described in paragraphs (b)(2) and (c)(2) of this section, shall be remitted to Treasury upon submission of each monthly and annual statement. Through its submitted statements, an insurer obtains credit for a refund of any Federal Terrorism Policy Surcharge previously remitted to Treasury that was subsequently returned by the insurer to a policyholder as attributable to refunded premium under § 50.74(e). A negative calculated amount in a monthly or annual statement indicates payment from Treasury is due to the insurer.

(e) Reporting shall continue for the one-year period following the end of the assessment period established by Treasury, unless otherwise permitted by Treasury.

§ 50.76 Insurer responsibility.

For purposes of the collection, reporting and remittance of Federal Terrorism Policy Surcharges to Treasury, an ''insurer,'' as defined in § 50.5(l), shall not include any affiliate of the insurer.

Dated: December 3, 2009.

Michael S. Barr,

Assistant Secretary (Financial Institutions).

[FR Doc. E9–29613 Filed 12–11–09; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505–AB92

Terrorism Risk Insurance Program; Cap on Annual Liability

AGENCY: Departmental Offices, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (''Treasury'') is issuing this final rule as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (''TRIA'' or ''the Act''), as amended by the Terrorism Risk Insurance Program Reauthorization Act of 2007 (''Reauthorization Act''). The Act established a temporary Terrorism Risk Insurance Program (''TRIP'' or ''Program'') under which the Federal Government would share with commercial property and casualty insurers the risk of insured losses from certified acts of terrorism. The Reauthorization Act has now extended the Program until December 31, 2014. This rule was published in proposed form on September 30, 2008, for public comment. Some clarifying changes have been made in the final rule in response to comments. The rule incorporates and implements statutory requirements in section 103(e) of the Act, as amended by the Reauthorization Act, for capping the annual liability for insured losses at $100 billion. In particular, the rule describes how Treasury intends to determine the *pro rata* share of insured losses under the Program when insured losses would otherwise exceed the cap on annual liability. The rule builds upon previous rules issued by Treasury.

DATES: This rule is effective January 13, 2010.

FOR FURTHER INFORMATION CONTACT: Howard Leikin, Deputy Director, Terrorism Risk Insurance Program, (202) 622–6770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297, 116 Stat. 2322) was enacted on November 26, 2002. The Act was effective immediately. The Act's purposes are to address market disruptions, ensure the continued widespread availability and affordability of commercial property and casualty insurance for terrorism risk, and allow for a transition period for the private markets to stabilize and build capacity while preserving state insurance regulation and consumer protections.

Title I of the Act establishes a temporary federal program of shared public and private compensation for insured commercial property and casualty losses resulting from an act of terrorism. The Act authorizes Treasury to administer and implement the Program, including the issuance of regulations and procedures. The Program provides a federal backstop for insured losses from an act of terrorism. Section 103(e) of the Act gives Treasury authority to recoup federal payments made under the Program through policyholder surcharges. The Act also contains provisions designed to manage litigation arising from or relating to an act of terrorism.

The Program originally was to expire on December 31, 2005; however, on December 22, 2005, the Terrorism Risk Insurance Extension Act of 2005 (Pub. L. 109–144, 119 Stat. 2660) was enacted, which extended the Program through December 31, 2007. On December 26, 2007, the Terrorism Risk Insurance Program Reauthorization Act of 2007 (Pub. L. 110–160, 121 Stat. 1839) was enacted, extending the Program through December 31, 2014.

The Reauthorization Act, among other Program changes, revised the provisions of the Act with regard to the cap on annual liability for insured losses of $100 billion. Previously, section 103(e)(3) stated that Congress would determine the procedures for and the source of any payments for insured losses in excess of the cap. This was deleted. Instead, this section now requires the Secretary of the Treasury to notify Congress not later than 15 days after the date of an act of terrorism as to whether aggregate insured losses are estimated to exceed the cap. TRIA, as amended by the Reauthorization Act, also requires the Secretary to determine the *pro rata* share of insured losses to be paid by each insurer incurring losses under the Program and that meets its deductible when insured losses exceed the cap, and to issue regulations for carrying this out.

II. Previous Rulemaking

To assist insurers, policyholders, and other interested parties in complying with immediately applicable requirements of the Act, Treasury has issued interim guidance for reference until issuance of superseding regulation. Rules establishing general provisions implementing the Program, including key definitions, and requirements for policy disclosures and mandatory availability, can be found in Subparts A, B, and C of 31 CFR Part 50. Treasury's rules applying provisions of the Act to State residual market insurance entities and State workers' compensation funds are at Subpart D of 31 CFR Part 50. Rules setting forth procedures for filing claims for payment of the Federal share of compensation for insured losses are at Subpart F of 31 CFR Part 50. Subpart G of 31 CFR Part 50 contains rules on audit and recordkeeping requirements for insurers, while Subpart I of 31 CFR Part 50 contains Treasury's rules implementing the litigation management provisions of section 107 of the Act.

III. The Proposed Rule

The proposed rule on which this final rule is based was published in the **Federal Register** at 73 FR 56767 on September 30, 2008. The proposed rule proposed to add a Subpart J to part 50, which comprises Treasury's regulations implementing the Act. It also proposed to amend § 50.53 of Subpart F. The proposed rule described how Treasury would initially estimate whether the cap will be exceeded, the means by which Treasury would develop and maintain estimates for determining the *pro rata* share of insured losses to be paid, the factors that would be considered in determining a *pro rata* percentage of the insured losses that are to be paid in order to stay within the cap, and the application of the *pro rata* percentage in paying insured losses.

