

CHAPTER 14

The Terrorism Risk Insurance Act

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Statutes:

**Terrorism Risk Insurance Act,
Pub. L. No. 107-297, 116 Stat. 2322,
codified at 15 U.S.C. § 6701 note,
28 U.S.C. § 1610 note, and 12 U.S.C. § 248(r).**

**Terrorism Risk Insurance Extension Act of 2005,
Pub. L. No. 109-144, 119 Stat. 2660**

**Terrorism Risk Insurance Program Reauthorization Act of 2007,
Pub. L. No. 110-160, 121 Stat. 1839**

Regulations:

31 C.F.R. Part 50

**Interim Guidance Concerning the Terrorism Risk
Insurance Extension Act of 2005,
71 Fed. Reg. 648 (notice Jan. 5, 2006)**

**Terrorism Risk Insurance Program; TRIA Extension Act Implementation,
71 Fed. Reg. 27,564 (interim final rule May 11, 2006),
50,341 (final rule Aug. 25, 2006)**

**Terrorism Risk Insurance Program Reauthorization Act Implementation,
73 Fed. Reg. 53,359 (interim rule Sept. 16, 2008);
74 Fed. Reg. 18,135 (final rule Apr. 21, 2009)**

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**Jeffrey E. Thomas, *Emerging Issues for Terrorism Insurance*,
2008 Emerging Issues 145 (Feb. 2008).**

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§ 14.01 Background

Terrorism insurance is not a new concept. Even before the 9/11 attacks, commercial property and casualty insurance typically included terrorism-risk protection, but at no additional charge. Insurers did not consider the risks associated with domestic acts of terrorism against U.S. targets to be serious ones compared to other hazards, and thus they did not identify or assess terrorism risk as a significant factor in the rating, underwriting, or pricing of their policies.

The September 11, 2001, attacks, however, diametrically reversed that assessment. Seeing the tens of billions of dollars in estimated damage resulting from just this one morning of attacks, many insurance companies quickly responded by withdrawing terrorism-risk insurance from commercial policies. In short order, it almost vanished from the marketplace.

The insurance industry reacted in significant part to steps taken by the reinsurance industry. Traditionally, the majority of reinsurance contracts had included terrorism coverage by default because those policies did not specifically exclude that risk. Soon after 9/11, however, most reinsurers notified domestic insurers that terrorism coverage would be excluded from reinsurance coverage upon renewal, and even the few reinsurers that retained the terrorism coverage did so with compensatory limits and

caps that provided significantly less protection than before.¹ With the loss of most reinsurance coverage, domestic insurers were left to shoulder the enormous financial risk and burden themselves, a prospect few could or would accept.²

Some insurers did continue to offer specific terrorism coverage, but at exorbitant rates. Property and casualty rates rose between 30 and 300%, with an average rate increase of 30–50%.³ These costly options precluded most insureds from finding adequate terrorism-risk insurance, despite the fact that most lenders required businesses to carry such coverage.⁴

The sudden cutback in terrorism-risk insurance cascaded through the business world, and especially the real estate industry. Businesses faced three options:

- (1) They could attempt to purchase the newly created and extremely expensive stand-alone terrorism-risk insurance policies, but at a cost that jeopardized or prevented profitability;
- (2) They could reserve funds and self-insure their exposure; or
- (3) They could elect, where permitted, to have no coverage at all.⁵

For new construction projects, however, the last option was not viable. Most lenders required coverage, and in any event, many builders and developers did not want to proceed with their projects without insurance coverage of terrorism risks now that all were acutely aware of the magnitude of those risks. Numerous real estate deals and projects did not go forward during the year following 9/11.

Consequently, the 9/11 attacks and the reactive market forces depressed the commercial construction and real estate finance industries, as lenders and investors became increasingly uncertain of the future, further burdening an already struggling

¹ See Lori L. Siwik, Commentary, *Terrorism Coverage: What Every Corporate Policyholder Needs To Know*, 8 Mealey's: Emerging Insurance Disputes, Feb. 4, 2003, at 30, 39 n.2. See generally U.S. General Accounting Office, GAO-04-806T, *Terrorism Insurance: Effects of the Terrorism Risk Insurance Act of 2002* (testimony by Richard J. Hillman, Director, Fin. Mkts. & Cmty. Inv., to S. Comm. on Banking, Housing & Urban Affairs, May 18, 2004); U.S. General Accounting Office, GAO-04-720T, *Terrorism Insurance: Effects of the Terrorism Risk Insurance Act of 2002* (testimony by Mr. Hillman to Subcomms. on Capital Mkts., Ins. & Gov't Sponsored Enterprises and on Oversight & Investigations, H. Comm. on Fin. Servs., Apr. 28, 2004).

² See Jeff Woodward, Int'l Risk Mgmt. Inst., Inc., *The ISO Terrorism Exclusions: Background and Analysis*, IRMI.com, Feb. 2002, available at www.irmi.com/expert/2002/woodward02.aspx (last visited Aug. 3, 2009).

³ Rodd Zolkos, *Property Market Sees Rate Hikes, Diminished Capacity*, Bus. Ins., July 8, 2002, available at www.rmi.gsu.edu/rmi/faculty/klein/RMI_3500/Readings/Other/Property_Hike.htm (last visited Aug. 3, 2009).

⁴ See Lori Widmer, *Terrorism Insurance: Where's the Coverage?*, Risk & Ins., July 2002, at 12 (finding that 80% of the insurance industry excluded terrorism risk from commercial policies). But see William Kleinknecht, *Terrorism insurance surges as costs sink: Post-9/11 law boosts coverage, cuts price*, Star-Ledger (Newark, N.J.), July 19, 2004, at 3.

⁵ Siwik, *supra* note 1, at 14.

economy.⁶ A legislative solution became necessary

§ 14.02 The TRIA

To accommodate the needs of the post-9/11 business environment, the business community and the White House supported a federally funded terrorism-risk insurance program. These supporters realized that such a program would be a crucial component to homeland security and a necessity toward reviving the economy. Yet, despite strong support, Congress wrangled for a year to agree on a bill. One major area of contention surrounded whether the bill should permit victims of terrorist attacks to sue businesses for punitive damages arising from alleged failures to take sufficient precautions to prevent an attack or injuries arising from an attack. Ultimately, the White House intervened; it assured members of Congress that, although punitive-damage limitations could eventually be sought, such concerns should not derail the important legislation.¹ Finally, on November 26, 2002, after it passed overwhelmingly in both houses of Congress, President Bush signed the Terrorism Risk Insurance Act (“TRIA” or “Act”) into law.²

TRIA created a federally funded temporary terrorism reinsurance program (the “Program”). The Program established a transitional period for the insurance industry to stabilize.³ This in turn offered the business community the security of knowing insurance coverage was available. To achieve this outcome, TRIA created a shared public-private compensation backstop for future losses suffered by insurers, but imposed a mandatory (but temporary) obligation upon all qualifying insurers and their affiliates to make terrorism-risk insurance coverage available.⁴ The Treasury Department was given both authority and responsibility to oversee the Program.⁵ Realizing the complexities involved with administering the Act, the Department not only solicited industry involvement in drafting implementing regulations, but it also provided in those regulations means for obtaining interpretive rulings.⁶

On December 22, 2005, nine days before TRIA was scheduled to expire, President Bush signed the Terrorism Risk Insurance Extension Act of 2005 (“TRIEA”), which

⁶ See *Survey: Lack of Terrorism Coverage Thwarts \$10.5 Billion in Real Estate Deals*, Nat’l Real Estate Investor, Sept. 4, 2002, available at http://nreionline.com/other/wtc/real_estate_survey_lack_terrorism/index.html (last visited Aug. 3, 2009) (the Real Estate Roundtable found more than \$10.5 million in real estate transactions impeded by a lack of terrorism insurance).

