

October 21, 2003

Dear Mr. H:

This letter is written in response to your letter in which you requested an interpretation concerning the application of the Terrorism Risk Insurance Act of 2002 (the “Act”) and Treasury’s regulations implementing the Act, to commercial property and casualty insurance policies that insure against losses arising from “wind and hail only.”<sup>1</sup>

### **Background**

The South Carolina Wind and Hail Underwriting Association (the “Wind Pool”)<sup>2</sup> is a legislatively-created residual market mechanism that provides coverage for the perils of wind and hail to individuals and businesses in certain state-designated coastal areas who are not able to buy the insurance through the standard insurance market. The Wind Pool offers a limited peril policy protecting against losses arising out of wind and hail damage.<sup>3</sup> Given the nature of the coverage, you requested answers to three specific questions related to your wind pool and similar wind pools:

1. Are property plans which issue “wind and hail only” policies subject to the [Act’s] requirements?
2. If the Wind Pools are subject to [the Act], are [the Wind Pools] providing coverage for “all risk terrorism” or are [the Wind Pools] merely providing coverage for wind and hail losses caused by acts of terrorism as described in the statute?
3. If the Wind Pools are subject to [the Act], is there anything, other than the initial notification and coverage offering, which [the Wind Pools] need to do in order to comply?

While you framed these questions generally, we prefer to answer them specifically with regard to the South Carolina Wind and Hail Underwriting Association.

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<sup>1</sup> This response is being issued pursuant to 31 C.F.R. §50.9, which sets forth a procedure whereby persons actually or potentially affected by the Act or regulations may request an interpretation.

<sup>2</sup> Despite its official name, the South Carolina Wind and Hail Underwriting Association is often referred to as the Wind Pool.

<sup>3</sup> The Wind Pool’s Standard Wind and Hail Commercial Policy states, in pertinent part: “We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from Wind and Hail.”

## Analysis

*Is the South Carolina Wind and Hail Underwriting Association, which issues “wind and hail only” policies, subject to the Act’s requirements?*

Section 102(6) of the Act specifically includes State residual market insurance entities among those insurers that are required to participate in the Program. Section 50.5(f)(1)(D) of the implementing regulations also provides that a State residual market insurance entity or state workers’ compensation fund are included in the categories of “insurers”<sup>4</sup> and thus are mandatory participants in the Program.<sup>5</sup>

The South Carolina Wind and Hail Underwriting Association is a residual market mechanism that meets the definition of “insurer” under the Program. Therefore, based on the information available to us, it appears that the South Carolina Wind and Hail Underwriting Association is a mandatory participant in the Program and is subject to the Act and its regulations.

In Interim Guidance published at 67 FR 78864 (Dec. 26, 2002), Treasury first published a list of entities that were identified for purposes of the Program as residual market mechanisms. In your letter, you explained that some wind pools (without identifying which ones) have relied on their not being listed to mean that they are not expected to participate in the Program. Such reliance is misplaced. An insurer should not assume that it is not required to participate in the Program simply because it is not listed on Treasury’s *List of State Residual Market Mechanisms*. The Act is quite clear: all State residual market entities and State workers’ compensation funds are insurers and are required to participate in the Program. Treasury’s list is simply intended to provide guidance and certainty to those entities included on the list.<sup>6</sup>

*If the Wind Pool is subject to the Act, must the pool provide coverage for “all risk terrorism” or merely coverage for wind and hail losses caused by acts of terrorism as described in the statute?*

The Act and regulations provide that an insurer must: (1) make available, in all of its property and casualty insurance policies, coverage for insured losses; and (2) make available property and casualty insurance coverage for insured losses that does not differ

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<sup>4</sup> In order to meet the definition of insurer, an entity must meet the criteria found at section 102(6)(A), (B), and (C) of the Act. Section 102(6)(A)(iv) lists state residual market mechanisms among those entities that are insurers if they otherwise meet the other criteria. Section 102(6)(B) of the Act does not apply to state residual market mechanisms and the Secretary has not prescribed any additional criteria under section 102(6)(C). *See also* 31 C.F.R. §50.5(f).

