

***Order Regarding Adoption of Policy No. 495,
“Business Economic Loss Claims: Matching of Revenues and Expenses.”***

1. ***Introduction.*** On October 2, 2013, a panel for the Fifth Circuit Court of Appeals remanded to the District Court for taking additional evidence on and reconsideration of what the Fifth Circuit found to be certain ambiguous provisions of the Settlement Agreement dealing with BEL claims, including issues of calculating “Variable Profit” and specifically whether the Settlement Agreement’s language required that revenues and expenses within claimant P&Ls be matched. Additionally, the Fifth Circuit directed the District Court to issue a “narrowly tailored” preliminary injunction pending this reconsideration.

After fully reviewing additional materials submitted by the parties and the definition of “Variable Profit”, on December 24, 2013, the District Court reversed its prior March 5, 2013 decision affirming the January 15, 2013 policy announcement of the Claims Administrator, which previous policy announcement stated that the Claims Administrator will typically consider both revenues and expenses in the periods in which those revenues and expenses were recorded. In interpreting “corresponding” as used within Exhibit 4C for calculating “Variable Profit”, the Court, in reversing its previous opinion, found that the provision for subtracting corresponding variable expenses requires that revenue must be matched with the variable expenses incurred by a claimant in conducting its business, which does not necessarily coincide with when revenue and variable expenses are recorded by that claimant.

Accordingly, the matter was remanded to the Claims Administrator with instructions to adopt and implement an appropriate protocol or policy for handling BEL claims in which the claimant’s financial records do not match revenue with corresponding variable expenses.

2. ***Policy 495.*** In response to the District Court’s order, the Claims Administrator has developed Policy 495, for Business Economic Loss Claims: Matching of Revenue and Expenses, which Policy was approved in its entirety by the District Court on May 5, 2014. This comprehensive Policy represents the frameworks and methodologies adopted by the Claims Administrator and approved by the Court for identifying those claims whose submitted financial records fail to sufficiently match revenues with expenses and for handling BEL claims in which the claimant’s financial records do not sufficiently match revenue with corresponding variable expenses, as ordered by the Court. Additionally, the District Court ordered the Claims Administrator to continue to accept and process BEL claims but left in place the suspension of the issuance of final determination notices and payments for BEL claims.
3. ***Order Dissolving Preliminary Injunction.*** On May 28, 2014, the District court issued an Order dissolving the preliminary injunction related to BEL claims, which Order included instructions for the implementation of Policy 495. The Order instructed the Claims Administrator to resume the processing and payment of claims in accordance with the terms of the Settlement Agreement. Additionally, the District Court ordered the Claims Administrator to apply Policy 495 to all BEL Claims currently in the claims process at any point short of final payment, including those claims currently in the claims appeal process,

save and except those claims that had prior to October 3, 2013 received a final Eligibility Notice or Denial Notice and either (a) no timely appeal had been filed or (b) did not satisfy the criteria of an appealable claim under the terms of the Settlement Agreement.

4. **Questions.** If you have any questions regarding the information in this Alert, please email us at Questions@dhecc.com, call us at 1-800-353-1262, or visit a Claimant Assistance Center. Law firms should contact their Law Firm Contacts for assistance.