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Terrorism Risk Insurance
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After the September 2001 terrorist attacks, many businesses were no longer able to purchase insurance to protect against property losses that might occur in any future terrorist attacks. Congress thus enacted the Terrorism Risk Insurance Act of 2002 (P.L. 107-297, TRIA) to create a temporary program to share future insured terrorism losses with the property-casualty insurance industry and policyholders. The act requires insurers to offer terrorism insurance to their commercial policyholders, preserves state regulation of this type of insurance, and directs the Secretary of the Treasury to administer the program of sharing losses. TRIA created a three-year program administered by the Treasury to back up commercial property and casualty insurance, covering up to $100 billion each year after set insurer deductibles. The government pays 90% of insured losses over the deductible, with the insurer paying 10%. The terrorism insurance law also voids all terrorism exclusions in contracts for property and casualty insurance. It requires insurers that had, after September 11, excluded coverage for future terrorist attacks to reinstate that coverage. These "make available" provisions in the statute are to be in effect until the end of 2004, with an option by the Secretary of the Treasury to extend them for a year. The Secretary exercised this option in June 18, 2004 and thus the make available provisions will be in effect until the end of 2005. TRIA also significantly bolsters the role of the Federal Reserve as the economy's emergency lender of last resort.

Economic Issue

Prior to the September 2001 attacks on the United States, insurers generally did not exclude or separately charge for terrorism risks. The events of "9/11," however, changed that as insurers asked for and generally received permission from their state regulators to exclude terrorism risks from their commercial policies, just as they had long excluded war risks. Estimates of insured losses from the 9/11 attack, which ranged from $30 billion to as high as $75 billion in the immediate aftermath, are currently around $35 billion, still the largest man-made insurance disaster on record.

Foreign and domestic reinsurers -- the insurers of insurance companies -- absorbed the heaviest losses. They were then unable to price for such risks and, so, withdrew from the market. Once reinsurers stopped offering coverage for terrorism risk, primary insurers also withdrew or tried to withdraw from the market. Terrorism risk insurance was soon unavailable or extremely expensive, and many businesses were no longer able to purchase insurance that would protect them in any future terrorist attacks. Although most data were anecdotal, this problem was widely thought to pose a threat of serious harm to the real estate, transportation, construction, energy, and utility sectors, in turn threatening the broader economy.

Congressional Action

TRIA's history began when the House Committee on Financial Services held a hearing in September 2001, and its Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises held another in October 2001. Chairman Oxley introduced H.R. 3210 in the 107th Congress in November 2001. During the November 29 debate on the bill, the House accepted a substitute bill by a narrow vote. The bill provided for a temporary government loan to insurers in case of acts of terrorism; it also contained controversial provisions on litigation management.

The legislation subsequently stalled over tort provisions. In the Senate, Members introduced four bills in 2001, but the chamber took no action. In June 2002, Senators Dodd, Reid, Sarbanes, and Schumer introduced a compromise proposal, S. 2600, which passed the Senate in July 2002. As passed, it did not require insurers to repay all federal assistance or contain the controversial liability reform.

The reconciling November 2002 conference report retained bill number H.R. 3210, which was subsequently passed. The President signed it on November 26, 2002, and it became P. L. 107-297, also known as TRIA.

Since enactment, congressional oversight has continued, with hearings in both the House and the Senate in April and May 2004. The principal points of concern expressed in these hearings were the Treasury decision to exclude group life insurance from coverage under TRIA, the upcoming Treasury decision on the make available provisions, and the possibility of a general extension of the act past its scheduled sunset date. Letters supporting an extension of the make available provisions were sent to the Secretary of the Treasury by both the majority and minority sides of the House Financial Services Committee. The Secretary made a determination on June 18, 2004 that the make available provisions should be extended to the end of 2005.

TRIA's Goals and Substance

TRIA's goals are to (1) create a temporary federal program of shared public and private compensation for insured losses to allow the private market to stabilize, (2) protect consumers by ensuring the availability and affordability of insurance for terrorism risks, and (3) preserve state regulation of insurance.

