

counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 924

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 15, 2006.

Brent Wahlquist,

Acting Director, Office of Surface Mining Reclamation and Enforcement.

■ For the reasons set out in the preamble, 30 CFR part 924 is amended as set forth below:

PART 924—MISSISSIPPI

■ 1. The authority citation for part 924 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Part 924 is amended by adding § 924.20 to read as follows:

§ 924.20 Approval of Mississippi Abandoned Mine Land Reclamation Plan.

The Mississippi AMLR plan statutes, as submitted on April 5, 2006, are approved. Copies of the approved plan statutes are available at:

Office of Surface Mining Reclamation and Enforcement, Birmingham Field Office, 135 Gemini Circle, Suite 215, Homewood, Alabama 35209.

Mississippi Department of Environmental Quality, Office of Geology, 2380 Highway 80 West, Jackson, Mississippi 39289-1307.

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DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505-AB67

Terrorism Risk Insurance Program; TRIA Extension Act Implementation

AGENCY: Departmental Offices, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (Treasury) is issuing this rule in final form as part of its implementation of amendments made to Title I of the Terrorism Risk Insurance Act of 2002 (TRIA or Act) by the Terrorism Risk Insurance Extension Act of 2005 (Extension Act). The Act established a temporary Terrorism Risk Insurance Program (Program) that was scheduled to expire on December 31, 2005, under which the Federal Government shared the risk of insured

losses from certified acts of terrorism with commercial property and casualty insurers. The Extension Act extends the Program through December 31, 2007, and makes other changes which are implemented by this rule. In particular, the rule addresses changes to the types of commercial property and casualty insurance covered by the Act, the requirements to satisfy the Act's mandatory availability ("make available") provision and the operation of the new "Program Trigger" provision in section 103(e)(1)(B) of the Act. Treasury published an interim final rule and a cross-referenced proposed rule with a request for comment on May 11, 2006. This final rule finalizes the proposed rule by adopting the text of the interim final rule without revision.

DATES: This final rule is effective September 25, 2006.

FOR FURTHER INFORMATION CONTACT:

Howard Leikin, Deputy Director, 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 (Pub. L. 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 by 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 (Program), including the issuance of regulations and procedures.

Each entity that meets the Act's definition of insurer (well over 2,000 firms) must participate in the Program. The amount of federal payment for an insured loss resulting from an act of terrorism is determined by insurance company deductibles and excess loss sharing with the Federal Government as specified in the Act and Treasury's implementing regulations. An insurer's

deductible increases each year of the Program and in Program Year 5, so does its share of the losses in excess of the deductible, thereby reducing the Federal Government's share of compensation for insured losses each year until the Program expires. An insurer's deductible is calculated based on the value of direct earned premiums collected over certain prescribed calendar periods. Once an insurer has met its individual deductible, the federal payments cover a percentage of the insured losses above the deductible, subject to an industry aggregate limit of \$100 billion.

The Act gives Treasury authority to recoup federal payments made under the Program through policyholder surcharges, up to a maximum annual limit. The Act reduces the Federal share of compensation for insured losses that have been covered under any other federal program. The Act also contains provisions designed to manage litigation arising from or relating to a certified act of terrorism. Section 107 of the Act 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. The Act provides the United States with the right of subrogation with respect to any payment or claim paid by the United States under the Program.

B. Terrorism Risk Insurance Extension Act of 2005

The Program was originally set to expire on December 31, 2005. On December 22, 2005, the President signed into law the Terrorism Risk Insurance Extension Act of 2005 (Pub. L. 109-144, 119 Stat. 2660), which extends the Program through December 31, 2007. In doing so, the Extension Act adds Program Year 4 (January 1-December 31, 2006) and Program Year 5 (January 1-December 31, 2007) to the Program. In addition, the Extension Act made other significant changes to TRIA that include:

- A revised definition of "insurer deductible" that adds new Program Years 4 and 5 to the definition. The insurer deductible is set as the value of an insurer's direct earned premium for commercial property and casualty insurance (as now defined in the Act) over the immediately preceding calendar year multiplied by 17.5 percent for Program Year 4 and by 20 percent for Program Year 5.

- A revised definition of "property and casualty insurance" that now excludes commercial automobile insurance; burglary and theft insurance;

surety insurance; professional liability insurance; and farmowners multiple peril insurance. Though the definition excludes professional liability insurance, it explicitly retains directors and officers liability insurance.

- Creation of a new Program Trigger for any certified act of terrorism occurring after March 31, 2006, that prohibits payment of Federal compensation by Treasury unless the aggregate industry insured losses resulting from that act of terrorism exceed \$50 million for Program Year 4 and \$100 million for Program Year 5.

