National Conference of Insurance Legislators

NCOIL LETTER

...for the statess

August 2009 www.ncoil.org

FEDERAL HEALTH REFORM AT CROSSROADS, VOTES DELAYED

Despite early assurances by Congressional leaders that healthcare reform is on track for swift passage, House and Senate lawmakers delayed key votes in August—prompting doubts about whether Congress can pass an overhaul by year-end.

At a crossroads, Members in favor of Administration-endorsed reform hoped to sway public perception during the August recess. Several highly publicized protests at town hall meetings and growing levels of public opposition, however, are jeopardizing that change. The President, who had steered clear of Congressional negotiations, is pushing hard for reform before 2010, saying during an August 4 speech in Elkhart, IN—and since then in other locations—that he would enact a bill "with or without Republican support."

Four of the five Congressional Committees with healthcare authority—the House Education & Labor, Energy & Commerce, and Ways & Means Committees and Senate Health, Education, Labor & Pensions (HELP) Committee—have approved bills. Each of the measures, which have drawn staunch opposition from Republicans and some conservative Blue Dog Democrats, exceed $1 trillion in costs, require individual and employer insurance coverage, and establish a government-sponsored insurance plan.

The Senate Finance Committee, however, remains gridlocked in bipartisan negotiations. Three influential Democrats and three key Republicans in August continued their closed-door efforts to advance a joint proposal in the face of growing public calls to produce a bill. Early reports say that the bill's cost could be fully offset. Reports suggest that the proposal would omit an employer mandate and would establish consumer-owned insurance cooperatives instead of a government-run insurance plan.

Further complicating matters, the Senate lost one of its longest-serving members—and a chief architect of healthcare reform—in late August when Sen. Edward Kennedy (D-MA) succumbed to cancer. According to lawmakers, Senator Kennedy's inability to participate in negotiations over the last several months had hampered progress.

Kennedy's death has had a pragmatic effect on Senate Democrats. His vacant seat means they have only 59 of the 60 votes necessary to thwart a filibuster. Dems now need to recruit a Republican supporter to ensure progress on a bill—a challenge that, many observers say, increases the odds that Democrats will use an obscure, only 51 vote-necessary budget procedure to enact reform.

NCOIL ADVANCES WORKERS' COMP EMPLOYEE MISCLASSIFICATION MODEL

Looking to address a root cause of workers' comp trouble in the states, NCOIL has moved forward with consideration of a *Workers' Compensation and Employee Misclassification Model Act* that targets transparency, disclosure, and accountability in workers' compensation insurance. A series of conference calls in the next several months aim to produce a refined working draft for review at the November Annual Meeting.

The draft model—based on Florida and Wisconsin statutes—would set up a strict nine-point test to clearly define an independent contractor and mandate workers' comp coverage in the construction industry, with certain exceptions. It would create clear procedures for insurer application, disclosure, and auditing and provide civil and criminal penalties for employee misclassification and insurance fraud. It also would establish strict enforcement authority including, among other items, power to temporarily shut down job sites when employers don't comply.

During the first, August 28 call, a subcommittee of legislators considered a revised discussion draft that incorporated interested-party amendments and other comments submitted prior to the NCOIL Summer Meeting. Legislators focused on the model's definitions and discussed, in

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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

Inside This Issue:

VIEW FROM THE HILL: MAJOR ACTION LIES AHEAD

Despite pressure from the Administration and elsewhere to enact groundbreaking legislation and despite some observer predictions, Members of Congress left on time for their scheduled August recess. With little to feel confident about, Members headed home to earfuls from unhappy constituents and to anticipation of a long September "to do" list. After all, health reform hadn't passed the House or Senate *(see story on page 1)* and a financial services regulatory reform package hadn't cleared even the House Financial Services Committee (HFSC).

To date, HFSC and the Senate Banking Committee have debated making the Fed a systemic risk regulator, creating a class of "Tier 1 Financial Holding Companies," establishing resolution authority over non-banks, reigning in an unregulated derivatives market, and forming a Consumer Financial Protection Agency (CFPA). However, in spite of near-daily hearings, major financial services bills haven't navigated through either Chamber. Only executive comp limits have moved ahead.

The business of insurance has stayed largely on the Congressional backburner. Although the Senate Banking Committee held one late-July hearing on insurance reform—and certain state officials and industry reps have pushed to exclude all insurance products from the CFPA—"insurance" has been cited only a few times in recent Committee hearings. Certainly the debates are coming—with President Obama's proposed Office of National Insurance (ONI) and Congressman Kanjorski's touted Office of Insurance Information (OII) sure to take center stage—but for now Committee members have focused on industries that actively contributed to the nation's financial crisis, namely the complexity that is U.S. banking regulation.

Next month should prove a "September to Remember," as tempers rise over reworking healthcare and as Chairman Frank plans to mark up and approve broad regulatory reform, sending a single financial services package over to his Senate colleagues. A year-end deadline for major change may be within legislators' reach if they move faster than they did this summer. Of course, who knows what after-August will bring?

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NCOIL ESTABLISHING CDS FRAMEWORK, LETTER SAYS

With Congress moving to revamp the derivatives market, NCOIL leaders apprised key U.S. House and Senate Committee Chairs recently of ongoing NCOIL efforts to guard against credit default swap (CDS) abuse. Signed by NCOIL President Sen. James Seward (NY) and Financial Services & Investment Products Committee Chair Assem. Joseph Morelle (NY), the July 22 letter pointed to NCOIL development of draft *Credit Default Insurance Model Legislation* —over a year-long process grounded in the belief that certain CDS are insurance.

