

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

RIN 1505-AB09

**Terrorism Risk Insurance Program; Additional Claims Issues; Insurer Affiliations****AGENCY:** Departmental Offices, Treasury.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of the Treasury (Treasury) is issuing this proposed rule as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (Act). The Act established a temporary Terrorism Risk Insurance Program (Program) under which the Federal Government will share the risk of insured loss from certified acts of terrorism with commercial property and casualty insurers until the Program ends on December 31, 2005. This proposed rule is a clarification that, for purposes of calculating insurer deductibles and meeting the requirements for claiming the Federal share of compensation for insured losses, affiliations are to be determined based on the insurer's circumstances as of the date of the first certified act of terrorism in a Program Year.

**DATES:** Written comments may be submitted on or before February 17, 2005.

**ADDRESSES:** Submit comments by e-mail to [triacomment@do.treas.gov](mailto: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 Insurer Affiliations". 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:** Howard Leikin, Senior Insurance Advisor; or David Brummond, Legal Counsel, 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 to allow for a transition period for the private markets to stabilize and build capacity while preserving State insurance regulation and consumer protections.

Title I of the Act establishes a temporary Federal program of shared public and private compensation for insured commercial property and casualty losses resulting from an act of terrorism, which as defined in the Act is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General. The Act authorizes Treasury to administer and implement the Terrorism Risk Insurance Program, including the issuance of regulations and procedures. The Program will end on December 31, 2005. Thereafter, the Act provides Treasury with certain continuing authority to take actions as necessary to ensure payment, recoupment, adjustments of compensation and reimbursement for insured losses arising out of any act of terrorism (as defined under the Act) occurring during the period between November 26, 2002, and December 31, 2005.

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

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

The mandatory availability or "make available" provisions in section 103 of

the Act require that, for Program Year 1, Program Year 2, and, if so determined by the Secretary of the Treasury, for Program Year 3, all entities that meet the definition of insurer under the Program must make available in all of their commercial property and casualty insurance policies coverage for insured losses resulting from an act of terrorism. This coverage cannot differ materially from the terms, amounts and other coverage limitations applicable to losses arising from events other than acts of terrorism. On June 18, 2004, the Secretary of the Treasury announced his decision to extend the make available requirements through Program Year 3.

As conditions for federal payment under the Program, insurers must provide clear and conspicuous disclosure to the policyholders of the premium charged for insured losses covered by the Program and of the Federal share of compensation for insured losses under the Program. In addition, the Act requires that insurers make certain certifications to Treasury and process and submit claims for the insured loss in accordance with appropriate business practices and any reasonable procedures Treasury may prescribe.

The Act also contains specific provisions designed to manage litigation arising out of or resulting from a certified act of terrorism. Among other provisions, section 107 creates, upon certification of an act of terrorism by the Secretary, an exclusive Federal cause of action and remedy for property damage, personal injury, or death arising out of or relating to an act of terrorism; preempts certain State causes of action; provides for consolidation of all civil actions in Federal court for any claim (including any claim for loss of property, personal injury, or death) relating to or arising out of an act of terrorism; and provides that amounts awarded in actions for property damage, personal injury, or death that are attributable to punitive damages are not to be counted as "insured losses" and not paid under the Program. The Act also provides the United States with the right of subrogation with respect to any payment or claim paid by the United States under the Program.

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

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

## II. Previous Rulemaking

To assist insurers, policyholders, and other interested parties in complying with immediately applicable requirements of the Act, Treasury issued interim guidance to be relied upon by insurers until superseded by regulations. These notices of interim guidance have now been superseded by final regulations. General provisions, including the scope of the Program and key definitions, and rules on disclosures and mandatory availability are at Subparts A, B, and C of 31 CFR part 50 (68 FR 41250; 68 FR 59720). 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 (68 FR 59715). The 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 (69 FR 39296). Subpart G of 31 CFR part 50 (69 FR 39296) contains the rules on audit and recordkeeping, which specify record retention by insurers in connection with the handling and settlement of claims to enable Treasury to perform financial and claim audits. Subpart I of 31 CFR part 50 (69 FR 44932) contains Treasury's rules implementing the litigation management provisions of section 107 of the Act.

## III. The Proposed Rule

Under the Act and regulations, "affiliates" are treated collectively as one insurer for purposes of calculating the insurer deductible. This proposed rule amends Subpart F of 31 CFR part 50, which contains the claims procedures for insurers seeking the Federal share of compensation for insured losses, to clarify that for that Subpart's purposes, insurer affiliations for any Program Year shall be determined based on the insurer's circumstances as of the date of the first

certified act of terrorism in that Program Year.

This change will clarify how deductible calculations, loss certifications, claims for the Federal share of compensation and receipt of payment are to be handled, considering that (1) affiliations of insurers may change over the course of a Program Year, and (2) there may be more than one act of terrorism certified in a Program Year. It is Treasury's intention to make known how such a combination of circumstances will be addressed under the Program so that insurers can plan their business affairs and transactions accordingly.

An insurer's deductible for a Program Year is based on direct earned premium from the prior calendar year. Through an interpretive letter, issued on December 1, 2003, Treasury addressed the question of how the direct earned premium (and consequently, the insurer deductible) would be determined for an insurer or insurer group where the composition of the affiliations has changed since the prior calendar year. The interpretive letter indicated that the affiliations in place at the time of the occurrence of the certified act of terrorism would govern how an insurer's or insurer group's direct earned premium would be determined and the resulting deductible calculated. This interpretation did not address the circumstance where more than one event is certified in the same Program Year.

