

***Clarity of This Regulation***

We are required by E.O. 12866, E.O. 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

***Public Availability of Comments***

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**List of Subjects in 30 CFR Part 250**

Administrative practice and procedure, Continental shelf, Oil and gas exploration, Public lands—mineral resources, Reporting and recordkeeping requirements.

Dated: August 14, 2008.

**Foster L. Wade,**

Deputy Assistant Secretary—Land and Minerals Management.

For the reasons stated in the preamble, Minerals Management Service (MMS) proposes to amend 30 CFR part 250 as follows:

**PART 250—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF**

1. The authority citation for part 250 continues to read as follows:

**Authority:** 31 U.S.C. 9701, 43 U.S.C. 1334.

2. Amend § 250.1201 by adding the definition of *Force majeure event* in alphabetical order as follows:

**§ 250.1201 Definitions.**

\* \* \* \* \*

*Force majeure event*—an event beyond your control such as war, act of terrorism, crime, or act of nature which prevents you from operating the wells and meters on your OCS facility.

\* \* \* \* \*

3. Amend § 250.1202 by revising paragraphs (d)(3), (k)(3), and (k)(4) as follows:

**§ 250.1202 Liquid hydrocarbon measurement.**

\* \* \* \* \*

(d) \* \* \*

(3) Prove each operating royalty meter to determine the meter factor monthly, but the time between meter factor determinations must not exceed 42 days. When a force majeure event precludes the required monthly meter proving, meters must be proved within 15 days after being returned to service;

\* \* \* \* \*

(k) \* \* \*

(3) Prove allocation meters monthly if they measure 50 or more barrels per day per meter. When a force majeure event precludes the required monthly meter proving, meters must be proved within 15 days after being returned to service; or

(4) Prove allocation meters quarterly if they measure less than 50 barrels per day per meter. When a force majeure event precludes the required quarterly meter proving, meters must be proved within 15 days after being returned to service;

\* \* \* \* \*

4. Amend § 250.1203 by revising paragraph (c)(1) as follows:

**§ 250.1203 Gas measurement.**

\* \* \* \* \*

(c) \* \* \*

(1) Calibrate meters monthly, but do not exceed 42 days between calibrations. When a force majeure event precludes the required monthly calibration, meters must be calibrated within 15 days after being returned to service;

\* \* \* \* \*

5. Amend § 250.1204 by revising paragraph (b)(1) as follows:

**§ 250.1204 Surface commingling.**

\* \* \* \* \*

(b) \* \* \*

(1) Conduct a well test at least once every 2 months unless the Regional Supervisor approves a different frequency. When a force majeure event precludes the required bimonthly (or other frequency approved by the Regional Supervisor) well test, wells

must be tested within 15 days after being returned to service;

\* \* \* \* \*

6. Amend § 250.1500 by adding the definitions *Contractor* and *Periodic* in alphabetical order and by revising the definition of *Production safety* to read as follows:

**§ 250.1500 Definitions.**

\* \* \* \* \*

*Contractor* means anyone performing work for the lessee. However, these requirements do not apply to contractors providing domestic services to the lessee or other contractors. Domestic services include janitorial work, food and beverage service, laundry service, housekeeping, and similar activities.

\* \* \* \* \*

*Periodic* means occurring or recurring at regular intervals. Each lessee must specify the intervals for periodic training and periodic assessment of training needs in their training programs.

*Production safety* includes safety in production operations, as well as the installation, repair, testing, maintenance, and operation of surface or subsurface safety devices. Production operations include, but are not limited to, separation, dehydration, compression, sweetening, and metering operations.

\* \* \* \* \*

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**DEPARTMENT OF THE TREASURY****31 CFR Part 50**

**RIN 1505-AB10**

**Terrorism Risk Insurance Program; Recoupment Provisions**

**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 (“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 proposed rule is the latest in a series of regulations Treasury has issued to implement the Act. The proposed 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 proposed 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:** Written comments must be received on or before October 17, 2008.

