

DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505-AA98

Terrorism Risk Insurance Program

AGENCY: Departmental Offices, Treasury.

ACTION: Interim final rule with request for comments.

SUMMARY: The Department of the Treasury (Treasury) is issuing this interim final rule as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (Act). The Act established a temporary Terrorism Risk Insurance Program (Program) under which the Federal Government will share the risk of insured losses from certified acts of terrorism with commercial property and casualty insurers until the Program sunsets on December 31, 2005. This interim final rule incorporates and clarifies statutory conditions for federal payment under the Program that require insurers to make certain disclosures to policyholders. The rule also incorporates and clarifies statutory requirements that insurers "make available," in their commercial property and casualty insurance policies, terrorism risk coverage for insured losses under the Program. The interim final rule generally incorporates interim guidance previously issued by Treasury in this area, but with some modifications. This is the second in a series of regulations that Treasury will issue to implement the Act.

DATES: This interim final rule is effective April 18, 2003. Written comments on this interim final rule may be submitted on or before May 19, 2003.

ADDRESSES: Submit comments (if hard copy, preferably an original and two copies) to Office of Financial Institutions Policy, Attention: Terrorism Risk Insurance Program Public Comment Record, Room 3160 Annex, Department of the Treasury, 1500 Pennsylvania Ave., NW., Washington, DC 20220. Because paper mail in the Washington, DC area may be subject to delay, it is recommended that comments be submitted by electronic mail to: triacomment@do.treas.gov. All comments should be captioned with "April 18, 2003 Interim Final Rule TRIA Comments." Please include your name, affiliation, address, e-mail address and telephone number in your comment. Comments will be available for public inspection by appointment only at the Reading Room of the Treasury Library. To make appointments, call (202) 622-0990 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT:

Mario Ugoletti, Deputy Director, Office of Financial Institutions Policy (202) 622-2730, or Martha Ellett or Cynthia Reese, Attorney-Advisors, Office of the Assistant General Counsel (Banking & Finance), (202) 622-0480 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

A. Terrorism Risk Insurance Act of 2002

On November 26, 2002, President Bush signed into law the Terrorism Risk Insurance Act of 2002 (Pub. L. 107-297, 116 Stat. 2322). The Act was effective immediately. Title I of the Act establishes a temporary federal program of shared public and private compensation for insured commercial property and casualty losses resulting from an act of terrorism as defined in the Act and certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General. The Act authorizes Treasury to administer and implement the Terrorism Risk Insurance Program, including the prescription of regulations and procedures. The Program will sunset on December 31, 2005.

The Act's purposes are to address market disruptions, ensure the continued widespread availability and affordability of commercial property and casualty insurance for terrorism risk and to allow for a transition period for the private markets to stabilize and build capacity while preserving State insurance regulation and consumer protections.

The amount of federal payment for an insured loss resulting from an act of terrorism is to be determined based upon the insurance company deductibles and excess loss sharing with the Federal Government, as specified by the Act. Thus, the Program provides a federal reinsurance backstop for a temporary period of time. The Act also provides Treasury with authority to recoup federal payments made under the Program through policyholder surcharges, up to a maximum annual limit.

Each entity that meets the definition of "insurer" (well over 2000 firms) must participate in the Program. From the date of enactment of the Act through the last day of Program Year 2 (December 31, 2004), insurers under the Program must "make available" terrorism risk insurance in their commercial property and casualty insurance policies and the coverage must not differ materially from the terms, amounts and other coverage limitations applicable to commercial property and casualty losses arising

from events other than acts of terrorism. The Act permits Treasury to extend the "make available" requirement into Program Year 3, based on an analysis of factors referenced in the study required by section 108(d)(1) of the Act, and not later than September 1, 2004.

An insurer's deductible increases each year of the Program, thereby reducing the Federal Government's involvement prior to sunset of the Program. An insurer's deductible is based on "direct earned premiums" over a statutory Transition Period (now expired) and the three Program Years. Once an insurer has met its deductible, the federal payments cover 90 percent of insured losses above the deductible, subject to an aggregate annual cap of \$100 billion. The Act prohibits duplicative payments for insured losses that are covered under any other federal program.

