

**DEPARTMENT OF THE TREASURY**

**Departmental Offices**

**31 CFR Part 50**

**RIN 1505-AB08**

**Terrorism Risk Insurance Program; Litigation Management**

**AGENCY:** Departmental Offices, Treasury

**ACTION:** Notice of Proposed Rulemaking

**SUMMARY:** The Department of the Treasury (Treasury) is issuing this proposed rule as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (Act). That Act established a temporary Terrorism Risk Insurance Program (Program) under which the Federal Government will share the risk of insured loss from certified acts of terrorism with commercial property and casualty insurers until the Program ends on December 31, 2005. This notice of proposed rulemaking proposes regulations concerning litigation management related to insured losses under the Program. This proposed rule is the fifth in a series of regulations that Treasury is issuing to implement the Program.

**DATES:** Written comments may be submitted on or before [INSERT DATE THAT IS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Submit comments (if hard copy, preferably an original and two copies) to the Terrorism Risk Insurance Program, Attention: Terrorism Risk Insurance Program Public Comment Record, Room 2100, 1425 New York Avenue, N.W., Washington, D.C. 20220. Because paper mail in the Washington, D.C., area may be subject to delay, it is recommended that comments be submitted electronically to: [triacomments@do.treas.gov](mailto:triacomments@do.treas.gov). All comments should be captioned with “[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] NPRM TRIA Comments.” Please include your name, affiliation, address, e-mail address, and telephone number in your comment. Comments may also be submitted through the Federal eRulemaking Portal: <http://www.regulations.gov>. 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:** David Brummond, Legal Counsel, or C. Christopher Ledoux, Senior Attorney, Terrorism Risk Insurance Program, (202) 622-6770 (not a toll-free number).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### *A. Terrorism Risk Insurance Act of 2002*

On November 26, 2002, the President signed into law the Terrorism Risk Insurance Act of 2002 (Public Law 107-297, 116 Stat. 2322). The Act was effective immediately. 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.

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, which as defined in the Act is 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 issuance of regulations and procedures. The Program will end on December 31, 2005. Thereafter, the Act provides Treasury with certain continuing authority to take actions as necessary to ensure payment, recoupment, adjustments of compensation and reimbursement for insured losses arising out of any act of terrorism (as defined under the Act) occurring during the period between November 26, 2002, and December 31, 2005.

Each entity that meets the definition of "insurer" (well over 2000 firms) must participate in the Program. The amount of federal payment for an insured loss resulting from an act of terrorism is to be determined based upon insurance company deductibles and excess loss sharing with the Federal Government, as specified by the Act and the implementing regulations. An insurer's deductible increases each year of the Program, thereby reducing the Federal Government's share prior to expiration of the Program. An insurer's deductible is calculated based on a percentage of the value of direct earned premiums collected over certain statutory periods. Once an insurer has met its individual deductible, the federal payments cover 90 percent of insured losses above the deductible, subject to an annual industry-aggregate limit of \$100 billion.

The Program provides a federal reinsurance backstop for three years. The Act provides Treasury with authority to recoup federal payments made under the Program through policyholder surcharges, up to a maximum annual limit. The Act also prohibits duplicative payments for insured losses that have been covered under any other federal program.

The mandatory availability or "make available" provisions in section 103(c) of the Act require that, for Program Year 1, Program Year 2, and, if so determined by the

Secretary of the Treasury, for Program Year 3, all entities that meet the definition of insurer under the Program must make available in all of their property and casualty insurance policies coverage for insured losses resulting from an act of terrorism. This coverage cannot differ materially from the terms, amounts and other coverage limitations applicable to losses arising from events other than acts of terrorism. The Secretary of the Treasury may determine, not later than September 1, 2004, to extend the make available requirements through Program Year 3, based on factors referenced in section 108(d)(1) of the Act. Regardless of whether the make available requirements of section 103 are extended, the Program and the Act's federal backstop for insured losses resulting from acts of terrorism continue through December 31, 2005.

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 the Federal share of compensation for insured losses under the Program. In addition, the Act requires that insurers submit claims and make certain certifications to Treasury. Treasury has recently published in the *Federal Register* a proposed rule concerning claims regulations for the Program. See 68 FR 67100 (Dec. 1, 2003).