- A change to the Federal share of compensation for insured losses. Subject to the Program Trigger, the Federal share is 90 percent of that portion of the amount of insured losses that exceeds the applicable insurer deductible in Program Year 4 and decreases to 85 percent of such amount in Program Year 5.

- Revisions to the recoupment provisions. For purposes of recouping the Federal share of compensation under the Act, the insurance marketplace aggregate retention amount for the two additional years of the Program is increased from the level in Program Year 3. For Program Year 4 the insurance marketplace aggregate retention amount is established as the lesser of \$25 billion and the aggregate amount, for all insurers, of insured losses during Program Year 4. The insurance marketplace aggregate retention amount for Program Year 5 is the lesser of \$27.5 billion and the aggregate amount, for all insurers, of insured losses during Program Year 5.

- A statutory codification of Treasury's litigation management regulatory requirements in § 50.82 of title 31 of the Code of Federal Regulations (as in effect on July 28, 2004), which requires advance approval by Treasury of proposed settlements of certain causes of action involving insured losses under the Program.

C. The Interim Final Rule

The interim final rule was published in the **Federal Register** at 71 FR 27564 (May 11, 2006) with a cross-referenced proposed rule published at 71 FR 27573 that would adopt the text of the interim final rule as final. References in the following discussion are to the interim final rule. The interim final rule incorporated certain changes to 31 CFR part 50 required by the amendments to TRIA in the Extension Act, which extended the Program by two years, to December 31, 2007. The changes in the rules included new insurer deductible amounts for each of those Program Years, the extension of mandatory

availability requirements, the deletion of certain types of insurance from the definition of property and casualty insurance, and a continued safe harbor for the use of model disclosure forms. The interim final rule also incorporated and clarified statutory changes to the determination of the Federal share of compensation, taking into account the new Program Trigger.

This final rule, and the preceding interim final rule, reflect interim guidance previously issued by Treasury in a notice published in the **Federal Register** on January 5, 2006 (71 FR 648), in order to assist insurers, policyholders, and other interested parties in complying with immediately applicable requirements of the Extension Act. Treasury consulted with the National Association of Insurance Commissioners (NAIC) in developing the interim final rule and has carefully considered the comments submitted in finalizing the interim final rule.

II. Summary of Comments and Final Rule

Treasury received four comments on the interim final rule.¹ Comments were submitted by a farm mutual insurer, an insurance company, a farm mutual reinsurer and an insurance industry trade association. The comments raised issues in two areas—farm owners multiple peril insurance and umbrella and excess policies. In addition, one comment commended the Terrorism Risk Insurance Program for addressing issues in the earlier interim guidance that had required clarification. After review and consideration of the comments, Treasury is now promulgating a final rule implementing the Extension Act changes to TRIA. The final rule makes no changes to the interim final rule, but the preamble provides some clarification in response to the issues raised in the comments. The following discussion also summarizes the provisions of the interim final, and now final, rule.¹

A. Definitions (§ 50.5)

The interim final rule incorporated revised definitions for insurer deductible, Program Years, and property and casualty insurance. The rule also added definitions for professional liability insurance and Program Trigger event.

The revisions to the definitions for insurer deductible and Program Years implemented the Extension Act's

¹ We also received one comment from a group of farm mutual insurers after the close of the comment period. We note that this comment raised the same issues contained in one of the four other comments. These issues were addressed in this final rule.

addition of Program Years 4 (calendar year 2006) and 5 (calendar year 2007) and the percentages to be applied to an insurer's direct earned premium for the immediately preceding calendar year in computing insurer deductibles for Program Year 4 (17.5 percent) and Program Year 5 (20 percent).

Section 102(12) of TRIA was also amended to exclude additional types of insurance from the definition of property and casualty insurance under the Program. The Act now excludes from the definition commercial automobile insurance, burglary and theft insurance, surety insurance, professional liability insurance (but not directors and officers insurance), and farmowners multiple peril insurance. To the extent the newly excluded types of insurance represent specific lines of business on the NAIC Annual Statement, Treasury is continuing to utilize NAIC line of business definitions in implementing the Act. The newly excluded types of insurance which may correspond to lines of business on the NAIC Annual Statement are: Line 3—Farmowners Multiple Peril; Line 19.3—Commercial Auto No-Fault (personal injury protection); Line 19.4—Other Commercial Auto Liability; Line 21.2—Commercial Auto Physical Damage; Line 26—Burglary and Theft; and Line 24—Surety. In addition, the interim final rule made clear that these types of insurance are excluded from the definition of property casualty insurance, regardless of how their premiums may be reported.

The only type of insurance that is newly excluded from the definition of property and casualty insurance in the Act, but is not a specific line of business on the NAIC Annual Statement, is professional liability insurance, located in new section 102(12)(xi). In the interim final rule, Treasury provided the following definition of "professional liability insurance":

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

Insurers are to use this definition in identifying policies excluded from the Program, as well as for satisfying the Act's "make available" requirement and determining which policies have

premiums that should be subtracted from Line 17—Other Liability on the NAIC Annual Statement when computing direct earned premium for Program purposes.

