating additional global capacity and competition that could be harmful to U.S. workers. Using taxpayer money to facilitate this offshoring of work is unacceptable for any industry. In light of this hearing, it is particularly objectionable with respect to domestic manufacturing for the clean energy industry which is critical for our economic future.

In order to ensure that federal support for exports of clean energy goods and services will in fact result in the creation of jobs here at home, we offer the following suggestions:

1. **Require employment impact statements (EIS).** Detailed employment impact statements (EIS) should be a required factor in any decision making process for government assistance. The results of the EIS should be a significant factor in the final determination concerning the project or transaction under consideration. The EIS would contain information pertaining to employment that would be maintained, created, or lost if the program in question were approved. It would also contain in detail the duration, wage, location, and category of those jobs. The jobs analysis would also examine the impact on domestic jobs if the transaction involved the export of capital equipment.

   To assure that the EIS is accurate and that they are fully and effectively implemented, federal agencies such as the Department of Commerce should submit annual reports to Congress summarizing the methodology used to calculate the number of jobs supported by federal programs. The reports would also furnish Congress and the Administration with valuable information about how its programs regarding clean energy technology manufacturing and export assistance are assisting with the creation and maintenance of jobs here at home. In terms of HR 5156, such information could be included in Commerce's report as provided under Section 2(d).

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[2] *BP closing Maryland solar manufacturing plant*, The Washington Post, 3/27/2010.
[3] Id.
[4] Russ Choma, *Renewable energy money still going abroad, despite criticism from Congress*, 2/8/2010.
[5] Id., The announcement and subsequent controversy has led to a number of discussions and at least one legislative proposal offered by Senator Schumer.

2. **Equipment used for manufacturing goods, as well as the goods themselves, must be domestically produced.** Capital equipment related to production as well as goods and services to be exported must be domestically manufactured and contain domestic materials. Current domestic content requirements that are in effect throughout government can be vague and present several questions. For example, how is domestic content measured and applied? What factors are included in determining content? Is the calculation limited to raw materials, production assembly and maintenance, or are intangible items like the value of research and development, marketing, and the value of intellectual property rights, which can be used to inflate domestic content included? How will the origin of components and sub-components be considered? Strong domestic content requirements, uniformly implemented and enforced should be specifically contained in HR 5156.

3. **Export Assistance should also be sought through the U.S. Export-Import Bank.** The U.S. Export-Import Bank's objective is to assist companies in financing exports that will support U.S. jobs. Ex-Im has well-developed expertise in export assistance for short, medium, and long-term transactions. Special expertise has also been developed in the energy and environmental sectors. HR 5156 could adopt provisions seeking specific coordination between Commerce and Ex-Im.

4. **Domestic production for export must be based on fair and level global competition.** Clean energy exporters must be able to compete on fair playing field with producers in other countries. If the domestic clean energy sector is to prosper and result in more U.S. manufacturing jobs, trade barriers that exist in other countries like China must be challenged and removed. Demands for transfer of technology and production in return for market access must be curtailed. Currency manipulation must also be formally recognized by our own government and addressed. Relatedly, subsidies to the industry by other countries, like China, should also be challenged by trade complaints. Moreover, subsidies which may take the form of artificially created cheap labor cost derived from the failure to recognize and enforce fundamental human rights must also be challenged and remedied.

As mentioned at the outset, U.S. manufacturing workers are in a crisis, and not coincidentally, so is our country's economy. Promoting U.S. clean energy companies to export domestically manufactured goods with U.S. made materials represents one important solution to this crisis.

We very much appreciate the opportunity to appear before you today and would be happy to answer any questions you might have.

Mr. RUSH. Mr. Crawford, you are recognized for 5 minutes.

STATEMENT OF JACK CRAWFORD, JR., CHIEF EXECUTIVE OFFICER, JADOO POWER

Mr. CRAWFORD. Thank you, Chairman Rush, Ranking Member Whitfield, members of the Committee on Energy and Commerce for inviting me to speak here today about ways to increase global competitiveness of small and medium-sized clean technology companies. I would also like to thank Representative Matsui for her kind welcome and applaud her efforts to boost competitiveness of clean technology companies in Sacramento, in the Sacramento area and the Nation.

I am Jack Crawford, Jr., the CEO of Jadoo Power, a small alternative energy technology company based in Folsom, California. I have the experience of starting and investing in and growing several technology companies in my career. I would like to talk about the challenges facing a clean energy technology startup and its efforts to market its clean products internationally.

Jadoo Power is an industry leader in advanced power and energy storage solutions. Jadoo has used its technology to develop and deliver demonstration products to the military, government and commercial sectors such as portable power for medical devices to support wounded soldier in war zones, emergency response communication solutions, and surveillance and security applications.

Fuel cells such as those manufactured by Jadoo also advance this other advancement of other clean technologies such as solar, LED lighting and wind power solutions. Whatever the energy source, fuel cells save energy and reduce emissions.

Jadoo's technology is being productized for military and commercial uses and additional support to scale or manufacturing will enable us to deliver a future large volume order of our products.

It has been the case for many years that American science and engineering has been pre-eminent in the world. The U.S. is the unequivocal leader in energy innovation just as we have been in such sectors as semiconductors, biotechnology, and the Internet.

As we strive to become a global leader in clean technology, one area of innovation where our advantage is most threatened is manufacturing. While breakthrough technology occurs here in the U.S., we are losing out to countries like China and Germany when it comes to energy manufacturing and exporting in part because these countries are providing hosts of tax incentives and export financial incentives and advantages for their clean technology companies.

Selling our clean energy companies to foreign markets will be imperative to the future growth and sustainability of the clean technology industry in America.

Like all other sectors of our economy, small businesses are the cornerstone of the clean technology industry. However, when it comes to exporting products and services, small businesses are at a disadvantage. Unlike large U.S. companies, small- and medium-sized clean technology companies do not have the financial resources, the expertise, or the relationships to navigate through and succeed in foreign markets.

According to the trade promotion coordinating committee, about 30 percent of nonexporting small- and medium-sized companies would consider exporting if they had more access to international market information and assistance in pursuing export opportunities. Jadoo Power is one of those companies.

This legislation being discussed today will help clean energy technology place clean energy technology at the forefront of our national export strategy and help small businesses find new customers and markets abroad.

A greater level of support from the U.S. Federal Government would level the playing field, particularly for small- and medium-sized businesses and accelerate the ability of U.S. clean technology companies to meet global demand and better compete in the clean energy marketplace.

I commend Representative Doris Matsui of Sacramento, along with Bobby Rush, John Dingell, and Anna Eshoo for introducing H.R. 5156, the Clean Energy Technology Manufacturing Export Assistance Act of 2010. This bill sets out a national strategy to assist U.S. clean energy technology companies with export assistance to find new markets for their products and services and to better compete in the international marketplace.

This bill also provides domestic manufacturing assistance to find new ways to reduce production costs and increase productivity in the clean technology sector.

For Jadoo, H.R. 5156 would provide tangible benefits as the company works to advance its manufacturing clean technology products and secure access and growth in the international marketplace.

In addition to providing a robust business environment for Jadoo Power, the Sacramento region is well positioned to be a national leader in producing clean energy technology. Along with Jadoo Power, there are more than 100 other Sacramento-based small- and medium-sized clean technology companies that would benefit from H.R. 5156, as well as other clean technology companies in California and around the U.S.

Representatives Matsui and Lungren, Governor Schwarzenegger and Sacramento's mayor, Kevin Johnson, have been actively supportive of clean technology companies both locally, Statewide and their continued support will be important to this emerging industry along with new support of government policies.

The emerging global market for clean energy products is ever growing, and it is now time we look to market and sell our U.S. made clean energy products to foreign markets. With a clear opportunity of clean energy technology, the United States can catch up and be a leader of the world with technology in American-manufactured products.

As we look at innovation and entrepreneurship in our country, it is time for us to go green and go global.

Thank you for inviting me to today's legislative hearing and allowing me to present my perspective.

[The prepared statement of Mr. Crawford follows:]

Testimony of Jack Crawford, Jr.
CEO of Jadoo Power
Folsom, California

Before the

Subcommittee on Commerce, Trade and Consumer Protection
United State House of Representatives

Wednesday, June 16, 2010

Introduction

Thank you Chairman Rush, Ranking Member Whitfield, and members of the Committee on Energy and Commerce for inviting me to speak here today about ways to increase the competitiveness of small and medium sized clean technology companies in today's competitive international marketplace. The clean energy technology industry represents a tremendous opportunity for entrepreneurs and investors, and the battle for global leadership is raging. The U.S. is in a fierce competition to develop companies that enable us to generate and utilize energy more efficiently and to do this cheaper and cleaner than our competitors. Nothing less than our global leadership is at stake here. The country that succeeds in innovating and exporting clean technology products and services will be the global economic leader and job creator in the future.

I am Jack Crawford, Jr., the CEO of Jadoo Power, which is a small alternative energy technology company based in Folsom, California. Having had the experience of starting up, investing in, and growing several companies in my career, I bring some amount of understanding to the challenges facing a clean energy technology startup company, and recognize the particular set of problems faced by my own company in this economy in its effort to market our clean tech products internationally.

Company Overview

Jadoo Power is an industry leader in advanced power and energy storage solutions. Our systems provide hybrid fuel cell power for government, military and commercial applications. The industry is evolving and Jadoo Power is at the forefront--moving toward the next evolution of superior power solutions that will greatly surpass current technologies and contribute to a healthier world environment. Jadoo Power continues to enhance fuel cell performance, advance fuel developments, hybridize with other clean energy technologies, improve manufacturing processes, and reduce costs.

We are taking fuel cell advancements into the future delivering portable commercial applications including complementary solar and LED technology that will continue to out-perform existing capabilities and provide better overall solutions.

With the emissions of green house gasses from conventional motors, generators and engines, and the limited power capabilities and toxic chemicals of conventional batteries, advanced fuel cell technology offers the promise of portable, clean, zero emissions power. Photovoltaic solar panels and wind turbines can provide utility scale power, but there continues to be a need for clean, efficient power sources that are small, portable and mobile so that some pollution-producing engines can be eliminated. Jadoo's fuel cell technology and alternative energy research and development programs provide the potential for ubiquitous clean energy storage and production.

Jadoo Power is solving some of today's energy challenges as well as working toward the next generation of power demands that will deliver better energy solutions, greatly surpassing current technologies and contributing to a healthier environment through reduced pollutants. Fuel cells, such as those manufactured by Jadoo, advance the integration of renewables, such as solar and wind power, into the electricity grid by enhancing their stability. Whatever the source, fuel cells save energy and reduce emissions.

To that end, Jadoo is working to realize several objectives. These objectives include:

- Enhancing fuel cell performance
- Hybridizing fuel cells with solar and LED technology
- Reducing production costs and improving manufacturing and integration processes
- Continuing to build key customer and partner relationships in military, government, and commercial markets

Through these efforts, Jadoo will continue to take fuel cell advancements into the future and deliver commercial applications that out-perform existing capabilities and provide better power solutions. As a leader in fuel cell technology and next generation power systems, Jadoo Power's products are providing hybrid fuel cell power in military, government and commercial applications.

Jadoo has used its technology to develop and deliver prototypes to the military, government, and the commercial sectors, in the following application areas:

- Portable and Mobile Power for portable rapid response medical devices supporting wounded soldiers in war zones
- Zero emissions back-up power for both indoor and outdoor operation
- Key communication applications for Emergency and First Responder Solutions
- Unmanned aerial vehicles, robotic, and surveillance applications in the military, government and homeland security applications

Need for Clean Technology Manufacturing and Export Assistance

I commend Representative Doris Matsui of Sacramento, along with Representatives Bobby Rush, John Dingell, and Anna Eshoo for introducting H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act of 2010. This bill sets out a national strategy to assist U.S. clean energy technology companies with export assistance to find new markets for their products and services to better compete in the international marketplace. The bill also provides domestic manufacturing assistance to find new ways to reduce production costs, and promote innovation, investment and greater productivity in the clean technology sector.

Jadoo Power, as a clean energy technology company, is a member of a very promising new category of business that is enjoying particularly strong growth in tems of number of companies and employee count in the U.S., and in particular in California, and in the Sacramento area where Jadoo itself is headquartered. The Sacramento region has more than 100 clean technology companies, and is well-positioned to be a national leader in producing clean energy technology. Since 1995, the Sacramento area has seen tremendous job growth in "green jobs" increasing by more than 87%. The entire state of California showed an increase in green jobs of 36%, or 42,000 in this same period, as compared to an overall job growth in this period of 13% in California. Nationwide, clean energy technology has been adding employees at the average rate 9% per year, as of 2008, for a total of approximately 770,000 jobs in this field (1). As recently stated by industry trade journals, the U.S. has the potential to capture 250,000 jobs in the next 10 years making, installing and servicing fuel cells (2). Clearly, the clean energy technology sector represents many promising employment growth opportunities in the future, and with the proper support from state and federal governments, this future growth potential can be fully realized, along with corresponding product revenues and increases in supporting businesses such as sub-contractors and services companies.

Jadoo has recognized that it has superior technology that is unsurpassed domestically, as well as internationally, and is now beginning to investigate how to scale the company's sales and manufacturing capabilities in order to supply both the domestic and international markets. Jadoo hopes to become competitive in the international market. However, many small clean energy companies, like Jadoo Power, do not have the knowledge of foreign markets or a full understanding how the export process works. That being said, Jadoo recognizes some of the challenges of competing in international markets. In many cases foreign suppliers that may have technically inferior products but have subsidies and support for exports from their own governments which creates a non-level playing field. Similar challenges await other domestic clean tech companies including some in the Sacramento region like WINDensity, a distributed wind power and fuel efficiency product company. With extraordinary opportunities in international markets, the key for this company is also to scale manufacturing and identify efficient access to international markets.

In addition to foreign competitors that have subsidies and support from their own governments, the lack of enforcement of international intellectual property rights further inhibits the entrance of U.S. companies into foreign markets.

Financing and Manufacturing Challenges

Growing a clean tech company is a challenge. We are breaking into a heavily regulated industry with well established players who can sometimes be threatened by innovators upsetting the status quo. But those challenges are minor in comparison to the financing challenges we face when we seek to advance our technology, grow our company, and build a demonstration plant or a first commercial plant. The funding gap that exists at this phase is sometimes referred to as a "valley of death."

The U.S. is the unequvocial leader in energy innovation, just as we have been in such sectors as semiconductors, biotechnology, and the Internet. As we strive to become a global leader in clean technology, one area of innovation where our advantage is most threatened is in manufacturing. Whereas breakthrough technology occurs here in the U.S., we are losing out to countries like China, Germany and Malaysia, when it comes to clean energy manufacturing, in part because those countries are providing a host of tax incentives and other recruitment advantages to lure companies away. First-of-a-kind capital intensive manufacturing facilities are often not able to secure traditional bank loans, due the risky nature of those loans and the lack of hard assets in the company.

As Jadoo and other companies begin to scale up their manufacturing capabilities, in order to reduce product costs and address foreign markets, these companies need assistance in developing and scaling manufacturing facilities that will allow them to compete internationally, not just domestically. The emerging U.S. market for clean energy products is growing and it is now time we look to sell our U.S. made clean energy products to foreign markets. A greater level of support from the federal government – in addition to – local and state governments will level the playing field and accelerate the ability of US clean technology companies to build and operate compliant and cost effective manufacturing.

It has been the case for many years that American science and engineering has been pre-eminent in the world. As a result of our pioneering technologies, we made entire new industries possible and we need to be vigilant in our appreciation and adoption of new and innovative technologies. The President has established a goal to double U.S. exports over the next five years. H.R. 5156 will place clean energy technology products at the forefront of our national clean tech export strategy.

Unfortunately, many times the U.S. has not been able to reap the benefits of this new technology with global sales of American made products, leaving other countries to benefit from our technology lead. We hope that this time, with the clear opportunity of clean energy technology, the United States will lead the world with our technology, and also be able to benefit from the distribution of American manufactured clean energy products because of the support for a U.S. clean energy technology

manufacturing base. Along with providing greater energy security and environmental security, our country's focus on clean technology manufacturing companies will provide greater economic security by creating and sustaining millions of new American jobs.

With proper support and assistance, Jadoo is an example of a company that could be well positioned to expand its manufacturing facilities and grow "green collar" jobs, thereby maintaining these jobs in the U.S. With H.R. 5156 and other such policies, Jadoo is likely to increase its employee base many fold as it scales its manufacturing capability to address both domestic and international sales opportunities. It is Jadoo's belief that, like many other American clean energy technology companies, it is a domestic leader in clean energy, and it can become a global leader in manufacturing, selling clean energy products with the appropriate set of government policies and support.

We believe that the Department of Commerce's International Trade Administration (ITA) can play an important role for U.S. companies that are selling products to foreign buyers. ITA has a wealth of experience in export promotion, helping small and medium sized companies find and navigate foreign markets.

Large, established domestic manufacturers are likely to have the track record, critical mass and ability to raise capital from commercial banks for new efficient manufacturing capabilities required for successful international sales, but small businesses do not have that ability. Presently, the government does not have an appropriate program for small manufacturers such as Jadoo Power to provide criticial export and manufacturing assistance.

In summary, we strongly support the goals of H.R. 5156 and support the creation of targeted policies that will enable American companies that have leading clean energy technologies to translate those leads into robust international product shipment though the support of the creation of globally competitive manufacturing capabilities. With capital to grow manufacturing capabilities as well as access to international markets of customers, many US-based small and medium sized clean technology manufacturing companies will become large companies that are global leaders in their industry.

Thank you for inviting me to today's legislative hearing, and allowing me to present my perspective.

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(1) SACTO (Sacramento Area Commerce and Trade Organization); SARTA (Sacramento Area Regional Technology Alliance); CleanStart's 2010 Progress Report, https://docs.google.com/viewer?url=http://www.sarta.org/tasks/sites/sarta/assets/File/cleanStartPR10_8.5x11.pdf

(2) Electric Drive Transportation Association, National Hydrogen Association, US Fuel Cell Council, Press Release, June 11, 2010, "Hydrogen and Fuel Cell Industries Join Call to Increase Clean Energy Investment".

Mr. RUSH. The chair now recognizes Mr. Kim for 5 minutes.

STATEMENT OF ANTHONY KIM, POLICY ANALYST, HERITAGE FOUNDATION

Mr. KIM. Chairman Rush, Ranking Member Whitfield and members of the committee. It is my privilege to testify today concerning the Clean Energy Technology Manufacturing Export Assistance Act of 2010. My name is Anthony Kim. I am a policy analyst at the Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation.

In recent years, clean energy has become a shorthand sum for the bold policy today on how to achieve green growth and enhance our energy security. The proposed legislation offers a timely opportunity to discuss better ways to trigger innovation in our clean energy technology sector.

Recognizing the urgency of developing a more competitive American clean energy technology sector, the proposed legislation intends to encourage innovation, investment and productivity, particularly via Federal subsidies. However, for the United States to regain economic leadership in the global clean energy industry, our strategy must be driven by real market conditions—not by government financial assistance that may serve as a temporary feel good action and delay more meaningful advancement of the clean energy sector.

