HJR

25

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

LEGISLATIVE AFFAIRS AGENCY

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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 5-14-87 1:30p.m.

H. JUD. 5-13-87 1:30p.m.

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/6/87

FURTHER REFERRALS:

DATE: 5-15-87

The Judiciary Committee has considered HJR 25

Relating to federal regulation of the insurance industry.

RECOMMENDS:

[ ] replace with CS HJR 25 (Jud) [ ] the same title
[ ] a new title

[ ] attached amendment(s)

[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis
[ ] same as previous fiscal note published _____
[ ] same as previous zero fiscal note published 5-6-87

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

Alaska State Legislature
House of Representatives

P.O. BOX 783
GIRDWOOD, ALASKA 99587
(907) 783-2905

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-2693/2719

REPRESENTATIVE
JIM ZAWACKI
DISTRICT 7

MEMBER
COMMUNITY & REGIONAL AFFAIRS COMMITTEE
LEGISLATIVE BUDGET & AUDIT COMMITTEE
FINANCE SUBCOMMITTEE

MEMORANDUM May 13, 1987

TO: Representative John Sund
Chairman, House Judiciary Committee

FROM: Representative Jim Zawacki

SUBJ: HJR 25

The intent of HJR 25 is to support efforts in Congress to amend the McCarran-Ferguson Act enacted in 1945 which exempts the insurance industry from federal antitrust laws.

The broad antitrust immunity enjoyed by the insurance industry under the McCarran-Ferguson Act is both undesirable and unnecessary. The exemption is undesirable because, by blunting some forms of competitive behavior, it denies consumers the best array of insurance services at the lowest possible cost. The exemption is unnecessary because application of the antitrust laws is in no way inconsistent with either desirable industry cooperation or effective state regulation.

There have been two objections raised by the insurance industry to this resolution. One, it is agrued that support of HJR 25 would remove or subordinate the primacy of states' regulatory role as regulator of the industry. This is not so. HJR 25 was drafted to address this concern. Senator Howard Metzenbaum, the original sponsor of the federal legislation, has testified that his intent was not to alter state regulatory primacy. The Senate Antitrust Committee in Washington, D.C. has made it clear that there is no intent to

alter the primacy of state regulatory authority over the industry. Two, is the assertion that the repeal of the antitrust exemption will restrict information pooling that assists the industry in accurately estimating how much they are likely to pay out in the future. Again, this is not so. HJR 25 specifically recognizes the need for the industry to pool and analyze the past claims they have paid; the more claims they can analyze, the more accurate their estimates of future payouts will be.

I was asked by the Citizens Coalition for Tort Reform to introduce this resolution. The Coalition has reviewed this issue closely and determined that it is in the consumers' best interests to repeal this special privilege to the insurance industry. The Coalition has found that there is strong bipartisan support to amend the McCarran-Ferguson Act and that the position of the insurance industry to retain this exemption is not logical or in the best interests of the consumer.

Thank you.

ALASKA ACADEMY OF TRIAL LAWYERS
604 WEST SECOND AVENUE
ANCHORAGE, ALASKA 99501
(907) 276-1130

May 14, 1987

TO: Honorable Members of the House Judiciary Committee
RE: HJR 25

Unfortunately, we missed yesterday's teleconference hearing on this resolution, so we are submitting these brief comments.

The membership of the Academy supports passage of HJR 25 as introduced. It seems impossible to justify the favored status guaranteed to the insurance industry by the McCarran-Ferguson Act. We can think of no valid reason for granting any one group the special protection from anti-trust provisions which is currently being given to the insurance industry. This special treatment is particularly offensive when industry profits for 1986 increased by almost 700% over 1985 figures--**reaching record highs of $12.7 billion***--while consumers are being forced to pay exorbitant premiums for reduced amounts of coverage. Amidst all of this, the insurance industry also enjoys special protection from investigation by the Federal Trade Commission without specific Congressional approval.

We see nothing which would prevent individual companies from sharing past cost data to allow forecasting of future claims and the setting of adequate rates.

In considering amendments to this resolution, please consider including a provision which make insurance industry practices subject to investigation by the Federal Trade Commission--like any other business--without requiring special Congressional approval.

This resolution involves issues of major concern to all Alaskans, and its passage would insure that our Congressional delegation is aware of its importance to our state. We urge passage of HJR 25.

Robert M. Libbey
President

*This is according to the industry's own accounting methods. Accounting methods recommended by the General Accounting Office (GAO) show industry profits to be almost **double** that amount.

MEMORANDUM

TO: Representative Sam Cotten

FROM: American Insurance Association, Thomas J. Slagle

RE: HJR25-Repeal of the McCarran/Ferguson Act

DATE: May 14, 1987

The American Insurance Association, represents 171 property/casualty insurance companies in the United States. The AIA opposes HJR25. You asked about why the insurance industry should have an anti-trust exemption for their rate making activities. Attached is the AIA position paper, as well as some background information from the Insurance Services Office, Inc. (ISO), one of the major statistical agents for establishing advisory rates. (Pages 6 through 10 gives some explanation of the rating process.)

I discussed some of the historical reasons for the anti-trust exemption under the McCarran/Ferguson Act. The testimony from the witnesses at the 5/13/87 teleconference gave additional reasons. Clearly there is no lack of competition in the industry. The function of rate making is to take as much actuarial information as possible to establish an adequate premium (or rate) in order to cover future losses. Arguably, without the anti-trust exemption, the rating organizations could not give this type of advisory rate.

Repeal of the McCarran/Ferguson Act would most profoundly affect small companies, who do not have an in-house actuarial department. Small insurance companies, or companies providing a new line of coverage, must rely on the advisory rates from organizations like the ISO. State regulators also rely on this information, to monitor rate changes.

This legislature has already passed a major insurance regulatory bill. This resolution is unnecessary and would give a negative message to any insurance company considering coming into the state.

The American Insurance Association urges your vote against this resolution.

cc: Members of the House Judiciary Committee
Representative Jim Zawacki
Division of Insurance

Enclosures:
1. ISO background information
2. AIA position paper

TJS#2:mb:46

AMERICAN INSURANCE ASSOCIATION

POSITION PAPER

McCARRAN-FERGUSON: STATE REGULATION OF INSURANCE

The American Insurance Association opposes repeal or modification of the McCarran-Ferguson Act. The Association continues to favor state regulation of the insurance business and opposes any system of dual federal and state regulation.

These principles were adopted unanimously by the Law and Regulation Committee at its meeting of February 4, 1987. The Committee also noted that staff should anticipate that at some time in the near future pressures for modification of the McCarran-Ferguson Act may require, in addition to continued opposition, demonstration of the lack of wisdom of repeal.

AIA staff will continue to emphasize:

- Preservation of anti-trust immunity for joint activity which is essential to the conduct of the business of insurance;

- Continued insulation of the insurance business from Federal Trade Commission regulation and investigative intrusions by that agency;

- Competition as the principal regulator, with restriction of anti-competitive regulation by the states;

- Preservation of the McCarran-Ferguson Act's statements respecting the primacy of state regulation of insurance and the inapplicability of general federal regulatory statutes to insurance.

The McCarran-Ferguson Act is essential to a competitive insurance market and a rational regulatory structure. Any weakening of that Act's current provisions would severely impair the entire system of state insurance regulation. In the absence of McCarran many cooperative efforts by the insurance industry, designed to protect the public, would be placed at risk. The repeal or restriction of McCarran-Ferguson would improve neither the availability nor affordability of insurance but would, instead, jeopardize essential cooperative activities such as market assistance plans and state authorized cooperative rate-making and data collection systems.

The insurance industry is presently accountable for improper anti-competitive activity. The McCarran Act does not protect boycotts, coercion or intimidation. Moreover, all historical anti-trust requirements apply to the industry - the Sherman Act, the Clayton Act, the Robinson-Patman Act and the Federal Trade Commission Act - to the extent that individual state laws do not already regulate the insurance business.

Moreover, competition within the industry is intense. The U.S. Department of Justice recently concluded that "property and casualty insurance (companies) are in effective competition with each other ...". There are nearly 3,500 companies that sell property and casualty insurance. Nine hundred operate nationwide, but none of them has dominant market share. Without McCarran-Ferguson smaller companies would have far greater difficulty entering and competing in the marketplace, and concentration in the industry would undoubtedly increase.

Repeal or weakening of McCarran-Ferguson would result in severe marketplace turmoil, without gaining anything of value for anti-trust enforcement. Therefore, the Association opposes any such modification and supports instead continuation of state regulation of the insurance business.

# # #

For further information, contact A. James Brodsky, Counsel, AIA Law Department in Washington, D.C. (202) 293-3010.

March 1987

ISO Insurance Issues Series

Insurance Data: A Close L

DEBRA T. BALLEN

VICE PRESIDENT
POLICY DEVELOPMENT AND RESEARCH
AMERICAN INSURANCE ASSOCIATION
1025 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
202/293-3010

Insurance Services Office, Inc.

ISO Insurance Issues Series

Insurance Data: A Close Look

Insurance Services Office, Inc.

Insurance Services Office, Inc. (ISO) is a non-profit corporation that makes available advisory rating, statistical, actuarial, policy form and related services to any U.S. property/casualty insurer.

Although the descriptions, procedures, data and reports mentioned throughout this document are generally applicable to most of the property and casualty lines of insurance, ISO has directed its comments to the commercial lines of insurance for which it provides services.

INTRODUCTION

All insurance data come from the same source: the transactions conducted by insurance companies each and every business day. Whenever an insurance premium is collected, a claim is paid, an expense is incurred, or an investment is made, an insurance company data processing system captures and compiles valuable information that can be reported to state regulators. This information provides a basis to evaluate solvency, estimate profitability, or measure the proper relationships between rates and coverages.

To obtain the most useful information—and maximize the efficiency of collecting it—current data reporting requirements reflect well-defined objectives and carefully designed specifications. In spite of the different programs and procedures of literally hundreds of insurance companies, these reporting requirements apply uniformly, allowing the data to be consolidated for analysis. And they are sufficiently comprehensive to allow for detailed analyses by accountants, actuaries, economists, regulators, statisticians, securities analysts, stockholders, underwriters, and others.

But sometimes, information needs can go beyond what is routinely collected. During the past, issues of interest to both insurers and policymakers made it desirable to supplement the data pool with information from other sources. Indeed, special studies during the 1970's about no-fault automobile insurance and product liability insurance could not have been conducted without supplemental information, some of which was found in insurer claim files.

While it is not within the role of Insurance Services Office, Inc. (ISO) to support or criticize proposed federal and state initiatives regarding additional data reporting requirements, ISO believes that several conditions are essential to assure meaningful benefits for consumers and the continuation of sound, efficient data collection mechanisms for regulators and insurers, namely:

- an increased awareness of the value and uses of the data that are already reported;
- more precise definitions of the public policy questions that must be addressed; and
- more realistic evaluations of the objectives that some additional data collection proposals are designed to satisfy.

This publication explains that vast amounts of insurance financial and statistical data are already collected and disseminated as a matter of public information. It is information that serves public policymakers well. It can be used to substantiate the continual escalation of liability insurance claim costs and the financial condition of insurers. It's collected under government auspices. It's accurate. And it's available to every citizen—not just insurers, or regulators, or legislators.

In addition, this booklet describes two specially-designed claim projects sponsored by ISO that will provide valuable information to supplement the current public policy discussions about the U.S. civil justice system.

FINANCIAL DATA

Financial data are reported to government in order to measure the overall solvency and profitability of insurance companies. Solvency is a basic goal of insurance public policy: an insurer must be financially able to satisfy its future obligations to protect customers and compensate injured victims. Profitability is also important: sufficient capital must be attracted to meet the current and future demands for insurance by America's businesses and individuals.

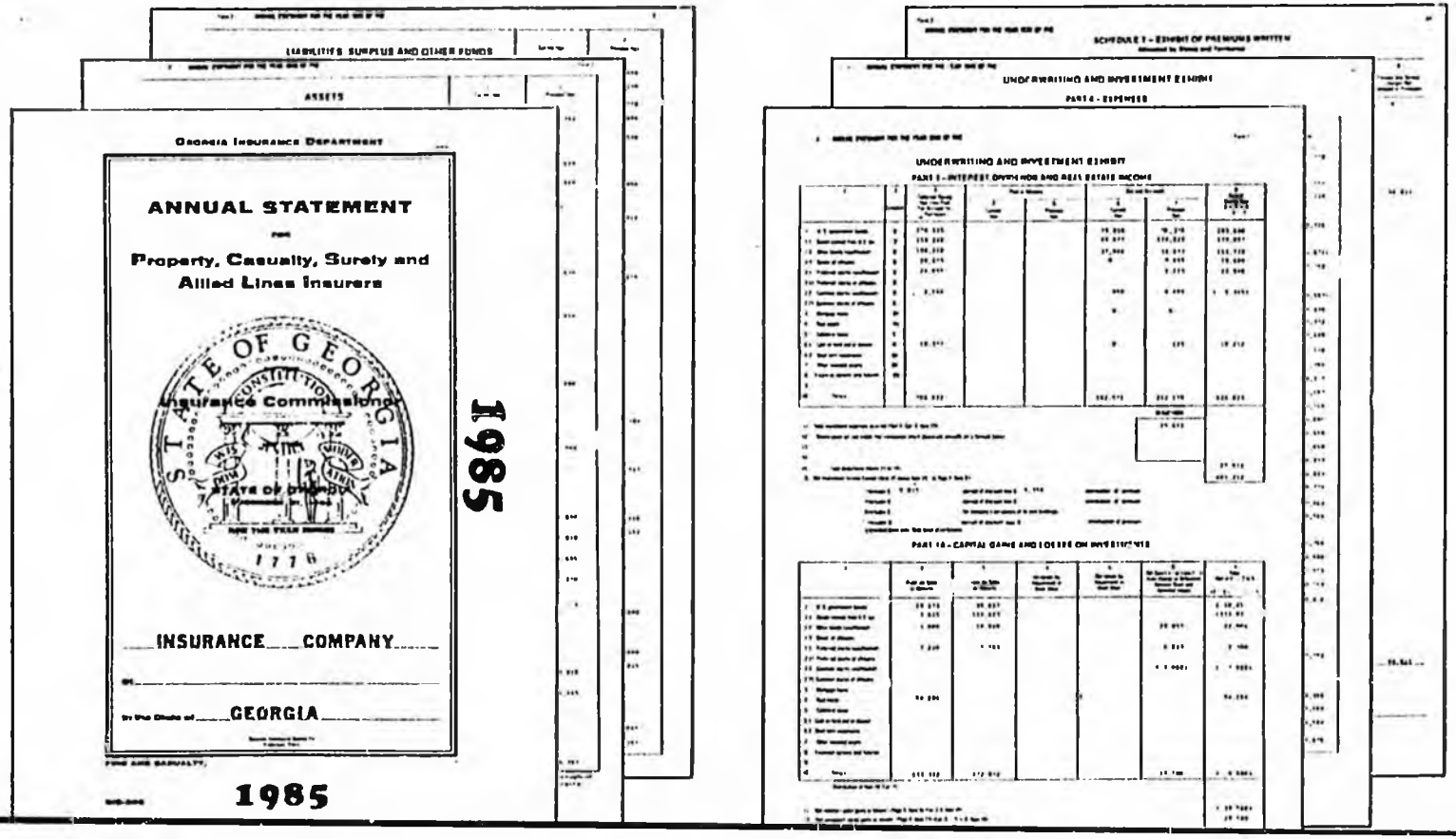
Insurance financial data focus on quarterly or annual performance. They are useful only as a one-time "snap shot" view of a financial picture that is both larger in scope and longer in duration. To achieve insurance financial data's basic objectives—measuring solvency and profitability—such data must account for the long-term liabilities assumed by insurance companies as part of their unique risk-taking function. The methods for doing so are prescribed by law and regulation and are known collectively as "statutory accounting principles."

Reporting financial data on the basis of "statutory accounting principles" helps regulators determine whether an insurer's financial position is sufficiently liquid to allow it to fulfill all of its obligations to policyholders. But the regulatory specifications for reporting financial data also encompass the information necessary to convert to "generally accepted accounting principles" (GAAP), the accounting methods that provide information on a going-concern basis. Most businesses, including the insurance industry, use GAAP for financial reporting to shareholders.

