McCarran-Ferguson's Enduring Power

Thoughts For State Policymakers Working Under The Unique System of U.S. Insurance Regulation

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SUMMARY

Basics

- State regulation not in Bible or Constitution.
- Insurance subject to Congressional control.
- Congress' policy choice in McCarran: State regulation.
  - "Regulation…by the several States…is in the public interest."
  - "Reverse preemption": Act not specific to insurance trumped by State law.
- Congress mainly avoids regular granular legislation regulating non-health insurance.
- Federal agencies aggressively exploit Congress' occasional discrete legislative grants.

McCarran And NCOIL's Role

- McCarran legal rule: "Reverse preempt" law not specific to insurance.
- McCarran political rule: State regulation controlling U.S. public policy.
  - McCarran establishes that State regulation is "in the public interest."
  - GLBA affirms McCarran, States as "functional regulators" of insurance.
  - Dodd-Frank grants of Federal power include severe statutory limits.
    - FIO no "general…regulatory authority over…insurance."
    - Fed must rely on States to "fullest extent possible" re thrifts' insurer affiliates.
- State legislators' defense of jurisdiction over regulatory policy.
  - Highlight strong performance of State-regulated insurers during 2008 financial crisis as supporting public policy that State regulation is "in the public interest."
  - Scrutinize Federal regulators for compliance with limited Congressional grants.
  - Speak out: NCOIL's HUD/FHA, Federal Reserve/Dodd-Frank resolutions.

BACKGROUND ON McCARRAN-FERGUSON

McCarran Background: Commerce Clause

- Commerce Clause: Article I, Section 8 of Constitution.
- "Congress shall have Power…To regulate Commerce…among the several States."
- Commerce Clause one of main pillars of Constitution.
  - Post-War period marked by protectionist economic regulation.
  - Articles of Confederation—each state regulates own economy.
  - Missed opportunity to unlock new country's economic potential.

McCarran Background: ***Paul v. Virginia***

- *Paul v. Virginia*, 75 U.S. 168 (1869)
- N.Y. insurers instigate test case to invalidate VA licensing requirements.
- Surprise ruling that insurance is not interstate commerce.
  - "Issuing a policy of insurance is not a transaction of commerce."
  - "Simple contracts of indemnity."
  - "Not commodities to be shipped … and then put up for sale."
- Subject to State oversight. "Local transactions…governed by…local law."
- Court reiterates interstate commerce ruling in subsequent decades.
  - *Hooper v. CA* (1895). "The business of insurance is not commerce."
  - *NY Life v. Deer Lodge Cty.* (1913). "Contracts of insurance are not commerce at all."

Paul v. Virginia: Structural Ramifications

- No interstate commerce, no Federal authority.
- State regulation the only regulation.
- No Federal regulation during economic boom, growing Federal power of late 1800s, early 1900s.

***Paul v. Virginia*: Substantive Ramifications**

- Federal antitrust law not applicable.
- Sherman Act cannot prevent cartels.
- Trustbusting era does not affect insurers.
- Fire insurers collude, aggressively enforce.

Insurance Regulation And Antitrust

- Prevailing regulatory view—pure competition bad.
  - Price competition led to underpricing, solvency problems.
  - Poor reserving, mass insolvencies after major urban fires.
- States allow collusion to avoid underpricing.
  - DOIs, rating bureaus regulate to keep rates up and adequate.
  - Rate regulation a solvency, not affordability tool.
  - Excessiveness standard only because collusion legal.

U.S. v. Southeastern Underwriters: Background

- Cartel controlled fire insurance in entire Southeast.
- Vicious anti-competitive tactics to enforce collusion.
  - Boycott, coercion, intimidation of non-participants.
- Resulted in very low loss ratios.
- DOJ issues indictment under Sherman Act.
- District court immediately dismisses, appeal follows.

***U.S. v. Southeastern Underwriters*: Insurance Status Quo**

- State amicus briefs oppose application of Sherman Act, Commerce Clause.
  - Seek to preserve State regulatory system.
  - Other concern: State premium taxes.
- Industry says price competition ruinous.

***Southeastern Underwriters*: Supreme Court's Holding**

- *U.S. v. South-Eastern Underwriters*, 322 U.S. 533 (1944).
- Majority sustains indictment under Sherman Act.
- Insurance is interstate commerce.
- Disingenuously claims not overruling *Paul*.
- Court's role to apply law, not worry about policy.
  - Hands tied regarding concerns raised by States, industry.