**ADDRESSES:** Submit comments electronically through the Federal eRulemaking Portal: <http://www.regulations.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 Avenue, NW., Washington, DC 20220. Because paper mail in the Washington, D.C., area may be subject to delay, it is recommended that comments be submitted electronically. All comments should be captioned with "TRIA Recoupment Proposed Rule Comments." Please include your name, affiliation, address, e-mail address, and telephone number in your comment. Comments will be available for public inspection on the Federal eRulemaking Portal and by appointment at the TRIP Office. To make appointments, call (202) 622-6770 (not a toll-free number).

**FOR FURTHER INFORMATION CONTACT:** Howard Leikin, Deputy Director, 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 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 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 President signed into law the Terrorism Risk Insurance Extension Act of 2005 (Pub. L. 109-144, 119 Stat. 2660), which extended the Program through December 31, 2007. On December 26, 2007, the President signed into law the Terrorism Risk Insurance Program Reauthorization Act of 2007 (Pub. L. 110-160, 121 Stat. 1839), 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 guidances 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

This proposed rule would add a Subpart H to part 50, which comprises Treasury's regulations implementing the Act. It also proposes to add definitions

in § 50.5 of Subpart A and amend §§ 50.60 and 50.61 of Subpart G.

##### A. Overview

Section 103(e)(6) of the Act, as amended, establishes an insurance marketplace aggregate retention amount for insured losses in any Program Year. This essentially guarantees that a certain aggregate amount of the insured losses will be borne by insurers and their policyholders in the insurance marketplace, irrespective of individual insurer deductibles and share of losses above those deductibles. Under the Reauthorization Act, the insurance marketplace aggregate retention amount for any additional Program Year after 2007 is the lesser of \$27.5 billion and the aggregate amount, for all insurers, of insured losses during the Program Year. To carry this out, Sections 103(e)(7) and (e)(8) of the Act set forth the requirements for recoupment and policy surcharges for terrorism loss risk-spreading premiums. The Act establishes a mandatory recoupment amount representing all or a portion of the federal payments for insured losses. The Act requires the Secretary to collect, through terrorism loss risk-spreading premiums, an amount equal to 133 percent of the mandatory recoupment amount.<sup>1</sup> The Act also authorizes the Secretary, at his discretion, to recoup additional amounts to the extent that federal payments exceed the mandatory recoupment amount. The Act requires that amounts established by the Secretary as terrorism loss risk-spreading premiums are to be imposed as a policyholder premium surcharge on property and casualty insurance policies in force after the date of establishment of the surcharge. The Secretary is required to provide for insurers to collect terrorism loss risk-spreading premiums and remit the amounts collected to Treasury.

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;

<sup>1</sup> Prior to the Reauthorization Act, under Section 103(e)(7)(C) of TRIA, the Secretary was required to collect premiums in an amount equal to any mandatory recoupment amount. The Reauthorization Act changed the amount to 133 percent of the mandatory recoupment amount.

- 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.

The Reauthorization Act also requires the Secretary to issue regulations describing the procedures to be used for collecting the required premiums in these time periods.<sup>2</sup>

The Reauthorization Act also added a provision (Section 103(e)(7)(F)) requiring the Secretary to publish, within 90 days 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. This 90-day period would begin to run from the date of certification. Such estimate is to be updated as appropriate, and at least annually.

The proposed rule describes how Treasury will 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. Treasury seeks comment on all aspects of the proposed rule.

It is Treasury's intention, to the extent possible, to keep insurer reporting requirements for recoupment purposes consistent with reporting schedules and definitions that currently apply under state insurance regulations. Treasury notes that certain elements of the TRIA recoupment requirements are similar to the state processes involved in assessing insurers for state guaranty funds or

collecting state premium taxes. In developing this proposed rule, Treasury has looked to these state regulatory processes as models for designing the recoupment mechanism and has consulted with the National Association of Insurance Commissioners (NAIC).

#### *B. Description of the Proposed Rule*

The major provisions of the proposed rule are as follows:

##### 1. Determination of Recoupment Amount

The proposed 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, would be 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 otherwise not paid. 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 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 proposed rule refers to these considerations in proposed § 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.

