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# Insurance Provisions of Financial Services Modernization Bills in the 106th Congress

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## Summary

Current financial services modernization proposals would continue state regulation of the insurance business and would generally approve expanded insurance powers for banks. On May 6, the Senate passed S. 900 (S.Rept. 106-44), a financial modernization bill with provisions paralleling those of H.R. 10, as introduced, with respect to state regulation of insurance. On July 1, the House passed H.R. 10 (H.Rept. 106-74, Parts I, II, and III). While the overall treatment of the insurance provisions in the two bills is similar, there are some differences. Among them are the treatment of sales of title insurance, the articulation of the standard for court review of disputes between federal and state regulators, and the extent to which national bank subsidiaries are precluded from underwriting insurance. H.R. 10, and not S. 900, would prohibit insurance companies from disclosing personal medical, health, and genetic information, and includes provisions on the redomestication of mutual insurance companies. Overall tracking of financial reform legislation is provided in CRS Issue Brief IB10035, which will be updated as developments warrant.

## Background

At the beginning of the 106th Congress, House Banking Committee Chairman Leach's version of financial modernization legislation, H.R. 10; House Banking Committee Minority Ranking Member LaFalce's H.R. 665; and Senate Banking Committee Chairman Gramm's committee staff draft legislation took distinct approaches to balancing state authority over insurance with preservation of federally authorized insurance powers for banks, bank subsidiaries, and bank and financial holding company affiliates.[1] On May 6, the Senate passed S. 900 (S.Rept. 106-44), a financial modernization bill with provisions paralleling those of H.R. 10, as introduced, with respect to state regulation of insurance.

[1] See CRS Report RS20132, "Insurance Provisions in Financial Services Modernization Bills in the 106th Congress: Antecedent Supreme Court Decisions."

On July 1, the House passed H.R. 10 (H.Rept. 106-74, Parts I, II, and III). While the overall treatment of the insurance provisions in the two bills is similar, there are some differences. Among them are the treatment of sales of title insurance, the articulation of the standard for court review of disputes between federal and state regulators, and the extent to which national bank subsidiaries are precluded from underwriting insurance. Some of the differences in the insurance provisions of the bills passed by each House are briefly outlined as follows:

| **H.R. 10** | **S. 900** |
|---|---|
| Prohibits insurance underwriting in national banks and their subsidiaries subject to certain exceptions. | Similar provision except authorizes national banks of assets of $1 billion or less to form subsidiaries to engage in financial activities including insurance underwriting. |
| Prohibits national banks and their subsidiaries from selling title insurance, except for that lawfully conducted on the date of enactment. Also permits title insurance sales in states which authorize state chartered banks to sell title insurance and only to the same extent, in the same manner, and under the same restrictions as state-chartered banks. | No similar provision. |
| Allows a mutual insurance company to change its domicile under certain circumstances. | No similar provision. |
| Establishes National Association of Registered Agents and Brokers for multistate insurance licensing purposes unless the majority of states have enacted uniform laws governing insurance licensing, including reciprocity, within three years. | Includes a “sense of Congress” resolution that if states have not implemented uniform insurance licensing within three years, Congress should take steps to rectify the problems. |
| States would continue to regulate insurance, with mandatory licensing (special temporary exemption from licensing for rental car agency activities).<br><br>Bank sales of insurance would be subject to state laws.<br><br>There would be 13 safe harbors where states could preempt federal bank regulators.<br><br>Specific provision applies functional regulation to insurance sales by national banks in places of less than 5,000. | Similar except no explicit provision applying functional regulation to national banks in places of less than 5,000. |
| Preempts States’ ability to prevent or restrict affiliations of banking institutions with insurance companies and specifies certain state administrative, management and capital requirements that are permissible. | Preempts ability of states to prevent or restrict affiliations of banking institutions with insurance companies and permits certain state administrative requirements “ if the State actions do not have the practical effect of discriminating, either intentionally or unintentionally” against a banking |

