

## **PROCEDURES FOR COMPLIANCE WITH THE PROVISIONS OF THE TERRORISM RISK INSURANCE EXTENSION ACT OF 2005**

### **This Bulletin Replaces Nevada Bulletin 04-004**

#### **Background**

Congress enacted and the President signed into law in November 2002, the Terrorism Risk Insurance Act of 2002. This federal law provides a federal backstop for defined acts of terrorism and imposes certain obligations on insurers. The Act has now been extended for an additional two years through December 31, 2007 with the enactment of the Terrorism Risk Insurance Extension Act of 2005.

The intent of this bulletin is to advise you of certain provisions of the Terrorism Risk Insurance Act of 2002 (the Act), as extended, that may require insurers to submit a filing in Nevada of the disclosure notices, policy language and the applicable rates that are discussed in the Act. In many cases, insurers' current filings will be adequate to meet the needs of the nation's business.

Several provisions of the initial Act have changed in the extension. Those changes include the following: deletion of commercial auto, burglary and theft, surety, professional liability, and farm owners multiperil 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 to study long-term availability and affordability of coverage for terrorism losses, including group life and nuclear, biological, chemical and radiological events. The President's Working Group on Financial Markets, in consultation with representatives of the National Association of Insurance Commissioners (NAIC), the insurance and securities industries and policyholders, is directed to submit a report of its findings to the House Financial Services and Senate Banking Committees by September 30, 2006.

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 commercial lines policies. 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. The Act also advises that insured loss excludes amounts awarded in a civil action that are attributable to punitive damages.

Further, the Act 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 are 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.

Nevada 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 an *act of terrorism* for purposes of the Act. Section 102(1)(B) states, “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 shall 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.”

Nevada 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*, Nevada will 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. 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**

Pursuant to NRS 686B.030, commercial rates are not regulated with the exception of workers’ compensation, medical malpractice and title insurance. Therefore, the filing of rates for terrorism risk insurance for commercial lines is not required

Insurers must submit the policy language that they intend to use in this state. The policy should define *acts of terrorism* and both *certified* and *non-certified losses* in ways that are consistent with the Act, Nevada 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, Nevada law and the requirements of this bulletin.

Commissioner Molasky-Arman requests that disclosure notices be filed with policy forms, because they are an integral part of the process for notification of policyholders in this state. The notices should be clear and not misleading to business owners in this state. The disclosures should comply with the requirements of the Act and consistent with the policy language filed by the insurer. If an insurer relies on an advisory organization to file forms, no filing is necessary unless the form has been altered.

### **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) 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 Nevada 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 estimated portion of the premium being charged a policyholder for acts of terrorism, as defined in the Act. Since Nevada 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 of rates, insurers must comply with the requirements set forth in Nevada Bulletin 03-002. Insurers must file their forms for approval by the Commissioner unless they're using a form that has been filed by the National Council on Compensation Insurance, Inc. (NCCI) and was approved by this office.

**Effective Date**

This bulletin shall take immediate effect and shall expire on December 31, 2007, unless Congress extends the duration of the Act.

Nevada Bulletin 04-004 is withdrawn.

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Commissioner of Insurance