

January 7, 2010

The Honorable Nancy Pelosi  
Speaker  
United States House of Representatives  
Washington, DC 20515

The Honorable Harry Reid  
Majority Leader  
United States Senate  
Washington, DC 20510

Dear Speaker Pelosi and Majority Leader Reid:

We write on behalf of our fellow state insurance regulators, as represented by the National Association of Insurance Commissioners (NAIC), to provide our thoughts on the health reform legislation adopted by the House and Senate, and to provide our perspective as you work towards assembling final legislation to be sent to the President.

We share your goal of enacting comprehensive legislation that will expand access to coverage, improve the quality of care, and restrain the rapid growth of health care spending in the United States, and we applaud the hard work by members of both chambers. As adopted, both bills would extend guaranteed issue protections to the non-group health insurance market, eliminate pre-existing condition exclusions and annual and lifetime limits, and end the practice of rating policies based upon gender and health. If paired with a truly effective individual mandate and subsidies to mitigate the risk of adverse selection, the NAIC supports these measures. In addition, the bills would initiate the creation of Health Insurance Exchanges that could streamline the process of purchasing coverage and make meaningful comparisons of health insurance plans much easier.

Of course, we all agree that unless health care spending is brought under control these reforms could shift the financial burden from one group to another without addressing the threat to the nation's fiscal picture. The challenge moving forward will be to overhaul the delivery system to promote prevention, quality, and results-based care, to encourage healthy lifestyles, and to eliminate waste and fraud in the system. We know you and other federal legislators are well aware of this fact and we pledge our expertise to assist in any way we can to help "bend the cost curve" in the future. To that end, we encourage you to grant states continued flexibility to experiment and find solutions that work.

As you move into negotiations to determine the final shape of legislation, we offer the following comments based upon state regulators' over 135 years of experience protecting consumers and promoting healthy insurance markets:

- **Administrative Structure and Federalism:** State insurance regulators have extensive experience and expertise in regulating health insurance. They are also closer to consumers and have a better understanding of the markets they regulate than a single national regulator in Washington, D.C. could have. For these reasons, consumers are best served by insurance regulation that is located firmly at the state level.

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EXECUTIVE OFFICE	444 N. Capitol Street, NW, Suite 701	Washington, DC 20001-1509	p   202 471 3990	f   816 460 7493
CENTRAL OFFICE	2301 McGee Street, Suite 800	Kansas City, MO 64108-2662	p   816 842 3600	f   816 783 8175
SECURITIES VALUATION OFFICE	48 Wall Street, 6th Floor	New York, NY 10005-2906	p   212 398 9000	f   212 382 4207

While there is, and will continue to be, some variation in state regulation of health insurance, this legislation will create important minimum standards that will improve the regulation of health insurance in most states. We agree that states must be held accountable to implement and enforce these standards. However, we strongly disagree that federalizing the regulation of insurance would improve consumer protections. As we have seen with programs such as Medicare Advantage, inadequate federal oversight and action has left consumers vulnerable to widespread marketing abuses. State insurance regulators have a proven track record of swift and appropriate action to protect insurance consumers, while there is no evidence that a federal regulator could or would perform comparably. As committed to consumer protection as the current administration may be, failures by future administrations to devote energy and resources to consumer protection would harm insurance buyers and policyholders across the entire country.

We oppose the creation of a new federal Health Choices Commissioner and Health Choices Administration with authority to enforce provisions of this act in states whose laws meet federal minimum standards. This dual regulation is likely to create unnecessary cost and confusion and produce no added value. Additionally, granting a federal regulator the authority to approve or deny premiums, or exclude plans from the Exchange if it disapproves of a premium increase, interferes with states' financial oversight of insurers and could expose a plan to insolvency, straining state guarantee funds and creating anxiety among healthcare consumers. A better way to ensure appropriate regulatory oversight over rates is to build that oversight into the federal minimum standards that states must meet so that financial regulation and rate regulation operate together.

We urge Congress to take advantage of state expertise, experience, and resources in implementing this legislation by ensuring that states retain primary responsibility for regulating the business of insurance and that health insurance Exchanges be established and administered at the state level with the flexibility to meet the needs of our local markets and consumers.

