



Legislative Bulletin.....November 29, 2001

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H.R. 3210—Terrorism Risk Protection Act

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Order of Business: The bill is scheduled to be considered on Thursday, November 29th, subject to a modified closed rule. An amendment in the nature of a substitute (consisting of the text of H.R. 3357, Rep. Armey) shall be considered as adopted upon passage of the rule. One amendment in the nature of a substitute to the adopted text (Rep. LaFalce, summarized below) will be made in order.

Summary (Armey text adopted under the rule):

Taxpayer Assistance for Coverage of Terrorist Acts:

H.R. 3210 would direct the Secretary of the Treasury to provide up to **\$100 billion** in financial assistance to commercial property and casualty insurers for losses incurred as a result of terrorist acts committed after enactment of the bill and prior to January 1, 2003 (or prior to January 1, 2004, or January 1, 2005, as determined by the Secretary and reported to Congress). The Secretary could provide such assistance only after insured losses related to terrorism exceed \$1 billion for the entire industry (or \$100 million if individual insurance companies are particularly affected, as detailed in the bill). After the appropriate threshold is met and companies absorb a \$5 million deductible per company per terrorist event, the Secretary would pay insurance companies 90% of subsequent covered losses.

Recoupment of Taxpayer Assistance:

The Secretary could recoup the assistance provided by assessing charges on the insurance industry and its customers (up to \$20 billion total—up to \$5 billion in year one and if applicable up to \$10 billion per year in years two and three). No such assessment could exceed 3% of the net written premium for any insurer for the preceding calendar year. For assistance that exceeds \$20 billion, the Secretary would be required to impose a surcharge on policy-holders' premiums for commercial property and casualty insurance. The bill would encourage the Secretary, when implementing assessments and surcharges, to take into account the potential effects on the commercial centers of urban areas and on rural areas.

Payment schedules, specific surcharge requirements, collections, refunds of excess payments, and other such matters would be at the discretion of the Secretary (though the Secretary would be encouraged to consult with state insurance commissioners). Insurers who failed to pay assessed amounts or submitted false data regarding their assessment would be subject to civil penalties of at least one million dollars (and at most the amount not remitted).

Determination of Terrorist Acts:

The Secretary of the Treasury would have the sole authority to determine whether an occurrence was caused by an act of terrorism, whether insured losses from acts of terrorism were caused by one or multiple occurrences, and whether an act of terrorism occurred during the covered period.

An “act of terrorism” that triggers the provisions of this bill would be any act that the Secretary of the Treasury determines to:

- be unlawful;
- cause harm to a person, property, or entity in the United States, or (in the case of a domestic air carrier or U.S. flag vessel) in *or outside* the United States;
- be committed by a person or group that is recognized (either before or after the act) by the Department of State or the Secretary as a terrorist group or a person who has conspired with such a group or the group’s agents or surrogates;
- have as its purpose the overthrowing or destabilization of the government of any country or the influencing of the policy or affecting the conduct of the U.S. government by coercion; and
- **not** be an act of war.

The Secretary would be authorized to issue any regulations necessary to carry out this legislation.

Preemption of State Laws:

This bill would preempt state law when:

- a commercial insurer providing terrorism insurance complies with this bill
- state law prevents an insurer from increasing its premium rates in an amount necessary to recover any assessments pursuant to terrorism coverage
- state law for terrorism coverage requires additional actions, other than the filing of rates, policies, and related information with the state insurance regulator

Liability Reform:

The bill would provide that if the Secretary of the Treasury makes a determination that one or more acts of terrorism occur, then an exclusive federal cause of action is triggered for lawsuits arising out of, relating to, or resulting from the acts of terrorism. The following apply to any action brought under this provision:

- Punitive damages are prohibited
- Plaintiffs could sue defendants for noneconomic damages, as long as the plaintiffs suffered physical harm. Any judgments would only be in proportion to the percentage of responsibility of the defendant.

- Funds awarded to a plaintiff would be reduced by the amount of collateral source compensation, if any, that the plaintiff received or is entitled to receive.
- Frozen assets of the terrorists could be used to pay damages from such lawsuits (subject to presidential waiver).
- **Attorney’s fees would be capped at 20% of the awarded damages or settlement amount, with a penalty (fine and imprisonment) for any attorneys charging or receiving higher amounts.**

Reports, Etc:

The bill would encourage the National Association of Insurance Commissioners to develop **standards for terrorism coverage** and would urge—but not mandate—states to adopt such standards.