A company's Annual Statement is the primary source document for insurer financial information. The Annual Statement is a "living" document, developed and reviewed continually by the National Association of Insurance Commissioners (NAIC). Because the Annual Statement provides a uniform data reporting format and is required by all states, it facilitates the analysis of financial information from insurers throughout the country.

The Annual Statement is designed to assist state regulators in evaluating individual insurers' solvency and solidity. The Annual Statement is the primary data source for estimating individual insurer and overall industry profitability. All companies, regardless of their size or market share, are required to submit Annual Statements.

Generally, the Annual Statement provides detailed information about assets and liabilities including data on premiums, losses, reserves, expenses, dividends, taxes, and investments. It encompasses thirty-two lines of business, including the major



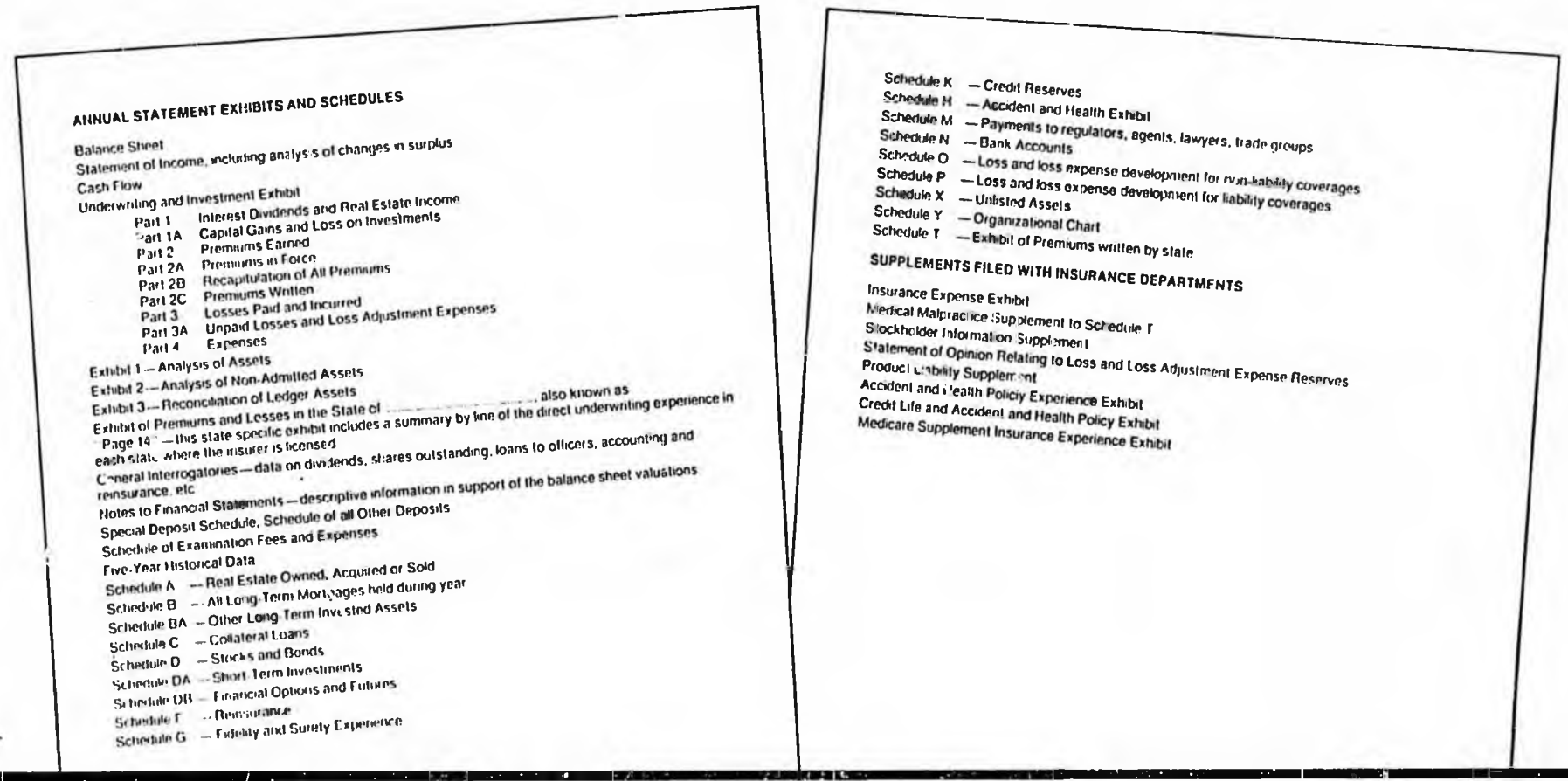
The annual statement is the primary source document for insurer financial data. It provides detailed information about assets and liabilities, including data on premiums, losses, reserves, expenses, dividends, taxes, and investments.

All companies are required to file these statements annually in each state in which they are licensed.

commercial lines of insurance such as Fire, Allied Lines, Farmowners Multiple Peril, Commercial Multiple Peril, Inland Marine, Medical Malpractice, Other Liability (General Liability), Commercial Auto No-Fault (Personal Injury Protection), Other Commercial Auto Liability, and Commercial Auto Physical Damage. When possible, Annual Statement financial data are separately identified by line of business, by state, or both.

The Annual Statement is much more comprehensive than a balance sheet. Typically, it provides over 60 pages of important financial information and, depending upon the complexity of an insurer's investments, may exceed several hundred pages. In addition to its basic financial presentation, the Annual Statement includes numerous special schedules and supplements that contain more detailed information about particular lines of business, such as general liability, or certain items, such as stocks and bonds.

The *Underwriting and Investment Exhibit*, *the Page 14 Exhibit of Premiums and Losses*, and the display of *Five-Year Historical Data* are frequently referenced examples of the basic financial data required as part of the Annual Statement. From these portions of the Annual Statement, detailed premium and loss information by line, market share information by line and state, and historic performance profiles can be calculated.



ANNUAL STATEMENT EXHIBITS AND SCHEDULES

Balance Sheet
Statement of Income, including analysis of changes in surplus
Cash Flow
Underwriting and Investment Exhibit
- Part 1 — Interest Dividends and Real Estate Income
- Part 1A — Capital Gains and Loss on Investments
- Part 2 — Premiums Earned
- Part 2A — Premiums in Force
- Part 2B — Recapitulation of All Premiums
- Part 2C — Premiums Written
- Part 3 — Losses Paid and Incurred
- Part 3A — Unpaid Losses and Loss Adjustment Expenses
- Part 4 — Expenses

Exhibit 1 — Analysis of Assets
Exhibit 2 — Analysis of Non-Admitted Assets
Exhibit 3 — Reconciliation of Ledger Assets
Exhibit of Premiums and Losses in the State of _____, also known as "Page 14" — this state specific exhibit includes a summary by line of the direct underwriting experience in each state where the insurer is licensed
General Interrogatories — data on dividends, shares outstanding, loans to officers, accounting and reinsurance, etc
Notes to Financial Statements — descriptive information in support of the balance sheet valuations
Special Deposit Schedule, Schedule of all Other Deposits
Schedule of Examination Fees and Expenses
Five-Year Historical Data
Schedule A — Real Estate Owned, Acquired or Sold
Schedule B — All Long-Term Mortgages held during year
Schedule BA — Other Long-Term Invested Assets
Schedule C — Collateral Loans
Schedule D — Stocks and Bonds
Schedule DA — Short-Term Investments
Schedule DB — Financial Options and Futures
Schedule F — Reinsurance
Schedule G — Fidelity and Surety Experience
Schedule K — Credit Reserves
Schedule H — Accident and Health Exhibit
Schedule M — Payments to regulators, agents, lawyers, trade groups
Schedule N — Bank Accounts
Schedule O — Loss and loss expense development for non-liability coverages
Schedule P — Loss and loss expense development for liability coverages
Schedule X — Unlisted Assets
Schedule Y — Organizational Chart
Schedule T — Exhibit of Premiums written by state

SUPPLEMENTS FILED WITH INSURANCE DEPARTMENTS

Insurance Expense Exhibit
Medical Malpractice Supplement to Schedule T
Stockholder Information Supplement
Statement of Opinion Relating to Loss and Loss Adjustment Expense Reserves
Product Liability Supplement
Accident and Health Policy Experience Exhibit
Credit Life and Accident and Health Policy Exhibit
Medicare Supplement Insurance Experience Exhibit

Schedule P of the Annual Statement is a representative example of the necessary analytical information that insurers report in addition to their basic "bottom line" financial data. Generally, Schedule P provides reserve development information for the so-called "long tail" lines — those characterized by a time lag between the occurrence that gives rise to the claim, the report of the claim, and the ultimate settlement. Examples of these long-tail lines include automobile liability, other liability, medical malpractice and the multiple-peril coverages. Using Schedule P, the adequacy of historic loss reserve levels can be evaluated.

The *Insurance Expense Exhibit* is the most prominent of the supplements required in conjunction with the Annual Statement. The exhibit shows the allocation of expenses (such as loss adjustment expenses, acquisition expenses, and taxes) to each Annual Statement line of business.

The *Quarterly Statement* is a streamlined version of the Annual Statement. It contains a balance sheet, income statement, and statement of changes in financial position, but with less supporting detail than the Annual Statement provides. Quarterly Statements are available for most of the major property and casualty insurers.

To ensure the integrity of the information provided in the Annual Statement, some states require independent verification by a certified public accountant (CPA). Because the overwhelming majority of insurance business is written by interstate writers of property/casualty insurance, the CPA verification effectively covers more than 90% of the business. In addition to the CPA verification, many states require that loss reserves be certified by actuaries or other designated loss reserve specialists.

State regulators and private service organizations compile the annual statements filed by individual companies into computerized financial data bases. These data bases facilitate analysis of individual companies and the industry as a whole.

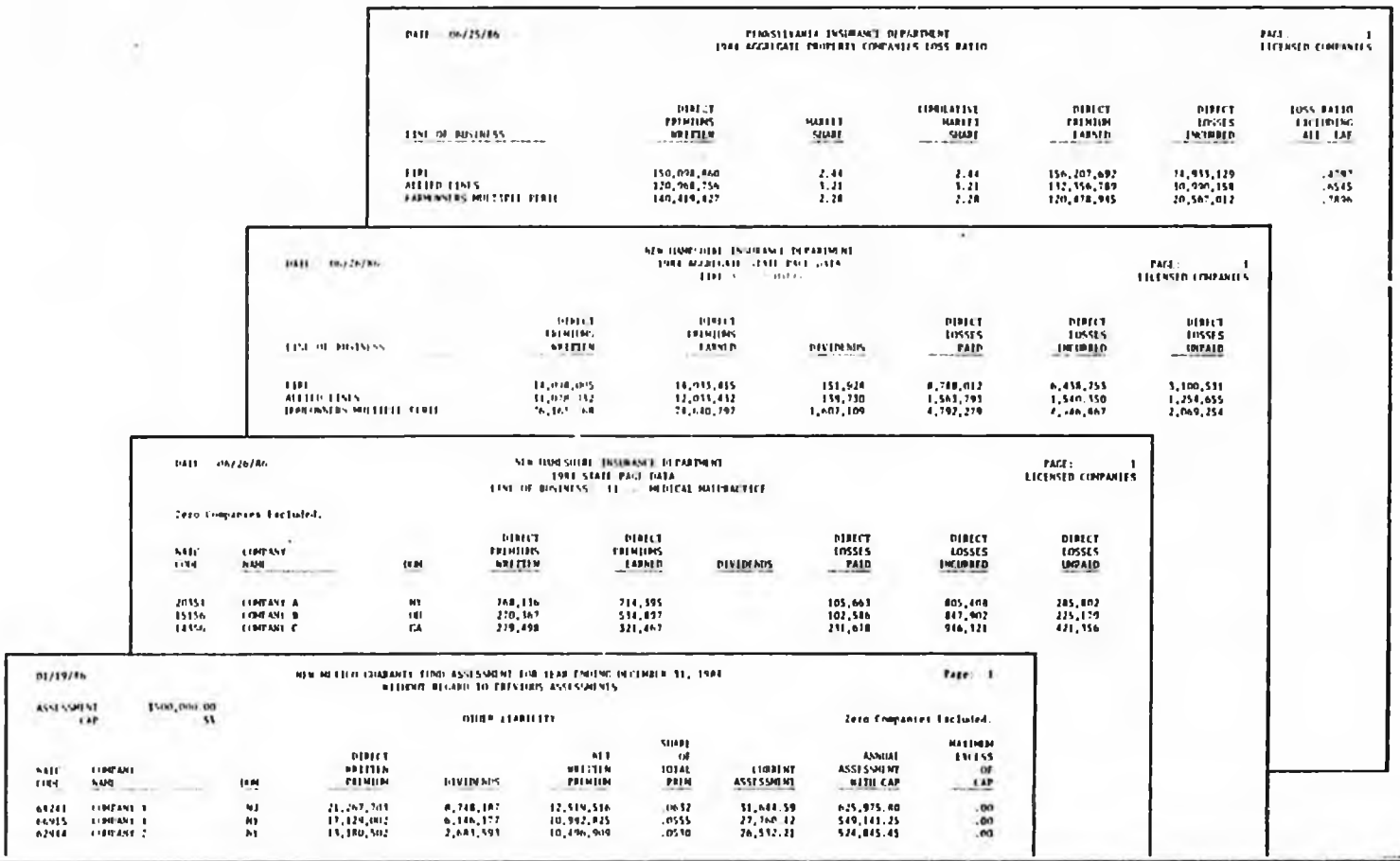
The *NAIC Support Services Office* compiles key financial data from the annual statements of all licensed insurers doing business in the United States. This compilation is accomplished through the NAIC's own data base, linked via the NAIC State Computing Network to terminals in the office of every state regulator. As soon as the data enter the NAIC data base—usually within a week of the time Annual Statement filings are required to be submitted to the states and the NAIC—individual states may directly access key information to perform solvency/solidity analyses. Important information regarding market share rankings and profitability is routinely made available to the states. With appropriate lead time, customized reports about particular states, companies, or insurance lines can also be produced.

The *Insurance Regulatory Information System (IRIS)*, generally known as the Early Warning System, is a valuable feature of the NAIC data base. Under IRIS, the NAIC calculates a series of financial ratios (such as ratio of written premium to policyholder's surplus) for each insurance company. These ratios serve as preliminary tests of the company's financial condition. The tests measure solvency, liquidity, profitability, and other aspects of insurance company operations.

The *NAIC Report on Profitability By Line and By State* was created to establish a standard format for estimating profitability. Since this report requires the allocation of line items that are not actually separable by line and state (such as surplus and investment income), the report has recognized limitations.

The *A.M. Best Company* is the most widely known private sector organization providing compilations, reports, and analyses of insurer annual statement data. Best's reports are available to regulators and the general public for a broad range of purposes. Best's reports include the following publications:

- Best's Executive Data Service compiles data from Page 14 of the Annual Statement. The service provides various loss ratios, market share, and market share trend information for the largest groups as well as on an aggregate basis. The service is available by line of business and by state.
- Best's Aggregates and Averages contain special reports based on Annual Statement data, consolidated for all companies. One particular portion, "Time Series," displays industry trends over a number of years, such as those for industry loss and expense ratios.
- Best's Insurance Reports contain financial data and information about the history, management and operation of each insurance company.



Through the NAIC state computing network, individual state regulators may access data to perform solvency/solidity analyses and obtain other information regarding market share rankings and profitability. With appropriate lead time, customized reports about particular states, companies, or insurance lines can also be produced.

