

Dated: October 2, 2003.

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[FR Doc. 03-29739 Filed 11-28-03; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505-AB07

Terrorism Risk Insurance Program; Initial Claims Procedures

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Treasury (Treasury) is issuing this proposed rule as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (the Act). That Act established a temporary Terrorism Risk Insurance Program (Program) under which the Federal Government will share the risk of insured loss from certified acts of terrorism with commercial property and casualty insurers until the Program sunsets on December 31, 2005. This proposed rule contains procedures for filing claims for payment of the federal share of compensation for insured losses under the Program and incorporates statutory conditions for federal payment. In particular, the proposed rule addresses requirements for loss certification and associated recordkeeping requirements; provides guidance on what is payable as the federal share of insured losses; and sets forth requirements for investigating and auditing claims under the Program. The rule generally builds upon previous interim guidances and final rules issued by Treasury, particularly in areas involving definitions and disclosure requirements. This proposed rule is the fourth in a series of regulations Treasury has issued to implement the Act.

DATES: Written comments may be submitted on or before December 31, 2003.

ADDRESSES: Submit comments by e-mail to triacomment@do.treas.gov or by mail (if hard copy, preferably an original and two copies) to: Terrorism Risk Insurance Program, Public Comment Record, Suite 2100, Department of the Treasury, 1425 New York Ave., NW., Washington, DC 20220. All comments should be captioned with "Proposed Rule on Claim Procedures". Please include your name, affiliation, address, e-mail address and telephone number in your comment. Comments will be

available for public inspection by appointment only at the Reading Room of the Treasury Library. To make appointments, call (202) 622-0990 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT:

David Brummond, Legal Counsel; Howard Leikin, Senior Insurance Advisor; C. Christopher Ledoux, Senior Attorney; Terrorism Risk Insurance Program (202) 622-6770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

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). 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 (the Program), including the issuance of regulations and procedures. The Program provides a three-year federal reinsurance backstop for insured losses from an act of terrorism until the Program ends on December 31, 2005.

Each entity that meets the Act's definition of insurer (well over 2000 firms) must participate in the Program. The amount of federal payment for an insured loss resulting from an act of terrorism is to be determined, based upon the insurance company deductibles and excess loss sharing with the Federal Government, as specified by the Act and the implementing regulations. An insurer's deductible increases each year of the Program, thereby reducing the Federal Government's share 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 statutory periods. Once an insurer has met its individual

deductible, the federal payments cover 90 percent 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.

II. Previous Rulemaking

This proposed rule is the latest in a series of rules issued by Treasury under the Act. In implementing the Program, Treasury has sought to achieve several goals. First, an effort has been made to implement the Act in a transparent and effective manner that treats comparably those insurers required to participate in the Program and that provides necessary information to policyholders in a useful and efficient manner. Second, Treasury seeks to rely as much as possible on the State insurance regulatory structure. In that regard, Treasury is closely coordinating with the National Association of Insurance Commissioners (NAIC) in implementing all aspects of the Program. Third, to the extent possible within statutory constraints, Treasury seeks to allow insurers to participate in the Program in a manner consistent with their normal course of business. Finally, given the temporary and transitional nature of the Program, Treasury is guided by the Act's goal for insurers to develop their own capacity, resources and mechanisms for terrorism risk insurance coverage when the Program expires.

To assist insurers, policyholders and other interested parties in complying with immediately applicable and time-sensitive requirements of the Act prior to the issuance of regulations, Treasury issued interim guidance in four separate notices on December 3 and 18, 2002 and on January 22 and March 25, 2003. Treasury publicly released these interim guidance notices on its Program Web site <http://www.Treasury.gov/trip> and published each notice in the **Federal Register** [67 FR 76206 (December 11,

2002); 67 FR 78864 (Dec. 18, 2002); 68 FR 4544 (Jan. 29, 2003); 68 FR 15039 (Mar. 27, 2003)]. The interim guidances addressed several issues requiring clarification of immediately applicable provisions, including provisions dealing with statutory disclosure obligations of insurers; requirements to make available terrorism risk insurance; the meaning of direct earned premium for commercial property and casualty insurance; categories of insurers required to participate in the Program; and the scope of the term insured loss under the Act.

