

## **The Process for Certifying an “Act of Terrorism” under the Terrorism Risk Insurance Act of 2002**

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U.S. DEPARTMENT OF THE TREASURY

*Completed pursuant to section 107 of the Terrorism Risk Insurance Program Reauthorization Act of 2015*

October 2015

## **I. Introduction**

The Terrorism Risk Insurance Act of 2002, as amended (TRIA),<sup>1</sup> established the Terrorism Risk Insurance Program (TRIP),<sup>2</sup> which the Secretary of the U.S. Department of the Treasury (Secretary) administers, with the assistance of the Federal Insurance Office (FIO).<sup>3</sup> TRIP provides a federal backstop for certain U.S. property and casualty insurance losses resulting from terrorism. Correspondingly, TRIA requires property and casualty insurers to make available coverage for terrorism risk on specified lines of commercial insurance. Property and casualty insurance losses paid by insurers resulting from an “act of terrorism” (as defined by TRIA), certified by the Secretary, in consultation with the Attorney General of the United States (Attorney General) and the Secretary of Homeland Security, are eligible for reimbursement through TRIP.

The Terrorism Risk Insurance Program Reauthorization Act of 2015 (Reauthorization Act)<sup>4</sup> requires the Secretary to conduct and complete a study on the process by which the Secretary determines whether to certify an “act of terrorism” under TRIA (certification process).<sup>5</sup> Section 107(c) of the Reauthorization Act requires the study on the certification process to include an examination and analysis of:

- (1) the establishment of a reasonable timeline by which the Secretary must make an accurate determination on whether to certify an act as an act of terrorism;
- (2) the impact that the length of any timeline proposed to be established under paragraph (1) may have on the insurance industry, policyholders, consumers, and taxpayers as a whole;
- (3) the factors the Secretary would evaluate and monitor during the certification process, including the ability of the Secretary to obtain the required information regarding the amount of projected and incurred losses for insurers resulting from an act which the Secretary would need when determining whether to certify the act as an act of terrorism;
- (4) the appropriateness, efficiency, and effectiveness of the consultation process required under section 102(1)(A) of TRIA and any recommendations on changes to the consultation process; and
- (5) the ability of the Secretary to provide guidance and updates to the public regarding any act that may reasonably be certified as an act of terrorism.<sup>6</sup>

Upon completion of the study, the Secretary must submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House

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<sup>1</sup> 15 U.S.C. § 6701 note. Because the provisions of TRIA and the Terrorism Risk Insurance Program Reauthorization Act of 2015 (Reauthorization Act), Pub. L. 114-1, 129 Stat. 3, appear in a note, instead of particular sections, of the United States Code, in this report references to the provisions of TRIA or the Reauthorization Act are identified by the sections of the law (e.g., “TRIA § 102(1) (definition of an “act of terrorism”)”).

<sup>2</sup> See 31 C.F.R. pt. 50.

<sup>3</sup> 31 U.S.C. § 313(c)(1)(D).

<sup>4</sup> 15 U.S.C. § 6701 note.

<sup>5</sup> Reauthorization Act § 107(b).

<sup>6</sup> Reauthorization Act § 107(c).

of Representatives.<sup>7</sup> This report (Report) contains the findings of the required study, and accordingly is issued pursuant to section 107(d) of the Reauthorization Act.

In support of this study, the Department of the Treasury (Treasury) consulted with consumers, federal agencies, state insurance regulators, insurance trade associations, insurers, and insurance producers. Treasury also published a notice (Notice) in the Federal Register seeking comments from the public on the considerations and factors listed in section 107(c) of the Reauthorization Act.<sup>8</sup> In response to the Notice, Treasury received nine written comments from individuals, insurers, organizations, and insurance trade associations.<sup>9</sup>

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<sup>7</sup> Reauthorization Act § 107(d).

<sup>8</sup> Study on Improving the Certification Process for the Terrorism Risk Insurance Program, 80 Fed. Reg. 7,075 (Feb. 9, 2015).

