

American Bankers Association  
American Bankers Insurance Association  
American Gas Association  
American Hotel and Lodging Association  
American Public Power Association  
American Resort Development Association Resort Owners' Coalition  
American Society of Association Executives  
America's Community Bankers  
Associated Builders and Contractors  
Associated General Contractors of America  
Association of American Railroads  
Association of Art Museum Directors  
The Bond Market Association  
Building Owners and Managers Association International  
CCIM Institute  
Chemical Producers and Distributors Association  
Commercial Mortgage Securities Association  
Edison Electric Institute  
Electric Power Supply Association  
The Food Marketing Institute  
General Aviation Manufacturers Association  
Helicopter Association International  
Hilton Hotels Corporation  
Host Marriott  
Independent Electrical Contractors  
Institute of Real Estate Management  
International Council of Shopping Centers  
The Long Island Import Export Association  
Marriott International  
Mortgage Bankers Association of America  
National Apartment Association  
National Association of Home Builders  
National Association of Industrial and Office Properties  
National Association of Manufacturers  
National Association of REALTORS®  
National Association of Real Estate Investment Trusts  
National Association of Waterfront Employers  
National Association of Wholesaler-Distributors  
National Basketball Association  
National Collegiate Athletic Association  
National Council of Chain Restaurants  
National Football League  
National Hockey League  
National Multi Housing Council  
National Petrochemical & Refiners Association  
National Restaurant Association  
National Retail Federation  
National Roofing Contractors Association  
National Rural Electric Cooperative Association  
The New England Council  
New York City Partnership  
Office of the Commissioner of Baseball  
Public Utilities Risk Management Association  
The Real Estate Board of New York  
The Real Estate Roundtable  
Six Continents Hotels  
Society of American Florists  
Starwood Hotels and Resorts  
Taxicab, Limousine & Paratransit Association  
Travel Business Round Table  
UJA-Federation of New York  
Union Pacific Corporation  
U.S. Chamber of Commerce  
Westfield

# CIAT

## COALITION TO INSURE AGAINST TERRORISM

insure against terrorism.org

March 31, 2003

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Office of Financial Institutions Policy  
Department of the Treasury

Martha Ellett  
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Office of the Assistant General Counsel (Banking & Finance)  
Department of the Treasury

Attn: Terrorism Risk Insurance Program  
Public Comment Record  
Room 3160, Treasury Annex  
1500 Pennsylvania Ave., N.W.  
Washington, DC 20220  
(Submitted via electronic mail to: [triacomments@do.treas.gov](mailto:triacomments@do.treas.gov))

**Re: 31 CFR Part 50, February 28 TRIA Comments, Interim Final Rule**

Dear Mr. Ugoletti and Ms. Ellett:

The following comments are submitted on behalf of the Coalition to Insure Against Terrorism ("CIAT"). CIAT is a broad-based coalition of sixty-four (64) trade and professional associations, from varied sectors of the U.S. economy, which came together last year to advocate passage of the legislation ultimately enacted as Terrorism Risk Insurance Act of 2002, Pub. Law 107-267 ("TRIA"). CIAT remains active in the Government's implementation of TRIA and in monitoring developments at State and local levels that may affect the ultimate availability and affordability of insurance against terrorism perils.

### OVERVIEW

CIAT commends Treasury for the diligence and speed with which it has undertaken the TRIA Program and is grateful for the opportunity, at this early juncture, to comment on both the Interim Final Rule and the progress to date in implementation of TRIA. CIAT looks forward to working with Treasury, Congress and other interested parties to make certain that TRIA lives up to expectations. Although we are still in the early stages in the life-cycle of this current three-year Program, certain preliminary results are emerging and some conclusions, however tentative, can be drawn. Overall, however, this rulemaking,



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and the current state of the insurance market raise more questions than answers about the ultimate success of this legislation. Our informal surveys of members and brokers suggests that TRIA has led to more availability of offers of terrorism coverage in many lines of commercial insurance. At the same time, actual participation among corporate insurance buyers appears to be quite limited. The Council of Insurance Agents and Brokers (CIAB), whose members are the top-tier of the nation's insurance brokers and collectively write 80 percent of the commercial property/casualty premiums annually, released a survey on March 24, 2003 which provides the first national sampling of the cost and availability of terrorism coverage and tends to confirm these views.

