

Public Citizen • U.S. PIRG • Consumer Watchdog

April 22, 2010

Re: S.3217 Title V – Office of National Insurance

Dear Senator:

We write to oppose provisions in Title V - Office of National Insurance, of S. 3217 the Restoring American Financial Stability Act of 2010. These provisions would authorize the Treasury Department to preempt existing state insurance consumer protections, including on solvency, based on international agreements establishing insurance regulatory policy that Treasury would be authorized to enter into without congressional approval. In sum, these provisions would newly empower Treasury to weaken existing state insurance regulation in the name of expanding access for foreign insurance firms to the U.S. market.

Certainly this is not what the American public is demanding. Americans expect an overhaul that remedies the failed regulation of the financial services industry, and you have promised that Congress will deliver that reform. It is therefore incomprehensible to us that a measure which promotes *further deregulation* of the insurance industry and threatens existing state-level consumer protections would be included as part of the financial re-regulation package.

Moreover, Title V's core provisions are an affront to the basic principles of American Democracy – separation of power and federalism. Title V would allow Treasury to usurp the role of Congress and state legislatures by diplomatically legislating substantive new financial regulatory policies via international negotiation. Title V would allow Treasury to enter into international commercial agreements without congressional approval. And, Title V would allow Treasury to unilaterally determine that state insurance regulatory policy violates the new Treasury standards and preempt states with respect to subject matter – insurance regulation – that Congress has explicitly put under state authority via the mere issuance of notice in the Federal Register.

We want to make clear that we do not oppose the creation of a new national office with insurance expertise. Such an institution could serve an important function in gathering information, monitoring developments and providing a centralized point of contact for both states and international regulators with respect to ongoing state insurance regulation in the United States. However, we oppose a new Office of National Insurance – or any branch of the federal government – being empowered to unilaterally set U.S. insurance regulatory policy constraints via international agreement, determine if state insurance policies conflict with such agreements and then *impose deregulation by preempting* such state insurance laws and regulations.

Title V would allow the Treasury to “establish Federal policy on prudential aspects of international insurance matters,” providing Treasury unilateral authority to set insurance policy for the states by negotiating international agreements and then preempting state law via administrative action upon its own determination that the state law is “inconsistent” with such agreements and “results in less

favorable treatment” of a non-U.S. insurer than a U.S. insurer. Such negotiations, held in international settings and behind closed doors, would provide no opportunity for comment by insurance consumers, state insurance regulators or Congress. The resulting agreements would not be subject to congressional approval.

These agreements would establish a new ceiling on insurance regulation by preempting state insurance laws on behalf of non-U.S. insurance companies seeking to operate here without being subject to state regulation on solvency and other matters. The states would have no authority to challenge Treasury’s preemption determinations on the merits, in contrast to the longstanding federalism protections included in U.S. trade agreement implementing legislation which apply when formal trade pact tribunal rulings implicate state law.

Title V dangerously combines powerful new preemption authority with a broad definition of what sorts of state regulatory measures are subject to preemption. Regulation of all lines of insurance except health insurance are subject to preemption. In response to concerns raised by consumer groups and state insurance regulators, Title V contains language that is intended to safeguard some consumer protections, such as laws regarding rate setting, from Treasury’s new preemption authority. However, solvency measures are subject to preemption. Why would Congress provide Treasury with new authority to undermine existing state regulations on solvency? While nearly 600 banks used funds from the Troubled Assets Relief Program (TARP), only three insurers obtained such assistance. AIG’s high-profile collapse was unquestionably due to the actions, and failed federal oversight, of its derivatives trading arm, not its state-regulated insurance companies.

The preemption standard in Title V does not require Treasury to consider the effect of preemption on the protection of policyholders, insurer safety and soundness, or whether it would create a gap or void in insurance regulation. It would thus allow Treasury to prioritize access for foreign firms to the U.S. insurance market over ensuring solvency and financial stability.

The Title V preemption standard would allow Treasury to preempt state insurance laws that apply identically to domestic and foreign insurance firms – if such laws have an unintended disparate *effect* on foreign firms. State insurance rules of general application, such as solvency requirements applying to all firms, would fall under this preemption authority. That the disparate effect of a nondiscriminatory law was caused by the foreign firm’s own business decisions would be irrelevant. This standard greatly expands the state insurance regulations that could be preempted by Treasury.

Moreover, Title V allows preemption of state policies that conflict with “international insurance agreements on prudential measures,” a term of art that connects to severe constraints on domestic financial service regulation included in various international “trade” agreements to which the United States is a signatory. These constraints are so broad that if this term of art is used, and the trade pacts are thus read into the set of agreements under which Treasury may preempt, an array of state insurance consumer regulations could be ensnared. A wide variety of regulations now in effect in many states are considered violations of various trade agreements by foreign insurance firms. 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.

And, Title V does not limit Treasury's new preemption authority to international agreements entered into *after* the passage of the reregulation package. Rather, Treasury would have authority to preempt state laws that conflict with existing trade agreements or other international agreements that cover prudential issues.

Never before has the U.S. government allowed a federal *agency* to unilaterally 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 contradict those agreements.

It sets bad precedent to delegate an executive agency new authority to become international trade and commercial agreement "enforcer" *against* U.S. state consumer regulatory policy – effectively empowering Treasury to assume the roles of investigator, judge, jury and executioner with respect to international obligations that would otherwise only enforceable through actions brought by another country in the context of formal international dispute resolution processes. 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.

An Office of National Insurance that would deregulate insurance by rolling back existing state-level consumer protections is in direct conflict with efforts on the part of Congress to design a plan to reregulate the financial sector and renew focus on consumer protection. It is critical that Congress use this opportunity to reverse course on deregulatory proposals from the past.

We urge amendments to Title V to remove Treasury's ability to negotiate international insurance agreements and override state insurance laws. An Office of National Insurance can serve as a central point of contact and coordination for state and international insurance regulators, and as a new base of federal expertise on insurance, without threatening hard-won state consumer protections and exposing Americans to the risk of future crises caused by weakening existing insurance solvency and other critical policies.

Sincerely,

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