NEW YORK STATE
DEPARTMENT of
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

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Superintendent

Circular Letter No. 2 (2015)
February 24, 2015

TO: **All Property/Casualty Insurers and Rate Service Organizations Doing Business in New York State, New York Property Insurance Underwriting Association, State Insurance Fund, New York Automobile Insurance Plan, and Excess Line Association of New York**

RE: **Guidelines and Procedures for the Implementation of the Provisions of the Terrorism Risk Insurance Program Reauthorization Act of 2015**

STATUTORY REFERENCES: Articles 21, 23, 34, 54, and 63 of the Insurance Law; Terrorism Risk Insurance Program Reauthorization Act of 2015

The purpose of this Circular Letter is to provide information and guidance about the Terrorism Risk Insurance Act of 2002 ("Act" or "TRIA") and its 2015 extension, the Terrorism Risk Insurance Program Reauthorization Act of 2015 ("Reauthorization Act").

Background

In the wake of the September 11, 2001 attacks, Congress enacted TRIA and the President signed it into law in November 2002. This federal law provided a federal backstop for defined acts of terrorism and imposed certain obligations on insurers. In 2005, the Act was extended for a two-year period by the Terrorism Risk Insurance Extension Act of 2005, and it was extended for an additional seven years, through December 31, 2014, with the enactment of the Terrorism Risk Insurance Program Reauthorization Act of 2007. TRIA has now been extended again, for six years, with the enactment of the Terrorism Risk Insurance Program Reauthorization Act of 2015 ("Reauthorization Act").

Shortly after TRIA was passed, the Department of Financial Services ("Department") issued Circular Letter No. 25 (2002) and Supplement No. 1 thereto, which explained TRIA and provided instructions and guidance to insurers to assist them in meeting their dual responsibilities under both federal and New York law. Likewise, Circular Letter No. 1 (2006) and Circular Letter No. 4 (2008) set forth guidelines and procedures for the implementation of the provisions of the Terrorism Risk Insurance Extension Act of 2005, and the Terrorism Risk Insurance Program Reauthorization Act of 2007, respectively. Except to the extent modified by a subsequent TRIA circular letter, including this one, the advice and guidelines contained in the prior circular letters and supplement remain in effect and are applicable to terrorism coverage in New York.

Changes Included in the Reauthorization Act

Several provisions of TRIA, as previously amended and extended, have changed under the Reauthorization Act. Those changes include:

- Extending the Terrorism Risk Insurance Program through December 31, 2020.

- Fixing the Insurer Deductible at 20% of an insurer's direct earned premium for the preceding calendar year and the federal share of compensation at 85% of insured losses that exceed insurer deductibles until January 1, 2016, at which time the federal share shall decrease by 1 percentage point per calendar year until equal to 80%.

- Requiring the Secretary of the Treasury to certify acts of terrorism in consultation with the Secretary of Homeland Security and the Attorney General.

- Amending the Program trigger to apply to certified acts with insured losses exceeding $100 million for calendar year 2015, $120 million for calendar year 2016, $140 million for calendar year 2017, $160 million for calendar year 2018, $180 million for calendar year 2019, and $200 million for calendar year 2020 and any calendar year thereafter.

- The mandatory recoupment of the federal share through policyholder surcharges increasing to 140 percent (from 133 percent).

- The insurance marketplace aggregate retention amount being the lesser of $27.5 billion, increasing annually by $2 billion until it equals $37.5 billion, and the aggregate amount of insured losses for the calendar year for all insurers. In the calendar year following the calendar year in which the marketplace retention amount equals $37.5 billion, the aggregate retention amount is revised to be the annual average of the sum of insurer deductibles for all insurers participating in the Program for the prior three calendar years as such sum is determined by the Secretary of the Treasury by regulation.

- Requiring the Secretary of the Treasury, not later than nine months after the date of enactment of the Reauthorization Act, to conduct and complete a study on the certification process, including the establishment of a reasonable timetable by which the Secretary must make an accurate determination of whether to certify an act as an act of terrorism.

- Requiring insurers participating in the Program to submit to the Secretary of the Treasury for a Congressional report to be submitted on June 30, 2016 and every other June 30 thereafter, information regarding insurance coverage for terrorism losses in order to evaluate the effectiveness of the Program. The information to be provided includes: lines of insurance with exposure to terrorism losses, premiums earned on coverage, geographical location of exposures, pricing of coverage, the take-up rate for coverage, the amount of private reinsurance for acts of terrorism purchased, and such other matters as the Secretary considers appropriate. This information may be collected by a statistical aggregator and in coordination with state insurance regulatory authorities.

