Government of the District of Columbia

Department of Insurance, Securities and Banking

Thomas E. Hampton
Commissioner

BULLETIN
06-IP-02-7/20

NOTE: THIS BULLETIN REPLACES BULLETIN 02-IP-014-12/18/02

TO: **ALL PROPERTY AND CASUALTY INSURERS WRITING COMMERCIAL LINES INSURANCE PRODUCTS**
ALL INSURERS ON THE NAIC QUARTERLY LISTING OF ALIEN INSURERS

RE: **FILING PROCEDURES FOR COMPLIANCE WITH THE PROVISIONS OF THE TERRORISM RISK INSURANCE EXTENSION ACT OF 2005**

FROM: **THOMAS E. HAMPTON, COMMISSIONER**

DATE: **JULY 20, 2006**

Background

On November 26, 2002, President Bush signed into law the "Terrorism Risk Insurance Act of 2002" ("Act" or "TRIA"). The Act established a temporary program under which the federal government provided a backstop for insurance losses caused by defined acts of terrorism and imposed certain obligations on insurers. On December 22, 2005, President Bush signed into law the "Terrorism Risk Insurance Extension Act of 2005" ("Extension Act") which extended the provisions of TRIA through 2007, with certain modifications.

Intent of this Bulletin

The intent of this bulletin is to advise you of certain provisions of the Act, as amended, that may require insurers to submit a filing in the District of Columbia of the disclosure notices, policy language, and applicable rates that are discussed in the Act. In many cases, insurers' current filings will be adequate to meet the needs of the District's businesses.

The Terrorism Risk Insurance Extension Act of 2005

Several provisions of the initial Act were changed by the Extension Act. Those changes include: deletion of commercial automobile, burglary and theft, surety, professional liability, and farm owners multiple peril coverages from eligible lines; increase in the individual company deductible for 2006 to 17.5 percent and the 2007 deductible to 20 percent; increase in the industry aggregate retention level from $15 billion to $25 billion in 2006 and to $27.5 billion in 2007; reduction in the federal share of compensation for covered losses from 90 percent to 85 percent for 2007; maintaining the $5 million threshold for certification of a terrorist act, while establishing a per event trigger for federal participation in aggregate insured losses of $50 million for losses occurring after March 31, 2006, and before January 1, 2007, and $100 million for losses occurring in the 2007 Program year; extension of existing litigation management provisions and codification of regulations requiring submission and approval of proposed settlements; and directing the President's Working Group on Financial Markets, in consultation with representatives of the National Association of Insurance Commissioners, the insurance and securities industries, and policyholders, to study the long-term availability and affordability of insurance for terrorism losses, including group life coverage and coverage for nuclear, biological, chemical, and radiological events and to submit a report of its findings to the House Financial Services and Senate Banking Committees by September 30, 2006.

Definitions of "Insurer," "Property and Casualty Insurance," and "Insured Loss"

Subsection 102(6) of the Act defines the term "insurer" for the purposes of the Act. Under the Act, the term "insurer" means any entity and affiliate thereof that:(A) is: (i) licensed or admitted to engage in the business of providing primary or excess insurance in any State; (ii) an eligible surplus line carrier listed on the Quarterly Listing of Alien Insurers of the NAIC, or any successor thereto; (iii) approved for the purpose of offering property and casualty insurance by a federal agency in connection with maritime, energy, or aviation activity; or (iv) a state residual market insurance entity or state workers' compensation fund; (B) receives direct earned premium for any type of commercial property and casualty insurance coverage; and (C) meets any other standards the Secretary of Treasury reasonably prescribes. The Secretary of Treasury may extend the Act to other classes or types of captive insurers and other self-insured arrangements by municipalities and other entities as well as to group life insurance.