<sup>9</sup> Three insurance trade associations (the National Association of Mutual Insurance Companies, the Property Casualty Insurance Association of America, and the Reinsurance Association of America (collectively NAMIC/PCI/RAA)) jointly submitted a single comment. All comments are *available at* <http://www.regulations.gov/#!docketDetail;D=TREAS-TRIP-2015-0002>.

## II. Overview of the Terrorism Risk Insurance Program

Prior to September 11, 2001, commercial policies insuring U.S. property and casualty risks generally did not exclude losses arising from terrorism. Following the events of September 11, 2001, which resulted in approximately \$43 billion of insured losses,<sup>10</sup> insurance for terrorism risks became largely unavailable. As a result, in states where permitted by law, insurers largely began to exclude coverage for terrorism risk under commercial property and casualty insurance policies.

TRIA was enacted, in part, based on the recognition that widespread unavailability of insurance for terrorism risk “could seriously hamper ongoing and planned construction, property acquisition, and other business projects, generate a dramatic increase in rents, and otherwise suppress economic activity.”<sup>11</sup> In general, TRIA requires commercial property and casualty insurers to make coverage available for “insured losses” resulting from one or more certified “acts of terrorism”<sup>12</sup> and, subject to certain conditions, provides a mechanism for reimbursement from the Treasury of losses under such policies resulting from certified “acts of terrorism.”<sup>13</sup> TRIA also defines a process for repayment by insurers of reimbursement payments by Treasury under TRIP.<sup>14</sup>

Before any losses may become eligible for reimbursement under TRIP, the act which results in such losses must be certified by the Secretary — in consultation with the Attorney General and the Secretary of Homeland Security — to:

- (1) be an act of terrorism;
- (2) be a violent act or an act that is dangerous to human life, property, or infrastructure;
- (3) have resulted in damage within the United States, to an air carrier, United States flagged vessel, or the premises of a United States mission; and
- (4) have been committed by an individual or individuals, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.<sup>15</sup>

Furthermore, an act is not eligible to be certified as an “act of terrorism” if –

- (1) the act is committed as part of the course of a war declared by Congress (except with respect to any coverage for workers’ compensation); or

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<sup>10</sup> Insured losses shown in 2013 dollars. See Insurance Information Institute, *Terrorism and Insurance: 13 Years After 9/11 The Threat of Terrorist Attack Remains Real* (September 9, 2014), available at <http://www.iii.org/press-release/terrorism-and-insurance-13-years-after-9-11-the-threat-of-terrorist-attack-remains-real-090914>.

<sup>11</sup> TRIA § 101(a)(5).

<sup>12</sup> TRIA §§ 103(a)(3), 103(c).

<sup>13</sup> See, e.g., TRIA § 103(e).

<sup>14</sup> TRIA § 103(e)(7).

<sup>15</sup> TRIA § 102(1)(A).

(2) the aggregate “property and casualty insurance losses” resulting from the act do not exceed \$5 million.<sup>16</sup>

The Secretary may not delegate the certification decision to any other officer, employee, or person, and the Secretary’s determination to certify, or not to certify, an act as an “act of terrorism” is final and is, according to the terms of TRIA, not subject to judicial review.<sup>17</sup>

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<sup>16</sup> TRIA § 102(1)(B).

<sup>17</sup> TRIA §§ 102(1)(C), 102(1)(E).

### **III. Findings of the Study**

The decision whether to certify an act as an “act of terrorism” may have significant implications for policyholders, insurers, and taxpayers. For a policyholder, the Secretary’s certification decision may affect whether property and casualty insurance losses resulting from the act will be covered by an insurance policy, particularly if the policyholder had previously declined to purchase coverage for losses arising from terrorism. In parallel, certification may affect insurers’ coverage obligations to policyholders, as well as insurers’ reinsurance coverage. Taxpayers may also be affected by a certification decision, if the annual aggregate insured losses exceed the “program trigger” amount above which Treasury may be required to make payments under TRIP.<sup>18</sup>

A certification decision by the Secretary is final, a fact which underscores the importance of any such decision. In view of these and other considerations,<sup>19</sup> the certification process must allow the Secretary the flexibility and means to assess the relevant information available at the time and, in light of that information and the requirements of TRIA and Treasury’s regulations governing TRIP,<sup>20</sup> to make a fully informed, final certification decision.

