RSC Republican Study Committee
Rep. Jeb Hensarling (R-TX), Chairman
Russ Vought, Executive Director
132 Cannon House Office Building
Washington, DC 20515
www.house.gov/hensarling/rsc
ph (202) 226-9717 / fax (202) 226-1633

Legislative Bulletin……………………………………….………September 19, 2007

Contents:

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: $0

Effect on Revenue: $2 billion increase over ten years

Total Change in Mandatory Spending: $10.4 billion increase over ten years

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: Numerous

Number of *Bills* Without Committee Reports: 0

Number of *Reported* Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 2761—Terrorism Risk Insurance Revision and Extension Act (*Capuano, D-MA*)

Please note the Conservative Concerns on page 6 below.

Order of Business: The bill is scheduled to be considered on Wednesday, September 19th, likely subject to a structured rule. Summaries of any amendments made in order under the rule will be provided in a separate RSC document.

Background: On November 26, 2002, President Bush signed into law H.R. 3210 (Public Law 107-297), which implemented the new federal back-stop for terrorism risk insurance (commonly known as "TRIA") in the wake of the September 11th attacks. The program was implemented to ensure that the private insurers would continue to offer terrorism insurance by protecting the insurance industry from financial collapse should a massive terrorist attack (or series of attacks) occur. At the time, it was *widely* agreed that this federal reinsurance for terrorism would be temporary; thus the law includes an explicit statement of program termination (on December 31, 2005). If Congress and the President did not act before the end of 2005, the program would have terminated.

To see the RSC Legislative Bulletins on H.R. 3210 from the 107th Congress, visit these two webpages:
http://www.house.gov/hensarling/rsc/doc/Lb111402.pdf; and
http://www.house.gov/hensarling/rsc/doc/LB112901.PDF.

Indeed, the Congress did act to extend TRIA. On December 22, 2005, President Bush signed into law S. 467 (Public Law 109-144), which extended TRIA for two years, through December 31, 2007. Although TRIA was extended, certain provisions were included as deliberate signals to the private market that the program would indeed terminate after 2007 and that the private market should continue its innovation to provide various terrorism insurance products acceptable to policyholders and the insurance industry.

For example, the TRIA extension raised the threshold of insured loss that triggers federal assistance from 90% of all aggregate losses annually above $5 million to 90% of losses above $50 million in 2006 and 85% of losses above $100 million in 2007. Additionally, the TRIA extension increased insurer deductibles in 2006 to 17.5% of the premiums received by the insurer in 2005 and in 2007 to 20% of the premiums received by the insurer in 2006. The extension also increased sharply the insurance industry's aggregate retention amount, which is linked to the formula for mandatory recoupment of federal pay-outs.

That is, although Congress did extend TRIA despite earlier promises, it did so for a short period of time along with certain contractions in the program—a clear signal to the private market that the government was going to do less terrorism reinsuring, and the private sector should therefore do more.

To see the RSC Legislative Bulletins on S. 467 from the 109th Congress, visit these two websites: http://www.house.gov/hensarling/rsc/doc/LB_120705_tria.pdf; and
http://www.house.gov/hensarling/rsc/doc/LB_121605_tria2.pdf.

Summary: H.R. 2761 would extend and greatly expand the U.S. Treasury Department's Terrorism Insurance Program, as follows:

- Extends the termination date of the TRIA program by **FIFTEEN YEARS**—from December 31, 2007 to December 31, 2022.

- Adjusts the congressional findings about the purpose of TRIA to reflect the amendments made by H.R. 2761.

- Revises numerous definitions as applicable to the bill. Most significantly, the bill would define a covered act of terrorism without reference to the nation of origin of the terrorists. That is, **TRIA would be expanded to cover acts of domestic terrorism** (as opposed to just foreign-based terrorism, as in current law).

- **Expands TRIA to include group life insurance** as a covered line of insurance (as opposed to just property and casualty insurance, as under current law). Additionally, farm owners multiple peril insurance would no longer be excluded from the definition of property and casualty insurance.

- Creates a separate category of terrorism for nuclear, biological, chemical, or radiological (NBCR) attacks, subject to certification by the Secretaries of Homeland Security and State, as well as the Attorney General.

