

exclusion is otherwise permitted by State law.

Another commenter raised similar questions with regard to Difference-In-Conditions (DIC) commercial property and casualty insurance. DIC insurance is included within the Program definition of commercial property and casualty insurance. DIC insurance is reported by insurers on commercial lines of Statutory Page 14 included in the Program (see section 50.5(l)). DIC insurance policies generally provide coverage for certain risks not covered by other policies. The commenter suggested that DIC commercial property and casualty insurance should not be included in the Program. The commenter contended that the Act and section 50.23 mean that all underlying commercial property and casualty policies must provide for—and cannot exclude—insured losses caused by an act of terrorism, and thus DIC coverage will never be triggered.

Treasury does not agree. As stated above with regard to umbrella policies, the Act requires all insurers under the Program to make available commercial property and casualty coverage for insured losses under the Program. If the issuer of a DIC commercial property and casualty insurance policy is an insurer as defined under the Program, then the DIC insurer must comply with the requirements of the Act and Treasury's implementing regulations, including those concerning the make available requirements. Insurers can exclude coverage for insured losses if the policyholder declines or elects not to purchase the coverage. If a DIC insurer's policyholder declines or elects not to purchase terrorism risk insurance coverage in an underlying policy, the Act requires that the DIC insurer must make available terrorism risk insurance for insured losses as part of the DIC policy. As with umbrella policies, Treasury recognizes that certain provisions of the Act may not fit neatly within typical business practices of DIC insurers but it is Treasury's view that the commenter's concern is more appropriately addressed through DIC underwriting procedures, pricing or policy drafting. Thus, in the final rule, Treasury is making no change to section 50.21 to provide special treatment to DIC or umbrella insurance policies.

#### 5. Limitations on Types of Risk (Section 50.23)

Section 103(c)(1)(B) of the Act provides that insurers under the Program “shall 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.” Sections 50.20 through 50.24 of the interim final rule reflect the statutory language and previously issued interim guidance. Section 50.23(b) addresses limitations on types of risk and provides that if an insurer does not cover all types of commercial property and casualty risks, then it is not required to cover the excluded risks in satisfying the make available requirements. For example, if an insurer does not cover all types of commercial property and casualty risk, 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. In addition, Section 50.24 addresses the applicability of State law.

A comment, submitted by a coalition of trade and professional associations expressed concern about the make available provisions in the interim final regulation. The commenter contended that the interim final rule's deference to State law exclusions for certain types of losses is not consistent with the purposes of the Act. The commenter also stated that the purpose of the Act was to put policyholders back to the level of coverage (or availability) that existed prior to September 11, 2001. Although acknowledging that whether a policyholder purchases terrorism risk insurance may be related to the price of the coverage, the commenter suggested that a lack of coverage for biological and chemical perils may adversely affect the policyholder's decision to purchase terrorism risk insurance.

After carefully considering the concerns expressed by the commenter and reviewing the purposes of the Act, Treasury is not making any change in the make available requirement as set forth in the interim final rule for the following reasons. First, it is Treasury's view that the make available requirement in the interim final rule, including the deference to state law exclusions, is fully consistent with the purposes of the Act. As stated in Section 101(b), the purposes of the Act include establishment of a temporary federal Program to “allow for a transitional period for the private markets to stabilize, resume pricing of such insurance and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections.” In addition, other provisions of the Act, such as section 106, generally support narrow State law preemption, consistent with the

McCarran Ferguson Act. Moreover, throughout the implementation process, Treasury has followed Congress's direction to consult with the NAIC, and in that regard, has relied to the greatest extent possible on the existing State regulatory structure for this temporary Program.

Second, based on information provided by the NAIC, it is Treasury's understanding that, even prior to September 11, 2001, insurers offered limited coverage for nuclear reaction or radiation or radioactive contamination, however caused, in commercial property and casualty insurance. In addition, deference to existing State law as it relates to the make available requirement does not mean that all losses associated with a nuclear, biological or chemical event would be excluded under the Program. Even with State exclusions, there may be commercial property and casualty insurance coverage in certain circumstances for certain biological, chemical or nuclear events. Moreover, the make available requirements in the interim final rule do not limit an insurer's ability to provide coverage for nuclear, biological, or chemical exposures as part of the Program, if the insurer chooses to offer such coverage. If an insurer provided such coverage in a commercial property and casualty policy, and met its insurer deductible and other conditions for federal payment, the insurer would receive federal payment under the Program for a claim filed based on that policy.

Third, the availability of terrorism risk insurance is affected by the affordability of such insurance. Neither the Act nor the Program mandates particular pricing. Therefore even if the “make available” requirement were applied in markets where exclusions are permitted, insurers would be able to price the coverage as appropriate, within any constraints, if any, imposed by the particular State. In such cases, if insurers believed they had insufficient capacity or that they lacked the ability to adequately evaluate the risks associated with a nuclear, biological, or chemical event, the corresponding price for such coverage along with the overall price for terrorism coverage could remain relatively high as insurers sought to build greater capacity and to account for greater uncertainty associated with these types of events.

### 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