IV. Summary of Comments and Final Rule

Treasury is now issuing this final rule after careful consideration of all comments received on the proposed rule. While this final rule largely reflects the proposed rule, Treasury has made several clarifications based on the comments received.

Treasury received comments on the proposed rule from two national insurance industry trade associations, a national insurance rating and data collection bureau, and one insurance company. Commenters generally noted that the approach to the administration of the cap is appropriate and efficient under the circumstances. Although Treasury invited the submission of alternatives to the proposed process for prorating insured losses when aggregate insured losses exceed the cap on annual liability, no other alternatives were submitted. In response to specific comments, Treasury has refined and clarified provisions in three areas: (1) Claims payments to be made immediately after an act of terrorism that is likely to exceed the cap on annual liability, but where specific *pro rata* amounts cannot yet be determined, (2) which insured losses will be affected by a *pro rata* determination, and (3) the prorating of insured losses where an insurer has not yet met its insurer deductible. The comments received and Treasury's revisions to the proposed rule are summarized below.

1. Notice to Congress (§ 50.91)

Proposed § 50.91 stated, in part, that pursuant to Section 103(e)(3) of the Act, the Secretary shall provide an initial notice to Congress within 15 days of the certification of an act of terrorism, stating whether the Secretary estimates that aggregate insured losses will exceed $100 billion for the Program Year. Two commenters requested that Treasury change the language of proposed § 50.91, in accordance with their reading of Section 103(e)(3), to require an initial notice to Congress within 15 days of the occurrence of an act of terrorism.

Section 103(e)(3) of the Act requires the Secretary to notify the Congress if estimated or actual aggregate insured losses exceed $100 billion during a Program Year. It further provides (as added by the Reauthorization Act) that ''the Secretary shall provide an initial notice to Congress not later than 15 days after the date of an act of terrorism, stating whether the Secretary estimates that aggregate insured losses will exceed $100,000,000,000.''

''Act of terrorism'' is a defined statutory term. Under Section 102(1)(A), an ''act of terrorism'' is any act which is certified by the Secretary, in concurrence with the Secretary of State and the Attorney General of the United States, to meet certain specified elements. Without certification, an act does not meet the definition of an ''act of terrorism.''

Treasury believes that the most reasonable interpretation of the second sentence of Section 103(e)(3) is that the initial notice must be provided to Congress not later than 15 days after certification of an act of terrorism. There is no limitation under Section 102(1) on the time the Secretary may take to certify, or determine not to certify, an act as an act of terrorism. That time could in many circumstances be more than 15 days after the act. In addition, as noted in the preamble to the proposed rule, there may be significant challenges involved in obtaining data for an estimate of aggregate insured losses even within the 15 days following the *certification* of an act of terrorism.

This interpretation is also consistent with the Procedural Order entered by the Judicial Panel on Multidistrict Litigation concerning the 90-day period in Section 107(a)(4) of the Act, which requires a designation by the Panel ''not later than 90 days after the occurrence of an act of terrorism.'' The order notes the definition of an ''act of terrorism'' and accordingly provides that ''the 90-day period for the Panel to designate the court or courts for litigation covered by the Act begins on the date that the Treasury Secretary certifies an act of terrorism.'' Procedural Order filed June 1, 2004 is available at *http://www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/pdf/order.pdf.*

For the above reasons, Treasury is adopting as the final rule § 50.91 as it was proposed.

2. Determination of Pro Rata Share (§ 50.92)

Under the Reauthorization Act, the Secretary shall not make any payment for any portion of the amount of aggregate insured losses that exceeds $100 billion during any Program Year; and no insurer that has met its deductible shall be liable for the payment of any portion of the amount of such insured losses that exceeds $100 billion. Generally, Treasury's approach will be to establish any proration relatively conservatively when it is estimated that the cap will be reached, so that early payments are not inequitably higher than later payments, and so that, barring a subsequent act of terrorism in the same Program Year, later refinements to the proration will allow additional payments to policyholders for prior settled losses. During a Program Year, until events have transpired that lead Treasury to believe that the cap could be reached, it is our intention that no proration would be established.

The final rule includes a definition of ''*pro rata* loss percentage'' (''PRLP''). This is the percentage determined by the Secretary to be applied against the amount that would otherwise be paid by an insurer under the terms and conditions of an insurance policy providing property and casualty insurance under the Program if there were no cap on annual liability. An insurer would apply the PRLP to compute the *pro rata* share of insured losses to be paid under an insurance policy.

The final rule provides that if Treasury estimates that insured losses may exceed the cap on annual liability for a Program Year, then Treasury will determine an initial PRLP and an effective date for that PRLP. This percentage applies in determining insured loss payments for insured losses incurred during the subject Program Year, starting with the effective date until Treasury determines a revised PRLP. Considerations in establishing the PRLP are: (1) Estimates of insured losses from insurance industry statistical organizations; (2) any data calls issued by Treasury; (3) expected reliability and accuracy of insured loss estimates and likelihood that insured loss estimates could increase; (4) estimates of insured losses and expenses not included in available statistical reporting; and (5) such other factors as the Secretary considers important. Revisions to the PRLP will be based on the same considerations, as needed. Notices of the initial and any revised PRLP will be provided through the **Federal Register,** or in another manner Treasury deems appropriate, based upon the circumstances of the act of terrorism under consideration.