- Sets the insurer deductibles for acts of conventional terrorism at 20% of an insurer's direct earned premiums from the previous calendar year for property and casualty insurance and at 0.0351% of an insurer's amount at risk for group life insurance. The bill also sets formulas for NBCR deductibles.

- For an act of terrorism resulting in aggregate industry insured losses exceeding $1 billion, the deductible for affected property and casualty insurers would decrease to 5% of prior-year premiums, if such act occurs in 2008, and increase by ½-percentage-point each subsequent year. Such percentage would reset to 5% in a year immediately following a $1 billion or greater act of terrorism and start increasing again as above. The Secretary could combine multiple acts of terrorism in the same year in the same geographic area for determining whether the $1 billion threshold has been exceeded.

- Requires that TRIA insurers offer coverage for losses resulting from acts of terrorism that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism, and **offer coverage for losses resulting from acts of NBCR terrorism in a similar manner** beginning on January 1, 2009. Requires insurers that have policies of insurance with pollution and nuclear hazard exclusions to make available a clear *exception* to those exclusions for acts of NBCR terrorism, upon the payment of a premium.

  The Secretary, in consultation with the National Association of Insurance Commissioners (NAIC), could exempt (for two years, subject to extension) insurers with less than $50 million in direct earned premiums for TRIA-covered lines from complying with the requirement to make NBCR coverage available, if such insurers demonstrate that they would become insolvent in the event of certain acts of NBCR terrorism.

- Requires insurers offering life insurance to offer coverage that neither considers past nor precludes future lawful foreign travel and prohibits such insurers from declining such coverage based on past or future lawful foreign travel or charging a premium that is "excessive" and not based on a "good faith" actuarial analysis (undefined). An insurer *could* decline or limit coverage based on plans to engage in future lawful foreign travel within the subsequent 12 months under certain circumstances detailed in the legislation.

- Sets the total federal share of insured loss compensation under TRIA (for acts of <u>conventional</u> terrorism) at 85% of the aggregate industry insured losses between the amount of the insurer deductibles and $100 billion in a year, plus 100% of the aggregate industry insured losses that exceed $100 billion (up to the total $100 billion annual cap on all federal TRIA compensation).

- Sets the total federal share of insured loss compensation under TRIA (for acts of <u>NBCR</u> terrorism) at 85% of the aggregate industry qualified NBCR losses of less than $10 billion, 87.5% of the aggregate NBCR losses between $10 billion and $20 billion, 90% of the aggregate NBCR losses between $20 billion and $40 billion, 92.5% of the aggregate NBCR losses between $40 billion and $60 billion, and 95% of the aggregate NBCR losses above $60 billion (up to the total $100 billion annual cap on all federal TRIA compensation).

- Sets the minimum size of a terrorist event required to trigger any federal assistance at $50 million. Reduces the trigger to $5 million for any subsequent certified act of terrorism after a certified act of terrorism occurs for which resulting aggregate industry insured losses exceed $1 billion.

- Caps the federal share of insured loss compensation for any single certificate holder under any group life insurance coverage at $1 million.

- Directs the Secretary to notify Congress and insurers "promptly" when estimated or actual aggregate federal compensation equals or exceeds $80 billion, equals $100 billion, or is likely to reach $100 billion. The Secretary would have to reimburse insurers for: (1) any payment for portions of aggregate insured losses that exceed $100 billion made before the Secretary provides notice at $80 billion in federal compensation; and (2) any payment for portions of aggregate insured losses that exceed $100 billion made after such notice, but only to the extent that such payment is ordered by a court, such payment does not include punitive damages or litigation or other costs, and the insurer made a good-faith effort to defend against any claims for such payment.

- Federal courts would have original and exclusive jurisdiction over claims relating to or arising out of the limitation on an insurer's financial responsibility for insured losses from acts of terrorism, and cases in state courts would be removed to federal court.

- Sets the annual insurance industry aggregate retention amount (for property and casualty insurance) at the lesser of $27.5 billion or the aggregate amount of actual insured losses during the year. The annual insurance industry aggregate retention amount (for group life insurance) would be set at the lesser of $5 billion or the aggregate amount of actual insured losses during the year.

