Example 1. Taxpayer A provides housing to N, a Hurricane Katrina displaced individual, from September 1, 2005, until March 10, 2006. Under paragraphs (a) and (c)(3) of this section, A may reduce A's taxable income by $500 on A's income tax return for calendar year 2005 or 2006 (but not both) for providing housing to N.

Example 2. The facts are the same as in *Example 1,* except that A and A's unmarried roommate B are co-lessees of their principal residence. Both A and B provide housing to N. Under paragraphs (a) and (c)(4) of this section, either A or B, but not both, may reduce taxable income by $500 for 2005 or 2006 for providing housing to N. If A or B reduces taxable income for 2005 for providing housing to N, neither A nor B may reduce taxable income for 2006 for providing housing to N.

Example 3. The facts are the same as in *Example 2,* except that in 2009 A and B provide housing to N, who in 2009 is a Midwestern disaster displaced individual. Under paragraph (c)(5) of this section, the limitation of paragraph (c)(4) of this section applies separately to each disaster. Therefore, either A or B may reduce taxable income by $500 for 2009 for providing housing to N.

Example 4. During 2008, unmarried roommates and co-lessees C and D provide housing to eight Midwestern disaster displaced individuals. Under paragraphs (a) and (c)(1)(i)(A) of this section, C may reduce taxable income by $2,000 on C's 2008 income tax return for providing housing to any four of these displaced individuals and D may reduce taxable income by $2,000 on D's 2008 income tax return for providing housing to the other four displaced individuals.

Example 5. (i) In 2008, a married couple, H and W, provide housing to a Midwestern disaster displaced individual, O. H and W file their 2008 income tax return as married filing jointly. Under paragraphs (a) and (c)(4) of this section, H and W may reduce taxable income by $500 on their 2008 income tax return for providing housing to O.

(ii) In 2009, H and W provide housing to O and to another Midwestern disaster displaced individual, P. H and W file their 2009 income tax returns as married filing separately. Because H and W reduced their 2008 taxable income for providing housing to O, under paragraph (c)(3) of this section, neither H nor W may reduce taxable income on their 2009 income tax returns for providing housing to O. Under paragraphs (a) and (c)(4) of this section, either H or W but not both, may reduce taxable income by $500 on his or her 2009 income tax return for providing housing to P.

Example 6. The facts are the same as in *Example 5,* except that in 2009 H and W provide housing to five Midwestern disaster displaced individuals in addition to O. H and W together may reduce taxable income on their 2009 income tax returns by a total of $2,000 for the Midwestern disaster displaced individuals (other than O). Under paragraph (c)(1)(i)(B) of this section, H and W may allocate the $2,000 in increments of $500 between their separate returns. For example, either one may reduce taxable income by $500 and the other may reduce taxable income by $1,500, or H and W each may reduce taxable income by $1,000.

(h) *Effective/applicability date.* This section applies for taxable years ending after December 11, 2006.

§ 1.9300–1T [Removed]

■ **Par. 3.** Section 1.9300–1T is removed.

Approved: December 8, 2009.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Michael F. Mundaca,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E9–29635 Filed 12–11–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505–AB10

Terrorism Risk Insurance Program; Recoupment Provisions

AGENCY: Departmental Offices, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (Treasury) is issuing this final rule as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (''TRIA'' or ''the Act''), as amended by the Terrorism Risk Insurance Extension Act of 2005 (''Extension Act'') and the Terrorism Risk Insurance Program Reauthorization Act of 2007 (''Reauthorization Act''). The Act established a temporary Terrorism Risk Insurance Program (''TRIP'' or ''Program'') under which the Federal Government would share the risk of insured losses from certified acts of terrorism with commercial property and casualty insurers. The Reauthorization Act has now extended the Program until December 31, 2014. This rule was published in proposed form on September 17, 2008, for public comment. The final rule contains minor clarifications in response to comments. The rule incorporates and implements statutory requirements in section 103(e) of the Act, as amended by the Reauthorization Act, for the recoupment of the Federal share of compensation for insured losses. In particular, the rule describes how Treasury will determine the amounts to be recouped and establishes procedures insurers are to use for collecting Federal Terrorism Policy Surcharges and remitting them to Treasury. The rule generally builds upon previous rules issued by Treasury.

DATES: This rule is effective January 13, 2010.

FOR FURTHER INFORMATION CONTACT: Howard Leikin, Deputy Director, Terrorism Risk Insurance Program, (202) 622–6770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297, 116 Stat. 2322) was enacted on November 26, 2002. 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 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. The Act authorizes Treasury to administer and implement the Terrorism Risk Insurance Program, including the issuance of regulations and procedures. The Program provides a Federal backstop for insured losses from an act of terrorism. Section 103(e) of the Act directs and gives Treasury authority to recoup Federal payments made under the Program through policyholder surcharges.

The Program was originally set to expire on December 31, 2005. On December 22, 2005, the Terrorism Risk Insurance Extension Act of 2005 (Pub. L. 109–144, 119 Stat. 2660) was enacted, which extended the Program through December 31, 2007. On December 26, 2007, the Terrorism Risk Insurance Program Reauthorization Act of 2007 (Pub. L. 110–160, 121 Stat. 1839) was enacted, which extends the Program through December 31, 2014.

The Reauthorization Act, among other changes, revised the recoupment provisions of the Act. These changes are explained below in the context of discussion of other provisions.

II. Previous Rulemaking

To assist insurers, policyholders, and other interested parties in complying with immediately applicable requirements of the Act, Treasury has issued interim guidance to be relied upon by insurers until superseded by regulations. Rules establishing general provisions implementing the Program, including key definitions, and requirements for policy disclosures and mandatory availability, can be found in Subparts A, B, and C of 31 CFR Part 50. Treasury's rules applying provisions of the Act to State residual market insurance entities and State workers'

compensation funds are at Subpart D of 31 CFR Part 50. Rules setting forth procedures for filing claims for payment of the Federal share of compensation for insured losses are at Subpart F of 31 CFR Part 50. Subpart G of 31 CFR Part 50 contains rules on audit and recordkeeping requirements for insurers, while Subpart I of 31 CFR Part 50 contains Treasury's rules implementing the litigation management provisions of section 107 of the Act.

