

DEPARTMENT OF THE TREASURY

Departmental Offices

Interim Guidance Concerning New Statutory Disclosure and Mandatory Availability Requirements of the Terrorism Risk Insurance Act of 2002

AGENCY: Department of the Treasury, Departmental Offices

ACTION: Notice.

SUMMARY: This notice provides interim guidance to insurers concerning certain statutory disclosure and mandatory availability requirements contained in the Terrorism Risk Insurance Act of 2002 (Pub.L.107-297). In addition, this notice provides interim guidance to insurers concerning the types of commercial property and casualty insurance covered by the Act and concerning the term “direct earned premium” as used in the Act.

DATES: This notice is effective immediately and will remain in effect until superceded by regulations or by subsequent notice.

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SUPPLEMENTARY INFORMATION:

This notice provides interim guidance to assist insurers in meeting certain requirements of the Terrorism Risk Insurance Act of 2002 pending the issuance of regulations by the Department of the Treasury. The interim guidance contained in this notice may be relied upon by insurers in complying with these statutory requirements prior to the issuance of regulations, but is not the exclusive means of compliance. This interim guidance remains in effect until superceded by regulations or subsequent notice.

I. Background

On November 26, 2002, the President signed into law the Terrorism Risk Insurance Act of 2002 (the Act). The Act became effective immediately. It establishes a temporary federal program of shared public and private compensation for insured commercial property and casualty losses resulting from an act of terrorism, as defined in the Act. The Terrorism Risk Insurance Program is administered and implemented by the Department of the Treasury (Treasury) and will sunset on December 31, 2005.

II. Interim Guidance

Treasury will be issuing regulations to administer and implement the Program. This notice is issued to assist insurers in complying with certain statutory requirements prior to the issuance of regulations. This notice contains interim guidance on disclosures required by sections 103 and 105 of the Act and concerning compliance with the mandatory availability requirements in section 103(c) of the Act. In addition, this notice provides interim guidance concerning commercial lines of property and casualty insurance covered by section 102(12) and concerning the statutory term “direct earned premium.” Treasury also may issue additional interim guidance as necessary prior to the issuance of regulations.

A. Disclosures to Policyholders

What Disclosures Are Required by the Act in Section 103 (b)(2)?

The Act requires that disclosures be made to policyholders as part of the conditions for Federal payments under the Terrorism Risk Insurance Program. Section 103(b)(2) requires an insurer to provide clear and conspicuous disclosure to the policyholder of the premium charged for insured losses covered by the Terrorism Risk Insurance Program and the Federal share of compensation for insured losses under the Program.

- For existing (in-force) policies issued before the date of enactment (November 26, 2002), the Act requires that disclosure to the policyholder be made not later than 90 days after November 26, 2002;
- For policies issued within 90 days of November 26, 2002, the Act requires the disclosure to the policyholder be made at the time of offer, purchase and renewal of the policy; and
- For policies issued more than 90 days after November 26, 2002, the Act requires disclosure on a separate line item in the policy at the time of offer, purchase and renewal of the policy.

What Disclosures (or Statements) Are Required by the Reinstatement Provisions in Section 105(c) of the Act?

Section 105(c) of the Act allows an insurer to reinstate *preexisting* exclusions of coverage for an act of terrorism in a contract for property and casualty insurance that is in force on the date of enactment, notwithstanding the general nullification and general preemption of terrorism exclusions in force on the date of enactment of the Act in Sections 105(a) and (b), *but only if* 1) the insurer has received a written statement from the insured that affirmatively authorizes such reinstatement or 2) if (A) the insured fails to pay any increased premium charged by the insurer for providing such terrorism coverage and (B) the insurer provided notice, at least 30 days before any such reinstatement of (i) the

increased premium for such terrorism coverage and (ii) the rights of the insured with respect to such coverage, including the date upon which the exclusion would be reinstated if no payment is received.

How May an Insurer Comply with the Disclosure Requirements of Section 103(b)(2)(A) If There is No Change in the Premium?

