

CLARIFYING AMENDMENT TO PROVIDE TERRORISM
VICTIMS EQUITY ACT

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JULY 12, 2016.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed
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Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 3394]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3394) to amend the Terrorism Risk Insurance Act of 2002 to allow for the use of certain assets of foreign persons and entities to satisfy certain judgments against terrorist parties, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Clarifying Amendment to Provide Terrorism Victims Equity Act” or the “CAPTIVE Act”.

SEC. 2. USE OF BLOCKED ASSETS TO SATISFY JUDGMENTS OF U.S. PERSONS AGAINST TERRORIST PARTIES.

Section 201(d) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note) is amended—

(1) in paragraph (2)—

(A) in the matter preceding subparagraph (A), by striking “means”;

(B) by amending paragraph (2)(A) to read as follows:

“(A) means any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)), under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702), or under section 805(b) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1904(b)); and”;

(2) by redesignating paragraph (4) as paragraph (5); and

(3) by inserting after paragraph (3) the following:

“(4) PERSON.—In subsection (a), the term ‘person’ means—

“(A) a natural person who, at the time the act of terrorism described in subsection (a) was committed upon which the judgment described in such subsection was obtained by that person, was either—

“(i) a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

“(ii) a member of the Armed Forces of the United States; or

“(iii) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee’s employment; or

“(B) if the person described in subparagraph (A) is deceased, the personal representative of the estate of that deceased person.”.

SEC. 3. APPLICABILITY.

The amendments made by this Act apply to any judgment described in section 201(a) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note) that is entered before, on, or after the date of the enactment of this Act.

Purpose and Summary

H.R. 3394, the “Clarifying Amendment to Provide Terrorism Victims Equity Act” or “CAPTIVE Act,” amends the Terrorism Risk Insurance Act (TRIA) to allow U.S. victims of narco-terrorism to satisfy court-awarded judgments against a terrorist party from the “blocked assets” of that terrorist party that have been frozen by the Federal Government under the Foreign Narcotics Kingpin Designation Act (Kingpin Act). Under TRIA, as currently written, only assets blocked under the International Emergency Economic Powers Act and the Trading with the Enemy Act are considered blocked assets.

Background and Need for the Legislation

A. SECTION 201 OF THE TERRORISM RISK INSURANCE ACT

Under statutes, like the terrorism exception to the Foreign Sovereign Immunities Act (FSIA)¹ and the civil liability provision in the Anti-Terrorism Act (ATA),² U.S. terrorism victims have successfully obtained judgments against terrorist parties that have

¹ 28 U.S.C. § 1605A.

² 18 U.S.C. § 2333.

caused them harm. However, after being awarded such judgments, terrorism victims have often faced practical and legal difficulties at the enforcement stage. Assets of terrorist parties may not be present in the United States and, to the extent they are present, they are often either well concealed or seized or frozen by the Federal Government.

In 2002, in order to help lessen these enforcement burdens, Congress passed section 201 of the Terrorism Risk Insurance Act,³ which authorizes execution or attachment in aid of execution in order to satisfy a terrorism judgment against a terrorist party from the blocked assets of that terrorist party. By permitting terrorism victims to attach blocked assets in order to satisfy their terrorism-based judgments, TRIA permits victims to bypass the usual requirement that a litigant first obtain a license from the United States Department of the Treasury Office of Foreign Assets Control (OFAC) in order to attach blocked assets.⁴ Section 201(a) of TRIA provides

Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject 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.⁵

Accordingly, the elements a terrorism victim is required to establish before executing on a blocked asset under section 201 are quite straightforward. The victim must first establish that he or she has obtained a judgment against a terrorist party that is for either a claim based on an act of terrorism or a claim for which a terrorist party is not immune under the terrorism exception to FSIA. The victim must then show that the assets are blocked as that term is defined in TRIA. And, finally, the total amount of the execution cannot exceed the amount of compensatory damages. If the victim wants to execute against the assets of a terrorist party's agency or instrumentality, he or she must further prove that the purported agency or instrumentality is actually an agency or instrumentality of the terrorist party against whom he or she holds a judgment.

As currently defined in TRIA, a "blocked asset" is any asset seized or frozen by the United States pursuant to section 5(b) of the Trading with the Enemy Act⁶ (TWEA) or sections 202 and 203 of the International Emergency Economic Powers Act⁷ (IEEPA).⁸

³Terrorism Risk Insurance Act (TRIA), Pub. L. 107-297 201(a), §201, 116 Stat. 2337 (28 U.S.C. § 1610 note).

⁴*See, e.g.*, 31 C.F.R. §§ 515.201, 515.310 (CACR) (requiring a license for attachment); *id.* §§ 535.201, 535.310 (Iran Assets Control Regulations) (same); *id.* §§ 594.201, 594.312 (GTSR) (same).

⁵TRIA § 201(a).

