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From: Kirk Blalock (CN=Kirk Blalock/OU=WHO/O=EOP [WHO])
To: Kristen Silverberg (CN=Kristen Silverberg/OU=WHO/O=EOP@EOP [WHO]), Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Subject: :

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Kirk Blalock (CN=Kirk Blalock/OU=WHO/O=EOP [WHO])
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TO:Kristen Silverberg (CN=Kristen Silverberg/OU=WHO/O=EOP@EOP [WHO])
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TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
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---------- Forwarded by Kirk Blalock/WHO/EOP on 09/05/2002 04:34 PM ----------

"Schwartz, Victor" <VSCHWARTZ@shb.com>
09/05/2002 04:31:43 PM
Record Type: Record

To: Kirk Blalock/WHO/EOP@EOP
cc: "Lorber, Leah" <LLORBER@shb.com>
Subject:

> Dear Kirk,
>
> We wanted to alert you to two important liability-related provisions in the House version of the Department of Homeland Security legislation, H.R. 5005. Sen. Lieberman's substitute, S. Amendment 4467, does not contain either provision and it is important that both provisions survive conference. The Administration's support on these would be greatly appreciated. We will discuss each provision separately and in some detail, so please excuse the length of this email.
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> 1. Limitation of Liability for Certain Airline Security Companies
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> H.R. 5005 contains language in Section 781 that would extend to certain airline security companies the same liability protections for 9/11-related claims that were given to the airlines last fall in H.R. 2926, the Air Transportation Safety and System Stabilization Act. The airline security companies to receive the protections would be Huntleigh USA and Globe Security, both of which are currently under contract with the federal government to provide air security services until the federalization of air security is completed. Argenbright Security is not covered, as it has faced allegations of criminal activity and other misconduct and limiting Argenbright's liability is not seen as politically palatable.
>

> These liability protections provide for: 1) a single and exclusive federal cause of action in the US District Court for the Southern District of New York for all claims arising out of the 9/11 attacks, with substantive rules based on the law of the state where the air crash occurred; 2) all damages, whether compensatory or punitive, to be limited to the amount of liability coverage maintained by the defendant; and 3) an exclusion from protection for defendants who were knowing participants in the 9/11 terrorist conspiracy.
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> H.R. 2926 initially provided these protections for airline security companies as well as the airlines, but these protections were deleted as to airline security companies in an eleventh-hour amendment to the Air Security Act due to attacks against private air security companies launched by Sen. Hollings. These attacks and the "carve out" came as a result of allegations of criminal activity and other misconduct by Argenbright. Unfortunately, the carve out applies to Huntleigh and Globe airline security companies as well.
>
> Despite a number of 9/11-related safety failures (such as the "it's safe to return to your offices" directive given to people in the WTC South Tower), the air security companies are now in the position of being the only innocent defendants who face unlimited liability for the 9/11 attacks on America (the terrorists and their backers are a different story). FAA regulations followed by air security companies at that time allowed passengers to carry boxcutters onto planes. It is difficult to tell what these companies should have done differently, yet they are beginning to be served with lawsuits that will be extremely costly to defend, let alone pay judgments in if juries seeking to compensate 9/11 victims actually find these companies liable.
>
> Media reports indicate that the TSA is not likely to meet the November 19th deadline of federalizing air transportation security services. Globe and Huntleigh need to be able to operate free from concerns about costly litigation to ensure they can provide the personnel needed to protect American air travelers as the holiday season approaches.
>
> We understand that Argenbright wishes to be covered by the 9/11 liability protections as well. U> nfortunately, given the company's apparent track record of misconduct, Members of Congress who support giving the protections to Huntleigh and Globe do not wish to extend those protections to Argenbright. The inclusion of that company is likely to kill the entire effort. The TSA has sent Congress a "technical corrections" amendment that would give the protections to Argenbright as well. We understand the TSA may feel pressure from Argenbright t> o do so, as Argenbright has a contract with the government to provide air transportation security in five airports. However, if Argenbright withdraws from that contract as a result of not gaining 9/11 liability limitations, either Huntleigh or Globe could easily replace Argenbright.
>
> We would appreciate the Administration's efforts to send a message to the Hill that the liability limitations for airline security companies in H.R. 5005 should be kept in the legislation as it works its way through conference. To that end, it also may be appropriate for the Administration to direct the TSA to drop or reduce its support for including Argenbright in these protections.
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> 2. Liability protections for anti-terrorism products.
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> H.R. 5005 also includes provisions in Section 753-755 that would provide civil liability protections to "Sellers" of certain products used against terrorism. These provisions are important to ensure the availability of useful products to protect the American people against terrorist activity. To ensure that all useful products receive this protection, we believe that the language needs to be tweaked a bit in conference. Here are our thoughts.
>
> First, the bill charges the Secretary of Homeland Security with determining what products are qualified anti-terrorism technologies. The definition of qualified anti-terrorism technologies in Section 755 of the bill has a significant gap that will result in excluding manufacturers of certain good and helpful products from the litigation management protections in this bill. Section 755 defines covered products as "any product, device, or technology designed, developed, or modified for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism and limiting the harm such acts might otherwise cause, that is designated as such by the Secretary."
>
> This means that the covered products must first meet the statutory definition in order to even be considered by the Secretary for designation as a qualified anti-terrorism technology. The Secretary then has the final word as to whether the product should be a qualified anti-terrorism technology, or not.
>
> The statutory definition does not allow the Secretary to designate certain safety equipment as qualified anti-terrorism technology unless that is the equipment's sole and only use. This defies common sense. The purpose of the legislation is to assure that safety-related products are available if a terrorist attack occurs. For example, safety masks and respirators that have been recommended by the CDC and others (such as Sen. Frist) to protect against bioterrorist agents. These masks and respirators were manufactured for general safety purposes but they are NOT solely for the specific purpose of fighting terrorism. However, as the CDC recommendations indicate, they can be useful in helping protect people against bioterrorist agents. Other products falling into this categoory include protective gloves, clothing, products to clean up biohazards such as the products and equipment being used to decontaminate the Brentwood post office, and the like. We believe that the legislation should include language that covers manufacturers of good products that are NOT manufactured specifically to be used against terrorism but still have been recommended by the government as useful against terrorism. The liability protection would only be available when the product was used to fight terrorism. Alternative language could read either: 1) "any product, device, or technology designed, developed, modified or recommended by the federal government for the purpose of preventing, detecting..." etc., or 2) "any product, device, or technology designed, developed, modified, or reasonably used for the purpose of preventing, detecting, ..." etc. >
>
> It is important to note that revising this statutory language does not automatically make the safety equipment a qualified anti-terrorism technology subject to liability protections. The Secretary still has the responsibility to make the ultimate decision.
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> Second, the term "Seller" may not be broad enough to encompass product manufacturers. The provision grants civil liability protections to "Sellers" of qualified products. However, the term is defined in Sec. 754 as "Any person or entity that sells or otherwise provides" a qualified product to federal and non-federal government customers. While it is likely that a "Seller" could be considered to be a "provider" of the product, to avoid confusion and costly litigation it would be best to explicitly include manufacturers in the definition. Such a definition should read: "Any person or entity that manufactures, distributes, sells, or otherwise provides.."
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> Conclusion
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> We appreciate your time and thoughts on these important issues and on whether we should outreach to others in the Administration. Please give me [redacted] or Leah [redacted] a call if you have any questions.
>
Sincerely, Victor and Leah
>
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