¹ Elisabeth Bumiller, *Threats and Responses: The President: Government to Cover Most Costs Of Insurance Losses in Terrorism*, N.Y. Times, Nov. 27, 2002, at A1; see Mark A. Hoffman, *Congress OKs Terror Backstop*, Bus. Ins., Nov. 25, 2002, available at www.rmi.gsu.edu/rmi/faculty/klein/RMI_3500/Readings/Other/TI_CongressOK.htm (last visited Aug. 3, 2009).

² Pub. L. No. 107-297, 116 Stat. 2322.

³ TRIA § 101(b).

⁴ *Id.*

⁵ TRIA § 103(a)(1).

⁶ 31 C.F.R. § 50.9. These rulings are available, appropriately redacted, on the webpage for the Office of the Terrorism Risk Insurance Program, www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/letters.shtml (last visited Aug. 3, 2009).

extended TRIA through December 31, 2007.⁷ Although the economic environment of 2005 was much different than that following the attacks of 9/11 and there had been great strides in the return of terrorism-risk insurance coverage at affordable prices in the commercial sector,⁸ “take-up” rates for purchasing such coverage remained at just 54%.⁹ As a result, significant uninsured exposure continued to persist, which would likely require government support in response to a terrorist act. The initial extension of TRIA reflected a belief that a well designed policy and procedure implemented before a terrorist attack would more adequately address the reality of the situation than a reactive plan developed after the fact.

Although the Program was set to expire on December 31, 2007, there was a perception in the marketplace that there remained a continued financial threat caused by uninsured exposure.¹⁰ After much political debate and compromise, President Bush signed into law the Terrorism Risk Insurance Program Reauthorization Act of 2007 (“TRIPRA”), which extended the Program through December 31, 2014, and made other amendments to TRIA.¹¹

§ 14.03 The TRIA Trigger

Following its enactment, most debate concerning TRIA focused on the definition of an “act of terrorism,” the triggering event for operation of the Program. Under TRIA, the Secretary of the Treasury (“Secretary”) is authorized to implement the Program by certifying, in concurrence with the Attorney General and the Secretary of State, that a specific event constitutes an “act of terrorism.”¹ The Act, prior to the TRIPRA amendments, defined an “act of terrorism” as a violent or dangerous act damaging to

⁷ Pub. L. No. 109-144, 119 Stat. 2660.

⁸ According to Department of the Treasury figures, in 2002 insurers wrote terrorism-risk coverage in 60% of commercial property and casualty insurance policies. That figure increased to 2/3 of policies in 2004, and the portion of insurers offering the coverage rose from 73% to 91%. Testimony of Treasury Secretary John W. Snow [to the] Committee on Banking[,] U.S. Senate[,] on the Terrorism Risk Reinsurance Program (July 14, 2005), *available at* www.treasury.gov/press/releases/js2633.htm (last visited Aug. 3, 2009); Testimony of Treasury Secretary John W. Snow before [the] Committee on Financial Services, U.S. House of Representatives[,] on the Terrorism Risk Reinsurance Program 3 (July 13, 2005), *available at* www.treasury.gov/press/releases/js2630.htm (last visited Aug. 3, 2009).

⁹ Although just over half of policyholders opted to purchase terrorism-risk coverage, this figure increased from 27% in 2002. Testimony of Treasury Secretary John W. Snow [to the] Committee on Banking[,] U.S. Senate[,] on the Terrorism Risk Reinsurance Program (July 14, 2005), *available at* <http://www.treasury.gov/press/releases/js2633.htm> (last visited Aug. 3, 2009); Testimony of Treasury Secretary John W. Snow before [the] Committee on Financial Services, U.S. House of Representatives[,] on the Terrorism Risk Reinsurance Program 3 (July 13, 2005), *available at* www.treasury.gov/press/releases/js2630.htm (last visited Aug. 3, 2009). This suggests wider availability and affordability of terrorism-risk coverage.

¹⁰ *See, e.g., President Signs Seven-Year TRIA Extension*, National Underwriter, Dec. 26, 2007, *available at* <http://www.property-casualty.com/News/2007/12/Pages/President-Signs-Seven-Year-TRIA-Extension.aspx> (last visited Aug. 3, 2009).

¹¹ *Id.*; Pub. L. No. 110-160, 121 Stat. 1839.

¹ TRIA § 102(1)(D).

human life, property, or infrastructure committed “on behalf of any foreign person or foreign interest” as part of a coercive effort to influence U.S. policy. Therefore, domestic acts of terrorism, such as the Oklahoma City bombing, did not initially fall within the protections of the Program.² TRIPRA, however, expressly amended TRIA by striking from its definition of “act of terrorism” the requirement that the act be committed “on behalf of any foreign person or foreign interest.”³ Thus, acts of domestic terrorism are now covered by the Program.

The definition explicitly limits covered damages to only those within the United States, or to those outside the United States involving a U.S. air carrier or vessel or a U.S. diplomatic mission.⁴ TRIA also precludes certain events that satisfy the definition of an “act of terrorism,” but that (i) do not exceed \$50 million in 2006 or \$100 million in 2007 and any Program Year thereafter in aggregate property and casualty losses, or (ii) involve losses (except for workers’ compensation claims) resulting from an act committed in connection with a congressionally declared war.⁵

The statute and its implementing regulations provide the Secretary with vast authority and discretion regarding certification of an “act of terrorism.” That duty is nondelegable; under TRIA, only the Secretary may issue the certification.⁶ The Secretary is vested with enormous latitude for the decision, as neither the statute nor any implementing regulations provide guidance, beyond the definition, as to what may qualify as an “act of terrorism.” Moreover, the regulations fail to define what it means

² Terrorism Risk Insurance Program, 68 Fed. Reg. 41,250, 41,252 (July 11, 2003) (supplementary information). In 2005, H.R. 4314 proposed the inclusion of domestic terrorism. This provision, however, was not included in the final bill.

³ Specifically, TRIA, as amended, now defines “act of terrorism” as follows:

(1) Act of Terrorism.—

(A) Certification.—The term “act of terrorism” means any act that is certified by the Secretary, in concurrence with the Secretary of State, and the Attorney General of the United States—

(i) to be an act of terrorism;

(ii) to be a violent act or an act that is dangerous to—

(I) human life;

(II) property; or

(III) infrastructure;

(iii) to have resulted in damage within the United States, or outside of the United States in the case of—

(I) an air carrier or vessel described in paragraph (5)(B); or

(II) the premises of a United States mission; and

(iv) to have been committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

TRIA § 102(1)(A); *see also* 31 C.F.R. § 50.5(b)(1).

⁴ TRIA § 102(1)(A)(iii); *see also* 31 C.F.R. § 50.5(b)(1)(iii).

