

**FROM:** Director, Worldwide Markets  
**LOCATION:** G12  
**EXTENSION:** 5998  
**DATE:** 02 May 2003  
**REFERENCE:** Y3054  
**SUBJECT:** U.S.TERRORISM RISK INSURANCE ACT OF 2002:  
US TREASURY SECOND INTERIM FINAL RULE  
**SUBJECT AREA(S):** US Commercial P & C business  
**ACTION POINTS:**  
**DEADLINE:** Immediate

### **Purpose of bulletin**

To notify the market that on 17<sup>th</sup> April 2003 the US Department of the Treasury issued its second Interim Final Rule implementing the Terrorism Risk Insurance Act of 2002 (TRIA). The previous Interim Final Rule was issued on the 25<sup>th</sup> February 2003 and was covered in Market Bulletin Y3004, issued on the 3<sup>rd</sup> March 2003.

### **Background**

The regulations build on the previously issued interim guidance detailed below, which was “designed to assist insurers in determining how they may comply with certain immediately applicable provisions of the Terrorism Risk Insurance Act prior to the issuance of the regulations by the Treasury”.

Three sets of Interim Guidance previously issued:

- Concerning New Statutory Disclosure and Mandatory availability Requirements of the TRIA – dated December 3 2002.
- Concerning Definition of Insurers, Scope of Insurance Coverage and Disclosures Mandated by the TRIA – dated December 18 2002.
- Concerning Certain Conditions for Federal Payment, Non-U.S. Insurers, and Scope of Insurance Coverage in the TRIA – dated January 22 2003.

Both these and the Interim Final Rules (IFR's) can be viewed in full on the US Treasury's web site at [www.treasury.gov/trip](http://www.treasury.gov/trip)

## **The issues covered by the latest interim final rule**

We suggest that underwriters and brokers obtain a copy of the Interim Final Regulation from the Treasury web site. Areas that will likely be of particular interest to underwriters are highlighted below:

### ➤ **Notice Requirements / “Separate Line Item”**

TRIA requires, of course, that insurers provide at the time of "offer, purchase, and renewal" disclosures to policyholders regarding premiums being charged for TRIA coverage and the existence of the government backstop. However, TRIA also requires that, for coverages incepting on or after February 24, 2003, the notice must be provided as a "separate line item" in the policy. This has raised questions as to how often the notice must be provided (offer, purchase, and renewal being three separate events) and as to what the "separate line item" requirement means. The IFR clarifies that the policyholder notice must be delivered "no later than the time the insurer first formally offers to provide insurance coverage or renew a policy for a current policyholder." (The IFR does not define the term "formal offer to provide insurance.") However, when the policy is ultimately issued, the "separate line item" requirement will be met if the policy makes "clear and conspicuous reference back to that disclosure, as well as the final terms of terrorism insurance coverage, at the time the transaction is completed." The IFR indicates that insurers will satisfy the "separate line item" requirement if the "reference back" to the disclosure is made: (1) on the declarations page of the policy, (2) elsewhere within the policy itself, or (3) in any rider or endorsement. The IFR reaffirms that required notices can be distributed via agents, brokers or intermediaries through which insurers normally communicate with policyholders.

The IFR indicates that the existence of the government program does not need to be detailed in the policy as long as: (a) it was detailed in the previously issued policyholder notice; and (b) the policy refers back to that notice in some way.

**For the Lloyd’s market, this means that underwriters must ensure that, where TRIA coverage is provided, sufficient information is included in the policy documentation to ensure compliance with the separate line item requirements, as detailed under the three 'options' above. Information (including reference to the disclosure notice) will need to be included on the slip to enable relevant information to be included in the policy – or as may be the case – in the covernote or evidence of cover. (Where policies are not issued contemporaneously with coverage inception or particularly in cases where full policies are not issued at all, then insuring documentation provided to the insured must meet the requirements.)**

**Lloyds considers that the use of an endorsement is likely to be the method most used to comply with the provisions of the Act. Several clauses (NMA, ISO, etc.) have been developed to address the need for information within the policy on TRIA coverage. However, neither Treasury nor TRIA require policy endorsements. Thus where such endorsements are not applied, then the notice, reference to it and details of the final terms of terrorism insurance coverage in the policy (or insuring documentation), coupled with the language of the statute itself, should serve as legal evidence of the coverage provided and satisfy requirements. Where TRIA coverage has not been taken up, underwriters may wish to consider the use of NTU clauses, although such clauses are again not required under TRIA.**

➤ **“Make Available”**

The IFR stresses that the make available requirement is not a "one-time" requirement. To illustrate: if a carrier satisfies make available requirements when it first offers TRIA coverage to a policyholder, but the policyholder declines the coverage, the insurer must also comply with TRIA upon renewal of the policy.