In addition to interim guidance, Treasury has published two interim final rules and a proposed rule that have now been issued as final rules. Treasury published the first regulation implementing the Act on February 28, 2003 (68 FR 9804) as an interim final rule. That interim final rule was revised and published as a final regulation on July 11, 2003 (68 FR 41250). Now Subpart A of part 50 in Title 31 of the Code of Federal Regulations, this rulemaking covers the purpose and scope of the Program, key definitions and certain general provisions. A technical revision to the final rule dealing with the definition of direct earned premium was subsequently published on August 13, 2003 (68 FR 48280).

On April 18, 2002 (68 FR 19302) Treasury published a second interim final rule. Among other things, this rule dealt with requirements governing disclosures that insurers must make to policyholders as a condition for federal payment under the Act and requirements that insurers make available terrorism coverage in their commercial property and casualty insurance policies. The interim final rule created new Subparts B and C of 31 CFR part 50. The interim final rule was revised and published as a final rule on October 17, 2003 (68 FR 59720).

Finally, Treasury published a proposed rule on April 18, 2003 to address issues involving State residual market insurance entities and State workers compensation funds as required by section 103(d)(1) of the Act (68 FR 19309). The proposed rule clarified characteristics of a residual market mechanism that define it as an "insurer", established guidelines for computing "direct earned premium" and continued the waiver of the Act's requirements related to disclosure. The proposed rule was revised and published as a final rule on October 17, 2003 (68 FR 59715). The final rule made minor revisions to the proposed rule and set forth disclosure requirements for residual market mechanisms.

III. The Proposed Rule

This proposed rule would add Subparts F and G to Part 50, which comprises Treasury's regulations implementing the Act. It also proposes to amend the definition of "insured loss" in § 50.5(e) of Subpart A.

A. Overview

Section 103(a)(2) of the Act requires the Secretary of the Treasury to administer the Program and pay the Federal share of compensation for insured losses. The proposed rule would establish requirements for insurers to follow in obtaining payment of the Federal share of compensation for insured losses from a terrorist event. The proposed rule is designed to reflect best practices of reinsurers, where applicable, in the context of the Act's text, goals and purposes. In general, the proposed rule describes what is payable to insurers as the Federal share of compensation and then follows the sequence of the process for paying reinsurance claims. Essentially, the process involves gathering information about insured losses of insurers as defined by the Act; requiring proof, or certification, that an insurer has met the requirements of the Act as a condition to payment of the Federal share; and making payment to insurers for the Federal share of compensation for their insured losses. The proposed rule is modeled on customary business practices and procedures of the reinsurance industry while implementing the statutory requirements of the Act. Treasury seeks comment on all aspects of the proposed rule from interested persons and entities.

In outlining proposed requirements for insurers to obtain payment for insured losses, Treasury seeks to establish operational procedures that emulate, as appropriate, the best practices of a reinsurer. In this proposed rule, Treasury's goal is to be able to respond quickly to insurer claims for payment while maintaining appropriate financial controls so that taxpayer funds are protected. To the extent possible, the information that will be required from insurers already exists as part of their current process for administering and managing insurance claims. In certain instances, however, the Act requires certifications of insurer actions that may be different from customary industry business practices. It is Treasury's objective to obtain the information and documentation needed to administer the Program, while avoiding undue burdens on insurers.

The proposed rule seeks to clarify the amount of the Federal share of compensation payable by Treasury and establish certain basic operational requirements to implement payment. Accordingly, the previous definition of "insured loss" is amended to facilitate clarification of items compensable as part of the Federal share. In addition to this proposed rulemaking, more detailed operating procedures will be developed as required. Such procedures will be posted on the Treasury Web site <http://www.Treasury.gov/trip>. For the present time, Treasury is concentrating on regulations that are important to the initial and supplementary reporting and certification of insured losses and the filing of claims for payment of the Federal share of compensation. This is being done so that Treasury and insurers can proceed expeditiously should a certified act of terrorism occur. There are other issues, typically those arising at later stages of the claims payment process, that are not addressed in the proposed rule. For example, payment priorities when aggregate losses constituting the Federal share of compensation approach the statutory maximum of \$100 billion are not included as part of this rulemaking. These and other issues will be the subject of subsequent rulemaking.