⁵ The original TRIA placed the trigger at \$5 million. TRIA § 102(1)(B). TRIA and its implementing regulations further modified the trigger to its 2006 and 2007 levels. TRIA § 6; 31 C.F.R. § 50.5(l).

⁶ TRIA § 102(1)(D). The implementing regulations are at 31 C.F.R. Part 50.

for an individual to act in an “effort to coerce the civilian population . . . or to influence the policy” of the United States.⁷ The Secretary has no limitations as to what or whom he or she may consult to reach a decision, and the statute and the regulations provide that the Secretary’s determination is final and not subject to judicial review, thus eliminating any avenue to challenge a determination.⁸

Originally, TRIA provided the Secretary with an unlimited amount of time to certify an event as an act of terrorism and declare an event eligible for federal reimbursement. The absence of a timeline caused concern within industry, as state laws and regulations often require insurers to timely pay claims. Insurers were concerned that while they were awaiting the Secretary’s decision regarding an event, cash flow problems might arise and possibly cause insolvency. An example cited by the insurance industry in 2004 was the fact that, even two years after the anthrax letters, no determination had been made as to whether they were part of an “act of terrorism.”⁹ TRIPRA, however, amended TRIA to require the Secretary to notify Congress not later than fifteen days after the date of an act of terrorism as to whether the aggregate insured losses are estimated to exceed \$100 billion.¹⁰

§ 14.04 Covered Lines of Insurance

The Act covers only commercial lines of property and casualty insurance.¹ These include business interruption, surety, and captive insurance, as well as state residual market insurance entities and workers’ compensation funds.² Punitive damages are not considered “insured losses” under TRIA.³ Self-insurance is not mentioned, and the Treasury Department has not issued any regulations to date regarding the inclusion of self-insurance arrangements.⁴ The implementing regulations also explicitly exclude “staff salaries, overhead, and other insurer expenses that would have been incurred notwithstanding the insured loss.”⁵

§ 14.05 Eligible Insurers

Under TRIA, an “insurer” is any entity or affiliate that falls within one of the following categories:

⁷ TRIA § 102(1)(A)(iv).

⁸ TRIA § 102(1)(C); *see also* 31 C.F.R. § 50.5(b)(3).

⁹ *Id.*

¹⁰ TRIPRA § 4(b)(1).

¹ TRIA expressly excludes fidelity, life, health, medical malpractice, crop, mortgage guarantee, and monoline financial guaranty insurance, and any losses covered by the national flood insurance program. TRIA § 102(12)(B); *see also* 31 C.F.R. § 50.5(l)(2). The statute’s 2005 amendment provides that the following are also excluded from coverage: commercial automobile insurance, burglary and theft insurance, surety insurance, professional liability insurance, and farm owners’ multiple peril insurance. TRIA § 3(b).

² TRIA § 102(12)(A); *see also* 31 C.F.R. § 50.5(l)(1).

³ TRIA § 107(a)(5).

⁴ 68 Fed. Reg. at 41,252 (supplementary information).

⁵ 31 C.F.R. § 50.5(e)(3).

- (1) it is a state licensed or admitted insurer;
- (2) it has gone through a state's insurance licensing or admittance process, is generally subject to state insurance regulation, and is managed independently from other participating insurers;
- (3) if not licensed or admitted in any state, it is an eligible surplus line carrier listed on the Quarterly Listing of Alien Insurers of the National Association of Insurance Commissioners;
- (4) it is approved or accepted by a federal agency to offer property and casualty insurance for maritime, energy, or aviation activity;
- (5) it is a state residual market insurance entity;
- (6) it is a state workers' compensation fund; or
- (7) it otherwise is determined to be an insurer by the Secretary.¹

Further, TRIA requires that, to be an "insurer," an entity, with the exception of state residual market insurance entities and state workers' compensation funds, receive direct earned premiums ("DEPs") for commercial property and casualty insurance.²

An "affiliate" under TRIA is "any entity that controls, is controlled by, or is under common control with the insurer."³ The operative term in defining "affiliate" is "control," which the statute defines as existing if an entity has the power

- either directly or indirectly "to vote at least 25 percent of any class of voting securities of the other entity," or
- to elect a "majority of the directors or trustees of the other entity."

In addition, after notice and an opportunity for a hearing, the Secretary may determine that an entity qualifies as an affiliate even if it does not satisfy either test.⁴

The regulations define "affiliate" and "control" in the same manner as the statute, but provide additional guidance to the Secretary for making the appropriate determination as to the status of an entity.⁵ This additional guidance was provided because approximately one-third of the comments submitted to the Treasury Department on the interim final rules raised concerns as to their definitions.⁶ Under the regulations, the Secretary may determine the status of an entity through one of two ways. First, if the Secretary determines that the entity satisfies either of the first two parts of the definition of "control" as stated in the statute, and as restated in the regulations, "control" is conclusively found, and thus one entity is deemed an affiliate with respect

¹ Section 102(6); *see also* 31 C.F.R. § 50.5(f).

² TRIA § 102(6)(B); *see also* 31 C.F.R. § 50.5(f)(2). DEPs are defined as the premiums received "for all commercial property and casualty insurance issued by any insurer for insurance against all losses, including losses from an act of terrorism." 31 C.F.R. § 50.5(d).

³ Section 102(2).

⁴ Section 102(3).

⁵ 31 C.F.R. § 50.5(c).

⁶ 68 Fed. Reg. at 41,252 (July 11, 2003) (supplementary information).

to another.⁷ The regulations also provide the Secretary with an extensive list of presumptions to apply when making a determination of “control” with regard to an affiliate.⁸ This method is not conclusive, however, and the entity may rebut these presumptions.⁹ The regulations further provide that an insurer’s affiliates for any program year shall be determined as of the date of the first certified act of terrorism in that program year.¹⁰

⁷ 31 C.F.R. § 50.5(c)(3).

⁸ If at least two of the following apply to an insurer, with respect to another insurer, it is rebuttably presumed that the former exercises a controlling influence, and therefore the Secretary will deem the latter to be an affiliate:

- (A) The insurer is one of the two largest shareholders of any class of voting stock;
- (B) The insurer holds more than 35 percent of the combined debt securities and equity of the other insurer;
- (C) The insurer is party to an agreement pursuant to which the insurer possesses a material economic stake in the other insurer resulting from a profit-sharing arrangement, use of common names, facilities, or personnel, or the provision of essential services to the other insurer;
- (D) The insurer is party to an agreement that enables the insurer to influence a material aspect of the management or policies of the other insurer;
- (E) The insurer would have the ability, other than through the holding of revocable proxies, to direct the votes of more than 25 percent of the other insurer’s voting stock in the future upon the occurrence of an event;
- (F) The insurer has the power to direct the disposition of more than 25 percent of a class of voting stock of the other insurer in a manner other than a widely dispersed or public offering;
- (G) The insurer and/or [its] representative or nominee constitute more than one member of the other insurer’s board of directors; or
- (H) The insurer or its nominee or [officer] serves as the chairman of the board, chairman of the executive committee, chief executive officer, chief operating officer, [or] chief financial officer or in any position with similar policymaking authority in the other insurer.