III. The Proposed Rule

The proposed rule on which this final rule is based was published in the **Federal Register** at 73 FR 53798 on September 17, 2008. The proposed rule proposed to add a Subpart H on Recoupment and Surcharge Procedures to part 50, which comprises Treasury's regulations implementing the Act. It also proposed to add definitions in § 50.5 of Subpart A and amend §§ 50.60 and 50.61 of Subpart G. The proposed rule described how Treasury would determine the amounts to be recouped, the factors and considerations that would be the basis for establishing the specific surcharge amount, the procedures for Treasury's notification to insurers regarding the surcharges to be imposed, and the requirements for insurers to collect, report, and remit surcharges to the Treasury.

IV. Summary of Comments and Final Rule

Treasury is now issuing this final rule after careful consideration of all comments received on the proposed rule. While this final rule largely reflects the proposed rule, Treasury has made several clarifications based on the comments. These changes appear in §§ 50.70(c), 50.74(c), and 50.74(e).

Treasury received comments on the proposed rule from two national insurance industry trade associations, a national insurance rating and data collection bureau, and one insurance company. As described further below, commenters generally agreed with the proposed rule and the approach as being compatible with business operations. There were no negative comments on the approach. In response to comments, Treasury is providing additional clarification and some modifications of provisions in the proposed rule that pertain to notification to insurers, meeting certain deadlines for the collection of surcharges, describing the policies and premium subject to surcharges, and closing out insurer reporting to Treasury. The comments received and Treasury's revisions to the proposed rule are summarized below.

A. Determination of Recoupment Amount

The final rule describes how and when Treasury will determine recoupment amounts. Definitions of insurance marketplace aggregate retention amount, aggregate Federal share of compensation, mandatory and discretionary recoupment amounts, and uncompensated insured losses, which reflect requirements in the Act, are added to § 50.5.

The mandatory recoupment amount is the difference between the insurance marketplace aggregate retention amount for a Program Year and the aggregate amount, for all insurers, of uncompensated insured losses during such Program Year (unless the aggregate amount of uncompensated insured losses is greater than the insurance marketplace aggregate retention, in which case the mandatory recoupment amount is zero). For any Program Year beginning with 2008 through 2014, the insurance marketplace aggregate retention amount is the lesser of $27.5 billion and the aggregate amount, for all insurers, of insured losses from Program Trigger Events during the Program Year. For example, if the aggregate amount of insured losses from Program Trigger Events during the Program Year were $10 billion, the insurance marketplace aggregate retention amount would be $10 billion. The mandatory recoupment amount would be the difference between $10 billion and the aggregate amount of uncompensated insured losses. ''Uncompensated insured losses'' is generally the aggregate amount of insured losses from Program Trigger Events not compensated by the Federal Government because the losses are within insurer deductibles or the 15 percent insurer share, or are within the portion of the insured losses that exceed the insurer deductible but are otherwise not paid pursuant to section 103(e)(1) of TRIA. The amount of uncompensated insured losses depends on the distribution of those losses among insurers. So continuing with the above example, if uncompensated insured losses amounted to $8 billion and Federal payments amounted to $2 billion, the mandatory recoupment amount would be $2 billion (the difference between $10 billion and the aggregate amount of uncompensated insured losses of $8 billion). The amount the Secretary would be required to collect under section 103(e)(7)(C) of the Act would be 133 percent of $2 billion, or $2.67 billion.

Section 103(e)(7)(D) of the Act also provides the Secretary with discretionary authority to recoup additional amounts to the extent that the amount of Federal financial assistance exceeds the mandatory recoupment amount. The Secretary may recoup such additional amounts the Secretary believes can be recouped based on: the ultimate costs to taxpayers of no additional recoupment; the economic conditions in the commercial marketplace; the affordability of commercial insurance for small- and medium-sized businesses; and such other factors that the Secretary considers appropriate. The final rule refers to these considerations in § 50.70(b). Because of the great uncertainty as to economic conditions after the occurrence of an act of terrorism, Treasury believes it is prudent to retain maximum flexibility to address these considerations at a future time. In exercising this discretionary authority, however, Treasury generally intends to consider these various factors on a broad-scale basis.

The Reauthorization Act added section 103(e)(7)(E), which establishes deadlines by which the collection of terrorism loss risk-spreading premiums, which are required for mandatory recoupment, must be accomplished. The amounts and deadlines vary depending on when an act of terrorism occurs:

- For any act of terrorism that occurs on or before December 31, 2010, the Secretary shall collect all required premiums by September 30, 2012;
- For any act of terrorism that occurs between January 1 and December 31, 2011, the Secretary shall collect 35 percent of any required premiums by September 30, 2012, and the remainder by September 30, 2017; and
- For any act of terrorism that occurs on or after January 1, 2012, the Secretary shall collect all required premiums by September 30, 2017.

Because of these deadlines, one commenter raised a concern over the potential that recoupment could far outpace the payment of claims and therefore recommended the use of present value calculations and excess fund accounts to earn interest on funds provided in advance to the Federal Government. In the preamble to the proposed rule, Treasury had stated that the timing requirements for collecting ''required premiums'' means that surcharges must be sufficient to recoup Federal funds *actually outlaid* as of the target dates for recouping any Federal share of compensation for insured losses. Treasury ascertained that the commenter's concern was based on the potential for recouping ultimate Federal share amounts that would not actually be expended by Treasury until after the recoupment period. For clarification,

Treasury has revised § 50.70 to state that required amounts will be collected ''based on the extent to which payments for the Federal share of compensation have been made by the collection deadlines.'' As illustrated in the example above, the required amounts include the additional 33 percent of the outlays. Continuing with the above example in which the Federal Government expects that Federal payments will reach $2 billion for an act of terrorism occurring prior to December 31, 2010, if as of September 30, 2012, $1 billion has actually been paid, recoupment should result in the collection of $1.33 billion by that date. The remaining amount of Federal payments plus 33 percent would be recouped after September 30, 2012.

Another commenter suggested additional language for the rule that would address Treasury's intention to not exceed required amounts in its establishment of surcharges, the avoidance of collecting *de minimis* amounts, and the handling of excess amounts collected. Treasury believes that the concerns raised were for the most part already addressed in the proposed rule § 50.72 which, in providing for the establishment of the surcharge, lists a number of factors and considerations including the collection timing requirements of section 103(e)(7)(E) of the Act, and the likelihood that the amount of the Federal Terrorism Policy Surcharge may result in the collection of an aggregate recoupment amount in excess of the planned recoupment amount. In addition, under the rule the Secretary may consider such other factors as the Secretary considers important, which could include the costs of collecting *de minimis* recoupment amounts.

