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CHIEF EXECUTIVE OFFICER: Thomas B. Considine



PRESIDENT: Rep. Steve Riggs, KY  
VICE PRESIDENT: Sen. Jason Rapert, AR  
SECRETARY: Rep. Bill Botzow, VT  
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IMMEDIATE PAST PRESIDENT:  
Sen. Travis Holdman, IN

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## **STATE-BASED REGULATION OF INSURANCE UNDER ATTACK BY CONGRESS**

*Recent Bills Passed in the House of Representatives Ignores Already-Existing State Antitrust Protections, Reduces Competition, Increases Consumer Costs, Leads to Market Instability, Eliminate State Consumer Protections, and Increases Potential Fraud and Abuse*

Manasquan, NJ: Commissioner Tom Considine, NCOIL CEO, recently sent letters to the Senate Judiciary Chair Chuck Grassley and Ranking Member Dianne Feinstein to oppose efforts to repeal the federal antitrust exemption for health insurers as set forth in The Competitive Health Insurance Reform Act of 2017 (H.R. 372) and the Senate Committee on Health, Education, Labor & Pensions Chair Lamar Alexander and Ranking Member Patty Murray regarding the Small Business Health Fairness Act (H.R. 1101). Both pieces of legislation recently passed the House of Representatives.

“Both of these pieces of legislation would negatively impact state-based regulation of insurance” said Commissioner Tom Considine, NCOIL CEO. “This our system has provided a stable marketplace for consumers and industry. These bills are the undoing of those protections.”

“Giving more power to Washington, DC over insurance matters is a recipe for disaster. This system has worked for nearly 75 years” said KY Rep. Steve Riggs, NCOIL President. “As a state legislator, my constituents find it easier reach me and know how to reach the insurance regulators in our state if they have an issue.”

### **Repealing the McCarran Ferguson Act’s limited antitrust**

Repealing the McCarran Ferguson Act’s limited antitrust exemption for health insurers would ignore already-existing State antitrust protections, reduce competition, and increase costs for consumers.

The application of the McCarran-Ferguson federal antitrust exemption has worked well for decades to promote the largest, most competitive and innovative insurance marketplace in the world. NCOIL agrees with the testimony given by America's Health Insurance Plans (AHIP), the National Association of Insurance Commissioners (NAIC), the National Association of Mutual Insurance Companies (NAMIC), and the Property Casualty Insurers Association of American (PCI) to the U.S. House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law on February 16, 2017 that opposed H.R. 372 and noted the harmful implications that the legislation would have on the insurance marketplace.

### **Exempting “Association Health Plans (AHPs), from State insurance regulation**

If enacted, H.R. 1101 would seriously undermine efforts States have made to protect consumers, and would ignore the fact that States, as the primary regulators of the local health insurance markets, are better able to assure effective regulation of entities such as AHPs than the federal government. Also, the solvency standards set forth in H.R. 1101 are inadequate and if enacted, AHP's could suffer the same fate that multiple employer welfare arrangements (MEWAs) did in the 1990s, leaving consumers uninsured and with no place to turn for redress.

For more than 70 years, the McCarran-Ferguson Act, which authorizes state-based regulation of insurance has ensured regulated entities are solvent and consumers are protected. NCOIL works to both preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act and to serve as an educational forum for public policy makers and interested parties.

Copies of both letters are attached.

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*NCOIL is a legislative organization comprised principally of legislators serving on state insurance and financial institutions committees around the nation. NCOIL writes Model Laws in insurance, works to both preserve the state jurisdiction over insurance as established by the McCarran-Ferguson Act seventy years ago and to serve as an educational forum for public policy makers and interested parties. Founded in 1969, NCOIL works to assert the prerogative of legislators in making state policy when it comes to insurance and educate state legislators on current and perennial insurance issues.*

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March 29, 2017

The Honorable Chuck Grassley  
Chairman  
U.S. Senate Committee on the Judiciary  
135 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
Ranking Member  
U.S. Senate Committee on the Judiciary  
331 Hart Senate Office Bldg.  
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the National Conference of Insurance Legislators (NCOIL), I write to oppose efforts to repeal the federal antitrust exemption for health insurers as set forth in The Competitive Health Insurance Reform Act of 2017 (H.R. 372). Repealing the McCarran Ferguson Act's antitrust exemption for health insurers would ignore already-existing State antitrust protections, reduce competition, and increase costs for consumers.

