Information Note
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ADVERSE IMPACTS OF THE AMERICAN OFFSHORE WORKER FAIRNESS ACT (H.R. 6728) ON OFFSHORE ENERGY SECURITY

H.R. 6728, a proposed amendment to the Outer Continental Shelf Lands Act ("OCSLA") would impose burdensome new citizenship-based restrictions on crews of foreign flag vessels that work on offshore energy projects on the U.S. Outer Continental Shelf ("OCS"). These projects provide critical domestic energy resources.

Vessels use trained crews from all over the world, and these proposed restrictions would effectively break an international regulatory system which has worked well for decades. This bill would disrupt critical domestic energy supplies by derailing infrastructure work supporting both the oil and gas sector and the rapidly emerging offshore wind industry. The proposed new bureaucratic obstacles for foreign vessel crews would run afoul of long-accepted principles of international law, comity, and reciprocity, and would substantially deter and delay growth of the offshore renewables sector. This would effectively shut down any possibility of meeting the targets set by the Biden Administration for offshore wind power, and would not yield any security benefits or economic advantages for the United States. In fact, it would serve to weaken U.S. energy production at a time of unparalleled global instability.

The proposed legislation would require and have the following impacts:

- Require mariners on foreign flagged vessels be either U.S. citizens, permanent residents (green card holders), or citizens of the nation of the flag state of the vessel, in contravention of longstanding international principles that regulation and credentialing of crews are matters under the sovereign control of vessels' flag states.

- Limit the number of visas that could be issued to crew of each foreign vessel to 2.5 times of the crew complement, creating problematic new administrative burdens for the U.S. Coast Guard, State Department, and owners of foreign flag vessels with no identifiable benefits to U.S. interests.

- Require foreign vessels to prove their ownership on an annual basis when less burdensome approaches to compliance are available.

- Require the USCG to inspect all such foreign vessels annually to ensure compliance with this law, unnecessarily taxing Coast Guard resources and creating an unfunded mandate without a corresponding homeland security or safety benefit.

- Impose an unworkable requirement that all crew members on these vessels carry TWIC cards from the U.S. Department of Homeland Security, despite the lack of any precedent or security need for mandating TWIC cards on foreign-flag vessels in such circumstances.

BACKGROUND: Current OCS Crewing Regime and Visa Requirements

While transportation of merchandise on the OCS is reserved to U.S.-flag, coastwise-qualified vessels under the Jones Act, certain specialized foreign-flag vessels play a vital role in the construction, installation, maintenance, and repair of domestic offshore energy infrastructure. These non-U.S. specialty vessels perform certain critical non-Jones Act functions on the OCS, such as seismic survey, pipe and cable laying, and heavy lift construction and decommissioning activities – services that are for the most part simply beyond the capabilities or current availability of the domestic fleet and U.S. crews.

As a general rule, under ("OCSLA") members of the regular complement of any vessel, rig, platform or other vehicle or structure ("OCS Unit") engaged in U.S. Outer Continental Shelf ("OCS") activities must be crewed or manned by U.S. citizens or permanent residents. 43 U.S.C. § 1356(c)(2). However, there is a longstanding exception procedure available for foreign-flag vessels that are over 50% foreign owned (at every tier of ownership) or foreign controlled (*i.e.* bareboat charter with over 50% foreign ownership at every tier of ownership) to engage in U.S. OCS activities using foreign citizen crewmembers. U.S. law also gives the Coast Guard authority to deny or modify an exemption request where the foreign country has implemented national manning requirements preventing U.S. citizens from working on a U.S. flag vessel in that country's OCS entirely or to some extent. The intent of this measure is to protect U.S. citizens working on a U.S.-flag OCS unit on a foreign continental shelf from being forced to be replaced with a foreign citizen by the coastal nation.

Under this section, the Coast Guard issues a crewing exemption (referred to by the Coast Guard as a "Letter of Non-applicability") authorizing the employment of foreign citizens aboard foreign flag units engaged in OCS activities. This Letter of Non-applicability is vessel-specific and valid until there is a change in ownership or control for all crewmembers serving aboard the vessel.

The U.S. immigration laws do not apply offshore to OCS activities. However, for foreign crew to travel through the United States to join or depart a vessel engaged in OCS activities, each foreign crewmember must obtain a B-1 (OCS) visa. Any U.S. embassy issuing the B-1(OCS) visa requires a valid U.S. Coast Guard Letter of Non-applicability for the vessel to which a particular crewman is serving aboard to initially issue the visa. Once issued, a B-1(OCS) visa is valid for a minimum of one year and in many cases multiple years depending on the foreign country involved. The B-1 (OCS) visa is not vessel-specific; thus, as long as the visa remains valid the crewman can be employed on any foreign flag vessel that has a valid Letter of Non-applicability issued by the Coast Guard. Currently, the U.S. Coast Guard interprets OCSLA to only require a foreign flag vessel engaged in oil and gas OCS operations to obtain a Letter of Non-applicability and does not apply this requirement to a vessel engaged in offshore wind operations.

The current regime has served its purpose well for many years, ensuring U.S. and foreign vessels and crews are treated in a fair and reciprocal way. The OCS-specific visa program for offshore workers includes a personal interview and routine security check by a U.S. embassy based on comprehensive information supplied by various U.S. governmental security agencies including terrorist screening. This along with the U.S. Customs and Border Protection and Coast Guard's advance notice of arrival and crew list submission requirements allows foreign crews to be vetted and reviewed for security purposes prior to their arrival in the U.S. As a result, non-U.S. specialty vessels are able to come to the U.S. and efficiently provide mission-critical services that otherwise would not be possible. The system is notable for the lack of compliance breakdowns, security incidents, or other crew-related concerns arising on the OCS. In short, the current system simply works.

