Public Citizen * U.S. PIRG * Center for Economic Justice * Consumer Federation of California

CONSUMER GROUPS HAVE STRONG CONCERNS ABOUT HR 5840 - BILL SLATED FOR SUSPENSION CALENDAR TUESDAY THAT CONTAINS TRADE-PACT RELATED PREEMPTION OF STATE INSURANCE LAW

September 15, 2008

Dear Representative,

We are writing to you today to ask you to oppose a financial services bill, HR 5840 that would allow the Department of the Treasury to interpret or enter into international agreements regarding insurance policy and regulation, and then *preempt* state insurance laws and regulations that Treasury believes to be in contradiction of such international agreements. HR 5840 (the "Insurance Information Act of 2008") is now listed on the suspension calendar for Tuesday, September 16.

This bill should not have been placed on the suspension calendar. Many members of Congress remain unaware of the bill's negative implications for state consumer protections – much less that the bill would set a bad precedent by delegating new authority to an executive agency to become international trade and commercial agreement "enforcer" *against* U.S. state consumer regulatory policy.

Among the requirements against which this bill would allow Treasury to measure U.S. state insurance policy are those that would be promulgated under future World Trade Organization (WTO) General Agreement on Trade in Services (GATS) pacts (one is currently under negotiation) and future "Free Trade Agreements" (FTAs) and through the industry-dominated TransAtlantic Dialogue process. The existing international commercial agreements that cover insurance, such as those related to the WTO and the FTAs, contain many restrictions on common state insurance regulations that provide essential consumer protections. There is no basis to believe that future international commercial agreements – to which this bill applies – will reverse this pattern of such pacts imposing limits on legitimate domestic regulatory authority.

However, currently, the constraints on domestic regulatory policy contained in trade agreements – and the various "Mutual Recognition Agreements" (MRAs) and other mechanisms through which these pacts are implemented – may only be enforced against U.S. states after a formal challenge has been brought and won by a foreign government against a U.S. law within the trade agreement's dispute resolution system. Further, for such international rulings to have effect against U.S. states additionally requires that the federal government win a preemption suit against states in federal court, as required by these pacts' implementing legislation. In contrast, this legislation would newly empower Treasury to be the trade-agreement MRA "enforcer" for foreign insurance firms' interests against U.S. state law.

Finally, it is unclear why Congress would ever choose to delegate new authority to an executive-branch agency in a manner that provides that agency broad discretion to determine the *substance* of policies in an area – insurance regulation – that has been left to the states and then authorize that federal agency to preempt state law on the basis of such unilateral agency determinations. Given the executive branch's past record of unilaterally binding the U.S. healthcare insurance sector to comply with severe WTO regulatory constraints, and other instances of executive-branch international commercial negotiations being used to limit Congress' domestic regulatory space, providing an executive agency with new open-ended authority to engage in a policy-*making* role versus policy-*enforcing* role is unwise.

HR 5840 is authored by Rep. Paul Kanjorski (D-Pa.), who has long been a proponent of consumer rights, fair trade, legislative-branch prerogatives and state sovereignty. Rep. Kanjorski has previously expressed concerns about unnecessary state preemption, providing the executive branch power that should be reserved to the legislative branch, and the retrograde nature of international commercial pacts' constraints on legitimate domestic regulation. Thus, we attempted to obtain changes in HR 5840 to remove the damaging preemption provisions. Unfortunately, these requests by consumer groups were rejected, although some modest improvements have been made.

HR 5840 is now listed for Tuesday's suspension calendar. This bill should be taken off the suspension calendar. If the vote occurs Tuesday, we ask that you vote no. There are three major concerns regarding the preemption provisions in the bill:

Never before has the U.S. government allowed a federal *agency* to interpret or enter into international agreements on subject matter under the authority of the legislative branch, and then preempt states through rule-making on the basis that state policies are in contradiction to those agreements. HR 5840 would allow the Treasury to "coordinate federal efforts and ***establish federal policy*** on international insurance matters" (emphasis added) and then preempt state law via administrative action upon its own determination that the state law is "inconsistent with such policy." The bill would newly empower Treasury to initiate such preemption *even if no trade suit has been brought and won against the United States.* Delegating an executive agency such extraordinary new preemption authority stands in stark contrast to the safeguards provided in existing trade-agreement implementing legislation designed to assuage state concerns about trade-agreement preemption. During the negotiations of the WTO and the North American Free Trade Agreement (NAFTA), state attorneys general obtained provisions which require that state laws held by a trade pact enforcement panel to be inconsistent with international commercial agreement obligations could only be preempted or declared invalid in an action brought by the United States government in federal court in which states would be granted the right to participate as parties and the federal government would bear the burden of proving the law's inconsistency.

A wide variety of state insurance regulations now in effect in many states are considered violations of various trade agreements by foreign insurance firms. It is not hard to imagine what future insurance MRAs and other international agreements would look like. Indeed, the European Union (EU) has long considered U.S. state-level regulation of insurance in *itself* to be a major barrier to international commerce. That is to say the absence of uniform U.S. federal insurance regulation in favor of the longstanding U.S. legal tradition of insurance being regulated at the state level is in itself considered to be discriminatory. The EU notes in its annual listing of U.S. trade barriers that "the fragmentation of the market into 56 different jurisdictions, with different licensing, solvency and operating requirements" in itself constitutes a serious trade barrier for EU firms and in effect discriminates against foreign firms because meeting such rules is a greater burden on them. However, currently, foreign governments must initiate formal trade challenges against the many different types of state prudential insurance regulation, such as state collateral requirements for unauthorized reinsurers, that have been targeted by foreign firms as discriminatory limits on their access to U.S. markets. HR 5840's various safeguard provisions would not adequately protect important consumer safeguards – just one example being loss-ratio requirements – against the expansive constraints on domestic service-sector regulation contained in today's trade agreements. And, there is no way to predict – and thus provide safeguards for – all of the U.S. consumer protection measures that might annoy foreign insurance firms in the future. Thus, the very concept of empowering any federal agency to enforce such international commercial agreement obligations for foreign governments and firms against U.S. states is fatally flawed.

Even if the bill were narrowed to deal solely with the issue of reinsurance, consumers would be placed in jeopardy. A primary goal of the reinsurance industry – one of the prime backers of HR 5840 – is the elimination of the 100 percent collateral requirements states impose on unauthorized reinsurers. Reinsurance is insurance purchased by insurers themselves. Unbeknownst to consumers, the United States has *offshored* a substantial portion of its insurance risk to foreign reinsurers based overseas. More than 2,300 foreign reinsurers from 75 foreign jurisdictions assumed risk from U.S. insurance companies in 2007. Nearly half of all reinsurance premiums are reinsured outside the United States. State collateral requirements effectively replace this lack of regulatory oversight by providing up-front assurance of solvency protection for U.S. consumers.

At a time when the U.S. and global economies are suffering major downturns – caused in large part by the deregulation of financial services promoted by multinational banking, investment and insurance firms – it is critical that Congress use this opportunity to *reverse course* on bills like HR 5840 and prevent foreign multinational firms and trade rules from undermining important consumer protections. We strongly urge that HR 5840 be removed from the suspension calendar and given a more thorough review.

Sincerely,

Lori Wallach
Public Citizen

Ed Mierzwinski
U.S. PIRG

Birny Birnbaum
Center for Economic Justice

Richard Holober
Consumer Federation of California