Treasury thus believes it is necessary to provide additional guidance to insurers to clarify Program implementation should more than one act of terrorism be certified in a Program Year. In developing this proposed rule, Treasury examined a variety of other alternatives for determining insurer affiliations, including:

1. The determination of affiliations as of each certified act of terrorism;
2. The determination of affiliations as of the first certified act in a Program Year for which the particular insurer has losses;
3. The determination of all affiliations as of January 1 of each Program Year.

Treasury has concluded that the first alternative would produce unacceptable results because the insurer deductible is a Program Year deductible, not a per-event deductible. Any calculation of the deductible, in Treasury's view, must be applied against all insured losses consistently for the entire Program Year.

The second alternative, determining affiliations at the time of a first certified act in a Program Year for which an insurer actually has insured losses, would provide a higher degree of

accuracy in reflecting the appropriate affiliations at the time of such an event. However, after examining the different ways that affiliations may change in the interim between events, Treasury considers this approach to be very complicated to describe and administer. Given the temporary nature of the Program, Treasury believes that this alternative would require too great an effort to overcome the possibility of confusion for both insurers and the Program.

The third alternative, determining affiliations as of January 1 of a Program Year, would be inconsistent with the interpretation Treasury has already issued. More importantly, Treasury considers this approach to have too great a potential to provide an inaccurate reflection of the insurance entity at the time of an actual certified act of terrorism. Since such an event can occur well into a Program Year, changes in affiliations may be significant.

It is Treasury's view that the proposed rule is a reasonable compromise approach, one that can be relatively easy to understand and follow and practical to administer. Under this approach, the affiliations used for calculating direct earned premium and the resultant insurer deductible for a Program Year are determined for all insurers as of the date of the first act of terrorism certified by the Secretary in a Program Year. This is regardless of whether the insurer has had any insured losses from the event. Treasury believes that the direct earned premium reported for the calendar year prior to the Program Year in which the certified act occurs can readily be determined for the insurers affiliated at the time of the first event. The insurer deductibles calculated from this information can be reasonably applied to that first event's insured losses as well as to the insured losses resulting from any certified acts in the remainder of the Program Year.

As a practical matter, Treasury is proposing that all requests for the Federal share of compensation for a Program Year will be processed based on the affiliations as of the first certified act in a Program Year, regardless of actual changes to those affiliations prior to the occurrence of another certified act within the same Program Year. This approach will allow Treasury to receive and maintain consistent information in providing the Federal share of compensation and reduce the potential administrative burden that Treasury might otherwise have in tracking and reviewing claims in this temporary program.

#### IV. Procedural Requirements

*Executive Order 12866, "Regulatory Planning and Review"*. This rule is not a significant regulatory action for purposes of Executive Order 12866, "Regulatory Planning and Review," and therefore has not 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 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 of 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. The proposed rule merely clarifies the point in time at which insurer affiliations are determined for purposes of the Program. A regulatory flexibility analysis is thus not required.

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

Terrorism risk insurance.

#### PART 50—TERRORISM RISK INSURANCE PROGRAM

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

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

2. Subpart F is proposed to be amended by adding a new section 50.55 to read as follows:

#### § 50.55 Determination of Affiliations.

For the purposes of this Subpart F, an insurer's affiliates for any Program Year shall be determined based on the insurer's circumstances as of the date of the first certified act of terrorism in that Program Year.

Dated: January 11, 2005.

**Wayne A. Abernathy,**

*Assistant Secretary of the Treasury.*

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#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 122

[OW-2002-0068; FRL-7862-1]

RIN 2040-AE71

#### Extension of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** Today EPA proposes to amend the rule on National Pollutant Discharge Elimination System storm water permits to postpone until June 12, 2006, the requirement to obtain permit coverage for oil and gas construction activity that disturbs one to five acres of land. This would be the second postponement promulgated by EPA for these activities. EPA proposes this postponement in order to afford the Agency additional time to complete consideration of the issues raised by stakeholders about storm water runoff from construction activities at oil and gas sites and of procedures for controlling storm water discharges as appropriate to mitigate impacts on water quality. EPA intends to take final action with respect to today's proposal by March 10, 2005. Within six months of this final action (September 12, 2005), EPA intends to publish a notice of proposed rulemaking in the **Federal Register** for addressing these discharges and invite public comments.

**DATES:** Comments on the proposed rule must be received on or before February 17, 2005.

**ADDRESSES:** Submit your comments, identified by Docket ID No. OW-2002-0068, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- Agency Web site: <http://www.epa.gov/edocket>. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

- E-mail: [ow-docket@epa.gov](mailto:ow-docket@epa.gov). Attention Docket ID No. OW-2002-0068.

- Mail: Water Docket, Environmental Protection Agency, Mailcode: 4101 T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

- Hand Delivery: Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. OW-2002-0068. Such deliveries are only accepted during the Docket's normal hours of operation. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

**Instructions:** Direct your comments to Docket ID No. OW-2002-0068. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.epa.gov/edocket>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I.C of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** All documents in the docket are listed in the EDOCKET index at