

business of providing primary or excess insurance in a State and receives direct earned premiums as required in section 102(6)(B), and three out of four of its affiliate insurance companies also are State licensed and meet the requirements of section 102(6)(B) and (C), then the parent company and the three affiliates that meet the definition of "insurer" are, collectively, one insurer for purposes of calculating and consolidating direct earned premiums and calculating insurer deductibles under the Program. The affiliate that does not fall within one of the categories in section 102(6)(A) or fails to meet all the requirements to be an "insurer" under section 102(6) is not included in the Program.

As discussed previously in Interim Guidance II, if an entity is "under common control with the insurer," and that entity meets the requirements to be an "insurer" in section 102(6)(A)–(C), Treasury will consider that entity collectively with the other insurer (its affiliate) as one "insurer" for the Program purposes of consolidating direct earned premiums and calculating the insurer deductible. For example, assume that two insurance companies are licensed to engage in the business of providing primary or excess insurance in any State (either in one State or in separate States) and both receive direct earned premiums as required by section 102(6)(B). Each company, would meet the definition of "insurer." Assume additionally that the common parent of the two companies does not fall into any of the categories in section 102(6)(A). Treasury will consider the two affiliated companies to be, collectively, one insurer for purposes of calculating and consolidating direct earned premiums and their insurer deductible under the Program, but their parent company is not an insurer and not included in the Program.

#### 4. "Control"

Related to the definition of insurer and affiliate is the definition of "control" in section 102(3)(A)–(C) of the Act. The definition and determination of "control" for purposes of the Program is used by Treasury to calculate the insurer deductible on a consolidated basis for an insurer "including any affiliate thereof" (see discussion of affiliate above). Under the Act, an entity is in control of another entity if the statutory definition is met under section 102(3)(A) or (B), or if Treasury makes a determination under (C) that the entity directly or indirectly exercises a controlling influence over the management or policies of the other entity. Each category of control for

purposes of the Program is described below with examples.

#### a. "Owns, Controls or has the Power to Vote" 25 Percent of Voting Securities.

Section 102(3)(A) provides that an entity has "control" over another if the entity directly or indirectly or acting through 1 or more other persons owns, controls or has power to vote, 25 percent or more of any class of voting securities of the other entity. For example, if Insurer X owns, or has the power to vote, 25 percent or more of any class of voting securities of Insurer Y, then Insurer X is in control of Insurer Y under section 102(3)(A). This control relationship means, among other things, that Treasury will consolidate the direct earned premiums of these two insurers under Insurer X for purposes of calculating the insurer deductible and evaluating a claim for federal payment.

Published elsewhere in this separate part of the **Federal Register** is a notice of proposed rulemaking in which Treasury solicits comments on whether the definition of control contained in the interim final rule should be supplemented by proposing a rule to address situations in which a corporate insurance structure may contain multiple insurers that own, control or have the power to vote more than 25 percent of the voting shares of another insurer. Based on available information, such control arrangements exist but they do not appear to be common. In particular, Treasury is considering consolidating direct earned premiums for purposes of calculating the insurer deductible on a pro rata basis among the multiple controlling owners. For example, if Insurer Y owns 40 percent of the voting shares of Insurer Z and Insurer X owns 30 percent of the voting shares of Insurer Z, then a pro rata allocation of premium income and insured loss under the Program would be, respectively, 57 percent and 43 percent.

#### b. Controls Election of Majority of Directors or Trustees.

Pursuant to section 102(3)(B), an entity also is in control over another entity for purposes of the Program if the entity controls in any manner the election of a majority of the directors or trustees of the other entity. For example, even if Insurer A does not own or have the power to vote 25 percent or more of any class of voting securities of Insurer B, if Insurer A controls in any manner the election of a majority of the directors or trustees of Insurer B, then Insurer A "controls" Insurer B under the Act. This means that, for purposes of the Program, Treasury will consolidate the direct earned premiums of these two insurers under Insurer A in calculating the

insurer deductible and evaluating a claim for federal payment.

#### c. Control Determination by Treasury under Section 102(3)(C).

If no control relationship exists on the basis of either section 102(3)(A) or (B), Treasury has authority, under section 102(3)(C), to determine, after notice and opportunity for hearing, that an insurer directly or indirectly exercises a controlling influence over the management or policies of another insurer. To provide further guidance for purposes of a control determination under this subsection (C), the interim final rule establishes several rebuttable presumptions. The first rebuttal presumption under section 102(3)(C) is that an entity is in control of another entity for purposes of the Program (including consolidation of direct earned premiums in calculating the insurer deductible) if a State has determined that a control relationship exists between the two entities. If a State has made such a control determination with regard to two insurers, and the affected insurers wish to rebut the presumption established in this interim final rule, then the insurers may request an informal hearing (e.g. exchange of documents) in which they will be given an opportunity by Treasury to present and support their position that no control relationship exists, prior to a final determination by Treasury.

The second rebuttable presumption Treasury is establishing is that an insurer exercises directly or indirectly a controlling influence over the management or policies of another insurer under section 102(3)(C) if 25 percent or more of capital of a stock insurer, policyholder surplus of a mutual insurer, or corporate capital of other entities qualifying as insurers is provided by another insurer, even in the absence of voting shares or of control of the election of a majority of the directors or trustees of the other insurer. The third rebuttable presumption is that an insurer exercises directly or indirectly a controlling influence over the management or policies of a syndicate insurer if, at any time during the Program Year, the insurer supplies 25 percent or more of the underwriting capacity for that year to the other insurer that is a syndicate consisting of a group including incorporated and individual unincorporated underwriters.

If the affected insurers wish to rebut the presumptions described above and established by this interim final rule, then such insurers may request a hearing in which they will be given an opportunity to rebut the presumption of control by presenting and supporting