

DEPARTMENT OF THE TREASURY**31 CFR Part 50**

RIN 1505-AC53

Terrorism Risk Insurance Program; Certification**AGENCY:** Departmental Offices, Department of the Treasury.**ACTION:** Interim final rule with request for comment.

SUMMARY: The Department of the Treasury (Treasury) is issuing this interim final rule as part of its implementation of changes to the Terrorism Risk Insurance Program (Program) required by the Terrorism Risk Insurance Program Reauthorization Act of 2015 (2015 Reauthorization Act). This interim final rule only addresses the process for certification of an act of terrorism, as published in proposed form on April 1, 2016, for public comment. Some clarifying changes have been made in this interim final rule in response to comments, and certain wording changes have also been made which are not intended to change the meaning of the rule as originally proposed.

The proposed rule includes a more general revision to and renumbering of the Program rules which will be issued in full at a later date. Accordingly, for now, the new subpart is renumbered to avoid duplication with the existing rule numbers. Upon issuance of the final rules for the Program, the final rules will reflect the numbering sequence in the notice of proposed rulemaking published on April 1, 2016.

DATES: *Effective date:* January 6, 2017. Written comments on this interim final rule must be received on or before January 6, 2017.

ADDRESSES: Submit comments electronically through the Federal eRulemaking Portal: <http://www.regulations.gov>, or by mail (if hard copy, preferably an original and two copies) to the Federal Insurance Office, Attention: Richard Ifft, Room 1410 MT, Department of the Treasury, 1500 Pennsylvania Avenue NW., Washington, DC 20220. Because postal mail may be subject to processing delay, it is recommended that comments be submitted electronically. All comments should be captioned with "Terrorism Risk Insurance Program Certification Comments." Please include your name, group affiliation, address, email address and telephone number(s) in your comment. Where appropriate, a comment should include a short Executive Summary (no more than five single-spaced pages).

In general, comments received will be posted on <http://www.regulations.gov> without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, will be part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Richard Ifft, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, 202-622-2922 (not a toll free number) or Kevin Meehan, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, 202-622-7009 (not a toll free number).

SUPPLEMENTARY INFORMATION:**I. Background**

The Terrorism Risk Insurance Act of 2002 (the Act or TRIA)¹ was enacted on November 26, 2002, following the attacks of September 11, 2001, to address disruptions in the market for terrorism risk insurance, to help ensure the continued availability and affordability of commercial property and casualty insurance for terrorism risk, and to allow for the private markets to stabilize and build insurance capacity to absorb any future losses for terrorism events. TRIA requires insurers to "make available" terrorism risk insurance for commercial property and casualty losses resulting from certified acts of terrorism (insured losses), and provides for shared public and private compensation for such insured losses. The Secretary of the Treasury (Secretary) administers the Program, including the issuance of regulations and procedures. Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Federal Insurance Office assists the Secretary in administering the Program.²

The Program has been reauthorized three times.³ Most recently, on January 12, 2015, the President signed into law the Terrorism Risk Insurance Program Reauthorization Act of 2015 (2015 Reauthorization Act),⁴ reauthorizing the Program until December 31, 2020. The

¹ Public Law 107-297, 116 Stat. 2322, codified at 15 U.S.C. 6701, note. Because the provisions of TRIA (as amended) appear in a note, instead of particular sections, of the United States Code, the provisions of TRIA are identified by the sections of the law.

² 31 U.S.C. 313(c)(1)(D).

³ Terrorism Risk Insurance Extension Act of 2005, Public Law 109-444, 119 Stat. 2660; Terrorism Risk Insurance Program Reauthorization Act of 2007, Public Law 110-160, 121 Stat. 1839; Terrorism Risk Insurance Program Reauthorization Act of 2015, Public Law 114-1, 129 Stat. 3.

⁴ Public Law 114-1, 129 Stat. 3.

2015 Reauthorization Act changed various operational matters respecting the Program. Among other changes, the 2015 Reauthorization Act mandates that Treasury issue final rules governing the certification process,⁵ following the submission of a mandated report on improving the process.⁶

II. Previous Rulemaking

To date, rules establishing general provisions implementing the Program, including key definitions, and requirements for policy disclosures and mandatory availability, are found in subparts A, B, and C of 31 CFR part 50.⁷ Treasury's rules applying provisions of the Act to state residual market insurance entities and state workers' compensation funds are set forth in subpart D of 31 CFR part 50.⁸ Rules concerning claims procedures governing payment of the Federal share of compensation for insured losses are currently found at subpart F of 31 CFR part 50.⁹ Subpart G of 31 CFR part 50 currently contains rules on audit and recordkeeping requirements for insurers,¹⁰ while subpart H of 31 CFR part 50 currently addresses recoupment and surcharge procedures.¹¹ Finally, subpart I of 31 CFR part 50 currently contains rules implementing the litigation management provisions of

⁵ TRIA, section 102(1)(D).