As described above, the Reauthorization Act included certain deadlines for the collection of mandatory recoupment amounts. The timing requirements for collecting “required premiums” means that surcharges must be sufficient to recoup Federal funds outlaid as of these target dates for the Federal share of compensation for insured losses.

The timing requirements for mandatory recoupment present two potential operational challenges, the severity of which depends on when an act of terrorism occurs within the designated time periods. The first is that in order to meet the deadlines, recoupment may have to be initiated based on estimates of insured losses and Federal outlays, but prior to the submission to Treasury of significant amounts of actual insurer claims for the Federal share of compensation for losses. The other challenge is that, again, in order to meet the deadlines, it may be difficult to provide the most desirable lead time notification to insurers for implementing surcharges. Both of these issues are further addressed below.

Proposed § 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

<sup>2</sup> The collection timing requirements and the requirement to collect 133 percent of the mandatory recoupment amount were included in an amendment to H.R. 2761, the terrorism Risk Insurance Program Reauthorization Act of 2007. 153 Cong. Rec. S14592 (daily ed. Nov. 16, 2007). In a letter dated November 15, 2007, to Chairman Dodd to the Senate Committee on Banking, Housing, and Urban Affairs, the Congressional Budget Office (CBO) estimated that the amended would cause Treasury to collect more revenues on an expedited basis an amounts sufficient to offset the estimated cost for the bill. <http://www.cbo.gov/ftpdocs/88xx/doc8825/TRIAItrSenBankingComm.pdf>. In its earlier cost estimate for the bill, CBO had noted that gross collections of surcharges would be partially offset by a loss of receipts from income and payroll taxes and, consistent with standard procedures for estimating the revenue impact of indirect business taxes, had reduced the gross revenue impact of the insurance surcharges by 25 percent to reflect offsetting effects on income and payroll tax receipts. (S. Rep. No. 110-215, at 14 (2007).)

recoupment amounts, then Treasury will make an initial determination of any mandatory or discretionary recoupment amounts for that Program Year. Treasury believes that it is desirable, to the extent possible, to base recoupment amounts on retrospective reviews of insured losses and the Federal share of compensation for those losses. Determining accurate recoupment amounts is dependent on the availability of mature and credible insured loss information. Enough time must pass to allow losses to be reported by insureds to their insurers, and for insurers to settle, pay and report their insured losses to Treasury and others such as states and statistical agents. It is clear that insured loss amounts will be changing over time. As new information becomes available, estimates of insured losses for a Program Year will gradually approach an accurate final number.

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 proposed § 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.

However, Treasury must also 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. Proposed § 50.71(b) provides that within 90 days after an act of terrorism, the Secretary shall publish an estimate of aggregate insured losses which shall be used as the basis for initially determining whether mandatory recoupment will be required. Further, 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. As noted above, Treasury will at least annually examine the latest available information on insured losses to recalculate any recoupment amounts.

Treasury is proposing, in § 50.71(d), that it may issue a data call to insurers for the submission of information on insured losses from Program Trigger

Events and for insurer deductible information. There are at least two circumstances where such a collection of data may be necessary. The first arises out of the requirement to publish within 90 days of an act of terrorism an estimate of insured losses and potentially to have to initiate mandatory recoupment based on the estimate in order to meet the Reauthorization Act's timing requirements for collections. Treasury intends, to the extent possible, to rely on existing industry statistical reporting mechanisms in making initial estimates. However, in order to initiate recoupment, it may be necessary to have more timely detail regarding insurer deductibles and reserves for insured losses from lines of business not normally included in existing industry reporting.

A second potential need for a data call arises even in the circumstance where Treasury is able to retrospectively review insured loss payments in order to determine a recoupment amount. Treasury will have accurate data on how much has been paid as the Federal share of compensation and will also have accurate data on the insured losses of the insurers that have submitted claims for the Federal share. However, Treasury will not have its own access to data on insured losses of insurers that have not submitted claims for the Federal share (in most cases because the insurers have not met their insurer deductibles). If it is apparent from industry sources that the aggregate amount of insured losses from Program Trigger Events for a Program Year is clearly below the specific dollar amount of the insurance marketplace aggregate retention amount, *i.e.*, \$27.5 billion, then Treasury will have the information that is needed to determine the mandatory recoupment amount. If the aggregate amount of such insured losses appears to be close to or greater than the specific insurance marketplace aggregate retention dollar amount, then Treasury may require more specific data on insured losses of insurers who have not submitted a claim for the Federal share.