This definition is derived from the definition of “Professional Errors and Omissions Liability” found in the Uniform Property & Casualty Coding Matrix currently utilized by the System for Electronic Rate and Form Filing (SERFF) sponsored by the NAIC.² However, this definition is not meant to limit insurers to the filing code (17.0019) specified under SERFF for “Professional Errors and Omissions Liability”. Certainly, policies and coverages that employ the SERFF filing code will meet the interim final rule definition of professional liability insurance. Treasury acknowledges that many insurers and insurance support organizations do not utilize the SERFF mechanism for all their form filings. Thus, the definition in the interim final rule was intended to have a broader application than the SERFF filing process and should not be viewed as limited to one particular SERFF filing code.

Directors and officers liability insurance, which is sometimes considered a type of professional liability insurance, is not included in the definition of professional liability insurance. Section 102(12)(A) of the Act now explicitly includes directors and officers liability insurance in the definition of property and casualty insurance. This change does not substantively modify the previous definition of property and casualty insurance under the Act, but is a statutory clarification that directors and officers liability insurance is distinct from professional liability insurance. Premium for directors and officers liability insurance may be already included in Line 17—Other Liability on the NAIC Annual Statement, one of the commercial lines of business listed in Treasury’s current regulations defining property and casualty insurance (31 CFR 50.5(n)), if not otherwise excluded. Treasury recommends that insurers consult the definition of “Directors & Officers Liability” found in the Uniform Property & Casualty Coding Matrix now being utilized by SERFF if further guidance is needed on what constitutes “Directors & Officers Liability” insurance.

The Extension Act adds a new section 103(e)(1)(B) to TRIA entitled “Program Trigger.” This new provision directs the Secretary not to compensate insurers

under the Program unless the aggregate industry insured losses from a certified act of terrorism exceed certain insured loss or “trigger” amounts.³ To implement this provision, the interim final rule added a new definition for “Program Trigger event”. Such an event is “a certified act of terrorism that occurs after March 31, 2006, for which the aggregate industry insured losses resulting from such act exceed \$50 million with respect to such insured losses occurring in 2006 and \$100 million with respect to such insured losses occurring in 2007.” Unless an act of terrorism is a Program Trigger event, insured losses from that act of terrorism will not be considered in any determination of or calculation leading to any Federal share of compensation under the Act. The Program Trigger is discussed further in “E. Federal Share of Compensation” below.

Farmowners Multiple Peril Insurance

The Extension Act revision to TRIA section 102(12) specifically excludes “farm owners multiple peril insurance”, a particular type of insurance which is also a specific line of business on the NAIC Annual Statement, from the definition of property and casualty insurance. Prior to the issuance of the interim final rule, insurers asked whether monoline farm insurance coverages are similarly excluded. With no clear guidance in the legislative history of the Extension Act on this issue and, guided by the plain meaning of the statute, Treasury issued the interim final rule based on its interpretation that this exclusion is applicable only to multiple peril coverages insuring farm risks. Single peril or monoline coverages insuring farm risks generally would continue to be evaluated based on the line of business on the NAIC Annual Statement (or equivalent reporting system) where the premiums for such coverages are reported. Thus, if the premiums for such monoline coverages are usually reported, or otherwise allocated, to one of the commercial lines of insurance on the NAIC Annual Statement (or equivalent reporting system), unless otherwise excluded by the Act, the monoline coverage would be treated as falling within the definition of property

and casualty insurance under Treasury’s regulations.

Aware of some concerns with this result on the part of some smaller insurance entities, such as farm and county mutuals, Treasury specifically sought comments on the practical implications of this issue and requested the articulation of a basis for any assertion that monoline coverages are excluded from the Program as part of the farmowners multiple peril exclusion.

Three commenters addressed the treatment of “farm owners multiple peril insurance” in Treasury’s interim final rule.

One Texas farm mutual insurer indicated it believed the monoline fire policies the insurer issues for farm risks in Texas “are residential in nature and not commercial”. Texas farm mutuals generally are precluded from writing commercial insurance. To the extent a farm mutual insurer files an NAIC Annual Statement in Texas (not all farm mutuals file an NAIC Annual Statement), the premium for its monoline fire policies is reported on Line 1—Fire of the NAIC Annual Statement (an included line). But the farm mutual insurer explained that the “Fire” line of business in Texas includes both personal and commercial lines. The insurer suggested that “an argument can be made” that the Texas Department of Insurance looks upon farm mutual policies as being residential policies and not commercial policies, and that these policies should not be subject to TRIA simply because of the line on which they are required to be reported.