Section 50.71(a) provides that if payments for the Federal share of compensation have been made for a Program Year, and Treasury determines that insured loss information is sufficiently developed and credible to serve as a basis for calculating recoupment amounts, then Treasury will make an initial determination of any mandatory or discretionary recoupment amounts for that Program Year. Ideally, Treasury will use loss information obtained from the submissions by insurers for the Federal share of compensation, as well as other industry sources, to determine the appropriate time to make an initial determination of recoupment amounts. Thereafter, as described under § 50.71(c), Treasury will at least annually examine the latest available information on insured losses to recalculate any recoupment amounts until such time as Treasury determines that the calculation is considered final. The final rule, in § 50.71(d), also provides that Treasury may issue a data call to insurers for the submission of information on insured losses from Program Trigger Events and for insurer deductible information.

Treasury must be prepared to initiate mandatory recoupment based on estimates, prospectively, of insured losses, the Federal share of compensation for insured losses, and the resulting Federal outlays. The Reauthorization Act added a provision (Section 103(e)(7)(F)) requiring the Secretary to publish, within 90 days of the date of an act of terrorism, an estimate of aggregate insured losses which shall be used as the basis for determining whether mandatory recoupment will be required. Proposed § 50.71(b) provided that Treasury would meet this requirement within 90 days *after certification* of an act of terrorism. Two commenters stated that this proposal should be revised because the statute requires that the estimate be published within 90 days after the occurrence of the act of terrorism.

''Act of terrorism'' is a defined statutory term. Under Section 102(1)(A), an ''act of terrorism'' is any act which is certified by the Secretary, in concurrence with the Secretary of State and the Attorney General of the United States, and meets certain specified elements. Without certification, an act does not meet the definition of an ''act of terrorism.''

Treasury believes that the most reasonable interpretation of Section 103(e)(7)(F) is that such an estimate of aggregate insured losses must be published 90 days after the certification of an act of terrorism. There is no limitation under Section 102(1) on the time the Secretary may take to certify, or determine not to certify, an act as an act of terrorism. Moreover, the purpose of this estimate is for use in determining whether mandatory recoupment will be required. Until there is a certification of an act of terrorism, there would be no basis to make Federal payments for insured losses and no need to consider whether mandatory recoupment would be required.

This interpretation is also consistent with the Procedural Order entered by the Judicial Panel on Multidistrict Litigation concerning the 90-day period in Section 107(a)(4) of the Act, which requires a designation by the Panel ''not later than 90 days after the occurrence of an act of terrorism.'' The order notes the definition of an ''act of terrorism,'' and accordingly provides that ''the 90-day period for the Panel to designate the court or courts for litigation covered by the Act begins on the date that the Treasury Secretary certifies an act of terrorism.'' Procedural Order filed June 1, 2004, available at *http://www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/pdf/order.pdf.* For the above reasons, § 50.71(b)(1) is being adopted as proposed.

2. Establishment of Federal Terrorism Policy Surcharge

Once Treasury has determined an amount to be recouped, an assessment period and Surcharge amount will be established. The final rule includes new definitions for ''Federal Terrorism Policy Surcharge'' and '' Surcharge'', ''assessment period'' and ''Surcharge effective date'', which are added to § 50.5 of the regulations. § 50.72(b) provides that the Surcharge is the obligation of the policyholder and payable to the insurer with the premium for a property and casualty insurance policy in effect during the assessment period.

An ''assessment period'' is defined as a period during which policyholders must pay, and insurers must collect, the Federal Terrorism Policy Surcharge for remittance to Treasury. Treasury's intention is that, to the extent possible, assessment periods will be in full-year increments in order to equitably impose the Surcharge on policyholders who have policy term effective dates throughout the year. Due to the collection deadlines, however, this may not always be feasible.

The definition for ''Federal Terrorism Policy Surcharge'' is the amount established by Treasury as a policy surcharge on policies of ''property and casualty insurance'' as that term is defined in § 50.5(u). The Surcharge is to be expressed as a percentage of the amount charged as written premium for commercial property and casualty coverage in such policies.

The factors and considerations Treasury will consider in establishing the amount of the Federal Terrorism Policy Surcharge are set out in § 50.72(a). They include requirements of the Act as well as other factors. In particular, Section 103(e)(7)(C) of TRIA as amended by the Reauthorization Act, requires that once a mandatory recoupment amount is determined, collections are to equal 133 percent of that amount. Section 103(e)(8)(D) of the Act requires Treasury, in determining the method and manner of imposing the Surcharge, to take into consideration the economic impact on commercial centers of urban areas, risk factors related to rural areas and smaller commercial

centers, and various exposures to terrorism risk for different lines of insurance. In the preamble to the proposed rule, Treasury explained that while it will consider these factors at the time it becomes necessary to establish the amount of a Surcharge, for several reasons it is likely that the same Federal Terrorism Policy Surcharge would apply to all commercial property and casualty lines of insurance, as defined by the Act, and all rating classifications. Treasury explained that after discussions with industry experts, it was understood that variations in underlying premium amounts for commercial lines insurance policies already appear to substantially operate in a way that addresses the adjustment factors described in the Act. Treasury also stated its concern over the time and resources needed to perform the complex analyses and to construct and implement a detailed risk classification scheme reflecting these factors, as well as needing to meet collection deadlines based on estimates of future Federal outlays. However, based on a review of economic conditions at the time a Surcharge amount is established, Treasury stated that it might, if necessary, and within the collection timing constraints, mitigate economic impacts by imposing a lesser Surcharge over a longer period of time. In the proposed rulemaking, Treasury specifically solicited public comment on this approach. No comments were submitted on this issue.

3. Notification of Recoupment

Section 50.73 of the final rule states that Treasury will provide reasonable advance notice of any initial Surcharge effective date. This effective date shall be January 1, unless such date would not provide for sufficient notice of implementation while meeting the collection timing requirements of section 103(e)(7)(E) of the Act.

The purpose of a January 1 effective date is to coordinate with the National Association of Insurance Commissioners (NAIC) Annual Statement reporting period. In the preamble to the proposed rule, Treasury stated its belief that there is a clear advantage to coordinating an assessment period and the written premium and remitted Surcharge amounts with the calendar year basis for the NAIC Annual Statements. However, insurers also would ideally have 180 days' notice to implement the Surcharge. The timing of an act of terrorism, the emerging estimates of insured losses and resulting Federal outlays, and the requirement to collect the Surcharges by certain deadlines could impinge on Treasury's ability to provide the desired 180 days' notice to insurers of a Surcharge implementation as of January 1. Two possible alternatives for managing this circumstance were suggested for which Treasury specifically sought public comment.