It is Treasury's intention to proceed with the development of forms for the electronic submission of insurer responses to a data call, with appropriate opportunity being provided for public review and comment. The circumstances of a particular Program Trigger Event will likely have a significant bearing on which insurers should receive the data call and how the data should be coordinated, perhaps with the NAIC or a particular state. Additional data call guidance will be provided as necessary based on the

circumstances of the particular Program Trigger Event. Treasury expects that for insurers that have already submitted data in conjunction with a claim for the Federal share, the requirement to respond to a special data call may not apply.

## 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 proposed rule includes new definitions for "Federal Terrorism Policy Surcharge" (also referred to herein as the Surcharge), "assessment period" and "Surcharge effective date", which would be added to § 50.5 of the regulations. Proposed § 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.

Treasury is proposing to define an "assessment period" 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 proposed 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 the existing § 50.5(n) (proposed to become § 50.5(u)). The Surcharge would 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 would consider in establishing the amount of the Federal Terrorism Policy Surcharge are set out in proposed § 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.

In order to estimate the premium base for the Surcharge during the anticipated assessment period, Treasury will use generally available industry reported information for written premium from

the prior calendar year for the lines of business defined as commercial lines of property and casualty insurance under Treasury regulations. Treasury is aware that there might be trends in written premium (e.g., hard or soft markets) that could be significant to the amounts anticipated during the assessment period. To the extent such trends are known and quantifiable, Treasury will consider the effect on the premium base and adjust the surcharge percentage accordingly.

Establishment of the Surcharge will be heavily influenced by the collection timing requirements of section 103(e)(7)(E) of the Act for mandatory recoupment. In the case of discretionary recoupment, the collection timing requirements do not apply, but the Act specifies that the Surcharge can be no greater, on an annual basis, than three percent of the premium charged for property and casualty insurance coverage under the policy.

Section 103(e)(8)(D) of the Act also 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. While Treasury will consider these factors at the time it becomes necessary to establish the amount of a Surcharge, for the following 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.

It is Treasury's understanding, after consulting with industry experts, that recognition of differences in risk factors related to rural versus urban areas and different lines of insurance is substantially accomplished through the rating plans for commercial lines insurance policies. These rating plans reflect variations in the underlying premiums to which the Surcharge would be applied based on the same sorts of adjustment factors described in the Act—rural versus urban risks, line of business risk, etc. For example, the same Surcharge percentage will produce a larger dollar amount when applied to the greater premiums in larger urban centers than it will produce when applied to premiums for insurance policies covering risks in other areas. In other words, 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 is also concerned about the time and resources needed to perform the complex analyses and to construct and implement a detailed risk classification scheme reflecting these factors. Too detailed a schedule of Surcharges could also create an undue administrative burden in the insurance marketplace where, generally, surcharge mechanisms are implemented on a comparatively broad basis. Moreover, these economic considerations would need to be applied along with the requirements to collect 133 percent of the mandatory recoupment amount by certain deadlines. As noted above, the Surcharge may very well be implemented on the basis of estimates of future Federal outlays for the Federal share of compensation for insured losses.

Treasury is therefore inclined to implement the same Surcharge for all commercial property and casualty lines of insurance and all rating classifications. However, based on a review of economic conditions at the time a Surcharge amount is established, Treasury might, if necessary, and within the collection timing constraints, mitigate economic impacts by imposing a lesser Surcharge over a longer period of time. Treasury welcomes comments on this approach.

### 3. Notification of Recoupment

Section 50.73 of the proposed 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. As explained below, the purpose of a January 1 effective date is to coordinate with the NAIC Annual Statement reporting period. Treasury's preference is to provide at least 180 days advance notice, allowing insurers to schedule necessary system changes and to take into account policy renewal cycles. Treasury will provide notification annually as to continuation of the Surcharge. Treasury also proposes to 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 act of terrorism under consideration.

