

the categories of insurer and the definition of affiliate. To participate in the Program, an entity, including an affiliate of an insurer, must itself meet all of the requirements of section 102(6)(A), (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, and (2) must receive direct earned premiums as required by section 102(6)(B) and (3) must meet any additional criteria established by Treasury pursuant to section 102(6)(C).

**a. Must Fall Within a Category of Insurers in Section 102(6)(A)**

First, an insurer must fall within at least one of the following several categories set forth in section 102(6)(A):

(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; or

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

Consistent with Interim Guidance II, the interim final rule provides that an entity that falls within two categories will be considered by Treasury to fall within the first category it meets under section 102(6)(A)(i)–(v). Therefore, if an entity is a federally approved insurer under section 102(6)(A)(iii) and is licensed or admitted in any State, it will be treated under the Program as a State licensed or admitted insurer under section 102(6)(A)(i).

In each of the categories of insurer in section 102(6)(A)(i)–(iv), the insurer has a pre-existing State or NAIC regulatory framework, or has a *relationship* with a Federal or State program. In developing this interim final rule, Treasury considers such a nexus between an insurer and a Federal or State program or regulatory authority to be extremely important to the effective and efficient administration of the Program. A pre-existing nexus between an insurer and a regulatory structure, for example, assists Treasury in ensuring the financial integrity of participating entities, in obtaining necessary data to implement and evaluate the Program and in carrying out Treasury's surcharge and recoupment, audit and enforcement responsibilities under the Act.

Treasury's emphasis on such a nexus is also in accord with the temporary nature of the Program and other aspects of the Program's statutory structure.

**"State Licensed or Admitted"**

Insurers under clause (i) of section 102(6)(A) include all entities that are licensed or admitted by a State's insurance regulatory authority. This group of insurers includes captive insurers, risk retention groups, and farm and county mutuals, if such entities are State licensed or admitted. The Program treats all State licensed or approved insurers consistently in accord with the plain language of section 102(6)(A)(i). This treatment also furthers other statutory objectives such as ensuring that policyholders have widespread access to the terrorism risk insurance benefits of Program, and spreading potential costs of the Program associated with any federal loss-sharing payments. (For example, see the cost spreading provisions in connection with recoupment as required by section 103(e)(7) and in connection with surcharges as required by section 103(e)(8) to be applied to all commercial property and casualty policyholders).

**Other Categories of Insurers**

The NAIC has established criteria for approval of eligible surplus line carriers for listing on the NAIC's Quarterly Listing of Alien Insurers. Federally approved insurers under section 102(6)(A)(iii) are addressed in detail below. Treasury intends to issue additional regulations to apply the provisions of the Act to insurers in clause (iv) of State residual market insurance entities and State workers' compensation funds pursuant to section 103(d).

As described above, all State licensed or admitted captive insurers are insurers within the Program under section 102(6)(A)(i). Treasury may, in consultation with the NAIC or the appropriate State regulatory authority, apply the provisions of the Act to "other classes or types of captive insurers and other self insurance arrangements" pursuant to section 103(f) of the Act, but only if such an application is determined before the occurrence of an act of terrorism and all of the provisions of the Act are applied comparably to such entities. Treasury has engaged in consultations, but has not yet made a decision regarding the participation in the Program of captives and other self insurance arrangements that do not fall into other categories in clauses (i)–(iv).

**b. Must Receive Direct Earned Premiums As Required by Section 102(6)(B)**

The second criteria an entity must meet to be an insurer for purposes of the Program is prescribed by section 102(6)(B). In addition to falling within a category in section 102(6)(A), to be an "insurer" under the Act, an entity must receive "direct earned premiums" (as defined) on any type of commercial property and casualty insurance (as defined). The key aspect of this requirement in the statutory definition of insurer is the Act's specification of a direct measure of premium income as opposed, for example, to a net measure of premium income which accounts for reinsurance. Although the legislative history and design of the Act envision reinsurance arrangements as an important component of capacity within the insurance market, the Act excludes reinsurance from the Program. (Section 103(g) of the Act provides that the Act does not limit or prevent "insurers" from obtaining reinsurance coverage for "insurer deductibles" or "insured losses" retained by insurers.) Therefore, consistent with the Act and Treasury's Interim Guidance II, the interim final rule provides that, if an entity does not receive direct earned premiums as required by section 102(6)(B), and subject to statutory exceptions, then the entity is not an "insurer" under the Act. In that regard, Section 102(6)(B) excepts State residual market insurance entities from the direct earned premium requirement.

**c. Must Meet Additional Criteria Prescribed by Treasury Under Section 102(6)(C)**

In addition to the requirements of section 102(6)(A) and (B) described above, section 102(6)(C) of the Act requires that an insurer also meet "any other criteria that the Secretary of the Treasury may reasonably prescribe." The interim final rule does not prescribe additional criteria under section 106(C). Published elsewhere in this separate part of the **Federal Register** is a notice of proposed rulemaking in which Treasury solicits 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. In this regard, in the notice of proposed rulemaking Treasury solicits comment on appropriate criteria to prevent participation in the Program by newly formed insurance companies deemed by Treasury to be established for the purpose of evading the insurer deductible requirements of the Act and the Program. As stated in the notice of proposed rulemaking, Treasury's objectives are to encourage new sources of capital in the market for terrorism