

Aerospace Industries Association
American Association of Port Authorities
American Bankers Association
American Bankers Insurance Association
American Bankers Securities Association
American Council of Engineering Companies
American Gaming Association
American Hotel and Lodging Association
American Land Title Association
American Public Gas Association
American Public Power Association
American Resort Development Association
American Society of Association Executives
Associated Builders and Contractors
Associated General Contractors of America
Association of American Railroads
Association of Art Museum Directors
Building Owners and Managers Association International
Boston Properties
Calpine Corporation
Campbell Soup Company
Citigroup Inc.
Community Associations Institute
Cornerstone Real Estate Advisers, LLC
CRE Finance Council
CSX Corporation
Edison Electric Institute
Emerson
Financial Services Roundtable
Food Marketing Institute
Helicopter Association International
Hilton Worldwide
Host Hotels & Resorts, Inc.
Ikaria, Inc.
Institute of Real Estate Management
InterContinental Hotel Group
International Council of Shopping Centers
International Franchise Association
International Safety Equipment Association
International Speedway Corporation
Long Island Import Export Association
Marriott International
Mortgage Bankers Association
NAIOP
National Apartment Association
National Association of Chain Drug Stores
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS
National Association of Real Estate Investment Trusts
The National Association for Stock Car Auto Racing (NASCAR)
National Association of Waterfront Employers
National Basketball Association
National Collegiate Athletic Association
National Council of Chain Restaurants
National Electrical Contractors Association
National Football League
National Hockey League
National Multifamily Housing Council
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National Rural Electric Cooperative Association
New England Council
Partnership for NYC
Public Utilities Risk Management Association
Office of the Commissioner of Baseball
The Real Estate Board of New York
The Real Estate Roundtable
Securities Industry and Financial Markets Association
Self-Insurance Institute of America, Inc.
Starwood Hotels and Resorts
Tenaska
Taxicab, Limousine & Paratransit Association
UJA-Federation of New York
United Airlines
Union Pacific
University Risk Management and Insurance Association
U.S. Chamber of Commerce
U.S. Travel Association

CIAT

COALITION TO INSURE AGAINST TERRORISM

www.insureagainstterrorism.org

May 31, 2016

U.S. Department of the Treasury
Federal Insurance Office, MT 1410
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: 2015 TRIA Reauthorization Proposed Rules Comments

To Whom It May Concern:

The Coalition to Insure Against Terrorism (“CIAT”) files these comments in response to the Notice of Proposed Rulemaking (“NPRM”) by the Federal Insurance Office (“FIO”) published in the April 1, 2016 Federal Register. 81 Fed. Reg. 18950. CIAT is a broad coalition of commercial insurance consumers formed immediately after 9/11 to ensure that American businesses could obtain comprehensive and affordable terrorism insurance. The diverse CIAT membership represents commercial real estate, banking, energy, construction, hotel and hospitality, entertainment, manufacturing, transportation, the major league sports, as well as public sector buyers of insurance. The current list of CIAT members can be found at www.insureagainstterrorism.org/who.html.

CIAT is pleased to have the opportunity to comment in response to FIO’s NPRM. As the principal commercial buyers of terrorism insurance, CIAT members were instrumental in the development and enactment of the Terrorism Risk Insurance Act (“TRIA”), and remain the true consumer voice on the TRIA program. CIAT continues to believe that the TRIA program has been, and remains, extremely effective, and as a result we were actively engaged as the latest reauthorization legislation made its way through Congress in 2014-2015.

COMMENTS ON PROPOSED RULES

CIAT appreciates FIO’s work in completing this comprehensive NPRM. We understand the need to bring the regulations in line with the current structure of TRIA, as amended by the 2015 Reauthorization Act, and we recognize the value of using this rulemaking to implement further refinements, such as the rules relating to civil penalties. As policyholders, CIAT members are not in a position to comment on certain aspects of the NPRM that generally impact insurers only. However, there are a number of issues upon which CIAT is pleased to offer the collective views of its members.