With respect to a January 1 effective date, Treasury believes 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, 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 a full 180 days' notice to insurers of a Surcharge implementation as of January 1. There are two possible alternatives for managing this circumstance for which Treasury is interested in public comment.

The first alternative is 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 is 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 Annual Statement data, but would yet be substantially consistent with the Annual Statement reporting period.

### 4. Collecting the Surcharge

Section 50.74 of the proposed rule specifies that insurers shall collect a Federal Terrorism Policy Surcharge as established by Treasury on new, renewal, mid-term, or audit additional premiums for all property and casualty insurance policies with policy term effective dates during the assessment period. Policies placed in force prior to the assessment period are not subject to the Surcharge until renewal, regardless of mid-term endorsements. Property and casualty insurance has been previously defined in the existing § 50.5(n). That definition was the result of extensive consultation, which produced a regulatory definition of commercial property and casualty insurance crafted in terms of specific lines of business employed in the NAIC's Exhibit of Premium and Losses, 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. Treasury prefers a Surcharge collection mechanism that is relatively

simple to administer and audit and that avoids complex calculations and systems adjustments. However, there is a complicating factor in the definition of commercial property and casualty insurance. Certain exclusions in the definition increase the likelihood 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)<sup>3</sup>) limit the application of the Surcharge to the policy premium amount charged for property and casualty insurance coverage under the policy.

In this rule, as a basic starting point, Treasury proposes 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 in § 50.5(n)(1). 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 regulation § 50.5(n)(2). Treasury anticipates that these cases are most likely to occur within Line 17—Other Liability, where professional liability, excess liability and umbrella liability policy premiums are reported. There may also be cases occurring in other lines involving coverage that is considered to be personal, not commercial (residential dwellings insured under monoline policies where premium is reported on Line 3—Fire) and therefore should be excluded, consistent with Treasury's rules in allocating such premiums for purposes of calculating direct earned premium. 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 provides 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. Treasury intends to develop reporting forms that will provide additional guidance for determining the premium subject to the Surcharge.

As part of this rule, Treasury is proposing 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, Treasury is proposing that in its reporting to Treasury, 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. Treasury is also proposing minor adjustments to the definition of direct earned premium to eliminate some inconsistencies between that definition and the new definition of direct written premium. 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.

Treasury is also proposing in § 50.74 that insurers may satisfy the obligation to collect the Federal Terrorism Policy Surcharge by simply remitting the calculated Surcharge amount to Treasury in circumstances where the expense of collecting the Surcharge from all policyholders during an assessment period exceeds the amount of the Surcharge 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. The proposed rule provides that no fees or commissions may be charged on the Surcharge. In addition, the proposed rule provides 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 above, while the collection of the Surcharge is an obligation of the insurer, the payment of the Surcharge is an obligation of the policyholder. The proposed 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

Treasury is proposing in § 50.76 that, notwithstanding the definition of an insurer in existing § 50.5(f) (proposed to become § 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 proposed 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. Treasury's proposed 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 proposed § 50.74(c) and the definition of "direct written premium" in proposed § 50.5(g) and other provisions of the proposed 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 has considered the amount of

<sup>3</sup> Under the Reauthorization Act, Section 103(e)(8)(C) now applies only to discretionary recoupment.

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 proposed rule would allow 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 proposed 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 the first month within the assessment period would be January. The proposed requirements are intended 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 proposed § 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, Treasury is proposing that direct written premium be broken down by policy year. This is similar to requirements imposed at the state level with regard to other assessments. Further, since remittance is on a "written" basis, there will be a continued reporting

requirement for one year following the end of the assessment period. During this period, Treasury anticipates that insurers will primarily be seeking reimbursement from Treasury for Federal Terrorism Policy Surcharges returned to policyholders in conjunction with a return of unearned premiums.

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

As stated previously, it is Treasury's intention that its reporting requirements, coordinated and reconciled with other state level reporting, will result in less of an audit burden than might otherwise be necessary. The proposed rule includes a revision of § 50.60 and an addition to § 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 proposed § 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 proposed rule.

