



- 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
- Boston Properties
- 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

January 15, 2004

Mr. Jeffrey Bragg  
Executive Director  
Terrorism Risk Insurance Program  
Department of the Treasury  
1425 New York Avenue, N.W.  
Suite 2110  
Washington, DC 20220

Re: Request for Interpretation of the Terrorism Risk Insurance Act

Dear Mr. Bragg:

Pursuant to 31 C.F. § 50.9, we hereby request an interpretation of the Terrorism Risk Insurance Act of 2002 (“TRIA” or the “Act”)<sup>1</sup> to confirm the applicability of TRIA to insurance coverage for nuclear (including radiological), biological and chemical (for short, “N/B/C”) contamination resulting from an act of terrorism. We also request that Treasury publish such interpretation to achieve maximum possible awareness among insurers and insurance brokers and consultants. Such a declaration by Treasury is important and needed because, as shown below, a misunderstanding persists in some quarters of industry that the Act does not apply to N/B/C perils and this almost certainly is limiting the terrorism risk insurance coverage that otherwise would be available with the benefit of the Act, contrary to Congressional intent.

**The N/B/C Exclusion Myth**

There is no reference, of course, in TRIA to the terms “nuclear,” “radiological,” “biological” or “chemical.” Indeed, specific types of perils or injury arising out of an act of terrorism are not distinguished in any way by the terms of the Act. Nevertheless, there does appear to be a persistent myth among some insurers, consultants and captive managers that the Act does not cover N/B/C contamination arising from an otherwise covered “act of terrorism.” This undoubtedly contributes to the widespread use of N/B/C exclusions on offers of coverage and in policies otherwise subject to TRIA’s make-available mandate and reinsurance backstop.

To demonstrate the prevalence of the misunderstanding in the industry, we submit several exhibits. The first two are articles from major insurance trade publications which describe industry conferences earlier this year in which the erroneous interpretation was offered to the respective audiences.

**Exhibit 1.** June 3, 2003 *BestWire Services* article, which indicates (without directly quoting him and perhaps inaccurately) that a senior U.S. insurance executive, speaking at the International Captives Conference in Bermuda, said that TRIA “excluded terrorism by a domestic party, *as well as biological, chemical or nuclear attack.*”

**Exhibit 2.** An article in the May 2003 edition of *Captive Insurance Company Reports*, describes a TRIA conference sponsored by the Vermont Captive Insurance Association which “attracted over 110 attendees.” The summary of the conference presentations included the following erroneous sentences: “Left uncovered by the Act are nuclear, biological, and chemical risks—the NBC exclusions. These were not automatically covered by P&C policies before September 11, so are not included now, unless the government changes its mind following an event.”<sup>1</sup> On the same page is a graphic chart depicting TRIA coverage of terrorism losses. A large right-hand box contains the descriptive title “No TRIA Coverage,” and below it the phrase “Nuclear, Biological, Chemical (NBC) Claims.”

Based on informal reports of the two conferences, no one challenged these statements which appear to have been accepted by the attendees as accurate descriptions of the Act.

These are not isolated examples. Putting the terms “TRIA” and “nuclear, biological and chemical” into the Google search engine just days before this filing, revealed additional evidence on the World-Wide Web of the widespread misunderstanding. Two examples:

**Exhibit 3:** A current “Client Advisory” from Palmer & Cay, Inc., one of the nation’s leading insurance, risk management and employee benefits consulting and brokerage firms (with 31 offices in the U.S.), which states that “nuclear, chemical and radiological attacks” are “specifically excluded under TRIA.”

**Exhibit 4.** A recent article in the *National Real Estate Investor* lists as a “key component” of TRIA the fact that it “does not cover nuclear, chemical or biological attacks.”

Reports such as these have contributed to confusion among our CIAT member companies and – more importantly – their insurers about the applicability of TRIA to N/B/C risks. This in turn has adversely impacted the availability of insurance for these perils in commercial property and casualty policies.

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<sup>1</sup> Even the description of pre-9/11 insurance coverages is inaccurate. Although nuclear exclusions of a sort were common before September 11th, few commercial insurance policies excluded expressly biological or chemical acts of violence, nor did typical pre-9/11 “war risk” clauses used in U.S. domestic commercial property and casualty policies exclude terrorism.

### **Possible Source of the Myth and Proposed Remedy**

Why this point on TRIA is so widely misunderstood is not immediately clear. However, all of the cited examples do post-date the April 18, 2003, issuance of the Interim Final Rule (“IFR”), which added (among other things) to Subpart B of 31 C.F.R. Part 50 a new subsection 50.23(b). This subsection implements the “make-available” mandate of TRIA Section 103(c)(1)(B), which requires participating insurers to make available in all commercial property and casualty policies coverage for acts of terrorism “that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism” under the same policy. Section 50.23(b) states that “. . .if an insurer does not cover all types of risks. . .because a State permits certain exclusions for certain types of losses, *such as nuclear, biological, or chemical events*, then the insurer is not required to make such coverage available.” (Emphasis added.) Similar language is included in the preamble to the IFR.

We do not take issue with Treasury’s interpretation of the statute as set forth in the IFR. We read the last quoted provision to mean merely that certain perils which otherwise would be included in the terrorism coverage that must be made available under TRIA 103(c)(1) may be excluded from the offer if the exclusion is also applied to occurrences other than acts of terrorism under the policy and the exclusion is permitted by applicable State law. The N/B/C perils were mentioned in the IFR merely as examples of the types of perils which might be so excluded. Of course, nothing in the IRF requires that such perils be excluded from such offers nor did the IFR indicate that, if such perils are not excluded, that insured losses arising from such perils would not be eligible for Program indemnification resulting from a certified act of terrorism. Nevertheless, it appears a significant portion of the insurance community has drawn just such a conclusion. Whatever its source, there is no doubt that this misunderstanding persists and affects the formulation of policy wordings and TRIA “make available” offerings.

We commend Treasury’s clarifying and helpful statement in the October 17, 2003 Final Rule indicating that the “make available” requirements “do not limit an insurer’s ability to provide coverage for nuclear, biological, or chemical exposures as part of the Program, if the insurer chooses to offer such coverage.” We hope this will help to clear up the misunderstandings. Nevertheless, the extent of the confusion on this issue (as evidenced in the Exhibits to this letter) suggests that the point bears repeating. We therefore ask Treasury to help alleviate this confusion by issuing a formal statutory interpretation pursuant to 31 C.F.R. § 50.9 stating that: (1) TRIA does not exclude N/B/C perils from its scope; (2) N/B/C perils are subject to TRIA’s “make available” mandate to the same extent as any other peril; (3) N/B/C perils may be excluded from TRIA coverage for “acts of terrorism” (as defined) only to the extent that the exclusion also applies to events other than “acts of terrorism” that are covered in the underlying policy; and (4) to the extent that coverage for N/B/C losses resulting from “acts of terrorism” is included in a policy, such losses are within the definition of “insured losses” under TRIA for all purposes and

Mr. Jeffrey Bragg  
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for which Program indemnification will be paid if other Section 103 reimbursement criteria are met.

Please let us know if you require any additional information in order to issue and publish the requested interpretative ruling.

Respectfully submitted,

Martin L. DePoy  
Steering Committee Coordinator  
The Coalition to Insure Against Terrorism

Vice President - Government Relations  
National Association of Real Estate Investment Trusts