In the preamble to the proposed rule, Treasury expressed its concern that there could be circumstances where we estimate that the cap on annual liability will be exceeded, but there is not yet adequate knowledge of insured losses with which to determine a PRLP. Allowing payments for early insured losses under the Program to continue without proration appears to be inequitable to those claimants with insured losses coming in later, for which the *pro rata* share calculation would have to be that much more severe. Treasury proposed that in such

a circumstance it would call a brief hiatus in insurer loss payments of up to two weeks. During this time Treasury would develop a PRLP as quickly as possible. During this hiatus, insurers could still make payments, but with the understanding that the PRLP would be effective retroactively to the start of the hiatus. Any insured losses later submitted in support of an insurer's claim for the Federal share of compensation would be reviewed for compliance with the regulations pertaining to the *pro rata* share payments.

One commenter commented that, absent an agreement between Federal and State officials concerning the preemptive scope of the Reauthorization Act, State insurance departments and labor commissions may seek to require the continuation of full benefits despite the hiatus. Insurers may have no option but to continue paying full benefits which would place them at odds with the compensation to be provided later under a retroactive PRLP. The commenter suggested, as an alternative to the hiatus, establishing an initial conservative PRLP which would be replaced by a higher PRLP determined later.

Treasury included a provision on a hiatus in the proposed rule because we believe that it is consistent with our authority in the Reauthorization Act to implement our Program obligations. In developing the proposed rule, Treasury consulted with the National Association of Insurance Commissioners (NAIC), and has not received any further comments from that group. In considering the submitted comment, we do see merit in providing some flexibility in managing the circumstances that had prompted the proposed hiatus and have made some revisions to § 50.92(e) in the final rule. First, we have added a provision stating that we would consult with the relevant state authorities before initiating action. Second, while we have retained the hiatus as a possible action, we have also added the possible alternative of determining an interim PRLP. This separately defined term is an amount determined without the availability of information necessary for consideration of all factors listed in § 50.92(b). All other provisions applicable to the PRLP would apply to the interim PRLP. This would be a conservatively low percentage amount determined in order to facilitate initial partial payments of claims by insurers after an act of terrorism and prior to the time that information becomes available to determine a PRLP based on consideration of the factors listed in § 50.92(b).

The more refined and expectedly higher PRLP, as later determined, would be effective retroactively as of the effective date of the interim PRLP. Any insured losses submitted in support of an insurer's claim for the Federal share of compensation would then be reviewed for the insurer's compliance with *pro rata* payments in accordance with the effective date of the interim PRLP, or as later replaced by the subsequent PRLP as appropriate. Thus, an insurer would be able to make additional payments and claims for the Federal share on insured losses previously limited by the interim PRLP. This alternative should provide us with enough flexibility to quickly establish proration, if necessary, in the aftermath of an act of terrorism.

One commenter requested clarification as to how and when policyholders are to be notified that benefits will be adjusted pursuant to the PRLP. As provided in TRIP regulations (§ 50.15(b)), as a condition for payments of the federal share of compensation for insured losses, an insurer must disclose to the policyholder the existence of the cap on annual liability for losses, at the time of offer, purchase, and renewal of the policy. The timing and form of notification to the policyholder of the adjustment, once Treasury has provided public notice of its determination of a PRLP, is up to the discretion and management of the insurer as guided by any pertinent State requirements.

3. Application of Pro Rata Share (§ 50.93)

In the proposed rule, Treasury provided that the PRLP be applied by insurers prospectively on individual insured losses that have not been settled as of the effective date of a PRLP. The intention was that the process of proration would not retroactively require repayment of any claims already legitimately made (or agreed to be paid) to insureds for insured losses. The impracticality of recovering payments already made has been generally recognized.

Proposed § 50.93 directed insurers to apply the PRLP to determine the *pro rata* share of each insured loss to be paid by the insurer on all insured losses where there is not a *signed settlement* as of the effective date established by Treasury for the PRLP. The same procedure would apply whether this was an initial PRLP or a subsequent PRLP that supersedes the prior determination.

Two commenters raised concerns over the use of a ''signed settlement'' in determining whether an insured loss is subject to proration. One commenter noted that the types of claims generated by a terrorist event may not lend themselves to signed settlement agreements and therefore recommended that the rule should refer to a ''claim paid'' instead. The other commenter, addressing the same concern, suggested that the rule refer to a ''complete and final settlement'' and a ''memorialization'' of the settlement. After consideration of these comments, Treasury has modified the final rule to provide that an insurer ''shall apply the PRLP to determine the *pro rata* share of each insured loss to be paid by the insurer on all insured losses where there is not an agreement on a complete and final settlement as evidenced by a signed settlement agreement or other means reviewable by a third party as of the effective date established by Treasury.'' We believe that this allows reasonable flexibility for insurers settling claims before and after the effective date of a PRLP while requiring appropriate documentation that can be reviewed during an audit.