#### 8. Other Technical Changes

As noted under "Collecting the Surcharge," Treasury is proposing 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 existing § 50.5(d)(1)(iv),

(d)(2), (d)(3), and (d)(4). Similarly, although the existing provision on recordkeeping is set out in proposed § 50.61(a), no substantive changes were made to that provision.

### 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 recoup all or a portion of the Federal share of compensation paid to insurers for insured losses in accordance with the Act. The Act itself 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. The Act also defines property and casualty insurance to mean commercial lines insurance, with certain specific exclusions, without any reference to the size or scope of the insurer or the policyholder. 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 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).

Organizations and individuals desiring to submit comments concerning the collection of information in the proposed rule should direct them to: Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. 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 November 17, 2008.

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.

At this time comments are being sought with respect to the collection of information in the proposed rule for: (a) The data call described at § 50.71 (d); (b) the burden of one-time systems changes needed for insurer collection and remittance of surcharges as required by § 50.74 and § 50.75; (c) the monthly collection, remittance and reconciliation of surcharges pursuant to § 50.74 and § 50.75; and (d) the recordkeeping requirement in § 50.61(b) for information to be used by Treasury (or its designees) to audit for the proper collection and remittance of recoupment amounts to Treasury. The forms to be prescribed by Treasury for the data call to collect information to ascertain the aggregate amount of insured losses will require information readily derived from existing normal industry internal and external reporting. This information would be needed by Treasury for the purpose of determining initial or recalculated recoupment amounts. Hence, Treasury may issue data calls to insurers for insurer deductible and insured loss information by Program Year. The number of respondents to such a data call is not expected to exceed 200 insurers. The data to be obtained in the immediate aftermath of certification of an act of terrorism would include the insurers' total expected losses and estimated insurer deductibles. These data would be used to formulate initial estimates of aggregate insured losses for determining whether mandatory recoupment might be required. A subsequent call(s) to refine the information received would include catastrophe code, line of business, losses paid, allocated loss adjustment expenses paid, case reserves, incurred but not reported reserves as well as the total expected loss and insurer deductible data. All of these are routinely generated and reported data in the insurance industry. Treasury estimates that an insurer will require 5 hours, on average, to assemble data and respond to the Treasury request. The estimated total burden would therefore be 1,000 hours (200 insurers × 5 hours). At a blended, fully loaded hourly rate of \$85.00, the cost would be \$85,000.

If recoupment of the Federal share of compensation is implemented by Treasury, all insurers subject to the Act

will be required to create and maintain records concerning their direct written premium, Surcharges, Surcharge amounts collected and Surcharge amounts remitted to Treasury. Calculating and imposing surcharges is a standard insurance processing system function that would be specifically implemented for the Federal Terrorism Policy Surcharge. The burden associated with the collection of information in the proposed rule is comprised of three components: (1) Surcharge implementation; (2) monthly submission and reconciliation; and (3) on-going recordkeeping.

Treasury estimates that an insurer will require, one time at the onset of the imposition of Surcharges, 40 hours, on average, to make systems changes necessary to implement the collection of Surcharges from policyholders. Treasury also estimates that the proposed rule will impose an annual recordkeeping burden, with respect to each insurer subject to the Act, of 4 hours. The estimated total burden for implementation is 80,000 hours (2,000 insurers × 40 hours) and the estimated total annual recordkeeping burden is 8,000 hours (4 hours × 2,000 insurers). If imposed, the first year cost to respondents for implementation of systems and procedures for the recoupment requirements is estimated to be \$7,400,000 (approximately 80,000 hours at a blended, fully loaded hourly rate of \$92.50). Once implemented and incorporated into respondents' systems, there is expected to be virtually no additional operation and maintenance cost.

To limit the burden on insurers, the reporting requirement to Treasury is being designed for electronic fulfillment. The data required are those normally developed and reported in the conduct of policy writing and accounting. Development and transmission of the individual monthly submission (including the final month's annual statement) is expected to be 5 hours, or 60 hours annually for each of the estimated 2,000 insurers subject to the requirement. At a blended hourly rate of \$70, the estimated annual burden to insurers is 120,000 hours and \$8,400,000.

