

## **Terrorism Risk Insurance Program Reauthorization Act of 2007**

**COMMONWEALTH OF KENTUCKY  
OFFICE OF INSURANCE  
FRANKFORT, KENTUCKY**

**ADVISORY OPINION  
2008-02**

**The following Advisory Opinion is to advise the reader of the current position of the Kentucky Office of Insurance (the "Office") on the specified issue. The Advisory Opinion is not legally binding on either the Office or the reader.**

TO: ALL PROPERTY & CASUALTY INSURERS WRITING COMMERCIAL LINES INSURANCE PRODUCES, and ALL INSURERS ON THE NAIC QUARTERLY LISTING OF ALIEN INSURERS

FROM: KENTUCKY OFFICE OF INSURANCE

RE: TERRORISM RISK INSURANCE PROGRAM REAUTHORIZATION ACT OF 2007

DATE: JANUARY 31, 2008

\* \* \* \* \*

### **Overview**

The Terrorism Risk Insurance Act of 2002 (the Act)(TRIA), 15 U.S.C. 6701 was enacted by Congress and the President signed it into law in November 2002, to provide a temporary federal backstop for incurred losses resulting from defined acts of terrorism, to protect American businesses by minimizing market disruptions, and to ensure widespread availability and affordability of property and casualty insurance for terrorism risks. This federal law provided a federal backstop for defined acts of terrorism and imposed certain obligations on insurers. See Advisory Opinion 2002-7.

The Terrorism Risk Insurance Extension Act of 2005 (TRIEA), signed by the President on December 22, 2005, extended TRIA for an additional two years - through December 31, 2007. See Advisory Opinion 2006-1.

TRIA 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 (TRIPRA). Provisions of the Act have changed with the 2007 extension as well. Those changes include:

- Revising the definition of a certified act of terrorism to eliminate the requirement that the individual(s) acted on behalf of any foreign person or foreign interest.
- 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 by December 26, 2008.
- 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 by June 23, 2008.
- 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.

The intent of this Advisory Opinion is to advise insurers of certain provisions of the Act, as extended, that may require insurers to submit a filing in Kentucky of the disclosure notices, policy language and the applicable rates and rules as a result of TRIPRA.

### **Definition of Act of Terrorism**

One of the changes made to TRIA with the enactment of TRIPRA was a revision to the definition of an act of terrorism that eliminated the requirement that an individual or individuals who carried out an act of terrorism acted 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. The 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 Terrorism Risk Insurance 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.

This state 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, Policy Form Language and Disclosure Notices**

Insurers subject to policy form regulation must submit the policy language they intend to use in this state. KRS 304.14-120. 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 Advisory Opinion. 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 Advisory Opinion. However, if existing policy forms make a distinction between acts of a foreign person or foreign interest and a domestic person or domestic interest, it is likely a form filing is required.

Form revisions may trigger companion rule filings pursuant to KRS 304.13-051(4) and KRS 304.13-011(2). The rule filing should provide sufficient information for the reviewer to determine what price would be charged to a business seeking to cover certified losses. Rule filings are required for all lines of business.

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 cap under Section 103(e)(2), at the time of offer, purchase and renewal of the policy.

If the disclosure notice is to be made a part of the policy, it is a policy form and must be filed. KRS 304.14-120.

Otherwise, Kentucky has not required disclosure notices be filed along with the policy forms, rates and rating systems (rules); but as disclosure notices 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 should be consistent with the policy language and rates filed by the insurer.

Kentucky does not require rate filings by insurers for most commercial lines of business included in TRIA. Rate filings are only required for Workers' Compensation, Medical Malpractice, Credit Insurance of any and every nature other than Credit Life and Credit Health, and Automobile Service Contracts issued pursuant to KRS 304.5-070(1)(p) and 806 KAR 5:050. As noted above, rule filings are required for all lines of business pursuant to KRS 304.13-051(4) and KRS 304.13-011(2). Rule filings must provide sufficient information for the reviewer to determine the rate or premium applicable.

All filings should follow the procedures set forth in 806 KAR 13:150 and 806 KAR 14:006 and in the checklists available on our Web site, <http://insurance.ky.gov/kentucky>. We encourage filers to take advantage of the SERFF system for submitting filings.

Given that the provisions of the TRIPRA are already in effect, and insurers and advisory organizations must accelerate filing activity in order to achieve compliance with the revised provisions of TRIA, Kentucky will permit insurers and advisory organizations to place new rates, policy forms and disclosure notices into use effective December 26, 2007 as long as the required filings are submitted by March 31, 2008. If an insurer does not submit filings prior to March 31, 2008, then it must submit normal filings, subject to regular filing requirements, including prior approval or use & file timeframes.