A Midwest reinsurer of county and town mutuals also raised concerns about Treasury’s interpretation of the meaning of “farm owners multiple peril”. The reinsurer noted that “the practical implication of Treasury’s interpretation is that inclusion of exposures in the Program is made dependent upon the method by which premium is reported and not with regard to the actual exposure being insured.” The reinsurer further suggested that Treasury’s interpretation of the Extension Act was inconsistent with Treasury’s earlier treatment of commercial property and casualty insurance⁴ that “was based on the exposure insured, not on the method of reporting premium.”

The third commenter, which reports all farm policy premium under the farm owners multiple peril line of its Annual Statement, even premium for what might be considered monoline policies,

³ Section 103(e)(1)(B) states: “In the case of a certified act of terrorism occurring after March 31, 2006, no compensation shall be paid by the Secretary under subsection (a), unless the aggregate industry insured losses resulting from such certified act of terrorism exceed—(i) \$50,000,000, with respect to such insured losses occurring in Program Year 4; or (ii) \$100,000,000, with respect to such insured losses occurring in Program Year 5.”

⁴ See 68 FR 9810.

² The Matrix can be found on the NAIC Web site at http://www.naic.org/industry_home.htm.

requested confirmation that under the rules, because of the way its premium is reported, the policy form it uses would be considered farm owners multiple peril insurance.

As noted previously, there is no clear guidance in the legislative history of the Extension Act that suggests the meaning of “farm owners multiple peril insurance” should be interpreted broadly to include single peril, or monoline, farmowners insurance. Moreover, “farm owners multiple peril insurance” is a specific line of business on the NAIC Statement. Since the inception of the Program, Treasury has used Statutory Page 14 of the NAIC Annual Statement as the “best available point of reference”⁵ to define what constitutes commercial property and casualty insurance, also applicable as guidance to insurers that do not report via Statutory Page 14 of the NAIC. Treasury’s rules generally define property and casualty insurance in terms of specified lines of business on the NAIC Annual Statement. Insurance for which premiums are reported on an excluded line of business is not included in the Program. Insurance for which premiums are reported on an included line of business is included, unless the particular type of insurance is otherwise excluded by the Act.

Treasury believes that its earlier guidance on what constitutes commercial property and casualty insurance is consistent with its more recent interpretation of the Extension Act meaning of “farm owners multiple peril insurance”. However, the preamble discussion of this issue in the interim final rule was fairly brief and we offer additional discussion below.

Treasury has maintained that premium reported on the specified commercial lines on Statutory Page 14 of the NAIC Annual Statement is only considered to be commercial premium subject to the Act “to the extent coverage provided is for commercial property and casualty exposures”⁶ (and provided it is not otherwise excluded by the Act). The definition of property and casualty insurance in § 50.5(n)(1) provides, in part, that it means “commercial lines within” certain specified lines of insurance. We have specifically noted that personal insurance (insurance primarily designed for personal, family or household purposes) that is reported on one of the specified commercial lines of Statutory Page 14 should be excluded from an insurer’s calculation of its direct earned

premium.⁷ We have likewise applied this analysis in clarifying what constitutes commercial property and casualty insurance coverage for purposes of paying insured losses and determining compliance with the “make available” provision of the Act.

In applying the foregoing to the farm risks described by the farm mutual commenters, if the premium for a monoline policy written by such insurers is reported on one of the specified commercial lines of Statutory Page 14 of the NAIC Annual Statement (Fire, Allied Lines, etc.), the monoline coverage as a general rule is subject to TRIA. However, if the monoline policy only insures a personal insurance exposure (residential dwelling), or is otherwise excluded by the Act, the policy is not commercial property and casualty insurance within the meaning of the Act and is not subject to the Act. To the extent a monoline policy is a hybrid policy that insures both personal and commercial exposures, farm mutual insurers should look to Treasury’s treatment of the direct earned premium for hybrid policies as a guide for how to treat the hybrid policy for other purposes under TRIA (determining claims for insured losses, complying with the “make available” provision, etc.).⁸

Consistent with the Extension Act, the interim final rule excludes farm owners multiple peril insurance from the definition of property and casualty insurance. In response to the commenter that raised the question about its policy form, we note that the interim final rule does not directly address policy forms or how various state regulators treat particular forms for NAIC Annual Statement reporting purposes. Treasury assumes that the forms and reporting practices are appropriate under applicable state law. Whatever treatment is afforded particular policies by insurers in compliance with relevant state law is generally the guide for how such policies are treated under Treasury’s regulations for what constitutes commercial property and casualty insurance, unless expressly excluded by the Act. Farm policies for which premiums are reported on the farmowners multiperil line are excluded from the Program.

Since the concerns of the three commenters related to “farm owners multiple peril insurance” are addressed by applying Treasury’s previous rulemaking and guidance, no changes have been made to the definition of property and casualty insurance in

section 50.5(n)(2) of the interim final rule.

