COVID-19: LEGISLATION SEEKS TO ESTABLISH A FEDERAL REINSURANCE PROGRAM TO INSURE FUTURE PANDEMIC-RELATED BUSINESS INTERRUPTION LOSSES

Date: 15 May 2020

U.S. Insurance Recovery and Counseling Alert

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As the insurance industry resists providing coverage for the spate of business interruption claims arising out of the COVID-19 pandemic[1], and coverage lawsuits are starting to spring up around the country, some federal lawmakers are already looking ahead to address insurance coverage for losses that may arise out of a future pandemic. Although not yet introduced in Congress, the Pandemic Risk Insurance Act (PRIA), currently only available in Discussion Draft form,[2] has been championed by House Financial Services Committee Chairwoman Maxine Waters (D-CA) and is stated to have bipartisan support.[3] Modelled after the Terrorism Risk Insurance Act (TRIA) — which established a federal reinsurance program to provide coverage for business interruption losses arising out of a terrorist attack following the World Trade Center attacks in 2001— PRIA seeks to borrow the same framework to prospectively "provide[] for a transparent system of shared public and private compensation for business interruption losses resulting from a pandemic or outbreak of communicative disease."[4]

If enacted, PRIA would establish a federal reinsurance program, administered by the U.S. Department of the Treasury, in order to —

- Protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of business interruption coverage for losses resulting from a pandemic or outbreak of communicative disease; and
- Allow for a transitional period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections.[5]

PRIA would provide coverage for a "covered public health emergency," which is currently defined to include any "outbreak of infectious disease or pandemic for which an emergency is declared" by the federal government.[6] In the Discussion Draft, an insurer can elect to participate in the program, and once a participant, it generally cannot exclude or limit coverage for defined covered losses. The program would provide US$500 billion in annual aggregate limits for covered losses, which become available only after aggregate insured losses resulting from a single "covered public health emergency" exceed US$250 million. PRIA further provides that participating insurers would be subject to individual deductibles, tied to the insurer's specific premium collections, before the federal reinsurance program becomes accessible. Certain details remain lacking or subject to further revisions, including how the US$250 million industry aggregate threshold would be calculated, what exactly would constitute a

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"covered public health emergency," who would have to declare the "emergency," and how payments to insureds would be allocated.

While TRIA remains a helpful legislative model as it was designed to respond to catastrophic and widespread losses and it has largely had bipartisan support since it was enacted, it has been substantially modified over the years, some question whether the private market is now sufficient, and notably, as of February 2019, no federal payments have ever been issued under the program.[7] There are, however, differences in the nature of the losses insured under PRIA and TRIA, and thus, PRIA could prove to be more accessible and vital for policyholders, if enacted.

Pandemic Risk Insurance Act - Summary of Key Provisions	
Trigger	Provides business interruption coverage for a "covered public health emergency," which is defined to include any "outbreak of infectious disease or pandemic for which an emergency is declared" by the federal government
Limits	Annual aggregate limit of US$500 billion
Threshold	No compensation will be paid unless the aggregate insured loss resulting from a covered health emergency exceeds US$250 million
Participating Lines of Insurance	Commercial lines of property and casualty insurance, including excess insurance, workers' compensation insurance, and directors and officers liability insurance
Excluded Lines of Insurance	Federal crop insurance or any other type of crop or livestock insurance that is privately issued or reinsured; private mortgage or title insurance; financial guaranty insurance; medical malpractice insurance; health or life insurance; flood insurance; reinsurance or retrocessional reinsurance; commercial automobile insurance; burglary and theft insurance; surety insurance; professional liability insurance; and farm owners multiple peril insurance

Proponents of PRIA, including the Risk Insurance Management Society (RIMS),[8] cite the current estimated business interruption losses of its member companies in support of its position that PRIA is necessary and, given the uncertainties the future brings, must be enacted soon. In letter sent to the U.S. House of Representatives, RIMS reported that 66 percent of its members "will have direct business interruption losses as a result of COVID-19," 77 percent of those companies expect the losses to be over US$1 million, and 36 percent expect the losses to be more than US$25 million.[9]

While PRIA awaits introduction to Congress, two other federal bills were introduced in the U.S. House of Representatives in April — however, both have faced opposition from the insurance industry. Introduced in April 2020, the Never Again Small Business Protection Act of 2020 (NASBPA) seeks to "make available insurance coverage for business interruption losses due to national emergencies," which include any cessation of business operations lasting 30 days or longer resulting from a local, state, or federal government order.[10] Unlike PRIA and other proposed state and federal legislation, NASBPA is not limited to pandemics or other communicable

