

Preserving State Insurance Regulation...

- By interacting with Congress on issues of critical importance to insurance public policy
- By educating state lawmakers on the solutions to their insurance-market crises
- By fostering relationships between state legislators
- By asserting the primacy of state insurance regulation under the McCarran-Ferguson Act of 1945

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MCCARRAN REPEAL WOULD DESTABILIZE INSURANCE MARKET, NCOIL CAUTIONS CONGRESS

In an April 6 letter to Senate Judiciary Committee Chair Patrick Leahy (D-VT), NCOIL urges the Committee to proceed with caution regarding S.618, the *Insurance Industry Competition Act of 2007*, that would repeal the McCarran-Ferguson Act limited antitrust exemption for insurers. The bill, NCOIL says, misinterprets the role of states in enforcing antitrust protections and would jeopardize insurer practices that promote available and affordable coverage, expose insurance markets to uncertainty and litigation, and create an environment that inadvertently disadvantages consumers most in need.

While commending the Committee's intentions, the letter, signed by NCOIL President Sen. Alan Sanborn (MI), notes that "The McCarran-Ferguson exemption is not a loophole through which bad actors can evade antitrust requirements. Nothing in the Act restricts federal prosecutors from enforcing federal laws related to boycotts, intimidation, or coercion." The letter also points out that nothing in the Act precludes a state attorney general—as evidenced by the

recent "tenacity" of the New York State attorney general's office—from prosecuting wrong doers under existing state laws.

Regarding competition, the letter expresses concern that S.618 would endanger the sharing of loss history and other information that allows smaller and more regional insurers to operate effectively against large companies. "Absent these more moderately sized carriers," Sen. Sanborn writes, "insurance markets would be less responsive to the availability and affordability needs of consumers—particularly in strained markets." Prices would go up, the letter notes, not down.

The letter also says that should the Federal Trade Commission enforce antitrust requirements, as S.618 would allow, "insurance companies would fall prey to a complicated and very likely contradictory climate of abiding by both state and federal laws. Such confusion," the letter continues, "would destabilize insurance markets that rely on predictability to gauge risks and price products," and likely would result in years of costly litigation.

Finally, the NCOIL

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NCOIL LEADERSHIP TO U.S. CHAMBER—"JUST SAY NO" TO OFC

NCOIL leadership in an April 12 letter to the U.S. Chamber of Commerce has urged caution regarding the Chamber's rumored support of an optional federal insurance charter (OFC). In the letter to Chamber President Tom Donohue, NCOIL officers and past presidents—most of whom are in business themselves—counsel the Chamber to consider the negative consequences of an OFC on businesses and consumers alike before opting to back such an initiative.

While commending the Chamber for its recent support of the McCarran-Ferguson Act limited antitrust exemption, the letter observes that, ironically,

an OFC would promote exactly what the Chamber in a March 23 letter to Congress posed as a harmful outcome of McCarran repeal—"a multilayered morass of state and federal insurance rules," promoting "confusion and uncertainty."

In the April 12 letter, NCOIL leadership maintains, "We are concerned that the Chamber of Commerce—an organization that for so many years has worked to represent businesses and fight against increased regulation—would now advocate for more government, which is the direct result of the dual regulatory systems. We would think that the Chamber of Commerce would agree

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VIEW FROM THE HILL: ANTI-MCCARRAN FORCES DIG IN

Congressional supporters of repealing the McCarran-Ferguson Act's limited antitrust exemption seem to be moving faster than might be expected, given the glacial pace at which Congress normally works.

On February 15, members in the Senate, where primary interest lies, and House introduced companion legislation that would repeal the limited exemption, in favor of allowing the Federal Trade Commission (FTC) to enforce antitrust requirements.

A bad idea, NCOIL says. In response to the introduction of S.618, the *Insurance Industry Competition Act of 2007*, NCOIL sent a letter to Sen. Patrick Leahy (D-VT), Judiciary Committee Chair and bill sponsor, commending the Committee's interest in strong insurance oversight, yet conveying NCOIL's deep concerns as to the destabilizing effect the bill would have on state insurance markets (see *story page 1*).

The legislation has already been the subject of hearings and differs from previous anti-McCarran proposals in that it does not attempt to create "safe harbors," or carve-outs for joint industry practices that do not

threaten market competition.