#### ***Data and Information Collection and Analysis***

As a starting point, any certification decision must consider the statutory criteria under TRIA. Three general criteria must be satisfied for an act to be eligible for certification, namely, the act must:

- (1) be a violent act or an act that is dangerous to human life, property, or infrastructure;
- (2) have resulted in damage within the United States;<sup>21</sup> and
- (3) have been committed by an individual or individuals, as part of an effort to coerce the civilian population of the United States or influence the policy or affect the conduct of the United States Government by coercion.<sup>22</sup>

The first and third criteria have multiple parts, thus creating a number of potential permutations and adding to the complexity of the certification analysis. For example, under the first criterion,

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<sup>18</sup> Recoupment provisions in TRIA may ultimately result in the recovery by Treasury of some or all of any reimbursement payments made by Treasury under TRIP.

<sup>19</sup> Certification also triggers the “Federal cause of action” provisions of TRIA §107(a)(1), respecting claims of property damage, personal injury, or death arising out of the certified “act of terrorism.”

<sup>20</sup> 31 C.F.R. pt. 50.

<sup>21</sup> An act is considered to have resulted in damage within the United States if the act resulted in damage within the United States, or to an air carrier (as defined in 49 U.S.C. § 40102) or a United States flag vessel (or a vessel based principally in the United States, on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), regardless of where the loss occurs, or at the premises of a United States mission. *See* TRIA § 102(1)(A)(iii).

<sup>22</sup> TRIA § 102(1)(A).

even if an act is not a “violent act,” the act still could satisfy the standard if the act is “dangerous to human life” (or to property or infrastructure).

Section 102(1)(A) of TRIA requires the Secretary to consult with the Attorney General and the Secretary of Homeland Security before certifying an act as an “act of terrorism.” The consultation requirement helps to ensure that the Secretary’s decision will be made with the benefit of collective knowledge and wisdom of at least three members of the President’s Cabinet.<sup>23</sup> The criteria that the Secretary must consider address matters concerning the nature of and motivations behind the act in question, and may implicate law enforcement, intelligence, and homeland security issues within the authorities and jurisdictions of the Attorney General and the Secretary of Homeland Security. Accordingly, coordination between and among Treasury and the Departments of Justice and Homeland Security allows the Secretary access to critical and timely information relevant to the certification inquiry. This required consultation under TRIA is appropriate in light of the important roles that the Attorney General and Secretary of Homeland Security will likely play following an act.

In addition to the certification criteria discussed above, any certification decision must take into account the severity of the aggregate losses resulting from the act under consideration. TRIA prohibits the Secretary from certifying an act as an “act of terrorism” if the “property and casualty insurance losses resulting from the act, in the aggregate, do not exceed \$5,000,000.”<sup>24</sup> While the terms “property and casualty insurance”<sup>25</sup> and “insured loss”<sup>26</sup> are defined by TRIA, the term “losses” is not. From the perspective of a policyholder, “losses” might encompass any amounts claimed under the covered lines of insurance. For an insurer, “losses,” which likely will develop over a period of days, weeks, months or even years later, might include paid losses, case reserves, and bulk reserves.<sup>27</sup>

Comments recommended that Treasury develop in advance and publicize a methodology to collect and validate loss data during the certification process.<sup>28</sup> In some instances, claims estimates generated by insurers — even if not yet recorded as case or even bulk reserves — could be useful in gauging the rough magnitude of the losses and thereby informing the certification process. Similarly, additional sources of data to help frame the loss amount could be available, such as information from modeling organizations. Importantly, established lines of

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<sup>23</sup> See, e.g., NAMIC/PCI/RAA Comments, pp. 2-3 (consultation requirement “is sensible and maintains opportunities for relevant agencies to have input into the decision while leaving the final decision to the Treasury Secretary”).