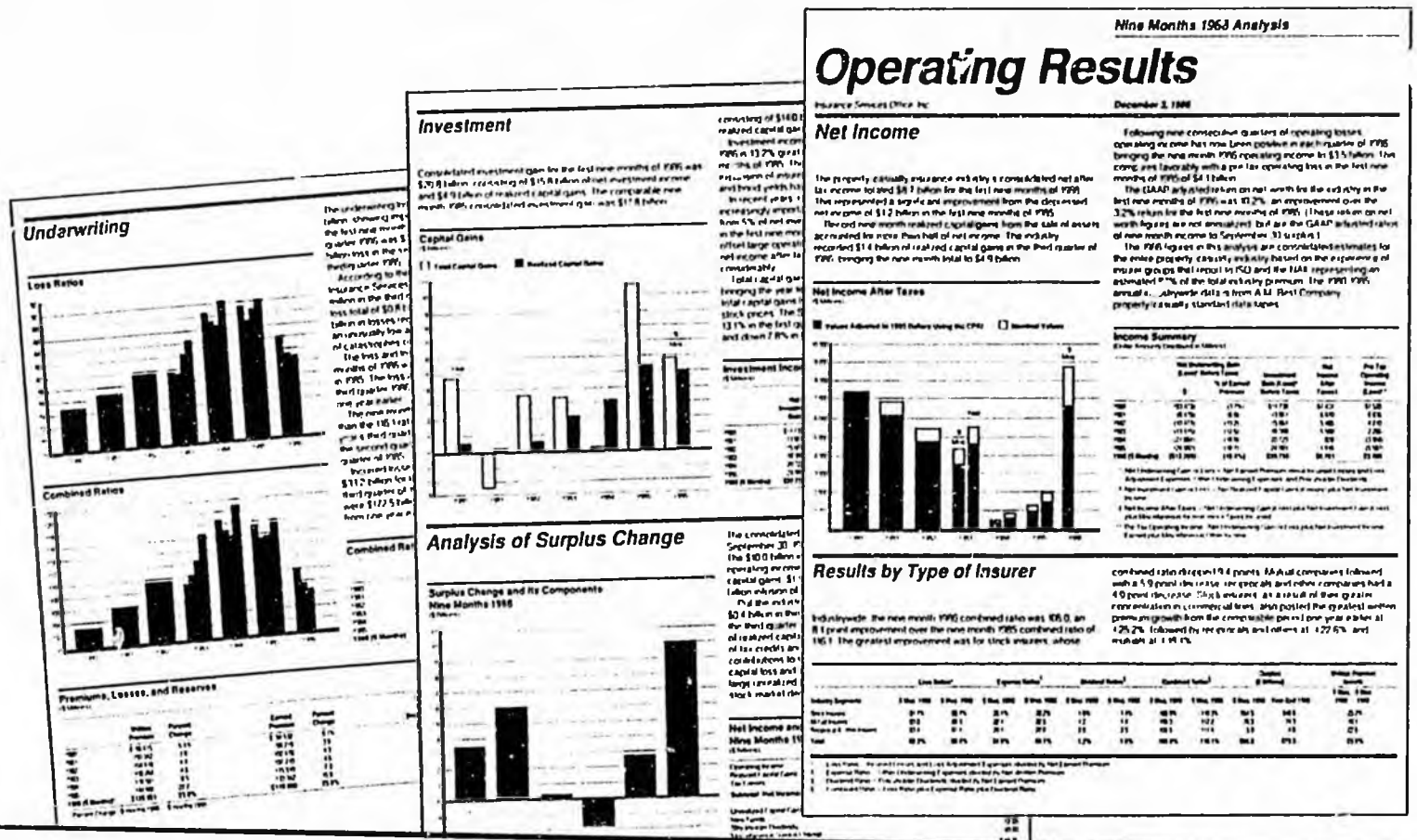
Just from Annual Statement data, comprehensive financial information exists as a matter of public information to permit even the most complex analyses to be performed. During the public debate of the past year, critics of the industry would have been unable to prepare their commentaries had not such a degree of financial data been available for public consumption.

But Annual Statements alone do not satisfy all of the financial data reporting obligations placed upon insurers. Because insurance companies are businesses, they must also comply with the requirements of government agencies that monitor the activities of the general business community, such as the Securities and Exchange Commission (SEC) and the Internal Revenue Service (IRS).

The SEC requires corporations with securities, either listed on national exchanges or registered under the Securities Act of 1933, to furnish shareholders with periodic information. Many insurance companies fall within these categories, and thus are subject to the requirements of the SEC. The IRS also specifies a detailed level of financial data reporting for all businesses, especially insurance companies. IRS activity represents one more leve of government review of insurer data.

STATISTICAL DATA

In addition to their regulatory responsibility to mo tor insurers for solvency and solidity, state regula tors are also charged with enforcing the statutory requirements that rates shall not be excessive,



Operating Results, ***published by Insurance Services Office, Inc., is one example of the kind of analysis that can be performed using insurer financial data.***

inadequate, or unfairly discriminatory. Therefore, the laws in most states require that insurers provide statistical information at least annually in the form and detail that is necessary to aid the regulator in determining whether the rating systems comply with the statutory standards.

Like financial data, statistical data are derived from the individual business transactions conducted by an insurance company. They contain fundamental information about insurance coverages and the premium and loss experience related to those coverages. Statistical data are collected in all states, regardless of whether insurance rates for those states are introduced with the prior approval of the regulator or are implemented by the company, subject to later regulatory review.

For statistical data to be valuable in supporting regulatory oversight of rate adequacy and pricing structures, they must be analyzed in an appropriate context. To test adequacy and fairness, the analysis must relate premiums to losses for a given set of policyholders. The analysis should include data in a level of detail that allows the evaluation of the rate structure *and* its component parts, such as class, territory, and coverage. To assist in projecting future costs, the analysis must accurately recognize loss development and loss frequency and severity trends.

State laws and regulations empower insurance regulators to collect the statistical data necessary to evaluate the adequacy and fairness of the rates and rating plans used in their states. These laws are usually patterned after the All-Industry Model Rating Law, adopted by the NAIC.

PRINCIPAL ISO PREMIUM CODING FIELDS

- Company or Group Number
- Transaction Type
- Accounting Date
- Inception Date
- Transaction Effective Date
- Transaction Expiration Date
- State
- Territory
- Type of Policy
- Annual Statement L.O.B.
- Subline
- Classification
- Coverage
- Rating ID
- Construction
- Protection
- Deductible
- Exposure/Amount of Insurance
- Rating Modification Factor
- Rate Departure Factor
- Premium Amount
- Premium Record ID
- Form
- Policy Limits
- Entry into Claims Made Date
- Limits ID
- BI or CSL Limit
- PD Limit
- BI Deductible
- PD Deductible
- State Exception
- Zone Rating
- BI or Combined Premium
- PD Premium
- PIP Premium
- PIP Limit
- PIP Deductible
- PIP Rating Basis
- OTC Coverage
- Collision Coverage
- Anti-theft Device
- Age
- Value per Rating Unit
- Building and Open Lots
- Original Cost New
- OTC Premium
- Collision Premium
- Number of Employees
- Rate Group
- Type Rating Deductible
- Area/Number of Apartments

PRINCIPAL ISO LOSS CODING FIELDS

- Company/Group Number
- Transaction Type
- Accounting Date
- Inception Date
- Loss Date
- State
- Territory
- Type of Policy
- Annual Statement L.O.B.
- Subline
- Class
- Coverage
- Rating ID
- Construction
- Protection
- Deductible
- Type of Loss
- Claim Count
- Exposure/Amount of Insurance
- Loss amount
- Loss Record ID
- Premium Record ID
- Form
- Policy Limits
- Entry into Claims Made Date
- Receipt of Claims Notice Date
- Status of Claim
- Limits ID
- Notice of Occurrence Date
- State Exception
- Accident State
- Zone Rating
- PIP Unit
- PIP Deductible
- PIP Rating
- PIP Limit
- Anti-theft Device
- Age
- Value per Rating Unit
- Building and Open Lots
- Original Cost New
- Number of Employees
- Rate Group
- Type
- Rating Deductible
- Actual Deductible

The ISO statistical plan requires the reporting of all major risk identifying characteristics, including coverage, class and premium for each policy written. Similarly, for each loss a record is reported with complete identifying detail.

In most cases, the regulatory agencies designate statistical agents to perform this function on their behalf. The statistical agents develop detailed instruction books, called statistical plans, which specify the way each insurer is to code and submit its premium and loss data to the statistical agent. The statistical plans define the data elements (e.g., line of business, coverage, class, state, territory, premium, etc.) as well as the formats and time-frames for company reporting. The data elements used in the classification and rating of risks are the data elements captured under the statistical plans. The plans are continually reviewed by the statistical agents and are modified, when necessary, to correspond to approved rating structures and coverage programs.

Statistical plans are subject to review and approval by individual states. Moreover, the statistical agents are subject to regulatory examination to assure that they are performing in accordance with regulatory standards.

ISO is one of the major statistical agents. Companies reporting to Insurance Services Office represent approximately 80 % of the market for the commercial lines of insurance that ISO services.

Each of ISO's reporting companies submits relevant information about individual commercial lines policies. Consistent with the purpose of statistical plans, the reported data vary for each commercial line of insurance. However, the data generally include elements necessary for a thorough evaluation of the rate structure for a given state, line, and class of business.

Data under the ISO statistical plans are collected on a unit transaction basis. That is, a record is coded and reported to ISO every time a policy is issued, a loss is paid, or a case reserve is established or revised. In addition to the premium dollars, the record captures substantial information about the risk's characteristics, such as the line of business (e.g., general liability, products and completed operations), the classification (e.g., dairy products manufacturing), the coverages (e.g., bodily injury, property damage), the exposure (e.g., units of area, receipts, or sales), the location (e.g., state and territory), policy limits, and deductible.

Similar reporting is required on the loss side. A loss record is generated every time a loss is paid or a case reserve is established or changed. Total loss dollars are reported separately for paid losses and outstanding losses. In addition to the risk characteristics reported on the premium record—line, class, coverage, state—information such as "type of loss" and "claim count" is also collected. ISO processes over 800 million records annually, and, at any one time, the size of its data base exceeds 1.7 billion records.

To meet statutory demands, ISO provides data i the complete detail of approved coverage forms and rating structures for each line of insurance. general liability insurance alone, ISO collects pr mium and loss data for over 1,100 separate clas in each state. These classes range from day ca centers to grocery stores to paper manufacture To the extent that these classifications generate enough data for a credible analysis, the data ca used to review historic rate level adequacy for e class or as the basis for prospective rate levels.

A comprehensive data quality program is an int gral part of the data processing function at ISO. Any data errors detected during processing are returned to the companies, which are then resp sible for correcting the errors and resubmitting data to ISO. This is not a selective process—it applies to every company and every submissio without exception.

Once the statistical data have been verified as valid, reliable, and accurate, they are reported regulators to assist them in determining wheth existing rate systems are in compliance with th insurance statutes of their states. The *NAIC St cal Handbook* specifies the statistical reports t regulators receive.

The NAIC Statistical Handbook defines the content and format of the reports that the statistical agents are required to produce annually. It suggests an efficient production schedule for the reports defined in the Handbook—and identifies other reports that can be produced within a specified time of their request. Moreover, it develops clear explanations of the data capabilities of each of the statistical agents so that differences can be easily identified and compatibility promoted, when possible.

In accordance with the requirements of the Statistical Handbook, the statistical agents file reports annually for each line of insurance with each state regulator. As the Statistical Handbook (Section II, Page 1) explains:

> The statistical reports can be used to review what the experience has been both over broad categories and for individual coverages. The loss ratios, average claim costs, claim frequencies, and pure premiums appearing on the reports can be used to compare different coverages and to determine trends. For example, territory experience and that for the entire state can be contrasted and differences between coverages can be discerned. Long term trends in loss ratio, claim cost and claim frequency can be reviewed. Aggregate results may serve as indicators of areas which warrant additional investigation.

In addition to the report requirements specified in the Statistical Handbook, the statistical agents are also required to compile data for the NAIC Fast Track Monitoring System.

SECTION TWO
SHEET 5

GENERAL LIABILITY INSURANCE
DAY NURSERIES (CLASS 82115)
MONOLINE AND MULTILINE COMBINED

This exhibit includes experience under the OL&T Day Nurseries classification. This class is institutional day care operations, i.e., when day care is the primary function of the business. This experience does not include day care which is provided out of an individual's home and has been deemed by the underwriter to be an "incidental business exposure" according to the rules of the Homeowners Policy and is covered there.

POLICY YEAR ENDED	TOTAL LIMITS EARNED PREMIUM	BASIC LIMITS INCURRED LOSSES	EXCESS LIMITS INCURRED LOSSES	NUMBER OF INCURRED CLAIMS	LOSS & LOSS ADJUSTMENT EXPENSE RATIO
12/31/80	$ 1,785,529	$ 1,013,414	$ 268,671	254	71.8%
12/31/81	2,581,645	1,199,095	1,139,122	336	90.6%
12/31/82	3,321,139	2,026,196	1,597,703	462	109.1%
12/31/83	4,016,915	3,073,908	2,430,769	612	137.0%
12/31/84	4,586,601	4,452,400	3,331,254	840	169.8%
TOTAL	$16,291,829	$11,765,013	$8,767,519	2,504	126.0%

This exhibit is extracted from ISO's April 1986 publication, *Countrywide Results for Selected Commercial Liability Classes.* ***It is an example of the kinds of analyses that can be performed using the statistical data routinely reported by insurers.***

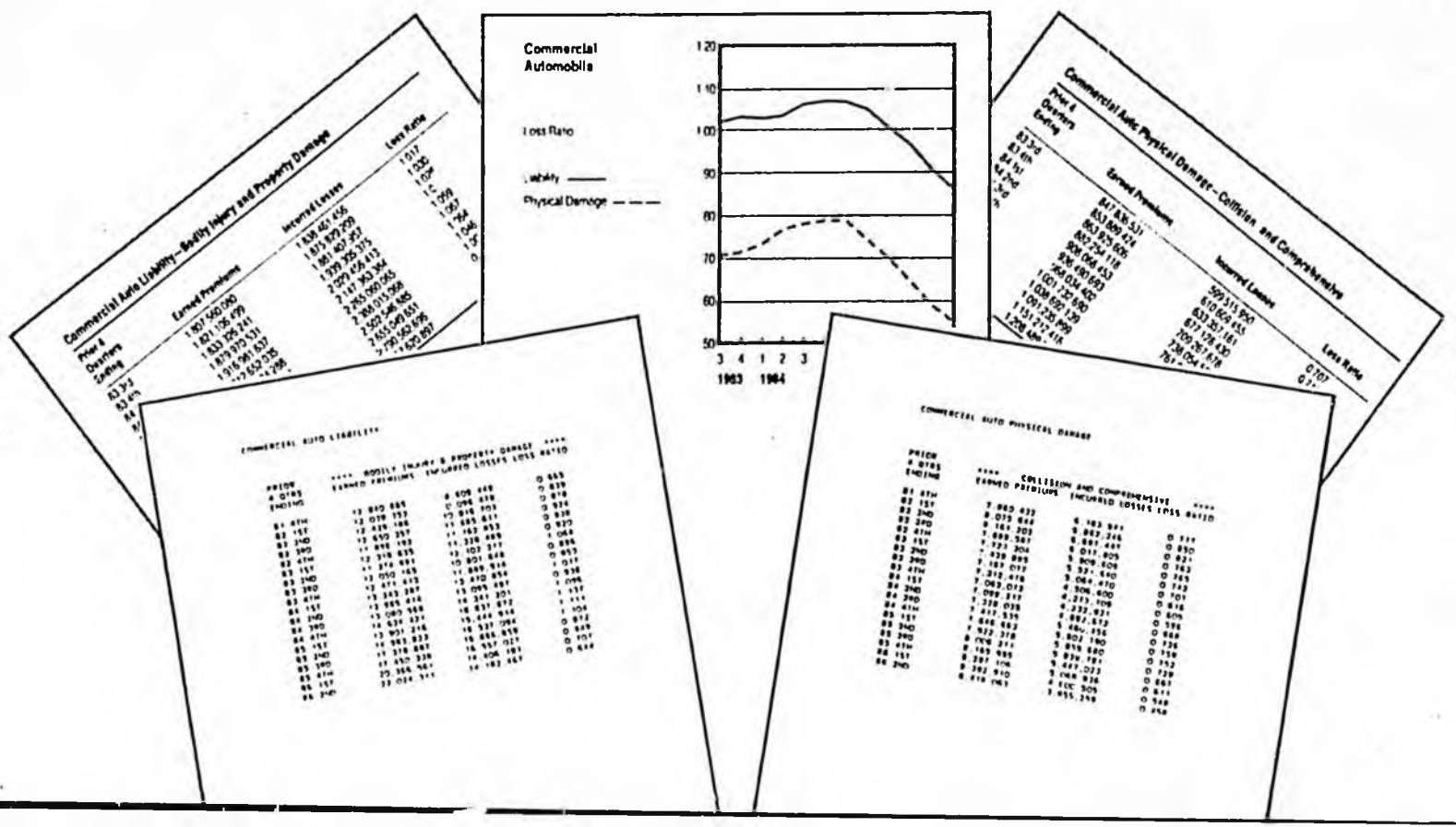
Under the *Fast Track Monitoring System*, loss ratio data, compiled by state and in the aggregate for the major lines of insurance, are used to give an early indication of the by line underwriting experience of the industry.

