

Received(Date): 18 SEP 2002 19:34:59
From: Kevin Warsh (CN=Kevin Warsh/OU=OPD/O=EOP [OPD])
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]), Kristen Silverberg (CN=Kristen Silverberg/OU=WHO/O=EOP@EOP [WHO])
Subject: : Dept. of Transportation comments on H.R. 3210/S. 2600 - TerrorismReinsurance

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CREATOR:Kevin Warsh (CN=Kevin Warsh/OU=OPD/O=EOP [OPD])
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SUBJECT:: Dept. of Transportation comments on H.R. 3210/S. 2600 - Terrorism Reinsurance
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
TO:Kristen Silverberg (CN=Kristen Silverberg/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
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Here is DOT, I will forward DOI. I understand there is a State letter around somewhere as well.

----- Forwarded by Kevin Warsh/OPD/EOP on 09/18/2002
07:36 PM -----

From: Lisa J. Macecevic on 09/10/2002 10:21:26 AM
Record Type: Record

To: Kevin Warsh/OPD/EOP@EOP
cc: James A. Brown/OMB/EOP@EOP, jane.decell@ost.dot.gov
Subject: Dept. of Transportation comments on H.R. 3210/S. 2600 - Terrorism Reinsurance

Kevin,

Attached for NEC's information is a views letter from DoT. I was previously advised (and have sent you) to send you any comments I receive from agencies so they may be forwarded to the negotiating team since the WH has decided that no formal views letters will be sent. The contact person at DoT is Jane DeCell (cc'd above) and her number is [redacted].

(Jane - Kevin works for the NEC and he can be reached at [redacted] if you have any further questions.)

FOIA(b)6
PRA-P6

Thanks,
Lisa

----- Forwarded by Lisa J. Macecevic/OMB/EOP on
09/10/2002 10:11 AM -----
x-DRAFT-x

U.S. Department of Transportation
400 Seventh Street, SW Washington, D.C. 20590

Maritime Administration

The Honorable
Chairman
Committee on

United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter provides the views of the Department of Transportation concerning H.R. 3210, the Terrorism Protection Act, as passed by the House of Representatives on November 29, 2001, and S. 2600, the Terrorism Risk Insurance Act of 2002, as passed by the U. S. Senate on June 18, 2002. The Department commends the Committees for their leadership in addressing the vital issue of commercial terrorism insurance, and looks forward to working with the conferees as differences between the House and Senate bills are resolved.

The Department supports the goals of H.R. 3210 and S. 2600. Catastrophic losses were incurred by commercial insurance underwriters as a result of the events of September 11th, and there has been an across-the-board reduction/elimination of terrorism insurance coverage.

The

Department's comments and recommendations regarding marine insurance industry

matters are intended to assist the conferees in developing final legislation

to provide the Department of Transportation and the Federal Government with the a comprehensive terrorism insurance program to respond to the new, post-September 11th threat environment.

Participating insurer

S. 2600 includes within its definition of "participating insurers" only insurers that are state-licensed and foreign surplus lines insurers listed by the National Association of Insurance Commissioners (NAIC). However, insurance for most maritime (and offshore energy production units) is exempt from state regulation, and therefore a state license or a NAIC listing is neither available or necessary for many of the insurers of these activities. The same is true for commercial aviation, yet the acceptability

of insurers of these activities is often subject to active oversight by federal agencies regulating the underlying maritime, energy or aviation activity. MARAD, for example, has a formal approval process to qualify foreign loan guarantors to insure vessels receiving loan guarantees under Title

XI of the Merchant Marine Act, 1936, which takes into account a number of factors, including their financial condition. While insurer eligibility rules or practices vary with each federal agency, the Department believes that federal agency approval should be accorded equivalent status to State agency approval or NAIC listing. Therefore, if the S. 2600 structure is adopted in conference, a provision should be made to incorporate federal agency approval of insurers as a basis for eligibility.