In speaking of the letter, Sen. Seward said, "The premise of our draft model act—that credit default swaps with material interest are insurance—means consumers would be protected by the safeguards inherent in state-regulated coverage." Assem. Morelle added that "Our efforts to address this complicated issue indicate our desire to make sense of a market that contributed significantly to our nation's financial crisis."

The letter to the Chairmen of the Senate Agriculture and Banking Committees and the House Financial Services and Agriculture Committees outlined the extensive model law development process—including naming interested parties that participated in NCOIL deliberations—and overviewed several model bill provisions. It said the proposed model—scheduled for final review at the November NCOIL Annual Meeting—would, among other things, regulate certain "covered" CDS as a new form of insurance, known as credit default insurance, and would prohibit so-called "naked" CDS, or swaps in which a party has no material interest in the underlying asset.

The proposed model is the result of six conference calls and months of extended discussion, including a January 2009 public hearing in which legislators determined that certain CDS are insurance. NCOIL subsequently formed a task force to develop a proposed model act. Prior to the November Annual Meeting vote, NCOIL will convene two conference calls to address any remaining concerns.

AIRBAG FRAUD, AFTERMARKET CRASH PART MODELS ON THE MOVE AT NCOIL

On September 9, NCOIL will hold the first in a series of conferences calls focused on model acts to promote transparency and accountability in auto repair. The calls—which follow aggressive debate at the July NCOIL Summer Meeting—target dangerous airbag fraud and choice in aftermarket crash parts/ auto body repair.

The subject of the first two calls, the *Model Act Regarding Auto Airbag Fraud* sets felony penalties for airbag crimes and requires that auto body shops show airbag bills of sale or invoices to prove that they had purchased suitable replacement airbags. The main area of contention is the model's scope—should the bill apply to salvaged bags? Those in favor of including them say the model is a straightforward anti-fraud bill that, as such, must recognize all types of airbags in the market. Those opposed argue that salvaged bags may be of inferior quality and should not be acknowledged as a repair option.

The final three Property-Casualty Insurance Committee calls will look at a *Model Act Regarding Motor Vehicle Crash Parts and Repair*. The bill requires notice and approval before crash part repair or replacement and establishes conditions in which insurers may require use of aftermarket crash parts. The model also mandates permanent, transparent identification of parts, allows consumers to pick their auto repair facility, and promotes accountability, among other things.

Issues of debate center on the safety and soundness of aftermarket crash parts, the impact of such parts on a competitive market, and the legality of limiting insurer-insured discussions of auto repair facilities.

Interested parties have submitted amendments for legislative consideration during the calls. The P-C Committee aims to have final drafts ready for November Annual Meeting consideration. Parties involved in the discussions include aftermarket crash part, anti-fraud, auto glass, auto manufacturer, auto safety, collision estimate, collision repair, and insurance company representatives. The proposed amendments are available at www.ncoil.org.

"The main area of contention is the [airbag fraud] model's scope—should the bill apply to salvaged bags? Those is favor...say the model is a straightforward anti-fraud bill....Those opposed argue that salvaged bags may be of inferior quality...."

NCOIL TO NAIC: LIFE INSURER RESERVE PLAN IS UNWISE

Despite some life insurer calls for fiscal relief during the economic downturn, NCOIL Officers in a recent letter remained adamant in their opposition to pending National Association of Insurance Commissioner (NAIC) changes to several financial reporting and company reserve requirements, questioning their "purpose, substance, and appearance."

The Officers—including NCOIL President Sen. James Seward (NY), President-Elect Rep. Robert Damron (KY), Vice-President Rep. George Keiser (ND), Secretary Sen. Carroll Leavell (NM), and Treasurer Sen. Vi Simpson (IN)—said in the letter that, at the very least, economic modeling and review should be done before changes are made. The legislators asserted that "without data supporting the validity of the proposed… relief, NCOIL must question if reducing company …[requirements] is a sound policy decision during the current economic condition."

Officers stressed that conservative reserve requirements have kept companies strong and have protected insurance consumers during these trying times, saying that "we hesitate to endorse any proposal that could be construed as weakening the existing solvency system, particularly in today's volatile economy. The states," the letter said, "have a lot to be proud of in our regulation of the business of insurance and we do not find it advisable to pursue a track that could lead to less direct regulation and more self-regulation—either implied or explicit."

Last November, NAIC regulators considered life insurer requests to expedite a nine-point proposal, which some companies argued would reduce unnecessary reserves and free capital to offset the credit crisis. The NAIC voted against emergency action in February but is advancing the changes under a normal review process—approving three changes since then and nearing completion on six others. After the decision against emergency action, several states individually adopted aspects of the proposal.

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part, whether and/or how to exempt homeowners from coverage requirements, employee/employer status, permitted employer affiliations, corporate officer relationships and exemptions, and treatment of non-profit construction projects.

The Subcommittee decided to further review TN language exempting homeowner projects in which no money is exchanged, as well as IRS language that might help determine when a homeowner should qualify as an employer. Legislators also discussed narrowing the bill to target abuses in the construction industry—considered one of the most problematic fields—rather than pursue a broader proposal. As now drafted, the model both creates a universal regulatory system and sets specific construction-industry mandates.

Additional comments received in August from the American Council of Life Insurers, American Trucking Assoc., Nat.'l Assoc. of Professional Insurance Agents, Nat.'l Federation of Independent Business, state regulators, and United Brotherhood of Carpenters & Joiners Assoc. of America were also addressed, but were not in the discussion draft.

Previously, and on the call also, interested parties—while generally acknowledging employee misclassification as a major problem and often supporting the model's goals—have expressed varying perspectives on the independent contractor nine-point test and the view that coverage should be mandated in other high-risk jobs, such as logging and trucking.

The second Subcommittee call is set for September 8. Comments and the latest discussion draft are available online.

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