

March 5, 2004

Dear Mr. S:

This letter is written in response to your letter on behalf of NNN, an association of nonprofit organizations in California, in which you requested an interpretation concerning the application of the Terrorism Risk Insurance Act of 2002 (the “Act”) and Treasury’s regulations implementing the Act, to a non-insurer, self-insured risk pool’s purchase of a “master policy” providing terrorism-only commercial liability coverage issued by an insurer participating in the Terrorism Risk Insurance Program (Program).¹

As a preliminary matter, we affirm that a self-insured risk pool is not an insurer under the Program and cannot itself participate in the Program by purchasing commercial terrorism-only coverage issued by an insurer through a “master policy” mechanism; only those entities that meet the definition of “insurer” can participate in the Program. However, an insurer that participates in the Program and issues such coverage to a self-insured risk pool may be entitled to federal payment under the Program provided that all other conditions to payment under the Act and regulations have been met.

Background

NNN is a group self-insured risk pool that provides commercial liability insurance to its members. NNN’s members are non-profit corporations located in California. NNN’s gross written premiums from its approximately 4,000 member-insureds are approximately \$30.9 million annually.²

Although NNN operates like an insurance company, you are correct that NNN is not an “insurer” for purposes of the Program, as that term is defined in the Act and implementing regulations.³ NNN is not an insurer because it:

- a) is neither licensed nor admitted to engage in the business of providing primary or excess insurance in any state;⁴

¹ 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.

² This data appeared on the NNN website (accessed July 30, 2003).

³ In order to meet the definition of insurer, an entity must meet the criteria found at section 102(6)(A), (B), and (C) of the Act. *See also* 31 C.F.R. §50.5(f).

⁴ 31 C.F.R. §50.5(f)(1)(i)(A).

- b) is not an eligible surplus lines carrier listed on the Quarterly Listing of Alien Insurers of the National Association of Insurance Commissioners;⁵
- c) is not approved or accepted by any federal agency to offer property and casualty insurance;⁶ and
- d) is not classified in California as a state residual market insurance entity or state workers' compensation fund.⁷

We note, however, that a self-insurance arrangement like NNN might be eligible to participate in the Program as a “licensed or admitted” insurer if the arrangement is a risk pool that meets certain other “licensed or admitted” criteria set out in our regulations.

NNN Does Not Meet Other “Licensed or Admitted” Criteria.

Under the regulations, a pooling arrangement is considered “licensed or admitted” under 31 C.F.R. §50.5(f)(1)(i)(A), and thus can qualify as an insurer, if the entity:

- (1) has gone through a process of being licensed or admitted to engage in the business of providing primary or excess insurance that is administered by the State’s insurance regulator, which process generally applies to insurance companies or is similar in scope and content to the process applicable to insurance companies;
- (2) is generally subject to State insurance regulation, including financial reporting requirements, applicable to insurance companies within the State; and
- (3) is managed independently from other insurers participating in the Program.⁸

Treasury believes NNN fails to meet the first two criteria. NNN has not gone through any process of being licensed or admitted to engage in the business of providing primary or excess insurance that is administered by the California Insurance Commissioner, nor is it subject to California insurance regulation. NNN operates as a risk pool pursuant to Section 5005.1 of the California Corporations Code and is not subject to the rules, regulation, and supervision of the California Department of Insurance. NNN is regulated as a charitable non-profit by the Attorney General of California.

⁵ 31 C.F.R. §50.5(f)(1)(i)(B).

⁶ 31 C.F.R. §50.5(f)(1)(i)(C).

⁷ 31 C.F.R. §50.5(f)(1)(i)(D).

⁸ 31 C.F.R. §50.5(f)

NNN Is a Self-Insured Arrangement.

As explained above, NNN is a self-insured risk pool. The Secretary has not extended the provisions of the Act to self-insured risk pools pursuant to his authority under section 103(f) of the Act. Therefore, although we recognize that you have requested that the Secretary extend application of the Program to self-insured arrangements, NNN cannot participate in the Program at this time.