The Act also contains specific provisions designed to manage litigation arising out of or resulting from a certified act of terrorism. Among other provisions, section 107 creates, upon certification of an act of terrorism by the Secretary, an exclusive Federal cause of action and remedy for property damage, personal injury, or death arising out of or relating to an act of terrorism; preempts certain State causes of action; provides for consolidation of all civil actions in Federal court for any claim (including any claim for loss of property, personal injury, or death) relating to or arising out of an act of terrorism; and provides that amounts awarded in actions for property damage, personal injury, or death that are attributable to punitive damages are not to be counted as "insured losses" and not paid under the Program. The Act 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. In this rulemaking, Treasury is proposing to implement these provisions of the Act to the extent that regulations are necessary for administration of the Program or involve the Federal share of compensation under the Program. This proposed regulation addresses the advance approval of proposed settlements of causes of action described in section 107 of the Act, as directed by the President in a *Memorandum to the Secretary of the Treasury*. See 38 WEEKLY COMP. PRES. DOC. 2096 (Nov. 25, 2002)(also accessible at [www.treasury.gov/trip](http://www.treasury.gov/trip)).

In implementing the Program, Treasury is guided by several goals. First, Treasury strives to implement the Act in a transparent and effective manner that treats comparably those insurers required to participate in the Program and provides necessary information to policyholders in a useful and efficient manner. Second, in accord with the Act's stated purposes, Treasury seeks to rely as much as possible on the State insurance regulatory structure. In that regard, Treasury has coordinated the implementation of all aspects of

the Program with the National Association of Insurance Commissioners (NAIC). Third, to the extent possible within statutory constraints, Treasury seeks to allow insurers to participate in the Program in a manner consistent with procedures used in their normal course of business. Finally, given the temporary and transitional nature of the Program, Treasury is guided by the Act's goal that insurers develop their own capacity, resources, and mechanisms for terrorism insurance coverage when the Program expires.

#### *B. Previously Issued Interim Guidance and Regulations*

To assist insurers, policyholders, and other interested parties in complying with immediately applicable requirements of the Act prior to the issuance of regulations, Treasury issued interim guidance in four separate notices, on December 3 and 18, 2002 and on January 22 and March 25, 2003. The interim guidance addressed issues requiring clarification to immediately applicable provisions. The guidance was to be relied upon by insurers until superseded by regulations or a subsequent notice.

Treasury's first notice of Interim Guidance was published in the *Federal Register* at 67 FR 76206 on December 11, 2002, and addressed, among other matters, statutory disclosure obligations of insurers as conditions for federal payment under the Program; the requirement that an insurer "make available" terrorism insurance; and how insurers were to calculate the "direct earned premium" received from commercial lines of property and casualty insurance as well as their "insurer deductibles" for purposes of the Program.

Treasury's second notice of interim guidance was published at 67 FR 78864 on December 26, 2002. The Interim Guidance addressed the statutory categories of "insurers" that are required to participate in the Program, including their "affiliates"; provided clarification on the scope of insured losses covered by the Program; and provided additional guidance to enable eligible surplus line carriers listed on the NAIC Quarterly Listing of Alien Insurers or Federally approved insurers to calculate their insurer deductibles for purposes of the Program. This was followed by Treasury's third notice of interim guidance, which was published at 68 FR 4544 on January 29, 2003, and further clarified certain disclosure and certification requirements, and addressed issues concerning non-U.S. insurers, and the scope of the term "insured loss" under the Act.<sup>1</sup>

On February 28, 2003 (68 FR 9804) Treasury published an interim final rule together with a proposed rule addressing the scope of the program, key definitions and

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<sup>1</sup> Treasury's fourth interim guidance, published at 68 FR 15039 on March 27, 2003, 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. The Interim Guidance has subsequently been superseded by a provision in the final rule for Subpart A of Part 50, Title 31 published at 68 FR 41250 (July 11, 2003).

certain general provisions to lay the groundwork for program implementation. This interim final rule was finalized and published in the *Federal Register* at 68 FR 41250 (July 11, 2003) (as amended at 68 FR 48280 (Aug. 13, 2003)) and created Subpart A of Part 50 in Title 31 of the Code of Federal Regulations. Treasury's second regulation created Subparts B and C of Part 50 as an interim final rule published in the *Federal Register* at 68 FR 19301 (Apr. 18, 2003) and was finalized and published at 68 FR 59720 (Oct. 17, 2003). These regulations address disclosures that insurers must make to policyholders as a condition for federal payment under the Act, and requirements that insurers make available, in their commercial property and casualty insurance policies, terrorism risk coverage for insured losses under the Program.

