Regulation, Not Deregulation: The Prescription for Lowering Health Costs Without Cutting Coverage (With or Without a Public Option)

I. Executive Summary

As Congress returns from its summer break, a familiar debate has awoken on the Hill over deregulation of health insurance.

Congressional leaders on both sides of the aisle know all to well that banks successfully argued for a decade that they were capable of self-policing and that oversight and regulation of the industry's riskiest practices were unnecessary. The turmoil on Wall Street has made it abundantly clear that corporations cannot be counted upon to self regulate. Yet insurance companies and their allies are claiming that deregulation, not new regulation, is the answer to the health care crisis.

Proponents of deregulation argue that state consumer protection laws unnecessarily drive up the cost of health care, deprive consumers of choice, and force many to pay for benefits that they do not want.[1] Proponents argue that deregulation and scaled-back benefits will drive down health insurance costs.

This analysis will explain why federal "reform" that guts state consumer protection laws in exchange for weak federal rules on health insurance would be a disaster for consumers and small business owners alike. It reviews the major provisions of a recent attempt by Senator Mike Enzi (R-WY) to do just that for health care, and outlines reforms that will provide cost savings without cutting necessary benefits.

The analysis also provides evidence of the success of the most stringent state regulation of the property/casualty insurance industry in the nation, California's Proposition 103 law authored by Consumer Watchdog founder Harvey Rosenfield, and how it would be a model for health insurance premium regulation in America. There is ample proof in California's insurance regulation that overall costs are reduced and steadily suppressed.

The components of California's landmark insurance regulation law, Proposition 103, include:

- **A prior approval system for insurance rates requiring insurers to seek permission from government regulators and justify rate increases.** Since 1988, California's Proposition 103 has saved drivers $62 billion.[2]

- **An intervenor system that allows the public to challenge unnecessary premium hikes.** Since 2003, Consumer Watchdog has saved $1.7 billion by challenging unnecessary premium increase, and insufficient decrease, requests using the public intervention process.

- **An elected commissioner accountable to the public directly for premium hikes.** To ensure that the reforms would be properly enforced, Proposition 103 made the insurance commissioner an elected position accountable directly to the voters, not to a politician who typically uses an appointment to reward the insurance industry's political support.

Republican Senator Mike Enzi (R-WY), ranking Republican member of the Senate health committee, would like to remake health insurance cooperatives ("co-ops"), suggested as an alternative to the "public option" to the private insurance market, into a vehicle to gut state consumer protection laws and eviscerate already limited health insurance legal accountability.

Enzi is a member of the so-called Gang of Six senators working behind closed doors to fashion a health care reform bill. A recent *Wall Street Journal* editorial suggests that the Senate Finance Committee is considering the Enzi co-op model.[3]

The major problems of the Enzi approach to health insurance co-ops include:

- **Loss of state benefit mandates which would allow exclusion of preventive treatments and exams, prevent early diagnosis of disease and evade Patient Bill of Rights laws passed in nearly every state**. Denying access to such basic preventive care makes treatment more costly to the policyholder and ultimately to taxpayers, who pick up the bill when individuals cannot pay outrageous out-of-pocket costs.

- **Loss of state consumer protection laws**. State laws providing consumers the right to appeal a health coverage denial to an independent panel of physicians, a right to a second opinion, and assistance from state regulators when coverage is denied would all be lost under the Enzi approach.

- **Loss of already limited legal accountability**. Individual patients who currently have the ability to hold insurers financially accountable for injuries caused by the denial or delay of necessary care would lose that right if they joined the Enzi co-op.

Instead of taking away regulatory power from the states, Congress should recognize and promote successful state insurance regulation like California's landmark insurance regulation initiative, Proposition 103.

II. Background

Republican Senator Mike Enzi (R-WY) has spoken favorably about a proposal by Senator Kent Conrad (D-N.D.) to establish health insurance co-ops,[4] to replace the "public option" in a national health reform plan. Enzi likened the co-ops to his 2006 proposal for "association health plans," embodied in his bill S. 1955, which would have exempted health policies from oversight by state laws and courts but failed in the U.S. Senate.[5]

Under the Enzi approach proposed in S. 1955, and as some supporters of the Conrad co-ops have urged,[6] co-ops should be allowed exemption from state-mandated benefits, state consumer protection laws, and accountability in state courts.

Loss of state benefit mandates, as proposed by Enzi's S. 1955, would allow exclusion of preventive treatments and exams, prevent early diagnosis of disease and evade Patient Bill of

Rights laws passed in nearly every state, for instance bans on "drive-thru" deliveries and requirements for minimum surgical care. Individual patients who currently have the ability to hold insurers accountable under state common law would lose those rights if they joined the Enzi co-op embodies in S. 1955.

