

March 25, 2004

Dear Mr. B:

This letter is in response to your request for an interpretation under the Terrorism Risk Insurance Act of 2002 (the “Act”)<sup>1</sup> and Treasury’s regulations implementing the Act to the *Terrorism Risk Insurance Act Endorsement* to your excess workers’ compensation policies.<sup>2</sup> Specifically, you ask whether your company’s liability under the Act would be limited by Section 103(e)(2)(A)(ii) in the event an act of war is certified as an act of terrorism for purposes of workers’ compensation losses. In our view, Section 103(e)(2)(A)(ii) of the Act would apply and thus would limit Employers Insurance Company’s (EIC’s) liability for insured losses under Part One coverage provided by the policies identified below.

### **Background**

EIC provides excess insurance coverage to self-insured companies and self-insured groups. These excess policies are not traditional workers’ compensation insurance policies. Instead, these are stop loss-type policies issued to employers to cover the employers’ excess losses above a certain retention point for employee liability exposures, including liabilities under their self-funded workers’ compensation programs. EIC provides this coverage through three policy forms (hereinafter “the Policies”).<sup>3</sup> Coverage under Part One of the Policies applies to losses paid by employers because of liability imposed upon the employers by state workers’ compensations laws. Part Two of the Policies applies to other, non-workers’ compensation, employer liabilities resulting from employee injuries.

### **Acts of War Certified as Acts of Terrorism**

Section 103(e)(2)(A) of the Act provides, in part, that if the aggregate insured losses under the Act exceed \$100 billion during a Program Year, no insurer that has met its insurer deductible is liable for the payment of any portion of that amount that exceeds \$100 billion.

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<sup>1</sup> Public Law 107-297, 116 Stat. 2322, 15 U.S.C. §6701, *note*.

<sup>2</sup> This response is being issued pursuant to 31 C.F.R. §50.9, which sets forth a procedure whereby persons actually or potentially affected by the Act or regulations may request an interpretation.

<sup>3</sup> The EIC policies are titled: (1) *Specific Excess & Aggregate Excess Workers’ Compensation and Employers Liability Indemnity Policy*; (2) *Aggregate Excess Workers’ Compensation and Employers Liability Indemnity Policy*; and (3) *Specific Excess Workers’ Compensation and Employers Liability Indemnity Policy*.

“Insured loss” is defined in Section 102(5) of the Act as “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 to certain air carriers or vessels, or at the premises of a U.S. mission. Under Section 102(1)(B) of the Act, the Secretary of the Treasury cannot certify an act as an “act of terrorism” if the act is committed as part of the course of a war declared by the Congress.<sup>4</sup> This limitation, however, does not apply “with respect to *any coverage* for workers’ compensation.”<sup>5</sup>

### Conclusion

In Treasury’s view, coverage under Part One of the Policies issued by EIC qualifies as coverage for workers’ compensation losses, notwithstanding that the Policies are excess liability policies rather than traditional workers’ compensation policies. Accordingly, in the event that an act of war is certified by the Secretary as an act of terrorism for purposes of workers’ compensation, Section 103(e)(2)(A)(ii) of the Act would limit EIC’s liabilities under Part One of the Policies if the aggregate insured losses exceed \$100 billion during a Program Year and EIC has met its insurer deductible.

Thank you for your inquiry. For additional information or if you have any specific questions, please call the Program office at 202-622-6770.

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This response addresses the application of the Act and regulations to the specific situation set forth in your request, as you have represented the facts to Treasury. If there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this response, then the requestor may not rely on that conclusion generally or as support for any proposed or subsequent activity. This response is provided by the Terrorism Risk Insurance Program as a means of stating its current interpretation of the Act and regulations. The Program may revise or revoke this interpretation upon its own initiative or upon the enactment of amendments to the Act or regulations.

Sincerely,

Jeffrey S. Bragg  
Executive Director

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<sup>4</sup> See generally 68 FR 41250, 41252 (Jul. 11, 2003).

<sup>5</sup> Emphasis supplied.