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May 31, 2016

Richard A. Ifft
Federal Insurance Office
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

RE: FR Docket No: 2016-06920
2015 TRIA Reauthorization Proposed Rule Comments

Dear Mr. Ifft:

The National Association of Mutual Insurance Companies (NAMIC) is pleased to respond to Treasury's request for public comment on its 2015 TRIA Reauthorization Proposed Rules. NAMIC is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies representing 40 percent of the total market. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies serve more than 170 million policyholders and write nearly $225 billion in annual premiums. Our members account for 54 percent of homeowners, 43 percent of automobile, and 32 percent of the business insurance markets.

Through our advocacy programs we promote public policy solutions that benefit NAMIC member companies and the policyholders they serve and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

Background

In January 2015, the President signed into law the Terrorism Risk Insurance Program Reauthorization Act of 2015, which reauthorized the Terrorism Risk Insurance Program (TRIP) for the third time since its inception in 2002. The 2015 Reauthorization Act reformed several operational aspects of TRIP with respect to such matters as the amount and application of the program trigger, the federal share of compensation, the recoupment percentage amount, and the insurer aggregate retention amount. On April 1, 2016, the Department of the Treasury issued a "Notice of proposed rulemaking" that describes a number of rules that Treasury is proposing to

implement these reforms and other modifications to TRIP as mandated by the 2015 Reauthorization Act. Many of the proposed rules do not substantially differ from rules that were in place prior to the 2015 Act; however, several of the proposed rules are new. In the following sections, we focus our comments on the proposed rules that are of particular concern to NAMIC member companies.

Subpart F – Data Collection

Section 111 of the 2015 Reauthorization Act requires Treasury to submit a report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate regarding, among other things, the impact and effectiveness of TRIP. Pursuant to this mandate, Treasury proposes several rules under "Subpart F – Data Collection."

Proposed Section 50.50

The first proposed rule under Subpart F is Section 50.50, which simply states that "Treasury may request from insurers such data and information as may be reasonably required in support of Treasury's administration of the Program." Notably missing from Section 50.50 is any acknowledgement of the Act's instruction to the Treasury Secretary that,

> before collecting any data or information […] from an insurer, or affiliate of an insurer, the Secretary shall coordinate with the appropriate State insurance regulatory authorities and any relevant government agency or publicly available sources to determine if the information to be collected is available from, and may be obtained in a timely manner by, individually or collectively, such entities. If the Secretary determines that such data or information is available, and may be obtained in a timely matter, from such entities, the Secretary shall obtain the data or information from such entities.

Indeed, the Act provides that Treasury may "collect such data or information from an insurer or affiliates" *only* in the event that "the Secretary determines that such data or information is not […] available" from the entities identified above. Otherwise, "the Secretary *shall* obtain the data or information from such entities." (Emphasis added.)

The failure of proposed Section 50.50 to include these conditions and caveats in its prescription for data collection is not inconsequential. To prepare its 2016 report to Congress, Treasury collected data directly from insurers (on a voluntary basis) after determining that the requisite data were not available from the alternative entities identified in the Act. However, there is reason to believe that in future reporting years, much, if not all, of the data Treasury needs for its annual report will be available from alternative entities. For example, a consortium of state

insurance regulators is pursuing an initiative to collect terrorism insurance-related data from virtually the entire U.S. commercial property insurance market, and there is ample reason to believe that the nature and scope of this data will be sufficient to allow Treasury to prepare its annual report to Congress.

Because data calls invariably place a heavy burden on insurers, we have stressed in numerous communications with Treasury officials our belief that Treasury should make every effort to coordinate with state insurance regulators to collect terrorism insurance data. To our dismay, that coordination did not occur in 2015, which has led to the present circumstance in which insurers will have contended with two terrorism-related data calls – one federal and one state – in 2016. Inasmuch as the states are moving forward on their data collection effort this year, we are troubled by the omission from Section 50.50 of language affirming that Treasury will collect data from insurers only to the extent that such data is not available from the states or other public entities. We strongly encourage Treasury to revise proposed Section 50.50 so that it fully and accurately reflects Congress's instruction to Treasury as expressed in the 2015 Reauthorization Act.