Denying basic preventive care makes treatment more costly to the policyholder and ultimately to taxpayers, who pick up the bill when individuals cannot pay outrageous out-of-pocket costs. Such coverage limitations are hidden in the fine print of health insurance policies and not fully known to consumers until they are sick and seek treatment.[7] In addition, current state laws provide consumers a right to appeal a coverage denial to an independent panel of physicians, the right to a second opinion, and assistance from state regulators when coverage is denied. These would all be lost under the Enzi approach.

Under some approaches, co-ops pay doctors and hospitals directly. In other examples, co-ops purchase coverage for members from insurers. Either way, consumers lose if the co-op is exempt from state consumer protection laws and benefit mandates, and immune from accountability in state courts. Associations that provide health coverage by bypassing state consumer protection laws, for example association health plans (AHPs) and Multiple Employer Welfare Arrangements (MEWAs), have perpetrated some of the nation's most anti-consumer and fraudulent health insurance practices.[8]

III. Co-Ops Under Enzi's S. 1955

Enzi's approach in S. 1955 would preempt a range of state laws governing health insurance regulation and replace them with new weak federal rules.[9] Under the Enzi approach, policies would be exempt from all state laws regulating health insurance companies[10] including state regulatory and common law. According to 39 state Attorneys General who wrote in opposition to the Enzi plan,

> We know from past experience that exempting plans from state law harms consumers. In the mid-1970s, Congress enacted legislation that exempted a similar type of plan from state law. These plans were called Multiple Employer Welfare Arrangements ("MEWAs"). The result of this experience was that at least 398,000 consumers were left with more than $123 million in unpaid claims. Not surprisingly, Congress repealed the exemption that preempted state regulation when it became clear that was the only way to limit fraud and abuse.[11]

A) Gut State Benefit and Consumer Protection Laws

Currently, state legislatures and health insurance regulators provide oversight of insurance companies in five ways. Specifically, by:

- Administering "rating rules" that protect individuals and employers from unfair rate increases.

- Adopting and implementing coverage mandates that require health policies to pay for specified treatments and procedures.

- Regulating claims handling practices and requiring prompt payment of providers.

- Barring bad practices like “drive thru” deliveries that deny any overnight hospital stay.

- Administering independent review panels for patients denied access to doctor-recommended care.

The Enzi plan, embodied in S. 1955, would have allowed a health insurer to avoid all state regulation so long as it merely “offers” at least one plan that provides benefits equal to those provided to state employees in one of the five most populous states. However, because the bill allowed an insurer to price such a policy prohibitively high, the requirement does not offer consumers any real protection. Moreover, one of the five most populous states, Florida, provides a high-deductible, low-benefits health plan for state employees. Under S. 1955, any insurer could circumvent all state regulation by simply offering the Florida low-benefits plan at a prohibitively high price.

The weak federal rules envisioned by the Enzi plan would likely not resemble the state laws they replaced. In fact, when replacing state law with federal rules, the federal “harmonizing” board appointed by the Secretary of Health and Human Services need only “consider…similar standards followed by a plurality of States” (Title III, Section 2932 (c)(2)(B)).

The types of protections at risk are state Patients’ Bill of Rights laws passed in 44 states, including requirements that insurers pay claims for covered benefits on time and abide by audits to ensure they are in compliance with the law.[12] Eliminating such state coverage requirements would increase health care costs and decrease access to health care:

> Many state insurance laws require a wide range of benefits including mammograms, routine gynecological care, and child wellness services and diabetes equipment. State benefit mandates were carefully considered by our state legislatures prior to adding the benefit . . . . Allowing health insurers to abandon mandated benefits, many of which are preventive and/or diagnostic, will result in an increasingly ill population and higher health costs as the health care system treats a growing number of consumers in crisis.[13]

Enzi’s approach would be likely to result in the loss of required benefits such as coverage for a woman’s visit to an OB/GYN and screenings for cervical and prostate cancers, mental health parity laws, rating rules designed to protect consumers and business owners from unfair rate increases, bans on “drive thru” deliveries, and guarantees of independent medical review if an insurer denies coverage for a medically necessary treatment.[14]

Insurers claim that eliminating these patient protections is essential to reducing costs in the system. However, the data suggests otherwise. The Congressional Budget Office found that five of the state coverage mandates considered by insurers to be the most expensive have in fact only a small marginal impact on premiums, ranging from 0.28 to 1.15 percent.[15] Massachusetts, which has among the strongest state mandates, calculated the total net cost on premiums to be only 3 percent to 4 percent.[16] Compare that to the 25 percent to 27 percent of premiums that goes to insurer overhead and profit.[17] What insurers are not saying is that state coverage mandates that ensure access to basic health care needs are necessary to prevent and manage disease, or to treat it before it becomes severe and more expensive to care for.