B. Description of Proposed Rule

The major provisions of the proposed rule are as follows:

1. *The Federal Share of Compensation.* The proposed rule generally outlines the Act's requirements and conditions for federal payment. A critical component of the calculation of the Federal share of compensation is the amount of insured losses of an insurer. The proposed rule thus clarifies elements of insured losses that are compensable by amending the current definition of "insured loss" in § 50.5(e). Following customary business practices in the insurance industry, Treasury is proposing that loss adjustment expenses allocable to a specific underlying loss be payable as part of insured losses. Treasury has not included losses in excess of policy limits (known commonly as XPL) as insured losses. However, comments on why the Federal Government should consider including XPL losses are solicited by Treasury. Since the Act specifically excludes compensation for punitive or exemplary damages, these are also not included as insured loss items.

The Federal share of compensation payable to an insurer under the Program is described by the proposed rule as 90 percent of that portion of the insurer's

insured losses that exceed its insurer deductible during a Program Year, subject to specified adjustments and the cap of \$100 billion as provided in the Act. The proposed rule stipulates several adjustments in calculating the Federal share of compensation. First, the proposed rule reduces aggregate insured losses by amounts recovered by insurers for salvage and subrogation. Treasury expects that as normal good business practice, insurers will pursue salvage and subrogation recoveries. The proposed rule sets forth that the amount of insured losses upon which the Federal share of compensation is calculated be reduced by such recoveries. The benefits of insurer recoveries for salvage and subrogation thus inure to both the insurer and to the Program.

The proposed rule also specifies two other adjustments that will be made to reduce the Federal share of compensation otherwise due for the insured losses. The Act requires that the Federal share of compensation for insured losses be reduced by any duplicate amount of compensation otherwise provided by the Federal Government for those insured losses. The Act recognizes that insurers may have other sources of recovery for their insured losses, particularly reinsurance agreements. Should the amount of an insurer's Federal share of compensation from the Program and the amount of recoveries from other sources exceed the aggregate amount of its insured losses in a Program Year, then any excess recovery must be returned to Treasury. Excluded from this requirement are recoveries from a reinsurer pursuant to an agreement whereby an insurer's obligation to repay its reinsurer takes priority over its obligation to repay Treasury.

2. Information Gathering. The next stage of the claims process under the proposed rule involves the submission of information about insured losses so that Treasury can determine the extent of its obligation to pay individual insurers under the Act.

a. Initial Notice. As the "payer" of Federal compensation for insured losses from acts of terrorism, Treasury is proposing an early notification requirement when an insurer obtains information indicating its insured losses will exceed 50% of its insurer deductible as defined by the Act. At that time Treasury expects the insurer to submit, on a form prescribed by Treasury, estimates of aggregate losses for the Program Year, its insurer deductible and the Federal share of aggregate losses, as well as to designate the person who will make required

certifications and receive Federal payments. Such information will assist in anticipating funding and operational requirements. Because the insurer deductible applies collectively to all insurers in an affiliated group, the notice must include the designation of a single insurance entity to coordinate the submission of required reports and documentation (including the Initial Notice), make required certifications and receive Federal payments on behalf of the affiliated group.

b. Loss Reporting. The proposed rule addresses the type of loss information that will be required to document insured losses when an insurer seeks reimbursement from Treasury for the Federal share of compensation. An Initial Certification of Loss, on a form prescribed by Treasury, is required when insured losses first exceed the insurer's deductible. If the insurer sustains ongoing, additional insured losses, periodic Supplementary Certifications of Loss, on a form prescribed by Treasury, must be submitted. These Certifications of Loss will be used by Treasury to assess payment eligibility for the Federal share of compensation and compliance with the Act's prerequisites for payment.