The first alternative was a possible bifurcated notification to insurers. Treasury would notify insurers 180 days in advance of January 1, that an assessment period will commence, but the actual Surcharge amount would not yet be provided. This would allow insurers time to develop systems changes to implement a Surcharge. The actual Surcharge amount would be provided at a later date, perhaps at least 60 days in advance of January 1.

The second alternative was to relax the standard of a January 1 implementation date. The assessment period could start as of the first day of a later month, but continue through that calendar year. The result of this would be a more complicated reconciliation of written premium and Surcharge amounts with NAIC Annual Statement data, but would yet be substantially consistent with the NAIC Annual Statement reporting period.

Two commenters provided comments on the alternative approaches. Both supported the first (bifurcated) approach to notification. One commenter stated that Treasury should allow at least 90 days advance notice of the actual surcharge amount while the other commenter stated that Treasury should provide notice of the actual surcharge amount at least 60 days in advance of January 1. In considering how to proceed based on these comments, Treasury is mindful of the generally recognized downside of using an effective date other than January 1. We acknowledge that 90 days advance notice of the actual surcharge amount would be preferable. However, we believe that most insurers could make the final system changes with at least 60 days' notice. To have to implement surcharges and reconciliations with a later implementation date than January 1, just because a 90 day notice was not possible, would be more disruptive to more insurers. Therefore, in implementing the final rule in circumstances where all necessary information cannot be provided at least 180 days in advance, Treasury intends to use the bifurcated approach. This would include 180 days' notice of the commencement of an assessment period, and, at least 60 days notice and, if possible, as much as 90 days notice of the actual surcharge amount.

Treasury will provide notification annually as to continuation of the Surcharge. Treasury will also provide reasonable advance notice of any modification or cessation of the Surcharge. In such cases, Treasury anticipates providing at least 90 days' notice. Notifications will be accomplished through publications in the **Federal Register** or in another manner Treasury deems appropriate, based upon the circumstances of the particular act of terrorism.

Despite the strong preference for the bifurcated approach, Treasury must have the flexibility to meet the statutory collection deadlines even if that approach cannot be accomplished. The final rule retains the language of § 50.73(b) of the proposed rule, which allows the effective date to be other than January 1 if that date would not provide for sufficient notice of implementation while meeting the statutory collection deadlines. The second alternative described above would only be implemented as a fallback position.

4. Collecting the Surcharge

Section 50.74 of the proposed rule specified that the Surcharge shall be imposed and collected on a written premium basis for policies that are in force during the assessment period. The proposed rule further provided that all new, renewal, mid-term, and audit additional premiums for a policy term would be subject to the Surcharge in effect on the policy term effective date. The preamble to the proposed rule noted that policies placed in force prior to the assessment period would not be subject to the Surcharge until renewal, regardless of mid-term endorsements. Two commenters suggested a clarification in the rule, referring to policies that ''incept or renew'' during the assessment period rather than policies that are ''in force'' during the assessment period. Treasury agrees that this is consistent with the intent and has made this change in the final rule.

One commenter noted that since return premium on audit would also be subject to the return of the Surcharge, the term ''audit additional premiums'' noted above should merely read ''audit premiums.'' Again, this is consistent with the intent and for the sake of clarity Treasury has made the suggested change in the final rule. For additional clarity, Treasury has modified the proposed rule § 50.74(e), which provided for the return of Surcharge amounts attributable to unearned premiums which are returned to policyholders, to state that Surcharge amounts are to be returned when attributable to any refunded premium.

As noted in the preamble of the proposed rule, the definition of property

and casualty insurance was the result of extensive consultation, which produced a regulatory definition crafted in terms of specific lines of business employed in the NAIC's Exhibit of Premium and Losses of the NAIC Annual Statement, modified by the exceptions for certain types of insurance excluded by the Act.

Insurers will be obligated to implement the Federal Terrorism Policy Surcharge on a policyholder transaction level. There is a complicating factor in the definition of commercial property and casualty insurance in that certain exclusions in the definition create a possibility of individual policies providing types of insurance that are considered to fall both within and outside the Act's definition of property and casualty insurance. The authorities under the Act (at subsections 103(e)(8)(A) and (C)[1]) limit the application of the Surcharge to the policy premium amount charged for property and casualty insurance coverage under the policy.

In the proposed rule, as a basic starting point, Treasury proposed that the Surcharge apply to the full premium for any policy falling within the definition of property and casualty insurance in proposed § 50.5(u), i.e., the premium for the policy is reported on the insurer's NAIC Annual Statement, or equivalent reporting document, in a specified commercial line of business as defined by Treasury's regulations. However, a portion of a policy's premium would not be subject to the Surcharge if, despite the line of business premium reporting to the NAIC, that portion of the premium is for coverage under the policy that is a type of insurance not considered to be commercial property and casualty insurance as specified in Treasury's regulations.

In the case of a policy providing multiple insurance coverages, where an insurer cannot identify the premium amount charged specifically for property and casualty coverage under the policy, the proposed rule provided for two circumstances. If the insurer estimates that the portion of the premium amount charged for coverage other than property and casualty insurance is *de minimis* to the total premium for the policy, the insurer may impose and collect from the policyholder a Surcharge amount based on the total premium for the policy. If the insurer estimates that the portion of the premium amount charged for coverage other than property and casualty insurance is not *de minimis,* the insurer shall impose and collect from the policyholder a Surcharge amount based on a reasonable estimate of the premium amount for the property and casualty insurance coverage under the policy.

One comment on the proposed rule was that it provides no guidance as to what is and what is not *de minimis.* Treasury intended for there to be some flexibility in applying this provision of the rule where there is a very small, but not specifically calculable portion of the premium that can be attributed to coverage that is not within the definition of property and casualty insurance.

The commenter urged Treasury to review analogous provisions of earlier TRIA regulations, such as those addressing insurer deductibles and direct earned premium calculations. It was unclear from this comment whether this was from the standpoint of concept or, more specifically, the 25 percent threshold for considering commercial coverage to be incidental to a policy for purposes of the definition of direct earned premium. If it is the latter, Treasury is satisfied that 25 percent of a premium is not a *de minimis* amount. However, in considering further guidance, because of the variety of insurer and policy premium circumstances, Treasury is reluctant to further define what is *de minimis.* As noted in the proposed rule preamble, Treasury will be developing reporting forms for the insurer submission of surcharges and will consider additional guidance in connection with that forms development. For the final rule, the relevant provision, § 50.74(c)(2), is unchanged.