- Requiring the Comptroller General of the United States to complete a study on the viability and effects of the federal government assessing and collecting upfront premiums and creating a capital reserve fund.

- Requiring the Secretary of the Treasury to conduct a study not later than June 30, 2017 and every other June 30 thereafter to identify competitive challenges small insurers face in the terrorism risk insurance marketplace.

- Requiring the Secretary of the Treasury to appoint an Advisory Committee on Risk-Sharing Mechanisms to provide advice, recommendations, and encouragement with respect to the creation and development of nongovernmental risk-sharing mechanisms. The Advisory Committee will be composed of nine members who are directors, officers, or other employees of insurers, reinsurers, or capital market participants.

- Changing the terms "program year" and "transition period" to "calendar year" throughout.

<u>Submission of Rates, Policy Forms, and Disclosure Notices</u>

Certain provisions of the Reauthorization Act may have an impact on an insurer's policy forms and the associated rates and rules, requiring insurers to submit filings to the Department. A rate filing should provide sufficient information for the Department to determine the price charged to a business seeking to cover certified losses. The supporting documentation should be sufficient for the reviewer to determine whether the rates comply with the standard set forth in Article 23 of the Insurance Law. Insurers may conclude that their current filings are in compliance with the Act, as amended, and state law.

Although TRIA requires that insurers make terrorism coverage available, the law also permits policyholders to opt out of such coverage. Accordingly, the Superintendent will consider for approval policy provisions that exclude coverage, or limit the amount thereof, for an "insured loss", provided that:

- the insurer has first satisfied the "make available" requirements of the Act;

- the exclusion or limitation applies solely to "insured loss" under the Act;

- the language of the exclusion or limitation mirrors the definition of "insured loss"; and

- the policy language is otherwise clear and not misleading.

However, such exclusions and limitation provisions remain subject to the applicable prior approval and all other statutory and regulatory requirements of the Insurance Law. In particular, as noted in Circular Letter No. 25 (2002), no terrorism exclusion or limitation is permitted to the extent that coverage is otherwise required under the Insurance Law. Accordingly, no such exclusion or limitation is permissible for coverage with respect to the peril of fire that is subject to Insurance Law Section 3404 or with respect to workers' compensation insurance. An insured cannot voluntarily waive this statutorily mandated coverage, and any such exclusion or limitation would be unenforceable under Insurance Law Section 3103.

A change introduced in the Terrorism Risk Insurance Reauthorization Act of 2007 was a disclosure requirement for any policy issued after its enactment. Specifically, in addition to other disclosure requirements previously included in TRIA, insurers since 2007 at the time of offer, purchase, and renewal of a policy have had to provide clear and conspicuous disclosure to the policyholder of the existence of the $100 billion cap under Section 103(e)(2).

Disclosure notices should be filed for informational purposes, along with policy forms, rates, and rating systems. Such notices should comply with the requirements of the Act, as amended, should be consistent with the policy language and rates filed by the insurer, and should be clear and not misleading to New York's business owners. The Department of the Treasury, in its "Interim Guidance Concerning the Terrorism Risk Insurance Program Reauthorization Act of 2015" issued on February 4, 2015, determined that NAIC Model Disclosure Form No. 1 and NAIC Model Disclosure Form No. 2, as amended in 2015, are consistent with the disclosure requirements of the Terrorism Risk Insurance Program regulations and TRIA, as amended by the 2015 Reauthorization Act. Accordingly, the Department considers the two NAIC model disclosure forms to be acceptable for use in complying with the disclosure requirements.

The Department encourages filers to submit the required filings using the SERFF system. Insurers may also take advantage of the expedited Speed-to-Market filing option as described in Circular Letter No. 11 (1998). Instructions for SERFF and Speed-to-Market submissions are available at the Department's website at www.dfs.ny.gov.

Questions regarding this Circular Letter should be addressed to Gerald Scattaglia, Assistant Bureau Chief, Property Bureau, by e-mail at Gerald.Scattaglia@dfs.ny.gov, or by phone at (212) 480-5583.

Very truly yours,

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Property and Casualty Insurance