| H.R. 10 | S. 900 |
|---|---|
| | institution. No mention is made of management or capital requirement. |
| Preempts ability of states to discriminate against insurance sales by banking institutions. | Preempts ability of states to discriminate against insurance sales by banking institutions. |
| Specifies that state antitrust and general corporate laws are subject to the antidiscrimination standard and are not preempted as restrictions on authorized affiliations. | No similar provision. |
| Expedited court review of federal and state regulator disputes "without unequal deference." | Expedited court review of federal and state regulator disputes "with equal deference." |
| Authorizes various disclosures between banking regulators and state insurance regulators. Requires federal banking agencies to consult with state insurance regulators prior to making determinations relating to affiliations. | No similar provisions. |
| Authorizes federal banking regulators to prescribe consumer protection regulations respecting bank insurance sales, specifying certain contents. | Similar approach. There are, however, variations in the prescribed content of the regulations. For example, H.R. 10 requires bank sales of insurance not discriminate against domestic violence victims, and S. 900 has no corresponding provision. Among the disclosures in S. 900 required to be included in regulations respecting the sales of insurance products, and not in H.R. 10, is one relating to the tying of the purchase of a financial product to obtaining enhanced service from an affiliate. There are other similar distinctions between the two bills. |
| State laws would preempt unless the federal bank regulators jointly determine that the federal regulations provide greater protection. | State laws would preempt unless the federal bank regulators jointly determine that the federal regulations provide greater protection and consider comments by state regulators and notify the states of federal preemption. Such preemption would not go into effect if within three years the state overrides the preemption by statute. |
| N.A. | Includes a requirement that federal regulations not have the practical effect of discriminating against insurance sales by persons not affiliated with an insured depository institution. |
| Insurance companies would be prohibited from disclosing individually identifiable medical, health, and genetic information, subject to certain exceptions. | No similar provision. |

Both bills would preserve functional regulation of insurance by state regulators and prohibit states from restricting bank affiliations permitted by federal law. The standard for determining whether a state law or regulation discriminates against a banking concern would be stated in terms of whether it distinguishes by its terms between depository institutions and other persons in a way that is more adverse to the depository institution than to the others. With respect to insurance sales activities, the bills include preemption standards that differ according to date of enactment of state law and type of activity being restricted. In some instances, the preemption provisions refer to the *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 1103 (1996) standard to preempt state laws that "prevent or significantly interfere with the ability of an insured depository institution or wholesale financial institution, or a subsidiary or affiliate thereof, to engage ... in any insurance sales, solicitation, or cross-marketing activity." These preemption standards are as follows:

| **Type of State Restriction** | **Standard of Preemption** |
|---|---|
| Any restriction falling into one of 13 safe harbors if enacted before 9/3/98 | No federal preemption. (Litigation could test whether the state law satisfies the standards of the safe harbors, with the court under the obligation to decide "based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without equal deference.") |
| Any restriction falling into one of 13 safe harbors if enacted on or after 9/3/98. | No federal preemption. (Litigation could test whether the state law satisfies the standards of the safe harbors, with the court under the obligation to decide "based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without unequal deference" ("with equal deference," S. 900).) |
| Any other state restriction relating to insurance sales if enacted before 9/3/98. | Federal preemption under the *Barnett* standard: "Whether it prevents or significantly interferes with the national bank's exercise of its power." |
| Any other state restriction relating to insurance sales if enacted on or after 9/3/98. | Federal preemption under a modified *Barnett* standard; "[w]hether it prevent[s] or significantly interfere[s] with the ability of an insured depository institution ... to engage ... in any insurance sales, solicitation, or cross-marketing activity." The court would be under the obligation to decide "based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without equal deference" ("with equal deference," S. 900).<br><br>Caveat: State laws falling into any of four |

