Update: TRIA Extended For Second Time

On December 18, 2007, the U.S. House of Representatives adopted legislation extending The Terrorism Risk Insurance Act of 2002 ("TRIA") on the terms favored by the Senate and President Bush. The President is expected to sign this legislation (the "Act") into law before the end of the year.

This action by the House ends a disagreement between the House and the Senate on the terms under which TRIA is to be extended. The House favored extension for a longer period on terms that would have substantially expanded the scope of the program. See our *Client Alert*, dated June 25, 2007, entitled *Congress Considers A Second Extension Of The Terrorism Risk Insurance Act*. The Senate favored a shorter extension under narrower terms. As adopted, the Act is substantially similar to the Senate bill summarized in our *Client Alert*, dated October 18, 2007, entitled *Senate Banking Committee Proposes TRIA Extension On Less Generous Terms Than The House*.

TRIA requires that commercial property and casualty insurers offer their policyholders the opportunity to purchase terrorism coverage and provides a federal backstop for such coverage in the form of a commitment that the federal government will reimburse a share of an insurer's terrorism losses over a statutory deductible. This *Client Alert* summarizes the terms on which TRIA has been extended by the Act.

Period of Extension. The Act extends the TRIA program for seven more years rather than the 15 years originally proposed by the House. **Pursuant to the Act, TRIA will expire December 31, 2014**.

Coverage of Domestic Acts of Terrorism. The only way in which the Act expands the TRIA program is to delete the provisions which currently restrict its application to acts of terrorism committed by terrorists acting on behalf of foreign persons or interests. **As amended, TRIA applies to domestic as well as foreign terrorism occurring in the U.S**.

Level of Federal Support. **The Act maintains the current level of federal support for insurers suffering terrorism losses**. TRIA currently applies to a terrorism event if aggregate industry losses from the event exceed \$100 million. The Act leaves this \$100 million program trigger unchanged for the extended term of the program. At present, TRIA would reimburse insurers for 85 percent of their terrorism losses in excess of a statutory deductible equal to 20 percent of an insurer's direct earned premiums on its commercial property and casualty policies for the prior year. The Act maintains co-payments and deductibles at these levels throughout the extended term of the program.

Program Cap. TRIA currently provides that the aggregate insured losses from acts of terrorism in any program year shall not exceed \$100 billion. However, there is wording in current law that could be construed to undermine the "hardness" of the program cap, since it provides that the \$100 billion program cap on insured liabilities applies "until Congress shall act otherwise." **The Act enhances the "hardness" of the program cap by deleting the reference to the possibility that Congress might "provide otherwise" and adding additional wording reiterating the application of the cap notwithstanding any other provision of federal or state law.** The Act also requires that the Treasury Secretary issue regulations for determining the pro rata share of insured losses under the program when aggregate insured losses exceed the program cap.

New Condition for Recovery. One provision of the Act that demands immediate attention from insurers is the addition of a new condition on an insurer's right to recovery from the federal backstop. Under current law, insurers are denied the right to federal compensation for terrorism losses if they fail to provide, at

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the time of the offer, purchase and renewal of a policy, clear and conspicuous disclosure to policyholders of the premium charged for coverage of terrorism losses covered by the program and the federal share of compensation for such losses. **The Act also denies insurers the right to compensation if, in the case of any policy issued after the date of the enactment of the Act, they fail to provide, at the time of the offer, purchase and renewal of a policy, clear and conspicuous disclosure to policyholders of the existence of the $100 billion program cap**. It appears that this requirement is intended to make certain that policyholders have notice that their coverage may be affected by the program cap.

Accelerated Recoupment. The Act accelerates the timing of mandatory recoupment by the federal government of any amounts expended in compensating insurers for terrorism losses. It also appears to increase the amount that the federal government is required to recoup. **In order to accommodate the accelerated recoupment schedule, the Act removes the three-percent annual cap on the premium surcharges on commercial insurance policies used to fund mandatory recoupment**.

Reports. The Act requires that, within one year of its enactment, the Comptroller General report to Congress on the availability and affordability of insurance for nuclear, biological, chemical or radiological terrorism events. It also requires that, within six months of its enactment, the Comptroller General report to Congress whether there are specific markets in the U.S. where there are unique capacity constraints on the amount of terrorism risk insurance available.

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