The recordkeeping requirement is mandatory for any insurer that writes property and casualty insurance as defined by the Act and Treasury's regulations. The number of insurers subject to recordkeeping is estimated to be 2,000. Treasury believes that the information that insurers would be required to generate and retain under § 50.61(b) involves systems and records that insurers routinely operate and

maintain in the course of issuing and administering policies, performing basic accounting, and regularly reporting to state regulators. The total annual recordkeeping costs for respondents is estimated to be \$240,000 (approximately 8,000 hours at a rate of \$30.00 per hour). These costs could continue in subsequent years.

The total first-year cost of these activities is estimated at \$16,040,000 with later years estimated at \$8,400,000 for collection and submission activities and \$240,000 for recordkeeping.

## List of Subjects in 31 CFR Part 50

Terrorism risk insurance.

## Authority and Issuance

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 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), (y) and (aa), respectively.

b. New paragraphs (d), (e), (g), (h), (i), (j), (n), (x), and (z) 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 effective date*—means the date established by Treasury that begins the assessment period.

\* \* \* \* \*

(z) *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.

50.70 Mandatory and discretionary recoupment.

50.71 Determination of recoupment amount.

50.72 Establishment of Federal Terrorism Policy Surcharge.

50.73 Notification of recoupment.

50.74 Collecting the Surcharge.

50.75 Remitting the Surcharge.

50.76 Insurer responsibility.

#### **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 his discretion, the Secretary may recover any portion of the aggregate Federal share of compensation that exceeds the mandatory recoupment amount through Federal Terrorism Policy Surcharges based on the factors set forth in section 103(e)(7)(D) of the Act.

(c) If the Secretary is required to impose Federal Terrorism Policy Surcharges as provided in paragraph (a) of this section, then the required amounts shall be collected in

accordance with section 103(e)(7)(E) of the Act:

(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;

(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 Federal Terrorism Policy Surcharges 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 (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 in force during the assessment period. All new, renewal, mid-term, and audit additional premiums for a policy term are subject to the Surcharge in effect on the policy term effective date. 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.

(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 to a policyholder, it shall also return any Federal Terrorism Policy Surcharge collected that is attributable to the unearned 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 Surcharge 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 Surcharges 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 Surcharge 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. An insurer may request refund of any Federal Terrorism Policy Surcharges previously remitted to Treasury that were subsequently returned by the insurer to a policyholder as attributable to unearned 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.

**David G. Nason,**

Assistant Secretary (Financial Institutions).

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## **DEPARTMENT OF HOMELAND SECURITY**

### **Federal Emergency Management Agency**

#### **44 CFR Part 67**

[Docket No. FEMA-B-1004]

### **Proposed Flood Elevation Determinations**

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Proposed rule.

**SUMMARY:** Comments are requested on the proposed Base (1 percent annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

**DATES:** Comments are to be submitted on or before December 16, 2008.

**ADDRESSES:** The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community are available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA-B-1004, to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646-3151, or (e-mail) [bill.blanton@dhs.gov](mailto:bill.blanton@dhs.gov).

#### **FOR FURTHER INFORMATION CONTACT:**

William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646-3151 or (e-mail) [bill.blanton@dhs.gov](mailto:bill.blanton@dhs.gov).

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) proposes to make

determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

#### *Administrative Procedure Act*

*Statement.* This matter is not a rulemaking governed by the Administrative Procedure Act (APA), 5 U.S.C. 553. FEMA publishes flood elevation determinations for notice and comment; however, they are governed by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and do not fall under the APA.

*National Environmental Policy Act.* This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

*Regulatory Flexibility Act.* As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601-612, a regulatory flexibility analysis is not required.

*Executive Order 12866, Regulatory Planning and Review.* This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

*Executive Order 13132, Federalism.* This proposed rule involves no policies that have federalism implications under Executive Order 13132.

*Executive Order 12988, Civil Justice Reform.* This proposed rule meets the applicable standards of Executive Order 12988.