Treasury also created a Subpart D to Part 50 of Title 31, which was first proposed and published in the *Federal Register* at 68 FR 19309 (Apr. 18, 2003) and finalized and published at 68 FR 59715 (Oct. 17, 2003). This regulation applies the provisions of the Act to State residual market insurance entities and State workers' compensation funds.

Most recently, Treasury published a proposed rule in the *Federal Register* at 68 FR 67100 (December 1, 2003) that adds Subparts F and G to Part 50 of Title 31. Subpart F establishes procedures for filing claims for payment of the Federal share of compensation for insured losses. Subpart G addresses information to be retained related to the handling and settlement of claims to enable Treasury to perform financial and claim audits.

## **II. The Proposed Rule**

### *A. Overview*

The rule proposed in this notice would create Subpart I of Part 50 in Title 31 of the Code of Federal Regulations. It would implement the litigation management provisions in section 107 of the Act, provide for advance approval of settlements of certain causes of action, and clarify related aspects of the Program. Upon certification of an act of terrorism by the Secretary, section 107 creates a Federal cause of action for property damage, personal injury, or death arising out of or resulting from the act of terrorism, which is the exclusive cause of action and remedy for such losses. In addition, section 107 provides that:

- 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;
- civil actions are to be consolidated in a Federal district court or courts, as designated by the Judicial Panel on Multidistrict Litigation, which 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;

- the substantive law for decision in such actions shall be derived from the law, including choice of law principles, of the State in which the act of terrorism occurred, unless such law is otherwise inconsistent with or preempted by Federal law;
- any amounts awarded in any action for property damage, personal injury, or death under section 107 that are attributable to punitive damages shall not count as “insured losses” for purposes of the Program;
- contractual arbitration rights are preserved; and
- the United States has a right of subrogation with respect to any payment or claim paid pursuant to the Act.

In connection with the implementation of the litigation management provisions of the Act, the President directed the Secretary to use his authority under the Act to require insurers to obtain Treasury’s advance approval before settling certain causes of action described in section 107 of the Act. The following discussion includes a section-by-section analysis of these proposed regulatory provisions.

*B. Exclusive Federal Cause of Action and Remedy (Section 50.80)*

Section 107(a)(1) of the Act states that once the Secretary has certified that an act of terrorism has occurred pursuant to section 102 of the Act, 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. The Federal cause of action 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 section 107(b) of the Act, as discussed further below. The exclusive Federal cause of action created by the Act applies to *all* actions for property damage, personal injury, or death arising out of or resulting from a certified act of terrorism, regardless of whether the cause of action involves an insured loss covered by commercial property and casualty insurance. Section 50.80(a) of the proposed rule follows this provision of the Act.

Section 107(b) of the Act creates an exception to the exclusive Federal cause of action and remedy established in section 107(a) by stating that nothing in the litigation management provisions of section 107 shall in any way 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 certified as such under the Act. The proposed rule reflects this exception.

Section 107(e) of the Act provides that section 107 applies only to actions for property damage, personal injury, or death that arise out of or result from acts of terrorism that occur or occurred during the effective period of the Program. Under the Act, the Program terminates on December 31, 2005 (*see* section 108(a) of the Act); therefore the proposed rule provides that the exclusive cause of action and remedy exists only for those causes of action that arise out of or result from certified acts of terrorism that occur through December 31, 2005.

Finally, section 107(d) of the Act provides that section 107 shall not be construed to affect (1) any party's contractual right to arbitrate a dispute; or (2) any provision of the Air Transportation Safety and System Stabilization Act (Public Law 107-42; 49 U.S.C. 40101 note). Section 50.80(c) of the proposed rule follows the provisions of the Act.

*C. Preemption of State Causes of Action (Section 50.81)*

The Act preempts all State causes of action for property damage, personal injury, or death arising out of or resulting from an act of terrorism that are otherwise available under State law, except as provided in section 107(b). *See* section 107(a)(2) of the Act. Section 50.81 of the proposed rule reflects this statutory preemption and includes the circumstances where the Act does not limit liability (*i.e.*, for causes of action against any government, organization, or person who knowingly participates in, conspires to commit, aids and abets, or commits any act of terrorism.)

