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CRS Report for Congress

Insurance Regulation: Issues, Background, and Current Legislation

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Insurance Regulation: Issues, Background, and Current Legislation

Summary

The individual states have been acknowledged as the primary regulators of insurance as far back as 1868. Since the 1945 McCarran-Ferguson Act, this system has operated with the specific blessing of Congress, but has also been subject to periodic scrutiny and suggestions that the time may have come for Congress to take back the regulatory authority that it granted to the states. In the late 1980s and early 1990s, congressional scrutiny was largely driven by the increasing complexities of the insurance business and concern over whether the states were up to the task of ensuring consumer protections, particularly insurer solvency.

Congressional interest in insurance regulation in the 107th-109th Congresses focused on the inefficiencies in the state regulatory system. A major catalyst for congressional interest has been the aftermath of the Gramm-Leach-Bliley Act of 1999 (GLBA), which modernized the regulatory structure for banks and securities firms, but left the insurance sector largely untouched. Many larger insurers, and their trade associations, had previously defended state regulation but consider themselves at a competitive disadvantage in the current regulatory structure. They are now largely arguing for an optional federal charter akin to that available to banks. The increased internationalization of insurance has also brought more pressure on the current U.S. regulatory system, particularly as the regulatory paradigms being embraced overseas differ greatly from those in the United States.

The states, particularly working through the National Association of Insurance Commissioners (NAIC), have not been idle in the face of this increased scrutiny. They reacted quickly to the GLBA requirements that related to insurance agent licensing and have embarked on a wider ranging project to modernize insurance regulation. This includes both regulatory aspects, such as streamlining the process for rate and form filing, and more basic legal aspects, such as the creation of an interstate compact to provide uniformity across states for some life insurance products. Since every state legislature must pass the legal changes suggested by the NAIC, the process typically does not move rapidly.

Some in Congress and the executive branch have not been content with the changes being undertaken by the states, and several proposals have been put forth over the past few years for increased federal involvement in insurance regulation. In the 110th Congress, S. 40 and H.R. 3200 would create an optional federal charter (OFC) for insurers modeled roughly after the dual regulatory system for banks. This call for an OFC was echoed by Secretary of the Treasury Paulson in a recently released blueprint for regulatory modernization. Several narrower bills addressing insurance regulation and regulatory requirements have been introduced in the 110th Congress. These include H.R. 1065 and S. 929, S. 618 and H.R. 1081, H.R. 1746, S. 1061, S. 1865, H.R. 4041, H.R. 5611, H.R. 5633, H.R. 5792, H.R. 5840, H.R. 6063, and H.R. 6213. The House passed H.R. 1065 on June 25, 2007, but the other bills have yet to be considered on the floor of either House in this Congress. This report will be updated as legislative events warrant.

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Insurance Regulation: Issues, Background, and Current Legislation

Introduction

Insurance companies comprise a major segment of the U.S. financial services industry. Unlike banks and securities firms, however, insurance companies have been regulated solely by the states for the past 150 years. This stems from an 1868 decision of the U.S. Supreme Court[1] that insurance was not interstate commerce and thus was not subject to regulation by the federal government under the Commerce Clause of the U.S. Constitution. Courts followed that precedent for the next 75 years. In 1944, the U.S. Supreme Court effectively reversed its 1868 ruling and held that insurance was interstate commerce and was subject to federal oversight.[2] By that time, the state insurance regulatory structure was well established, and a joint effort led by state regulators and insurance industry leaders to overturn the decision legislatively led to the passage of the McCarran-Ferguson Act of 1945.[3] That act relinquished to the states federal authority to regulate insurance, subject to "effective" insurance regulation by the states, and granted a federal antitrust exemption to the insurance industry for "the business of insurance," which has been determined not synonymous with the "business of insurers."[4]

After 1945, the jurisdictional stewardship entrusted to the states under McCarran-Ferguson was reviewed by Congress on various occasions. Some narrow exceptions to the 50-state structure of insurance regulation have been enacted such as that for some types of liability insurance in the Liability Risk Retention Act.[5] In general, however, each time broad proposals were made to transfer insurance regulatory authority back to the federal government, they were met by successful opposition from the states as well as from a united insurance industry. Such proposals for federal oversight usually spurred a series of regulatory reform efforts at the state level and by the National Association of Insurance Commissioners (NAIC). Such efforts were directed at correcting perceived deficiencies in state regulation in order to forestall a federal regulatory takeover. They were generally accompanied by pledges from state regulators to work for more uniformity and efficiency in the state regulatory process.

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[1] *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868).

[2] *U.S. v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

[3] 15 U.S.C. Sec. 1011 *et seq*.

[4] See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979).

[5] 15 U.S.C. Sec. 3901 *et seq*. See CRS Report RL32176, *The Liability Risk Retention Act: Background, Issues, and Current Legislation*, by Baird Webel.

