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Terrorism Insurance – Comparison of H.R. 3210, S. 2600, and Conference Report

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Summary

The terrorist attacks of September 11 resulted in the largest insured catastrophic loss in history, estimated to total $40 billion. Even though the insurance industry committed to pay losses resulting from the attacks, industry spokesmen asserted that insurers might not be able to cover major future terrorism losses without a federal backstop. The 107th Congress considered how to provide such a backstop.

On November 29, 2001, the House of Representatives passed H.R. 3210, the Terrorism Risk Protection Act, providing for a temporary federal backstop. In the Senate, four similar measures were introduced in 2001, but no action was taken during the first session of the 107th Congress. On June 7, 2002, Senators Dodd, Sarbanes, Schumer, and Reid introduced a compromise proposal, S. 2600, which was passed by the Senate on June 18, 2002. On October 17, 2002, leaders of the House-Senate conference committee and the White House tentatively agreed in principle upon a proposed compromise version of the legislation, which was circulated to all conferees for signatures. The conferees approved the conference report, which was filed November 13. The House agreed to the report by voice vote on November 14, and the Senate by vote of 86-11, on November 19. The President signed the bill, which became P.L. 107-297, the Terrorism Risk Insurance Act, on November 26, 2002.

This report records the legislative development of H.R. 3210, S. 2600, and the conference report language enacted as P.L. 107-297. It will not be updated further. For further information, please call Rawle King (707-5975), or Barbara Miles (707-7804).

Background

The terrorist attacks of September 11, 2001 resulted in the largest insured catastrophic loss in history, estimated to total $40 billion. At the time, the insurance industry committed to pay losses resulting from the attacks and not invoke "act of war" clauses, even though there had been considerable discussion that such an invocation might be appropriate. Despite the magnitude of the projected losses, the solvency of the insurance industry and most insurance firms was not seriously threatened, in part because of the spreading of losses among many secondary insurers through the industry practice of "reinsurance."

In light of the huge "9/11" losses and because of the lack of any actuarial basis for determining loss exposures, however, many reinsurers indicated an unwillingness to accept the risk of loss from terrorism in the future. In turn, industry spokesmen asserted that in view of the impending difficulty in obtaining reinsurance for the risk of future terrorist attacks, primary insurers would not be able to cover future terrorism losses without some form of federal backstop. There were anecdotal accounts of dramatically increased premiums or outright inability of some businesses and major real estate landmarks to get insurance that included coverage for acts of terrorism. Several proposals for a federal backstop were introduced in Congress in 2001, and one – H.R. 3210 – passed the House on November 29, 2001. On April 24, 2002, a unanimous consent agreement was proposed to bring H.R. 3210 to the Senate floor and amend it by substituting the language of the compromise agreed to by Banking Committee members, Senators Dodd, Sarbanes, and Gramm. Efforts to reach agreement were not successful, and on June 7, 2002, Senators Dodd, Sarbanes, Schumer, and Reid introduced the compromise proposal as a separate bill (S. 2600), which was passed by the Senate on June 18, 2002. On October 17, 2002, leaders of the House-Senate conference committee and White House officials agreed in principle upon a proposed version of the legislation, which was circulated to all conferees for signatures. The conferees approved and filed the conference report on November 13, and its language was subsequently passed by the House on November 14, and the Senate (86-11) November 19. On November 26, the bill was signed by the President and enacted as P.L.107-297.

Comparison of H.R. 3210, S. 2600, and Conference Report (P.L. 107-297)

The House, Senate, and conference report language were similar in several aspects, such as by establishing a temporary backstop program, providing for oversight by the U.S. Treasury, setting triggers (losses sufficient to bring the federal backstop into play), setting definitions of what constitutes a terrorism event, and preempting state laws. They differed with respect to whether or not assistance must be repaid, the nature of legal modifications and limitations, and other specific details.

Key provisions, similarities, and differences are set out in the following chart.

Provision	H.R. 3210	S. 2600	Conference Report
Name	Terrorism Risk Protection Act	Terrorism Risk Insurance Act	Terrorism Risk Insurance Act
Purpose	Provides a temporary government loan program	Provides a temporary government/industry program for sharing losses	Combines payback program with loss sharing program

Provision	H.R. 3210	S. 2600	Conference Report
Governance	Oversight by Secretary of the Treasury – may issue regulations	Secretary of the Treasury has authority to establish regulations and procedures to implement Program	Follows both bills
Length of Program	One year, but may be extended two additional years	One year, but may be extended for one additional year	Three years, plus "transition year" for balance of 2002
Trigger (Industry-wide)	Losses exceed $1 billion	Losses exceed $5 million, then two levels of shared losses: up to $10 billion, and over $10 billion (increases to $15 billion if extended to second year)	Losses exceed $10 billion in first year, $12.5 billion in second year, or $15 billion if extended to third year
Trigger (Individual Insurer)	Industry-wide losses exceed $100 million and individual insurer's losses exceed 10% of capital surplus and 10% of net premiums	Trigger is a retention amount referred to as "deductible" at first level, based on insurer's market share times $10 billion ($15 billion in second year)	Trigger or deductible is the greater of $5 million or losses in excess of 1% of direct earned premiums in 2002, 7% in 2003, 10% in 2004, and 15% in 2005
Post Trigger Federal Assistance	90% loan with payback, but if trigger is industry-wide, then subject to a $5 million deductible per insurer	80% cost sharing for amounts over individual insurers' market share "deductible" (net of reinsurance) up to $10 billion, then 90% over $10 billion	90% cost sharing over individual insurer trigger/deductibles, and over industry-wide trigger
Cap on Assistance	$100 billion	$100 billion per year (also effectively caps industry share)	Follows Senate bill, with transition year combined with 2003

