

Overview of the Terrorism Risk Insurance Act

By Lorelie S. Masters and Katherine A. Fallow

On November 26, 2002, President Bush signed into law a program authorizing the federal government to cover a substantial portion of losses caused by a terrorist attack. The Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 covers up to \$100 billion in total insured losses. The Act also creates certain requirements for insurers and is likely to affect upcoming insurance renewals and premium rates. Policyholders may also need to address the effect that the Act has on insurance policies and premiums.

As directed in the Act, the United States Department of the Treasury has published interim regulations governing the Act (available at www.treasury.gov/trip). The Act also contemplates the participation of the National Association of Insurance Commissioners ("NAIC"), and NAIC has issued model bulletins regarding the Act's requirements (available at www.naic.org/pressroom/releases/EmergencyResponse.htm).

Section 101 of the Act states the "Congressional Findings and Purpose," and declares that one of the Act's primary purposes is to "protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk . . ." Act, § 101(b)(1). The Act negates commercial terrorism exclusions approved by various state insurance commissions prior to enactment but otherwise generally preserves state regulatory authority over insurance. The Act also requires insurance companies to make terrorism coverage "available" in order to qualify for compensation under the Act.

Key provisions of the Act include:

- Insurers must "make available" coverage for losses caused by a terrorist act (as defined by the Act and certified by the Secretary of Treasury, the Secretary of State, and the Attorney General) to be eligible for compensation under the program. § 103(c)(1). The Act requires that such terrorism insurance must "not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism." § 103(c)(1).
- According to interim guidelines issued by the Treasury Department, "the 'make available' requirement does not mean that insurers must make available coverage for all types of risks. For example, if an insurer does not cover all types of risks, either because the insurer is outside of direct State regulatory oversight or a State permits exclusions for certain types of losses (e.g., nuclear, biological, or chemical events) an insurer would not be required to make such coverage available." 12/3/02 Interim Guidance at 5.
- The Act does not cover purely domestic acts of terrorism or losses caused outside the United States (with some limited exceptions). The Act applies only to losses occurring within the United States caused by a terrorist act that is committed "on behalf of any foreign person or foreign interest." §§ 102(5), 102(1)(A)(iv).
- The Act invalidates existing terrorism exclusions in commercial insurance agreements, and preempts previous state insurance commission approvals of such exclusions. § 105(a) & (b). The Act otherwise preserves traditional state authority over insurance regulation, including the power to disapprove rates. § 106.

- An insurer may reinstate a preexisting terrorism exclusion only if the policyholder provides a written statement authorizing such reinstatement, or if the policyholder fails to pay the increased premium for terrorism coverage after receiving at least 30 days' notice of the premium amount and the policyholder's rights with respect to the terrorism exclusion. § 105(c).
- Although the Act allows for reinstatement of preexisting terrorism exclusions upon written consent of the policyholder, such waivers would not apply in "standard fire policy" states to the extent the exclusion precluded coverage for loss due to fire caused by an act of terrorism. See NAIC Model Bulletin at 7.
- With regard both to existing and future insurance agreements, the Act requires insurers to provide "clear and conspicuous" notice of the premium being charged for terrorism coverage, and the federal government's share of compensation for losses caused by a terrorist act. Notice must be given within 90 days of the law's enactment for existing policies, and "at the time of offer, purchase, and renewal" of policies issued after November 26, 2002. § 103(b)(2).
- All insurers covered by the Act must participate in the program. Insurers covered by the Act include all entities licensed to provide primary or excess insurance in any state or the District of Columbia; eligible surplus insurers listed on the NAIC's list of alien insurers; insurers approved by any federal agency to offer insurance in connection with maritime, energy, or aviation activity; and state residual market insurance agencies and state workers' compensation funds. § 102(6); § 103(a)(3).

In one body of legislation the Terrorism Risk Insurance Act of 2002 creates federal assistance for insurers (and policyholders) as well as imposing certain obligations.

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