Proposed Section 50.51

In the Notice preamble, Treasury explains that Section 50.51 "establishes rules concerning the annual collection of data by Treasury concerning the effectiveness of the Program, as mandated by Section 111 of the 2015 Reauthorization Act." Not to belabor the point, but the wording of Section 50.51 seems to assume *ipso facto* that Treasury will be collecting data on an annual basis directly from insurers, despite the Act's explicit mandate that Treasury undertake this effort only if the requisite data is not available from other entities.

Turning to the substance of the rule, Treasury proposes a March 1 reporting deadline, explaining that "Treasury has proposed this reporting deadline to provide insurers with sufficient time to compile and provide the necessary information and ensure it is true and correct," adding that "a March 1 deadline is also consistent with other annual reporting requirements insurers must meet" (without indicating what these "other" reporting requirement pertain to or consist of). Based on our members' experience with the voluntary data call that was to be completed by April 30, NAMIC is concerned that many insurers will have considerable difficulty meeting a March 1 deadline in future years. Because of the extensive scope and complexity of this year's data call, several of our members have indicated that a deadline in mid or late May would be necessary in future years to ensure that the data submitted are accurate and complete.

The Notice states that "the reporting forms and portals […] are still under development and will be published for comment separately." In light of the challenges some of our members faced in trying to assemble and provide the various data elements included in the recent voluntary data call, we are eager to review the new forms and look forward to having the opportunity to

comment on them when they are made available. In general, many insurers do not collect or maintain data in the format or fashion requested by Treasury. Therefore insurers incur costs when they are required to manipulate existing data or change business procedures to collect data points/sets for the purpose of reporting to Treasury. It will be very important to get this process right so as not to be unduly burdensome.

Proposed Section 50.54

Section 50.54 importantly recognizes the proprietary nature of the data that Treasury seeks to collect and outlines the security and confidentiality measures that are to be taken. We appreciate the focus on this as an issue, but are concerned that the issue of working with a third-party vendor – such as ISO – to facilitate information collection is not addressed. Treasury must put in place specific protections for the data before turning over information in order to maintain its proprietary nature. As was done with the Federal Trade Commission's Homeowners Credit Study, contracts containing appropriate confidentiality and nondisclosure provisions with any third-party vendor need to be established. To the extent that aggregated industry data is used, such as is being provided by NCCI, it resolves the proprietary concerns of individual insurer data.

Subpart G -- Certification

Proposed Section 50.61(a), "Initial Notification," provides that "Treasury shall publish a document in the Federal Register notifying the public that [an] act is under review for certification as an act of terrorism." This is to occur "[a]fter the Secretary commences consideration of whether an act may satisfy the definition" of a terrorist act. But the Section gives no indication as to how much time may elapse between the date on which an act of potential terrorism occurs and the date that the Secretary will commence its consideration of whether the act meets the statutory definition of a terrorist act. In theory, then, Treasury could wait a year or more following a potentially certifiable act of potential terrorism before it even begins to consider whether the act is certifiable as an act of terrorism.

We suggest that Section 50.61(a) establish a firm deadline for publication of the initial notification. Since the notification merely serves to announce that Treasury is beginning to consider whether an act that has occurred qualifies as an act of terrorism, we see no reason why publishing such an announcement should take more than a few days. That said, we believe the initial notification should also contain a preliminary indication as to whether Treasury expects that the act will be certified as an act of terrorism.[1]

[1] A preliminary indication of this kind would be perfectly consistent with proposed Section 50.61(e), "Nonbinding decision," which provides that a "notification made under this section shall not be construed to be a final determination by the Secretary of whether to certify an act as an act of terrorism."

If Treasury indicates in its initial notification that the act is not likely to be certified, insurers would then be in a position to consider whether to "voluntarily submit information to the Secretary," as provided in Section 50.62(a)(2), to convince Treasury that the act should be certified. This would streamline the certification process, which could otherwise drag on indefinitely given that Subpart G provides no timeframe within which Treasury must make its final determination regarding certification. In sum, we suggest that the initial notification include a preliminary indication as to whether an act is likely to be certified, and that this notification be published no more than 15 days following the date of the potentially certifiable act.