The President would be required to establish a temporary commission to study and report on (within 120 days of enactment) the potential **effects of terrorism on the U.S. life insurance industry.**

The Secretary of the Treasury would be required to study and report on (within 120 days of enactment) how the federal government can address a possible crisis in the availability and affordability of **railroad and trucking insurance** by making such insurance for acts of terrorism available on “commercially reasonable terms.”

Additionally the Secretary would have to study and report on (within four months of enactment) issues relating to permitting property and casualty insurance companies to **establish tax-deductible terrorism reserves** against future losses.

Further, the Secretary of the Treasury, the Board of Governors of the Federal Reserve System, and the Comptroller General of the United States would be directed to jointly study and report on (within six months of enactment):

- the advisability and effectiveness of establishing a reinsurance pool system relating to future acts of terrorism; and
- the potential effects of the provisions of this bill on the availability of terrorism insurance coverage.

The bill lists several findings, the following of which are noteworthy:

- “given time, the private markets will diversify and develop risk spreading mechanisms to increase capacity and guard against possible future losses incurred by terrorist attacks;”
- “it is necessary to create a temporary industry risk sharing program to ensure the continued availability of commercial property and casualty insurance and reinsurance for terrorism-related risks;”
- “such action is necessary to limit immediate market disruptions, encourage economic stabilization, and facilitate a transition to a viable market for private terrorism risk insurance;”
- “in addition, it is necessary to repeal portions of the tax law which discourage the insurance market from developing the necessary reserves to handle possible future losses due to acts of terrorism.”

Cost to Taxpayers: Although no one is able to predict terrorism or the resulting financial losses, CBO has used statistical probabilities and the experiences with terrorism insurance in the United Kingdom to formulate cost estimates.

CBO estimates that implementing H.R. 3210 would increase direct spending by **\$800.0 million** in FY2002, **\$7.3 billion** in the FY2002-FY2006 period and **\$8.5 billion** in the FY2002-FY2011 period. However, this increase in spending over many years would be offset (on a cash basis) by the repayment and surcharge requirements in the bill. In its cost estimate of H.R. 3210 prior to the addition of the Arney text, CBO assumed that such offsetting payments would be collected over several years after the distribution of financial assistance to insurance companies. The “original” CBO estimate calculated that H.R. 3210 would increase government receipts by \$0.0 in FY2002, **\$1.4 billion** in the FY2002-FY2006 period and **\$5.3 billion** in the FY2002-FY2011 period. However, these figures for receipts are likely to be higher under the Arney text, since the repayment schedule would be accelerated.

Does the Bill Create New Federal Programs or Rules?: YES, it creates a new federal reinsurance program for commercial insurers that provide terrorism coverage. This new federal program, in many instances detailed above, would preempt state law. The bill would also create a new federal cause of legal action for terrorism-related damages and mandate several new studies and reports.

Constitutional Authority: The Financial Services Committee (in House Report 107-300) cites constitutional authority in Article I, Section 8, Clause 1 (relating to the general welfare of the United States) and Article I, Section 8, Clause 3 (relating to the power to regulate interstate commerce).

LaFalce (Democrat) Amendment in the Nature of a Substitute:

- Requires terrorism coverage as part of commercial property and casualty insurance. Requires that such terrorism coverage not be materially different from other sorts of coverage, not be waivable or excludable, and meet any standards the Secretary may prescribe.
- Changes the industry-wide trigger for federal financial assistance from \$1 billion in the Arney text to \$100 million.
- Contains no limitations on tort actions or recoveries (including attorney’s fees).
- Includes an industry deductible of \$5 billion in Year 1, increasing to \$10 billion in Year 2 if applicable. No insurance company could receive federal assistance until it has absorbed its deductible (assigned in proportion to liability). Individual companies would have to retain losses of up to 7% of their net premiums until the industry-wide deductible is met.
- Requires the Secretary, in determining whether to establish a surcharge on policyholders (for recouping assistance over \$20 billion), to consider the cost to the taxpayer, economic conditions, affordability of insurance for small- and medium-sized businesses, and other factors as determined by the Secretary.

All other provisions in the LaFalce Amendment are essentially the same as the Arney text.