One commenter also noted that it appeared that the proposed rule would not allow ''signed settlements'' executed after an initial PRLP to be modified should the PRLP later increase. This circumstance was addressed in proposed § 50.95(a) which spoke to Treasury's determination of a final PRLP and ''adjustments to previous insured loss payments.'' We anticipate that it is most likely that Treasury would only increase the PRLP once it is clear what a final proration should be. However, in reviewing this comment we have determined that we can accommodate other increases in the PRLP should they be warranted prior to determining a final PRLP and allow payments on ''prior settlements'' to be increased. This will be accomplished by establishing the effective date of a higher PRLP retroactively to an appropriate earlier PRLP effective date, similar to the mechanism described above for the interim PRLP that would facilitate initial partial claim payments by insurers under § 50.92(e). This will allow insurers to determine any additional payment amounts and allow the submission of updated loss information to Treasury for purposes of determining the Federal share of compensation to be reviewed under the new PRLP criteria.

In proposed § 50.93(a), Treasury provided that the *pro rata* share is determined based on the final claim settlement amount that would otherwise be paid. If partial payments have already been made as of the effective

date of the PRLP, then the *pro rata* share for that loss is the greater of the amount already paid or the amount computed by applying the PRLP to the estimated or actual final claim settlement amount. One commenter recommended the inclusion of words at the end of the subsection, for consistency and clarity, reinforcing that the PRLP is being applied to the final claim settlement amount ''that would otherwise be paid.'' The final rule has been revised to include this. Treasury noted in the preamble to the proposed rule that some insured losses, such as those associated with workers' compensation or business interruption, may involve ongoing regular payments. In these cases, the proration would still be determined based on the final claim settlement amount that would otherwise be paid.

In the claims procedures regulations (Subpart F) and in the forms for insurer submissions for the Federal share of compensation that Treasury has already promulgated, workers' compensation losses are required to be substantiated at the policy level. That is to say, underlying loss information on the bordereaux and reviewed by Treasury in determining the Federal share is submitted in aggregate by policy/employer rather than individual claimant/employee. In the proposed rule, Treasury proposed to continue that scheme. The application of the PRLP to determine the *pro rata* share would be against the estimated or actual unprorated loss amounts by policy (broken down by medical only, medical portion of indemnity, and indemnity portion of indemnity), following the way loss information has been required to be reported as part of the TRIP Certifications of Loss. Despite this calculation of the *pro rata* share at the policy level for purposes of reporting to Treasury, Treasury noted its expectation that insurers would prorate payments made to individual claimants.

One commenter suggested that for workers' compensation losses, the PRLP should be applied and controlled by Treasury at the claimant level rather than at the policy level. The comment also made note that workers' compensation losses could involve ''hundreds or thousands of claimants from the same event at the same location.'' The commenter also supplied an example of a scenario where the proration on a policy basis was carried out in such a way that the *pro rata* portion of the payment that otherwise would have been made to one claimant (58 percent) was significantly different than the *pro rata* portion of payment for another claimant (92 percent) under the same policy.

Treasury has carefully reviewed this comment along with the submitted example. In part, the disparity in the example is due to the timing of claims with the establishment of a PRLP, a circumstance that has generally been noted as possibly producing disparities in all lines of business, not just workers' compensation. We note that the disparity in *pro rata* portions of payments in the example was exacerbated by the manner in which the PRLP was applied at the claimant level. Application of the proration at the claimant level can be carried out in ways that are consistent with the rule, but can reduce or exacerbate disparities.

After considering this comment in the context of other authority and control concerns, Treasury has concluded that the proposed application of the PRLP to workers' compensation claims, controlled by Treasury at the policy level as described in the notice of proposed rulemaking, will be adopted in the final rule for the following reasons.

When establishing the claims process for TRIP, it was generally recognized that creating a system under which detailed reporting of insured losses would be required at the claimant level went beyond what is necessary for Treasury to fulfill its program obligations as a ''reinsurer''. We believe that this is still fundamentally the right approach and do not want to require a more detailed reporting structure for all acts of terrorism because of the contingency that there might be a requirement to cap annual losses. Nor do we want to develop a system with two different levels of reporting dependent on whether annual losses are to be capped or not.

There is some flexibility in how an employer (the policyholder) and the insurer decide to manage payment streams. This includes how and when insurance payments to claimants are continued at a reduced level, or stopped after limits are reached. We expect proration to be done in some manner at the claimant level, but the detail as to exactly how that is done may depend on other factors and authorities that are not superseded by this rule.

Treasury's interest is in managing the proration due to the cap on annual losses in such a way that makes sense as a ''reinsurer''. We continue to believe that this is best accomplished by controlling the application of proration at the policy level. However, as discussed below, we have provided for the possibility of some adjustments in the calculation of the Federal share of compensation for insured losses in the context of workers' compensation policies in one particular situation.

The same commenter also recommended language for § 50.93(a) to provide additional flexibility in workers' compensation cases for handling partial payments versus the final claim settlement amount. Under the commenter's assumption that proration and the computation of the Federal share of compensation would be computed at the claimant level, the commenter provided examples where an injured worker either had a shorter life or returned to work sooner than anticipated in the estimates of final claim settlement amount. Thus applying the PRLP to the actual final claim settlement amount produced a lower *pro rata* amount than the amount of partial payments already made, which were based on the expectation of a higher final claim settlement amount. An insurer therefore might not be fully compensated in the computation of the Federal share because it is based on applying the PRLP to the lower actual final settlement amount. However, in the provided examples where payments to an injured worker continued longer than anticipated in the estimates, applying the PRLP to the actual final claim settlement amount fully compensated the insurer. The commenter recommended modifying the proposed rule to provide that in cases where the estimated or actual settlement amount is lower than a prior estimate, then ''the *pro rata* share of that loss is the greater of the amount already paid or the amount computed by applying the PRLP to the estimated or actual final claim settlement amount.''

