Order Code RS22671
Updated December 12, 2007

# CRS Report for Congress

# The Terrorism Risk Insurance Program: Current Issues, Legislation, and Background

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## Summary

After September 11, 2001, many businesses were no longer able to purchase insurance protecting against property losses that might occur in future terrorist attacks. Addressing this problem, Congress passed the Terrorism Risk Insurance Act of 2002 (TRIA, P.L. 107-297, 116 Stat. 2322), creating a temporary three-year program to share future insured terrorism losses with the property-casualty insurance industry and commercial policyholders. The act required insurers to offer terrorism insurance to their commercial policyholders, preserved state regulation of this type of insurance, and directed the Secretary of the Treasury to administer a program for sharing terrorism losses. Once certain conditions were met, the initial program covered 90% of insurer losses up to $100 billion each year. Responding to concerns that three years was insufficient time to allow the private sector to develop the capacity to insure terrorism risk, the 109th Congress passed the Terrorism Risk Insurance Extension Act of 2005 (TRIEA, P.L. 109-144, 119 Stat. 2660) to extend the program two additional years. TRIEA left the program essentially intact while increasing the private sector's exposure to terrorism risk through a higher trigger, higher deductibles, greater industry loss sharing and exclusion of certain lines of insurance.

With little time left in the extended program, concerns are again being expressed that the private market will be unable to provide terrorism insurance without a government backstop. The House and Senate have passed different versions of H.R. 2761 to revise and extend the program, with the House version being substantially more expansive than that passed by the Senate. No conference committee was convened to reconcile the differences. Instead, on December 12, 2007, the House took up and passed, on a vote of 303-116, a new bill (H.R. 4299). H.R. 4299 contains the text of the Senate-passed H.R. 2761 along with additional language, much of which was originally in H.R. 2761 as it passed the House. A Presidential veto has been threatened for H.R. 4299, and whether the Senate will consider the bill is unclear. This report provides an overview of the current TRIA program, general background on the issue, and a summary of current legislation. It will be updated as significant legislative events occur.

## Current Terrorism Risk Insurance Program

The current Terrorism Risk Insurance Program, as created by the Terrorism Risk Insurance Act of 2002[1] and modified by the Terrorism Risk Insurance Extension Act of 2005,[2] "provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism."[3] The TRIA program is often described as a reinsurance backstop. It does not offer policies directly to insurance consumers, but operates by sharing losses due to a terrorist attack with the insurance companies which have sold policies to businesses. After certain thresholds are reached, it steps in and pays insurers for a portion of covered losses due to a terrorist act. Depending on the total size of the losses, the federal payments made to individual insurers may or may not be recouped through assessments on all those covered by TRIA in the years following the attack. TRIA is limited to covering $100 billion in insured losses and relieves insurers of liability for losses over this amount. What, if anything, that could be done in the event of losses exceeding $100 billion is a question left to a future Congress.

### TRIA Thresholds

- TRIA applies only to an act of foreign terrorism (as certified by the Secretary of Treasury in concurrence with the Secretary of State and the Attorney General).
- TRIA applies only to commercial property/casualty insurance, excluding federal crop insurance, private mortgage insurance, title insurance, financial guaranty insurance, medical malpractice insurance, health or life insurance, flood insurance, reinsurance, commercial automobile insurance, burglary and theft insurance, surety insurance, professional liability insurance (except for directors and officers liability), and farm owners multiple peril insurance.
- Aggregate industry insured losses in a given year must exceed $100 million (the "Program Trigger").
- Before payments are made to an individual insurer, that entity's losses must exceed 20% of the value of its direct earned premiums from the previous year (the "Insurer Deductible").

Once these thresholds are met, TRIA covers 85% of the insured losses caused by a terrorist attack. If the total insured losses are under $27.5 billion (the "Aggregate Retention Amount"), then all of the insurers covered by TRIA would be assessed a recoupment fee, not to exceed 3% of premium, until the federal share of the losses has been repaid. The Secretary of the Treasury has the authority to set the exact recoupment

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[1] P.L. 107-297, 116 Stat. 2322. See CRS Report RS21444, *The Terrorism Risk Insurance Act of 2002: A Summary of Provisions*, by Baird Webel.

[2] P.L. 109-144, 119 Stat. 2660. See CRS Report RL33177, *Terrorism Risk Insurance Legislation in 2005: Issue Summary and Side-by-Side*, by Baird Webel.

[3] U.S. Treasury Department, Treasury Terrorism Risk Insurance Program, *Overview*, available at [http://www.ustreas.gov/offices/domestic-finance/financial-institution/terrorism-insurance].

percentage, as well as the authority to extend the recoupment fee and require payment to the government beyond the $27.5 billion amount required by law.