As conditions for federal payment under the Program, insurers must provide clear and conspicuous disclosure to the policyholders of the premium charged for insured losses covered by the Program, and must submit a claim and certain certifications to Treasury. Treasury will be prescribing claims procedures at a later date.

The Act also contains specific provisions designed to manage litigation arising from or relating to a certified act of terrorism. Section 107 creates an exclusive federal cause of action, provides for claims consolidation in federal court and contains a prohibition on federal payments for punitive damages under the Program. This section also provides the United States with the right of subrogation with respect to any payment or claim paid by the United States under the Program. As part of the claims process, and as directed by the President, Treasury will be issuing regulations addressing Treasury's role in the approval of settlements.

B. Previously Issued Interim Guidance

To assist insurers, policyholders and other interested parties in complying with immediately applicable and time-sensitive requirements of the Act prior to the issuance of regulations, Treasury issued interim guidance in four separate notices. Treasury publicly released these interim guidance notices on its Program Web site, <http://www.treasury.gov/trip> and published each notice in the **Federal Register**.

Treasury released the first notice of Interim Guidance on December 3, 2002, within a week of the Act's enactment (Interim Guidance I). Interim Guidance I was published at 67 FR 76206 on

December 11, 2002, and addressed several issues pertaining to immediately applicable provisions of the Act, including statutory disclosure obligations of insurers as conditions for federal payment under the Program and the requirement that an insurer "make available" terrorism risk insurance. The disclosure guidance in Interim Guidance I references certain model forms of the National Association of Insurance Commissioners (NAIC) and provides a safe harbor for those insurers that make use of such forms prior to the issuance of regulations, but Interim Guidance I stated that these forms are not the exclusive means by which insurers could comply with the disclosure conditions prior to the issuance of regulations. Interim Guidance I also provided guidance concerning the "direct earned premium" on lines of property and casualty insurance to enable insurers to calculate their "insurer deductibles" and enable insurers to price and disclose premiums for terrorism risk insurance to policyholders within statutory time periods.

On December 18, 2002, Treasury issued a second notice of interim guidance. This interim guidance was published at 67 FR 78864 on December 26, 2002 (Interim Guidance II). Interim Guidance II addressed the statutory categories of "insurers" that are required to participate in the Program, including their "affiliates;" provided clarification on the scope of "insured loss" covered by the Program and provided additional guidance to enable eligible surplus line carriers listed on the Quarterly Listing of Alien Insurers of the NAIC or federally approved insurers to calculate their insurer deductibles for purposes of the Program.

On January 22, 2003, Treasury issued a third notice of interim guidance, published at 68 FR 4544 on January 29, 2003 (Interim Guidance III). Interim Guidance III further clarified certain disclosure and certification questions, issues for non-U.S. insurers, and the scope of the term "insured loss" under the Act.

On March 25, 2003, Treasury issued a fourth interim guidance published at 68 FR 15039 on March 27, 2003 (Interim Guidance IV). Interim Guidance IV provided insurers a procedure by which they could seek to rebut a presumption of control established in Treasury's first set of interim final regulations. See *Previously Issued Regulations* in section C below and Treasury's Web site at <http://www.treasury.gov/trip>.

In issuing each notice of Interim Guidance, Treasury stated that the Interim Guidance may be relied upon by

insurers until superseded by regulations or a subsequent notice. Treasury provided safe harbors for actions by those insurers taken in accordance with, and in reliance on, the interim guidance for the time period prior to the issuance of regulations.

C. Previously Issued Regulations

Treasury published the first regulation implementing the Act on February 28, 2003 (68 FR 9804) as an interim final rule together with a proposed rule. Both request comments by March 31, 2003. The first regulation, which is subpart A of new part 50 in title 31 of the CFR, covers the purpose and scope of the Program, key definitions, and certain general provisions.

