Terrorism Risk Insurance Act (*TRIA*) Extended to Expire December 31, 2014

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by Robert Ball

On December 18, 2007, Congress finally came together on a plan to once again extend TRIA (the Terrorism Risk Insurance Act of 2002). The President signed the Extension Bill on December 26, 2007, extending TRIA for seven years. It is now slated to expire on December 31, 2014.

Although there were a number of proposals afloat to change (mostly to increase) TRIA's scope, only one that has immediate impact on Insureds made it into the Extension.

- Acts of Terror perpetrated on behalf of **domestic** persons or interests are now subject to TRIA (TRIA previously only applied to Acts of Terror perpetrated on behalf of **foreign** persons or interests).

Aside from this single point, the terms and conditions applying during each of the Extension years are essentially the same as those applied during 2007.

- The Extension does significantly increase the total amount of the post-loss premium surcharges that will be imposed in situations where TRIA <u>requires</u> the government to recoup its reinsurance payments. It also no longer places a limit on these surcharges as a percentage of overall policy premium, and newly stipulates the period within which mandatory recoupments must be completed. TRIA still only <u>requires</u> recoupment to the extent the insurance industry has not retained enough TRIA loss net of TRIA reinsurance (i.e., has not fully incurred the Insurance Marketplace Aggregate Retention). Surcharges imposed for <u>discretionary</u> recoupments remain limited to, at maximum, 3% of overall post-loss policy premium on an annual basis.

Under the Extension, subject insurers must continue offering coverage for 'certified' Acts of Terror in all their policies and quotes. The terms of the Extension should not trigger the 'Conditional' Terrorism Endorsements attached to many policies, but it will trigger some, especially since TRIA was modified when it was extended. Insureds will want to obtain specific confirmation of how or if their particular Endorsement applies.

SIGNIFICANT ASPECTS OF TRIA THAT DO NOT CHANGE IN THE EXTENSION

TRIA has two essentially separate components:

- The insurance that TRIA requires subject insurers to offer.
- The free reinsurance that TRIA provides to insurers/captives subject to TRIA.

With regard to TRIA's insurance component:

- It did not become mandatory for insurers to offer coverage for Nuclear, Biological, Chemical, or Radiological (NBCR) reactions, releases, or contamination resulting from certified Acts of Terror in <u>all</u> their policies. However, the mandatory offer to cover loss resulting from certified Acts of Terror is still deemed to include the offer to cover NBCR reactions resulting from such Acts in policies that cover NBCR reactions resulting from other events.
- TRIA has not been extended to include Group Life insurance.

- Some of the other coverages to which TRIA still does not apply are Commercial Auto, Professional Liability other than D&O, Medical Malpractice, and Reinsurance.
- Acts of Terror still can only be certified (i.e., covered) if they cause more than $5 million in industry aggregate property and casualty loss and fulfill all of the other certification criteria.
- TRIA still does not appear to require the government to certify any Act of Terror.
- Under TRIA's Cap on Annual Liability, insurers will still be able to cease paying TRIA loss after $100 billion in industry aggregate loss has been incurred in any given year if they have satisfied their individual annual aggregate TRIA reinsurance deductibles for that year (see below).

With regard to TRIA's reinsurance component

- The Program Trigger (which must be exceeded before the government can pay any reinsurance to any insurer with respect to a given certified Act of Terror) remains $100 million in industry aggregate property and casualty loss arising from a given certified Act of Terror.
- The Insurer Deductible (an individual insurer's annual aggregate deductible, which must be exceeded before the government can pay any reinsurance to that insurer) still equals 20% of that insurer's prior-year total earned premium.
- After the Program Trigger has been activated, the government still only pays 85% of each insurer's TRIA loss exceeding their individual deductible.