A major effort to transfer insurance regulatory authority to the federal government began in the mid-1980s, following insolvencies of several large insurance companies. Representative John Dingell, who chaired the House Energy and Commerce Committee that had jurisdiction over insurance at the time, questioned whether state regulation was up to the task of overseeing such a large and diversified industry. He conducted several hearings on the state regulatory structure and also proposed legislation that would have created a federal insurance regulatory agency modeled on the Securities and Exchange Commission (SEC). State insurance regulators and the insurance industry opposed his proposal and worked together on a series of reforms at the state level and at the NAIC, including a new state accreditation program setting baseline standards for state solvency regulation. Under those standards, in order to obtain and retain its accreditation, each state must have adequate statutory and administrative authority to regulate an insurer's corporate and financial affairs and the necessary resources to carry out that authority. In spite of such reforms, however, another breach in the state regulatory system occurred in the 1990s, when Martin Frankel, who had previously been barred from securities dealing by the SEC, slipped through the oversight of several states' insurance regulators. Before being stopped, he had looted a number of small life insurance companies of some $200 million. Such a breach was a major embarrassment to state regulation, but it did not bring long-term change to federal policy.

In the middle and latter part of the 1990s, Congress' attention on insurance regulatory matters waned. In recent Congresses, however, attention has again focused on the regulatory structure of insurance. The House Financial Services Committee in particular held more than a dozen hearings at both the subcommittee and full committee levels on insurance matters from the 107th through the 109th Congresses. Representative Michael Oxley, who chaired the committee for this time, indicated a strong interest in pursuing legislation to change the regulatory structure. A number of broad proposals for some form of federal chartering or other federal intervention in insurance regulation were put forward in both houses of Congress, but none were marked up or reported by the various committees of jurisdiction.

In the first session of the 110th Congress, Senators John Sununu and Tim Johnson and Representatives Melissa Bean and Edward Royce introduced the National Insurance Act of 2007 (S. 40 and H.R. 3200) into their respective chambers. While differing slightly, both bills would create an optional federal charter (OFC) for property/casualty and life insurance. This legislation was echoed by the U.S. Department of the Treasury when it released a "Blueprint for a Modernized Financial Regulatory Structure" on March 31, 2008. As an intermediate step, the Treasury blueprint also called for an optional federal charter, although it did not specifically endorse the existing OFC bills.

A number of narrower bills affecting different facets of insurance regulation and regulatory requirements have also been introduced. These bills include the Nonadmitted and Reinsurance Reform Act of 2007 (H.R. 1065 and S. 929), the Insurance Industry Competition Act of 2007 (S. 618 and H.R. 1081), the Holocaust Insurance Accountability Act of 2007 (H.R. 1746), the Homeowners' Insurance Noncoverage Disclosure Act (S. 1061), the Life Insurance Fairness for Travelers Act of 2007 (S. 1865), the Insurance Non-Discrimination for Survivors Act (H.R. 4041), the National Association of Registered Agents and Brokers Reform Act of 2008

(H.R. 5611), the Nondiscriminatory Use of Consumer Reports and Consumer Information Act of 2008 (H.R. 5633), the Increasing Insurance Coverage Options for Consumers Act of 2008 (H.R. 5792), the Insurance Information Act of 2008 (H.R. 5840) the Personal Lines of Insurance Fairness Act of 2008 (H.R. 6062), and the Reinsurance International Solvency Standards Evaluation Board Act of 2008 (H.R. 6213). (See below for additional details on legislation.)

Factors Promoting Change

Three interrelated factors provide impetus for broad change in the insurance regulatory system. These are (1) previous legislation that revamped regulation for the banking and securities industries; (2) change in the insurance marketplace; and (3) the impact of regulatory changes abroad. Taken together, these changes are having a significant impact on the competitive position of companies both within the insurance industry and between insurers and other financial service companies. Largely because of this impact, significant portions of the insurance industry, which had previously supported the state regulatory system, are now calling for federal intervention.

The Gramm-Leach-Bliley Act[6]

In 1999, Congress passed the Gramm-Leach-Bliley Act (GLBA), instituting a massive overhaul of the federal laws governing U.S. financial institutions. Support for the measure came largely as a result of changes in market forces, frequently referred to as "convergence." Convergence in the financial services context refers to the breakdown of distinctions separating different types of financial products and services, as well as the providers of once separate products. Drivers of such convergence are generally considered to be market forces such as globalization, new technology, e-commerce, deregulation, market liberalization, increased competition, tighter profit margins, and the growing number of sophisticated consumers. The goals behind these driving forces, in turn, appear to be the increasing efforts of all financial services providers to find growth, gain market share, create new revenue streams, and enter new markets. For example, U.S. banks have looked to adjunct non-banking products such as insurance and pension products to increase their profitability, pointing to European "bancassurers" that generate 20% to 30% of their profits from the sale of insurance and investment products integrated into core retail banking businesses.