⁶ 2015 Reauthorization Act, section 107. See U.S. Department of the Treasury, *The Process for Certifying an "Act of Terrorism" under the Terrorism Risk Insurance Act of 2002* (October 2015) (Certification Report), available at <http://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/2015%20Report%20on%20the%20Certification%20Process%20under%20the%20Terrorism%20-%20Production%20Version.pdf>.

⁷ See 68 FR 9804 (Feb. 28, 2003) (Program definitions (Interim Final Rule)); 68 FR 19302 (April 18, 2003) (disclosure and mandatory availability requirements (Interim Final Rule)); 68 FR 41250 (July 11, 2003) (Program definitions (Final Rule)); 68 FR 48280 (Aug. 13, 2003) ("direct earned premium" definition (Final Rule)).

⁸ See 68 FR 19309 (Apr. 18, 2003) (residual market entities and state compensation funds (Notice of Proposed Rulemaking)); 68 FR 59715 (Oct. 17, 2003) (residual market entities and state compensation funds (Final Rule)).

⁹ See 68 FR 67100 (Dec. 1, 2003) (claims procedures (Notice of Proposed Rulemaking)); 69 FR 39296 (June 29, 2004) (claims procedures (Final Rule)); 70 FR 2830 (Jan. 18, 2005) (timing of affiliation for purposes of claims payments (Notice of Proposed Rulemaking)); 70 FR 34348 (June 14, 2005) (timing of affiliation for purposes of claims payments (Final Rule)).

¹⁰ See 68 FR 67100 (Dec. 1, 2003) (audit and investigative procedures (Notice of Proposed Rulemaking)); 69 FR 39296 (audit and investigative procedures (Final Rule)).

¹¹ See 73 FR 53798 (Sept. 17, 2008) (recoupment and surcharge procedures (Notice of Proposed Rulemaking)); 74 FR 66051 (Dec. 14, 2009) (recoupment and surcharge procedures (Final Rule)).

TRIA,¹² and subpart J of 31 CFR part 50 currently addresses rules concerning the cap on annual liability established under TRIA.¹³ To assist insurers, policyholders, and other interested parties in complying with immediately applicable requirements of the Act, Treasury has also at times issued interim guidance to be relied upon by insurers until superseded by regulations.

No rules concerning the certification process have previously been proposed or issued by Treasury.¹⁴

III. The Proposed Rule

The proposed rule on which this interim final rule is based was published in the **Federal Register** at 81 FR 18950 on April 1, 2016. The proposed rule included Subpart G—Certification to 31 CFR part 50, which comprises regulations addressing the certification process, as required under the 2015 Reauthorization Act. Proposed subpart G, which is new, is part of a general proposal published on April 1, 2016 to strike existing 31 CFR part 50 in its entirety and to replace it with revised Program rules that incorporate new financial and operational provisions for the Program added in the 2015 Reauthorization Act. The proposal also reorders the existing rules to incorporate the new subparts, and makes other changes to further clarify existing rules and to eliminate redundancies.

Pursuant to the 2015 Reauthorization Act, Treasury submitted a report to Congress in October 2015 entitled *The Process for Certifying an “Act of Terrorism” under the Terrorism Risk Insurance Act of 2002* (Certification Report). The proposed rules concerning the certification process are consistent with Treasury’s findings in the Certification Report. For example, Treasury determined that a rule governing the certification process that required the Secretary to render a certification decision within a given time following an act could adversely

affect the Secretary’s ability to collect information necessary to that decision.¹⁵ Furthermore, the 2015 Reauthorization Act specifically requires the establishment of a timeline for which an act is *eligible* for certification. Treasury’s proposed rules identified the required timing considerations as to when an act is eligible for certification and Treasury believes that additional issues concerning milestones and certainty respecting the certification process are best addressed by procedures providing for improved notification and communication to the public once an act is under review for certification. Treasury’s observation in 2003 concerning how an “act of terrorism” may occur in various and unpredictable ways, that render imposition of a timeline subject to rigid deadlines impracticable, remains true today as well:

[T]here is no way to predict future events and ascertain a time frame that would be appropriate for all potential situations. Facts could be immediately available and, after consultation, present a clear basis for a quick determination by the Secretary; conversely, a determination could require more time to gather information and conduct an analysis of the act.¹⁶

IV. Summary of Comments and Interim Final Rule

Treasury is now issuing this interim final rule concerning the certification process after careful consideration of all comments received on the proposed rule. While this interim final rule largely reflects the proposed rule, Treasury has made several revisions based on the comments received, and Treasury solicits comment on the changes to the timeline for eligibility for certification adopted in this interim final rule. Treasury expects to issue final rules based on this interim final rule and the rules proposed in the Notice of Proposed Rulemaking published on April 1, 2016 in the near future.