31 C.F.R. § 50.5(c)(4).

Furthermore, if at least one of the above factors applies to an insurer with respect to another insurer, in conjunction with one of the following factors, it is rebuttably presumed that the former exercises a controlling influence, and therefore the Secretary will deem the latter to be an affiliate:

- (i) If an insurer controls another insurer under any State law. . . .
- (ii) If an insurer provides 25 percent or more of another insurer’s capital (in the case of a stock insurer), policyholder surplus (in the case of a mutual insurer), or corporate capital (in the case of other entities that qualify as insurers). . . .
- (iii) If an insurer, at any time during a Program Year, supplies 25 percent or more of the underwriting capacity for that year to an insurer that is a syndicate consisting of a group including incorporated and individual unincorporated underwriters. . . .

Id.

⁹ *Id.* The procedure for rebutting the Secretary’s determination is set forth in 31 C.F.R. § 50.8.

¹⁰ 31 C.F.R. § 50.55.

§ 14.06 Insurer Rights and Obligations

One of the critical features of TRIA is its mandatory nature.¹ All qualifying insurers must “make available” property and casualty insurance coverage for insured losses resulting from “acts of terrorism” that would be similar to losses resulting from non-terrorist events.² This obligation requires commercial insurers to provide coverage as of the date of TRIA’s original enactment through December 31, 2014, pursuant to TRIPRA.³

TRIA also addresses the many reactive measures taken by both private insurers and state governments following 9/11. TRIA nullifies all terrorism-risk exclusion provisions and requires that those insurers provide terrorism-risk coverage to the same extent that an existing policy would cover a similar type of loss, regardless of whether the loss resulted from an act of terrorism.⁴ Furthermore, the Act preempts any state action taken with regard to terrorism-risk exclusions, to the extent that the excluded losses otherwise would have constituted covered losses.⁵

In return for mandating commercial insurance policies to include acts of terrorism, TRIA allows insurers to increase premiums to help pay for the added protection. While doing so, TRIA requires insurers to make specific disclosures in order to “enhance comparison shopping and Program awareness by policyholders.”⁶ Therefore, TRIA and its accompanying regulations establish a disclosure scheme that creates market transparency in hopes that market forces will adequately regulate the premium increases.

These disclosure provisions require insurers to provide clear and conspicuous disclosure to policyholders regarding the premiums charged for the additional protection required by the Program, as well as the federal share of compensation for insured losses.⁷ Furthermore, insurers must disclose the premiums at the times of offer, purchase, and renewal of the policy.⁸ The regulations further guide insurers as to how to make clear and conspicuous disclosures.⁹

The regulations provide that consideration of the totality of the facts and circumstances is necessary in determining clear and conspicuous disclosure.¹⁰ The Treasury Department and the National Association of Insurance Commissioners (“NAIC”)

¹ Section 103(a)(3).

² Section 103(c); *see also* 31 C.F.R. § 50.20.

³ TRIPRA § 3.

⁴ TRIA § 105(a); *see also* 31 C.F.R. § 50.18(a).

⁵ TRIA § 105(b); *see also* 31 C.F.R. § 50.24(a).

⁶ Terrorism Risk Insurance Program; Disclosures and Mandatory Availability Requirements, 68 Fed. Reg. 59,720, 59,722 (Oct. 17, 2003) (supplementary information).

⁷ TRIA § 103(b)(2); *see also* 31 C.F.R. § 50.10(a).

⁸ TRIA § 103(b)(2); *see also* 31 C.F.R. § 50.10(b)–(d).

⁹ 31 C.F.R. § 50.12.

¹⁰ *Id.*

provide insurers with model forms to assist them in making compliant disclosures.¹¹ The disclosure regulations require insurers to disclose any premium increases resulting from the Program.¹² This disclosure may be done by indicating the actual portion or percentage of the premium due to coverage under the Program.¹³ Disclosure may not, however, be made in a way that would mislead the policyholder, “such as by characterizing the premium as a ‘surcharge.’ ”¹⁴ For all policies issued after February 25, 2003, the regulations allow insurers to satisfy the disclosure requirement by making the disclosure on the declarations page of the policy, by including it elsewhere in the policy, or by providing a rider or other document that is made part of the policy.¹⁵ Distribution of sufficient disclosures may be made to insurers’ policyholders through the use of normal business practices.¹⁶ Insurers also may make disclosures through intermediaries, such as an insurance producer, but the insurer remains responsible for ensuring that policyholders receive the proper disclosures.¹⁷

The differing structure of state residual market insurance entities and state workers’ compensation funds necessitates a different disclosure process.¹⁸ The regulations allow these insurers to provide the required disclosures directly by using normal business practices, or their individual servicing insurers may make the disclosure through the use of normal business practices.¹⁹ Ultimately, the responsibility for ensuring that the proper disclosure is made resides with the insurer who files a claim under the Program.²⁰

In recognition of the fact that the Program calls for increases in insurance premiums, TRIA allows the insured to opt out of the more expensive terrorism coverage.²¹ There are two ways for the insured to eliminate this higher level of coverage. First, the insured may affirmatively opt out by providing the insurer with a written statement authorizing reinstatement of a terrorism-risk exclusion.²² Otherwise, if the insured fails to pay additional premiums after having received at least thirty days’ notice of the proposed increase in premiums due to the Program and information explaining the insured’s rights, the coverage need not be provided.²³

¹¹ 31 C.F.R. § 50.17 (providing information for retrieving the NAIC disclosure forms).

¹² 31 C.F.R. § 50.12(b).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 31 C.F.R. § 50.14.

¹⁶ 31 C.F.R. § 50.12(c).

¹⁷ 31 C.F.R. § 50.12(d).

¹⁸ 31 C.F.R. § 50.19(b).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Section 105(c); *see also* 31 C.F.R. § 50.18(b).

²² TRIA § 105(c)(1); *see also* 31 C.F.R. § 50.18(b)(1).

²³ TRIA § 105(c)(2); *see also* 31 C.F.R. § 50.18(b)(2).

§ 14.07 Compensation and Limitations

In addition to the disclosure requirements, the Program imposes several conditions for insurers to receive federal payments.¹ First, a claim must be filed with an insurer for an insured loss suffered as a result of an act of terrorism.² Second, the insured loss must exceed the insurer's deductible.³ Third, the insurer must have made a payment to the insured based upon the claim.⁴ Fourth, the insurer must have investigated the claim diligently and processed it in accordance with appropriate insurance business practices.⁵ Fifth, the loss must fall within the scope of coverage provided by the insurer.⁶ Finally, the insurer must submit to the Secretary, in accordance with the applicable procedures, a claim for payment for insured losses under the Program, a written certification of the underlying claim and of all payments made for insured losses, and certification of the submission's compliance with the regulations.⁷

¹ TRIA § 103(b); 31 C.F.R. §§ 50.50–.54.

² TRIA § 103(b)(1). Both the “insurer” and the “insured loss” must satisfy their respective definitions. See 31 C.F.R. § 50.5(e), (f).

³ 31 C.F.R. § 50.50(d)(2).