Prior to the issuance of regulations or further guidance by Treasury, any insurer that uses the Model Form No. 2 attached to the model bulletin on Terrorism Risk Insurance dated November 26, 2002 of the National Association of Insurance Commissioners (NAIC), and posted on the NAIC website at http://www.naic.org/pressroom/releases/disclose_two_final.pdf, as a policyholder disclosure form for in-force policies, if the insurer makes no change in the existing premium, will be deemed by Treasury to be in compliance with section 103(b)(2)(A).

How May an Insurer Comply with the Disclosure Requirements of Section 103(b)(2)(B) for Policies Issued Within 90 Days of Enactment?

Either NAIC Model Disclosure Form No. 1 which is posted on the NAIC website at http://www.naic.org/pressroom/releases/disclose_one_final.pdf, or NAIC Model Disclosure Form No. 2 which is posted on the NAIC website at http://www.naic.org/pressroom/releases/disclose_two_final.pdf, may be modified as appropriate by insurers for the particular policy and used for policies issued within 90 days of enactment. Prior to the issuance of regulations or further guidance by Treasury, any insurer that modifies as appropriate and uses either of these model disclosure forms as its disclosure for policies issued within 90 days of enactment of the Act will be deemed by Treasury to be in compliance with the Section 103(b)(2)(B) disclosure requirements.

May an Insurer Use the Same Form to Comply with the Reinstatement Requirements of Section 105(c) and the Disclosure Requirements of Section 103(b)(2)(A) if Applicable?

Yes. Prior to the issuance of regulations or further guidance by Treasury, if applicable to an existing policyholder, *e.g.* for in-force policies where there is a change of premium, Treasury will deem disclosure by an insurer to an existing policyholder using NAIC Model Disclosure Form 1, posted on the NAIC website at http://www.naic.org/pressroom/releases/disclose_one_final.pdf, to comply with the disclosure requirements of Section 105(c) of the Act, as well as with the requirements of section 103(b)(2)(A).

Is This Interim Guidance the Exclusive Means By Which an Insurer May Comply with Disclosure or Reinstatement Requirements of the Act?

No. This interim guidance concerning certain disclosures as specified above may be relied upon by insurers as a safe harbor in complying with these requirements of the Act

until regulations or further guidance is issued by Treasury, but it is not the exclusive means by which an insurer may comply with these requirements of the Act.

How May an Insurer Comply with the “Separate Line Item” Requirement in Section 103(b)(2)(C) for policies issued more than 90 days after the date of enactment?

Treasury will be issuing additional interim guidance as appropriate, and will be issuing regulations concerning other disclosure requirements, such as the separate line item disclosure requirement.

May an Insurer Comply With the Disclosure Requirements of the Act Through a Broker or Other Agent?

Yes. In many situations, commercial property and casualty insurance is procured for policyholders through an insurance broker or other intermediary acting as agent for the insurer. Prior to the issuance of regulations or further guidance by Treasury, if the normal form of communication between an insurer and the policyholder is through an insurance broker (or other intermediary acting as agent for the insurer), an insurer may provide the Act’s required disclosures through such agents. While this interim guidance permits an insurer to provide disclosures to its policyholders through an insurance broker or other agent, the responsibility for ensuring that such disclosures are provided to policyholders still rests with the insurer.

B. Mandatory Availability

What Does “Make Available” Mean?

From enactment through the end of Program Year 2 (December 31, 2004), Section 103 (c) (1) of the Act requires that an insurer:

- (A) shall make available, in all of its property and casualty insurance policies, coverage for insured losses; and
- (B) shall 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.

Until Treasury issues regulations or provides further guidance on the requirements of section 103(c), “make available” means an insurer is required to offer coverage to a policyholder for acts of terrorism (as defined in the Act) that does not differ materially from the terms, amounts, and other coverage limitations offered to the policyholder for losses from events other than acts of terrorism. For example, compliance with “make available” means that insurers offer coverage for acts of terrorism (as defined in the Act) at deductibles and limits that do not differ materially from the coverage provided for other perils.

For the purposes of this interim guidance, the “make available” requirement does not mean that insurers must make available coverage for all types of risks. For example, if an insurer does not cover all types of risks, either because the insurer is outside of direct State regulatory oversight or a State permits exclusions for certain types of losses (*e.g.*, nuclear, biological, or chemical events) an insurer would not be required to make such coverage available.