The issue presented is another reason why Treasury believes that the better way to compute and control the *pro rata* share of losses under a workers' compensation policy for purposes of determining the Federal share of compensation is at the policy level. For a workers' compensation policy, in all likelihood the final claim settlement amount to which the PRLP is applied will remain an estimated amount for quite some time. As noted by the commenter, the fluctuation of the actual settlement amount from the estimated amount at the claimant level could be significant.

Treasury anticipates the estimate at the policy level would be a much more stable amount, taking into account that some actual payments to individual claimants may be less than the expected amounts while others may be greater. However, we do understand how even at the policy level, where perhaps a policy is covering a small number of employees, that a circumstance such as

actual mortality differing from original assumptions could produce an unexpectedly large reduction in the estimated loss after payments have already been made. The final rule has been modified by adding a provision in § 50.93(c) allowing a workers' compensation insurer to submit for review information justifying an appropriate adjustment in the calculation of the Federal share of compensation.

A commenter noted the assumption that concerned insurance trade associations would work with Treasury to address the issue of what happens if an employer is unable to rely on its workers' compensation insurance for full payment of an injured worker's claim. No other comments specific to this issue have been submitted. This is not an issue addressed under the Act.

In the notice of proposed rulemaking, Treasury noted that in examining our authorities as stipulated in the Reauthorization Act, the conclusion was reached that we cannot provide for *pro rata* sharing of insured losses in such a way that an insurer's liability would be limited when it has not met its deductible. Thus, proposed § 50.93 provided that if an insurer has not yet made payments in excess of its insurer deductible, but estimates that it will exceed its deductible by making payments based on the application of the PRLP, then that insurer shall apply the PRLP as of the effective date of the PRLP. If an insurer has not yet made payments in excess of its insurer deductible, but estimates that it will not exceed its deductible by making payments based on the application of the PRLP, then that insurer may make payments on the same basis as prior to the effective date of the PRLP. In this latter circumstance, the decision to prorate as of the effective date of the PRLP would be up to the insurer. If the insurer prorates and does not exceed its deductible, then it would be liable for additional, retroactive loss payments that in the aggregate bring the insurer's total insured loss payments up to an amount equal to the lesser of its insured losses without proration or its insurer deductible. If the insurer does not prorate, but does exceed its deductible, then it would apply the PRLP to its remaining insured losses once it makes payments equal to its insurer deductible. Once an insurer exceeds its deductible and submits a claim for the Federal share of compensation, however, Treasury's review of eligible payments associated with the underlying losses and calculations for the Federal share would be based on the application of the PRLP as if the insurer had originally estimated that it would exceed its deductible while applying the PRLP to its insured losses.

Two comments were submitted regarding this provision of the proposed rule. One commenter urged Treasury to require that the PRLP be used by all insurers until loss estimates clearly demonstrate that an insurer will not reach its deductible. The commenter's concern was that an insurer might attempt to gain a competitive advantage in attracting or retaining business by underestimating losses to be within the insurer deductible and thus making higher loss payments by not applying the otherwise required PRLP.

A second commenter recommended that insurers be allowed to request Treasury approval of an individual insurer PRLP that is greater than the published PRLP so that an insurer can more quickly make payments that approach its insurer deductible amount. The commenter's concern was that the proposed rule appeared to allow only two choices: applying the PRLP with a delayed truing up with policyholders at a later date when Treasury has determined the final PRLP, or making unprorated payments to policyholders and possibly exceeding their insurer deductible without being eligible for a Federal sharing of losses above the deductible.

These two comments conflict with one another. Treasury's intention with § 50.93(c) of the proposed rule was to allow an insurer, that already knows that it will not meet its insurer deductible by applying the PRLP to its insured losses, to expeditiously meet its obligations to its policyholders. The onus for estimating its losses relative to its insurer deductible and the consequence for overpaying losses that should have been prorated, was placed on the insurer who, as opposed to Treasury, would have the most up to date information. On balance, Treasury believes that the objective of expediting complete payment of insured losses overrides the concern that an insurer might overpay to gain a competitive advantage. Any such overpayment will not affect the Federal share of compensation. Treasury believes that additional flexibility can be provided in the rule without requiring Treasury approval of individual insurer PRLP's. The final rule has been modified to allow an insurer that has not yet made payments in excess of its insurer deductible and that estimates it will not exceed its deductible making payments based on the application of the PRLP, to make payments ''on the basis of applying some other *pro rata* amount it determines that is greater than the PRLP, where the insurer estimates that application of such other *pro rata* amount will result in it not exceeding its insurer deductible.'' The insurer is still liable for loss payments that in the aggregate bring the insurer's total insured loss payments up to an amount equal to the lesser of its insured losses without proration or its insurer deductible.

4. Data Call Authority (§ 50.94)

Treasury proposed in § 50.94 of the proposed rule that it may issue a data call to insurers for the submission of insured loss information. We explained that we anticipate requesting summary level information on insured losses and insurer deductible information. Such a collection of data may be necessary not only for the purposes of the cap on annual liability, but also with regard to potential recoupment. Treasury further explained that we intend, to the extent possible, to rely on existing industry statistical reporting mechanisms in making initial estimates. However, in order to estimate whether the cap on annual liability will be reached and determine an initial or subsequent PRLP, it may be necessary to have more timely detail regarding insurer deductibles and reserves for insured losses from lines of business not normally included in existing industry reporting.