To meet the first goal, TRIA began a short-term program for the federal government to share insured commercial property-casualty losses with the private insurance market that extends from enactment through December 31, 2005. Public and private parties share insured losses in four ways. First, the federal government shares in any insurer's losses only if the industry's aggregate insured losses from an act of terrorism exceed $5 million. Second, each insurer is responsible for paying out a certain amount in claims -- known as its deductible -- before it can call upon federal assistance. Its deductible is directly proportionate to its size, rising from 7% of earned premiums in 2003 to 11% in 2004, and 15% in 2005. Third, the federal government will pay 90% of each insurer's losses above its deductible. Fourth, for any year in which terrorism causes aggregate insured losses greater than $10 billion to $15 billion, insurers must impose a limited surcharge on policyholders.

The Act covers only U.S. commercial property-casualty insured losses due to acts of terrorism certified by the Treasury Secretary. It does not cover losses due to acts of war declared by Congress, except workers' compensation losses. Congress also "carved out" certain lines, disallowing their coverage under TRIA. The carved-out lines are: federal crop insurance, private crop or livestock insurance, private mortgage insurance, title insurance, financial guaranty insurance of single-line guaranty insurers, medical malpractice, flood insurance, reinsurance, and all life insurance products. Congress charged the Secretary of the Treasury with certifying an act of terrorism and administering the program.

TRIA addressed the second goal, to protect consumers, by nullifying all commercial terrorism exclusions in force on TRIA's date of enactment. TRIA required property-casualty insurers, as a condition of receiving federal assistance, to make terrorism insurance available prospectively to their commercial policyholders by February 23, 2003. The coverage could not differ materially from coverage for other types of losses. Each offer must reveal both the premium charged for terrorism insurance and the federal share of compensation. TRIA in effect gave policyholders coverage for terrorism risk immediately, without charge, until the policyholder accepted or declined the coverage TRIA required insurers to offer. The policyholder was not, however, required to purchase coverage. If the policyholder declines, its insurer may exclude terrorism losses. TRIA did not limit what insurers could charge for terrorism risk insurance, though it did give state regulators the authority to modify excessive, inadequate, or unfairly discriminatory rates.

TRIA's third goal was to preserve state regulation of insurance. Section 106 does so expressly, with some exceptions. One exception is the definition of an "act of terrorism": TRIA's definition applies despite any definition in state law. A second exception is TRIA's limited preemption of state rate and form filing requirements. TRIA preempts all prior approvals through December 31, 2003, though it does allow any state to invalidate an excessive or discriminatory rate and any state with prior approval authority to review policy forms after their use. Thus, states retain considerable authority over rates and terms for terrorism coverage. A third exception is TRIA's requirement that workers' compensation coverage include not only coverage for terrorism risk but also for war risk. Finally, TRIA directs the Treasury Secretary to consult with the state regulators' group, the National Association of Insurance Commissioners, on several application issues. These include treatment of captive insurers, studies required by the act, and access to information about rates.

Other Provisions

The law also contains a variety of terrorism-related, non-program provisions. TRIA follows Senate provisions on liability reform. Section 107 creates an exclusive federal cause of action for property damage, personal injury, and death resulting from any certified act of terrorism. It preempts all state causes of action, except where the defendant in any action has knowingly committed or conspired to commit an act of terrorism. It provides for jurisdiction in federal courts, as directed by the Judicial Panel on Multidistrict Litigation, and applies the law of the state in which the act of terrorism occurred to those actions. Finally, Section 107 confers a right of subrogation -- recovery of outlays -- on the United States and expressly preserves contractual rights to arbitration.

Title II of the act allows satisfaction of judgments from blocked assets of terrorists, terrorist organizations, and state sponsors of terrorism. For purposes of this Title, the definition of an act of terrorism is broader than discussed above.

Title III of the act expands the authority of the Federal Reserve Board to act in certain circumstances. It would allow as few as two of the seven members of the Board to act in "unusual and exigent circumstances" when "action is necessary to prevent, correct, or mitigate serious harm to the economy or the stability of the financial system of the United States." Following 9/11, the Federal Reserve took extraordinary actions in extending credit to financial institutions and others to maintain liquidity in the economy. TRIA allows actions to further backstop the liquidity of U.S. nonfinancial entities (individuals, partnerships and corporations) even if most Board members are unavailable to vote on such need. Section III thus helps the economy's lender of last resort to reach beyond the banking system, to finance the working capital needs of many businesses in any economic collapse.