Insurer deductible means:

(1) For an insurer that has had a full year of operations during the calendar year immediately preceding the applicable Program Year:

(i) For the Transition Period (November 26, 2002 through December 31, 2002), the value of an insurer's direct earned premiums over calendar 2001, multiplied by 1 percent;

(ii) For Program Year 1 (January 1, 2003 through December 31, 2003), the value of an insurer's direct earned premiums over calendar year 2002, multiplied by 7 percent;

(iii) For Program Year 2 (January 1, 2004 through December 31, 2004), the value of an insurer's direct earned premiums over calendar year 2003, multiplied by 10 percent;

(iv) For Program Year 3 (January 1, 2005 through December 31, 2005), the value of an insurer's direct earned premiums over calendar year 2004, multiplied by 15 percent;

(v) For Program Year 4 (January 1, 2006 through December 31, 2006), the value of an insurer's direct earned premiums over calendar year 2005, multiplied by 17.5 percent; and

(vi) For Program Year 5 (January 1, 2007 through December 31, 2007), or any Program Year thereafter, the value of an insurer's direct earned premiums over calendar year 2006, multiplied by 20 percent; and

(2) For an insurer that has not had a full year of operations during the calendar year immediately preceding the applicable Program Year, the insurer deductible will be based on data for direct earned premiums for the applicable Program Year multiplied by the specified percentage for the insurer deductible for the applicable Program Year. If the insurer does not have a full year of operations during the applicable Program Year, the direct earned premiums for the applicable Program Year will be annualized to determine the insurer deductible.

31 C.F.R. § 50.5(g).

⁴ 31 C.F.R. § 50.50(d)(3).

⁵ TRIA § 103(b)(3); 31 C.F.R. § 50.50(d)(7).

⁶ 31 C.F.R. § 50.50(d)(8).

⁷ TRIA § 103(b)(4); 31 C.F.R. § 50.50(d)(9); Treasury Form TRIP 02B.

This information must be submitted on specified Treasury forms.⁸ The failure to satisfy any of these requirements may suspend payment “for all other insured losses” pending investigation or audit.⁹ Pursuant to regulation, an Initial Notice of Insured Loss shall be submitted “whenever the insurer’s aggregate insured losses (including reserves for ‘incurred but not reported’ losses) within a Program Year exceed an amount equal to 50% of the insurer’s deductible as specified in § 50.5(g).”¹⁰ The form for this purpose is TRIP 01, “Terrorism Risk Insurance Program, Initial Notice of Insured Loss.”¹¹ With regard to an affiliated group of insurers, the form requires the designation of a single point of contact and allows the insurer to file a certification of DEP.¹² This certification is required by § 50.53(b)(3).

The regulations allow (but do not require) an insurer to make a claim upon the Treasury for payment of the federal share of an insurer’s insured losses.¹³ If an insurer decides to make a claim, it must do so on Treasury Form TRIP 02, “Terrorism Risk Insurance Program, Certification of Loss.”¹⁴ The insurer is required to use its “best efforts” to file an “Initial Certification of Loss” within “45 days following the last calendar day of the month when an insurer has paid aggregate insured losses that exceed its insurer deductible.”¹⁵

The Certificate of Loss must be accompanied by three schedules, filed on Treasury forms. The first document required to accompany the Certification of Loss is a “Declaration of ‘Direct Earned Premium’ and Calculation of ‘Insurer Deductible’ Under Terrorism Risk Insurance Act of 2002 (TRIA).”¹⁶ This document must reflect consolidated information for all affiliates and be certified by an officer of the insurer.¹⁷

The second attachment to the claim form is the “Certification of Compliance with Section 103(b) of Terrorism Risk Insurance Act of 2002.”¹⁸ This document requires the company to certify that it is complying with the specific financial and notification requirements of TRIA, including that the information on the third attachment, the

⁸ Forms are available in portable document format on the Treasury website at www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/claims_process/request_share.shtml.

⁹ 31 C.F.R. § 50.50(f).

¹⁰ 31 C.F.R. § 50.52.

¹¹ This form is available in portable document format on the Treasury website at www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/claims_process/request_share.shtml.

¹² 31 C.F.R. § 50.52.

¹³ 31 C.F.R. § 50.53(a).

¹⁴ This form is available in portable document format on the Treasury website at www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/claims_process/request_share.shtml.

¹⁵ 31 C.F.R. § 50.53(b).

¹⁶ Treasury Form TRIP 02A (“Schedule A” on the Treasury website, www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/claims_process/request_share.shtml).

¹⁷ Instructions at www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/claims_process/request_share.shtml.

¹⁸ 31 C.F.R. § 50.50; Treasury Form TRIA 02B, *available at* www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/claims_process/request_share.shtml as Schedule B.

bordereau, discussed below, is accurate, under penalty of law.¹⁹

The final attachment required with a Certification of Loss is “Schedule C,” a “bordereau,” a report about the insurer’s underlying claims. This document, a spreadsheet prescribed by the Department,²⁰ requires specific financial information and in this regard complements the information required under 31 C.F.R. § 50.50 and discussed above. The Department supplies detailed instructions for this form, and the information supplied on it is certified to by signing the Certification of Loss.²¹

Certificates of Loss may be filed even though the total amount of the federal share has not been determined.²² In such a situation, the insurer is required to file monthly (or as the Department determines) a “Supplementary Certification of Loss.”²³ This document must be accompanied by a bordereau, described above, a certification that the insurer remains in compliance with the Act and the regulations, and any other information the Department may require to “ascertain the Federal share of compensation for the insured losses of any insurer.”²⁴

In order to receive payment of the federal share of compensation, the insurer must be enrolled in the Department’s Financial Management Service’s Automated Application for Payments (“ASAP”) system.²⁵ Information on registration is available on the Department’s website.²⁶ The Department commits to prompt payment, but retains the right to make payments “in such installments and on such conditions as determined by the Treasury to be appropriate.”²⁷ Reimbursement payments may be made to any account designated by the insurer;²⁸ advance payments may be made only to a segregated, interest-bearing account at a financial institution eligible to receive payments through the Automated Clearing House network.²⁹ The account may be used only for purposes related to the federal share, and all interest must be remitted quarterly to the Treasury Department’s Office of Financial Management.³⁰

The Program originally provided that the federal share of compensation would be

¹⁹ Form TRIA 02B.

²⁰ See the Treasury website, www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/claims_process/request_share.shtml (last visited Aug. 3, 2009).

²¹ *Id.*

²² 31 C.F.R. § 50.53(c).

²³ There is no specific form with this title. From the text of § 50.53, it appears that the Certification of Loss form would be used unless the Department specifies otherwise.

²⁴ 31 C.F.R. § 50.53(b), (c)(1)–(2), (d).

²⁵ 31 C.F.R. § 50.54(b) requires payment through electronic funds transfer. The Certification of Loss form, TRIP 02, requires enrollment in ASAP.

²⁶ www.fms.treas.gov/asap/index.html (last visited Aug. 3, 2009).

²⁷ 31 C.F.R. § 50.54(a).

²⁸ 31 C.F.R. § 50.54(c).

²⁹ 31 C.F.R. § 50.54(d).

³⁰ 31 C.F.R. § 50.54(d)(1), (2).