B. Interim Guidance Safe Harbors (§ 50.7)

Section 50.7 of the current regulations provides that “[a]n insurer will be deemed to be in compliance with the requirements of the Act to the extent the insurer reasonably relied on Interim Guidance prior to the effective date of applicable regulations.” The interim final rule added “Interim Guidance IV issued by Treasury on December 29, 2005, and published at 71 FR 648 (January 5, 2006)” to the list of applicable Interim Guidances.

C. Disclosure (§§ 50.12 and 50.17)

The interim final rule incorporated guidance on compliance with disclosure requirements and revised safe harbor language with regard to the use of NAIC model disclosure forms.

The Extension Act continues, as a condition for federal payments under the Act, the existing requirements contained in section 103(b) to provide disclosures “at the time of offer, purchase, and renewal of the policy”. Some insurers faced certain operational difficulties with regard to policies processed in the latter part of Program Year 3 (2005) for issuance or renewal effective in 2006. In some cases, policies were issued or renewed in 2006 in a form that already included coverage for terrorism risks, whether or not TRIA was extended. Because TRIA would have sunset as of December 31, 2005, disclosures were not provided with these policies.

The Extension Act made no change to the requirement that disclosures are required as a condition for payment of the Federal share of compensation for insured losses. However, given the late date of enactment of the Extension Act, the interim final rule provided in section 50.12(e) that “[i]f an insurer made available coverage for insured losses in a new policy or policy renewal in Program Year 3 for coverage becoming effective in Program Year 4, but did not provide a disclosure at the time of offer, purchase or renewal, then the insurer must be able to demonstrate to Treasury’s satisfaction that it has provided a disclosure as soon as possible following January 1, 2006.”

For an insurer to demonstrate to Treasury’s satisfaction that it has provided disclosures as soon as possible following January 1, 2006, Treasury expects that an insurer will have provided disclosures by 30 days after publication of the interim final rule in the **Federal Register** (June 10, 2006), barring unforeseen or unusual

⁵ See 68 FR 41257.

⁶ See 68 FR 9810.

⁷ See § 50.5(d)(1)(ii).

⁸ See § 50.5(d).

circumstances. If not completed by that time, an insurer will be expected, when submitting a claim for the Federal share of compensation, to demonstrate why such disclosures could not be made by that date and why the insurer should be deemed to be in compliance with the Act's disclosure requirement.

Pursuant to 31 CFR 50.17, insurers that have used NAIC Model Disclosure Forms that were in existence on April 18, 2003, were deemed to satisfy the disclosure requirements of section 103(b)(2) of the Act. Although the Extension Act made no change to the requirements for clear and conspicuous disclosure to policyholders of the premium charged for insured losses covered by the Program and of the Federal share of compensation for insured losses under the Program, revisions were made to the Act that required rewording of the NAIC Model Disclosure Forms. The NAIC has since issued revised Model Disclosure Forms, dated January 26, 2006, which if used by insurers, will be deemed to satisfy disclosure requirements of the Act and Treasury regulations. The interim final rule continued the safe harbor approach for use of the most current NAIC Model Disclosure forms deemed by Treasury to meet Program requirements. Insurers may also continue to use other forms to comply with the disclosure requirements.

D. Make Available (§§ 50.20 and 50.21)

For Program Year 4 (Calendar 2006) and Program Year 5 (Calendar 2007) insurers are required to continue to "make available" coverage for insured losses as required by TRIA and Treasury regulations. Amendments to the "make available" requirement in section 103(c) of the Act are simply conforming amendments that continue the requirement through Program Years 4 and 5. Thus, insurers issuing or renewing commercial property and casualty insurance policies in Program Years 4 and 5 must continue to offer coverage for insured losses resulting from an act of terrorism, as required by section 103(c) of the Act and 31 CFR 50.20 to 50.24, if they wish to have their insured loss claims eligible for the Federal share of compensation in the extended Program Years.

In its Interim Guidance IV published on January 5, 2006, Treasury addressed the "make available" requirement with regard to the transition from Program Year 3, originally the last year of the Program, to the extended Program Years 4 and 5. In that issuance, Treasury noted that the Extension Act made no changes to the "make available" requirement for insurers. Treasury provided guidance on

how insurers could comply with Program requirements given operational difficulties arising from the Extension Act passage late in the year.

In addition Treasury Interim Guidance IV clarified that no additional "make available" offer is required if terrorism coverage for the duration of the policy term was offered for policies issued or renewed in 2005. It also explained how an insurer could comply with "make available" requirements under the following scenarios where:

- (1) A policy's terrorism coverage expired on December 31, 2005, but the remainder of the policy continued in force in 2006,
- (2) A policy did not provide terrorism coverage after December 31, 2005, but the policyholder had rejected an offer of terrorism coverage for the portion of the policy term prior to December 31, and
- (3) A policy renewal or application was processed in 2005 for coverage becoming effective in 2006 and the insurer did not "make available" terrorism coverage for Program Year 4 as contemplated by the Extension Act.

