

executive committee, chief executive officer, chief operating officer, chief financial officer or in any position with similar policymaking authority in another insurer;

In addition, if a State has determined that an insurer controls another insurer, and at least one of the factors listed above exists, then Treasury will presume controlling influence exists unless and until rebutted by the insurer.

Further, 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), and at least one of the factors listed above exists, then Treasury will presume a controlling influence exists unless and until rebutted by the insurer.

Finally, if an insurer, at anytime during the 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, and at least one of the factors in the above list exists, then Treasury will presume a controlling influence unless and until rebutted by the insurer.

A few of the commenters objected to the second and third rebuttable presumptions in the interim final rule as inconsistent with the conclusive control provisions in section 102(3)(A) and (B). As a general matter, Treasury is directed by the Act to treat insurers comparably under the Program. Treasury views the provision by an insurer of 25 percent of an insurer's corporate capital (or policyholder surplus), or supplying of 25 percent of an insurer's underwriting capacity for the Program Year, to indicate the functional equivalent of ownership of 25 percent of voting securities. As the administrator of the Program, Treasury also seeks to prevent loopholes in the regulations and elsewhere that may create opportunities to avoid or greatly minimize an insurer deductible merely on the basis of an insurer's unusual corporate structure or arrangement where, in effect, the insurer exercises a controlling influence over another insurer in the same or similar manner as the more traditional corporate structures of other insurers. The controlling influence determination authority in section 102(3)(C) aids Treasury's efforts to treat insurers comparably and helps preserve the goals and effectiveness of the Program. As described below, the final rule provides insurers with an opportunity for a hearing and a final determination on controlling influence.

#### Opportunity for Hearing

Section 102(3)(C) of the Act authorizes Treasury to make a determination that an insurer directly or indirectly exercises a controlling influence over the management or policies of another insurer, after notice and opportunity for hearing. The statutory language providing an opportunity for hearing does not require a formal hearing on the record. In the interim final rule, Treasury provided an opportunity for an informal hearing to any insurer that (1) does not come within the conclusive control provisions of section 102(3)(A) or (B) and (2) wanted to rebut a presumption of controlling influence. The informal hearing procedure requires an insurer to provide Treasury with relevant facts and circumstances concerning the relationship and in support of the insurer's contention that no controlling influence exists. The procedure also allows a supplementary oral presentation by the insurer, if deemed necessary by Treasury. Based on the information provided by the insurer, including any oral presentation, the factors listed in the regulation and other relevant facts and circumstances, Treasury would then make a final determination of whether a controlling influence exists.

A few commenters contended that Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, requires Treasury to hold a formal hearing for insurers challenging determinations of entity control under section 102(3) of the Act. We do not agree. The APA's formal hearing requirements apply when a hearing on the record is required by statute. "While the exact phrase 'on the record' is not an absolute prerequisite to the application of formal hearing procedures, the Supreme Court has made clear that these provisions do not apply, unless Congress has clearly indicated that the 'hearing' required by the statute must be trial-type hearing on the record." *U.S. Lines Inc. v. Federal Maritime Commission*, 584 F. 2d 519 (D.C. Cir 1978) (citing *United State v. Florida East Coast R. Co.*, 410 U.S. 224, 234-38 (1973)). The D.C. Circuit added that, in that case, the statute did not provide for a hearing "on the record," and nothing in the terms of the statute or in its legislative history indicated that a trial-type hearing was intended. *Id.* Similarly, section 102(3)(C) of the Act does not require a hearing on the record and nothing in the language or history of the Act indicates that Congress intended Treasury to establish procedures and apparatus for formal

trial-type hearings on the issue of controlling influence for purposes of this temporary Program.

In response to the comments received, the final rule revises the interim final rule to provide greater transparency in the controlling influence determination process. The final rule includes regulatory notice of specific factors that Treasury considers indicative of a controlling influence, and the rebuttable presumptions in the interim final rule are revised to avoid reliance on state law determinations without other indicia of control. The final rule affords insurers an opportunity to request an informal hearing in which an insurer may submit all relevant information on the issue of controlling influence, whether to rebut a presumption or to otherwise obtain a final controlling influence determination from Treasury. As in the interim final rule, the final rule allows an oral presentation, where deemed necessary by Treasury to supplement the written submission. Treasury will base its final determination on the factors set forth in the final rule, on information provided to Treasury by the insurer and on other relevant facts and circumstances. Although the final rule sets no deadline for an insurer to request a hearing, Treasury encourages insurers that do not come within the conclusive control provisions but that are in a relationship or arrangement in which the control factors apply or exist to request a hearing as soon as possible if they wish to rebut the regulatory presumptions of controlling influence and obtain a final determination from Treasury of whether the relationship involves a controlling influence (and therefore control).

Separately from the issuance of the interim final rule, Treasury solicited comment on a pro rata allocation method for control determinations under section 102(3)(C) of the Act, in situations in which multiple insurers each provide 25 percent or more of the capital of a stock insurer, policyholder surplus of a mutual insurer or corporate capital of other entities that meet the definition of insurer under the Act and in the interim final rule. The pro rata approach under consideration by Treasury would allocate premium on a pro rata basis in situations where there are multiple 25 percent owners. This approach is still under consideration by Treasury and may be proposed in connection with claims procedures.

Treasury anticipates proposing within claims procedures at a later date that the controlling insurer will be the insurer that will be required to file any claim with Treasury for Federal payment under the Program and that this insurer