Ten commenters responded to the proposed rule concerning the certification process. The ten commenters included insurance industry trade associations; a trade association representing consumers of terrorism risk insurance; an insurance company; Lloyd’s (an insurance and reinsurance market); a captive insurance manager; and an individual.¹⁷ The

comments received and Treasury’s revisions to the proposed rule are summarized below.

1. Certification (§ 50.60)

Proposed § 50.60 sets forth the general parameters of the certification process, as required under TRIA, as amended by the 2015 Reauthorization Act. It establishes in paragraph (b) that, from a timing standpoint, an act which satisfies the definition of an act of terrorism is eligible for certification once the Secretary has consulted with the Attorney General of the United States and the Secretary of Homeland Security, in accordance with the requirements of the Reauthorization Act. Most of the comments received by Treasury concerning the certification process involve this provision. One comment states that the proposed rule “falls short of what was required by Congress” with respect to the certification process because there is no “clear timeline for certification decisions.”¹⁸ Other comments also provide suggestions for specific deadlines to be imposed upon the certification decision, although the other commenters do not imply that such a specific timeline is a statutory requirement.¹⁹

The 2015 Reauthorization Act, at Section 107(e), requires only that a final rule concerning the certification process include “a timeline for which an act is eligible for certification by the Secretary on whether an act is an act of terrorism under this paragraph.” This means that Section 107(e) requires that Treasury promulgate rules establishing a timeline for when an act is *eligible* for certification as an act of terrorism,

Comments); the National Association of Mutual Insurance Companies (NAMIC Comments); the Property Casualty Insurers Association of America (PCIAA Comments); the Reinsurance Association of America (RAA Comments); The Coalition to Insure Against Terrorism (CIAT Comments); Exchange Indemnity Company (Exchange Indemnity Comments); Lloyd’s of London (Lloyd’s Comments); Marsh Captive Solutions (Marsh Captive Solutions Comments); and Jason M. Schupp (Jason Schupp Comments). All of the comments received in connection with the proposed rules published for comment on April 1, 2016, are available at <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=TREAS-TRIP-2016-0005>.

¹⁸ CIAT Comments at 2.

¹⁹ PCIAA Comments at 4–5 (incorporating prior comment filed in connection with Treasury’s preparation of the Certification Report, at 2) (preliminary certification decision within 15 days following the potential act of terrorism, and a final decision 60 days after the potential act of terrorism); CIAB Comments at 2 (proposing certification timeframe of 90 days); CIAT Comments at 2 (proposing as an “appropriate limit” 45 days after Treasury commences review of an act, or receives a request from either an insurer or policyholder that it commence such review).

¹² See 69 FR 25341 (May 6, 2004) (Federal cause of action and settlement approval provisions (Notice of Proposed Rulemaking)); 69 FR 44932 (July 28, 2004) (Federal cause of action and settlement approval provisions (Final Rule)).

¹³ See 73 FR 56767 (Sept. 30, 2008) (cap on annual liability (Notice of Proposed Rulemaking)); 74 FR 66061 (Dec. 14, 2009) (cap on annual liability (Final Rule)).

¹⁴ Although, and as noted below, Treasury has previously responded to comments provided in response to proposed rules concerning applicable definitional provisions for the Program that Treasury “establish a time frame within which the Secretary would be required to make a determination or certification that an ‘act of terrorism’ had occurred. . . .” See 68 FR 41250, 41252 (July 11, 2003).

¹⁵ Certification Report at 9.

¹⁶ 68 FR 41250, 41252 (July 11, 2003).

¹⁷ Comments addressing the certification process in some fashion were submitted by the American Insurance Association (AIA Comments); The Council of Insurance Agents & Brokers (CIAB

rather than for when that act will be certified.

The 2015 Reauthorization Act also does not include any requirements for including specific deadlines in the eligibility timeline. Indeed, the previously proposed version of the 2015 Reauthorization Act did contain such specific deadline requirements, *see* H. Rept. 113–523, 45, but the final version passed by Congress instead delegated authority to establish a timeline to Treasury. Furthermore, Congress required Treasury to conduct a study on the establishment of a reasonable timeline by which the Secretary must make an accurate determination on whether to certify an act before issuing this rule. This sequence provides evidence that Congress intended for Treasury to adopt rules governing the certification process that reflect the findings of the study. The Senate Banking Committee report reflects this intent, noting that “[a]fter the conduction of the study, the Secretary would be required to issue regulations under existing authorities governing the certification process to address the finding of the study.” S. Rept. 113–199, 9. Based on the statutory text and legislative history, Treasury believes that it is not required to adopt a timeline that includes a strict deadline for certification.