Two entities provided comments regarding the data call authority. Both recognized the appropriateness of Treasury collecting insurer loss data in order to meet Program obligations.

One commenter noted that proposed § 50.91 stated that the initial reporting obligation to Congress would be met based on loss information ''compiled by insurance industry statistical organizations and any other information the Secretary in his or her discretion considers appropriate.'' Further, Treasury indicated in the description of this section of the proposed rule that a data call may not be timely enough to meet the reporting obligation. The commenter stated that Treasury should consider adding clarifying language to § 50.94 reflecting this view. We reiterate that our intention is to meet the initial reporting obligation through data obtained from statistical organizations and other sources of general loss information. However, we do not wish to unnecessarily restrict the use of a data call if that became the only way for us to meet our statutory reporting obligation. Therefore, § 50.94 of the final rule has not been revised.

Both commenters asserted that data requested be ''relevant and accessible'' and that the request should minimize

disruptions to insurer claims handling during a catastrophic event. One commenter further urged that Treasury ''continue this current rulemaking, and determine and define what data they will need.''

In the Notice of Proposed Rulemaking, Treasury provided estimates of burden hours to comply with data requests as well as specific data elements for summary level loss information that is contemplated under a data call. This included initial information requested in the immediate aftermath of an act of terrorism as well as further information that might be requested as claims processes progressed. As part of the Paperwork Reduction Act requirements for this rulemaking, comments on the collection of information in the proposed rule were solicited for submission to the Office of Management and Budget (OMB) with a 60-day comment period. No comments were submitted.

In past development of information collection requirements associated with the Terrorism Risk Insurance Program, Treasury has benefited from both the formal processes and informal contacts with members of the insurance industry. We will continue both of these types of efforts in further development of the data call requirements.

Concerning the data calls contemplated by proposed § 50.94, one commenter requested that Treasury recognize that the claims data should be considered proprietary information of the submitting insurers and suggested that provisions be added to the regulation similar to what was included in ''The Insurance Information Act of 2008'', which was introduced in, but not passed by the 110th Congress.

The Program does not intend to make insurer-specific data public. The regulation does not override other law that would otherwise be applicable. Any information submitted to Treasury would be subject to the Freedom of Information Act (FOIA). Treasury would handle any request for information that has been submitted by an insurer in response to a data call in accordance with Treasury's FOIA regulations at 31 CFR Part 1. This would include consideration of the applicability of FOIA exemptions, including those applicable to commercially or financially sensitive information.

5. Other Comments

One commenter raised the general topic of the interaction of the regulations with State law, and suggested that guidance on certain issues would be helpful to insurers. The issues noted were: How the payment hiatus interacts with State prompt payment laws; the extent to which a State regulator may modify the procedures in the regulations; and the extent to which a State regulator may require that a preference be applied to the full payment of certain lines, claims, or insureds.

Section 106(a) of the Act provides generally that nothing in the Act shall affect the jurisdiction or regulatory authority of the insurance commissioner (or any agency or office performing like functions) of any State over any insurer or other person except as specifically provided in the Act. Section 103(a)(2) of the Act provides that notwithstanding any other provision of State or Federal law, the Secretary shall administer the Program, and shall pay the Federal share of compensation for insured losses in accordance with subsection (e). Section 103(e)(2) requires Treasury to issue regulations for determining the *pro rata* share of insured losses under the Program when insured losses exceed $100 billion.

Treasury consulted with the National Association of Insurance Commissioners (NAIC) early in the process of formulating the proposed rule. If specific issues are raised in the future, Treasury will consider issuing further guidance as appropriate.

V. Procedural Requirements

Executive Order 12866, ''Regulatory Planning and Review''. This rule is a significant regulatory action for purposes of Executive Order 12866, ''Regulatory Planning and Review,'' and has been reviewed by the OMB.

Regulatory Flexibility Act. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* it is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. TRIA requires all insurers that receive direct earned premiums for commercial property and casualty insurance to participate in the Program. The Act also defines ''property and casualty insurance'' to mean commercial lines, with certain specific exclusions. Insurers affected by these regulations tend to be large businesses, therefore Treasury has determined that the rule will not affect a substantial number of small entities. In addition, the Department has determined that any economic impact will not be significant. Under the Act, Treasury shall not make any payment for any portion of the amount of annual aggregate insured losses that exceed $100 billion and no insurer that has met its insurer deductible is liable for the payment of any portion of the amount of annual aggregate insured losses that exceeds $100 billion. Further, the Act requires the Secretary to determine the *pro rata* share of insured losses to be paid by each insurer and to issue regulations for determining the *pro rata* share of insured losses under the Program. If there is no act of terrorism, or there are insured losses cumulatively less than $100 billion (a level that is more than three times the amount reported by the insurance industry for the World Trade Center), this regulation has no economic impact. Should the legislatively mandated cap on annual losses be triggered, proration is carried out through existing insurer and policyholder processes for claiming, adjusting and settling insured losses. Moreover, for any affected commercial property and casualty insurers (including those that might be small entities), there is a favorable economic impact because the rule implements the statutory limitation on an insurer's liability. Treasury did not receive any comments at the proposed rule stage relating to the rule's impact on small entities. Accordingly, a regulatory flexibility analysis is not required.

Paperwork Reduction Act. The collection of information contained in this final rule has been approved by the OMB under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3507(d), and has been assigned control number 1505–0208. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number.