As part of this rule, Treasury is adding a definition to § 50.5 for direct written premium, which is the premium information for commercial property and casualty insurance, as defined in the regulations, that is included by an insurer in column 1 of the Exhibit of Premiums and Losses of the NAIC Annual Statement or in an equivalent reporting requirement. Consistent with the discussion above, an insurer would subtract the premium that is not subject to the Surcharge. Otherwise, the full premium for the policy is included for Surcharge computation. Minor adjustments to the definition of direct earned premium to eliminate some inconsistencies between that definition and the new definition of direct written premium are included in the final rule as had been proposed. The definition of direct written premium has been crafted to be consistent with premium billing and collection practices on a transactional level, as well as consistent with state regulatory requirements for reporting written premiums. The Surcharge itself is not considered premium.

The proposed rule, in § 50.74(c)(1), stated that for purposes of applying the Surcharge, written premium basis means the premium amount charged a policyholder by an insurer for property and casualty insurance as defined in § 50.5(u), including all premiums, policy expense constants and fees defined as premium pursuant to the Statements of Statutory Accounting Principles (SSAP) established by the NAIC. One commenter asserted that since states can modify the SSAP, this section should allow for premium pursuant to the SSAP as adopted by the jurisdiction for which the premium is reported. Treasury has made this change in the final rule.

Section 50.74(f) provides that an insurer may satisfy its obligation to collect the Federal Terrorism Policy Surcharge by remitting the calculated Surcharge amount to Treasury, without actual collection, in circumstances where the expense of collecting the Surcharge from all policyholders during an assessment period exceeds the amount of the Surcharges anticipated to be collected.

The Federal Terrorism Policy Surcharge is a repayment of Federal financial assistance in an amount required by law. It is not a premium paid by a policyholder to an insurer. Proposed § 50.74(g) stated that no fee or commission shall be charged on the Federal Terrorism Policy Surcharge. Two commenters said that the provision should be expanded to provide that the surcharge is not subject to taxes or assessments. Section 106 of the Act generally preserves the jurisdiction or regulatory authority of the insurance commissioner (or any agency or office performing like functions) of any state over any insurer or other person except as specifically provided in the Act. Whether the surcharge is subject to taxes or assessments concerns state law as well as the issue of Federal preemption. Treasury has concluded that taxes and assessments should not be addressed in the regulation.

The proposed rule provided that if an insurer returns any unearned premium to a policyholder, it shall also return any Federal Terrorism Policy Surcharge collected that is attributable to the unearned premium. As noted earlier in the discussion of comments associated with treatment of audit premiums, § 50.74(e) of the final rule has been modified to address the refund of any premiums.

[1] Under the Reauthorization Act, Section 103(e)(8)(C) now applies only to discretionary recoupment.

The final rule provides that the insurer shall have such rights and remedies to enforce the collection of the Surcharge that are equivalent to those that exist under applicable state or other law for nonpayment of premium. Insurers should follow the appropriate state law in such circumstances.

5. Remitting the Surcharge

The effect of § 50.76 of the final rule is that, notwithstanding the definition of an insurer in prior § 50.5(f) (now redesignated as § 50.5(l)), the collection, reporting and remittance of Federal Terrorism Policy Surcharges to Treasury shall be the responsibility of each individual insurer entity as otherwise defined in § 50.5(f) without including affiliates. This is because affiliations of insurers that are relevant in determining insurer deductibles are not pertinent to the collection and remittance of the Surcharges.

Consistent with the Act, Treasury's approach to the collection and remittance of the Federal Terrorism Policy Surcharge is to place an obligation on the policyholder to pay the Surcharge and require the insurer to collect the Surcharge from each policyholder. The final rule provides insurers the means to address non-payment of the Surcharge and provides for the reporting and remittance of the Surcharge to Treasury according to calculated amounts that are based on statutory financial reporting already required by the States. The description of premium subject to the Surcharge in § 50.74(c) and the definition of ''direct written premium'' in § 50.5(g) and other provisions of the final rule on the treatment of the Surcharge at both the policy transaction and financial statement reporting levels have been crafted so that the Surcharge amounts calculated for remittance to Treasury will be equivalent to the actual collections. By relying on premium amounts that are reported to the States, and that are already subject to other audit requirements, Treasury expects that its own audit responsibilities can be accomplished with less focus on individual insurer compliance with the Surcharge collection than would otherwise be necessary. This will result in a more efficient mechanism for recoupment for Treasury, insurers, and policyholders.

In developing reporting and remittance frequency requirements, Treasury considered the amount of time insurers may be holding the funds collected prior to remittance to Treasury, and the current Value of Federal Funds published by the Treasury's Financial Management Service. Treasury also recognizes that a monthly accounting period is standard within the insurance industry. The final rule allows insurers to retain the interest (and therefore not have to separately account and remit such amounts to Treasury) on funds collected on a ''written'' basis and remitted monthly to Treasury. Treasury believes that this is a reasonably efficient approach to administering the collection and remittance requirements of the Act. Should the Value of Federal Funds at the time of any actual imposition of the Federal Terrorism Policy Surcharge be significantly greater than current levels, Treasury will revisit this issue.

Section 50.75 of the final rule calls for insurers to report and remit Federal Terrorism Policy Surcharges on a monthly basis, starting with the first month within the assessment period, through November of the calendar year and on an annual basis as of the last month. As discussed earlier, ideally and as intended, the first month within the assessment period would be January. The requirements are expected to ease the administrative burden by building upon reporting requirements already imposed by the States. The definition of ''direct written premium'' on which an insurer must report and the specific due dates for reporting in § 50.75(a) have been coordinated with NAIC Annual Statement requirements. The main reconciliation of information reported to Treasury and to NAIC would be accomplished with the year-end NAIC Annual Statements.

The collection timing requirements of section 103(e)(7)(E) of the Act generally require recoupment of certain amounts of Federal outlays through September 30, coinciding with the end of the Federal fiscal year. Treasury will estimate recoupment amounts and Surcharges so that these deadlines are met, while still keeping to an end of calendar year date for defining an assessment period. This end date will allow the reporting and reconciliation to be coordinated with Annual Statements.

To accommodate possible changes in the Federal Terrorism Policy Surcharge amount from one year to another, direct written premium is to be broken down by policy year. This is similar to requirements imposed at the state-level with regard to other assessments.

