

those policyholders covered by the policies. These insured losses are used in determining whether an insurer has met its insurer deductible under the Program. If an insurer chooses not to provide disclosures on a block of policies covered by the Program, the insurer will not receive federal payment for any claims it may submit to Treasury for insured losses covered by such policies because the required disclosures—a condition for federal payment—were not made. The insurer could submit a claim for federal payment under the Program on another block of policies, as long as the insurer made the required disclosures to those policyholders, and otherwise met all other conditions for payment of those insured losses. Treasury will initiate a future rulemaking concerning claims and certification procedures for purposes of the Program.

The following example provides further clarification of section 50.12(f). A surety insurer may satisfy the Act's make available requirement by providing terrorism risk insurance coverage under the Program to a block of notary public bond policyholders at no cost. The surety insurer may decide not to provide disclosure notices to those policyholders because it considers the expense of making the disclosures as being greater than the benefit of receiving the federal payments under the Program. Therefore, the insurer would be liable for any insured losses on the notary public bonds, but would not be eligible to receive any federal payment under the Program backstop on such losses because a condition for federal payment (making the requisite disclosures to policyholders) was not met. However, if the insurer provides the required disclosures to policyholders insured under a separate block of construction bond policies, the failure to make disclosures to the notary public bond policyholders would not prevent the insurer from certifying that it provided the required disclosure to policyholders insured under the construction bond policies for which the insurer was seeking federal payment for insured losses under the Program. The insured losses under the construction bond policies "form the basis" for a claim submitted for federal payment; the insured losses under the notary public bonds do not. Regardless of whether disclosures are provided, direct earned premiums on the notary public bonds would be included in the calculation of the insurer deductible for purposes of the Program and such notary public bond policyholders would be subject to any subsequent

recoupment. The insurer's calculation of insured losses under the Program for purposes of meeting its insurer deductible would include only those losses on the construction bonds.

Section 50.12(f) relates to other aspects of the Program in the following ways. First, regardless of whether an insurer intends to submit a claim for federal payment, all insurers must comply with the make available requirements of section 103(c) of the Act and in the regulations. Second, in calculating its direct earned premium and insurer deductible under the Program, an insurer must include premium income from all policies for commercial property and casualty insurance for losses occurring at certain locations (see section 50.5(d)), whether or not the insurer made the required disclosures. Third, an insurer may submit a claim for federal payment only for those "insured losses" on policies on which the insurer made required disclosures to policyholders. Finally, all commercial property and casualty insurance policies are subject to the Act's surcharge provisions, regardless of whether the insurer made the disclosures. Accordingly, if an insurer fails to provide the disclosure notices to its policyholders, the insurer will not have met conditions for federal payment and will not be eligible for federal payment for insured losses under those policies. The insurer, however, will continue to be subject to the make available requirements, and the insurer and its policyholders will continue to be subject to the surcharge provisions under the Act and the Program.

3. Separate Line Item (Section 50.14)

Section 50.14 of the interim final rule incorporates interim guidance previously issued by Treasury that deems an insurer to be in compliance with the requirement of providing disclosure on a "separate line item in the policy" under section 50.10(d), and in compliance with section 103(b)(2)(C) of the Act, if the insurer makes the disclosure: (1) on the declarations page of the policy; (2) elsewhere within the policy itself; or (3) in any rider or endorsement that is made a part of the policy. In addition to the clear and conspicuous requirement, the Act requires that the separate line item disclosure be "in the policy."

Rather than require insurers to rewrite all of their policies, Treasury has determined that the disclosure is sufficient if made on the declarations page or within any rider or endorsement that is made a part of the policy. One commenter suggested revising the interim final rule to clarify that other

documents could be used. This commenter contended this would make it clear that compliance is not dependent on the name or title of the document, but rather on the fact that such disclosure document is made part of the policy. Treasury agrees and is amending section 50.14(c) accordingly.

B. Mandatory Availability

1. General Mandatory Availability Requirements (Sections 50.20 and 50.21)

Sections 103(c)(1)(A) and (B) of the Act require an insurer (as defined by the Act and the implementing regulations) to make available, in all of its property and casualty insurance policies, coverage for insured losses; and 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. The make available requirements apply during the period beginning on the first day of the Transition Period and ending on the last day of Program Year 2 unless the make available requirements are extended by the Secretary through Program Year 3. The duration and possible extension of the make available requirements in section 103(c) should not be confused with the established three-year duration of the Program as provided by section 108 of the Act.

2. Policies in Existence on November 26, 2002

Section 50.21(a) of the interim final rule states, in part, that the make available requirement of the Act applies to insurance policies in existence on November 26, 2002 (the date of enactment of the Act). One commenter suggested this provision may not be technically correct. The commenter reasoned that the make available requirement applies at the time of initial offer of coverage and that for policies in existence on November 26, 2002, the initial offer of coverage had already occurred, and, further, that only section 105 (voiding of terrorism exclusions) is applicable for policies in existence at the time of enactment.

It is Treasury's view that the make available requirement applies to policies in existence on November 26, 2002. Section 103(c)(1)(A) of the Act mandates that beginning on the first day of the Transition Period (defined in section 102(11) as of the date of enactment), an insurer shall make available coverage for insured losses in all of its property and casualty insurance policies. Section 105 of the Act, in effect, made coverage