90% of the amount of insured losses in excess of deductibles.³¹ TRIEA established that the percentage of insured losses eligible for compensation in excess of deductibles would remain at 90% in 2006 and be lowered to 85% in 2007.³² TRIA imposes a federal deductible on participating insurers so that the federal burden will shift slowly from the government to private insurers. During the transitional year of the Program, from the date of enactment through December 31, 2002, the deductible was 1% of the value of the insurer's DEP.³³ During Program Year 1, the 2003 calendar year ("PY1"), the deductible was 7% of the value of DEP.³⁴ During Program Year 2, the 2004 calendar year ("PY2"), the deductible was 10% of DEP.³⁵ During Program Year 3, the 2005 calendar year ("PY3"), the deductible was 15% of DEP.³⁶ In Program Year 4, the 2006 calendar year ("PY4"), the deductible was 17.5% of DEP.³⁷ For Program Year 5, the 2007 calendar year ("PY5"), and for each Program Year thereafter, the deductible is 20% of DEP.³⁸ For insurers that have not operated for a full year during the applicable program year, the insurer's deductible is determined by annualizing the DEP for that year.³⁹ Finally, any duplicative federal compensation will reduce the federal share.⁴⁰

TRIA imposes an annual aggregate cap of \$100 billion that is available to pay for property and casualty losses as a result of terrorist acts.⁴¹ Neither the federal government nor insurers are required to make payments for any insured losses in excess of this \$100 billion ceiling.⁴² In the event that insured losses exceed \$100 billion, the Treasury will assign each insurer a pro rata share.⁴³ The \$100 billion cap requires this reduction, and TRIA specifies that all insurers share in it proportionately.⁴⁴ An implication of this provision is that the Secretary may have to wait until all claims have been assessed before reimbursing any losses if an early determination that the cap will not be reached cannot be made.

Section 103(b)(3) of TRIA, as amended by TRIPRA, requires an insurer to provide a clear and conspicuous disclosure to the policyholder of the existence of the \$100 billion cap set forth in § 103(e)(2). This requirement applies to any policy that is issued

³¹ TRIA.

³² TRIEA § 4.

³³ 31 C.F.R. § 50.5(g)(1)(i).

³⁴ 31 C.F.R. § 50.5(g)(1)(ii).

³⁵ 31 C.F.R. § 50.5(g)(1)(iii).

³⁶ 31 C.F.R. § 50.5(g)(1)(iv).

³⁷ 31 C.F.R. § 50.5(g)(1)(v).

³⁸ 31 C.F.R. § 50.5(g)(1)(vi).

³⁹ 31 C.F.R. § 50.5(g)(2).

⁴⁰ TRIA § 103(e)(1)(C).

⁴¹ Section 103(e)(2).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ TRIA § 102(e)(2)(B).

after the date of TRIPRA's enactment, December 26, 2007. The cap disclosure must be made at the times of offer, purchase, and renewal of the policy.⁴⁵

§ 14.08 Federal Recoupment

TRIA provides for the Treasury Department to recoup federal expenses through recovery of insurance payments and imposition of surcharges on premiums.¹ Although the Department plans to issue final regulations in this area,² it has yet to do so. Section 103(e)(7) of TRIA provides that federal recoupment is mandatory for the difference between the "insurance marketplace aggregate retention amount" and the aggregate amount of insured losses for all insurers that are not compensated by the federal government as either within the insurer deductible or not included within the federal share.³

The "insurance marketplace aggregate retention amount" is defined by the Act as the *lesser* of an annually increasing amount and the aggregate amount for all insurers of insured losses during each of the program years.⁴

TRIA establishes a mandatory recoupment amount representing all or a portion of the federal payments for insured losses. Furthermore, as amended by TRIPRA, TRIA now requires the Secretary to collect, through terrorism-loss risk-spreading premiums, an amount equal to 133% of the mandatory recoupment amount.⁵ Prior to TRIPRA's enactment, the Secretary was required to collect premiums in an amount equal to any mandatory recoupment amount. TRIA, as amended, also authorizes the Secretary to recoup additional amounts to the extent that the federal payments are in excess of the mandatory recoupment amount.

§ 14.09 Civil Penalties

Under certain circumstances, the Secretary may assess a civil monetary penalty against an insurer.¹ This penalty may be assessed only following the Secretary's determination, based on an administrative record and after an opportunity for a hearing,² for an insurer's failure to charge, collect, or remit terrorism-loss risk-spreading premiums; the intentional submission of erroneous information regarding premium or loss amounts to the Secretary; the submission of fraudulent claims to the Secretary; the failure to provide satisfactory disclosures; or the failure to comply with the statute or its implementing regulations.³ The maximum penalty that may be

⁴⁵ See 31 C.F.R. § 50.15.

¹ TRIA § 103(e)(7).

² See 73 Fed. Reg. 53,798 (Terrorism Risk Insurance Program; Recoupment Provisions) (proposed Sept. 17, 2008).

³ TRIA § 103(e)(7)(A).

⁴ TRIA § 103(e)(6). The former amount rises from \$10 billion to \$27.5 billion.

⁵ TRIA § 103(e)(7)(C).

¹ TRIA § 104(e)(1).

² *Id.*

³ TRIA § 104(e)(1)(A)–(E).

imposed cannot exceed the greater of \$1 million and, in the case of a failure to pay, charge, collect, or remit, the amount in dispute.⁴

To protect against the imposition of penalties, insurers should note the recordkeeping and audit provisions of the regulations. “Such records as are necessary to fully disclose all material matters” shall be maintained for between three and five years.⁵ The Department has the right to audit these records upon “reasonable notice.”⁶

§ 14.10 Litigation

Upon the certification by the Secretary determining that an event was an act of terrorism, TRIA establishes a “Federal cause of action for property damage, personal injury, or death arising out of or resulting from such act of terrorism.”¹ This federal cause of action preempts all state claims, except to the extent that additional liability may exist under state law.² TRIA also contains a special jurisdictional provision that requires the designation, within ninety days of certification of an event as an act of terrorism, of one U.S. district court, or if necessary, multiple U.S. district courts, that will have original and exclusive jurisdiction over all actions relating to the act of terrorism.³ The governing law will be that of the state where the terrorist act occurred.⁴ This federal cause of action under TRIA allows for punitive-damage awards, although it makes clear that any such awards do not constitute insured losses.⁵

On July 28, 2004, the Treasury Department issued final rules concerning litigation management under TRIA.⁶ In addition to the statutory requirements, the Department requires that settlements for claims of a certain value receive its advance approval.⁷ In the event approval is not sought or approval is sought but not granted, the “insurer will not be entitled to include the paid settlement amount (or portion of the settlement amount, to the extent partially disapproved) in its aggregate insured losses for purposes of calculating the Federal share of compensation of its insured losses, unless the insurer can demonstrate . . . extenuating circumstances.”⁸ For all other settlements, the Department maintains discretionary review authority based upon various factors, several of which are provided in the rules.⁹

⁴ TRIA § 104(e)(2).

⁵ 31 C.F.R. § 50.61.

⁶ 31 C.F.R. § 50.60.

¹ Section 107(a)(1); 31 C.F.R. § 50.80.

² *See supra* § 14.06; *see also* 31 C.F.R. § 50.81.

³ TRIA § 107(a)(4).

⁴ TRIA § 107(a)(3).

⁵ TRIA § 107(a)(5).

⁶ Terrorism Risk Insurance Program: Litigation Management, 69 Fed. Reg. 44,932 (codified at 31 C.F.R. pt. 50).

⁷ 31 C.F.R. § 50.82. The procedures an insurer must follow are provided in 31 C.F.R. § 50.83.

⁸ 31 C.F.R. § 50.82(d).

⁹ 31 C.F.R. § 50.82(b).

