INTRODUCTION:
Proposals to allow the purchase of insurance across state lines (PASL) have gained some support in recent years. Health insurers have traditionally been allowed to sell a policy only within the state that approved and regulates that particular policy. PASL would allow insurers to sell a policy approved in one state to people residing in any state.

Any federal legislation to enact PASL in an individual insurance market would have to address two main legal considerations: 1) the McCarran-Ferguson Act, which allows the states to retain their regulatory authority over insurance, and 2) a constitutional prohibition against the commandeering of state officials by the federal government. This paper outlines these obstacles and potential solutions, and concludes that as long as the legislation is thoughtfully drafted (see below), there is no significant legal or Constitutional barrier to enacting PASL. Additionally, the concepts discussed here may be relevant to any federal health reform legislation involving regulation of health insurance or the use of state officials.

POTENTIAL SOLUTIONS:
• Congressional Authority under the McCarran-Ferguson Act: The federal McCarran-Ferguson Act delineates the respective roles of the federal and state governments in regulating health insurance. While states retain the primary role in regulating health insurance, the federal government can preempt state laws in this area if it does so explicitly and clearly, or if a federal law specifically relates to the business of insurance. PASL legislation is most likely to survive a potential court challenge to Congress’ authority if it includes both of the following two steps:

  ➢ Clearly state that Congress is using its Commerce Clause power: Courts have historically been very deferential to Congress when it is legislating under its Commerce Clause authority, increasing the chance that the legislation would be upheld. A clear statement of Commerce Clause jurisdiction in legislation would make this authority clear to the Court.

  ➢ Ensure that the legislation meets the legal preemption standard: The legislation could expressly state that the law preempts state laws on the subject. Alternatively, Congress could include clear language ensuring that the legislation specifically relates to the business of insurance, which would meet the Supreme Court test for preemption under the McCarran-Ferguson Act.
• **Commandeering of State Officials:** The federal government is prohibited under the Constitution from requiring state officials to implement or enforce federal law, or “commandeering” those state officials. However, the Supreme Court has ruled that the federal government can regulate interstate commerce, so long as state officials are not required to alter their actions as a result. Congress can also attach conditions or requirements to federal money it grants to the states. For a PASL proposal, concerns about commandeering challenges can be minimized by Congress’ taking the following steps:

  - **Impose No New Duties:** Congress should make the strongest case possible that any responsibilities modified by the PASL legislation do not impose new duties on state officials. Additionally, Congress could characterize the participation of states as “primary states” in PASL as voluntary.

  - **Use Congress’s Spending Power:** If Congress provides new funding to states to incentivize them to participate in a PASL program, it can rely on its Constitutional spending power and can attach requirements on the states’ participation. Use of the relatively broad spending power can minimize any commandeering concerns.

**LEGAL ISSUES & APPLICABLE LAW:**

- **McCarran-Ferguson Act:** Ordinarily, where a state and federal law conflict, the federal law preempts (takes priority over) the state law. The federal McCarran-Ferguson Act, by contrast, reaffirms the role of the states as the primary regulators of the insurance industry while preserving federal authority to regulate insurance if it acts specifically to do so. If Congress wishes to preempt state health insurance law, it can explicitly declare that a particular piece of legislation preempts state law, or draft the legislation to fit under the exception provided by the Act for legislation specifically relating to the business of insurance.

- **Commandeering of State Officials:** The Tenth Amendment and the principle of state sovereignty in the Constitution prohibit the federal government from commanding the states to implement federal law or policies that would interfere with state sovereignty. This is referred to as the “anti-commandeering” principle. A PASL bill could minimize this constitutional concern by characterizing duties of state officials as consistent with existing duties and by providing incentives to states through funding, as opposed to requiring state participation.

**CONCLUSION:**

PASL legislation can be implemented, if it addresses key legal issues using the solutions outlined above. McCarran-Ferguson concerns can be addressed by carefully crafting the legislation with explicit references to the insurance industry, or by including a specific statement of preemption. Concerns about the commandeering of state officials can be curtailed by drafting the legislation so that state officials are not given additional duties, and by providing financial incentives to the states to enforce the federal law. Policymakers should keep in mind that the solutions above, in addition to being relevant to PASL proposals, may also be relevant to any federal legislation involving the federal regulation of health insurance or that requires specific action by state officials.