In part, the limited participation may be a function of price. It may also be because domestic (non-certified) acts of terrorism and the nuclear/biological/chemical perils generally are not being covered even in the TRIA-supported insurance packages on offer. These are important gaps which reduce the value or utility of the remaining coverage. There is also the question of whether, as discussed below, the relatively restrictive reading which Treasury has provisionally given to several Program elements has reduced the broad applicability of the Program to the U.S. economy as well as its affordability. For example, Treasury should require that all "federally approved insurers" participate and make available coverage of acts of terrorism in all relevant policies offered to U.S. business to the same extent as insurers that qualify under Section 102(6)(A)(i)(licensed or admitted) and (A)(ii)(NAIC-listed). Finally, because these interpretations are limiting the Program, that exacerbates the adverse selection problems for participating insurers, which may in turn compound the pricing and affordability issues for business customers. We hope the following specific comments assist Treasury in identifying areas where the Program can be improved in the short-run so that the best intentions of the legislation and the broad business community behind it can be realized.

## **SPECIFIC COMMENTS**

### **A. Treasury's Approach to "Insurer" Qualification Contributes to Unavailability**

**1. "Federally Approved Insurers."** Many U.S. businesses, particularly the most sophisticated and those with the most challenging insurance requirements, need capacity from commercial insurers in Bermuda and other offshore jurisdictions. This is not a question of not using domestic markets; rather complex, high-limits insurance programs for real estate, hotel and industrial buyers often require the layered participation of every market, domestic and offshore, in order to assemble needed capacity.

Many of the Bermuda and other offshore insurers are not State-licensed nor NAIC-listed because of the type of U.S. business they write and the method in which they do business. In many cases, however, they have been approved by one or more Federal agencies. As such, CIAT believes that they come within the definition of "insurer" under Section 102(6)(A)(iii). They should be required to participate and to make available coverage of

acts of terrorism in all relevant policies offered to U.S. business to the same extent as licensed or NAIC-listed insurers. Nothing in the statutory structure of TRIA justifies a different treatment of these insurers. Treasury, however, has provided that such insurers participate only for the insurance written subject to the Federal program approval. This qualification undercuts the applicability of TRIA to these insurers' U.S. business and reduces the terrorism coverage that otherwise should be available to their U.S. business customers. It also seems inconsistent with the treatment of offshore, NAIC-listed insurers who are in the Program for all their U.S. commercial P&C insurance exposures, not just the ones written pursuant to State surplus-lines rules (to which the NAIC listing relates.)

Treasury's limitation on participation and coverage under Section 102(6)(A)(iii) runs counter to the Act's purpose under Section 101(b) (to "protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk.") Significantly, failure to permit such insurers and their related coverages to be included within the scope of the Program is one of the factors that inhibits insurance availability

Treasury acknowledges that it is "possible to interpret Section 102(6)(A)(iii) more broadly" but decided to give it a narrower reading over a stated concern with a lack of "pre-existing nexus" that it does not fully explain. We urge Treasury to recognize that (1) Federal insurer approval is sufficient jurisdictional nexus to trigger the Act's participation requirement and (2) Treasury has ample authority under Section 103 and 104 to condition indemnification payments upon compliance by such insurers with any other reasonable conditions which Treasury finds necessary, including data reporting to the NAIC or other designee. CIAT understood during the legislative deliberations that the Section 102(6) definition would embrace these offshore insurers and that Treasury would be expected to implement these requirements without narrowing the scope of required participation.

We urge Treasury to adopt a broader approach that requires an insurer, once it qualifies as a "federally approved" insurer in connection with maritime, energy and aviation activities, to participate and make available coverage any insurance policy it issues which would have been covered if the insurer had qualified as an insurer under sub parts (i) or (ii) of section 102(6)(A), including but not limited to the type of insurance coverage specifically required by the federal agency. Language such as the following should be added to the rule:

"An insurer qualifying as an Federally Approved Insurer under Section 102(6)(A)(iii) shall be required to participate for any property and casualty insurance it offers or issues, if the Insurer would have been required to participate for the same insurance had it qualified as an Insurer under subparts (i) or (ii) of Section 102(6)(A)."

