NCOILETTER

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ROYCE DROPS HOUSE OPTIONAL FEDERAL CHARTER BILL

On September 28, House Financial Services Committee Member Rep. Ed Royce (R-CA) introduced legislation to create an optional federal charter (OFC) for both life and property-casualty insurers, in lieu of state-based oversight.

The bill, H.R. 6225, the *National Insurance Act of 2006*, would create a federal insurance regulator within the Treasury Department, creating a bifurcated regulatory system similar to the dual banking approach. Despite legislative and other arguments regarding the adequacy of federal oversight, proponents of H.R. 6225 say that so-called "prompt corrective action" provisions in the bill would allow federal authorities to act quickly should an insurance company approach insolvency.

The legislation is similar to S. 2509, which Senators John Sununu (R-NH) and Tim Johnson (D-SD) introduced in the Senate back in April. To date, lawmakers have taken no action on that measure, which does not include the prompt corrective action language. S. 2509 remains in the Senate Committee on Banking, Housing, and Urban Affairs.

Royce, speaking before the American Bankers Insurance Association prior to introducing his bill, said, "I believe that the U.S. is one marketplace, and that the insurance industry should be able to participate in this national market." He commented that a more complicated, p-c inclusive proposal would ultimately be more successful because it would enjoy a broader base of support. Many observers say that a bill would more easily pass Congress if it focused on life insurers.

With the 110th Congress winding down, H.R. 6225 may only be a place holder for the next Congress. Much will depend on the outcome of the November elections. Should Democrats take control of the House, passage of H.R. 6225 may

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SENATE BILL WOULD REPEAL INSURER ANTITRUST EXEMPTION

On September 29, Senator Arlen Specter (R-PA), chair of the U.S. Senate Committee on the Judiciary, introduced a bill that would repeal the limited federal antitrust exemption granted to the insurance industry under the McCarran-Ferguson Act of 1945.

S. 4025, the *Insurance Industry Antitrust Enforcement Act of 2006*, was introduced without fanfare in the final hours of Congressional session before Members adjourned for campaign activity. Unlike earlier attempts to repeal the exemption, the one-page legislation does not reference "safe harbors" for the industry. Rather, it would allow the Federal Trade Commission (FCC) to issue guidelines identifying practices that do not raise antitrust concerns, including, perhaps, information sharing.

It is probable that S. 4025 is a "trial balloon" that will allow the Senators to gauge opposition to the bill before re-introducing it in the next Congress. The legislation is co-sponsored by Ranking Member Senator Patrick Leahy (D-VT) and Senators Trent Lott (R-MS) and Mary Landrieu (D- LA) and follows a May 2006 Judiciary Committee hearing entitled "The McCarran-Ferguson Act: Implications of Repealing the Insurers'

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS

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:

ROYCE

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prove unlikely given division within the House Financial Services Committee. The Committee's head Democrat, Rep. Barney Frank (D-MA), has stated that he opposes an OFC.

However, the Democrat most likely to chair the Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises, Rep. Paul Kanjorski (D-PA), recently said, "With this bill, Congressman Royce has advanced the legislative debate about creating an OFC. Going forward, I will continue to work with him to modernize the structure of insurance regulation in a way that protects consumers and reflects the realities of today's financial system."

NCOIL continues to fight against OFC and other federal preemptive efforts, which legislators assert will violate consumer interests and protections, and will further examine the issue at the NCOIL Annual Meeting.

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SENATE

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Antitrust Exemption." The bill falls against the backdrop of various pending federal preemptive initiatives, including, among others, House and Senate optional federal charter legislation.

McCarran-Ferguson permits the states to continue regulating insurance after a 1944 Supreme Court decision that found insurance to be interstate commerce and therefore within Congress's constitutional authority to regulate. The Act explicitly provides for state supremacy in the regulation of the business of insurance; provides insurers with a limited exemption from federal antitrust laws as long as the activity is state regulated; and allows insurers to share information that lowers costs of doing business, including the development of insurance forms and the sharing of loss data to help with policy pricing.

