

CONGRESSIONAL BILLS ATTEMPT TO LEVEL THE PLAYING FIELD BETWEEN DOMESTIC AND FOREIGN MANUFACTURERS

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On August 6, 2009, Sen. Sheldon Whitehouse (D-R.I.), introduced the Foreign Manufacturers Legal Accountability Act of 2009 (S. 1606) in the Senate and on February 24, 2010, Rep. Betty Sutton (D-Ohio) introduced the Foreign Manufacturers Legal Accountability Act of 2010 (H.R. 4678) in the House. These substantially identical bills are designed to address perceived inequities in product liability litigation between domestic and foreign manufacturers. The bills would require that foreign manufacturers and producers consent to service of process and personal jurisdiction as a condition of importing products into the United States.

The bills would apply to five categories of “covered products,” which include: drugs, devices and cosmetics; biological products; consumer products; chemical substances; and pesticides. In addition, the bills would require that the Secretary of Agriculture and the Commissioner of Food and Drugs conduct a study on the feasibility and advisability of including food products as a “covered product.”

The bills would require “foreign manufacturers and producers of covered products distributed in commerce (or component parts that will be used in the United States to manufacture such products) to establish a registered agent in the United States who is authorized to accept service of process on behalf of such manufacturer or producer for the purpose of all civil and regulatory actions in State and Federal courts . . .” By registering an agent in the United States, the bills state that a foreign manufacturer thereby “consents to the personal jurisdiction of the State and Federal courts of the State in which the registered agent is located for the purpose of any civil or regulatory proceeding.”

The constitutionality of this proposal is in question because the jurisdictional provision may exceed the limits of due process. If the bill is enacted into law and survives a constitutional challenge, then American businesses and consumers may find it easier to obtain personal jurisdiction and service of process over foreign manufacturers previously outside their reach.