

Terrorism Risk Insurance Program Reauthorization Extension Act of 2007

(Effective December 31, 2007)

The purpose of this bulletin is to advise Ohio insurers of certain provisions of the Terrorism Risk Insurance Program Reauthorization Extension Act of 2007, that may require insurers to submit a filing in this state of the policy language and the applicable rates and rules as a result of the original 2002 Act, the Extension Act of 2005 and this Extension Act of 2007.

Background

The United States Congress enacted and the President signed into law in November 2002, the Terrorism Risk Insurance Act of 2002 (The Act or TRIA). This federal law provides a federal backstop for defined acts of terrorism and imposes certain obligations on insurers. The Act was extended for a two-year period (Extension Act of 2005) covering program years 2006 and 2007. The Act has now been extended for an additional seven years through December 31, 2014, with the enactment of the Terrorism Risk Insurance Program Reauthorization Extension Act of 2007.

Several provisions of the initial Act have changed in the Extension Act of 2007. Those changes include:

- Revising the definition of a certified act of terrorism to eliminate the requirement that the individual(s) are acting on behalf of any foreign person or foreign interest.
- Extending the program through December 31, 2014.
- Requiring clear and conspicuous notice to policyholders of the existence of the \$100,000,000,000 cap.
- Fixing the Insurer Deductible at 20% of an insurer's direct earned premium, and the federal share of compensation at 85% of insured losses that exceed insurer deductibles.
- Fixing the program trigger at \$100,000,000 for all additional program years.
- Requiring the U.S. Treasury to promulgate regulations for determining pro-rata shares of insured losses under the program when insured losses exceed \$100,000,000,000.
- Requiring the Comptroller General to study the availability and affordability of insurance coverage for losses caused by terrorist attacks involving nuclear, biological, chemical, or radiological materials and issue a report not later than one year after the enactment of the Terrorism Risk Insurance Program Reauthorization Extension Act of 2007.
- Requiring the Comptroller General to determine whether there are specific markets in the United States where there are unique capacity constraints on the amount of terrorism insurance available and issue a report not later than 180 days after the enactment of the Terrorism Risk Insurance Program Reauthorization Extension Act of 2007.
- Requiring the President's Working Group on Financial Markets to continue an ongoing study of the long-term availability and affordability of terrorism risk insurance.
- Accelerating the timing of the mandatory recoupment of the federal share through policyholders surcharges.

Other terms of The Act, as amended by the Terrorism Risk Insurance Extension Act of 2005, remain unchanged.

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 Ohio Department of Insurance (The Department) has allowed, and will continue to allow, some significant limitations that provide coverage for acts of terrorism under certain circumstances for commercial lines policies. 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 that 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 that 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

One of the changes made to TRIA with the enactment of the Terrorism Risk Insurance Program Reauthorization Act of 2007 was a revision to the definition of an act of terrorism that eliminated the requirement that an individual or individuals that carry out an act of terrorism be acting on behalf of a foreign person or foreign interest. In short, this means that acts formerly referred to as “domestic” terrorism may now be certified as an act of terrorism under TRIA.

Section 102(1) defines an *act of terrorism* for purposes of The Act. Please note that the unmodified reference to “the Secretary” refers to the Secretary of the Treasury. Revised Section 102(1)(A) states, “The term “act of terrorism” means any act that is certified by the Secretary, 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 paragraph (5)(B); or (II) the premises of a United States mission; and (iv) to have been committed by an individual or individuals, 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, “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.” 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 Act, as amended, contains in Section 103(1)(B) a program trigger of \$100 million in aggregate industry insured losses resulting from a certified act of terrorism before federal reimbursement is triggered.

The Department 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 acts of terrorism that fail to be *certified*. Insurers required to file policy forms may submit language containing coverage limitations for *certified losses* that exceed \$100 billion in the aggregate.

Submission of Rates, Rules and Policy Form Language

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*. Insurers that develop and file rates independently may choose to maintain their currently filed rates or submit a new filing. 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 Department 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 this state. The policy should define *acts of terrorism* in ways that are consistent with The Act, as amended,

state 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, as amended, state law and the requirements of this bulletin. However, if policy forms make a distinction between acts of a foreign person or foreign interest and a domestic person or domestic interest, it is likely that a filing is required.

Another change introduced in the Terrorism Risk Insurance Program Reauthorization Act of 2007 is a new disclosure requirement for any policy issued after the enactment of The Act. Specifically, in addition to other disclosure requirements previously contained in TRIA, insurers must now also provide clear and conspicuous disclosure to the policyholder of the existence of the \$100,000,000,000 cap under Section 103(e)(2), at the time of offer, purchase and renewal of the policy. Disclosure notices mandated by the Act are NOT required to be filed with The Department.

Given that the provisions of the Terrorism Risk Insurance Program Reauthorization Act of 2007 are already in effect, and insurers and advisory organizations must accelerate filing activity in order to achieve compliance with the revised provisions of TRIA, The Department will suspend its "Prior Approval" and "File and Use" filing procedures found under ORC 3935.04 and 3937.03, respectively, until April 1, 2008. This suspension applies only to rate, rule and forms filings pertaining to "certified" and "non-certified" terrorism losses for commercial property and casualty lines of business (as defined under The Act).

The Department will process these filings on a "Use and File" basis as detailed below:

- Rate, rule and form filings for "certified" and "non-certified" terrorism losses shall be made within 30 days after they are implemented.
- Disclosure notices mandated by The Act are NOT required to be filed.
- The normal procedure for insurer adoption of advisory organization filings remains in effect. Therefore, if an insurer has authorized an advisory organization to file loss costs, rules, or forms on its behalf and chooses to adopt those items exactly as filed by the advisory organization and with the same effective date, NO FILING is required by the insurers.

This temporary "Use and File" filing process shall remain in place until April 1, 2008. If an insurer does not want to take advantage of the "Use and File" filing process (or cannot file prior to April 1, 2008) then it must submit a filing subject to filing procedures found under ORC 3935.04 and 3937.03.

Surplus lines insurers are not required to file rates, rules or forms.

Effective Date

This bulletin shall take effect on December 31, 2007.



Mary Jo Hudson
Director of Insurance