II. Analysis of the Interim Final Rule

This interim final rule incorporates and clarifies statutory conditions for federal payment that require insurers to make certain disclosures to policyholders within specified time limits. The interim final rule also incorporates and clarifies statutory requirements that insurers must "make available" in all of their commercial property and casualty insurance policies, coverage for insured losses resulting from an act of terrorism as defined by the Act. The Act requires insurers to make such terrorism risk coverage available at terms, amounts, and other coverage limitations that do not differ materially from those applicable to losses arising from events other than acts of terrorism. The interim final rule generally incorporates interim guidance previously issued by Treasury, except as described in this preamble. In accordance with section 104(c) of the Act, Treasury has consulted with the National Association of Insurance Commissioners on this rule. Treasury is also issuing a companion proposed rule with request for comment.

Although Treasury is issuing these requirements in as an interim final rule, we are soliciting comments on all aspects of the interim final rule from all interested parties. Published elsewhere in this separate part of this issue of the **Federal Register** is a notice of proposed rulemaking proposing to adopt the provisions of this interim final rule as a final rule.

A. Disclosures

One of the conditions for federal payments under section 103(b) of the Act is that the insurer provide "clear and conspicuous disclosure to the policyholder of the premium charged for insured losses covered by the Program and the federal share of

compensation for insured losses under the Program." The Act provides that in the case of any policy that is issued before the date of enactment of the Act (November 26, 2002), this disclosure must occur not later than 90 days thereafter (February 24, 2003). In the case of any policy that is issued within 90 days of the date of enactment, the disclosure must be made "at the time of offer, purchase, and renewal of the policy." In the case of any policy that is issued more than 90 days after the date of enactment, disclosure must be made "on a separate line item in the policy, at the time of offer, purchase, and renewal of the policy."

The disclosure requirements are key provisions of the Act, both in terms of being a condition for payment and a mechanism to effectuate the other purposes of the Act. The Conference Report accompanying the Act states, in part:

Before receiving Federal assistance under this Act, an insurer must certify its claim for payment of insured losses, that a policyholder (or person acting on the policyholder's behalf) has filed a claim for such loss, and the insurer's compliance with the Act. The Secretary may not reimburse an insurer for such losses unless the insurer has provided clear and conspicuous disclosure to the policyholder of the premium charged for terrorism coverage and the Federal share of compensation. * * *

The Conferees intend this disclosure to enhance the competitiveness of the marketplace by better enabling consumers to comparison shop for terrorism insurance coverage, and to make policyholders better aware that the Federal government will be sharing the costs of such coverage with the insurers, thereby reducing the insurers's (sic) exposure. * * * H.R. Conf. Rep. No. 107-779 (2002).

Section 50.12 of the interim final rule deals generally with disclosure requirements. Section 50.12(a) contains a new provision stating that whether a disclosure is clear and conspicuous depends on the totality of the facts and circumstances. Treasury is not specifying an exclusive form or means of satisfying the statutory disclosure requirements, and Treasury does not intend to adopt a practice of prescribing particular language or forms. However, in order to provide guidance to insurers, Treasury in previous interim guidance has deemed certain NAIC model forms to be acceptable in terms of satisfying the disclosure requirement and has stated that insurers may modify the forms to meet individual circumstances, or use other forms. This interim guidance has been incorporated into the interim final rule and provides a safe harbor (see section 50.17 of the interim final rule) for policies that were in force

on the date of enactment or were issued within 90 days of enactment. For policies issued more than 90 days after enactment, section 50.17 (c) provides that insurers may continue to use certain NAIC model forms if appropriate or develop other disclosures that meet the requirements of sections 50.10(a) and 50.14.

Treasury stated in Interim Guidance II that an insurer may communicate the premium for insured losses in a manner that is consistent with standard business practice, which in some cases may be as a percentage of the overall policy premium. This interim final rule incorporates this guidance and also contains a provision in section 50.12(b) stating that 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." It is inappropriate to use the term "surcharge" in the disclosures, because that term is used in the Act and the Program only in connection with the statutory recoupment procedure that requires certain surcharges to repay the federal financial assistance. Pursuant to the Act's recoupment provisions, any amount established by the Secretary as a terrorism loss risk-spreading premium is to be imposed as a policyholder premium "surcharge" on property and casualty insurance policies in force at that time. See sections 103(e)(7) and (8) of the Act.