Subsection 102(12) of the Act states that the term "property and casualty insurance": (A) means commercial lines of property and casualty insurance, including excess insurance, workers' compensation insurance, and directors and officers liability insurance; and (B) does not include crop or livestock insurance, private mortgage or title insurance, financial guaranty insurance issued by monoline financial guaranty insurance corporations, medical malpractice insurance, health or life insurance including group life, flood insurance provided under the National Flood Insurance Act, reinsurance or retrocessional reinsurance, commercial automobile insurance, burglary and theft

insurance, surety insurance, professional liability insurance, or farm owners multiple peril insurance.

All insurers, as defined in the Act in Section 102(6), are required by the Act to participate in the Terrorism Insurance Program (the Program) and make available coverage for insured losses in all of their covered property and casualty insurance policies. The term "insured loss" means any loss resulting from an act of terrorism (including an act of war, in the case of workers' compensation) that is covered by primary or excess property and casualty insurance issued by an insurer if such loss: (A) occurs within the United States; or (B) occurs to an air carrier (as described in section 40102 of title 49 of the United States Code), to 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. The Act also advises that insured loss excludes amounts awarded in a civil action that are attributable to punitive damages. The Act further requires insurers to make available property and casualty insurance coverage for insured losses that do not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism.

Certified and Non-Certified Losses

As a result of the definition of insured loss contained in the Act, there are essentially two distinct types of losses that a business might face that result from terrorism. One type of loss is the insured loss that is defined within and covered by the provisions of the Act. For convenience, we will adopt the moniker of "certified loss" to refer to losses resulting from certified acts of terrorism. The second type of loss that a business might face is one that does not fit within the definition of insured loss as described in the Act. For convenience, we will adopt the moniker of "non-certified loss" to refer to losses resulting from terrorism that is not certified. The most significant difference between these losses is that the certified losses will always involve a foreign person or foreign interest, while the non-certified losses may not.

The District of Columbia has allowed, and will continue to allow, some significant limitations that provide coverage for acts of terrorism under certain circumstances. For policies providing property insurance coverage the following limitations apply to non-certified losses:

- Exclusion for acts of terrorism only apply if the acts of terrorism result in industry-wide insured losses that exceed $25,000,000 for related incidents that occur within a 72-hour period;
- Exclusions for acts of terrorism are not subject to the limitations above if:
    - The act involves the use, release, or escape of nuclear materials or directly or indirectly results in nuclear reaction or radiation or radioactive contamination;
    - The act is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or

- Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the terrorism was to release such materials.

For policies providing liability insurance coverage the following limitations apply to non-certified losses:

- Exclusion for acts of terrorism only apply if the acts of terrorism result in industry-wide insured losses that exceed $25,000,000 for related incidents that occur within a 72-hour period; or
- Fifty or more persons sustain death or serious physical injury for related incidents that occur within a 72-hour period. For purposes of this provision serious physical injury means:
  - Physical injury that involves a substantial risk of death;
  - Protracted and obvious physical disfigurement; or
  - Protracted loss of or impairment of the function of a bodily member or organ.
- Exclusions for acts of terrorism are not subject to the limitations above if:
  - The act involves the use, release, or escape of nuclear materials or directly or indirectly results in nuclear reaction or radiation or radioactive contamination;
  - The act is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or
  - Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the terrorism was to release such materials.

Definition of "Act of Terrorism"

Section 102(1) defines the term "act of terrorism" for the purposes of the Act. Section 102(1)(A) states that the term "act of terrorism" means any act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State, and the Attorney General of the United States: (i) to be an act of terrorism; (ii) to be a violent act or an act that is dangerous to: (I) human life: (II) property; or (III) infrastructure; (iii) to have resulted in damage within the United States, or outside the United States in the case of: (I) an air carrier or vessel described in the definition of "insured loss"; or (II) the premises of a United States mission; and (iv) to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, 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. Section 102(1)(B) states that no act shall be certified by the Secretary as an act of terrorism if: (i) the act is committed as part of the course of a war declared by the Congress (except that this clause does not apply with respect to any coverage for workers' compensation); or (ii) property and casualty insurance losses resulting from the act, in the aggregate, do not exceed $5,000,000. Section 102(1)(C) and (D) specify that the determinations are final and not

subject to judicial review and that the Secretary of the Treasury cannot delegate the determination to anyone.