According to a California State Department of Insurance report exploring the negative impact of S. 1955, the Enzi approach would gut state laws designed to stabilize prices for older and sicker employees:

> [I]n the mid-1990s California and many other states developed laws that help small business owners purchase insurance for their employees. California's protections for small business owners and employees include rules that make premiums more predictable. These laws also assure that risk is spread more equitably among small employers to prevent insurers from "cherry picking" good risks and redlining older employees with health challenges. California has also enacted laws that ensure that health insurance will be of real value by guaranteeing access to certain medical treatments and providers.
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> These state laws guarantee consumers access to adequate health coverage despite changes in their own or their coworkers' health status, and without considerable financial risk. State laws not only protect consumers from insurance fraud and plan insolvency, but, over the last two decades, have improved availability of coverage for small businesses by outlawing "cherry picking" (only selling coverage to healthy people) and requiring portability, so employees with health problems can retain coverage when switching employers.[18]

The Florida Insurance Commissioner raised similar concerns with the Enzi approach of replacing protective state rating rules with weaker federal rules. In particular, Commissioner Kevin McCarty refuted the proponent's argument that removing state rating rules would drive down costs overall by bringing in younger workers. Such a move, argues McCarty, would instead drive up rates overall by increasing premium costs for older and sicker workers:

> The Office of Insurance Regulation believes standardizing rating laws among the states will do little or nothing to reduce health insurance costs. The concept of the proposed rating bands is to bring younger and/or healthier people into the market by providing lower premiums. Unfortunately, bringing healthier lives into the market will not achieve its intended purpose of lowering overall market premiums. Rather, broad bands serve to increase the premiums required for older and/or less healthy population[s].[19]

B) No Accountability

Currently, individuals who buy health insurance on their own, or work for the government or a religious organization, have the right to sue their insurer in state court for improper denials of treatment or improper processing of a claim. On the other hand, consumers who receive health coverage through a private employer cannot hold their HMO or insurer financially accountable. This is due to the U.S. Supreme Court's decision in *Pilot Life Insurance v. Dedeaux*,[20] which found that: "State common law causes of action arising from the improper processing of a claim are preempted" by the federal Employee Retirement Income Security Act (ERISA).

Instead of repealing the ERISA shield, the Enzi co-op approach would extend it. Title I, Section 101 (a) of S.1955 would have amended ERISA to include health insurance policies purchased by individuals from co-ops, thereby depriving individuals who buy these plans of access to a remedy under state common law. S. 1955 would have also, as discussed above, revoked the "savings clause" acknowledgement of a state's right to regulate health insurers and require coverage of basic benefits.

Under ERISA and the *Pilot Life* decision, lawsuits are removed to federal court where victims can only recover the cost of the procedure or service denied in the first place – no damages or penalties are allowed. The patient must prove the denial was arbitrary and capricious. If the patient dies before receiving the treatment, the insurer pays nothing. The prevailing party does not necessarily recover attorney fees. Without the threat of legal accountability, HMOs and insurers are free to deny access to care for those with private employer-based coverage. The impact has been devastating for patients' health.[21]

The Enzi model would greatly expand the effects of the ERISA shield to millions of individually insured Americans who currently have the right to sue their health insurer in the event of serious delays or denials of medical care. Under the Enzi model, many of these Americans would be lured into co-ops with the promise of lower health insurance premiums, only to find out too late that co-ops lack legal accountability. The corrosive effects of removing legal accountability have been well known for decades, yet Congress has yet to take corrective action. For example, in 1982 former Illinois state Attorney General Tyrone Fahner told Congress:

> What is shocking is that the insurance cheats are using the Federal ERISA law and the principle of Federal preemption as an offensive weapon, in court and out, against consumers. In this way, they have largely avoided regulation, repayment, or prosecution. In my opinion, the insurance trust swindle has the potential to become the most sophisticated and profitable white-collar crime in America…. It is high profit and very low risk crime under the existing laws … an operator with virtually no capital can go into the ERISA trust benefit business and become a very rich person by cheating people out of their premiums and face almost no chance of going to jail.[22]

Ten years after Fahner's testimony, a report by the House Subcommittee on Investigations made similar findings in an investigation of MEWAs, which had been previously considered exempt from state law under ERISA:

> For almost 18 years now, conmen, crooks, and hucksters have been able to take advantage of a continuing regulatory vacuum (be it actual or perceived) in the area of self-insured employer sponsored health benefit programs to fleece unsuspecting employers and their employees of hard-earned premium dollars. They have built their lavish lifestyles on the shattered lives of innocent men, women and children while regulators have argued with one another over who has jurisdiction and whether the problem already has been solved.[23]

Republican and Democrat alike have decried the devastating impact of the ERISA legal accountability shield on consumers and small business owners. For example, Senator Grassley's remarks during a 2004 Senate Finance Committee investigation into health insurance scams sums up the human impact of health coverage providers operating above the law:

> This hearing is a wake-up call to America, and a reminder that there are unscrupulous individuals who intentionally inflict emotional and financial harm upon businesses and individuals.[24]

C) Increased Risk of Fraud

Associations that provide health coverage exempt from oversight by state Insurance Commissioners and Attorneys General have perpetrated some of the nation's most anti-consumer practices.[25] As a result, some state regulatory oversight has been restored to MEWAs. The Enzi model would reverse this trend toward more state oversight. Such a shift to oversight only by federal regulators would encourage more predatory behavior, according to state insurance regulators and attorneys general.

