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**Subject:** : Principal Provisions of Draft Anti-Terrorism Technology Advancement Legislation  
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SUBJECT:: Principal Provisions of Draft Anti-Terrorism Technology Advancement Legislation  
TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )  
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CC:"Schmitz, John P." <JSchmitz@mayerbrownrowe.com> ( "Schmitz, John P." <JSchmitz@mayerbrownrowe.com> [ UNKNOWN ] )  
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[Mr. Kavanaugh -- I'm probably too late in sending this to you...John asked me to send it to you earlier today]:

Brett:

Our draft of a legislative concept is attached. We believe it strikes a good balance in addressing the insurance issue, as well as providing protection for the manufacturers of qualified anti-terrorism technology product and a meaningful approach for compensation of victims. This set of principals would not need to be changed to apply if you all decided to include provisions for state and local government purchases of qualified technology.

This definitely a work in progress.

Call if you have any questions.

John Schmitz

FOIA(b)6  
PRA-P6

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**Principal Provisions of The Anti-Terrorism Technology Advancement, Liability and  
Compensation Act**

**September 6, 2002/ 11:15 a.m. Draft**

1. **Scope** – The legislation will apply to [all] [catastrophic] third party claims, including tort and contract claims, brought against a designer, manufacturer, distributor or seller of a piece of qualified anti-terrorism technology for injuries, deaths, business interruption losses and/or property damage or losses caused by, arising out, of or related to terrorism events in which a failure of the qualified anti-terrorism technology to perform as intended or marketed may have been causally related to the claims arising from the terrorism event.
  
2. **Exclusive Federal Jurisdiction & Federal Preemption** – The legislation preempts and supersedes all other state and federal causes of action and is the exclusive remedy against designers, manufacturers, distributors and sellers of qualified anti-terrorism technologies. As set forth below, the legislation provides claimants with a choice of procedures for obtaining compensation for damages within the scope of the legislation (as set forth in Section 1, above). First, the legislation provides for the establishment of a compensation scheme that provides for payment of claims within the scope of the legislation regardless of whether the claimant proves that a manufacturing or design defect in the qualified anti-terrorism technology at issue was the proximate cause of his or her claimed damages. And second, the legislation gives claimants the choice to opt out of the administrative compensation scheme and, instead, to bring actions, including tort and contract actions, in the United States District Courts for the district in which the terrorism event occurred for damages that are caused by, arise out of, or are related to terrorism events and are alleged to have been proximately caused by the defective manufacture or design of a qualified piece of anti-terrorism technology. The legislation vests original, exclusive jurisdiction in the U.S. District Courts to resolve such claims under the act, with normal opportunities to appeal.
  
3. **Willful Misconduct Exception** – The protections afforded by the legislation will not be available to a designer, manufacturer, distributor or seller of qualified anti-terrorism technology if a claimant can show by clear and convincing evidence that the designer, manufacturer, distributor or seller engaged in willful misconduct in relation to the qualified anti-terrorism technology and such misconduct was the proximate cause of the harm experienced by the claimant.
  
4. **Determination of Qualified Anti-Terrorism Technology** – The Secretary of Homeland Security will make the determination about whether a particular piece of technology should be considered qualified anti-terrorism technology. The legislation provides criteria for the Secretary to use in making such determination and requires an “efficient” review process.



5. **Compensation Alternatives** – As noted above, the legislation provides for two (mutually exclusive) options for obtaining compensation for damages under the Act.

5.1 **Administrative Compensation Scheme** – First, the legislation provides for the creation of an administrative compensation scheme that affords relief without recourse to judicial process. Claimants who choose to obtain relief through the administrative compensation scheme are precluded from seeking relief through judicial process. Claimants may obtain relief through the compensation scheme upon a showing that the damages forming the basis of their claims were caused by, arose out of, or related to terrorism events in which a failure of qualified anti-terrorism technology to perform as intended or marketed may have been causally related to the occurrence of the terrorism events and the claimed damages. Claimants opting for relief through the administrative compensation scheme may obtain compensation without regard to whether they prove the qualified anti-terrorism technology was defective or that any such defect was a proximate cause of their damages. A special master appointed by the Secretary will use appropriate criteria to determine the size of the administrative compensation scheme fund, and will administer the claims process and make all awards.