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Certification Process

CIAT has long believed improvements can be made to the manner in which an act of terrorism is “certified” under TRIA, and we supported the 2015 Reauthorization Act’s requirement that a timeline be implemented. As became quite clear following the tragic events at the Boston Marathon in 2013, uncertainty relating to certification can have market consequences. For example, even when insured losses from an attack do not reach the TRIA program trigger, certification by the Treasury Secretary is still relevant because most commercial policies in the United States cover or exclude terrorism by reference to TRIA’s definition of “act of terrorism,” which includes the certification requirement.

CIAT believes that the NPRM provides some degree of structure to the certification process, but that it falls short of what was required by Congress and what is needed in the market. Treasury is nominally required to notify the public regarding when an act is being considered for certification, but there is no timeline for doing so, and the rules provide that Treasury is not precluded from certifying or determining not to certify an act prior to the initial public notification. If Treasury does issue an initial notification, Treasury must provide an update to that notification within 30 days, and then every 60 days after that, but there is no limit to how long an event may be listed as still under review.

It is also possible that Treasury could fail to give any indication one way or another concerning an event, and there is no mechanism for policyholders or insurers to request a determination that may be relevant even if the event is below the Program Trigger.

The lack of a clear timeline could impact the timeliness of claims payments following an event, which is at odds with the purpose of TRIA. This can be particularly relevant when the policyholder purchases terrorism coverage through a stand-alone tower of insurers, separate and apart from the primary program panel. In most stand-alone policies, the terrorism coverage may not be applicable until an act is certified. If it takes months to determine if the damages are due to a certified act of terrorism, insurers on either coverage panel may not make voluntary payments, without a Joint Loss Agreement clause in the policy. This restrictive financial response could affect rebuild obligations in real estate deals, debris removal, loss mitigation efforts, business interruption recoveries, loan covenants or other aspects of the claim recovery process.

Accordingly, CIAT makes two recommendations regarding the proposed Subtitle G. First, CIAT believes the rules should include a mechanism whereby policyholders and/or insurers may request a certification determination from the Treasury Secretary. Second, CIAT believes that the rules should provide a clear timeline for certification decisions, as envisioned by Congress in the 2015 Reauthorization Act. While we view the simple need to have a clear timeline as more important than the precise length of it, we believe an appropriate limit could be 45 days after either (a) the Treasury Department issues an initial public notice of consideration, or (b) Treasury receives a request for determination from a policyholder or insurer as discussed above.

NPRM Questions Regarding Captives

Several CIAT members have used captive insurance companies for a variety of purposes over the years, and as such, we appreciate the opportunity to comment on some of the specific questions posed in the NPRM regarding the participation of captives in TRIA.

Question 1. What is the current role of captive insurers (both state-licensed entities and otherwise) in providing insurance in TRIP-eligible lines?

CIAT members have used captive insurance companies as a part of their overall insurance and risk management programs for many years. While members often prefer to purchase commercial insurance if it is available, at a reasonable price, with necessary terms and limits, captives can often be used to provide enhanced coverage that is not generally available, or to decrease third party premium costs for risks that the captive owner is comfortable in retaining to a larger extent. For terrorism coverage, they have proven to be useful in enhancing the captive owner's overall insurance program, such as by providing excess coverage when other insurance does not provide high enough limits. Captives have also been used to provide coverage that is otherwise unavailable or prohibitively expensive, such as cover for nuclear, biological, chemical, and radiological ("NBCR") terrorism perils.

Question 2. Should captive arrangements that insure U.S.-based risks, other than those involving state-licensed insurers, participate in the Program? Upon what basis should such participation take place?