GLBA repealed federal laws that seemed inconsistent with the way that financial services products were actually being delivered, and removed many barriers that kept banks or securities firms from competing with insurance companies. The result was the creation of a new competitive paradigm in which insurance companies now find themselves in direct competition with brokerages, mutual funds, and commercial banks. GLBA did not, however, change the basic regulatory structure for insurance or other financial products. Instead, it reaffirmed the McCarran-Ferguson Act, recognizing state insurance regulators as the "functional" regulators

[6] P.L. 106-102, 113 Stat. 1338.

of insurance products and those who sell them. Some insurance companies believe that in this environment, state regulation places them at a competitive marketplace disadvantage. They maintain that their non-insurer competitors in certain lines of products have far more efficient federally based systems of regulation, while they remain subject to the perceived inefficiencies of state insurance regulation, such as the regulation of rates and forms as well as other delays in getting their products to market. For example, life insurers with products aimed at retirement and asset accumulation must now compete with similar bank products. Banks can roll out such new products nationwide in a matter of weeks, while some insurers maintain that it can take as long as two years to obtain all the necessary state approvals for a similar national insurance product launch.

GLBA also addressed the issue of modernizing state laws dealing with the licensing of insurance agents and brokers and made provision for a federally backed licensing association, the National Association of Registered Agents and Brokers (NARAB), which would have come into existence three years after the date of enactment if at least 29 states failed to enact the necessary legislation for state uniformity or reciprocity. Following GLBA, the requisite number of states enacted this legislation, and thus the NARAB provisions never came into effect. The issue of insurance producer licensing reciprocity or uniformity continued, however, as some have continued to see problems in the actions taken by the individual states. Every state has not passed legislation implementing reciprocity and, even in those states that did, it has not always been implemented as smoothly as desired, particularly by the agents and brokers themselves.[7]

The Market after the Gramm-Leach-Bliley Act

Congress passed the Gramm-Leach-Bliley Act to enhance competition among financial services providers. Though many observers expected banks and insurers to converge as institutions after it passed, this has not occurred as expected. In fact, the major merger between a large bank, Citibank, and a large insurer, Travelers, which actually spurred the passage of GLBA, has effectively been undone. The corporation that resulted from the merger, Citigroup, has divested itself of almost all of its insurance subsidiaries. The property/casualty divisions were sold first, to the St. Paul's Companies, and the large majority of the life insurance operations were sold to Metlife. The only remaining sizeable bank-insurer merger is Chase Insurance, which is a part of JPMorgan Chase.[8]

Although large bank-insurer mergers have not occurred as expected, significant convergence has continued. Instead of merging across sectoral lines, banks began distributing — but not "manufacturing" — insurance, and insurers began creating products that closely resembled financing. Consolidation has also continued within

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[7] See, for example, the April 16, 2008 testimony by Tom Minkler on behalf of the Independent Insurance Agents and Brokers made before the House Financial Services Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises at: [http://www.house.gov/apps/list/hearing/financialsvcs_dem/minkler041608.pdf].

[8] In 2003, Bank One acquired Zurich Life, and then in 2004, Bank One merged into JPMorgan Chase, and the insurance divisions were renamed.

each sector, as banks merged with banks and insurers with insurers. Also, although Congress had instituted "functional regulation" in GLBA, regulation has since tended to track institutional lines.[9]

International Developments

Although banking, insurance and other financial services are not an industry that produces a tangible good to be shipped across borders, the trade in such services makes up a large amount of international trade. The United States has generally enjoyed a surplus in trade in financial services, other than insurance, but in insurance services the United States has consistently run a deficit with the rest of the world.[10] Consolidations in the insurance industry are creating larger international entities with growing market shares, particularly in the reinsurance market. Some have speculated that the growing "internationalization" of the financial services industry means governments may find it difficult to reform their regulation in isolation from other jurisdictions and international developments. The need for a single voice at the federal level to represent U.S. insurance interests on the international stage is a frequently heard argument for increased federal involvement in insurance regulation.

The European Union (EU), our biggest trading partner in insurance services, is continuing with its Financial Services Action Plan (FSAP), a comprehensive program to transform the EU into a single market for financial services. The EU is putting forward an updated solvency regime for insurers — known as Solvency 2 — that is intended to parallel the Basel II capital standards for banks. It is "'an ambitious proposal that will completely overhaul the way we ensure the financial soundness of our insurers. We are setting a world-leading standard that requires insurers to focus on managing all the risks they face and enables them to operate much more efficiently.'"[11] The EU has also adopted a reinsurance directive that creates a "single license" or "passport" for EU reinsurers, which would enable reinsurers licensed under the proposed standards in their home EU country to do business in all other EU countries without further requirements or collateral.[12] The reinsurance directive is seen as "a useful tool in international trade negotiations as

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[9] See CRS Report RS21827, *Insurance Regulation After the Gramm-Leach-Bliley Act*, by Carolyn Cobb.

[10] U.S. exports of non-insurance financial services were $46 billion in 2007 vs. imports of $11.5 billion. Insurance exports in 2007 totaled $10.3 billion vs. imports of $42.8 billion. See the Bureau of Economic Analysis website at [http://www.bea.gov/bea/international/bp_web/simple.cfm?anon=71&table_id=3&area_id=3].

[11] Charlie McCreevy, European Union Internal Market and Services Commissioner, quoted in "'Solvency II': EU to take global lead in insurance regulation" available at [http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1060&format=HTML&aged=0&language=EN&guiLanguage=en]. The general EU website on Solvency 2 is [http://ec.europa.eu/internal_market/insurance/solvency/index_en.htm].

