

resulting from an act of terrorism as defined by section 102(1) of the Act. In this regard, section 103(c) requires insurers to make such terrorism risk coverage available at terms, amounts and other coverage limitations that do not differ materially from those applicable to losses arising from events other than from acts of terrorism. Subpart D, as directed by section 103(d)(1) of the Act, applies the provisions of the Act to State residual market insurance entities and State workers' compensation funds. In the preamble to the proposed rule, Treasury requested comment on application of the disclosure requirements of the Act to State residual market insurance entities and State workers' compensation funds. As part of this rulemaking, Treasury is amending section 50.19 of subpart B, which was previously reserved, to apply the disclosure requirements to those entities.

The various rules reflect earlier interim guidance notices, issued by Treasury soon after the Act's enactment date, and designed to assist insurers, policyholders, and other interested parties in complying with immediately applicable and time-sensitive requirements.<sup>1</sup> In finalizing this rule, Treasury carefully considered the comments submitted and consulted with the NAIC.

## II. Summary of Comments and Final Rule

Treasury received four comments on the proposed rule. Comments were submitted by a group of insurance trade associations, the Ohio Bureau of Workers' Compensation, and a State residual market insurance entity. After review and careful consideration of these comments, as well as additional research and consultation with the NAIC, Treasury is now promulgating a final rule applying the Act to State residual market insurance entities and State workers' compensation funds (referred to collectively as "residual market mechanisms" where appropriate). Treasury has made no changes to the proposed rule. Treasury is, however, adding specific disclosure provisions by amending section 50.19. The final rule and amendment to

section 50.19, including clarifications, are discussed in the summary of comments below.

### A. Mandatory Participation by Residual Market Mechanisms (Section 50.30)

In subpart D of this final rule, Treasury is setting forth regulations specific to the participation of residual market mechanisms in the Program. Section 102(6) of the Act specifically includes State residual market insurance entities and State workers' compensation funds as insurers that are required to participate in the Program. As we stated in the notice of proposed rulemaking (published in the **Federal Register** at 68 FR 19309 on April 18, 2003), Treasury considers the Act's terms "State residual market insurance entities" and "State workers' compensation funds" to encompass all State legislatively-created residual market mechanisms that facilitate the availability of primary and excess commercial property and casualty insurance coverage for risks that face difficulties in obtaining such coverage from the voluntary market. This includes—but is not limited to—residual market mechanisms associated with the provision of commercial property, commercial liability, workers' compensation, and commercial automobile coverage. Sections 50.30(a) and (b) of this final rule, taken together, provide that residual market mechanisms are insurers under the Program, even if they do not receive direct earned premiums, and thus are mandatory participants in the Program.

#### 1. List of Residual Market Mechanisms

In its second notice of interim guidance (67 FR 78864), Treasury first published a list of entities that Treasury, in consultation with the NAIC, identified as residual market mechanisms required to participate in the Program and that provide commercial property and casualty insurance, as defined by the Act and regulations. The list is not exclusive. A residual market mechanism should not assume that because it is not listed on Treasury's *List of State Residual Market Mechanisms* it is not required to participate in the Program. All State residual market insurance entities and State workers' compensation funds are insurers that *must* participate in the Program. See sections 50.5(f)(1)(D) and 50.4. Treasury's list was merely intended to provide guidance and certainty to those entities on the list as well as to foster transparency in the Program.

In the notice of interim guidance, Treasury encouraged residual market

mechanisms that were not included on the list to notify Treasury. Since the publication of that notice of interim guidance, Treasury has continued to work with the NAIC to revise the *List of State Residual Market Mechanisms*. Section 50.30(c) of this final rule explains that Treasury will maintain and continue to update this list from time to time, as necessary. Treasury's list will be publicly available at [www.treasury.gov/trip](http://www.treasury.gov/trip), along with the procedures for providing comments and updates.

Treasury, in consultation with the NAIC, has considered the following characteristics in identifying residual market mechanisms that should be included on Treasury's list:

- Was the mechanism created by a state legislature?
- Does the mechanism provide commercial property and casualty insurance to policyholders, either directly or through servicing carriers?
- Does the mechanism seek to make available commercial property and casualty insurance for risks that are "distressed" or "hard to place" in the voluntary market?
- How does the mechanism share or allocate its profits and losses from its operations?
- Does the mechanism meet the requirements of § 50.5(f)?

#### 2. State Workers' Compensation Reinsurance Pools

Treasury received a comment from the Minnesota Workers' Compensation Reinsurance Association ("WCRA"), a State workers' compensation reinsurance pool, that requested the Secretary exercise his discretion under section 103(f) of the Act (which mentions State workers' compensation reinsurance pools) and include such pools in the Program. Treasury is not making a section 103(f) determination at this time. However, looking beyond the commenter's name to its function, Treasury has determined that the commenter fits within the residual market mechanism category under section 103(d) of the Act, as explained below.

The WCRA is a State-mandated reinsurance pool from which workers' compensation insurers are required by State law to purchase excess reinsurance. WCRA also provides workers' compensation insurance directly to self-insured employers. While section 102(12)(vii) of the Act expressly excludes reinsurance from the definition of property and casualty insurance covered by the Program, Treasury believes that an insurance arrangement between a self-insured and

<sup>1</sup> These interim guidance notices were published in the **Federal Register** at 67 FR 76206 (Dec. 11, 2002); 67 FR 78864 (Dec. 26, 2002) and at 68 FR 4544 (Jan. 29, 2003). Treasury also issued a fourth interim guidance at 68 FR 15039 (Mar. 27, 2003), which has subsequently been superseded by a new provision in the final rule for Subpart A, published at 68 FR 41250 (July 11, 2003). The interim guidance and all regulations can also be located on Treasury's Terrorism Risk Insurance Program Web site at [www.treasury.gov/trip](http://www.treasury.gov/trip).