2022 TRIP Data Collection Comments

Submission by the Centers for Better Insurance

Captive Insurers

The Centers for Better Insurance, LLC (CBI) is an independent organization committed to enhancing the value the insurance industry delivers to all stakeholders (including policyholders, employees, and society at large). CBI does so by making available unbiased analysis and insights about key regulatory issues facing the industry for use by insurance professionals, regulators, and policymakers. Additional information regarding CBI is available on the web at www.betterins.org or by email request at info@betterins.org.

CBI submits these comments in response to Treasury's Notice appearing at 86 FR 64600 (November 18, 2021) with respect to the Terrorism Risk Insurance Program 2022 Data Call.

CBI applauds Treasury's efforts to collect additional information regarding captive insurance companies. Specifically, Treasury intends to require participating captive insurance companies to report:

- "[W]hether the insurance coverage provided by the captive insurer to a policyholder encompasses the reimbursement of such policyholder's deductible that must be satisfied under a policy issued by another insurer" by requiring "that the information be broken out by each TRIP-eligible line of insurance, which results in changes to both the Premium and Exposure Bases worksheets";
- "[R]equire captive insurers to provide the total amount of all other non-TRIP eligible direct earned premium of the captive insurer on the Premium worksheet"; and
- "[W]hether coverage is being issued by the captive insurer that only provides coverage for nuclear, biological, chemical, and radiological (NBCR) exposures".

Treasury seeks comments as to:

- The proposed changes in data collection forms;
- Whether there are other publicly available sources of information that bear on captive insurance companies that Treasury should consider; and
- Whether there is other information Treasury should collect regarding captives.

Captive Insurer Compliance Rate

Treasury has consistently raised concerns with its ability to determine the rate of compliance by participating captive insurance companies with the Program's annual data calls.[1] Unfortunately,

[1] Report on the Effectiveness of the Terrorism Risk Insurance Program, Federal Insurance Office, U.S. Department of the Treasury (June 2020), page 12.

state insurance commissioners are broadly prohibited by state law from publishing information regarding the captives domiciled in and regulated by their respective jurisdictions.

With the hands of state insurance commissioners largely tied, Treasury is deprived of an otherwise ready and reliable means to validate compliance rates for captives. Treasury has been able to determine a compliance rate of 100% for non-small insurers and 87% for small insurers by comparing data submitted to the Program with "[publicly available] information reported to state insurance regulators."[2] For captives, Treasury offers only that it "estimates that the significant majority of captive insurers participating in the Program" have complied with the annual data call.

540 captives have responded to the most recent data call.[3] Through independent research, CBI has identified 3132 captives domiciled in U.S. states, territories, and possessions.[4] In addition, there are well over 1000 active cell captives (and perhaps thousands more) in the U.S. and more than 600 tribal captives. The pool of captives potentially participating in the program is perhaps 10 times or greater than the number of captives responding to Treasury's mandatory data call.[5]

This evident disconnect between the number of participating and reporting captives may (in part) come down to Treasury's instruction that "[c]aptive insurers that write policies in the TRIP-eligible lines of insurance, but which do not provide any terrorism risk insurance, do not have a reporting requirement."[6] It may very well be that captive insurance companies that would otherwise report did not do so because they erroneously believed this instruction exempts a captive from reporting if:

- The captive insurer does not provide stand-alone terrorism coverage (as opposed to "all risks" or similar coverage without a specific terrorism exclusion);[7]
- The captive insurer does not charge a specific premium related to the risk of loss from an act of terrorism;
- The captive insurer purports to "opt out" of the Program;

[2] Report on the Effectiveness of the Terrorism Risk Insurance Program, Federal Insurance Office, U.S. Department of the Treasury (June 2020), page 12.

[3] Report on the Effectiveness of the Terrorism Risk Insurance Program, Federal Insurance Office, U.S. Department of the Treasury (June 2020), page 65.

[4] Over the last year CBI has pursued public records requests (with certain litigation still pending) to obtain the names of single parent captives domiciled in the US. Outside of the US, regulators make the names of captives freely accessible.

[5] Treasury suggests from the rate of responsiveness, only "approximately 17 percent of the total number of domestic U.S. captive insurers … write terrorism risk insurance subject to the Program." Report on the Effectiveness of the Terrorism Risk Insurance Program, Federal Insurance Office, U.S. Department of the Treasury (June 2020), page 65.

[6] Report on the Effectiveness of the Terrorism Risk Insurance Program, Federal Insurance Office, U.S. Department of the Treasury (June 2020), page 13, footnote 49.

