

DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505-AC53

Terrorism Risk Insurance Program

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (Treasury) is issuing this final rule as part of its implementation of changes to the Terrorism Risk Insurance Program (TRIP or Program) required by the Terrorism Risk Insurance Program Reauthorization Act of 2015 (2015 Reauthorization Act), as published in proposed form on April 1, 2016, for public comment. Treasury previously issued an interim final rule addressing the process for certification of an act of terrorism, as published in proposed form on April 1, 2016. This final rule addresses the balance of the other proposed rules published on April 1, 2016, and adopts the general renumbering of sections as proposed on April 1, 2016. Some clarifying changes have been made in this final rule in response to comments, and certain other wording changes have also been added which do not change the meaning of the rule as originally proposed.

DATES: This rule is effective January 17, 2017.

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SUPPLEMENTARY INFORMATION:

I. Background

The Terrorism Risk Insurance Act of 2002 (the Act or TRIA) ¹ was enacted on November 26, 2002, following the attacks of September 11, 2001, to address disruptions in the market for terrorism risk insurance, to help ensure the continued availability and affordability of commercial property and casualty insurance for terrorism risk, and to allow for the private markets to stabilize and build insurance capacity to absorb any future losses for terrorism events. TRIA requires insurers to “make available” terrorism risk insurance for

commercial property and casualty losses resulting from certified acts of terrorism (insured losses), and provides for shared public and private compensation for such insured losses. The Secretary of the Treasury (Secretary) administers the Program, including the issuance of regulations and procedures. Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Federal Insurance Office assists the Secretary in administering the Program.²

The Program has been reauthorized three times.³ Most recently, on January 12, 2015, the President signed into law the Terrorism Risk Insurance Program Reauthorization Act of 2015 (2015 Reauthorization Act),⁴ reauthorizing the Program until December 31, 2020. The 2015 Reauthorization Act reformed various operational matters respecting the Program. Among other changes, the 2015 Reauthorization Act mandates that Treasury issue final rules governing the certification process,⁵ and that Treasury collect from participating insurers information and data considered by the Secretary to be appropriate to analyze the effectiveness of the Program.⁶

II. Previous Rulemaking

To date, rules establishing general provisions implementing the Program, including key definitions, and requirements for policy disclosures and mandatory availability, are found in Subparts A, B, and C of 31 CFR part 50.⁷ Treasury’s rules applying provisions of the Act to state residual market insurance entities and state workers’ compensation funds are set forth in Subpart D of 31 CFR part 50.⁸ Rules concerning claims procedures governing payment of the Federal share of compensation for insured losses are currently found at Subpart F of 31 CFR part 50.⁹ Subpart G of 31 CFR part 50

currently contains rules on audit and recordkeeping requirements for insurers,¹⁰ while Subpart H of 31 CFR part 50 currently addresses recoupment and surcharge procedures.¹¹ Subpart I of 31 CFR part 50 currently contains rules implementing the litigation management provisions of TRIA,¹² and Subpart J of 31 CFR part 50 currently addresses rules concerning the cap on annual liability established under TRIA.¹³ Finally, Subpart K of 31 CFR part 50 currently addresses rules concerning the certification process under TRIA.¹⁴ To assist insurers, policyholders, and other interested parties in complying with immediately applicable requirements of the Act, Treasury has also at times issued interim guidance to be relied upon by insurers until superseded by regulations.

III. The Proposed Rule

The proposed rule on which this final rule is based was published in the **Federal Register** at 81 FR 18950 on April 1, 2016.¹⁵ The proposed rule would strike existing 31 CFR part 50 in

Rule)); 70 FR 2830 (Jan. 18, 2005 (timing of affiliation for purposes of claims payments (Notice of Proposed Rulemaking)); 70 FR 34348 (June 14, 2005) (timing of affiliation for purposes of claims payments (Final Rule)).

¹⁰ See 68 FR 67100 (Dec. 1, 2003) (audit and investigative procedures (Notice of Proposed Rulemaking)); 69 FR 39296 (audit and investigative procedures (Final Rule)).

¹¹ See 73 FR 53798 (Sept. 17, 2008) (recoupment and surcharge procedures (Notice of Proposed Rulemaking)); 74 FR 66051 (Dec. 14, 2009) (recoupment and surcharge procedures (Final Rule)).

¹² See 69 FR 25341 (May 6, 2004) (Federal cause of action and settlement approval provisions (Notice of Proposed Rulemaking)); 69 FR 44932 (July 28, 2004) (Federal cause of action and settlement approval provisions (Final Rule)).

¹³ See 73 FR 56767 (Sept. 30, 2008) (cap on annual liability (Notice of Proposed Rulemaking)); 74 FR 66061 (Dec. 14, 2009) (cap on annual liability (Final Rule)).

¹⁴ See 81 FR 18950 (Apr. 1, 2016) (certification process (Notice of Proposed Rulemaking)); 81 FR 88592 (Dec. 7, 2016) (certification process (Interim Final Rule)). In order to avoid a temporary duplication of sections, the certification rules (initially proposed as Subpart G, Sections 50.60 to 50.63) were issued as Subpart K, Sections 50.100 to 50.103. With this final rule, those sections (which remain as interim final rules pending evaluation of any further comments received) are renumbered as originally proposed on April 1, 2016.

¹⁵ In the April 1, 2016 Notice of Proposed Rulemaking, Treasury also sought comments concerning the participation of captive insurers and other self-insurance arrangements in the Program, in anticipation of the development of rules concerning the participation of captive insurers and, potentially, other self-insurance arrangements in the Program. 81 FR 18950, 18956–57 (April 1, 2016). Treasury is presently evaluating the comments received concerning captive insurers and self-insurance arrangements generally to determine whether additional rules should be proposed concerning the participation of these entities in the Program.

¹ Public Law 107–297, 116 Stat. 2322, codified at 15 U.S.C. 6701, note. Because the provisions of TRIA (as amended) appear in a note, instead of particular sections, of the United States Code, the provisions of TRIA are identified by the sections of the law.

² 31 U.S.C. 313(c)(1)(D).

³ Terrorism Risk Insurance Extension Act of 2005, Public Law 109–444, 119 Stat. 2660; Terrorism Risk Insurance Program Reauthorization Act of 2007, Public Law 110–160, 121 Stat. 1839; Terrorism Risk Insurance Program Reauthorization Act of 2015, Public Law 114–1, 129 Stat. 3.

⁴ Public Law 114–1, 129 Stat. 3.

⁵ TRIA, section 102(1)(D).

⁶ TRIA, section 104(h).

⁷ See 68 FR 9804 (Feb. 28, 2003) (Program definitions (Interim Final Rule)); 68 FR 19302 (April 18, 2003) (disclosure and mandatory availability requirements (Interim Final Rule)); 68 FR 41250 (July 11, 2003) (Program definitions (Final Rule)); 68 FR 48280 (Aug. 13, 2003) (“direct earned premium” definition (Final Rule)).

⁸ See 68 FR 19309 (Apr. 18, 2003) (residual market entities and state compensation funds (Notice of Proposed Rulemaking)); 68 FR 59715 (Oct. 17, 2003) (residual market entities and state compensation funds (Final Rule)).

⁹ See 68 FR 67100 (Dec. 1, 2003) (claims procedures (Notice of Proposed Rulemaking)); 69 FR 39296 (June 29, 2004) (claims procedures (Final

its entirety and would replace it with revised Program rules incorporating new Program financial and operational provisions contained in the 2015 Reauthorization Act. The proposed rule included several new subparts to 31 CFR part 50. Subpart F—Data Collection addressed the collection of Program data by Treasury, as required under the 2015 Reauthorization Act, is adopted in this final rule. Subpart G to Part 50, which comprised Treasury's regulations concerning the certification process, was adopted as an interim final rule on December 7, 2016. In addition to these new subparts, the proposal also incorporated a Civil Penalties rule under the Program, pursuant to authority granted by Congress in TRIA,¹⁶ and proposed the adoption, with certain minor changes, of a previously proposed rule addressing the Final Netting of Payments. Finally, the proposal reordered the existing rules to incorporate the new subparts, and made other changes providing further clarification to existing rules and eliminating redundancies.

IV. Summary of Comments and Final Rule

Treasury is issuing this final rule after careful consideration of all comments received on the proposed rule. While this final rule largely reflects the proposed rule, Treasury has made several revisions based on the comments received.

Seventeen commenters submitted comments in response to the general proposal relating to 31 CFR part 50.¹⁷ The 17 commenters included: Insurance industry trade associations; trade associations representing consumers of terrorism risk insurance; insurance companies; Lloyd's (an insurance and

reinsurance market); and individuals.¹⁸ The comments received and Treasury's revisions to the proposed rule are summarized below.

1. Subpart A—General Provisions

The proposed changes to Subpart A principally addressed changes to definitional provisions, many of which were required by the 2015 Reauthorization Act, or which were otherwise required by the passage of time or to provide greater clarity to existing provisions. Treasury did not receive comments respecting many of these proposed changes, which are adopted as originally proposed. Treasury received comments concerning four of the definitions within Subpart A: (1) The proposed change to the definition of "affiliate" in § 50.4(c)(2), as it relates to the rule of construction in Section 106 of the 2015 Reauthorization Act, which provides that control for purposes of determining if an insurer is an "affiliate" under TRIA is not established solely because an entity acts as an attorney-in-fact for another entity that is a reciprocal insurer; (2) the proposed change in § 50.4(g) defining "captive insurer" for purposes of implementing TRIA, and the related exclusion of captive insurers from the definition of "small insurer" in proposed § 50.4(z); (3) the proposed change in § 50.4(m) as it relates to the manner in which Treasury proposes to determine the insurance marketplace aggregate retention amount for any calendar year beginning with 2020, in accordance with the requirement in Section 104 of the 2015 Reauthorization

Act to issue rules for determining this amount; and (4) the definition proposed in § 50.4(z) of "small insurer" as required under Section 112 of the 2015 Reauthorization Act for purposes of conducting a study of small insurers participating in the Program, and as it might relate to the scope of data to be collected from such entities.

One comment was received concerning the proposed revision to the "affiliate" definition, which suggested that the proposed language would nonetheless permit the Secretary to find control by an entity based solely upon its attorney-in-fact relationship with a reciprocal insurer, contrary to the intention of the rule of construction contained in Section 106 of TRIA.¹⁹ Treasury did not intend to suggest that a control determination could be made based solely upon an attorney-in-fact relationship, and will accordingly modify the proposed rule consistent with the comment (by eliminating the cross-reference to the attorney-in-fact rule of construction), to confirm that the ability of the Secretary to determine that control exists, notwithstanding the non-applicability of the specific factors identified in § 50.4(c)(2)(i), cannot be based upon the attorney-in-fact relationship addressed in § 50.4(c)(2)(ii).

The comments received concerning the definition of captive insurer in proposed § 50.4(g) (which simply references how captives are identified by relevant state law) were principally based upon reference to the term in proposed § 50.4(z), which excludes captive insurers from the definition of "small insurer" regardless of their size. Most comments questioned the basis for excluding all captives from the "small insurer" definition, regardless of the size of the captive insurer or its sponsoring parent organization. Other comments suggested that exclusion of captive insurers from the definition of small insurers should not be made before further evaluation of the issue.²⁰

The "small insurer" definition has only two consequences under the proposed Program rules: (1) It will define those insurers that will be considered in the studies Treasury shall conduct and resulting reports it will prepare pursuant to the 2015 Reauthorization Act;²¹ and (2) it will identify those insurers which may be subject to exemption from modified

¹⁶ The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74, modified the procedure for amending civil penalty amounts for inflation, and called for the amounts to be adjusted by interim final rule to take effect not later than August 1, 2016 (with readjustment not later than January 15 of each year after 2016). Accordingly, Treasury has issued separately an interim final rule, adopting new 31 CFR 50.86, Adjustment of civil monetary penalty amount, which identifies the new penalty amount as mandated by statute effective August 1, 2016, and provides for its adjustment by January 15 of each year thereafter. See 81 FR 88600 (Dec. 7, 2016). As reflected below, in light of the general reordering of the Program rules provided for in the proposal, that provision shall be identified as 31 CFR 50.83 with the adoption of these final rules.

¹⁷ Ten commenters (who are also among the 17 commenters that have submitted comments generally in connection with the proposed rules) submitted comments directed to the proposed rule concerning the certification process, which Treasury has already addressed. See 81 FR 88592 (Dec. 7, 2016).

¹⁸ Comments addressing the proposed rules in some fashion were submitted by the American Bankers Association (ABA Comments); the American Insurance Association (AIA Comments); The Council of Insurance Agents & Brokers (CIAB Comments); The Coalition to Insure Against Terrorism (CIAT Comments); Exchange Indemnity Company (Exchange Indemnity Comments); Farmers Insurance Group (Farmers Insurance Comments); the International Underwriting Association of London (IUAL Comments); Jason M. Schupp (Jason Schupp Comments); Lloyd's of London (Lloyd's Comments); M. Mohiuddin (Mohiuddin Comments); Marsh Captive Solutions (Marsh Captive Solutions Comments); Mortgage Bankers Association (MBA Comments); the National Association of Mutual Insurance Companies (NAMIC Comments); the Property Casualty Insurers Association of America (PCIAA Comments); the Reinsurance Association of America (RAA Comments); RIMS, the Risk Management Society (RIMS Comments); and the Vermont Captive Insurance Association (VCIA Comments). In addition, a number of additional comments were received generally addressing the Program, but not providing any specific comments concerning the proposed rules. All of the comments received in connection with the proposed rules published on April 1, 2016 are available at <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dc=PS&D=TREAS-TRIP-2016-0005>.

¹⁹ Farmers Insurance Comments at 1–3.

²⁰ ABA Comments at 1–2; AIA Comments at 2–3; CIAB Comments at 3; Jason Schupp Comments at 3–4; M. Mohiuddin Comments at 1; Marsh Captive Solutions Comments at 2; RIMS Comments at 1–2; VCIA Comments at 2.

²¹ TRIA, section 108(h).

annual data calls under proposed § 50.51. See proposed § 50.51(e).²²

Regarding the first point, the principal purpose of the “small insurer” studies and reports mandated by the 2015 Reauthorization Act is “to identify any competitive challenges small insurers face in the terrorism risk insurance marketplace,” based upon a number of identified factors, including changes in market share, premium volume, and policyholder surplus vis-à-vis large insurers, and the impact on such insurers of the mandatory availability requirement.²³ This report requirement was originally proposed in conjunction with a provision under consideration prior to the 2015 reauthorization of TRIA (which ultimately was not adopted) that would have permitted Treasury to develop an “opt out process” from TRIA for small insurers “if they can demonstrate financial hardship or financial infeasibility of providing coverage for insured losses.” H. Rept. 113–523, 20.

As Treasury has recently observed, “captive insurers may issue policies for terrorism risk subject to the Program that provide coverage that might not be readily available otherwise, such as for NBCR [nuclear, biological, chemical, and radiological] risks, or for ‘trophy’ properties.”²⁴ As a result, captive insurers may play an important role in the provision of terrorism risk insurance, and Treasury is currently reviewing other comments received concerning their participation in the Program. That participation, however, is subject to issues very different from those faced by small conventional insurers that must make available terrorism risk insurance generally in the insurance marketplace:

The potential exposure associated with terrorism risk insurance written by captive insurers for parent or other affiliated entities differs from that of conventional commercial insurers that must “make available” terrorism risk insurance coverage to all potential, unrelated policyholders in the TRIP-eligible lines of insurance. For captive insurers, the offer and acceptance of terrorism risk insurance under the Program is essentially controlled by the insured.²⁵

²² Many of the comments suggesting that captive insurers should not necessarily be excluded from the definition of “small insurer” focused upon the potentially lessened data production obligations for such small insurers under the proposed rules. See, e.g., CIAB Comments at 4.

²³ TRIA, section 108(h)(1).

²⁴ U.S. Department of the Treasury, Federal Insurance Office, Report on the Overall Effectiveness of the Terrorism Risk Insurance Program (June 2016) (2016 Effectiveness Report), at 19, available at https://www.treasury.gov/initiatives/fio/reports-and-notice/Documents/2016_TRIP_Effectiveness_%20Report_FINAL.pdf.

²⁵ *Id.*

Although captive insurers are mandatory participants in the Program, and may be an important resource in the terrorism risk insurance marketplace, the potentially unique issues such captives face are not on account of “competitive challenges” vis-à-vis other insurers as contemplated by the 2015 Reauthorization Act, and accordingly they do not present the concerns (regardless of their size) that led to the requirement for the study in question. For these reasons, the “small insurer” studies should not and will not address captive insurers, regardless of their size. Treasury has reserved Subpart E of the Program rules to address captive insurers and other self-insurance mechanisms, and development of these regulations in the future will allow Treasury to address any issues particular to captive insurers that might justify individualized treatment under the Program rules.

The other concern identified in the comments—that captive insurers will not be excused from annual data calls (or potentially subject to different data calls) under proposed § 50.51(e)—should be obviated by other changes to the proposed rules that have been made in connection with the final rules as adopted. Based upon Treasury’s experience with its recent collection of data on a voluntary basis, a request that may make sense in connection with one type of insurer may be unnecessary or overly burdensome when directed to another. Treasury accordingly has modified § 50.51 as adopted in final form to contain a provision confirming that Treasury may modify data requests by type of insurer to which the requests are directed. Treasury intends to develop data requests for participating captive insurers that will be tailored to the manner in which these entities participate in the Program, which will allow such insurers to provide necessary information in an efficient fashion.

Accordingly, the fact that the definition of “small insurers” excludes captive insurers does not have any significant consequences for captive insurers, and Treasury will adopt § 50.4(g) and § 50.5(z) as originally proposed.

Treasury received two comments concerning proposed § 50.4(m), which addressed, as required by the 2015 Reauthorization, the manner of calculation and publication of the insurance marketplace aggregate retention amount beginning in calendar

year 2020.²⁶ One comment “finds the process outlined in Section 50.4(m) to be adequate and aligned with the requirements under the statute.”²⁷ The other comment did not identify any proposed changes to the rule, but suggested that the final rule should be deferred given that it is based upon data collection that has not yet occurred, and that Treasury may benefit from future data collection experience before finalizing the rule.²⁸

Treasury will issue § 50.4(m) as originally proposed at this time. Given the deadline for the issuance of this rule, no data that will be used to calculate the insurance marketplace aggregate retention amount for 2020 will be collected before the rule must be issued,²⁹ and therefore there is no benefit in waiting to finalize the rule. Between the issuance of the present rule and the time when a final rule concerning the methodology for the collection must be issued in January 2018, Treasury would gain only one further year of data collection (in 2017, for information relating to calendar year 2016). While further experience over time will no doubt continue to allow Treasury to improve and refine the data collection process, Treasury remains able to modify collection requests made on an annual basis to address any lessons learned over time (see proposed § 50.51(c)(2)). By the time data is collected that will factor into the calculation of the insurance marketplace aggregate retention amount for 2020, the collected data to date will provide an appropriate basis for making the calculation as set forth in the proposed rule.

Treasury received very few comments concerning the proposed definition of “small insurer” proposed in § 50.4(z), aside from the exclusion of captive insurers from the definition, which is addressed above. One comment offered “no view” as to whether the proposed definition “is suitable for Treasury’s purposes,” but identified a number of factors for consideration in identifying a small insurer, principally relating to

²⁶ Prior to 2020, the insurance marketplace aggregate retention amount is defined by statute. TRIA, section 103(e)(6).

²⁷ CIAT Comments, at 4.

²⁸ Jason Schupp Comments, at 4. Among possible issues identified in the comment is the manner in which the calculation will be made if data is not collected from certain insurers. *Id.* Under the 2015 Reauthorization Act, a final rule must be issued concerning the calculation and its publication by January 12, 2018. TRIA, section 103(e)(6)(C).

²⁹ By statute, the calculation of the insurance marketplace aggregate retention amount for 2020 will be based upon data for calendar years 2017 to 2019; however, none of this data will be available for collection prior to the deadline for publishing the final rule by January 2018.

whether the policyholder surplus element of the definition was set at an appropriate level.³⁰ Another comment questioned the use of a policyholder surplus element in the definition at all, stating that Treasury's preamble to the proposed rule "offers no explanation for the inclusion of the policyholder surplus as a 'second prong' of the definition," and "question[ing] its appropriateness" as a part of the definition.³¹ Neither comment offered alternative suggestions for measuring a "small insurer" under the 2015 Reauthorization Act.