> There has been a 30-year history of health insurance scams involving associations and multiple employer arrangements. Scams flourished after Congress exempted these arrangements from state oversight in 1974 through the Employee Retirement Income Security Act (ERISA). Operators targeted small businesses and self-employed people through legitimate and phony associations. They collected premiums for non-existent health insurance, did not pay medical claims, and left businesses, workers and providers with millions of dollars in unpaid bills and patients without health insurance coverage. The U.S. Department of Labor, having the responsibility for oversight, was not able to protect businesses and their workers.
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> In response to widespread fraud, in 1982 Congress amended ERISA to restore states' authority and to allow both the states and the federal government to regulate in order to better protect consumers covered by associations and multiple employer arrangements.[26]

States have regulatory and enforcement expertise based on decades of responsibility. States require health insurance agents to report fraud. They impose financial penalties on agents that sell phony coverage, and can move quickly to shut down fraudulent plans by issuing cease and desist orders without going to court.[27]

Removing state consumer protection oversight, particularly laws that allow patients to appeal to state regulators when coverage providers deny access to necessary coverage, would undermine health care quality and access. According to the 39 state Attorneys General, the Enzi plan to eliminate state assistance to consumers having difficulty obtaining benefits promised by their contracts:

> [W]ill result in less health care coverage for consumers and higher overall costs as these consumers encounter various health crises. Consumers rightfully expect their state government to require a minimum of health benefit protections and to protect them from abuse by health insurers. Elimination of strong state protections in exchange for weak federal oversight fails consumers.[28]

Federal regulators, far removed from the source of the action, could not be as responsive as state regulators. According to the California Department of Insurance:

> The sale of illegal health plan products by otherwise legal trade associations has been a serious issue in all states. While The California Department of Insurance faces challenges in keeping ahead of these fraudulent schemes, it has shown that it can deal with health insurance fraud effectively. The Department of Labor (DOL) has limited experience in these matters and may be hard pressed to respond to them.[29]

This robust state regulation already curbs taxpayer costs of fraud as well as protecting the health of consumers. By taking one more step, Congress could drive down overall costs as well.

IV. Needed Reforms

A) Preserve & Promote Successful State Regulation Like California's Proposition 103

Existing federal health care laws provide a model for a federal-state partnership rather than federal pre-emption of more protective state standards and enforcement duties. Medicaid, HIPPA, COBRA, and the CHIPP program for children's health insurance all provide minimum federal standards and funding levels but allow states to fit the federal program to local needs, provide enforcement, and adopt regulations not envisioned by federal law.

States have traditionally been the laboratories of innovation in health care policy and insurance reform. Instead of taking away regulatory power from the states, Congress should recognize and promote successful state insurance regulation like California's landmark insurance regulation initiative, Proposition 103. The federal government should require every state to adopt the premium regulation provisions of Proposition 103, which requires government approval for premium increases and decreases, as well as the opportunity for public hearings on the necessity of rate increases, and extend them to health insurers.

1) Proposition 103's Success

California has the best automobile insurance regulation in the nation, with the slowest-growing premiums and one of the most competitive markets in the country, according to a state-by-state 2008 study by the Consumer Federation of America.[30] In 1988, California voters approved Proposition 103, which enacted the nation's toughest insurance reform.

Proposition 103 protects consumers from arbitrary insurance rates and practices, encourages a competitive insurance marketplace, provides an Insurance Commissioner accountable to the public, and helps ensure that insurance is fair, available, and affordable for all Californians. California stands out as a model of consumer protection:

- California drivers have saved $61.8 billion in auto insurance rates since enacting the strongest regulation in the nation, an average of $1670 per Californian;[31]

- California is first among all states in holding down insurance premiums, with a 12.9 percent increase compared to an average national increase of 50 percent.[32]

The insurance industry thrives in California as well:

- California is the fourth most competitive auto insurance market in the nation; Completely unregulated Illinois ranks 44th.[33]

- Auto insurers fare as well as consumers in California, with strong profits over the last ten years - 10.1%.[34]

The success of California's public intervention system – where any member of the public can challenge unreasonable rate increase requests through administrative hearings shows the power of public accountability. Since 2003, Consumer Watchdog has saved $1.7 billion by challenging unnecessary premium increase and insufficient decrease requests using the public intervention process. The chart on the next page summarizes the savings company by company.