- **Grandfathering of Existing Plans:** While we see the value of limiting the application of some provisions for policies that are already in force, in an effort to maintain stability for those already insured, we are concerned that indefinitely maintaining this exemption for group plans will make policies in the reformed marketplace unaffordable. In many states current law is more favorable to the young and healthy, whose costs are lower, than to the old and sick, whose costs are higher. The opposite will be the case in the reformed marketplace. We fear that young and healthy groups will maintain their current policies as long as possible, while older and sicker groups seek new policies subject to rules that are more favorable to them. In the individual market, with its frequent turnover and an influx of new policyholders, this is of limited concern. In the group market, however, we fear that those purchasing coverage in the reformed marketplace will be disproportionately older and sicker, resulting in higher premiums for these policies. We strongly recommend that all group policies be subject to the important reforms in this legislation at the end of a five-year grace period. Furthermore, conferees should ensure that any risk adjustment in the legislation be applied to both grandfathered and newly-issued policies to prevent the adverse selection that could result from applying different regulations to these blocks of business.
- **Individual Mandate:** Reforms such as guaranteed issue, community rating, and the elimination of preexisting condition exclusions can encourage young, healthy individuals to wait until they get sick to purchase health insurance coverage, especially in the individual market. While both bills include provisions designed to mitigate this risk, we are concerned that overly broad exemptions and insufficient penalties will prompt many to opt out of insurance coverage, endangering the viability of the entire reform package. Given the Congressional Budget Office's projection that the average premium for single coverage through the Exchanges will exceed \$5,000 annually, we believe that

more robust penalties will be needed to ensure that young, healthy individuals do not drop out of the insurance market. We are especially concerned with the minimal sanctions in the Senate version.

In the early years of implementation, in particular, an effective mandate will be essential. The experience of the vast majority of states, which allow medical underwriting and health status rating prior to implementation of this reform, will differ markedly from that of Massachusetts when it implemented its individual mandate. Because Massachusetts already prohibited these practices, and nothing in the reform law had the potential to create adverse selection, there was no need to coordinate the timing of the individual mandate penalty and it could be phased in with only minimal penalties at first. That unfortunately will not be the case with this legislation, and significant first-year penalties will be necessary to prevent adverse selection from increasing penalties when guaranteed issue and other reforms become effective. We can not overstate our concern that minimal sanctions, or a slowly implemented mandate, will fatally undermine this entire effort.

In addition, we are concerned that an exemption for anyone for whom premiums will amount to more than 8% of income will significantly weaken the mandate and lead to adverse selection. Many of the individuals who would qualify for this exemption are the young and healthy individuals who must remain in the insurance pool in order to prevent premiums from increasing. We urge conferees to either remove this exemption or increase the threshold for the exemption.

- **Rating Rules:** Tight restrictions on the use of age as a rating factor will make substantial penalties for failure to obtain coverage even more important in order to avoid squeezing younger individuals out of the marketplace. Furthermore, we are concerned that application of rating rules to large group coverage will have the unintended consequence of encouraging these businesses to self-insure in order to evade this provision. Businesses that do so would be disproportionately young and healthy, which will destabilize the fully-insured large group market when they flee. Self-insuring businesses will be beyond the jurisdiction of all state insurance regulation, so employees of these businesses would also be deprived of valuable consumer protections and assistance from state regulators, placing a greater burden on federal regulators who have limited authority and resources to provide assistance. We urge conferees to limit the application of the bill's rating rules to the individual and small group markets in order to prevent these serious unintended consequences.

On a related issue, we are concerned that businesses that lack the size and resources to safely self-insure may be encouraged to do so in order to avoid these reforms. Failures of these self-insured plans would have a devastating impact on the businesses, employees and health care providers. We urge conferees to consider taking steps to ensure states have authority to protect consumers from this danger.

- **Rate approval:** In addition to protecting consumers from abusive insurance company practices, one of the main charges of state regulators is, and will continue to be, ensuring the solvency of all companies in the marketplace. If federal regulators are given the authority to deny premium increases that are needed to maintain the solvency of a company or to exclude carriers from the marketplace in response to these needed premium increases, the ability of state regulators to ensure the financial stability of companies could be severely compromised. We urge conferees to avoid any provision that could separate the regulation of premiums from the regulation of solvency.
- **Combating Fraud:** Whenever major changes are implemented in insurance markets and regulation, particularly if they have the potential to increase premiums for any group of individuals or businesses, unscrupulous individuals will be waiting to capitalize on the situation by engaging in insurance fraud. We strongly encourage conferees to close existing gaps in the regulatory structure by including provisions from the Senate bill that would allow the federal government to quickly shut

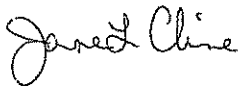
down fraudulent multiple employer welfare arrangements (MEWAs) that falsely claim to be exempt from state regulation. Currently this process can be quite lengthy, something that the perpetrators of these schemes exploit to delay enforcement and prey on additional victims.