### **Effective Date**

This Advisory Opinion shall take immediate effect and shall expire on December 31, 2014, unless Congress extends the duration of the Act. The filing procedures discussed in this bulletin shall expire on March 31, 2008. (See Exhibit A to this Advisory Opinion)

This Advisory Opinion, the statutes, administrative regulations, and forms are available on the Kentucky Office of Insurance website, <http://insurance.ky.gov/kentucky>.

Any questions should be directed to Robin Coombs, Assistant Director, Property & Casualty Division at (502) 564-3630 x 4294 or [Robin.Coombs@ky.gov](mailto:Robin.Coombs@ky.gov).

s/ Timothy J. LeDonne

Timothy J. LeDonne, Acting Executive Director  
Kentucky Office of Insurance

On this 31st day of January 2008.

**COMMONWEALTH OF KENTUCKY  
OFFICE OF INSURANCE  
FRANKFORT, KENTUCKY**

### **IN THE MATTER OF:**

Extension of the timeframe for the filing and prior approval of forms and rates for insurers pursuant to the Terrorism Risk Insurance Program Reauthorization Extension Act of 2007.

### **ORDER**

WHEREAS, KRS 304.13-051 and 806 KAR 13:150 require every insurer to file with the executive director rates and supplementary information to be used in this state for commercial risks designated by the executive director not later than 15 days after the first use of the rates;

WHEREAS, KRS 304.13-051 and 806 KAR 13:150 require every insurer to file with the executive director all rating manuals and underwriting rules that it uses in this state not later than 15 days after the manual and rules become effective;

WHEREAS, KRS 304.14-120 and 806 KAR 14:006 provide that no basic insurance policy or printed rider or endorsement form shall be delivered or issued for delivery in this state unless the form has been filed with and approved by the executive director;

WHEREAS, the Terrorism Risk Insurance Program Reauthorization Extension Act of 2007 (TRIPREA) was signed into law by President George Bush on December 26, 2007, extending the Terrorism Risk Insurance Act of 2007 for an additional seven years through December 31, 2014;

WHEREAS, TRIPREA requires insurers to comply with the terms of the TRIPREA beginning December 26, 2007.

WHEREAS, TRIPREA may trigger necessary form, manual, rule, and rate filings with the state of Kentucky pursuant to KRS 304.13-051, KRS 304.14-120, 806 KAR 13:150, and 806 KAR 14:006;

WHEREAS, KRS 304.14-120(4) allows the Kentucky Office of Insurance to extend the timeframe for the filing and prior approval of policies and forms;

WHEREAS, the effective date of TRIPREA makes it impracticable for insurers to comply with the state's deadlines and prior approval filing requirements imposed upon the insurers;

NOW THEREFORE, the executive director being duly and sufficiently advised, it is hereby ORDERED, the prior approval requirements for policies and forms pursuant to KRS 304.14-120, as well as the filing requirement deadlines for rates, manuals and rules pursuant to KRS 304.13-051 are hereby suspended for the sole purpose of complying with the provisions of TRIPREA. All policies, forms, rates, manuals, and rules amended to comply with TRIPREA shall be filed with the Office of Insurance no later than March 31, 2008. The review of the filings by the Office shall be in accordance with the procedures outlined in KRS 304.13-051 and KRS 304.14-120.

Done and effective this 25th day of January, 2008.

s/ Timothy J. LeDonne \_\_\_\_\_

Timothy J. LeDonne, Acting Executive Director  
Kentucky Office of Insurance

#### Certificate of Service

This is to certify that the original of the foregoing Order was hand-delivered to:

Tracy Bertram, Director  
Property and Casualty Division  
Kentucky Office of Insurance

215 W. Main Street  
Frankfort, Kentucky 40601

KOI Custodian of Record  
215 W. Main Street  
Frankfort, Kentucky 40601

and to certify that a true copy of the foregoing Order was hand-delivered to:

Insurance Legal Division Attorney  
215 W. Main Street  
Frankfort, Kentucky 40601

on this 25th day of January, 2008.

s/ Kimberly H. Whitley

Kimberly H. Whitley, Counsel  
Kentucky Office of Insurance  
215 West Main Street  
P.O. Box 517  
Frankfort, Kentucky 40602  
Telephone: (502) 564-6032  
Fax: (502) 564-1456