The District of Columbia will not allow exclusions of coverage for acts of terrorism that fail to be certified losses solely because they fall below the $5,000,000 threshold in Section 102(1)(B) on any policy that provides coverage for certified losses. Insurers required to file policy forms may submit language containing coverage limitations for certified losses that exceed $100 billion.

The Act includes a definition of acts of terrorism that is used within this bulletin to mean certified losses. Policies subject to policy form filing requirements should also define what constitutes an act of terrorism for non-certified losses. For non-certified losses, the District of Columbia would accept the following definition, or one that is more liberal to policyholders:

> The phrase "non-certified act of terrorism" means a violent act or an act that is dangerous to human life, property, or infrastructure that is committed by an individual or individuals and that appears to be part of an effort to coerce a civilian population or to influence the policy or affect the conduct of any government by coercion, and the act is not certified as a terrorist act pursuant to the federal Terrorism Risk Insurance Act of 2002.

Submission of Rates, Policy Form Language, and Disclosure Notices

If an insurer relies on an advisory organization to file loss costs and related rating systems on its behalf, no rate filing is required unless an insurer plans to use a different loss cost multiplier than is currently on file for coverage for certified losses. The rate filing should provide sufficient information for the reviewer to determine what price would be charged to a business seeking to cover certified losses. The District of Columbia will accept filings that contain a specified percentage of premium to provide for coverage for certified losses. Insurers may also choose to use rating plans that take into account other factors such as geography, building profile, proximity to target risks, and other reasonable rating factors. The insurer should state in the filing the basis that it has for selection of the rates and rating systems that it chooses to apply. The supporting documentation should be sufficient for the reviewer to determine if the rates are excessive, inadequate, or unfairly discriminatory.

Insurers subject to policy form regulation must submit the policy language that they intend to use in the District of Columbia. The policy should define the terms "acts of terrorism" and both "certified losses" and "non-certified losses" in ways that are consistent with the Act, District law, and the guidance provided in this bulletin. The definitions, terms, and conditions should be complete and accurately describe the coverage that will be provided in the policy. Insurers may conclude that current filings are in compliance with the Act, District law, and the requirements of this bulletin.

The Commissioner requests that the disclosure notices be filed for informational purposes, along with the policy forms, rates, and rating systems as they are an integral part of the process for notification of policyholders in the District of Columbia and should be clear and not misleading to business owners in the District of Columbia. The disclosures should comply with the requirements of the Act and should be consistent with the policy language and rates filed by the insurer.

Effect on Workers' Compensation Insurance Coverage

Treatment of workers' compensation is slightly different than for other property and casualty insurance coverages. First, Section 102(1)(B)(i) of the Act provides that the federal Program will share the risk of loss for workers' compensation for acts of war in addition to acts of terrorism. This treatment occurs because of the statutory nature of the workers' compensation program, which does not provide an exclusion for losses resulting from an act of war. Under District law there is no exclusion for workers' compensation losses resulting from an act of war. There is no provision in the Act that would preempt the compulsory coverage aspects of workers' compensation insurance policies. In other respects, however, workers' compensation coverage is treated under the Act as any other covered line of insurance. Therefore, the notice requirements of Section 103(b)(2) and the mandatory "make available" requirements of Section 103(c) apply to workers' compensation policies. In this connection, workers' compensation insurers are required to separately state the amount of the premium being charged a policyholder for acts of terrorism, as defined in the Act. As the District's workers' compensation law does not have any exclusions for terrorism or war, neither insurers nor policyholders may use the Act's procedures to create such an exclusion. With regard to the filing and approval of rates and forms, workers' compensation insurers are also covered by the Act.

Effective Date

This bulletin shall be effective immediately and shall sunset on December 31, 2007, unless Congress extends the duration of the Act.