In Interim Guidance III, Treasury indicated that the disclosures can be communicated by the use of channels, methods and forms of communication normally used to communicate similar policyholder information. This interim final rule incorporates that principle in section 50.12(c). In some contexts there may be a question about who is the "policyholder" with whom the insurer normally communicates. For example, a surety insurance company may normally deal with purchasers of surety bonds and communicate to them policyholder information similar to disclosures, although the bonds run in favor of other parties who would be paid in the event of loss. In such cases where there is some ambiguity as to who the policyholder is, insurance companies should rely on normal business practices in determining what parties should be provided disclosures.

Section 50.12(d) of the interim final rule reiterates guidance previously issued (see Interim Guidance I) to the effect that an insurer may communicate disclosures through an insurance broker or other intermediary acting as agent for the insurer if the insurer normally communicates with a policyholder in

this fashion. The insurer remains responsible for ensuring that the disclosures are provided to policyholders.

Section 50.12(e) of the interim final rule states that an insurer may demonstrate that it has complied with the disclosure requirement through use of appropriate systems and normal business practices that demonstrate a practice of compliance. As stated in Interim Guidance II, compliance with the disclosure provisions may be evidenced in a variety of ways, including a proof of mailing process and other methods consistent with normal forms of communication with policyholders. Treasury has taken this approach to enable insurers to utilize their normal business practices and risk management procedures as much as possible to minimize the administrative burden to insurers in implementing the Act.

In Interim Guidance III, Treasury stated that it expected to propose regulations that would require an insurer to certify that it complied with the required disclosure(s) to the policyholder on the underlying claim or claims submitted by the insurer for federal payment under the Program. This provision does not in any way impact the calculation of an insurer's direct earned premium as specified in section 50.5(d) (see the first interim final rule, 68 FR 9804), or the statutory recoupment provisions. Section 50.12(f) of this interim final rule clarifies that an insurer will only be required to certify with respect to those policies that form the basis for its claims, *i.e.*, not all other policies that are written by an insurance company. "Basis" means all policies used by an insurer to calculate its total insured loss.

Sections 50.13 and 50.14 of the interim final rule incorporate guidance previously issued (see Interim Guidance III) on what constitutes "offer, purchase, and renewal" and a "separate line item" for purposes of this provision of the Act. 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 if the insurer makes the disclosure when the insurer first formally offers to provide insurance coverage or renew a policy for a current policyholder, and makes clear and conspicuous reference back to that disclosure, as well as the final terms of terrorism insurance coverage, when the transaction is completed. An insurer is deemed to be in compliance with the "separate line item" requirement if the insurer makes the disclosure: on the declarations page of the policy;

elsewhere within the policy itself; or in any rider or endorsement that is made a part of the policy. Taken together, sections 50.13 and 50.14 allow for an insurer to make the required disclosure when the insurer first formally offers to provide coverage, and then to refer back to that disclosure using any of the options that qualify a separate line item.

Section 50.17 incorporates the safe harbors provided in interim guidance for certain NAIC model forms. These forms may be found on the NAIC Internet Web site at http://www.naic.org/pressroom/releases/disclose_one_final.pdf and http://www.naic.org/pressroom/releases/disclose_two_final.pdf. These forms are also accessible from the Treasury Web site at <http://www.treasury.gov/trip>. As noted above, these forms are only examples and are not the exclusive means for an insurer to comply with the disclosure requirements.

Section 50.18 of the interim final rule reiterates the disclosure requirements in section 105(c) of the Act for reinstatement of any preexisting terrorism exclusion. Section 50.19 is merely a cross-reference to the regulations in subpart D, which will be issued separately and will cover State residual market insurance entities and State workers' compensation funds.

The Act specifies certain time limits for disclosures to policyholders. Treasury will be evaluating whether an insurer has materially complied with these and other conditions for payment with respect to any claim. In so doing, Treasury expects to consider applicable facts and circumstances, including good faith efforts of the insurer to meet applicable time limits after enactment of the Act, and during the duration of the Program.

