National Conference of Insurance Legislators

NCOIL ETTER

...for the states

February 2010 www.ncoil.org

NCOIL MOVES FORWARD WITH MEDICAL BALANCE BILLING MODEL

Legislators charged with protecting consumers from unexpected medical balance bills initiated discussion this month of draft disclosure model legislation. An NCOIL subcommittee, during a February 8 conference call, began sorting through controversial public policy issues—including emergency room disclosures and conflicts with federal law, strong pre-treatment notification, and Medicare exclusions—and opened the door for discussion of network adequacy and physician fee concerns. The subcommittee will continue its work on a February 22 call and aims to produce a draft model bill for review at the March 5 through 7 NCOIL Spring Meeting.

On February 8, interested parties urged legislators to exempt from the model act healthcare practitioners engaging in emergency stabilization—as they are required by federal law to provide urgent care to all patients, regardless of their ability to pay. Legislators recognized a potential conflict with federal law should emergency room physicians be included in the *Proposed Draft Model on Healthcare Balance Billing Disclosure*, but cautioned against a blanket exemption for all such providers.

The group also debated if/how stronger pre-treatment disclosures could be required, such as a minimum five-day hospital disclosure to consumers about payments and interest—in addition to or in place of similar insurer disclosures within 48 hours of approving/certifying a consumer's procedure.

Regarding Medicare, the subcommittee recognized a need to exempt plans from the proposed model, as Medicare prohibits balance billing.

Throughout the NCOIL process, interested parties have encouraged legislators to address network adequacy, saying that allegedly low insurer reimbursement rates discourage specialists and other providers from participating in networks, therefore creating network "holes" that lead to balance billing. Insurers, for their part, have criticized certain out-of-network physician charges, saying that doctors often charge fees well in excess of Medicare reimbursement rates.

Thirteen groups/individuals representing consumers, emergency room physicians, hospitals, insurers, and other healthcare providers have submitted comments and are participating in the NCOIL discussions.

The working draft—which features language from recently enacted Texas and Louisiana laws—would require pre- and post-treatment consumer disclosures from hospitals, insurers, and providers about a facility-based provider's network status and consequent consumer financial responsibilities.

Balance billing occurs when doctors charge their patients any fees that remain after insurer reimbursement. The practice is common in hospitals where, unknown to most consumers, hospital-based physicians such as radiologists and anesthesiologists may not be in the same networks as the hospital itself.

NCOIL has the honor of welcoming **Director Scott Richardson** of the South Carolina Department of Insurance as keynote luncheon speaker during the NCOIL Spring Meeting in Isle of Palms, SC. The event will take place Friday, March 5, from 12:00 to 1:00 p.m. at the Wild Dunes Resort.

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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NAMIC versus Center for Economic Justice

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VIEW FROM THE HILL: OBAMA BUDGET EYES INSURANCE CHANGES, INDUSTRY OBJECTS

The President made few friends in the insurance world this month when he introduced his FY 2011 budget. The $3.8 trillion proposal, which anticipates that regulatory and health insurance reform measures will pass this year, would cut federal funding for the Terrorism Risk Insurance Program, impose a new Troubled Asset Relief Program repayment fee, and tax certain offshore reinsurance arrangements, among many other things.

The proposal assumes congressional approval of an NCOIL-opposed Office of National Insurance, as well as a Financial Services Oversight Council, both currently pending in financial overhaul legislation. Such an assumption may be overly optimistic, however, now that Senator Chris Dodd (D-CT) has announced an "impasse" in his efforts to wrangle bipartisan support for his yet-unnumbered reform measure.

On the health side, the draft 2011 budget includes commentary on how wide-ranging reform legislation, now stalled in Congress, would address cost/quality concerns. The Obama budget takes smaller steps, boosting funding for comparative effectiveness, health IT, and primary care projects created under the 2009 stimulus package, as well as for initiatives to combat childhood obesity and improve rural healthcare, among others.

The President's idea to eliminate almost $250 million from the federal backstop for private terrorism insurance drew immediate criticism from large industry associations. While the Administration argued that the subsidies were no longer needed because of a "robust private market," insurers warned that without federal assistance, there would be no market.

The 2011 budget calls for a new "financial crisis responsibility fee" to recover money paid in 2008 and 2009 to failing financial giants. The controversial fee would be assessed on certain liabilities of the largest financial firms—including insurers—regardless of whether the firms received bailout money. Insurers say they are uncertain as to which of them will be affected.

Leaving almost no insurance stone unturned, the President also proposes eliminating a long-standing tax deduction for U.S. insurers that cede premium money to their offshore affiliates, such as those in tax-favorable Bermuda. The FY 2011 budget, in addition, would create new life settlement disclosure requirements and would make sizeable crop insurance funding cuts, among other items.

