

## **DEPARTMENT OF THE TREASURY**

### **Departmental Offices**

#### **Treasury's Decision to Extend the Terrorism Risk Insurance Act's "Make Available" Requirement**

**AGENCY:** Department of the Treasury, Departmental Offices

**ACTION:** Notice; Request for Comments

**SUMMARY:** Title I of the Terrorism Risk Insurance Act of 2002 (Pub. L. 107-297) requires that, from the date of enactment (November 26, 2002) through the last day of Program Year 2 (December 31, 2004), each insurer must make available, in all of its property and casualty insurance policies, coverage for insured losses under the Act. In this regard, the Act requires that such insurance coverage must not differ materially from the terms, amounts and other coverage limitations applicable to losses arising from events other than acts of terrorism. In addition, the Act requires the Secretary of the Treasury (Treasury) to determine, no later than September 1, 2004, whether to extend these statutory make available requirements through Program Year 3 (December 31, 2005). To obtain additional information to assist Treasury in its determination, the Treasury solicits public comment on the questions listed below.

**DATES:** Comments must be in writing and received by [30 days after publication in the Federal Register].

**ADDRESSES:** Send comments by e-mail to [triacomments@do.treas.gov](mailto:triacomments@do.treas.gov). Please include your name, affiliation, address, e-mail address, and telephone number. All submissions should be captioned "Comments on Make Available Determination."

**FOR FURTHER INFORMATION CONTACT:** Mario Ugoletti, Acting Director, Office of Financial Institutions Policy, 202-622-0715; Roy Woodall, Senior Insurance Analyst, Office of Financial Institutions Policy, 202-622-5171; U.S. Treasury Department (not toll-free numbers).

### **SUPPLEMENTARY INFORMATION:**

On November 26, 2002, President Bush signed into law the Terrorism Risk Insurance Act of 2002 (the Act). The Act was effective immediately. Title I of the Act established a temporary federal program of shared public and private compensation for insured commercial property and casualty insured losses resulting from an act of terrorism as defined by the Act. The Act authorized Treasury to administer and implement the three year Terrorism Risk Insurance Program which ends on December 31, 2005.

Section 103(c)(1) of the Act requires each entity that meets the definition of an insurer under the Act to (A) make available, in all of its property and casualty insurance policies

coverage for insured losses; and (B) make available property and casualty insurance coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism. These requirements apply from the date of enactment (November 26, 2002) through the last day of Program Year 2 (December 31, 2004).<sup>1</sup>

In addition, section 103(c)(2) of the Act requires Treasury to determine, no later than September 1, 2004, whether to extend the “make available” requirements of section 103(c)(1) through Program Year 3 (December 31, 2005). (Regardless of whether the make available requirements are extended by Treasury through Program Year 3, we note that the overall Program and the Act’s federal backstop for insured losses for acts of terrorism continue through December 31, 2005.) The Treasury determination on whether to extend the make available requirements through Program Year 3 is to be based on the factors referred to in section 108(d)(1) of the Act. The factors referred to in section 108(d)(1) are:

- The “effectiveness of the Program;”
- The “likely capacity of the property and casualty insurance industry to offer insurance for terrorism risk after termination of the Program” and
- The “availability and affordability of such insurance for various policyholders, including railroads, trucking, and public transit.”

Pursuant to the Act, Treasury is now considering whether to extend the make available requirements in section 103(c)(1)(A) and (B) to Program Year 3. As noted above, section 103(c)(2) provides that Treasury base this determination “on the factors referred to in section 108(d)(1)”. Section 108(d) of the Act requires Treasury to conduct a study and prepare a report to Congress by June 30, 2005 relating to the termination of the Program; the factors described in section 108(d)(1) (and cross-referenced by section 103 of the Act) are keyed directly to the overall effectiveness of the Program and how the insurance industry might respond after the termination of the Program. To better enable Treasury to evaluate the overall effectiveness of the Act as required by section 108(d), Treasury is in the process of conducting a series of nationally representative surveys of insurers and policyholders.

The section 103(c) determination of whether to extend the make available requirements, and its timing, differ from the purpose and timing of the study and report required by section 108(d), but the Act requires Treasury to base the make available determination on the factors referenced in section 108(d)(1).