Treasury also believes that it would not be prudent to adopt such a timeline that includes such strict deadlines. The principal problems the study identified with imposing a time by which an act must be certified are two-fold. First, certification may implicate complex issues relating to the motivation of the actor(s) involved in a particular situation or the actual facts of the situation, all of which may be subject to ongoing criminal investigations (of unknown duration), and Treasury may need to await the results of such investigations before determining whether to certify an act of terrorism.²⁰ For example, the Secretary may not be able to determine whether an airplane crashing in the ocean is an act of terrorism or a mechanical failure until the black box is recovered. Such recovery may take several months or years. A rule requiring that a

certification decision be made within any specified time period keyed to the occurrence of an act could force the Secretary to make a decision without all of the relevant information. Accordingly, it is important that the Secretary’s decision be made only after considering all of the relevant information. Given the wide differences in circumstances surrounding potential acts of terrorism, Treasury does not believe that it would be reasonable to establish any specific deadlines for certification, even where such deadlines could be extended when necessary.

The second problem identified in the report is that, in many cases, insurance losses may take substantial periods of time to develop before Treasury can determine whether an act is even eligible for certification.²¹ For example, it could take years to fully evaluate whether insurance losses related to certain events (*e.g.*, the introduction of a carcinogenic agent into a municipal water supply) result in losses above the certification threshold. No commenters have suggested that these issues are illusory, or offered for consideration any mechanisms to avoid the problems that a timeline subject to specific deadlines presents given these realities.

The renewed calls for a timeline subject to precise deadlines have also been based upon arguments that insurers require a quick decision respecting certification of an act of terrorism because of the effect that this determination might have upon coverage issues, and their obligations to respond promptly to claims under state law provisions.²² In addition, some commenters have suggested that a certification decision made within a defined time is necessary for economic stability and for a proper functioning insurance market.²³

Although Treasury appreciates insurers have obligations to respond to claims in a timely fashion, the state law obligations that have been invoked are subject to extensions when a greater period of time is necessary to make a claims determination.²⁴ None of the

commenters that have invoked these obligations have addressed this feature of state law. Commenters also claimed that a rule with specific deadlines may further “economic stability” and avoid “market consequences,” yet the commenters did not identify any specific economic or insurance marketplace stability issue resulting from uncertainty about Treasury’s position with respect to a particular act. Furthermore, Treasury’s public communications under proposed § 50.61 should provide sufficient information to allow market participants to take appropriate steps pending the finalization of a future certification process.

While Treasury believes, based on the statutory text and the findings in the Certification Report, that adopting strict deadlines is neither required by statute nor an appropriate policy decision, the regulations as adopted in this interim final rule have been modified to more clearly lay out a timeline for whether an act is eligible for certification by the Secretary as an act of terrorism. Each of the events outlined in this interim final rule were contemplated in the proposed rule, but are now consolidated in a single schedule to provide for greater clarity. The timeline in this interim final rule clarifies that there will be (1) a commencement to this process, subject to public notification, as discussed in proposed § 50.61(a); (2) regular public notification under the schedule set forth in proposed § 50.61(b); (3) a period of time during which the Secretary evaluates the factors relevant to the certification decision, which is subject to regular public notification of continued review, as reflected in proposed § 50.61(b); and (4) a consultation between the Secretary and the Attorney General and Secretary of Homeland Security, as required by TRIA, as reflected in proposed § 50.60(a), (b). Because the consultation required by TRIA will take place after the Secretary has obtained relevant information and completed the review identified in Step 3, the concerns militating against adoption of specific deadlines do not apply to the timing of the consultation. Therefore, Treasury can and has identified a time period of 30 days during which this action can be expected to occur. Treasury specifically

imposing time deadlines upon claims decisions, which have been adopted in some form by 47 states and two territories, provide “the opportunity to obtain further time, upon notice to the policyholder, within which to make the claims determination”) (citing NAIC, *Unfair Property/Casualty Claims Settlement Practices Model Regulation*, 902–4, section 7.B, *available at* <http://www.naic.org/store/free/MDL-902.pdf>).

²⁰ Certification Report at 9 (“In order for the Secretary to make an informed certification decision in accordance with the statutory criteria, for example, Treasury might need to coordinate with other government agencies conducting investigations concerning the perpetrators of or motivations for the act. The Secretary will also need to be respectful of activities of law enforcement and the justice system concerning the investigation, apprehension, and prosecution of the individual or individuals suspected or accused of committing the act.” (Footnote omitted)).

²¹ Certification Report at 9–10 (“Loss development patterns—*i.e.*, the severity, timing, and distribution of losses as information becomes available—are not always predictable from preliminary information and will be affected by the magnitude and type of act under consideration for certification. The time it may take for claims to be submitted to one or more insurers by affected policyholders after an act has occurred, for those claims to be investigated and adjusted by the insurers, and (if appropriate) to be reserved or paid by the insurers, might vary considerably.”).

²² Lloyd’s Comments at 1–2; PCIAA Comments at 4–5 (incorporating prior comments at 1).

²³ CIAB Comments at 2; CIAT Comments at 2.

²⁴ Certification Report at 8 n.36 (observing that state model regulations identified by insurers as

solicits comment on whether there are any reasonable improvements to the timeline set forth in this interim final rule that would provide further clarity concerning the process, in a way that would materially benefit interested parties and which would still be practical given the nature of the process and the issues with a strict deadline identified by Treasury.