§ 14.11 Termination of the Program

As discussed above, President Bush signed legislation extending TRIA through the end of 2014.¹ Accordingly, pursuant to TRIPRA, the terrorism-risk insurance program is now due to expire on December 31, 2014.² TRIA contains a savings clause providing that, upon the termination of the Program, the Secretary will retain the authority to determine the final netting, recoup federal shares, collect surcharges for terrorism-loss risk-spreading premiums, investigate and audit claims under the Program, consult with the NAIC, contract for services to implement the Program, assess civil penalties, and seek funding.³

§ 14.12 Studying the Program

TRIA requires studies to determine whether the Program works effectively.¹ These studies assess the Program so that Congress is informed as to the estimated ability of the property and casualty insurance industry to offer affordable and adequate terrorism-risk insurance following the expiration of the Program. This assessment was broken into three phases.²

The first phase began in November 2003 with field tests, surveys, and interviews of insurers, risk managers, and reinsurers. The surveys were distributed to a national cross-section of corporations, partnerships, and state and local governments to solicit information and comments on the Program's effect in both urban and rural areas. They targeted specific areas thought to be high-risk targets for terrorism, such as high-risk cities, railroads, and public transportation systems. The second survey was sent in 2004, and the third phase was conducted in 2005.³ The findings were reported to Congress in a June 30, 2005, report: *Assessment: The Terrorism Risk Insurance Act of 2002*.⁴

TRIEA also mandates further study and analysis of the market conditions for terrorism-risk insurance.⁵ Specifically, TRIEA required the President's Working Group

¹ *Supra* § 14.02.

² TRIPRA § 3.

³ TRIA § 108(c).

¹ Section 108(d)(1).

² For more on the process, see a presentation by Acting Assistant Secretary for Economic Policy Mark J. Warshawsky to the Risk and Insurance Management Society on October 23, 2003, which is available at www.ustreas.gov/offices/economic-policy/press/presentation-102303.pdf (last visited Aug. 3, 2009). See also Departmental Offices; Proposed Collection; Comment Request, 69 Fed. Reg. 720 (notice and request for comments by Treasury Department about the Terror Risk Insurance Survey, Jan. 6, 2004); U.S. General Accounting Office, GAO-04-307, *Terrorism Insurance: Implementation of the Terrorism Risk Insurance Act of 2002* (report to the Chairman, H. Comm. on Fin. Servs., Apr. 2004).

³ U.S. Dep't of the Treasury, *Assessment: The Terrorism Risk Insurance Act of 2002*, at 39–47 (2005).

⁴ Available at www.treas.gov/press/releases/reports/063005%20tria%20study.pdf (last visited Aug. 3, 2009).

⁵ TRIEA § 8. Section 5 of TRIPRA mandated further studies and required that the President's Working Group submit reports in 2010 and 2013 on the long-term availability and affordability of

on Financial Markets, in consultation with the NAIC, the insurance and securities industries, and policyholders, to perform an analysis of the long-term availability and affordability of terrorism-risk insurance. This report—*Terrorism Risk Insurance: Report of the President’s Working Group on Financial Markets*—was issued in September 2006.⁶

The improved availability and affordability of terrorism-risk insurance since 9/11 were key to the Working Group’s finding. The take-up rate of insurance had increased over 30% between 2003 and 2005,⁷ and the cost of coverage had decreased by approximately 3 to 5%.⁸ The Working Group found that this improvement was due to “better risk measurement and management, improved modeling of terrorism risk, greater reinsurance capacity, and a recovery in the financial health of property and casualty insurers.”⁹ However, despite these gains, significant numbers of policyholders still declined to purchase coverage.¹⁰ The Working Group also found that little had changed with regard to chemical, nuclear, biological, and radiological (“CNBR”) coverage. This was due in part to the fact that such coverage had not been widely available prior to 9/11 and that most insurers were reluctant to provide such coverage notwithstanding the federal program.¹¹

§ 14.13 Title II—Treatment of Terrorist Assets

Title II of TRIA¹ establishes a general framework authorizing the federal government to seize terrorists’, or their agents’, assets for the satisfaction of any adjudged liabilities. Specifically, TRIA provides that

a judgment against a terrorist party on a claim based upon an act of terrorism, or

terrorism-risk insurance. TRIPRA also required that the Comptroller General report on coverage for nuclear, biological, chemical, and radiological terrorist events, and regional capacity restraints on amounts of available terrorism-risk insurance.

⁶ Available at www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/pdf/report.pdf (last visited Aug. 3, 2009).

⁷ *Id.* at 42.

⁸ *Id.* at 37.

⁹ *Id.* at 2.

¹⁰ *Id.* at 55.

¹¹ *Id.* at 72. The Government Accountability Office also issued a report in September 2006, specifically focused on CNBR insurance coverage. U.S. Gov’t Accountability Office, GAO-06-1081, *Terrorism Insurance: Measuring and Predicting Losses from Unconventional Weapons is Difficult, but Some Industry Exposure Exists* (report to chairman, H. Comm. on Financial Servs., Sept. 2006). This report similarly concluded that, despite TRIA, insurers have generally attempted to limit their exposure to CNBR risks. The report observed that such risks present distinct challenges because they do not generally meet the principles for determining insurable risk. The GAO issued a follow-up report in December 2008 that found, as consistent with the 2006 report, that insurers still generally seek to exclude such coverage from their commercial policies. U.S. Gov’t Accountability Office, GAO-09-39, *Terrorism Insurance: Status of Coverage Availability for Attacks Involving Nuclear, Biological, Chemical or Radiological Weapons* (report to chairmen, H. Comm. on Financial Servs. and S. Comm. on Banking, Housing, and Urban Affairs, Dec. 2008).

¹ TRIA § 201 (codified as a note to 28 U.S.C. § 1610).

for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7),] [subjects the] blocked assets of that terrorist party [or its agents] to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.²

The statute defines “blocked assets” as any “asset seized or frozen by the United States” in accordance with the Trading With the Enemy Act³ or under sections 202 and 203 of the International Emergency Economic Powers Act.⁴ Section 201(d)(4) of TRIA further defines a “terrorist party” to include terrorists and terrorist organizations as defined in the Immigration and Nationality Act⁵ and foreign governments deemed state sponsors of terrorism as designated in the Export Administration Act of 1979⁶ or the Foreign Assistance Act of 1961.⁷

TRIA § 201(a) recognizes that a state is immune if it has not been properly designated as a state sponsor of terrorism at the time of the allegedly terrorist act.⁸ A state that, at the time of the act, is a properly designated state sponsor of terrorism also is immune in instances where the foreign state has not had sufficient time to resolve the claim in accordance with accepted international rules of arbitration, or if neither the claimant nor the victim is a U.S. national at the time of the terrorist act.⁹ Additionally, Title II vests the President with the discretion to determine on an asset-by-asset basis whether a waiver from the execution or attachment of an asset is in the interest of national security.¹⁰

² Section 201(a).

³ 50 U.S.C. App. § 5(b).

⁴ That is, 50 U.S.C. §§ 1701–1702. The definition is at TRIA § 201(d)(2)(A). This, however, does not include property that has otherwise been reallocated by the United States government in accordance with a statute other than the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. § 287 et seq.), or property subject to the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, or any other such property that enjoys equivalent privileges and immunities. TRIA § 201(d)(2)(B).