Congress directed the Treasury Secretary to conduct an expedited study of whether the TRIA program should be extended to group life insurance. The results of this study were announced in August 2003; it was determined that TRIA would not be extended to group life insurance. TRIA also directed the Secretary to "study the potential effects of acts of terrorism on the availability of life insurance and other lines of insurance coverage, including personal lines," by August 2003. The report on this study has yet to be delivered to Congress. Finally, the Secretary must report to Congress by June 30, 2005, on the effectiveness of the program, the ability of the property-casualty industry to offer terrorism insurance after the program ends, and on "availability and affordability of such insurance for various policyholders, including railroads, trucking, and public transit."

Outlook

The Treasury has issued guidelines and rules for carrying out TRIA in stages, with additional rules still expected. (See http://www.treasury.gov/trip for the latest details.) Treasury's preparations for certifying "an act of terrorism," for certifying and paying claims, for determining insurer and policyholder shares, for auditing the program, and for approving settlements are not controversial to date. It is possible, however, that if losses due to another terrorist attack on the United States occur, such issues may become controversial. Other issues could arise post-attack as well; for example, lawsuits could come from policyholders who declined to purchase coverage, alleging that insurers did not notify them as required under TRIA. The cause of losses would then also be an issue, since TRIA does not cover acts of domestic terrorism, and insurance for terrorism loss does not usually cover nuclear, chemical, or biological agent caused losses. Early reports on TRIA's required offers of coverage suggested that premiums were considered too expensive for many policyholders to purchase. Premiums have dropped significantly though 2003 and into 2004, but many policyholders still seem to be declining terrorism coverage.

Barring a large-scale terrorist attack and subsequent claims under TRIA, the legislative action seems likely to occur on two tracks. First, it is expected that Congress will conduct normal oversight of TRIA's ongoing implementation. The House Financial Services Committee and Senate Banking Committee held hearings on TRIA on April 28 and May 18, 2004 respectively. Second, with TRIA scheduled to expire at the end of 2005, some in both Congress and the insurance industry have called for reauthorizing the program to run past this date, which would require additional legislation.

Support for some sort of extension of the program has been expressed both at the recent hearings and in a letter to Secretary Snow signed by 190 Members of the House. However, some concerns about TRIA extension were raised at the recent hearings and whether all who express support for TRIA extension agree on the exact form of this extension is unclear as well. Officials at the Treasury Department in the past have repeatedly indicated that they expect the program to expire as the law provides. When pressed for the Administration's current position on TRIA extension at the hearings, the Treasury witnesses generally indicated no strong position, preferring instead to wait for the results of an ongoing study. It was reported in *Roll Call* on June 17, 2004, that some Senators who had been urging a quick TRIA extension were no longer advocating for immediate action on the issue on grounds unrelated to TRIA itself.

On June 23, 2004, H.R. 4634 was introduced by Representative Pete Sessions with cosponsors including two Financial Services subcommittee chairs. H.R. 4634 would extend the TRIA sunset date two years until the end of 2007 while raising the insurer deductible from 15% to 20% of earned premiums in 2007. It would also extend the make available provisions and raise the aggregate limit above which an insurer surcharge would be imposed from $15 billion in 2005, to $17.5 billion in 2006, and $20 billion in 2007. Finally, the bill would again ask Treasury to study and make a determination as to whether group life insurance should be included under TRIA backstop, and report to Congress on the availability of terrorism insurance after the termination of the program.

For further analysis, see CRS Report RL31166, *Insurance Exclusion Clauses: Excluding War Risks and Terror Risks from Insurance Contracts*, by Christopher A. Jennings; CRS Report RS21444, *The Terrorism Risk Insurance Act of 2002*, by Baird Webel; and CRS Report RS21445, *Terrorism Insurance: The Marketplace After the Terrorism Risk Insurance Act of 2002,* by Baird Webel.