<sup>5</sup> *See also* 31 C.F.R. §§50.30(as proposed), 50.4.

<sup>6</sup> Treasury’s list will be updated from time to time, as necessary, and will soon be publicly available at [www.treasury.gov/trip](http://www.treasury.gov/trip). Based on the above analysis, the South Carolina Wind and Hail Underwriting Association will be added to the list.

materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism.<sup>7</sup> The Wind Pool’s “wind and hail only” policies are “commercial property and casualty insurance” as defined by the regulations.<sup>8</sup> Premiums for wind and/or hail policies are reported as Allied Lines on the National Association of Insurance Commissioner’s (NAIC’s) Exhibit of Premiums and Losses, also known as Statutory Page 14, a commercial line included in the Program as “property and casualty insurance.”<sup>9</sup>

The regulations provide that if an insurer does not cover all types of risks, then it is not required to cover the excluded risks in satisfying the requirement to make available coverage for losses resulting from an act of terrorism that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism.<sup>10</sup> Therefore, an insurer that does not cover all types of risks but that insures against the risk of commercial property damage or casualty caused by “wind and hail only,” is not required to make available “all-risk terrorism” coverage; instead, the insurer is required to make available coverage for insured losses from wind and hail associated with an act of terrorism.<sup>11</sup>

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<sup>7</sup> See §103(c)(1) of the Act. See also 31 C.F.R. §50.20.

<sup>8</sup> Section 50.5(l) of the regulations defines property and casualty insurance as:

(l) *Property and casualty insurance* means commercial lines of property and casualty insurance, including excess insurance, workers' compensation insurance, and surety insurance, and

(1) Means commercial lines within only the following lines of insurance from the NAIC's Exhibit of Premiums and Losses (commonly known as Statutory Page 14): 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; and

(2) Does not include: . . . .

<sup>9</sup> Treasury explained in the preamble to the final rule published in the *Federal Register* at 68 FR 41250 (July 11, 2003), that it is currently considering issuing a proposed rule specifically requesting comment on the inclusion or exclusion in the Program definition of “commercial property and casualty insurance” of single peril natural disaster insurance, such as stand-alone, single peril wind and hail insurance, reported on included lines of Statutory Page 14. At this time, however, such insurance is included in the definition of “commercial property and casualty insurance.”

<sup>10</sup> 31 C.F.R. § 50.23(b).

<sup>11</sup> Treasury’s analysis does not depend on evaluating the likelihood of whether or not an act of terrorism could cause a wind or hail loss. However unlikely, it is certainly plausible that certain types of terrorist devices could induce wind (*i.e.*, wind from a large-scale blast) or be spread by wind (*i.e.*, chemical

*If the Wind Pools are subject to TRIA, is there anything, other than the initial notification and coverage offering, which we need to do in order to comply?*

An insurer's obligations under the Program can be found in the Act and in the regulations implementing the Act, specifically 31 C.F.R. §§50.10 *et seq.* The Act and regulations are available at the TRIP website ([www.treasury.gov/trip](http://www.treasury.gov/trip)). For additional information or if you have any specific questions, please call the TRIP 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.

Dated: October 21, 2003

#### TERRORISM RISK INSURANCE PROGRAM

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Jeffrey S. Bragg  
Executive Director

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or biological release). While you state in your letter that your underwriters do not believe your policy would be triggered in the latter situation, you acknowledge that some courts and insurers might have a different coverage opinion. Moreover, we note that your standard policy language excludes man-made causes of wind and hail losses. Your standard policy excludes: "Nuclear reaction or radiation, or radioactive contamination, however caused" and "Acts ... of any person, group, organization, or government body." Therefore, by excluding those causes, your policy recognizes that wind could be induced by an act of terrorism, which if not excluded might be covered.