Testimony of

Sean Dilweg

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Senate Judiciary Committee
Subcommittee on Crime and Drugs
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Chairman Durbin, Ranking Member Graham, and Members of the Subcommittee on Crime and Drugs, thank you for the opportunity to testify today. My name is Sean Dilweg and I am the Commissioner of Insurance for the state of Wisconsin. I commend you and the Committee for taking the lead in examining fraudulent activity in the health care marketplace.

Health care consumers have in the past and continue today to be harmed by health care fraud and regulatory gaming. State insurance regulators have fought a decades long battle against fraudulent and near fraudulent health care plan schemes. Such schemes range from bogus health care plans that leave millions in unpaid claims to more sophisticated schemes designed to circumvent rating and other restrictions to protect less healthy, less fortunate consumers.

I applaud your efforts to study prevention of billing, provider and other fraud that increase the costs of health care delivery, including fraud affecting Medicare, Medicaid and private health plans. It is just as critical that federal legislative proposals include measures to prevent schemes designed to directly harm consumers. I urge you to make this issue your highest priority and advocate for health care reform that allows confidential coordination of inquiries and investigations among state and federal regulatory and law enforcement agencies, creates a coordinating council, and gives regulatory flexibility to adapt to the changing face of fraudulent and regulatory gaming schemes.

This Congressional session may be a turning point in the history of our country's health care financing system. Great care must be taken to ensure these proposals do not inadvertently expose consumers, our families and friends, to fraud, or leave them unprotected from unscrupulous schemes. Now is the time to enact measures that encourage communication and coordination

among federal and state regulatory and law enforcement jurisdictions, as well as set firm boundaries in the law to prevent schemes that abuse consumers.

There have been other such turning points. The enactment of the federal Employee Retirement Income Security Act of 1974 (ERISA) is an example. The enactment of the Erlenborn amendment in 1983 to ERISA is another. The 1974 enactment of ERISA was a major step towards protecting workers against fraud and abuse in the private pension system. It also was the unintended door opener to fraudulent health care insurance schemes. After enactment of ERISA, unscrupulous and innovative operators set up multiple employer trusts to provide bogus health coverage. These operators used the cover of ERISA's preemption of state regulatory authority over insurance activity to set up such fraudulent health insurance plans. They relied on legal ambiguity, limited federal administrative agency flexibility, and gaps in communication, coordination and authority among federal and state law enforcement and regulatory agencies to run bogus health insurance scams.

The history of criminal health coverage fraud is documented in Congressional records and studies. A 2004 General Accounting Office study reported that in the period 2000 to 2002, 144 unauthorized entities provided bogus health plan coverage to 15,000 employers and left more than $250 million in unpaid claims. Most of these bogus plans relied on ERISA preemption provisions for legal cover. The GAO found that every state had at least five such plans operating at some time during this period.

Please do not conclude that shutting down these criminal health plan schemes can be achieved by simply outlawing these arrangements. That approach has proven unsuccessful. Fraud is always creative and energetic. It will evolve. The best preventive measures are provisions for flexible, coordinated and targeted regulatory, law enforcement and consumer education tools.

The 1983 Erlenborn Amendment to ERISA took aim at fraudulent schemes, but missed. The Erlenborn Amendment closed off some avenues for schemes while offering templates for others.

After the Erlenborn amendment was enacted, health care insurance schemes became more diverse. They included operations that:

o Purported to "aggregate" small employers into a "self-funded" single large employer by "leasing" employees;
o Purported to enter into "collective bargaining" agreements with participating employers;
o Purported to establish separate single employer "self-funded" trust arrangements;
o Purported to provide only stop-loss insurance (rather than health insurance) at attachment points of $500 or less;
o Purported to be "fully insured" although only by an insurer licensed in a single state although coverage is offered in multiple states; and
o Schemes that falsely purported to be fully insured by a licensed insurer.

This history demonstrates that legislation to prevent criminal health schemes must be flexible and provide for coordinated enforcement and education measures.

The second and equally important lesson is that fraudulent health plans often evolve from schemes to gain windfall profits at the expense of the public by exploiting regulatory gaps. The history of fraudulent health plans demonstrates that it is not uncommon for regulatory avoidance schemes to convert to criminal enterprises.

Protecting consumers from harm due to regulatory gaming also protects them from criminal fraud. The "leased employee" and the stop loss insurance schemes I described illustrate arrangements can be used to exploit regulatory gaps and to circumvent insurance regulations. These arrangements can evolve, and have evolved into criminally fraudulent operations. They circumvent insurance consumer protections that give rate stability, adjusted community rating, and guaranteed renewal and issue rights. If the arrangements are criminally operated they will also serve as schemes to defraud claimants, leaving claims unpaid.

The National Association of Insurance Commissioners has developed a set of recommendations that urge the inclusion of fraud and regulatory gaming prevention tools in any federal health care reform proposal. I worked with the NAIC to develop these recommendations, which I strongly support. A copy of the recommendations is included with my written comments. I urge you to make it a priority to include the following key points in any federal health care reform legislation:

1) Establish a privilege and a statutory structure for confidential coordination and exchange of information among federal agencies and states insurance regulators. The privilege and structure should safeguard the confidentiality of communications among states regulatory and law enforcement and/or with the federal government for the purpose of regulatory oversight and facilitating investigations and inquiries.

2) Provisions reaffirming state insurance regulators authority to protect consumers. The legislation should not include ERISA-like preemption provisions that provide cover for health coverage schemes or create regulatory gaps.

3) A provision enabling the federal administrating agency to issue regulations or orders establishing that a person engaged in the business of insurance is subject to the laws of the states regulating the business of insurance and to foreclosing the use of federal law, including ERISA, as cover for fraudulent health plan schemes or for schemes to exploit regulatory gaps.

4) Provisions establishing a coordinating body to focus on health insurance fraud schemes and schemes to exploit regulatory gaps. The coordinating body should include state and federal regulators and law enforcement including the U.S. Department of Labor, FBI, the U.S. Postal Inspector, the Department of Labor's Inspector General, the IRS, and the Department of Justice and the U.S. Department of Health and Human Services.

5) Criminal and civil penalties for operators, and those who assist operators, of a health plan that falsely represents itself as exempt from state insurance regulatory authority.

6) Provisions for adequate staff and funding for regulatory enforcement.

7) Provision for adequate staff and funding for an effective consumer education program.

Your committee is right to make health care fraud a priority. I urge you to continue your attention to this important and timely topic.