Though the President can recommend program cuts and new funding sources as he likes, Members of Congress—many of whom are up for nail-biting re-election bids—will have the final word.

NCOIL MODEL SEEKS RULES ON AFTERMARKET CRASH PARTS, AUTO BODY CHOICE

Join legislators on March 5 and 6 during the NCOIL Spring Meeting as they debate tough standards for use and disclosure.

Draft model available at www.ncoil.org.

REGISTER AT WWW.NCOIL.ORG FOR THE

NCOIL SPRING MEETING IN SOUTH CAROLINA!

March 5 through 7, 2010 Isle of Palms — Wild Dunes Resort

TENTATIVE GENERAL SCHEDULE AVAILABLE ONLINE

POINT-COUNTERPOINT: FTC INSURANCE AUTHORITY, HELP OR HINDER?

Healthcare reform legislation passing the U.S. House in November included language to give the FTC certain authorities over the business of insurance. Despite slowdown on the healthcare debate, Members are expected to introduce the FTC language in a separate bill. The writers below answered the following question: How would giving the FTC authority to study the business of insurance impact state oversight?

FTC Oversight: An Unwise Move Toward Dual Insurance Regulation

By Julie Gackenbach

The national health care debate has reopened the dispute over the authority of the Federal Trade Commission ("FTC") to investigate the insurance industry. The House-passed Affordable Health Care for America Act (H.R. 3692) includes provisions granting the FTC unfettered authority to conduct studies and prepare reports on insurance. In addition, the FTC would be empowered to share information with law enforcement agencies.

The provisions would overturn a 30-year congressionally imposed prohibition on the FTC from studying or issuing reports on any part of the insurance industry unless specifically requested by the relevant congressional committees.

The legislation would not limit the FTC's authority to the "business of insurance," but would give the federal agency the discretion to examine virtually any aspect of insurance, including state legislative and regulatory conduct. Although included in health reform legislation, the expanded authority would extend to all lines of insurance.

The legislation represents a first dramatic step toward dual regulation of insurance. Over-

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A Set of Independent Eyes Can Only Help Consumers and Regulators

By Birny Birnbaum

Under the McCarran Ferguson Act of 1945, states are given sole authority to regulate insurance, and insurers are granted an exemption from the federal anti-trust laws prohibiting anti-competitive practices, such as colluding to set rates. The Federal Trade Commission (FTC)—an agency dedicated to identifying and stopping anti-competitive market practices—is forbidden from prosecuting violations related to the business of insurance. However, until 1981—shortly after the FTC issued a report critical of whole life insurance products—the FTC could investigate and study insurance-industry problems and make policy and enforcement recommendations to states.

FTC studies of insurance markets would address two critical problems with state insurance regulation. The first is the poor track record and limited technical skills of regulators on competition issues. Despite efforts to develop a market analysis capability, insurance regulators do little sophisticated data collection and analysis and major market problems are more often identified by non-regulators, including journalists and state attorneys general. In some key areas—monitoring competition or examining unfair discrimination—state regulators have done little or nothing.

The second problem is the political pressure on state regulators from the insurance industry with the states. In many states, insurers are some of the largest employers and seek protection from market investigations and enforcement actions. In other states, regulators cannot be relied upon for independence, as demonstrated recently when regulators codified the massive capital relief granted

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NCOILetter

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FTC Oversight

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laying state-based supervisory authority with a new, unrestrained federal invest-tigatory authority is a recipe for regulatory confusion. The activities of the insurance industry at large and individual market participants are expansively, and effectively, regulated at the state level. Adding the FTC to the insurance regulatory mix would undermine state authority.

The proposal is billed by supporters as a simple report and information gathering regime; however, the expanded authority would effectively transform the FTC into a quasi-regulatory and enforcement agency. Congress correctly limited the authority of the FTC in the 1980s and there is no evidence to support a change in position.

The expansion of FTC authority is unwarranted, unwise and unnecessary. Congress should not abdicate its oversight responsibility and must not overrule state legislative and regulatory authority in favor of unelected federal bureaucrats.

Ms. Gackenbach *is founder of Confrere Strategies in Washington, DC, writing on behalf of the National Association of Mutual Insurance Companies (NAMIC).*

A Set of Eyes

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by just a few states in order to maintain some measure of level competition.

State insurance regulators have defended state regulation over proposals for federal regulation by stating that state diversity is a strength—that that there are 51 sets of eyes examining insurers' financial condition. Another set of independent eyes—particularly with expertise in competition and unfair trade practices—would help consumers and regulators. With FTC authority limited, there can be no credible argument about duplicative regulation because the FTC would not be regulating insurance.

Mr. Birnbaum *is Executive Director of the Center for Economic Justice, based in Texas, and former Chief Economist at the Texas Department of Insurance.*

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