Treasury will issue § 50.4(z) as originally proposed, with the clarifying modification that "policyholder surplus" will be evaluated as it is reported by a participating insurer for state regulatory purposes on its Annual Statement at Page 3, Line 37, Column 1.³² Treasury explained in its preamble to the rule as originally proposed that some consideration of an insurer's policyholder surplus was required because the impact of a loss that exceeded an insurer's deductible but which did not reach the Program Trigger "would be lessened to the extent the insurer's policyholder surplus was sufficient to satisfy any amounts that would not be reimbursed in such a scenario under the Program."³³ Given the limited purposes of the "small insurer" definition—to define the scope of certain studies concerning competitive challenges faced by participating insurers, and to define the scope of potential modifications to the requirement to provide data—some consideration of the claims-paying ability of insurers, as measured by policyholder surplus, is clearly appropriate. Another comment suggested that there is some "imbalance" which supports elimination of policyholder surplus as a consideration because the TRIP-eligible direct earned premium (DEP) component of the definition is not calculated on the same basis as policyholder surplus (which extends to all lines of insurance).³⁴ This suggestion ignores the fact that both measures address the same consideration: The impact upon a participating insurer of policyholder claims for certified acts of terrorism, whether the reimbursement for the claims can be obtained through

insurer reimbursement under the Program (as measured by the first component of the definition), or if the participant's policyholder surplus is sufficient to pay claims in the absence of Program support (as measured by the second component of the definition).

Treasury also received comments concerning two provisions within proposed Subpart A to which Treasury did not propose any modifications. The first of these is with respect to proposed § 50.1(c), which one commenter suggested should be modified to confirm that the Program rules also apply to claimants against participating insurers and their policyholders, given that certain provisions of TRIA and the implementing regulations (for example, matters concerning Subpart K, the Federal Cause of Action, and Subpart L, the Cap on Annual Liability) also have an impact upon such claimants.³⁵ The observation of this commenter is correct; although many of the proposed rules do not have any direct or indirect impact upon third-party claimants, there are provisions that do have such an effect. Accordingly, Treasury will modify proposed § 50.1(c) as suggested.

The second comment referred to proposed § 50.5, the Rule of Construction for Dates, which provides that "any date in these regulations is intended to be applied so that the day begins at 12:01 a.m. and ends at midnight on that date." Two commenters have observed that this language presents a potential and unintended gap of 59 seconds, if "midnight" means 12:00:00 a.m., and not 12:00:59 a.m.³⁶ Treasury does not believe that any modification to the rule as stated (which has been in place since the inception of the Program) is necessary. It is Treasury's intention and understanding that in this context 12:01 a.m. means, if necessary, 12:01:00 a.m., and that "midnight" should be read to mean 12:00:59 a.m., such that there is no unintended gap between the dates as expressed within the rule.

Treasury did not receive comments respecting the remaining proposed changes to Subpart A. Treasury therefore adopts as the final rule Subpart A as it was proposed, subject to the modifications identified above.

2. Subpart B—Disclosures as Conditions for Federal Payment

Subpart B addressed the TRIA disclosure requirements, which must be satisfied in order for a participating insurer to qualify for Federal payments.

Treasury proposed a clarifying change to § 50.12(b), addressing the manner in which the portion or percentage of the premium attributable to terrorism risk insurance should be disclosed to policyholders or potential policyholders, and also proposed changes to the existing rules to implement changes to the disclosure requirements contained in the 2015 Reauthorization Act. Treasury received comments concerning both of these changes, as well as other suggestions concerning the provisions of Subpart B.

The clarifying change to § 50.12(b) proposed to add the phrase "and provided that the amount of annual premium or the method of determining the annual premium is also stated." The intent behind the change, as explained in the proposal, was "to ensure that the actual dollar value of the premium is evident."³⁷ Treasury received a number of comments concerning this provision, suggesting that it imposes some new or different requirement respecting disclosure of the terrorism risk premium being charged.³⁸

It appears from the comments that the principal concern is that while the rule originally stated that an insurer "may describe the premium charged for insured losses covered by the Program as a portion or percentage of an annual premium" (emphasis added), the added proviso potentially purports to require as a matter of disclosure the "annual" premium for terrorism risk insurance, even in situations where policy coverage is not provided on an annual basis, leading to confusion for insurers and policyholders alike.³⁹ This was not the intention, and given that the proviso modifies language stating that the insurer "may" provide the information in this fashion, the concerns expressed are not required by the language as proposed. Nonetheless, the comments highlight the fact that the rule raises a potential ambiguity in situations where coverage is not provided on an annual basis. To avoid the issue, Treasury will substitute the term "policy" for "annual" where it appears in proposed § 50.12(b).

Treasury's intention remains to ensure that the actual dollar value of the premium is evident from the disclosure. As stated in the rule, there may be a number of ways for an insurer to accomplish this disclosure, and Treasury is not requiring by rule any

³⁰ Jason Schupp Comments, at 2–3.

³¹ PCIAA Comments, at 3.

³² This was the definition used by Treasury in its 2016 data collection. Treasury is not aware of any questions that any responding insurers had as to what was meant by policyholder surplus as defined in this fashion.

³³ 81 FR 18950, 18953 (Apr. 1, 2016).

³⁴ See PCIAA Comments, at 3.

³⁵ See Jason Schupp Comments, at 1.

³⁶ See Jason Schupp Comments, at 4–5; AIA Comments, at 5.

³⁷ 81 FR 18950, 18953 (April 1, 2016).

³⁸ See PCIAA Comments, at 3–4; AIA Comments, at 5; Jason Schupp Comments, at 5–7.

³⁹ *Id.*

particular method.⁴⁰ Nor does this revision require an insurer to charge for terrorism risk insurance if the insurer did not otherwise intend to make such a charge.⁴¹ If a charge is being made, however, the intention of the rule is that the disclosure be made to the policyholder in such a way that the policyholder can actually determine the amount that it is being charged by the insurer for the terrorism risk insurance. None of these changes modify the manner in which the Program operates. From the inception, TRIA has required that “the insurer provides clear and conspicuous disclosure to the policyholder of the premium charged for insured losses covered by the Program,”⁴² which requirement has been memorialized in the Program rules as well (see existing 31 CFR 50.10(a)(1)).

Treasury received an additional comment concerning portions of proposed § 50.12 that Treasury did not propose to modify from the prior version.⁴³ The commenter suggested that proposed § 50.12(d) and (e) be combined into a single § 50.12(d), which would provide that an insurer could demonstrate compliance with disclosure requirements through use of appropriate systems and business practices, “including where an insurer normally communicates with a policyholder

through an insurance producer or other intermediary.”⁴⁴

Treasury declines to make the suggested change. The comment would eliminate the language in proposed § 50.12(d) (which has previously been in the existing rule) that “[i]f an insurer elects to make the disclosures through an insurance producer or other intermediary, the insurer remains responsible for ensuring that the disclosures are provided by the insurance producer or other intermediary to policyholders in accordance with the Act.” This language is consistent with industry practice generally—*i.e.*, while insurers may rely upon intermediaries to perform actions that are the responsibility of the insurer, it is the insurer that remains ultimately responsible for ensuring that the actions are performed.

When coupled with existing § 50.12(e), an insurer may demonstrate compliance with disclosure requirements “through use of appropriate systems and normal business practices that demonstrate a practice of compliance,” and this would extend to the use of such systems and normal business practices by an intermediary on behalf of a participating insurer. However, it is the participating insurer that will remain responsible for demonstrating, if an issue of compliance is raised, that appropriate systems and normal business practices were employed by the intermediary on behalf of the insurer. The use of an intermediary, in and of itself, does not demonstrate compliance, or otherwise excuse an insurer from demonstrating compliance. Treasury will adopt as the final rule § 50.12(d) and § 50.12(e) as originally proposed.

Treasury made a number of changes to Subpart B to implement provisions of the 2015 Reauthorization Act which modified the timing of the general disclosure requirements. In the 2015 Reauthorization Act, however, no change was made to the timing of the disclosure requirements applicable to the cap disclosure. A number of commenters have suggested that this was an unintentional oversight on the part of Congress, and that Treasury should implement similar revisions to its rules respecting the cap disclosure.⁴⁵

⁴⁴ AIA Comments, at 5–6.

⁴⁵ PCIAA Comments, at 5–6; AIA Comments, at 5 n.5. Treasury has proposed a change to § 50.15, providing expanded guidance for ensuring compliance with the requirement that the cap disclosure be provided at the time of offer, purchase, and renewal. It did not, however, seek to remove entirely the disclosure requirement at the time of purchase, as the commenters have suggested Treasury should do.

Treasury understands the position of the commenters. However, while it is possible that the different treatment in the 2015 Reauthorization Act of the various requirements respecting disclosure is the result of an oversight, it is equally possible that the differing treatment reflects a conscious determination that a different approach be taken. See, *e.g.*, *Loughrin v. United States*, 573 U.S. ___, 134 S. Ct. 2384, 2390 (2014) (“We have often noted that when ‘Congress includes particular language in one section of a statute but omits it in another’—let alone in the very next provision—this Court presume[s] that Congress intended a difference in meaning.” (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))). Treasury declines to provide for the modification sought by the commenters, where it is at best unclear that Congress intended to make such a change.

Treasury adopts as the final rule Subpart B as it was proposed, subject to the modifications identified above.

3. Subpart C—Mandatory Availability

The proposed changes to Subpart C involved changes seeking to delete provisions that are redundant or unnecessary on account of the passage of time, substitute language to clarify Treasury’s intent, or implement other minor changes that conform the existing regulations to the requirements of the 2015 Reauthorization Act. No comments were received concerning these proposed changes.

Treasury adopts as the final rule Subpart C as it was proposed.

4. Subpart D—State Residual Market Insurance Entities; Workers’ Compensation Funds

No substantive changes were proposed by Treasury to Subpart D, nor did Treasury receive any comments concerning this Subpart.

Treasury adopts as the final rule Subpart D as it was proposed.

5. Subpart E—Self-Insurance Arrangements; Captives [Reserved]

Treasury continues to reserve Subpart E for future additional rules addressing the participation in TRIP of self-insurance arrangements and captive insurers.

6. Subpart F—Data Collection

Subpart F is new; the proposed rules establish procedures for collection of data as mandated by Section 111 of the 2015 Reauthorization Act, and also address the collection of data by Treasury in other contexts, including in the event that an act of terrorism has

⁴⁰ Treasury understands that that some premiums may develop over time in a way that it is not possible to disclose a particular amount of terrorism risk premium at the time a policy is offered. To the extent such a situation cannot be addressed by the application of a percentage for purposes of the calculation, which has always been an option under the Program rules, the insurer remains in a position to make a disclosure which explains to the policyholder how the amount is being calculated, so that the policyholder can assess what the charge will be. As otherwise provided in the rules in this regard, “whether a disclosure is clear and conspicuous depends on the totality of the facts and circumstances of the disclosure.” 31 CFR 50.12(a) (2016).

⁴¹ While neither TRIA nor the Program Rules have ever required an insurer to charge any particular sum for terrorism risk insurance, or charge any amount at all, neither TRIA nor the Program Rules have ever allowed an insurer to make a charge for terrorism risk insurance, and then not to disclose that amount to the policyholder for some reason. Accordingly, and contrary to the suggestion by one commenter, there has never been any “existing Treasury policy” that would permit an insurer to reflect that it is not charging a premium for terrorism risk insurance when it is charging such a premium. See PCIAA Comments, at 4. If a charge is being made, both TRIA and the Program Rules have always required that such charge be disclosed to the policyholder.

⁴² TRIA, section 103(b)(2).

⁴³ Changes were proposed by Treasury to § 50.12(e); however, those changes deleted provisions addressing disclosure requirements during earlier years which have been rendered redundant by the passage of time, and the comment did not address these changes.

been certified. Treasury received a number of comments concerning each of these provisions, which it will address on a section-by-section basis.

General (§ 50.50)

Proposed § 50.50 states that Treasury may generally request information from insurers in connection with the Program, as part of its administration and implementation of the program. This provision is not related specifically to any of the authorities provided under Section 111 of the 2015 Reauthorization Act, and, if exercised, would be based upon Treasury's general authority to seek information in support of the operation of programs that it administers.

Treasury only received one comment specifically directed to proposed § 50.50, and it appears that this comment actually meant to address proposed § 50.51, as the comment actually addresses the annual data collection in aid of Treasury's reporting requirements.⁴⁶ Treasury will accordingly address that comment in the context of proposed § 50.51, and will adopt proposed § 50.50 as originally proposed.

Annual Data Reporting (§ 50.51)

Proposed § 50.51 establishes rules concerning the annual collection of data by Treasury from participating insurers concerning the effectiveness of the Program, as mandated by Section 111 of the 2015 Reauthorization Act. The comments concerning proposed § 50.51 fall into four general categories: (1) Comments suggesting that provisions should be included memorializing that Treasury should collect data from other sources, if available, in lieu of any annual data collection by Treasury directly from participating insurers;⁴⁷ (2) comments suggesting a later collection date than the March 1 date originally proposed by Treasury;⁴⁸ (3) comments suggesting the need for participating insurers to review and comment upon the scope and nature of

future annual data collections, and seeking additional time beyond the 90 days specified in the proposed rule before requiring collection of any newly-specified data or information;⁴⁹ and (4) comments suggesting (either directly or indirectly) that annual data requests should be adjusted by industry group or size of insurer, observing that this is not an area in which "one size fits all."⁵⁰ Treasury will address these comments in turn.

Under the 2015 Reauthorization Act, the Secretary "shall" collect data from participating insurers annually "regarding insurance coverage for terrorism losses of such insurers as the Secretary considers appropriate to analyze the effectiveness of the Program."⁵¹ The data collected is to form the basis for various reports that the 2015 Reauthorization Act requires the Secretary to submit to Congress.⁵² Before such collection is made, Treasury shall "coordinate with the appropriate State insurance regulatory authorities and any relevant government agency or publicly available sources to determine if the information to be collected is available from, and may be obtained in a timely manner by, individually or collectively, such entities."⁵³ If the information required by the Secretary can be obtained from these other sources, in a timely fashion, Treasury is to collect the information in this manner. If not, Treasury may collect the information directly from participating insurers.⁵⁴

In advance of the recent voluntary data collection, Treasury did coordinate with other sources, including state insurance regulatory authorities, and determined that the data it sought was not available from other sources.⁵⁵ In fact, Treasury determined that comprehensive data concerning the

participation of insurers in the Program had never been collected previously. Treasury will continue to evaluate in the coming years what data it requires to perform the analyses that it must make, and whether that data can be obtained from other sources in lieu of direct collection from participating insurers. Because this evaluation will necessarily vary from year to year, depending upon the data that Treasury needs, the timing of any reports that must be submitted, and the availability of data from other sources, it is not practical to attempt to codify a uniform process. However, Treasury has added language to § 50.51(b) to reflect the possibility that Treasury may be able to obtain some or all of the information from publicly available or other third-party sources. Treasury thus recognizes the provisions of the 2015 Reauthorization Act concerning the potential collection of information from sources other than participating insurers, and will continue to evaluate the availability of such information in future years.

In terms of the timing of annual data collections from participating insurers, Treasury proposed a March 1 deadline because it is consistent with the date of other industry reporting requirements, and it would provide Treasury with the data in sufficient time to complete required reports.⁵⁶ Most of the commenters addressing this issue suggested that a March 1 date was problematic precisely because participating insurers had other reporting obligations falling due that day, such that adding an additional obligation at the same time would be burdensome.⁵⁷

Treasury does not wish to pose any unnecessary burdens upon participating insurers on account of required data collection. It will accordingly modify the data collection response date from March 1 to May 15, which will provide participating insurers the additional time sought but should still provide Treasury with sufficient time to analyze the data for the required reports.

Regarding the nature and scope of the annual data collection, future data collections will be based upon proposed collection templates which will be published for comment in the calendar year prior to the actual collection of

⁴⁶ NAMIC Comments, at 2–3.

⁴⁷ PCIAA Comments, at 2; NAMIC Comments at 2–3.

⁴⁸ PCIAA Comments, at 2–3 (suggesting an April 1 reporting deadline); AIA Comments, at 6 (suggesting "mid-April or to later in the year (October/November)"); CIAB Comments at 4 (suggesting "a later deadline" than March 1); Exchange Indemnity Comments at 2 (suggesting a deadline of May 31); Lloyd's Comments at 3 (suggesting May 15 deadline); M. Mohiuddin Comments at 1–2 (suggesting "a date later in year" than March 1); NAMIC Comments at 3 (suggesting that "a deadline in mid or late May would be necessary in future years to ensure that the data submitted are accurate and complete"); IUAL Comments at 1–3 (suggesting a date "shortly after" May 15).

⁴⁹ CIAB Comments at 4 (suggesting an increase from 90 days to 180 days in the notice period); Exchange Indemnity at 2 (180 day implementation period, following prior publication and comment period).

⁵⁰ RAA Comments at 1 ("Private market participants' approach to these risks vary and there is no 'one size fits all' approach."); *see also* AIA Comments at 6 (suggesting "a more focused data collection effort" based upon character of insurer involved); IUAL Comments at 4 (suggesting reporting mechanism for alien surplus lines insurers consistent with existing financial reporting form generated by such entities); CIAB Comments at 4 (suggesting that "to protect the confidentiality of captive insurer information" such insurers be allowed "to report less robust data"); Exchange Indemnity Comments at 1 (suggesting a narrower collection of data from captive insurers given the nature of risks they write).

⁵¹ TRIA, section 104(h)(1).

⁵² TRIA, section 104(h)(2).

⁵³ TRIA, section 104(h)(4).

⁵⁴ *Id.*

⁵⁵ 2016 Effectiveness Report at 7.

⁵⁶ The reports and studies based upon annual data required under the 2015 Reauthorization Act must be completed by not later than June 30 of each year under which they are required. TRIA, sections 104(h)(2), 108(h)(1).

⁵⁷ *See, e.g.,* AIA Comments at 6; PCIAA Comments at 2–3; Exchange Indemnity Comments at 2.

information.⁵⁸ See proposed § 50.51(c)(2). Participating insurers will be in a position to comment upon future data collection templates through this mechanism. Furthermore, given that Treasury has moved the collection date to May 15, and new data collection templates will be published during the prior calendar year, participating insurers will now have a period of time of at least 120 days, and likely more, to evaluate changes to data collection protocols and prepare for responding to any modified requests. Accordingly, only one clarifying change to proposed § 50.51 is required in light of these issues, as the rule (as modified) effectively addresses these comments.⁵⁹

Finally, a number of comments were received that suggested that annual data collection requests should be adjusted depending upon the nature of the reporting insurer's participation in the Program. The rule as originally proposed recognized this to some extent, in the provision suggesting that "small insurers," as otherwise defined, might be exempted from annual data collection, or subject to modified requests. Based upon Treasury's experience in the recent collection of data, however, it is also the case that modified requests may be used to provide a more efficient collection mechanism for different types of participants in the terrorism risk insurance marketplace, such as captive insurers and alien surplus lines insurers. Accordingly, Treasury will modify subsection (c) of proposed § 50.51 to confirm that the forms for

data collection may vary depending upon the type of insurer participating in the Program. As noted above, these proposed forms will be published in advance of their approval and use, such that interested parties are in a position to comment upon the information requested.

Treasury will accordingly adopt as the final rule § 50.51 as originally proposed, subject to the modifications addressed above.

Small Insurer Data (§ 50.52)

Proposed § 50.52 addresses the collection of data relating to small insurers, as defined in proposed § 50.4(z), in support of the studies of small insurers mandated by the 2015 Reauthorization Act. The data elements specified in proposed § 50.52 are those specified in Section 112 of the 2015 Reauthorization Act. Apart from the comments concerning whether captive insurers should be considered "small insurers" for these purposes, addressed above, Treasury did not receive any comments concerning proposed § 50.52. Treasury accordingly adopts as the final rule § 50.52 as originally proposed.

