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September 7, 2016

The Honorable Mac Thornberry  
Chair  
Committee on Armed Services  
2216 Rayburn House Office Building  
U.S. House of Representatives  
Washington, DC 20515

The Honorable John McCain  
Chair  
Committee on Armed Services  
228 Russell Senate Building  
U.S. Senate  
Washington, DC 20510

The Honorable Adam Smith  
Ranking Member  
Committee on Armed Services  
2216 Rayburn House Office Building  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Jack Reed  
Ranking Member  
Committee on Armed Services  
228 Russell Senate Building  
U.S. Senate  
Washington, DC 20510

Dear Chairmen Thornberry and McCain and Ranking Members Smith and Reed:

Following up on the concerns I raised during the meetings of conferees, I am writing to provide additional information and urge the conferees to delete Section 3512 contained in the House version of the National Defense Authorization Act (NDAA) for FY 2017 (H.R. 4909).

The amendment's objective is to eliminate Longshore and Harbor Workers' Compensation Act (LHWCA) coverage for workers who repair very large yachts and luxury watercraft by altering the definition of "recreational vessel." By stripping workers of the protections under LHWCA, these workers would be shifted into coverage under state workers' compensation laws. Regrettably, many state workers' compensation benefit levels are substantially inferior to LHWCA coverage, especially in states such as Florida, where there is a large recreational boating industry.

Recently, the Florida Supreme Court found that the Florida workers' compensation law was unconstitutional because the duration of disability benefits was so truncated and the benefit levels so anemic that they did not constitute "a system of redress" that "functions as a reasonable alternative to tort litigation."<sup>1</sup>

<sup>1</sup> *Westphal v City of St. Petersburg*, No. SC13-1930 (June 9, 2016).

The Honorable Mac Thornberry  
The Honorable Adam Smith  
The Honorable John McCain  
The Honorable Jack Reed  
September 7, 2016  
Page 2

Both the Department of Labor (DOL) and the U.S. Coast Guard (USCG) oppose Section 3512. The attached position statements detail objections to the drafting, the policy, and the adverse collateral impacts on other regulatory and enforcement authorities.

The DOL states that, at a minimum, the drafting of Section 3512 will “lead to uncertainty and foster litigation regarding Longshore Act coverage” because the definition of “recreational” vessel introduces subjective criteria. This concern was also raised in the attached letter from the AFL-CIO. DOL also expressed concern that this “legislation will simply encourage employers to shift their employees out of the more protective federal longshore workers’ compensation system.”

The USCG notes that Section 3512 changes the definition of “recreational vessel” under Section 4301 of Title 46 (the Federal Boat Safety Act of 1971). This approach to amending the LHWCA will have adverse collateral impacts on Coast Guard regulatory and enforcement authorities. Their statement notes that, while they have not had time for exhaustive review, this provision could:

- Exclude vessels now covered under the U.S. implementing legislation for the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, and reduce available civil monetary penalties to deter violations;
- Allow a foreign vessel owner to exempt itself from tonnage taxes by declaring its vessel to be under repair; and,
- Allow foreign flagged vessels to avoid requirements for safety management systems under the International Safety Management Code.

None of these valid concerns have been considered in hearings within the respective committees of jurisdiction for USCG or DOL. At a minimum, the issues deserve careful consideration.

Given the harmful impacts to injured workers, and the collateral harm to USCG regulatory and enforcement authorities, I urge the removal of Section 3512. Please follow up with Denise Forte or Richard Miller of the House Committee on Education and Workforce at (202) 225-3725.

