

SCHWARTZ & BALLEN LLP

1990 M STREET, N.W. · SUITE 500

WASHINGTON, DC 20036-3465

(202) 776-0700

FACSIMILE
(202) 776-0720

www.schwartzandballen.com

MEMORANDUM

October 15, 2003

To Our Clients and Friends

Re: Terror Risk Insurance Program – Final Rules

The Treasury Department has issued two final rules implementing the Terrorism Risk Insurance Act (the “Act”).¹ One rule addresses the disclosure and “make available” requirements of the Act, and the other addresses the participation of state residual market insurance entities and state workers’ compensation funds in the Terrorism Risk Insurance Program (the “Program”). Both rules are similar to the proposed/interim final rules previously issued² and are effective upon publication in the *Federal Register*.

DISCLOSURE AND “MAKE AVAILABLE” REQUIREMENTS

Under the final rule, an insurer must provide clear and conspicuous disclosure to the policyholder of the premium charged for insured losses covered by the Program and the federal share of compensation for insured losses under the Program. The purpose of the disclosure is to enable policyholders to comparison shop terrorism insurance coverage. The premium may be described as a portion or percentage of an annual premium, if consistent with standard business practices, but not as a “surcharge.” For policies issued on or after February 25, 2003, the disclosure must be made on a separate line item in the policy, which includes on the declaration pages of the policy, elsewhere within the policy itself, or in any rider or endorsement or other document that is made a part of the policy.

¹ The Terrorism Risk Insurance Act of 2002 establishes the Terrorism Risk Insurance Program under which the federal government will share the risk of insured loss from certified acts of terrorism with commercial property and casualty insurers until December 31, 2005. See our website for memoranda dated March 4, 2003 and July 8, 2003 that describe the Act and other implementing rules.

² See 68 *Fed. Reg.* 19301, 19309 (April 18, 2003).

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An insurer may provide disclosures using normal business practices, including forms and methods of communication used to communicate similar policyholder information to policyholders. If an insurer normally communicates with the policyholder through an insurance producer or other intermediary, an insurer may provide disclosure through such person but the insurer remains responsible for ensuring that the required disclosures are provided to the policyholder.

Under the final rule, an insurer also must make available, in all of its property and casualty insurance policies, coverage for insured losses resulting from acts of terrorism that does not differ materially from the terms (excluding price), amounts, and other coverage limitations applicable to losses arising from other events. This availability is to apply to the initial offer of coverage as well as to renewals of policies during the period beginning November 26, 2002 and ending on December 31, 2004. (This period may be extended by the Secretary of the Treasury to December 31, 2005.) The rule also confirms that the make available requirement applies to policies in existence on November 26, 2002.

STATE RESIDUAL MARKET INSURANCE ENTITIES AND STATE WORKERS' COMPENSATION FUNDS

The final rule states that all state residual market insurance entities and state workers' compensation funds ("residual market mechanisms") are insurers and must participate in the Program even if they do not receive direct earned premiums. Treasury maintains on its website a list of entities considered to be residual market mechanisms. The Treasury's list, however, is not exhaustive, and a residual market mechanism may be covered even if it is not included in the Treasury's list.

Residual market mechanisms are required to make the same disclosures as other insurers although a 90-safe harbor is given to allow sufficient time for compliance.

The rule also distinguishes between entities that do and do not share profits and losses with private sector insurers in determining an insurer's deductible under the Act.

The final rules can be found at http://www.schwartzandballen.com/whats_new.html.

If you have any questions concerning the Terrorism Risk Insurance Act, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.