B. Mandatory Availability

Section 103(c) of the Act requires each entity that meets the definition of an insurer under the Act to (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. These requirements apply from the date of enactment (November 26, 2002) through the last day of Program Year 2 (December 31, 2004). The Secretary is required to determine, not later than September 1, 2004, based on the factors in section 108(d)(1) of the Act, whether the make available requirements should be extended through Program Year 3

(December 31, 2005). The Conference Report accompanying the Act states, with respect to this provision, that “the Secretary has discretion to extend this requirement to the third year of the Program, to preserve this important option for policyholders.” H.R. Conf. Rep. No. 107–779 (2002).

Section 50.20 of the interim final rule incorporates the general statutory requirements as described above.

Section 50.21 of the interim final rule covers general matters of applicable time periods, initial offers of coverage versus subsequent negotiations, and how an insurer may demonstrate compliance. Section 50.21(a) makes clear that the make available requirements apply to policies in existence on November 26, 2002, new policies issued, and renewals of existing policies through the end of Program Year 2 (unless extended by the Secretary). The make available requirements are not one-time requirements. For example, if an insurer has satisfied the make available requirements in Program Year 1 in its offer to a policyholder, but the coverage offered is declined, the insurer must still satisfy the make available requirements again when the policy is renewed in Program Year 2.

Section 50.21(a) also states, consistent with Interim Guidance I, that the make available requirements apply at the time an insurer makes the initial offer of coverage, as distinguished from changes negotiated by the insurer thereafter as part of the process of agreeing on a contract of insurance. Section 50.21(b)(1) addresses a situation in which an insurer makes an initial bona fide offer of terrorism risk 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; the policyholder then declines the offer, and the insurer subsequently negotiates terrorism risk coverage of the policyholder for insured losses at a lower amount of terrorism risk coverage than initially offered. In such a situation, under the interim final rule, the make available requirements would have been satisfied by the initial offer, and therefore an offer of a lower amount of terrorism risk coverage is deemed permissible, if allowed under any applicable State law. Although a subsequent lower offer as described is permissible, neither the Act nor the Program require an insurer to offer partial coverage if the policyholder declines full coverage in an initial offer. (See the discussion below of section 50.24, which deals with the applicability of State law requirements.)

Section 50.21(c) addresses the demonstration of compliance by an insurer with the make available requirement. Treasury has audit and investigative authority under the Act and insurers should be prepared to demonstrate compliance with the make available requirements. Treasury is not prescribing any new recordkeeping requirement. With regard to an insurer's current insurance policies, records related to the make available requirements are likely to be included and retained as part of standard policy documents in the normal course of business. In this regard, however, if an insurer makes an offer of insurance but no contract of insurance is purchased or renewed (*i.e.* no insurance contract is finalized), the insurer may demonstrate that it has satisfied the make available requirements through its routine adherence to normal risk management systems (*e.g.*, company policies, use of internal controls and audits) and normal business practices (*e.g.* sample forms routinely used to solicit business) during the relevant time period that evidence its practice of compliance.

Section 50.23 of the interim final rule addresses the language “terms, amounts, and coverage limitations” in the make available requirements. Sections 50.23(a) and (b) of the interim final rule incorporate guidance previously issued by Treasury (Interim Guidance I). Section 50.23(a) states that an insurer must offer coverage for insured losses resulting from an act of terrorism that does not differ materially from the terms, amounts, and other coverage limitations (including deductibles) applicable to losses from other perils. “Terms” excludes price for purposes of this requirement. This means the requirement to offer 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 does not apply to the price of the coverage. As noted in Interim Guidance I, however, Treasury will be monitoring the pricing and availability of terrorism risk insurance coverage as part of the Act's requirements that Treasury study the effectiveness of the Program (section 108(d)(1)).

Section 50.23(b) provides that if an insurer does not cover all types of risks, then it is not required to cover the excluded risks in satisfying 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. 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.