Collection of Claims Data (§ 50.53)

Proposed § 50.53 establishes rules for the collection of data by Treasury once an act has been certified as an act of terrorism. As explained in the preamble to the proposed rule, Treasury proposed this provision, which accelerates the time that participating insurers would otherwise be required to report claims to Treasury, because in the absence of such information Treasury could be unaware that the Program Trigger threshold has been breached, which would thus delay its response to legitimate claims for payment of the Federal share of compensation.⁶⁰ Treasury received two comments concerning this proposed rule which suggested, respectively, that no rationale was offered and that the proposal should be withdrawn pending further study, and the existing requirement (which limits claims reporting to situations where 50 percent of a particular insurer's deductible has been eroded) is sufficient.⁶¹

Having this requirement in the rules serves an important purpose—to alert Treasury to the need to make payments to an insurer that has satisfied its deductible, but as to which it is unclear, based upon that particular insurer's experience alone, that the Program Trigger has been met. While the proposed rule may not provide any

particular benefit to a large insurer, whose claims may alone demonstrate that the Program Trigger has been reached, it could be critical to a smaller insurer that cannot make this demonstration on its own, when other insurers have not met the current 50 percent threshold for reporting claim information and have no reporting obligation. Treasury interprets both comments as implying that the monthly reporting requirement would pose an increased burden on insurers. Treasury believes that the information that will be required from an insurer under this provision will be generated by the insurer in the ordinary course of its business. As a result, Treasury does not believe that this provision imposes a significant additional burden on a participating insurer, any more than an insurer would be burdened if it received such a request from its reinsurer.

Under these circumstances, Treasury believes that the proposed rule serves an important purpose, and provides an important safeguard to insurers that may be most at risk when faced with a disproportionate number of terrorism risk claims. Accordingly, Treasury will adopt as the final rule § 50.53 as proposed.

Handling of Data (§ 50.54)

Finally, proposed § 50.54 implements the requirements found in Section 111 of the 2015 Reauthorization Act, which recognize that the data Treasury will need to collect from participating insurers may constitute proprietary information that is highly sensitive to the individual companies (and, potentially, underlying policyholders and claimants) from which it is obtained. Treasury received one comment concerning the proposed rule, which is generally in favor of the provision but which suggests that the rule fails to address potential confidentiality issues presented by the use of a third-party vendor by Treasury, such as an insurance statistical aggregator, to collect confidential data.⁶²

The 2015 Reauthorization Act expressly provides that Treasury—"to the extent possible"—shall contract with an insurance statistical aggregator to collect data and obtain it in aggregated form, precisely to address confidentiality issues identified in the

⁵⁸ The 2016 data collection was based upon a collection template for which Treasury obtained emergency approval for a voluntary collection from the Office of Management and Budget, in light of timing considerations, and was thus not subject to public comment (although Treasury conducted substantial interaction with stakeholders during the development of that template). See 81 FR 11649 (March 4, 2016).

⁵⁹ A number of comments were received from captive insurers, or groups associated with captive insurers, suggesting that data collection from captive insurers should be accomplished through the state regulators of their various domiciliary states, on grounds that data could be provided in this fashion on an anonymous basis and not reveal confidential, proprietary information respecting the insureds of participating captive insurers. See, e.g., CIAB Comments at 4; Exchange Indemnity Comments at 1. Treasury notes that the 2015 Reauthorization Act provides for, to the extent possible, the collection of data on a confidential, aggregated basis through an insurance statistical aggregator, and that this was the approach taken in connection with the 2016 data collection. The suggested approach would require the collection of information through many more separate state insurance departments, for which there is no current mechanism for such reporting. In any event, these comments can and will be considered in connection with the development of future data collection protocols for captive insurance companies.

⁶⁰ See 81 FR 18950, 18954 (April 1, 2016).

⁶¹ AIA Comments, at 7; Jason Schupp Comments at 7–8.

⁶² NAMIC Comments at 4. In addition to this comment, Treasury received a number of comments that mentioned the confidentiality provisions of proposed § 50.54, but only in the context of suggesting that lesser data production requirements should be adopted for captive insurers. See Exchange Indemnity Comments at 2; Marsh Captive Solutions Comments at 1–2. Treasury will address such comments in connection with future data collection protocols.

2015 Reauthorization Act and the proposed rule. Such insurance statistical aggregators are subject to confidentiality requirements in their ordinary business activities, and the 2015 Reauthorization Act directs that any such entity with which Treasury might contract “shall keep any nonpublic information confidential” Although the statutory language effectively addresses the concern identified by the commenter, Treasury will modify the proposed rule to provide that, to the extent Treasury utilizes an insurance statistical aggregator to assist in the collection of data, such insurance statistical aggregator will be subject to the requirement to keep nonpublic information confidential, as required by the 2015 Reauthorization Act.

Treasury adopts as the final rule Subpart F as it was proposed, subject to the modifications identified above.

7. Subpart G—Certification

Subpart G, §§ 50–60 to 50.63, as modified, was previously adopted by Treasury as an interim final rule, although was initially adopted as Subpart K, §§ 50.100 to 50.103, in order to avoid reduplication of Subparts and section numbers in light of the existing rules. It is adopted here as Subpart G, §§ 50.60 to 50.63, as an interim final rule pending receipt and consideration of additional comments concerning the certification process as identified in the interim final rule. In this version of the interim final rule concerning certification, Treasury has also modified the internal citations within Subpart G to conform to the relevant sections that now apply with the issuance of these additional rules.

8. Subpart H—Claims Procedures

Most of the proposed changes to Subpart H addressed modifications required by the 2015 Reauthorization Act. In addition, Treasury proposed new § 50.76, addressing the final netting of claims. Treasury previously received comments on this provision after it was originally proposed in August 2010, and made certain changes to the draft rule as currently proposed in response to those comments.⁶³ Only one additional comment was received in response to the present April 2016 proposed rule, which incorporated comments previously provided in connection with the earlier August 2010 proposed rule. The comment received suggests the proposed rule (at § 50.76(e)) should be

modified to provide that if a participating insurer meets a 20 percent threshold of additional claims within a year after the Final Netting Date— notwithstanding the final netting and an associated communication—Treasury “shall” reopen the claim.⁶⁴ As currently proposed, the rule provides only that Treasury may permit the claim to be reopened. In addition, the same commenter suggests that, when a commutation is being considered, Treasury should provide the insurer in question no less than 180 days within which to submit the information required by Treasury to consider the proposed commutation, as opposed to “no less than 90 days” in proposed § 50.76(d)(2).⁶⁵

As Treasury explained in its preamble to this proposed rule, section 103(e)(4) of TRIA provides the Secretary with the sole discretion to determine the time at which claims relating to any insured loss or act of terrorism shall be considered final. Based on that authority, the final netting rule provides the mechanism for the Secretary to determine when claims for the Federal share of compensation shall be considered final, and accordingly that final payments shall be made by Treasury to insurers, or by insurers to Treasury, such that Treasury can close out its claims operation for insured losses for a given calendar year. By contrast, the comment proposes that Treasury leave open the final netting process for further extended periods of time.

Treasury declines to make the proposed change obligating Treasury to necessarily reopen the claims process if an insurer is able to satisfy the 20 percent threshold. As proposed, Treasury will be able to determine that the additional claims experience satisfying the 20 percent threshold arose in an unexpected fashion, such that it could not have been accounted for in any prior commutation process. If it does not appear that the claims in question were otherwise expected—at a time when the likelihood of further claim activity should be quite remote—Treasury would be able to allow for a reopening, assuming no other considerations militate against doing so. However, because the Secretary has sole discretion in determining the time at which claims must be considered to be final, there should not be any mandatory obligation upon the Secretary to further extend the claims process.

Similarly, allowing for a period of not less than 6 months for the provision of requested data would necessarily extend out any commutation process for a period far longer than the time that would reasonably be required. As the commenter acknowledges, “not less than 90 days” means that Treasury may still provide longer than 90 days to the insurer in question, if the insurer shows that a longer period is reasonably required to generate the information called for by Treasury. Imposing a far lengthier default period upon the process, regardless of the time actually necessary to respond to the inquiries, does not strike the appropriate balance in a situation where the statutory goal is to bring to a close Treasury’s involvement in the claims process.

Treasury adopts as the final rule Subpart H as it was proposed.

9. Subpart I—Audit and Investigative Procedures

The only substantive change to Subpart I (formerly Subpart G) was new § 50.82, addressing civil penalties in connection with TRIA. The proposed rule tracked the statutory language as to the situations in which a civil penalty may be assessed, and provided (as required by the Act) for any penalty to be assessed only after proceedings on the record and after an opportunity for a hearing is extended to the insurer in question. The proposed rule also identified a proposed increase for inflation, as required by Federal law, although more recent statutory authority now requires an increase in the maximum penalty amount from \$1,000,000 to \$1,311,850, as distinguished from the \$1,325,000 as originally proposed. Treasury has already issued an interim final rule increasing the maximum penalty amount and providing for its annual adjustment, as required by statute.⁶⁶

Treasury received a number of comments in response to the proposed rule. None of the comments challenged the authority for the issuance of the rule, or the fact that the amount of the maximum penalty must be increased for inflation on account of Federal law requirements. A number of commenters

⁶⁶ The amount of the civil penalty and its annual readjustment, as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, was previously adopted by Treasury. See 81 FR 88600 (Dec. 7, 2016) (adopting by interim final rule 31 CFR 50.87). That rule was identified as 31 CFR 50.87 in order to avoid reduplication of existing rule numbers; as part of this final rule, that provision is renumbered as 31 CFR 50.83. For purposes of the final rule, proposed § 50.82 has also been revised to now cross-reference the civil penalty amount now set forth in 31 CFR 50.83.

⁶³ 81 FR 18950, 18955 (April 1, 2016); see also 75 FR 45563 (August 2, 2010) (final netting rule as originally proposed in 2010).

⁶⁴ NAMIC Comments at 5.

⁶⁵ NAMIC Comments at 5–6.

proposed, however, that proposed § 50.82 should be amended to include language requiring that the conduct giving rise to the potential imposition of penalties be subject to increased levels of culpability (e.g., “intentionally”, in “gross disregard”, “knowingly”)⁶⁷ where proposed § 50.82 as published does not already require “intentional” or “fraudulent” conduct as a basis for a claim of violation justifying the imposition of civil penalties.⁶⁸ In addition, one commenter suggested inclusion of a provision that would permit relief for insurers that “upon notification of a potential violation, take steps to correct it.”⁶⁹

Proposed § 50.82 is based upon the provisions of section 104(e) of TRIA. The violations specified in the proposed regulation are those identified in the statute, which does not prescribe (with the exception of the violations identified in proposed § 50.82(a)(2) and (3)) any heightened standard of conduct or culpability in connection with a violation. At least one of the violations which is not subject to any higher standard—the collection of recoupment amounts, under proposed § 50.82(a)(1)—implicates matters central to the financial mechanisms under which the Program is based. Furthermore, because the maximum penalty amount is either the statutory figure or, if greater, the amount in dispute in cases of a “failure to pay, charge, collect, or remit amounts in accordance with” the Act, modification of the proposed rule as suggested would impose a greater burden on the government to prove a violation than contemplated by the statute, in a situation where the violation has resulted in a failure to pay, charge, collect, or remit amounts even greater than the statutory figure that could be essential to the integrity of the Program.

For these reasons, Treasury declines to modify proposed § 50.82 to include

higher standards of culpable conduct than were identified by Congress in TRIA when establishing a civil penalty in the first place. Of course, the culpability of an insurer’s conduct in responding to a claim that it is subject to a civil penalty may be relevant to the amount of any penalty that is ultimately imposed, when a violation is identified. Treasury believes, however, that this is best accomplished through the individual adjudication process, and does not warrant a modification to the scope of the civil penalty provision as enacted in TRIA.

Similarly, while Treasury agrees with the comment that, in the event of a claimed violation, Treasury should take into account situations where an insurer takes steps to cure an innocent violation upon notification, Treasury will not modify the rule as proposed. The nature of any claimed violation could clearly have an effect on the amount of any civil penalty assessed, or whether any penalty should be assessed at all. The situation identified by the commenter is one of any number of circumstances that might arise reflecting reduced culpability that could be found by Treasury to justify either a reduction or elimination of any civil penalty assessed. However, because such circumstances are fact dependent and case specific, this is something best addressed on a case-by-case basis rather than through a revision to the rule as originally proposed.

Because of the recent inclusion of a new rule addressing the amount of the civil penalty and its adjustment over time, proposed § 50.82 is also being modified to reference § 50.87—which is renumbered in this Final Rule as § 50.83—as the source of the amount of the civil penalty.

Treasury adopts as the final rule Subpart I as it was proposed, subject to the modification identified above.

10. Subpart J—Recoupment and Surcharge Procedures

The principal changes proposed to Subpart J were in connection with proposed § 50.90 (formerly § 50.70), and were based upon changes to the Program adopted in the 2015 Reauthorization Act—i.e., the increase, from 133 percent to 140 percent, in the amount of terrorism loss risk-spreading premiums to be applied to any mandatory recoupment amount, and the revised schedule for the collection of terrorism loss risk-spreading premiums, depending upon the timing of any certified act of terrorism. The balance of the proposed changes to Subpart J were in the nature of clarifying and conforming changes in light of the 2015

Reauthorization Act, and did not seek to establish any further substantive changes. Treasury did not receive any comments concerning the proposed revisions to this Subpart.

Treasury adopts as the final rule Subpart J as it was proposed.

11. Subpart K—Federal Cause of Action; Approval of Settlements

The proposed Rule incorporated certain changes and clarifications to Subpart K, involving the Federal Cause of Action and Approval of Settlements by Treasury. These changes are designed to enhance Treasury’s ability to evaluate and manage significant claims that could have a material impact upon Treasury’s payment of the Federal share of compensation. The balance of the proposed changes to Subpart K made certain clarifying changes or deleted material that is now redundant or unnecessary, and did not seek to establish any substantive changes. Treasury did not receive any comments concerning the proposed revisions to this Subpart.

Treasury adopts as the final rule Subpart K as it was proposed.

12. Subpart L—Cap on Annual Liability

The proposed changes in Subpart L incorporated language required by the 2015 Reauthorization Act, or conformed the provisions to Treasury’s other data collection authorities under Part 50. Treasury did not receive any comments concerning the proposed revisions to this Subpart.

Treasury adopts as the final rule Subpart L as it was proposed.

V. Procedural Requirements

Executive Order 12866, “Regulatory Planning and Review.” Executive Order 12866, as supplemented by Executive Order 13563, establishes a program to reform and make more efficient the regulatory process of the Federal Government. In accordance with such Executive Orders, this rule is a significant regulatory action, and has been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act. In general, the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), which applies to any rule subject to notice and comment rulemaking under the Administrative Procedure Act or any other law, requires a federal agency to conduct a full regulatory flexibility analysis unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. (5 U.S.C. 605(b)). In the preamble to the proposed rule, Treasury certified that the rule, if promulgated, would not have

⁶⁷ See NAMIC Comments, at 6 (suggesting inclusion of “intentionally or with gross disregard” standard in proposed § 50.82(a)(1) and (4), and “intentional or grossly negligent” standard in proposed § 50.82(a)(5)); Lloyd’s Comments, at 2–3 (suggesting inclusion of a “knowingly” standard in proposed § 50.82(a)(5)).

⁶⁸ As proposed, § 50.82 identifies five categories of conduct (§ 50.82(a)(1)–(5)) that could potentially justify the imposition of a civil penalty: subsections (a)(2) (intentional provision of erroneous information) and (a)(3) (submission of fraudulent claims to the Program) already contain heightened culpability standards. Subsections (a)(1) (failure to collect recoupment surcharges), (a)(4) (failure to provide disclosures or other required information), and (a)(5) (other failures to comply with TRIA or the regulations) as proposed do not require “intentional” or “knowing” violations, or conduct in “gross disregard” for imposition of a civil penalty.

⁶⁹ Lloyd’s Comments, at 3.

a significant economic impact on a substantial number of small entities. Treasury did not receive any comments in response to the proposed rule on the impact to small entities or insurers, and the final rule has not been revised in any way that warrants a change to this certification. As discussed in the preamble to the proposed rule, some small entities—as defined by the regulations of the SBA (see 13 CFR 121.201)—and small insurers—as defined by the proposed rules—are affected by the statutory obligation that they submit data to aid the Secretary in analyzing the effectiveness of the Program.⁷⁰ Treasury has estimated that approximately 500 insurers will have lesser reporting burdens because they are “small insurers” as now defined in Treasury’s regulations, either because of the lesser amount of data that they have, or on account of being excused from the most detailed reporting requirements. See 81 FR 18950, 18957 (April 1, 2016).

Although a substantial number of small entities may be affected, any economic impact will not be significant. Treasury crafted these regulations in a manner that most insurers, including small insurers, should already be collecting and maintaining the data in question as part of their ordinary course of business, such that any additional costs will be occasioned by some reprogramming costs to permit the more efficient reporting of the requested data. Given the character of the information that is sought, Treasury believes that any such costs should be nominal, in light of existing obligations all insurers have to record and retain the information sought by Treasury. Nonetheless, and recognizing that the provisions of the regulations respecting data collection may impose some additional costs and burdens on small insurers, the regulations provide Treasury with the authority to excuse or modify the data collection requirements as applicable to small insurers.

Treasury did receive a number of comments, as addressed above, which questioned the general exclusion of captive insurance companies from Treasury’s proposed definition of “small insurers” for purposes of the Program. As explained above, the only consequences of this exclusion are that (1) captive insurers (regardless of their size) will not be evaluated by Treasury in a study of small insurers mandated under the 2015 Reauthorization Act (which Treasury has determined was not meant to address any issues that captive insurers might face); and (2) captive insurers, regardless of their size,

will not be subject to data collection requirements instituted for “small insurers”—although, as also explained above, data collection from captive insurers will be addressed separately by Treasury in data collection requests directed specifically to captive insurers in light of the nature of captive insurer operations. Accordingly, Treasury finds that the rule as adopted will not have a significant economic impact on a substantial number of small entities that might also be captive insurers.

Paperwork Reduction Act. The proposed collection of information as contained in the proposed rule was submitted to the Office of Management and Budget (OMB) for review under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3507(d). In response to its solicitation for comments addressing various factors, Treasury received two comments from the public concerning the necessity of the collection of information with respect to claims data, which Treasury has addressed above in the section entitled “Collection of Claims Data” under proposed § 50.53.⁷¹ In addition, Treasury received a number of comments which provided (or could be read to provide) suggestions for minimization of the burden of the annual data requests,⁷² which Treasury addressed above in the section entitled “Annual data reporting” under proposed § 50.51, and in response to which it has made certain modifications to the rules adopted as final that will govern annual data collection. Treasury also received a comment concerning data that might be collected in support of a commutation under the Final Netting Rule,⁷³ which Treasury has addressed above in the section entitled “Claims Procedures” under proposed § 50.76. Although solicited, Treasury did not receive any comments from the public concerning the accuracy of Treasury’s burden estimates; suggestions for enhancement of the quality, utility, and clarity of the information collection; or estimates of capital or start-up costs that would be necessary for compliance with the information collection. The final rule does not contain any new collections of information. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB Control number. Treasury will

obtain final OMB approval for the collection of information concerning Annual Data Requests, Claims Data, or Final Netting-Commutation prior to any collection of such information.

List of Subjects in 31 CFR Part 50

Insurance, Terrorism.

Authority and Issuance

For the reasons stated in the preamble, 31 CFR part 50 is revised to read as follows:

PART 50—TERRORISM RISK INSURANCE PROGRAM

Subpart A—General Provisions

Sec.

- 50.1 Authority, purpose, and scope.
- 50.2 Responsible office.
- 50.3 Mandatory participation in program.
- 50.4 Definitions.
- 50.5 Rule of construction for dates.
- 50.6 Special rules for Interim Guidance safe harbors.
- 50.7 Procedure for requesting determinations of controlling influence.
- 50.8 Procedure for requesting general interpretations of statute.

Subpart B—Disclosures as Conditions for Federal Payment

- 50.10 General disclosure requirements.
- 50.11 Definition.
- 50.12 Clear and conspicuous disclosure.
- 50.13 Offer and renewal.
- 50.14 Separate line item.
- 50.15 Cap disclosure.
- 50.16 Use of model forms.
- 50.17 General disclosure requirements for State residual market insurance entities and State workers’ compensation funds.

Subpart C—Mandatory Availability

- 50.20 General mandatory availability requirements.
- 50.21 Make available.
- 50.22 No material difference from other coverage.
- 50.23 Applicability of State law requirements.

Subpart D—State Residual Market Insurance Entities; Workers’ Compensation Funds

- 50.30 General participation requirements.
- 50.31 Entities that do not share profits and losses with private sector insurers.
- 50.32 Entities that share profits and losses with private sector insurers.
- 50.33 Allocation of premium income associated with entities that do share profits and losses with private sector insurers.