NCOIL has long asserted the critical importance of the McCarran-Ferguson Act. Legislators will address issues regarding S. 4025 at the November NCOIL Annual Meeting.

(See "Fact Findings" on page 4 for excerpts of Specter's introductory remarks.)

VIEW FROM THE HILL

The first few months as Director of State-Federal Relations here in NCOIL's Washington DC office have been exciting. There has been much activity on Capitol Hill, from Congressional hearings on issues ranging from Terrorism Risk Insurance to Sarbanes-Oxley to the NAIC Securities Valuation Office. There also has been legislation introduced that would scale back McCarran-Ferguson and legislation that would allow for an Optional Federal Charter. We also have seen the House adopt a surplus lines and reinsurance regulatory reform bill.

While this was going on I traveled to the NAIC meeting in St. Louis, worked with NCOIL staff and legislators to further our efforts regarding a market conduct model act, and assisted the Legislative Committee of the new Interstate Insurance Product Regulation Commission. In that effort NCOIL played a large part developing the bylaws and rulemaking rules that will guide the Compact.

The only regret I have so far is that I haven't had time to reach out to the membership to introduce myself as much as I would have liked. However, I look forward to Napa Valley and getting to know you all. As a bit of background on myself for those I have not yet met, I come to NCOIL after working five years on Capitol Hill for Rep. Peter King (R-NY). I look forward to using the skills and contacts I've developed over the years to further NCOIL's goals. — Kevin Horan

DRUG REIMPORTATION CLEARS HURDLES

On October 4, President Bush signed H.R. 5441, the *Department of Homeland Security Appropriations Act for 2007*, that, in addition to allocating $33.8 billion for homeland security projects, represents a step forward for supporters of drug reimportation.

The law includes a provision prohibiting Customs and Border Protection agents from seizing legal drugs being brought across the U.S.-Canada border. Individuals returning to the U.S. will be permitted to carry a "personal-use quantity" not to exceed a 90-day supply of medication.

H.R. 5441 complements a recent decision by U.S. Customs and Border Protection officials to terminate an 11-month-old drug-seizing policy on October 9. Since November 2005, Customs has seized more than 35,000 prescription drug packages imported via mail from Canada.

The recent decisions to expand the accessibility of Canadian drugs in the U.S. flies in the face of administration policy and U.S. law. Congressional calls to repeal the ban on prescription imports had been consistently rejected by the Bush and Clinton administrations.

Opponents of drug reimportation, including drug manufacturers, argue that drugs imported from Canada are unsafe because they are not scrutinized by the U.S. Food and Drug Administration (FDA). Reimportation advocates argue that the drugs are safe and point to the significant cost savings enjoyed by Americans who purchase prescriptions over the border.

The AARP supports a measure, S. 334, proposed by Senators Byron Dorgan (D-ND) and Olympia Snowe (R-ME), that would require FDA regulation of imported drugs. The bill has 32 co-sponsors; its House companion is H.R. 700. Currently, a handful of other reimportation bills are pending.

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NCOIL CAUTIONS STATES: SOX CORPORATE GOVERNANCE STANDARDS COMING THEIR WAY

On September 21, NCOIL reasserted its opposition to applying Sarbanes-Oxley (SOX) corporate governance requirements to non-public insurers in a letter to state insurance committee chairs. The letter resent a February 2006 NCOIL *Resolution on the Application of Federal Sarbanes-Oxley Standards to State Insurance Regulation* that challenges a National Association of Insurance Commissioners (NAIC) effort to expand the applicability of SOX-like mandates.

The letter, sent by NCOIL President Rep. Frank Wald (ND), recognizes the struggles of public companies trying to comply with SOX. The letter states that "mutual and other non-public insurers should not be burdened with similar requirements and ensuing negative consequences" and that compliance costs would be passed on to policyholders.