Section 50.24 of the interim final rule addresses the interrelationship of federal and State law requirements and confirms the continued applicability of State law requirements, consistent with Interim Guidance I. (See also the discussion of section 50.21(b), above.) 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. For example, if an insurer subject to State regulation first satisfies the requirement to 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, 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. If such an insurer first satisfies the make available requirement but 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.

III. Procedural Requirements

The Act established a Program to provide for loss sharing payments by the Federal Government for insured losses resulting from certified acts of terrorism. The Act became effective immediately upon the date of enactment (November 26, 2002). Preemptions of terrorism risk exclusions in policies, mandatory participation provisions, disclosure and other requirements and conditions for federal payment contained in the Act applied immediately to those entities that come within the Act's definition of “insurer.”

The disclosure requirements are statutory conditions for federal payment under the Program. The disclosure

requirements were effective immediately upon enactment and remain ongoing requirements that apply to new and renewed policies throughout the life of the Program. In the event of an act of terrorism resulting in insured losses under the Program, insurers must certify, and Treasury must ascertain, that these disclosure requirements have been met before federal payment is made. Similarly, the make available requirements are critical elements of the Act. These requirements were effective immediately upon enactment and applied to policies in effect at that time. They will continue to apply to new and renewed policies through the end of 2004 (and if the requirements are extended by the Secretary, through 2005). Given the significance of the disclosure and make available requirements to policyholders and insurers, there is an urgent need to issue immediately effective regulations that incorporate and clarify interim guidance with regard to these requirements.

For the above reasons, pursuant to 5 U.S.C. 553(b)(B), Treasury has determined that it would be contrary to the public interest to delay the publication of this rule in final form during the pendency of an opportunity for public comment. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), Treasury has determined that there is good cause for the interim final rule to become effective immediately upon publication. While this regulation is effective immediately upon publication, Treasury is seeking public comment on the regulation and will consider all comments in developing a final rule.

This interim final rule is a significant regulatory action and has been reviewed by the Office of Management and Budget under the terms of Executive Order 12866.

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. However, the Act and the Program are intended to provide benefits to the U.S. economy and all businesses, including small businesses, by providing a federal reinsurance backstop to commercial property and casualty policyholders and spreading the risk of insured loss resulting from an act of terrorism.

List of Subjects in 31 CFR Part 50

Terrorism risk insurance.

Authority and Issuance

■ For the reasons stated above, 31 CFR part 50 is amended as follows:

PART 50—TERRORISM RISK INSURANCE PROGRAM

■ 1. The authority citation for 31 CFR part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 321; Title I, Pub. L. 107–297, 116 Stat. 2322 (15 U.S.C. 6701 note).

■ 2. Subpart B of 31 CFR part 50 is amended by adding §§ 50.10 through 50.14 and 50.17 through 50.19 to read as follows:

§ 50.10 General disclosure requirements.

(a) *All policies.* 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) *Policies in force on the date of enactment.* For policies issued before November 26, 2002, the disclosure required by the Act must be provided within 90 days of November 26, 2002 (no later than February 24, 2003).

(c) *Policies issued within 90 days of the date of enactment.* For policies issued within the 90-day period beginning on November 26, 2002 through February 24, 2003, the disclosure required by the Act must be provided at the time of offer, purchase, and renewal of the policy.

(d) *Policies issued more than 90 days after the date of enactment.* For policies issued on or after February 25, 2003, the disclosure required by the Act must be made on a separate line item in the policy, at the time of offer, purchase, and renewal of the policy.

§ 50.11 Definition.

Except as provided in § 50.18, for purposes of this subpart the term “disclosure” or “disclosures” refers to the disclosures described in section 103(b)(2) of the Act and § 50.10.

§ 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 § 50.17 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 an annual premium, if consistent with standard business practice. 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.* 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 agent.* If an insurer normally communicates with a policyholder through an insurance broker or other intermediary acting as agent for the insurer, an insurer may provide disclosures through such an agent. The insurer remains responsible for ensuring that disclosures are provided 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, 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 § 50.10(c) and (d) if the insurer:

(a) 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

(b) 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.

§ 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(d) 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 that is made a part of the policy.

§ 50.17 Use of model forms.