Subpart E—[Reserved]

Subpart F—Data Collection

- 50.50 General.
- 50.51 Annual data reporting.
- 50.52 Small insurer data.
- 50.53 Collection of claims data.
- 50.54 Handling of data.

⁷¹ See AIA Comments at 7; Jason Schupp Comments at 7–8.

⁷² See generally above, addressing comments in connection with proposed § 50.51.

⁷³ See NAMIC Comments at 5–6.

⁷⁰ TRIA, section 104(h).

Subpart G—Certification

- 50.60 Certification.
- 50.61 Public communication.
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- 50.70 Federal share of compensation.
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Subpart I—Audit and Investigative Procedures

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- 50.100 Federal cause of action and remedy.
- 50.101 State causes of action preempted.
- 50.102 Advance approval of settlements.
- 50.103 Procedure for requesting approval of proposed settlements.
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Subpart L—Cap on Annual Liability

- 50.110 Cap on annual liability.
- 50.111 Notice to Congress.
- 50.112 Determination of *pro rata* share.
- 50.113 Application of *pro rata* share.
- 50.114 Data call authority.
- 50.115 Final amount.

Authority: 5 U.S.C. 301; 31 U.S.C. 321; Title I, Pub. L. 107–297, 116 Stat. 2322, as amended by Pub. L. 109–144, 119 Stat. 2660, Pub. L. 110–160, 121 Stat. 1839 and Pub. L. 114–1, 129 Stat. 3 (15 U.S.C. 6701 note); Pub. L. 114–74, 129 Stat. 601, Title VII (28 U.S.C. 2461 note).

Subpart A—General Provisions**§ 50.1 Authority, purpose, and scope.**

(a) *Authority.* This part is issued pursuant to authority in Title I of the Terrorism Risk Insurance Act of 2002, Public Law 107–297, 116 Stat. 2322, as amended by the Terrorism Risk Insurance Extension Act of 2005, Public Law 109–144, 119 Stat. 2660, the Terrorism Risk Insurance Program Reauthorization Act of 2007, Public Law

110–160, 121 Stat. 1839, and the Terrorism Risk Insurance Program Reauthorization Act of 2015, Public Law 114–1, 129 Stat. 3.

(b) *Purpose.* This part contains rules prescribed by the Department of the Treasury to implement and administer the Terrorism Risk Insurance Program.

(c) *Scope.* This part applies to insurers subject to the Act and their policyholders and claimants.

§ 50.2 Responsible office.

The office responsible for the administration of the Terrorism Risk Insurance Act in the Department of the Treasury is the Terrorism Risk Insurance Program Office within the Federal Insurance Office. The Treasury Assistant Secretary for Financial Institutions prescribes the regulations under the Act.

§ 50.3 Mandatory participation in program.

Any entity that meets the definition of an insurer under the Act is required to participate in the Program.

§ 50.4 Definitions.

For purposes of this part:

(a) *Act* means the Terrorism Risk Insurance Act of 2002 (as amended).

(b) *Act of terrorism*—(1) *In general.*

The term *act of terrorism* means any act that is certified by the Secretary, in consultation with the Attorney General of the United States and the Secretary of Homeland Security:

- (i) To be an act of terrorism;
- (ii) To be a violent act or an act that is dangerous to human life, property, or infrastructure;
- (iii) To have resulted in damage within the United States, or outside of the United States in the case of:

(A) An air carrier (as defined in 49 U.S.C. 40102) or 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); or

(B) 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.

(2) *Limitations.* The Secretary is not authorized to certify an act as an act of terrorism if:

- (i) The act is committed as part of the course of a war declared by the Congress (except 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.

(3) *Judicial review precluded.* The Secretary's certification of an act of terrorism, or determination not to certify an act as an act of terrorism, is final and is not subject to judicial review.

(c)(1) *Affiliate* means, with respect to an insurer, any entity that controls, is controlled by, or is under common control with the insurer. An affiliate must itself meet the definition of insurer to participate in the Program.

(2)(i) For purposes of paragraph (c)(1) of this section, an insurer has control over another insurer for purposes of the Program if:

(A) The insurer directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the other insurer;

(B) The insurer controls in any manner the election of a majority of the directors or trustees of the other insurer; or

(C) The Secretary determines, after notice and opportunity for hearing, that an insurer directly or indirectly exercises a controlling influence over the management or policies of the other insurer, even if there is no control as defined in paragraph (c)(2)(i)(A) or (c)(2)(i)(B) of this section.

(ii) An entity, including any affiliate thereof, does not have control or exercise controlling influence over a reciprocal insurer under this section if, as of January 12, 2015, the entity, including any affiliate thereof, was acting as an attorney-in-fact for the reciprocal insurer, provided that the entity does not, for reasons other than activities it may perform under the attorney-in-fact relationship, have control over the reciprocal insurer as otherwise defined under this section.

(3) An insurer described in paragraph (c)(2)(i)(A) or (B) of this section is conclusively deemed to have control.

(4) For purposes of a determination of controlling influence under paragraph (c)(2)(i)(C) of this section, if an insurer is not described in paragraph (c)(2)(i)(A) or (B) of this section, the following rebuttable presumptions will apply:

(i) If an insurer controls another insurer under the laws of a state, and at least one of the factors listed in paragraph (c)(4)(iv) of this section applies, there is a rebuttable presumption that the insurer that has control under state law exercises a controlling influence over the management or policies of the other insurer for purposes of paragraph (c)(2)(i)(C) of this section.

(ii) If an insurer provides 25 percent or more of another insurer's capital (in the case of a stock insurer), policyholder surplus (in the case of a mutual insurer),

or corporate capital (in the case of other entities that qualify as insurers), and at least one of the factors listed in paragraph (c)(4)(iv) of this section applies, there is a rebuttable presumption that the insurer providing such capital, policyholder surplus, or corporate capital exercises a controlling influence over the management or policies of the receiving insurer for purposes of paragraph (c)(2)(i)(C) of this section.

(iii) If an insurer, at any time during a calendar year, supplies 25 percent or more of the underwriting capacity for that year to an insurer that is a syndicate consisting of one or more incorporated or individual unincorporated underwriters, and at least one of the factors in paragraph (c)(4)(iv) of this section applies, there is a rebuttable presumption that the insurer exercises a controlling influence over the syndicate for purposes of paragraph (c)(2)(i)(C) of this section.

(iv) If paragraphs (c)(4)(i) through (iii) of this section are not applicable, but two or more of the following factors apply to an insurer, with respect to another insurer, there is a rebuttable presumption that the insurer exercises a controlling influence over the management or policies of the other insurer for purposes of paragraph (c)(2)(i)(C) of this section:

(A) The insurer is one of the two largest shareholders of any class of voting stock;

(B) The insurer holds more than 35 percent of the combined debt securities and equity of the other insurer;

(C) The insurer is party to an agreement pursuant to which the insurer possesses a material economic stake in the other insurer resulting from a profit-sharing arrangement, use of common names, facilities or personnel, or the provision of essential services to the other insurer;

(D) The insurer is party to an agreement that enables the insurer to influence a material aspect of the management or policies of the other insurer;

(E) The insurer would have the ability, other than through the holding of revocable proxies, to direct the votes of more than 25 percent of the other insurer's voting stock in the future upon the occurrence of an event;

(F) The insurer has the power to direct the disposition of more than 25 percent of a class of voting stock of the other insurer in a manner other than a widely dispersed or public offering;

(G) The insurer and/or the insurer's representative or nominee constitute more than one member of the other insurer's board of directors; or

(H) The insurer or its nominee or an officer of the insurer serves as the chairman of the board, chairman of the executive committee, chief executive officer, chief operating officer, chief financial officer or in any position with similar policymaking authority in the other insurer.

(5) An insurer that is not described in paragraph (c)(2)(i) or (ii) of this section may request a hearing in which the insurer may rebut a presumption of controlling influence under paragraph (c)(4)(i) through (iv) of this section or otherwise request a determination of controlling influence by presenting and supporting its position through written submissions to Treasury, and in Treasury's discretion, through informal oral presentations, in accordance with the procedure in § 50.7.

(6) An insurer's affiliates for a calendar year, for purposes of subpart H of this part, shall be determined in accordance with the timing requirements laid out in § 50.75 of this part.

(d) *Aggregate Federal share of compensation* means the aggregate amount paid by Treasury for the Federal share of compensation for insured losses in a calendar year.

(e) *Assessment period* means a period, established by Treasury, during which policyholders of property and casualty insurance policies must pay, and insurers must collect, the Federal terrorism policy surcharge for remittance to Treasury.

(f) *Attorney-in-fact* means a person or entity appointed by the subscribers or members of a reciprocal insurer to act for and bind the reciprocal insurer under relevant state law for the benefit of its subscribers or members.

(g) *Captive insurer* means an insurer licensed under the captive insurance laws or regulations of any state.

(h) *Direct earned premium* means direct earned premium for all property and casualty insurance issued by any insurer for insurance against all losses, including losses from an act of terrorism, occurring at the locations described in section 102(5)(A) and (B) of the Act.

(1) *State-licensed or admitted insurers*. For a state licensed or admitted insurer that reports to the NAIC, direct earned premium is the premium information for property and casualty insurance reported by the insurer on column 2 of the Exhibit of Premiums and Losses of the NAIC Annual Statement (commonly known as Statutory Page 14).

(i) Premium information as reported to state regulators through the NAIC should be included in the calculation of

direct earned premiums for purposes of the Program only to the extent it reflects premiums for property and casualty insurance issued by the insurer against losses occurring at the locations described in section 102(5)(A) and (B) of the Act.

(ii) Premiums for personal property and casualty lines of insurance (insurance primarily designed to cover personal, family or household risk exposures, with the exception of insurance written to insure 1 to 4 family rental dwellings owned for the business purpose of generating income for the property owner), or premiums for any other insurance coverage that does not meet the definition of property and casualty insurance, should be excluded in the calculation of direct earned premiums for purposes of the Program.

(iii) Personal property and casualty lines of insurance coverage that includes incidental coverage for commercial purposes are primarily personal coverage, and therefore premiums may be fully excluded by an insurer from the calculation of direct earned premium. For purposes of this section, commercial coverage is incidental if less than 25 percent of the total direct earned premium is attributable to commercial coverage. Property and casualty insurance against losses occurring at locations other than the locations described in section 102(5)(A) and (B) of the Act, or other insurance coverage that does not meet the definition of property and casualty insurance, but that includes incidental coverage for commercial risk exposures at such locations, is primarily not commercial, and therefore premiums for such insurance may also be fully excluded by an insurer from the calculation of direct earned premium. For purposes of this section, property and casualty insurance for losses occurring at the locations described in section 102(5)(A) and (B) of the Act is incidental if less than 25 percent of the total direct earned premium for the insurance policy is attributable to coverage at such locations. Also for purposes of this section, coverage for commercial risk exposures is incidental if it is combined with coverages that otherwise do not meet the definition of property and casualty insurance and less than 25 percent of the total direct earned premium for the insurance policy is attributable to the coverage for commercial risk exposures.

(iv) If an insurance policy covers both commercial and personal property and casualty exposures, insurers may allocate the premiums in accordance with the proportion of risk between commercial and personal components

in order to ascertain direct earned premium. If a policy includes insurance coverage that meets the definition of property and casualty insurance for losses occurring at the locations described in section 102(5)(A) and (B) of the Act, but also includes other coverage, insurers may allocate the premiums in accordance with the proportion of risk attributable to the components in order to ascertain direct earned premium.

(2) *Insurers that do not report to NAIC.* An insurer that does not report to the NAIC, but that is licensed or admitted by any state (such as certain farm or county mutual insurers), should use the guidance provided in paragraph (h)(1) of this section to assist in ascertaining its direct earned premium.

(i) Direct earned premium may be ascertained by adjusting data maintained by such insurer or reported by such insurer to its state regulator to reflect a breakdown of premiums for commercial and personal property and casualty exposure risk as described in paragraph (h)(1) of this section and, if necessary, re-stated to reflect the accrual method of determining direct earned premium versus direct premium.

(ii) Such an insurer should consider other types of payments that compensate the insurer for risk of loss (contributions, assessments, etc.) as part of its direct earned premium.

(3) *Certain eligible surplus line carrier insurers.* An eligible surplus line carrier insurer listed on the NAIC Quarterly Listing of Alien Insurers must ascertain its direct earned premium by pricing separately its premium for insurance that meets the definition of property and casualty insurance for losses occurring at the locations described in section 102(5)(A) and (B) of the Act.

(4) *Federally approved insurers.* A federally approved insurer, defined under section 102(6)(A)(iii) of the Act, should use a methodology similar to that specified for eligible surplus line carrier insurers in paragraph (h)(3) of this section to calculate its direct earned premium. Such calculation should be adjusted to reflect the limitations on scope of insurance coverage under the Program (i.e., to the extent of Federal approval of property and casualty insurance in connection with maritime, energy or aviation activities).

(i) *Direct written premium* means the premium information for property and casualty insurance that is included by an insurer in column 1 of the Exhibit of Premiums and Losses of the NAIC Annual Statement or in an equivalent reporting requirement. The Federal terrorism policy surcharge is not

included in amounts reported as direct written premium.

(j) *Discretionary recoupment amount* means such amount of the aggregate Federal share of compensation in excess of the mandatory recoupment amount that the Secretary has determined will be recouped pursuant to section 103(e)(7)(D) of the Act.

(k) *Federal Insurance Office* means the Federal Insurance Office within the U.S. Department of the Treasury.

(l) *Federal terrorism policy surcharge* means the amount established by Treasury under Subpart J of this Part that is imposed as a policy surcharge on property and casualty insurance policies, expressed as a percentage of the written premium.

(m) *Insurance marketplace aggregate retention amount* means an amount for a calendar year as calculated under section 103(e)(6) of the Act.

(1) For calendar years beginning with 2015 through 2019, such amount is the lesser of the aggregate amount, for all insurers, of insured losses once there has been a Program Trigger Event during the calendar year and:

(i) For calendar year 2015:

\$29,500,000,000;

(ii) For calendar year 2016:

\$31,500,000,000;

(iii) For calendar year 2017:

\$33,500,000,000;

(iv) For calendar year 2018:

\$35,500,000,000; and

(v) For calendar year 2019:

\$37,500,000,000.

(2) For calendar years beginning with 2020 and any calendar year thereafter as may be necessary, such amount is the lesser of the aggregate amount, for all insurers, of insured losses once there has been a Program Trigger Event during the calendar year and the annual average of the sum of insurer deductibles for all insurers for the prior 3 years, to be calculated by taking

(i) the total amount of direct earned premium reported by insurers to Treasury pursuant to section 50.51 for the three calendar years prior to the calendar year in question, and then dividing that figure by three; and

(ii) Multiplying the resulting three-year average figure by 20%.

(3) Beginning in 2020, Treasury shall publish in the **Federal Register** the insurance marketplace aggregate retention amount for that calendar year no later than April 30, 2020, and by every April 30 thereafter for any subsequent calendar years as necessary. To the extent the Secretary certifies an act as an act of terrorism prior to April 30 of any calendar year after 2019, Treasury will publish the relevant insurance marketplace aggregate

retention amount as soon as practicable thereafter.

(n) *Insured loss.* (1) The term insured loss means 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 the loss:

(i) Occurs within the United States;

(ii) Occurs to an air carrier (as defined in 49 U.S.C. 40102), or 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; however, to the extent a loss occurs to such an air carrier or vessel outside the United States, the insured loss does not include losses covered by third party insurance contracts that are separate from the insurance coverage provided to the air carrier or vessel; or

(iii) Occurs at the premises of any United States mission.

(2) The term insured loss includes reasonable loss adjustment expenses, incurred by an insurer in connection with insured losses, that are allocated and identified by claim file in insurer records, including expenses incurred in the investigation, adjustment, and defense of claims, but excluding staff salaries, overhead, and other insurer expenses that would have been incurred notwithstanding the insured loss.

(3) The term insured loss does not include:

(i) Punitive or exemplary damages awarded or paid in connection with the Federal cause of action specified in section 107(a)(1) of the Act. The term "punitive or exemplary damages" means damages that are not compensatory but are an award of money made to a claimant solely to punish or deter; or

(ii) Extra-contractual damages awarded against, or paid by, an insurer; or

(iii) Payments by an insurer in excess of policy limits.

(o) *Insurer* means any entity, including any affiliate of the entity, that meets the following requirements:

(1)(i) The entity must fall within at least one of the following categories:

(A) It is licensed or admitted to engage in the business of providing primary or excess insurance in any state (including, but not limited to, state licensed captive insurance companies, state licensed or admitted risk retention groups, and state licensed or admitted farm and county mutuals) and, if a joint underwriting association, pooling

arrangement, or other similar entity, then the entity must:

(1) Have gone through a process of being licensed or admitted to engage in the business of providing primary or excess insurance that is administered by the state's insurance regulator, which process generally applies to insurance companies or is similar in scope and content to the process applicable to insurance companies;

(2) Be generally subject to State insurance regulation, including financial reporting requirements, applicable to insurance companies within the State; and

(3) Be managed independently from other insurers participating in the program;

(B) It is not licensed or admitted to engage in the business of providing primary or excess insurance in any state, but is an eligible surplus line carrier listed on the NAIC Quarterly Listing of Alien Insurers;

(C) It is approved or accepted for the purpose of offering property and casualty insurance by a Federal agency in connection with maritime, energy, or aviation activity, but only to the extent of such Federal approval of property and casualty insurance coverage offered by the insurer in connection with maritime, energy, or aviation activity;

(D) It is a state residual market insurance entity or state workers' compensation fund; or

(E) As determined by the Secretary, it falls within any of the classes or types of captive insurers or other self-insurance arrangements by municipalities and other entities.

(ii) If an entity falls within more than one category described in paragraph (o)(1)(i) of this section, the entity is considered to fall within the first category within which it falls for purposes of the program.

(2) The entity must receive direct earned premium, except in the case of:

(i) State residual market insurance entities and state workers' compensation funds, to the extent provided in subpart D of this part; and

(ii) Other classes or types of captive insurers and other self-insurance arrangements by municipalities and other entities to the extent provided for in subpart E of this part.

(3) The entity must meet any other criteria as prescribed by Treasury.

(p) *Insurer deductible* means:

(1) For an insurer that has had a full year of operations during the calendar year immediately preceding the applicable calendar year, the value of an insurer's direct earned premiums during the immediately preceding calendar year, multiplied by 20 percent; and

(2) For an insurer that has not had a full year of operations during the immediately preceding calendar year, the insurer deductible will be based on data for direct earned premiums for the applicable calendar year multiplied by 20 percent. If the insurer does not have a full year of operations during the applicable calendar year, the direct earned premiums for the applicable calendar year will be annualized to determine the insurer deductible.

(q) *Mandatory recoupment amount* means the difference between the insurance marketplace aggregate retention amount for a calendar year and the uncompensated insured losses during such calendar year.

(r) *NAIC* means the National Association of Insurance Commissioners.

(s) *Person* means any individual, business or nonprofit entity (including those organized in the form of a partnership, limited liability company, corporation, or association), trust or estate, or a State or political subdivision of a state or other governmental unit.

(t) *Professional liability insurance* means insurance coverage for liability arising out of the performance of professional or business duties related to a specific occupation, with coverage being tailored to the needs of the specific occupation. Examples include abstracters, accountants, insurance adjusters, architects, engineers, insurance agents and brokers, lawyers, real estate agents, stockbrokers, and veterinarians. For purposes of this definition, professional liability insurance does not include directors and officers liability insurance.

(u) *Program* means the Terrorism Risk Insurance Program established by the Act.

(v) *Program Trigger Event* means a certified act of terrorism within a calendar year that results in aggregate industry insured losses, either on its own or in combination with any other certified act(s) of terrorism having previously taken place in the same calendar year, exceeding:

(1) \$100,000,000 with respect to calendar year 2015 insured losses;

(2) \$120,000,000 with respect to calendar year 2016 insured losses;

(3) \$140,000,000 with respect to calendar year 2017 insured losses;

(4) \$160,000,000 with respect to calendar year 2018 insured losses;

(5) \$180,000,000 with respect to calendar year 2019 insured losses; or

(6) \$200,000,000 with respect to calendar year 2020 insured losses and with respect to any calendar year thereafter.

