RSC Republican Study Committee
REP. TOM PRICE, M.D. (R-GA), CHAIRMAN
PAUL TELLER, EXECUTIVE DIRECTOR
424 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
rsc.price.house.gov
ph (202) 226-9717 / fax (202) 226-1633

Legislative Bulletin……..…..February 24, 2009

Contents:

Key Conservative Concerns

Take-Away Points

-- **Increases Litigation and Premiums:** CBO has found that, if anything, the bill may in fact increase premium costs due to additional (federal) litigation. It is worth noting that this repeal has been pushed by the American Bar Association.

-- **Anticompetitive:** The repeal may have a negative effect on competition by prohibiting new entrants to the market and smaller insurance businesses from gaining access to enough information to accurately trend, forecast, rate or price.

--Unnecessary and Duplicative: State laws and regulators already oversee insurers and bar anticompetitive behavior such as "price fixing, bid rigging, or market allocation."

-- **Politics Not Policy:** This bill appears to be a political move to intimidate insurers rather than thoughtful policy.

For more details on these concerns, see below.

H.R. 4626 — Health Insurance Industry Fair Competition Act *(Perriello, D-VA)*

Order of Business: The bill is scheduled to be considered on Wednesday, February 24, 2009, under a closed rule and waives all points of order except those under clause 9 or 10 of rule XXI. The rule provides for one motion to recommit with or without instructions.

Summary: This week, as part of Speaker Pelosi's plan to peel off small "populist" pieces of the larger government takeover of health care bill (H.R. 3962), the House will vote on the "Health Insurance Industry Fair Competition Act", H.R. 4626. H.R. 4626 provides for a blanket repeal of

the narrow anti-trust exemption currently granted under the McCarran-Ferguson Act to the "business of insurance" for only health insurers. The bill does two things:

- Removes "the business of health insurance" from the exemption granted under the McCarran-Ferguson Act.
- Expands the Federal Trade Commission's (FTC) oversight authority over health insurance whether or not the insurer is for profit or not for profit (current FTC authority applies only to for-profit).

This bill appears to be a political move to intimidate insurers – as contrary to Democrats claim that a repeal (perhaps tellingly, being pushed by the American Bar Association), will increase competition and bring down costs, CBO has found that it may in fact increase premium costs due to being subject to additional (federal) litigation, but more than likely would have no effect as **"state laws already bar the activities that would be prohibited under federal law if this bill was enacted."** The repeal may in fact have a negative effect on competition by prohibiting new entrants to the market and smaller insurance businesses from gaining access to enough information to accurately trend, forecast, rate or price. The National Association for Insurance Commissioners (NAIC) also stated in a Letter to the House and Senate Judiciary Chairmen that "the notion that McCarran-Ferguson in any way encourages collusion or is the cause of high health insurance and medical malpractice premiums **is not supported by the facts** [emphasis added]." **Some conservatives may be concerned that ultimately the bill could have the ironic effect of reducing insurance choices for individuals.**

Background: Congressional Democrats often cite the anti-trust exemption for insurance companies allowed by the McCarran-Ferguson Act of 1945 (15 U.S.C. S. §§ 1011-1015) as the reason for why insurance companies don't "play fair." This argument demonstrates an incomplete understanding of what the narrow exemption actually allows. Congress enacted McCarran-Ferguson in reaction to a Supreme Court decision (*United States v. South-Eastern Underwriters Ass'n*) that opened up insurers to federal anti-trust laws thus throwing in question the long practice and precedent of regulation and taxation of insurers at the state level. **It is worth noting that this legislation was enacted under a Democratic Congress and signed into law by President Franklin D. Roosevelt.**

In the 111th Congress, three separate bills prior to H.R. 4626 (Sec. 262 of H.R. 3962, the "Affordable Health Care for America Act", and H.R. 3596 and S. 1681, the "Heath Insurance Industry Antitrust Enforcement Act of 2009") sought to strip health insurers and medical liability insurers of this exemption to some extent. However, unlike previous attempts in the House, H.R. 4626 does not affect medical liability insurers and does provide a limited safe harbor for sharing historical loss data or "performing actuarial services if doing so does not involve a restraint of trade." During the markup of H.R. 3596, an amendment by Rep. Lungren was accepted that would have permitted the collection and distribution of historical loss data, creation of a loss development factor, and performance of actuarial services that do not involve a "restraint of trade." While this improved the bill, there were still concerns that the exception was vague and would be subjected to significant future litigation. This amendment, however, was left out of the final version, H.R. 4626.