Since remittance is on a ''written'' basis, the proposed rule provided for a continued reporting requirement for one year following the end of the assessment period. One commenter noted that closing out reporting one year after the termination of the assessment period would be satisfactory for the vast majority of policies, but that some policies will have final audits that close after that time and that, in addition, the proposed rule was unclear with respect to policies with terms longer than one year. In developing the proposed rule and in considering this comment, Treasury has endeavored to strike a balance between the accounting of Surcharges and the costs of maintaining the systems for collecting, submitting, and reporting of Surcharges on the part of insurers and Treasury. After consulting with industry experts, Treasury believes that revisions to the written premium amounts that would occur more than one year after the termination of the assessment period, which would be associated with additional or returned premiums on policies that incepted or renewed in the assessment period, would be sufficiently small relative to the aggregate premium amounts to justify ending further adjustments to the Surcharge. Therefore in the final rule, clarifications have been added to §§ 50.74(c) and (e) to provide that insurers are no longer required to collect or refund Surcharges once the reporting requirement to Treasury has ended. Section 50.75(d) has also been revised to clarify that an insurer obtains credit for a refund of any Federal Terrorism Policy Surcharges previously remitted to Treasury through its submission of monthly or annual statements.

Treasury will be developing forms for the reporting and remittance of the Federal Terrorism Policy Surcharge and plans on implementing an electronic reporting and payment facility.

6. Audit Authority and Recordkeeping

It is Treasury's intention that it's reporting requirements, coordinated and reconciled with other state-level reporting, will result in less of an audit burden than might otherwise be necessary. The final rule includes a revision of the current § 50.60 and an addition to the current § 50.61. The revision adds language to the effect that the Secretary of the Treasury, or an authorized representative, shall have, upon reasonable notice, access to all books, documents, papers and records of an insurer that are pertinent to the Federal Terrorism Policy Surcharge. The addition generally provides that records relating to premiums, Surcharges, collections and remittances to Treasury shall be retained by an insurer and kept available for review for not less than three (3) years following the conclusion of the assessment period or settlement of accounts with Treasury, whichever is later.

7. Enforcement

Insurers will be responsible for collecting appropriate Surcharge amounts from their policyholders. Because § 50.74(d) provides that insurers have rights and remedies to enforce collection that are equivalent to those that exist under state law for nonpayment of premium, Treasury believes insurers will have the requisite tools to collect the Surcharge. Treasury may rely on its authority to impose civil monetary penalties on an insurer pursuant to section 104(e)(1)(A) of the Act for the failure to charge, collect or timely remit proper Surcharge amounts to enforce the provisions of this final rule.

8. Other Technical Changes

As noted under ''Collecting the Surcharge,'' the final rule includes some minor changes to the existing definition of ''direct earned premium.'' Although the complete definition is set out for information, no substantive changes were made to the existing § 50.5(d)(1)(iv), (d)(2), (d)(3), and (d)(4). Similarly, although the existing provision on recordkeeping is set out in § 50.61(a), no substantive changes were made to that provision.

V. Procedural Requirements

Executive Order 12866, ''Regulatory Planning and Review''. This 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 (OMB).

Regulatory Flexibility Act. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* it is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. TRIA requires all insurers that receive direct earned premiums for commercial property and casualty insurance, to participate in the Program. Treasury is required to recoup all or a portion of the Federal share of compensation paid to insurers for insured losses in accordance with the Act. Insurers that are affected by these regulations tend to be large businesses, therefore Treasury has determined that the rule will not affect a substantial number of small entities. In addition, Treasury has determined that the economic impact of the rule is not significant. The Act requires that a policyholder surcharge be imposed on all policies of property and casualty insurance, as defined in the Act. The Act requires Treasury to provide for insurers to collect the surcharges and remit them to Treasury. Unless there is an act of terrorism, and a Federal sharing of compensation for insured losses requiring recoupment, there is no economic impact at all. The ability to collect surcharges is routine within the insurance industry. Should a surcharge be required, it would be collected and submitted by insurers based on existing normal business processes. The payment of a surcharge is the obligation of the policyholder. The insurer must collect the surcharge, but would do so through the normal payment by the policyholder of the insurance premium for property and casualty insurance. The economic impact on all commercial property and casualty insurers (including any that might be small entities) should thus be minimal. Treasury did not receive any comments at the proposed rule stage relating to the rule's impact on small entities. Accordingly, a regulatory flexibility analysis is not required.

Paperwork Reduction Act. The collection of information contained in this final rule has been approved by the OMB under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3507(d) and has been assigned control number 1505–0207.

List of Subjects in 31 CFR Part 50

Terrorism risk insurance.

Authority and Issuance

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

PART 50—TERRORISM RISK INSURANCE PROGRAM

■ 1. The authority citation for part 50 is revised to read as follows:

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

■ 2. Section 50.5 is amended as follows:
■ a. Paragraphs (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), and (r) are redesignated as paragraphs (f), (k), (l), (m), (o), (p), (q), (r), (s), (t), (u), (v), (w), (z) and (bb), respectively.
■ b. New paragraphs (d), (e), (g), (h), (i), (j), (n), (x), (y), and (aa) are added.
■ c. Newly designated paragraph (f) is revised.

The revisions read as follows:

§ 50.5 Definitions.

* * * * *

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

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

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

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

(i) Premium information as reported to the NAIC should be included in the calculation of direct earned premiums for purposes of the Program only to the extent it reflects premiums for commercial property and casualty insurance issued by the insurer against losses occurring at the locations described in section 102(5)(A) and (B) of the Act.

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

(iii) Personal property and casualty insurance coverage that includes incidental coverage for commercial purposes is primarily personal coverage, and therefore premiums may be fully excluded by an insurer from the calculation of direct earned premium. For purposes of the Program, commercial coverage is incidental if less than 25 percent of the total direct earned premium is attributable to commercial coverage. Commercial property and casualty insurance against losses occurring at locations other than the locations described in section 102(5)(A) and (B) of the Act, or other insurance coverage that does not meet the definition of commercial property and casualty insurance, but that

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

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

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

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

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

(3) *Certain eligible surplus line carrier insurers.* An eligible surplus line carrier insurer listed on the NAIC Quarterly Listing of Alien Insurers must ascertain its direct earned premium as follows:

(i) For policies that were in-force as of November 26, 2002, or entered into prior to January 1, 2003, direct earned premiums are to be determined with reference to the definition of property and casualty insurance and the locations described in section 102(5)(A) and (B) of the Act by allocating the appropriate portion of premium income for losses for property and casualty insurance at such locations. The same allocation methodologies contained within the NAIC's ''Allocation of Surplus Lines and Independently Procured Insurance Premium Tax on Multi-State Risks Model Regulation'' for allocating premium between coverage for property and casualty insurance for losses occurring at the locations described in section 102(5)(A) and (B) of the Act and all other coverage, to ascertain the appropriate percentage of premium income to be included in direct earned premium, may be used.