- Adds group life insurance to the federal cost recoupment provisions in current law.

- Directs the Secretary to annually index for inflation all the TRIA-related dollar amounts (triggers, federal shares, notices, etc.) beginning in 2009.

- Between the date of enactment of H.R. 2761 and the following dates, the following items would not be subject to prior approval or waiting period requirements under state law (subject to certain exceptions):
  - --December 31, 2008: the rates and forms for coverage of acts of conventional terrorism;
  - --December 31, 2009: forms for coverage of acts of NBCR terrorism (to the extent of the addition of such coverage and where such coverage was not previously required); and
  - --December 31, 2010: rates for coverage of acts of NBCR terrorism (to the extent of the addition of such coverage and where such coverage was not previously required).

- Directs the Secretary of the Treasury to establish a Terrorism Buy-Down Fund that would make available additional terrorism coverage for insurers' insured losses, available for purchase by insurers on a voluntary basis. An insurer could purchase deductible, co-share, or pre-trigger buy-down coverage (subject to certain limits) by making an advance election to treat some or all of the premiums it has disclosed under TRIA as fees imposed by the Secretary and by remitting such amounts to the Fund.

  The Secretary would have to establish voluntary risk-sharing mechanisms for insurers participating in the Fund to pool their reinsurance purchases and share terrorism risk. Upon termination of TRIA, the Fund would become a privately-operated mutual terrorism reinsurance company owned by the insurers that submitted buy-down coverage premiums.

- Instructs the Secretary of the Treasury, in consultation with NAIC, representatives of the insurance industry, representatives of the securities industry, and representatives of policyholders, to analyze the long-term availability and affordability of private-market terrorism risk insurance. The Secretary would have to submit biennial reports to, and upon submission of each such report, testify before, Congress.

- Establishes a 21-member Commission on Terrorism Risk Insurance (made up of a diverse membership of stakeholders) to make recommendations on "possible actions to encourage, facilitate, and sustain provision by the private insurance industry in the United States of affordable coverage for losses due to an act or acts of terrorism…and possible actions to significantly reduce the federal role in covering losses resulting from acts of terrorism."

- Provides that TRIA will operate as in current law through December 31, 2007, and that the amendments made by H.R. 2761 would apply beginning January 1, 2008.

<u>Additional Background</u>: The Treasury Department has said private sector industry surpluses for terrorism insurance have climbed to record levels, prices have declined, coverage has become more available, and companies have become better diversified to model for terrorism risk. The "take-up" rate of companies buying terrorism coverage has increased from 27% in 2003 to 58% in 2005, while the cost of coverage has generally fallen to roughly 3-to-5 percent of total property insurance costs.

Interestingly, in regards to the asserted need for a long-term TRIA extension to make large construction projects in New York and other big cities more feasible, the New York Building Congress has said "the years 2006 through 2008 will see unprecedented construction levels…. After a banner year in 2005, during which $18.8 billion was spent on construction in New York City, spending is expected to reach $20.8 billion in 2006 and exceed $21 billion in 2007 and 2008."

<u>RSC Bonus Facts</u>: Congressional finding number six in the original TRIA legislation (H.R. 3210, 107th Congress) stated: "the United States Government should provide **temporary** financial compensation to insured parties, contributing to the stabilization of the United States economy <u>in a time of national crisis</u>, while the financial services industry develops the systems, mechanisms, products, and programs necessary <u>to create a viable financial services market for **private** terrorism risk insurance</u>." [emphasis added]

The stated purpose for TRIA in the original legislation was (emphasis added):

> to establish a **temporary** Federal program that provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism, in order to--
>
> (1) protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk; and
>
> (2) allow for a **transitional period for the private markets to stabilize**, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections.

<u>Committee Action</u>: On June 18, 2007, the bill was referred to the Financial Services Committee, which subsequently referred it to its Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises. On July 24th, the Subcommittee marked up the bill and forwarded it to full Committee by a vote of 26-17. On August 1st, the full Committee marked up the bill and ordered it reported to the full House by voice vote.