To produce Fast Track data, companies that together write a large percentage of the industry's premium for Fast Track lines report highly summarized accounting data by quarter, on an accelerated schedule, to the two major statistical agents. The statistical agents, Insurance Services Office and The National Association of Independent Insurers (NAII), combine these data and make them available to regulators.

CLAIM FILE INFORMATION

Occasionally, issues of interest to both insurers and policymakers have made it desirable to supplement the financial and statistical data that are routinely provided. For example, claim studies of private passenger automobile liability insurance were c ducted to examine the potential efficiencies of a fault system of compensation. Claim studies ha also been used to analyze problems in medical malpractice and product liability insurance.

Claim studies can be helpful in answering spec questions. However, even in a well-designed cla study, inherent limitations exist with respect to the availability and use of information, and thes limitations may inhibit the precise quantificatio of results.



Under the Fast Track Monitoring System, loss ratio data, compiled by state and in the aggregate for the major lines of insurance, give an early indication of the by line underwriting experience of the industry.

Moreover, selection of the appropriate methodology must be based on the issues to be addressed in the study, and the questions to be answered. For example, a claim file study may focus on open or closed claims and it may be prospective or retrospective. A selection of any one of these four types of claim file studies has advantages and disadvantages that will vary based on the question that the study is intended to answer.

Regardless of the methodology that is chosen, some limitations remain:

- The required information may not be available if a claim is voluntarily settled.

  The great majority of claims are settled before they ever reach a verdict—or even before they reach trial. When that happens, only the total dollar amount of the settled claim is identified in the claim file. Specific information on economic loss versus non-economic loss, or punitive damages, or other quantitative distinctions will not usually be contained in the claim file. In addition, follow-up interviews with the claimant and defendant or their legal representatives frequently disclose that the parties involved in the claim value the various quantitative components of the payment quite differently.

- Claim file information may be incomplete even if a claim is tried to verdict.

  For example, some states do not require that verdicts be itemized. In other states, collateral source information is inadmissible as evidence and is not in the claim file. Some types of information are available only in plaintiff's attorney files and cannot generally be accessed by insurers.

- Claim file information does not provide an exact measurement of current conditions or how the environment has changed.

  For example, it is expected that some of the claims closed during a six-month period in 1986 will have occurred as early as 1976, while some will have occurred in 1986 and every year in between. In order to make any analysis of the impact on current losses, appropriate actuarial adjustments would be required to put each of these claims on the same current cost basis.

- An expanding proportion of insurance protection is provided through self-insurance, captive insurance companies, and combinations of those mechanisms with surplus lines insurers. This is particularly true for the lines of business most affected by tort reform. Much of the captive and surplus lines business is written by companies outside the United States and, therefore, is outside the United States regulatory system and its associated data reporting requirements. This means that a significant component of the data critical to the evaluation of the impact of tort reform is not available in United States insurance industry data bases and claim files.

ISO DATA PROJECTS

With full recognition of the potential limitations that claim studies present, ISO is sponsoring two high-priority projects involving commercial insurance claims data. Using the services of a respected policy and management consulting firm, as well as ISO's own statistical and actuarial expertise, the two projects will efficiently provide valuable, focused claim data to:

- obtain as much objective information as possible about the relative impact on claim costs of various tort reforms;

- assist insurers, regulators and others in making the difficult judgments associated with evaluating the effects of tort reform; and

- gather all available information from insurer claim files that will be valuable in assessing future changes or modifications to existing tort law.

By their very nature, these projects cannot provide all the information needed to precisely measure tort reform. Therefore, informed judgement will remain a key ingredient in any evaluation of the effects of various tort reforms.

The first project—the *Claim Evaluation Project*—is being conducted by the independent policy and management consulting firm of Hamilton, Rabinovitz and Alschuler of Los Angeles, California. The Claim Evaluation Project will require a group of representative, experienced, claims staff to evaluate certain typical but hypothetical claims, first, under current, and then, under "reformed" tort laws. In effect, each claim examiner will evaluate the identical set of typical claims. Their differing evaluations, based upon the alternative legal contexts, will demonstrate the relative claim cost differences for these situations on the bodily injury liability portions of these lines of insurance:

- Owners, Landlords, and Tenants
- Manufacturers & Contractors
- Product Liability
- Commercial Auto
- Businessowners

Fifteen states that have enacted tort reform—Alaska, California, Colorado, Connecticut, Florida, Illinois, Maryland, Michigan, Minnesota, New Hampshire, New York, Oklahoma, Utah, Washington, and Wyoming—and nine states that have not enacted tort reform, or that have enacted tort reform with more limited applicability—Georgia, Louisiana, Massachusetts, New Jersey, North Carolina, Ohio, Pennsylvania, Texas, and Virginia—have been selected for a representative evaluation. Their selection was based on a combination of criteria, including geographic region of the country, population, existing tort law, the purity of the reforms enacted and the mix of the reforms enacted.

Up to 200 claim examiners are participating in each of these project states. They represent nine of the leading commercial lines insurers and two independent claims adjustment bureaus.

A final report for the Claim Evaluation Project will be issued during March 1987.

The second project, the *Claim File Data Analysis*, will be performed by ISO and participating insurers, with the results compiled by ISO. The project will collect key data from actual claim files in selected states that have enacted some modification of the tort system. Not only is the project designed to provide an estimate of the value of the claims in the new tort environment, but the project will collect additional data that could be used by insurers in their individual evaluation of the effect of various other tort reform measures on claim costs.

The Claim File Data Analysis is designed to encompass a review of the claim data in twenty-seven states that have enacted various modifications of the tort system. Those states are: Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New York, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Washington, West Virginia, and Wyoming. While these states represent a broad cross-section of the country by size, location, and mixture of current tort reform environments and enacted tort reforms, study design is sufficiently flexible to accommodate other states where unique substantive tort reforms may be enacted.

The actual technical specifications of the project have been reviewed with representatives of the National Association of Insurance Commissioners (NAIC). The NAIC was invited to participate and suggest appropriate adjustments, where necessary, to ensure that the project provides useful information to regulators and other government interests.

The design of the Claim File Data analysis contemplates a review of at least 12,000 claims—6,000 claims, each with a total claim value estimated to be greater than $25,000, and 6,000 claims, each with a value less than $25,000. Recognizing the possible limitations of claim studies, ISO has attempted to minimize those limitations by a project design that includes a mixture of open and closed claims and a balance of maturity and freshness.

The criteria for selecting claims are as follows:

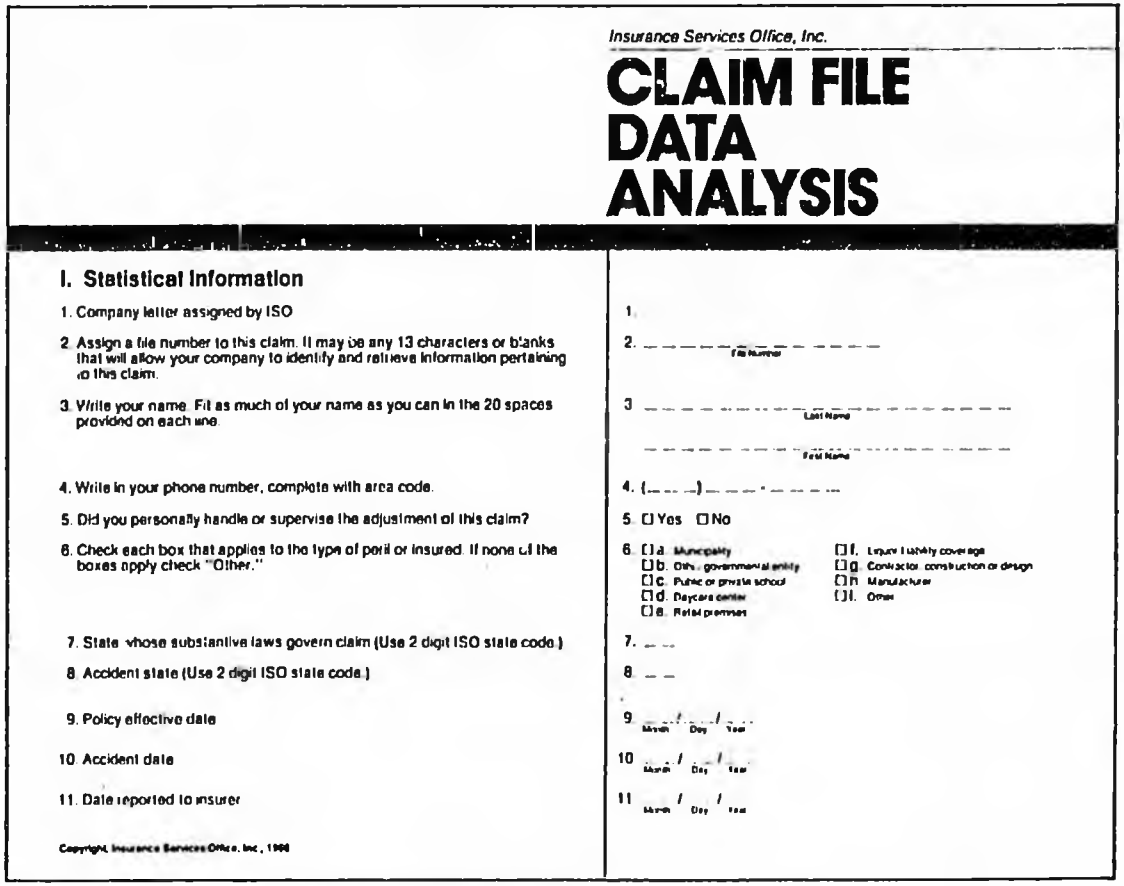
- Claims over $25,000—A reasonable balance between currency of data and maturity of claims is essential for this body of claims. For this reason, the options of looking solely at closed claims (too stale) or open claims (too immature) were rejected. Therefore, the project will examine claims greater than $25,000 arising out of policy year 1983, closed after July 1, 1985 or currently open. To assure a reasonable degree of maturity of claim file data on currently open claims, it is required that the claims were open on or before January 1, 1986.

- All claims sizes—A target sample of 200 claims per state will be extracted from claims, regardless of policy year and regardless of size of claim, closed during the month of May 1987.

- Government Claims—All governmental claims from policy year 1983, open or closed, regardless of size, will be selected.

The *Claim File Data Analysis* will study the bodily injury liability portions of Owners, Landlords & Tenants, Manufacturers and Contractors, Product Liability, Commercial Auto, and Businessowners Insurance. To the extent insurer claim files contain sufficient information on any of the enacted tort reforms, the study will consider, among other reforms:

- limiting non-economic damages;
- restricting or eliminating punitive damages;
- restricting or eliminating the collateral source rule; and
- restricting or eliminating the doctrine of "joint and several" liability.



Insurance Services Office, Inc.

CLAIM FILE DATA ANALYSIS

I. Statistical Information

1. Company letter assigned by ISO
2. Assign a file number to this claim. It may be any 13 characters or blanks that will allow your company to identify and retrieve information pertaining to this claim.
3. Write your name. Fit as much of your name as you can in the 20 spaces provided on each line.
4. Write in your phone number, complete with area code.
5. Did you personally handle or supervise the adjustment of this claim?
6. Check each box that applies to the type of peril or insured. If none of the boxes apply check "Other."
7. State whose substantive laws govern claim (Use 2 digit ISO state code.)
8. Accident state (Use 2 digit ISO state code.)
9. Policy effective date
10. Accident date
11. Date reported to insurer

1.
2. _ _ _ _ _ _ _ _ _ _ _ _ _ _ _
File Number
3. _
Last Name
_ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _
First Name
4. (_ _ _) _ _ _ - _ _ _ _
5. ☐ Yes ☐ No
6. ☐ a. Municipality ☐ f. Liquor liability coverage
☐ b. Other governmental entity ☐ g. Contractor, construction or design
☐ c. Public or private school ☐ h. Manufacturer
☐ d. Daycare center ☐ i. Other
☐ e. Retail premises
7. _ _
8. _ _
9. _ _ / _ _ / _ _
Month Day Year
10. _ _ / _ _ / _ _
Month Day Year
11. _ _ / _ _ / _ _
Month Day Year

The ISO Claim File Data Analysis project is designed to provide an estimate of the value of claims in new tort environments. It will include a review of at least 12,000 commercial liability claims in 27 states that have enacted various modifications to their tort systems.

Among the matters the study will examine are the amount of the claim, the cause of the claimant's injury (such as defective product sold by the insured), the type of claim (closed or open), the economic impact to the claimant (such as wage loss), the existence of collateral sources (such as Medicare), the allocated loss adjustment expense (such as the cost of defending against the claim), and the amount of any punitive damages.

About twenty-four insurers will participate. They will represent almost 80% of the countrywide general liability insurance premiums written. While no insurer will participate in all of the 27 states selected, the insurers participating in each state collectively will represent at least 50% of the general liability premiums written in that state.

CONCLUSION

Some industry critics have advocated additional data reporting requirements as an outgrowth of their perceived need to substantiate or disprove insurer explanations for price increases and coverage availability.

Given the importance that regulators, consumers, and insurers already place upon sound, efficient data collection mechanisms, it is unlikely that additional data reporting requirements will provide a measurable increase in benefits. Insurers already provide comprehensive financial and statistical data that can be used to evaluate solvency, estimate profitability, or measure the proper relationships between rates and coverages. In addition, two projects being sponsored by ISO are specifically designed to provide maximum amounts of information about the relative impact on claim costs of various tort reforms, as well as other information that will supplement the discussions of public policymakers reviewing the industry's recent performance.

Much of the information contained in this publication was extracted from the Report of the Statistical Information Advisory Committee to the NAIC Legal Liability Insurance (D) Task Force. ISO served as chairman of the Advisory Committee and the following organizations participated in, and contributed to, the Advisory Committee efforts:

Alliance of American Insurers
All-Industry Advisory Committee on Special Data Reporting
American Academy of Actuaries
American Association of Insurance Services
American Insurance Association
Employers Insurance of Wausau
Independent Insurance Agents of America, Inc.
National Association of Independent Insurers
National Association of Professional Insurance Agents
National Association of Professional Surplus Lines Office, Ltd.
National Independent Statistical Service
Nationwide Insurance Companies
Reinsurance Association of America
Risk and Insurance Management Society, Inc.
State Farm Insurance Companies
The Travelers Insurance Companies

January 1987

Prepared for House Judiciary
By Rep. Zawacki 3/13/87

SUPPORT for amending the McCarran-Ferguson Act:

Citizens Coalition for Tort Reform

National Association of Attorney Generals

National Conference of State Legislatures

National Insurance Consumer Organization

U.S. Presidents:

-the Ford Administration exhaustively studied the insurance industry and concluded that price competition in the insurancce industry, without McCarran Act antitrust protection, would be in the public interest.

-similarly, President Carter's National Commission for the Reform of Antitrust Laws and Procedures, composed of the nation's leading antitrust experts, concluded 18-2 that McCarran-Ferguson's broad antitrust immunity should be repealed.

-the Reagan Administration supports repeal of the broad McCarran-Ferguson antitrust exemption, as Federal Trade Commission Chairman Dan Oliver recently testified before the Senate Commerce Committee in February 1987.

(All the above noted for support has documentation that is in your file)

Alaska State Legislature
House of Representatives

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GIRDWOOD, ALASKA 99587
(907) 783-2905

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-2693/2719

REPRESENTATIVE
JIM ZAWACKI
DISTRICT 7

MEMBER
COMMUNITY & REGIONAL AFFAIRS COMMITTEE
LEGISLATIVE BUDGET & AUDIT COMMITTEE
FINANCE SUBCOMMITTEE

MEMORANDUM May 5, 1987

TO: Representative Dave Donley, Chairman
House Labor & Commerce Committee

FROM: Representative Jim Zawacki

SUBJ: HJR 25

The intent of HJR 25 is to support efforts in Congress to amend the McCarran-Ferguson Act enacted in 1945 which exempts the insurance industry from federal antitrust laws.

The broad antitrust immunity enjoyed by the insurance industry under the McCarran-Ferguson Act is both undesirable and unnecessary. The exemption is undesirable because, by blunting some forms of competitive behavior, it denies consumers the best array of insurance services at the lowest possible cost. The exemption is unnecessary because application of the antitrust laws is in no way inconsistent with either desirable industry cooperation or effective state regulation.