[7] Leading support to this theory, Treasury reports that the 540 captive responding to the study issued 285 stand-alone insurance policies. As a group, responding small insurers (representing 10.6% of covered industry premium) issued only 1 stand-alone insurance policy.

- The captive insurer declines to make the disclosures required by the Program, including the premium disclosure, thereby disqualifying it from a backstop recovery; or
- The captive is willing to accept the penalty for failing to report (which so far has been nil).

Full compliance by captive insurers in the Program's annual data calls is indispensable to the credibility of the Federal Insurance Office's mandated reports to Congress. Captive insurers – writing just 4% of covered industry premium – are in line to receive up to 95% of program payouts.[8] Non-small insurers representing 80% of industry premium (and for which Treasury is confident in 100% reporting compliance) take as little as 5% of program payouts under scenarios analyzed by Treasury.

In a very practical way, the Terrorism Risk Insurance Program is overwhelmingly for the benefit of captive insurance companies and their corporate parents. Yet, Treasury is only receiving data from 540 of the 3000+ traditional captives (and seemingly no data from cell captives or tribal captives).

To close the yawning compliance gap among captive insurers, Treasury should:

1. Initiate a program of direct outreach to captive insurer boards, managers, owners, and service providers to raise awareness of the requirement to comply with the annual data call coupled with practical explanations of any exemptions from participation in the data call; and
2. Clarify and actively raise awareness that failure to participate in an annual data call is subject to civil penalties under Section 104(e).

Given the lack of publicly available data and inability to enlist state insurance regulators to assist, Treasury may find it advisable to require all captives domiciled in the U.S. to submit a report if only to determine how many claim not to participate in the program and how many are simply ignoring their obligations under the Program.

Protected Cell Captives and Tribal Captives

Treasury has not provided guidance as to whether individual cells of protected cell or sponsored captives are considered a single insurer or multiple insurers for the purposes of the Program. A protected cell captive can be broadly defined as a "a sponsored captive or rent-a-captive, which maintains underwriting accounts separately for each participant."[9] The instructions should clarify whether reporting is made by the "core" of the legal entity on a consolidated basis for all cells, the core reports separately for each cell, or each individual cell reports its own data.

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[8] Report on the Effectiveness of the Terrorism Risk Insurance Program, Federal Insurance Office, U.S. Department of the Treasury (June 2018), pages 11 and 51.

[9] Insurance Risk Management Institute's Glossary of Insurance and Risk Management Terms.

Similarly, Treasury has not addressed whether tribal captives are program participants and therefore required to respond to the annual data call.

Clarification of the instructions for cell and tribal captive insurance companies should drive up compliance with annual data calls and help Treasury, Congress, and others that rely on insights from these data calls to better understand the dominant role of captives in the Program.

Improvements to Data Collection for Captives

Treasury should expand the Type of Insurer choices to include "Pure Captive", "Individual Captive Cell", "Protected Cell", and "Other Captive".

D9-D27	Type of Insurer	Select from drop-down list the item that best describes the operations of the reporting insurer with respect to the Terrorism Risk Insurance Program (Captive, Offshore Licensed Captive, Risk Retention Group, or Alien Surplus Lines Insurer).

Treasury should include tribal domiciles as a selection option (unless tribal captives are excluded from the Program). It may be more useful to ask whether an entity is a tribal insurer through a different column since it appears some tribes may issue insurance licenses to non-tribal domiciled entities.

E9-E27	Domicile	Select the jurisdiction in which the insurer is domiciled.

Nuclear Biological, Chemical and Radiological Coverage

Treasury notes findings that the availability of NBCR coverage is limited in the conventional market. Accordingly, Treasury plans to require captives to report "whether coverage is being issued by the captive insurer that only provides coverage for nuclear, biological, chemical, and radiological (NBCR) exposures."

As structured, the data call will pick up instances where the limit of liability for the insurance is equal as between NBCR and conventional terrorism and where NBCR terrorism is excluded. The data call will not pick other significant differences among terrorism insurance structures:

Different Limits for Conventional and NBCR Terrorism – It is not uncommon for captive insurers to maintain different limits of liability for conventional and NBCR coverage. For example, Vornado Realty Trust's captive provides its corporate parent conventional terrorism insurance limits of $6 billion but NBCR limits of $5 billion. Accordingly, the captive is exposed (gross) to $6 billion of loss for its conventional terrorism program and $5 billion to NBCR.