CAUTIONS AND SIGNIFICANT CLARIFICATIONS

Do not ignore Terrorism Exclusions even if you buy TRIA:

Insureds that accept the TRIA offer cannot categorically ignore Terrorism Exclusions because TRIA only supersedes Terrorism Exclusions with respect to certified Acts of Terror. Terrorism Exclusions will still be completely effective against all uncertified Acts of Terror. Note also, with respect to certification, that TRIA does not appear to make certification automatic.

- TRIA only stipulates that the government cannot certify an Act of Terror unless it causes damage in the U.S. or at certain U.S. owned/related properties elsewhere and fulfills all the other certification criteria, one of which is that it must result in insurance industry aggregate loss (including all subject coverages) that exceeds $5 million.

Simply meeting the criteria for certification does not technically appear to be enough to actually invoke TRIA.

Review TRIA Endorsements Carefully:

TRIA endorsements vary. It is not safe to assume they all do exactly the same thing, or that their variances are not important. Some can be quite confusing. It may sometimes be advisable, if not necessary, to extract a definitive clarification of their intent from the insurer.

TRIA Does Not Apply to All Property and Casualty Coverages:

TRIA applies to many, but not all, lines of property and casualty coverage. The list of excluded lines increased when TRIA was extended in 2005. Insureds may want to refresh their knowledge concerning the currently excluded *lines* (a complete list appears at close of document) *s*o they are not led astray by TRIA references or even TRIA charges that may sometimes appear in quotes for excluded lines of cover.

TRIA itself does not limit how much an Insurer may charge for TRIA Coverage:

With respect to premium, TRIA says nothing except that the insurer must disclose how much of a policy's premium relates to TRIA. However, TRIA does not appear to supersede or pre-empt any State Insurance Regulations that might limit premium.

TRIA does not alter Deductibles, Retentions, and/or Quota-Shares under Subject Policies:

TRIA talks about an "insurer deductible," an "insurance marketplace aggregate retention," a "program trigger," and "insured loss shared compensation" (where, among other things, it describes a "quota-share" arrangement). These are references to the reinsurance the government provides to insurers subject to TRIA, and they are only pertinent to such reinsurance. As for insurance provided by subject policies, TRIA essentially mandates that the deductibles, retentions, and/or quota-shares applying to other covered damages must also apply to damages arising from certified Acts of Terror. It applies the same mandate to the limits of subject policies, except to the extent of TRIA's Cap on Annual Liability.

Acts of Terror not activating the 'Program Trigger' may still activate TRIA Insurance:

An Act of Terror can be certified if it fulfills the other certification criteria outlined in TRIA and results in more than $5 million in industry aggregate property and casualty loss. Certification activates TRIA's insurance coverage for that Act. This can occur whether or not the loss exceeds the $100 million Program Trigger, which is only relevant to TRIA's reinsurance coverage.

A BRIEF HISTORY OF TRIA

TRIA is the U.S. federal law limiting the ability of many insurers (including captive insurers licensed/admitted in any U.S. state/territory/possession) to exclude terrorism under their property or casualty insurance (not reinsurance) policies covering U.S. exposures. The law also provides some free terrorism reinsurance to affected insurers.

TRIA was originally passed into law on November 26, 2002. Intended as a temporary stop-gap to stimulate commercial development stalled by the absence of terrorism insurance and to buy time for the private sector terrorism insurance market to re-emerge, it originally had a built-in end date of December 31, 2005. The date was extended to December 31, 2007 with amendments that narrowed its scope, notably regarding the reinsurance TRIA provides to insurers subject to TRIA.

LINES OF COVERAGE SUBJECT TO TRIA

All commercial property and casualty lines, including workers' compensation and directors and officer's liability, are subject to TRIA, ***except*** *for the following:*

- Burglary and theft insurance
- Commercial auto insurance
- Farm owners multi-peril insurance
- Federal crop insurance
- Financial guarantee insurance (when provided by monoline financial guarantee insurers)
- Flood insurance (when provided by the National Flood Insurance Program)
- Health or life insurance
- Medical malpractice insurance
- Private mortgage insurance
- Professional liability insurance
- Surety insurance
- Reinsurance

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About Integro

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