Government-mandated funding has often resulted in unbalanced development and lasting government interference in the private sector which dampen dynamic growth and innovation. It also invites the question as to whether government has the expertise to effectively help private companies navigate through rapidly evolving clean energy markets.

The proposed bill also fails to acknowledge that there are existing government resources and market incentives to increase production of efficient or tentative clean energy.

In advancing the competitiveness of our clean energy sector, there are more practical policy alternatives that can and should be implemented. At the top of the list should be further globalization of international trade. Free trade fosters economic efficiency, and economic efficiency is the basis for innovation, growth, and competitiveness.

Over the past decades, the most practical improvements in energy efficiency and protecting environment have not come from government mandate funding. As chairman of the analysis of the Heritage Foundation's index of economic freedom, most progress has been driven by advances in freer trade and economic freedom. These unleash greater economic opportunity generating a purchase cycle of investment, innovation, and dynamic growth.

Comprehensive globalization provides the most efficient export promotion strategy. Such trade globalization can be achieved by advancing freer trade through multilateral as well as bilateral trade pacts. Free trade agreements have spurred competition and economic growth. In recent years, the FTAs currently enforced accounted for more than one trillion in two-way merchandise trade. FTAs also include provisions that safeguard American businesses

from discrimination and protect and enforce intellectual property rights for U.S. firms.

The pending FTA with Colombia, Panama, and South Korea will result in significant new market access and lower types for American businesses, including our clean energy producers.

There is no doubt that accelerating innovation and production of clean energy technology has become an economic necessity for our future. The best strategy to make this happen is not through special subsidies, but rather through dynamic leadership in opening markets and spurring innovation technology.

In conclusion, I want to emphasize that we need a strategy that conforms to conditions in the international marketplace, not one that struggles against it by subsidizing technologies that cannot stand on their own. We know one sure way of doing this, and that is through open markets, not closing them with protectionist measures.

Thank you again for the opportunity to testify before this committee today.

[The prepared statement of Mr. Kim follows:]

Clean Energy Technology Manufacturing and Export Assistance Act of 2010

Testimony before
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection

June 16, 2010

Anthony Kim
Policy Analyst
Center for International Trade and Economics
The Heritage Foundation

Chairman Rush, Ranking Member Whitfield, and members of the Committee, it is my privilege and honor to testify before you today concerning the Clean Energy Technology Manufacturing and Export Assistance Act of 2010.

My name is Anthony Kim. I am a policy analyst in the Center for International Trade and Economics at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

The Clean Energy Technology Manufacturing and Export Assistance Act aims to create a government fund in an effort to assist American clean tech firms in advancing their competitiveness in the global market. As a matter of fact, in recent years, "clean energy" has become a shorthand term for the broad policy debate on how to achieve green growth and enhance our energy security in the future. It is encouraging that the proposed legislation offers another timely opportunity to discuss better ways to boost the development of clean energy technology and trigger innovation in the American clean energy industry.

Indeed, the global clean energy industry presents an important market opportunity for the United States, one that could lead to dynamic exports and job creation. Private investment in clean technology is estimated to reach $450 billion annually by 2012 and over $600 billion by 2020 on a global scale, and potentially much larger if recent market opportunity estimates are realized.[1]

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[1] World Economic Forum, "Green Investing: Toward a Clean Energy Infrastructure," January 2009, at *http://www.weforum.org/pdf/climate/Green.pdf.*

Shortcomings of the Clean Energy Technology Manufacturing and Export Assistance Act

Recognizing the urgency of the need to develop a more competitive American clean energy sector that can capitalize on such global market opportunity, the proposed legislation intends to "encourage innovation, investment, and productivity" in the sector, particularly via federal subsidies, by establishing a $75 million fund over the next five fiscal years that will be administered through the International Trade Administration.

However, for the United States to regain economic leadership in the global clean energy industry, our strategy must be driven by real market conditions, not by government financial assistance that serves as a momentary feel-good action and delays a more meaningful advancement of the clean energy sector.

Government-mandated funding has resulted in unbalanced government subsidies and lasting government interference in the private sector, which dampen dynamic growth and innovation of the sector. It also invites the question as to whether the United States government has the expertise and qualifications to effectively help private companies navigate through rapidly evolving clean energy foreign markets.

The proposed legislation fails to identify specific policies to be pursued and risks becoming little more than a financial subsidy grab bag for politically connected special interests. The proposed bill also neglects to acknowledge that there are existing government resources and market incentives for the private sector to invest and develop technological solutions to increase production of efficient alternative clean energy. If this bill becomes law, taxpayer money will be wasted in government bureaucracy.

The American people deserve a government that spends every taxpayer dollar with as much care as taxpayers spend their own dollars. In fact, in response to rising public uneasiness about the widening federal deficit, White House Chief of Staff Rahm Emanuel recently noted that President Obama's goal now is "to change Washington's focus from figuring out how to spend money to how to save money."[2] It seems that the currently proposed bill is more in line with "spending," not "saving."

Freer Trade: Key Ingredient in Making Our Clean Energy Sector More Competitive

In advancing the competiveness of our clean energy technology sector, there are more practical policy alternatives that can and should be implemented. At the top of the list should be further liberalization of international trade.

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[2] Laura Meckler, "Giving Government Incentives to Save," *The Wall Street Journal*, June 7, 2010.

When a country lowers its barriers to trade, it opens its economy to competition and a wider variety of goods and services than was previously available. Competition spurs the movement of labor and capital from industries that cannot compete to those that can, enabling a nation both to produce more efficiently and to attract new investment—critical elements of any long-term economic growth and competitiveness strategy.

The need to adhere to such a strategy is no less important today than before.[3] Free trade fosters economic efficiency, and economic efficiency is the basis for innovation, growth, and competitiveness. Undeniably, trade has opened markets around the world to U.S. goods and services and has created a level of competition that leads to innovation, better and less expensive products, higher-paying jobs for Americans, and the investment needed for long-term economic growth and continued prosperity.

Indeed, the success of America's growth and rising prosperity over the past decades is based on reducing the state's role in the economy, breaking down barriers to international trade and investment, and streamlining the rules and regulations that shape and define long-term competitiveness. Tariffs, quotas, government subsidies, and cheap loans to businesses, outright nationalization of industry, and other policy mechanisms not only serve to distort prices and reduce international markets for goods and services, but also have a chilling effect on private investment and do little to boost business confidence.

These economic facts of life apply to the clean energy technology sector the same as they do to any other. The energy sector also needs freer trade. In fact, freer trade and advancing clean energy technology can go hand in hand, being mutually supportive.

Freer Trade Is Key to Green Growth

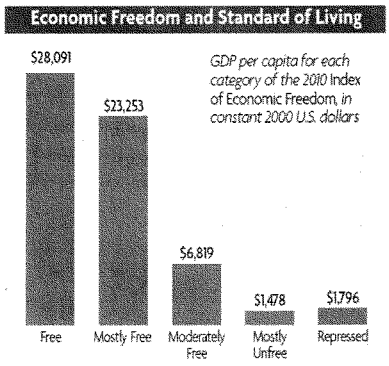
In remarks on World Environment Day, the Director-General of the World Trade Organization (WTO), Pascal Lamy, pointed out that "Trade opening has much to contribute in the fight against climate change and to the protection of the environment." Indeed, the most practical improvements in energy efficiency and protecting the environment through clean energy technology over the past decades haven't stemmed from government-mandated funding or regulations. As shown in the analysis of The Heritage Foundation's *Index of Economic Freedom*, the most progress has been driven by advances in freer trade and economic freedom. These

[3] Yet, while the U.S. has long been a leading advocate for open markets and trade liberalization, the recent financial crisis and global economic downturn have led some to question the worth of policies creating more trade freedom. Focusing predominantly on negative impact of trade on our economy, protectionists charge that trade is unfair to U.S. firms and employees. Unfortunately, they see only a small part of the story. Balanced against any trade-related economic pain must be the overall increase in U.S. employment, productivity, and wage rates that stems from an open, liberal trading environment.

unleash greater economic opportunity and prosperity, generating a virtuous cycle of investment, innovation, and dynamic economic growth.

Echoing the same message, the WTO chief further noted:

> The entire world is well aware of the environmental dangers posed to our planet. But the ability of governments to respond to these dangers is tied closely to the resources at their disposal. Countries which have had success in alleviating poverty and raising living standards tend to be more adept at creating the conditions for a cleaner environment.



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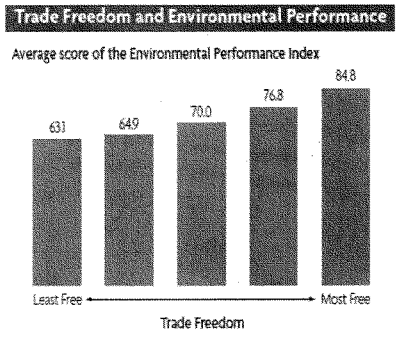

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Policy efforts aimed at imposing stricter environmental standards through a national or global regulatory body run great risk of being not only fruitless, but also counterproductive. They undercut the economic growth and efficiency indispensable to effective efforts to protect the environment. Such regulations are likely to be little more that feel-good actions.

The fundamental flaw of those favoring new government directives is the fallacy that there must be a trade-off between economic growth and environmental protection. They seem to think that to get more of one, you have to have less of the other. The truth is just the opposite: To get more environmental protection, you need more growth, not less.

It is encouraging that many Americans see that truth. As a March 2010 Gallup survey reveals, more Americans believe that economic growth should take priority over environmental

protection when the two goals collide, with fewer willing to support environmental measures that may have a negative economic impact.

Freer Trade, Not National Export Initiative, Boosts U.S. Clean Energy Technology

Chairman Emeritus Dingell, a co-sponsor of the Clean Energy Technology Manufacturing and Export Assistance Act, pointed out that the proposed legislation is "part and parcel to the President's goal of doubling exports in five years and gives wonderful incentive to American companies to design and manufacture the environmentally friendly technologies of tomorrow."[4]

The National Export Initiative (NEI), President Obama's trade plan that was unveiled in the 2010 State of the Union address, aims to bolster U.S. international competitiveness by creating an export promotion cabinet that will oversee the expansion of both government programs and special financing for firms and farmers seeking oversees market opportunities.[5]

Recognizing the key role of exports in America's economic strength was an important first step in forming an effective U.S. trade policy. However, the truth is that it is only part of a winning, comprehensive American trade strategy. Our economy needs a plan that addresses *all* aspects of trade. For America to excel in the world marketplace, U.S. trade objectives need to be clear and consistent with the open-market principles America has long promoted and, indeed, demands from other nations.

As a matter of fact, export promotion via comprehensive trade liberalization provides the most efficient, market-based export promotion strategy for U.S. interests. Such trade liberalization can be achieved by advancing freer trade through a comprehensive and substantive conclusion to the Doha Round of trade negotiations and ratification of the three pending free trade agreements with Colombia, Panama, and South Korea without further delay.

According to the WTO, global talks on free trade in environmental goods and services that will have special treatment in a new global trade deal are recording progress.[6] In April, U.S. Trade Representative Ron Kirk asked the U.S. International Trade Commission to investigate the economic benefit of eliminating U.S. tariffs on imported environmental goods and determine how much U.S. environmental goods exporters might benefit from trade liberalization.[7]

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[4] News release, "Matsui, Rush, Dingell, Eshoo Introduce Legislation to Bolster U.S. Clean Tech Industry," Office of Congressman John Dingell, April 27, 2010, at *http://www.house.gov/apps/list/press/mi15_dingell/MatsuiRushDingellEshooIntrolegtobolsterCleanTech.shtml.*

[5] Press release, "Executive Order—National Export Initiative," Office of the Press Secretary, the White House, March 11, 2010, at *http://www.whitehouse.gov/the-press-office/executive-order-national-export-initiative.*

[6] John Acher, "WTO's Lamy Sees Trade Pact Boosting Green Goods," Reuters, May 20, 2010, at *http://www.reuters.com/article/idUSLDE64J13F20100520.*

The U.S. can and should spur global economic growth by leading the Doha Round to a successful and ambitious conclusion. The absence of a new, comprehensive trade pact reduces countries' discipline in keeping a rein on protectionist measures designed to prop up inefficient domestic companies during today's economic slump. Moreover, without the new market access a multilateral deal would bring, it will be more difficult for firms that are struggling domestically to export instead.

In order to open up foreign markets for our clean energy sector more practically, America should enhance existing relationships with important trade and investment allies. NAFTA and other free trade agreements (FTAs) the U.S. has in place have spurred competition, job creation, and economic growth. These agreements have an important role in maintaining American competitiveness and prosperity.[8] In 2008, the FTAs currently in force accounted for more than $1 trillion in two-way merchandise trade, which is about 35 percent of U.S. trade worldwide.

U.S. FTAs go beyond winning lower tariffs on American manufacturing and services exports. FTAs include provisions that safeguard investors from discrimination, increase regulatory transparency, combat corrupt practices, and protect and enforce intellectual property rights. U.S. trade agreements include transparent dispute resolution and arbitration mechanisms to guarantee that the agreements are upheld and fully respect the rights of U.S. firms and consumers.

The pending FTAs with Colombia, Panama, and South Korea will result in significant new market access and lower tariffs for America's businesses: Most Colombian and Panamanian products already enter the U.S. duty-free under various preference programs. Because these countries have already had preferential access to U.S. markets, any impact on U.S. jobs from imports from those countries has already occurred. Instead, these agreements will result in new economic opportunity for America's exporters and the U.S. businesses that support them—opportunity that will grow over time as these countries continue to develop through trade and mature into larger, more sophisticated markets more closely integrated with the U.S. economy.

Conclusion

There is no doubt that accelerating U.S. clean energy technology innovation and production has become an economic necessity for America's future. The best strategy to help this happen is not

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[7] Office of the Secretary, U.S. International Trade Commission, April 14, 2010, at *http://www.usitc.gov/research_and_analysis/ongoing/332_516_request_letter.pdf.*

[8] As of the beginning of 2010, the U.S. had 11 FTAs with 17 countries. Congress has approved FTAs with the following nations: Israel; Canada and Mexico (NAFTA); Jordan; Singapore; Chile; Australia; Morocco; the Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua (DR–CAFTA); Bahrain; Oman; and, most recently, Peru.

through special subsidies or tax breaks for specific American firms, but rather through dynamic leadership in opening markets and spurring global competition so that the most productive and innovative technologies can rise to the top.

We need a strategy that conforms to conditions in the international marketplace, not one that struggles against it by encouraging and subsidizing technologies that can't stand on their own. We know one sure way to do this, and that is through opening markets, not closing them with protectionist measures. This bill, unfortunately, takes the other path.

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Mr. RUSH. The chair thanks all of the witnesses for your testimony, and the chair recognizes himself now for 5 minutes for the purposes of asking questions.

And I am going to ask all of the witnesses to answer "yes" and "no" to the following questions. I only have 5 minutes. If you could please restrict your answer to "yes" or "no," that would be appreciated.

Seizing clean energy export opportunities accelerate U.S. Recovery and become an engine of growth.

You answer "yes," or "no."

Beginning with the first witness, Ms. Saunders.

Ms. SAUNDERS. Yes.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes.

Mr. RUSH. Dollar for dollar, clean energy investment will create more jobs than investments in conventional energy sector.

Ms. SAUNDERS. I can't answer that officially.

Ms. WINCE-SMITH. It depends on how you define "clean energy." I am on the edge.

Mr. HERRNSTADT. I don't know.

Mr. CRAWFORD. Can you ask the question one more time?

Mr. RUSH. Dollar for dollar, clean energy investment will create more jobs than investments in conventional energy sector.

Mr. CRAWFORD. I agree it is difficult to answer without specifically defining "clean energy."

Mr. KIM. It depends. Potentially yes.

Mr. RUSH. With new jobs created in the clean energy sector will create new jobs and provide good wages. Yes or no.

Ms. SAUNDERS. Yes, in particular to export-related jobs which pay more than the average job.

Ms. WINCE-SMITH. Yes, because they take new skills and new capabilities.

Mr. HERRNSTADT. I hope so.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes.

Mr. RUSH. Outside the U.S. borders, there is a promising market for U.S. green products.

Ms. SAUNDERS. Absolutely.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes, sir.

Mr. RUSH. Trade barriers are not the only obstacles to increasing exports of American products.

Ms. SAUNDERS. Yes, I agree.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes.

Mr. RUSH. Last question. Other countries, especially our main competitors like China and other European countries and Japan, have a more aggressive export policy platform.

Ms. SAUNDERS. Typically exports account for a larger percentage of those economies, and I would agree they strongly support the exports.

Ms. WINCE-SMITH. Absolutely.

Mr. HERRNSTADT. It appears so.

Mr. CRAWFORD. Yes, and it's leading to a significant advantage for them.

Mr. KIM. Yes. I think they are in favor of free trade.

Mr. RUSH. You also have policies that protect their domestic production.

Ms. SAUNDERS. In specific areas, that is correct.

Ms. WINCE-SMITH. Yes. For instance, China's new policy on indigenous innovation is very worrisome.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes and no.

Mr. RUSH. The U.S. needs to have a more robust export assistance policy to its manufacturing industry.

Ms. SAUNDERS. We are operating within our current appropriated levels.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes, particularly for small- and medium-sized businesses.

Mr. KIM. Yes, but to get there it is open to debate.

Mr. RUSH. Compared to other countries, the U.S. pays far less on export promotion. Yes or no.

Ms. SAUNDERS. It is hard to take an overall average compared to specific areas. The European Union, for example, that is correct.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes. I think particularly with some countries. I am not an expert on the others.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes, but I think it depends.

Mr. RUSH. Thank you very much.

The chair now recognizes the gentleman from Kentucky, Mr. Whitfield.

Mr. WHITFIELD. Thank you, and I thank all of you for your testimony. We appreciate you being here today.

Ms. Saunders, I was just curious, you have been so generous with your time today and you have testified that you didn't testify, you said you were not going to make any comments about this legislation. I was just curious why is that or why was that?

Ms. SAUNDERS. The administration has not taken a position on H.R. 5156.

Mr. WHITFIELD. So you have no position.

Ms. SAUNDERS. No position.

Mr. WHITFIELD. Mr. Crawford, I noticed in your testimony you were talking about, particularly in clean energy companies, particularly in manufacturing, it is very difficult to obtain financing; is that correct?

Is that one of the reasons you support this legislation is because of the grant program that it would establish the $75 million grant program?

Mr. CRAWFORD. Yes. I feel like as a country between the venture capital investments and the stimulus, we have seeded innovation in R&D around clean technology. We have gotten to demonstrable products. And now the next logical steps are to scale manufacturing and begin to sell those protects both here and abroad.

Mr. WHITFIELD. This legislation on page 3 says specifically that the Secretary shall administer the funds to promote policies that will reduce production costs. Is that—it seems odd to me.