[12] Text of and further information about the directive is available at [http://europa.eu.int/comm/internal_market/insurance/reinsurance_en.htm].

it could help improve access for European reinsurers to foreign markets...” such as the United States.[13]

Access to the U.S. market for insurance is a significant issue. Of particular concern have been the state regulatory requirements that reinsurance issued by alien[14] reinsurers must be backed by 100% collateral deposited in the United States. Alien reinsurers have asked state regulators to reduce this requirement to as low as 50% for insurers who meet particular criteria, pointing out, among other arguments, that U.S. reinsurers do not have any collateral requirements in many foreign countries and that the current regulations do not recognize when an alien reinsurer cedes some of the risk back to a U.S. reinsurer. In the past, the NAIC has declined to recommend a collateral reduction, citing fears of unpaid claims from alien reinsurers and an inability to collect judgments in courts overseas. At recent NAIC national meetings, however, the NAIC Reinsurance Task Force has advanced a proposal to ease the collateral requirements somewhat, tying them to the financial strength of alien reinsurers. A final NAIC decision has not been reached on the issue and it has provoked significant controversy within the NAIC. In addition to the reinsurance collateral debate, the overall complexity of the regulatory system in the United States has been seen by some as a barrier to overseas companies operating in the United States.[15] This complexity may also end up hindering U.S. companies in the EU as it is not clear that state supervision of U.S. insurers will be sufficient to allow the same “single passport” access to all EU countries that EU insurers will enjoy.

State Regulatory Modernization

Following the passage of GLBA, state insurance regulators working through the NAIC embarked on an ambitious regulatory modernization program in response to both the mounting criticisms of state insurance regulation and the recognition of the growing convergence of financial services and financial services products. In early 2000, NAIC members signed a *Statement of Intent: The Future of Insurance Regulation*, in which they pledged “to modernize insurance regulation to meet the realities of the new financial services marketplace” and “to work cooperatively with all our partners — governors, state legislators, federal officials, consumers, companies, agents and other interested parties — to facilitate and enhance this new and evolving market place as we begin the 21st Century.” New NAIC working groups were formed and charged with addressing the various changes needed to implement those provisions of GLBA requiring regulatory action such as that needed

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[13] European Commission, “Commission Proposes a Directive To Create a Real EU-Wide Market for Reinsurance,” *Internal Market: Financial Services: Insurance: Press Release,* [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/04/513|0|RAPID&lg=EN&display=].

[14] In the United States, the term “foreign” insurer generally denotes an insurer that is chartered in a different state; those insurers from a different country are called “alien” insurers.

[15] See, for example, p. 54 of the European Commission’s *US Barriers to Trade and Investment Report for 2007*, at [http://trade.ec.europa.eu/doclib/docs/2008/april/tradoc_138559.pdf.pdf].

to prevent NARAB from coming into existence, and also to update and modernize state regulation in other ways not required by GLBA but needed to deter growing industry support for federal oversight. The NAIC's new groups addressed such key issues as state privacy protections, reciprocity of state producer licensing laws, promotion of "speed to market" of new insurance products, development of state-based uniform standards for policy form filings, and other proposed improvements to state rate and form filing requirements.

According to NAIC, the states are now well underway in their efforts to modernize state regulation. In 2003, they set specific targets and an implementation schedule for their action plan (entitled: *A Reinforced Commitment: Insurance Regulatory Modernization Action Plan*).[16] Highlights of the NAIC efforts include:

- Certification of 47 states (as of September 2006) as reciprocal jurisdictions for producer licensing laws.[17] This is substantially more than the 29 states needed under GLBA to prevent the establishment of NARAB.

- Continued growth of the System for Electronic Rate and Form Filing (SERFF), intended to be a single, one-stop point of entry for insurers to file changes to rates and forms. More than 269,00 filings were made through SERFF in 2005, up from about 3,700 in 2001. Twelve states now require insurers to file using SERFF or other electronic means.[18]

- State approvals of the Interstate Insurance Product Regulation Compact. This compact is intended to provide increased regulatory uniformity and a single point of product filing using SERFF for four insurance lines — life, annuities, disability income, and long-term care. It came into effect in May 2006.[19] Currently, 32 states[20] have joined the compact. Four additional states[21] have current legislation pending to endorse the compact.

NAIC maintains that states are better positioned than the federal government to serve the interests of U.S. insurance consumers, emphasizing that state regulators are more able to make sure that the personal interests of consumers are not lost in the arena of commercial competition. To support this position, the NAIC points out that

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[16] See [http://www.naic.org/topics/topic_regulatory_mod_plan.htm].

[17] See [http://www.naic.org/urtt_utlr.htm].

[18] See [http://www.serff.org].

[19] See [http://www.insurancecompact.org].

[20] AK, CO, GA, HI, IA, ID, IN, KS, KY, LA, MA, MD, ME, MI, MN, NC, NE, NH, OH, OK, PA, RI, SC, TN, TX, UT, VA, VT, WA, WI, WV, and WY. Puerto Rico is also a member.