Both the Senate proposal and its House version, H.R.1081, enjoy sizeable bipartisan support, including, in the Senate, Minority Whip Trent Lott (R-MS), who is still wrangling—very publicly—with State Farm regarding the loss of his Mississippi-coast home.

In typical fiery language, Lott testified at a March 7 Senate Judiciary Committee hearing, "I truly believe the exemption has allowed insurers to engage in anti-competitive conduct, and I can find no justification to exempt the industry from federal government oversight." Later, in an April 10 hearing in the Senate Commerce, Science & Transportation Committee, Lott said insurers operating along the Gulf have been "arrogant and mean-spirited" and that "The reason we need to repeal [the exemption]...is because the industry opposes [repeal]."

There was, however, one sign on April 10 that Lott may be softening, if just a bit—he said he would consider letting small insurers with less than \$2 billion in premium retain the limited exemption.

In related news, an Antitrust Modernization Commission on April 3 released a report evaluating certain antitrust exemptions, including

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While Congress approved budget resolutions with \$50 billion for SCHIP reauthorization and expansion, the President has pushed for limiting the scope of the program to children from families with incomes below 200 percent of the federal poverty level.

WHITE HOUSE, CONGRESS PLAY POLITICS WITH SCHIP

Though six states may exhaust their federal funding for a State Children's Health Insurance Program (SCHIP) by May 7, the widely supported system has become a subject of intense political debate and policy maneuvering between the White House and Congress.

On March 23 and 29, respectively, the U.S. House of Representatives and Senate approved supplemental 2007 appropriations bills that would provide funding for ongoing military operations in Afghanistan and Iraq and also address SCHIP. The House included \$750 million and the Senate included \$745 million to address current state SCHIP shortfalls. However, each bill also contained controversial benchmarks for withdrawing American troops from Iraq.

President Bush has declared that he would veto any such legislation if it included a timetable for withdrawal. It is unclear if members of Congress will remove the contentious language when they conference to reconcile the two spending bills, following their April recess.

Legislators and President Bush also have clashed over SCHIP reauthorization in the 2008 budget debate. While Congress approved budget resolutions with \$50 billion for SCHIP reauthorization and expansion, President Bush has advocated for limiting the scope of the program to children from families with incomes below 200 percent of the federal poverty level.

During the congressional debate over the program's future, legislators expressed concern regarding SCHIP-permitted waivers that allow

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NCOIL FOUNDATION LAUNCHES GROUNDBREAKING STUDY ON STATE AUTHORITY

Michigan Sen. Alan Sanborn, NCOIL president, announced on April 19 the launch of a groundbreaking *Study on State Authority*—a study that will take an in-depth objective look at state insurance regulation in its current form—where it works well and contributes to a healthy market and where it may not work as well, inhibiting that market.

The Insurance Legislators Foundation study, the first of its kind, will scrutinize the current system and the need for improvements to create a more effective, efficient structure and to better serve consumers and the industry. The study will be conducted by Lord, Bissell & Brook; Navigant Consulting, Inc.; and Joseph Zimmerman, Professor of Political Science, Rockefeller College of Public Affairs & Policy, State University of New York at Albany. James Schacht of Navigant Consulting will lead the study group.

In announcing the study, Sen. Sanborn said, “The study will provide a constructive analysis of the components of state regulation—the legislative, executive, regulatory and judicial branch, as well as other entities—that presently interact and impact the regulation of insurance markets in the states.”

Sen. Sanborn said, “NCOIL recognizes that there has been an ever-increasing blurring of the lines of responsibility with regard to state insurance regulation and feels it necessary for purposes of clarity and efficiency to objectively examine the role of legislators, regulators, state attorneys general, the courts, the National Association of Insurance Commissioners (NAIC), as well as additional govern-

mental and other entities.” He added, “The allocation and delegation of state authority to regulate the business of insurance is clearly a legislative matter.”

“To paraphrase Mark Twain,” Sen. Sanborn said, “rumors of the death of insurance regulation have been greatly exaggerated. Nevertheless, NCOIL recognizes that the state system faces challenges and there is need to harmonize and modernize regulation. State authority and its allocation of resources is a critical element of that response. If the policy ambition of some to create an optional federal charter becomes a reality, the states must be in a position to have a real and legitimate state option for insurers that may contemplate securing a federal license. This study will assist in that effort.”