There have been two objections raised by the insurance industry to this resolution. One, it is agrued that support of HJR 25 would remove or subordinate the primacy of states' regulatory role as regulator of the industry. This is not so. HJR 25 was drafted to address this concern. Senator Howard Metzenbaum, the original sponsor of the federal legislation, has testified that his intent was not to alter state regulatory primacy. The Senate Antitrust Committee in Washington, D.C. has made it clear that there is no intent to

alter the primacy of state regulatory authority over the industry. Two, is the assertion that the repeal of the antitrust exemption will restrict information pooling that assists the industry in accurately estimating how much they are likely to pay out in the future. Again, this is <u>not</u> <u>so</u>. HJR 25 specifically recognizes the need for the industry to pool and analyze the past claims they have paid; the more claims they can analyze, the more accurate their estimates of future payouts will be.

I was asked by the Citizens Coalition for Tort Reform to introduce this resolution. The Coalition has reviewed this issue closely and determined that it is in the consumers' best interests to repeal this special privilege to the insurance industry. The Coalition has found that there is strong bipartisan support to amend the McCarran-Ferguson Act and that the position of the insurance industry to retain this exemption is not logical or in the best interests of the consumer.

Thank you.

(7)

HOUSE COMMITTEE REPORT

Date referred: 3/25/87 FURTHER REFERRALS: Judiciary

DATE: 5/5/87

The Labor & Commerce Committee has considered HJR 25

Relating to federal regulation of the insurance industry.

RECOMMENDS:

[ ] replace with HJR25 [ ] the same title

[ ] attached amendment(s) [ ] a new title

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HJR 25
Publish Date :

REQUEST:

Revision Date:
Title : Relating to federal regulation of the insurance industry.
Sponsor : Zawacki
Requestor : House Labor & Commerce

Agency Affected :
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Dave Donley, Chairman

Prepared by : House Labor & Commerce
Division :

Phone : 465-3892
Date : 5/5/87

Approved by Commissioner :
Agency :

Date :

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

page ____ of ____

Submitted by Tom Slagle

HJR 25

The McCarran-Ferguson Act

Proposals have been submitted in Congress to repeal or modify the McCarran-Ferguson Act. This Act gives the insurance industry certain limited exemptions from federal antitrust laws.

However, state and federal authorities who investigated the causes of the recent problems in insurance liability markets generally agree that the factors that precipitated these problems had nothing to do with antitrust law violations. Few insurance industry observers believe that repeal or modification of the McCarran-Ferguson Act would lead to reductions in the price of liability insurance or to an expansion of the market where coverage has been difficult to obtain. Repeal of the Act would, however, change the way the insurance industry is regulated because it would create the need for a federal regulatory system. This system would either exist side-by-side with the current state system, producing a dual system of regulation similar to banking regulation, or supersede the state regulatory system and eventually replace it. To make any judgment as to whether this change would benefit consumers, it is important to understand the provisions of the McCarran-Ferguson Act and how it came to be enacted.

Key Provisions of the McCarran-Ferguson Act

Public Law 79:15, known as the McCarran-Ferguson Act

after its sponsors Sens. Patrick Anthony McCarran of Nevada and Homer Ferguson of Michigan, was signed into law on March 9, 1945.

The McCarran-Ferguson Act was designed not to free insurance companies from federal antitrust laws but to ensure the preeminence of state regulation. The Act speaks of continued state regulation and taxation of the industry as being in "the public interest." Thus, no act of Congress should be "construed to invalidate, impair, and supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business." Federal antitrust laws only would apply "to the extent that such business is not regulated by state law." The Sherman Act of 1890, the cornerstone of U.S. antitrust law, would always apply to cases involving boycott, coercion or intimidation.

Early Ruling Affirms Preeminence of State Regulation

State governments historically have regulated the insurance business. Although state regulation evolved slowly, the primacy of state, as opposed to federal, regulation was confirmed by a Supreme Court ruling in 1869, early in the insurance industry's development. The precedent-setting case, Paul vs. Virginia 75 U.S. (8 Wall.) 168 (1869) involved a Virginia statute that required

out-of-state insurance companies doing business in the state to be licensed. Some insurers at this time preferred the uniformity of federal regulation to the growing diversity of state regulation and, to promote their cause, they argued that their agents, specifically a Mr. Paul, should not have to obtain a license to do business in the state of Virginia. Only Congress had the power to regulate interstate commerce, they said.

The pivotal issue was whether insurance could be considered "commerce" within the definition of the Commerce Clause of the U.S. Constitution. The Court ruled that the Virginia statute was not unconstitutional because insurance "policies are simply contracts ... not articles of commerce in any proper meaning of the word."

The Paul vs. Virginia ruling, which placed insurance outside the realm of federal regulation on the basis that the sale of insurance was not commerce, remained intact for 75 years.

Reversal of Decision Leads to McCarran-Ferguson Act

Then, in 1944, in U.S. vs. South-Eastern Underwriters Association, 322 U.S. 533 (1944), the Supreme Court overturned Paul vs. Virginia. The case involved an indictment of South-Eastern Underwriters Association and its member companies for alleged violations of the Sherman Antitrust Act. Explaining that the size and importance of the insurance industry had grown immensely since 1869 when

Paul vs. Virginia was decided, the Court held that an insurer conducting a substantial portion of its business across state lines was indeed engaged in interstate commerce. Congress had not intended to exempt insurers from antitrust laws, the court said.

The South-Eastern Underwriters decision alarmed the insurance industry as well as state governments. Since the early days of insurance, both insurers and state regulators had come to realize that some cooperation in ratemaking was essential to preserve the industry's financial health. Small companies need to participate in data-sharing programs because they lack the resources and the broad data base needed to predict losses and establish adequate rates. So by 1944, setting prices in concert, within a framework of state regulation to prevent abuses, had become an accepted practice.

Insurers now faced the prospect of antitrust prosecution for ratemaking activities. State governments also would be affected by the South-Eastern Underwriters decision. They stood to lose both their developing system of state regulation and funds generated by taxes on the insurance industry. These fears were not unfounded. Following the South-Eastern underwriters ruling, some insurers did challenge state tax laws in court. Thus, both the states and insurance companies were seeking a federal remedy to deal with the situation. Within a year after the South-Eastern Underwriters Supreme Court ruling, Congress passed the McCarran-Ferguson Act.

Requirements For Antitrust Exemption

The McCarran-Ferguson Act established three requirements for antitrust exemption to apply: (1) the activity in question must fall within the business of insurance; (2) the activity must be regulated by state law; and (3) the activity must not involve boycott, coercion or intimidation. These broad requirements, especially the first one, have been the subject of much litigation. Several cases reached the Supreme Court. The decisions in these and other cases clarify and define the areas in which the insurance industry has immunity from federal antitrust laws.

1) The Business of Insurance: The meaning of the term "business of insurance" is crucial in determining what specific activities are within the scope of the McCarran exemption. In an often-cited case, SEC vs. National Securities, Inc. 393 U.S. 453 (1969), the Supreme Court declared that the "business of insurance" does not encompass every activity that insurers engage in but revolves around the relationship between insurance companies and their policyholders.

The case involved an Arizona law which gave the state's Insurance Director the authority to approve mergers between insurance companies. The SEC wanted a particular merger undone, claiming one of the companies had fraudulently

obtained stockholders' votes. The company argued the SEC had no jurisdiction. The Supreme Court ruled state regulation of the relationship between an insurance company and its stockholders was not included in the "business of insurance."

More recent U.S. Supreme Court cases have set forth a three-prong test for determining what constitutes the "business of insurance" for purposes of the McCarran Act exemption. In Group Life & Health Insurance Company vs. Royal Drug, 440 U.S. 205 (1979), the Court focused on two elements in determining what constitutes the "business of insurance": (1) the spreading and underwriting of risk; and (2) a direct connection with the contractual relationship between the insurer and insured.

The Royal Drug action was brought by 18 independent pharmacies against Blue Shield of Texas and three pharmacies that had entered into agreements to keep down the price of drugs. The Supreme Court ruled that Blue Cross's agreements to fix drug prices did not involve underwriting or spreading of risk and, therefore, did not come within the business of insurance.

In Union Life Insurance Company vs. Pireno, 458 U.S. 119 (1982), which involved the use of a peer review committee to assess the necessity of treatment and the reasonableness of medical fees submitted by claimants, the Supreme Court added the third prong, namely, that the anticompetitive practice must be limited to entities within the insurance industry, thus narrowing the McCarran-Ferguson

exemption and opening the door for any agreement between an insurance company and a third party outside the industry to be scrutinized for violation of antitrust laws.

2) Regulated by State Law: While courts have tended to narrow the scope of what is meant by the "business of insurance" under McCarran-Ferguson, court interpretations have been more liberal in deciding what kind of state regulation provides immunity from federal laws. In general, courts will not inquire into the actual effectiveness of state laws and regulations governing the insurance industry.

The Supreme Court, in FTC vs. National Casualty Co., 357 U.S. 560 (1958), decided that if a state had any appropriate legislation and authorized administrative enforcement, it was regulating within the meaning of McCarran-Ferguson. At issue was whether the FTC could order insurance companies licensed in a state to stop certain advertising practices even though the state had enacted legislation pertaining to unfair advertising by insurers. The court ruled the existing regulation sufficient to trigger immunity from federal action without regard to the effectiveness of the regulation.

The court did draw a line, however, in FTC vs. Travelers Health Association 362 U.S. 293 (1960) when called upon to determine whether a state's regulation of its domiciled companies' advertising activities in other states was sufficient regulation to invoke McCarran immunity from the FTC. In the Travelers case the FTC issued a cease and

desist order to prohibit a company licensed only in Nebraska and Virginia from making deceptive statements in circulars soliciting mail-order insurance business from customers in other states.

The Supreme Court stated that regulation meant regulation by the state in which the activity is practiced and has its impact. The Court was not willing to allow the regulatory activities of a few states to invoke McCarran immunity for the activity in all other states.

3) Boycott, Coercion or Intimidation: As mentioned earlier, one of the more important areas of antitrust immunity pertains to the industry's practice of pooling and sharing information on losses associated with various types of insurance coverages. This sharing of data enables companies to make statistically valid predictions of future losses, charge adequate rates and maintain realistic reserves. The use of industry-wide data to develop advisory rates, shared loss experience, standardized contract forms and shared underwriting are essential elements of the business of insurance which could run afoul of antitrust statutes without McCarran-Ferguson immunity.

Generally the courts have applied the boycott, coercion or intimidation provision to three types of activities: the exclusion of nonconforming competitors from the market, tie-in sales, and concerted refusals to deal.

A landmark case in this area was St. Paul Fire and Marine Insurance Co. vs. Barry 438 U.S. 541 (1978) where the

Supreme Court found certain types of risk selection practices could constitute concerted refusals to deal. The Court also stated that victims of such practices need not be limited to insurance entities, substantially broadening the boycott exception. St. Paul had announced that it would not renew medical malpractice policies covering claims occurring during the term of a policy but reported after the policy expired. Other companies were alleged to have refused to write the business and Barry claimed that his allegations of a collective effort of refusal to deal should be outside of McCarran immunity. The Supreme Court held that the alleged conduct of the malpractice insurers would, if proven, constitute a boycott and the McCarran-Ferguson exemption, therefore, did not apply.

A lower court, in Fry vs. John Hancock Mutual Life Ins. Co., 355 F. Supp. 1151 (D.C. Tex. 1973) declined to give tie-ins antitrust immunity. The company had been requiring those who applied for loans to also purchase life insurance from the insurer. The court ruled that federal regulation is applicable to the sale of insurance tied in to farm loans.

These court cases exemplify the most prevalent types of disputes. Other cases have tended to refine these three areas.

FROM National Conference of State Legislatures

NAME: Insurance Data Collection

COMMITTEE: Government Operations & Regulation

TYPE OF POLICY: Consent

The adequacy and contents of property and casualty insurance data has come under increasingly serious scrutiny as state legislatures have attempted to resolve problems with affordable and available liability insurance.

To address this matter, several state legislatures have recently enacted legislation substantially expanding the data which insurers must submit when seeking rate changes. These actions demonstrate how insufficient the information necessary to evaluate rate requests is and how uneven the collection and utilization of appropriate data appears to be. Most annual reports submitted to state insurance commissioners appear to be inadequate.

Many insurers operate on an interstate basis. State regulation ought to ensure that rates are developed with sufficient and relevant background information. Rates do affect availability. Appropriate data can demonstrate relationships between the civil justice system and the costs for obtaining property and casualty insurance.

To ensure that adequate and comprehensive data is made available regularly, NCSL believes that Congress should enact legislation compelling the annual submission, to the appropriate federal agency, of data that includes, but is not limited to, the following: (a) premiums earned and written; (b) total claims paid regarding judicial dispositions, settlements and administrative/legal costs; (c) reserves; (d) individual classifications of business where premiums have increased/decreased the previous year; and (e) investment income. This data shall be submitted by classification of business and be completed on a national aggregate and individual state aggregate basis. State collection of insurance data and annual financial reporting requirements shall not be prohibited by any federal legislation. All data collected nationally by an appropriate federal agency shall be disseminated to the

NCSL further urges Congress to repeal the antitrust exemption which the insurance industry has been granted, with limited exceptions, by the McCarran-Ferguson Act of 1945. Barring comprehensive repeal, Congress ought to clarify which federal antitrust laws shall or shall not be applicable to the conduct of the insurance industry and which types of data could be shared among insurers.

August 7, 1986

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Summer Meeting
Seattle, Washington
June 9-12, 1986

I.

REPEALING THE INSURANCE INDUSTRY'S EXEMPTION FROM THE ANTITRUST LAWS

WHEREAS, The Sherman Act, the Clayton Act, and decisional law prescribe the appropriate standards of conduct for competing businesses and for individual firms acquiring and exercising market power in the United States; and

WHEREAS, those laws prohibit activities in restraint of trade that have repeatedly been shown to be harmful to the economy and injurious to consumers; and

WHEREAS, in 1944, the Supreme Court determined, in United States v. South-Eastern Underwriters Association, 322 U.S. 533, that the business of insurance constitutes commerce within the scope of the antitrust laws; and

WHEREAS, in 1945, Congress, apprehensive about the effect of South-Eastern Underwriters on the powers of states to tax and regulate insurance, adopted the McCarran-Ferguson Act (15 U.S.C. sections 1011-1015), granting the insurance industry broad exemption from most provisions of the Sherman and Clayton Acts, including the proscriptions against such anticompetitive practices as price-fixing, agreements not to compete, monopolization, mergers of dominant firms, tying agreements, and a wide range of other conduct that is unlawful for nearly every firm outside the insurance industry; and

WHEREAS, subsequent developments in antitrust law, particularly evolution of the state-action doctrine, have made it clear that nothing in the Sherman and Clayton Acts would hinder the exercise of traditional state powers of taxation and regulation, including price-regulation, making the antitrust immunity of the McCarran-Ferguson Act unnecessary for the purposes that originally motivated Congress to enact it; and

WHEREAS, it is also clear that nothing in the antitrust laws prohibits insurers from sharing information on losses in order to price their product, or from engaging in reinsurance and other risk-sharing arrangements common to the industry, making the antitrust immunity of the McCarran-Ferguson Act unnecessary to the legitimate needs of the insurance industry; and

WHEREAS, the insurance industry is critical to the national economy, with Americans paying over $140 billion per year in premiums on property/casualty insurance alone, and with insurance being a necessity for many enterprises; and

WHEREAS, serious questions have been raised about the current crisis in liability insurance and whether it may have been fostered by the industry's antitrust exemption;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General, reaffirming its commitment to the historic right of the states to regulate and to tax insurance and its commitment to the importance of the antitrust laws to free and competitive markets, urges the Congress of the United States to repeal the special immunity from the antitrust laws granted to the insurance industry and to subject insurance companies to the rules of the competitive marketplace applicable to other firms; and

BE IT FURTHER RESOLVED, that the Association authorizes its Executive Director and General Counsel to make these views known to the Congress, the Administration, and other interested parties.

