National Conference of Insurance Legislators

NCOILETTER

...for the states

December 2008 www.ncoil.org

NCOIL HEARING TO PROBE STATE CREDIT DEFAULT SWAP OVERSIGHT

Responding to the financial turmoil surrounding formerly unregulated credit default swaps (CDS)—and to a need to forestall future crises—NCOIL has scheduled a public hearing in New York City on how CDS are and should be regulated, as well as the role that states and NCOIL should play in CDS oversight.

The hearing, slated for Saturday, January 24, from 11:00 a.m. to 3:00 p.m. at the New York Marriott Marquis, will look at whether federal law would allow states to regulate CDS under their insurance statutes and whether standards regarding reserving, insurable interest, and solvency are needed in the credit default swap market. The hearing also will examine whether a state-federal partnership approach to regulation could work.

The hearing kicks off a 2009 NCOIL Financial Services & Investment Products Committee charge to explore the role of credit default swaps and other financial instruments, develop a position, and communicate to legislative colleagues regarding their public policy implications.

Those wishing to testify at the hearing must submit a request-to-testify form and an electronic copy of their written testimony to NCOIL by January 16. Further information is available at www.ncoil.org or by contacting NCOIL at 202-220-3014.

NCOIL CALLS FOR STATE INSURANCE SUMMIT, SOLIDARITY

On December 10, NCOIL President Sen. James Seward (NY) applauded The Council of State Governments (CSG) for recently restating its opposition to federal insurance chartering and called on state officials to convene a strategy meeting to discuss financial regulatory reform.

In announcing plans for the summit, Sen. Seward said, "Next year it will be more important than ever for state officials, including governors, attorneys general, insurance commissioners, and legislators, to work in unison to safeguard our regulatory authority to protect our consumers and businesses."

"States cannot sit idly by," Seward stressed, "as our carefully crafted consumer protection laws and strong solvency requirements are replaced by an untested federal system. The ongoing financial crisis has again confirmed that deregulation via optional, or mandatory, federal regulation does not protect American consumers."

Seward said NCOIL would soon send letters of inquiry to leadership of national organizations, including the NAIC, National Governors Association, National Association of Attorneys General, and the National Conference of State Legislatures, to gauge interest in a (continued on page 2)

SEC IGNORES NCOIL CONCERNS, TAKES OVER INDEXED ANNUITIES

In a move that strips states of their ability to police the fixed indexed annuities market, the U.S. Securities and Exchange Commission (SEC) voted on December 17 to approve draft Rule 151A and reclassify fixed indexed annuities as securities rather than insurance products. The move came despite calls from NCOIL, NAIC, other state organizations, and several Members of Congress to withdraw, or at least delay, consideration of the proposal.

In offering its rationale, the SEC said that state standards are inconsistent and that consumers would benefit from uniform protections under federal securities law. Rule 151A will require brokers to hold a securities license and disclose certain information at the (continued on page 4)

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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VIEW FROM THE HILL: CONGRESS MAY TAKE "OPTIONAL" OUT OF OFC

As the U.S. financial crisis has deepened, the prospect that Congress will enact legislation to create an optional federal charter (OFC) for insurance companies has dimmed. Any sort of "optional" regulation seems to be off the table for 2009. Rather, Washington whisperers say that Congress has its sights on creating some form of upper-level "systemic risk regulator" that could actually mandate a federal charter.

Rumors have pegged the proposed risk regulator as an individual or office with authority over anything that it determined was "significant" in the financial services sector. How to determine that and how much power the regulator would have generally—and on insurance specifically—are topics still open for discussion, as Members have not hammered out the substantive details.

The aim of creating such a regulator seems clear: to prevent catastrophic collapses like those that occurred at jumbo holding companies, such as that of American International Group (AIG), and at large investment banks—at least at the few that remain. What officials may not fully appreciate is the effect such a regulator could have on state insurance regulation, which—unlike ineffective and often spotty federal oversight — has much to boast about during this economic storm. It is widely recognized, for instance, that AIG's insurance subsidiaries were among its most valuable assets, while its federally supervised holding company was the core of AIG troubles.

House Financial Services Committee Chair Barney Frank (D-MA) and Capital Markets Subcommittee Chair Paul Kanjorski (D-PA) are again expected to lead on financial services modernization in 2009. While a second, sizeable economic stimulus package will be one of the first orders of business, we expect Congress to look seriously at regulatory reform well before its July 4 recess.

Washington whisperers say that Congress has its sights on creating some form of upper-level "systemic risk regulator" that could actually mandate a federal charter.

NCOIL

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joint meeting. Legislators and certain insurance commissioners had endorsed the idea during a Legislative Liaison at the December NAIC Winter Meeting.

CSG adopted at its early-December Annual State Trends & Leadership Forum a *Resolution Opposing Continuing Federal Insurance Chartering Efforts*, which argued against federal mechanisms such as an optional federal charter (OFC) and an Office of Insurance Information (OII).

The leadership summit could take place in early 2009.