While many CIAT members' captives are state-licensed and thus already are TRIA-eligible, we see no reason to exclude non-U.S. captives if they are insuring U.S.-based risks. Just as certain non-U.S. insurers are eligible for participation in the Program, it is appropriate for Treasury to consider the proper basis for including non-U.S. captives. Since the goal of the program is to provide protection for the U.S. economy, CIAT believes it is worthwhile to include as much insurance of U.S.-based risk as possible.

Question 3. Should separate rules address the criteria for which captives, of any type, qualify for reimbursement under the Program?

For captives that are state-licensed, we believe it would be unnecessary and potentially disruptive to impose separate rules for program eligibility. However, recognizing that other entities do not currently qualify as "insurers" under TRIA, we note that Treasury has authority to expand eligibility for captives and other self-insurance arrangements under sections 102(6)(A)(v) and 103(f) of TRIA. As a general rule, we would likely be comfortable with Treasury's use of this authority to expand TRIA-eligibility, but we may have concerns if this is used to impose stricter limits on captives' participation. Were captives somehow limited in their participation in TRIA, our members believe that there could be unintended market consequences. NBCR coverage, for example, could be severely limited, as it is unlikely that a captive insurer would be able to completely replace the protection provided by the TRIA backstop with private reinsurance.

Question 4. Given the relatively small size of some captive insurers, should some assessment be made of their capital and claims paying ability in connection with their participation in the Program?

As noted above, we would caution that stricter limits on captives could have unintended market consequences. If there are particular limits Treasury is contemplating, we are happy to review and provide more specific comments on such proposals.

In considering this question, we recognize that Treasury may have concerns about the potential use of captives to manipulate the Program's deductible/reimbursement features. On this point, we note

that the use of captives by businesses, including our members, pre-dates TRIA, and such captives may be used to accomplish many different objectives and are often used by our members to insure a much broader range of perils and coverages than terrorism risk alone. Treasury should recognize that captives are typically just one piece of an overall risk-management program, and any specific rules regarding their participation in TRIA should be sufficiently flexible.

With respect to claims procedures, we note that many captives may not have the resources to make claims payments in advance of receiving the federal co-share compensation. As such, we believe the rules as proposed in the NPRM, which allow payment if insurer “is prepared to pay” its losses, are sufficient to accommodate the need for captives to receive reimbursement prior to paying its claims.

Question 5. To what extent are captives being relied upon to insure so-called “trophy risks” that might be deemed to be subject to a heightened risk of terrorism?

Some CIAT members do indeed use captives to provide terrorism coverage for their “trophy risks,” particularly to provide coverage limits that are meaningful to such properties. The ability of such captives to be eligible for TRIA is critical for this usage in many, if not most, cases. Were these captives not eligible for TRIA, or somehow limited in their eligibility, it is likely that many such captives could not continue to offer terrorism cover.

Insurance Marketplace Aggregate Retention Amount

As policyholders, CIAT members are specifically invested in the rules surrounding TRIA’s recoupment mechanism, so the 2015 Reauthorization Act’s move to benchmark the insurance marketplace aggregate retention amount in 2020 (and possibly beyond) is of particular interest to CIAT. Section 50.4(m) of the NPRM specifies how Treasury will determine the insurance marketplace aggregate retention amount for any calendar year beginning with 2020 and publicize such determinations, in accordance with requirement in Section 104 of the 2015 Reauthorization Act. In general, CIAT finds the process outlined in Section 50.4(m) to be adequate and aligned with the requirements under the statute. Though CIAT’s members would always prefer clarity on potential exposure as early as possible, we understand that time is needed for collecting the relevant data used in to calculate this amount.

CONCLUSION

In conclusion, CIAT continues to believe that TRIA has been a tremendous success, and appreciates FIO’s efforts to maintain a strong regulatory framework for its effective operation. We appreciate the opportunity to provide our input on the proposed rules, and look forward to working with you as you continue the implementation process.

Sincerely,

Martin DePoy, Steering Committee Coordinator
The Coalition to Insure Against Terrorism