<sup>24</sup> TRIA § 102(1)(B)(ii).

<sup>25</sup> TRIA § 102(11).

<sup>26</sup> TRIA § 102(5).

<sup>27</sup> Case reserves are an insurer’s balance sheet estimates of its exposure to loss and loss adjustment expense from particular claims or cases. Bulk reserves are reserve estimates set through use of a formula or loss ratio applied over a particular portfolio or line of business, and include estimates for incurred but not reported losses as well as further future loss development in the existing case reserves.

<sup>28</sup> Various comments suggested that having a data collection and evaluation process in place prior to the time that the Secretary would need to make any certification decision would be important in terms of maximizing the efficiency and effectiveness of any determination. American Academy of Actuaries (AAA) Comments, p. 2; Council of Insurance Agents and Brokers (CIAB) Comments, p. 2; American Insurance Association (AIA) Comments, p. 3.

communication between Treasury and relevant stakeholders should be in place so that data from relevant sources can readily be obtained when needed. Prior to the occurrence of an act, affected insurers should know the categories and format of data that will be collected by Treasury.

Loss information on actual claims will, in the first instance, be generated by insurers in response to notifications from policyholders. To obtain the accurate and timely loss data needed for the certification process, Treasury may need to receive data directly from insurers following an act under consideration for certification.<sup>29</sup> To do so, once an act is under consideration for certification, Treasury must be able to identify potentially affected insurers from which data will be collected. Mechanisms for accomplishing such identification could include some combination of insurers self-identifying, Treasury obtaining assistance from the office(s) of the relevant state insurance department(s), or from other industry sources (e.g., brokers and insurance data aggregators).

The insurance industry has substantial expertise in evaluating losses resulting from scenarios of varying complexity that could characterize an act under consideration for certification as an act of terrorism. Thus, in order to confirm the nature of information that will likely be available in connection with an act under consideration, as well as any limitations respecting such data that might affect the ability of Treasury to rely upon it as the certification process is ongoing, Treasury will engage with industry stakeholders during the development or amendment of any final rule addressing certification. Treasury anticipates that any proposed rule concerning certification will identify the information which Treasury expects to obtain from insurers and other stakeholders in connection with the certification process as well as a pre-established method for collecting such information.

### *Timing of Certification*

Treasury sought comments addressing the potential establishment and duration of any timeline respecting certification. Of the nine comments received, seven either recommended that Treasury adopt a timeline of some specified length governing when the Secretary must make a certification decision, or indicated that it would be reasonable for the Secretary to reach a certification decision within a defined period of time. These comments offered a variety of opinions about the length of the timeline and how rigid it should be. One comment proposed that a “reasonable timeline . . . would be less than 30 days;”<sup>30</sup> another suggested a period as long as 90 days;<sup>31</sup> while another suggested a brief but unspecified period (subject to extension upon notice) for the Secretary to determine whether an act would be certified as “an act of terrorism.”<sup>32</sup>

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<sup>29</sup> Because such loss data collected by Treasury in connection with a certification inquiry could include proprietary information from insurers, including case reserves, Treasury will need to maintain the confidentiality of such claims information that it collects.

<sup>30</sup> AAA Comments, p. 1 (although acknowledging that “it will be difficult to accurately determine the collective size of the loss from industry data in such a short timeframe”).

<sup>31</sup> CIAB Comments, p. 3.

<sup>32</sup> E.g., Coalition to Insure Against Terrorism (CIAT) Comments, p. 3. Other comments among these seven also coupled suggestions for a timeline with an extension mechanism. See Lloyd’s Comments, p. 2 (“60 days from the event date would be a reasonable period for a decision on certification,” with some mechanism for extension of that

One comment did not advocate a specific timeline but instead identified the time periods that might govern the development of certain types of loss information that could affect the time that would be required by the Secretary to reach a decision.<sup>33</sup> The remaining comment observed that “[t]he notion of a time frame is simplistic,” in light of the uncertainties respecting law enforcement processes that might govern the ability of the Secretary to reach a certification decision.<sup>34</sup>