(i) Loss Bordereau. The primary vehicle for gathering information about the insured losses of an insurer is a summary report of loss data commonly known in the reinsurance industry as a "bordereau". A bordereau is a management report of basic information about an insurer's underlying claims that, in the aggregate, constitute the insured losses of the insurer. The bordereau is used within the reinsurance industry to track insured losses and otherwise establish the reinsurer's obligation to pay under a reinsurance agreement. The proposed rule would require insurers to provide Treasury with a bordereau that identifies insured losses by Program Year, by industry catastrophe code and by line of business. If an industry catastrophe code is not issued, Treasury will issue a code for insurer use. It is Treasury's intent to coordinate this code with appropriate industry reporting organizations.

In the future, Treasury will issue operating procedures and a prescribed format for the bordereau in its implementation of these regulations. For each underlying claim, Treasury contemplates the submission of information that is typical of a reinsurer's requirements. Such basic information will allow Treasury to expeditiously handle and provide payment for claims under the Program. Certain data will be sought for claim

identification and coverage determination, such as claim number, insured name, state code for the location of the loss, date of loss, policy effective date and length of term. Other data will assist in the assessment of the insurer's claim, such as policy limits. And finally, certain data are simply basic to the insurer's claim, such as the loss and allocated loss adjustment expenses paid, amounts reserved for those expenses and amounts recovered through salvage and subrogation.

(ii) Other Information. The forms to be prescribed by Treasury will also seek loss-related information that is required by specific provisions of the Act. As previously noted, section 103(g)(2) of the Act recognizes that insurers may have other reinsurance recoveries for their insured losses. However, the Act requires that the Federal share of compensation from Treasury and amounts recovered from other sources cannot exceed the aggregate amount of the insurer's insured losses in any Program Year. Thus, Treasury will require insurers to indicate on the bordereau whether an underlying claim could or does have other reinsurance recoverable. As part of the loss certification and bordereau information reported, an insurer would also report total reinsurance recoveries from other sources. This will provide the Treasury with an early notification that other reinsurance exists.

Section 107(a)(5) of the Act provides that punitive damage amounts may not be included as insured losses. Thus, Treasury will require such amounts to be reported with an underlying claim on the bordereau for appropriate adjustment of the amount claimed from the Program.

Finally, section 103(e)(1)(B) of the Act requires the reduction of the Federal share of compensation for insured losses under the Program by the amounts provided by the Federal Government through any other program for those same losses. Accordingly, insurers will be required to inquire of each of their claimants whether or not the claimant received any duplicate recovery from any other Federal source and to report that amount on the bordereau with the underlying claim.

3. Compliance Certifications. The proposed rule also addresses various written certifications the Act requires as a condition for payment of the Federal share. Specific statements certifying actions by the insurer as required by the Act will be included as part of each Certification of Loss. Section 103(b)(2) of the Act states that no payment may be made to an insurer for a covered insured loss unless "the insurer

provides clear and conspicuous disclosure to the policyholder of the premium charged for insured losses covered by the Program and the Federal share of compensation for insured losses under the Program.” This requirement has been addressed in the previously issued Treasury regulations at §§ 50.10 through 50.19 and will be a formal requirement in submitting a claim for the Federal share of compensation for an insured loss. Treasury anticipates that an executive officer of the insurer will provide this written certification for all underlying claims submitted on the bordereau, both with the Initial Certification of Loss and with any Supplementary Certifications of Loss.

Section 103(c) of the Act also requires that through December 31, 2004, an entity meeting the definition of an insurer under this Program “(A) shall make available, in all of its commercial property and casualty insurance policies, coverage for insured losses; and (B) shall make available property and casualty insurance coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism”. This requirement has also been addressed in the previously issued Treasury regulations at §§ 50.20 through 50.24. The Initial and each Supplementary Certification of Loss will include a certification that this availability requirement has been met. Although this is not a statutory condition for payment, Treasury believes it is necessary to effectively administer and implement the Program.