Mr. CRAWFORD. That is a significant issue for small and medium-sized companies, and here's why.

Mr. WHITFIELD. I thought that you said that primarily you needed it for financing.

Mr. CRAWFORD. Part of investing and financing in the manufacturing process is to reduce the overall costs of producing those products. And so as you deliver demonstration units, they are oftentimes pretty expensive to manufacture and the logical next step is to invest and finance the manufacturing process to reduce the costs of those parts so you can compete in those commercial markets.

Mr. WHITFIELD. Mr. Kim, I noticed in your testimony that you seem to be diametrically opposed to what Mr. Crawford is saying. Your general testimony seems to be you don't think the government should be involved in providing funds for private enterprise.

Mr. KIM. That is correct, sir. I think government can play a much bigger role through free trade, through enhancing free trade agreements via multilateral or at a bilateral level. So there are things they can do, but not through Federal subsidies.

Mr. WHITFIELD. So you think the free trade agreements will play a vital role?

Mr. KIM. I think free trade is vital. For example, the current pending U.S.-South Korea FTA. South Korea has a huge market for green energy technology.

Mr. WHITFIELD. You said the proposed legislation fails to identify specific policies to be pursued and risks becoming little more than a financial subsidy grab bag for politically connected special interests.

Mr. KIM. There is no monitoring mechanism that we can follow. So I think we will have to see how this bill is actually implemented and then the entire process regarding this will be processed. But there is a political risk and then it can invite other problems, too.

Mr. WHITFIELD. Mr. Herrnstadt, I notice that you all—certainly your union certainly favors the intent of this legislation, but I think you are specifically saying that it does not go far enough. And one of the things that you mentioned that needed to be done was to any grant that goes to any company that there be an EIS, as you call it, an employment impact statement, which actually I think is a pretty good idea.

Have you all been successful in getting EIS requirements in other government programs?

Mr. HERRNSTADT. Not yet. But we're still trying. I think it's a really commonsense solution to what we're talking about. It really started off with an idea dealing with government procurement and the billions we spend on it. The government should know what it is getting for its money, and if a specific program is directed to-

wards creating jobs, we need to calculate that with precision and that's something I am not sure the Commerce Department is doing yet.

Mr. WHITFIELD. That sounds like that would certainly improve this bill from your perspective.

Mr. HERRNSTADT. It is one area that would, but I also want to point out that the bill itself is a real acknowledgment that there's a link between clean energy and U.S. jobs and I think that by itself is a real step forward.

Mr. WHITFIELD. I know I only have 3 seconds.

Mr. Crawford, the XM bank is very much involved in exporting technology, environmental technological products abroad. Has your company utilized the XM bank for——

Mr. CRAWFORD. We haven't. My perception is the difference here is we're talking about a focus on one particular industry sector that's of critical importance to our country and small- and medium-sized businesses so the combination of those two things with this policy would not only provide us with access to greater expertise focused on our company but also set up relationships that could be helpful in getting traction in the international marketplace.

Mr. RUSH. The chair now recognizes the author of the bill, Ms. Matsui, for 5 minutes.

Mr. MATSUI. Thank you all for being here today.

As I mentioned in my opening statement, my home town is Sacramento, is home to 110 clean tech companies, many of them are small. And medium-sized companies are just now supporting ways to expand their businesses by exporting their products to foreign markets. But as you know, like large companies, they don't have the resources, time, and manpower to effectively promote their products abroad. And they do need assistance, and I do doubt that many of them have asked for help with Department of Commerce and small business and other entities that we can all think about.

But I particularly have a question, several questions for Mr. Crawford with you being a small business person. Is Jadoo Power currently looking to expand by exploring ways to explore technology products abroad?

Mr. CRAWFORD. We're looking at new markets. In particular, international markets.

Ms. MATSUI. What are the current barriers you face in exporting?

Mr. CRAWFORD. Access to expertise in how best to export relationships and effectively resources, the time.

Ms. MATSUI. So how do you go about it now?

Mr. CRAWFORD. Right now it is independent market research. It is trying to identify people who have expertise in international market places. It's consultants. It's research on the Internet. Those types of efforts.

Mr. MATSUI. As you know, this legislation authorizes about $50 million a year for 5 years. Now as a small business person who is really concerned about expenses and resources, do you feel that this legislation, this amount of money is a responsible use and so that this country can actually establish a national clean tech export strategy to boost the competitiveness of small and medium-sized businesses?

Mr. CRAWFORD. As a small business owner and taxpayer, I think you can make the case that this is one of the best case uses of taxpayer money. What we're talking about with regard to our company and others across the country is something that can impact our energy security, our environmental security and have a positive impact on our economy. Those are driving issues in our country today, and this is the type of bill that could have a positive impact on taking small companies effectively that are the cornerstone of our economy and growing them.

So my question actually is why aren't we, as a body, considering 10 or 20 times the amount because this is something that's addressing all of the relevant issues of today.

Mr. MATSUI. Thank you.

Ms. Saunders, do our international competitors, like in the EU and Asia, help their small and medium-size businesses, particularly clean tech businesses, facilitate exports to the U.S.?

Ms. SAUNDERS. Yes, they do.

Mr. MATSUI. How do they do that?

Ms. SAUNDERS. They do that through export promotion programs very similar to the ones we operate out of the Department of Commerce and other trade agencies.

Mr. MATSUI. But they have more emphasis on it?

Ms. SAUNDERS. As I said earlier, specific countries in the European Union and other parts of the world have exports that are a larger part of their economy and they allocate a large portion of their government resources to promoting those exports.

Mr. MATSUI. If this legislation were enacted, what are your rough estimates on the amount of increased Euros clean tech exports in dollar amount or in other measurements?

Ms. SAUNDERS. We can always do more with more resources. We believe we're actively servicing this industry as a current priority of the Secretary and the administration. As far as dollar amounts, it is difficult to speculate as technology and services and actual products being exported have different values assigned to them. I would say generally from the International Trade Administration we have data that estimates that for every dollar invested in International Trade Administration programs, we generate $56 worth of exports.

Mr. MATSUI. Ms. Wince-Smith, now the President has repeatedly stated that he wants the U.S. to be the leader in exporting clean tech to other Nation's. However, international competitors like China and Germany are exporting substantially more clean tech energy products. I know I look at solar fuel cells and all of that.

In your opinion, would this legislation provide the tools and resources to boost clean tech for its competitiveness in exporting their products and services?

Ms. WINCE-SMITH. Like my colleagues, I believe it's a very important first step, and many of the provisions in the legislation in addition to the grant program that's been mentioned are really to accelerate the tools, the practices, the networks that small, medium-sized businesses need.

I think one of the other issues that we really have to address still is how do we stimulate the production in the United States on a viable scale that it can go out globally. And you know that is a

very, very serious part of this because in order for these new clean tech innovators to have a scale, they really have to have access to deep equity and debt capital and that gets into a whole broader set of issues.

Ms. MATSUI. Understood. And I think Mr. Crawford has been experiencing that himself.

But as a small business person, you are excited about the fact that we are having a focus on clean tech exporting as I understand, because it does—it is part of the picture so to speak, it is not the complete picture obviously, but it is part of the picture.

Anyway. Thank you very much and I yield back the balance of my time.

Mr. RUSH. The chair thanks the gentlelady.

The chair thanks all of the witnesses who have participated in today's hearing, and the chair particularly thanks Ms. Saunders. You have been very patient with us and you have been very giving of your time and your contributions as it relates to your expertise. And some of your statements are very provocative and certainly we will take all of your statements to heart as we proceed with this legislative process.

The chair thanks you and appreciates you very much. Thank you and God bless.

[Whereupon, at 12:49 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Congressman Gene Green
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
Hearing on the Foreign Manufacturers Legal Accountability Act (Sutton) and Clean Energy Technology Manufacturing and Export Assistance Act (Matsui)
June 16, 2010

Mr. Chairman, thank you for holding this hearing and thank you to my colleagues Ms. Sutton and Ms. Matsui for introducing these important pieces of legislation. It is important that we closely examine the issues that these bills raise.

As a cosponsor of the Sutton bill, I have considerable concerns about the quality of our imports. I am disturbed by the recent significant increase in imported products that have been found to pose a risk to consumers and have resulted in recalls. In 2007, the CPSC recalled the highest number of products in 10 years. Of those recalls, 82% of them involved imported products. Of these recalled imported products, 74% originated in China. As a direct result of poor quality control by foreign manufacturers, primarily in China, our nation's consumers are placed in peril and our federal regulatory agencies, such as the CPSC must spend already scarce resources to protect us.

While challenges remain to encourage our trading partners to implement stronger safety and quality standards, those affected by these dangers are left with little recourse in our court system. Victims have little ability to provide service of process, aside from pursuing the costly and time consuming method laid out in the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, and jurisdiction is difficult to establish in our courts.

This bill fixes these shortcomings and provides a way to hold foreign manufacturers accountable. It accomplishes this by insisting that foreign manufacturers and producers that import products designate a registered agent who is authorized to accept service of process here. When an entity registers this agent, it is accepting the jurisdiction of the state and federal courts of the state in which the agent is located. If a foreign manufacturer fails to designate a registered agent, the Act prohibits their products from being imported to the United States.

The other bill we are examining today, the Clean Energy Technology Manufacturing and Export Assistance Act, addresses the alarming rate with which clean energy jobs are moving overseas. As our nation, and the world, moves toward using more diverse sources of energy, it is critical that we seize this opportunity to spur domestic job creation. We must pursue increasing our domestic manufacturing capabilities to produce clean energy technologies for use in this country and to export to others.

Currently, there is a staggering imbalance between the level of clean energy technology products and services exported by our country and other countries such as China and Germany. Additionally, few of the leading clean technology companies are based in this country. Without a doubt, this justifies some scrutiny of this issue. And, I believe legislative action is necessary to help our clean technology sector grow and create jobs in Texas and across the country. As President Obama correctly noted last night, "countries like China are investing in clean energy jobs and industries that should be here in America."

Ms. Matsui's bill takes necessary steps toward accomplishing this. It creates a fund administered by the International Trade Administration within the Department of Commerce to encourage growth within our domestic manufacturers of clean energy technologies.

I am pleased that these panels of expert witnesses have agreed to testify today. I believe that they all provide valuable perspectives on these bills. As the Committee moves ahead in addressing the issues raised by our witnesses and these bills, I look forward to working with my colleagues to craft legislation that will accomplish the goals that are in the best interests of our constituents, workers, and our economy.

Mr. Chairman, thank you again for your leadership on these issues. I look forward to hearing the testimony of these witnesses.

Statement of the Honorable Joe Barton
Ranking Member, Committee on Energy & Commerce
Subcommittee on Commerce, Trade and Consumer Protection
Hearing on
H.R. 4678, the "Foreign Manufacturer Accountability Act of 2010"
and
H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act"

Thank you, Mr. Chairman.

The first of two bills we will discuss today is H.R. 4678, the "Foreign Manufacturer Accountability Act of 2010." This legislation would mandate that foreign manufacturers consent to jurisdiction under U.S. courts, and establish a registered agent to receive service of process in order to sell their goods in America.

First, let me say I think we can all agree that in a perfect world everyone should be held responsible for their wrongdoing, no matter where they are. Although this bill was written with that goal in mind, I have serious concerns about the practical effect of the bill. I fear it may actually undermine U.S. companies involved in international trade. Consultation with industry has indicated that American importers and customs brokers, not their contacts abroad, will most likely be responsible for meeting the bill's registered agent requirements. . The bill would simply create another layer of bureaucracy and higher compliance costs for U.S. industry and their suppliers.

Aside from increased compliance costs and administrative burdens, I question whether the bill will have any significant impact on foreign manufacturers' compliance with our laws or their availability to our citizens in court. Although the bill would force foreign manufacturers to consent on paper to our laws, our courts could still not force foreign companies abide by the judgments of U.S. courts.

I also think we should examine how this law would affect our exporters if we were to encourage other countries to pass similar laws. Some of our trade partners are less scrupulous than others and we should be prudent in considering whether our trading partners will reciprocate, and what reciprocity would mean for U.S. exports.

Finally Mr. Chairman, I believe we should consider the legality of this measure. After speaking with experts, I understand this legislation could run afoul of WTO regulations for equal treatment of foreign and domestic goods.

The second bill we will explore today is H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act." As with H.R. 4678, I believe this bill was designed with the best of intentions – narrowing our trade deficit in the clean energy technology arena – but this measure, also like H.R. 4678, misses the mark.

Mr. Chairman, there are three primary reasons we have a trade deficit in this area and none of them would be impacted by this allocation of $75 million in taxpayer funds. We have a trade deficit because of the cost of labor in other countries versus ours, because we lack access to the necessary natural resources - such as rare earth minerals - in the U.S., and because other markets have erected barriers or are simply closed to our energy products.

I think it's a fair observation that the dramatic gap in labor costs is the chief reason companies move their work overseas. This bill, however, simply ignores the fact of life that workers in China make less than a $1 per hour and U.S. workers make $30 an hour. As that isn't likely to change soon, spending $75 million we don't have for something we can't get just doesn't seem like a sound idea.

This fund also cannot create natural resources in the U.S. that are used in these products. And nothing in the bill makes it easier to open a new mine and extract the resources we do have. If we do not increase access to those domestic materials we can find here, this fund will only serve to subsidize our competitors by forcing domestic vendors to purchase materials and components from international firms. In the end, this scheme could actually widen our trade deficit rather than narrowing it.

Fundamentally, Mr. Chairman, I believe in our market and the capitalist system on which it is based. I don't believe we need to create a government program to replace what private firms now capably do on their own. I agree the government has a role in increasing exports, but it is the job of the Federal government to fight against protectionist barriers and to pry open foreign markets to our products. Unfortunately, the Obama administration seems markedly unenthusiastic about any of the pending trade agreements.

The unhappy truth is that this fund cannot make up for the absence of a serious trade policy. . Unless we actually open markets through successful trade

negotiations, we will have fewer and fewer places outside the U.S. where our companies can sell their products and services. For markets that may be open to U.S. companies, our government must eliminate tariffs and other trade barriers or we can't expect to be competitive market participants.

I look forward to hearing from our two panels of witnesses today and exploring these questions further.

Thank you, Mr. Chairman. I yield back.

"Legislative Hearing on H.R. 4678, the Foreign Manufacturers Legal Accountability Act"
Committee on Energy and Commerce
Subcommittee on Commerce, Trade and Consumer Protection
June 16, 2010

Responses of Mr. Jeremy Baskin to Questions for the Record from Ranking Member Joe Barton[1]

1. **Yes or No please. Do you believe American companies that sell their products abroad should submit to the legal authority of foreign courts?**

   Response: Yes, if there is reciprocity. CPSC defers to the work of the Office of the U.S. Trade Representative, the Department of State, the Department of Commerce, and other responsible agencies in negotiating agreements with foreign governments on this issue.

2. **You mention a number of cases where the CPSC was requesting information from Chinese drywall manufacturers, and the requests were returned denied and unopened. Would this bill allow the CPSC to force foreign companies to comply with information requests?**

   Response: The proposed legislation would provide CPSC with a mechanism to put pressure on a domestic party to seek this information from the foreign manufacturer.

3. **Do you have a ballpark estimate for how many foreign manufacturers of consumer products this bill would apply to? What other means does the CPSC have available to ensure only compliant products are sold in the U.S.?**

   Response: CPSC does not currently maintain a registry of foreign manufacturers of consumer products. Therefore, CPSC is unable to provide a current estimate of how many individual foreign entities would be covered by the proposed legislation.

   CPSC currently has authority to stop noncompliant articles at the ports and require their exportation or destruction. It has recall authority to remove noncompliant products from the supply chain. In addition, the Commission has stringent civil penalty provisions to pursue against parties who would sell or distribute noncompliant products.

4. **Scam artists will evade the law and reconstitute themselves. For smaller fly by night manufacturers in foreign countries, would this legislation stop them from starting a new business with a new name?**

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[1] This is a staff document, and has not been reviewed or approved by, and may not necessarily reflect the views of, individual CPSC Commissioners.

Response: The legislation cannot stop that practice (no legislation can), but it will make those individuals more easily identifiable. Each new foreign manufacturing entity covered by the proposed law would be required to appoint an agent to accept service of process. Otherwise, that business would not be able to import its products into the United States. Furthermore, domestic agents engaging in due diligence could identify these companies and decline to do business with them, thereby making it more difficult for them to import.

a. **You state it is rare sentiment for companies to refuse to pay compensation imposed by a court, despite the legal advice of one Chinese attorney. How big a problem is the lack of a registered agent in the US? Even if the company had a registered agent, is there anything to compel them to pay court ordered fines or penalties?**

Response: Having the registered agent will not serve to compel the company to pay fines or penalties, but *not* having the agent will bar that company from importing. Requiring the agent can serve as an incentive to submit to U.S. legal authorities and come forward and pay legally assessed fines and penalties.

5. **Importers or distributors in the U.S. are considered the manufacturer for purposes of compliance under the Consumer Product Safety Act. What liability attaches to the importer or distributor?**

Response: Importers and distributors can incur civil monetary penalties of up to $15 million under the CPSA. Importers are required to have bonds as a condition to import. If importers distribute noncompliant imported products, they can incur money damages under those bonds in addition to civil monetary penalties that might be assessed and collected. CPSC can ask CBP to seize and forfeit noncompliant imported products.

6. **Do you believe that this bill will have a significant improvement on product safety? Please explain.**

Response: This new powers contained in this legislation would provide an additional tool in the arsenal of CPSC's compliance measures. This, in turn, permits greater oversight over imported products.

7. **Do you have any estimate for what threshold the CPSC might establish for the minimum size requirements in the bill?**

Response: Not at this time. This issue would require careful regulatory consideration by the full Commission and should be resolved in collaboration with other agencies that will have this service of process requirement.

8. **Section 4 of the bill requires foreign manufacturers who make "any part" of a covered product or "any part" of a component part of a covered product to have a registered agent in the United States before said covered product or component part can be legally imported. How far down the supply chain would this requirement stretch?**

    a. **Could companies producing the raw materials that a covered product is made from be required to have a registered agent in the U.S. before the covered product can be imported?**

    Response: The Department of Homeland Security (DHS) is empowered to promulgate the regulations governing this section. CPSC cannot speculate on how DHS would interpret this provision.

    b. **Please describe how the breadth of the registered agent requirement could affect the U.S. export and import industries as well as global trade relations.**

    Response: CPSC is not in a position to speculate on the impact of the legislation on global trade relations.

9. **Holding manufacturers accountable – whether they are domestic or foreign – is a worthy goal.**

    a. **How does the legislation change the current applicable laws that make the foreign company more accountable in the U.S.?**

    Response: As noted in the responses to question 4, having the registered agent will not serve to compel the company to pay fines or penalties, but *not* having the agent will bar that company from importing. This will provide an incentive to accede to U.S. legal authorities and come forward and pay legally assessed fines and penalties.

    b. **If a judgment is rendered against a foreign manufacturer, what does it take to enforce the judgment? Can a judgment against a company be enforced more easily because of this legislation or will it still require a company to be a responsible party?**

    Response: Currently, service of process against a foreign manufacturer is usually affected under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (commonly called the "Hague Service Convention"). In many cases, service under this convention is a cumbersome and time-consuming process.