(w) *Property and casualty insurance* means commercial lines of property and casualty insurance, including excess insurance, workers' compensation insurance, and directors and officers liability insurance, and:

(1) Means commercial lines within only the following lines of insurance from the NAIC's Exhibit of Premiums and Losses (commonly known as Statutory Page 14): Line 1—Fire; Line 2.1—Allied Lines; Line 5.1—Commercial Multiple Peril (non-liability portion); Line 5.2—Commercial Multiple Peril (liability portion); Line 8—Ocean Marine; Line 9—Inland Marine; Line 16—Workers' Compensation; Line 17—Other Liability; Line 18—Products Liability; Line 22—Aircraft (all perils); and Line 27—Boiler and Machinery; and

(2) Does not include:

(i) Federal crop insurance issued or reinsured under the Federal Crop Insurance Act (7 U.S.C. 1501 *et seq.*), or any other type of crop or livestock insurance that is privately issued or reinsured (including crop insurance reported under either Line 2.1—Allied Lines or Line 2.2—Multiple Peril (Crop) of the NAIC's Exhibit of Premiums and Losses (commonly known as Statutory Page 14);

(ii) Private mortgage insurance (as defined in section 2 of the Homeowners Protection Act of 1998) (12 U.S.C. 4901) or title insurance;

(iii) Financial guaranty insurance issued by monoline financial guaranty insurance corporations;

(iv) Insurance for medical malpractice;

(v) Health or life insurance, including group life insurance;

(vi) Flood insurance provided under the National Flood Insurance Act of 1968 (42 U.S.C. 4001 *et seq.*) or earthquake insurance reported under Line 12 of the NAIC's Exhibit of Premiums and Losses (commonly known as Statutory Page 14);

(vii) Reinsurance or retrocessional reinsurance;

(viii) Commercial automobile insurance, including insurance reported under Lines 19.3 (Commercial Auto No-Fault (personal injury protection)), 19.4 (Other Commercial Auto Liability) and 21.2 (Commercial Auto Physical Damage) of the NAIC's Exhibit of Premiums and Losses (commonly known as Statutory Page 14);

(ix) Burglary and theft insurance, including insurance reported under Line 26 (Burglary and Theft) of the NAIC's Exhibit of Premiums and Losses (commonly known as Statutory Page 14);

(x) Surety insurance, including insurance reported under Line 24 (Surety) of the NAIC's Exhibit of Premiums and Losses (commonly known as Statutory Page 14);

(xi) Professional liability insurance as defined in paragraph (t) of this section; or

(xii) Farm owners multiple peril insurance, including insurance reported under Line 3 (Farmowners Multiple Peril) of the NAIC's Exhibit of Premiums and Losses (commonly known as Statutory Page 14).

(x) *Reciprocal insurer* means an insurer organized under relevant state law as a reciprocal or interinsurance exchange.

(y) *Secretary* means the Secretary of the U.S. Department of the Treasury.

(z) *Small insurer* means an insurer (or an affiliated group of insurers in the case of affiliates within the meaning of paragraph (c) of this section) whose policyholder surplus for the immediately preceding year (as reported on its Annual Statement for state regulatory purposes at Page 3, Line 37, Column 1, or as calculated in similar fashion by participating insurers that do not file an Annual Statement) is less than five times the Program Trigger amount for the current year and whose direct earned premium for the preceding year is also less than five times the Program Trigger amount for the current year. An insurer that has not had a full year of operations during the immediately preceding calendar year is a small insurer if its policyholder surplus in the current year is less than five times the Program Trigger amount for the current year. A captive insurer is not a small insurer, regardless of the size of its policyholder surplus or direct earned premium.

(aa) *State* means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, each of the United States Virgin Islands, and any territory or possession of the United States.

(bb) *Surcharge* means the Federal terrorism policy surcharge as defined in paragraph (l) of this section.

(cc) *Surcharge effective date* means the date established by Treasury that begins the assessment period.

(dd) *Treasury* means the U.S. Department of the Treasury.

(ee) *Uncompensated insured losses* means the aggregate amount of insured losses of all insurers in a calendar year, once there has been a Program Trigger Event, that is not compensated by the Federal Government because such losses:

(1) Are within the insurer deductibles of insurers, or

(2) Are within the portions of losses in excess of insurer deductibles that are not compensated through payments made as a result of claims for the Federal share of compensation.

(ff) *United States* means the several states, and includes the territorial sea and the continental shelf of the United States, as those terms are defined in the Violent Crime Control and Law Enforcement Act of 1994 (18 U.S.C. 2280 and 2281).

§ 50.5 Rule of construction for dates.

Unless otherwise expressly provided in the regulation, any date in these regulations is intended to be applied so that the day begins at 12:01 a.m. and ends at midnight on that date.

§ 50.6 Special rules for Interim Guidance safe harbors.

(a) An insurer will be deemed to be in compliance with the requirements of the Act to the extent the insurer reasonably relied on Interim Guidance prior to the effective date of applicable regulations.

(b) For purposes of this section, Interim Guidance means the following documents, which are available from Treasury at <https://www.treasury.gov/resource-center/fin-mkts/Pages/program.aspx>:

(1) Interim Guidance I issued by Treasury on December 3, 2002;

(2) Interim Guidance II issued by Treasury on December 18, 2002;

(3) Interim Guidance III issued by Treasury on January 22, 2003;

(4) Interim Guidance IV issued by Treasury on December 29, 2005;

(5) Interim Guidance V issued by Treasury on December 31, 2007; and

(6) Interim Guidance VI issued by Treasury on February 4, 2015.

§ 50.7 Procedure for requesting determinations of controlling influence.

(a) An insurer or insurers not having control over another insurer under § 50.4(c)(2)(i) or (ii) may make a written submission to Treasury to rebut a presumption of controlling influence under § 50.4(c)(4)(i) through (iv) or otherwise to request a determination of controlling influence. Such submissions shall be made to the Terrorism Risk Insurance Program Office, Department of the Treasury, Room 1410, 1500 Pennsylvania Ave. NW., Washington, DC 20220. The submission should be entitled, "Controlling Influence Submission," and should provide the full name and address of the submitting insurer(s) and the name, title, address and telephone number of the designated contact person(s) for such insurer(s).

(b) Treasury will review submissions and determine whether Treasury needs additional written or orally presented information. In its discretion, Treasury may schedule a date, time, and place for an oral presentation by the insurer(s).

(c) An insurer or insurers must provide all relevant facts and circumstances concerning the relationship(s) between or among the affected insurers and the control factors in § 50.4(c)(4)(i) through (iv); and must explain in detail any basis for why the insurer believes that no controlling influence exists (if a presumption is being rebutted) in light of the particular facts and circumstances, as well as the Act's language, structure and purpose. Any confidential business or trade secret information submitted to Treasury should be clearly marked. Treasury will handle any subsequent request for information designated by an insurer as confidential business or trade secret information in accordance with Treasury's Freedom of Information Act regulations at 31 CFR part 1.

(d) Treasury will review and consider the insurer submission and other relevant facts and circumstances. Unless otherwise extended by Treasury, within 60 days after receipt of a complete submission, including any additional information requested by Treasury, and including any oral presentation, Treasury will issue a final determination of whether one insurer has a controlling influence over another insurer for purposes of the Program. The determination shall set forth Treasury's basis for its determination.

(Approved by the Office of Management & Budget under control number 1505-0190.)

§ 50.8 Procedure for requesting general interpretations of statute.

Persons actually or potentially affected by the Act or regulations in this Part may request an interpretation of the Act or regulations by writing to the Terrorism Risk Insurance Program Office, Room 1410, Department of the Treasury, 1500 Pennsylvania Ave. NW., Washington, DC 20220, giving a detailed explanation of the facts and circumstances and the reason why an interpretation is needed. A requester should segregate and mark any confidential business or trade secret information clearly. Treasury in its discretion will provide written responses to requests for interpretation. Treasury reserves the right to decline to provide a response in any case. Except in the case of any confidential business or trade secret information, Treasury will make written requests for interpretations and responses publicly available at the Treasury Department

Library, on the Treasury Web site, or through other means as soon as practicable after the response has been provided. Treasury will handle any subsequent request for information that had been designated by a requester as confidential business or trade secret information in accordance with Treasury's Freedom of Information Act regulations at 31 CFR part 1.

Subpart B—Disclosures as Conditions for Federal Payment

§ 50.10 General disclosure requirements.

(a) *Content of disclosure.* As a condition for Federal payments under section 103(b) of the Act, the Act requires that an insurer provide clear and conspicuous disclosure to the policyholder of:

- (1) The premium charged for insured losses covered by the Program; and
 - (2) The Federal share of compensation for insured losses under the Program.
- (b) *Form and timing of disclosure.* The disclosure required by the Act must be made on a separate line item in the policy, at the time of offer and of renewal of the policy.

§ 50.11 Definition.

For purposes of this Subpart, unless the context indicates otherwise, the term “disclosure” or “disclosures” refers to the disclosure described in section 103(b)(2) of the Act and § 50.10. The term “cap disclosure” refers to the disclosure required by section 103(b)(3) of the Act and § 50.15.

§ 50.12 Clear and conspicuous disclosure.

(a) *General.* Whether a disclosure is clear and conspicuous depends on the totality of the facts and circumstances of the disclosure. See § 50.16 for model forms.

(b) *Description of premium.* An insurer may describe the premium charged for insured losses covered by the Program as a portion or percentage of a policy premium, if consistent with standard business practice and provided that the amount of policy premium or the method of determining the policy premium is also stated. An insurer may not describe the premium in a manner that is misleading in the context of the Program, such as by characterizing the premium as a “surcharge.”

(c) *Method of disclosure.* Subject to § 50.10(b), an insurer may provide disclosures using normal business practices, including forms and methods of communication used to communicate similar policyholder information to policyholders.

(d) *Use of producer.* If an insurer normally communicates with a

policyholder through an insurance producer or other intermediary, an insurer may provide disclosures through such producer or other intermediary. If an insurer elects to make the disclosures through an insurance producer or other intermediary, the insurer remains responsible for ensuring that the disclosures are provided by the insurance producer or other intermediary to policyholders in accordance with the Act.

(e) *Demonstration of compliance.* An insurer may demonstrate that it has satisfied the requirement to provide clear and conspicuous disclosure as described in § 50.10 through use of appropriate systems and normal business practices that demonstrate a practice of compliance.

(f) *Certification of compliance.* An insurer must certify that it has complied with the requirement to provide disclosure to the policyholder on all policies that form the basis for any claim that is submitted by an insurer for Federal payment under the Program.

§ 50.13 Offer and renewal.

An insurer is deemed to be in compliance with the requirement of providing disclosure “at the time of offer and of renewal of the policy” under § 50.10(b) if the insurer makes the disclosure no later than the time the insurer first formally offers to provide insurance coverage or renew a policy for a current policyholder.

§ 50.14 Separate line item.

An insurer is deemed to be in compliance with the requirement of providing disclosure on a “separate line item in the policy” under § 50.10(b) if the insurer makes the disclosure:

- (a) On the declarations page of the policy;
- (b) Elsewhere within the policy itself; or
- (c) In any rider or endorsement, or other document that is made a part of the policy.

§ 50.15 Cap disclosure.

(a) *General.* Under section 103(e)(2) of the Act, if the aggregate insured losses exceed \$100,000,000,000 during any calendar year, the Secretary shall not make any payment for any portion of the amount of such losses that exceeds \$100,000,000,000, and no insurer that has met its insurer deductible shall be liable for the payment of any portion of the amount of such losses that exceeds \$100,000,000,000.

(b) *Other requirements.* As a condition for Federal payments under section 103(b) of the Act, an insurer must provide clear and conspicuous

disclosure to the policyholder of the existence of the \$100,000,000,000 cap under section 103(e)(2). The cap disclosure must be made at the time of offer, purchase, and renewal of the policy.

(c) *Offer, purchase, and renewal.* An insurer is deemed to be in compliance with the requirement of providing disclosure “at the time of offer, purchase, and renewal of the policy” under § 50.15(b) if the insurer:

(1) Makes the disclosure no later than the time the insurer first formally offers to provide insurance coverage or renew a policy for a current policyholder; and

(2) If terrorism risk coverage is purchased, the insurer makes clear and conspicuous reference back to that disclosure, as well as the final terms of terrorism insurance coverage, at the time the transaction is completed.

(d) *Other applicable rules.* The cap disclosure is covered by the rules in § 50.12(a), (c), (d), (e), and (f) (relating to clear and conspicuous disclosure).

§ 50.16 Use of model forms.

(a) *General.* An insurer that is required to make the disclosure under § 50.10(b) or § 50.15(b) is deemed to be in compliance with the disclosure requirements if the insurer uses NAIC Model Disclosure Form No. 1 or NAIC Model Disclosure Form No. 2, as appropriate.

(b) *Not exclusive means of compliance.* An insurer is not required to use NAIC Model Disclosure Form No. 1 or NAIC Model Disclosure Form No. 2 to satisfy the disclosure requirements. An insurer may use other means to comply with the disclosure requirements, as long as the disclosures comport with the requirements of the Act.

(c) *Definitions.* For purposes of this section, references to NAIC Model Disclosure Form No. 1 and NAIC Model Disclosure Form No. 2 refer to such forms as revised in January 2015, or as subsequently modified by the NAIC, provided Treasury has stated that usage by insurers of the subsequently modified forms is deemed to satisfy the disclosure requirements of the Act and the insurer uses the most current forms, so approved by Treasury, that are available at the time of disclosure. These forms may be found on the Treasury Web site at <https://www.treasury.gov/resource-center/fin-mkts/Pages/program.aspx>.

§ 50.17 General disclosure requirements for State residual market insurance entities and State workers' compensation funds.

(a) *Residual market mechanism disclosure.* A state residual market

insurance entity or state workers' compensation fund may provide the disclosures required by this subpart B to policyholders using normal business practices, including forms and methods of communication used to communicate similar information to policyholders. The disclosures may be made by the state residual market insurance entity or state workers' compensation fund itself, the individual insurers that participate in the state residual market insurance entity or state workers' compensation fund, or its servicing carriers. The ultimate responsibility for ensuring that the disclosure requirements have been met rests with the insurer filing a claim under the Program.

(b) *Other requirements.* Except as provided in this section, all other disclosure requirements set out in this subpart B apply to state residual insurance market entities and state workers' compensation funds.

Subpart C—Mandatory Availability

§ 50.20 General mandatory availability requirements.

(a) *General requirements.* Under section 103(c) of the Act, an insurer must:

(1) Make available, in all of its property and casualty insurance policies, coverage for insured losses; and

(2) Make available property and casualty insurance 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.

(b) *Compliance through 2020.* Under section 108(a) of the Act, an insurer must comply with paragraphs (a)(1) and (2) of this section through calendar year 2020.

(c) *Beyond 2020.* Notwithstanding paragraph (a)(2) of this section and § 50.22(a), property and casualty insurance coverage for insured losses does not have to be made available beyond December 31, 2020, even if the policy period of insurance coverage for losses from events other than acts of terrorism extends beyond that date.

§ 50.21 Make available.

(a) *General.* The requirement to make available coverage as provided in § 50.20 applies at the time an insurer makes the initial offer of coverage as well as at the time an insurer makes an initial offer of renewal of an existing policy.

(b) *Offer consistent with definition of act of terrorism.* An insurer must make available coverage for insured losses in

a policy of property and casualty insurance consistent with the definition of an act of terrorism as defined in § 50.4(b).

(c) *Changes negotiated subsequent to initial offer.* If an insurer satisfies the requirement to make available coverage as described in § 50.20 by first making an offer with 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, which the policyholder or prospective policyholder declines, the insurer may negotiate with the policyholder or prospective policyholder an option of partial coverage for insured losses at a lower amount of coverage if permitted by any applicable state law. An insurer is not required by the Act to offer partial coverage if the policyholder or prospective policyholder declines full coverage. See § 50.23.

(d) *Demonstrations of compliance.* If an insurer makes an offer of insurance but no contract of insurance is concluded, the insurer may demonstrate that it has satisfied the requirement to make available coverage as described in § 50.20 through use of appropriate systems and normal business practices that demonstrate a practice of compliance.

§ 50.22 No Material difference from other coverage.

(a) *Terms, amounts, and other coverage limitations.* As provided in § 50.20(a)(2), an insurer must offer coverage for insured losses arising from an act of terrorism that does not differ materially from the terms, amounts, and other coverage limitations (including deductibles) applicable to losses arising from events other than acts of terrorism. For purposes of this requirement, "terms" excludes price.

(b) *Limitations on types of risk.* An insurer is not required to cover risks that it typically excludes or does not write to satisfy the requirement to make available coverage for losses resulting from an act of terrorism that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism. For example, if an insurer does not cover all types of risks, either because the insurer is outside of direct state regulatory oversight, or because a state permits certain exclusions for certain types of losses, such as nuclear, biological, or chemical events, then the insurer is not required to make such coverage available.

§ 50.23 Applicability of State law requirements.

(a) *General.* After satisfying the requirement to make available 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, if coverage is rejected an insurer may then offer coverage that is on different terms, amounts, or coverage limitations, as long as such an offer does not violate any applicable state law requirements.

(b) *Examples.* (1) If an insurer subject to state regulation first makes available coverage in accordance with § 50.20 and the state has a requirement that an insurer offer full coverage without any exclusion, then the requirement would continue to apply and the insurer may not subsequently offer less than full coverage or coverage with exclusions.

(2) If an insurer subject to state regulation first makes available coverage in accordance with § 50.20 and the state permits certain exclusions or allows for other limitations, or an insurance policy is not governed by state law requirements, then the insurer may subsequently offer limited coverage or coverage with exclusions.

Subpart D—State Residual Market Insurance Entities; State Workers' Compensation Funds

§ 50.30 General participation requirements.

(a) *Insurers.* As defined in § 50.4(o), all state residual market insurance entities and state workers' compensation funds are insurers under the Program even if such entities do not receive direct earned premiums.

(b) *Mandatory participation.* State residual market insurance entities and State workers' compensation funds are mandatory participants in the Program subject to the rules issued in this Subpart.

(c) *Identification.* Treasury maintains a list of state residual market insurance entities and state workers' compensation funds at <https://www.treasury.gov/resource-center/fin-mkts/Pages/program.aspx>. Procedures for providing comments and updates to that list are posted with the list.

§ 50.31 Entities that do not share profits and losses with private sector insurers.

(a) *Treatment.* A state residual market insurance entity or a state workers' compensation fund that does not share profits and losses with a private sector insurer is deemed to be a separate insurer under the Program.

(b) *Premium calculation.* A state residual market insurance entity or a

state workers' compensation fund that is deemed to be a separate insurer should follow the guidelines specified in § 50.4(h)(1) or (2) for the purposes of calculating the appropriate measure of direct earned premium.

§ 50.32 Entities that share profits and losses with private sector insurers.

(a) *Treatment.* A State residual market insurance entity or a State workers' compensation fund that shares profits and losses with a private sector insurer is deemed not to be a separate insurer under the Program.

(b) *Premium and loss calculation.* A state residual market insurance entity or a State workers' compensation fund that is deemed not to be a separate insurer should continue to report, in accordance with normal business practices, to each participant insurer its share of premium income and insured losses, which shall then be included respectively in the participant insurer's direct earned premium or insured loss calculations.

§ 50.33 Allocation of premium income associated with entities that do share profits and losses with private sector insurers.

(a) *Servicing carriers.* For purposes of this subpart, a servicing carrier is an insurer that enters into an agreement to place and service insurance contracts for a state residual market insurance entity or a state workers' compensation fund and to cede premiums associated with such insurance contracts to the State residual market insurance entity or State workers' compensation fund. Premiums written by a servicing carrier on behalf of a state residual market insurance entity or State workers' compensation fund that are ceded to such an entity or fund shall not be included as direct earned premium (as described in § 50.4(h)(1) or (2)) of the servicing carrier.

(b) *Participant insurers.* For purposes of this Subpart, a participant insurer is an insurer that shares in the profits and losses of a state residual market insurance entity or a state workers' compensation fund. Premium income that is distributed to or assumed by participant insurers in a state residual market insurance entity or state workers' compensation fund (whether directly or as quota share insurers of risks written by servicing carriers), shall be included in direct earned premium (as described in § 50.4(h)(1) or (2)) of the participant insurer.

Subpart E—[Reserved]

Subpart F—Data Collection

§ 50.50 General.

Treasury may request from insurers such data and information as may be reasonably required in support of Treasury's administration of the Program.

§ 50.51 Annual data reporting.

(a) *General.* No later than May 15 of each calendar year, all insurers shall provide specified data and information respecting their Program participation.