Two commenters suggested the inclusion of a provision that would permit an interested party (identified as either an insurer or a policyholder) to request that Treasury make a certification determination regarding a particular act.²⁵ Another commenter proposed a “dispute resolution and/or notice and comment procedure to ensure that all impacted parties are given the opportunity to address concerns surrounding certification or non-certification of an event.”²⁶ Such comments fail to appreciate the nature of the certification determination entrusted to the Secretary under TRIA.

Initially, the certification decision is entrusted to the Secretary, who is empowered with non-delegable authority under TRIA to determine whether to certify an act as an act of terrorism, once there has been the required consultation between the Secretary, the Attorney General, and the Secretary of Homeland Security. TRIA recognizes the high levels of sensitivity embodied in this determination by making this decision final and not subject to judicial review. The Secretary, in consultation with the Attorney General and the Secretary of Homeland Security, may, for instance, conclude that law enforcement priorities require waiting to make the certification decision. Permitting an insurer or policyholder to trigger a certification determination, or to be able to dispute the certification or non-certification of an event would be inconsistent with TRIA’s delegation of authority to the Secretary to make the determination on a non-reviewable basis. Moreover, nothing in TRIA or Treasury’s proposed rules prohibits a stakeholder from contacting Treasury to bring to its attention an event that the stakeholder believes might be subject to certification under TRIA, or other information relevant to that event. Treasury’s adoption of proposed § 50.62(b) specifically recognizes the value that stakeholder input has to the certification process. Furthermore, a dispute resolution or notice and comment procedure would only operate to delay a certification determination,

which is inconsistent with comments otherwise offered that a timeline is necessary to insure that a timely certification decision is made.

Two additional comments concerning proposed § 50.60 warrant attention. First, two commenters note that proposed § 50.60(a), as currently proposed, could be read to require that the Secretary consult with the Attorney General and the Secretary of Homeland Security even when ultimately deciding not to certify an act as an act of terrorism.²⁷ It was not Treasury’s intent to impose a consultation requirement where the Secretary determines not to certify, and in this context the word “whether” in proposed § 50.60(a) should not be read to impose any obligation on the Secretary that would be inconsistent with the Secretary’s discretion under TRIA. Accordingly, this interim final rule adopts § 50.60(a) as originally proposed, subject to this understanding.

Second, another comment observes that there is circularity in the provisions of proposed § 50.60(b), respecting the timing of when a certification decision can take place, in that the cross-reference in proposed § 50.60(b) to proposed § 50.4(b) (the “act of terrorism” definition) incorporates the consultation process which then would have to take place before the consultation process identified in proposed § 50.60(b). Thus, the commenter observes, proposed § 50.60(b) could be read to suggest “that no act could ever be certified because only previously certified acts are eligible for certification,” and that the provision should just be deleted.²⁸

Proposed § 50.60(b) cannot be eliminated, as it is a necessary provision setting forth the timeline for when an act is eligible for certification by the Secretary as an act of terrorism. Treasury’s modification of proposed § 50.60(b) to better reflect the timeline contemplated in the proposed rule resolves this ambiguity. As noted, this formulation is already contemplated by the proposed rules, and as expressed in this fashion provides for a clearer ordering of the relevant milestones that avoids the potential circularity issue identified in the comments.

For the reasons set forth above, Treasury will modify proposed § 50.60 as described above, and adopt in this interim final rule § 50.100 as so amended. As noted at the outset, this section of the interim final rule is for now adopted as § 50.100 to avoid

duplication with existing rule numbers, and we anticipate it will be renumbered to § 50.60 in the final rule.

2. Public Communication (§ 50.61)

Proposed § 50.61 addresses the commencement of the certification process and public communication concerning the process. As Treasury explained in the Certification Report, public communication respecting the certification process provides the public with necessary information concerning the certification process in a way that is not subject to the problems inherent with a strict timeline, as addressed above.²⁹ No commenters disagreed with Treasury’s proposal to provide such public communication of the certification process. Three commenters suggested that the proposed rule should incorporate a deadline or milestones to govern when Treasury must notify the public that an act is being considered for certification, and even to provide “preliminary indications” respecting certification at that point of initial notification.³⁰ One commenter suggested a change to proposed § 50.61(a) to confirm that Treasury will only provide public notification where an act is actually under review for certification as an act of terrorism, “to avoid any suggestion [Treasury’s] routine monitoring of events should trigger expectations of public notification.”³¹

In response to the comments, Treasury has modified proposed § 50.61(a) to provide that once the Secretary commences review, Treasury shall publish a document in the **Federal Register** within 30 days notifying the public of this fact. Although this provision remains subject to the rule of construction that would permit the modification of this date by the Secretary in the event that timely notification is impracticable, the modification to the proposed rule reflects Treasury’s intention to provide notification of the commencement of a certification process within 30 days.