Finally, the Act requires that insurers absorb a specified level of insured losses, or an insurer deductible, before receiving reimbursement for the Federal share of compensation for insured losses. To facilitate the administration of this provision, the Initial Certification of Loss requires an insurer to certify the amount of its direct earned premium, along with the calculation of its insurer deductible. The proposed rule provides that, at the option of the insurer, this statement and supporting documentation can be submitted along with the Initial Notice of Insured Loss instead of being provided in conjunction with the Initial Certification of Loss. This is allowed so that the amount of the insurer's deductible can be on file with the Program to expedite the processing of the insurer's Initial Certification of Loss. Treasury will prescribe a schedule or attachment to the Initial Notice of Insured Loss and the Initial Certification of Loss forms for the calculation and certification by an insurer of its direct earned premium and

resulting insurer deductible based on its reporting to the NAIC, or as otherwise appropriately reported.

4. *Paying the Federal Share.* The final stage in the claim process addressed by Treasury in the proposed rule is to make payment as provided by the Act. Once again, the proposed rule generally follows payment practices and procedures used in the reinsurance industry.

a. *Payment Process.* Treasury is proposing that it will, upon receiving the required documentation, promptly provide payment. If Treasury makes payments before the total amount of insured losses are known, such payments will be subject later to adjustment based on any overpayment or underpayment. If the total amount of insured losses to be paid by the insurer or the amount of Federal compensation payable by Treasury has not been finally determined when the Initial Certification of Loss has been filed, the normal procedure to be followed is that the insurer will file Supplementary Certifications of Loss on a monthly basis. If monthly reporting is inappropriate in a particular case, then Treasury may determine a more suitable schedule to be worked out with the insurer. In either situation, on the basis of each Supplementary Certification of Loss thereafter, Treasury or the insurer, as the case may be, shall pay the balance due. It is proposed that any overpayment to an insurer will either be offset from future payments or due to Treasury within 45 days of the reporting of the overpayment.

Because the Act requires insurance entities within an affiliated group to be treated as a single entity in determining the insurer deductible, Treasury is proposing that all payments will be made to a single insurance entity within an affiliated group. This entity will be identified by the affiliated group and designated on the Initial Notice of Loss. The proposed rule also requires that insurers within the affiliated group assign their rights to payment from Treasury to the single insurance entity. Failure to make such assignment may be grounds for Treasury withholding an affiliate insurer's share of Federal compensation under the Program.

b. *Audits and Records.* If a certified act of terrorism occurs, it will be the objective of the Treasury to reimburse insurers according to the Act as soon as possible following receipt of the Initial Certification of Loss and supporting documentation. The proposed rule requires insurers to retain all records and files pertaining to the handling and settlement of claims, including electronic documents and data, for

subsequent financial and claims audits. This is because Treasury and/or its appointed designee(s) will need to have access to pertinent books, files, agreements and records which support the Certifications of Loss previously submitted. Insurer records should be retained for a minimum of three years following the conclusion of the policy year for premium information and for a minimum of five years following the final adjustment of each individual claim.

c. *Fraud and Civil Penalties.* One of the conditions for Federal payment under section 103(b) of the Act is that the insurer “processes the claim for the insured loss in accordance with appropriate business practices, and any reasonable procedures that the Secretary may prescribe.” The proposed rule provides that Treasury may deny eligibility for payment of the Federal share of insured losses should an insurer intentionally conceal or misrepresent any material fact or circumstance, engage in fraudulent conduct, or make false statements relating to participation under the Act. Fines, civil penalties and imprisonment under applicable Federal laws may also apply.

IV. 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.

Regulatory Flexibility Act. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et. seq.*, it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. Treasury is required to pay the Federal share of compensation to insurers for insured losses in accordance with the Act. A condition of Federal payment is that the insurer must submit to Treasury, in accordance with procedures established by Treasury, a claim for payment and certain certifications. The proposed rule seeks to emulate loss reporting practices in the reinsurance industry, which insurers already follow in order to get payment for reinsurance, thus minimizing the impact on all insurers. The Act itself requires all insurers receiving direct earned premium for any type of property and casualty insurance, as defined in the Act, to participate in the Program. This includes all insurers regardless of size or sophistication. The Act also defines property and casualty insurance to mean commercial lines

insurance without any reference to the size or scope of the insurer or the insured. Accordingly, any economic impact associated with the proposed rule flows from the Act and not the proposed rule. A regulatory flexibility analysis is thus not required.