Treasury recognizes that the Act's preemption of State causes of action for personal injury or death raises a question regarding the treatment of workers' compensation claims under section 107. It is Treasury's view that section 107(a)(2) of the Act does not preempt workers' compensation claims involving personal injury or death on the basis that workers' compensation claims are not "causes of action" for personal injury or death within the meaning of section 107. A "cause of action" is a group of operative facts giving rise to one or more bases for one person to sue and obtain a remedy in court from another person.<sup>2</sup> As a general matter, the laws of the various States have eliminated "causes of action" for work-related injuries and replaced them with various types of workers' compensation systems; therefore, there are no "causes of action . . . otherwise available under State law" for work related injuries within the meaning of section 107(a)(2). Thus, it is Treasury's view that the preemption provision in section 107(a)(2) does not extend to workers' compensation systems in the various States.

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<sup>2</sup> *See* BLACK'S LAW DICTIONARY 214 (7th ed. 1999).

*D. Program Procedures for Notifying Federal Court*

Section 107(a)(4) of the Act provides that for each act of terrorism certified by the Secretary pursuant to section 102 of the Act, the Judicial Panel on Multidistrict Litigation shall designate one 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.

The Act also provides that the Judicial Panel on Multidistrict Litigation is to designate the district court or courts not later than 90 days after the occurrence of an act of terrorism. However, it is the Secretary's certification of an act of terrorism that triggers the creation of the exclusive Federal cause of action and the need for the Judicial Panel to designate a district court for the consolidation of actions. Therefore, to facilitate administration of the Program, Treasury intends to notify the Panel as soon as practicable following any certification of an act of terrorism. In this regard, Treasury is considering the appropriate operational procedures that it would follow once an act of terrorism is certified by the Secretary. Treasury invites comments on such procedures from all interested parties.

*E. Failure to Litigate in Federal Court Pursuant to the Act*

In applying section 107(a)(4) of the Act specifically to the Program, Treasury is considering whether it is appropriate or necessary to include in Part 50 a rule providing that any amounts awarded in any civil action relating to or arising out of an act of terrorism that are not awarded by the district court or district courts designated by the Judicial Panel on Multidistrict Litigation shall be ineligible for compensation, regardless of whether the amounts awarded are insured losses covered by commercial property and casualty insurance issued by an insurer. Treasury solicits public comment on such a provision from all interested parties.

*F. Treasury's Advance Approval of Settlements (Section 50.82)*

On November 26, 2002, upon signing the Terrorism Risk Insurance Act of 2002, the President issued a *Memorandum to the Secretary of the Treasury* that directed the Secretary to propose a rule requiring insurers to obtain the advance approval of Treasury of any proposed settlements of causes of action described in section 107 of the Act arising out of or resulting from an act of terrorism. 38 WEEKLY COMP. PRES. DOC. 2096 (Nov. 25, 2002) (also accessible at [www.treasury.gov/trip](http://www.treasury.gov/trip)).

The Act authorizes Treasury to administer the Program, investigate and audit claims, and pay the Federal share of compensation for insured losses. (*see* section 104(a) of the Act). In addition, under section 103(b)(3) of the Act, Treasury is authorized to prescribe reasonable procedures concerning insurers' processing of claims for insured



losses, which become conditions for federal payment. Pursuant to its administrative authority under the Act and to protect the interests of the United States, the proposed rule requires advance approval by Treasury of proposed settlements of certain causes of action described in section 107, to the extent liability for such causes of action is covered by or paid, in whole or in part, by an insurer pursuant to coverage for insured losses under the Program, provided that the insurer intends to submit the settlement as part of its claim for federal payment under the Program.

### *1. Pre-Approval of Certain Proposed Settlements*

Under section 104(a)(2), the Secretary is authorized to prescribe regulations to administer and implement the Program effectively. Treasury believes that establishing monetary thresholds below which an insurer is not required to seek pre-approval by Treasury of settlements balances the need to protect the interests of the United States with the administrative costs involved in the advance approval of settlements. Treasury invites comments on these thresholds (which are explained in more detail below) from all interested parties.

Treasury's proposed rule would require an insurer to seek Treasury's advance, written approval where an insurer (directly or through its insured) intends to settle a Federal cause of action involving third-party liability claims (by a third party against an insured and/or the insurer) for property damage, personal injury, or death arising out of or resulting from an act of terrorism when:

- any portion of the proposed settlement amount that is attributable to liability for personal injury or death is \$1 million or more, or that is attributable to liability for property damage (including loss of use) is \$5 million or more, regardless of the number of third-party liability claims being settled; and
- all or part of the settlement amount is expected to be part of the insurer's claim for federal payment under the Program (included in the insurer's aggregate insured losses). No approval is required if the insurer does not intend to and does not submit all or part of the settlement as part of its claim for federal payment of insured losses under the Program.