The interim final rule generally incorporated this interim guidance into the TRIA "make available" provisions. Section 50.21(b) was added to address the special Program Year 4 requirements for scenarios (1) and (2) above. For scenarios (1) and (3), where an insurer must make an offer of coverage, section 50.21(d) (formerly 50.21(c)) was amended to provide that the insurer must be able to demonstrate to Treasury's satisfaction that it has provided an offer of coverage for insured losses by January 1, 2006, or as soon as possible following that date. In demonstrating to Treasury's satisfaction that it has provided an offer of coverage for insured losses as soon as possible after January 1, 2006, Treasury considers January 31, 2006, to be the latest reasonable date for offers of coverage, barring unforeseen or unusual circumstances. If not provided by January 31, 2006, Treasury would expect an insurer to demonstrate why the offer could not be made by that date when submitting a claim for Federal compensation under the Program.

The interim final rule incorporated technical amendments to section 50.20 that extend the "make available" requirements into Program Years 4 and 5. Section 50.20(c) also provided that "property and casualty insurance coverage for insured losses does not have to be made available beyond December 31, 2007 (the last day of Program Year 5), even if the policy period of insurance coverage for losses from events other than acts of terrorism extends beyond that date".

Umbrella and Excess Policies

In the Supplementary Information section of the preamble accompanying the interim final rule, Treasury provided guidance regarding the "make available" and disclosure requirements for excess or umbrella liability policies in light of the Extension Act's deletion of certain types of insurance from the definition of property and casualty insurance. The guidance reflected earlier rulemaking and that as a general rule, excess or umbrella liability policies are property and casualty insurance within the meaning of TRIA. Section 102(12)(A) of the Act defines the term "property and casualty insurance" as meaning commercial lines of property and casualty insurance "including excess," unless otherwise excluded from the definition under Section 102(12)(B). Premiums for commercial excess and umbrella insurance policies are normally reported on Line 17—Other Liability in the NAIC Annual Statement.⁹ Although generally reported on a line which is included in the Program, in interim guidance Treasury advised that excess or umbrella insurance is commercial property and casualty insurance only to the extent it provides coverage above primary or underlying coverage that is a type of insurance included in the Program, and not specifically excluded from the definition of property and casualty insurance itself. However, where the commercial property and casualty coverage segment of an excess or umbrella liability policy is merely incidental to the remaining non-TRIA coverage under the policy, an insurer may treat the entire policy as not providing property and casualty insurance within the meaning of TRIA and Treasury's regulations.¹⁰ In such elections, the TRIA "make available" and disclosure requirements will not apply and no losses from the commercial coverage segment of such policies will be paid by Treasury.

One comment submitted by an insurance trade organization requested that Treasury give "due consideration to the possibility that property casualty insurers, in good faith, might have treated commercial umbrella and excess insurance policies differently under the TRIA Extension than the **Federal Register** guidance". As an example, the comment states that, "as premiums from

⁹ See 68 FR 59725.

¹⁰ See 31 CFR 50.5(d)(1)(iii): "For purposes of the Program, commercial coverage combined with coverages that otherwise do not meet the definition of property and casualty insurance is incidental if less than 25 percent of the total direct premium is for such coverage."

these policies are reported on line 17 of the NAIC annual Statement (a line that is included within the Federal program), insurers could have reasonably assumed that those policies would either be included entirely in the program or that the policies would be included unless there was no possibility of a covered claim from the underlying policy”.

Treasury acknowledges that, if an insurer, prior to the publication of the interim final rule, relied on the assumptions in the above example in carrying out its “make available” and disclosure obligations (if any) the insurer would be considered to be reasonably compliant with Program requirements. However, in no circumstance can losses associated with an underlying coverage that is excluded from the Program form the basis for a claim for the Federal share of compensation.

Commenters asked Treasury to reconsider the position that “excess or umbrella insurance is commercial property and casualty insurance included in the Program only to the extent it provides coverage above primary or underlying coverage that is a type of insurance included in the Program”. One of these comments suggests that “this position makes some sense within the insurance context of how umbrella/excess and the underlying coverage are typically consistent, [but] one could also make a case for commercial umbrella/excess being totally included under TRIA—even when written over exempted coverages—if the goal was to make the provisions of TRIA apply as broadly as the law will allow and thus encouraging as much terrorism coverage as possible in the marketplace”.

Treasury considered and rejected this alternative prior to issuing the interim final rule. After reconsideration based on the comments, we continue to believe that the better interpretation of the statutory authority and intent, given that the Extension Act restricted the types of insurance included under the Program, is as stated in the preamble to the interim final rule. Therefore, no change is being made to the final rule.