[21] CA, IL, NJ, and NY. The District of Columbia also has legislation pending. See [http://www.insurancecompact.org/compact_map.htm].

the total budget for the state insurance departments in 2007 was nearly $1.4 billion. In 2006, the states handled nearly 394,000 official consumer complaints and more than 2.5 million consumer inquiries regarding their policies and their treatment by insurance companies and agents. In 2006, the states employed more than 13,600 employees to handle these complaints and perform the other functions of the state insurance departments.[22]

U.S. Treasury Blueprint for a Modernized Financial Regulatory Structure

On March 31, 2008, the U.S. Treasury Department released a blueprint for revamping the financial regulatory structure in the United States.[23] A wide-ranging document, the blueprint foresees a completely revamped regulatory structure for all financial services. As an intermediate step, it makes two specific recommendations on insurance regulation. First, it calls for the creation of a federal insurance regulator to oversee an optional federal charter for insurers as well as federal licensing for agents and brokers. Second, recognizing that the debate over an optional federal charter is ongoing in Congress, it recommends the creation of an "Office of Insurance Oversight" in the Department of the Treasury as an interim step. This office would be charged with two primary functions: (1) dealing with international regulatory issues, including the power to preempt inconsistent state laws, and (2) collecting information on the insurance industry and advising the Secretary of the Treasury on insurance matters.

Recent Legislative Activity

110th Congress

The National Insurance Act of 2007 (S. 40 and H.R. 3200). Senators John Sununu and Tim Johnson introduced S. 40 on May 24, 2007, and Representatives Melissa Bean and Edward Royce introduced a very similar, but not identical version of the bill (H.R. 3200) in the House on July 26, 2007. These bills would create the option of a federal charter for the insurance industry, including insurers, insurance agencies, and independent insurance producers. They would create a federal regulatory apparatus inside the Department of the Treasury and would preempt most state insurance laws. Thus, nationally licensed insurers, agencies, and producers would be able to operate in the entire United States without fulfilling the requirements of each individual 50 states' insurance laws. S. 40 and H.R. 3200 also would reduce substantially the rate and form regulation applicable to national insurers. Similar, but not identical, bills of the same name were introduced in the 109th Congress. One significant difference between the 109th and 110th Congress

[22] Statistics provided by the NAIC.

[23] See [http://www.treas.gov/press/releases/reports/Blueprint.pdf].

versions is the inclusion of surplus lines insurance[24] in the bill. The current bills would allow only the state in which the insured resides or does business to tax surplus lines insurance and would allow national insurance producers to sell surplus lines insurance. The previous versions of the National Insurance Act did not specifically address surplus lines insurance.[25]

H.R. 3200 was referred to the House Financial Services Committee. Hearings or markups specifically on it have yet to be scheduled. The bill was discussed in a Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises hearing on April 16, with one witness, Alastair Shore, testifying on behalf of the American Council of Life Insurance and the American Insurance Association in support of the bill. S. 40 was referred to the Senate Banking Committee, which has yet to take action on the bill.

The Nonadmitted and Reinsurance Reform Act of 2007 (H.R. 1065 and S. 929). Representative Dennis Moore and 44 cosponsors introduced H.R. 1065 on February 15, 2007. H.R. 1065 is nearly identical to H.R. 5637, which passed the 109th Congress as is discussed below. Senators Mel Martinez and Bill Nelson introduced S. 929 on March 20, 2007. S. 929 is identical to H.R. 5637 from the 109th Congress as that bill passed the House. In the 110th Congress, the House again acted on this bill, passing it under Suspension of the Rules by voice vote on June 25, 2007. After being received by the Senate, H.R. 1065 was referred to the Committee on Banking, Housing, and Urban Affairs, as S. 929 was after introduction. At the time of this report, no committee action was scheduled on either bill.

These bills would address a relatively narrow set of insurance regulatory issues where currently some see overlapping regulation by multiple states. In the area of nonadmitted ,or surplus lines, insurance, the bills would harmonize, and in some cases reduce, regulation and taxation of this insurance by investing the "home state" of the insured with the sole authority to regulate and collect the taxes on a surplus lines transaction. Those taxes that would be collected may be distributed according to a future interstate compact, but absent such a compact their distribution would be up to the home state. These bills also would preempt any state laws on surplus lines eligibility that conflict with the NAIC model law and would implement "streamlined" federal standards allowing a commercial purchaser to access surplus lines insurance. For reinsurance transactions, they would invest the home state of the insurer purchasing the reinsurance with the authority over the transaction while investing the home state of the reinsurer with the sole authority to regulate the solvency of the reinsurer.[26]

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[24] This is insurance written by companies who do not hold a license in a particular state. In general, it is used to insure unusual risks which no licensed, or admitted, insurer wishes to insure.

[25] See CRS Report RL34286, *Insurance Regulation: Optional Federal Charter Legislation*, by Baird Webel.

[26] See CRS Report RS22506, *Surplus Lines Insurance: Background and Current Legislation*, by Baird Webel.