Executive Order 13132, ''Federalism.'' The rule may have federalism implications to the extent it deals with the making of payments by insurers to their policyholders under contracts of insurance, which is ordinarily regulated under State insurance law. However, TRIA established a temporary Federal program that is national in scope and significance. Section 106 of TRIA preserves the jurisdiction or regulatory authority of State insurance commissioners or similar offices, except as specifically provided in TRIA. Section 103(e)(2) requires Treasury to issue regulations for determining the *pro rata* share of insured losses under the Program when insured losses exceed $100 billion.

Treasury consulted with the NAIC early in the process of formulating the proposed rule. State insurance commissioners who are members of the NAIC Terrorism Insurance Working Group were given an opportunity to submit comments, and a few minor and technical comments were received and considered by Treasury. No further

comments were received on the proposed rule.

The provision in the rule (§ 50.92(e)) where Treasury would call for a hiatus in payments by insurers in circumstances where the cap on annual liability may be exceeded, but an appropriate PRLP cannot yet be determined, could potentially conflict with State insurance laws prescribing fixed periods for insurers to pay claims. However, Treasury believes the impact is limited in the rule because the period of the hiatus is brief (up to two weeks), and it would apply shortly after an act of terrorism occurs. Treasury concluded that a brief hiatus may be necessary to carry out the purpose of the statute to establish shares of insured losses on a *pro rata* basis by avoiding the inequity of allowing early claims to be paid in full before a PRLP can be determined.

As noted above in response to a comment on the proposed rule, Treasury has modified the final rule to include the second option of an interim PRLP to address the circumstance where information necessary for consideration of all factors listed in § 50.92(b) is unavailable. The final rule also provides that Treasury will consult with relevant state authorities before a course of action is selected. These added provisions further mitigate the federalism implications.

List of Subjects in 31 CFR Part 50

Terrorism risk insurance.

Authority and Issuance

■ For the reasons set forth above, 31 CFR Part 50 is amended as follows:

PART 50—TERRORISM RISK INSURANCE PROGRAM

■ 1. The authority citation for part 50 continues 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 and Pub. L. 110–160, 121 Stat. 1839 (15 U.S.C. 6701 note).

■ 2. Section 50.53 is amended by adding paragraph (b)(5) to read as follows:

§ 50.53 Loss certifications.

* * * * *

(b) * * *

(5) A certification that if Treasury has determined a *Pro rata* Loss Percentage (PRLP) (see § 50.92), the insurer has complied with applying the PRLP to insured loss payments, where required.

* * * * *

■ 3. Subpart J is added to read as follows:

SUBPART J—CAP ON ANNUAL LIABILITY

Sec.

SUBPART J—CAP ON ANNUAL LIABILITY

§ 50.90 Cap on annual liability.

Pursuant to Section 103 of the Act, if the aggregate insured losses exceed $100,000,000,000 during any Program Year:

(a) The Secretary shall not make any payment for any portion of the amount of such losses that exceeds $100,000,000,000;

(b) No insurer that has met its insurer deductible shall be liable for the payment of any portion of the amount of such losses that exceeds $100,000,000,000; and

(c) The Secretary shall determine the *pro rata* share of insured losses to be paid by each insurer that incurs insured losses under the Program.

§ 50.91 Notice to Congress.

Pursuant to section 103(e)(3) of the Act, the Secretary shall provide an initial notice to Congress within 15 days of the certification of an act of terrorism, stating whether the Secretary estimates that aggregate insured losses will exceed $100,000,000,000 for the Program Year in which the event occurs. Such initial estimate shall be based on insured loss amounts as compiled by insurance industry statistical organizations and any other information the Secretary in his or her discretion considers appropriate. The Secretary shall also notify Congress if estimated or actual aggregate insured losses exceed $100,000,000,000 during any Program Year.

§ 50.92 Determination of *pro rata* share.

(a) *Pro rata loss percentage (PRLP)* is the percentage determined by the Secretary to be applied by an insurer against the amount that would otherwise be paid by the insurer under the terms and conditions of an insurance policy providing property and casualty insurance under the Program if there were no cap on annual liability under section 103(e)(2)(A) of the Act.

(b) Except as provided in paragraph (e) of this section, if Treasury estimates that aggregate insured losses may exceed the cap on annual liability for a Program Year, then Treasury will determine a PRLP. The PRLP applies to insured loss payments by insurers for insured losses incurred in the subject Program Year, as specified in § 50.93, from the effective date of the PRLP, as established by Treasury, until such time as Treasury provides notice that the PRLP is revised. Treasury will determine the PRLP based on the following considerations:

(1) Estimates of insured losses from insurance industry statistical organizations;

(2) Any data calls issued by Treasury (see § 50.94);

(3) Expected reliability and accuracy of insured loss estimates and likelihood that insured loss estimates could increase;

(4) Estimates of insured losses and expenses not included in available statistical reporting;

(5) Such other factors as the Secretary considers important.

(c) Treasury shall provide notice of the determination of the PRLP through publication in the **Federal Register**, or in another manner Treasury deems appropriate, based upon the circumstances of the act of terrorism under consideration.

(d) As appropriate, Treasury will determine any revision to a PRLP based on the same considerations listed in paragraph (b) of this section, and will provide notice for its application to insured loss payments.