➤ **Negotiated Lower Levels of TRIA & Pricing**

The IFR confirms previous advice from LeBoeuf, Lamb Greene & MacRae (LLGM) that insurers may provide only partial coverage for TRIA insured losses, but that this may occur, of course, only after a policyholder declines the insurer's first offer of full TRIA coverage on terms and conditions not materially different from the underlying coverage. While not specifically stated in the IFR, negotiated lower levels of coverage will be backstopped by TRIA to the extent that losses covered under the policy meet TRIA's definition of "insured losses" and as long as the "make available" requirement has been met. Treasury notes that offers of partial coverage are completely optional.

Treasury clarified that pricing of TRIA terrorism coverage is not subject to the "materially different" standard for other contract terms. Therefore, surplus lines insurers and otherwise non-admitted insurers are essentially free to charge whatever they choose for TRIA terrorism coverage. Also with respect to pricing, insurers may describe the premium charged for terrorism coverage as a percentage of the original annual premium. Insurers may not, however, mislead buyers by characterizing the premium as a "surcharge."

➤ **Recordkeeping Requirements**

Although the explanatory text that accompanied the IFR insists that the IFR "is not prescribing any new recordkeeping requirement," that same text warns that "insurers should be prepared to demonstrate compliance with [TRIA's] 'make available' requirements." Lloyd's suggests that each syndicate should maintain an audit trail capable of evidencing that notice has been issued, and that TRIA cover has been priced separately. The IFR states that the disclosure requirements are key to the provision of the Act, both in terms of being a condition for payment and a mechanism to effectuate the other purposes of the Act. The audit trail would serve to identify potential claimants and assist insurers to meet the requirement to self certify compliance when presenting a claim.

As relates to current policyholders, insurers can expect that records sufficient to demonstrate compliance with TRIA's "make available" requirements are included among and retained "as part of standard policy documents in the normal course of business." As relates to potential or former policyholders who elected not to purchase or renew coverage, an insurer can demonstrate compliance with the "make available" requirements through "routine adherence to normal risk management systems (e.g., company policies, use of internal controls and audits) and normal business practices (e.g., sample forms routinely used to solicit business)." In other words, an insurer need not retain documentation to prove that it made TRIA coverage available to every one of its potential or former policyholders. Instead, an insurer need only be able to document that it has had in place practices and procedures designed to make certain that TRIA coverage is uniformly made available to any potential, new, or former policyholders.

➤ **NBC & Other Exclusions**

The IFR specifically confirms that an insurer who does not cover all types of risks is not required under TRIA "to cover [otherwise] excluded risks in satisfying the requirement to make available coverage for losses resulting from an 'act of terrorism.'" As a result, insurers

whose policies uniformly exclude coverage for certain types of losses (e.g., losses resulting from nuclear, biological, or chemical (NBC) perils) may exclude those same risks from any TRIA coverage they provide.

### **Submission of Comments**

This Interim Final Rule is effective once it is published in the Federal Register, but is subject to a 30-day comment period. Lloyd's will provide a central response, in liaison with the LMA. Managing Agents and others wanting to comment can do so by providing input via the contacts given below.

For further information contact Worldwide Markets division in Lloyd's, on extension 6677 (email at [market.services@lloyds.com](mailto:market.services@lloyds.com)).

The LMA has also provided extensive information to the market. Contact Martin Roberts on Lloyd's extension 8370 (by email at [martin.roberts@lloyds.com](mailto:martin.roberts@lloyds.com)).

This bulletin has been sent to active underwriters and compliance officers of managing agents and Lloyd's brokers.