The Insurance Industry Competition Act of 2007 (S. 618 and H.R. 1081). Senator Patrick Leahy and four cosponsors introduced S. 618 in the Senate on February 15, 2007, while Representative Peter DeFazio and five cosponsors introduced H.R. 1081 in the House on the same day. The two bills are identical. Both would abolish the current exemption from federal antitrust laws for the "business of insurance" that dates to the McCarran-Ferguson Act of 1945 and remove a prohibition on investigations of insurance companies by the Federal Trade Commission. Neither bill would change the sections of the McCarran-Ferguson Act that give preeminence to state insurance regulators. The Senate Judiciary Committee held a hearing on S. 618 on March 7, 2007, but hearings have not been scheduled in the House on H.R. 1081.[27]

The Holocaust Insurance Accountability Act of 2007 (H.R. 1746). Representative Ileana Ros-Lehtinen and four cosponsors introduce H.R. 1746 on March 28, 2007. This bill would create a publically available registry of insurance polices issued between January 30, 1933, and December 31, 1945, to persons domiciled in an area controlled by or allied with Nazi Germany, and require insurers to file information on these policies with the Secretary of Commerce within 90 days of the bill's enactment. H.R. 1746 would also create a federal civil cause of action for any claim arising out of such a policy. It specifically indicates that nothing in the act would preempt state laws requiring disclosure or providing for rights or remedies available to a claimant on such a policy. The House Foreign Affairs Committee marked up the bill with minor amendments and ordered it reported on October 23, 2007.

The House Financial Services Committee, the primary committee of jurisdiction, held a hearing on February 7, 2008, and marked up the bill on June 25, 2008. At this markup, Chairman Barney Frank began with an amendment in the nature of a substitute significantly different than the original bill text. Chairman Frank's amendment would require insurers to respond to written inquiries regarding Holocaust-era policies within 90 days and provide, within a reasonable amount of time, all information regarding this request. It provides for monitoring of insurer compliance by the New York Holocaust Claims Processing Office and a $5,000-per-day civil penalty on insurers for non-compliance. The Frank amendment retains a federal cause of action for Holocaust-era claims, but substantially limits this cause of action. In the markup, a Sherman amendment relating to subsidiary liability was agreed to, subject to modification of the precise language, while another Sherman amendment establishing a registry of insurance policies from the Holocaust-era was not agreed to. The committee ordered the bill to be reported by voice vote.

H.R. 1746 has also been referred to the House Oversight and Government Reform Committee, where it is still pending.[28]

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[27] See CRS Report RS22639, *Impact of the Abolition of McCarran-Ferguson Antitrust Exemption for the 'Business of Insurance'*, by Janice E. Rubin and Baird Webel, and CRS Report RL33683, *Courts Narrow McCarran-Ferguson Antitrust Exemption for 'Business of Insurance': Viability of 'State Action' Doctrine as an Alternative*, by Janice E. Rubin.

[28] See CRS Report RL34348, *Holocaust-Era Insurance Claims: Background and Proposed*
(continued...)

The Homeowners' Insurance Noncoverage Disclosure Act (S. 1061). Senator Trent Lott introduced S. 1061 on March 29, 2007. This bill would require a "plain English" disclosure box at the front of the insurance policy restating "all conditions, exclusions, and other limitations" of the policy. Such requirements are typically a part of the policy form approval process that is done by state insurance regulators. S. 1061, however, would not create a federal insurance regulator; instead, the Federal Trade Commission would enforce this requirement pursuant to its "unfairness" authority.

The Life Insurance Fairness for Travelers Act of 2007 (S. 1865). Senator Charles Schumer introduced S. 1865 on July 24, 2007. This bill would limit the ability of life insurers to consider foreign travel in their underwriting decisions, preventing them from declining coverage due to travel and requiring any increase in premium be based on good faith actuarial evidence. It would do this by amending the Terrorism Risk Insurance Act of 2002 (TRIA, 15 U.S.C. 6701 note) and is similar to language included in H.R. 2761 and H.R. 4299, bills considered by the House to extend and expand the TRIA. Such language was not included in H.R. 2761 as it was signed into law by the President. S. 1865 does not indicate a specific enforcement mechanism for the requirements it contains, nor grant a specific right of private action.

The Insurance Non-Discrimination for Survivors Act (H.R. 4014). Representatives Lucille Roybal-Allard and Ted Poe introduced H.R. 4014 on October 31, 2007. This bill would forbid insurers from discriminating against survivors of domestic abuse by canceling an insurance policy, limiting insurance coverage, or increasing insurance premiums on the basis of this abuse. Such actions would be considered an unfair or deceptive trade practice under the Federal Trade Commission Act and individuals would be granted a private cause of action in state or federal court against insurers in violation of the act.

The National Association of Registered Agents and Brokers Reform Act of 2008 (H.R. 5611). This bill was introduced by Representative David Scott along with 14 cosponsors on March 13, 2008. H.R. 5611 would establish a National Association of Registered Agents and Brokers (NARAB). NARAB would be a private, nonprofit corporation, whose members, once licensed as an insurance producer in a single state, would be able to operate in any other state subject only to payment of the licensing fee in that state. The NARAB member would still be subject to each state's consumer protection and market conduct regulation, but individual state laws that treated out of state insurance producers differentially than in-state producers would be preempted. NARAB would be overseen by a board made up of five appointees from the insurance industry and four from the state insurance commissioners. The appointments would be made by the President and the President could dissolve the board as whole or suspend the effectiveness of any action taken by NARAB. The language in this bill is similar to the provisions on insurance producer licensing in GLBA discussed previously in this report.

