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Consumer Federation of America

Statement of

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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

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I. Introduction

Chairman Rush, Ranking Member Whitfield, and Members of the Subcommittee, my name is Ami Gadhia, Policy Counsel with Consumers Union, the 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.

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/CPSC/PUB/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 United 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 they 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.

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