    This legislation does not affect the Hague Service Convention. In addition, enforcement of the judgment in a foreign country will not be affected. However, the legislative may provide an incentive for foreign manufacturers to submit to U.S.

jurisdiction by tying designation of an agent and accepting service of process to the continued future ability to import products into the United States.

c. **How often do large foreign companies that sell products in the U.S. avoid legal proceedings? Can they continue to sell in the U.S.?**

Response: CPSC does not currently attempt to track the number of foreign consumer product manufacturers that seek to avoid service of process in domestic civil litigation.

10. Is it fair to say this legislation is targeted at the companies with no U.S. presence?

Response: Depending on how the legislation is implemented, it could include companies that have no or little U.S. presence.

a. **The more a company depends on the U.S. market for its business, isn't it more likely they will need to respond to a US judgment if they want to continue business in this country? If that is the case do you need to require an agent for service of process?**

Response: Yes. Requiring the designation of an agent to accept service of process will act as incentive for those companies with little or no presence in the U.S. to submit to jurisdiction so that they will be able to legally import products in the future.

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

July 13, 2010

Ami Gadhia
Policy Counsel
Consumers Union
1101 17th Street, NW, Suite 500
Washington, DC 20036

Dear Ms. Gadhia:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

Consumers Union/Consumer Federation of America Responses to Questions for the Record from the Honorable Joe Barton, re: H.R. 4678, The Foreign Manufacturers Legal Accountability Act

1. Yes or No please. Do you believe American companies that sell their products abroad should submit to the legal authority of foreign courts?

If they are availing themselves of the foreign market, yes.

2. Given that there is no method to enforce U.S. court judgments; to what degree will this bill increase the ability of consumers to be compensated if they still only have access to the assets of U.S. based companies?

Depending upon the relationship of the U.S-based company to the foreign manufacturer, it is possible that a consumer may be able to enforce a judgment against the U.S.-based entity. The U.S.-based entity, again depending upon its legal relationship with the foreign company, could then be reimbursed for the judgment by the foreign company. The foreign country may also help enforce the judgment.

3. You testified that the inability of consumers to obtain compensation from foreign manufacturers hurts industry, because liability factors into their cost of business for U.S. companies, but not for foreign ones. Will this bill change this situation, considering that consumers will still only have enforcement power to obtain compensation from American companies?

This bill will change this situation. Currently, foreign manufacturers are, in many cases, completely "scot-free" from any responsibility to our civil justice and regulatory system. The knowledge that they cannot be hailed into court, or brought before a U.S. agency, factors into their business plans – they can use toxic materials, or take other dangerous shortcuts, all to cut costs because they know they do not have to submit to U.S. jurisdiction. By requiring foreign manufacturers to submit to such jurisdiction in the U.S., you are ensuring that U.S. manufacturers who do not cut corners to save money do no lose out to foreign companies that sell their potentially dangerous products at lower prices. American companies will actually have a fighting chance to compete with foreign manufacturers.

4. You stated in your testimony that it is untenable to have a system of accountability that relies upon altruistic and rare behavior. Isn't that similar to the system for enforcement of U.S. judgments if this bill passed, given that there is no mechanism for enforcing U.S. judgments abroad?

Enforcing a U.S. judgment would not simply be a case of relying on altruistic and rare behavior. Sometimes, the foreign country may help enforce the judgment. The U.S. assets of a foreign company doing business in the U.S. may also be subject to seizure in order to satisfy a judgment. But regardless of how enforcement occurs, the fact that a judgment has been rendered against a foreign manufacturer helps put the company on notice to make safer products. The U.S. legal system is also put on notice, so that future imports from that company may trigger restrictions of

future unsafe products reaching U.S. consumers. This legislation does not directly touch enforcement of judgments (doing so may be a WTO violation), but does lessen some of the jurisdictional and bureaucratic hurdles a consumer must overcome before he or she can even get a judgment entered against a negligent foreign manufacturer.

5. It's my understanding that the U.S. importers who purchase foreign goods and brings them into the U.S. would be the ones capable of and responsible for facilitating a recall. However, you mentioned in your testimony that the bill's provisions mandating registered agents for foreign manufacturers would help the CPSC with recalls. Could you expand on that?

Requiring a foreign manufacturer to register an agent for service of process and for regulatory issues, such as safety recalls, will ensure that the right entity is contacted by the agency for a recall. In some cases, the importer may be the entity in the best position to facilitate a recall of a foreign-made product, but in other cases, the importer may not be the best party. The importer may also be a "fly-by-night" operator, who may have changed names in the weeks, months, or years between the importation of a product and the need for a safety recall. Tracking this importer might therefore prove difficult. A registered agent for service of process, on the other hand, would have more up-to-date information about how best to contact a foreign manufacturer for the purposes of a recall.

6. You mentioned that this bill could act as a deterrent against irresponsible foreign manufacturers. However, if a foreign manufacturer is going to willingly or recklessly make a defective product, and thereby do significant damage to their business reputation, what is the likelihood that they will be deterred by a court with no real power over them?

Right now, our courts have absolutely no power over foreign manufacturers, because the manufacturers are not subject to jurisdiction here in the U.S. Therefore, under current law, a consumer injured by a defective or dangerous product has no chance at holding the foreign manufacturer responsible. But the bill will change this, and give courts – and injured consumers – a chance to hold these companies responsible, because consumers and federal agencies will at least be able to hail these companies into court. Even after a verdict against them, it is possible for a foreign – *or a domestic* – manufacturer to flagrantly violate our laws, and to try and evade paying a judgment against them. But this legislation would at least give injured consumers the ability to bring suit against these manufacturers, so they have a chance at obtaining a judgment to enforce – a step further than is available today.

7. Section 4 of the bill requires foreign manufacturers who make "any part" of a covered product or "any part" of a component part of a covered product to have a registered agent in the United States before said covered product or component part can be legally imported. How far down the supply chain would this requirement stretch?

    a. Could companies producing the raw materials that a covered product is made from be required to have a registered agent in the U.S. before the covered product can be imported?

The intent of the legislation as we understand it is a basic principle of fairness: if a company is going to avail themselves of the U.S. consumer market, then they should play by the same rules that American companies play by. That means being a part of our civil justice and regulatory systems if their products injure people. If a consumer is injured by a finished product, or if a federal agency is recalling a finished product, but the finished product manufacturer disavows all responsibility for the defective product and claim that a raw material or component manufacturer is responsible, it would be a perverse outcome if the consumer or the federal agency could not hold the right party responsible simply because component parts were not covered by the legislation.

b. Please describe how the breadth of the registered agent requirement could affect the U.S. export and import industries as well as global trade relations.

We believe that this legislation will positively impact American manufacturers, because they will be able to complete on a level playing field with foreign manufacturers. American companies will not lose out, e.g., on selling drywall to contractors because theirs is more expensive than foreign-made drywall because the American manufacturers refused to take safety shortcuts. Stronger American companies could conceivably be better able to take part in export markets around the globe.

Some concerns have been raised about whether this bill violates World Trade Organization (WTO) agreements. WTO violations occur when foreign entities are treated differently than domestic ones under U.S. laws. This legislation seeks to do the opposite. This legislation actually creates an equal playing field by holding all manufacturers, no matter where there are based, responsible for the safety of the products they sell in the United States. Manufacturers as well as the products produced and sold in the U.S. would be treated equally under this legislation.

8. Holding manufacturers accountable – whether they are domestic or foreign – is a worthy goal.

a. How does the legislation change the current applicable laws that make the foreign company more accountable in the U.S.?

We do not believe that current applicable laws make foreign companies more accountable in the U.S. As foreign companies are not subject to jurisdiction here in the U.S., it is primarily their good will that currently makes them accountable to U.S. consumers.

b. If a judgment is rendered against a foreign manufacturer, what does it take to enforce the judgment? Can a judgment against a company be enforced more easily because of this legislation or will it still require a company to be a responsible party?

Sometimes, the foreign country may help enforce the judgment. The U.S. assets of a foreign company doing business in the U.S. may also be subject to seizure in order to satisfy a judgment. But regardless of how enforcement occurs, the fact that a judgment has been rendered against a foreign manufacturer helps put the company on notice to make safer products. The U.S. legal system is also put on notice, so that future imports from that company may trigger restrictions of

future unsafe products reaching U.S. consumers. This legislation does not directly touch enforcement of judgments (doing so may be a WTO violation), but does lessen some of the jurisdictional and bureaucratic hurdles a consumer must overcome before he or she can even get a judgment entered against a negligent foreign manufacturer.

c. How often do large foreign companies that sell products in the U.S. avoid legal proceedings? Can they continue to sell in the U.S.?

Some large foreign companies with a U.S. presence delay and make legal proceedings unnecessarily expensive for harmed U.S. consumers by claiming that their parent company - located overseas - was responsible for the design or manufacturing defect of a product. For example, we have heard of many instances of well-known foreign car manufacturers forcing U.S. consumers to serve process through the Hague Convention (spending tens of thousands of dollars extra) to be able to reach their overseas parent company, and then having to litigate further that there is appropriate jurisdiction over that company before these consumers even get their day in court. Though these companies have well-established U.S. subsidiaries, their ability to evade liability and make injured or harmed consumers jump through procedural hoops allows them to continue profiting off of U.S. consumers while at the same time skirting the very U.S. laws by which their U.S. counterparts must abide.

9. Is it fair to say this legislation is targeted at the companies with no U.S. presence?

a. The more a company depends on the U.S. market for its business, isn't it more likely they will need to respond to a U.S. judgment if they want to continue business in this country? If that is the case do you need to require an agent for service of process?

You do still need to require an agent for service of process, because foreign companies may still attempt to take shortcuts on safety if they know there will never be consequences – i.e., being brought into our civil justice and regulatory systems – for their actions. Even if a company is availing itself of the U.S. market, as you describe, they will never be legally reachable if they do not have an agent for service of process here in the U.S. An agent for service of process is a simple but vital prerequisite for being held responsible for following U.S. laws.

Consumers Union
Nonprofit Publisher of Consumer Reports

June 21, 2010

Honorable Bart Stupak
2268 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Stupak:

This letter is in response to your inquiry during a hearing before the House Energy & Commerce Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010 regarding H.R. 4678, The Foreign Manufacturers Legal Accountability Act. During the hearing, you asked whether, in addition to requiring foreign manufacturers to have a U.S.-based agent for service of process, it would also make sense for foreign manufacturers to have an entity in the U.S. who had substantive knowledge of its products in order to aid U.S. agencies in the event of a recall of a product covered by H.R. 4678.

Consumers Union believes that such entities could in fact assist the federal agencies whose products are the subject to the bill's requirements to more effectively and efficiently conduct recalls. We further believe that Committee report language accompanying H.R. 4678 could address this point; we would be happy to assist however we can regarding the drafting of such report language.

Sincerely,

Ami V. Gadhia

Ami V. Gadhia
Policy Counsel
Consumers Union

Cc: Honorable Henry Waxman, Chair Honorable Joe Barton, Ranking Member
House Energy & Commerce Committee

Honorable Bobby Rush, Chair Honorable Ed Whitfield, Ranking Member
Subcommittee on Commerce, Trade, & Consumer Protection
House Energy & Commerce Committee

Honorable Betty Sutton

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

July 13, 2010

Andrew F. Popper
Professor of Law
Washington College of Law
American University
4801 Massachusetts Avenue
Washington DC, 20016

Dear Professor Popper:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

1. **Yes or No please. Do you believe American companies that sell their products abroad should submit to the legal authority of foreign courts?**

Since you requested a yes/no response, the answer is "yes." Obviously, there are great variations in foreign legal systems and a one-word answer does not encourage a discussion of those factors.

As noted in several answers below, principles of comity are of consequence in all foreign affairs – especially trade – and outright rejection of all non-U.S. legal systems (or a "no" response to your question) by all companies doing business abroad does not seems a wise approach – nor a safe generalization.

In a number of counties where U.S. products are sold, U.S. companies are already subject to the domestic legal system of the place the injury occurs. In that sense, H.R. 4678 would close a loophole in the U.S. legal system by creating accountability obligations consistent with those that exist abroad.

For example, consider the new Chinese tort law which is modeled, in part, on the law of several U.S. states. Articles 43, 45, and 47 establish both punitive damages and strict liability which, commentators report, will have "significant ramifications for companies doing business in China. . . ." Roy Zou and Xi Liao, "China Enacts Systematical Tort Law,"
http://www.lexology.com/library/detail.aspx?g=4f49b26b-c799-461b-b1ce-e15223ecfe53 (site visited July 19, 2010);
See: "Psst. China Has Tort Laws. Oh, And They Are Relevant For Foreigners," China Law Blog – China Law For Businesses
http://www.chinalawblog.com/2010/03/psst_china_has_tort_laws_oh_an.html
(site visited July 19, 2010).

U.S. firms are already advising their clients about this reality:

> China's new Tort Liability Law, another step in the Chinese government's strategy for dealing with China's legacy of environmental damage, represents a shift toward a tougher Western-style tort system. The law is in fact harder on defendants than laws inmost places around the globe, including the U.S. and Europe. *Those doing business in China will need to understand the potential for increased liability and the potential need to expand coverage* by the time the law goes into effect July 1. "China Introduces Tough New Tort Laws."
> http://www.willis.com/documents/publications/Services/International/2010/Intl_Alert_China_New_TORT_Law.pdf (Site visited July 19, 2010) (emphasis added)
>
> The Tort Liability Law is a new development in China's environmental laws and *will have significant ramification on companies doing business in China.*

> Companies should be aware that they may face heightened exposure to environmental tort claims notwithstanding full compliance with China's environmental laws and regulations, and defending against such claims can be costly. How Chinese courts will interpret and enforce the Tort Liability Law remains to be seen, but an increase in environmental tort claims in the future can be expected. Kaichen Xu, "China Adopts Environmental Tort Law," http://www.omm.com/newsroom/publication.aspx?pub=921 (Site visted July 19, 2010). (emphasis added)
>
> [T]he stated purpose of the law is "protecting the lawful rights and interests of civil law parties, explicitly defining tort liability, preventing and punishing torts, and promoting social harmony and stability." *Companies active in the China market and their insurers should revisit insurance policies and other risk management measures in light of this important development.* "China Passes Tort Law: A Brave New World of Punitive Damages?" http://www.gtlaw.com/NewsEvents/Publications/Alerts?find=132305 (Site visited July 19, 2010) (emphasis added)

For the Paul Weiss advisory, see, "New Tort Law in China," http://www.paulweiss.com/files/Publication/092ddc34-a1e8-4d59-9a8b-db68bed8f433/Presentation/PublicationAttachment/10944494-5b87-4230-98bc-dd1d9052b110/PW-ALB10-5.pdf (Site visited July 19, 2010)

For the Taylor Wessing advisory (which has an elaborate discussion of the law and encourages foreign companies doing business in China to secure in-country product liability insurance), see, Ingo Vinck & Yimin Chen, "Milestones: China's New Law on Tort Liability." http://www.taylorwessing.com/newsletter/china/archive/china-alerter-april-2010/milestones-chinas-new-law-on-tort-liability.html (Site Visited July 19, 2010)

European countries following Article 5(3) of the Brussels I apply tort law constructs to U.S. companies.

In Japan (pursuant to Article 15(I) of the Code of Civil Procedure), there is an in-country jurisdictional base for persons injured by products manufactured abroad.

Thus, H.R. 4678 is in-step with our major trading partners and does not impose legal obligations on foreign manufacturers any more than (a) are imposed on domestic sellers, and (b) any more than are imposed on U.S. companies doing business abroad.

2. It is my understanding that there is currently no method to enforce U.S. judgments abroad other than 'good will'. Keeping that in mind, how much accountability do you believe this bill will assign to foreign manufacturers considering that it cannot be enforced?

I do not agree with the premise of the question; there is more to enforcement than a "good will hope" of compliance. Thus, I believe that H.R. 4678 will generate a meaningful measure of accountability – *which strikes me as the main reason foreign manufacturers are fighting this legislation.*

Moreover, it makes perfect sense that this bill is not focused on enforcement of judgments against foreign manufacturers – the first step is to get them into court. Thus far, foreign manufacturers have evaded the U.S. legal system. It's time to put that to a stop.

After this bill becomes law, a number of things are likely to happen, all of which benefit U.S residents.

First, foreign companies will have to give thought to making their products safer – which is, in the end, the driving force behind the tort system. The current system gives foreign manufacturers a free pass – and the results speak for themselves: freed of any obligations under our system of civil liability, there have been a consistent and dangerous flow of unsafe foreign products.

Second, injured U.S. consumers or business who seek to hold accountable a foreign manufacturer will not have to waste time and resources serving process through the Hague Convention. The potential for reasonable access to court *at a reasonable cost* has a great incentive value in terms of the quality of goods and services.

Third, as jurisdiction is secured and judgments are entered under the terms of this bill, the premise of this question will be tested. Enforcement of judgments *may* require cooperation with foreign legal systems – but I would not assume such cooperation will be denied.

Well-established principles of comity essential to the entire diplomatic process actually suggest the opposite result. Moreover, large entities doing business in the U.S. often have assets in the U.S. – and those assets can be seized to enforce an unpaid judgment. This is a powerful incentive to comply with the terms of a judgment.

Finally, one interpretation of this question presupposes that if a judgment is unfulfilled, it has no value. That is a false assumption. A judgment is a public record and can have powerful consequences for the foreign provider. Market perception and market value are sensitive; a finding against a manufacturer and entry of a judgment affects public perception of the value and safety of a product. This is powerful tool in creating incentives for safer, more efficient, and more reliable products.

3. You testified that there are "tens of millions of defective, dangerous, and in some instances deadly goods produced abroad for sale in U.S. markets." If true that is an alarming figure. What time scale is that production figure over, and what studies are you referencing?

I began research on the question of the range and nature of the problem of defective goods in 2008. I referenced in my testimony my article in the *Product Safety and Liability Reporter* from 2009 which lists some of the defective products. If anything, "tens of millions' is an understatement. FORBES MAGAZINE, not exactly a forum for the consumer voice – and not given to hyperbole – has called the number of defective products *colossal.*

President George W. Bush's Interagency Working Group on Import Safety, established in 2007, reported there are $2 trillion worth of products imported into the U.S. and that there is a need to raise safety standards for foreign products and for establishing identification and enforcement mechanisms for foreign products.

The number of foreign manufactured defective products sold in the U.S. is, I suppose, subject to debate. However, the notion that it is less than "tens of millions" simply is not true. It is more – far more. To give a sense of the magnitude of the problem, I have listed below a very small number of online pieces from detailing certain defective goods.