Provision	H.R. 3210	S. 2600	Conference Report
Covered Lines	Commercial	Commercial – mandatory Personal – optional	Follows House bill, plus war coverage for workers' compensation; excludes reinsurance; Secretary of Treasury has discretion to add group life insurance
Mandatory Terrorism Coverage	No, but appears as though insurer not writing terrorism policies still subject to assessments	Yes. Participating insurers must offer terrorism insurance in all commercial policies (assumes opt-out by policyholder)	Follows Senate bill for first two years; Secretary of Treasury has discretion to extend requirement to third year
Payback	Yes, through assessments on insurers for first $20 billion, and surcharges on policyholders for amounts from $20-$100 billion, with civil monetary penalties for failure to pay	No	Yes, through surcharges of up to 3% of annual premiums on all policyholders with mandatory recoupment for amounts under the annual industry-wide trigger ($10 billion for 2002-2003, $12.5 billion for 2004, and $15 billion for 2005); no mandatory recoupment if uncompensated losses exceed insurance marketplace retention; Secretary of Treasury has discretion to recoup additional amounts
Application to Self-insureds and Offshore Insurers	Yes, if Secretary of Treasury, in consultation with NAIC, so determines	Yes. Secretary of Treasury, in consultation with NAIC may establish procedures for municipalities and other entities in existence on 9/11	Follows House bill as to self-insureds, captives, plus state residual market pools, surplus lines carriers and state workers' compensation funds

Provision	**H.R. 3210**	**S. 2600**	**Conference Report**
Definition of Terrorism	Yes, to be developed by Secretary of Treasury and NAIC consistent with the requirements of the Act	Yes, as certified by Secretary of Treasury, in concurrence with Secretary of State and Attorney General – based on requirements in the Act (losses exceed $5 million)	Follows Senate bill
Cost Disclosure of Terrorism Coverage	Yes. Sense of Congress that states require separate disclosure of cost of terrorism coverage	Yes, as a condition for federal payment	Yes. Must disclose terrorism insurance premiums and the existence of the federal backstop
Consultation with State Insurance Regulators (NAIC)	Yes, as to assessments, surcharges, claims investigation, and covered perils	Yes, as to life insurance study and non-insurer entities to be covered	Yes, as the Secretary determines appropriate, concerning the program
State Regulation Uniformity	Yes, as to "terrorism" definitions and underwriting standards	No	Follows Senate bill
Civil Actions and Litigation	Federal cause of action in district court(s) designated by Judicial Panel on Multidistrict Litigation	General federal cause of action (no designation by Judicial Panel on Multidistrict Litigation)	Follows House bill
Legal Modifica-tions and Limitations	Punitive damages prohibited. Non-economic damages proportional as to fault. U.S. right of subrogation. 20% cap on attorneys' fees	Punitive damages do not constitute "insured losses" and thus no federal participation. U.S. right of subrogation	Follows Senate bill

Provision	H.R. 3210	S. 2600	Conference Report
Studies	Life insurance, railroad and trucking insurance, and reinsurance pool system for future acts of terrorism	Life insurance and other lines of insurance	Life/group life insurance, and other facets of affected insurance markets, including personal lines, railroads and public transit
Reports from Insurers	None required, except for data not available to NAIC	Only as to claims (premium rates reported to NAIC)	Follows House bill, but burden of compiling premium data placed on the Secretary of Treasury
State Preemption	Yes, of impediments to increasing premiums to recover assessments, but not as to filings or subsequent review of rates	Yes, as to "terrorism" definition and state prior approval rating statutes. Access to books/records by Secretary of Treasury guaranteed	Follows Senate bill, plus nullifies existing terrorism exclusions, with provisions for reinstatement under certain conditions
Civil Monetary Penalties	Yes, $1 million against insurers for failing to pay assessments or surcharges, erroneous data, or violation of regulations	Yes, to be assessed by Secretary of Treasury for violations of Act or of any rule, regulation or order	Follows House bill
Report to Congress	Yes. If Secretary extends the term of the program, must state reasons	Yes, not later than nine months after the date of enactment, covering required items, plus joint report 12 months later with Comptroller General as to NAIC, FTC, and GAO reports	Yes, not later than June 30, 2005, covering required items, in consultation with NAIC, insurance industry and other experts
Satisfaction of Judgments from Assets of Terrorists	Yes	Yes	Yes