Health insurance company premiums are not subject to California's prior approval system. Numerous legislative attempts to establish such a prior approval system for health insurers have been stopped in the California legislature where health insurers have lobbied hard against the changes.[35]

Insurer	Line	Millions Saved
Safeco - 2003	Homeowners	$30
AAA of Northern Cal.	Homeowners	$26
CA Casualty Ins. Co.	Homeowners	$3.2
State Farm - Mobilehomes	Homeowners	$3.8
Safeco - 2004 (Decision in 2006)	Earthquake	$19.3
Safeco - 2006	Homeowners	$40.5
Farmers - 2006	Homeowners	$171
State Farm - 2006	Homeowners	$266
Fireman's Fund HO - 2008	Homeowners	$35
Allstate - 2008	Homeowners	$242
Geovera - 2008	Earthquake	$5.7
Fireman's Fund EQ - 2008	Earthquake	$2.2
Farmers HO 2007	Homeowners	$24.2
Safeco HO 2008	Homeowners	$4.6
Total this Line		**$873.5**
SCPIE -2002-03	Medical Malpractice	$23
SCPIE - 2003-04	Medical Malpractice	$11
Norcal Mutual-2003	Medical Malpractice	$11.6
Medical Protective Co.	Medical Malpractice	$3.9
National Union	Medical Malpractice	$0.9
Norcal Mutual-2004	Medical Malpractice	$4.9
The Doctors Company - 2004	Medical Malpractice	$6.6
Medical Protective Co.	Medical Malpractice	$0.5
American Casualty of Reading, PA	Medical Malpractice	$1.6
Medical Protective Co. 2005	Medical Malpractice	$2.0
Total this Line		**$ 66**
Calif Cas. Indem. Exch.	Automobile	$9.6
Farmers Ins Exchange	Automobile	$93.9
State Farm	Automobile	$100
Executive Risk (Chubb Group)	Automobile	$1.2
Allstate Ins. Co. and Allstate Indemnity Co. - 2007	Automobile	$258
Explorer - 2008	Automobile	$8.3
Topa - 2008	Automobile	$0.3
State Farm - 2008	Automobile	$131.4
21st Century Auto	Automobile	$95.9
Auto Club Auto 2008	Automobile	$61.6
Mid-Century Auto 2008	Automobile	$12.4
Progressive Choice Auto 2008	Automobile	$7.0
Total this Line		**$779.58**
Total Savings – All Lines		**$1,719.08**

2) Proposition 103 Components – How to Build a Successful Insurance Regulation

The key components of the 1988 voter-approved Proposition 103 are: 1) a prior approval system for rates requiring insurers to seek permission from government regulators and justify rate increases; 2) an intervenor system that allows the public to challenge unnecessary premium hikes; and, 3) an elected commissioner accountable to the public for premium hikes.

Proposition 103, provides, among other things, that no property and casualty insurance rate shall be "approved or remain in effect" if it is "excessive, inadequate, unfairly discriminatory."[36] Proposition 103 established a system under which: a) property and casualty insurance companies operating in California must apply to the Insurance Commissioner for prior approval of their rates and automobile insurance underwriting factors;[37] b) the Commissioner must notify the public of such applications;[38] and, c) consumers have an unconditional right to initiate and intervene in proceedings regarding insurance rates and rating practices.[39]

In order to protect consumers during the transition to the prior approval system, and to offset the rate increases during the year prior to the election, the initiative froze automobile and other property-casualty insurance rates and premiums at 80% of the 1987 levels for one year. The 20% rollback avoided "locking in" the excessive rates of the preceding years, during which time insurance rates rose well in excess of the inflation rate. Insurance companies eventually issued over $1.4 billion in rollback refunds to policyholders.

(i) Approval and Justification of Rate Increases

California's Proposition 103 requires insurers to be transparent about how rates are developed and requires "prior approval" by state government before a property casualty insurance premium is changed. The elected Insurance Commissioner must prohibit excessive premium increases, insufficient premium decreases, and decreases that lead to insufficient insurance company reserves.

The Insurance Commissioner has the authority to set standards to test the assumptions insurers make in setting rates, including:

- Cap the rate of return.

- Establish ceilings for executive salaries and set an overall limit on expenses equal to the industry average, rewarding insurers who operate more efficiently with a higher rate of return. Expenses in excess of the limit cannot be included in the rate.

- Prohibit insurers from engaging in bookkeeping practices that inflate their claims losses and limits the amount insurers can set aside as surplus and reserves.