> http://www.hktdc.com/info/vp/a/ctde/en/1/2/1/1X06ZQ6O/China-Trade/CPSC-Recalls-Various-Products-Made-in-Mainland-China.htm
>
> 9 July 2010
> CPSC Recalls Various Products Made in Mainland China
>
> The CPSC has announced the following recalls of products made in mainland China.
>
> Baby Walkers. Suntech Enterprises Inc. has recalled about 8,400 baby walkers because they can fit through a standard doorway and fail to have sufficient protection to prevent falls downstairs. The recalled baby walkers have a plastic frame supported by four wheels and eight brake pads. They were sold in blue, pink and green with a white activity tray and a patterned vinyl seat. Item number WK110 or WK112 is printed on the side of the packaging. These baby walkers were sold at small juvenile product stores in California, Illinois, New York and Texas from January 2007 through December 2009.
> http://www.cpsc.gov/cpscpub/prerel/prhtml10/10269.html
>
> Cribs. Seven manufacturers (Child Craft Industries Inc., Delta Enterprise, Evenflo, Jardine Enterprises, LaJobi, Million Dollar Baby and Simmons Juvenile Products Inc.) have issued separate recalls affecting some 2.2 million cribs to address drop-side hazards and other hazards that affect the safety of young children. Details on the recalls affecting mainland Chinese merchandise are provided below.

Delta Enterprise has recalled about 747,000 drop-side cribs and an indeterminate number of fixed and drop-side cribs using wooden stabiliser bars. These cribs were made in mainland China, Indonesia, Thailand and Croatia and sold at children's product stores nationwide and on-line from January 2000 through May 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10273.html

Evenflo is recalling some 750,000 Jenny Lind cribs with model numbers 012614, 0126141, 012615, 012616, 012617, 014614, 014615, 014616, 014617, 015614, 015615, 015616, 015617, 0161614, 0161615 and 0161617. These cribs were made in mainland China and Mexico and sold by children's product stores and various other retailers nationwide from January 2000 through November 2007.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10274.html

Jardine Enterprise Ltd. has recalled about 103,000 drop-side cribs with model numbers 0102B00 (Natural Olympia Single), 0102P00 (Black Olympia Single), 0108C00WP (White Capri Single), 0108L00WP (Antique Walnut Capri Single), 0115S00 (Rubbed Black Claremont Single), BC-33 (Dark Pine 3-1 Convertible), BC-66 (White 3-1 Convertible), DA0930B (Walnut Single), DA333BC (Natural Madison Single), DA616BC (Dark Pine Siera 2 in 1), DA616BN (Natural Siera 2 in 1), DA618BC (Natural Hampton), DA833BC (Natural Madison Single), DV601BC (Dark Pine Windsor Single), DV623BC (Cherry Windsor Single) and DV628BC (White Windsor Single). These cribs were manufactured in mainland China and Vietnam and sold at Babies "R" Us, Toys "R" Us, Geoffrey Stores and KidsWorld stores nationwide from January 2002 through June 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10275.html

LaJobi has announced a recall for approximately 306,000 Bonavita, Babi Italia and ISSI drop-side cribs. The cribs have drop-side hardware that contains metal or plastic pegs that are recessed into either the drop side or the headboard and footboard of the crib. A label on the headboard of the crib identifies the manufacturer as LaJobi. These cribs were made in mainland China, Italy, Vietnam, Thailand and the United States and sold at children's product stores and by various other retailers nationwide from May 1999 through May 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10276.html

Million Dollar Baby has recalled about 156,000 drop-side cribs under the brand names Million Dollar Baby, Baby Mod and Da Vinci. The model names included in this recall are Alexandria, Alpha, Bailey, Caleb, Jenny Lind, Lauren, Naomi, Oxford, Pine Canopy, Sleigh, Twinkle, Anastasia, Annabelle, Kendall, Kirsten, Leonardo, Michelangelo, Robin, Roxanne and Serena. These cribs were made in mainland China and Taiwan and sold by

children's product stores and other retailers nationwide from January 2000 through March 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10277.html

Simmons Juvenile Products has issued a recall for about 50,000 drop-side cribs with model numbers 011641, 011671, 011941, 015341, 016061, 016771, 016821, 016831, 017201, 017211, 017351, 018500, 018501, 018502, 018510, 018511, 018512, 026261, 028061, 028081, 028180, 029061, 29062, 029071, 029180, 029561, 029562, 029571, 034060, 034560, 039180, 044091, 053091, 065071, 068261, 068271, 068561, 201060, 202060, 202080, 202180, 202181, 203060, 204060, 204180, 205060, 206060, 207060, 209560, 211060, 211080, 212060, 214060, 214080, 215060, 216060, 216070, 216080, 216180, 216180, 216570, 218060, 219560, 220180, 220181, 221060, 221070, 221070, 221077, 222060, 222070, 224060, 225060, 225070, 225080, 227560, 228060, 229060, 230060, 231070, 236180, 236187, 236188, 236189, 238060, 238069, 239180, 239187, 239189, 240060, 248069, 251060, 251069, 257060, 261060, 053091A and 251060M. These cribs were manufactured in mainland China, the United States, Indonesia, Croatia and Canada and sold by children's product stores and other retailers nationwide and on-line from January 2002 through February 2007.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10278.html

Youth Tiaras. Wilton Industries Inc. has announced a recall for about 7,300 children's tiaras because they contain high lead levels. This recall involves the Wilton Youth Tiara with a SKU number of 120-228. The tiara is silver-coloured with clear crystals. They were sold by Party City, Jo-Ann Fabrics, Ben Franklin Stores, Amazon.com and other retailers nationwide from June 2009 through April 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10279.html

Fireworks. Big Fireworks has recalled about 4,700 Super Lighting Rockets because they are overloaded with pyrotechnic composition, violating the federal regulatory standard for this product. This recall involves stick-type rockets with a 1.5-wide engine that is mounted on a 32-inch wood stick. The engine is wrapped in black paper with a background of the solar system and the writing "Super Rocket" in assorted colours. The recalled rockets were sold in packs of four and have item number GCR3150 printed on the front of the package and on the rocket engine. They were sold at fireworks stands and stores in Florida, Indiana, Pennsylvania and Michigan from November 2009 through June 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10281.html

Power Adapters. Radio Systems Corporation is recalling about 20,000 power adapters for heated pet beds because they can cause arcing between the coil spring and the metal connector when the connector is removed from

the bed. This recall involves the Class 2 transformers that were sold with PetSafe Heated Wellness Sleepers. The adapters are identified by the markings "PLUG IN CLASS 2 TRANSFORMER," "MODEL NO: K12-800" and have a spring coil covering the length of the electrical wire that goes from the sleeper. Power adapters without spring coils are not affected by this recall. The recalled adapters were sold at pet specialty stores and by catalogue and on-line retailers nationwide from September 2006 through April 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10283.html

Notebook Computers. Sony Electronics Inc. is recalling about 233,000 Sony VAIO notebook computers because they can overheat and pose a burn hazard to consumers. The recalled products are VPCF11 series and VPCCW2 series notebook computers. These computers are available in many colours and have "VAIO" on the front outside panel. They were made in mainland China and the United States and sold at Best Buy, Costco, Frys, Amazon.com and Sony Style retail stores and sonystyle.com as well as by other electronics retailers and business suppliers nationwide. The recalled computers were shipped to consumers and resellers between January and April 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10284.html

Children's Jewellery. SmileMakers Inc. has issued a recall for about 66,200 charm bracelets and 2,200 rings because the metal substrate in this jewellery contains high levels of cadmium. This recall involves "Happy" charm bracelets and football rings. The "Happy" charm bracelet is composed of colourful beads on a small elastic band to which a metal charm in the shape of a butterfly, moon or sun is attached. The football ring is a small adjustable metal band to which a metal football charm is attached. These items were distributed at doctor and dentist offices nationwide from June 2005 through March 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10287.html

Drill Presses. Southern Technologies has recalled about 500 Powertec drill presses because wires in the motor housing can be pinched, posing a risk of electrical shock to consumers. This recall involves Powertec eight-inch drill presses with an AC powered laser. The model number is DP800 and can be found on the product specification label located above the handle on the right side of the machine. The recalled drill presses were sold exclusively at Blain's Farm and Fleet stores nationwide from November 2009 through February 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10288.html

Bicycles. Felt Bicycles has recalled approximately 2,100 bicycles because the bicycle's fork steer tube can break, causing the rider to lose control, fall and suffer injuries. The recall includes all 2009 Felt model B12, B16 and

S32 road bicycles. B12 bicycles are gloss silver/carbon and have carbon fibre frames with carbon fibre forks and aluminium steer tubes. B16 bicycles are matte black/red and have carbon fibre frames with carbon fibre forks and aluminium steer tubes. S32 bicycles are available in gloss white/red and have aluminium frames with carbon fibre forks and aluminium steer tubes. The recalled bicycles were sold at bicycle specialty stores nationwide from October 2008 through May 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10290.html

Laptop Batteries. Tekkeon Inc. has issued a recall for about 500 external laptop batteries because the battery cell can short-circuit and overheat, posing a fire hazard to consumers. The myPower ALL Plus External Laptop Battery is a universal rechargeable battery used to power laptop computers, MP3 players, mobile phones, DVD players and other portable devices. It is black with "Tekkeon" printed on the front and model number MP3750 printed on a label on the back. These batteries were sold by Amazon.com and other on-line retailers from September through December 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10744.html

Coin Purses and Jewellery. Daiso California LLC has recalled approximately 190 children's coin purses and jewellery because surface paint on the zippers of the coin purses and the clasps of the jewellery contain high lead levels. This recall involves coin purses with rainbow stripes and earrings and necklaces that have blue, pink, red, white and yellow coloured droplets. "The Coin Purse" and "Mobile Case Coin Purse" are printed on the tag attached to the purse. "Colorful Drop Accessory Bracelet" is printed on the front of the necklace packages and "Colorful Drop Accessory Pierce" is printed on the front of the earring packages. The tag and packaging have "Produced for Daiso Japan" on either the front or back. These items were made in mainland China and South Korea and sold at Daiso stores in California and Washington from May through December 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10292.html

Here is a CPSC circular with more information pertaining to defective foreign goods:

http://www.cpsc.gov/cpscpub/prerel/prhtml10/10115.html

U.S. Consumer Product Safety Commission - January 20, 2010

Graco Recalls Strollers Due to Fingertip Amputation and Laceration Hazards

Name of Product: Graco's Passage™, Alano™ and Spree™ Strollers and Travel Systems

Units: About 1.5 million. . . .

Manufactured in: China. . . .

Here is some additional online information on the volume of defective goods flowing in to the U.S.:

- On the recall of 900,000 Simplicity Cribs from China

http://www.reuters.com/article/idUSSP36172920080917

- On lead paint:

http://www.reuters.com/article/idUSWEN191320071025
"U.S. Recalls More China-made Products for Lead in Paint"

"NEW YORK (Reuters) - A slew of products made in China ranging from children's jewelry to cake decorations were recalled on Thursday because they contain excessive amounts of lead. . . .The recall of roughly 665,000 items announced by the Consumer Product Safety Commission (CPSC) includes about 38,000 Go Diego Go Animal Rescue Boats from Mattel Inc's Fisher-Price division. . . ."

- On children's jewlery:

http://www.fox8.com/news/wjw-news-teen-jewelry-recall,0,1228102.story
"About 137,000 pieces of imported children's jewelry sold at two stores popular with preteen girls — Justice and Limited Too — were recalled Tuesday for high levels of cadmium, the latest in a series of recalls involving the toxic metal.
The voluntary recall, announced by the U.S. Consumer Product Safety Commission, was the sixth callback since The Associated Press first released findings of an investigation into cadmium in children's jewelry."

- Here is the FORBES piece mentioned earlier:

http://www.forbes.com/2007/10/10/starbucks-china-recalls-markets-equity-cx_ml_1010markets29.html

"The U.S. Consumer Product Safety Commission has a new beef with China.

The CPSC released a statement on Tuesday announcing a voluntary recall of Starbucks (nasdaq: SBUX - news - people) children's plastic cups. The cups reportedly fracture easily, leaving sharp edges and broken pieces that pose a choking or laceration hazard to children.

Starbucks has received seven reports of the cups breaking, and in two instances children began to choke on the broken pieces. Though no injuries have been reported, Starbucks has asked that the products be taken away from tots, and will offer a complimentary beverage as an incentive to return the faulty products.

The Seattle-based coffee company's stock has dripped .8%, or 22 cents, to $26.55 in Wednesday trading. . . . The Starbucks incident is just one of a ***colossal group*** of CPSC recalls over the past few months due to more detection of defective and contaminated products manufactured in China. On September 11, the U.S. and Chinese Product Safety Agencies announced an agreement to improve the quality and safety of imported consumer goods, but since then many more recalls have been made. (See: Nothing Abstract About Big Bird) Chinese-made products ranging from Cub Scout badges, light fixtures, glitter candles, air purifiers, aluminum water bottles, key chains and baby cribs have all been recalled by the CPSC in recent weeks. (emphasis added). . . ."

- On massive quantities of dangerous and defective drywall:

http://www.manufacturing.net/News-Defective-Chinese-Drywall-Hits-Homeowners-Insurance-101509.aspx

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The websites above are from a very brief search on this topic conducted on July 15, 2010. These sites, as well as my research leading to the article cited I my testimony, confirm the statements made in the hearing.

4. As I understand it, this legislation subjects foreign companies to the jurisdiction of U.S. courts, but lacks any associated enforcement power. Given that it doesn't increase liability for the assets of any foreign company, won't plaintiffs still go after U.S. companies. i.e. those with the accessible deep pockets?

This question is answered in part in my response to Question 2.

Currently, product liability cases can and do result in liability of domestic companies – if the bill becomes law, that liability would either be transferred to or shared with foreign manufacturers and not borne solely by the U.S. company.

The question presumes that no foreign company will respect the jurisdiction of U.S. courts and that every foreign country will refuse to assist in the implementation of U.S. law. I do not believe that is a correct assumption. At the most basic level, U.S. assets of a foreign company doing business in the U.S. would be subject to seizure to satisfy a judgment.

Even if enforcement of judgments becomes an issue, I believe that the passage of this bill will force foreign entities to give thought to making their products safer – which is (as mentioned earlier) the driving force behind the tort system.

Finally, as noted in response 2, a judgment is a public record and can have powerful consequences for the foreign provider. Market perception and market value are sensitive; a finding against a manufacturer and entry of a judgment affects public perception of the value and safety of a product. This is powerful tool in creating incentives for safer, more efficient, and more reliable products – and will relieve pressure on U.S. manufacturers.

5. How can U.S. judgments against foreign companies be enforced if this bill passes?

See responses to questions 2 and 4.

In addition to the potent force of seizing domestic assets of foreign companies, the profound impact of a judgment on the market value or reputation of a product, and the well-established principles of comity that suggest that judgments will be enforced, there are other factors to consider. Once a judgment is entered, the whole of the U.S. legal system is on notice – and that includes regulation of imports. An unsatisfied judgment – coupled with a finding of defect – may well trigger restrictions that would limit or prohibit the import of a presumptively unsafe product.

In dealing with the very real problem of unsafe foreign goods coming into the U.S., President Bush's 20007 Interagency Working Group on Import Safety recommended the increased use of electronic track and trace technologies to identify the product source and points of distribution. (Report to the President page 39) Couple notice of defects with notice of unpaid judgments and the incentive on foreign manufacturers increases to become accountable and to avoid selling dangerous products (again, a primary feature of the tort system).

If there is an enforcement mechanism, does it worry you how similar provisions passed by foreign countries might affect U.S. importers?

That does not seem a dominant consideration. U.S. companies are already subject to foreign laws in a number of countries (see answer to question 1).

I do not see U.S. importers affected meaningfully by this bill – but I do see U.S. consumers finally having their day in court. The capacity to hold accountable the seller of a defective and dangerous product is the real consequence of this bill – not the conjectural impact on U.S. companies selling goods abroad.

6. Industry has informed us that U.S. importers will likely have to shoulder the compliance burden for establishing registered agents on behalf of their foreign counterparts. Keeping that in mind, wouldn't this bill hurt U.S. importers, instead of leveling the playing field as you stated in your testimony? Additionally, if foreign countries reciprocate, won't that place an additional compliance cost on U.S. exporters?

As to the first question, "no." This has been answered in 2, 4, and 5.

In addition, domestic importers will be able to require foreign manufacturers to designate a foreign agent in the United States. The U.S. companies will be relieved of liability – not have it increased.

As to the second question involving reciprocity or retaliation, please see answers to 1, 2, 4, and 5.

2. In your testimony you illustrated a scenario where a foreign producer cannot be sued or "haled" into court. My understanding is that once service of process requirements are met a court is authorized to move forward with a suit. It is also my understanding that the Hague convention on Service of Process, and failing that, Letters Rogatory can be used to serve process to generally all our major trading partners. Considering this, how prevalent currently is the scenario you described?

I would characterize the scenario from my testimony as common and troubling.

The problems with the Hague Convention and Letters Rogatory include inefficiency, time-consumption, and expense. Designation of a U.S. agent is simple and a regular part of doing business for all domestic companies. Today, foreign companies often use the Hague rules as a delaying strategy, even where they have sufficient presence here and could have been served with process.

HR 4678 allows consumers and businesses to bypass these obstacles. Requiring foreign entities to register their appropriate corporate identity together with the

products shipped to this country and to consent to jurisdiction in the U.S. would give injured consumers their right to their day in court and would short circuit complexity and inefficiency in the Hague model.

7. Section 4 of the bill requires foreign manufacturers who make "any part" of a covered product or "any part" of a component part of a covered product to have a registered agent in the United States before said covered product or component part can be legally imported. How far down the supply chain would this requirement stretch?

The legislation requires federal agency findings of volume and product designation. That is the process that will be used to determine which products or finished, processed, and/or assembled component parts are within the reach of the bill, should it become law. Component part liability is a regular and important part of tort law in the U.S. – there are instances where the component part provider is found liable and those where the entity assembling the product bears full responsibility and the component part provider is indemnified. It is safe to assume that body of law will be used (in conjunction with agency designation) to determine "[h]ow far down the supply chain this requirement would stretch."

a. Could companies producing the raw materials that a covered product is made from be required to have a registered agent in the U.S. before the covered product can be imported?

No. I do not think that is the purpose of the bill (assuming "raw product" means unfinished, unprocessed, and unassembled and not a final product intended for sale "as is" to a user/consumer in the U.S.)

b. Please describe how the breadth of the registered agent requirement could affect the U.S. export and import industries as well as global trade relations.

I do not believe there would be a discernible effect on U.S. companies engaged in import and export other than relieving U.S. domestic sellers of responsibility properly borne by their foreign suppliers.

The registered agent requirement is designed to hold foreign manufacturers accountable for the products they sell in this extremely lucrative market without having an array of expensive and unnecessary procedural defenses which complicate, limit, and in some instances block the protection of American consumers. The likelihood that many foreign manufacturers would forego sales in a $2 trillion market because of the need to have a registered agent seems remote.

8. Holding manufacturers accountable – whether they are domestic or foreign – is a worthy goal.

a. How does the legislation change the current applicable laws that make the foreign company more accountable in the U.S.?