(ii) For policies issued after January 1, 2003, premium for insurance that meets the definition of property and casualty insurance for losses occurring at the locations described in section 102(5)(A) and (B) of the Act, must be priced separately by such eligible surplus line carriers.

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

(g) *Direct written premium* means the premium information for commercial property and casualty insurance as defined in paragraph (u) of this section that is included by an insurer in column 1 of the Exhibit of Premiums and Losses of the NAIC Annual Statement or in an equivalent reporting requirement. The Federal Terrorism Policy Surcharge is not included in amounts reported as direct written premium.

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

(i) *Federal Terrorism Policy Surcharge* means the amount established by Treasury under section 103(e)(8) of the Act which is imposed as a policy surcharge on property and casualty insurance policies, expressed as a percentage of the written premium.

(j) *Insurance marketplace aggregate retention amount* means an amount for a Program Year as set forth in section 103(e)(6) of the Act. For any Program Year beginning with 2008 through 2014, such amount is the lesser of $27,500,000,000 and the aggregate amount, for all insurers, of insured losses from Program Trigger Events during the Program Year.

* * * * *

(n) *Mandatory recoupment amount* means the difference between the insurance marketplace aggregate retention amount for a Program Year and the uncompensated insured losses during such Program Year. The mandatory recoupment amount shall be zero, however, if the amount of such uncompensated insured losses is greater than the insurance marketplace aggregate retention amount.

* * * * *

(x) *Surcharge* means the Federal Terrorism Policy Surcharge as defined in paragraph (i) of this section.

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

* * * * *

(aa) *Uncompensated insured losses*—means the aggregate amount of insured losses, from Program Trigger Events, of all insurers in a Program Year that is not compensated by the Federal Government because such losses:

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

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

* * * * *

■ 3. Revise §§ 50.60 and 50.61 of Subpart G to read as follows:

§ 50.60 Audit authority.

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

§ 50.61 Recordkeeping.

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

(b) Each insurer that collects a Federal Terrorism Policy Surcharge as required by subpart H of this part shall retain records related to such Surcharge, including records of the property and casualty insurance premiums subject to the Surcharge, the amount of the Surcharge imposed on each policy, aggregate Federal Terrorism Policy Surcharges collected, and aggregate Federal Terrorism Policy Surcharges remitted to Treasury during each assessment period. Such records shall be retained and kept available for review for not less than three (3) years following the conclusion of the assessment period or settlement of accounts with Treasury, whichever is later.

■ 4. Subpart H of part 50 is added to read as follows:

Subpart H—Recoupment and Surcharge Procedures

Sec.

Subpart H—Recoupment and Surcharge Procedures

§ 50.70 Mandatory and discretionary recoupment.

(a) Pursuant to section 103 of the Act, the Secretary shall impose, and insurers shall collect, such Federal Terrorism Policy Surcharges as needed to recover 133 percent of the mandatory recoupment amount for any Program Year.

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

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

(1) For any act of terrorism that occurs on or before December 31, 2010, the Secretary shall collect all required amounts by September 30, 2012;

(2) For any act of terrorism that occurs between January 1 and December 31, 2011, the Secretary shall collect 35 percent of any required amounts by September 30, 2012, and the remainder by September 30, 2017; and

(3) For any act of terrorism that occurs on or after January 1, 2012, the Secretary shall collect all required amounts by September 30, 2017.

§ 50.71 Determination of recoupment amounts.

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

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

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

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

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

§ 50.72 Establishment of Federal Terrorism Policy Surcharge.

(a) Treasury will establish the Federal Terrorism Policy Surcharge based on the following factors and considerations:

(1) In the case of a mandatory recoupment amount, the requirement to collect 133 percent of that amount;

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

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

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

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

(6) The collection timing requirements of section 103(e)(7)(E) of the Act;

(7) The likelihood that the amount of the Federal Terrorism Policy Surcharge

may result in the collection of an aggregate recoupment amount in excess of the planned recoupment amount; and

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

(b) The Federal Terrorism Policy Surcharge shall be the obligation of the policyholder and is payable to the insurer with the premium for a property and casualty insurance policy in effect during the assessment period established by Treasury. *See* § 50.74(c).

§ 50.73 Notification of recoupment.

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

(b) Treasury will provide reasonable advance notice to insurers of any initial Federal Terrorism Policy Surcharge effective date. This effective date shall be January 1, unless such date would not provide for sufficient notice of implementation while meeting the collection timing requirements of section 103(e)(7)(E) of the Act.

(c) Treasury will provide reasonable advance notice to insurers of any modification or cessation of the Federal Terrorism Policy Surcharge.

(d) Treasury will provide notification to insurers annually as to the continuation of the Federal Terrorism Policy Surcharge.

§ 50.74 Collecting the Surcharge.

(a) Insurers shall collect a Federal Terrorism Policy Surcharge from policyholders as required by Treasury.

(b) Policies subject to the Federal Terrorism Policy Surcharge are those for which direct written premium is reported on commercial lines of business on the NAIC's Exhibit of Premiums and Losses of the NAIC Annual Statement (commonly known as Statutory Page 14) as provided in § 50.5(u)(1), or equivalently reported.

(c) For policies subject to the Federal Terrorism Policy Surcharge, the Surcharge shall be imposed and collected on a written premium basis for policies that incept or renew during the assessment period. All new, renewal, mid-term, and audit premiums for a policy term are subject to the Surcharge in effect on the policy term effective date. Notwithstanding this paragraph, if the premium for a policy term that would otherwise be subject to the Surcharge is revised after the end of the reporting period described in § 50.75(e), then any additional premium attributable to such revision is not subject to the Surcharge. For purposes of this subpart:

(1) Written premium basis means the premium amount charged a policyholder by an insurer for property and casualty insurance as defined in § 50.5(u), including all premiums, policy expense constants and fees defined as premium pursuant to the Statements of Statutory Accounting Principles established by the National Association of Insurance Commissioners, as adopted by the state for which the premium will be reported.

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

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

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

(3) The Federal Terrorism Policy Surcharge is not considered premium.

(d) A policyholder must pay the applicable Federal Terrorism Policy Surcharge when due. The insurer shall have such rights and remedies to enforce the collection of the Surcharge that are the equivalent to those that exist under applicable state or other law for nonpayment of premium.