Paperwork Reduction Act. The collection of information (recordkeeping requirement) contained in this proposed rule has been submitted to the Office of Management and Budget (OMB) for review under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3507(d). The forms to be prescribed by Treasury will be the subject of a separate submission to OMB on which the public will be provided an opportunity to comment. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

Organizations and individuals desiring to submit comments concerning the collection of information in the proposed rule should direct them to the Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (preferably by Fax to 202-395-6974, or by e-mail to jlackeyj@omb.eop.gov). A copy of the comments should also be sent to Treasury at the addresses previously specified. Comments on the collection of information should be received by December 31, 2003.

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

The collection of information in the proposed rule is the recordkeeping requirement in § 50.61. The information will be used by Treasury (or its designees) to audit or examine claims for Federal payments submitted by insurers. The recordkeeping requirement is mandatory for any insurer that seeks payment of a Federal share of compensation.

If an act of terrorism is certified under the Act, the number of respondents, if any, will be determined by the size and nature of the certified act of terrorism. Because of the extreme uncertainty regarding any such event, a "best estimate" has been developed based on the considered judgment of Treasury. This estimate has 100 insurers sustaining insured losses; each of these insurers would be required to retain records concerning 100 claims. Treasury believes that the records that insurers would be required to retain under § 50.61 largely duplicate the records that insurers would normally retain in the course of processing and administering claims, and that the burden associated with the proposed rule therefore is minimal. Accordingly, Treasury estimates that the proposed rule will impose 5 minutes of burden with respect to each claim; the estimated annual burden per recordkeeper is therefore 8.33 hours (100 claims × 5 minutes) and the estimated total annual burden is 833 hours (8.33 hours × 100 insurers).

List of Subjects in 31 CFR Part 50

Terrorism risk insurance.

For the reasons stated above, 31 CFR part 50 is proposed to be amended as follows:

PART 50—TERRORISM RISK INSURANCE PROGRAM

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

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

2. Revise § 50.5(e) to read as follows:

§ 50.5 Definitions.

* * * * *

(e) *Insured loss.* (1) The term *insured loss* means any loss resulting from an act of terrorism (including an act of war, in the case of workers' compensation) that is covered by primary or excess property and casualty insurance issued by an insurer if the loss:

- (i) Occurs within the United States;
- (ii) Occurs to an air carrier (as defined in 49 U.S.C. 40102), to a United States flag vessel (or a vessel based principally in the United States, on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), regardless of where the loss occurs; or
- (iii) Occurs at the premises of any United States mission.

(2)(i) A loss that occurs to an air carrier (as defined in 49 U.S.C. 40102), to a United States flag vessel, or a vessel based principally in the United States,

on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States, is not an insured loss under section 102(5)(B) of the Act unless it is incurred by the air carrier or vessel outside the United States.

(ii) An insured loss to an air carrier or vessel outside the United States under section 102(5)(B) of the Act does not include losses covered by third party insurance contracts that are separate from the insurance coverage provided to the air carrier or vessel.

(3) The term *insured loss* includes loss adjustment expenses incurred by an insurer in connection with insured losses that are allocated and identified by claim file in insurer records, including expenses incurred in the investigation, adjustment and defense of claims, but excluding staff adjuster salaries and any allocations of other internal insurer expenses.

(4) The term *insured loss* does not include:

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

(ii) Extra contractual damages awarded, or obligations paid by an insurer, including but not limited to, punitive, exemplary, or special damages, or damages in excess of policy limits.

* * * * *

3. New Subparts F and G of Part 50 are added to read as follows:

Subpart F—Claims Procedures

Sec.

- 50.50 Federal share of compensation.
- 50.51 Adjustments to the Federal share of compensation.
- 50.52 Initial Notice of Insured Loss.
- 50.53 Loss certifications.
- 50.54 Payment of Federal share of compensation.

Subpart F—Claims Procedures

§ 50.50 Federal share of compensation.