As respects the comment that a revision to proposed § 50.61(a) may be in order to confirm that public notification should not be expected simply on account of the “routine monitoring of events” by Treasury, the proposed rule should not engender any such expectations. Notice will be

²⁹ Certification Report at 10–11.

³⁰ Lloyd’s Comments at 2; CIAT Comments at 2; see NAMIC Comments at 4 (initial notification that certification is under review “should also contain a preliminary indication as to whether Treasury expects that the act will be certified as an act of terrorism”).

³¹ Jason Schupp Comments at 9.

²⁵ Lloyd’s Comments at 2; CIAT Comments at 2.

²⁶ CIAB Comment at 3.

²⁷ Jason Schupp Comments at 8; AIA Comments at 7.

²⁸ Jason Schupp Comments at 8–9.

provided when the Secretary determines that an act should be considered for certification as an act of terrorism under TRIA. Nothing in the proposed rule suggests, or is meant to suggest, that consideration of current events by Treasury short of the Secretary's determination to commence the certification process will trigger any sort of public notification by Treasury.

For the above reasons, Treasury will modify proposed § 50.61 as described above, and adopt in this interim final rule § 50.101 as so amended. As noted at the outset, this section of the interim final rule is for now adopted as § 50.101 to avoid duplication with existing rule numbers, and we anticipate it will be renumbered to § 50.61 in the final rule.

3. Certification Data Collection (§ 50.62)

A few comments were received concerning proposed § 50.62, which establishes rules for the collection of data by Treasury in aid of the certification process. Under TRIA, the Secretary may not certify an act as an act of terrorism unless property and casualty insurance losses resulting from the act, in the aggregate, exceed \$5 million. Treasury may need to collect data from insurers, as well as from other entities in the insurance industry, in connection with its analysis of whether the insurance losses resulting from an act under review for certification satisfy the loss threshold.

No comments were received asserting that the proposed rule was unnecessary.³² Two comments suggested that some restrictions upon the data collection provision should be incorporated, to allow insurers to challenge a request on the grounds that an insufficient period to respond has been provided, or that the request is unduly broad, burdensome, or involves confidential information.³³ Because these requests involve the certification process, Treasury may need to obtain information on an accelerated basis. However, in setting the reporting deadline, Treasury will take into account the amount and the complexity of the information requested. Regarding the scope of any requests, the act under

³² One comment did take the opportunity to criticize the statutory greater than \$5 million aggregate loss threshold aspect of the "act of terrorism" definition, asserting that "the threshold has been more of an impediment to practical application of TRIA than a worthwhile definitional component," and observed that "[a] more useful way of looking at the threshold would be to view it in the context of the TRIA aggregate loss program trigger." AIA Comment at 7. Treasury notes that this threshold is prescribed by statute and may not be modified via regulation.

³³ Exchange Indemnity Comments at 2; Marsh Captive Solutions Comments at 2.

review will define the scope of the needed information, and Treasury expects that any requests will be narrowly tailored to the act in question which should prevent any requests from being unduly broad or burdensome. As respects confidentiality, proposed § 50.54 (concerning Handling of Data) already sufficiently addresses the treatment of any confidential information that might be obtained pursuant to proposed § 50.62. Accordingly, no changes to proposed § 50.62 for the reasons identified are warranted.

Another comment observed that any certification data collection process should be "a streamlined, orderly method for collecting and organizing data from carriers and their affiliates, as well as a federal consolidation point for claims data (perhaps FIO)," and encourages that any final rules "include a centralized data collection process for purposes of the certification determination."³⁴ No specific language or revisions to achieve this goal, however, were suggested.

Although Treasury is in agreement with the sentiments of this comment, proposed § 50.62 sets forth the sort of process identified by the commenter. The certification process is one that is solely within the responsibility of the Secretary, who is assisted by FIO in the administration of the Program. Proposed § 50.62 sets forth a process under which Treasury will collect insurance-related information relevant to the certification decision, and does not contemplate that this will be accomplished through any other federal agencies or processes. While requests are likely to be tailored to address a particular situation, such that different requests may be made from case to case, nothing in the rule contemplates any sort of process that would subject responding entities to conflicting, disparate requests for information.

For the above reasons, Treasury is adopting § 50.102 as it was proposed. As noted at the outset, this section of the interim final rule is for now adopted as § 50.102 to avoid duplication with existing rule numbers, and we anticipate it will be renumbered to § 50.62 in the final rule.