The comments which expressed support for (or suggested a proposed reasonable period for) a timeline identified the importance of what most described as “certainty” regarding the certification decision in light of the effects it could have upon the adjustment and payment of particular insurance claims, as well as more generally upon the insurance industry overall as it evaluates the potential impact of the act in question. As respects individual claims, many commercial insurance policies for policyholders who decline an offer for terrorism risk insurance incorporate exclusions for loss or damage caused by a certified “act of terrorism.”<sup>35</sup> In the event that an act were to be certified by the Secretary as an “act of terrorism,” these exclusions may reduce the coverage available to policyholders that had declined terrorism risk insurance. Further, citing state laws based on the National Association of Insurance Commissioners (NAIC) Unfair Property/Casualty Claims Settlement Practices Model Regulation,<sup>36</sup> comments expressed concerns that state insurance regulators could require insurers to make claims decisions within a specific timeframe for policyholders that had declined terrorism coverage, even if the Secretary does not issue a certification decision with respect to an act that, from some perspectives, might appear to warrant that decision.<sup>37</sup>

Comments suggesting that a predetermined timeline may assist in promoting economic stability and a functional insurance market following an act did not reflect sufficient consideration of the limitations that an inflexible timeline might impose. Significant in this regard will be the need of the Secretary to coordinate with domestic and/or international law enforcement processes in evaluating the nature of the act under consideration. Importantly, those comments that highlighted the value of certainty also recognized that any certification timeline should

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period); AIA Comments, p. 4 (preliminary determination within 15 days with final determination within 30 days, with the ability to extend beyond 30 days where full information is not known); NAMIC/PCI/RAA Comments, p. 2 (60 days from date of the act of terrorism for certification, with the ability to extend for additional successive 45 day periods where investigations remain ongoing); RIMS Comments, p. 1 (60-90 day deadline from the date of the act under consideration with an ability on the part of the Secretary to request a 30 day extension).

<sup>33</sup> Insurance Services Office, Inc. (ISO) Comments, pp. 1-2.

<sup>34</sup> Brooks White Comments, p. 1.

<sup>35</sup> A form of the exclusion for losses due to a certified act of terrorism has been developed by ISO, and approved by certain state insurance regulators for use by insurers.

<sup>36</sup> As of December 2014, 47 states and two territories have adopted, in some form, NAIC’s Unfair Property/Casualty Claims Settlement Practices Model Regulation. See NAIC, Unfair Property/Casualty Claims Settlement Practices Model Regulation, 902-4, available at <http://www.naic.org/store/free/MDL-902.pdf>. Under section 7.A of this model regulation, a claims decision is to be made within 21 days after a properly executed proof of loss is provided. Where further time is required for the investigation, however, section 7.B of the model regulation provides the insurer with the opportunity to obtain further time, upon notice to the policyholder, within which to make the claims determination.

<sup>37</sup> NAMIC/PCI/RAA Comments, p. 1; Lloyd’s Comments, p. 1.

incorporate an extension procedure to accommodate such ongoing investigative activities.<sup>38</sup> With respect to the comments focused on concerns regarding insurers' claims payment decisions,<sup>39</sup> such issues are an inherent dynamic for the insurance business and are not confined to circumstances involving the certification process. In any event, these same claim decisions may themselves be subject to extension under relevant state regulation where uncertainty that affects the claim decision requires that the claims investigation be continued.<sup>40</sup>

Any certification of, or determination not to certify, an act may be financially significant to consumers, insurers, policyholders, and taxpayers. The certification process may well occur in a context in which uncertainty exists about factual circumstances surrounding the act. Such circumstances invariably would be the subject of ongoing investigations and responses by multiple governmental agencies. It cannot be known in advance how long such investigatory work might take in any particular instance. Furthermore, sufficient data relevant to property and casualty insurance losses needed to make an informed determination may be unavailable during the initial stages of the certification process.

