



INTERNATIONAL TRADE UPDATE

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U.S. Legislation on Foreign Manufacturer Liability Could Have Consequences for Wide Range of Companies

Proposed U.S. legislation would require all foreign manufacturers of certain products and product components to consent to be sued in U.S. courts as a condition for their goods to be imported into the United States. The bill, the Foreign Manufacturers Legal Accountability Act, may have significant consequences for foreign manufacturers and any U.S. corporate affiliates, and for U.S. importers – including U.S. manufacturers that source their components overseas.

The FMLAA would require non-U.S. manufacturers of consumer products, cars and auto parts, drugs, medical devices, cosmetics, biological products, chemicals, and pesticides to maintain registered agents in the United States to accept service of process and to consent to the jurisdiction of U.S. state and federal courts for lawsuits related to the products covered by the bill. It would then restrict U.S. imports of covered products to those produced by registered manufacturers, either by requiring importers to certify that goods are being sourced from registered companies, or by banning imports from non-registered companies.

Proponents of the legislation point to recent product safety concerns relating to imported products, such as drywall and toys with lead content, and state that the bill is intended to ensure that U.S. plaintiffs can sue foreign manufacturers for damages for defective products sold in the United States. However, the legislation as currently framed has the potential to lead to unintended consequences, including expanded liability for U.S.-based entities related to foreign manufacturers and onerous new trade hurdles that could slow or impede the entry process for imported products. Opponents also point to risks that U.S. exporters could be subjected to similar requirements in other countries.

The Legislation and Its Key Provisions

The House of Representatives and Senate are considering different versions of the legislation. In the House, Rep. Betty Sutton (D-OH) introduced H.R. 4678. In the Senate, Sen. Sheldon Whitehouse (D-RI) has introduced S. 1606, and has indicated that he intends to offer it as an amendment to other legislation pending in the Senate.

Both bills have evolved since their introduction, and several versions are in play. The key provisions, as they are believed to stand at this time, are:

- The Food and Drug Administration, the Consumer Product Safety Commission, and the Environmental Protection Agency must require foreign manufacturers of covered products to establish registered U.S. agents that can accept service of process on behalf of the manufacturer. In the current House version, this requirement would take effect 180 days after regulations implementing the law are issued; in the Senate version, it would take effect more quickly, no later than 180 days after the measure becomes law.
- Covered products include consumer products; drugs, devices and cosmetics; biological products; chemicals; pesticides; and any components of such products. The current House version also includes autos and auto parts, and adds the National Highway Traffic Safety Administration as an agency responsible for implementing the bill.
- The bills anticipate that the registration requirement may not apply to manufacturers of products and components that are produced or imported in small amounts (*i.e.* below a certain minimum value, quantity, or frequency, which will be determined by the agencies).
- The agencies and the Commerce Department would be responsible for maintaining an updated registry of agents, and must make it available to the public.
- The House bill would ban imports from unregistered manufacturers, effective 180 days after implementing regulations are issued, with the Department of Homeland Security (and presumably U.S. Customs and Border Protection (CBP)) responsible for enforcement. The current Senate bill would require declarations, to be filed at the time of each importation, that the foreign manufacturer has registered under the

law, beginning 180 days after enactment; CBP would be responsible for enforcement.

- The House bill would require a study on the feasibility of imposing a registration requirement for the foreign manufacturers of components that are included in imported finished products. Both bills would require a study on the feasibility of imposing similar requirements on food imports.

Possible Implications

In its current form, the FMLAA raises issues for many companies, well beyond the smaller and harder-to-trace foreign makers that its authors sought to target. For example, it would apply to U.S.-owned offshore affiliates even if those affiliates are simply shipping goods back to their parent company. It would also require foreign parent companies to register, even if they are shipping goods to their U.S.-based subsidiaries. Thus, the bill will apply to, and potentially impede imports from, companies that have a well-established presence in the United States that is already subject to U.S. jurisdiction.

A second issue is how components will be treated. Both the House and Senate version of the bill will apply its requirements not only to finished products, but also to components of products that are imported into the United States for processing and manufacturing. Thus, U.S. manufacturers will face uncertainty about their access to imported components for their production processes.

Further, opponents are concerned that passage of the bill could prompt U.S. trading partners to develop similar legislation that would establish registration and consent-to-suit requirements for U.S. companies that sell overseas. This not only could add costs and delays for companies moving goods around the world, but also could subject them to litigation in many jurisdictions.

The legislation has already been criticized by U.S. trading partners as disproportionate to the alleged harm and as establishing unjustified barriers to trade. The European Union

warned in a July letter that the bill may violate U.S. obligations in the World Trade Organization to refrain from imposing non-tariff barriers to trade in goods. The import ban language in the House bill would explicitly bar the entry of goods from unregistered companies. Even the Senate language, which would require transaction-by-transaction declarations by importers, means denial of entry to goods made by non-registered manufacturers. The EU also argued that the bill may be incompatible with the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, to which the U.S. is a party, and which already provides a mechanism to serve lawsuits on foreign companies via their home governments.

Next Steps

Congress is expected to take up this legislation again in September, when it returns from its August break. Members of the House and Senate agreed to delay consideration of the bill in light of industry concerns, and are entertaining a range of potential amendments. But the FMLAA is perceived as a pro-

consumer issue and as part of the “Make it in America” legislative agenda currently being pursued by Democratic leaders in advance of the mid-term elections. That increases the prospects for congressional action.

There are proposals under consideration to address some of the concerns raised about these bills. One possibility is exempting foreign companies with a substantial U.S. presence. Language purportedly intended to exempt some such companies was approved by the House Energy & Commerce Committee, but it would require the manufacturer’s U.S.-based entity to agree to bear all liability arising from the design, testing, manufacturing and other aspects of the foreign-manufactured product.

Language is also under consideration to provide that U.S. registration would not be an admissibility requirement for goods (*i.e.* that it will not directly block imports at the border) and to make any declaration requirement an annual document rather than one required for each separate entry.