- Forbid insurers from passing through to consumers the costs of the industry's lobbying, political contributions, institutional advertising, the unsuccessful defense of discrimination cases, bad faith damage awards, and fines or penalties.

California Department of Insurance regulations contain actuarial formulas to determine whether to approve an insurer's requested rate.[40] The upper boundary is called the "maximum

permitted earned premium,"[41] above which a rate is "excessive", and the lower boundary is called the "minimum permitted earned premium,"[42] below which a rate is inadequate.

The "prior approval" system disengages the insurers' traditional "cost-plus" approach, ending their ability to unilaterally pass through to policyholders all claims costs, overhead and profits. It substitutes a rate structure that encourages both insurers and consumers to engage in loss prevention. Insurers are rewarded for research and innovative programs that lead to reduced losses and claims. One of the greatest achievements of Proposition 103 is its documented success in forcing California insurance companies to prosecute claims fraud for the first time. Consumers, in turn, are rewarded with lower premiums for their individual loss prevention efforts, such as installation of anti-theft or anti-fraud devices and maintenance of a safe driving record.

(ii) Public Intervenor System

To encourage public participation in the implementation and enforcement of the insurance laws, consumers have the right to initiate or intervene in insurance matters before the California Department of Insurance and the courts.

Proposition 103 grants consumer representatives the right to petition for a formal public hearing on any rate application submitted to the Commissioner for approval.[43] The Commissioner must respond to any petition for hearing filed within 45 days of the public notice.[44] If a rate application seeks a change (increase or decrease) of less than 7% for personal lines or less than 15% for commercial lines, the decision to grant a hearing is discretionary, but if the application seeks a rate change of more than 7% for personal lines or 15% for commercial lines and the petition is filed within 45 days of the public notice, the Commissioner must hold a public hearing.[45]

A member of the public who takes advantage of this right to participate in insurance matters, either in the courts or before the California Department of Insurance, may seek compensation for "reasonable" advocacy and witness fees, so long as that person represents the interests of consumers and makes a "substantial contribution" to the resulting rate order.[46] This ensures competent, professional representation of consumers at such public hearings.

(iii) Elected Insurance Commissioner

An independent regulator is crucial to successful regulation. To ensure that the reforms would be properly enforced, Proposition 103 made the insurance commissioner an elected position accountable directly to the voters. Prior insurance commissioners were political appointees of the governor, usually insurance executives who were political supporters of the governor and who returned to the insurance industry when leaving office.

Proposition 103 created the office of an elected insurance commissioner and charged the commissioner with approving or denying insurers' premium increase requests. Compared to appointed California insurance commissioners, elected commissioners have done more for the consumer:

- California's last appointed Commissioner, Roxani Gillespie, a former insurance company executive, exempted 402 auto insurance companies from Proposition 103 rate rollbacks.

The elected commissioner who followed Gillespie, Commissioner John Garamendi, forced companies to comply with Prop 103's rate rollback requirements. Insurance companies were eventually ordered to refund $1.4 billion to insurance policyholders.[47] The *Los Angeles Times* declared of Gillespie's actions at the time, "It looks as though the official charged with enforcing Prop 103 is bending over backward to benefit the insurance industry, but won't do the same for consumers."[48]

- Under California's last appointed commissioner, Roxani Gillespie, auto insurance rates rose 11% annually[49] and rates were the 3rd highest in the nation in 1989, when she left office. Under elected insurance commissioners, California's auto insurance rates rose just 12.9 percent through 2006 while auto rates in the rest of the nation increased 50% over the same period.[50]

- Just prior to leaving office, appointed Commissioner Gillespie granted 46 auto insurance companies rate increases. Elected Commissioner John Garamendi subsequently froze insurance premiums. Garamendi's rate freeze was in place the majority of his tenure.[51]

B) Provide New Accountability – Remove ERISA Shield

For patients who receive health coverage through a private employer, HMOs and health insurers face no financial consequences for mishandling claims. The Supreme Court decision in *Pilot Life Insurance v. Dedeaux*[52] stated that "state common law causes of action arising from the improper processing of a claim are preempted." Under the Employee Retirement Income Security Act (ERISA) and the Pilot Life decision, lawsuits are removed to federal court where victims can only recover the cost of the procedure or service denied in the first place—no damages or penalties are allowed. As a result, HMOs and insurers are largely free to deny access to care without fear of reprisal or financial consequences. Any health care overhaul should overturn *Pilot Life* and restore the reach of state common law.