The substantive law would be applied to foreign manufacturers on the same basis it is applied to American manufacturers. The difference would be that this legislation would make the foreign firms more identifiable and more accessible to jurisdiction in American courts. It would merely deprive them of costly and protracted procedural defenses without depriving them of any defenses that are available to domestic manufacturers under American law.

b. If a judgment is rendered against a foreign manufacturer, what does it take to enforce the judgment? Can a judgment against a company be enforced more easily because of this legislation or will it still require a company to be a responsible party?

See answers to 2,4, and 5.

c. How often do large foreign companies that sell products in the U.S. avoid legal proceedings? Can they continue to sell in the U.S.?

In my article in the *Product Safety and Liability Reporter*, I detailed dozens of cases where foreign entities were able to resist the jurisdiction of U.S. courts – and that is a small sample.

Large foreign companies that sell products in the U.S. avoid legal proceedings regularly. I looked through many, many reports and articles on Chinese companies selling defective goods in the U.S. and I think it is safe to say that this is not a debatable point.

Those companies that *are* the subject of lawsuits today delay the process and force U.S. consumers and businesses to go through substantial procedural bureaucracy – requiring translation of papers and a foreign government to serve process – before they will admit that process has been served, often with no consequences for the harm they caused.

The bill changes that inequity. It does not prohibit sales – it makes sellers accountable and creates incentives for limiting and eliminating the great range and nature of dangerous or defective products currently in the stream of commerce.

9. Is it fair to say this legislation is targeted at the companies with no U.S. presence?

This legislation is targeted at any company that benefits from the lucrative U.S. market and is (today) able to delay and avoid litigation and accountability. If the companies have a substantial in-state U.S. presence, they are already subject to the jurisdiction of the courts. The problem (noted in my testimony and in my *Product Safety and Liability Reporter* article) is that the "minimum contacts" requirement is difficult to meet – and is not satisfied by high profits, significant impact, or even the uncontested assertion that the product was intended for sale in the U.S.

a. The more a company depends on the U.S. market for its business, isn't it more likely they will need to respond to a U.S. judgment if they want to continue business in this country?

Yes. See answers to questions 2-5.

b. If that is the case do you need to require an agent for service of process?

Absolutely. As noted in my testimony and my article, the problem of securing *in personam* jurisdiction over foreign companies is widespread. It frustrates just and fair results, limits accountability, and denies persons in the U.S. access to the courts. In the absence of an agent, these problems will continue.

Moreover, this bill does more than require designation of an agent – it gives clear and understandable notice to all that doing business in the U.S. means being subject to U.S. law. This is required of every domestic company – and it should be required of every foreign entity doing business here as well. Consent to jurisdiction (mandated in the bill) is not an undue advantage – it is the law for every U.S. business.

The potential to serve a foreign company that benefits from U.S. sales and from the U.S. legal system at many level (in terms of banking, currency, credit, etc.) and the U.S. infrastructure (broadly defined) is fair, just and reasonable. Injured consumers should not be tormented by our legal system – they should be served by it. An agent in the U.S. makes that possible. U.S. consumers injured in their home states by products on which they rely justifiably should not be met with massive expenses and no reasonable assurance that the wrongs they sustained will be redressed.

This bill is a chance to give consumers and businesses the basic and straightforward opportunity to resolve peacefully disputes in a court of law and to secure remedies where they have been wronged. Designation of an agent is a remarkably simple, elegant, and wise step forward.

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

July 13, 2010

Marianne Rowden
President and CEO
American Association of Exporters and Importers (AAEI)
1050 17th Street, NW, Suite 810
Washington, DC 20036

Dear Ms. Rowden:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

The Voice of the International Trade Community Since 1921

July 27, 2010

Via E-Mail: Earley.Green@mail.house.gov
Rep. Joe Barton
Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
U.S. House of Representatives
2125 Rayburn House Office Building
Washington D.C. 20515

ATTN: Earley Green, Chief Clerk

Re: Hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act" – June 16, 2010

Dear Congressman Barton:

Thank you for the opportunity to testify on behalf of the American Association of Exporters and Importers (AAEI) concerning H.R. 4678. I respectfully submit the answers below in response to your written Questions for the Record (QFR).

1. **Section 4 of the bill requires foreign manufacturers who make "any part" of a covered product or "any part" of a component part of a covered product to have a registered agent in the United States before said covered product or component part can be legally imported. How far down the supply chain would this requirement stretch?**

   We understand section 4 of H.R. 4678 would require the U.S. importer to review its list of imported components (called a "bill of materials") to determine two things: 1) whether the component will be incorporated into a finished product covered by the law; and 2) whether the foreign manufacturer or producer of that component has a current registered agent on file as of the date of importation. It is unclear to us whether, for example, section 4 requires the U.S. importer of a finished engine from a foreign manufacturer to obtain the name of the producers of the components of that engine (and the name of their registered agents) in order to satisfy the requirements of section 4.

   a. **Could companies producing the raw materials that a covered product is made from be required to have a registered agent in the U.S. before the covered product can be imported?**

      Because such a wide variety of products are covered by H.R. 4678, we do not know the degree to which Congress intends to have producers of raw materials appoint registered agents. For example, an automobile covered under NHTSA, we believe that the legislation could very well cover the rubber in the tires being covered by the statute. In the case of chemicals, we do not know whether the legislation would require the producers of polymers used to make a final chemical product appoint a registered agent. Additionally, AAEI could easily envision active pharmaceutical

ingredients ("APIs") which give drugs their medicinal properties being covered by the legislation, but we are unsure about whether molecules utilized to develop biologics (covered in section 2(3)(B)) necessitate a company appointing a registered agent. The broader the scope of this legislation, the more expensive products are ultimately going to be for the American consumer, without corresponding increase in safety, security, functionality or even legal recourse.

b. Please describe how the breadth of the registered agent requirement could affect the U.S. export and import industries as well as global trade relations.

The breadth of the registered agent requirements does four very damaging things to U.S. export and import industries:

First, it moves the United States closer to a general import license regime in that importers would, for all intents and purposes, be required to seek government permission to import goods from "registered" suppliers limiting their sourcing ability.

Second, it destroys the U.S. position as a "value added" economy whereby low value components are sourced outside the United States and brought into the country for the high-value processing that can justify U.S. labor costs. The chemical and pharmaceutical industries are among the most heavily regulated and highly compliant companies who are net exporters for the U.S. regardless of where their headquarters reside. As a result, many of these high-paying jobs currently in the U.S. will simply move overseas as companies will avoid the "hassle factor" that this legislation imposes on U.S. manufacturing. This requirement exacerbates our trade relations because it adds another "U.S. centric" requirement while companies are seeking raise and standardize manufacturing processes across the globe. Also, this requirement punishes highly compliant and complex multinational companies by casting aside all of the infrastructure they have put in place in the United States to manage this marketplace by reaching through the corporate structure to pull the umbrella company into the United States' legal system. Many of the companies that this legislation seeks to reach are in countries that have at least partial state ownership of a significant percentage of all businesses. These businesses may not be subject to these rules because of the sovereign immunity of foreign governments.

Thirdly, the registered agent requirement adds another layer of enforcement at the time of entry and release from CBP custody, which can easily impede the flow of commerce.

Fourth, this legislation may very well lead to retaliatory mirror legislation being enacted by some of our trading partners. Not only will this directly harm US companies, but it could lead to trade wars with our current trade allies. Finally, even if the United States were to enact this damaging legislation, it would do little more than provide a false sense of peace for

wronged American consumers, because we are not party to any treaty that would allow for enforcement of any judgments that may or may not arise out of this legislation.

2. Holding manufacturers accountable – whether they are domestic or foreign – is a worthy goal.

a. How does the legislation change the current applicable laws that make the foreign company more accountable in the U.S.?

Because many U.S. state have tort laws with "joint and several liability" (i.e., each entity may be liable for the full amount of the liability), AAEI does not believe that this legislation will make the foreign company more accountable (or liable) in the U.S. nor does it reduce the liability of the U.S. importer.

b. If a judgment is rendered against a foreign manufacturer, what does it take to enforce the judgment? Can a judgment against a company be enforced more easily because of this legislation or will it still require a company to be a responsible party?

AAEI does not believe that HR. 4678 will advance a U.S. citizen's ability to collect on a judgment for money damages rendered by a U.S. court. Based on our preliminary review of the Hague Convention on Foreign Judgments in Civil and Commercial Matters, AAEI believes that two necessary prerequisites would need to be in place before judgment can be rendered against a foreign manufacturer: 1) the country in which the manufacturer resides would need to be a signatory to the Hague Convention or by some other legal instrument recognize a judgment from a U.S. court; and 2) a foreign court must exercise its authority over the foreign manufacturer by requiring the payment of money damages in the judgment or seizing the assets of the foreign manufacturer in satisfaction of the U.S. judgment. It is important to note that the United States is not a signatory to this particular treaty, and we are unaware of any effort to sign on.

c. How often do large foreign companies that sell products in the U.S. avoid legal proceedings? Can they continue to sell in the U.S.?

It is AAEI's experience that large foreign corporations generally do not avoid legal proceedings in the U.S. for several important business reasons: 1) to protect the company's brand and goodwill which are important business assets in the United States and abroad; 2) to continue its access to the U.S. market which remains among the most lucrative in the world; 3) reputable world-class companies want to be good corporate citizens because it is in the best long-term financial interest of the company. Because the industries covered by H.R. 4678 are so heavily regulated now by the federal government, U.S. regulatory agencies already possess the regulatory tools to block a foreign company's access to the U.S. market.

3. What would you recommend as the best method to hold foreign manufacturers accountable in the U.S.?

If the United States wants a long-term solution to ensure that U.S. citizens harmed by defective products manufactured by foreign corporations can get redress for their injuries, the United States must pursue a "holistic approach" comprised of three components: 1) commercial; 2) regulatory; and 3) legal.

The commercial component would comprise of working with our trading partners to set high international standards for product safety through standards-setting bodies such as the International Standards Organization (ISO). These standards would be uniform on a multi-lateral basis to ensure that companies can meet a single standard rather than a patchwork of standards. The commercial incentive for companies to comply with one international standard is that it lowers costs whereas a national standard which drives up the cost of producing goods for markets with different standards.

Second, the United States must continue to develop a robust regulatory regime that can handle globalization since most of our safety laws were developed at the turn of the 20th Century for goods produced and consumed in the U.S. market only. An important aspect of the regulatory component is sharing of data between regulatory agencies to oversee and audit corporate quality control, and take immediate action when defective products are detected before they get into the global supply chain.

Third, the legal component would be used as the system of last resort when corporate quality control and regulatory surveillance fails. If the United States became the leader in supporting international quality standards and promoted regulatory dialog as part of international trade agreements (e.g., the Doha Round at the World Trade Organization or through bilateral and regional free trade agreements), then more countries would probably become signatories to the Hague Convention on Foreign Judgments in Civil and Commercial Matters or other instruments recognizing and enforcing U.S. judgments because they will be looked upon as anomalies rather than simply a hazard of the U.S. legal system.

a. Does our current system have any accountability built into it?

Yes, the U.S. regulatory regime imposing all legal and regulatory responsibilities on the U.S. importer, which is typically a U.S. company with assets in the United States, currently makes that entity as accountable as if the produce was made in the United States by a U.S. corporation. Thus, U.S. importers are legally responsible today for liability of imported products and additional financial guarantees (e.g., bonds) can be added to address concerns about financial solvency.

4. What benefits – if any - do you see from this legislation? Do you have any concerns about how U.S. companies might be affected by similar laws in foreign countries, especially if those countries have less scrupulous legal systems than ours?

AAEI sees no benefit to this legislation – it neither compensates past victims of defective products nor does it provide a realistic avenue for relief to future victims of defective products made by foreign corporations. Moreover, we suspect that other countries will develop similar requirements to block U.S. corporations from accessing their markets. Other countries may also be encouraged to take arbitrary regulatory actions or justify taking legal actions against U.S. companies to harass them enough so that they exit the foreign market or force a U.S. corporation to sell its product through a foreign "middleman."

5. Could this bill complicate the ability of U.S. importers and exporters to conduct business globally?

Yes, this legislation will impact global traders in an extremely negative way. H.R. 4678 has the effect of "micromanaging" business decisions better left to corporate managers. This legislation will limit the sourcing options of globally competitive businesses which have manufacturing facilities in the United States and will reduce the attractiveness of the United States as a place where these companies can make products either for the U.S. or North American markets from globally sourced components.

6. You mentioned that there is no method by which a U.S. court judgment against a foreign manufacturer for money damages could be enforced abroad. If this bill passed and hypothetically could be enforced abroad, how would that affect your members and U.S. trade relations?

The enforcement of a U.S. court judgment requires, at a minimum, legality and practicality. Quite often, enforcement also entails considerable legal expense and a protracted period of enforcement. For legality, the United States needs some instrument (either international treaty or bilateral arrangement) whereby the U.S. judgment is viewed as valid as if it were a judgment rendered in that country. More importantly, satisfying a judgment requires practicality of getting that foreign corporation to either pay the judgment or finding property (e.g., real estate, inventory, bank accounts, etc.) which can either be sold or liquidated to satisfy the judgment by order of a court in the foreign country. Unfortunately, all of these things are reactions to an incident relating to an unsafe product. AAEI recommends that U.S. efforts are better focused on preventing the entry of unsafe products, rather than improving our reaction to what may happen after they enter the commerce of the United States.

For large multi-national corporations which have large-scale business operations in the United States and other countries around the world, AAEI is concerned that unintended consequences of H.R. 4678 may result in states seeking tax revenue from non-resident foreign corporations who have "consented" to jurisdiction of the state complicating the relationship between parent and subsidiary (or related) corporations). However, for small-medium size businesses (SMEs) which do not have market leverage with foreign suppliers, we anticipate that they will increase prices due to a smaller pool of foreign suppliers willing to appoint a registered agent in the United States. Moreover, we could envision a scenario whereby a

foreign supplier could require the small-medium size U.S. importer to contractually obligate itself to pay the legal fees of the foreign supplier or even to "hold harmless" the foreign manufacturer for the payment of any U.S. judgment enforced abroad against the foreign manufacturer. (In an extreme case, the U.S. company could be forced to pay the judgment twice if a U.S. court finds the U.S. importer and the foreign manufacturer severally liable, and the U.S. importer pays the judgment by authority of the U.S. court and the foreign manufacturer requiring the U.S. importer to pay its share of the judgment by contract.) Since we already have a legal regime that holds the importer of record liable for the products they import, this bill would do nothing but needlessly complicate trade for the most vulnerable members of the trading community - SMEs.

7. In your testimony you touched on the progress U.S. regulators are making with foreign countries to enhance the safety of our imports. How would this bill affect those relationships?

AAEI believes that some foreign countries may cease cooperation with U.S. regulatory agencies out of fear that any information they provide could become subject to discovery proceedings in U.S. litigation as a way of determining which foreign manufacturer may have made a defective product or component which resulted in an injury to a U.S. plaintiff. We believe that a reduction in this information sharing among U.S. and foreign regulatory agencies will result in the government "flying blind" where they will not have sufficient information to pinpoint anomalies so that they can prevent defective product from coming into the United States and recalling defective product that is already in the U.S. Market. In addition to this lack of cooperation harming current business relationships, the United States Customs and Border Protection's data requirements (ISF, the 24 hour rule, etc.) already MANDATE that U.S. companies work with their foreign suppliers to produce the data required for entry. This legislation may *de facto* bar imports from some uncooperative suppliers and irreparably harm small businesses in America.

8. Some have testified that foreign manufacturers need the incentive of tort liability in order to make safe products? Would you say that is true, and if not, what other incentives and systems are already in place to help ensure imported products are safe for Americans?

While tort liability has worked in some areas in making products safer in the United States, we must recognize that countries have different business cultures. Nonetheless, all companies must make a profit (with the exception state owned or heavily subsidized companies), and thus the most effective and efficient method to get companies to make safe products is a financial incentive – that is, making quality products is good business. A good example is supply chain security. After 9/11, companies feared that the U.S. government would shut down ports of entry through which goods are imported. U.S. Customs and Border Protection (CBP) worked with U.S. importers to develop the Customs-Trade Partnership Against Terrorism (C-TPAT), a voluntary program whereby CBP provided commercial incentives (e.g., fewer inspections) if member companies assessed and improved their global supply chain and also requested that members get their business partners (including foreign corporations) to adopt

good supply chain security practices. As a result, belonging to C-TPAT and adopting security procedures became an important commercial credential in the global trading system. Such practices have been adopted worldwide in the form of Authorized Economic Operator (AEO) programs. C-TPAT alone has over 9,800 members, but security procedures have been adopted by thousands of foreign companies, many of whom belong to their national AEO program.

CBP is working with the U.S. Consumer Product Safety Commission (CPSC) to develop a Product Safety Importer Self-Assessment Program whereby U.S. importers do an assessment of their internal controls for quality and safety in exchange for certain benefits from CBP and CPSC. This program is in the pilot stage, but could be ramped up if Congress gave its imprimatur in statute. (Many companies were reluctant to join C-TPAT because they feared that investments in a voluntary regulatory program could be either eliminated or diluted by subsequent statute or regulation. Thus, Congress recognized C-TPAT as a voluntary program in the SAFE Port Act, and enrollment in C-TPAT has nearly doubled since enactment of the statute.) It is extremely important to note that with any voluntary program, benefits must be guaranteed, well-defined and relative to the time, effort and resources companies are asked to spend on the set up and maintenance of the program.

9. Some have talked about the issue of the "tort tax". If this bill is passed, could U.S. businesses be exposed to a similar new "registered-agent" tax in other countries where they do business?

Yes, we believe that it is highly likely that other countries will adopt a similar measure aimed at U.S. corporations, which would harm our ability to meet the President's export initiative to double exports in five years.

10. The issue of the "tort tax" is a concern to some, where U.S. businesses are liable for foreign products, but foreign manufacturers themselves are not held accountable. Considering that there is no method to enforce U.S. judgments abroad, would this bill actually address that issue?

AAEI believes that because the United States' legal system operates on a territorial basis whereby a court has authority over a company with some physical property in its jurisdiction or an intentional presence in that jurisdiction via the stream of commerce, this legislation simply does not address the inability of U.S. courts to enforce judgments by demanding that money judgments be paid in cash or through a judicial lien on real property or tangible assets of the foreign corporation to be held accountable for harm to U.S. consumers. Therefore, we believe that U.S. importers will continue to bear sole responsibility for damages resulting from defective goods even if H.R. 4678 is enacted into law. Furthermore, we feel that the result of this legislation will be to lull U.S. consumers into a false sense of security about the liability of foreign manufacturers.

I hope that these QFR responses are helpful to you and the Subcommittee in considering H.R. 4678.