Treasury notes that its proposed settlement approval requirement applies to Federal causes of action described above regardless of whether a lawsuit has actually been filed or an arbitration commenced with respect to the matter.

Treasury also notes that settlements that are not required to be submitted for prior approval are still subject to Treasury review, like any other claim, at the point of claim submission by the insurer or at the time of any audit (*see* Subparts F and G proposed as part of claims and audit rulemakings, 68 FR 67100 (Dec. 1, 2003)).

Treasury views this prior approval requirement as extending to settlements for insured losses arising from third-party claims for property damage, personal injury or death against a commercial insured. Most commercial liability policies provide coverage for the insured's defense of such action. In this regard, the insurer is usually involved in the settlements of litigated third-party property and casualty claims. Through the insurer, Treasury will have final settlement approval authority.

Coverage disputes and other civil actions involving contract rights are not included in the scope of the civil actions requiring advanced settlement approval by Treasury. Such disputes involve causes of action that are based on contract law, not on property damage, personal injury, or death and are not subject to prior approval by Treasury.

Treasury seeks comments on how frequently claims are received by commercial property and casualty insurers under commercial liability policies where the insured settles directly with a claimant and then notifies the insurer after the settlement has been consummated. In this situation, if the insurer was not promptly notified in advance of the settlement, the insurer may have difficulty meeting the requirement to obtain prior approval from Treasury of the proposed settlement, jeopardizing the application of federal reinsurance under the Program. Treasury invites public comments on the frequency of such situations, the size of claims usually involved, and possible approaches to address these situations.

## 2. *Factors to be Reviewed by Treasury*

In determining whether to approve a proposed settlement, and in keeping with its obligation to safeguard the use of taxpayer resources, Treasury will consider the nature of the insured loss, the facts and circumstances surrounding the loss, and other factors such as whether:

- the proposed settlement compensates for a *bona fide* loss that is an insured loss under the terms and conditions of the underlying commercial property and casualty insurance policy;
- 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);
- the settlement amount offsets amounts received from the United States pursuant to any other Federal program;
- attorneys' fees and expenses in connection with the settlement are unreasonable or inappropriate, in whole or in part and whether they have

caused the insured losses under the underlying commercial property and casualty insurance policy to be overstated; and

- any other criteria that Treasury may consider appropriate, depending on the facts and circumstances surrounding the settlement, including the information contained in section 50.83.

Additionally, Treasury will review any proposed settlement in accordance with proposed section 50.50 of Subpart F, including whether:

- the settlement was fraudulent, collusive, in bad faith, or otherwise dishonest; and
- the insurer took all businesslike steps reasonably necessary to properly and carefully investigate and ascertain the amount of the loss consistent with appropriate business practices.

### *3. Settlement Without Treasury's Approval*

If an insurer settles a cause of action after Treasury has rejected the proposed settlement, or if an insurer settles a cause of action without seeking Treasury's approval in advance, as required by section 50.82, the insurer will not be entitled to the Federal share of the amount paid as part of its claim for federal payment unless the insurer can demonstrate, to the satisfaction of the Treasury, extenuating circumstances. Also, the insurer shall not be entitled to include the paid settlement amount as an insured loss in its aggregate insured losses (whether or not those aggregate insured losses exceed the insurer deductible) for purposes of calculating the Federal share of compensation due to the insurer under the Program. Treasury is proposing to make advance approval of certain settlements a condition for federal payment under the Program, unless the insurer demonstrates, to the satisfaction of the Treasury, that extenuating circumstances prevented the insurer from seeking Treasury's advance approval.

### *4. Ensuring that Punitive Damages are Not Compensated for Under the Program.*

Section 107(a)(5) of the Act provides that any amounts awarded in actions under section 107(a)(1) of the Act (exclusive Federal cause of action for property damage, personal injury, or death arising out of or resulting from an act of terrorism) that are attributable to punitive damages shall not count as insured losses under the Act. Punitive damages, sometimes also referred to as exemplary damages, are damages that are not compensatory in nature but are an award of money made to a claimant solely to punish or deter a wrongdoer. Because section 107(a)(5) of the Act does not consider punitive damages as "insured losses" under the Act, the Federal Government will not compensate an insurer for such damages. Accordingly, Treasury has proposed amending section 50.5

of Subpart A (as part of another proposed rulemaking recently published in the *Federal Register*) and amending the definition of “insured loss” specifically to exclude punitive or exemplary damages as compensable under the Program.