(a) *Policies in force on the date of enactment.* (1) An insurer that is required to make the disclosure under § 50.10(b) and that makes no change in the existing premium, is deemed to be in compliance with the disclosure

requirement if it uses NAIC Model Disclosure Form No. 2.

(2) An insurer that is required to make the disclosure under § 50.10(b) and that makes a change in the existing premium, is deemed to be in compliance with the disclosure requirement if it uses NAIC Model Disclosure Form No. 1. Such an insurer may also use the same NAIC Model Disclosure Form No. 1 to comply with the disclosure requirement of section 105(c) of the Act. *See* § 50.18.

(b) *Policies issued within 90 days of the date of enactment.* An insurer that is required to make the disclosure under § 50.10(c) is deemed to be in compliance with the disclosure requirement if it uses either NAIC Model Disclosure Form No. 1 or NAIC Model Disclosure Form No. 2, as long as the form used is modified as appropriate for the particular policy.

(c) *Policies issued more than 90 days after the date of enactment.* An insurer that is required to make the disclosure under § 50.10(d) may continue to use NAIC Model Disclosure Form No. 1 or NAIC Model Disclosure Form No. 2 if appropriate, or other disclosures that meet the requirements of §§ 50.10(a) and 50.14 may be developed.

(d) *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 requirement. An insurer may use other means to comply with the disclosure requirement, as long as the disclosure comports with the requirements of the Act.

(e) *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 were in existence on April 18, 2003. These forms may be found on the Treasury Web site at <http://www.treasury.gov/trip>.

§ 50.18 Disclosure required by reinstatement provision.

(a) *Nullification of terrorism exclusion.* Any terrorism exclusion in a contract for property and casualty insurance that was in force on November 26, 2002, is void to the extent it excludes losses that would otherwise be insured losses.

(b) *Reinstatement of terrorism exclusion.* Notwithstanding paragraph (a) of this section, an insurer may reinstate a preexisting provision in a contract for property and casualty insurance that was in force on November 26, 2002, and that excludes coverage for an act of terrorism only if:

(1) The insurer has received a written statement from the insured that affirmatively authorizes such reinstatement; or

(2) The insured provided notice at least 30 days before any such reinstatement of the increased premium for such terrorism coverage and the rights of the insured with respect to such coverage, including the date upon which the exclusion would be reinstated if no payment is received, and the insured fails to pay any increased premium charged by the insurer for providing such terrorism coverage.

§ 50.19 Disclosure by State residual market insurance entities and State workers' compensation funds [Reserved]

■ 3. Subpart C of 31 CFR part 50 is amended by adding §§ 50.20, 50.21, 50.23 and 50.24 to read as follows:

§ 50.20 General mandatory availability requirements.

(a) *Transition Period and Program Years 1 and 2—period ending December 31, 2004.* Under section 103(c) of the Act (unless the time is extended by the Secretary as provided in that section) during the period beginning on November 26, 2002 and ending on December 31, 2004 (the last day of Program Year 2), 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) *Program Year 3—calendar year 2005.* [Reserved]

§ 50.21 Make available.

(a) *General.* The requirement to make available coverage as provided in § 50.20 applies to policies in existence on November 26, 2002, new policies issued and renewals of existing policies during the period beginning on November 26, 2002 and ending on December 31, 2004 (the last day of Program Year 2), and if the requirement is extended by the Secretary, to new policies issued and renewals of existing policies in Program Year 3 (calendar year 2005). The requirement applies at the time an insurer makes the initial offer of coverage.

(b) *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 declines, the insurer may negotiate with the 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 declines full coverage. *See* § 50.24.

(c) *Demonstration 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.

§ 50.23 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 resulting from an act of terrorism that does not differ materially from the terms, amounts, and other coverage limitations (including deductibles) applicable to losses from other perils. For purposes of this requirement, “terms” excludes price.

(b) *Limitations on types of risk.* If an insurer does not cover all types of risks, then it is not required to cover the excluded risks in satisfying 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.

§ 50.24 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.

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Wayne A. Abernathy,

Assistant Secretary of the Treasury.

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