NCOIL is a national legislative organization created by and comprised of State legislators, principally serving on State insurance and financial institutions committees around the nation. NCOIL writes Model Laws in insurance and financial services, works to both preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act seventy years ago and to serve as an educational forum for public policy makers and interested parties. Founded in 1969, NCOIL works to assert the duty of legislators in making State policy when it comes to insurance and educate State legislators on current and perennial insurance issues.

The application of the McCarran-Ferguson federal antitrust exemption has worked well for decades to promote the largest, most competitive and innovative insurance marketplace in the world. NCOIL agrees with the testimony given by America's Health Insurance Plans (AHIP), the National Association of Insurance Commissioners (NAIC), the National Association of Mutual Insurance Companies (NAMIC), and the Property Casualty Insurers Association of American (PCI) to the U.S. House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law on February 16, 2017 that opposed H.R. 372 and noted the harmful implications that the legislation would have on the insurance marketplace.

Specifically, NCOIL agrees that the antitrust exemption fosters competition and creates consumer choice by granting insurers the ability to share loss history and other information. Without loss history data, smaller and medium sized companies, which do not have the business volume to develop actuarially credible rating information, would be unable to compete with larger companies that are less dependent on industry-wide data. Indeed, NAMIC is correct in its testimony when it stated that the absence of such data would have a chilling effect on the ability of smaller and medium sized insurers to expand into new markets or new product lines. Also, despite the bill's alleged safe-harbors for data collection and sharing, NCOIL believes that numerous lawsuits challenging such insurer practices as violations of the federal antitrust laws are likely, and therefore, the uncertain risks of new litigation challenges and organizational change pressures resulting from the bill's enactment would produce offsetting costs.

Further, proponents of H.R. 372 are mistaken in their beliefs that the bill would have any effect on the affordability and availability of health insurance premiums. First, H.R. 372 ignores the reality that every State has its own antitrust and unfair competition laws under which State regulators and attorneys general have historically monitored, investigated, and punished insurers, agents, and brokers who have violated them. Health insurers' rates are also subject to rigorous actuarial review, and are not permitted unless justified. House Report 115-36 accompanying H.R. 372 bill recognizes these realities when stating “[a]s a direct result of McCarran-Ferguson, every state has its own regulations and regulatory agency to protect consumers and competition in the insurance market. **These regulations include bans on the types of anticompetitive conduct by insurers that the Federal antitrust laws would reach if they applied.**” (emphasis added). Accordingly, the antitrust exemption granted under the McCarran-Ferguson Act is not a loophole through which bad actors can avoid punishment. Existing State protections provide the necessary tools needed to stop anti-competitive conduct.

Second, in its cost estimate report on H.R. 372, the Congressional Budget Office (CBO) stated the bill's effect on health insurance premiums “would probably be quite small,” and enacting the bill “would have no significant effect on the premiums that private insurers would charge for health or dental insurance.” Therefore, as you can see, H.R. 372 is simply the wrong solution in trying to solve the health insurance market's affordability and accessibility problems.

Lastly, although H.R. 372 applies only to health insurers, NCOIL and the nation's State insurance legislator members believe that the legislation sets an ominous precedent that would enable Congress to return later with legislation that repeals the McCarran-Ferguson federal antitrust exemption for other areas of insurance. Such action would be imprudent as it would disrupt the largest, most competitive and innovative insurance marketplace in the world. In fact, such efforts have already been attempted as an amendment to include medical malpractice insurance, a property casualty product, in H.R. 372 was introduced but ultimately defeated.