H.R. 3210 includes a broad definition of "commercial insurer" and also expressly directs the Secretary of the Treasury to ensure that the act is applied "as appropriate to any offshore or non-admitted entities that provide commercial property and casualty insurance." This definition presumably makes certain that the insurers who cover activities in the United States territorial waters (and continental shelf) are eligible. If

the conferees structure the final bill in a manner similar to H.R. 3210, they should retain the provision directing the Secretary of the Treasury to apply the act to offshore and non-admitted insurers, as appropriate.

Geographic Scope of Coverage

In S. 2600, the definitions of "act of terrorism" and "insured losses" are primarily limited to acts and harm occurring "within the United States." In H.R. 3210, the definition of "act of terrorism" refers to acts or harm occurring "in the United States." How these definitions would apply to activities conducted in the jurisdictional waters of the United States is unclear. Such activities include both coastwise and international shipping, bound to or from the United States, which carries the preponderance of U.S. exports and imports. Another critical activity is energy production on the United States continental shelf, which is an increasing share of the country's hydrocarbon production.

Congress specifically foresaw the possibility of terrorist acts against shipping in the U.S. territorial sea (the 12-mile limit) and against fixed platforms on the U.S. continental shelf when it passed the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103-322). Section 60019 of that Act ("Offenses of Violence against Maritime Navigation or Fixed Platforms") made such terrorist acts a federal crime and confirmed U.S. territorial jurisdiction over such criminal activities. These provisions, codified at 18 U.S.C. Sec. 2280-2281, define U.S. jurisdiction with respect to "acts to compel the United States to do or abstain from doing any act" to include the "territorial sea of the United States" meaning all waters seaward to 12 nautical miles from the baseline on the United States (generally the shoreline); and the "continental shelf of the United States," meaning the seabed or subsoil of the submarine areas that extend beyond the territorial sea to the limits provided by the customary international law as reflected in Article 76 of the 1982 Convention on the Law of the Sea.

Shipping and other maritime activity proximate to U.S. ports, including deepwater ports, and U.S. offshore energy facilities are potential targets of foreign terrorists. The conferees should ensure that such key economic activities are protected by the program. S. 2600 addresses this by including the territorial sea in its definition of "United States." However, the conferees should further clarify the definition of the United States by incorporating the jurisdictional lines set forth in 18 U.S.C. Sec. 2280 and 2281 respectively for the "territorial sea of the United States" (12-mile nautical limit) and the "continental shelf of the United States." This will ensure that all shipping in U.S. waters, and all oil and gas activities on the United States continental shelf, fall within the geographic scope of the bill since these activities are equally as vital to the U.S. economy as other domestic activities covered under the bill.

Coverage of Title XI Guaranteed Vessels

Section 19 of H.R. 3210, which delineates the property eligible for terrorism insurance, includes United States flag vessels or vessels based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States. If the H.R. 3210 structure is adopted by the conferees, Subsection (1)(B)(ii) should be amended to also include foreign-flag vessels which are subject to a Title XI ship financing mortgage. MARAD has financed a number of vessels under the export provisions of Title XI of the 1936 Merchant Marine Act. Although those vessels are registered under non-U.S. flags, they carry a mortgage in favor of the United States. These vessels should be included under the provisions of this insurance to protect the government's security interest.

Railroad and Trucking Insurance Study

Section 17 of H.R. 3210 requires the Secretary of Treasury to conduct a study to determine how the Federal government should address a possible crisis in the availability and affordability of railroad and trucking insurance, by making such insurance for acts of terrorism available on commercially reasonable terms. The study would also address the advisability and effectiveness of establishing a reinsurance pool system relating to future acts of terrorism to replace the program provided for under H.R. 3210.

If such a study is included in final legislation, the Department believes that it should be expanded to include all critical transportation systems and infrastructure, and not just the trucking and railroad industries. Therefore, Section 17 should be amended to also include ports, intermodal terminals, airports and pipelines. In addition, since most of the expertise on these transportation industry segments rests with DOT, the study should be co-chaired by the Secretary of Transportation.

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