

COMMONWEALTH OF VIRGINIA



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Administrative Letter 2020-07

To: All Property and Casualty Insurers and Rate Service Organizations Licensed in Virginia

**Re: Filing Procedures for Compliance with the Provisions of the Terrorism Risk Insurance Program Reauthorization Act of 2019;
Withdrawal of Administrative Letter 2015-03**

The purpose of Administrative Letter 2020-07 is to advise insurers of certain provisions of the Terrorism Risk Insurance Program Reauthorization Act of 2019 amending and extending the Terrorism Risk Insurance Act of 2002. All references to the Terrorism Risk Insurance Act of 2002 and subsequent reauthorizations will be hereafter referenced as "the Act". The 2019 reauthorization of the Act does not require any filing actions by insurers. For further details, please consult the Act itself.

Further, Administrative Letter 2020-07 brings forward relevant provisions of previously issued administrative letters to address filing-related requirements pertaining to coverage for terrorism risk in property and casualty insurance contracts. The previously issued administrative letter listed above is hereby withdrawn.

The reauthorized Act, as amended and extended, contains minimal changes, including:

- Extending the program through December 31, 2027.
- Changing the timing of the mandatory recoupment by moving the date of each referenced year back five years.
- Requiring the Secretary of the Treasury to include in the Secretary's annual report an evaluation of the availability and affordability of terrorism risk insurance, specifically for places of worship.
- Requiring the Comptroller General of the United States to conduct a study on: overall vulnerabilities and potential costs of cyber-attacks on the U.S.; whether state-defined cyber liability under a property and casualty line of insurance is adequate coverage for an act of cyber terrorism; whether such risks can be

adequately priced by the private market; and whether the current risk-share systems under the Act are appropriate for a cyber terrorism event.

Background

In November 2002, the Terrorism Risk Insurance Act of 2002 was enacted. This Federal law provided a federal backstop for coverage for defined acts of terrorism and imposed certain obligations on insurers. The Act has been extended for additional periods and has now been extended through December 31, 2027.

All insurers, as defined in the Act, are required by the Act to participate in the Terrorism Risk Insurance Program and to make available coverage for ***insured losses***, as defined in the Act, resulting from an ***act of terrorism***, as defined in the Act, in all of their property and casualty insurance policies, as defined in the Act. The Act further requires insurers to make available, in all property and casualty insurance policies, coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism.

Definition of Insured Loss(es)

The Act defines “insured loss” as any loss resulting from an act of terrorism (including an act of war in the case of workers’ compensation) that is covered by primary or excess property and casualty insurance issued by an insurer if such loss—(A) occurs within the United States; or (B) occurs to an air carrier (as defined in 49 USC § 40102), to a United States flag vessel (or a vessel based principally in the United States, on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), regardless of where the loss occurs, or at the premises of any United States mission.

Definition of Act of Terrorism

Section 102(1) defines an ***act of terrorism*** for purposes of the Act. Please note that the unmodified reference to “the Secretary” refers to the Secretary of the Treasury. The revised § 102(1)(A) states, “The term ‘act of terrorism’ means any act that is certified by the Secretary, in consultation with the Secretary of Homeland Security, and the Attorney General of the United States—(i) to be an act of terrorism; (ii) to be a violent act or an act that is dangerous to—(I) human life; (II) property; or (III) infrastructure; (iii) to have resulted in damage within the United States, or outside the United States in the case of—(I) an air carrier or vessel described in paragraph (5)(B); or (II) the premises of a United States mission; and (iv) to have been committed by an individual or individuals,

as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.” Section 102(1)(B) states, “No act shall be certified by the Secretary as an act of terrorism if—(i) the act is committed as part of the course of a war declared by the Congress, except that this clause shall not apply with respect to any coverage for workers’ compensation; or (ii) property and casualty insurance losses resulting from the act, in the aggregate, do not exceed \$5,000,000.” Section 102(1)(C) and (E) specify that the determinations are final and not subject to judicial review and that the Secretary of the Treasury cannot delegate the determination to anyone.

The policy form must include a definition of *act(s) of terrorism*. Section 102(1) defines an *act of terrorism* for purposes of the Act. To satisfy this filing requirement, insurers may reference the definition of “acts of terrorism” in the Act or restate the definition in the policy form. If the term “acts(s) of terrorism” is defined in the policy form, it is not necessary for the insurer to repeat the definition in endorsements used with the policy form.

Definition of Property and Casualty Insurance

For details regarding the lines of insurance to which the Act applies, please consult the Act and the Interim Guidance provided by the Department of the Treasury.

Certified and Non-Certified Acts of Terrorism

As a result of the definitions of “act of terrorism” and “insured loss” contained in the Act, there are essentially two distinct types of losses that a policyholder might face that result from terrorism. One type of loss is the insured loss that is defined within and covered by the provisions of the Act. For convenience, the term “certified loss” will be used to refer to losses resulting from certified acts of terrorism. The second type of loss is one that does not fit within the definition of insured loss as described in the Act. For convenience, the term “non-certified loss” will be used to refer to those losses resulting from acts of terrorism that are not certified.

Non-Certified Acts of Terrorism

If insurers elect to exclude non-certified acts of terrorism, the coverage form must define a non-certified act, which includes an act of terrorism that fails to be certified solely because it falls below the \$5,000,000 threshold in § 102(1) (B) of the Act.

