

available” terrorism risk insurance. The disclosure guidance in Interim Guidance I references certain model forms of the National Association of Insurance Commissioners (NAIC) and provides safe harbor for those insurers that make use of such forms prior to the issuance of regulations, but Interim Guidance I stated that these forms are not the exclusive means by which insurers could comply with the disclosure conditions prior to the issuance of regulations. Interim Guidance I also provided guidance concerning the “direct earned premium” on lines of property and casualty insurance to enable insurers to calculate their “insurer deductible” and enable insurers to price and disclose their premiums for terrorism risk insurance to policyholders within statutory time periods.

On December 18, 2002, Treasury issued a second notice of interim guidance. This interim guidance was published at 67 FR 78864 on December 26, 2002 (Interim Guidance II). Interim Guidance II further addressed the statutory categories of “insurers” that are required to participate in the Program, including their “affiliates”; provided clarification on the scope of “insured loss” covered by the Program and provided additional guidance to enable eligible surplus line carriers listed on the Quarterly Listing of Alien Insurers of the NAIC or federally approved insurers to calculate their insurer deductible for purposes of the Program.

On January 22, 2003, Treasury issued a third notice of interim guidance, published at 68 FR 4544 on January 29, 2003 (Interim Guidance III). Interim Guidance III further clarified certain disclosure and certification questions, issues for non-U.S. insurers, and the scope of the term “insured loss” under the Act.

In issuing each notice of Interim Guidance, Treasury stated that the Interim Guidance may be relied upon by insurers until superseded by regulations or a subsequent notice. Treasury provided safe harbors for actions by those insurers taken in accordance with, and in reliance on, the interim guidance for the time period prior to the issuance of regulations. Treasury now is issuing an interim final rule with request for comment. The interim final rule addresses certain general Program provisions and Program definitions. Treasury is also issuing a companion proposed rule with request for comment.

## II. Analysis of the Interim Final Rule

The interim final rule establishes a new Part 50 in Title 31 of the Code of Federal Regulations, 31 CFR Part 50. Part 50 eventually will include other regulations deemed necessary by Treasury to implement the Program. Subpart A of new Part 50 contains certain general provisions and definitions of Program terms.

Some of the definitions are taken virtually verbatim from the Act because they do not need further clarification and are included in the interim final regulations primarily for ease of reference. In addition, the interim final rule generally incorporates the interim guidance provided previously by Treasury as it pertains to Program terms, for example, the terms “insurer,” “affiliate,” “property and casualty insurance” and “direct earned premium.” In several areas, the interim final regulation makes clarifying modifications to, or supplements, the interim guidance. For example, the interim final rule clarifies and emphasizes that the Program covers only commercial lines of property and casualty insurance, subject to the inclusions and exclusions of certain lines of insurance as set forth in the definition of property and casualty insurance in section 102(12) of the Act. The Program does not cover personal lines of property and casualty insurance, even if the latter are reported by an insurer on the NAIC’s Exhibit of Premiums and Losses (commonly known as Statutory Page 14).

In implementing the Program, Treasury has been guided by several goals. First, we strive to implement the Act in a transparent and effective manner that, for example, treats comparably those insurers required to participate in the Program and that provides necessary information to policyholders in a useful and efficient manner. Second, Treasury seeks to rely as much as possible on the State insurance regulatory structure. In that regard, Treasury is closely coordinating with the NAIC in implementing definitions and other aspects of the Program. Third, to the extent possible within statutory constraints, Treasury seeks to allow insurers to participate in the Program in a manner consistent with their normal course of business. Finally, given the temporary and transitional nature of the Program, Treasury is guided by the Act’s goal for insurers to develop their own capacity, resources and mechanisms for terrorism risk insurance coverage when the Program expires.

Key Program definitions contained in the interim final regulation are analyzed below.

### A. What is an “Act of Terrorism” Under the Program?

The Program definition of “act of terrorism” in the interim final rule is the same definition that is contained in section 102(1) of the Act. Section 106(a)(2) of the Act provides that the Act’s definition is the exclusive definition of the term “act of terrorism” for purposes of compensation for insured losses under the Act. The Act’s definition requires a certification by the Treasury Secretary, in concurrence with the Secretary of State and the Attorney General of the United States, that an act is an act of terrorism within the statutory parameters. These parameters include an act that is violent or dangerous to human life, property or infrastructure; that has resulted in damage within the United States, or outside the United States in the case of certain air carriers or vessels or if on the premises of a U.S. mission; and that has been committed by individual(s) on behalf of any foreign person or foreign interest, as part of an effort to coerce the U.S. civilian population or to influence the policy or affect the conduct of the U.S. government by coercion.

Thus, for example, acts of domestic civil disturbance would not be covered by the Act’s definition of “act of terrorism” or therefore, by the Program. As in the Act, the interim final rule provides that the Secretary’s determination or certification with regard to an act is final and is not subject to judicial review. An act of terrorism must meet a \$5,000,000 de minimis aggregate loss requirement before it may be certified. The Act also provides that an act is not certifiable if committed as part of a course of war declared by Congress, except with respect to workers compensation coverage.

### B. What Entities Must Participate in the Program (“Affiliate”, “Control”, “Insurer”)?

#### 1. Mandatory Participation of Insurers

The general provisions of the interim final rule incorporate the Act’s requirement in section 103(a)(3) that each entity meeting the definition of “insurer” under the Act must participate in the Program.

#### 2. “Insurer”

The interim final rule incorporates the statutory definition of “insurer” and generally incorporates the guidance set forth in Interim Guidance II concerning