NCOIL PROBES BALANCE BILLING, STATES TAKE ACTION

Moved by consumer complaints and the prospects of growing uninsured and underinsured populations, NCOIL and states across the country, are investigating controversial "balance billing" practices—an expanding trend that places consumers in the middle of an ongoing battle between healthcare providers and insurers regarding reimbursement. The practice, which NCOIL will explore on February 27 during the NCOIL Spring Meeting in Washington, DC, forces patients to cover unpaid balances that often run into thousands of dollars.

Many consumers are hit with balance bills after receiving treatment from someone they believe is in-network. Recent probes by California regulators revealed that balance billing is most frequent among providers working in emergency room settings, such as anesthesiologists. Often, these specialists don't participate in the same insurance networks as their hospital, which can leave consumers in the dark about their financial responsibilities.

Forty-seven states ban balance billing for in-network providers, and federal law protects Medicare beneficiaries from the practice. However, little regulation exists regarding non-participating doctors and specialists.

In 2008, Califor-

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NCOIL GUIDES STATES: ADOPTS KEY PHYSICIAN REIMBURSEMENT MODEL

On November 23, after more than three years of NCOIL effort and input from numerous interested parties, NCOIL legislators offered critical guidance to states by finalizing a long-debated and controversial *Rental Network Contract Arrangements Model Act* at the NCOIL Annual Meeting in Duck Key. The model—approved in time to be considered in 2009 legislative sessions—allows unlimited "downstream" rentals of PPO contracts and physician discounts, while ensuring that network access information is available to providers.

The NCOIL model hinges on disclosure. It sets forth clear criteria for network and discount access, as well as for contract termination; lays out contracting entity rights and responsibilities; requires disclosure to providers and contracting entities of third-party access; calls for registration of unlicensed contracting entities; prohibits and penalizes unauthorized access to provider network contracts; and lets physicians refuse a network discount without a contractual basis.

The model also says that an initial contracting entity must keep a list of all health plans and PPOs with access, including downstream rentals by other plans and PPOs—so that through this list, a provider can determine up front if someone has legitimately accessed that network and its discount rate.

Legislators decided—after much debate, and in order to ensure optimal transparency—that the model should apply to affiliates and subsidiaries of contracting entities. In addition, a drafting note acknowledges that states themselves will determine whether the act should apply to ERISA entities.

NCOIL HEADS TOWARD EDUCATION/OCCUPATION UNDERWRITING STANCE

NCOIL will investigate whether the use of education and occupation in insurance underwriting is fair—and will move toward adoption of an NCOIL policy position—when it holds a special February 28 session at the 2009 NCOIL Spring Meeting in Washington, DC.

Legislators in November discerned a need to examine what NCOIL Property-Casualty Insurance Committee Chair Rep. Charles Curtiss (TN) has called a "fundamental consumer protection" issue. According to Curtiss, "We are called on, as elected officials, to determine whether insurers have the right to use [education level and type of job], whether strong restrictions are appropriate, or whether this form of underwriting simply goes against the public interest."

Insurers that use education and occupation treat more favorably a person with a higher degree and/or a white-collar job than they treat someone with a high school education and/or a blue-collar profession.

The P-C Committee special session will be held from 3:00 to 4:15 p.m. at the Hyatt Regency Washington on Capitol Hill. The Committee adopted a 2009 Committee charge at the November NCOIL Annual Meeting that commits the group to examining use of education/occupation in order to develop an NCOIL position.

"We are called on, as elected officials, to determine whether insurers have the right to use [education level and type of job], whether strong restrictions are appropriate, or whether this form of underwriting simply goes against the public interest."

Register online at www.ncoil.org for the **NCOIL SPRING MEETING** and see **key issue items** scheduled for legislative consideration!

February 27 through March 1 at the

Hyatt Regency Capitol Hill in Washington, DC

BALANCE BILLING

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nia banned balance billing for insured health maintenance organization (HMO) beneficiaries in emergency settings, while New York and Illinois explored ways to protect consumers through proper disclosures and restrictions.

Connecticut and West Virginia target healthcare providers. Maryland limits balance billing to a certain percentage over what an HMO would pay a similar provider in the same geographic area. Colorado and Rhode Island indemnify consumers. The Louisiana insurance commissioner has proposed an overall ban, with further action anticipated in 2009, and other states have pursued balance billing approaches.

The NCOIL discussion will take place during the February 27 Health, Long-Term Care & Health Retirement Issues Committee meeting, slated for 10:15 to 11:30 a.m.

SEC

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point of sale about material terms, fees, and risks.

The SEC vote was not unanimous. One of the five SEC commissioners objected, arguing that the group was exceeding its authority and inaccurately assuming that state insurance regulators are inadequate, among other comments.

The rule will apply on a prospective basis to indexed annuities issued after January 12, 2011. Future litigation regarding SEC authority is anticipated.

NCOIL opposed Rule 151A—and supported state insurance commissioner authority over indexed annuities—in a November 23 resolution, and again in a December 16 letter to the SEC.

NCOILetter

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