

of four of the companies it controls also meet the Act's definition of "insurer," then the parent company and the three companies it controls that meet the Act's definition of "insurer" (the parent company's affiliates) will be treated by Treasury collectively as one insurer for purposes of calculating direct earned premiums and calculating the insurer deductible under the Program. The company that does not meet the definition of "insurer" is not included in the Program.

In addition, if an entity is under common control with an insurer, and that entity also meets the definition of "insurer" under Section 102(6) of the Act as implemented by Treasury, then the two insurers are "affiliates" and Treasury will treat them collectively as one "insurer" for the Program purposes of consolidating direct earned premiums and calculating the insurer deductible. If their parent company does not meet the definition of "insurer" under the Act, then it is not included in the Program.

Control

The statutory definition of "control" in section 102(3) contains three categories. Section 102(3)(A) and (B) establish conclusive control under certain circumstances for purposes of the Program. The conclusive control provisions of the Act are contained in the definition of "affiliate" in the interim final rule at section 50.5(c)(2)(i) and (ii). If a relationship between or among insurers does not fit within the conclusive control provisions, control may still exist for purposes of the Program if Treasury determines, pursuant to section 102(3)(C), that an entity directly or indirectly exercises a controlling influence over the management or policies of another entity. Section 102(3)(C) is contained in the interim final rule at section 50.5(c)(2)(iii). In making a determination of whether controlling influence exists among insurers, section 102(3)(C) of the Act requires Treasury to provide notice and an opportunity for a hearing.

The Act's definition of control in section 102(3)(A), (B) and (C) is almost identical to the definition of "control" contained in the Bank Holding Company Act (BHCA) at 12 U.S.C. 1841(a)(2) and in the Savings and Loan Holding Company Act (SLHCA) at 12 U.S.C. 1467a, except that the Act does not contain a presumption of no control for holding less than 5 percent of any class of voting securities, nor does the Act provide any of the other explicit statutory exemptions that are provided in the BHCA and SLHCA. The Act's

definition of control is also similar to the definition of control in the NAIC's Model Insurance Company Holding Company Act (Model Act) except that the Model Act contains a presumption of control if an entity owns 10 percent of the voting securities of an insurance company instead of the 25 percent conclusive control threshold that is contained in the Act (and in the BHCA and the SLHCA).

Owns, Controls or has the Power to Vote 25 Percent or More of Voting Securities

Under Section 102(3)(A) of the Act, "an entity has 'control' over another entity if the entity directly or indirectly or acting through 1 or more persons owns, controls or has the power to vote 25 percent or more of any class of voting securities of the other entity." The interim final rule incorporates this statutory definition, but uses the word "insurer" instead of "entity" to clarify that the definition of control does not include entities that are not insurers.

One commenter asked for clarification that an affiliate itself must be an insurer to be treated as part of a consolidated entity with a related insurer. In view of the congressional intent that affiliated insurers be treated as a consolidated entity for purposes of calculating direct earned premiums, there is no reason to include non-insurer entities in the definition of "affiliate" because these entities do not have "direct earned premiums" as defined in the Act. Viewing a group of affiliates with both insurer and non-insurer entities, the direct earned premiums for the group should be no different whether or not the non-insurers are included in the group. For this reason, Treasury has decided to interpret the Act as generally excluding non-insurers from the definitions of affiliate and control at this time. Treasury could revisit this issue if it finds evidence that other corporate structures or arrangements are being used to thwart the goals and purposes of the Program.

Five insurance industry commenters took the position that ownership of 25 percent or more of the voting securities of an insurer should not automatically result in control. These commenters asserted that Treasury could and should by regulation change this statutory limit. One commenter referenced the NAIC Model Act language in support of creating a regulatory presumption. As noted above, unlike section 102(3)(A), the NAIC Model Act contains a 10 percent statutory presumption not a threshold of conclusive control. Several of these commenters stated that a 25 percent or more conclusive control limit could adversely affect the availability

and affordability of coverage, and in particular, would have an adverse effect on their own companies if they were required to aggregate direct earned premiums. These commenters suggested various alternatives for Treasury to use instead of the 25 percent statutory limit. These included substituting other regulatory factors for the 25 percent limit and accepting a state determinations of "no control" based on state law even where there is ownership of more than 25 percent.

Consistent with the statutory language in section 102(3)(A) and with other statutes containing similar language, Treasury interprets the 25 percent or more direct or indirect ownership of any class of voting securities to be an objective standard establishing conclusive control. Under the plain language of the statute, the 25 percent voting securities threshold is not a presumption, and is not subject to rebuttal. We also note that in addressing the rebuttable presumptions in the interim final rule in connection with section 102(3)(C), several commenters characterized the ownership of 25 percent or more of any class of voting securities threshold in section 102(3)(A), as well as the control provision in section 102(3)(B), as objective standards. For these reasons, Treasury has not made any change in the final rule to the 25 percent threshold in section 50.5(c)(2)(ii) of the interim final rule.

Controls the Election of a Majority of the Directors or Trustees

The interim final rule provides that an insurer controls another insurer for purposes of the Program if the insurer controls in any manner the election of a majority of the directors or trustees of the other insurer. In general, this regulatory provision incorporates the statutory language in section 102(3)(B). For the reasons stated above in connection with section 102(3)(A), Treasury interprets the section 102(3)(B) as another objective standard that establishes conclusive control for purposes of the Act. This standard is not a presumption and is not subject to rebuttal.

Controlling Influence and Rebuttable Presumptions

In addition to the conclusive control provisions in section 102(3)(A) and (B), the Act defines control to exist if, "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 102(3)(C). In the interim