⁵ 8 U.S.C. § 1182(a)(3)(B)(vi).

⁶ 50 U.S.C. App. § 2405(j).

⁷ 22 U.S.C. § 2371.

⁸ 28 U.S.C. § 1605(a)(7)(A) (stating that designation of a foreign state as a state sponsor of terrorism must be done in accord with section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. § 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371)). Paragraph (7) was repealed in 2008 by the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, div. A, tit. X, § 1083, 122 Stat. 341 (Jan. 28, 2008). The terrorism exception to foreign-state immunity is now in 28 U.S.C. § 1605A.

⁹ 28 U.S.C. § 1605(a)(7)(B), repealed by the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, div. A, tit. X, § 1083, 122 Stat. 341 (Jan. 28, 2008). The terrorism exception to foreign-state immunity is now in 28 U.S.C. § 1605A.

¹⁰ TRIA § 201(b)(1). The President’s waiver authority, however, is not absolute, as international treaties provide that the waiver authority will not apply to property or proceeds subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations. TRIA § 201(b)(2).

TRIA also provides special rules that make extensive amendments, in cases concerning Iran, to the

§ 14.14 TRIA Going Forward

Initial analysis illustrated that, while TRIA improved access to terrorism-risk insurance for commercial property owners in high-risk areas, the vast majority of commercial policyholders opted out of the program.¹ The data suggested that only 10 to 30% of the eligible policyholders actually purchased terrorism insurance.² Although then-Secretary Snow testified that just over half of policyholders (54%) were opting to purchase terrorism-risk coverage, this figure shows a marked increase, suggesting that TRIA is in fact fostering wider availability and affordability of coverage.³ More recently, a September 2008 U.S. GAO Report found that while some owners of high-value properties in major cities faced initial hurdles obtaining coverage compared with policyholders nationwide, these owners were able to meet current coverage requirements through a variety of approaches.⁴

Most eligible policyholders are in low-risk areas and are reluctant to seek coverage. Therefore, because the majority of those paying into the system are in high-risk areas, and the Program keeps premiums relatively low, the result could be an underfunded insurance system should a major terrorist event occur in a high-risk area.⁵ In addition, the vast group of policyholders with no terrorism-risk coverage at all presents areas where enormous uninsured losses could result.⁶ The problem of allocating uninsured losses is particularly acute where environmental damage may be done from a foreseeable terrorist event.⁷

The future of TRIA will be dictated, in part, by the Obama administration. With the

Victims of Trafficking and Violence Protection Act of 2000. TRIA § 201(c).

¹ U.S. General Accounting Office, GAO-04-307, Terrorism Insurance: Implementation of the Terrorism Risk Insurance Act of 2002, at 23–24 (report to the Chairman, H. Comm. on Fin. Servs., Apr. 2004); *see also* Testimony of Treasury Secretary John W. Snow [to the] Committee on Banking[,] U.S. Senate[,] on the Terrorism Risk Reinsurance Program (July 14, 2005), *available at* <http://www.treasury.gov/press/releases/js2633.htm> (last visited Aug. 3, 2009); Testimony of Treasury Secretary John W. Snow before [the] Committee on Financial Services, U.S. House of Representatives[,] on the Terrorism Risk Reinsurance Program 3 (July 13, 2005), *available at* www.treasury.gov/press/releases/js2630.htm (last visited Aug. 3, 2009) (According to Department of the Treasury figures, in 2002 insurers wrote terrorism-risk coverage in 60% of commercial property and casualty insurance policies. That figure increased to 2/3 of policies in 2004, and the portion of insurers offering the coverage rose from 73% to 91%. “Take-up” rates for purchasing such coverage remained at just 54%.).

² U.S. GAO, *supra* note 1, at 24. Other reports are available through, for example, www.rand.org/multi/ctrmp (last visited Aug. 3, 2009) and www.consumerfed.org/pdfs/terrorism_insurance_report.pdf (last visited Aug. 3, 2009).

³ The Working Group’s 2006 report demonstrates further gains in take-ups, but still finds significant numbers of policyholders declining coverage. *Infra* § 14.12.

⁴ U.S. Gov’t Accountability Office, GAO-08-1057, Terrorism Insurance: Status of Efforts by Policyholders to Obtain Coverage (report to chairman, H. Comm. on Financial Servs., and S. Comm. on Banking, Housing, and Urban Affairs, Sept. 2008).

⁵ U.S. GAO, *supra* note 1, at 25.

⁶ *Id.* at 24.

⁷ James T. O’Reilly, *Allocating the Private Sector Costs of a Future 9/11*, 20 ABA Nat. Resources & Env’t 43 (Winter 2006).

enactment of TRIPRA, many property and casualty insurers presumably believed that the Terrorism Risk Insurance Program was safe until 2014. Therefore, the industry may have been caught off guard when, in May 2009, President Obama released his 2010 budget that called for cuts in federal subsidies for coverage under TRIA.⁸ While doing so, the Obama administration was clear in its view of the Program: “The Administration proposes to decrease Federal intervention in the terrorism insurance market and reduce an excessive Federal subsidy to private insurers beginning in 2011. By reducing an insurance market subsidy, the proposal encourages the private sector to mitigate terrorism risk through other means such as building safer buildings.”⁹

President Obama’s budget proposal projects a total of \$644 million in Program savings between 2010 and 2019. In proposing these cuts to the Program, the budget document stated that “[p]roperty and casualty insurers are better equipped to pay claims associated with covered terrorist attacks as policyholder surplus has increased from \$287.5 billion at the end of 2002 to \$456 billion currently available.”¹⁰

According to the administration, beginning in 2011, “when the economy is expected to have stabilized,” and then again in 2013, the proposal would increase the insurer deductible and co-payment, and the event-trigger amount for federal payments.¹¹ The proposal would also remove coverage for domestic terrorism on the basis that prior to the 2007 passage of TRIPRA, “coverage of domestic terrorism was widely available even in the absence of Government support.” Furthermore, the proposal would “allow insurers additional time to remit policyholder surcharges to Treasury and to require commercial property and casualty insurance policyholders to collectively pay back only 100 percent rather than the current 133 percent of the Federal payments made under the program.”¹²

In closing, it is important to note that while the President’s FY 2010 budget proposal calls for changes to the Program, the proposal does not set forth how those changes would be done. Because certain measures proposed are contrary to current provisions of TRIA, as amended, some of the changes sought in the budget proposal would likely require passage of new legislation further amending TRIA.

⁸ Budget of the U.S. Government—Fiscal Year 2010: Terminations, Reductions and Savings, available at www.budget.gov; see also *TRIA Rollback Ups Industry Threat Level*, Risk Market News, May 12, 2009, available at <http://www.riskmarketnews.com/files/396b2c7362796a7cd5e3c4ae92f6653d33.html> (last visited Aug. 3, 2009).

⁹ Budget of the U.S. Government—Fiscal Year 2010: Terminations, Reductions and Savings 90, available at www.budget.gov.

¹⁰ *Id.*

¹¹ Budget of the U.S. Government—Fiscal Year 2010: Analytical Perspectives 58, available at <http://www.whitehouse.gov/omb/budget/fy2010/assets/spec.pdf> (last visited Nov. 5, 2009).

¹² *Id.* at 59.