E. Federal Share of Compensation (§ 50.50)

The interim final rule added several provisions to section 50.50 to reflect the addition of the new Program Trigger provision to the Act. Under section 103(a) of TRIA, the Secretary is required to pay the Federal share of compensation for insured losses in accordance with section 103(e) of the Act. The Extension Act amended subsection (e) to provide, in part, that

no compensation shall be paid by the Secretary under subsection (a) unless the aggregate industry insured losses from a certified act of terrorism occurring after March 31, 2006, exceed certain amounts. This provision was intended to ensure that there would be no Federal compensation unless the aggregate industry losses from an act of terrorism exceed these amounts.

The interim final rule incorporated a technical amendment to renumbered § 50.50(a) (formerly 50.50(d)) to provide that the Federal share of compensation in Program Year 5 shall be “85 percent of that portion of the insurer’s aggregate insured losses that exceed its insurer deductible during Program Year 5,” (subject to any adjustments in § 50.51 and the cap of \$100 billion as provided in section 103(e)(2) of the Act). A new provision was also added to renumbered § 50.50(d) (formerly 50.50(a)) that reiterates, as a condition for Federal compensation for insured losses, a basic insurance principle that, “[t]he insurer offered the coverage for insured losses and the offer was accepted by the insured prior to the occurrence of the loss”.

New § 50.50(b) incorporated the Program Trigger limitations on the amount of Federal compensation payable under the Act. To implement these limitations, § 50.50(g) stated that Treasury will determine the amount of aggregate industry insured losses, and that if the aggregate industry insured losses exceed the applicable Program Trigger amounts, Treasury will publish notice in the **Federal Register** that the act of terrorism is a Program Trigger event. As noted in the previously issued Interim Guidance, Treasury also expects to provide notification through press releases and postings on the TRIP Web site.

Section 50.50(c) clarified that in the provisions dealing with claims procedures, subpart F, insured losses or aggregate insured losses for acts of terrorism after March 31, 2006 will be limited to those insured losses resulting from Program Trigger events. This limitation on insured losses controls any determinations of, or calculations leading to, a Federal share of compensation under the Act including any adjustments of the Federal share, and applies to submissions of an insurer in conjunction with Initial Notices of Loss and Certifications of Loss and payments of the Federal share.

The Program Trigger provision also has a direct bearing on which insured losses count towards satisfaction of the insurer deductible. In Program Year 4, and similarly, in Program Year 5, only an insurer’s insured losses resulting

from Program Trigger events in the year will count towards satisfaction of the insurer deductible.

F. Determination of Affiliations (§ 50.55)

Section 50.55 provides that for the purposes of claims procedures and the determination of the Federal share of compensation “an insurer’s affiliates for any Program Year shall be determined by the circumstances existing on the date of occurrence of the act of terrorism that is the first act of terrorism in a Program Year to be certified by the Secretary for that Program Year.” The purpose of this regulation, when promulgated in 2005, was to clarify the point in time when insurer affiliations would be determined in order to facilitate the calculation of insurer deductibles and the payments of the Federal share of compensation for Program Years in which affiliations could change over time. Since this has meaning only if there is a potential Federal share of compensation, the interim final rule incorporated an amendment clarifying that if the first certified act of terrorism occurs after March 31, 2006, it must also be a Program Trigger event to be used for determining affiliations under the rule.

G. Federal Cause of Action; Approval of Settlements

The Extension Act added section 107(a)(6) to TRIA, which provides that procedures and requirements established by the Secretary under 31 CFR 50.82, as in effect on the date of issuance of that section in final form [July 28, 2004], shall apply to any Federal cause of action described in section 107(a)(1). This provision was added to new § 50.85 of the interim final rule.

Section 50.82 of the regulations requires insurers to submit to Treasury for advance approval certain proposed settlements involving an insured loss, any part of the payment of which the insurer intends to submit as part of its claim for federal payment under the Program. Thus, Treasury would not expect insurers to submit any proposed settlement if the insured losses would not be eligible for payment, as would be the case if the losses resulted from a post-March 31, 2006 certified act that was not a Program Trigger event. However, if there is uncertainty whether or not a certified act will become a Program Trigger event, an insurer may wish to err on the side of caution and submit a proposed settlement for prior approval in order to preserve any subsequent eligibility for Federal compensation for insured losses under the Program. Otherwise the insured will

be ineligible for later payment if the Program Trigger is reached.