- **Medical Loss Ratios:** We are concerned that a loss ratio of 80% in the individual market may not be readily achievable by many insurers. These companies have already entered into contracts with agents and brokers that obligate them to pay specified levels of commissions, and have expenses associated with underwriting and marketing that they will not be able to reduce until guaranteed issue requirements and health insurance Exchanges are implemented.
- **Repeal of the McCarran-Ferguson Antitrust Exemption:** While promoting competition is an important element of fostering healthy insurance markets, it is unlikely that a repeal of the McCarran-Ferguson antitrust exemption for health and medical malpractice insurers will lead to more competition and lower premiums. The business of insurance, while exempted from federal antitrust law, is still subject to state antitrust enforcement actions. In fact, even if the McCarran-Ferguson antitrust exemption were repealed, the state action doctrine exemption would continue to apply. The most likely result of this repeal would therefore not be increased competition, but a series of lawsuits testing the limits of the state action doctrine, with associated litigation costs being passed along to consumers in the form of higher premiums. We would recommend against including provisions limiting the McCarran-Ferguson Act in the conference report.
- **Effective Dates:** Many provisions of both the House and Senate bills, if enacted on their own, would cause adverse selection that would raise premiums for all, as younger healthier individuals and businesses forego coverage. It is crucial that the effective dates of these important reforms be coordinated with implementation of the individual mandate and subsidies that will mitigate the risk of adverse selection. A mandate that is not fully phased-in until the third year of reform will not effectively mitigate this risk, especially when the penalties in the first year of the reformed marketplace are minimal. Similarly, a minimum loss ratio requirement that is appropriate for an individual market with guaranteed issue, adjusted community rating, and a health insurance Exchange, where companies will likely have significantly lower underwriting, marketing, and enrollment costs, may not be realistic or appropriate for the current market rules that will continue to apply in the interim.
- **Vouchers:** We have serious concerns about any provision that would allow individuals to use an employer's contribution to a group health plan to purchase coverage in the individual market. Those who do so could be younger and healthier individuals seeking less expensive options in the Exchange, and their departure from an employer's pool could critically destabilize the group plan, raising premiums for those who remain. Conversely, an employer could cut back on coverage and, thus, encourage sicker individuals to seek more comprehensive coverage through the Exchange, thus removing them from the employer's pool. We would recommend that conferees not include this provision in the conference report.
- **Temporary High Risk Pools:** Both the House and Senate bills contain provisions creating a new federal high risk pool program to provide immediate coverage for those with preexisting health care conditions. We applaud these provisions and encourage conferees to ensure that the high risk pool program is in the final legislation. Because of the short implementation timeline for this provision, flexibility in working with the states will be essential. We urge conferees to preserve as much flexibility as possible in implementation to allow states with and without high risk pools to utilize alternative coverage mechanisms to meet the goals of these provisions.

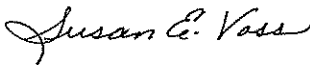
- **National Plan:** Anytime policies that are subject to different regulatory requirements are sold to the same population, it is likely that adverse selection will occur. For this reason, we strongly recommend that any nationally-sold plans be subject to all statutes and regulations that apply to other plans being sold to the same population and that they remain subject to the oversight of state insurance regulators.

Thank you for considering these suggestions, which we offer to ensure that these reforms, when implemented, will work as intended. We commend the House and the Senate for their action to enact comprehensive health reform that will expand access to insurance, make it more affordable, and improve the quality of care in the United States. We pledge to work with you as you craft a conference report and as the final legislation is implemented. Please do not hesitate to call upon us if we can be of further assistance.

Sincerely,



Jane Cline  
West Virginia Insurance Commissioner  
NAIC President



Susan Voss  
Iowa Insurance Commissioner  
NAIC President-Elect



Kevin McCarty  
Florida Insurance Commissioner  
NAIC Vice-President



Kim Holland  
Oklahoma Insurance Commissioner  
NAIC Secretary-Treasurer



Sandy Praeger  
Kansas Insurance Commissioner  
NAIC Health Insurance & Managed Care (B)  
Committee Chair



Joel Ario  
Pennsylvania Insurance Commissioner  
NAIC Health Insurance & Managed Care (B)  
Committee Vice-Chair