U.S. v. SEUW: Insurance's Key Role In U.S. Commerce

- Majority spotlights insurance's importance to economy.
  - "[O]ne of the largest and most important branches of commerce."
    - "Total assets…approximate equivalent of the value of all farm lands and buildings."
    - "Annual premium receipts…more than…average annual revenue" of U.S. government.
  - "Perhaps no modern commercial enterprise directly affects so many persons in all walks of life…Insurance touches the home, the family, and the occupation or the business of almost every person."
- Because critically important, "We cannot make an exception of the business of insurance."

U.S. v. SEUW: Holding Doctrinally Correct

- Commerce Clause key provision in Constitution: "Federal power to determine the rules…across state lines was essential to weld a loose confederacy into a single, indivisible nation."
- Remedied defect in Articles of Confederation: "interfering…unneighborly regulations of some States, contrary to the true spirit of the Union…if not restrained by a national control…serious sources of animosity and discord."
- Insurance can't be legal anomaly: "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress."

U.S. v. SEUW: Nuances

- Court was technically legally correct.
- But ignored all context.
  - Ruling jeopardized constitutionality of State system.
  - No Federal infrastructure, expertise to regulate insurance.
  - Terrible timing.
    - Congress unprepared to address.
    - Ruling issued on eve of D-Day, see next slide.

"All the News That's Fit to Print"

The New York Times.

6 A. M. EXTRA

NEW YORK, TUESDAY, JUNE 6, 1944. THREE CENTS

ALLIED ARMIES LAND IN FRANCE IN THE HAVRE-CHERBOURG AREA; GREAT INVASION IS UNDER WAY

ROOSEVELT SPEAKS

Says Rome's Fall Marks 'One Up and Two to Go' Among Axis Capitals

WARNS WAY IS HARD

Asks World to Give the Italians a Chance for Recovery

Conferees Accept Cabaret Tax Cut

PURSUIT ON IN ITALY

Allies Pass Rome, Cross Tiber as Foe Quits Bank Below City

PLANES JOIN IN CHASE

1,200 Vehicles Wrecked —Eighth Army Battles Into More Towns

FEDERAL LAW HELD RULING INSURANCE

Supreme Court, 4-3, Decides Business Is Interstate and Subject to Trust Act

FIRST ALLIED LANDING MADE ON SHORES OF WESTERN EUROPE

EISENHOWER ACTS

U. S., British, Canadian Troops Backed by Sea, Air Forces

MONTGOMERY LEADS

Nazis Say Their Shock Units Are Battling Our Parachutists

Communique No. 1 On Allied Invasion

POPE GIVES THANKS ROME WAS SPARED

Italy's Monarch Yields Rule To Son, but Retains Throne

PARADE OF PLANES CARRIES INVADERS

U.S. v. SEUW: Jackson's Concurrence

- Practical approach disagrees with key majority holding.
  - Apply Sherman Act against cartels that "unduly burden…interstate commerce."
  - Recognize insurance as interstate commerce—without immediately changing doctrine.
    - Adhere to contrary legal "fiction…so long as Congress acquiesces."
    - Advise that future regulatory bills would enjoy "most forceful presumption of constitutional validity."
- Court can't be oblivious in Constitutional rulings.
  - "Practical and political judgments" should "be made by the political branches."
  - "To force the hand of Congress" not "proper function of the judiciary."
  - Would not "use my office, at a time like this…to dislocate the functions and revenues of the states and to catapult Congress into immediate…responsibility."

U.S. v. SEUW: Results

- Result of holding—immediate 180 degree turn:
  - Morning of June 5: The "modern commercial enterprise…directly affecting" the most "persons in all walks of life" not subject to Congress' oversight.
  - Morning of June 6: Massive industry has overnight become interstate commerce—and Congress' responsibility.
- Therefore:
  - Structurally: State practices may violate Dormant Commerce Clause (burdens to interstate commerce invalid even where no Federal regulatory scheme).
  - Substantively: Antitrust law applies to collusion previously allowed by States.
- Regulation of pivotal industry thrown into chaos.
  - Congress, "hand forced," is "catapulted into responsibility."
  - Must fashion regulatory scheme for huge sector in middle of world war.

U.S. v. SEUW: Congress Reacts

- Immediate response necessary to avert chaos.
- Must address structural and substantive issues.
  - Structural: Legal authority for State regulation—and taxation—of business of insurance.
  - Substantive: Mechanism for exempting business of insurance from Federal antitrust laws.