What the Current Anti-Trust Exemption Actually Allows For: Despite the Administration and Congressional Democrats arguments that this exemption allows for anticompetitive practices like "price fixing, bid rigging, and market allocation," McCarran only allows a federal exemption for insurers to the extent that three conditions are met:

- The activity is "the business of insurance" (this definition has been narrowed by the Courts to mean activities such as underwriting, spreading of risk, the relationship between companies and their policyholders, and is limited to entities within the industry ***not any insurance company activity or "business of insurers")***;
- Such "business of insurance" is regulated at the state level; and,
- Such activity does not comprise "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation".

Thus the business of insurers (such as mergers) already falls under current anti-trust laws, the FTC, and the Department of Justice.

Conservative Concerns:

Increased Uncertainty and Litigation: While H.R. 4626, does not specifically identify "price fixing, bid rigging, or market allocation" as items it seeks to rectify (as the stand alone House and Senate bills did), it does opens the door for additional federal litigation and challenges to practices currently allowed, regulated and even mandated by the states. In a January 14, 2009 report, Congressional Research Service (CRS) found that given the courts' narrowing definition of the "business of insurance," they would be unlikely to find such activities as protected from McCarran-Ferguson from antitrust laws. However, as CRS noted: "if all of the cited examples of cooperation (sharing data through ratings bureaus, creation and filing of standardized insurance forms, advisory organizations or state-created mechanisms) were found to be in violation**, it would necessitate major changes in the operation of insurers, particularly small insurers which do not have large pools of information from their own experience. Should additional data be unavailable to small insurers in some way, further consolidation in the insurance industry as small insurers merge in order to gain the competitive advantage of additional information is a likely, albeit, ironic, possibility."**

The Business of Insurance is Unique: Without the ability to pool historical loss data and trending, as provided under McCarran-Ferguson, many smaller insurers would simply not be able to establish appropriate prices while maintaining solvency. Unlike most other businesses, the insurance industry must price its product before it knows the costs of providing the products (i.e., "loss costs").

Insurance is Already Regulated at the State Level: As the NAIC points out, "We know there are persuasive arguments that there is a lack of competition in some states, with few insurance companies competing against one another. Such a situation normally raises serious anti-trust concerns. However, insurance companies are different than other businesses in terms of current state oversight." Rates, among other issues, are currently reviewed by state insurance commissioners, who do not permit a rate if it is not justified by claims experience.

Other reasons for high market share that have nothing to do with anti-trust violations may be the result of that plan offering the most competitive rates, highest beneficiary satisfaction or longest market history in that state, or other factors such as aggressive state regulations and benefit mandates that keep insurers from entering the market.

Some conservatives may believe that a more reasonable approach to increase insurance competition would be to allow for individuals to shop across state lines (which does not require repealing the current anti-trust exemption).

Committee Action: The original version as introduced, H.R. 3596, was referred to the House

Committee on Judiciary and reported out on November 2, 2009 by a vote of 20-9 with three Republicans voting in favor. H.R. 4626 was referred to the House Committee on Judiciary on February 22, 2010.

Cost to Taxpayer: No CBO score for H.R. 4626. However, CBO determined that, H.R. 3596, would likely "could affect direct spending and revenues, but any such effects would not be significant".

Does the Bill Expand the Size and Scope of the Federal Government?: Yes. The bill allows for health insurers to now fall under both state and federal jurisdiction. According to CBO "Because the bill would establish a new offense, the government would be able to pursue cases that it otherwise would not be able to prosecute."

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes. While there is no CBO score or committee report for H.R. 4626, CBO determined that H.R. 3596 contains a private-sector mandates on the issuers of health insurance as defined in the Unfunded Mandates Reform Act (UMRA). The total cost to the private sector of those mandates, as estimated by CBO, would not exceed the threshold established in that act for private entities ($139 million in 2009, adjusted annually for inflation).

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: There is no committee report citing constitutional authority available on H.R. 4626. However, the committee reports for H.R. 3596 states that the bill does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

Constitutional Authority: There is no committee report citing constitutional authority available on H.R. 3962. However, the Committee reports for H.R. 3596 state that pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committees found that the constitutional authority for H.R. 3596 is provided in article I, section 8, clauses 3 and 18 of the United States Constitution.

Outside Groups Opposed: Competitive Enterprise Institute (CEI), America's Health Insurance Plans (AHIP), National Association of Health Insurers (NAIC), National Association of Health Underwriters (NAHU), U.S. Chamber of Commerce, and National Conference of Insurance Legislators (NCOIL). Note this list is not inclusive; numerous other groups were opposed to previous versions of the legislation but have not weighed in on the current bill.

RSC Staff Contact: Emily Henehan Murry, emily.murry@mail.house.gov, (202) 225-9286