STATEMENT
OF THE
NATIONAL INSURANCE CONSUMER ORGANIZATION

ON
REPEAL OF MCCARRAN-FERGUSON ANTITRUST IMMUNITY

BEFORE THE
SENATE JUDICIARY COMMITTEE

FEBRUARY 18, 1987

by

J. Robert Hunter, President
Jay Angoff, Counsel
National Insurance Consumer
Organization

121 N. Payne Street
Alexandria, Virginia 22314
(703) 549-8050

FACT SHEET ON McCARRAN-FERGUSON

I. The McCarran-Ferguson Act, enacted in 1945, exempts the insurance industry from the antitrust laws and thus allows insurance companies to fix prices. There is an exception to the exemption for boycotts, coercion and intimidation -- agreements among insurers to refuse to write insurance at any price therefore can be and have been prosecuted. See, e.g., State of West Virginia ex. rel. Brown v. St. Paul Fire and Marine Insurance Co., Civ. No. 86-C-1400, Kanawha Cty. Circ. Ct. (W. Va., filed Apr. 14, 1986); "Day care centers file insurance suit," The Denver Post, Jan. 17, 1986, at B-1. On the other hand, agreements among insurers to raise their rates in concert are not subject to antitrust prosecution. In other industries such agreements are felonies punishable by three years in jail.

II. Because of the McCarran-Ferguson Act, rates for workers compensation insurance are fixed: the National Council on Compensation Insurance, the rate making organization to which all workers compensation insurers belong, requires its member to adhere to the rates it issues. Constitution of National Council on Compensation Insurance, Art. VII (3)(c). The Insurance Services Office, the rate-making organization for liability insurers, does not expressly require its members to adhere to its rates but rather issues "advisory" rates. Yet, as a practical matter, this "advisory" rate is frequently adhered to. See National Underwriter, Sept. 6, 1985, at 82 ("what has occurred ... is a return to basic ISO rating ....")

III. There has traditionally been bi-partisan support for prohibiting price-fixing by insurance companies. For example, the Ford Administration exhaustively studied the insurance industry and concluded that price competition in the insurance industry, without McCarran Act antitrust protection, would be in the public interest. U.S. Dept. of Justice, The Pricing and Marketing of Insurance, at viii (1977). Similarly, in 1979 President Carter's National Commission for the Reform of Antitrust Laws and Procedures, composed of the nation's leading antitrust experts, concluded 18-2 that McCarran-Ferguson's broad antitrust immunity should be repealed. In its stead the Commission recommended narrowly drawn legislation to affirm the lawfulness of a limited number of esstential collective activities. The Reagan administration also supports repeal of the broad McCarran-Ferguson antitrust exemption, as Federal Trade Commission Chairman Dan Oliver recently testified before the Senate Commerce Committee.

IV. Insurance companies could continue to pool data without McCarran-Ferguson protection.

Because most insurers have not paid enough claims in the past to accurately estimate how much they are likely to pay out in the future, they do need to get together to pool and analyze the past claims they have paid -- the more paid claims they can analyze, the more accurate their estimates of their future payouts will be. However, the joint collection and dissemination of past cost data does not violate the antitrust laws. See U.S. Dept. of Justice, The Pricing and Marketing of Insurance 91-118, and cases therein cited. And if insurers truly have doubts about the legality of pooling loss data under the antitrust laws Congress can expressly legalize such pooling without also legalizing price-fixing, as the McCarran Act does.

V. State regulation of insurance can - and should - be preserved with the McCarran-Ferguson Act repealed. In fact, the two leading organizations of state officials -- the National Conference of State Legislatures and the National Association of Attorneys-General -- have both passed resolutions calling for McCarran repeal. With McCarran-Ferguson repealed, the states would continue to regulate the insurance industry; the federal government would not regulate the insurance industry. As the NAAG put it, repealing McCarran-Ferguson would simply "subject insurance companies to the rules of the competitive marketplace applicable to other firms." NAAG Resolution I, Repealing the Insurance Industry's Exemption From the Antitrust Laws. (June 1986).

VI. Much of the insurance industry is willing to live without McCarran-Ferguson antitrust immunity. For example, the new president of the American Insurance Association, Robert Vagley, told the Journal of Commerce that the industry was willing to consider making changes in McCarran-Ferguson. And in 1979, State Farm Insurance Co. supported a bill that would substantially cut back on McCarran antitrust immunity,. Allstate and several other insurance companies have also indicated that they are willing to live without McCarran. In short, the industry's opposition to the McCarran-Ferguson exemption is probably based more on its traditional opposition to change than anything else.

HJR 25

CITIZENS COALITION FOR TORT REFORM

907-561-6250

March 24, 1987

Representative Jim Zawacki
PO Box V
Juneau, Alaska 99811

Representative Zawacki,

This is to confirm our request that you cause to have introduced a House Joint Resolution in support of efforts by Congress to amend the McCarran-Ferguson Act, which exempts the insurance industry from federal antitrust laws.

As we have discussed not only have the past three Presidents of the United States supported such amendments, but a host of national organizations have recently passed resolutions supporting this action. The National Conference of State legislatures and the National Association of Attorneys General are just two examples of national groups that support amendment of the law.

Two concerns have been raised by the insurance industry that must be addressed in the body of a resolution.

1. Individual states must be able to continue their regulatory role of the industry.

2. The insurance industry must still be allowed to exchange past cost data and allow accurate forecasting of future claims.

Additional information on the efforts in Washington, D.C. will be forwarded to you upon receipt, including a new Senate bill that specifies the amendments, that is now in final draft.

We believe the insurance industry, except for the two exceptions we have noted, should be subject to the same laws as other businesses. We believe the insurance consumer and all consumers will benefit from this action and that there will be greater competition in the industry.

We appreciate your efforts in this area of reform.

Al Tamagni, Sr.
Chairman of the Board

P.O. Box 201668 • Anchorage, Alaska 99520

The Informer

Citizens Coalition for Tort Reform

Weekly Update

April 10, 1987

RESOLUTION CALLS FOR AMENDMENTS TO FEDERAL ANTITRUST LAW

HOUSE JOINT RESOLUTION 25

Bipartisan group sponsors reform of federal regulation of insurance industry

HJR 25 was introduced by a bipartisan group of House members concerned with insurance reform. Representatives Zawacki, Navarre, Gruenberg, Martin, Shultz and Taylor introduced HJR 25 at the request of the Coalition.

The intent of HJR 25 is to support efforts in Congress to amend the McCarran-Ferguson Act (1945) which exempts the insurance industry from federal antitrust laws.

Two objections have been raised by the insurance industry to this Joint Resolution, they are:

1. Support of HJR 25 to repeal or amend the McCarran-Ferguson Act would remove or subordinate the primacy of states regulatory roll over the insurance industry.

Not so. HJR 25 has been specifically drafted to address this concern. Already the Senate Antitrust Committee in Washington, D.C. has made it clear that there is no intent to alter the primacy of state regulatory authority over the industry. Senator Howard Metzenbaum, the original sponsor of the federal legislation has testified that his intent was not to alter state regulatory primacy and has asked the committee to adjust the original bill to ensure that this is clear. Support for HJR 25 does not alter the primacy of state regulatory authority.

2. Repeal of the antitrust exemption will restrict information pooling that assists the industry in accurately estimating how much they are likely to pay out in the future.

Again, Not so. HJR 25 specifically recognizes the need for the industry to pool and analyze the past claims they have paid - the more claims they can analyze the more accurate their estimates of future payouts will be.

Why is the Coalition calling for repeal of the antitrust exemption and support of House Joint Resolution 25?

Last year, during debate on tort reform legislation, the issue of the McCarran-Ferguson exemption from antitrust was raised by the opposition. The Coalition has reviewed this issue closely and determined that it is in the consumers best interest to repeal this special privilege to the insurance industry. The Coalition found strong bipartisan support for amendment to the McCarran-Ferguson act and that the position of the insurance industry to retain this exemption was not logical or in the best interests of the consumer.

The Coalition has extensive materials in support of and in opposition to the proposed amendment of the McCarran-Ferguson Act. This information, including copies of resolutions by the NFIB, The National Conference of State Legislatures, The National Association of Attorneys General and statements by the Chairman of the Federal Trade Commission, is available upon request. Just call the Executive Director at 561-6250.

907-561-6250

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The Executive Letter

February 23, 1987 Vol. 20 No. 8

FTC, JUSTICE DEPARTMENT HIT McCARRAN-FERGUSON ACT

At a Senate Judiciary Committee hearing on the McCarran-Ferguson Act last week, Sen. Howard Metzenbaum (D-Ohio), chairman of the Antitrust Subcommittee, found broad support for proposals to amend or repeal the 1945 statute which gives the insurance industry limited shelter from federal antitrust law and confirms the primacy of state regulation of insurance. Federal Trade Commissioner Daniel Oliver charged that the McCarran-Ferguson Act "protects price fixing" by insurers and said the statute's repeal is long overdue. Charles Rule, acting head of the Justice Department's Antitrust Division, affirmed the Department's basic support for ending the antitrust exemption "if certain uncertainties can be resolved." Metzenbaum expressed willingness to revise his bill (S.80) so that it would remove only the antitrust exemption while retaining language clarifying the role of state regulation. Joining the call for repeal or revision of McCarran were representatives of the National Conference of State Legislatures and the National Association of Attorneys General. Small business and consumer groups also called for changing the law.

Insurance industry representatives told the panel that changes in the act would have had no effect on recent problems with commercial liability insurance. They also voiced concern about the costs and confusion that would come from the dual federal-state regulation of insurance that likely would follow repeal of the act. Similar concerns about repeal were voiced by representatives of the National Association of Insurance Commissioners (NAIC) and the Conference of Insurance Legislators. The NAIC came under pointed criticism from Metzenbaum for alleged financial ties and revolving door relationships with the insurance industry.

ABA ADOPTS POSITION PAPER ON TORT LIABILITY SYSTEM

The American Bar Association (ABA) adopted a position paper on the tort liability system wnich did not contain the significant tort reforms outlined in the draft report presented by a special ABA study commission at its annual meeting in New Orleans. The draft report called for limits on noneconomic damages in certain cases, but the House of Delegates rejected this suggestion and instead voted to go on record as opposing any caps on awards

NATIONAL INSURANCE
CONSUMER ORGANIZATION

March 25, 1987

Honorable Joseph R. Biden
Chairman
Senate Judiciary Committee
U. S. Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Thank you for your letter of February 25. Enclosed are the answers to the questions you pose.

Question 1. The tort policy working group reviewed a number of industries and found that insurance was becoming increasingly unavailable. For example, biotechnology companies are having a difficult time in the insurance market because they are new, small companies dealing mostly in research and development in a field largely unknown to insurers. Many of our basic industries, such as oil, gas drilling and heavy manufacturing are hard pressed to find insurance at a reasonable cost as well. Is this a manufactured crisis? If so, by whom?

Answer 1. The insurance crisis -- sudden, dramatic rate increases and refusals to deal by insurance companies -- is real. It is the insurance industry's explanation for the crisis -- a purported litigation explosion -- that is manufactured. See, e.g., National Center for State Courts, A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981 and 1984 (April 1986); "Focusing on the Facts of the Insurance Crisis," a Report to the House Subcommittee on Economic Stabilization, by Phillip J. Hermann, Chairman of the Board, Jury Verdict Research, Inc., August 6, 1986 (JVR studies "do not support any claim of recently escalating jury awards").

The true cause of the recent insurance crisis, and a similar crisis in 1975-76, is the cyclicality of the insurance industry. Insurance rates rose dramatically in 1985-86, just as they did in 1976-77, because the insurance industry's rate of return bottomed out at about 3% in 1984 just as it had in 1975. 1/

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Explanations for the cycle vary. The most frequently cited is that the profitability of the industry tracks interest rates. When interest rates are high insurers earn high returns on the premiums they collect, their profitability rises and they begin cutting prices; when interest rates are low they earn low returns on their premiums, their profitability falls and they must raise prices. 2/ Other factors also contribute to the insurance cycle: the inelastic nature of demand for insurance; statutory barriers to entry (e.g., laws prohibiting banks from entering the insurance industry); fluctuations in exchange rates, which substantially affect the supply of reinsurance -- insurance for insurance companies -- since the reinsurance market is dominated by foreign firms; and stock prices, since although most property/casualty insurance company funds are in bonds, about 20% is in common stocks. 3/

More important than all factors but the fluctuation in interest rates, however, is the insurance industry's exemption from the antitrust laws under the McCarran-Ferguson Act. The relationship between the antitrust exemption and the insurance cycle is explained in the answer to Question 2.

Question 2. Is the insurance crisis particularly related to the insurance industry's exemption from the federal antitrust laws or federal regulation in general?

Answer 2. The insurance crisis is related to the insurance industry's exemption from the antitrust laws.

First, the antitrust exemption allows insurance companies to suddenly and dramatically raise rates in concert at the bottom of each cycle. For example, in January 1985, the Insurance Services Office apparently decided that the price-cutting of the last few years had gone far enough: ISO President Dan McNamara called a joint industry conference with the Insurance Information Institute, the industry's public relations arm, at which he emphasized that "the need for significant premium increases, especially for commercial lines, is absolute for the next three years." 4/ Then, in May 1985, ISO distributed throughout the industry a major position paper, entitled "1985: A Critical Year," which proclaimed that "the brutal price war of the last six years is over," and that "significant premium increases are needed, especially for the current commercial lines products." 5/ And the next month William O. Bailey, President of Aetna, the nation's third largest commercial liability insurer, told the National Association of Insurance Brokers that "Clearly another round of price increases is absolutely necessary for the business." 6/ Then suddenly, in the summer of 1985, insurance companies that only a few months earlier had been competing on price and ignoring the ISO "advisory" rate were tripling and quadrupling their premiums, returning to the ISO rate. 7/

Because the courts have consistently prohibited trade associations from circulating "suggested" price lists, even if the list serves only as a guide or starting point for price determination, ISO could probably not issue an advisory rate absent antitrust immunity. See Northern California Pharmecutical Ass'n v. U.S., 306 F.2d 379 (9th Cir. 1962), cert. denied., 371 U.S. 862; Plymouth Dealers Ass'n of Northern California v. U.S. 279 F.2d 379 (9th Cir. 1969); U.S. v. Nationwide Trailer Rental System, Inc., 156 F. Supp. 800 (D. Kan. 1957), aff'd per curiam, 355 U.S. 10 (1957); Esco. Corp. v. U.S., 340 F.2d 1000 (9th Cir. 1965); Dept. of Justice, The Pricing and Marketing of Insurance 167-70 (1977). And absent antitrust immunity, ISO and insurance company executives would certainly be less likely to urge other insurance executives to raise their prices.

Second, the antitrust exemption encourages pricing below cost when interest rates are high. It is the knowledge on the part of insurance companies that, because of McCarran-Ferguson, they can get together, call a halt to price-cutting and suddenly raise their prices in concert to excessive price levels that permits their price cutting to go so far. Because of McCarran-Ferguson, they can get back in one year what they gave away in six.

The children's game of tag provides an instructive analogy. The McCarran-protected rate bureau rate functions as "home base" functions in tag. Insurers, during the competitive phase of the cycle, can ignore the bureau rate and seek market share by cutting price. The price-cuts are deeper and the duration of the price-cutting longer than would be the case in the free market because the price-cutters know that they can always return to the home base of the bureau rate. Because the bureau rate is set at a level at which the least efficient bureau member is profitable, the bureau rate will allow most insurers to earn excess profits. These excess profits attract capital, which sets the stage for the price-cutting to begin again.

If insurance companies competed in a free market subject to the antitrust laws, they would not be able to suddenly call a halt to price-cutting and to sharply raise their prices in concert. Moreover, the knowledge that they could not raise prices in concert after "cashflow" underwriting would prevent them from engaging in such underwriting in the first place, and force them to carefully evaluate risks at all points on the cycle. Because interest rates will continue to fluctuate and demand for insurance will remain relatively inelastic, the insurance cycle will not completely disappear if McCarran antitrust immunity is eliminated. But eliminating that immunity will smooth out the cycle , and should therefore put an end to the insurance "crises" that recur every nine years or so.

Question 3. A number of experts, including those who participated in both the 1977 and 1979 Justice Department studies, have concluded that this industry is competitively

structured, even if individual companies do not behave competively in the context of the industry's regulatory environment. Why is repeal of McCarran-Ferguson so critical to enhanced competitiveness in the industry? Wouldn't it be enough if the states enacted tougher unfair trade or antitrust laws applicable to the industry?

Answer 3. Repeal of McCarran-Ferguson antitrust immunity is critical to enhanced competitiveness because it is the antitrust immunity which allows the competitively structured insurance industry to perform in an anticompetitive manner, as explained in the answer to question 2.