McCARRAN-FERGUSON ACT OF 1945 15 U.S.C. §§ 1011-1015

McCarran-Ferguson Act

- Fast response nine months after *SEUW*.
- Minimalist legislation: 413 words.
- Addresses both concerns of States, industry.
  - Structural. States will be primary regulators.
  - Substantive. Federal antitrust laws can be mostly preempted by States.

McCarran Structural: State Regulation As Federal Policy

- Delegates primary authority back to the States.
- "Congress hereby declares…the continued regulation and taxation by the several States of the business of insurance is in the public interest." Sect. 1011.
- "Business of insurance…shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Sect. 1012(a).

McCarran Structural: Reverse Preemption

- Unique regime turns Supremacy Clause on its head.
  - "No Act of Congress shall…invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance…unless such Act specifically relates to the business of insurance…." Sect. 1012(b).
- Decades of litigation regarding what constitutes "specifically relates to the business of insurance" and "invalidate, impair or supersede."

Reverse Preemption In Practice

- Recent reverse preemption holding: *Ludwick v. Harbinger* (2017).
  - Example: 8th Circuit reverse preempts application of RICO to business of insurance.
  - Plaintiff's case required "holding…that state insurance regulators were wrong to let the transactions proceed."
  - Court refused being "drag[ged] … into second-guessing state regulators' oversight."
- Insurance trades' challenge to HUD disparate impact rule.
  - Complaint argues that the Fair Housing Act "does not specifically indicate an intention to override the States' authority…within…McCarran."
  - Disparate impact contrary to substance of States' risk classification standards, under which:
    - Direct discrimination against protected classes is unfair trade practice.
    - Actuarially unjustified risk classification is "unfair discrimination."
    - Disparate impact has no legal meaning if risk is actuarially classified.
  - NCOIL resolution supports McCarran, opposes HUD rule.

McCarran Substantive: Antitrust

- States can preempt Federal antitrust law.
  - Before June 30, 1948, antitrust acts "shall not apply to the business of insurance." Sect. 1014(a).
  - Starting June 30, 1948, Sherman, Clayton, FTC Acts become "applicable to the business of insurance to the extent that such business is not regulated by State Law." Sect. 1013(a).
- Boycott, coercion, intimidation always illegal. Sect. 1013(b).

McCarran Substantive:
Federal Policy Of State Rate/Market Regulation

- Act incentivizes States to occupy field with rate regulation, market conduct laws.
  - Sen. O'Mahoney: "an invitation to legislate in good faith."
  - Sen. Ferguson: empowering "a State…to curb" Federal antitrust laws "exactly what we intended."
- States did legislate in three year window.

McCarran Results: State Rate Regulation

- Model Rate Laws disable Sherman Act.
  - Rates not inadequate, excessive, unfairly discriminatory.
  - Rebates prohibited.
  - Bureau participation frequently mandatory.
- State rate regulation thus Congressional policy.
- Solvency tool for adequacy, not affordability.

McCarran Results: Robust Unfair Practices Regulation

- Unfair Practices Acts disable FTC Act.
  - NAIC Model UTPA: "The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress."
  - Model UTPA legislative history: "strengthen…state laws…to attempt to cover the field through state legislation with respect to…Section 5 of…[FTC] Act."
- McCarran intentional, thoughtful Federal policy shaping vigorous State regulation.

McCarran's Legacy

- Modern insurance regulatory system created in 1945.
  - State regulation previously spotty.
  - "Invitation to legislate" brought consistency and rigor.
- Established State primacy in insurance regulation.
- Pillars of State-based system:
  - Legal: Reverse preemption of Federal laws not specific to insurance.
  - Public policy: "Regulation by the States…is in the public interest."
    - Can argue that 73 years of State regulation—including stability during 2008 financial crisis—illustrates that public interest.

POST-McCARRAN DEVELOPMENTS

Congressional Scrutiny: 1990s House Hearings

- Several big 1980s insolvencies.
- Commerce Committee report: "Failed Promises."
- Report analogized to savings and loan crisis.
  - Note: Insurance failures nowhere near as substantial.
  - (But: Is long term care a possible modern-day analogous concern?)
- Chair, Dingell, threatens Federal regulation.