(a) *General.* The Treasury will pay to insurers the Federal share of compensation for insured losses resulting from acts of terrorism as provided in section 103 of the Act. Treasury shall determine the amount of payment of the Federal share of compensation based upon a determination by Treasury, or upon Treasury's reservation of rights and a later determination, that:

(1) The insurer is an entity meeting the requirements of § 50.5(f);

(2) The insurer's insured losses as defined in § 50.5(e) have exceeded its insurer deductible as defined in § 50.5(g);

(3) The insurer has made payment of an underlying insured loss to a person who had suffered the insured loss, or to a person acting on behalf of such person, and who had filed a claim that was not fraudulent, collusive, made in bad faith or otherwise dishonest;

(4) The insurer had provided a clear and conspicuous disclosure as required by §§ 50.10 through 50.19;

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

(6) The insured losses submitted for payment are within the scope of coverage issued by the insurer for commercial property and casualty insurance as defined in § 50.5(l); and

(7) The procedures specified in this subpart have been followed and all conditions to payment have been met.

(b) *Amount payable.* The Federal share of compensation payable to an insurer under the Program shall be 90 percent of that portion of the insurer's aggregate insured losses that exceed its insurer deductible during a Program Year, subject to any adjustments in § 50.51 and the cap of \$100 billion as provided in section 103(e)(2) of the Act.

§ 50.51 Adjustments to the Federal share of compensation.

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

(b) *Amount of Federal share of compensation.* The Federal share of compensation shall be adjusted as follows:

(1) *No excess recoveries.* For any Program Year, the sum of the Federal share of compensation paid by Treasury to an insurer and the insurer's recoveries for insured losses from other sources shall not be greater than the insurer's aggregate amount of insured losses for acts of terrorism in that Program Year. Amounts recovered for insured losses in excess of an insurer's aggregate amount of insured losses in a Program Year shall be repaid to Treasury within 45 days after the end of the month when such amounts are received by the insurer. For purposes of

this paragraph, amounts recovered from a reinsurer pursuant to an agreement whereby the reinsurer's right to any excess recovery has priority over the rights of Treasury shall not be considered a recovery subject to repayment to Treasury.

(2) *Reduction of amount payable.* The Federal share of compensation due an insurer for insured losses shall be reduced by any amounts received by the insurer or an insured or a third party suffering the underlying loss from any other Federal programs as compensation for those insured losses, including, but not limited to, insurance, assistance, grants or disaster relief from the Federal Government. Each insurer shall inquire of each of its claimants whether or not duplicate payments for insured losses have been paid from other Federal sources. Such amounts shall be reported with each underlying claim on the bordereau specified in § 50.53(b)(1) and the total amount subtracted from the aggregate amount claimed as the Federal share of compensation for insured losses.

§ 50.52 Initial Notice of Insured Loss.

Each insurer shall submit to Treasury an Initial Notice of Insured Loss, on a form prescribed by Treasury, whenever the insurer's aggregate insured losses (including reserves for "incurred but not reported" losses) within a Program Year exceed an amount equal to 50 percent of the insurer's deductible as specified in § 50.5(g). Insurers are advised the form for the Initial Notice of Insured Loss will include an initial estimate of aggregate losses for the Program Year, the amount of the insurer deductible and an estimate of the Federal share of compensation for the insurer's aggregate insured losses. In the case of an affiliated group of insurers, the form for the Initial Notice of Insured Loss will include the name and address of a single insurance entity within the affiliated group that will serve as the single point of contact for the purpose of providing loss and compliance certifications as required in § 50.53 and for receiving payments of the Federal share of compensation in accordance with § 50.54(b). An insurer, at its option, may elect to include with its Initial Notice of Insured Loss the certification of direct earned premium required by § 50.53(b)(3).

§ 50.53 Loss certifications.

(a) *General.* When an insurer has paid aggregate insured losses that exceed its insurer deductible, the insurer may make claim upon Treasury for the payment of the Federal share of compensation for its insured losses. The

insurer shall file an Initial Certification of Loss, on a form prescribed by Treasury, and thereafter such Supplementary Certifications of Loss, on a form prescribed by Treasury, as may be necessary to receive payment for the Federal share of compensation for its insured losses.