(b) *Scope.* Except as otherwise provided by Treasury, the information to be provided shall address: the lines of property and casualty insurance subject to the Program, the premiums earned for terrorism risk insurance within those lines and for those lines generally, the geographical location of exposures covered under terrorism risk insurance, the pricing of terrorism risk insurance, the take-up rate for terrorism risk insurance, the amount of private reinsurance obtained by participating insurers in connection with such policies, and other matters concerning the Program as may be identified by Treasury.

(c) *Method of reporting.* (1) Treasury will promulgate forms defining the specific data and information that each insurer must submit and make these forms available on its Web site. Treasury may adopt different data reporting forms for different types of insurers that participate in the Program, which modify the requested information by each different category of participating insurer based upon the manner and scope of the participation of those insurers in the Program. Each insurer shall submit the required data and information by electronic submission through the forms and data portal(s) identified on Treasury's Web site. All data and information provided as part of such electronic submission shall be certified by the insurer as a full and true statement of the information provided to the best of its knowledge, information and belief.

(2) The data and information required to be provided under this subsection may be modified annually by Treasury. Any modification shall be made during the prior calendar year, and Treasury shall provide insurers at least 90 days before requiring collection of any newly specified data or information.

(d) *Supplemental requests.* Treasury may issue supplemental requests, to some or all participating insurers, in connection with the annual data request provided for under this section, to the

extent Treasury determines that it requires additional or clarifying information in order to analyze the effectiveness of the Program. Insurers shall respond to any such supplemental requests as may be made within the timeframe and in the manner specified by Treasury.

(e) *Small insurer exception.* The Secretary may exempt a small insurer that meets the definition in § 50.4(z) from any or all data calls under this section, or may modify the requests as applicable to such small insurer.

§ 50.52 Small insurer data.

(a) *General.* The Secretary may collect information relating to small insurers, as defined in § 50.4(z), in order to conduct a study of small insurers participating in the Program, and identify any competitive challenges small insurers face in the terrorism risk insurance marketplace.

(b) *Scope.* Information collected concerning small insurers may include information necessary for Treasury to identify:

- (1) Changes to the market share, premium volume, and policyholder surplus of small insurers relative to large insurers;
- (2) How the property and casualty insurance market for terrorism risk differs between small and large insurers, and whether such a difference exists within other perils;
- (3) The impact on small insurers of the Program's mandatory availability requirement under section 103(c) of the Act;
- (4) The effect on small insurers of increasing the trigger amount for the Program under section 103(e)(1)(B) of the Act;
- (5) The availability and cost of private reinsurance for small insurers; and
- (6) The impact that state workers compensation laws have on small insurers and workers compensation carriers in the terrorism risk insurance marketplace.

§ 50.53 Collection of claims data.

(a) *General.* Subsequent to any certification by the Secretary of an act of terrorism, insurers shall report to Treasury information respecting insured losses arising from the act of terrorism.

(b) *Contents of periodic reporting.* Reporting under this subsection shall be by a form prescribed by Treasury and made available on the Treasury Web site, which provides basic information about each claim established by an insurer that involves or potentially involves an insured loss. Information to be reported for any claims by or against a policyholder shall identify paid and

reserved amounts associated with the claim. In the case of an affiliated group of insurers, the form required by this subsection shall be submitted by a single insurer designated within the affiliated group, which shall report on a consolidated basis. Data and information reported under this subsection will include:

(1) A listing of each claim by name of insured, catastrophe code, line of business, and in the case of an affiliated group of insurers, the particular insurer or insurers within the group associated with each claim;

(2) Amounts paid, both loss and loss adjustment expenses, in connection with the claim as of the effective date of the report; and

(3) Amounts reserved, both loss and loss adjustment expenses, in connection with the claim as of the effective date of the report.

(c) *Timing of reporting.* To the extent that an insurer has established one or more claims that it believes involve insured losses arising from an act of terrorism, the insurer shall submit its first report within 60 days of establishing the first of such claims. An updated report shall be submitted each month thereafter, reporting data as of the prior month, until all claims arising from the act of terrorism have been resolved.

(d) *Interrelationship with other reporting requirements.* The reporting requirements under this subsection are independent of the Initial Notice of Deductible Erosion, Initial Certification of Loss, and Supplementary Certifications of Loss requirements in subpart H.

(e) *Other sources of information.* Subsequent to any certification of an act of terrorism, Treasury may also seek information respecting loss estimates and projections from one or more organizations that are not participants in the Program, such as state insurance regulators, insurance modeling organizations, rating agencies, insurance brokers and producers, and insurance data aggregators. A data request may also be directed to insurers identified in connection with such inquiries. An insurer subject to such a data call shall respond to this request within the time frame specified in the request.

§ 50.54 Handling of data.

(a) *General.* All nonpublic information submitted to the Secretary under subparts F and G of this part shall be considered proprietary information and shall:

(1) Be handled and stored by Treasury in an appropriately secure manner;

(2) Be considered, where appropriate, to be trade secrets or commercial or financial information obtained from a person and privileged or confidential; and

(3) Not be publicly released in any unaggregated form in which a consumer, policyholder, or insurer is identifiable.

(b) *Use of insurance statistical aggregator.* To the extent Treasury utilizes an insurance statistical aggregator in connection with any data collection under subparts F and G, such insurance statistical aggregator shall keep any nonpublic information that it collects confidential, consistent with the requirements of this section.

(c) *Confidentiality.* (1) The submission of any non-publicly available data and information to the Secretary under subparts F and G of this part, and the sharing of any non-publicly available data with or by the Secretary among other Federal agencies, the state insurance regulatory authorities, or any other entities shall not constitute a waiver of, or otherwise affect, any privilege or immunity arising under Federal or state law (including the rules of any Federal or state court) to which the data or information is otherwise subject.

(2) Any requirement under Federal or state law to the extent otherwise applicable, or any requirement pursuant to a written agreement in effect between the original source of any non-publicly available data or information and the source of such data or information to the Secretary, regarding privacy or confidentiality of any data or information in the possession of the source to the Secretary, shall continue to apply to such data or information after the data or information has been provided pursuant to this Subpart.

(3) Any data or information obtained by the Secretary under subparts F or G of this part may be made available to state insurance regulatory authorities, individually or collectively through an information-sharing agreement that:

(i) Shall comply with applicable Federal law; and

(ii) Shall not constitute a waiver of, or otherwise affect, any privilege or immunity under Federal or state law (including any privilege referred to in paragraph (b)(1) of this section and the rules of any Federal or State court) to which the data or information is otherwise subject.

(4) Section 552 of title 5, United States Code, including any exceptions thereunder, shall apply to any data or information submitted under this Subpart by an insurer or affiliate of an insurer.

Subpart G—Certification

§ 50.60 Certification.

(a) *Certification decision.* The Secretary, in consultation with the Attorney General of the United States and the Secretary of Homeland Security, is responsible for determining whether to certify an act as an act of terrorism.

(b) *Timeline for eligibility.* An act is eligible for certification as an act of terrorism at the end of the following timeline:

(1) The Secretary commences review of whether an act satisfies the definition in § 50.4(b);

(2) Within 30 days of the Secretary commencing review, Treasury publishes the notice required by § 50.61(a). During such review, the schedule of public notifications in § 50.61(b) shall apply, as appropriate;

(3) The Secretary's review finds that the act satisfies the elements for certification under § 50.4(b)(1)(i) through (iv), and that it is not otherwise precluded from certification by § 50.4(b)(2); and

(4) Within 30 days or as soon as otherwise practicable after the review identified in paragraph (b)(3) of this section concludes that the act satisfies the necessary criteria, the Secretary consults with the Attorney General of the United States and the Secretary of Homeland Security pursuant to section 102(1)(A) of the Act.

(c) *Other consultation.* Nothing in this section shall prevent the Secretary from consulting and coordinating with the Attorney General of the United States, the Secretary of Homeland Security, or any other government official prior to the consultation identified in paragraph (b)(4) of this section.

(d) *Finality.* Any decision by the Secretary to certify, or determination not to certify, an act as an act of terrorism under this Subpart shall be final, and shall not be subject to judicial review.

(e) *Nondelegation.* The Secretary may not delegate or designate to any other officer, employee, or person, the determination of whether to certify an act as an act of terrorism.

§ 50.61 Public communication.

(a) *Initial notification.* After the Secretary commences review of whether an act may satisfy the definition in § 50.4(b), Treasury shall publish a notice in the **Federal Register** within 30 days of the Secretary commencing review notifying the public that the act is under review for certification as an act of terrorism. Treasury may also announce that an act is not under review for certification.

(b) *Update notification.* Not later than 30 days following the publication of a notice under paragraph (a) of this section that an act is under review for certification, and not later than every 60 days thereafter until the Secretary determines whether to certify an act as an act of terrorism, Treasury shall publish a notice in the **Federal Register** notifying the public whether the act is still under review for certification as an act of terrorism.

(c) *Contents of notification.* Nothing in this section shall require Treasury to provide any information other than whether the act is under review for certification as an act of terrorism (or is no longer under such review) or shall limit Treasury from providing further information of relevance.

(d) *Rules of construction.* Nothing in this section shall be construed to preclude the Secretary from certifying or determining not to certify an act as an act of terrorism before notifying the public that the act is under review for certification. If, in the discretion of the Secretary, circumstances relating to an act render timely notification under this section by Treasury impracticable, Treasury shall provide the notification as soon as practicable, in a manner the Secretary determines is appropriate.

(e) *Nonbinding decision.* A notification made under this section shall not be construed to be a final determination by the Secretary of whether to certify an act as an act of terrorism.

§ 50.62 Certification data collection.

(a) *General.* (1) The Secretary, when evaluating an act for certification as an act of terrorism, may at any time direct one or more insurers to submit information regarding projected and actual losses in connection with an act and any other information the Secretary determines appropriate. The information sought by the Secretary shall be specified in the data request, and any insurer subject to the data request shall respond to the request within the time frame specified by the Secretary at the time of the request. The data requested may include actual loss reserves established by insurers in connection with the act under consideration, loss estimates generated by insurers in connection with the act under consideration which have not yet been established as actual loss reserves, and information respecting an insurer's property and casualty exposures in a particular geographic area associated with the act under consideration.

(2) An insurer not required by Treasury to submit information under paragraph (a)(1) of this section may

voluntarily submit information to the Secretary as specified in public notifications issued by Treasury.

(b) *Other sources of information.* The Secretary may request information with respect to loss estimates and likely affected insurers from organizations, including state insurance regulators, insurance modeling organizations, rating agencies, insurance brokers and producers, and insurance data aggregators.

§ 50.63 Notification of certification determination.

(a) *Public notification.* Not later than 5 business days after the Secretary determines whether to certify an act as an act of terrorism, Treasury shall publish a statement and submit a notice to the **Federal Register** notifying the public of the Secretary's decision.

(b) *Insurance supervisor notification.* Not later than 5 business days after the Secretary determines whether to certify an act as an act of terrorism, Treasury shall notify in writing any relevant supervisory officials of the Secretary's decision.

(c) *Congressional notification.* Not later than 5 business days after the Secretary determines whether to certify an act as an act of terrorism, Treasury shall notify in writing the President of the U.S. Senate and the Speaker of the U.S. House of Representatives of the Secretary's decision.

(d) *Rule of construction.* If, in the discretion of the Secretary, circumstances relating to an act render timely notification by Treasury under this section impracticable, Treasury shall provide the notification as soon as practicable, in a manner the Secretary determines is appropriate.

Subpart H—Claims Procedures

§ 50.70 Federal share of compensation.

(a) *General.* (1) Treasury will pay the Federal share of compensation for insured losses as provided in section 103 of the Act once a Certification of Loss required by § 50.73 is deemed sufficient. The Federal share of compensation under the Program shall be:

(i) 85 percent of that portion of the insurer's aggregate insured losses that exceeds its insurer deductible during calendar year 2015;

(ii) 84 percent of that portion of the insurer's aggregate insured losses that exceeds its insurer deductible during calendar year 2016;

(iii) 83 percent of that portion of the insurer's aggregate insured losses that exceeds its insurer deductible during calendar year 2017;

(iv) 82 percent of that portion of the insurer's aggregate insured losses that exceeds its insurer deductible during calendar year 2018;

(v) 81 percent of that portion of the insurer's aggregate insured losses that exceeds its insurer deductible during calendar year 2019; and

(vi) 80 percent of that portion of the insurer's aggregate insured losses that exceeds its insurer deductible during calendar year 2020 and any calendar year thereafter.

(2) The percentages in paragraph (a)(1) of this section are subject to any adjustments described in § 50.71 and to the cap of \$100 billion as provided in section 103(e)(2) of the Act.

(b) *Program Trigger amounts.*

Notwithstanding paragraph (a) of this section or anything in this subpart to the contrary, Federal compensation will not be paid by Treasury unless the aggregate industry insured losses resulting from one or more certified acts of terrorism exceed the following amounts:

(1) For insured losses resulting from acts of terrorism taking place in calendar year 2015: \$100 million;

(2) For insured losses resulting from acts of terrorism taking place in calendar year 2016: \$120 million;

(3) For insured losses resulting from acts of terrorism taking place in calendar year 2017: \$140 million;

(4) For insured losses resulting from acts of terrorism taking place in calendar year 2018: \$160 million;

(5) For insured losses resulting from acts of terrorism taking place in calendar year 2019: \$180 million;

(6) For insured losses resulting from acts of terrorism taking place in calendar year 2020 and any calendar year thereafter: \$200 million.

(c) *Conditions for payment of Federal share.* Subject to paragraph (d) of this section, Treasury shall pay the appropriate amount of the Federal share of compensation for an insured loss to an insurer upon a determination that:

(1) The insurer is an entity, including an affiliate thereof, that meets the requirements of § 50.4(o);

(2) The insurer's insured losses, as defined in § 50.4(n) and limited by paragraph (d) of this section (including the allocated dollar value of the insurer's proportionate share of insured losses from a state residual market insurance entity or a state workers' compensation fund as described in § 50.33), have exceeded its insurer deductible as defined in § 50.4(p);

(3) The insurer has paid or is prepared to pay an insured loss, based on a filed claim for the insured loss;

(4) Neither the insurer's claim for Federal payment nor any underlying

claim for an insured loss is fraudulent, collusive, made in bad faith, dishonest or otherwise designed to circumvent the purposes of the Act and regulations;

(5) The insurer has provided a clear and conspicuous disclosure as required by §§ 50.10 through 50.14 and a cap disclosure as required by § 50.15;

(6) The insurer offered coverage for insured losses and the offer was accepted by the insured prior to the act which results in the insured loss;

(7) The insurer took all steps reasonably necessary to properly and carefully investigate the insured loss and otherwise processed the insured loss using practices appropriate for the business of insurance;

(8) The insured loss is within the scope of coverage issued by the insurer under the terms and conditions of one or more policies for commercial property and casualty insurance as defined in § 50.4(w); and

(9) The procedures specified in this Subpart have been followed and all conditions for payment have been met.

(d) *Adjustments.* Treasury may subsequently adjust, including requiring repayment of, any payment made under paragraph (c) of this section in accordance with its authority under the Act.

(e) *Suspension of payment for other insured losses.* Upon a determination by Treasury that an insurer has failed to meet any of the requirements for payment specified in paragraph (c) of this section for a particular insured loss, Treasury may suspend payment of the Federal share of compensation for all other insured losses of the insurer pending investigation and audit of the insurer's insured losses.

(f) *Aggregate industry losses.* Treasury will determine the amount of aggregate industry insured losses resulting from a certified act of terrorism. If aggregate industry insured losses in a calendar year resulting from one or more certified acts of terrorism exceed the applicable Program Trigger amounts specified in paragraph (b) of this section, Treasury will publish a document in the **Federal Register** of a Program Trigger Event.

§ 50.71 Adjustments to the Federal share of compensation.

(a) *Aggregate amount of insured losses.* The aggregate amount of insured losses of an insurer in a calendar year used to calculate the Federal share of compensation shall be reduced by any amounts recovered by the insurer as salvage or subrogation for its insured losses in the calendar year.

(b) *Amount of Federal share of compensation.* The Federal share of

compensation shall be adjusted as follows:

(1) *No excess recoveries.* For any calendar year, the sum of the Federal share of compensation paid by Treasury to an insurer and the insurer's recoveries for insured losses from other sources shall not be greater than the insurer's aggregate amount of insured losses for acts of terrorism in that calendar year. Amounts recovered for insured losses in excess of an insurer's aggregate amount of insured losses for acts of terrorism in a calendar year shall be repaid to Treasury within 45 days after the end of the month in which total recoveries of the insurer, from all sources, become excess. For purposes of this paragraph, amounts recovered from a reinsurer pursuant to an agreement whereby the reinsurer's right to any excess recovery has priority over the rights of Treasury shall not be considered a recovery subject to repayment to Treasury.

(2) *Reduction of amount payable.* The Federal share of compensation for insured losses under the Program shall be reduced by the amount of other compensation provided by other Federal programs to an insured or a third party to the extent such other compensation duplicates the insurance indemnification for those insured losses.

(i) *Other Federal program compensation.* For purposes of this section, compensation provided by other Federal programs for insured losses means compensation that is provided by Federal programs established for the purpose of compensating persons for losses in the event of emergencies, disasters, acts of terrorism, or similar events. Compensation provided by Federal programs for insured losses excludes benefit or entitlement payments, such as those made under the Social Security Act, under laws administered by the Secretary of Veteran Affairs, railroad retirement benefit payments, and other similar types of benefit payments.

(ii) *Insurer due diligence.* With respect to any underlying claim for insured losses, each insurer shall inquire of all involved policyholders, insureds, and claimants whether the person receiving insurance proceeds for an insured loss has received, expects to receive, or is entitled to receive compensation from another Federal program for the insured loss, and if so, the source and the amount of the compensation received or expected. The response, source, and such amounts shall be reported with each underlying claim on the form specified in § 50.73(b)(1).

§ 50.72 Notice of deductible erosion.

Each insurer shall submit to Treasury a Notice on a form prescribed by Treasury whenever the insurer's aggregate insured losses (including reserves for "incurred but not reported" losses) within a calendar year exceed an amount equal to 50 percent of the insurer's deductible as specified in § 50.4(p). Insurers are advised that the form for the Notice of Deductible Erosion will include an initial estimate of aggregate insured losses for the calendar year, the amount of the insurer deductible, and an estimate of the Federal share of compensation for the insurer's aggregate insured losses. In the case of an affiliated group of insurers, the Notice will include the name and address of a single designated insurer within the affiliated group that will serve as the single point of contact for the purpose of providing loss and compliance certifications as required in § 50.73 and for receiving, disbursing, and distributing payments of the Federal share of compensation in accordance with § 50.74. An insurer, at its option, may elect to include with its Notice of Deductible Erosion the certification of direct earned premium required by § 50.73(b)(3).

§ 50.73 Loss certifications.

(a) *General.* When an insurer has paid aggregate insured losses that exceed its insurer deductible for a calendar year, the insurer may make claim upon Treasury for the payment of the Federal share of compensation for its insured losses. The insurer shall file an Initial Certification of Loss, on a form prescribed by Treasury, and thereafter such Supplementary Certifications of Loss, on a form prescribed by Treasury, as may be necessary to receive payment for the Federal share of compensation for its insured losses.

(b) *Initial certification of loss.* An insurer shall use its best efforts to file with the Program the Initial Certification of Loss within 45 days following the last calendar day of the month when an insurer has paid aggregate insured losses that exceed its insurer deductible. The Initial Certification of Loss will include the following:

(1) Basic information, on a form prescribed by Treasury, about each insured loss paid (or to be paid pursuant to § 50.73(b)(2)(i)) by the insurer. The form will include:

(i) A listing of each insured loss paid (or to be paid pursuant to § 50.73(b)(2)(i)) by the insurer by catastrophe code and line of business;

(ii) The total amount of reinsurance recovered from other sources;

(iii) A calculation of the aggregate insured losses sustained by the insurer above its insurer deductible for the calendar year; and

(iv) The amount the insurer claims as the Federal share of compensation for its aggregate insured losses.