Subpart H – Claims Procedures

We are concerned about several aspects of the commutation provisions of the final netting process described in proposed Section 50.76(d). Treasury defines "commutation" as "the payment by Treasury of a lump sum present value of future payments to an insurer in lieu of making payments in the future…." In the Notice preamble, Treasury notes that it received comments regarding a previous iteration of Section 50.76(d) in which commenters "recommend[ed] that Treasury should not impose a commutation over the objection of the relevant insurer, or that Treasury should expressly obligate itself to reopen and/or extend the insurer's claim for the Federal share of compensation if the 20 percent exception threshold of increased compensation is met." Treasury dismisses this recommendation on the grounds that payment of the federal share of compensation is made "pursuant to the terms of TRIA *not as a matter of contract*…." (Emphasis added.)

Consequently, proposed Section 50.76(e) provides that Treasury "may" reopen or extend an insurer's claim for the Federal share of compensation within one year after the final netting date, but is not required to do so. We would suggest that if an insurer is able to provide valid claim information indicating that the 20 percent exception threshold has been met, it is reasonable to expect that Treasury would consider the relevance of that information to its commutation decision. We say this not because we believe that Treasury would be obliged to reconsider it commutation decision under such circumstances "as a matter of contract," but rather as a matter of fairness. We therefore recommend that the word "may" Section 50.76(e) be changed to "shall."

Finally, proposed Section 50.76(d)(2) provides that "If Treasury notifies an insurer of a requirement to submit additional information to inform its commutation decision, the insurer will be provided (depending on the complexity of the material sought) no less than 90 days from the date of notification to submit material required in the notice." An insurer that fails to do so "will forfeit the right to future payments from Treasury." Given this harsh penalty, and because the "material sought" may indeed be highly complex, we believe that 90 days may not be enough

time for an insurer to submit the required material. To be sure, the locution "no less than 90 days" allows for the possibility that Treasury may decide on an *ad hoc* basis to establish a longer timeframe. Nevertheless, we suggest that the specified number of days be increased from 90 to 180.

Subpart I – Audit and Investigative Procedures

The proposed Subpart I establishes a "civil penalty" of up to $1,325,000 that would be levied against any insurer that "(1) Has failed to charge, collect, or remit the Federal terrorism policy surcharge under Subpart J; (2) Has intentionally provided to Treasury erroneous information regarding premium or loss amounts; (3) Submits to Treasury fraudulent claims under the Program for insured losses; (4) Has failed to provide any disclosures or other information required by Treasury; or (5) Has otherwise failed to comply with provisions of the Act or these regulations."

TRIA as originally enacted in 2002 authorizes Treasury to establish a civil penalty of up to $1,000,000, but this is the first time Treasury has proposed to implement it. The maximum penalty that Treasury now proposes – $1,325,000 – reflects a 32.65 percent increase in the CPI since 2002, as required by statute.

The proposed civil penalties rule contains what appear to be fairly robust due process protections, including "(1) The opportunity for a written submission by the insurer that provides all relevant facts and circumstances concerning the alleged conduct, including any information that the insurer wishes Treasury to consider in connection with the alleged conduct; and (2) A hearing on the record, unless waived by the insurer, during which Treasury and the insurer may present further information respecting the conduct in question."

To further strengthen those protections, NAMIC recommends making the following changes to Section 50.82. First, under (a) (1) and (4) the addition of the phrase "intentionally or with gross disregard" between the words "Has" and "failed." Second, under (5) (b) and (c) the addition of the phrase "intentional or grossly negligent" between the words "any" and "failure." We believe those additions make clear that the civil penalties being proposed are intended to deter bad actors from intentionally or negligently threatening or undermining the operation of the TRIA program.

Conclusion

We hope you will find these comments useful and look forward to continuing to be a resource to the Federal Insurance Office. Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

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Vice President, Public Policy