Congress Considers Pandemic Risk Insurance Act to Address COVID-19 Business Interruptions Losses

By Richard W. Brown and Andres Avila

The draft legislation, entitled the Pandemic Risk Insurance Act of 2020 ("PRIA"), would establish a Federal Pandemic Risk Reinsurance Fund and Program (the "Program"), that is intended to provide a system of shared public and private compensation for business interruption ("BI") losses resulting from a pandemic or outbreak of communicable disease. PRIA, in its current draft form, is modeled after and in many ways mirrors the Terrorism Risk Insurance Act that was enacted to address catastrophic losses resulting from acts of terrorism.

PRIA effectively mandates that participating insurers provide coverage for any business interruption loss resulting from an outbreak of infectious disease or pandemic that is declared an emergency or major disaster by the President and certified by the Secretary of Treasury (the "Secretary") as a public health emergency. PRIA would be triggered in the case of certified public health emergencies upon the aggregate industry insured losses exceed $250 million dollars, and include an annual aggregate limit capped at $500 billion dollars. The draft bill provides that the Secretary would administer the Program and pay the Federal share of compensation for insured losses, which would be 95% of losses in excess of an applicable insurer annual deductible, once the Program is triggered. The compensation would benefit those insurers that elect to participate in the Program in exchange for a premium paid by the participating insurer for reinsurance coverage under the Program.

Any primary or excess business interruption insurer interested in participating in the Program is required to provide business interruption coverage for losses resulting from a certified public health emergency, if the loss occurs in an area of the United States where there is a certified public health emergency, and for the period that the public health emergency remains in effect ("Insured Loss"). PRIA would be applicable to commercial lines of property and casualty insurance, including excess lines and director's and officer's liability coverage, but specifically excludes other lines such as professional liability and commercial auto insurance. Subject to further regulation to be established by the Secretary, PRIA would also apply to State workers' compensation funds, State residual market insurance entities, and captive insurers.

Notably, if enacted, the draft legislation would apply retroactively to void any virus/disease/pandemic/public health emergency exclusions contained in an insurance policy for business interruption coverage that was issued by a participating insurer and in place on the effective date of the act, *unless* the policyholder opts out of the Program or fails to pay an increased premium, charged by the participating insurer, for providing public health emergency coverages under the Program.

Additionally, PRIA would create a Federal cause of action for property damage, personal injury, or death arising out of or resulting from a certified health emergency, which shall be the exclusive cause of action and remedy for claims or property damage, personal injury, or death arising out of or relating to such public health emergency. The Judicial Panel on Multidistrict Litigation would designate one district court or, if necessary, multiple district courts of the United States, which would be vested with original and exclusive jurisdiction over all actions for any such claims. Further, any punitive damages awarded under any such litigation would not be insured under the Program.

It is important to again note that the draft PRIA legislation is in the very early stages of review and discussion among select members of Congress. SDV will continue to monitor and provide updates as to the status of PRIA and other COVID-19-related legislation.

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