



OFFICE OF  
INSURANCE COMMISSIONER

January 21, 2006

**IMPORTANT: STATE OF WASHINGTON NOTICE TO ALL PROPERTY AND CASUALTY COMPANIES**

- 1. WRITING COMMERCIAL LINES INSURANCE PRODUCTS; AND**
- 2. INCLUDED ON THE NAIC QUARTERLY LISTING OF ALIEN INSURERS**

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

**Background**

The Terrorism Risk Insurance Act of 2002 (the Act) was adopted by Congress to provide a temporary federal shared loss program for incurred losses resulting from certain acts of terrorism to protect American businesses by minimizing market disruptions and ensuring the widespread availability and affordability of property and casualty insurance for terrorism risk. 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. This notice supplements the information provided in our Notice of December 4, 2002, which was revised on December 23, 2002.

**Important Changes to the Act**

Several parts of the initial Act have been amended by Congress under the Terrorism Risk Insurance Extension Act of 2005 (the extension Act). The extension Act:

- Deletes commercial auto, burglary and theft, surety, professional liability (except D&O), and farm owners multi-peril coverages from eligible lines.
- Increases the individual company deductible to 17.5 percent in 2006 and 20 percent in 2007.
- Increases industry aggregate retention level from \$15 billion to \$25 billion in 2006 and to \$27.5 billion in 2007.
- Reduces the federal share of compensation for covered losses from 90 percent to 85 percent for 2007.

- Retains the \$5 million threshold for certification of a terrorist act, while establishing a per event trigger for federal participation in aggregate insured losses. These participation triggers are \$50 million for losses occurring after March 31, 2006 through the remainder of 2006 and \$100 million for losses occurring in 2007.
- Extends existing litigation management provisions and codification of regulations requiring submission and approval of proposed settlements.

Congress also directed the President's Working Group on Financial Markets, in consultation with representatives of the NAIC, the insurance and securities industries and policyholders, 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 must submit a report of its findings to the House Financial Services and Senate Banking Committees by September 30, 2006.

The intent of this notice is to describe certain provisions of the extension Act that may require insurers to file 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.

### **Definition of Property and Casualty Insurance**

Subsection 102(12)A of the extension Act amends the definition of "property and casualty insurance" to mean commercial property and casualty insurance, including excess insurance, workers' compensation insurance, and directors and officers liability insurance.

Subsection 102(12)B of the extension Act explicitly excludes these lines of commercial insurance from the definition of property and casualty insurance:

- Crop or livestock insurance
- Private mortgage or title insurance
- Financial guaranty insurance issued by mono-line financial guaranty insurance corporations
- Medical malpractice
- 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 (except directors and officers)
- Farm owners multiple peril insurance

All insurers, as defined in the Act in Section 102 (6), must participate in the Terrorism Insurance Program (the Program) and make available coverage for *insured losses* in all of their covered commercial lines policies.

## **Definition of “Insured Loss”**

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 occurs:

- Within the United States; or
- In an air carrier (as described in section 40102 of title 49, 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.

As a result of the definition of insured loss contained in the Act, there are two distinct types of losses that a business might face that result from terrorism:

- **Certified Loss:** An *insured loss* defined within and covered by the provisions of the Act (losses that result from a certified act of terrorism). *Certified losses* will always involve a foreign person or foreign interest.
- **Non-Certified Loss:** A “non-certified loss” means losses resulting from terrorism that is not certified. *Non-certified losses* may not always involve a foreign person or foreign interest.

## **Acceptable Coverage Limitations**

The State of Washington 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*:

1. Exclusion for acts of terrorism applies only 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.
2. Exclusions for acts of terrorism are not subject to the limitations in 1., 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*:

1. Exclusion for acts of terrorism applies only 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
2. 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.
3. Exclusions for acts of terrorism are not subject to the limitations in 1. or 2., 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.

### **Required Coverage Provisions**

- **Washington is a Standard Fire Policy state.** The requirements for fire coverage are established in Chapter 284-20 WAC and must meet or exceed the provisions of the Standard Fire Policy. These legal requirements cannot be waived, and are not preempted by the Act. Thus, a business cannot voluntarily waive this mandated coverage.
- **“Concurrent causation” exclusions are not permitted in the State of Washington.** If an insurer covers the “efficient proximate cause” of the loss, the insurer may not exclude coverage for later events, even if they are the “causes-in-fact” of the loss. The policy form must be drafted or amended in a manner consistent with ISO form IL0983 05 04.

### **Unacceptable Exclusions**

The State of Washington 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*, this state 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

- Is not certified as a terrorist act pursuant to the Federal Terrorism Risk Insurance Act of 2002, as extended by the Terrorism Risk Insurance Extension Act of 2005.

### **Rate, Rule and Form Filings**

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*. This state 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 file any forms they intend to use. The policy must cover *acts of terrorism* and both *certified losses* and *non-certified losses* in ways that are consistent with the Act, state law and the guidance provided in this notice.

The State of Washington has “use and file” laws that apply to commercial lines rates, rules and forms (except surety forms)<sup>1</sup>. This means that new rates, rules and forms subject to the Act can be used before they are filed with the Office of Insurance Commissioner (OIC). Filings must be received at the OIC within 30 days of the effective date of the first policy that includes the rate, rule or form. The filings remain subject to review under current applicable state law and must be corrected if disapproved. If rates, rules, or forms are filed on behalf of an insurer by a rating organization or advisory organization (bureau), often the insurer must file only if it wants to deviate or not adopt the bureau filing. Independent programs will require specific filings by each insurer.

Due to the existence of “use and file” filing laws, the EXPEDITED TRANSMITTAL DOCUMENT is not applicable in the State of Washington. Filings must be submitted in the normal way with the exception of inserting the key word “TERRORISM” in the filing description area of the transmittal form. This word will help identify filings for OIC internal priority procedures. See the OIC webpage for filing procedures and forms at: [http://www.insurance.wa.gov/companies/rates\\_forms/main\\_property\\_casualty.shtml](http://www.insurance.wa.gov/companies/rates_forms/main_property_casualty.shtml).

### **Disclosure Notices**

Insurers are not required to file Disclosure Notices in the State of Washington unless they are made a part of the policy. Any disclosures should comply with the requirements of the Act and should be consistent with the policy language and rates filed by the insurer.

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<sup>1</sup> Surety rates and rules are prior approval; surety forms are not subject to filing requirements.