Consistent with the proposed claims procedures rule, a factor Treasury will consider in approving a proposed settlement is whether the settlement excludes punitive damages, regardless of how the parties to the settlement agreement characterize the payment. An insurer shall be required to identify any portion of a proposed settlement amount that is attributable to punitive damages, or that intends to compromise a claim or demand for punitive damages in a cause of action for which punitive damages could be awarded. Treasury will review proposed settlements to determine whether all or part of the settlement amount is intended to compromise an actual or threatened claim for punitive or exemplary damages, even if the settlement does not indicate that the payment includes punitive or exemplary damages.

#### 5. *Evaluating Attorneys’ Fees and Expenses*

One of the factors Treasury will take into account in reviewing proposed settlements is the amount of attorneys’ fees and other legal expenses. In evaluating the appropriateness of attorneys’ fees and expenses that are part of any proposed settlement, Treasury intends to consider such factors as those weighed by Federal courts regarding the reasonableness of attorneys’ fees under applicable law. Among the factors Treasury may consider are the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly; the customary fee; whether the fee is fixed or contingent; the amount involved and results obtained; the experience, reputation, and the ability of the attorneys; and awards in similar cases. In addition, Treasury will determine whether the attorneys’ fees in question have caused the insured losses under the underlying commercial property and casualty insurance policy to be overstated.

#### G. *Procedures for Requesting Approval of Settlements (Section 50.83)*

Section 50.83 of the proposed rule establishes a procedure for an insurer to submit proposed settlements for advance approval by Treasury. Generally, within 30 days after Treasury’s receipt of a complete notice of the proposed settlement and an insurer’s request that the proposed settlement be approved, Treasury may issue a written response and either approve or disapprove the proposed settlement, in whole or in part. If Treasury does not issue a written response within 30 days after its receipt of a complete notice (or within the time as extended in writing by Treasury), the request for advance approval of the settlement will be deemed approved under section 50.83. (The settlement will still be subject to review under the claims procedures.) The proposed rule also outlines the minimum information Treasury believes may be relevant and useful in considering whether to approve a proposed settlement. Treasury invites public comment concerning this settlement approval request process.

*H. Right of Subrogation (Section 50.84)*

Section 107(c) of the Act provides that the United States shall have the right of subrogation with respect to any payment or claim paid by the United States under the Act. In most commercial insurance policies, insurance companies become subrogated to the rights of the persons they pay, to the extent of payment. In section 50.85, Treasury proposes to require insurers to take steps to preserve rights of subrogation under section 107(c).

**III. Procedural Requirements**

*Executive Order 12866, “Regulatory Planning and Review”.* This proposed rule is a significant regulatory action for purposes of Executive Order 12866, “Regulatory Planning and Review,” and has been reviewed by the Office of Management and Budget.

*Regulatory Flexibility Act.* Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. The proposed rule establishes requirements for advance approval of settlements when claims are to be submitted for insured losses. There is no impact on small insurers unless an act of terrorism occurs and federal compensation is sought by small insurers entitled to reimbursement for their insured losses. If an act of terrorism occurs and federal payment is sought through a claim, the proposed rule’s impact on small insurers is likely to be minimal because most of the information that would have to be submitted in connection with Treasury approval of settlements largely duplicates information already contained in an insurer claim file or an attorney case file. Moreover, the \$1 million and \$5 million thresholds for the submission of settlements to Treasury for approval is likely further to minimize burdens on small insurers.

*Paperwork Reduction Act.* The collection of information contained in this proposed rule has been 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). 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 control number assigned by OMB.

Organizations and individuals desiring to submit comments concerning the collection of information in the proposed rule should direct them to the Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 (preferably by FAX to 202-395-6974, or by email to [jlackeyj@omb.eop.gov](mailto:jlackeyj@omb.eop.gov)). A copy of the comments should also be sent to Treasury at the following address: Terrorism Risk Insurance Program, Attention: Terrorism Risk Insurance Program Public Comment Record, Room 2100, 1425 New

York Avenue, N.W., Washington, D.C. 20220 and electronically to: triacomment@do.treas.gov. Comments on the collection of information should be received by [INSERT 30 DAYS AFTER PUBLICATION].

