

(December 31, 2005). The Conference Report accompanying the Act states, with respect to this provision, that “the Secretary has discretion to extend this requirement to the third year of the Program, to preserve this important option for policyholders.” H.R. Conf. Rep. No. 107–779 (2002).

Section 50.20 of the interim final rule incorporates the general statutory requirements as described above.

Section 50.21 of the interim final rule covers general matters of applicable time periods, initial offers of coverage versus subsequent negotiations, and how an insurer may demonstrate compliance. Section 50.21(a) makes clear that the make available requirements apply to policies in existence on November 26, 2002, new policies issued, and renewals of existing policies through the end of Program Year 2 (unless extended by the Secretary). The make available requirements are not one-time requirements. For example, if an insurer has satisfied the make available requirements in Program Year 1 in its offer to a policyholder, but the coverage offered is declined, the insurer must still satisfy the make available requirements again when the policy is renewed in Program Year 2.

Section 50.21(a) also states, consistent with Interim Guidance I, that the make available requirements apply at the time an insurer makes the initial offer of coverage, as distinguished from changes negotiated by the insurer thereafter as part of the process of agreeing on a contract of insurance. Section 50.21(b)(1) addresses a situation in which an insurer makes an initial bona fide offer of terrorism risk coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism; the policyholder then declines the offer, and the insurer subsequently negotiates terrorism risk coverage of the policyholder for insured losses at a lower amount of terrorism risk coverage than initially offered. In such a situation, under the interim final rule, the make available requirements would have been satisfied by the initial offer, and therefore an offer of a lower amount of terrorism risk coverage is deemed permissible, if allowed under any applicable State law. Although a subsequent lower offer as described is permissible, neither the Act nor the Program require an insurer to offer partial coverage if the policyholder declines full coverage in an initial offer. (See the discussion below of section 50.24, which deals with the applicability of State law requirements.)

Section 50.21(c) addresses the demonstration of compliance by an insurer with the make available requirement. Treasury has audit and investigative authority under the Act and insurers should be prepared to demonstrate compliance with the make available requirements. Treasury is not prescribing any new recordkeeping requirement. With regard to an insurer's current insurance policies, records related to the make available requirements are likely to be included and retained as part of standard policy documents in the normal course of business. In this regard, however, if an insurer makes an offer of insurance but no contract of insurance is purchased or renewed (*i.e.* no insurance contract is finalized), the insurer may demonstrate that it has satisfied the make available requirements through its routine adherence to normal risk management systems (*e.g.*, company policies, use of internal controls and audits) and normal business practices (*e.g.* sample forms routinely used to solicit business) during the relevant time period that evidence its practice of compliance.

Section 50.23 of the interim final rule addresses the language “terms, amounts, and coverage limitations” in the make available requirements. Sections 50.23(a) and (b) of the interim final rule incorporate guidance previously issued by Treasury (Interim Guidance I). Section 50.23(a) states that an insurer must offer coverage for insured losses resulting from an act of terrorism that does not differ materially from the terms, amounts, and other coverage limitations (including deductibles) applicable to losses from other perils. “Terms” excludes price for purposes of this requirement. This means the requirement to offer coverage for insured losses that does not differ materially from the terms, amounts and other coverage limitations applicable to losses arising from events other than acts of terrorism does not apply to the price of the coverage. As noted in Interim Guidance I, however, Treasury will be monitoring the pricing and availability of terrorism risk insurance coverage as part of the Act's requirements that Treasury study the effectiveness of the Program (section 108(d)(1)).

Section 50.23(b) provides that if an insurer does not cover all types of risks, then it is not required to cover the excluded risks in satisfying the requirement to make available coverage for losses resulting from an act of terrorism that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of

terrorism. If an insurer does not cover all types of risks, either because the insurer is outside of direct State regulatory oversight, or because a State permits certain exclusions for certain types of losses, such as nuclear, biological, or chemical events, then the insurer is not required to make such coverage available.

Section 50.24 of the interim final rule addresses the interrelationship of federal and State law requirements and confirms the continued applicability of State law requirements, consistent with Interim Guidance I. (See also the discussion of section 50.21(b), above.) After satisfying the requirement to make available coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism, if coverage is rejected, an insurer may then offer coverage that is on different terms, amounts, or coverage limitations, as long as such an offer does not violate any applicable State law requirements. For example, if an insurer subject to State regulation first satisfies the requirement to make available property and casualty insurance coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism, and the State has a requirement that an insurer offer full coverage without any exclusion, then the requirement would continue to apply and the insurer may not subsequently offer less than full coverage or coverage with exclusions. If such an insurer first satisfies the make available requirement but the State permits certain exclusions or allows for other limitations (or an insurance policy is not governed by State law requirements), then the insurer may subsequently offer limited coverage or coverage with exclusions.

III. Procedural Requirements

The Act established a Program to provide for loss sharing payments by the Federal Government for insured losses resulting from certified acts of terrorism. The Act became effective immediately upon the date of enactment (November 26, 2002). Preemptions of terrorism risk exclusions in policies, mandatory participation provisions, disclosure and other requirements and conditions for federal payment contained in the Act applied immediately to those entities that come within the Act's definition of “insurer.”

The disclosure requirements are statutory conditions for federal payment under the Program. The disclosure