4. Notification of Certification Determination (§ 50.63)

Proposed § 50.63 provides for **Federal Register** notification and other communication of any certification decision, as well as separate notifications to Congress and specified insurance supervisory authorities. One

³⁴ CIAB Comments at 3.

commenter observed that proposed § 50.63 should only require notification of "actual certification decisions," and not for "acts that clearly will not meet the definition outlined in TRIA."³⁵ Another commenter suggested that the rule could be modified to provide that notice under proposed § 50.63 will be provided only for those situations where Treasury has provided notice under proposed § 50.61(a) that an act is under review for certification as an act of terrorism.³⁶

Treasury acknowledges that it monitors events and situations that, given their circumstances, could potentially involve the Program. The proposed certification rules address and contemplate situations in which the Secretary (1) determines that an act will or will not be certified as an act of terrorism without any prior advance notification to the public (see proposed § 50.61(d), as adopted below); or (2) commences review of whether to certify an act as an act of terrorism, as provided for in proposed § 50.61(a). The notification procedures under proposed § 50.63 govern these situations, once a decision whether to certify has been made by the Secretary.

For the above reasons, Treasury is adopting § 50.63 as it was proposed. As noted at the outset, this section of the interim final rule is for now adopted as § 50.103 to avoid duplication with existing rule numbers, and we anticipate it will be renumbered to § 50.63 in the final rule.

V. Procedural Requirements

Executive Order 12866, "Regulatory Planning and Review." Executive Order 12866, as supplemented by Executive Order 13563, establishes a program to reform and make more efficient the regulatory process of the Federal Government. In accordance with such Executive Orders, this rule is a significant regulatory action, and has been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act. In general, the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), which applies to any rule subject to notice and comment rulemaking under the Administrative Procedure Act or any other law, requires a federal agency to conduct a full regulatory flexibility analysis unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. (5 U.S.C. 605(b)). In the preamble to the proposed rule, Treasury certified that the rule, if promulgated, would not have

³⁵ AIA Comment at 8.

³⁶ Jason Schupp Comments at 9.

a significant economic impact on a substantial number of small entities. Treasury did not receive any comments in response to Subpart G of the proposed rule on the impact to small entities or insurers, and the interim final rule has not been revised in any way that warrants a change to this certification. As discussed in the preamble to the proposed rule, some small entities—as defined by the regulations of the SBA (see 13 CFR 121.201)—and small insurers—as defined by the proposed rules—will be impacted by the rule, but the costs that may be incurred arise from requirements in TRIA and not Treasury regulations.

Paperwork Reduction Act. The proposed collection of information concerning the certification process as contained in the proposed rule was submitted to the Office of Management and Budget (OMB) for review under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3507(d). Although solicited, Treasury did not receive any comments from the public concerning (1) the necessity of the collection of information in aid of the certification process; (2) the accuracy of Treasury's burden estimates; (3) suggestions for enhancement of the quality, utility, and clarity of the information collection; (4) suggestions for minimization of the burden of the information collection;³⁷ or (5) estimates of capital or start-up costs that would be necessary for compliance with the information collection. The interim final rule does not contain any new collections of information. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB Control number. Treasury will obtain final OMB approval for the collection of information in aid of the certification

³⁷ As noted above, Treasury did receive one comment suggesting that any certification data collection process should be established to provide for "a streamlined, orderly method for collecting and organizing data from carriers and their affiliates, as well as a federal consolidation point for claims data (perhaps FIO)," and encourages that any final rules "include a centralized data collection process for purposes of the certification determination." CIAB Comments at 3. As explained above, Treasury believes that the proposed collection of information, which will be managed through the Federal Insurance Office at Treasury, satisfies the concern identified in this comment. In addition, Treasury also received two comments suggesting the adoption of procedures allowing for various challenges to data as requested by Treasury; however, as explained above, the timing and scope of data required by Treasury will be driven by the nature of the act under review for certification, such that changes to the proposed collection would not be warranted.

process prior to any collection of such information.

Administrative Procedure Act. The Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (APA) generally requires public notice before promulgation of regulations. See 5 U.S.C. 553(b). The Department published a notice of proposed rulemaking requesting comment on the proposed rule on April 1, 2016 (81 FR 18949). The Department has considered the comments received in developing this interim final rule but also wishes to provide the public another opportunity to comment on the provisions described in this document.

List of Subjects in 31 CFR Part 50

Insurance, Terrorism.

Authority and Issuance

For the reasons stated in the preamble, 31 CFR part 50 is amended as follows:

PART 50—TERRORISM RISK INSURANCE PROGRAM

- 1. The authority citation for part 50 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 321; Title I, Pub. L. 107–297, 116 Stat. 2322, as amended by Pub. L. 109–144, 119 Stat. 2660, Pub. L. 110–160, 121 Stat. 1839 and Pub. L. 114–1, 129 Stat. 3 (15 U.S.C. 6701 note).

- 2. Subpart K is added to read as follows:

Subpart K—Certification

Sec.

- 50.100 Certification.
- 50.101 Public communication.
- 50.102 Certification data collection.
- 50.103 Notification of certification determination.

Subpart K—Certification

§ 50.100 Certification.

(a) **Certification decision.** The Secretary, in consultation with the Attorney General of the United States and the Secretary of Homeland Security, is responsible for determining whether to certify an act as an act of terrorism.

