

purposes of the Program must be certified by the Treasury Secretary, in concurrence with the Secretary of State and the Attorney General of the United States, and must fall within other statutory parameters. The requirements in clauses (i)–(iv) of section 102(1)(A) are conjunctive. An act of terrorism, if it also meets the limitations in section 102(1)(B), may be certified if it: is violent or dangerous to human life, property or infrastructure; and has resulted in damage within the United States, or outside the United States in the case of certain air carriers or vessels or if on the premises of a U.S. mission; and has been committed by individual(s) on behalf of any foreign person or foreign interest, as part of an effort to coerce the U.S. civilian population or to influence the policy or affect the conduct of the U.S. government by coercion. Therefore, acts of domestic civil disturbance would not be covered by the Act's definition of "act of terrorism" or by the Program.

Section 102(1)(B) limits the Secretary's ability to certify an act if committed as part of a course of war declared by Congress, (except for workers' compensation coverage), or if property and casualty insurance losses resulting from the act, in the aggregate, do not exceed a \$5,000,000 *de minimis* threshold. With regard to the first limitation, one commenter raised a question concerning the effect of a declaration of war on an act of terrorism certification. While it is not possible for a regulation to address all potential situations surrounding an act of terrorism determination under the Program, it is Treasury's view that the war exclusion in the Act applies only to acts of terrorism committed in connection with a formal, congressionally declared war. While the phrase "war declared by the Congress" is not defined in the Act, Article I, section 8, clause 11 of the Constitution grants Congress the exclusive authority to declare war. Congress has done so on five occasions, the most recent of which occurred in 1941 at the outset of World War II. Most other American military actions have been conducted pursuant to constitutional authorities of the President connected with his role as commander-in-chief, and while many of these have also enjoyed explicit Congressional support, they have not been authorized by a formal declaration of war. For example, the "Authorization for Use of Military Force Against Iraq Resolution of 2002," (P.L. 107–243) gave the President authority to conduct military operations, but is not a formal declaration of war.

With regard to the second statutory limitation on an act of terrorism certification, one commenter asked whether the \$5,000,000 threshold loss has to be suffered by one insured policyholder. The Act, as reflected in the interim final rule, provides that the *de minimis* threshold is based on loss "in the aggregate". One certified act of terrorism could result in insured losses from several policyholders, none of which alone would amount to \$5,000,000, but, in the aggregate, would be in excess of that amount.

Section 106(a)(2) of the Act provides that the Act's definition is the exclusive definition of the term "act of terrorism" for purposes of compensation for insured losses under the Act. In addition, section 102(1)(C) of the Act provides that the Secretary's determination or certification with regard to whether an act is an act of terrorism for purposes of the Program is final and is not subject to judicial review.

One commenter urged Treasury to establish a time frame within which the Secretary would be required to make a determination or certification that an "act of terrorism" had occurred in order to better assist insurers in responding to inquiries and claims from their policyholders. Treasury understands the desire for certainty of those in the industry who would advocate a definite time frame, and intends to make its determination as promptly as possible after obtaining and evaluating the facts surrounding a possible act of terrorism. However, there 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. Given this inherent uncertainty and the significance of an act of terrorism determination to all aspects of the Program, Treasury does not believe that it would be in the public interest to establish in advance a regulatory time frame that may later prove to be inappropriate or unattainable.

B. "Affiliate" Including "Control" (Section 50.5(c))

Approximately one-third of the comments submitted to Treasury on the interim final rule raised questions or concerns with regard to the definition of "affiliate", which includes the definition of "control" in section 50.5(c). Most of these comments raised questions with either procedural or

substantive aspects of the rebuttable presumptions of controlling influence in this section. After careful consideration of the comments and further consultation with the NAIC, Treasury has made several revisions in the final rule to address these comments. The regulatory definitions and changes to the interim final rule are set forth below.

Section 102(6) of the Act defines an "insurer" to include "any affiliate thereof." The definitions of "affiliate" and "control" are intertwined in the Act. Section 102(2) defines "affiliate" to mean "with respect to any insurer, an entity that controls, is controlled by, or is under common control with the insurer." Pursuant to Section 102(3) of the Act, "control" exists if

- an entity directly or indirectly or acting through 1 or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the other entity; or
- an entity controls in any manner the election of a majority of the directors or trustees of the other entity; or
- the Secretary determines, after notice and opportunity for hearing, that the entity directly or indirectly exercises a controlling influence over the management or policies of the other entity.

Section 50.5(c) of the interim final rule generally incorporates and combines the related statutory definitions of "affiliate" and "control." In addition, the interim final rule provides that an affiliate must itself meet the definition of "insurer" to participate in the Program. (See part E of this preamble for further discussion of "insurer" definition.) The definitions of affiliate and control are integral to Treasury's implementation of the Program. As discussed further in parts C and F of this preamble, affiliated insurers are treated collectively as one entity by Treasury for purposes of calculating direct earned premiums and an insurer deductible under the Program. Three comments objected to this consolidated treatment as not equitable. However, as noted in the preamble to the interim final rule, this consolidated treatment is in accord with the Act's legislative history and the clear intent of Congress. The Conference Report states that the terms "affiliate" and "control" were meant "to ensure that affiliated insurers are treated as a consolidated entity for calculating direct earned premiums." H.R. Conf. Rep. No. 107–779 (2002).

Therefore, for example, if an insurance company meets the definition of an "insurer" under section 102(6) as implemented by Treasury, and three out