A rule or guideline prescribing a timeline for the Secretary to render a certification decision by a given date following an act could adversely affect the Secretary's ability to collect the information necessary to that decision. In order for the Secretary to make an informed certification decision in accordance with the statutory criteria, for example, Treasury might need to coordinate with other government agencies conducting investigations concerning the perpetrators of or motivations for the act. The Secretary will also need to be respectful of activities of law enforcement and the justice system concerning the investigation, apprehension, and prosecution of the individual or individuals suspected or accused of committing the act.<sup>41</sup> Consistent with this observation, most of the comments favoring the adoption of some timeline also acknowledge the importance of some sort of extension mechanism to accommodate the Secretary's need to coordinate his or her consideration with such efforts.

Availability of information regarding the amount of property and casualty insurance losses resulting from the act under consideration may also affect the timing of any certification decision, particularly if it has not yet become clear from such information whether the losses will exceed the \$5 million certification threshold.<sup>42</sup> Loss development patterns — i.e., the severity, timing, and distribution of losses as information becomes available — are not always predictable from preliminary information and will be affected by the magnitude and type of act under

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<sup>38</sup> See NAMIC/PCI/RAA Comments, p. 2 (recognizing that any certification decision may need to be delayed where “the investigation into the potential act of terrorism remains open and more time is needed to gather relevant information”). See also *supra* note 32 (citing additional comments suggesting the need for an extension mechanism in any timeline).

<sup>39</sup> Several comments mentioned the 2013 Boston attacks to support such concerns, but did not offer evidence of any resulting instability or dysfunction in the terrorism insurance market.

<sup>40</sup> *Supra* note 36.

<sup>41</sup> See, e.g., AIA Comments, p. 4 (acknowledging that “where a criminal investigation is ongoing” any certification timeline may need to be expanded). See also Brooks White Comments, p. 1 (“Law enforcement should not be constrained by the financial implications of TRIP.”).

<sup>42</sup> See, e.g., ISO Comments, p. 2 (noting that six months is the “quickest timeframe” during which workers compensation losses may be estimated with a fairly high level of confidence). Some terrorism scenarios may result in relatively high workers compensation losses as compared to losses under other lines of insurance.

consideration for certification. The time it may take for claims to be submitted to one or more insurers by affected policyholders after an act has occurred, for those claims to be investigated and adjusted by the insurers, and (if appropriate) to be reserved or paid by the insurers, might vary considerably.

Recognizing that an “act of terrorism” may occur in various and unpredictable ways, in 2003 Treasury stated that:

[T]here is no way to predict future events and ascertain a time frame that would be appropriate for all potential situations. Facts could be immediately available and, after consultation, present a clear basis for a quick determination by the Secretary; conversely, a determination could require more time to gather information and conduct an analysis of the act.<sup>43</sup>

Based on the concerns analyzed above, Treasury continues to believe that pre-determination of the precise timing of any step or component of the certification process is not advisable in light of the uncertainty the Secretary may face when making a responsible assessment of whether an act is an act of terrorism. An inflexible timeline for the certification process that would apply uniformly and rigidly to potentially disparate circumstances is impractical. Additionally, a certification decision by the Secretary is final. The imposition of a rigid deadline would require the Secretary to make a decision to certify, or not to certify, an act of terrorism that could not be changed, even if more complete or accurate information becomes available outside of that deadline.<sup>44</sup> Accordingly, adopting a rule that prescribes a fixed timeline for the certification process, particularly a rule which incorporates strict deadlines, would be inappropriate and impractical, and is not justified by the purported benefits. The legitimate concerns expressed by comments in support of the imposition of a timeline may be ameliorated by communication from Treasury as the certification process proceeds.

### ***Improving Communication Regarding Certification***

While a rigid, pre-determined timeline for the certification process is not appropriate or practical, enhanced public communication regarding the status of the Secretary’s assessment of an act could be beneficial for consumers, policyholders, insurers, and the general public, and may ameliorate some of the concerns expressed in comments. Several comments made suggestions in this regard.<sup>45</sup> Improved public communication might, for example, include announcements following an act as to whether the act is under consideration for certification as an act of terrorism, as well as periodic updates addressing the status of the certification process. Communication regarding the current status of the certification process must, in nearly all cases, be balanced against the legitimate needs of law enforcement agencies to safeguard certain

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<sup>43</sup> Terrorism Risk Insurance Program, 68 Fed. Reg. 41,250, 41,252 (July 11, 2003).

