

approving insurers, do not have in place any type of ongoing data reporting requirements similar to that of the NAIC.

*Ability to Impose Surcharges or Take Enforcement Actions.* Many of the insurers approved by Federal agencies may be outside the direct jurisdiction of the United States. Treasury has little leverage vis a vis these insurers and this could make it difficult for Treasury to impose surcharges in the case of any recoupment under the Act or to take enforcement actions if needed. In contrast, if an insurer on the NAIC's Quarterly Listing of Alien Insurers is not in compliance with provisions of the Act, the insurer could suffer the consequences of losing its NAIC listing for poor character, which in turn could adversely affect its U.S. business operations. It is possible that a Federal agency could also revoke approval for noncompliance with provisions of the Act. However, the limited nature of a Federal agency's approval authority could somewhat lessen the impact of any such action and Treasury has no authority to require such action by another federal agency.

*Comparability Among Federally Approved Insurers.* Treasury strongly believes that all federally approved insurers should be treated in a similar manner that is consistent with the statute. For example, such consistency implies that the mandatory participation requirements of the Act should be applied to all federally approved insurers in a similar fashion. In that regard, Treasury would find it difficult to justify one group of federally approved insurers having broader access to the Program than the current interim final rule provides, while other groups stayed with the current approach in the interim final rule.

Treasury has considered carefully the concerns raised by commenters regarding the interim final rule's treatment of federally approved insurers. At this time, Treasury has decided that no changes to the rule are warranted. It appears that many of the insurers that have been approved by a Federal agency also qualify to participate in the Program based on other criteria. Treasury also notes that obtaining a listing on the NAIC's Quarterly Listing of Alien Insurers is an option that insurers can employ if they are not satisfied with the treatment of federally approved insurers under the interim final rule. Obtaining such a listing would satisfy the concerns we noted above, while at the same time imposing limited burden on insurers. It is our understanding that perhaps the

major obstacle to obtaining a listing is setting up the necessary trust fund.

Treasury will continue to evaluate this issue as the Program matures. While Treasury does not plan on making any changes to the treatment of federally approved insurers at this time, Treasury would be open to considering alternatives if the three key factors listed above "ongoing data reporting requirements, ability to impose surcharges or take enforcement actions, and comparability among federally approved insurers"—could be addressed.

#### Other Insurer Criteria

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. Specifically, Treasury solicited comment on whether criteria should be developed to prevent newly formed insurance companies from participating in the Program if such companies were established for the purpose of evading the Act's deductible requirements.

A few commenters raised concerns that developing such criteria could limit the development of new structures to provide terrorism risk insurance coverage. One commenter acknowledged the concerns raised by Treasury and supported the interim final rule's treatment of the deductible requirements for newly formed insurance companies in section 50.5(g)(2) as an appropriate safeguard. Another commenter suggested a set of general criteria that Treasury could look to as it considers this issue. As Treasury noted in the preamble to interim final rule, we are seeking to balance the goals of encouraging new sources of capital in the market for terrorism risk insurance while also maintaining the integrity of the Program. Treasury is not proposing any additional criteria at this time, but we will continue to monitor developments in the market for terrorism risk insurance and the market's response to the Act.

Treasury also solicited comments on whether additional criteria should be proposed for federally approved insurers. Some commenters suggested that additional financial criteria could be applied if necessary, while one commenter suggested that the Act does not give Treasury the authority to regulate insurance. Given that the final rule retains the interim final rule's treatment of federally approved insurers, the scope of potential problems related to the financial

integrity of such insurers is somewhat limited. Thus, Treasury is not proposing any additional criteria at this time, but we will continue to study and monitor this issue.

#### F. Insurer Deductible (Section 50.5.g)

The interim final rule incorporated the statutory definition of "insurer deductible" found in section 102(7) of the Act and set forth a procedure specifying how newly formed insurance companies would calculate their deductible under the Program. In particular, the interim final rule specified that for an insurer that came into existence after November 26, 2002, the insurer deductible will be based on data for direct earned premiums for the current Program Year. If the insurer has not had a full year of operations during the applicable Program Year, the direct earned premiums for the current Program Year will be annualized to determine the insurer deductible.

The two commenters who addressed this issue both indicated support for Treasury's determination that premiums for new insurers would be annualized in the calculation of their insurer deductible, and the language of the interim final rule is incorporated without change into the final rule.

### III. Procedural Requirements

The Act established a Program to provide for loss sharing payments by the Federal Government for insured losses resulting from certified acts of terrorism. The Act became effective immediately upon the date of enactment (November 26, 2002). Preemptions of terrorism risk exclusions in policies, mandatory participation provisions, disclosure and other requirements and conditions for federal payment contained in the Act applied immediately to those entities that come within the Act's definition of "insurer." Treasury has issued and will be issuing additional regulations to implement the Program. This final rule provides critical information concerning the definitions of Program terms that lays the groundwork for Treasury's implementation of the Program. No one can predict if, or when, an act of terrorism may occur. There is an urgent need for Treasury, as Program administrator, to lay the groundwork for Program implementation through regulations to provide clarity and certainty concerning which entities are required to participate in the Program; the scope and conditions of Program coverage; and other implementation issues that immediately affect insurers, their policyholders, State regulators and other interested parties. This includes the need to supplement, or modify as