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[28] (...continued)
Legislation, by Paul Belkin, David H. Carpenter, Janice E. Rubin, and Baird Webel.

H.R. 5611 was referred to the House Financial Services Committee. Hearings or markups specifically on it have yet to be scheduled. The bill was discussed in the House Financial Services Committee's Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises hearing on April 16, 2008, with one witness, Thomas Minkler, testifying on behalf of the Independent Insurance Agents and Brokers of America in support of the bill.

The Nondiscriminatory Use of Consumer Reports and Consumer Information Act of 2008 (H.R. 5633). This bill was introduced by Representative Luis Gutierrez along with two cosponsors on March 13, 2008. H.R. 5633 would amend the Fair Credit Reporting Act to prohibit the use of consumer information in connection with the underwriting of insurance when the Federal Trade Commission determines that this usage results in racial or ethnic discrimination or represents a proxy for race or ethnicity. The bill specifically exempts information on property loss data, driver history, and medical history subject to other requirements in the law. It also specifies that any state laws on the use of consumer information in insurance would not be limited or superseded. This bill followed a hearing entitled "Credit-Based Insurance Scores: Are They Fair?" that Chairman Melvin Watt held in the House Financial Services Committee's Oversight Subcommittee on October 2, 2007. The subcommittee held another hearing on "The Impact of Credit-Based Insurance Scoring on the Availability and Affordability of Insurance," on May 21, 2008, where H.R. 5633 was discussed, but there have been no hearings or markups specifically on the bill.

The Increasing Insurance Coverage Options for Consumers Act of 2008 (H.R. 5792). This bill was introduced by Representative Dennis Moore, along with Representatives Deborah Pryce, John Campbell, and Ron Klein, on April 15, 2008. H.R. 5792 would amend the Liability Risk Retention Act (15 U.S.C 3901 *et seq.*) to allow risk retention groups and risk purchasing groups to expand into commercial property insurance, while adding requirements on corporate governance including the addition of independent directors on risk retention group boards and a fiduciary duty requirement for group directors. The bill would require risk retention groups be chartered in a state that has adopted "appropriate" or "minimum" financial and solvency standards. It would also strengthen the current preemption from state laws enjoyed by risk retention and risk purchasing groups.[29]

H.R. 5792 was referred to the House Financial Services Committee. Hearings or markups specifically on it have yet to be scheduled; however, the bill was discussed in the House Financial Services Committee's Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises hearing on April 16, 2008, with one witness, Lawrence Mirel, testifying on behalf of the Self Insurance Institute of America in support of the bill.

The Insurance Information Act of 2008 (H.R. 5840). Representative Paul Kanjorski and four cosponsors introduced H.R. 5480 on April 17, 2008. This bill would create an "Office of Insurance Information" for non-health insurance in

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[29] See CRS Report RL32176, *The Liability Risk Retention Act: Background, Issues, and Current Legislation*, by Baird Webel.

the Department of the Treasury. The Deputy Assistant Secretary heading this office would be charged with collecting and analyzing publicly available insurance information and establishing federal policy on international insurance issues, as well as advising the Secretary of the Treasury on major insurance policy issues. State laws or regulations that the head of the office finds to be inconsistent with the federal policy on international insurance issues would be preempted, subject to an appeal to the Secretary.

H.R. 5840 was announced on April 16, 2008, at a hearing "Examining Proposals on Insurance Regulatory Reform," held by Chairman Kanjorski in the House Financial Services Committee's Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises and was the specific subject of a hearing in the same subcommittee on June 10, 2008. Chairman Kanjorski indicated at the June hearing that he hoped to move further on the bill in "weeks, not months," but a markup has not been scheduled.

The Personal Lines of Insurance Fairness Act of 2008 (H.R. 6062). Representative Maxine Waters (along with three cosponsors) introduced this bill on May 15, 2008. H.R. 6062 would amend the Fair Credit Reporting Act to prohibit a consumer reporting agency from furnishing credit information for usage in underwriting personal lines of insurance. It specifically exempts consumer databases containing insurance information, such as property loss data, driving history, and medical history, from this prohibition. H.R. 6062 followed a hearing entitled "Credit-Based Insurance Scores: Are They Fair?" that Chairman Melvin Watt held in the House Financial Services Committee's Oversight Subcommittee on October 2, 2007. The subcommittee held another hearing on "The Impact of Credit-Based Insurance Scoring on the Availability and Affordability of Insurance," on May 21, 2008, where the bill was discussed, but there have been no hearings or markups specifically on H.R. 6062.

The Reinsurance International Solvency Standards Evaluation Board Act of 2008 (H.R. 6213). Representative Tom Feeney introduced this bill on June 9, 2008. This bill would establish a non-profit board, whose members would be appointed by, and serve at the pleasure of, the President for terms up to seven years. This board's primary tasks would be establishing standards for reinsurance supervisory systems, evaluating the supervisory systems of both U.S. states and foreign jurisdictions, and certifying whether these systems met the board's standards. For reinsurers domiciled in certified jurisdictions, H.R. 6213 would preempt any state collateral requirements placed on these reinsurers.