NNN Proposed Action

Despite not being an “insurer” under the Program, NNN would like to provide its members with terrorism insurance.⁹ You have explained in your letter that NNN can not obtain affordable reinsurance and that the available reinsurance is “wholly inadequate.”¹⁰ If NNN could avail itself of the federal backstop provided by the Act, it could offer more affordable terrorism coverage to its members. However, as explained above, NNN is not an “insurer” under the Program and it is not entitled to the federal backstop. Thus, NNN proposes to proceed by purchasing a “master policy” from a risk retention group within its same group of companies.

NNN is part of the Nonprofits Insurance Alliance which is made up of four distinct companies, including a risk retention group – the Nonprofits Insurance Alliance Risk Retention Group (RRG). RRG is a risk retention group that provides commercial liability insurance to non-profit organizations located outside the State of California. RRG is an existing Vermont-domiciled captive insurance company and is consequently an “insurer” under the Program.¹¹

NNN plans on RRG issuing a stand-alone commercial liability insurance policy that would cover losses caused only by acts of terrorism certified by the Secretary pursuant to section 102(1)(A) of the Act. RRG’s commercial liability insurance, as described, would be considered commercial property and casualty insurance, as defined in the regulations. Thus, as an insurer issuing commercial property and casualty insurance coverage for insured losses, RRG has the benefit of the Act’s backstop.

RRG is registered with the Insurance Department of California to conduct the business of insurance in that State and could sell the insurance directly to NNN’s

⁹ NNN may already do so. According to NNN’s 2002 Annual Report, “both RRG and NNN offer terrorism coverage to members who wish to purchase it.”

¹⁰ According to NNN’s 2002 Annual Report and its Consolidated Financial Statements, NNN obtains its reinsurance from another member of the National Insurance Alliance which is a captive reinsurer, which in turn retrocedes the NNN risk to Swiss Re. *Id.*

¹¹ 31 C.F.R. §50.5(f)(1)(i)(A). Unlike captive insurers that have been formed after the enactment of the Act and that only provide TRIA-only coverage (a special purpose vehicle Treasury is concerned about if designed to avoid the Act’s deductible requirements), RRG was incorporated in 1999, began its operations in 2001, and offers various commercial coverages to non-profits.

members if they joined RRG as members. However, NNN is not proposing that RRG sell its commercial liability insurance product directly to NNN's non-profit members, which you explained during a conference call would be permitted under California law. Instead, NNN proposes to have RRG, an insurer, issue the insurance to NNN in the form of a "master policy."¹² Under the master policy, NNN would be the policyholder and NNN's members would have the option to purchase the coverage and be issued a certificate of insurance under the master policy as additional named insureds. NNN would act as agent for RRG by placing the terrorism coverage and collecting premiums on behalf of RRG .

Conclusion

Under the facts and circumstances stated above, we conclude that the federal backstop provided by the Act is available to share in losses paid by RRG under the master policy planned to be issued to NNN and its members, as presented. This is because: 1) the insurance is issued by RRG, an "insurer"; and 2) the insurance policy provides "property and casualty insurance." Also, NNN would be acting as agent for RRG, and RRG would receive all the coverage premiums collected by NNN from the additional insureds. Moreover, RRG (not NNN) would be responsible for any resulting claims that may arise under the master policy.¹³

If you have any specific questions, please telephone our office at 202-622-6770.

* * *

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

¹² A master policy is one that is issued to a group policyholder setting forth the provisions of the group insurance plan. The individuals insured under the policy are then issued certificates of insurance. Master policies are typically issued to an employer or trustee, establishing a group insurance plan for designated members of an eligible group.

¹³ Neither the Act nor our regulations dictate to whom primary or excess property and casualty insurance is to be sold, which is regulated by State insurance regulation. The Act generally preserves State insurance regulation and this letter assumes that the master policy mechanism you have presented is permitted under applicable State law.

Also, we would note that should the Treasury issue regulations pursuant to Section 103(f), given the corporate structure of the Nonprofits Insurance Alliance, there could be as yet undetermined implications for calculating the Alliance's insurer deductible under the Program at least on a prospective basis.

regulations. As provided in Section 50.9 of the regulations, this response and your request for interpretation will be publicly available as soon as practicable.

TERRORISM RISK INSURANCE PROGRAM

Jeffrey S. Bragg
Executive Director