⁶50 U.S.C. app. §§ 1-44.

⁷50 U.S.C. §§ 1701-1708.

⁸TRIA § 201(d)(2)(A).

Both TWEA and IEEPA authorize the President to freeze the assets of foreign enemies and their agencies and instrumentalities so that the President may dispose of these assets in the manner that best furthers the United States' foreign-relations and national-security interests. Assets become blocked under TWEA or IEEPA when OFAC designates the owner of the assets under those Acts.⁹

In addition to TWEA and IEEPA, the President may also block the assets of designated foreign narcotics traffickers under the Kingpin Act. Section 805(b) of the Kingpin Act blocks all property and interests in property within the United States, or within the possession or control of any U.S. person, which are owned or controlled by significant foreign narcotics traffickers, as identified by the President, or foreign persons designated by the Secretary of the Treasury after consultation with the Attorney General, the Director of Central Intelligence, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of Homeland Security, and the Secretary of State, as meeting the criteria in the Kingpin Act.¹⁰

Although the Kingpin Act has its genesis in a blocking order issued by President Clinton under IEEPA,¹¹ assets blocked pursuant to the Kingpin Act are not considered "blocked assets" for purposes of TRIA. Accordingly, under current law, assets blocked under the Kingpin Act are not available to satisfy judgments of terrorism victims against terrorist parties that are both terrorist parties and drug kingpins to the extent that their assets are only frozen under the Kingpin Act.¹²

B. THE CAPTIVE ACT

The CAPTIVE Act amends TRIA in two small, but important ways. First, it amends the definition of "blocked asset" under TRIA such that an asset of a terrorist party that is blocked under the Kingpin Act is subject to execution or attachment in aid of execution in order to satisfy a terrorism judgment against that terrorist party to the extent of any compensatory damages for which the terrorist party has been adjudged liable. As is explained above, "blocked asset" is currently defined only to include assets seized or frozen under TWEA and IEEPA.

This presents a problem in cases in which a terrorist party's assets (or the assets of an agency or instrumentality of a terrorist party) are blocked pursuant only to the Kingpin Act. One such case involved the victims of a terrorist attack by the Revolutionary Armed Forces of Colombia (FARC). On February 13, 2003, Keith Stansell, Marc Gonsalves, Thomas Howes, and Thomas Janis were flying over Colombia while performing counter-narcotics reconnaissance. Members of FARC shot their plane down and, after a crash

⁹OFAC specifies the jurisdictional basis (the statute under which an individual or entity is designated) for any designation it makes. Thus, the blocking of an asset by OFAC does not necessarily bring that asset within the coverage of TRIA.

¹⁰21 U.S.C. § 1904(b).

¹¹Exec. Order No. 12978, 60 Fed. Reg. 54579 (October 24, 1995). In 1999, Congress enacted the Kingpin Act based partially upon the successful application of IEEPA against Colombian narcotics traffickers by Executive Order 12978. H.R. Rep. No. 106-457, at 22, 42-43 (1999) (Conf. Rep.).

¹²Stansell v. Revolutionary Armed Forces of Colombia, 704 F.3d 910, 915-17 (11th Cir. 2013) (holding that "assets frozen pursuant to the Kingpin Act are not 'blocked assets' under the Terrorism Act").

landing, captured the group. FARC immediately executed Janis and took the other survivors hostage, holding them for over 5 years. After they were rescued and returned to the United States, Stansell, Gonsalves, Howes, and Janis's wife and his surviving children successfully brought suit against FARC under the Anti-Terrorism Act.¹³ This group of victims though has had difficulty satisfying this judgment against FARC.

FARC has been designated as both a "Specially Designated Global Terrorist," under IEEPA, and a "Significant Foreign Narcotics Trafficker," under the Kingpin Act. However, to the extent any FARC assets exist within the jurisdiction of the United States, such assets are well concealed. Because of the difficulty inherent in the direct execution of the judgment against FARC, these victims have sought to satisfy their award by attaching the assets of agencies or instrumentalities of FARC pursuant to section 201(a) of TRIA. But even this strategy has proved difficult as the only identifiable blocked assets of FARC agencies and instrumentalities are designated under the Kingpin Act, rather than under IEEPA or TWEA, making them outside TRIA's ambit. The CAPTIVE Act, by adding assets blocked pursuant to the Kingpin Act to the definition of "blocked asset" in TRIA, addresses this issue for victims of terrorists' acts carried out by narco-terrorists like FARC.

Second, to make TRIA consistent with the civil liability provision in the ATA¹⁴ and the state-sponsored terrorism exception to FSIA,¹⁵ the CAPTIVE Act defines "person" as it is used in section 201(a) of TRIA to be limited to U.S. nationals, members of the armed forces, and U.S. government employees and contractors. This change will prevent foreign nationals, who Congress has specifically excluded from the ATA and state-sponsored terrorism FSIA cases, from using TRIA to defeat the efforts of U.S. terrorism victims to enforce their compensatory damages judgments from the limited pool of blocked assets.