The Bureau will continue to approve certain limitations to coverage for *non-certified* acts of terrorism. For policies providing property insurance coverage, the following limitation applies to exclusions of *non-certified losses*:

- Industry-wide insured losses must exceed \$25,000,000 for related incidents that occur within a 72-hour period;

Exclusions applicable to non-certified acts of terrorism are **not** subject to this limitation if:

1. The act involves the use, release or escape of nuclear materials, or directly or indirectly results in nuclear reaction or radiation or radioactive contamination;
2. The act is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or
3. Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the terrorism was to release such material.

The exemption in § 38.2-2102 B of the Code of Virginia (Code) does not apply to non-certified acts; therefore, the provisions of § 38.2-2105 of the Code apply to ensuing fire losses for non-certified acts of terrorism.

For policies providing liability insurance coverage, the following limitations apply to exclusions of *non-certified losses*:

- Industry-wide insured losses must exceed \$25,000,000 for related incidents that occur within a 72-hour period; or
- Fifty or more persons must sustain death or serious injury for related incidents that occur within a 72-hour period. For the purposes of such provisions, serious injury means:
 1. Physical injury that involves a substantial risk of death;
 2. Protracted and obvious physical disfigurement; or
 3. Protracted loss of or impairment of the function of a bodily member or organ.
- Exclusions applicable to non-certified acts of terrorism are not subject to the above limitations if:
 1. The act involves the use, release, or escape of nuclear materials, or directly or indirectly results in nuclear reaction or radiation or radioactive contamination;
 2. The act is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or
 3. Pathogenic or poisonous biological or chemical materials are released, and it appears one purpose of terrorism was to release such materials.

Submission of Rates, Loss Cost Multipliers, and Policy Forms or Endorsements

Coverage Forms, Endorsements

Except to the extent an insurer has authorized a rate service organization (RSO) to file forms on its behalf, insurers must file any policy forms or endorsements that they intend to use to cover or exclude *certified losses* on or before the date the forms or endorsements are effective. However, for lines or sub-classifications of insurance exempted from form filing requirements by Virginia statutes or administrative orders, the forms or endorsements related to terrorism coverage for those lines or sub-classifications of insurance are also exempt from filing requirements. The requirements of the Act, however, are not affected by such exemptions and continue to apply.

Conditional Terrorism Exclusions

As a result of uncertainty associated with reauthorizations of the Act, insurers filed conditional terrorism exclusions that would be activated in the event the Act was not renewed or renewed on a basis that substantially affected the risk of the loss assumed by the insurer during the period that the policy was in effect. In response to those concerns, the Bureau approved conditional terrorism exclusions. These endorsements must provide the same limitations to coverage for *non-certified* acts of terrorism, which are described above, for any terrorism loss that occurred after the termination of the Act. Approved conditional endorsements may remain on file to ensure that they are available for any subsequent uncertainty related to the expiration of the Act. Insurers and rate service organizations should review these endorsements to determine their continued appropriateness.

Exclusions Not Allowed in Virginia Coverage Forms

- Virginia laws and regulations prohibit the use of terrorism exclusions in personal automobile insurance and insurance covering owner-occupied dwellings.
- Workers' compensation coverage forms are subject to regulation by the Virginia Workers' Compensation Commission (WCC). Terrorism exclusions have not been approved by the WCC. Any questions pertaining to workers' compensation insurance coverage forms should be directed to the WCC.

- For property insurance policies that are subject to the provisions of Virginia's standard fire policy, as set forth in § 38.2-2105 of the Code, coverage for ensuing fire losses is required. If, however, the insured does not purchase fire coverage for certified acts of terrorism, the provisions of § 38.2-2102 B of the Code apply, and the insurer would be allowed to exclude the ensuing fire loss from certified acts of terrorism.

Rates, Loss Cost Multipliers – Other than Workers' Compensation

Rate and loss cost multiplier filings will be accepted on a file-and-use basis, in accordance with § 38.2-1906 of the Code. If an insurer relies on an RSO for advisory loss costs and to file supplementary rate information on its behalf, no filing is required unless an insurer plans to use a different loss cost multiplier than is currently on file for coverage for *certified losses*. It is important to note that for lines or sub-classifications of insurance exempted from rate filing requirements by Virginia statutes or administrative orders, the rates related to terrorism coverage for those lines or sub-classifications of insurance are also exempt from filing requirements. The requirements of the Act are not affected by such exemptions and continue to apply.

Rates, Loss Cost Multipliers – Workers' Compensation

If an insurer relies on an RSO to file workers' compensation loss costs and related rating systems on its behalf, no filing is required unless the insurer plans to use a different loss cost multiplier than is currently on file. Refer to Administrative Letter 2010-05 for additional details regarding filing loss cost multipliers. Insurers electing to file independent workers' compensation rates for terrorism exposures that do not rely upon the approved loss costs filed on their behalf by the National Council on Compensation Insurance are subject to the 60-day prior filing requirements of § 38.2-1912 of the Code and must include full actuarial support for their proposed rates.

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Disclosure Notices – Filing Not Required

Insurers should **not** submit the federally required disclosure notices to the Bureau for review or approval. The federally required disclosure notices do not contain terms or conditions of coverage and are, therefore, not subject to form filing requirements

Please feel free to contact the Property and Casualty Division of the Bureau of Insurance at (804) 371-9965 with your questions about Administrative Letter 2020-07.

Sincerely,



Scott A. White
Commissioner of Insurance