C) Public Option

State law preemption issues aside, co-ops have largely failed to provide health care savings for small businesses and the self-employed because they could not amass enough purchasing power to leverage better prices from the health insurance industry.[53] Conversely, the proposed "public option" would allow business and individuals and small businesses to bypass the private insurance market altogether, if they chose, and avoid wasteful administrative costs and profits that are ten times greater than administrative costs of public health plans like Medicare.[54]

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[1] Allison Rupp, "Enzi: Reform health care in stages," *Casper Star Tribune*, August 18, 2009, *available at* http://www.trib.com/articles/2009/08/18/news/wyoming/7b194a8d9e78b1548725761500818c68.txt ("Enzi said [co-ops] are very similar to the small business health plans he proposed several years ago, which would allow small businesses to pool together across state lines and even nationwide to effectively negotiate for lower insurance costs. 'That is something I am still

pushing for,' Enzi said."); Robert Schroeder, "Health co-ops face operating table when Congress returns," *MarketWatch*, August 6, 2009, *available at* *http://www.marketwatch.com/story/health-co-ops-face-congressional-operating-table-2009-08-06*; James Oliphant, "Healthcare co-ops emerging as viable alternative," *Los Angeles Times*, August 20, 2009, *available at* http://www.consumerfed.org/pdfs/state_auto_insurance_report.pdf

[2] J. Robert Hunter, "State Automobile Insurance Regulation: A National Quality Assessment and In-Depth Review of California's Uniquely Effective Regulatory System," Consumer Federation of America, April 2008, *available at* http://www.consumerfed.org/pdfs/insurance_response_report.pdf

[3] "Fannie Med; The bipartisan Senate negotiators are leaning toward proposing a health-care Fannie Mae," *Wall Street Journal*, Editorial, July 30, 2009, *available at* http://online.wsj.com/article/SB10001424052970204619004574318474224065070.html

[4] Allison Rupp, "Enzi: Reform health care in stages," *Casper Star Tribune*, August 18, 2009, *available at* http://www.trib.com/articles/2009/08/18/news/wyoming/7b194a8d9e78b1548725761500818c68.txt ("Enzi said [co-ops] are very similar to the small business health plans he proposed several years ago, which would allow small businesses to pool together across state lines and even nationwide to effectively negotiate for lower insurance costs. 'That is something I am still pushing for,' Enzi said."); Robert Schroeder, "Health co-ops face operating table when Congress returns," *MarketWatch*, August 6, 2009, *available at* *http://www.marketwatch.com/story/health-co-ops-face-congressional-operating-table-2009-08-06*; James Oliphant, "Healthcare co-ops emerging as viable alternative," *Los Angeles Times*, August 20, 2009.

[5] *Id.*

[6] *Air Talk with Larry Mantle*, KPCC, Thursday, August 20, 2009. Segment 1 (11:00 am – 11:45 am) *available for download at* http://www.scpr.org/programs/airtalk/2009/08/20/health-care-debate-are-exchanges-and-co-ops-real-r/

[7] *See also* Mila Kofman, J.D., "Loss of State Oversight Means Regulatory Vacuum and More Fraud," Georgetown University Health Policy Institute, Summer 2005. *See also* "Health insurance companies that refuse to pay," ABC-TV World News Tonight, March 06, 2002, *available at* http://www.consumerwatchdog.org/patients/articles/?storyId=14805.

[8] "Health insurance companies that refuse to pay," ABC-TV World News Tonight, March 06, 2002, *available at* http://www.consumerwatchdog.org/patients/articles/?storyId=14805

[9] "S. 1955 – Health Insurance Marketplace Modernization and Affordability Act of 2006 of 2006," Congressional Budget Office Cost Estimate, May 3, 2006.

[10] National Association of Attorney Generals letter to the U.S. in opposition to S. 1955, April 25, 2006 (signed by 39 state Attorneys General). *See also* Mila Kofman, J.D., "Loss of State Oversight Means Regulatory Vacuum and More Fraud," Georgetown University Health Policy Institute, Summer 2005.

[11] *Id.*

[12] National Conference of State Legislators (NCSL), available at: http://ncsl.org/programs/health/hmolaws.htm

[13] National Association of Attorney Generals letter to the U.S. in opposition to S. 1955, April 25, 2006 (signed by 39 state Attorneys General).

[14] For a summary of some of the state laws that could be lost, view a series of charts compiled by the National Conference of State Legislators at: http://ncsl.org/programs/health/hmolaws.htm and http://ncsl.org/programs/health/healthmc.htm (see "State Insurance Mandated Coverage").