Rep. Wald urges lawmakers to "further explore this issue and monitor its effect on your state's businesses and consumers, as it is sure to impact your state's insurance market as well as those of states across the nation."

The letter notes that this past year, SOX has come under increased scrutiny for its costs and its consequences. Challenges have been issued in the courts, in Congress, and in the U.S. Securities and Exchange Commission (SEC), NCOIL says. At a recent Congressional hearing, SEC Chair Chris Cox and Financial Services Committee Chair Michael Oxley (R-OH) admitted that SOX-required audits are too costly, more than anticipated.

The NCOIL letter affirms the prerogative of legislatures to set public policy and opposes NAIC revisions to its Model Audit Rule, key to effectively expanding

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SAVE THE DATE

NCOIL Annual Meeting & Seminar

November 9-10, 2006

Napa Valley, California

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FACT FINDINGS: SPECTER SPEAKS ON ANTI-TRUST BILL

Last month, Sen. Arlen Specter (R-PA), Judiciary Committee chair, introduced a bill that is seemingly less intrusive to state regulation than other proposals. S. 4025 would, with exceptions, repeal the McCarran-Ferguson limited antitrust exemption (see page 1). Below are excerpts from his introductory remarks.

Congress enacted the McCarran-Ferguson Act in 1945. It did so in response to a controversial Supreme Court case in which the Court held that the business of insurance constituted interstate commerce. The ruling opened the door to federal regulation of insurance, a business that had historically been regulated by the States. Reacting to concern from the states that they would no longer have authority to collect taxes on insurance premiums, Congress passed McCarran-Ferguson, which reaffirmed the power of the States to regulate insurance and collect taxes.

In doing so, Congress exempted insurance industry practices from the antitrust laws to the extent that such practices are "regulated by state law." Since then, the courts...have held that insurance industry practices are exempt from the antitrust laws so long as regulators have been given jurisdiction over the challenged practices—regardless of whether the regulators ever exercise that jurisdiction.

Over the years, State regulators have either chosen not to regulate, or failed to regulate, practices that would have violated the antitrust laws absent McCarran-Ferguson…. The most notorious practices to come to light involved bid-rigging and customer allocation by insurance broker Marsh & McClennan and several of the nation's largest insurers….

Several States prosecuted the insurance companies under a variety of State laws, including antitrust laws, but federal prosecutors could not bring their significant resources to bear….

This is not the first attempt to subject the insurance industry to Federal antitrust law. In the wake of numerous insolvencies, mismanagement, and other misconduct by insurers in the late 1980s, legislation was introduced repealing the exemption. That legislation…faced opposition from insurers who claimed that many industry practices engaged in jointly by insurance companies were procompetitive and necessary….

More recently, some have argued that the answer to insurance industry ills is full federal regulation. I do not necessarily believe that stripping the States of their authority to regulate the insurance industry is the answer. This bill does not do that. It allows states to continue to regulate….

If a state is actively supervising practices by its insurance industry that might otherwise violate the antitrust laws, this legislation would exempt that practice from the antitrust laws....

The insurers will argue that repealing the antitrust exemption for insurers will create uncertainty by throwing into question the legality of every joint practice....However, this bill has been drafted to avoid such litigation….The bill would allow the Federal Trade Commission to issue guidelines identifying joint practices that do not raise antitrust concerns and would therefore not face scrutiny from antitrust enforcers….

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SOX. The rule is incorporated into law in many states—and may be updated automatically without suitable legislative review.

At the NCOIL Summer Meeting, legislators voted to resend the resolution, one of several NCOIL expressions of substantive and procedural concern regarding the NAIC initiative.

NCOIL copied the U.S. House Financial Services Committee, state legislative majority leaders, insurance commissioners, and NAIC staff on the letter.

SOX, passed in response to major corporate/accounting scandals, aims to protect shareholders of public companies.