Unlike private reinsurance, the TRIA program charges no premiums for the reinsurance coverage provided by the program. The law, however, does place requirements on insurers. Specifically, all insurers are required to offer coverage for terrorism risk "that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism."[4] The policyholders, however, are not required to purchase this offered terrorism coverage.

## Background on Terrorism Insurance and TRIA

Prior to the September 2001 attacks on the United States, insurers generally did not exclude or separately charge for terrorism risks. The events of September 11, 2001, however, changed this, as insurers realized the extent of possible losses from terrorism. Estimates of insured losses from the 9/11 attacks are around $36 billion in current dollars, the largest man-made insurance disaster on record.[5]

The heaviest insured losses were absorbed by foreign and domestic reinsurers — the insurers of insurance companies. Because of the lack of data on or modeling of terrorism risk, reinsurers felt unable to price for such risks, and they largely withdrew from the market for terrorism risk insurance. Once reinsurers stopped offering coverage for terrorism risk, primary insurers, who also suffered from a lack of data and models, also withdrew or tried to withdraw from the market. In most states, state regulators must approve policy form changes, and state regulators generally agreed to insurer requests to exclude terrorism risks from their commercial policies, just as they had long excluded war risks. Terrorism risk insurance was soon unavailable or extremely expensive, and many businesses were no longer able to purchase insurance that would protect them in 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.

Responding to the perceived problem, Congress passed TRIA in November 2002. TRIA's stated goals were 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. The act's initial structure is essentially still in place. The federal government's liability in the event of a terrorist attack, however, was higher at the beginning of the program, and it has decreased through the life of the program. This decrease in the federal liability, and resulting increase in private liability, was intentional; it was hoped that this would spur the private market to develop the financial capacity and other infrastructure necessary to begin insuring terrorism risk without a government program.

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[4] 15 U.S.C. § 103(c).

[5] See "Terrorism Risk and Insurance," Insurance Information Institute website, available at [http://www.iii.org/media/hottopics/insurance/terrorism/].

The development of a private market for terrorism risk did not proceed with the speed hoped for when TRIA was passed. Soon after TRIA's enactment, the insurance industry and others, worried about a possible absence of terrorism insurance and viewing terrorism risk as essentially uninsurable, began calling for an extension of the program, or some other longer-term solution. Responding to concerns about a continuing lack of private market in terrorism risk insurance, Congress passed a two-year extension bill, TRIEA, near the end of 2005. This act continued the first act's trend of decreasing the federal government's liability in the case of a terrorist attack. Not only were the monetary thresholds increased, but additional lines of insurance were also excluded. **Table 1** details the evolution of the various aspects of the TRIA program through the five program years to date.

## Table 1. TRIA Program from 2002 to 2007

| | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|---|
| Program Trigger | $5 million | $5 million | $5 million | $50 million | $100 million |
| Insurer Deductible | 7% | 10% | 15% | 17.5% | 20% |
| Industry Retention | $10 billion | $12.5 billion | $15 billion | $25 billion | $27.5 billion |
| Federal Share | 90% | 90% | 90% | 90% | 85% |
| Excluded Insurance Lines | federal crop insurance, private mortgage insurance, title insurance, financial guaranty insurance, medical malpractice insurance, health or life insurance, flood insurance, reinsurance | | | As before plus: commercial automobile insurance, burglary and theft insurance, surety insurance, professional liability insurance (except for directors and officers liability), and farm owners multiple peril insurance | |

The passage of TRIEA exposed significant policy differences between the House and the Senate on how to deal with terrorism risk insurance. The Senate bill (S. 467, 109th Congress), which was backed by the President and eventually enacted,[6] kept the same TRIA structure while further scaling back federal involvement. The House bill (H.R. 4314, 109th Congress) was more varied. H.R. 4314 would have extended TRIA and also would have revised the program extensively. Changes that H.R. 4314 would have implemented included expanding the program to cover domestic terrorist events; increasing the types of insurance covered to include group life and specific coverage for nuclear, biological, chemical, and radiological (NBCR) events; implementing a different insurer deductible for different lines of insurance; and creating TRIA Capital Reserve Funds (CRF), which would allow insurers to set aside untaxed reserves to tap in the case of a terrorist event.

[6] S. 467 was first passed by the Senate on November 18, 2005. The House replaced the text of S. 467 with the large majority of the language from H.R. 4314 before passing S. 467 on December 7, 2005. The Senate then responded by replacing the House text with S.Amdt. 2689, a slightly modified version of S. 467 as the Senate had previously passed the bill. This version of S. 467 passed the Senate on December 16, 2005 and the House on December 17, 2005.

# TRIA Extension Legislation in the 110th Congress

Both the House and the Senate held hearings early in the 110th Congress on the future of TRIA. The Senate Banking, Housing, and Urban Affairs Committee acted first with a hearing on February 28, 2007, entitled "Examining the Terrorism Risk Insurance Program," while the House Financial Services Committee's Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises held two hearings. The first "The Need to Extend the Terrorism Risk Insurance Act" was a field hearing held in New York City on March 5, 2007, and the second "Policy Options for Extending the Terrorism Risk Insurance Act" occurred on April 24, 2007.