[15] Congressional Budget Office, *Increasing Small-Firm Health Insurance Coverage Through Association Health Plans and HealthMarts* 21 (Washington, D.C. January 2000).
[16] Massachusetts Division of Health Care Finance and Policy, *Comprehensive Review of Mandated Benefits in Massachusetts: Report to the Legislature* 4 (Boston, MA July 2008).
[17] Cathy Schoen, et al., "Building Blocks for Reform: Achieving Universal Coverage With Private and Public Group Health Insurance," *Health Affairs*, Volume 27, No. 3, May/June 2008, p. 647. A public option based on Medicare is expected to provide premiums more than 30 percent lower than private market premiums as a result, in part, of Medicare's lower administrative costs. Karen Davis et. al., "The Building Blocks of Health Reform: Achieving Universal Coverage and Health System Savings," CommonWealth Fund Issue Brief, May 2008, p. 2, *available at* http://www.commonwealthfund.org/Content/Publications/Issue-Briefs/2008/May/The-Building-Blocks-of-Health-Reform--Achieving-Universal-Coverage-and-Health-System-Savings.aspx
[18] "Bad for Business, Bad for Employees: Analysis of S. 1955 and Its Impact on California Small Business," California State Department of Insurance, 2006, page 2-3.
[19] Letter from Florida Insurance Commissioner Kevin McCarty in opposition to Ezni co-op plan, March 7, 2006.
[20] 481 U.S. 44 (1987).
[21] Jamie Court, "Making a Killing: HMOs and the Threat to Your Health," Common Courage Press, 1999, chapter 5, *available at* http://www.makingakilling.org/chapter5.html
[22] Testimony of Tyrone Fahner, Attorney General, State of Illinois (former Assistant U.S. Attorney and former Director of Illinois Department of Law Enforcement), before the Subcommittee on Labor-Management Relations of the Committee on Education and Labor House of Representatives, March 5, 1982, at 6.
[23] U.S. Senate Permanent Subcommittee on Investigations Report "U.S. Government efforts to combat fraud and abuse in the insurance industry" hearing focused on efforts at the state and federal level to detect and deter fraud and abuse in certain employer sponsored health benefit plans known as multiple employer welfare arrangements, or MEWAs. Senate Report 102-262, March 1992, at 17-18.
[24] Senator Grassley, Statement, "Health Insurance Challenges: Buyer Beware," Senate Finance Committee hearing to investigate health insurance scams, March 2004.
[25] "Health insurance companies that refuse to pay," ABC-TV World News Tonight, March 06, 2002, *available at* http://www.consumerwatchdog.org/patients/articles/?storyId=14805
[26] Mila Kofman, J.D., "Loss of State Oversight Means Regulatory Vacuum and More Fraud," Georgetown University Health Policy Institute, Summer 2005, page i.
[27] *Id.*
[28] National Association of Attorney Generals letter to the U.S. in opposition to S. 1955, April 25, 2006 (signed by 39 state Attorneys General).
[29] "Bad for Business, Bad for Employees: Analysis of S. 1955 and Its Impact on California Small Business," California State Department of Insurance, 2006, page 5.
[30] J. Robert Hunter, "State Automobile Insurance Regulation: A National Quality Assessment and In-Depth Review of California's Uniquely Effective Regulatory System," Consumer Federation of America, April 2008, *available at* http://www.consumerfed.org/pdfs/insurance_response_report.pdf
[31] *Id.* page 45.
[32] *Id.* page 46.
[33] *Id*. page 19-20.
[34] *Id.* page 68.

[35] For example, AB 1218 (Assembly Member Dave Jones) was defeated in the Assembly Health Committee on April 28, 2009; AB 1554 (Assembly Member Dave Jones) was defeated in the Senate Health Committee on July 11, 2007.
[36] Ins. Code § 1861.05(a).
[37] Ins. Code §§ 1861.05(b) and 1861.02(a).
[38] Ins. Code § 1861.02(c).
[39] Ins. Code § 1861.10(a).
[40] *See* 10 CCR § 2644.1 et seq.
[41] *See* 10 CCR § 2644.2.
[42] *See* 10 CCR § 2644.3.
[43] *See* Ins. Code § 1861.05(c).
[44] *See* Ins. Code § 1861.05(c)(1).
[45] Ins. Code § 1861.05(c)(3).
[46] Ins. Code §§ 1861.05(c); 1861.10; see also 10 CCR §§ 2661.1(k) [defining "substantial contribution"], 2661.2 [right of intervention].)
[47] California Department of Insurance, 2006 Annual Report of the Insurance Commissioner.
[48] "Whose Side Is Gillespie On?," *Los Angeles Times*, August 24, 1989.
[49] Returning Insurance Commissioner To Gubernatorial Appointment Removes People's Control Over Insurance Rates, Group Says, Press Release, Consumer Watchdog, June 11, 1997, *available at* http://www.consumerwatchdog.org/insurance/articles/?storyId=16682
[50] *Id.* page 46.
[51] *Id.*
[52] 481 U.S. 44 (1987).
[53] Elliot K. Wicks, *Health Insurance Purchasing Cooperatives*, Issue Brief, The Commonwealth Fund, November 2002, page 3-4.
[54] Jacob S. Hacker, Ph.D., *Case for Public Plan Choice in National Health Reform*, Institute for America's Future & U.C. Berkeley School of Law, December 2008, page 5.