Dingell Oversight: Aftermath

- States establish NAIC accreditation program.
  - Deference to domestic regulator in model examination law.
  - Based on passing models, department resources, etc.
- Dingell not satisfied.
  - Prepares critical new report in 1994.
  - Seen as pursuing Federal regulator.
  - Republicans issue contrary minority reports.
- Dingell loses gavel after 1994, push subsides.

Gramm-Leach-Bliley (1999)

- Financial Services Modernization Act.
  - Convergence—banking, securities, insurance.
  - Repeals Glass-Steagall sector separation.
- Catching up to Federal regulators, market.
  - Fed, OCC issued interpretations eroding walls.
  - Citicorp 1998 merger with Travelers.

GLBA: Insurance Provisions

- State regulation reiterated as U.S. policy.
  - "McCarran-Ferguson Act remains the law." Sect. 104(a).
  - States functionally regulate insurance: "The insurance activities of any person…including a national bank…shall be functionally regulated by the States." Sect. 301.
- Subject to specific preemption standard for bank sales of insurance.

GLBA:
Preemption Standard—Bank Sales

- "In accordance with the legal standards…set forth in…*Barnett Bank*…*v. Nelson*," States may not "prevent or significantly interfere with…ability of…[banks] to engage…in…insurance sales." Sect. 104(d)(2)(A).
- Federal bank regulator aggressively interprets standard.
  - OCC says standard is not "prevent or significantly interfere."
  - Cites phrase in *Nelson*—"stands as an obstacle"—as standard.
  - Fourth Circuit defers to OCC's very low preemption bar.

GLBA:
NARAB

- National Assn. of Registered Agents and Brokers.
  - Sects. 321-326 of GLBA.
  - NARAB regulation to preempt States if majority not uniform or reciprocal in three years.
  - Like McCarran, Congress incentivizes States with three year window before Federal preemption begins.
- Statute's requirements met; some feel bar too low.

House Financial Services Committee Created (2001)

- Recognizes financial services convergence.
- Former Banking Committee adds non-health insurance jurisdiction from Commerce Committee.
- FSC creates new Housing and Insurance Subcommittee.
  - Standing unit with insurance in title.
  - Pays more attention to insurance than previous committees.
  - But without Federal regulator to supervise, far different from traditional day-to-day Congressional oversight of major industry.

2005 Hearings: SMART Act

- States rights Republicans not inclined toward Federal regulator.
- "Federal tools" concept, including preemption as stick.
  - Recognizes States' collective action problems.
  - Particularly market regulation where no accreditation threat.
  - Congress using Commerce Clause powers with States still regulating.
- Differing approaches to substance of Federal tools.
  - Target only most difficult political problems in States (rate regulation)?
  - Lengthy draft bill instead comprehensive covers many areas of system.
- NCOIL, NAIC oppose; draft does not get off ground.

FACT Act (2003)
FTC Study (2007)

- Fair and Accurate Credit Transactions Act directs FTC study.
  - Impact of credit-based insurance scores on availability, affordability.
  - Analysis of relationship between scores, protected classes.
- 2007 auto Study cites NCOIL Credit Model, finds:
  - Insurers' "strong economic incentive to predict risk as accurately as possible."
  - "Using better risk prediction methods is an important form of competition."
  - "Credit-based insurance scores are predictive of risk."
- Findings benign, but Act and Study's focus on disparate impact contrary to insurance business and regulatory practice.
  - State unfair discrimination laws based on actuarial accuracy, not disparate impact.
  - NCOIL Model consistent with basics of substantive State regulation.

2009 Affordable Care Act “Obamacare”

- Health—only area of consistent Federal micro regulation of insurance industry.
- Federal standards and extensive dual, Federal/State regulation.
  - Awkward implementation.
  - Extraordinary resource drain on State DOIs.

2008 Financial Crisis

- Great Recession reshapes financial services regulation.
- Insurers, regulation fare very well, consistent with State regulation being "in the public interest."
- Biggest bailout to AIG, but group's main failures in unregulated non-insurer.
- Key regulatory failure: CFTC's attempts to supervise derivatives are blocked within Federal government.

Dodd-Frank (2010)

- Wall Street Reform and Consumer Protection Act.
- Emphasizes group-wide supervision, identification of contagions affecting regulated subsidiaries.
- Creates Federal Insurance Office.
- Federal Reserve implementation of authority over insurance SLHCs becomes dramatic incursion.

