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Legislative Bulletin……………………………………….……December 12, 2007

Contents:

H.R. 4299—Terrorism Risk Insurance Program Reauthorization Act (*Frank, D-MA*)

Please note the Conservative Concerns on page 6 below.

Order of Business: On September 19, 2007, the House passed H.R. 2761 by a vote of 312-110. On November 16th, the Senate stripped out several of the major provisions of the House-passed bill and passed the amended version of H.R. 2761 by unanimous consent.

Originally, the House, subject to H.Res. 849, was to motion to amend the Senate-passed bill and attach House amendments at the end. Instead, Financial Services Committee Chairman Barney Frank (D-MA) introduced a new bill, H.R. 4299, that incorporates the Senate text plus the amendments that the House was to add in its motion. The consideration of H.R. 4299 today is subject to the passage of the closed rule, H.Res. 862, which would allow no amendments, waive all points of order against considering the bill (except those for earmarks and PAYGO), waive all points of order against the bill itself, and allow for one motion to recommit, with or without instructions.

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.

To see the RSC Legislative Bulletin on H.R. 2761 from the 110th Congress, as it was considered in the House in September 2007, visit these two webpages: http://www.house.gov/hensarling/rsc/doc/lb_091907_tria.doc; and http://www.house.gov/hensarling/rsc/doc/lb_091907_triaamdts.doc.

Summary: H.R. 4299 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 **SEVEN YEARS**—from December 31, 2007 to December 31, 2014. *(It was 15 years in the House bill from September.)*

- Revises the definition of 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-based terrorism** (as opposed to just foreign-based terrorism, as in current law).

- Requires the Department of Treasury to notify Congress within 15 days of an act of terrorism if aggregate insured losses are expected to exceed $100 billion.

- Adjusts the recoupment provision in current law so that the terrorism loss risk-spreading premiums assessed on insurers are set so as to recover an amount equal to 133% (as opposed to 100% in current law) of any mandatory recoupment amount.

- Sets the timing for the collection of terrorism loss risk-spreading premiums based on when the act of terrorism occurs (as detailed in the bill; see "Cost to Taxpayers" section below for a discussion of how this is a budget gimmick). The Secretary would have to publish an estimate of aggregate insured losses that would be used as the basis for determining the recoupment needs.

- **Expands TRIA to include group life insurance** as a mandatory covered line of insurance (as opposed to just property and casualty insurance, as under current law).

- Sets the insurer deductibles for acts of terrorism at 0.0351% of an insurer's amount at risk for group life insurance.

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

- 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 and sets the premium rate for group life at 0.0053% of the amount at risk for covered lines under such a policy.

- 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 then 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.

- **Sets the minimum size of a terrorist event required to trigger any federal assistance at $50 million (down from $100 million in current law).** 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.

- 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.

- Requires the Government Accountability Office (GAO) to study the availability and affordability of insurance for nuclear, biological, chemical, and radiological terrorist events and to report its findings to Congress within one year of this bill's enactment, along with recommendations for expanding the availability and affordability of such insurance.

- Requires GAO to determine whether there are specific markets in the United States that are experiencing unique capacity constraints on the amount of available terrorism insurance and to report its findings to Congress within 180 days, along with recommendations for addressing any such constraints.

- Continues the requirement for the President's Working Group on Financial Markets to study the long-term availability and affordability of terrorism insurance, with reports to Congress required in 2010 and 2013.

- Provides that TRIA will operate as in current law through December 31, 2007, and that the amendments made by H.R. 4299 would apply beginning January 1, 2008.

<u>Major Exclusions from the Original House-Passed Bill</u>. The following provisions that were included in the original House-passed version of H.R. 2761 are **<u>NOT</u>** included in H.R. 4299:

- Mandatory coverage of nuclear, biological, chemical, and radiological (NBCR) terrorism and all its related provisions.

- Requiring the congressional enactment of a joint resolution of approval (of a certification by the Secretary of Treasury, in concurrence with the Secretaries of State and Homeland Security, as well as the Attorney General that there has been a covered act of terrorism) before any TRIA compensation could be paid. *(This was the provision that enabled the original TRIA bill this year to circumvent PAYGO rules.)*

- Including farm owners multiple peril insurance as part of the definition of property and casualty insurance.

- Giving federal courts 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 removing cases in state courts to federal court.

- Annual indexing for inflation all the TRIA-related dollar amounts (triggers, federal shares, etc.) beginning in 2009.

- Establishing 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.

- Establishing a 21-member Commission on Terrorism Risk Insurance 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.”

Additional Background: 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.”

RSC Bonus Facts: 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 in a time of national crisis, while the financial services industry develops the systems, mechanisms, products, and programs necessary to create a viable financial services market for **private** terrorism risk insurance.” [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.

Committee Action: On December 6m 2007, H.R. 4299 was referred to the Financial Services Committee, which took no subsequent official action on that bill.

On June 18, 2007, H.R. 2761 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 H.R. 2761 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.

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

- Long-Term Extension. 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 seven years, this bill not only reauthorizes this "temporary" program for longer than many "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. 4299 would not only extend TRIA, but *significantly expand* TRIA to cover group life insurance and domestic-based terrorism. 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.