Hearings

The Committee on the Judiciary held no hearings on H.R. 3394.

Committee Consideration

On April 27, 2016, the Committee met in open session and ordered the bill, H.R. 3394, favorably reported, with an amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 3394.

¹³*Id.* at 913. (noting that the victims sued FARC in the U.S. District Court for the Middle District of Florida under the civil remedies provisions of the Anti-Terrorism Act, 18 U.S.C. § 2333, and obtained a default judgment against FARC).

¹⁴18 U.S.C. § 2333 (only a "national of the United States" may bring a claim under the civil liability provision in the Anti-Terrorism Act).

¹⁵28 U.S.C. § 1605A (the private right of action provided for in the terrorism exception to the Foreign Sovereign Immunities Act is limited to U.S. nationals, members of the armed forces, and U.S. government employees and contractors).

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3394, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 24, 2016.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3394, the “Clarifying Amendment to Provide Terrorism Victims Equity Act.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Rabent, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3394—Clarifying Amendment to Provide Terrorism Victims Equity Act.

As ordered reported by the House Committee on the Judiciary
on April 27, 2016.

H.R. 3394 would amend the Terrorism Risk Insurance Program (TRIP). CBO estimates that implementing H.R. 3394 would have no significant effect on the federal budget.

Under current law, TRIP authorizes the use of the blocked assets of groups designated as terrorist parties to settle claims related to acts of terrorism perpetrated by those groups.¹ H.R. 3394 would

¹Blocked assets are defined in TRIP as certain assets seized or frozen by the United States under the Trading With the Enemy Act or the International Emergency Powers Act.

permit the blocked assets to remain available to satisfy claims arising from judgments against a terrorist group even if the group later loses that designation. H.R. 3394 also would expand the definition of blocked asset to include assets seized or frozen under the Foreign Narcotics Kingpin Designation Act. On the basis of information from the Department of the Treasury, CBO estimates that implementing the bill would have no significant cost to the federal government.

Enacting H.R. 3394 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 3394 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 3394 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Stephen Rabent. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 3394 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 3394 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that, pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3394 amends section 201 of the Terrorism Risk Insurance Act to make assets that are seized or frozen under the Foreign Narcotics Kingpin Designation Act available for execution or attachment in aid of execution to satisfy judgments of U.S. terrorism victims.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3394 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title.

Section 1 provides for the short title of the legislation, the “Clarifying Amendment to Provide Terrorism Victims Equity Act” or the “CAPTIVE Act.”

Section 2. Use of Blocked Assets to Satisfy Judgments of U.S. Persons Against Terrorist Parties.

Section 2 amends section 201(d) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. §1610 note) in order to add assets seized or frozen by the United States under section 805(b) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. § 1904(b)) to the definition of “blocked asset.” In addition, section 2 adds a definition of “person” to section 201(d). Under the CAPTIVE Act, “person” is defined as a natural person who, at the time of the act of terrorism upon which the eligible judgment is based, was (1) a national of the United States, (2) a member of the Armed Forces of the United States, (3) otherwise an employee of the Federal Government or an individual performing a Federal Government contract, or (4) the personal representative of the estate of a deceased person described in clauses (1), (2), or (3).

Section 3. Applicability.

Section 3 provides that the amendments made by the CAPTIVE Act shall apply to any judgment described in section 201(a) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. § 1610 note) entered before, on, or after the date of the enactment of the Act. This protects terrorist victim judgment holders’ rights by clarifying that the changes to existing law made by the bill apply retroactively to previously entered judgments on liability for acts of terrorism.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TERRORISM RISK INSURANCE ACT OF 2002

* * * * *

TITLE II—TREATMENT OF TERRORIST ASSETS

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code,

the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject 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.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(c) [Omitted Amendatory]

(d) DEFINITIONS.—In this section, the following definitions shall apply:

(1) ACT OF TERRORISM.—The term “act of terrorism” means—
(A) any act or event certified under section 102(1); or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term “blocked asset” **means**—

[(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and]

(A) means any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)), under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702), or under section 805(b) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1904(b)); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by 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

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term “property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations” and the term “asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations” mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) PERSON.—*In subsection (a), the term “person” means—*

(A) *a natural person who, at the time the act of terrorism described in subsection (a) was committed upon which the judgment described in such subsection was obtained by that person, was either—*

(i) *a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));*

(ii) *a member of the Armed Forces of the United States; or*

(iii) *otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee’s employment; or*

(B) *if the person described in subparagraph (A) is deceased, the personal representative of the estate of that deceased person.*

[(4)] (5) TERRORIST PARTY.—The term “terrorist party” means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under 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).

* * * * *