<u>Possible Conservative Concerns</u>: Some conservatives have expressed numerous concerns about this second TRIA extension, including the following:

- <u>Long-Term Extension</u>. TRIA was intended to be a temporary, transitional solution to market uncertainties in the immediate aftermath of the September 11th attacks. By extending TRIA for fifteen years, this bill not only reauthorizes this "temporary" program for longer than most "permanent" programs are authorized for, but also sends a signal to the private marketplace to relax its efforts to seek new private-market ways to provide terrorism insurance.

- Expansion of the Program. The first TRIA extension was designed deliberately to demonstrate that TRIA was shrinking and would eventually go away. H.R. 2761 would not only extend TRIA, but *significantly expand* TRIA to cover group life insurance and domestic terrorism, among other things. Such expansion not only exposes the taxpayer to more risk, but again sends a signal to the private marketplace that TRIA is not going away and therefore robust private-sector efforts to fill the government void are not necessary at this time.

- New Mandates on Insurers. This TRIA extension includes new mandates for insurers to cover losses from nuclear, biological, chemical, and radiological (NBCR) attacks—and how they should cover such losses. Since TRIA itself is a mandate on private insurers, any mandate within TRIA places even more burdens on private insurers.

- Deductibles and Triggers Remain the Same or Shrink. The previous two TRIA bills (the original statute plus the first extension) provided for steadily increasing deductibles and triggers, ensuring that the private market would absorb more and more of the terrorism reinsurance burden over time and signaling a consistent removal of the federal government from this marketplace. H.R. 2761 reduces trigger levels and then effectively and indefinitely freezes the deductibles and triggers at 2008 levels (other than increases for inflation), and shrinks the deductibles sharply after a $1 billion event, putting a halt to the federal retreat from terrorism reinsurance.

- Government Commission on the Private Market. Ironically, H.R. 2761 would create a new government commission to encourage the private-market provision of terrorism insurance and reinsurance. The creation of this commission is peculiar since TRIA would be extended for 15 years and since numerous provisions throughout the legislation *discourage* the private-market provision of terrorism insurance and reinsurance.

- No Premiums for the Insured. Some conservatives have argued that TRIA should be a voluntary program, in which insurers who *want* to be in the program pay premiums to the federal government. H.R. 2761 not only fails to move TRIA toward voluntary status, it grows TRIA and expands the federal role in the insurance marketplace.

Administration Position: The Statement of Administration Policy (SAP) asserts that the President's senior advisors would recommend that President Bush veto this bill, should it make it to his desk in its current form. The Administration's main points of opposition are as follows:

- Duration. The Administration believes that any TRIA extension should be "short-term" and lead to the phasing out of the program, while H.R. 2761 would extend TRIA for 15 years.

- Extent of Coverage. The Administration opposes any expansion of TRIA, while H.R. 2761 would expand TRIA to include group life insurance and attacks by domestic terrorists.

- Nuclear/ Biological/ Chemical/ Radiological Attacks. The Administration opposes any mandate that insurers cover nuclear, biological, chemical, or radiological (NBCR) attacks to be able to participate in TRIA, while H.R. 2761 includes an NBCR mandate. The Administration also opposes reducing insurance industry deductibles and reducing co-payments for NBCR losses (since this could result in reduced private sector participation in areas where NBCR coverage is currently being provided), while H.R. 2761 includes such NBCR language.

- Cost. The Administration opposes the increased spending in a TRIA extension without legitimate offsets in real spending, while H.R. 2761 includes no such offsets.

Additionally, the Administration notes its objection to any effort to reduce below the current $100 million the loss level that triggers TRIA, as well as to any measure that would reduce the amount of losses insurers must absorb in total.

In sum, the SAP argues that, "The Administration believes that the Terrorism Risk Insurance Act (TRIA) should be phased out in favor of a private market for terrorism insurance. The Administration strongly opposes efforts to expand the Federal government's role in terrorism reinsurance. The most efficient, lowest cost, and most innovative methods of providing terrorism risk insurance will come from the private sector. Unfortunately, H.R. 2761 effectively makes TRIA permanent, increases the role of the Federal government, and expands the scope of coverage well beyond the point where it is needed."