| Type of State Restriction | Standard of Preemption |
|---|---|
| | categories specified as discriminating against depository institutions are preempted. |
| Any other state restriction relating to insurance, other than sales, if enacted before 9/3/98. | *Barnett* standard, including interpretation of McCarran-Ferguson Act. |
| Any other state statute relating to insurance, other than sales, if enacted on or after 9/3/98 | Whether "it prevent[s] or restrict[s] an insured depository institution ... from engaging ... in any activity permitted under this Act." The court would be under the obligation to decide "based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without unequal deference."<br><br>Caveat: There would be no federal preemption for "State statutes ... and ... actions ... to the extent that they ... relate to, or are issued, adopted, or enacted for the purpose of regulating the business of insurance in accordance with ... the 'McCarran-Ferguson Act,'" unless they fall into any of four categories specified as discriminating against depository institutions. |

The thirteen safe harbors are types of laws which states could enact that distinguish between banking institutions and other insurance-providing entities. They would cover banking concerns acting in behalf of insurance companies, e.g., by processing claims or providing investment management, as well as those engaged directly in providing insurance. The safe harbor provisions would insulate from federal preemptions state restrictions regarding: (1) requiring credit insurance issued by an affiliate or subsidiary; (2) imposing fees for non-affiliated credit insurance that are not required for such insurance issued by a subsidiary or affiliate; (3) misleading advertising concerning whether the federal government guarantees the insurance product issued by the bank; (4) paying of any insurance brokerage fee or commission to anyone not a licensed insurance broker; (5) paying any insurance referral fee to anyone other than a licensed insurance broker; (6) releasing insurance customer information without consent; (7) using health information obtained in the insurance business for other purposes; (8) various specified tying arrangements involving tying of services to the purchase of insurance; (9) informing bank and financial holding company loan customers that the loan is not contingent upon purchasing insurance from an affiliate or subsidiary; (10) informing insurance customers of the absence of the federal guaranty for the insurance products; (11) separate documentation of combined credit and insurance transactions; (12) written consent for the inclusion of insurance premiums in credit transactions; and (13) separating insurance transactions records and opening them to state inspection.

The four categories of state laws that are included as discriminating against depository institutions are those that (1) distinguish by their terms between banking institutions and others engaged in the insurance activities "in any way adverse" to the depository institutions; (2) will have an impact on depository institutions substantially

more adverse than on the others; (3) effectively prevent depository institutions from engaging in insurance activities permitted under the legislation; or (4) conflict with the intent of this legislation to permit authorized affiliations between depository institutions and insurance concerns.

## Medical Records Privacy[2]

H.R. 10 also includes restrictions on insurance company disclosure of individually identifiable customer health, medical, and genetic information that applies to insurance companies and their subsidiaries and affiliates. Disclosure is authorized: (1) with consent of the customer, (2) for various specified purposes related to insurance operations and business; (3) in connection with payments or transfer of accounts or interests in accounts; and (4)for various law enforcement purposes.[3] Enforcement would be under existing state law or by a federal court enforcement action brought by a State. These restrictions would go into effect on February 1, 2000. The legislation contains a sunset provision stating that these restrictions will not take effect or will cease to take effect if legislation is enacted satisfying the requirements of section 264(c)(1) of the Health Insurance Portability and Accountability Act of 1996. While these restrictions are in effect there is to be consultation with the Secretary of Health and Human Services.

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[2] "Medical Records Confidentiality" is the subject of CRS Issue Brief 98002, which elaborates on the relevant provisions of the Health Insurance Portability and Accountability Act of l996.

[3] Critics have raised concerns about the breadth of the exceptions to the consent requirement and whether or not the language of the provisions preempt the requirement in the Health Insurance Portability and Accountability Act of 1996, which in the absence of Congressional medical privacy legislation, would require the Secretary of Health and Human Services to promulgate certain medical records privacy regulations. See statements of Rep. Condit, 145 *cong. Rec.* H 5291 (July 1, 1999); statement of Rep. LaFalce, 145 *Cong. Rec.* H 5186 (July 1, 1999); and, "Still Not Private Enough," Editorial, *Washington Post* A-1, col. 1 (July 8, 1999).