Dodd-Frank: FIO

- Title V, Subtitle A—Federal Insurance Office.
- First Federal institutionalized, general insurance office.
- "Retention Of Existing State Regulatory Authority. Nothing…shall be construed to establish or provide the Office…with general supervisory or regulatory authority over…insurance." Sect. 313(k).
  - Director repeatedly recites in hearings that FIO is not a regulator.
  - Camel's nose under tent, or limit of Congress' interest in Federal presence?

Dodd-Frank: FIO Functions

- Enumerated functions include:
  - "Monitor all aspects of the insurance industry, including…gaps."
  - "Monitor…traditionally underserved communities…, minorities."
  - "Assist…in administering…Terrorism Insurance Program."
  - "Coordinate Federal efforts and…policy on…international insurance."
  - "Determine…preempt[ion]" of State laws under "covered agreements."
- Substantial information gathering authority.
- Must provide initial, regular reports to Congress.

FIO Active Within Discrete Grants

- Seeks to become voice of U.S. in international bodies.
- Data calls on terrorism, underserved communities.
- Reports, testimony note States', NAIC's lack of national authority under Constitution.
- Negotiates covered agreement with European Union on reinsurance and other matters.

FIO:
Covered Agreement

- Agreement with foreign entities on insurance regulation.
  - "Recognition of prudential measures…that achieves a level of protection…substantially equivalent to…protection…under State…regulation."
  - Legislative history—designed to address State reinsurance collateral requirements.
  - FIO director given substantial power to preempt contrary State law.
- EU agreement goes past reinsurance, includes group supervision.
  - Supporters view recognition as big benefit to U.S. in return for collateral reform.
  - Opponents see expansion of authority, possible erosion of legal entity regulation.
  - NCOIL, NAIC criticize secrecy of negotiations.
- Future unclear.
  - Agreements on collateral with other countries? Agreements on other issues?
  - Statute designed for specific purpose has potential for broader preemption.

Dodd-Frank: SLHC Regulation

- Act's most significant impact on insurers.
- Federal Reserve regulates insurers two ways.
  - Non-bank SIFIs—four designated, but none left.
  - Insurer savings and loan holding company systems (own thrifts).
- SLHC regulation—significant chunk of market.
  - Fed "consolidated supervisor" of "insurance holding companies…hold[ing]…$2 trillion…one quarter of…industry assets."
  - Includes Nationwide, State Farm, TIAA-CREF, USAA.
- Majority of insurance SLHCs dropped out.

The Fed
And SLHCs

- 12 USC § 1467a(b)(4)(A)—Fed authority over insurer in SLHC.
  - "May examin[e]…savings and loan holding company and each subsidiary."
- But next provisions, 12 USC § 1467a(b)(4)(B) and (C), restrict scope, require deference to functional regulator. Fed shall:
  - "Consult with…State regulator[s]…before commencing… examination."
  - "To the fullest extent possible, rely on…examination reports made by other…regulatory agencies relating to…any subsidiary."
  - "To the fullest extent possible, avoid duplication of examination activities, reporting requirements, and requests for information."

Nationwide's 2018 House Testimony: Fed Examiners An Aggressive, Poor Fit

- "Thrift…just 3%...of…assets"; Fed sees "Large Banking Organization."
- "Treat[ed]…same manner as a similarly-sized bank holding company despite…Ohio [DOI] already performing extensive group-wide supervisory analysis and activities."
  - "Continuously subject to some level of Fed…examination activity."
  - "Intensive…examinations…designed…to manage bank-centric risks."
  - "Not appropriately tailored to the risks posed by insurance SLHCs."
  - "Nearly 200 pieces of supervisory guidance…ha[ve] not provided…indication…[Fed] would evaluate insurance SLHCs…in consultation…with the state [DOIs]."
- "Significant supervisory inefficiency."
  - Diversion of "substantial…board…and management time" to banking-centric "poor fit" diverts "resources [from] managing…risks" supervised by "primary insurance holding company supervisor" (Ohio DOI).
  - Managing "catastrophe", "underwriting", "product pricing", "mortality", "morbidity", "longevity", "investment risks" are insurer, insurance regulators' core "experience and capabilities," not Fed's.