**2. Fronting Arrangements.** Fronting is a credit-enhancement procedure often employed by business customers and their insurers to expand available insurance capacity, particularly to access and enhance credit-worthiness of single-parent or group captives. It is recognized by insurance regulators when appropriate disclosure and safeguards are observed.<sup>1</sup> There are early signs that the willingness of highly-rated commercial insurers to continue to front for customer-owned programs is drying up because Treasury has not (i) clarified who is the “insurer” under TRIA in such cases nor (ii) given commercial insurers comfort that “fronted” direct earned premiums will not raise their own insurer deductibles under TRIA. Rules for Federal indemnification payments under the Program should also be developed to assure that the real party in interest in lawfully fronted programs receive the Federal payments directly.

In particular, the Rule should remove any potential disincentive on commercial insurers from performing an otherwise appropriate fronting arrangement. This can be accomplished by confirming that the “fronted” premium will not raise the insurer deductible of the fronting insurer if the insurer assuming the risk (captive or otherwise) is also a participating insurer under the TRIP program. CIAT recommends that Treasury address this and other fronting issues promptly and would be pleased to work with the Program’s Executive Director and staff to develop any other specific criteria for this purpose.

**3. “Affiliate” and “Control.”** While this is an area where insurers will have more specific and detailed comments than CIAT, we wish to observe that Treasury appears to have given these two terms the most rigid possible interpretation, causing many insurers to have higher projected deductibles under the Program than would otherwise have been the case. This in turn may dampen insurers’ appetite to write risks under the Program or to price such risks affordably.

We encourage Treasury to carefully re-examine, for example, the necessity of its conclusion that 25% or greater ownership of an insurer automatically makes the controlling insurer responsible for 100% of the affiliate’s direct earned premium. As the implementation of the Program matures, this feature could be a significant drag on overall availability and affordability of the insurance coverage. It is our understanding that this rule results in reinsurance protection that is inconsistent with what would normally be arranged to protect corporate balance sheets.

#### **B. Captive Insurer Status Should Be Addressed Promptly**

One measure of the success of TRIA will be how well captive insurers — whether single-parent or group captives — are integrated into the Program. We believe that Treasury so far has failed to exercise the discretion which Congress clearly provided in this area. Until adequate — and more flexible — guidance is provided, not only will TRIA’s goals

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<sup>1</sup> See NAIC Model Fronting Disclosure and Regulation Act for one definition of the arrangement.

be under-served but the move by captives and their sponsors to offshore jurisdictions could be exacerbated, with possible further loss of tax revenue as well.

Several observations are in order:

1. Specific rules for captives should be developed so that this important (and growing) sector of the insurance market and their customers can be adequately supported by TRIA.
2. In the one captive issue which Treasury has addressed, on-shore captives, i.e., those having one or more State licenses, have been lumped into the “licensed or admitted” insurer category (Section 102(6)(A)(i)) without any recognition of alternative treatment. While perhaps simple to administer, this determination by Treasury effectively makes the several captive-specific provisions of TRIA relevant only to offshore (non-U.S.) entities. This was not the expectation of the business community during the legislative phase.
3. The combination of these two points — no captive rules yet and disregard of the captive nature of onshore entities — could, as earlier suggested, result in (a) further moves offshore with possible loss of tax revenue and (2) disincentive for captive participation in the TRIA Program.
4. Among the areas on which specific clarification is needed is how, if at all, any future policyholder surcharges will be applied to captives. Treasury needs to consider whether single-parent and various forms of group captives would be treated the same for this purpose.
5. CIAT believes that the best way to address these issues is to establish a voluntary system of opt-in/opt-out for qualifying captive insurers. Treasury could require that an express election could be made at a specific time (or annually) to avoid any opportunity to “game” the system. This election procedure should apply to both domestic (on-shore) captive as well as U.S.-owned or -connected off-shore captives, to avoid creating any perverse incentives to re-locate outside the United States.

## **CONCLUSION**

CIAT is grateful for the opportunity to comment on the Interim Final Rules. CIAT believes that, in order for the statutory goals of TRIA to be maximized, Treasury should be encouraged to be flexible in application of the Act, recognizing that the paramount Congressional purpose was to facilitate affordable coverage of acts of terrorism and the growth of insurance capacity in all forms to respond to that need.

Mr. Mario Ugoletti and Ms. Martha Ellett

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CIAT would be pleased to work with the Program staff to develop any specific criteria in response to these comments.

Respectfully submitted,

Martin L. DePoy

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