---

<sup>1</sup> Following enactment of the Act, Treasury promptly issued interim guidance on the make available requirement and other provisions of the Act. See for example, 67 FR 76206 (December 11, 2002). This interim guidance was superceded by Treasury’s interim final rules and notice and comment rulemaking. Treasury’s final regulations implementing the make available requirements of section 103(c)(1) are located at 31 CFR 50.20-24. See also 68 FR 59720 (October 17, 2003).

Treasury's data collection from the surveys we are conducting as part of our overall evaluation of the Program for purposes of the study under section 108(d) will only be partially complete by the time a decision on extending the make available requirement must be made. In addition, the make available requirement of section 103(c) comprises only one component of the overall Program. Thus, as Treasury considers whether to extend the make available requirement into Program Year 3, we are particularly interested in any specific way, or ways, in which the make available requirement has worked or affected the overall operation of the Program and whether this ties into the factors described in section 108(d)(1).

To facilitate a determination by Treasury within the required time frame on whether to extend the make available requirement into Program Year 3, Treasury solicits general comments from the public as well as specific responses to the following questions, including submission of any relevant empirical data in support of such comments where appropriate and available.

#### I. Effectiveness of the Make Available Requirement in the Context of the Overall Program

1.1 Has the make available requirement contributed to the overall effectiveness of the Program over the first two years of the Program? In particular, has the make available requirement been effective in making terrorism insurance coverage available and more affordable to the insurance marketplace in general, to large corporate policyholders, and to small business policyholders? (We specifically seek information on terrorism coverage for railroads, trucking and public transit in response to this question.)

1.2 How would the effectiveness of the Program be affected during Program Year 3 (where the federal backstop for terrorism insurance is still maintained under the Act) if the make available requirement is not extended? Would policyholders still be able to obtain terrorism risk insurance (under what terms and conditions) and would the affordability be impacted if the requirement is not extended? Compare your response to the preceding questions to what you believe would be the effectiveness of the Program if the make available requirement is extended into 2005.

1.3 Has Treasury's implementation of the make available requirement contributed to the effectiveness of the Program? In particular, has the make available requirement resulted in businesses being provided with useful information and the enhanced ability to compare prices for terrorism risk insurance across a number of providers? Given the experience with the make available requirement since enactment and policyholders' decisions on whether to purchase coverage provided by the Act, are there other approaches to implementing the make available requirement that are worth considering?

1.4 How would a decision on extending or not extending the make available requirement affect policyholders' understanding of their options regarding the availability of terrorism risk insurance coverage in Program Year 3 (e.g., that the federal backstop for

terrorism risk insurance is still in force)? Would one course of action be better understood by policyholders than other options?

## II. The Relationship Between the Make Available Requirement and the Likely Capacity of Property and Casualty Insurers to Offer Coverage for Terrorism Risk After Termination of the Program

2.1 What is the relationship between the make available requirement and an insurer's capacity to offer terrorism risk insurance coverage? How has the make available requirement affected or interacted with the available capacity of property and casualty insurers to provide terrorism risk insurance coverage during the course of the Program to date? Has the make available requirement led to any build-up in capacity?

2.2. How would a Treasury decision to extend or not to extend the make available requirement affect or interact with the capacity of property and casualty insurers (including the availability of reinsurance) in terms of offering terrorism risk insurance coverage in Program Year 3? In addition, would there be any effect on insurers' decision to offer terrorism risk insurance coverage beyond 2005 that could be associated with a decision to extend or not to extend the make available requirement during Program Year 3?

## III. Operational Issues

3.1 What would be the regulatory impact at the state level (e.g. on filings with the state regulator of policy forms or exclusions) if the make available requirement were extended through Program Year 3 (2005)? Similarly, what would be the regulatory impact at the state level if the make available requirement were not extended through Program Year 3?

3.2 Are there other operational issues that Treasury should consider as part of determining whether or not to extend the make available requirement through Program Year 3?

Dated:

**Wayne A. Abernathy**

Assistant Secretary for Financial Institutions