The states have not applied state antitrust laws to the insurance industry and in general have not enacted tough unfair trade laws that are applicable to the insurance industry. Moreover, as was evident from the testimony of the West Virginia Attorney-General, individual states simply do not have the resources to prosecute the insurance industry under "little FTC Acts" or "little Sherman Acts" even if they did apply to the insurance industry. As New Jersey Insurance Commissioner Ken Merin has put it, the states are simply "outmanned and outgunned" by the insurance industry. 8/ There are also those who argue, including the U.S. General Accounting Office, that state insurance commissioners often do not have what the GAO called an "arms-length relationship " with the insurance industry. 9/

Question 4. The consumer groups have testified that they favor the repeal of the exemption from the federal antitrust laws that the insurance industry enjoys under McCarran-Ferguson. However, such legislative action has often been linked with proposals for increased federal regulation of the insurance industry -- ideas such as the establishment of a federal insurance agency to review state regulation. That is a much more complicated position. Is such regulation necessary if McCarran-Ferguson is repealed?

Answer 4. No. We support repeal of the antitrust exemption for the insurance industry contained in the McCarran-Ferguson Act and the maintenance and strengthening of the national commitment to state regulation of the insurance industry.

We applaude Senator Metzenbaum's public statement that he will amend S. 80 so that it would repeal only the anti-trust exemption while maintaining and strengthening state regulation. The debate must focus on the appropriate question -- do insurance companies need to be able to fix prices? -- rather than the red herring of state versus federal regulation. With the elimination of the antitrust exemption, states could choose to deregulate and would be assured that deregulation would not lead to anticompetive behavior. On the other hand, states that chose to regulate prices would remain free to do so, under the state action doctrine.

Question 5. Would it be logical to subject insurance companies to liability under federal antitrust law without comprehensive federal regulation of the industry as a whole?

Answer 5. Yes. State-chartered banks, for example, are subject to antitrust law but are not federally regulated.

Question 6. The insurance industry argues that restricting or repealing McCarran-Ferguson would lead to great uncertainty as to what kinds of collective activities would be permissible. For example, what kinds of data would companies be able to share, or would they be able to do this at all? Would they be able to pool risks and establish joint ventures to obtain reinsurance? Aren't these legitimate concerns? How would you propose to establish some legal certainty without years of litigation?

Answer 6. The antitrust laws do not prohibit the pooling of past cost data. To the contrary, the cases clearly establish that the exchange of past cost data is lawful as long as the data are compiled and disseminated in composite form, deal exclusively with past and closed transactions, and are widely published and readily available to consumers. Maple Flooring Ass'n v. U.S., 268 U.S. 563 at 573-74, 586 (1925); U.S. v. FMC Corp., 317 F. Supp. 443, 446 (E.D. Pa. 1970); Department of Justice, The Pricing and Marketing of Insurance at 102, 116-17.

In contrast, the pooling of future pricing data clearly is prohibited by the antitrust laws.

The legality of the pooling of risks and the establishment of joint ventures to obtain reinsurance would be governed by the rule of reason. For example, an agreement among the only three insurers writing a line of business to pool that business would not normally be pro-competitive and thus would not pass muster under the rule of reason. On the other hand, a pooling agreement among several small insurers attempting to enter that same three-firm market would normally be pro-competitive, and thus legal under the rule of reason.

To the extent that insurers truly believe that the rule of reason gives them insufficient guidance as to which activities are lawful and which unlawful, Congress could write carefully drafted standards codifying the rule of reason into the law, as it did with the limited immunity for research and development joint ventures enacted in the 98th Congress.

Question 7. If the Judiciary Committee were to act on this kind of legislation, wouldn't we be wiser to consider a more limited and well-defined immunity from the antitrust laws than an outright repeal of McCarran-Ferguson? Wouldn't the uncertainty that might otherwise be created actually harm consumers and make at least some kinds of insurance even harder and more expensive to obtain?

Answer 7. We support, and believe the Judiciary Committee should support, a repeal of the antitrust immunity granted by the McCarran-Ferguson Act rather than a repeal of the entire McCarran-Ferguson Act. To the extent Congress is concerned that repealing the antitrust exemption would create uncertainty that would harm consumers, Congress could write specific standards into the law. (We fail to see, however, how subjecting the insurance industry to the antitrust laws could harm consumers. We are certain that the current situation harms consumers by protecting inefficient anti-competitive behavior which costs consumers billions of dollars in inefficiencies.)

Question 8. What kinds of exceptions would consumer groups be willing to support?

Answer 8. While we do not believe that exceptions are necessary, neither do we believe that expressly permitting insurance companies to jointly collect, compile and disseminate past cost data is harmful. In addition, we believe Congress should give the insurance industry every opportunity to make its case that additional exemptions are needed, and we would welcome the opportunity to discuss with your Committee and the industry the need for any specific exemptions for which your Committee felt the industry had made a prima facie case.

Sincerely,

J. Robert Hunter
President

Jay Angoff
Counsel

FOOTNOTES

1/ Insurance Information Institute, Insurance Facts: 1986-87 Property/Casualty Fact Book, at 22; Insurance Information Institute, Insurance Facts: 1982-83 Edition, at 19.

2/ E. G., "Insurers Must Take Part of the Rap," Business Week, March 10, 1986.

3/ Insurance Information Institute, Insurance Facts: 1986-87 Property/Casualty Fact Book, at 23.

4/ Business Insurance, Feb. 4, 1986, at 16.

5/ ISO and NAII, "1985: A Critical Year," at 5.

6/ Business Insurance, June 10, 1985 at 3.

7/ National Underwriter, Sept. 6, 1985, at 8, 82 ("The quick reversal in underwriting standards has been shocking . . . . What has occurred . . . . is a return to the basic ISO rating subject to a minimum 20 percent surcharge.")

8/ Journal of Commerce, July 8, 1986, at 1.

9/ See U. S. General Accounting Office, Issues and Needed Improvements in State Regulation of the Insurance Business (Oct. 1979).

100TH CONGRESS
1ST SESSION

S. 80

To repeal the McCarran-Ferguson Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 6, 1987

Mr. METZENBAUM introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To repeal the McCarran-Ferguson Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to express the intent of the Congress with reference to the regulation of the business of insurance", commonly known as the McCarran-Ferguson Act (59 Stat. 33), is repealed.

(b) The repeal made by this section shall be effective as to conduct engaged in beginning one year after the date of enactment of this Act.

SEC. 2. (a) In any action brought under the provisions of the Clayton Act or the Sherman Act alleging a violation of either such Act for conduct that would have otherwise been

lawful pursuant to the provisions of the Act entitled "An Act to express the intent of the Congress with reference to the regulation of the business of insurance" no award of treble damages or criminal penalties shall be awarded against any such person for conduct by such person occurring within two years after the date of enactment of this Act.

(b) During the two year period referred to in this section, no relief shall be granted against any person in an action referred to in subsection (a) for conduct by such person during such period, if such person has, in good faith, relied upon an advisory opinion issued by the Department of Justice.

○

(A) APPLICATION FOR REVIEW.—Any employee who is aggrieved by a violation of section 9(b) or 9(c) may, within 6 months after such violation occurs, apply to the Secretary of Labor for a review of such alleged violation.

(B) INVESTIGATION.—On receipt of such application, the Secretary of Labor shall cause such investigation to be made as the Secretary of Labor considers appropriate.

(C) ACTION.—If, no such investigation, the Secretary of Labor determines that this section has been violated, the Secretary of Labor shall bring an action in any appropriate United States district court. In any such action, the United States district courts shall have jurisdiction for cause shown to restrain violations of this section and order all appropriate relief under subsection (e) or (f).

(2) DETERMINATION BY SECRETARY.—Within 90 days of the receipt of the application filed under this subsection, the Secretary of Labor shall notify the complainant of the determination of the Secretary of Labor under paragraph (1). If the Secretary of Labor finds that there was no such violation, the Secretary shall issue an order denying the application.

(e) REINSTATEMENT AND OTHER RELIEF.—Any employee who is discriminated against in violation of section 9(b) or 9(c) shall be restored to his or her employment and shall be compensated for—

(1) any lost wages (including fringe benefits and seniority);

(2) costs associated with medical monitoring that are incurred up to the time when the discrimination is fully remedied; and

(3) costs associated with bringing the allegation of violation.

(f) CIVIL PENALTIES.—Any person that discriminates against an employee in violation of this section shall be liable for a civil penalty of not less than $1,000 or more than $10,000 for each violation.

(g) EFFECT ON OTHER LAWS.—The notification of an employee pursuant to this Act that the employee is in a population at risk and the initiation of medical evaluation and monitoring shall not constitute or in any way affect a claim for compensation, loss, or damage arising out of exposure to the occupational health hazard, except that the results of such medical evaluation and monitoring may be introduced as evidence with respect to such a claim. Notification pursuant to this Act shall not be relevant in determining whether such a claim is timely under any applicable statute of limitations.

SEC. 11. REPORTS TO CONGRESS.

(a) HAZARD COMMUNICATION STANDARD REPORT.—The Secretary of Labor shall report to Congress annually, not later than January 15 of each year, regarding implementation and enforcement of the hazard communication standard. The report shall include detailed information on—

(1) MONITORING AND ENFORCEMENT.—Monitoring and enforcement; significant areas of noncompliance; and penalties assessed and steps taken to correct the noncompliance.

(2) ENFORCEMENT.—Efforts to evaluate the hazard communication standard.

(3) EMPLOYER ASSISTANCE.—Efforts to assist employers to comply with the hazard communication standard.

(4) EMPLOYEE EDUCATION.—Efforts to educate employees to their rights under the hazard communication standard.

(5) FEDERAL COURT DECISIONS.—Efforts to comply with Federal court decisions requiring or encouraging an expanded scope for the hazard communication standard.

(b) OCCUPATIONAL DISEASE NOTIFICATION REPORT.—The Secretary shall report to Congress annually, not later than January 15 of each year, regarding implementation and enforcement of notification under this Act.

The report shall include detailed information on—

(1) NOTIFICATIONS.—Numbers, types and results of notifications carried out pursuant to section 5 and 6 of this Act.

(2) RESEARCH.—Research efforts carried out pursuant to section 8 of this Act.

(3) TRAINING.—Training efforts for employees, personal physicians, and other professionals carried out pursuant to sections 7 and 8 of this Act.

(4) ENFORCEMENT.—Enforcement efforts carried out pursuant to section 10 of this Act.

(5) ASSISTANCE.—Efforts to assist employers under this Act.

SEC. 12. SUBJECTS OF FEDERAL AGENCY STUDIES.

(a) NOTIFICATION REQUIRED.—Each Federal agency that conducts epidemiologic studies on occupational disease initiated after the effective date of this act shall establish procedures for notifying the subjects of such studies of findings demonstrating that they are part of a population at risk of disease.

(b) METHOD OF NOTICE.—All occupational epidemiologic studies conducted by a Federal agency initiated after the effective date of this Act shall include in the study design specific methods for notifying living subjects or their immediate family members that they are part of a population at risk of disease.

SEC. 13. REGULATIONS.

The Secretary shall prescribe such regulations as may be necessary to carry out this Act.

SEC. 14. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated $25,000,000 for each of the fiscal years 1988 and 1989 to carry out this Act, of which $5,000,000,000 shall be available for research under section 8.

SEC. 15. EFFECTIVE DATE.

Except as may be otherwise provided in this Act, this Act shall become effective January 1, 1988, or 6 months after the date of enactment of this Act, whichever occurs first.

● Mr. STAFFORD. Mr. President, I am joining today with Senator METZENBAUM in introducing the High Risk Occupational Disease Notification and Prevention Act of 1987.

There are several good reasons for enacting this bill.

The first is simple justice. Those whose lives, livelihoods, and health may be in jeopardy because of earlier exposures to poisonous chemicals should know it because we all deserve to know what our risks are.

Equally important, that knowledge should be shared because it can minimize or even eliminate the risk of actually contracting the disease for which a worker or his or her family may be at risk. Some diseases, especially cancers, which may be almost always fatal if undetected are significantly less fatal if found and treated early. In yet other cases, a disease may never develop if proper precautions are taken. Workers exposed to asbestos, for example, run a tenfold greater risk of dying from lung cancer if they smoke than if they do not.

In a society such as ours where the dangers of toxic chemicals are almost invariably discovered long after workers and others have been exposed, some sort of notification program is a necessity if the loss of human life is to be minimized. Exposures ought to never happen, but it is a fact of life that they do. Given that fact of life, we should establish a program such as the one proposed in this bill.

Mr. President, I urge my fellow Senators to review this bill carefully and join Senator METZENBAUM and me in cosponsoring this bill.●

By Mr. METZENBAUM:

S. 80. A bill to repeal the McCarran-Ferguson Act, and for other purposes; to the Committee on the Judiciary.

MCCARRAN-FERGUSON ACT REPEAL

● Mr. METZENBAUM. Mr. President, today I am introducing legislation to repeal the McCarran-Ferguson Act, the law which provides that the business of insurance is exempt from the Federal antitrust laws.

There is no justification for exempting the insurance industry from Federal antitrust standards. It is one of the largest and most important industries in the Nation. Virtually every individual and every business in this country must purchase insurance. Yet this essential industry is not now required to conform to the basic national policy of free competition.

How can the Congress explain to the American people why the insurance industry is exempt from Federal prohibitions against price-fixing and other anticompetitive practices when the price of insurance is skyrocketing? Promoting competition in insurance can only improve the availability and affordability of insurance. Maintaining the current antitrust exemption only restricts healthy and vigorous competition.

For some time now, we have heard the argument that the only problems in obtaining access to insurance are greedy lawyers and outrageous liability judgments. Every solution offered by the industry turns out to cut back on the rights of the victims in personal injury or other suits.

Focusing only on those injured is unfair. It's bad public policy. It is time that we took the broad public interest into account, not simply the industry's.

The current exemption for insurance arose from a unique combination of historical events. In 1869, the Supreme Court held that the business of insurance was not commerce and that insurance transactions were not interstate in character. *Paul* v. *Virginia*, 75 U.S. 168 (1869). This early decision took an extremely narrow view of the reach of the commerce clause.

Over the decades, the Supreme Court's interpretation of the commerce clause expanded considerably and in the early 1940's, the Justice Department challenged collusive arrangements in the industry. The Supreme Court reversed its earlier decision and found that the antitrust laws did apply to insurance. *United States* v

South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

The very next year, the insurance industry came to Congress and persuaded it to exempt the industry from the Federal antitrust laws. There is no doubt that this decision was undertaken in response to the argument that the industry could not adjust to the radical changes that would occur if rules of free competition were to apply rather than the extensive system of State-approved price-fixing that was in existence.

Whatever validity that argument had in 1945, it is totally unpersuasive today. Subjecting the insurance industry to the same antitrust standards that apply to other industries is completely consistent with State regulation of the industry as well as legitimate joint activities by insurance companies. Requiring insurance companies to live by the rules of free competition would not disrupt State regulatory programs. It would not prevent insurance companies from sharing information. It would not preclude State approval of rates. It would promote competition in the industry, promote lower prices and greater availability of coverage, and insure that consumers have better information about the policies they purchase.

Unlike the situation in 1945, applying Federal antitrust standards to insurance woud not undercut State regulatory policies. Almost all States have abandoned setting specific rates for insurance coverage. Instead, insurance companies have considerable flexibility in setting rates, subject to filing requirements. In addition, the Supreme Court has made clear that business conduct which is subject to a clearly articulated State regulatory scheme and actively supervised by the State is not subject to Federal antitrust law. The Supreme Court has recently held, for example, that collective ratemaking activities, permitted under a clearly articulated and actively supervised State policy, do not violate the antitrust laws. *Southern Motor Carriers Rate Conf. v. U.S.*, 471 U.S. 48 (1985).

Another development is the recognition by the courts that joint activities by competitors which promote competition are permissible under the antitrust laws. The courts have long held that substantial information can be shared among competitors without running afoul of the antitrust laws. More recently, the Supreme Court has clearly stated joint activities which reduce costs and enable products to be marketed more efficiently will be upheld. *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979). This principle applies to sharing information about risks, joint underwriting of large-scale projects, and other joint activities which promote a more efficient and productive insurance industry.