Fed Exams Inconsistent With Congressional Instructions

- Acting as if primary regulator of insurance group, not deferring to DOIs.
- Despite provisions in Federal law.
  - McCarran: State regulation "is in the public interest."
  - GLBA: McCarran "remains the law"; "insurance…shall be functionally regulated by the States."
  - Dodd-Frank: Fed should "rely…to the fullest extent possible" on States.
- Despite Dodd-Frank's purpose being to fill gaps.
  - Financial crisis holding company failures caused by unregulated derivatives in unregulated subsidiaries.
  - Insurers thoroughly regulated under State Holding Company Acts.
- Despite Fed leaders' statements about insurance regulation.
  - "Funding structures of traditional insurers…much more *stable* than…commercial banks."
  - "Dodd-Frank…preserved the functional regulation of holding company affiliates."
  - "No role in regulating the types of insurance offered…or the manner in which…provided."
  - "Line here is arguably brighter…because of…structure of insurance regulation…in…McCarran."

NCOIL Draft Resolution On Fed, SLHCs

- Draft regarding Federal Reserve regulation in 30 day materials.
  - Cites key language of McCarran, GLBA, Dodd-Frank.
  - Quotes Federal Reserve leadership: "Dodd-Frank…preserved…the functional regulation of holding company affiliates based on…financial intermediation in which they are engaged."
  - Questions if Fed examiners "over-extended…examination powers by routinely requiring insurance companies to supply information and responses to inquiries of the sort…that are the province of…the day-to-day functional regulator of these companies."
  - "Exercise of such powers will most likely conflict with the jurisdiction of State insurance regulators…or, at best, will be duplicative."
  - Fed should follow Dodd-Frank "fullest extent possible" rule, Congress should oversee.
- Consistent with States' well-established role.
  - Seven decades of success, including 2008 crisis—"in the public interest."
  - State Holding Company Act regulation, beefed up in last decade, looks to whole group.

HUD Disparate Impact Rule

- Prior administration aggressively expanded jurisdiction.
- Disparate impact rule directly conflicts with established insurance norms.
  - Direct discrimination against protected classes prohibited.
  - Unfair discrimination rule—requiring actuarial justification—controls rest.
- NCOIL 2012 resolution
  - HUD in conflict with "primacy of…the States" to regulate underwriting, rating.
  - Called on FIO (Treasury) to advise HUD as such.
  - Treasury does, in 2017 report recommending "HUD reconsider … disparate impact rule," and whether "consistent with McCarran-Ferguson and existing state law."
- HUD opens rule for comment again, signaling potential reconsideration.
  - NCOIL resubmits resolution to HUD.
- Trades' lawsuit challenging validity of current rule currently pending.
  - Cites McCarran—Federal intent to regulate insurance must be clear to avoid reverse preemption.

Other Significant Federal Legislation

- NFIP (National Flood Insurance Program) laws.
- TRIA (Terrorism Risk Insurance Act), 2002, plus reauthorizations.
- NRRA (Nonadmitted and Reinsurance Reform Act), part of SMART Act, passed in Dodd-Frank (2010).
- NARAB II, 2015. Passed in TRIA Reauthorization.
- Regulatory Relief Act (2018). Recognizes State insurance regulators' role in international affairs, directs Federal officials to seek IAIS transparency.
- Proposed but not enacted bills from current Congress:
  - HR 5059. Bolsters State DOIs as primary regulator of insurance SLHCs.
  - HR 3746. Clarifies CFPB's lack of jurisdiction over insurance.
  - HR 3861. Moves FIO within Treasury, cuts back several FIO functions.
  - HR 4537. Federal negotiators must seek recognition of U.S. system in international deals.

CONCLUSIONS

States Are Functional, Primary Regulators, But U.S. Agencies Significantly Encroach

- McCarran-Ferguson, State regulation remain basic, controlling U.S. law.
- Federal agencies' aggressive use of discrete grants affects broad swaths of market.
  - Fed SLHCs hold 25% of insurer assets.
  - HUD rule covers entire homeowners market.

State Legislators Policy Guardians Of State Jurisdiction

- Scrutinize U.S. agency practices vs. limits of Congressional grants.
- Two main Federal tools protect States' primacy.
  - Legal tool of reverse preemption.
  - Clear U.S. public policy favoring State regulation.
    - State regulation "is in the public interest" (McCarran).
    - "Insurance activities…shall be functionally regulated by the States" (GLBA).
- Resolutions on HUD rule, Fed exams strong building blocks.
    - HUD disparate impact rule conflicts with States' risk classification laws.
    - Fed examiners' granular demands conflict with Dodd-Frank's instructions to rely to "fullest extent possible" on States' functional regulation.