(e) When an insurer returns an unearned premium, or otherwise refunds premium to a policyholder, it shall also return any Federal Terrorism Policy Surcharge collected that is attributable to the refunded premium. Notwithstanding this paragraph, if the written premium for a policy is revised and refunded after the end of the reporting period described in § 50.75(e), then the insurer is not required to refund any Surcharge that is attributable to the refunded premium.

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

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

§ 50.75 Remitting the surcharge.

(a) Each insurer shall provide a statement of direct written premium and Federal Terrorism Policy Surcharge to Treasury on a monthly basis, starting with the first month within the assessment period, through November of the calendar year and on an annual basis as of the last month of the calendar year. Reporting will be on a form prescribed by Treasury and will be due according to the following schedule:

(1) For each month beginning in the first month of the assessment period through November, the last business day of the calendar month following the month for which premium is reported, and

(2) March 1 for the calendar year.

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

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

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

(3) Insurer certification of the submission.

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

(1) Direct written premium as defined in § 50.5(g), adjusted for premium not subject to the Federal Terrorism Policy Surcharge, summarized by policy year and by commercial line of insurance as specified in § 50.5(u).

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

(3) In the case of an insurer that has chosen not to collect the Federal Terrorism Policy Surcharge from its policyholders as provided in § 50.74(f), a certification that the expense of collecting the Surcharge during the assessment period would have exceeded the amount of the Surcharges collected over the assessment period.

(4) Insurer certification of the submission.

(d) The calculated aggregate Federal Terrorism Policy Surcharge amount, as

described in paragraphs (b)(2) and (c)(2) of this section, shall be remitted to Treasury upon submission of each monthly and annual statement. Through its submitted statements, an insurer obtains credit for a refund of any Federal Terrorism Policy Surcharge previously remitted to Treasury that was subsequently returned by the insurer to a policyholder as attributable to refunded premium under § 50.74(e). A negative calculated amount in a monthly or annual statement indicates payment from Treasury is due to the insurer.

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

§ 50.76 Insurer responsibility.

For purposes of the collection, reporting and remittance of Federal Terrorism Policy Surcharges to Treasury, an ''insurer,'' as defined in § 50.5(l), shall not include any affiliate of the insurer.

Dated: December 3, 2009.

Michael S. Barr,

Assistant Secretary (Financial Institutions).

[FR Doc. E9–29613 Filed 12–11–09; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505–AB92

Terrorism Risk Insurance Program; Cap on Annual Liability

AGENCY: Departmental Offices, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (''Treasury'') is issuing this final rule as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (''TRIA'' or ''the Act''), as amended by the Terrorism Risk Insurance Program Reauthorization Act of 2007 (''Reauthorization Act''). The Act established a temporary Terrorism Risk Insurance Program (''TRIP'' or ''Program'') under which the Federal Government would share with commercial property and casualty insurers the risk of insured losses from certified acts of terrorism. The Reauthorization Act has now extended the Program until December 31, 2014. This rule was published in proposed form on September 30, 2008, for public comment. Some clarifying changes have been made in the final rule in response to comments. The rule incorporates and implements statutory requirements in section 103(e) of the Act, as amended by the Reauthorization Act, for capping the annual liability for insured losses at $100 billion. In particular, the rule describes how Treasury intends to determine the *pro rata* share of insured losses under the Program when insured losses would otherwise exceed the cap on annual liability. The rule builds upon previous rules issued by Treasury.

DATES: This rule is effective January 13, 2010.

FOR FURTHER INFORMATION CONTACT: Howard Leikin, Deputy Director, Terrorism Risk Insurance Program, (202) 622–6770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297, 116 Stat. 2322) was enacted on November 26, 2002. 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 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. The Act authorizes Treasury to administer and implement the Program, including the issuance of regulations and procedures. The Program provides a federal backstop for insured losses from an act of terrorism. Section 103(e) of the Act gives Treasury authority to recoup federal payments made under the Program through policyholder surcharges. The Act also contains provisions designed to manage litigation arising from or relating to an act of terrorism.

The Program originally was to expire on December 31, 2005; however, on December 22, 2005, the Terrorism Risk Insurance Extension Act of 2005 (Pub. L. 109–144, 119 Stat. 2660) was enacted, which extended the Program through December 31, 2007. On December 26, 2007, the Terrorism Risk Insurance Program Reauthorization Act of 2007 (Pub. L. 110–160, 121 Stat. 1839) was enacted, extending the Program through December 31, 2014.

The Reauthorization Act, among other Program changes, revised the provisions of the Act with regard to the cap on annual liability for insured losses of $100 billion. Previously, section 103(e)(3) stated that Congress would determine the procedures for and the source of any payments for insured losses in excess of the cap. This was deleted. Instead, this section now requires the Secretary of the Treasury to notify Congress not later than 15 days after the date of an act of terrorism as to whether aggregate insured losses are estimated to exceed the cap. TRIA, as amended by the Reauthorization Act, also requires the Secretary to determine the *pro rata* share of insured losses to be paid by each insurer incurring losses under the Program and that meets its deductible when insured losses exceed the cap, and to issue regulations for carrying this out.

II. Previous Rulemaking

To assist insurers, policyholders, and other interested parties in complying with immediately applicable requirements of the Act, Treasury has issued interim guidance for reference until issuance of superseding regulation. Rules establishing general provisions implementing the Program, including key definitions, and requirements for policy disclosures and mandatory availability, can be found in Subparts A, B, and C of 31 CFR Part 50. Treasury's rules applying provisions of the Act to State residual market insurance entities and State workers' compensation funds are at Subpart D of 31 CFR Part 50. Rules setting forth procedures for filing claims for payment of the Federal share of compensation for insured losses are at Subpart F of 31 CFR Part 50. Subpart G of 31 CFR Part 50 contains rules on audit and recordkeeping requirements for insurers, while Subpart I of 31 CFR Part 50 contains Treasury's rules implementing the litigation management provisions of section 107 of the Act.

III. The Proposed Rule

The proposed rule on which this final rule is based was published in the **Federal Register** at 73 FR 56767 on September 30, 2008. The proposed rule proposed to add a Subpart J to part 50, which comprises Treasury's regulations implementing the Act. It also proposed to amend § 50.53 of Subpart F. The proposed rule described how Treasury would initially estimate whether the cap will be exceeded, the means by which Treasury would develop and maintain estimates for determining the *pro rata* share of insured losses to be paid, the factors that would be considered in determining a *pro rata* percentage of the insured losses that are to be paid in order to stay within the cap, and the application of the *pro rata* percentage in paying insured losses.