

it remains the “insurer” under the Act and the premiums it receives become part of its DEP. This is not unlike situations where primary insurers report DEP on policies that they subsequently reinsure, and reinsurance is specifically excluded from the Act. Therefore, Treasury will not provide assurance that fronted premiums will not be included in DEP.

D. Insured Loss (Section 50.5.e)

Treasury incorporated the statutory definition of “insured loss” found in section 102(5) of the Act in section 50.5(e)(1) of the interim final rule. Section 50.5(e)(2) of the interim final rule clarified the meaning of insured loss as it relates to section 102(5)(B) of that Act as follows:

(i) A loss that occurs to an air carrier (as defined in 49 U.S.C. 40102), to a United States flag vessel, or a vessel based principally in the United States, on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States, is not an insured loss under section 102(5)(B) of the Act unless it is incurred by the air carrier or vessel outside the United States.

(ii) An insured loss to an air carrier or vessel outside the United States under section 102(5)(B) of the Act does not include losses covered by third party insurance contracts that are separate from the insurance coverage provided to the air carrier or vessel.

One commenter took exception to Treasury’s clarification that such extraterritorial insured third party losses to United States air carriers and vessels are not insured losses, and cited legislative history of the Act to indicate an intent on the part of Congress to provide extraterritorial coverage to United States air carriers and vessels without limitation.

After reviewing the comments including the legislative history cited by the commenter, Treasury has determined not to change the position it took in the interim final rule. Therefore, for purposes of the Program, an insured loss is “any” loss, including a third party liability loss, if it occurs within the geographic boundaries of the United States; but, if the loss occurs outside of the geographic boundaries of the United States (extraterritorial) to a United States air carrier or vessel, then only that portion of the loss “to” that air carrier or vessel is an insured loss eligible for the backstop. To further clarify, “to” in this context means insured losses that are incurred by United States air carriers and vessels (e.g., through United States air carriers’ or vessels’ property and liability

insurance coverage), not losses that are incurred by other entities that are covered by third party insurance contracts that are separate from the insurance coverage provided to the air carrier or vessel.

Treasury’s position is consistent with how third party liability losses are generally treated under the Program (including how such losses are treated for foreign air carriers and foreign flag vessels) in that such losses would be considered insured losses if they are incurred within the geographic scope of the United States. The extension of coverage provided to United States air carriers and vessels under the Act is related directly to those entities and their potential insurance exposures, which are fully covered under the interim final rule. Treasury does not believe that granting broader third party indemnification on an extraterritorial basis and creating greater exposure for United States taxpayers is consistent with congressional intent for the Program.

E. Insurer (Section 50.5.f)

The interim final rule incorporated the statutory definition of “insurer” as generally reflected in previously issued interim guidance that was published at 67 FR 78864. In accordance with section 103(a)(3) of the Act, each entity that meets the definition of “insurer” under the Act as implemented by Treasury must participate in the Program. To participate in the Program, an entity, including an “affiliate” of an insurer (see further discussion in part B of this preamble), must itself meet all of the requirements of section 102(6)(A) and (B) and, as the Treasury may prescribe, (C). This means that to be an insurer, an entity must: (1) Fall within one of the categories in section 102(6)(A) described below; (2) receive direct earned premiums as required by section 102(6)(B); and (3) meet any additional criteria established by Treasury pursuant to section 102(6)(C).

The categories of insurers in Section 102(6)(A) that were directly addressed in the interim final rule include:

(i) Licensed or admitted to engage in the business of providing primary or excess insurance in any State (“State” includes the District of Columbia and territories of the United States);

(ii) Not so licensed or admitted, but is an eligible surplus line carrier listed on the Quarterly Listing of Alien Insurers of the National Association of Insurance Commissioners;

(iii) Approved for the purpose of offering property and casualty insurance by a Federal agency in connection with maritime, energy or aviation activity; and

(iv) A State residual market insurance entity or State workers’ compensation fund.

The interim final rule provides that an entity that falls within two categories will be considered by Treasury to fall within the first category that it meets under section 102(6)(A)(i)–(iv). All entities that are licensed or admitted by a State’s insurance regulatory authority, such as captive insurers, risk retention groups, and farm and county mutuals, fall under section 102(6)(A)(i).

The interim final rule also specified that the scope of insurance coverage (insured losses) under the Program for federally approved insurers under section 102(6)(A)(iii) is only to the extent of federal approval of the commercial property and casualty insurance coverage approved by the Federal agency in connection with maritime, energy or aviation activity. Therefore, insured losses under other insurance coverage that may be offered by a federally approved insurer under section 102(6)(A)(iii) would not be covered by the Program.

In addition to falling within a category in section 102(6)(A), an “insurer” must meet the requirements in section 102(6)(B) unless statutorily excepted. Therefore, an “insurer” must receive “direct earned premiums” (as defined) on any type of commercial property and casualty insurance (as defined). In addition, an “insurer” must meet any additional criteria prescribed by Treasury under section 102(6)(C). The interim final rule did not prescribe additional criteria under section 102(6)(C). However, under a separate notice of proposed rulemaking published at 68 FR 9814 Treasury solicited public comment on whether the Secretary should prescribe other criteria for certain insurers pursuant to the authority provided by section 102(6)(C) and, if so, what criteria Treasury should prescribe.

Captive Insurers

Treasury received six comments that addressed the treatment of captive insurers under the Program. The majority of these objected to Treasury’s mandatory inclusion of captive insurers as a State licensed or approved insurer under Section 102(6)(A)(i). These commenters suggested that captives should be allowed to opt-in to the Program as opposed to being mandatory participants. In support of this position, commenters offered the following points: many captive insurers were created to operate outside of the traditional insurance marketplace, and thus they should not be treated as other insurance companies; some types of commercial coverage provided by