

final rule, Treasury established several rebuttable presumptions for the purposes of a determination of controlling influence: (1) If a State has determined that an insurer controls another insurer; (2) if an insurer provides 25 percent or more of another insurer's capital (in the case of a stock insurer), policyholder surplus (in the case of a mutual insurer), or corporate capital (in the case of other entities that qualify as insurers); or (3) if an insurer, at any time during a Program Year, supplies 25 percent or more of the underwriting capacity for that year to an insurer that is a syndicate consisting of a group including incorporated and individual unincorporated underwriters.

Section 50.5(c)(4) of the interim final rule provided an insurer with an opportunity for an informal hearing to rebut a controlling influence presumption through written submissions and, in addition in Treasury's discretion, by an informal oral presentation. Treasury subsequently issued a notice on March 25, 2003 (68 FR 15039, March 27, 2003, "Interim Guidance IV") providing further guidance on the procedure for rebutting a presumption of controlling influence.

In establishing several rebuttable presumptions in Section 50.5(c)(3) of the interim final rule, Treasury had two key goals. One was to provide additional transparency about the factors that Treasury considers indicative of controlling influence to provide greater certainty to insurers prior to a final determination of control and thereby facilitate the calculation of insurer deductibles prior to presentment of a claim.

The second was to enhance administrative efficiency given available time and other resources in this temporary Program.

With regard to the second goal, we point out that, in the Act, Congress established a temporary backstop program with the expectation that Treasury would not build a large bureaucratic program structure, but instead would leverage off of the state insurance regulatory structure, where possible and appropriate. Unlike state insurance commissioners, or state or federal bank examiners, Treasury does not conduct regular on-site examinations of Program participants, nor does it routinely review acquisitions, mergers or other transactions of such insurers. Thus, Treasury does not have ready access to detailed information on the control relationships of insurers that is generally available to regulators that

implement the control provisions of the BHCA, the SLHCA, or state insurance law.

At this point, it is unclear to Treasury how many insurers fall outside section 102(3)(A) and (B) but may come within the controlling influence category. Rejecting the imposition of significant new regulatory reporting requirements on the property and casualty insurance industry, Treasury decided to utilize regulatory presumptions to accomplish these two goals and to implement the controlling influence provisions.

Treasury received 6 comments, from insurers and from a large insurance industry trade group, taking exception to the rebuttable presumptions as presented in the interim final rule. These commenters objected on procedural and substantive grounds. In addition, one commenter supported, in principle, the rebuttable presumption process.

Most of these commenters objected to the reliance on a state law determination of control in the first rebuttable presumption in the interim final rule. They contended that exclusive reliance on a state law determination, for purposes of a rebuttable presumption, was inappropriate given the varying state standards and the differences between the Act's definition of "control", and the definition of "control" in the NAIC Model Law used by most states. Several commenters suggested that Treasury utilize specific guidelines or standards (such as the existence of a management agreement) instead of rebuttable presumptions.

After consideration of these comments and the stated administrative goals, Treasury has decided to retain the use of rebuttable presumptions, with modifications. Use of the rebuttable presumptions provides increased certainty and transparency to insurers and others of the factors that Treasury considers indicative of a controlling influence. Rebuttable presumptions have been and are used successfully by other agencies in implementing nearly identical statutory definitions of "control." Rebuttable presumptions also aid efficient implementation of the controlling influence determination process, given that Treasury does not have ready access to relevant information about the financial, managerial, policymaking and corporate structures of insurers. Moreover, a rebuttable presumption is not a final determination of controlling influence by Treasury. Under the final rule, insurers subject to rebuttable presumptions, and others that do not fall within the conclusive control

provisions and wish to have a final determination of controlling influence, all have an opportunity for a hearing. Based upon the comments, and further consultation with NAIC, Treasury is revising the rebuttable presumptions to provide more detail and transparency concerning factors that Treasury will consider indicative of controlling influence and is using these factors in the rebuttable presumptions. For example, in response to several comments, no rebuttable presumption relies exclusively on a state law determination of control in the absence of the existence of at least one of the listed control factors. The final rule also adds the existence of at least one of the control factors to the other two presumptions (which are based on the provision of 25 percent corporate capital/ policyholder surplus, or the provision of 25 percent underwriting capacity to another insurer).

In the final rule, if an insurer does not come within the conclusive control provisions of section 102(3)(A) or (B) (section 50.5(c)(2)(i) or (ii) of the final rule), but at least two of the following control factors exists, then Treasury will presume controlling influence exists prior to a final determination unless and until rebutted by the insurer:

- The insurer is one of the two largest shareholders of any class of voting stock;
- The insurer holds more than 35 percent of the combined debt securities and equity of the other insurer;
- The insurer is party to an agreement pursuant to which the insurer possesses a material economic stake in another insurer resulting from a profit-sharing arrangement, use of common names, facilities or personnel, or the provision of essential services to another insurer;
- The insurer is party to an agreement that enables the insurer to influence a material aspect of the management or policies of another insurer;
- The insurer would have the ability, other than through the holding of revocable proxies, to direct the votes of more than 25 percent of the other insurer's voting stock in the future upon the occurrence of an event;
- The insurer has the power to direct the disposition of more than 25 percent of a class of voting stock in a manner other than a widely dispersed or public offering;
- The insurer and/or the insurer's representative or nominee constitute more than one member of the other insurer's board of directors;
- The insurer or its nominee or an officer of the insurer serves as the chairman of the board, chairman of the