

September 2, 2004

Dear Mr. L:

Thank you for your letter requesting an interpretation of the applicability of the “make available” requirement under section 103(c) of the Terrorism Risk Insurance Act¹ (“TRIA”) to members of the Norwegian marine hull insurance community. In direct response to your inquiry, we do not believe that the “make available” requirement of section 103(c) of TRIA is satisfied by offering marine insurance for acts of terrorism as described in your letter. We note, however, that the “make available” requirement only applies to entities that meet the TRIA definition of “insurer”² and to situations that involve an “insured loss”³ within the meaning of the Act.

Background

Your clients, Norwegian marine insurers, provide insurance against marine and war perils to ship owners and operators on the basis of the hull and hull war risk terms of coverage in the Norwegian Marine Insurance Plan of 1996 (“NMIP”), as revised and updated in 2003. Chapter 2 of the NMIP defines the perils insured against as “marine perils” and “war perils.” The scope of risks insured as “marine perils” is broadly defined under Section 2-8 of Chapter 2 as “all perils to which the interest may be exposed,” with four enumerated exceptions. The first of these exceptions is “the perils covered by an insurance against war perils” as defined in Section 2-9 of Chapter 2. Section 2-9 of Chapter 2 defines “insurance against war perils” to include “riots, strikes, lockouts sabotage, *acts of terrorism* and the like.” (Emphasis supplied). Thus, Section 2-8 coverage is broad-based but excludes the terrorism risk, while Section 2-9 coverage is narrow but specifically includes the terrorism risk.

Section 2-10 of Chapter 2 of the NMIP explicitly provides that “unless otherwise agreed, the insurance [under the NMIP] covers only marine perils.” Thus, unless ship owners affirmatively specify their desire for “war perils” coverage under Section 2-9, the Section 2-8 coverage for “marine perils” will be issued. In follow-up discussions with your firm, we were told that it is commonly understood by Norwegian ship owners that “war peril” coverage under the NMIP must be requested by the ship owner. Your firm also indicated that “marine peril” and “war peril” coverage under the NMIP are usually written by separate insurers. Insurers who write “marine peril” coverage under Section 2-8 usually do not write “war peril” coverage under section 2-9, and *vice versa*.

¹ Pub. L. 107-297, 116 Stat. 2322, 15 U.S.C. §6701 note.

² *Id.* at section 102(6)(A). There is no information in the letter indicating whether Norwegian Hull Insurers meet any of the five categories of “insurer” in TRIA section 102(6)(A) and §50.5(f)(1)(i) of Treasury’s regulations.

³ *Id.* at section 102(5).

Make Available

You seek an interpretation from this office of whether the “make available” requirement of TRIA section 103(c) can be satisfied by offering insurance on the basis of the NMIP. Section 50.23 in the TRIA regulations provides that an insurer “must offer coverage for insured losses resulting from an act of terrorism that does not differ materially from the terms, amounts and other coverage limitations (including deductibles) applicable to losses from other perils.” This means an “offer” of coverage -- something more than simply disclosing that coverage is available for purchase.⁴ We envision that an “offer” of coverage that satisfies the TRIA “make available” requirement requires an affirmative act on the part of an insurer; passive reference to the availability of coverage is not sufficient.

With regard to the NMIP, you stated that Norwegian ship owners wishing to obtain “war peril” coverage must explicitly express their desire for such coverage at the time insurance is sought. If they do not expressly request coverage, section 2-10 of the NMIP acts to limit coverage for “marine perils” only. Until the ship owner requests “war peril” coverage, an insurer does not “offer” coverage within the meaning of our regulations. We do not believe this meets the “make available” requirement of TRIA section 103(c) and §50.21 of our regulations. Insurers who write marine insurance under the NMIP must make an affirmative offer of coverage to ship owners at the time an inquiry for insurance is made. The passive availability of “war peril” coverage in the NMIP is not an offer of coverage as contemplated by §50.21 of our regulations.

Thank you for your inquiry. We hope this explanation of TRIA and its “make available” requirement are helpful to you. For additional information or if you have other questions that need to be addressed, please write or call the Program office at 202-622-6770.

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This response addresses the application of the Act and regulations to the specific situation set forth in your request, as you have represented the facts to Treasury. If there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this response, then the requestor may not rely on that conclusion generally or as support for any proposed or subsequent activity. This response is provided by the Terrorism Risk Insurance Program as a means of stating its current interpretation of the Act and regulations. The Program may revise or revoke this interpretation upon its own initiative or upon the enactment of amendments to the Act or regulations.

TERRORISM RISK INSURANCE PROGRAM

Jeffrey S. Bragg
Executive Director

⁴ 68 F.R. 59725 (October 17, 2003).