This interim guidance is consistent with the Act’s stated purpose of ensuring widespread availability of terrorism risk insurance while preserving State insurance regulation. During the course of implementing the Program, Treasury will be monitoring the pricing and availability of terrorism risk insurance coverage as part of the Act’s requirements that Treasury study the effectiveness of the Program (Section 108(d)(1)) and compile information on the premium rates of insurers (Section 104(f)).

How May Insurers Comply with the “Make Available” Provision?

For purposes of this interim guidance, an insurer that makes a formal offer of coverage to a policyholder that does not differ materially from the terms (other than price), amounts and other coverage limitations offered to the policyholder will be deemed in compliance with the “make available” requirement.

May an Insurer Offer Coverage for Acts of Terrorism (as Defined in the Act) that Differs Materially from the Terms, Amounts, and Other Coverage Limitations for Losses Arising From Events Other than Acts of Terrorism?

For the purposes of this interim guidance, an insurer may offer coverage that is on different terms, amounts, or coverage limitations as long as the insurer satisfies the “make available” requirements (as described in the previous question and answer) and as long as such offers do not violate any State laws or regulations. For example, in a State that requires the provision of full coverage without any exclusion, the Act would not preempt that State’s preexisting requirements. In contrast, if a State permits certain exclusions or allows for other limitations, or if an insurance policy is not directly governed by State requirements, then after first satisfying the “make available” requirement (as described in the previous question and answer), an insurer could offer limited coverage or coverage with exclusions.

C. Property and Casualty Insurance and Direct Earned Premium

What Types of Property and Casualty Insurance are Covered by the Program?

Section 102(12) of the Act defines property and casualty insurance to mean commercial lines of property and casualty insurance, including excess insurance, workers’ compensation insurance, and surety insurance.

As interim guidance prior to the issuance of regulations, Treasury deems the following lines of insurance from the NAIC’s Exhibit of Premiums and Losses (commonly know as

Statutory Page 14) to be included in the Program: Line 1 – Fire; Line 2.1 – Allied Lines; Line 3 – Farmowners Multiple Peril; Line 5.1 – Commercial Multiple Peril (non-liability portion); Line 5.2 – Commercial Multiple Peril (liability portion); Line 8 – Ocean Marine; Line 9 – Inland Marine; Line 16 – Workers’ Compensation; Line 17 – Other Liability; Line 18 – Products Liability; Line 19.3 – Commercial Auto No-Fault (personal injury protection); Line 19.4 – Other Commercial Auto Liability; Line 21.2 – Commercial Auto Physical Damage; Line 22 – Aircraft (all perils); Line 24 – Surety; Line 26 – Burglary and Theft; and Line 27 – Boiler and Machinery.

Section 102(12) (B) of the Act lists types of insurance coverage that are excluded from the Program. These are private mortgage or title insurance; financial guaranty insurance issued by monoline financial guaranty insurance corporations; insurance for medical malpractice; health or life insurance, including group life insurance; flood insurance provided under the National Flood Insurance Act of 1968; and reinsurance or retrocessional reinsurance.

In addition, the Act excludes, “Federal crop insurance issued or reinsured under the Federal Crop Insurance Act, or any other type of crop or livestock insurance that is privately issued or reinsured.” As interim guidance to facilitate implementation, Treasury deems the phrase “any other type of crop or livestock insurance that is privately issued or reinsured” to mean Multiple Peril Crop insurance reported on Line 2.2 of the NAIC’s Exhibit of Premiums and Losses (commonly know as Statutory Page 14).

How is Direct Earned Premium Measured?

The Act contains the term “direct earned premium.” The Act specifies an insurer’s direct earned premiums over a given calendar year as the deductible base for purposes of calculating an “insurer deductible” as defined in section 102(7) of the Act. For purposes of interim guidance to enable insurers that report to the NAIC to calculate their “insurer deductible” and to facilitate immediate implementation of the Program, the term “direct earned premium” means the direct premiums earned as reported to the NAIC in the Annual Statement in column 2 of the Exhibit of Premiums and Losses (commonly known as Statutory Page 14). Treasury will be issuing additional guidance for entities covered under the Program that do not report to the NAIC.

Dated: December 3, 2002

Peter R. Fisher
Under Secretary of the Treasury