Read the complete SAP here.

Cost to Taxpayers: CBO reports that H.R. 2761 would increase mandatory spending by $200 million in FY2008, by $3.6 billion over the FY2008-FY2012 period, and by **$10.4 billion over the FY2008-FY2017 period.** The bill would also increase revenues by $0 in FY2008, by $100 million over the FY2008-FY2012 period, and by $2.0 billion over the FY2008-FY2017 period.

The bill contains no offsets for this net increase in the deficit, as scored by CBO, therefore a PAYGO point of order could be lodged against H.R. 2761 (assuming such point of order is not waived in the rule). Reports indicate that a self-executing amendment on the rule will make any future TRIA pay-outs subject to a separate, expedited, affirmative vote from Congress, thereby removing the PAYGO violation. Conservatives would likely view this amendment as a budget gimmick, at best.

The Administration is also opposed to any attempt to "get around" the mandatory spending in this bill: "Nor would the costs of this bill be diminished by a requirement that Congress vote to release funds after a terrorist event has occurred. The Administration strongly opposes the use of any such gimmicks to mask the true cost of the legislation and circumvent budget rules."

In explaining the basis for the cost estimate for H.R. 2761, CBO noted the following:

> There is no reliable way to predict how much insured damage terrorists might cause in any specific year. Rather, CBO's estimate of the cost of financial assistance provided under H.R. 2761 represents an expected value of payments from the program—a weighted average

that reflects industry experts' opinions of various outcomes ranging from zero damages up to very large damages resulting from possible future terrorist attacks. The expected value can be thought of as the amount of an insurance premium that would be necessary to just offset the government's losses from providing this insurance, although firms do not pay any premium for the federal assistance offered by TRIA.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, the bill would increase the taxpayer's financial exposure under TRIA.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes. CBO confirms that, "H.R. 2761 would extend and expand mandates contained in the Terrorism Risk Insurance Act. Those mandates would:

- Require that certain insurers offer terrorism insurance, including insurance for nuclear, biological, chemical, and radiological attacks;
- Require that certain insurers and their policyholders repay the federal government for the cost of assistance (in the form of assessments and surcharges); and
- Preempt state laws regulating insurance.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: The Financial Services Committee, in House Report 110-318, asserts that, "H.R. 2761 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI."

Constitutional Authority: The Financial Services Committee, in House Report 110-318, cites constitutional authority in Article 1, Section 8, Clause 1 (relating to the congressional power to promote the general welfare of the United States) and Clause 3 (relating to the congressional power to regulate interstate commerce).

Outside Organizations: Although a complete list of supporters and opponents of H.R. 2761 was unavailable at press time, the following organizations are known to be expressing a public position, as follows:

Opposed to H.R. 2761:

- Club for Growth
- National Taxpayers Union
- Property and Casualty Insurers of America

Supporting H.R. 2761:

- American Bankers Association
- American Gas Association
- American Hotel and Lodging Association
- American Land Title Association
- American Public Power Association
- American Society of Association Executives
- Associated Builders and Contractors

- Associated General Contractors of America
- Association of American Railroads
- The Bond Market Association
- Chemical Producers and Distributors Association
- Citigroup Inc.
- Commercial Mortgage Securities Association
- CSX Corporation
- Edison Electric Institute
- Electric Power Supply Association
- The Financial Services Roundtable
- The Food Marketing Institute
- Hilton Hotels Corporation
- Intercontinental Hotels
- International Council of Shopping Centers
- International Franchise Association
- Marriott International
- Mortgage Bankers Association
- National Apartment Association
- National Association of Home Builders
- National Association of Manufacturers
- National Association of REALTORS®
- National Association of Wholesaler -Distributors
- National Council of Chain Restaurants
- National Petrochemical & Refiners Association
- National Restaurant Association
- National Retail Federation
- National Rural Electric Cooperative Association
- The Real Estate Roundtable
- Starwood Hotels and Resorts
- Union Pacific Corporation
- U.S. Chamber of Commerce

RSC Staff Contact: Paul S. Teller, paul.teller@mail.house.gov, (202) 226-9718