These considerations led the National Commission for the Review of Antitrust Laws and Procedures to recommend in 1979 that:

> The current broad antitrust immunity for the business of insurance granted by the McCarran-Ferguson Act should be repealed. In its place, narrowly drawn legislation should be adopted to affirm the lawfulness of a limited number of essential collective activities under the antitrust laws. • • •
>
> The Commission believes that the current immunity is not only overly broad, but also unnecessary: Those collective activities by insurers that are essential to the functioning of a competitive industry would likely pass muster under the traditional rule of reason analysis of Sherman Act section 1. Similarly, where collective activity or other insurance company behavior is affirmatively mandated by a State in its capacity as sovereign, and effectively supervised by independent State officials, such behavior would fall within the judicially recognized "State action" exception to the antitrust laws. (Report of the Commission, pp. 225-6)

In short, the argument that the insurance industry requires an antitrust exemption to function effectively is nonsense: The antitrust laws allow joint activities by insurance companies which are in the public interest. In contrast, the current exemption prevents the Department of Justice, the Federal Trade Commission, or private plaintiffs from challenging even blatant anticompetitive activity.

Under the current law, an agreement by insurance companies to fix prices or allocate markets could not be challenged by the Department of Justice, the Federal Trade Commission, or private plaintiffs. Not only does the current law bar these actions, but in cases where the exemption may not apply, it guarantees prolonged litigation over its applicability. For example, the FTC recently challenged particular activities by title insurance companies that allegedly restrain competition on the grounds that these activities were not really the business of insurance. *Ticor Title Insurance Co.*, D-9190. Nevertheless, the defendants have vigorously disputed the authority of the FTC to bring the case.

In addition to the problem of preventing the Government from challenging anticompetitive actions, the McCarran-Ferguson Act exempts the industry from the Federal prohibition against unfair and deceptive practices enforced by the Federal Trade Commission. Today, if an insurance company misleads consumers in its marketing of insurance, the Federal Trade Commission is in almost all cases foreclosed from acting.

In 1979, Congress went even beyond the McCarran-Ferguson Act in prohibiting the Federal Trade Commission from even studying the insurance industry without a specific request from the House or Senate Commerce Committee. This provision was enacted after the FTC had published a study which concluded that the average rate of return on the investment portion of whole life insurance was 1.3 percent. As former Chairman of the Federal Trade Commission, Michael Pertschuk, stated:

> The Commission had concluded—as many other students of life insurance marketing had also concluded—that this low level of return was directly caused by a marketing system that made it virtually impossible for a prospective policyholder—other than an actuary—to compare the interest yields of competing investment opportunities. (Testimony before Subcommittee on Monopolities and Commercial Law, House Committee on the Judiciary, May 3, 1984, pp. 3-4)

The FTC did not issue a regulation in this area. It did not propose Federal intervention at all. Instead, it distributed its report to the States and recommended that they develop a standard disclosure requirement so that the insurance industry would provide information about investment return to consumers. The Congress reacted by prohibiting the FTC from studying the insurance industry without an express request by either the House or Senate Commerce Committee. In other words, the FTC was to keep its mouth shut about problems with the insurance industry until Congress told it to speak. Former Chairman Pertschuk called this provision a "legislative prefrontal lobotomy."

The bill I am introducing today would simply apply the same antitrust standards of free competition to insurance that apply to other industries. In doing so, it would repeal the language in the McCarran-Ferguson Act which purports to rest all regulation of the insurance industry in the States. By repealing that language, my bill would not in any way do away with State insurance commissions or preclude the States from regulating insurance as they do now. Just as in many other industries, Federal antitrust laws would apply to companies which are the subject of State regulations.

The bill also provides for a delayed effective date to enable the insurance industry to review its activities for potential antitrust liability. In particular, the bill provides that the repeal of the exemption is deferred for 1 year after the date of enactment. In addition, no criminal penalties or treble damages can be assessed for 2 years. Finally, no antitrust remedy is available for 2 years if the defendant in an antitrust case has relied in good faith on an advisory opinion by the Department of Justice. These provisions provide ample time for the industry to review its activities and insure that they are in full compliance with antitrust standards.

I fully expect that the insurance industry will again argue that it cannot function under the Federal antitrust standards and that many of its current activities will be prohibited, even those which benefit the public. If the industry can show that certain defined activities which are in the public interest would actually be prohibited under the antitrust laws, then certain narrow and carefully defined exemptions may be warranted. These issues can best be pursued in through hear-

S.80

ings where the industry and other obsrvers can comment.

This industry is too big, too important to every American, to maintain an an antitrust exemption long after its initial justification has disappeared. Today, access to insurance and affordable prices have become critical problems for individuals, small business, and even governmental bodies. Insurance companies should have to operate under the rules of free competition just as other industries do.

The McCarran-Ferguson Act has long outlived whatever legitimate purpose it served. It is time to repeal it.

I ask unanimous consent that a copy of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 80

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That the Act entitled "An Act to express the intent of the Congress with reference to the regulation of the business of insurance", commonly known as the McCarran-Ferguson Act (59 Stat. 33), is repealed.

(b) The repeal made by this section shall be effective as to conduct engaged in beginning one year after the date of enactment of this Act.

SEC. 2. (a) In any action brought under the provisions of the Clayton Act or the Sherman Act alleging a violation of either such Act for conduct that would have otherwise been lawful pursuant to the provisions of the Act entitled "An Act to express the intent of the Congress with reference to the regulation of the business of insurance" no award of treble damages or criminal penalties shall be awared against any such person for conduct by such person occurring within two years after the date of enactment of this Act.

(b) During the two year period referred to in this section, no relief shall be granted against any person in an action referred to in subsection (a) for conduct by such person during such period, if such person has in good faith, relied upon an advisory opinion issued by the Department of Justice.●

By Mr. METZENBAUM:

S. 81. A bill to amend the Older Americans Act of 1965 to establish the Alzheimer's Disease and Related Dementias Home and Community Based Services Block Grant; to the Committee on Labor and Human Resources.

ALZHEIMER'S DISEASE AND RELATED DEMENTIAS HOME AND COMMUNITY BASED SERVICES BLOCK GRANT ACT

● Mr. METZENBAUM. Mr. President, Alzheimer's disease has been called the "Disease of the Century." Today, I am introducing a bill, "The Alzheimer's Disease and Related Dementias Home and Community-Based Services Block Grant" to provide needed support to victims of Alzheimer's disease and related dementias, and their families.

At both Federal and State hearings, professionals and families alike, described Alzheimer's as an "insidiuous disease; no illness is more terrifying and life-altering than Alzheimer's." It destroys its victims and damages their families.

Through demonstration projects, and activities of voluntary organizations, we have learned much about the urgent needs of our older citizens who, with age, are increasingly vulnerable to dementing disorders, and to the risk of institutionalization and total impoverishment. The risk for Alzheimer's disease increases rapidly over the age of 65, with 20 to 30 percent of those over the age of 80 afflicted.

We know that demographic data project an aging population. Rapid increases in the number and proportion of older people in the United States, especially those in their eighties and nineties confront us with a major challenge, and an urgent necessity to plan appropriately—and without delay.

There are currently close to 3 million persons with Alzheimer's disease and related disorders. Less than 60 years from now, we will face a major epidemic with that number expected to triple to 9 million.

Currently, we depend heavily on family caregivers—spouses and children—to provide long-term care for family members with Alzheimer's disease. However, projections indicate that families will be smaller in the years to come. Thus, there will be fewer caregivers available.

Mr. President, Alzheimer's disease not only imposes extreme physical and emotional hardships on the family, it creates enormous financial costs as well. These costs are already estimated at over $40 billion. Unless we begin now to provide the social supports essential for continued family caregiving, we may find our institutions and our health care system overwhelmed with increasingly large numbers of demented adults, and our Nation overwhelmed with colossal costs of hundreds of billions of dollars.

Research continues, with insufficient funds, given the magnitude of the problem. The research community appears cautiously optimistic that answers will be found. This very month, the fourth International Conference on Alzheimer's Disease is meeting in Zurich to compare research findings worldwide. There will be answers—eventually—sooner, rather than later, we hope.

However, until that happy day arrives, family caregivers will need many social supports to maintain their afflicted family members in the home.

Mr. President, my bill will delay the institutionalization so costly to families and to the nation by providing needed home and community-based services.

This bill, "The Alzheimer's Disease and Related Dementias Home and Community-Based Services Block Grant," amends the Older Americans Act which comes up for reauthorization this year.

It establishes a block grant program directed by the Administration on Aging. The grant will be made available to States on a matching formula basis, to develop a plan to provide for:

Coordination of services;

Case management and counseling to determine services needed for delaying nursing home admission;

Respite care;

Day care;

Training and counseling of family members;

Homemaker services,

Transportation, and other such supportive services that will help families maintain Alzheimer victims at home.

I urge my colleagues to join me in support of the millions of Americans suffering physical, emotional, and financial devastation as a result of this insidious and tragic disease, and the related dementing disorders.

I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 81

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Alzheimer's Disease and Related Dementias Home and Community Based Services Block Grant Act of 1987".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) there are more than 3,000,000 individuals with Alzheimer's disease and related dementias in the United States;

(2) the cost of caring for individuals with Alzheimer's disease and related dementias is estimated at over $40,000,000 annually;

(3) over one half of the patients in nursing homes are diagnosed as patients with Alzheimer's disease or related dementias;

(4) the potential number of individuals who may have Alzheimer's disease and related dementias in their old age will overwhelm the capacity of our institutions to care for such individuals;

(5) individuals with Alzheimer's disease or related dementias often require specialized long term care services to be provided in a coordinated manner by many agencies; and

(6) providing home and community based services for individuals with Alzheimer's disease and related dementias will extend the ability of caregivers of such individuals to maintain such individuals in their homes and can reduce health care costs by delaying or preventing institutionalization.

(b) It is the purpose of this Act to prevent or delay the institutionalization of individuals with Alzheimer's disease and related dementias by providing home and community based services to assist in caring for such individuals in their homes.

ESTABLISHMENT OF BLOCK GRANT

SEC. 3. The Older Americans Act of 1965 is amended by adding at the end thereof the following new title:

"TITLE VIII—ALZHEIMER'S DISEASE AND RELATED DEMENTIAS HOME AND COMMUNITY BASED SERVICE BLOCK GRANT

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 801. For purpose of allotments under section 802, there are authorized to be appropriated $80,000,000 for each of the fiscal years 1988, 1989, 1990, 1991, and 199

DISCUSSION DRAFT

100th CONGRESS

1st Session S.____

IN THE SENATE OF THE UNITED STATES

Mr. Metzenbaum introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the McCarran-Ferguson Act to limit the federal antitrust exemption of the business of insurance, to reaffirm the continued state regulation of the business of insurance, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Insurance Competition Improvement Act of 1987".

FINDINGS AND DECLARATION OF PURPOSE

Sec. 2.(a). The Congress finds and declares that--

(1) the continued regulation and taxation by the several States of the business of insurance is in the public interest; and

(2) the Federal antitrust laws comprise an essential component of congressional policy in favor of competition and consumer protection, and the current broad exemption from the antitrust laws afforded the insurance industry has weakened competition and adversely affected consumers of insurance.

(b). It is the purpose of this Act to promote price competition among insurers by modifying the current antitrust exemption of the business of insurance.

AMENDMENTS TO THE MCCARRAN-FERGUSON ACT

Sec. 3 (a) Section 1 of the Act entitled "An Act to express the intent of the Congress with reference to the regulation of the business of insurance", approved March 9, 1945 (15 U.S.C. 1011; known as the McCarran-Ferguson Act), is amended by striking out the period and inserting in lieu thereof the following: "; but that a continued broad exemption of the business of insurance from the federal antitrust laws is not in the public interest.".

(b) Section 2 of that Act (15 U.S.C.1012 (b)), is amended by striking out all after "insurance" the second place it appears and inserting in lieu thereof a period.

(c) Section 3 of that Act (15 U.S.C. 1013) is repealed and amended to read as follows:

"Section 3. (a) Except as provided in subsections (b) and (c), the antitrust laws shall apply to the business of insurance or to acts in the conduct of such business. "

"(b)(1)The antitrust laws shall not be construed to prohibit any agreement, understanding, or concert of action between or among insurers, any insurance advisory organizations or their members, any individual insurers or any other persons that is limited to:

"(A) Collecting, compiling and disseminating statistical data on past losses incurred by insureds from insurers or any other source, provided that such information is made available to an appropriate state regulatory agency;

"(B) Preparing and filing policy forms and endorsements, provided that no individual insurer shall agree with any other insurer or with an insurance advisory organization to refrain from using any other forms, and provided further that no forms or endorsements that contain rate-related terms or conditions may be subject to an agreement or understanding between or among individual insurers or the members of an insurance advisory organization unless such forms are approved by and subject to the active supervision of an appropriate state regulatory agency.

"(C) Conducting research and on-the-site inspections in order to prepare classifications of public fire defenses.

"(D) Collecting, compiling and distributing information relating to fraudulent claims and other fraudulent practices, provided that the dissemination of such information is subject to the approval and active supervision of an appropriate state regulatory agency.

"(2) The antitrust laws shall be construed to prohibit any association or other combination of insurers or any insurance advisory organization from recommending, preparing, establishing or distributing any material that contains recommended premium or final rates, or procedures, formulae, guidelines, or schedules for the calculation of premium or final rates, including without limitation loss development factors, claim trending factors, claim adjustment expense factors, profit allowances, or other actuarial components (excepting reported losses and units of exposure to risk) used in the calculation of insurance rates;

"(c) Nothing in this Act or any state law shall render the antitrust laws inapplicable to any agreement to boycott, coerce, or intimidate, or to any act of boycott, coercion, or intimidation.

"(d) Insurers and other persons participating in joint underwriting, pools, or residual market mechanisms may, in

connection with such activity, act in cooperation with each other in the making of rates, rating systems, policy forms, underwriting rules, surveys, inspections, and investigations, if the joint underwriting, pools, or residual market mechanism is required by law or is approved by and subject to the active supervision of an appropriate state regulatory agency.

"(e) Nothing in this Act shall be construed to prohibit any State from establishing or approving a residual market mechanism.

"(f) As used in this section, the terms--

(1) 'advisory organization' means any organization which is comprised of, or is controlled by, one or more insurers and which prepares policy forms and endorsements for use by its members or subscribers, compiles and promulgates insurance-related statistical data, prepares and revises insurance rating plans and classification systems, and provides assistance in the preparation of insurance rates;

(2) 'antitrust laws' means the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), and the Federal Trade Commission Act (15 U.S.C.41 et seq.);

(3) 'loss development' means an adjustment to reflect the amount an insurer will eventually pay out on policies in effect for a given year derived by multiplying the amount that has actually been paid out over a certain period of time for claims covered by a class of policies by a factor based on the pattern of payouts over time for settlements on prior years' policies;

(4) 'claim trending' means any procedure for adjusting the claims rate to reflect changes in the rate of claims per unit of exposure or per unit of insurance;

(5) 'claims adjustment expense' means the amount of any rate attributable to (i) acquisition, field supervision, and collection expenses, (ii) general experses, and (iii) taxes, licenses and fees;

(6) 'residual market mechanism' means an arrangement, either voluntary or mandated by law, involving participation by insurers in the equitable apportionment among them of insurance which may be afforded applicants who are unable to obtain insurance through ordinary methods.

(7) 'joint underwriting' means a voluntary arrangement established on an ad hoc basis to provide insurance coverage for a commercial individually rated risk under which

two or more insurers contract with the insured at a price and under policy terms agreed upon between the insurers, or negotiated between the underwriter and the insured;

(8) 'pool' means a voluntary arrangement, other than a residual market mechanism, established on an ongoing basis, under which two or more insurers participate in the sharing of risks on a predetermined basis by means of an association, syndicate, or other pooling agreement

(9) 'final rate'

means_____.

Sec. 4. (a) This Act and the amendments made by this Act shall become effective one year after the date of enactment.

(b) In any action brought under the provisions of the antitrust laws alleging a violation of those laws for conduct that would have otherwise been lawful pursuant to the provisions of the McCarran-Ferguson Act, no award of treble damages or criminal penalties shall be awarded against any such person for conduct by such person occuring within two years after the date of enactment of this Act.

(c) During the two year period referred to in subsection (b), no relief shall be granted against any person in an action

referred to in subsection (b) for conduct by such person during such period, if such person has, in good faith, relied upon an advisory opinion issued by the Department of Justice.