(2) A certification that the insurer is in compliance with the provisions of section 103(b) of the Act and this part, including certifications that:

(i) The underlying insured losses reported pursuant to § 50.73(b)(1) either: Have been paid by the insurer; or will be paid by the insurer upon receipt of an advance payment of the Federal share of compensation as soon as possible, consistent with the insurer's normal business practices, but not longer than five business days after receipt of the Federal share of compensation;

(ii) The underlying claims for insured losses were filed by persons who suffered an insured loss, or by persons acting on behalf of such persons;

(iii) The underlying claims for insured losses were processed in accordance with appropriate business practices and the procedures specified in this subpart;

(iv) The insurer has complied with the disclosure requirements of §§ 50.10 through 50.14, and the cap disclosure requirement of § 50.15, for each underlying insured loss that is included in the amount of the insurer's aggregate insured losses; and

(v) The insurer has complied with the mandatory availability requirements of subpart C of this part.

(3) A certification of the amount of the insurer's direct earned premium, together with the calculation of its insurer deductible (provided this certification was not submitted previously with the Notice of Deductible Erosion).

(4) A certification that the insurer will disburse payment of the Federal share of compensation in accordance with this Subpart.

(5) A certification that if Treasury has determined a *Pro Rata Loss Percentage* (PRLP) (see § 50.112), the insurer has complied with applying the PRLP to insured loss payments, where required.

(c) *Supplementary certifications of loss.* If the total amount of the Federal share of compensation due an insurer for insured losses under the Act has not been determined at the time an Initial Certification of Loss has been filed, the insurer shall file monthly, or on a schedule otherwise determined by Treasury, Supplementary Certifications of Loss updating the amount of the Federal share of compensation due for the insurer's insured losses.

Supplementary Certifications of Loss will include the following:

(1) A form as described in § 50.73(b)(1); and

(2) A certification as described in § 50.73(b)(2).

(d) *Supplementary information.* In addition to the information required in paragraphs (b) and (c) of this section, Treasury may require such additional supporting documentation as required to ascertain the Federal share of compensation for the insured losses of any insurer.

(e) *State Residual Market Insurance Entities and State Workers' Compensation Funds.* A state residual market insurance entity or a state workers' compensation fund described in § 50.32 shall provide the Certifications of Loss described in § 50.73(b) and (c) for all of its insured losses to each participating insurer at the time it provides the allocated dollar value of the participating insurer's proportionate share of insured losses. In addition, at such time the state residual market insurance entity or state workers' compensation fund shall provide the certification described in § 50.73(b)(2) to Treasury. Participating insurers shall treat the allocated dollar value of their proportionate share of insured losses from a state residual market insurance entity or state workers' compensation fund as an insured loss for the purpose of their own reporting to Treasury in seeking the Federal share of compensation.

§ 50.74 Payment of Federal share of compensation.

(a) *Timing.* Treasury will promptly pay to an insurer the Federal share of compensation due the insurer for its insured losses. Payment shall be made in such installments and on such conditions as determined by the Treasury to be appropriate. Any overpayments by Treasury of the Federal share of compensation will be offset from future payments to the insurer or returned to Treasury within 45 days.

(b) *Payment process.* Payment of the Federal share of compensation for insured losses will be made to the insurer designated on the Notice of Deductible Erosion required by § 50.72. An insurer that requests payment of the Federal share of compensation for insured losses must receive payment through electronic funds transfer. The insurer must establish either an account for reimbursement as described in paragraph (c) of this section (if the insurer only seeks reimbursement) or a segregated account as described in paragraph (d) of this section (if the

insurer seeks advance payments or a combination of advance payments and reimbursement). Applicable procedures will be posted at <https://www.treasury.gov/resource-center/fin-mkts/Pages/program.aspx> or otherwise will be made publicly available.

(c) *Account for reimbursement.* An insurer shall designate an account for the receipt of reimbursement of the Federal share of compensation at an institution eligible to receive payments through the Automated Clearing House (ACH) network.

(d) *Segregated account for advance payments.* An insurer that seeks advance payments of the Federal share of compensation as certified according to § 50.73(b)(2)(i) shall establish a segregated account into which Treasury will make advance payments as well as reimbursements to the insurer.

(1) *Definition of segregated account.* For purposes of this section, a segregated account is an interest-bearing separate account established by an insurer at a financial institution eligible to receive payments through the ACH network. Such an account is limited to the purposes of:

(i) Receiving payments of the Federal share of compensation;

(ii) Disbursing payments to insureds and claimants; and

(iii) Transferring payments to the insurer or affiliated insurers for insured losses reported as already paid.

(2) *Remittance of interest.* All interest earned on advance payments in the segregated account must be remitted at least quarterly to Treasury's Bureau of the Fiscal Service or as otherwise prescribed in applicable procedures.

(e) *Denial or withholding of advance payment.* Treasury may deny or withhold advance payments of the Federal share of compensation to an insurer if Treasury determines that the insurer has not properly disbursed previous advances of the Federal share of compensation or otherwise has not complied with the requirements for advance payment as provided in this Subpart.

(f) *Affiliated group.* In the case of an affiliated group of insurers, Treasury will make payment of the Federal share of compensation for the insured losses of the affiliated group to the insurer designated in the Notice of Deductible Erosion to receive payment on behalf of the affiliated group. The designated insurer receiving payment from Treasury must distribute payment to affiliated insurers in a manner that ensures that each insurer in the affiliated group is compensated for its share of insured losses, taking into account a reasonable and fair allocation

of the group deductible among affiliated insurers. Upon payment of the Federal share of compensation to the designated insurer, Treasury's payment obligation to the insurers in the affiliated group with respect to any insured losses covered is discharged to the extent of the payment.

§ 50.75 Determination of affiliations.

For the purposes of this subpart, an insurer's affiliates for any calendar year shall be determined by the circumstances existing on the date of the act which is the Program Trigger Event for that calendar year.

§ 50.76 Final netting.

(a) *General.* Pursuant to section 103(e)(4) of the Act, the Secretary shall have sole discretion to determine the time at which claims relating to any insured loss or act of terrorism shall become final.

(b) *Final Netting Date.* The Secretary may determine a Final Netting Date for a calendar year, which for purposes of this Part is the date on or before which an insurer must report to Treasury on the insurer's Certifications of Loss (both Initial Certification of Loss and any Supplemental Certifications of Loss) all insured losses that have been reported by its policyholders for the calendar year.

(1) *Criteria for Final Netting Date.* The establishment of a Final Netting Date will be based on factors and considerations including:

(i) Amounts of case reserves reported by insurers to Treasury for open underlying insured losses;

(ii) The rate at which claims for the Federal share of compensation for insured losses are being made by insurers to Treasury;

(iii) The rate at which new underlying insured losses are being added by insurers to their Supplementary Certifications of Loss and reported;

(iv) The predominant lines of business for which underlying insured losses are being reported;

(v) Tort and contract statutes of limitations relevant to insured losses and the manner in which they are being applied by the Federal courts;

(vi) Common business practices;

(vii) Issues that are delaying final resolution of insured losses;

(viii) The application of the liability limitations and procedures under the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (6 U.S.C. 441 *et seq.*) that may affect final resolution of insured losses;

(ix) Issues related to the cap on annual liability for insurer losses, including whether a projection that the

cap on annual liability will be reached in connection with any calendar year indicates that no Final Netting Date should be set for that calendar year;

(x) Treasury's claims administration costs; and

(xi) Such other factors as the Secretary considers appropriate to take into account.

(2) *Notice of Final Netting Date.* Treasury shall announce and publish in the **Federal Register** notice of a proposed Final Netting Date and its application to a specific calendar year, and will solicit comments from the public regarding the appropriateness of the proposed Final Netting Date. After receipt and evaluation of comments respecting its proposed Final Netting Date, Treasury will publish in the **Federal Register** a Final Netting Date, which is at least 180 days after the date of publication. The Secretary's determination of a Final Netting Date is final and not subject to judicial review.

(c) *Post-Final Netting Date claims.* After the Final Netting Date, insurers may only make further claims for the Federal share of compensation for insured losses by submission of Supplemental Certifications of Loss with updated information on underlying insured losses previously reported to Treasury. Such updated information may reflect a decision by a court of competent jurisdiction concerning a limitation of liability under the Support Anti-terrorism by Fostering Effective Technologies Act of 2002. In the case of workers' compensation losses, the insurer may provide updated information based on the number of workers' compensation claimants previously reported. An insurer may not report any new underlying insured losses, or increased workers' compensation loss amounts based on an increase in the number of workers' compensation claimants, to Treasury after a Final Netting Date, except as provided in this section.

(d) *Commutation.* A commutation is the payment by Treasury of a lump sum present value of future payments to an insurer in lieu of making payments in the future, as provided in this section.

(1) In lieu of continued submission of Supplemental Certifications of Loss after the Final Netting Date as provided in paragraph (c) of this section, Treasury may require, or consider an insurer's request for, a commutation of an insurer's future claims for the Federal share of compensation based on estimates for the underlying insured losses reported to Treasury on or before the Final Netting Date. The payment by Treasury of a final commuted amount to an insurer will discharge Treasury from

all future liabilities to the insurer for the Federal share of compensation for insured losses for the applicable calendar year. In the case of an affiliated group of insurers, the requirements of § 50.74(f) apply, and payment of the final commuted amount to the designated insurer of the affiliated group discharges Treasury's payment obligation to the insurers in the affiliated group for insured losses for the applicable calendar year.

(2) If future claims are to be commuted, Treasury may require additional information from the insurer, including an insurer's justification for a final payment amount with necessary actuarial factors and methodology, and pertinent information regarding the insurer's business relationships and other reinsurance recoverables. Insurers will be required to justify discount and other factors from which final payment amounts are derived. If Treasury notifies an insurer of a requirement to submit additional information to inform its commutation decision, the insurer will be provided (depending upon the complexity of the material sought) no less than 90 days from the date of notification to submit material required in the notice. If the insurer fails to provide the requested information, it will forfeit the right to future payments from Treasury. Treasury will evaluate such information in order to determine a final payment amount or (if applicable) an amount to be repaid to Treasury. Treasury may determine that it will not consider commutation until it has completed an audit of an insurer's insured losses pursuant to the authority set forth in Subpart I of these regulations.

(3) Payments of commuted amounts are not considered to be advance payments requiring a segregated account as described in § 50.74(d).

(4) Notwithstanding § 50.70(d), a payment by Treasury of a final commuted amount to an insurer is final unless:

(i) Treasury is put on notice that an insurer's claim was fraudulent or that other conditions for Federal payment were not met, in which case the insurer will be required to repay amounts that were not due; or

(ii) The exception in paragraph (e) of this section applies, in which case Treasury may make additional payments for insured losses, but only under the conditions described in paragraph (e).

(e) *Exception.* If within one year after the Final Netting Date, and regardless of commutation, an insurer has additional underlying reported insured losses that, in the absence of a Final Netting Date,

would result in an increase of the Federal share of compensation to that insurer by 20% of the total amount already paid to that insurer, the insurer may request Treasury to allow those underlying insured losses to be submitted as part of a certification of loss. Under such circumstances and provided that all other conditions for payment have been met, Treasury may reopen or extend the insurer's claim for the Federal share of compensation for insured losses for the pertinent calendar year.

Subpart I—Audit and Investigative Procedures

§ 50.80 Audit authority.

The Secretary of the Treasury, or an authorized representative, shall have, upon reasonable notice, access to all books, documents, papers and records of an insurer that are pertinent to amounts paid to the insurer as the Federal share of compensation for insured losses, or pertinent to any Federal terrorism policy surcharge that is imposed pursuant to subpart J of this part, for the purposes of investigation, confirmation, audit, and examination.

§ 50.81 Recordkeeping.

(a) Each insurer that seeks payment of a Federal share of compensation under subpart H of this part shall retain such records as are necessary to fully disclose all material matters pertinent to insured losses and the Federal share of compensation sought under the Program, including, but not limited to, records regarding premiums and insured losses for all commercial property and casualty insurance issued by the insurer and information relating to any adjustment in the amount of the Federal share of compensation payable. Insurers shall maintain detailed records for not less than five (5) years from the termination dates of all reinsurance agreements involving property and casualty insurance subject to the Act. Records relating to premiums shall be retained and available for review for not less than three (3) years following the conclusion of the policy year. Records relating to underlying claims shall be retained for not less than five (5) years following the final adjustment of the claim.

(b) Each insurer that collects a Federal terrorism policy surcharge as required by Subpart J of this part shall retain records related to such surcharge, including records of the property and casualty insurance premiums subject to the surcharge, the amount of the surcharge imposed on each policy, aggregate Federal terrorism policy

surcharges collected, and aggregate Federal terrorism policy surcharges remitted to Treasury during each assessment period. Such records shall be retained and kept available for review for not less than three (3) years following the conclusion of the assessment period or settlement of accounts with Treasury, whichever is later.

§ 50.82 Civil penalties.

(a) *General.* The Secretary may assess a civil monetary penalty, in an amount not exceeding the amount specified under § 50.83, against any insurer that the Secretary determines, on the record after opportunity for a hearing:

- (1) Has failed to charge, collect, or remit the Federal terrorism policy surcharge under Subpart J;
- (2) Has intentionally provided to Treasury erroneous information regarding premium or loss amounts;
- (3) Submits to Treasury fraudulent claims under the Program for insured losses;
- (4) Has failed to provide any disclosures or other information required by Treasury; or
- (5) Has otherwise failed to comply with provisions of the Act or these regulations.

(b) *Recovery of amount in dispute.* A penalty under this section for any failure to pay, charge, collect, or remit amounts in accordance with the Act or under these regulations shall be in addition to any such amounts recovered by Treasury.

(c) *Procedure.* Treasury shall notify in writing any insurer that it believes has committed one or more of the acts identified in paragraph (a) of this section. In that notification, Treasury shall identify the act or acts that it believes has been violated, and its basis for that belief, and shall set a schedule for further proceedings which shall include:

- (1) The opportunity for a written submission by the insurer that provides all relevant facts and circumstances concerning the alleged conduct, including any information that the insurer wishes Treasury to consider in connection with the alleged conduct; and
- (2) A hearing on the record, unless waived by the insurer, during which Treasury and the insurer may present further information respecting the conduct in question.

(d) *Other remedies preserved.* Treasury's assessment and collection of a civil monetary penalty under this section shall be in addition and without prejudice to any other civil remedies or criminal penalties that may arise on

account of the conduct in question under any other laws or regulations of the United States.

§ 50.83 Adjustment of civil monetary penalty amount.

(a) *Catch-up adjustment.* Any penalty under the Act and these regulations may not exceed the greater of \$1,311,850 and, in the case of any failure to pay, charge, collect, or remit amounts in accordance with the Act or these regulations such amount in dispute.

(b) *Annual adjustment.* The maximum penalty amount that may be assessed under this section will be adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. 2461 note, by January 15 of each year and the updated amount will be posted in the **Federal Register** and on the Treasury Web site at <https://www.treasury.gov/resource-center/fin-mkts/Pages/program.aspx>.

Subpart J—Recoupment and Surcharge Procedures

§ 50.90 Mandatory and discretionary recoupment.

(a) Pursuant to section 103(e) of the Act, the Secretary shall impose, and insurers shall collect, such Federal terrorism policy surcharges as needed to recover 140 percent of the mandatory recoupment amount for any calendar year.

(b) In the Secretary's discretion, the Secretary may recover any portion of the aggregate Federal share of compensation that exceeds the mandatory recoupment amount through a Federal terrorism policy surcharge based on the factors set forth in section 103(e)(7)(D) of the Act.

(c) If the Secretary imposes a Federal terrorism policy surcharge as provided in paragraph (a) of this section, then the required amounts, based on the extent to which payments for the Federal share of compensation have been made by the collection deadlines in section 103(e)(7)(E) of the Act, shall be collected in accordance with such deadlines:

(1) For any act of terrorism that occurs on or before December 31, 2017, the Secretary shall collect all required amounts by September 30, 2019;

(2) For any act of terrorism that occurs between January 1 and December 31, 2018, the Secretary shall collect 35 percent of any required amounts by September 30, 2019, and the remainder by September 30, 2024; and

(3) For any act of terrorism that occurs on or after January 1, 2019, the Secretary shall collect all required amounts by September 30, 2024.

§ 50.91 Determination of recoupment amounts.

(a) If payments for the Federal share of compensation have been made for a calendar year, and Treasury determines that insured loss information is sufficiently developed and credible to serve as a basis for calculating recoupment amounts, Treasury will make an initial determination of any mandatory or discretionary recoupment amounts for that calendar year.

(b)(1) Within 90 days after certification of an act of terrorism, the Secretary shall publish in the **Federal Register** an estimate of aggregate insured losses which shall be used as the basis for initially determining whether mandatory recoupment will be required.

(2) If at any time Treasury projects that payments for the Federal share of compensation will be made for a calendar year, and that in order to meet the collection timing requirements of section 103(e)(7)(E) of the Act it is necessary to use an estimate of such payments as a basis for calculating recoupment amounts, Treasury will make an initial determination of any mandatory recoupment amounts for that calendar year.

(c) Following the initial determination of recoupment amounts for a calendar year, Treasury will recalculate any mandatory or discretionary recoupment amount as necessary and appropriate, and at least annually, until a final recoupment amount for the calendar year is determined. Treasury will compare any recalculated recoupment amount to amounts already remitted and/or to be remitted to Treasury for a Federal terrorism policy surcharge previously established to determine whether any additional amount will be recouped by Treasury.

(d) For the purpose of determining initial or recalculated recoupment amounts, Treasury may issue a data call to insurers for insurer deductible and insured loss information by calendar year. Treasury's determination of the aggregate amount of insured losses from Program Trigger Events of all insurers for a calendar year will be based on the amounts reported in response to a data call and any other information Treasury in its discretion considers appropriate. Submission of data in response to a data call shall be on a form promulgated by Treasury.

§ 50.92 Establishment of Federal terrorism policy surcharge.

(a) Treasury will establish the Federal terrorism policy surcharge based on the following factors and considerations:

(1) In the case of a mandatory recoupment amount, the requirement to collect 140 percent of that amount;

(2) The total dollar amount to be recouped as a percentage of the latest available annual aggregate industry direct written premium information;

(3) The adjustment factors for terrorism loss risk-spreading premiums described in section 103(e)(8)(D) of the Act;

(4) The annual 3 percent limitation on terrorism loss risk-spreading premiums collected on a discretionary basis as provided in section 103(e)(8)(C) of the Act;

(5) A preferred minimum initial assessment period of one full year and subsequent extension periods in full year increments;

(6) The collection timing requirements of section 103(e)(8)(E) of the Act;

(7) The likelihood that the amount of the Federal terrorism policy surcharge may result in the collection of an aggregate recoupment amount in excess of the planned recoupment amount; and

(8) Such other factors as the Secretary considers appropriate to take into account.

(b) The Federal terrorism policy surcharge shall be the obligation of the policyholder and is payable to the insurer with the premium for a property and casualty insurance policy in effect during the assessment period established by Treasury. See § 50.94(c).

§ 50.93 Notification of recoupment.

(a) Treasury will provide notifications of recoupment through publication of notices in the **Federal Register** or in another manner Treasury deems appropriate, based upon the circumstances of the certified act(s) of terrorism under consideration.

(b) Treasury will provide reasonable advance notice to insurers of any initial Federal terrorism policy surcharge effective date. This effective date shall be January 1 of the calendar year following publication of the notice, unless such date would not provide for sufficient notice of implementation while meeting the collection timing requirements of section 103(e)(8)(E) of the Act.

(c) Treasury will provide reasonable advance notice to insurers of any modification or cessation of the Federal terrorism policy surcharge.

(d) Treasury will provide notification to insurers annually as to the continuation of the Federal terrorism policy surcharge.

§ 50.94 Collecting the surcharge.

(a) Insurers shall collect a Federal terrorism policy surcharge from policyholders as required by Treasury.

(b) Policies subject to the Federal terrorism policy surcharge are those for which direct written premium is reported on commercial lines of business on the NAIC's Exhibit of Premiums and Losses of the NAIC Annual Statement (commonly known as Statutory Page 14) as provided in § 50.4(w)(1), or equivalently reported.

(c) For policies subject to the Federal terrorism policy surcharge, the surcharge shall be imposed and collected on a written premium basis for policies that become effective or renew during the assessment period. All new, renewal, mid-term, and audit premiums for a policy term are subject to the surcharge in effect on the policy term effective date. Notwithstanding this paragraph, if the premium for a policy term that would otherwise be subject to the surcharge is revised after the end of the reporting period described in § 50.95(e), then any additional premium attributable to such revision is not subject to the Surcharge. For purposes of this Subpart:

(1) Written premium basis means the premium amount charged a policyholder by an insurer for property and casualty insurance, including all premiums, policy expense constants and fees defined as premium pursuant to the Statements of Statutory Accounting Principles established by the NAIC, as adopted by the state for which the premium will be reported.