Sincerely,



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**ROBERT C. "BOBBY" SCOTT**  
Ranking Member

The Honorable Mac Thornberry  
The Honorable Adam Smith  
The Honorable John McCain  
The Honorable Jack Reed  
September 7, 2016  
Page 3

Encl: Coast Guard Views of Sec. 3512 of H.R. 4909, the NDAA for FY 17  
U.S. Department of Labor, letter to conferees on the NDAA for FY 17  
AFL-CIO letter to conferees on NDAA for FY 17

cc: Hon. John Kline, Chair, Committee on Education and the Workforce  
Hon. Bill Shuster, Chair, Committee on Transportation and Infrastructure  
Hon. Peter A. DeFazio, Ranking Member, Committee on Transportation and  
Infrastructure  
Hon. John Thune, Chair, Committee on Commerce  
Hon. Bill Nelson, Ranking Member, Committee on Commerce  
Hon. Lamar Alexander, Chair, Committee on Health, Education, Labor and Pensions  
Hon. Patty Murray, Ranking Member, Committee on Health, Education, Labor and  
Pensions

## Coast Guard Views on Sec. 3512 of H.R. 4909, the NDAA for FY17

The Coast Guard would oppose the previously referenced amendment to 46 U.S.C. § 4301. As a general matter, it seems like this proposed amendment is out of place. Sec. 803 of the American Investment and Recovery Act amended sec. 2(3)(F) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 902(3)(F)), a statutory regime squarely within the purview of the Department of Labor (DOL). Indeed, in 2011, it was DOL—not the Coast Guard—that promulgated the rule in question that, according to industry background documentation, would appear to be the root cause of this issue.<sup>1</sup> Thus, any changes to address this issue should be more properly directed either to the Longshore and Harbor Workers' Compensation Act or to DOL and its implementing regulations.

Aside from the amendment's misplaced statutory location, the proposed amendment contains numerous drafting issues. For example, the proposed amendment contains no limitation of the “dismantling” language to those activities “in connection with the repair of such vessel.” Irrespective of the drafting issues, the proposed amendment would not provide any immediate relief as the draft language contains terms undefined by statute that prevent it from being self-executing. Finally, if adopted, the amendment would likely create a wholly unnecessary bifurcated regulatory scheme between the DOL regulations under 20 C.F.R. §§ 701.501-701.505 and additional regulations promulgated by the Coast Guard.

The proposed change to the definition of a “recreational vessel”<sup>2</sup> to include “any vessel, including a foreign vessel, being repaired or dismantled [...] during such repair or dismantling if the vessel (1) shares elements of design and construction of traditional recreational vessels (as so defined); and (2) when operating is not normally engaged in a military, commercial, or traditionally commercial undertaking” has significant impacts on Coast Guard regulatory and enforcement authorities.

The change in the definition would expand the current exclusion for “recreational vessels” from the U.S. implementing legislation for the International Convention on the Control of Harmful Anti-Fouling Systems on Ships.<sup>3</sup> Specifically, civil penalties for owners of “recreational vessels” are statutorily limited to \$5,000 as compared to the \$37,500 maximum penalty for all other vessel owners.

The change in the definition could be construed to allow a foreign vessel owner to exempt itself from tonnage taxes required under 46 U.S.C. § 60301 by claiming that its vessel is “being repaired” and thereby a recreational vessel exempted from tonnage taxes.

The change in the definition could also be construed to allow foreign flagged vessels to avoid the requirements to maintain a safety management system onboard under 46 U.S.C.

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<sup>1</sup> 76 Fed. Reg. 82,128 (Dec. 30, 2011) codified at 20 C.F.R. §§ 701.501-701.505.

<sup>2</sup> Defined at 46 U.S.C. § 2101(25) as: “a vessel-- (A) being manufactured or operated primarily for pleasure; or (B) leased, rented, or chartered to another for the latter's pleasure.”

<sup>3</sup> As implemented at 33 U.S.C. § 3801 et seq.

§ 3201, et seq. by claiming that its vessel is “being repaired” and thereby a recreational vessel exempted from Safety Management Requirements under the International Safety Management Code.

In addition to these statutory impacts, there are numerous Coast Guard regulations not related to Longshoreman and Harbor Workers Compensation Act authorities that would be impacted by the change. These include:

- 33 C.F.R. § 95.001
- 33 C.F.R. § 151.51
- 46 C.F.R. § 2.01-7
- 46 C.F.R. § 4.03-50
- 46 C.F.R. § 67.11
- 46 C.F.R. § 136.105

This list is by no means exhaustive. Given the time for review, the Coast Guard has not been able to conduct a comprehensive review of statutory and regulatory impacts that would be implicated by this change. Furthermore, as drafted, this change would require the Coast Guard to reallocate a substantial amount of financial and personnel resources to ensure that its regulations were in alignment with the revised definition. Such an undertaking is wholly incompatible with the current fiscal climate.