**Terrorism Risk Insurance Revision and Extension Act of 2007 (TRIREA).** Representative Michael Capuano, along with 23 cosponsors, introduced H.R. 2761 on June 18, 2007. The House passed the bill on a vote of 312-110 on September 19, 2007. Significant amendments were made to the bill as it moved through the committee process. The following is a summary of the bill as it passed the House. For more complete information on the bill, see CRS Report RL34025, *Terrorism Risk Insurance: Issue Analysis and Legislation* and CRS Report RL34219, *Terrorism Risk Insurance Legislation in 2007: Issue Summary and Side-by-Side*, both by Baird Webel.

H.R. 2761 as passed by the House on September 19, 2007, included provisions that would make the following changes to the current Terrorism Risk Insurance Program:

- Extend the TRIA program for 15 years, until the end of 2022.
- Make spending by the program contingent on passage of a future joint resolution.
- Add coverage for domestic terrorist acts in the program.
- Add the Secretary of Homeland Security to the certification process.
- Add group life insurance to the program with a separate set of retentions and deductibles.
- Return farmowners multiple peril as a covered line.
- Reduce the general trigger to $50 million.
- Require insurers to cover nuclear, biological, chemical, and radiological (NCBR) terrorist attacks starting in 2009.
- Lower insurer deductible for NCBR attacks to 3.5% immediately and then raise that number by 0.5% per year in the future.
- Increase the federal share of NCBR losses from 85% to as high as 100% for attacks causing over $100 billion in losses.
- Temporarily preempt state laws on rate and form filing for NCBR coverages.
- Provide the possibility of relief from NBCR requirement to smaller insurers.
- Reset individual insurer deductibles to 5% and the program trigger to $5 million in the aftermath of a future terrorist attack (or series of attacks) that causes more than $1 billion in damage. Deductible reset would be only for insurers who suffer losses.
- Increase the post-reset insurer deductibles by 0.5% per year.
- Establish a "Terrorism Buy-Down Fund" that would essentially allow insurers to put aside reserves that would grow tax-free to cover future

losses that are not reimbursed by TRIA. The fund would also be available to the Secretary of the Treasury to cover the federal share of TRIA losses.

- Restrict life insurers' use of foreign travel as an underwriting tool.
- Index the dollar amounts in the program to future inflation.

**Terrorism Risk Insurance Program Reauthorization Act of 2007 (TRIPRA).** The Senate Banking, Housing, and Urban Affairs Committee marked up this original bill on October 17, 2007, and ordered it favorably reported to the Senate by a vote of 20-1. It was introduced by Senator Christopher Dodd as S. 2285 on November 1, 2007. The Senate inserted TRIPRA's language, plus additional language increasing and accelerating the recoupment provisions, into H.R. 2761 on November 16, 2007, and passed the bill by unanimous consent the same day.

TRIPRA is a relatively straightforward reauthorization of the existing TRIA program. The two primary changes that it would make to the program are (1) extend the program for seven years, until 2014, and (2) add coverage for domestic terrorist attacks to the program. In addition, it would modify slightly the annual liability cap and require the Secretary of the Treasury to promulgate regulations on determining payments should losses exceed $100 billion, rather than leaving this determination to a future Congress. The bill would also call for reports from the Government Accountability Office (GAO) on the possibility of insurance coverage for NCBR events (within one year) and on the affordability and availability of terrorism insurance in specific markets (within 180 days). In addition, the President's Working Group on Financial Markets would be tasked to continue its analysis of the longer term availability and affordability of terrorism risk insurance and report on this subject in 2010 and 2013.

**H.R. 4299.** Introduced by Representative Barney Frank on December 6, 2007, this bill shares the TRIPRA title with S. 2285 and H.R. 2761 as passed by the Senate. H.R. 4299 includes the Senate-passed language, plus provisions that would do the following:

- Add coverage of group life insurance with a separate deductible, retention pool, recoupment amount, and policy surcharge amount.
- Decrease the individual insurer deductible in 2008 to 5% for terrorist attacks that exceed $1 billion, and then increase this amount by 0.5% per year after 2008.
- Reset, after a $1 billion attack, the trigger to $5 million and the insurer deductible to 5% with a 0.5% increase per year thereafter.
- Restrict life insurers' use of foreign travel as an underwriting tool.
- Reduce the program trigger to $50 million.

**Administration Reaction.** The Office of Management and Budget has released two Statements of Administration Policy on TRIA legislation in 2007. The first, dated September 17, threatened a veto for H.R. 2761 as it ultimately passed the House. The second, dated December 11, threatened a veto if the Senate-passed version of H.R. 2761 were amended with the language that was passed by the House in H.R. 4299.