Treasury specifically invites comments on: (a) whether the proposed collection of information is necessary for the proper performance of the mission of Treasury and whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the collections of information (see below); (c) ways to enhance the quality, utility, and clarity of the information collection; (d) ways to minimize the burden of the information collection, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to maintain the information.

The collection of information in the proposed rule is the information required in connection with requests for Treasury approval of proposed settlements in § 50.83. The submission of specified information in connection with a proposed settlement is mandatory for any insurer that seeks payment of a Federal share of compensation.

If an act of terrorism is certified under the Act, the number of settlements, if any, will be determined by the size and nature of the certified act of terrorism. Because of the extreme uncertainty regarding any such event, a “best estimate” has been developed based on the considered judgment of Treasury. This estimate has 100 insurers sustaining insured losses; each of these insurers would process an average of 100 underlying claims for a total of 10,000 claims. If one in five claims involves amounts in dispute that exceed the monetary thresholds in § 50.82(a), there would be 2,000 claims eligible for settlement. If 90 percent of these claims settle before any judgment or award, this would require 1,800 claims to be submitted to Treasury for advance approval under Subpart I.

The information required by Treasury in connection with a request for advanced approval of a proposed settlement in § 50.83 largely duplicates information already contained in an insurer claim file or an attorney case file. The burden associated with compiling and submitting such information to Treasury is therefore relatively moderate. Accordingly, Treasury estimates that the proposed rule will impose 5 hours of burden with respect to each claim. The estimated annual burden of the proposed rule is therefore 9,000 hours.

### **List of Subjects in 31 CFR Part 50**

Terrorism risk insurance.

### **Authority and Issuance**

For the reasons set forth above, 31 CFR part 50 is proposed to be amended as

follows:

## **PART 50 – TERRORISM RISK INSURANCE PROGRAM**

1. The authority citation for 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 I of part 50 is proposed to be added to read as follows:

### **SUBPART I – FEDERAL CAUSE OF ACTION; APPROVAL OF SETTLEMENTS**

#### **§ 50.80 Federal Cause of Action and Remedy.**

(a) *General.* Upon certification of an act of terrorism pursuant to section 102 of the Act, 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 (c) of this section.

(b) *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 that occur or occurred during the effective period of the Program as set forth in section 108 of the Act.

(c) *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 (Public Law 107-42; 49 U.S.C. 40101 note).

#### **§ 50.81 State Causes of Action Preempted.**

Upon certification of an act of terrorism pursuant to section 102 of the Act, all State causes of action of any kind for property damage, personal injury, or death arising

out of or resulting from such 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.

**§ 50.82 Advance Approval of Settlements.**

(a) *General.* 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, including any agreement between its insured(s) and third parties, involving an insured loss, all or part of the payment of which the insurer intends to submit as part of its claim for Federal payment 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 \$1 million or more, 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 \$5 million or more, regardless of the number of causes of action or insured losses being settled.

(b) *Factors.* In determining whether to approve a proposed settlement in advance, 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 loss that is an insured loss under the terms and conditions of the underlying commercial property and casualty insurance policy;

(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 does not involve unreasonable or inappropriate attorneys' fees and legal expenses and whether they 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 §50.83.

(c) *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 this section and in accordance with §50.83 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.

### **§ 50.83 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 <http://www.treasury.gov/trip> 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 § 50.50.

(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 insured's underlying claim, the insured's loss, the amount of the claim, the operative policy terms, defenses to coverage, and all damages sustained;

(2) An itemized statement of all damages by category (*i.e.*, actual, economic and non-economic loss, punitive damages, *etc.*);

(3) A statement from the insurer or its attorney recommending the settlement and the basis for the recommendation;

(4) The total dollar amount of the proposed settlement;

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

(6) The net amount to be paid to the insured and/or third party;

(7) The amount to be paid that will compensate attorneys for their services and expenses and an explanation as to why the amount is not unreasonable;

(8) The amount received from the United States pursuant to any other Federal program 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 specific policy, coverage and/or aggregate limits; and

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

(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 as may be requested by Treasury or its designee.

**§ 50.84 Subrogation.**

An insurer shall not waive its rights of subrogation under its insurance policy and shall take all steps necessary to preserve the subrogation right of the United States as provided by section 107(c) of the Act.

Dated: April , 2004

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Wayne A. Abernathy  
Assistant Secretary of the Treasury