**U.S. Department of Labor**

Office of Workers' Compensation Programs  
Washington, DC 20210



File Number:

The Honorable William M. "Mac" Thornberry  
Chairman  
Committee on Armed Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable John McCain  
Chairman  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

Dear Mr. Chairmen:

As you conference on the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, I write to express concern with Section 3512 of H.R. 4909, as passed by the House. If adopted, Section 3512 could make it more difficult for workers who repair recreational watercraft—especially luxury yachts and other large boats—to receive fair compensation for their workplace injuries. As you know, on July 13<sup>th</sup>, you received a letter from Secretary of Defense Ash Carter laying out a number of concerns from the Administration, including some specific to the Department of Labor, regarding both the Senate and House passed FY 2017 NDAA bills. This correspondence is meant to supplement that letter.

The Longshore Act compensates workers (and their survivors when fatalities occur) for injuries related to maritime employment on the navigable waters of the United States or adjoining areas, including shipbuilding and repair. The Act provides much fairer and greater benefits to injured workers than most state workers' compensation laws.

The Longshore Act generally excludes from coverage workers who repair "recreational vessels," or dismantle them for repair. 33 U.S.C. § 902(3)(F). Although the Longshore Act does not define the term "recreational vessel," the Department of Labor's regulations set out objective standards for determining whether a vessel is being used in a commercial as opposed to recreational manner. 20 C.F.R. § 701.501. These regulations ensure that workers injured while repairing vessels that do not meet DOL's definition of "recreational vessel"—luxury yachts and other boats that carry paying passengers or produce an income stream—receive Longshore Act coverage.

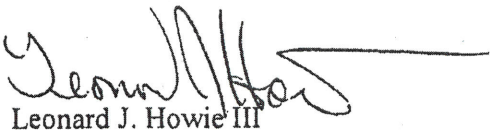
Section 3512 of H.R. 4909 introduces a new definition of "recreational vessel" that would apply to the Longshore Act. Under Section 3512, recreational vessels are those vessels "not normally engaged in a military, commercial, or traditionally commercial undertaking." Since Section 3512 does not explicitly state what constitutes "normally engaged in . . . commercial" use, some servicers of luxury yachts and other boats that carry paying passengers or produce income will likely view this provision as providing an exclusion from the Department's regulations. At a minimum, Section 3512 will lead to uncertainty and foster litigation regarding Longshore Act coverage.

Ship and boat repair is hazardous work. The workplace injury and illness rate for ship and boat repair (6.5/100 workers) is more than twice the national average. Most state workers' compensation systems provide compensation that is far inferior to federal longshore standards. In Florida, one of the states whose workers are likely to be most impacted by Section 3512, workers' compensation protections are so weak that the Florida Supreme Court recently declared that a major provision of that state's workers' compensation law violated the Florida Constitution. *Westphal v. City of St. Petersburg*, \_\_ So.3d \_\_, 2016 WL 3191086, at \*9-14 (June 9, 2016). Provisions such as Section 3512 only serve to encourage employers in Florida and other states to shift their employees out of the more-protective federal longshore workers' compensation system.

Finally, we note that Section 3512 would amend the general shipping statutes (at 46 U.S.C. § 4301) administered by the United States Coast Guard. By its terms, the amendment would apply to "any Federal law."<sup>1</sup> Given its breadth, Section 3512, if passed, will likely have unforeseen ramifications beyond the Longshore Act.

Accordingly, the Department requests that Section 3512 be stricken from the bill.

Sincerely,



Leonard J. Howie III  
Director  
Office of Workers' Compensation Programs  
U.S. Department of Labor

cc:  
The Honorable Adam Smith  
Ranking Member

cc:  
The Honorable Jack Reed  
Ranking Member

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<sup>1</sup> Section 3512 explicitly carves out only the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, from its reach.