ANALYSIS: Proposed Legislation

The legislative proposal would break the current system by layering on unnecessary and unworkable new obstacles and restrictions. The legislation is not calibrated to improve the safety, security, or efficiency of the offshore energy sector; rather, it seems tailored to cause maximum operational disruption to both the wind and oil and gas sectors, in a misguided effort to drive critically needed global service providers away from the U.S. market. The result of the bill would not be the boom to the U.S. energy or maritime sector that proponents might imagine. Rather, these new regulatory barriers would only have the effect of driving investment, expertise, and projects away from the United States, particularly noteworthy in view of President Biden's goal of substantially increasing the offshore wind sector by 2030 and recent international developments in Eastern Europe. In addition, imposing such restrictions on foreign flag vessels would likely result in direct retaliation from other countries countering with imposing restrictions on U.S. flag vessels servicing energy projects on the OCS of foreign countries further decimating the growth and employment of the U.S. offshore fleet.

Restricting Foreign Crew Citizenship and Lack of Trained Mariners

Specifically, the bill attacks the current regime by mandating that any exemption granted to a foreign-owned or controlled vessel must limit the foreign citizen crew members to the nationality of the flag state of the vessel. For example, if the vessel involved is a Vanuatu flag vessel then the exemption issued by the Coast Guard would limit the foreign citizens working on the vessel to Vanuatu nationals, a purposefully implausible result as there are few Vanuatu mariners in existence. However, under longstanding customary international law as reflected in the United Nations Convention on the Law of the Sea, no country, including the United States, has the authority to dictate citizenship requirements for foreign nationals working aboard a foreign flag vessel. The flag State alone has the authority to establish citizenship requirements for its vessels, and the citizenship of the foreign flag vessel's crew, under international law, are not required to be the same as the flag State unless that specific flag State mandates such a requirement.

As a practical matter, implementation of the new proposal would appear to have the practical effect of disrupting or shutting down the entire offshore energy market, both wind and oil and gas. This is because foreign flag vessels engaged in various types of specialized OCS activities must employ crew members from maritime nations with particular skill sets that cannot be replaced easily. Consistent with international law, it is common practice to permit an owner or operator to crew a vessel under a particular flag with crew members from any country as long as the crewmember is trained, has the experience to meet international safe manning requirements, and earns the required credentials from the flag state issued in accordance with international credentialing standards.

Supporters of this legislation allege that enactment will close a loophole that allows foreign vessels to utilize mariners from low-wage nations and somehow this will lead to employment of U.S. citizen crew. Not only is this far from the truth, even in the best-case scenario, domestic energy projects would face at a minimum, substantial disruptions of years, if not a total shutdown due to an abrupt loss of essential technical personnel on irreplaceable specialty vessels. In addition, the domestic OCS fleet would essentially be laid up in its entirety with no work to perform in support of the developers and foreign flag vessels performing OCS work. Moreover, the current U.S. citizen mariner employment pool is already stretched thin to meet the demand to crew U.S. flag vessels in the regular shipping and OCS markets, without even considering employing them aboard foreign flag vessels, and they do not have the technical expertise or training to replace specialized foreign crew members serving the OCS construction markets. It is noteworthy that the offshore wind industry will shortly need a new fleet of U.S. flag Service Operations Vessels ("SOVs") which will need to be fully crewed with U.S. citizens. It would make more sense for the domestic fleet to focus on this new development for future work.

Imposing a Transportation Worker Identification Card ("TWIC") Requirement

Similarly, the imposition of a TWIC requirement on all OCS units would not address a bona fide security issue on the OCS. Rather, it would erect a practical obstacle for foreign crew members, who would have to engage with the Transportation Security Agency in person in the United States to obtain a credential. A TWIC is required by the Maritime Transportation Security Act for workers who need unescorted access to secure areas of the nation's maritime facilities and vessels. This is simply not applicable in this case because there is no need for a person granted an exemption to access secure areas without an escort when working on the OCS. Accordingly, overlaying the TWIC program (which has had its own well-documented administrative challenges) on the OCS is unnecessary and unprecedented for foreign vessels, as flag states maintain their own credentialing requirements for foreign crew in line with applicable international conventions.

Linking Visas to Vessels and Limiting Exemptions to 2.5 Times the Number of Crewmembers

The new proposal to restrict the number of exemptions available per vessel, and in turn linking visas to a specific vessel and individual exemptions issued thereunder, would not address any existing problem on the OCS. Rather, it would create a complex new administrative burden on the State Department and Coast Guard, effectively requiring both agencies to play a hands-on oversight role in the deployment of individual workers on foreign units on the OCS. It would be a return to (and a step beyond) a discarded State Department policy of limiting visas to individual vessels, which was unworkable and unnecessary from a security and immigration perspective.

CONCLUSION

The current regulatory scheme has served the offshore oil and gas industry well for decades. There is no loophole to close and key aspects of the current proposal would create a technical trade barrier that would not only fail to enhance safety, security, efficiency, or compliance, but rather would ultimately cripple U.S. energy projects, employment, growth, and security, profoundly undermining the energy security of the United States. However, industry stands ready to work with Congress and the Coast Guard to discuss practical updates to improve efficiency and compliance with the current system, such as certifications and renewals to ensure existing exemptions are up to date and valid, closer cooperation with the Coast Guard on compliance checks, and supporting additional resources for program administration.

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