

Aerospace Industries Association
American Association of Port Authorities
American Bankers Association
American Council on Education
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 General Contractors of America
Association of American Railroads



Association of Art Museum Directors
Bank Policy Institute
Building Owners and Managers Association International
Boston Properties
Citigroup Inc.
Community Associations Institute
CRE Finance Council
CSX Corporation
Edison Electric Institute
Emerson
Food Marketing Institute
Hilton Worldwide
Host Hotels & Resorts, 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 College and University Business Officers (NACUBO)
National Association of Home Builders
National Association of REALTORS
Nareit
The National Association for Stock Car Auto Racing (NASCAR)
National Association of Waterfront Employers
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
Tenaska
Taxicab, Limousine & Paratransit Association
United Airlines
Union Pacific
University Risk Management and Insurance Association
U.S. Chamber of Commerce
U.S. Travel Association
WarnerMedia

May 16, 2022

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

RE: 2022 Report on the Effectiveness of the Terrorism Risk Insurance Program

Dear Mr. Ifft:

The Coalition to Insure Against Terrorism ("CIAT") files these comments in response to the Request for Comment (RFC) published in the March 30, 2022 *Federal Register*. 87 Fed. Reg. 18473.

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, higher education, manufacturing, transportation, entertainment, the major league sports and racing, as well as public sector buyers of insurance. The CIAT membership can be found at <http://www.insureagainstterrorism.org/who-we-are/>.

CIAT is pleased to have the opportunity to comment on the overall effectiveness of the Terrorism Risk Insurance Program ("TRIP," or "Program"). CIAT members, as policyholders rather than insurers, are not in a position to provide specific comments on all questions presented by FIO, but it is important that the policyholder perspective be heard as Treasury considers this important program.

Statutory Question 1. The Overall Effectiveness of TRIP.

CIAT believes TRIP has been a success. CIAT and its members were early supporters of the Terrorism Risk Insurance Act ("TRIA") prior to its enactment, and have supported each subsequent reauthorization, including the 2019 reauthorization. TRIP remains extremely effective in achieving its primary purpose, which is to ensure the continued availability of terrorism coverage for commercial policyholders. As part of its economic national security, America needs a stable, reliable, and competitive terrorism insurance market so that employers can invest in assets and create jobs without assuming unprotected the risk and liabilities of a terrorist attack. TRIP has been the key factor in ensuring that the private insurance market remained intact and has continued to meet the American economy's needs in this respect largely through private risk capacity backstopped by this Program.

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Statutory Question 2. The Availability and Affordability of Terrorism Risk Insurance.

CIAT members report that, due to TRIA, terrorism risk coverage has been available to commercial policyholders since the law's enactment. As the principal commercial buyers of terrorism insurance, CIAT members remember all too well the economic environment that led to it. In the aftermath of 9/11, it was virtually impossible for commercial policyholders to secure coverage against terrorism risk; however, banks and other capital providers would not provide financing without it. According to a Real Estate Roundtable survey, over \$15 billion in real estate-related transactions were stalled or even cancelled because of a lack of terrorism risk insurance in the 14 months between 9/11 and TRIA's enactment. Additionally, due to deferred construction investment, the White House Council of Economic Advisors estimated that there was a direct loss of 300,000 jobs during that period. In short, the lack of availability of terrorism insurance for commercial policyholders had a very real and far-reaching impact on the economy.

TRIA's "make available" requirement remains the principal reason that CIAT members are able to access coverage. We have seen no evidence that the private market would be able to devote the necessary capacity to terrorism risk absent the TRIA backstop. Indeed, we continue to see evidence that capacity would dwindle without TRIA. During each reauthorization cycle of TRIA, CIAT members have seen policy renewals with "springing exclusions" that would void terrorism cover if TRIA were to expire during the policy term. In the 2019 reauthorization, Congress acted over a year in advance of TRIA's planned expiration, so such exclusions were less apparent, but CIAT members report they were still largely in place for multi-year policies that extended into 2021. With an otherwise volatile insurance marketplace due to uncertainty surrounding pandemic risk, the availability of terrorism risk insurance has remained relatively stable, which is principally due to TRIA.

We can also report that coverage remains generally affordable, as evidenced by the high take-up rates associated with terrorism cover. A 2019 Marsh study noted that take-up rates have remained around 60% for several years,¹ while FIO's own 2020 report on TRIA's effectiveness similarly has shown strong take-up rates for terrorism insurance -- whether measured by policy count, direct earned premium, or policy limits.²

Additional Question 3. The Impact of COVID-19.

The COVID-19 pandemic has created substantial disruption in the insurance marketplace, but in general the market for terrorism risk insurance has remained stable. As commercial policyholders, CIAT members have seen disruption in many lines of property-casualty insurance as a result of the pandemic. This has been true in lines obviously impacted by the pandemic -- such as business interruption and event cancellation -- but also in more standard lines, such as general liability, where coverage without a communicable disease exclusion remains difficult to procure at a reasonable cost.

CIAT members believe the stability of the terrorism risk insurance market in this environment is due to the smart design and continued effectiveness of TRIA, where the private market continues to offer affordable terrorism cover pursuant to TRIA's make available requirement and has the certainty of a public-private cost-sharing mechanism should a large event take place.