107th-109th Congresses

In the 109th Congress, the National Insurance Act of 2006, S. 2509, was introduced by Senators John Sununu and Tim Johnson on April 5, 2006. Representative Ed Royce introduced a House version of the bill, H.R. 6225, on September 28, 2006. While not identical, the two versions were nearly so and shared the same basic structure and intent. These bills, modeled to some degree after the state/federal regulation in the banking industry, would have provided for an optional federal charter for the insurance industry. They were similar to the bill of the same title introduced in the 110th Congress and discussed above.

Also in the 109th Congress, the Financial Services Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises held a June 16, 2005 hearing on the State Modernization and Regulatory Transparency (SMART) Act, a draft bill that had originally circulated among interested parties in the latter part of 2004. One draft of the SMART Act encompasses 17 titles and more than 300 pages.[30] This draft would set up a number of uniform standards in different areas, including market conduct, product and producer licensing, life insurance, property/casualty insurance, and reinsurance. While establishing that there should be uniform standards, and threatening federal preemption if the standards are not followed, the draft often leaves the exact standards to be followed to the state regulators and NAIC. One aspect of the proposal, however, that is not up to the states is a federal preemption of state laws requiring prior approval of insurance rates. At a June 21, 2006 subcommittee hearing, then-Chairman Richard Baker indicated that the SMART Act's comprehensive approach might be superseded by a number of smaller bills addressing particular problems in state regulation. As an example, he held up H.R. 5637, which was a primary focus of this hearing.

H.R. 5637, the Nonadmitted and Reinsurance Reform Act of 2006, was introduced by Representative Ginny Brown-Waite along with 16 bipartisan cosponsors on June 16, 2006. This bill as introduced was substantially similar to the two bills of the same name discussed above. After relatively minor amendments at subcommittee and full committee markups, the House Financial Services Committee ordered H.R. 5637 reported favorably by voice vote on July 26, 2006, and reported the bill (H.Rept. 109-649, Part I) on September 12. The House Judiciary Committee, which was jointly referred the bill, held a subcommittee hearing on September 19 and H.R. 5637 was discharged from that committee on September 22. It was brought to the House floor under Suspension of the Rules and passed 417-0 on September 27. The Senate received the bill but did not act on H.R. 5637 during the 109th Congress.

During the 108th Congress, Senator Ernest Hollings introduced S. 1373, "A bill to authorize and direct the Secretary of Commerce, through an independent commission within the Department of Commerce, to protect consumers by regulating the interstate sale of insurance, and for other purposes." S. 1373 would have created a federal commission within the Department of Commerce to regulate the interstate business of property/casualty and life insurance and would have required federal regulation of all interstate insurers. It thus would have preempted most current state regulation of insurance, except that of single state insurance companies. The federal commission would have had full regulatory powers, including licensure, rate and form approval, regulation of solvency, and regulation of market conduct. S. 1373 also would have repealed the antitrust exemptions in the McCarran-Ferguson Act and created a federal guaranty fund. S. 1373 was referred to the Commerce Committee; no hearings or markups on the bill were held. Senator Hollings retired following the 108th Congress.

During the 107th Congress, two formal proposals were advanced providing for an optional federal charter for insurers. Senator Charles Schumer presented legislation in December 2001, which was not assigned a number, while

[30] See [http://www.aba.com/ABIA/ABIA_Reg_Mod_Page.htm] for one copy of the bill.

Representative John LaFalce introduced a bill in February 2002, which was designated H.R. 3766. As with the current National Insurance Act of 2006, they both were roughly modeled after the current dual state/federal regulatory system that exists for the banking industry. Such a system allows institutions to be chartered at either a state or a federal level and would have enabled insurance companies to choose between state and federal regulation. There were no hearings or markups on either proposal during the 107th Congress. Senator Schumer has not introduced such a bill since, while Representative LaFalce retired following the 107th Congress.

In addition to the legislation taking general aim at the current insurance regulatory system, other proposals have had a more limited impact on the system. For example, the Terrorism Risk Insurance Act of 2002[31] (TRIA) specifically endorsed state regulation of insurance, while it included provisions preempting state definitions of "terrorism" and previous state approvals of terrorism exclusions. In considering the Fair and Accurate Credit Transactions (FACT) Act of 2003,[32] some would have included provisions to regulate insurer usage of credit information; however, the final bill included only a study of this usage. This study was to be completed in late 2005, but was only delivered to Congress in July 2007. TRIA had been set to expire at the end of 2005, and this pending expiration provoked significant legislative and lobbying activity on a bill to extend TRIA. Such a bill, S. 467, was passed in early December 2005 and signed into P.L. 109-144 on December 22, 2005. S. 467 extended TRIA two years and changed little in TRIA's relatively minimal intrusion into the state insurance regulatory system. The 110th Congress passed another TRIA extension bill, H.R. 2671, in December 2007, and it was signed into P.L. 110-160 on December 26, 2007. This bill extended TRIA seven years and again did not substantially change TRIA's minimal intrusion into the state regulatory system.

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[31] P.L. 107-297, 116 Stat. 2322.

[32] P.L. 108-159, 117 Stat. 1953.