NCOIL understands why some believe the issues of consolidation and anti-competitiveness in the health insurance marketplace merit exploration, but H.R. 372 is not the answer. As noted above, the unintended consequences of this legislation outweigh the intended consequences. As a proven bi-partisan group of accomplished, solutions-oriented legislators from around the country, NCOIL can provide effective and important feedback on these issues in an efficient manner. Our members and I welcome the opportunity to discuss these issues with you further.

With appreciation for your consideration, I am,

Very truly yours,

Thomas B. Considine  
Chief Executive Officer  
National Conference of Insurance Legislators

cc:

The Honorable Paul A. Gosar  
U.S. House of Representatives  
504 Cannon HOB  
Washington, D.C., 20515

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March 29, 2017

The Honorable Lamar Alexander  
Chairman  
U.S. Senate Committee on Health,  
Education, Labor & Pensions  
455 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Patty Murray  
Ranking Member  
U.S. Senate Committee on Health,  
Education, Labor & Pensions  
154 Russell Senate Office Building  
Washington, DC 20510

Dear Chairman Alexander and Ranking Member Murray:

On behalf of the National Conference of Insurance Legislators (NCOIL), I write in opposition to The Small Business Health Fairness Act (H.R. 1101). Exempting “Association Health Plans (AHPs)” from State insurance regulation and oversight would preempt the States’ authority to protect consumers and create competitive insurance markets as authorized by the McCarran Ferguson Act.

NCOIL is a national legislative organization created by and comprised of State legislators, principally serving on State insurance and financial institutions committees around the nation. NCOIL writes Model Laws in insurance and financial services, works to both preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act seventy years ago and to serve as an educational forum for public policy makers and interested parties. Founded in 1969, NCOIL works to assert the duty of legislators in making State policy when it comes to insurance and educate State legislators on current and perennial insurance issues.

The concept of allowing small employers to band together across State lines through federally certified AHPs and purchase health insurance for their workers is not new and the proposal has been studied at length. An extremely similar piece of legislation, The Small Business Health Fairness Act of 2003 (H.R. 660), passed the House in 2003 but received no support in the Senate. The same concerns with that legislation apply to H.R. 1101, primarily, the fact that such legislation would preempt the consumer protections that are the very core of the State insurance

regulatory system that has created and fostered the largest, most competitive and innovative insurance marketplace in the world.

H.R. 1101 would exempt federally certified AHPs from: State licensing and financial requirements imposed on traditional insurers, thereby leading to a greater risk of insolvency; State consumer protections that otherwise apply to State-regulated insurers which vary from requiring network adequacy, to appeal processes for denied services; and State oversight of insurance related fraudulent and abusive practices. Accordingly, if enacted, H.R. 1101 would seriously undermine efforts States have made to protect consumers, and would ignore the fact that States, as the primary regulators of the local health insurance markets, are better able to assure effective regulation of entities such as AHPs than the federal government. Also, the solvency standards set forth in H.R. 1101 are inadequate and if enacted, AHP's could suffer the same fate that multiple employer welfare arrangements (MEWAs) did in the 1990s, leaving consumers uninsured and with no place to turn for redress.

NCOIL acknowledges the problem of the growing number of small business owners and employees who cannot afford health insurance in the current marketplace, and it supports efforts to address that problem. However, contained within H.R. 1101 are a myriad of unintended consequences that would only exacerbate the problem. Preempting the States' proven consumer protections and solvency laws that have worked diligently over the years to create and nurture thriving insurance markets is not the solution to which Congress should be looking. As a proven bi-partisan group of accomplished, solutions-oriented legislators from around the country, NCOIL can provide effective and important feedback on these issues in an efficient manner. Our members and I welcome the opportunity to discuss these issues with you further.

With appreciation for your consideration, I am,

Very truly yours,

Thomas B. Considine  
Chief Executive Officer  
National Conference of Insurance Legislators

cc:

The Honorable Sam Johnson  
U.S. House of Representatives  
2304 Rayburn House Office Building  
Washington, D.C., 20515