Sen. Sanborn said that, specifically, the study will look at the legal and statutory authority behind primary oversight of insurance, those responsibilities granted and those presently undertaken, funding of regulatory entities, and interaction between the entities within and among states.

The study’s goal is to provide recommendations to clarify and define the role of such entities and their oversight duties in order to promote an effective, efficient regulatory environment. The study’s findings and recommendations will be used by NCOIL to set a strategic agenda for development of a policy on state insurance regulation that can be considered for adoption by each state.

NCOIL will hold a special session on July 21, in conjunction with its Summer Meeting in Seattle to consider preliminary results of Phase I of the study.

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SAVE THE DATE

**NCOIL
Summer
Meeting &
Seminar**

**July
19 through 22,
2007**

**Seattle,
Washington**

CHECK THE **MAY 2007 EDITION** OF THE NCOILETTER
FOR DETAILS REGARDING AN APRIL 21 INTERIM MEETING OF
THE **NCOIL LIFE SETTLEMENTS SUBCOMMITTEE**

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NCOIL

MCCARRAN

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document recognizes that S.618 would call into question the operations of state guaranty funds and residual market mechanisms, which, NCOIL says, together with laws carefully tailored to suit specific state markets, “safeguard the needs of consumers most at risk.”

Copies of the letter were sent to the bill’s co-sponsors: Sens. Harry Reid (D-NV), Trent Lott (R-MS),

Arlen Specter (R-PA), and Mary Landrieu (D-LA). NCOIL distributed a similar letter to House Judiciary Committee Chair Rep. John Conyers (D-MI), who has jurisdiction over companion bill H.R.1081; Rep. Peter DeFazio (D-OR), H.R.1081 sponsor; and co-sponsors Reps. Rodney Alexander (R-LA), Bobby Jindal (R-LA), Charlie Melancon (D-LA), Gene Taylor (D-MS), and Walter B. Jones, Jr. (D-NC).

NCOIL

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that the last thing business needs is more unnecessary and costly regulation.”

The letter lays out the costs as large and many. It argues that while insurers promise to cover OFC establishment expenses, estimated in millions of dollars, reason dictates that actual costs could be much greater. It asserts that “businesses, both large and small, and individuals will end up paying for the additional costs created by dual systems.”

Other likely costs, NCOIL says, include higher business taxes when state premium taxes are raided to cover not-yet-determined costs of a new regime, and employer absorption of solvency-related losses when guaranty funds—

safety nets for companies affected by insolvencies—are inevitably compromised.

The letter stresses that an even “larger cost—though not in dollars and cents—is that an OFC would nullify critical state-initiated consumer safeguards, and deny important consumer access and recourse in problem times. As both legislatures and the businesses they regulate are committed to consumer satisfaction, this could be the highest price to pay.”

The letter states that NCOIL looks forward to discussing the issue further with the Chamber, as the two groups share a common goal, that of “interest in a strong, efficient, and consumer-based system of insurance oversight.”

VIEW

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McCarran. The group concluded that the exemptions should be “disfavored” and granted rarely, courts should interpret all such exceptions narrowly, and Congress should examine the issue.

More scathing were the related statements of certain individual mem-

bers, including one who pushed for immediate and outright repeal.

McCarran foes will surely dig their heels in during the coming weeks due, in part at least, to the ongoing brawls between homeowners and their Gulf Coast insurers. Stay tuned.

WHITE HOUSE

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coverage for pregnant women, parents of children enrolled in SCHIP, and low-income adults without children. Several lawmakers suggested that SCHIP should focus only on the nine million uninsured children in America.

Senator Jay Rockefeller (D-WV) argued in a March 27 *The Hill* article that the waivers help children obtain coverage. He wrote, “It was understood then [at the program’s inception], as it is now, that parent coverage furthers the goals of SCHIP. A child whose parent has health insurance

coverage is more likely to receive health care and use preventative health services, such as dental exams and immunizations.”

SCHIP was developed in 1997 to expand health insurance coverage to children who did not qualify for Medicaid but whose families could not afford private coverage. It was authorized for fiscal years 1998 through 2007 as a federal block grant and has provided coverage for six million children.

In addition to the six states likely to exhaust funding by May 7, eight others will run out of monies by October 1.