(e) If Treasury estimates based on an initial act of terrorism or subsequent act of terrorism within a Program Year that aggregate insured losses may exceed the cap on annual liability, but an appropriate PRLP cannot yet be determined, Treasury will provide notification advising insurers of this circumstance and, after consulting with the relevant State authorities, may initiate the action described in either paragraph (e)(1) or (e)(2) of this section.

(1) Call a hiatus in insurer loss payments for insured losses of up to two weeks. In such a circumstance, Treasury will determine a PRLP as quickly as possible. The PRLP, as later determined, will be effective retroactively as of the start of the hiatus. Any insured losses submitted in support of an insurer's claim for the Federal share of compensation will be reviewed for the insurer's compliance with *pro rata* payments in accordance with the effective date of the PRLP.

(2) Determine an interim PRLP. (i) An interim PRLP is an amount determined without the availability of information necessary for consideration of all factors listed in § 50.92(b). It is a conservatively low percentage amount determined in order to facilitate initial partial claim payments by insurers after an act of terrorism and prior to the time that information becomes available to

determine a PRLP based on consideration of the factors listed in § 50.92(b).

(ii) In such a circumstance, Treasury will determine a PRLP to replace the interim PRLP as quickly as possible. The PRLP, as later determined, will be effective retroactively as of the effective date of the interim PRLP. Any insured losses submitted in support of an insurer's claim for the Federal share of compensation will be reviewed for the insurer's compliance with *pro rata* payments in accordance with the effective date of the interim PRLP, or as later replaced by the PRLP as appropriate.

§ 50.93 Application of *pro rata* share.

An insurer shall apply the PRLP to determine the *pro rata* share of each insured loss to be paid by the insurer on all insured losses where there is not an agreement on a complete and final settlement as evidenced by a signed settlement agreement or other means reviewable by a third party as of the effective date established by Treasury. Payments based on the application of the PRLP and determination of the *pro rata* share satisfy the insurer's liability for payment under the Program. Application of the PRLP and the determination of the *pro rata* share are the exclusive means for calculating the amount of insured losses for Program purposes. The *pro rata* share is subject to the following:

(a) The *pro rata* share is determined based on the estimated or actual final claim settlement amount that would otherwise be paid.

(b) *All policies.* If partial payments have already been made as of the effective date of the PRLP, then the *pro rata* share for that loss is the greater of the amount already paid as of the effective date of the PRLP or the amount computed by applying the PRLP to the estimated or actual final claim settlement amount that would otherwise be paid.

(c) *Certain workers' compensation insurance policies.* If an insurer's payments under a workers' compensation policy cumulatively exceed the amount computed by applying the PRLP to the estimated or actual final claim settlement amount that would otherwise be paid because such estimated or actual final settlement amount is reduced from a previous estimate, then the insurer may request a review and adjustment by Treasury in the calculation of the Federal share of compensation. In requesting such a review, the insurer must submit information to supplement its Certification of Loss demonstrating a reasonable estimate invalidated by unexpected conditions differing from prior assumptions including, but not limited to, an explanation and the basis for the prior assumptions.

(d) If an insurer has not yet made payments in excess of its insurer deductible, the rules in this paragraph apply.

(1) If the insurer estimates that it *will* exceed its insurer deductible making payments based on the application of the PRLP to its insured losses, then the insurer shall apply the PRLP as of the effective date specified in § 50.92(b).

(2)(i) If the insurer estimates that it *will not* exceed its insurer deductible making payments based on the application of the PRLP to its insured losses, then the insurer may make payments on the same basis as prior to the effective date of the PRLP. The insurer may also make payments on the basis of applying some other *pro rata* amount it determines that is greater than the PRLP, where the insurer estimates that application of such other *pro rata* amount will result in it not exceeding its insurer deductible. The insurer remains liable for losses in accordance with § 50.95(c).

(ii) If an insurer estimates that it will not exceed its insurer deductible and has made payments on the basis provided in (2)(i), but thereafter reaches its insurer deductible, then the insurer shall apply the PRLP to any remaining insured losses. When such an insurer submits a claim for the Federal share of compensation, the amount of the insurer's losses will be deemed to be the amount it would have paid if it had applied the PRLP as of the effective date, and the Federal share of compensation will be calculated on that amount. However, an insurer may request an exception if it can demonstrate that its estimate was invalidated as a result of insured losses from a subsequent act of terrorism.

§ 50.94 Data call authority.

For the purpose of determining initial or recalculated PRLPs, Treasury may issue a data call to insurers for insured loss information. Submission of data in response to a data call shall be on a form promulgated by Treasury.

§ 50.95 Final amount.

(a) Treasury shall determine if, as a final proration, remaining insured loss payments, as well as adjustments to previous insured loss payments, can be made by insurers based on an adjusted PLRP, and aggregate insured losses still remain within the cap on annual liability. In such a circumstance, Treasury will notify insurers as to the final PRLP and its application to insured losses.

(b) If paragraph (a) of this section applies, Treasury may require, as part of the insurer submission for the Federal share of compensation for insured losses, a supplementary explanation regarding how additional payments will be provided on previously settled insured losses.

(c) An insurer that has prorated its insured losses, but that has not met its insurer deductible, remains liable for loss payments that in the aggregate bring the insurer's total insured loss payments up to an amount equal to the lesser of its insured losses without proration or its insurer deductible.

Dated: December 3, 2009.

Michael S. Barr,

Assistant Secretary (Financial Institutions).

[FR Doc. E9–29614 Filed 12–11–09; 8:45 am]

BILLING CODE 4810–25–P