The data call instructions appear to require the captive in this case to report $6 billion in Column K. Reporting the terrorism program of the captive in that manner completely obscures the difference between the conventional and NBCR coverage limits.

Different Reinsurance Structures for Conventional and NBCR Terrorism – It is not uncommon for captive insurers to maintain identical limits for conventional and NBCR coverage but acquire very different reinsurance programs for each. For example, Alexander's, Inc.'s captive has issued its parent a terrorism insurance policy with a $1.7 billion limit covering both conventional and NBCR terrorism. The captive has reinsured 100% of its exposure to conventional terrorism through private reinsurance and the program's backstop. The captive has no reinsurance for NBCR terrorism leaving the captive responsible for its $275,000 deductible and 20% co-share above that deductible. Accordingly, the captive is exposed (net) to $0 of loss for its conventional terrorism program and $335 million to NBCR.

The data call instructions appear to require the captive in this case to report $1.7 billion in Column K. Reporting the terrorism program of the captive in that manner completely obscures the difference between conventional and NBCR coverage, the role of private insurance, and the exposure shifted into the program.

K6-K28	Total 2021 TRIP-Eligible Limits of Liability (Terrorism Risk Coverage Provided and NBCR Risks Not Excluded)	For each corresponding TRIP-eligible line of insurance listed in Cells B6-B28, provide the insurer's total 2021 liability exposure under all 2021 policies where terrorism risk coverage was provided in connection with liability coverage **and** where the policy does not exclude coverage for nuclear, biological, chemical, and radiological (NBCR) risks. • Use the same instructions as identified above for reporting policy limits generally. • To the extent liability policies that provide coverage for terrorism risk **do not** contain exclusions for NBCR risks, the figures entered in K6-K28 will be the same as the figures reported in J6-J28. • To the extent liability policies that provide coverage for terrorism risk **do** contain exclusions for NBCR risks, the figures entered in K6-K28 will be a lesser subset of the amount reported in J6-J28. • To the extent any of the insurer's policies provide coverage for some, but not all, risks within the NBCR category, assume that policies provide full NBCR coverage.
L6-L28	Total 2021 TRIP-Eligible Limits of Liability (Terrorism Risk Coverage Provided Only for NBCR Risks)	For each corresponding TRIP-eligible line of insurance listed in Cells B6-B28, provide the insurer's total 2021 liability exposure under all 2021 policies where terrorism risk coverage was obtained and where the policy **only** provides coverage for nuclear, biological, chemical, and radiological (NBCR) risks. • Use the same instructions as identified above for reporting policy limits generally. To the extent the insurer's policies provide coverage for some, but not all, risks within the NBCR category, assume that policies provide coverage for NBCR risk only so long as that is the only coverage provided by the policy.

At least for this first year collecting data from captives on the different treatment between conventional and NBCR terrorism coverage, it is more practical to focus on standalone policies issued by captives. According to Treasury's latest report, the 540 responding captive insurance companies reported issuing 285 stand-alone terrorism insurance policies. Given that these 285 policies are responsible (under modeled scenarios reported by Treasury) for the a large proportion (and in some cases nearly all) backstop payouts, Treasury, Congress, and other stakeholders would have far more useful insights if the data call for captive insurers contained a section drawing out the details of those policies.

Such a section could ask of captive insurers:

For each standalone terrorism insurance policy report:

1. Line of business
2. Limit of liability for conventional terrorism events
3. Limit of liability for NBCR terrorism events
4. Exposure to conventional terrorism loss (net of reinsurance and backstop)
5. Exposure to NBCR terrorism loss (net of reinsurance and backstop)
6. Backstop deductible

Using the two examples above, the data call as currently proposed by Treasury would result in the following information:

	Insurer A	**Insurer B**
Line of Business	Property	Property
Limit of Liability – Conventional (NBCR Not Excluded)	$6 billion	$1.7 billion

Using these same two examples, the data call as suggested in these comments would result in the following information:

	Insurer A	**Insurer B**
Line of Business	Property	Property
Limit of Liability - Conventional	$6 billion	$1.7 billion
Limit of Liability - NBCR	$5 billion	$1.7 billion
Net Exposure – Conventional	$0	$0
Net Exposure – NBCR	$1 billion	$335 million
Backstop Deductible	$1.8 million	$275,000

This level of data would allow the aggregator to provide totals and averages for each data element thereby supporting richer and more meaningful insights about the role of captives in the program. Treasury could build on this base of information in subsequent data calls.