III. Procedural Requirements

Executive Order 12866, "Regulatory Planning and Review"

This 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.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is hereby certified that the final rule will not have a significant economic impact on a substantial number of small entities. The final rule implements changes prescribed or authorized by the Extension Act. The Act itself requires all insurers receiving direct earned premium for any type of property and casualty insurance, as defined in the Extension Act, to participate in the Program. This includes all insurers regardless of size or sophistication. The Extension Act also defines property and casualty insurance to mean commercial lines of insurance without any reference to size or scope of the insurer or the insured. The disclosure and "make available" requirements are required by the Act. The rule allows all insurers, whether large or small, to use existing systems and business practices to demonstrate compliance. Treasury is required to pay the Federal share of compensation to insurers for insured losses subject to the new Program Trigger provisions in the Act. The requirement that insurers seek advance approval of certain settlements is now required by the Act. Any economic impact associated with the final rule flows from the Extension Act and not the final rule. 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 insurance policyholders and spreading the risk of insured losses resulting from an act of terrorism. Accordingly, a regulatory flexibility analysis is not required.

List of Subjects in 31 CFR Part 50

Terrorism risk insurance.

Authority and Issuance

■ For the reasons set forth above, the interim final rule revising subparts A, B, C, F, and I of 31 CFR part 50, which was published at 71 FR 27564 on May 11, 2006, is adopted as a final rule without change.

Dated: August 9, 2006.

Emil W. Henry, Jr.,

Assistant Secretary of the Treasury.

[FR Doc. E6-14180 Filed 8-24-06; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

[DoD-2006-OS-0182; 0720-AA97]

32 CFR Part 199

TRICARE Program; TRICARE Prime Remote for Active Duty Family Members and TRICARE Prime Enrollment Period

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This final rule implements 10 U.S.C. 1079(p), as added by section 722(b) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. The rule provides coverage for medical care for active duty family members who reside with an active duty member of the Uniformed Services assigned to remote areas and eligible for the program known as TRICARE Prime Remote. Active duty family members who enroll in TRICARE Prime Remote for Active Duty Family Members (TPRADFM) will enjoy benefits generally comparable to TRICARE Prime enrollees including access standards, benefit coverage, and cost-shares.

This final rule also implements Section 702 of the NDAA for FY 2003, which establishes circumstances under which dependents of Reserve Components and National Guard members called to active duty in support of contingency operations may enroll in TRICARE Prime Remote for Active Duty Family Members, and dependents of TRICARE Prime Remote service members may remain enrolled when the service member receives orders for an unaccompanied follow-on assignment.

Finally, this final rule establishes circumstances under which eligible beneficiaries may enroll in TRICARE Prime for a period of less than 1 year.

DATES: *Effective Date:* This rule is effective October 24, 2006.

ADDRESSES: TRICARE Management Activity (TMA), Program Requirements Division, 16401 East Centretech Parkway, Aurora, CO 80011-9066.

FOR FURTHER INFORMATION CONTACT: John J.M. Leininger, Program Requirements Division, TMA, (303) 676-3613 for questions on the TPRADFM portion of this rule. Ann Fazzini, Medical Benefits

and Reimbursement Systems, TMA, (303) 676-3803 for questions on the TRICARE Prime Enrollment Period portion of this rule.

SUPPLEMENTARY INFORMATION:

I. Summary of Final Rule Provisions

On October 30, 2000, the Floyd D. Spence National Defense Authorization Act (NDAA) for Fiscal Year 2001, Public Law 106-398 was signed into law. This final rule implements section 722(b) of this Act, which amended section 1079 of Title 10, United States Code, by adding subsection (p). It requires a TRICARE Prime-like benefit for active duty family members residing with their active duty Uniformed Services sponsor eligible for TRICARE Prime Remote, as defined by section 1074(c)(3) of Title 10, United States Code. The reader should refer to the interim final rule that was published on February 6, 2002 (67 FR 5477).

This final rule implements Section 702 of the NDAA for FY 2003, which amended section 1079 of Title 10, United States Code, by adding subsection (3) to subsection (p) which establishes circumstances under which dependents of Reserve Components and National Guard members called to active duty in support of contingency operations may enroll in TRICARE Prime Remote for Active Duty Family Members, and dependents of TRICARE Prime Remote service members may remain enrolled when the service member receives orders for an unaccompanied follow-on assignment. The reader should refer to the interim final rule that was published on July 31, 2003 [68 FR 44882] and was effective September 29, 2003.

This final rule also establishes circumstances under which eligible beneficiaries may enroll in TRICARE Prime for a period of less than one year. Enrollment in TRICARE Prime normally must be for a period of one year. Section 199.17(v), provides for the establishment of administrative requirements and procedures to ensure reasonable implementation and operation of the TRICARE program. Under this authority, an exception to the one-year enrollment requirement has been provided for Reservists and members of the National Guard who are called or ordered to active duty for a period of 179 days or more. A second exception has been established for those beneficiaries who are eligible to enroll in Prime but have less than one year of TRICARE eligibility remaining. For example, the dependents of an active duty member may enroll in Prime even though the member has less than one year of active duty remaining, and the