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diseases. While the title of NASBPA suggests that it would only provide protection for small businesses, the text of the bill is not so limiting. However, if enacted, NASBPA would not protect any business for losses if it involuntarily terminates (i) any employee or (ii) the health care insurance coverage for any employee during the national emergency. NASBPA also mandates the undertaking of a study to determine the effectiveness and efficiency of a federal backstop that would reinsure insurers for "excessive losses" under the program, but does not provide any further details or requirements for the federal backstop. While NASBPA was introduced by a bipartisan group of legislators, it has not garnered support from the insurance industry. Even less popular among the insurance industry and some federal lawmakers, the Business Insurance Coverage Act of 2020, also introduced in April 2020, seeks to make available insurance coverage for business interruption losses. Offering somewhat of a middle ground, it seeks to provide coverage for viral pandemics, forced closures of businesses, mandatory evacuations, and public safety power-shut-offs.[11] It is currently facing the most opposition because it also seeks to nullify pandemic-related exclusions in existing insurance policies. Both bills have been referred to the House Committee on Financial Services.

It remains to be seen whether the bills introduced in April will garner any additional support, whether PRIA will be introduced into Congress (and if so, what the final program will provide), or whether states will enter the fold in the meantime.[12]

Even absent enactment of PRIA or other similar litigation at the federal or state level, existing business interruption policies, as well as a variety of other insurance policies, may provide coverage for pandemic-related losses. All policyholders should identify any potentially applicable policies, carefully review the terms, and then provide their insurers with timely notification of any potentially covered losses.

FOOTNOTES

[1] See Evan G. Greenberg, What Won't Cure Corona: Lawsuits, THE WALL STREET JOURNAL (21 April 2020)

[2] See Pandemic Risk Insurance Act of 2020, H.R. ___, 116th Cong. (2d Sess. 2020)

[3] See Memorandum from Maxine Waters to Democratic Members, House of Representatives (18 March 2020), (encouraging U.S. House members to "create a reinsurance program similar to the Terrorism Risk Insurance act for pandemics, by capping total insurance losses that insurance companies would face.").

[4] See PRIA Discussion Draft, *supra* note 2, at 1-2.

[5] See PRIA Discussion Draft, *supra* note 2, at 2.

[6] See PRIA Discussion Draft, *supra* note 2, at 2. Note that the PRIA Discussion Draft indicates that this provision may be further revised. In its current form, it provides: "covered public health emergency" means any "outbreak of infectious disease or pandemic [for which an emergency is declared under the Public Health Services Act/for which an emergency or major disaster is declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act/that is certified by the Secretary, as a public health emergency?] [sic]."

[7] See Baird Webel, The Terrorism Risk Insurance Act (TRIA), CONGRESSIONAL RESEARCH SERVICE, (Feb. 1, 2019), (explaining that no terrorist attack (domestic or foreign, as defined by TRIA) "has been certified under the act and no federal payments have been made").

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[8] See Letter from RIMS to the U.S. House of Representatives, (20 April 2020), (explaining that RIMS is "a not-for-profit organization representing more than 2,700 companies making up small businesses, corporate, industrial, service, nonprofit, charitable and government entities across the country").

[9] See RIMS Letter, *supra* note 8.

[10] See Never Again Small Business Protection Act of 2020, H.R. 6497, 116th Cong. (2d Sess. 2020).

[11] See Business Interruption Insurance Coverage Act of 2020, H.R.6494, 116th Cong. (2d Sess. 2020).

[12] A growing number of U.S. States have proposed legislation that would address current claims for business interruption coverage arising from the COVID-19 pandemic. For a review of the current pending state legislation, see Frederic J. Giordano, Steven P. Wright, Christopher J. Valente, Michael R. Creta & Reymond E. Yammine, COVID-19: Growing Number of U.S. States Propose Legislation Requiring Insurers to Pay for COVID-19-Related Losses Incurred by Small Companies (6 April 2020); Frederic J. Giordano, Steven P. Wright, Jennifer H. Thiem, Christopher J. Valente, Michael R. Creta & Reymond E. Yammine, COVID-19: Congress, Pennsylvania, Michigan, and South Carolina Join Other Jurisdictions Proposing Legislation Addressing Insurers' Obligations to Pay for Pandemic-Related Losses, THE NATIONAL LAW REVIEW (6 May 2020).

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