Sincerely,

Marianne Rowden
President & CEO

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225-2927
Minority (202) 225-3641

July 13, 2010

Mary Saunders
Deputy Assistant Secretary for Manufacturing and Services
International Trade Administration
1401 Constitution Ave., NW, Room 3832
Washington, DC 20230

Dear Ms. Saunders:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

The Honorable Joe Barton

1. **Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to Act?**

Commerce's support for the National Export Initiative will help create and sustain jobs by increasing U.S. exports across a number of important sectors, including in clean energy technology. This effort, combined with implementation of pending U.S. FTAs that offer significant immediate tariff reduction, would help support and position the United States for growth in a sector with enormous export potential going forward.

2. **ITA's website states that the Manufacturing and Services unit strives to "work with industry and government agencies to reduce costs of regulation and other government policies".**

    a. **What policies or regulations have you worked on to reduce costs to U.S. manufacturers?**

The Manufacturing and Services (MAS) Regulatory Affairs program has participated in interagency discussions for almost three dozen rules since the program started in 2006, including rules from the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Department of Homeland Security. A list of rules we have worked on can be found online at http://www.trade.gov/mas/ian/industryregulationmasinput/index.asp. Our most significant contributions include work OSHA's Worker Exposure to Hexavalent Chromium Rule and DHS's Importer Security Filing Rule.

    b. **If the legislation we considered regarding U.S. based registered agents for service of process were replicated by other countries and imposed on our exporters, would you work to reduce the costs of those regulations?**

The Administration has not yet issued an official position on this legislation. Further, DAS Saunders did not testify on that particular piece of legislation and thus cannot appropriately address this question.

    c. **Would such regulations on U.S. companies help their prospects of increasing exports?**

The Administration has not yet issued an official position on this legislation. Further, DAS Saunders did not testify on that particular piece of legislation and thus cannot appropriately address this question.

3. **According to the Overseas Private Investment Corporation (OPIC) website, "Investment prospects for renewable energy sectors are indeed massive. A 2009 report**

by the Renewable Energy Policy Network, between 2004 and 2008, stated that solar photovoltaic capacity increased sixfold, wind power capacity increased 250 percent, and total power capacity from new renewables increased 75 percent. Global revenues for solar photovoltaics, wind power, and biofuels expanded from $76 billion in 2007 to $115 billion in 2008."

a. If the industry is burgeoning and capital is flowing to it, why do we need the government involved to subsidize their processes?

Despite the flood of news about fast-growing clean energy technology opportunities in foreign markets, U.S. clean energy technology exports cannot increase if protectionist rules and policies prevent open competition.

The connection between clean energy technologies and green jobs has led many countries, developing and developed alike, to adopt policies that make it more difficult for foreign firms to compete in their markets. Many countries – either implicitly or explicitly – favor their domestic industry through preferential tendering criteria (China) and burdensome certification requirements (Korea, Japan). In addition, concerns regarding adequate protection of intellectual property rights also hamper some firms from entering foreign markets. This is an area particularly critical to new, small- and medium-sized clean energy companies whose survival might depend on a small number of critical patents.

b. If these businesses are capable enough to develop their products, shouldn't they also be capable of expanding their own prospects or hiring consultants to help them identify and navigate new export opportunities?

The majority of U.S. clean energy companies are small companies that often find it difficult to finance their own expansion in foreign markets. U.S. government resources that assist in identifying and navigating new export opportunities are provided, in part because comparable private sector services are often beyond the means of many new clean energy companies.

c. Isn't subsidizing efforts for only a few select companies harmful to the U.S. competitors who have already labored to become successful exporters and developed their own expertise?

Export assistance is offered to exporters across industries. A few select programs target the clean energy sector because standard business models do not fit the industry. For example, clean energy, such as renewable energy and nuclear power, requires high up front capital investment, while the energy savings accrue over the lifetime of the project. To compensate, the OECD has authorized export credit agencies, such as the U.S. Export-Import Bank, to extend loan repayment periods to eighteen years.

4. Rather than a general appropriation contained in H.R. 5156 to fund the program, shouldn't exporters have to pay user fees to compensate the government for the cost of

services they use? Otherwise isn't the program simply socializing the costs while privatize the gains?

Although, the Administration has not yet issued an official position on this legislation, current Export promotion programs offered by the U.S. Commercial Service operate on a cost recovery approach. Companies pay a user fee to cover up to the full cost of services provided.

5. **DOE recently announced a request for information (RFI) on rare earth metals and other materials used in the energy sector - specifically those materials used in clean energy technologies such as wind turbines, hybrid vehicles, solar panels, and energy efficient light bulbs. Recognizing domestic supply and demand may not be equal, the purpose of the RFI is to help develop a "clean energy future" plan. The responses were due on June 7.**

    a. **How important is the acquisition cost of these minerals to the ability to manufacture products here in the U.S.?**

The percentage of the cost of these materials relative to the cost of the final product usually is small. The issue is that for many of these end use applications, there is not an adequate mineral substitute for the rare earth elements. Therefore rare earth mineral access and availability are concerns for non-China based manufacturing of clean energy technologies, including the magnets used in batteries and in wind turbines.

    b. **If China possesses many of the minerals we need, then aren't U.S. manufacturers subject to China's willingness to sell us those minerals? Would it be more efficient for US companies to manufacture their products in close proximity to where the minerals are located –such as in China?**

Rare earth metals are found in many countries, including the United States, Canada and Australia. The United States was the leading producer of these metals as recently as 20 years ago. However at present, China produces over 90 percent of the global supply of rare earth elements but the U.S. has very little current downstream capability. Therefore, even material (in the oxide form) produced in the U.S. must get exported to China for processing, manufacturing of components, and initial assembly. Yet, if the U.S. were to build a much larger domestic manufacturing capacity in applications using magnets (e.g. wind energy) than in the near term, the U.S. manufacturers would be reliant on Chinese supply.

In the interim, China continues to reduce export quotas for rare earth elements, thereby reducing the quantities of rare earth elements available for users outside of China, including U.S. manufacturers. The U.S. Government continues to urge China to eliminate these rare earth export restraints in order to ensure that there is a level playing field for all competitors in this important sector and that China lives up to its international trade commitments.

China's strategy in doing so is to attract the value-added downstream industries to mainland China. However, the Obama Administration continues to promote growth in the manufacturing

sector and in doing this, more opportunities for American companies to grow here in the U.S. have become available, such as the DOE new Battery grant for hybrid technology and wind turbine manufacturing. Whether or not it would be more efficient for U.S. companies to manufacture in China depends on their business models. But, there is evidence that favorable feedstock prices, established supply chains, and low cost of capital is attracting multi-nationals to locate manufacturing in China.

c. How does our export of clean energy products affect our trade balance when many of the raw materials need to be imported?

As one of the most innovative and competitive sectors of the U.S. economy, renewable energy and energy efficiency technologies and services are expected to be among the major export markets over the course of the President's National Export Initiative. While restricted access to timely and cost-competitive raw materials could impede the growth in U.S. manufacturing and export of some clean energy products, the U.S. Government is committed to helping U.S. companies meet these challenges by address foreign government practices that impede trade in rare earths. Again, as market demand for rare earths increases, we expect to see the reopening of some U.S. rare earths mines, and new mining development in third countries that could reduce the tightness in global supply of these materials.

6. Energy trade has always been a difficult sector to negotiate free trade and open access.

a. **How open are developing countries to our exports?**

Average tariff data on products related to energy for the developing world as a whole is currently unavailable, and the data that are available for key markets are mixed. For energy subsectors (coal, petroleum, renewables, etc.) in key developing country U.S. export markets, such as China, India and Brazil, average tariffs are fairly low (between 0 and 12 percent) but the tariff range is wide. For example, China has tariffs that range from 0-35 percent and Brazil has a range of 0-20 percent on products related to renewable energy.

In addition, recently, a number of countries have been considering putting in place local content requirements in the energy sector. These could effectively create new barriers to U.S. exports by mandating the use of local goods and services. The Administration is working with foreign governments to address these potential barriers.

b. **What is the Administration doing to open foreign markets and reduce barriers?**

On the global level, the Administration continues to seek broad tariff cuts in agriculture and industrial goods through the WTO Doha Round negotiations. These negotiations are also addressing services liberalization, as well as elimination of relevant non-tariff barriers in the WTO Non-Agricultural Market Access (NAMA) negotiations. The Administration will also continue to press for a robust outcome in liberalizing trade in environmental goods and services, including goods and services related to renewable energy. On a regional level, the Trans-Pacific Partnership (TPP) also presents significant opportunities for increased market access in the energy sector, and negotiations with TPP countries are currently underway.

7. Some industry participants complain foreign markets uses domestic preferences for their government projects. Do you agree?

Domestic preferences arise in both government procurement requirements and in other government programs. Such domestic preferences are well documented in the clean energy sector. Until recently, China required that large wind farms in China use wind turbines that met a 70% local content requirement. China agreed to remove this requirement at the November 2009 U.S.-China Joint Commission on Commerce and Trade high level meeting, co-chaired on the U.S. side by the Department of Commerce and the Office of the U.S. Trade Representative. Canada's Ontario Province has imposed local content requirements that companies must meet to take advantage of new renewable energy feed-in tariffs which will impact U.S. renewable energy suppliers' market access. Brazil levies a 14% tariff on imported wind turbines.

India has placed far reaching local content requirements on implementation of its Jawaharlal Nehru National Solar Mission (NSM) which targets the installation of 20 gigawatts of solar energy by 2022. The NSM will be conducted in three phases. During the first phase it will be mandatory for projects based on crystalline silicon technology to use modules manufactured in India. During the second phase, it will be mandatory for all projects to use cells and modules manufactured in India. These restrictions will significantly limit U.S. export potential.

The United States is a party to the plurilateral WTO Agreement on Government Procurement (GPA) and bilateral and regional Free Trade Agreements. These agreements require the 52 countries that are parties to one of the agreements to to not apply buy local preferences with respect to the parties and procurement covered under the agreements. The parties are also required to apply to fair transparent and competitive procurement procedures for purchases subject to those agreements. Countries that are not party to either a U.S. FTA or to the GPA have made no commitments to the United States to not enact domestic preferences to meet specific economic objectives. U.S. Buy American provisions apply to U.S. procurements that are not subject to GPA or an FTA. Among our top priorities is expanding government procurement opportunities in foreign markets for U.S. businesses and their workers by expanding the countries that are party to the GPA and including similar commitments in future FTAs.

8. Are there any concerns that U.S. energy markets need to be opened to further competition as a reciprocal trade negotiation?

The fair and reciprocal opening of market access between two countries has generally had a net positive impact on the economies of both countries, regardless of the sector.

a. If our markets open to competing energy products, such as ethanol, how will that affect our net trade balance and jobs in the energy sector?

Any impact on the U.S. energy sector would reflect the reciprocal nature of trade negotiations, not just the further opening of the U.S. market, and can only be assessed in that context. Speculating on the specific impact of a hypothetical trade policy change is difficult, particularly

with respect to a specific product. However, bear mind that the ultimate goal in any trade negotiation is to increase productivity, worker compensation and living standards in the United States, and, in times of high unemployment, contribute to job recovery with growth in export-supported jobs.

b. Are jobs in the "clean technology" additive or substitute of existing jobs?

It is unclear what the question assumes is "clean technology". While it is difficult to draw a direct correlation between the addition of jobs in one sector and the reduction in a different sector, in general investments in clean energy technologies are a net positive job creator due to the fact that clean energy technologies have a higher labor intensity than traditional energy sources. To determine the degree would require an in depth study on the specific clean energy technology and its role in the broader production and consumption of energy.

c. At what point do clean technology jobs eliminate existing energy jobs and fail to be a net positive job creator?

To answer this question would require evaluating a specific investment in clean energy. In general, investments in clean energy technologies are a net positive job creator due to the fact that clean energy technologies have a higher labor intensity than traditional energy sources.

d. If clean technology exports increase to $40 billion and generate up to 750,000 jobs by 2020 as you state the Department of Energy estimates, what will be the loss of existing jobs cannibalized by the clean technology companies?

It is not clear how the expansion of exports would lead to a cannibalization of existing domestic jobs.

9. Of the $36.7 billion in Federal funds used from the American Recovery and Reinvestment Act directed towards clean energy technologies, how many new jobs were created? How many of the new jobs can continue without continued taxpayer support?

The Department of Energy administers the dispersal of ARRA funds directed towards clean energy. We would have to defer this question to the Department of Energy.

10. Your unit works to enhance the global competitiveness of U.S. firms. What are the biggest barriers to our firms being globally competitive? (e.g., regulatory, tax, labor costs, intellectual property rights/protection, etc.?) What domestic rulemakings most affect our companies' global competitiveness?

The barriers to competitiveness vary by industry, so it's difficult to cite one or a few barriers whose removal would help all U.S. firms become more competitive. One of the ways the government can improve competitiveness in any industry is to address market failures where they occur so that markets function the way they should. However, addressing market failures (for

example, through regulations) can have unanticipated side effects. MAS' Regulatory Affairs program works within the interagency process to ensure that the goals of such regulations are met without unnecessarily burdening U.S. competitiveness.

With respect to the U.S. clean energy industry in particular, barriers to competitiveness include lack of consistent domestic policy incentives to deploy clean energy technologies, lack of intellectual property protection in key markets, foreign incentives to manufacturers locating abroad, and generous government support for foreign exporters. As an example of the impact of this, the early lead that the United States held in renewable energy innovation in the 1970s and 1980s was lost to European and Japanese companies that benefitted from strong domestic markets.

11. Are our clean energy technology markets open to foreign competition and WTO - consistent?

Commerce works hard to help ensure that U.S. clean energy policies and programs are structured and implemented in a manner consistent with U.S. law and U.S. obligations under the WTO.

a. Do any foreign governments have energy related policies that are potentially countervailable or that have WTO-inconsistent subsidies? If so, which countries? What is the Administration doing about it?

As part of the National Export Initiative, Commerce has redoubled its commitment to utilize the tools at its disposal under U.S. law to confront unfair and illegal trade practices, including foreign subsidies practices that injure U.S. workers and companies. Commerce's Import Administration (IA) investigates potentially countervailable subsidies, including those that relate to a foreign government's energy policies, when it receives a properly alleged and supported allegation of such subsidies, consistent with U.S. law, by a US petitioning industry in the context of a countervailing duty (CVD) petition or investigation.

IA has received and investigated such allegations in CVD cases. Some recent examples, involving investigations of subsidized products from China, include the government provision of subsidized electricity to manufacturers, and the provision of loans and R&D assistance to promote energy-efficient manufacturing processes. In addition, IA has a Subsidies Enforcement staff dedicated to identifying and monitoring foreign subsidy practices, including those related to energy policies, to determine whether such practices are WTO-inconsistent or otherwise adversely impact the interests of U.S. companies and workers.

IA is currently tracking clean energy technology-related initiatives in various countries, including India, Canada, China and the EU. Working closely with the U.S. Trade Representative's Office, IA pursues resolution of such foreign practices, as appropriate, through a number of informal and formal means including, for example, bilateral government-to-government discussions, more formal engagement under the WTO's subsidy notification and monitoring process, or through a formal complaint under the WTO dispute settlement mechanism.

12. To qualify for an ITA-led trade mission, does a business need to be of a certain size and maintain existing exports to other countries? If so, does that indicate that the businesses has the competency to navigate foreign markets on their own?

The criteria for participation vary by trade mission. The trade mission statement always specifies the applicable criteria. The primary criteria for participation in Department of Commerce trade missions are suitability of the U.S. exporter's product or service to the mission's goals; their potential for business in the target market, including likelihood of exports resulting from the trade mission; and consistency of the applicant's goals and objectives with the stated scope of the trade mission. Generally, a U.S. company need not be of any specific size to be eligible to apply. Export experience requirements may vary. For some missions, based on the targeted sectors and markets, prior export experience has been required. Other missions have specifically encouraged participation by new-to-export companies. Prior experience in one market does not necessarily translate to ability to enter a new export market easily and independently.

13. You have stated that many firms face complex domestic regulatory requirements. What are these requirements and how can we reduce these burdens?

U.S. businesses must comply with a number of regulations promulgated by agencies in the executive branch, including those related to health, environment, safety, and security. MAS' Regulatory Affairs program works within the interagency process to ensure that the goals of such regulations are met without unnecessarily burdening U.S. competitiveness.

Renewable energy firms in particular face an array of federal, state and local regulations concerning siting, permitting, and electricity interconnection requirements. Creating standardized incentives, streamlined permitting requirements, and interconnection requirements would speed the deployment of clean energy technologies.

The Honorable Deborah Wince-Smith
President & CEO
Council on Competitiveness
Questions for the Record
Clean Energy Technology Manufacturing and Export Assistance Act

The Honorable Joe Barton

1. **Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to act?**

   The clean tech export fund proposed in H.R. 5156 offers significant job growth potential, however it cannot work in isolation. To maximize clean tech job growth, U.S. manufacturers must gain greater access to foreign markets. FTAs are a key way to penetrate these markets, and broaden American manufacturers' consumer base beyond our own borders. The clean tech export fund must be understood in the greater context of U.S. trade agreements and the geopolitical realities governing international trade. Job growth will occur as a result of the combined efforts of passing FTAs and advancing ideas like the clean tech export fund.

2. **You discuss in your testimony the importance of creating the right environment to manufacture at scale. But we all know that the United States has lost manufacturing jobs to foreign competitors in sectors ranging from textiles to consumer electronics. What makes you believe we can be competitive in the clean technology sector and that we will not lose jobs to countries with cheaper labor?**

   Production line manufacturing has been vanishing for decades from the American employment landscape for a numbers of reasons including greater efficiency and technology deployment. However, the clean tech sector demands a well-educated and highly skilled workforce, the type which will not be easily exported. In the recent Council-Deloitte Global Manufacturing Competitiveness Index, CEOs around the world identified talent driven innovation as the number one competitiveness driver. Though off-shoring may be tempting for low-wage low skilled manufacturing positions, world class firms cannot easily export high-skill clean tech jobs.

3. **You've stressed the need to capitalize on our position as a leader in high performance computing. How long will it be before competition threatens our leadership position in this area?**

   U.S. leadership in HPC is being challenges now. As of June, China possesses one of the most powerful supercomputers in the world, second only to the Cray Jaguar at Oak Ridge National Lab in Tennessee. Failure to not only retain, but actively expand our HPC capacity, both in

terms of development and deployment, will significantly inhibit America's ability to take advantage of the most advanced modeling, simulation and computing capacity.

4. **You have testified that we need to have the infrastructure in place to reap the value from our investments. Can you explain what you mean and your recommendations for capturing that value?**

   Infrastructure affects the ability of firms of all sizes to compete and drives "site-ing" decisions from the smallest start-ups to the largest multi-national enterprises. A world class infrastructure must be a part of the American competitiveness equation. Specifically, increased electrical capacity and deployment of smart-grid technology are essential to the long-term competitiveness outlook for the U.S. With energy demands on the rise annually, we must take the steps now to ensure our electrical capacity is able to meet our nation's increasing needs.

   Transportation and telecommunication infrastructures are equally important to our competitive outlook, as they are essential to move our nation's citizens, products and ideas.