¹ Marsh and McLennan Companies, *2019 Terrorism Risk Insurance Report*, 8 (May 2019), available at <<https://www.marshmclennan.com/content/dam/mmc-web/insights/publications/2019/may/2019-terrorism-risk-insurance-report.pdf>> .

² FEDERAL INSURANCE OFFICE, U.S. DEPT. OF THE TREASURY, REPORT ON THE EFFECTIVENESS OF THE TERRORISM RISK INSURANCE PROGRAM 28-30 (June 2020).

Additional Question 4. Availability of Terrorism Risk Insurance for NBCR Exposures.

Availability of terrorism cover for NBCR risk remains a challenge for commercial policyholders. This is not a challenge that is unique to terrorism, as NBCR risk is generally excluded for non-terrorism perils as well.

Coverage remains available for NBCR terrorism in workers compensation due to state laws that prohibit its exclusion, and in some cases, CIAT members utilize captive insurers to secure limited NBCR coverage that is then backstopped by TRIA. Without the TRIA backstop, much if not most of this coverage would go away. What coverage might be available would probably be in the standalone market and would likely be very limited and very expensive.

Again, CIAT believes that issues with the availability of NBCR cover are not -- have never been -- unique to terrorism risk, and therefore do not represent any particular flaw in the TRIA model.

Additional Question 6. Issues Presented by Cyber-Related Losses.

Legislative history demonstrates³ Congressional intention that the TRIA backstop be available for cyber terrorism, and there is nothing in the statute that specifically excludes cyber coverage. However, the issues that have emerged regarding cyber vis-à-vis TRIA are generally twofold: (1) whether the cyber cover is written in a TRIA-eligible line; and (2) whether the cyber event will be eligible for certification as an “act of terrorism” under TRIA.

FIO’s guidance issued in late 2016 provides additional clarity on the question of eligible lines, though we note that cyber insurance remains an evolving market and additional guidance may be necessary pending future developments.

On the question of certification, TRIA requires that an act be “violent” or “dangerous [to life, property, or infrastructure]” and that it cause “damage.” In the cyber-terrorism context, whether the “dangerous” and the “damage” conditions are met presumably may turn upon whether, for example, destruction of financial accounts, would be considered “damage” to “property.” Massive infrastructure interruptions, such as electric grid, rails, pipelines, and air traffic control, presumably would present more straight-forward application. While we recognize Treasury’s need to maintain some flexibility in certification decisions, it would be helpful for FIO to provide additional guidance on the application of certain aspects of the “act of terrorism” definition in the cyber context -- in particular, the scope of what may constitute “damage,” and additionally a requirement relating to intent or motivation of the perpetrator.

Additional Question 7. Potential Changes to Encourage Take-up of Cyber-Terrorism Insurance.

Cyber insurance, and in particular cyber-terrorism insurance, is an evolving market. As noted above, among the chief issues presented in the context of TRIA is the lack of clarity over whether a cyber-terrorism event would be certified as an “act of terrorism” under TRIA. One aspect of TRIA that could be revised, therefore, to encourage take-up of cyber-terrorism insurance would be to bring greater clarity to the certification process.

CIAT would like to see Treasury’s certification regulations include process for policyholders and insurers to petition Treasury to commence a certification review of an event. It is also possible that some of the timelines

³ Specifically, the Conference Report on the original TRIA in 2002 notes that “the Conferees intend the legislation to apply only to primary and excess commercial property and casualty insurance (including cyberterrorism and business interruption coverage).” H.R. Rep. No. 107-779, at 24 (2002) (Conf. Rep.).

in the current regulations could be shortened, as delay or ambiguity could leave insurers and policyholders in limbo since coverage for terrorism often hinges upon a certification decision by virtue of policy language.

Additionally, it would be helpful for Treasury to inform the public when an event is under review, and if applicable, when an event has been determined to not meet the definition of “act of terrorism” under TRIA. Nothing at all was communicated after the Boston Marathon, for example, and policyholders and insurers remained in limbo due to this uncertainty.

Additional Question 9. Captive Insurers’ Access to TRIP

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.

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. 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. Captives are typically just one piece of an overall risk-management program, and should Treasury contemplate any specific rules regarding their participation in TRIA, we urge that such rules should be sufficiently flexible.

Conclusion

Overall, TRIP has been a tremendous success. It is a comprehensive plan to provide for economic continuity and recovery in the wake of a major terrorist attack, and it has achieved three important benefits: (1) policyholders have the security of knowing their risk is properly insured rather than dependent upon after-the-fact disaster assistance; (2) the insurance industry’s risk management and claims adjustment expertise is available for terrorism risk; and (3) a more significant portion of the costs of recovery from any act of terrorism will be borne by the private insurance industry’s capital base than would be the case without TRIA ensuring their participation. While achieving this through a contingent backstop, it has cost the Federal government and taxpayers nothing. Contrasting this to the ad hoc nature of prior federal disaster responses, having TRIP in place decreases taxpayer exposure, improves policyholder risk management, and ensures a functioning terrorism insurance marketplace.

Sincerely,

The Coalition to Insure Against Terrorism