5.2 **Judicial Remedies Under the Act** – The legislation also provides for compensation through judicial process, but requires claimants bringing actions under the Act to bring their claims in Federal District Court for the district in which the terrorism event occurred and to prove by a preponderance of the evidence that their damages were proximately caused by a manufacturing or design defect in the qualified anti-terrorism technology. Claimants availing themselves of judicial remedies under the Act are precluded from making claims under the administrative compensation scheme.

## 6. **Funding of Compensation Alternatives:**

6.1 **Administrative Compensation Scheme Funding** – The legislation provides that the administrative compensation scheme shall be funded, in part, by user fees to be paid by purchasers of qualified anti-terrorism technology. The user fees will consist of a \_\_\_% surcharge on the purchase prices of qualified anti-terrorism technology, such surcharge to be transferred to the fund by the manufacturers, distributors, and/or sellers of such technology. The remainder of the administrative compensation scheme shall be funded through the Congressional appropriations process. Annually, the Secretary of Homeland Security shall evaluate the adequacy of the fund and the level(s) of the surcharges and shall make such adjustments to either or both as he or she deems necessary, taking into account (1) the size of the fund in relation to past, current, and/or expected claims; (2) the success of the legislation in making qualified anti-terrorism technology available; and (3) the effect of the fund and the legislation more generally on the development of a private insurance market for qualified anti-terrorism technology.

6.2 **Funding of Judicial Remedy Claimants** – To assure adequate funding for payments to qualified claimants who opt to pursue the judicial remedies under the Act, the legislation provides that each designer, manufacturer, distributor or seller of qualified anti-terrorism technology must carry adequate insurance subject to the availability of such insurance at reasonable cost. Thus, for purposes of funding the



claims payable to claimants who pursue the judicial remedies under the Act, the following apply:

(a) (1) Any person or entity that sells or otherwise provides a qualified anti-terrorism technology to non-federal government customers ("Seller") shall obtain liability insurance of such types and in such amounts as shall be required in accordance with this section to satisfy otherwise compensable third-party claims brought by claimants who pursue the judicial remedies under this Act for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against such act and the claimant has proven by a preponderance of the evidence that the anti-terrorism technology was defectively manufactured or designed and such defect was a proximate cause of the damages claimed.

(2) For such total claims brought by claimants who pursue the judicial remedies under this Act (as defined above) and which are related to one such act of terrorism, the Seller is not required to obtain liability insurance of more than the maximum amount of liability insurance reasonably available from private sources on the world market at prices and terms that will not unreasonably distort the sales price of Seller's anti-terrorism technologies.

(3) Liability insurance obtained pursuant to this subsection shall, in addition to the Seller, protect the contractors, subcontractors, suppliers, vendors and customers of the Seller, to the extent of their potential liability for involvement in the manufacture, qualification, sale, use, or operation of qualified anti-terrorism technologies deployed in defense against an act of terrorism.

(4) Such liability insurance under this section shall provide coverage against third party claims brought by claimants who pursue the judicial remedies under this Act for claims arising out of, relating to, or resulting from the sale or use of anti-terrorism technologies.

(b) EXTENT OF LIABILITY. – Notwithstanding any other provision of law, liability for all claims against a Seller brought by claimants who pursue the judicial remedies under this Act for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed against such act and such claims result or may result in loss to the Seller, whether for compensatory or punitive damages or for contribution or indemnity, shall not be in an amount greater than the limits of liability insurance coverage required to be maintained by the Seller under this Section.