# AFL-CIO

## LEGISLATIVE ALERT

September 2, 2016

The Honorable Roger Wicker  
Chairman, Subcommittee on Seapower  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

The Honorable Mazie Hirono  
Ranking Member, Subcommittee on Seapower  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

The Honorable J. Randy Forbes  
Chairman, Subcommittee on Seapower  
and Projection Forces  
Committee on Armed Services  
United States House of Representatives  
Washington, DC 20515

The Honorable Joe Courtney  
Ranking Member, Subcommittee on Seapower  
and Projection Forces  
Committee on Armed Services  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Wicker, Ranking Member Hirono, Chairman Forbes and Ranking Member Courtney:

Section 3512 of the National Defense Authorization Act for FY 2017 (H.R. 4909) would make it more difficult for workers engaged in the repair of super yachts and other large boats to receive fair compensation for their workplace injuries. We urge conferees on the bill to delete this provision.

In 2009, Congress passed legislation exempting the repair of marine recreational vessels from coverage under the Longshore and Harbor Workers Compensation Act (LHWCA), so long as state workers' compensation is available. To implement this legislation, the Department of Labor revised its regulations defining "recreational vessel" by incorporating more detailed, longstanding standards used by the Coast Guard. Section 3512 would establish a new definition of "recreational vessel" that would require a case by case determination of whether a vessel is commercial or recreational.

The effect of this amendment in the NDAA is to make it more difficult to determine whether a boat being repaired is commercial or recreational for the purposes of LHWCA coverage. As a result, an injured worker will not know whether he or she is entitled to federal or state benefits.

While repair of commercial vessels is subject to the federal LHWCA, repair of recreational vessels is subject to state workers' compensation law. The Longshore Act provides much fairer and greater benefits to injured workers than most state workers' compensation laws. The reason this legislation is being proposed is to lower the workers' compensation premiums for employers who are engaged in boat repair.

Under this bill, workers who work in boat repair who are injured on the job will have great uncertainty about whether their workplace injury is covered by federal or state compensation. It may take years of litigation to resolve this issue, leaving workers with no compensation or coverage for



medical bills while such claims are litigated. The U.S. Department of Labor underscored this concern in a recent letter to conferees.

This legislation may be a good deal for employers who are engaged in the repair of super yachts and the owners of luxury vessels. But it is a bad deal for workers. Ship and boatbuilding is hazardous work. The workplace injury and illness rate for ship and boat repair (7.2/100 workers) is more than twice the national average. And for those cases which are subject to state compensation, it will leave workers with less coverage and reduced benefits.

In Florida, the workers' compensation coverage and benefits are so limited that in 2016, the Florida Supreme Court ruled that the law was unconstitutional since it deprived workers of their right to sue for injuries without providing an adequate compensation benefit as an alternative (*Westphal v City of St. Petersburg*, June 9, 2016). Suggestions that enactment of section 3512 will still provide an adequate backstop for injured workers through state workers' compensation in Florida are inaccurate.

Conferees should reject this measure which is only designed to profit employers while taking away needed benefits from injured workers.

Sincerely,



William Samuel, Director  
Government Affairs

CC

The Honorable John McCain, Chairman, Committee on Armed Services  
The Honorable Jack Reed, Ranking Member, Committee on Armed Services  
The Honorable Mac Thornberry, Chairman, Committee on Armed Services  
The Honorable Adam Smith, Ranking Member, Committee on Armed Services  
The Honorable Bill Nelson, Committee on Armed Services  
The Honorable Patty Murray  
The Honorable Bobby Scott  
The Honorable Peter DeFazio

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**American Federation of Labor and Congress of Industrial Organizations**

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**RICHARD L. TRUMKA**  
PRESIDENT

**ELIZABETH H. SHULER**  
SECRETARY-TREASURER

**TEFERE GEBRE**  
EXECUTIVE VICE PRESIDENT