<sup>44</sup> NAMIC/PCI/RAA acknowledged the likely efficacy of “a flexible standard,” which balances the need for information and for timely decision-making. Comments, p. 2.

<sup>45</sup> See, e.g., AIA Comments, p. 4; CIAT Comments, p. 3. Treasury also discussed the potential utility of enhanced communications regarding ongoing consideration of certification as part of its outreach with stakeholders during the study underlying this Report.

information during any pending investigation into activity that might be subject to certification as an “act of terrorism.”<sup>46</sup> Such communications, even with the noted limitations, could provide information that some comments recognized would permit insurers and insureds to “better assess their respective positions” while the certification process continues.<sup>47</sup>

Under current rules, Treasury does not have an obligation to issue public statements about the status of the Secretary’s consideration (in consultation with the Attorney General and the Secretary of Homeland Security) of whether to certify an act as an “act of terrorism.” Modifying the rules to reflect that the Secretary should provide public notice as to whether an act is (or continues to be) under consideration for certification as an “act of terrorism” (together with updates on the status of the certification process relating to that act), could address many of the concerns expressed in the comments in response to the Notice.<sup>48</sup>

Treasury will engage with industry, stakeholders, and the public in general in advance of the development of any proposed rule addressing disclosures that could be made while the certification process is ongoing in order to further evaluate, within the constraints described here, the particular disclosures that could be most helpful and which could be provided in advance of any final decision respecting certification. Treasury concludes that while it is appropriate to make available information as the certification process continues, the amount and timing of that information could vary depending upon the facts and circumstances attending the particular act under consideration. Such communication would be intended to provide the public and industry stakeholders with information regarding the status of the certification process. To a reasonable extent, the communication may enhance the stakeholders’ ability to evaluate the appropriate course of action while a certification decision remains pending.

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<sup>46</sup> See Brooks White Comments, p. 1 (Treasury “should not prematurely make public its investigation if it might interfere with the ongoing investigation or potential prosecution.”).

<sup>47</sup> See CIAT Comments, p. 3.

<sup>48</sup> See, e.g., AAA Comments, p. 2 (noting confusion among insurers and insureds over the lack of any official pronouncement respecting the 2013 Boston attack).

#### **IV. Conclusion**

Certification of, or the determination not to certify, an act as an “act of terrorism” has significant implications for consumers, the insurance industry, policyholders, and taxpayers. The determination of whether to certify an act must be made in accordance with the statutory elements established in TRIA and subject to the conditions of that law. The information that will be necessary to make a determination following an act that is the subject of the certification process will be available through consultation with state and federal law enforcement and intelligence resources (including the appropriately mandated consultation with the Departments of Justice and Homeland Security), as well as through Treasury’s own collection of information regarding “property and casualty insurance losses.” The certification process must allow for the flexibility needed for the Secretary to examine the particular factors of the specific act and obtain relevant information as the information becomes available or becomes increasingly reliable.

Importantly, any certification decision by the Secretary must be informed by and, to a certain extent, based on relevant loss data. In order to receive the necessary and most accurate loss data in a timely manner, data may appropriately be collected directly from insurers following an act that is the object of the certification process. To make this data collection possible, a protocol should be established for Treasury to work with state insurance regulators and data aggregators, where appropriate, to identify potentially affected insurers from which loss data will be collected for a given act, and to establish a system for collecting, storing, and analyzing the loss data.

The nature and scope of a potential “act of terrorism,” and amount of losses related to the act will vary from one case to another. For this reason, requiring the Secretary to comply with a rigid timeline for the certification process that would apply uniformly in all cases is not appropriate. Nevertheless, an initial public notice followed by public updates on the status of the certification process for an act under consideration may assist consumers, policyholders, insurers, and taxpayers as they evaluate the potential effect of any certification decision.