

This final rule (and the preceding interim final rule) reflect earlier interim guidance, issued by Treasury in notices that were published soon after the Act's enactment date, and were designed to assist insurers, policyholders and other interested parties in complying with immediately applicable and time-sensitive requirements.¹ In finalizing the interim final rule, Treasury carefully considered the comments submitted and consulted with the NAIC.

II. Summary of Comments and Final Rule

Treasury received 12 comments on the interim final rule. Comments were submitted by individual insurance companies and their legal counsel, by insurance and mortgage banker industry trade associations, by a coalition of trade and professional associations and by the American Academy of Actuaries. 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 concerning the Act's disclosure and make available requirements. The final rule makes few changes to the interim final rule. Clarifications were made in several areas based on comments received. These clarifications are discussed in the summary of comments below.

A. Disclosures

1. General Disclosure Requirements (Section 50.10)

Section 103(b) of the Act requires insurers to make certain disclosures to policyholders as a condition for federal payment under the Act. The general disclosure requirements of section 50.10 of the interim final rule incorporate the Act's requirements. This section of the final rule is unchanged from the interim final rule. Section 50.10 states, in part, that an insurer must provide clear and conspicuous disclosure to the policyholder of: (1) The premium charged for insured losses covered by the Program; and (2) the federal share of compensation for insured losses under the Program. As discussed below, the disclosure provisions are a condition for federal payment under the Act and a mechanism through which Congress

sought to enhance competition and comparison shopping in the purchase of terrorism risk insurance and to increase awareness of the federal contribution to the Program.

One commenter, a mortgage banking trade association, urged Treasury to revise the interim final rule to specifically require insurers to notify lenders, securitizers, and servicers of commercial mortgages (collectively referred to in this preamble as mortgage finance providers) of the terrorism coverage options offered under the Act. The commenter also requested that the interim final rule be changed to require insurers to provide notice to these mortgage finance providers of their borrowers' acceptance or rejection of the terrorism risk insurance coverage made available by the insurer. In support of these suggested revisions, the commenter stated that mortgage finance providers are having difficulty determining "whether most of the properties in their portfolios carry adequate terrorism risk insurance as required by loan documents." The commenter also asserts that the absence of these suggested extensions to the current regulatory disclosure requirements produces inefficiencies in the commercial real estate and capital markets, including information gaps that may have an adverse effect on economic growth and on the condition of key financial institutions.

In a careful evaluation of whether the suggested revisions to the interim final rule were appropriate, Treasury first reviewed the scope of the disclosure provisions of section 103(b) of the Act and then considered the legislative history concerning those disclosure requirements. Treasury also considered whether there were alternative ways in which these mortgage finance providers may obtain the insurance coverage information they seek from their borrowers. Treasury consulted with the NAIC concerning definitions in various state laws and typical industry business practices and standards. For the reasons discussed below, Treasury is not extending the disclosure requirement in the interim final rule as suggested by the commenter.

Section 103(b) requires that clear and conspicuous disclosure of certain information be provided by insurers to "policyholders." The Conference Report to the Act states that Congress required the disclosures in section 103(b) in order, "to enhance the competitiveness of the marketplace by better enabling consumers to comparison shop for terrorism insurance coverage, and to make policyholders better aware that the Federal government will be sharing

the costs of such coverage with insurers thereby reducing the insurers' exposure." H.R. Conf. Rep. No. 107-779, at 24 (2002). Neither the language in section 103(b) of the Act, nor the congressional intent of these disclosures as explained in the Conference Report, requires that these disclosures be made to mortgage finance providers or other entities that are not policyholders. Similarly, there is no third party notification requirement in the Act concerning whether a policyholder has, or has not, elected to purchase terrorism risk insurance coverage. The stated legislative intent of the disclosures is to enhance comparison shopping and Program awareness by policyholders.

For purposes of the Program, policyholder refers to the "person" to whom the insurer issues a commercial property and casualty insurance policy and who has apparent authority to negotiate, determine or modify the terms of the insurance contract. In this regard, the Act and Treasury's regulations require insurers to disclose information about the premium and the federal share of compensation to policyholders at the time of offer, purchase, and renewal.

In its comment, the association also expressed a concern that, "under notice provisions to the mortgagee contained in existing insurance policies, a partial cancellation of coverage for terrorism (as opposed to a cancellation of the entire policy) may be deemed by the insurers as an endorsement of the policy that does not require the insurer to send notice to the mortgage lender." Thus, the commenter is concerned that mortgage finance providers may not be notified if there is a subsequent change in the policy with regard to terrorism risk insurance. However, the commenter also acknowledges that the failure of mortgage finance providers to obtain such notice appears to be due to the drafting of notice provisions in policies.

Treasury considered whether there were other, perhaps more appropriate ways, in which mortgage finance providers could obtain the information they seek from their borrowers instead of through the expansion of the statutory disclosure requirements under this temporary Program. Treasury understands that mortgage finance providers generally may obtain the information about the status of a borrower's coverage for terrorism risks (whether the losses are those covered by the Program or broader in scope) through their underwriting requirements and/or by contract. For example, loan documents generally require that borrowers provide appropriate insurance coverage

¹ 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 <http://www.treasury.gov/trip>.