

available upon enactment of the Act by voiding any exclusions within insurance policies that were in existence on November 26, 2002. Because the make available requirement and the process in section 105 of the Act for voiding terrorism risk insurance exclusions and offering coverage are generally consistent for commercial property and casualty policies in effect on November 26, 2002, Treasury has decided that no additional clarification is needed. See below for a discussion of the "initial offer of coverage" provision in the rule.

3. Initial Offer of Coverage

Section 50.21(a) of the interim final rule provides that the make available requirement also applies to new policies issued and renewals of existing policies during the period beginning on November 26, 2002 and ending on December 31, 2004 (the last day of Program Year 2) and, if the requirement is extended by the Secretary, to new policies issued and renewals of existing policies in Program Year 3 (calendar year 2005). The last line of 50.21(a) states that the "requirement applies at the time an insurer makes the initial offer of coverage."

One commenter, an insurance trade association, proposed revising the interim final rule by adding language to the end of section 50.21 stating that the make available requirement applies at the time an insurer makes the initial offer of coverage "and at no other time." The commenter suggested this revision because of a concern that a policyholder may try to purchase terrorism risk insurance coverage during a policy period (for example, upon a heightened state of terror alert) despite having rejected an initial offer of coverage by an insurer.

In context, Treasury believes the requirement in section 50.21(a) is clear. It is Treasury's view that by offering the coverage at the time of initial offer, the insurer has satisfied the make available requirement. However, the commenter's suggested change would limit the make available requirement more narrowly than intended by Treasury. This is because the initial offer of coverage is not the only time when the make available requirement applies. Treasury did not intend section 50.21 of the interim final rule to be read to mean that, as long as an insurer makes coverage available through an initial offer, the insurer has no further obligation to make coverage available to the policyholder during the Program's duration (e.g., at initial offer of renewal or in a new policy.) An insurer must make the coverage available, not only at

the time of initial offer, but also upon offer of policy renewal.

It is Treasury's view that an insurer need not make coverage available to a policyholder who did not accept an initial offer of coverage and later demands the coverage be added to the same policy during the policy period (i.e., through endorsement). In such a situation, the policyholder is not left without options; a policyholder can cancel its policy and solicit a new offer or proposal for insurance. Treasury is modifying section 50.21(a) to clarify the make available requirement applies at the time an insurer makes the initial offer of coverage as well as at the time an insurer makes an initial offer of renewal of an existing policy.

This insurance association commenter also suggested that Treasury consider changing the rule to eliminate the requirement that an insurer make available coverage through an initial offer. Instead, the commenter proposed that an insurer only be required to simply disclose that coverage is available for purchase and to invite policyholders to contact the insurer for an offer or quote, if desired. The commenter suggested that insurers could still make a formal offer of coverage if consistent with their normal business practice, but an offer would not be required. Treasury is not adopting this suggestion, which is inconsistent with the purposes of the statutory provisions.

4. Umbrella-Type Policies

An insurance industry trade association commenter raised several questions about the applicability of the make available requirement for insured losses through commercial property and casualty umbrella insurance. In response, Treasury emphasizes that commercial property and casualty umbrella insurance is included in the Program because it falls within the Program's definition of commercial property and casualty insurance. Therefore, an insurer that offers such umbrella insurance coverage is subject to the make available requirements.

Section 102(12) of the Act defines commercial lines of property and casualty insurance to specifically include "excess insurance." Section 50.5(l) of the regulations further defines commercial property and casualty insurance with reference to certain lines of insurance business reported on NAIC's Annual Statement's Exhibit of Premiums and Losses, commonly known as Statutory Page 14. Commercial property and casualty umbrella insurance is reported on Statutory Page 14 and not otherwise

excluded. Such umbrella policies are within the definition of "commercial property and casualty insurance." If the umbrella policy issuer is an insurer under the Act, it must participate in the Program and it is subject to the Act's requirements.

Accordingly, insurers that issue commercial property and casualty insurance through umbrella policies are subject to the make available requirements of the Program. This means that they must (1) make available in all of their commercial property and casualty insurance policies coverage for insured losses and (2) make available such 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 commenter also stated that some policyholders have declined insurance coverage for losses caused by an act of terrorism from their primary insurance carriers, electing instead to have such losses covered by the "drop down" coverage afforded through their (presumably less expensive) umbrella insurance policies. To prevent what the commenter characterizes as policyholder "gaming," the commenter suggests that "Treasury permit an umbrella insurer, in accordance with normal business practice, to refuse to drop down where the insured intentionally elected to forego primary coverage for acts of terrorism."

Although Treasury understands that certain provisions of the Act may not fit neatly with typical business practices of umbrella policy underwriters and other insurers, Treasury has determined to not revise the interim final rule as suggested because it may create a situation that appears to excuse an insurer from fulfilling its contractual obligation to pay a policyholder's claim for an insured loss that otherwise may be covered by the terms and conditions of a policy covered by the Program. Instead, it is Treasury's view that the commenter's concern is more appropriately addressed by the insurer that issues the umbrella policy, for example, through the insurer's underwriting procedures, pricing, and/or policy drafting. Therefore, an umbrella insurer could draft policy language that excludes from "drop down" coverage any losses arising from perils for which insurance was available from the primary or underlying insurer but was intentionally not purchased by the policyholder, provided: (1) The language does not differ materially from the terms and other coverage limitations applicable to losses arising from events other than acts of terrorism and (2) the