- 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. 4299 reduces trigger levels and then effectively and indefinitely freezes them at 2008 levels, and shrinks the deductibles and triggers sharply after a $1 billion event, putting a halt to the federal retreat from terrorism reinsurance.

- Foreign Travel Mandate. The legislation retains the mandate on life insurers regarding foreign travel prohibitions, a clear federal intrusion into private-market decision-making and product offerings.

- Recoupment. Some conservatives may regard the mandatory recoupment language as a budget gimmick. See "Cost to Taxpayer" section below.

- Not Voluntary. 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. 4299 not only fails to move TRIA toward voluntary status, it grows TRIA and expands the federal role in the insurance marketplace.

In short, some conservatives may be concerned that the TRIA program would get bigger, kick in sooner, and last longer.

Administration Position: A Statement of Administration Policy (SAP) for H.R. 4299 was not available at press time, but the SAP for the House amendments to H.R. 2761, which is the same text as H.R. 4299, is as follows (in its entirety):

> The Administration believes that the Terrorism Risk Insurance Act (TRIA) should be phased out in favor of a private market for terrorism insurance. The most efficient, lowest-cost, and most innovative methods of providing terrorism risk insurance will come from the private sector. Therefore, the Administration has set forth three key elements for an acceptable extension of TRIA: (1) the Program should be temporary and short-term; (2) there should be no expansion of the Program; and (3) private sector retentions should be increased.
>
> The Administration continues to believe that any TRIA reauthorization should satisfy these three key elements. However, the Administration will not oppose the version of H.R. 2761 passed by the Senate on November 16, 2007. The Administration strongly opposes any amendments that move the Senate-passed version of the bill away from the Administration's key elements. Accordingly, if H.R. 2761 were presented to the President in the form to be considered by the House, his senior advisors would recommend that he veto the bill.

Cost to Taxpayers: CBO estimates that H.R. 4299 would increase mandatory spending by $300 million in FY2008, by $4.2 billion over the FY2008-FY2012 period, and by $8.8 billion over the FY2008-FY2017 period. Additionally, CBO estimates that federal revenues would increase by $4.4 billion over the FY2008-FY2012 period and by $9.0 billion over the FY2008-FY2017 period, thereby technically complying with PAYGO.

However, note that a PAYGO violation is avoided through what many conservatives may regard as a **budget gimmick**. Specifically, the bill would contain timing requirements for the recoupment of federal payouts that align with PAYGO requirements but not necessarily with reality. The Treasury Secretary would be required to recoup federal payouts under TRIA:

- for any act of terrorism that occurs on or before December 31, 2010, the Secretary would have to recoup payments by September 30, 2012;
- for any act of terrorism that occurs between January 1 and December 31, 2011, the Secretary would have to recoup 35% of any payments by September 30, 2012, and the remainder by September 30, 2017; and
- for any act of terrorism that occurs on or after January 1, 2012 (though note that TRIA expires at the end of 2014), the Secretary would have to recoup payments by September 30, 2017.

Note that the payback dates align perfectly with the five-year and ten-year PAYGO frameworks, thereby requiring some insurers to pay back the federal government within five or more years, while other insurers to pay back the federal government in as little as 21 months.

The way the bill is currently written, if the terrorist attack causes government losses beyond the amount subject to mandatory payback, the government never gets the money back (thereby throwing in to question whether the bill could actually make the government whole, as PAYGO intends). Furthermore, the paybacks are not required to accrue interest, further questioning the true compliance with PAYGO. Also, reports indicate that TRIA claims are still being submitted to the federal government for the 9/11 attacks; thus it is difficult to see how claims for future attacks could come in as fast as 21 months. This gimmick assumes that claims are filed nearly simultaneously with, or very soon after, the occurrence of an attack.

While CBO asserts that this bill would lower deficits over the five- and ten-year windows, it also notes that deficits would likely increase over the life of the program, since additional payments can be made after 2017, but no additional revenue will be coming in to the federal government after 2014 (as the bill is currently written, assuming no extension beyond 2014).

In explaining the basis for the original cost estimate for H.R. 2761 earlier this year, 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.

In sum, some conservatives may be concerned that the bill contains expanded, unrealistic mandates on the private sector and yet still does not comply with PAYGO.

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 the bill would extend and expand mandates contained in the Terrorism Risk Insurance Act. Those mandates would:

- Require that certain insurers offer terrorism insurance;
- 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 following statement was submitted in yesterday's *Congressional Record*: "H.R. 4299, the Terrorism Risk Insurance Program Reauthorization Act of 2007, does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI."

Constitutional Authority: A committee report for H.R. 4299 is not available. For H.R. 2761, 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 list of supporters and opponents of H.R. 4299 was unavailable at press time, the following organizations expressed a public position during the original House consideration of the TRIA expansion in September:

Opposed:

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

Supporting:

- American Bankers Association
- American Gas Association
- American Hotel and Lodging 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
- Commercial Mortgage Securities Association
- The Financial Services Roundtable
- The Food Marketing Institute
- International Council of Shopping Centers
- International Franchise Association
- 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
- U.S. Chamber of Commerce

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