(b) **Timeline for eligibility.** An act is eligible for certification as an act of terrorism at the end of the following timeline:

(1) The Secretary commences review of whether an act satisfies the definition in § 50.5(b);

(2) Within 30 days of the Secretary commencing review, Treasury publishes the notice required by § 50.101(a). During such review, the schedule of public notifications in § 50.101(b) shall apply, as appropriate;

(3) The Secretary's review finds that the act satisfies the elements for

certification under § 50.5(b)(1)(i) through (iv), and that it is not otherwise precluded from certification by § 50.5(b)(2); and

(4) Within 30 days or as soon as otherwise practicable after the review identified in paragraph (b)(3) of this section concludes that the act satisfies the necessary criteria, the Secretary consults with the Attorney General of the United States and the Secretary of Homeland Security pursuant to section 102(1)(A) of the Act.

(c) **Other consultation.** Nothing in this section shall prevent the Secretary from consulting and coordinating with the Attorney General of the United States, the Secretary of Homeland Security, or any other government official prior to the consultation identified in paragraph (b)(4) of this section.

(d) **Finality.** Any decision by the Secretary to certify, or determination not to certify, an act as an act of terrorism under this Subpart shall be final, and shall not be subject to judicial review.

(e) **Nondelegation.** The Secretary may not delegate or designate to any other officer, employee, or person, the determination of whether to certify an act as an act of terrorism.

§ 50.101 Public communication.

(a) **Initial notification.** After the Secretary commences review of whether an act may satisfy the definition in § 50.5(b), Treasury shall publish a notice in the **Federal Register** within 30 days of the Secretary commencing review notifying the public that the act is under review for certification as an act of terrorism. Treasury may also announce that an act is not under review for certification.

(b) **Update notification.** Not later than 30 days following the publication of a notice under paragraph (a) of this section that an act is under review for certification, and not later than every 60 days thereafter until the Secretary determines whether to certify an act as an act of terrorism, Treasury shall publish a notice in the **Federal Register** notifying the public whether the act is still under review for certification as an act of terrorism.

(c) **Contents of notification.** Nothing in this section shall require Treasury to provide any information other than whether the act is under review for certification as an act of terrorism (or is no longer under such review) or shall limit Treasury from providing further information of relevance.

(d) **Rules of construction.** Nothing in this section shall be construed to preclude the Secretary from certifying or determining not to certify an act as an

act of terrorism before notifying the public that the act is under review for certification. If, in the discretion of the Secretary, circumstances relating to an act render timely notification under this section by Treasury impracticable, Treasury shall provide the notification as soon as practicable, in a manner the Secretary determines is appropriate.

(e) *Nonbinding decision.* A notification made under this section shall not be construed to be a final determination by the Secretary of whether to certify an act as an act of terrorism.

§ 50.102 Certification data collection.

(a) *General.* (1) The Secretary, when reviewing an act for certification as an act of terrorism, may at any time direct one or more insurers to submit information regarding projected and actual losses in connection with an act and any other information the Secretary determines appropriate. The information sought by the Secretary shall be specified in the data request, and any insurer subject to the data request shall respond to the request within the time frame specified by the Secretary at the time of the request. The data requested may include actual loss

reserves established by insurers in connection with the act under review, loss estimates generated by insurers in connection with the act under review which have not yet been established as actual loss reserves, and information respecting an insurer's property and casualty exposures in a particular geographic area associated with the act under review.

(2) An insurer not required by Treasury to submit information under paragraph (a)(1) of this section may voluntarily submit information to the Secretary as specified in public notifications issued by Treasury.

(b) *Other sources of information.* The Secretary may request information with respect to loss estimates and likely affected insurers from organizations, including state insurance regulators, insurance modeling organizations, rating agencies, insurance brokers and producers, and insurance data aggregators.

§ 50.103 Notification of certification determination.

(a) *Public notification.* Not later than 5 business days after the Secretary determines whether to certify an act as an act of terrorism, Treasury shall publish a statement and submit a notice

to the **Federal Register** notifying the public of the Secretary's decision.

(b) *Insurance supervisor notification.* Not later than 5 business days after the Secretary determines whether to certify an act as an act of terrorism, Treasury shall notify in writing any relevant supervisory officials of the Secretary's decision.

(c) *Congressional notification.* Not later than 5 business days after the Secretary determines whether to certify an act as an act of terrorism, Treasury shall notify in writing the President of the U.S. Senate and the Speaker of the U.S. House of Representatives of the Secretary's decision.

(d) *Rule of construction.* If, in the discretion of the Secretary, circumstances relating to an act render timely notification by Treasury under this section impracticable, Treasury shall provide the notification as soon as practicable, in a manner the Secretary determines is appropriate.

Dated: December 1, 2016.

Amias Moore Gerety,

Acting Assistant Secretary for Financial Institutions.

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