(b) *Initial Certification of Loss.* An insurer shall use its best efforts to file the Initial Certification of Loss with Treasury within 45 days following the last calendar day of the month when an insurer's aggregate insured losses exceed its insurer deductible. Insurers are advised the Initial Certification of Loss will include the following:

(1) A bordereau, on a form prescribed by Treasury, that includes basic information about each underlying insured loss. The bordereau will include, but may not be limited to:

(i) A listing of each underlying insured loss by catastrophe code and line of business;

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

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

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

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

(i) The insurer has paid all underlying claims comprising the insured losses listed in the bordereau provided pursuant to § 50.53(b)(1);

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

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

(iv) The insurer has complied with the disclosure requirements of §§ 50.10 through 50.19 for each underlying insured loss that is included in the amount of the insurer's aggregate insured losses; and

(v) The insurer has complied with the mandatory availability requirements of §§ 50.20 through 50.24.

(3) A certification of the amount of the insurer's "direct earned premium" as defined in § 50.5(d), together with the calculation of its "insurer deductible" as defined in § 50.5(g) (provided this certification was not submitted previously with Initial Notice of Insured Loss specified in § 50.52).

(c) *Supplementary Certification of Loss.* If the total amount of the Federal

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

Supplementary Certifications of Loss will include the following:

(1) A bordereau described in

§ 50.53(b)(1); and

(2) A certification as described in § 50.53(b)(2).

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

(e) *Bordereau defined.* For purposes of this section, a "bordereau" is a report of basic information about an insurer's underlying claims that, in the aggregate, constitute the insured losses of the insurer.

§ 50.54 Payment of Federal share of compensation.

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

(b) *Payee.* Payment of the Federal share of compensation for insured losses will be made to the insurer filing the Initial Notice of Loss required by § 50.52. In the case of an affiliated group of insurers, payment of the Federal share of compensation for the insured losses of the affiliated group will be made to the single insurance entity designated in the Initial Notice of Loss to receive payment on behalf of the affiliated group. It shall be the responsibility of the single insurance entity to distribute payments of the Federal share of compensation as appropriate to affiliated insurers in the group.

(c) *Assignment of payments.* To facilitate a single point of contact for payment of the Federal share of compensation to an affiliated group, an insurer within an affiliated group shall assign its rights to be paid amounts due or to become due from Treasury to the

single insurance entity designated to receive payment on behalf of the affiliated group. The failure to make such an assignment may be grounds for Treasury to withhold, in whole or in part, payment of the Federal share of compensation due an insurer.

Subpart G—Audit and Investigative Procedures

50.60 Audit authority.

50.61 Recordkeeping.

50.62 Eligibility for Federal share of compensation.

Subpart G—Audit and Investigative Procedures

§ 50.60 Audit authority.

The Secretary of the Treasury, or an authorized representative, shall have 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 for the purpose of investigation, confirmation, audit and examination.

§ 50.61 Recordkeeping.

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 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 3 years following the conclusion of the policy year. Records relating to underlying claims shall be retained for not less than 5 years following the final adjustment of the claim.

§ 50.62 Eligibility for Federal share of compensation.

(a) An insurer may be ineligible to receive payment for the Federal share of compensation for insured losses under the Act upon a determination by Treasury that the insurer:

(1) Intentionally concealed or misrepresented any material fact or circumstance;

(2) Engaged in fraudulent conduct; or

(3) Made false statements relating to participation under the Act or this Part.

(b) An insurer's ineligibility for payment of the Federal share of compensation shall be effective as of the date any act described in paragraph (a) of this section was committed.

(c) Fines, civil penalties and imprisonment under applicable Federal laws may apply in addition to ineligibility for payment of the Federal share of compensation.

Dated: November 12, 2003.

Wayne A. Abernathy,

Assistant Secretary of the Treasury.

[FR Doc. 03–29729 Filed 11–28–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–D–7576]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Proposed rule.

SUMMARY: Technical information or comments are requested on the proposed Base (1% annual chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

ADDRESSES: The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT:

Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–2903.