(2) In the case of a policy providing multiple insurance coverages, if an insurer cannot identify the premium amount charged a policyholder specifically for property and casualty insurance under the policy, then:

(i) If the insurer estimates that the portion of the premium amount charged for coverage other than property and casualty insurance is *de minimis* to the total premium for the policy, the insurer may impose and collect from the policyholder a surcharge amount based on the total premium for the policy, but

(ii) If the insurer estimates that the portion of the premium amount charged for coverage other than property and casualty insurance is not *de minimis*, the insurer shall impose and collect from the policyholder a Surcharge amount based on a reasonable estimate of the premium amount for the property and casualty insurance coverage under the policy.

(3) The Federal terrorism policy surcharge is not considered premium.

(d) A policyholder must pay the applicable Federal terrorism policy

surcharge when due. The insurer shall have such rights and remedies to enforce the collection of the surcharge that are the equivalent to those that exist under applicable state or other law for nonpayment of premium.

(e) When an insurer returns an unearned premium, or otherwise refunds premium to a policyholder, it shall also return any Federal terrorism policy surcharge collected that is attributable to the refunded unearned premium. Notwithstanding this paragraph, if the written premium for a policy is revised and refunded after the end of the reporting period described in § 50.95(e), then the insurer is not required to refund any Surcharge that is attributable to the refunded premium.

(f) Notwithstanding paragraphs (a), (b), and (c) of this section, if the expense of collecting the Federal terrorism policy surcharge from all policyholders of an insurer during an assessment period exceeds the amount of the Surcharges anticipated to be collected, such insurer may satisfy its obligation to collect by omitting actual collection and instead remitting to Treasury the amount otherwise due.

(g) The Federal terrorism policy surcharge is repayment of Federal financial assistance in an amount required by law. No fee or commission shall be charged on the Federal terrorism policy surcharge.

§ 50.95 Remitting the surcharge.

(a) Each insurer shall report direct written premium and Federal terrorism policy surcharges to Treasury on a monthly and annual basis during the assessment period. Reporting will be on a form prescribed by Treasury and will be due according to the following schedule:

(1) *Monthly*: From the beginning of the assessment period through November, on the last business day of the calendar month following the month for which premium is reported, and

(2) *Annually*: March 1 for the prior calendar year.

(b) The monthly statements provided to Treasury will include the following:

(1) Cumulative calendar year direct written premium adjusted for premium not subject to the Federal terrorism policy surcharge, summarized by policy year.

(2) The aggregate Federal terrorism policy surcharge amount calculated by applying the established surcharge percentage to the insurer's adjusted direct written premium by policy year.

(3) Insurer certification of the submission.

(c) The annual statements to be provided to Treasury will include the following:

(1) Direct written premium, adjusted for premium not subject to the Federal terrorism policy surcharge, summarized by policy year and by commercial line of insurance as specified in § 50.4(w).

(2) The aggregate Federal terrorism policy surcharge amount calculated by applying the established surcharge percentage to the insurer's adjusted direct written premium by policy year.

(3) In the case of an insurer that has chosen not to collect the Federal terrorism policy surcharge from its policyholders as provided in § 50.94(f), a certification that the expense of collecting the Surcharge during the assessment period would have exceeded the amount of the surcharges collected over the assessment period.

(4) Insurer certification of the submission.

(d) The calculated aggregate Federal terrorism policy surcharge amount, as described in paragraphs (b)(2) and (c)(2) of this section, shall be remitted to Treasury upon submission of each monthly and annual statement. Through its submitted statements, an insurer obtains credit for a refund of any Federal terrorism policy surcharge previously remitted to Treasury that was subsequently returned by the insurer to a policyholder as attributable to refunded premium under § 50.94(e). A negative calculated amount in a monthly or annual statement indicates payment from Treasury is due to the insurer.

(e) Reporting shall continue for the one-year period following the end of the assessment period established by Treasury, unless otherwise permitted by Treasury.

§ 50.96 Insurer responsibility.

Notwithstanding § 50.4(o), for purposes of the collection, reporting and remittance of Federal terrorism policy surcharges to Treasury, the definition of insurer shall not include any affiliate of the insurer.

Subpart K—Federal Cause of Action; Approval of Settlements

§ 50.100 Federal cause of action and remedy.

(a) *General*. If the Secretary certifies an act as an act of terrorism pursuant to Subpart G of this Part, there shall exist a Federal cause of action for property damage, personal injury, or death arising out of or resulting from such act of terrorism, pursuant to section 107 of the Act, which shall be the exclusive cause of action and remedy for claims

for property damage, personal injury, or death arising out of or relating to such act of terrorism, except as provided in paragraph (d) of this section.

(b) *Jurisdiction*. For each determination described in paragraph (a) of this section, not later than 90 days after the Secretary certifies an act as an act of terrorism, the Judicial Panel on Multidistrict Litigation shall designate a single district court or, if necessary, multiple district courts of the United States that shall have original and exclusive jurisdiction over all actions for any claim (including any claim for loss of property, personal injury, or death) relating to or arising out of an act of terrorism subject to section 107 of the Act.

(c) *Effective period*. The exclusive Federal cause of action and remedy described in paragraph (a) of this section shall exist only for causes of action for property damage, personal injury, or death that arise out of or result from acts of terrorism during the effective period of the Program.

(d) *Rights not affected*. Nothing in section 107 of the Act or this Subpart shall in any way:

(1) Limit the liability of any government, organization, or person who knowingly participates in, conspires to commit, aids and abets, or commits any act of terrorism;

(2) Affect any party's contractual right to arbitrate a dispute; or

(3) Affect any provision of the Air Transportation Safety and System Stabilization Act (Pub. L. 107–42; 49 U.S.C. 40101 note).

§ 50.101 State causes of action preempted.

All State causes of action of any kind for property damage, personal injury, or death arising out of or resulting from an act of terrorism that are otherwise available under state law are preempted, except that, pursuant to section 107(b) of the Act, nothing in this section shall limit in any way the liability of any government, organization, or person who knowingly participates in, conspires to commit, aids and abets, or commits the act of terrorism certified by the Secretary.

§ 50.102 Advance approval of settlements.

(a) *Mandatory submission of settlements for advance approval*. Pursuant to section 107(a)(6) of the Act, an insurer shall submit to Treasury for advance approval any proposed agreement to settle or compromise any Federal cause of action for property damage, personal injury, or death, asserted by a third-party or parties against an insured, involving an insured loss, all or part of the payment of which

the insurer intends to include in its aggregate insured losses for purposes of calculating the insurer deductible or the Federal share of compensation of its insured losses under the Program, when:

(1) Any portion of the proposed settlement amount that is attributable to an insured loss or losses involving personal injury or death in the aggregate is \$2 million or more per third-party claimant, regardless of the number of causes of action or insured losses being settled; or

(2) Any portion of the proposed settlement amount that is attributable to an insured loss or losses involving property damage (including loss of use) in the aggregate is \$10 million or more per third-party claimant, regardless of the number of causes of action or insured losses being settled.

(b) *Discretionary review of other settlements.* Notwithstanding paragraph (a) of this section, Treasury may require that an insurer submit for review and advance approval any proposed agreement to settle or compromise any Federal cause of action for property damage, personal injury, or death, asserted by a third-party or parties against an insured, involving an insured loss, all or part of the payment of which the insurer intends to include in its aggregate insured losses for purposes of calculating the insurer deductible or the Federal share of compensation of its insured losses where the settlement amounts are below the applicable monetary thresholds identified in paragraphs (a)(1) and (2) of this section.

(c) *Factors.* In determining whether to approve a proposed settlement, Treasury will consider the nature of the loss, the facts and circumstances surrounding the loss, and other factors such as whether:

(1) The proposed settlement compensates for a third-party's loss, the liability for which is an insured loss under the terms and conditions of the underlying commercial property and casualty insurance policy, as certified by the insurer pursuant to § 50.103(d)(2);

(2) Any amount of the proposed settlement is attributable to punitive or exemplary damages intended to punish or deter (whether or not specifically so described as such damages);

(3) The settlement amount offsets amounts received from the United States pursuant to any other Federal program;

(4) The settlement amount does not include any items such as fees and expenses of attorneys, experts, and other professionals that have caused the insured losses under the underlying

commercial property and casualty insurance policy to be overstated; and

(5) Any other criteria that Treasury may consider appropriate, depending on the facts and circumstances surrounding the settlement, including the information contained in § 50.103.

(d) *Settlement without seeking advance approval or despite disapproval.* If an insurer settles a cause of action or agrees to the settlement of a cause of action without submitting the proposed settlement for Treasury's advance approval in accordance with paragraph (a) or (b) of this section, and in accordance with § 50.103 or despite Treasury's disapproval of the proposed settlement, the insurer will not be entitled to include the paid settlement amount (or portion of the settlement amount, to the extent partially disapproved) in its aggregate insured losses for purposes of calculating the Federal share of compensation of its insured losses, unless the insurer can demonstrate, to the satisfaction of Treasury, extenuating circumstances.

§ 50.103 Procedure for requesting approval of proposed settlements.

(a) *Submission of notice.* Insurers must request advance approval of a proposed settlement by submitting a notice of the proposed settlement and other required information in writing to the Terrorism Risk Insurance Program Office or its designated representative. The address where notices are to be submitted will be available at <https://www.treasury.gov/resource-center/fin-mkts/Pages/program.aspx> following any certification of an act of terrorism pursuant to section 102(1) of the Act.

(b) *Complete notice.* Treasury will review requests for advance approval and determine whether additional information is needed to complete the notice.

(c) *Treasury response or deemed approval.* Within 30 days after Treasury's receipt of a complete notice, or as extended in writing by Treasury, Treasury may issue a written response and indicate its partial or full approval or rejection of the proposed settlement. If Treasury does not issue a response within 30 days after Treasury's receipt of a complete notice, unless extended in writing by Treasury, the request for advance approval is deemed approved by Treasury. Any settlement is still subject to review under the claim procedures pursuant to § 50.80.

(d) *Notice format.* A notice of a proposed settlement should be entitled, "Notice of Proposed Settlement—Request for Approval," and should provide the full name and address of the submitting insurer and the name, title,

address, and telephone number of the designated contact person. An insurer must provide all relevant information, including the following, as applicable:

(1) A brief description of the claim against the insured, the amount of the claim, the operative policy terms, and defenses to coverage;

(2) A certification by the insurer that the settlement is for a third-party's loss, the liability for which is an insured loss under the terms and conditions of the underlying commercial property and casualty insurance policy;

(3) A brief description of all damages allegedly sustained and an itemized statement of all damages by category (*i.e.*, actual, economic and non-economic loss, punitive damages, etc.);

(4) A statement from the insurer or its attorney in support of the settlement;

(5) The total dollar amount of the proposed settlement and the amount of the proposed settlement which is an insured loss;

(6) Indication as to whether the settlement was negotiated by counsel;

(7) The amount to be paid that will compensate for any items such as fees and expenses of attorneys, experts, and other professionals for their services and expenses related to the insured loss and/or settlement and the net amount to be received by the third-party after such payment;

(8) The amount(s) received from the United States pursuant to any other Federal program(s) for compensation of insured losses related to an act of terrorism;

(9) The proposed terms of the written settlement agreement, including release language and subrogation terms;

(10) Other relevant agreements, including:

(i) Admissions of liability or insurance coverage;

(ii) Determinations of the number of occurrences under a commercial property and casualty insurance policy;

(iii) The allocation of paid amounts or amounts to be paid to certain policies, or to a specific policy, coverage and/or aggregate limits;

(iv) Any other agreement that may affect the payment or amount of the Federal share of compensation to be paid to the insurer; and

(v) Any other relevant agreement requested by Treasury.

(11) A statement indicating whether the proposed settlement has been approved by the Federal court or is subject to such approval and whether such approval is expected or likely; and

(12) Such other information that is related to the insured loss as may be requested by Treasury that it deems necessary to evaluate the proposed settlement.

§ 50.104 Subrogation.

An insurer shall not waive its rights of subrogation under its property and casualty insurance policy with respect to any losses the payment of which the insurer intends to include in its insurer deductible or the aggregate insured losses for purposes of calculating the Federal share of compensation of its insured losses and shall, unless upon request the United States agrees in writing to forbear from exercising such right, preserve the subrogation right of the United States as provided by section 107(c) of the Act by not taking any action that would prejudice the subrogation right of the United States.

Subpart L—Cap on Annual Liability**§ 50.110 Cap on annual liability.**

Pursuant to section 103 of the Act, if the aggregate insured losses exceed \$100,000,000,000 during a calendar year:

(a) The Secretary shall not make any payment for any portion of the amount of such losses that exceeds \$100,000,000,000;

(b) An insurer that has met its insurer deductible shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100,000,000,000; and

(c) The Secretary shall determine the *pro rata* share of insured losses to be paid by each insurer that incurs insured losses under the Program.

§ 50.111 Notice to Congress.

Pursuant to section 103(e)(3) of the Act, the Secretary shall provide an initial notice to Congress within 15 days of the certification of an act of terrorism, stating whether the Secretary estimates that aggregate insured losses will exceed \$100,000,000,000 for the calendar year in which the event occurs. Such initial estimate may be based on insured loss amounts as compiled by insurance industry statistical organizations, data previously collected by the Secretary, and any other information the Secretary in his or her discretion considers appropriate. The Secretary shall also notify Congress if estimated or actual aggregate insured losses exceed \$100,000,000,000 during any calendar year.

§ 50.112 Determination of *pro rata* share.

(a) *Pro rata loss percentage (PRLP)* is the percentage determined by the Secretary to be applied by an insurer against the amount that would otherwise be paid by the insurer under the terms and conditions of an insurance policy providing property and casualty insurance under the Program if

there were no cap on annual liability under section 103(e)(2)(A) of the Act.

(b) Except as provided in paragraph (e) of this section, if Treasury estimates that aggregate insured losses may exceed the cap on annual liability for a calendar year, then Treasury will determine a PRLP. The PRLP applies to insured loss payments by insurers for insured losses incurred in the subject calendar year, as specified in § 50.113, from the effective date of the PRLP, as established by Treasury, until such time as Treasury provides notice that the PRLP is revised. Treasury will determine the PRLP based on the following considerations:

(1) Estimates of insured losses from insurance industry statistical organizations;

(2) Any data calls issued by Treasury (see § 50.114);

(3) Expected reliability and accuracy of insured loss estimates and likelihood that insured loss estimates could increase;

(4) Estimates of insured losses and expenses not included in available statistical reporting;

(5) Such other factors as the Secretary considers important.

(c) Treasury shall provide notice of the determination of the PRLP through publication in the **Federal Register**, or in another manner Treasury deems appropriate, based upon the circumstances of the act of terrorism under consideration.

(d) As appropriate, Treasury will determine any revision to a PRLP based on the same considerations listed in paragraph (b) of this section, and will provide notice for its application to insured loss payments.

(e) If Treasury estimates based on an initial act of terrorism or subsequent act of terrorism within a calendar year that aggregate insured losses may exceed the cap on annual liability, but an appropriate PRLP cannot yet be determined, Treasury will provide notification advising insurers of this circumstance and, after consulting with the relevant state authorities, may initiate the action described in either paragraph (e)(1) or (2) of this section.

(1) *Hiatus in payments.* Call a hiatus in insurer loss payments for insured losses of up to two weeks. In such a circumstance, Treasury will determine a PRLP as quickly as possible. The PRLP, as later determined, will be effective retroactively as of the start of the hiatus. Any insured losses submitted in support of an insurer's claim for the Federal share of compensation will be reviewed for the insurer's compliance with *pro rata* payments in accordance with the effective date of the PRLP.

(2) *Determine an interim PRLP.* (i) An interim PRLP is an amount determined without the availability of information necessary for consideration of all factors listed in § 50.112(b). It is a conservatively low percentage amount determined in order to facilitate initial partial claim payments by insurers after an act of terrorism and prior to the time that information becomes available to determine a PRLP based on consideration of the factors listed in § 50.112(b).

(ii) In such a circumstance, Treasury will determine a PRLP to replace the interim PRLP as quickly as possible. The PRLP, as later determined, will be effective retroactively as of the effective date of the interim PRLP. Any insured losses submitted in support of an insurer's claim for the Federal share of compensation will be reviewed for the insurer's compliance with *pro rata* payments in accordance with the effective date of the interim PRLP, or as later replaced by the PRLP as appropriate.

§ 50.113 Application of *pro rata* share.

An insurer shall apply the PRLP to determine the *pro rata* share of each insured loss to be paid by the insurer on all insured losses in the absence of an agreement on a complete and final settlement as evidenced by a signed settlement agreement or other means reviewable by a third party as of the effective date established by Treasury. Payments based on the application of the PRLP and determination of the *pro rata* share satisfy the insurer's liability for payment under the Program. Application of the PRLP and the determination of the *pro rata* share are the exclusive means for calculating the amount of insured losses for Program purposes. The *pro rata* share is subject to the following:

(a) The *pro rata* share is determined based on the estimated or actual final claim settlement amount that would otherwise be paid.

(b) *All policies.* If partial payments have already been made as of the effective date of the PRLP, then the *pro rata* share for that loss is the greater of the amount already paid as of the effective date of the PRLP or the amount computed by applying the PRLP to the estimated or actual final claim settlement amount that would otherwise be paid.

(c) *Certain workers' compensation insurance policies.* If an insurer's payments under a workers' compensation policy cumulatively exceed the amount computed by applying the PRLP to the estimated or actual final claim settlement amount

that would otherwise be paid because such estimated or actual final settlement amount is reduced from a previous estimate, then the insurer may request a review and adjustment by Treasury in the calculation of the Federal share of compensation. In requesting such a review, the insurer must submit information to supplement its Certification of Loss demonstrating a reasonable estimate invalidated by unexpected conditions differing from prior assumptions including, but not limited to, an explanation and the basis for the prior assumptions.

(d) If an insurer has not yet made payments in excess of its insurer deductible, the rules in this paragraph apply.

(1) If the insurer estimates that it will exceed its insurer deductible making payments based on the application of the PRLP to its insured losses, then the insurer shall apply the PRLP as of the effective date specified in § 50.112(b).

(2)(i) If the insurer estimates that it will not exceed its insurer deductible making payments based on the application of the PRLP to its insured losses, then the insurer may make payments on the same basis as prior to the effective date of the PRLP. The insurer may also make payments on the basis of applying some other *pro rata* amount it determines that is greater than

the PRLP, where the insurer estimates that application of such other *pro rata* amount will result in it not exceeding its insurer deductible. The insurer remains liable for losses in accordance with § 50.115(c).

(ii) If an insurer estimates that it will not exceed its insurer deductible and has made payments on the basis provided in paragraph (d)(2)(i) of this section, but thereafter reaches its insurer deductible, then the insurer shall apply the PRLP to any remaining insured losses. When such an insurer submits a claim for the Federal share of compensation, the amount of the insurer's losses will be deemed to be the amount it would have paid if it had applied the PRLP as of the effective date, and the Federal share of compensation will be calculated on that amount. However, an insurer may request an exception if it can demonstrate that its estimate was invalidated as a result of insured losses from a subsequent act of terrorism.

§ 50.114 Data call authority.

For the purpose of determining initial or recalculated PRLPs, Treasury may issue a data call to insurers for insured loss information, seeking information in addition to any information provided to Treasury under subparts F and H of this part.

§ 50.115 Final amount.

(a) Treasury shall determine if, as a final proration, remaining insured loss payments, as well as adjustments to previous insured loss payments, can be made by insurers based on an adjusted PLRP, and aggregate insured losses still remain within the cap on annual liability. In such a circumstance, Treasury will notify insurers as to the final PRLP and its application to insured losses.

(b) If paragraph (a) of this section applies, Treasury may require, as part of the insurer submission for the Federal share of compensation for insured losses, a supplementary explanation regarding how additional payments will be provided on previously settled insured losses.

(c) An insurer that has prorated its insured losses, but that has not met its insurer deductible, remains liable for loss payments that in the aggregate bring the insurer's total insured loss payments up to an amount equal to the lesser of its insured losses without proration or its insurer deductible.

Dated: December 9, 2016.

Amias Moore Gerety,

Acting Assistant Secretary for Financial Institutions.

[FR Doc. 2016-29987 Filed 12-16-16; 4:15 pm]

BILLING CODE 4810-25-P