   We must have the best roads, railways and telecommunication networks to meet the needs of the professional and private sectors, and to attract the best and brightest workers, firms and industries. Our global competitors are aggressively developing world-class infrastructures, and we face the very real risk of losing talent and industry to countries who can simply offer a better set of tools with which to operate.

5. **You have stated that we need to incorporate manufacturing design into our considerations upfront in the innovation process. Do our labor and environmental regulations permit such new manufacturing capabilities?**

   Favorable regulatory environments are key drivers of innovation, and contribute to the innovation ecosystem which must be in place to foster the most advanced, cutting edge technologies and goods. Incorporating manufacturing design is more a function of recognizing the evolving nature of what manufacturing is, rather than the need for any specific regulatory change.

6. **Your testimony quotes that "U.S. manufacturing of clean energy technologies lags behind its international competitors on almost all fronts." The quote goes on to reference that we have no capacity in high speed rail manufacturing. However, isn't that just one example of a technology we have been unable to fully utilize for a number of reasons that has left it as an unviable means of transportation?**

   Yes. And there are a number of similar examples.

7. **Why have we fallen from first to fifth among top solar manufacturing countries and now import solar cells from Europe and Asia?**

Our country does not foster manufacturing solar cells at scale, nor does it incentivize the deployment of solar technology into our existing electrical infrastructure. The barriers are too great, and the costs are to high to move solar cells from development to production.

8. **If revenue is expected to triple within the decade for wind, solar, and biofuels, why do we need to subsidize it in the U.S.?**

To capitalize on the apparent boon from alternative energies, we must cultivate an environment that allows them to be developed and manufactured domestically. Scaling costs for any of the aforementioned technologies make unilateral private-sector action cost prohibitive.

More alarming, however, is the fact that other nations are embracing these technologies with increasing frequency and intensity. Through subsidies and favorable regulatory policies, nations like China are attracting the companies and scientists capable of driving the advancement of these technologies. The nations who lay the groundwork for widespread manufacturing of alternative energies in 2010 will be the ones reaping the economic benefits in 2020.

9. **To what extent does the lack of strong IP protection threaten our ability to grow our exports?**

As the global leader in innovation, strong IP protection means protecting one of our greatest assets. IP forms the foundations upon which products, and in turn firms and industries are built. Failure to protect this knowledge leaves our innovators and entrepreneurs vulnerable to foreign competition; competition which seeks to capitalize on the significant intellectual and financial resources we have invested at home.

10. **You support the continuation of the Doha Round while simultaneously working to remove tariffs and non-tariff barriers without creating a dual track of trade liberalization. How do you suggest we do this and what hope do you have for the Doha round to be revived?**

Advancing greater trade liberalization through the Doha talks is imperative for long-term economic growth in the United States. To compete with China, India and other population giants, we must have access to foreign consumers. A revival of the Doha round and removal of existing trade barriers, even in the absence of dual-track trade liberalization, are relatively straightforward means to reach this end, and are not mutually exclusive. My hopes for a revival of the Doha round are pinned to the increasing realization in the America and around the world, that trade liberalization is essential to reinvigorating the 21st century global economy in a significant and meaningful way.

11. **You have advocated for financing support derived from 30% of carbon taxes. Wouldn't such a policy simply be shifting wealth from current to potential future manufacturers?**

A price on carbon would be a dual innovation stimulant, by encouraging current manufacturers to seek new carbon mitigating technologies and providing funding for start-up enterprises who wish to enter the manufacturing space.

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 226–3641

July 13, 2010

Owen E. Herrnstadt
Director of Trade and Globalization
International Association of Machinists & Aerospace Workers
9000 Machinists Place
Upper Marlboro, MD 20772

Dear Mr. Herrnstadt:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

1. Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to act?

   A careful and comprehensive analysis should be conducted by government with respect to HR 5156 and all FTAs, including those that are proposed like KORUS and those that are already in force. The analysis should include careful attention to determining the number and kind of domestic jobs that will be (and have been) directly and indirectly impacted, as well as their location and duration.

2. You raised several good points in your testimony, many of which you heard touched upon during opening statements. For instance, you highlighted the unlevel playing field on which our domestic firms play in other countries.

   a. You testified that the government must work to remove trade barriers in foreign markets. Could you expand on this point and make recommendations on how this can be accomplished?

      Other governments have sophisticated offset policies that require the transfer of production and/or technology in return for a sale. The U.S. should be working multilaterally and bilaterally to curtail the use of these market distorting mechanisms.

   b. If foreign markets remain closed to our products, then will this $75 million fund provide any benefit as we'll have no place to sell our goods? Is this an example of putting the cart before the horse?

      Working toward opening markets and the goals outlined in HR 5156 can be undertaken at the same time.

3. We've heard from several experts that many of the raw materials necessary for clean-tech manufacturing are either limited or non-existent here in the U.S. For instance, we have only one rare earth mine in the U.S. and it sat idle or under-produced for many years pending government approval to restart operations. We also have little to no domestic sources of heavy rare earth minerals. In your testimony, you raised a concern which I share—that unless we have access to domestic sources of these materials, we may simply subsidize our foreign competitors.

   a. If this is the case, how do we avoid using these taxpayer dollars to "facilitate this off-shoring of work," as you phrased the problem in your testimony?

      The key is to use taxpayer money to create incentives for production of manufactured goods here at home. We should also examine our current policies to make certain that we are not using taxpayer money to encourage offshoring.

b. Again, if our natural resources are either nonexistent or limited (due to either natural occurrence or administrative barriers), how would we determine what domestic content requirements should be as you have advocate in your testimony?

As reflected in my testimony, the definition and implementation of domestic content requirements throughout government are not transparent and not uniform. We should begin by making certain that domestic content as applied is strictly defined so that variables that are relatively easy to manipulate, such as marketing costs, are not included in domestic content calculations.

4. In your testimony you urged U.S. companies to make use of the assistance of the Ex-Im Bank. What value-added will this new fund/program have over and above what the Ex-Im Bank and the ITA provide?

The answer depends on how the fund is set up and implemented.

5. You suggest that "if enacted, the Bill would assist U.S. companies in exporting clean energy products and services." Yet, if natural resources are limited or non-existent and foreign markets are closed to us, how will this bill increase our exports?

I am not certain that I understand the question. My testimony focused on domestic manufacturing. The question may be best directed to the Bill's sponsors.

6. Recent reports indicate China intends to restrict exports of the vital rare earth elements. In doing so, it will reduce supply while demand climbs, thus pushing costs higher. Even if the Federal government begins to break down trade barriers to foreign markets, do you have thoughts on how domestic firms can become and maintain competitive pricing given rising component costs, particularly combined with the significant labor cost differential?

U.S. companies should be working to support the Federal government in eliminating trade barriers that have been created by other countries and in cooperating with trade enforcement. U.S. companies should also be exerting their influence to make certain that national laws reflect and enforce the ILO's core labor standards.

Jack Crawford Jr. Jadoo Power

The Honorable Joe Barton

1. Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to act?

   Crawford: I cannot say which have a greater economic impact or impact on job creation. However, in terms of specific affect upon small businesses producing clean energy products, I believe that the clean tech export fund will likely have a greater economic impact because it is focused specifically on this sector. Even with free trade agreements, we will not have leveraged the innovations and products of our small businesses effectively to take advantage of those FTAs. I believe a focus on clean tech entrepreneurship is a priority and must come first for us to be successful with exporting.

2. You testified that this bill will provide companies with export assistance to find new markets for clean energy products and services. Many trade experts identify trade barriers to foreign market access as one of the chief underlying causes of the trade deficit in this arena.

   a. If there is little to no access to open markets, and there are few to no level playing fields in markets that may be open to us, will the provisions of this bill create any significant benefits? Could taxpayer money be better spent?

      Crawford: I agree that trade barriers to foreign markets are an impediment, but export assistance is a benefit to small companies without the resources to identify specific foreign markets as a first step.

   b. Are we putting the cart ahead of the horse if we do not address market access first?

      Crawford: No because we need assistance to transform innovation into products before we can formulate a global go-to-market strategy.

   c. How will this bill address the problem of trade barriers?

      Crawford: It will not directly address the problem of trade barriers. However, having small companies well positioned to enter foreign markets will provide them with direction and focus to address the trade barrier issue. If we have domestic companies that are not equipped to address foreign markets, we have little to gain from removing trade barriers.

3. You testified that the bill will provide US firms with assistance to find new ways to reduce production costs, and promote innovation, investment and greater productivity. Yet, you also testified about your own success in these areas as a small alternative energy company.

a. Why should we spend taxpayer dollars on companies that do not possess the creative talents that are the keystone of success, those talents that companies such as yours possess?

Crawford: By assisting small businesses to reduce production costs, promote innovation, increase investment, and improve productivity, there will be additional motivation and momentum behind efforts to overcome the typical challenges of new market opportunities. Using the Internet as an example, taxpayer dollars supported the early years of innovation and now the US leads the world with products and services in this new market. It's clear to me that the US has this same opportunity with clean tech –and that the leadership will come from small companies that grow into big companies. It was venture-backed innovators like Google, Yahoo, and Facebook that led the way with "new media" in the Internet sector –not the large established media companies. I believe there could be global leaders created in the US focused on residential energy storage, commercially distributed wind generation, portable solar, and fuel-cell powered "green" generators in the coming years.

b. Are we simply subsidizing companies that are not the fittest in a survival of the fittest market?

Crawford: Many American companies have products that could be globally competitive, but do not have the ability to identify and address foreign market opportunities. In my opinion, the lack of access and resources to address foreign markets does not equate to lacking "fitness to survive". The stimulus funding has provided tremendous support to clean tech innovation –and this bill will help with productizing and sales in the global economy.

c. You testified that foreign suppliers may have inferior products but have subsidies and other government support, creating an unlevel playing field for your products. Along those lines, won't this fund just end up subsidizing your domestic competitors that do not possess the innovative spirit your company has demonstrated?

Crawford: Domestic competitors need to not only have access to foreign markets but they must also possess superior products. This fund will not help companies with inferior products compete in foreign markets –it will have a filtering process that enables the identification of the best products and companies in the US.

4. We have heard much about access to natural resources being a speed bump on this clean energy road. If we do not increase access to those domestic sources that exist, aren't we essentially subsidizing your competitors by forcing foreign sourcing?

Crawford: I believe that certain natural resources such as neodymium which is used to create high performance electric motors and generators are most abundant in certain foreign countries, and economically viable domestic

alternatives are presently not known to exist. Expanding domestic exploration for unknown deposits of such materials might be a more useful objective.

5. From your written testimony, it sounds like your chief concern is a lack of understanding on how the export process works. What would this new program do to educate firms such as yours that ITA does not already do?

Crawford: Our chief concern is creating a level playing field so that US companies have the same advantages in creating manufacturing capabilities as do our foreign competitors. While education is about the export process is important, we do not see it as the primary benefit of the new legislation. However, we are hopeful that a portion of the new legislation will direct some educational resources to small clean tech companies.

6. You and many industry observers have expressed concern over the state of intellectual property rights (IPR) and protections in other countries. At the same time, a number of advocates suggest this type of technology should simply be transferred to developing countries.

   a. Do you have any thoughts on how technology transfer could impact domestic clean energy producers?

Crawford: The simple transfer of our technology to foreign companies would not help domestic clean energy producers. Innovation protected by intellectual property rights is often the foundation and justification that attracts seed capital to new companies. As domestic companies explore selling their products internationally, a recurring concern is the lack of protection against a foreign company reverse engineering and replicating their product. We are strongly in favor of measures that would help to strengthen IPR in other countries.

   b. Do you have any thoughts on how we can address the concerns over IPR?

Crawford: We need to create agreements with foreign countries that require them to not only enact stronger IP protection laws but also require proper enforcement of those IP protection laws. In some way, we need to motivate foreign companies who ship products to the U.S. to encourage their own governments to strengthen their IP laws and enforcement procedures.

Anthony Kim, Policy Analyst, The Heritage Foundation

Follow-Up Responses Concerning
June 16 Hearing on *Clean Energy Technology Manufacturing and Export Assistance Act*

The Honorable Joe Barton

1. **Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to act?**

   Free trade agreements will be far more effective in creating more dynamic and meaningful jobs in America than the proposed Clean Tech Export Fund. Our trade engagement with different parts of the world via three pending FTAs (with Panama, Colombia, and South Korea) ensures that American companies compete in the vivacious global market and expand their market shares.

   The Clean Tech Export Fund proposed in H.R. 5156 ignores and suppresses more practical trade policies that will transform solid economic opportunities into real gain. The bill seems to be rather short-sighted and wishful, only adding more government meddling into the private energy sector. Perhaps, a few jobs would be created in Sacramento CA, the "clean energy capitol of the U.S.," but the buck is likely to stop there, not able to spur more sustainable economic growth that would generate vibrant job creation.

2. **Would the $75 million dedicated in this bill be better served on trade missions devoted to opening foreign markets?**

   Absolutely. The bill's vague and ambiguous language does not specify where the money will actually end up and will possibly waste the taxpayers' money. Furthermore, the bill will likely have minimal effect on the creation of American jobs. By contrast, if the money were to be spent on trade missions devoted to opening foreign markets via freer trade, it lends itself to a much broader effects. Free trade leads to economic growth. This economic growth will spur job creation and its effects are not limited.

   The proposed bill may only create $75 million of jobs, products, etc. The end result could be $75 million dollars spent and probably little profit or economic growth will incur as a result of the bill. On the other hand, opening foreign markets via ratifying the currently pending FTAs will have much more extensive and dynamic effects. The possibility of economic growth and job creation will exceed far more than $75 million. The long term, positive effects of sustained economic growth through trade will far outweigh the minimal short term gains in job growth in a particular sector.

3. **You testified that "our strategy must be driven by real market conditions, not by government financial assistance."**

   a. **Can you please expand on what you mean by "real market conditions**?"

Anthony Kim, Policy Analyst, The Heritage Foundation

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A strategy driven by "real market conditions" harnesses the power of free markets so that buyers and sellers may make deals without government interference. Real market conditions encompass a free market system in which decision makings regarding production, consumption, resource allocation, and price levels are conducted by natural market interactions based on supply and demand.

This spurs competition, innovation and new products. Additionally, the system naturally identifies markets that consumers want and could be tapped into. Minimal government intervention encourages competition and greater innovation, benefitting both producers and consumers. History shows us that free market systems are highly effective in promoting vibrant economic growth.

b. **Please explain why this new fund is not compatible with either "real market conditions."**

The proposed Clean Tech Export Fund is not compatible with these real market conditions because it does not encompass many aspects listed above. Government allocation of funds interferes with the full realization of the power of free markets. Subsidies, which would inevitably be the focus of the funds, often lower incentives to increase the subsidized firm's competitiveness (i.e. become more innovative and lower prices), making them more dependent on subsidies. Choosing to award certain companies with government funds discriminates against potentially more innovative firms that would otherwise have been effective sources of economic growth and job creation.

4. **You referenced existing government resources for investment, technology development, and exports. What are those existing resources and who offers them?**

A variety of agencies help companies in the private sector to increase technological developments, investments, and exports. For example, some effective government resources already exist in the Department of Commerce. Various technical assistance programs on the promotion of export and investment is available in the department. The U.S. Commercial Service gives American companies a state-by-state and city-by-city Export Assistance Center. This sector of the Department of Commerce is solely for the purpose of helping U.S. companies to export. They provide consulting, market research, trade finance, advocacy, and help companies find potential customers and partners.

5. **What value-add will this new fund have over and above what the Ex-Im Bank and the ITA provide?**

The Ex-Im Bank provides financing to support U.S. exports, and its support for environmentally beneficial exports has been of long-standing congressional interest.

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Currently, Congress directs the Ex-Im Bank to allocate 10 percent of its annual financing to renewable energy, energy efficient end-use technologies, and other environmentally beneficial exports.

The ITA is committed to helping U.S. industries and firms enhance their competitiveness in exporting green technologies. From working with US manufacturers to improve the energy efficiency of their operations to hosting industry events on low carbon energy sources, The ITA is actively involved in assisting U.S. interests aspiring to take advantage of the green energy market.

The proposed Clean Tech Export Fund seems to be redundant in the sense that both the Ex-Im Bank and the ITA address relatively the same interest that the fund aims to focus on. Without adding any meaningful values, the fund intends to offer financial assistance to American clean energy firms, perhaps more specially than the Ex-Im Bank or the ITA. However, it cannot be denied that the similar assistance is also reflected and implied in the functions of both the Ex-Im Bank and the ITA.

6. **You testified that liberalization of trade is one of the keys to decreasing our trade deficit in this arena.**

   a. **What are the most common trade barriers?**

      The most common trade barriers include basic tariffs and nontariff barriers that include quotas, import licensing, export subsidies, and other numerous customs/administrative impediments to free trade.

   b. **What is our government currently doing to address such barriers?**

      Through various trade pacts over the years, the U.S. has been trying to dismantle various trade barriers. At the same time, the U.S., like other countries, utilizes other mechanisms in the World Trade Organization in order to address trade impediments.

   c. **Do you have any recommendations on what we should do to address those barriers?**

      The U.S. needs to be more proactively involved in dismantling trade barriers by demonstrating leadership in global free trade. Getting rid of price-distortive subsidies is certainly a right step towards ensuring freer trade.

7. **In addition to closed foreign markets, we have heard the two other primary stumbling blocks to increased exports are diminished or no access to domestic natural resources and the significant trade differential between the U.S. and foreign competitors. Could you please expand on those points?**

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The government has imposed many onerous regulations that restrict our ability to tap into our own natural resources. Because of the restrictions imposed by the government, domestic production that requires those natural resources has become more costly. The United States, though blessed with enormous supplies of natural gas, oil, and other energy sources, suffers from high prices because of government imposed restrictions. When these prices become too high, American firms turn to a cheaper source: foreign resources. Since we cannot use our own resources cheaply, we import them from other countries and force ourselves to become more dependent on them. This not only increases imports, but has also undermined future economic growth, ultimately creating domestic job loss.

8. **If we do not increase access to domestic sources of natural resources – at least those that exist in the U.S. – required by so many of the clean energy technologies, do we risk essentially subsidizing our foreign competitors by forcing foreign sourcing? What is the likely net effect of this scenario on the trade deficit in this arena?**

If we do not increase access to domestic sources of natural resources required by so many of the clean energy technologies, we absolutely risk subsidizing our foreign competitors by forcing foreign outsourcing. If government restrictions result in outsourcing to foreign competitors, our trade deficit will grow. A clean energy technology company requires natural resources in order to function. They must get them somewhere. Government restrictions inhibit domestic resource procurement, causing prices to increase. U.S. companies import foreign resources because they are the cheapest option. Even if clean energy companies will be able to export their products eventually, they will have to import the resources necessary to create the final products. Because energies such as oil and natural gas are more efficient than current clean energy, the current trend of importing natural resources will continue until the value of clean energy is greater than traditional fossil fuels. Only the free market can signal this relationship through prices, and subsidizing green energy interferes with these market forces.