Defending Liberty
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AMERICAN BAR ASSOCIATION

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February 27, 2017

The Honorable Bob Goodlatte
Chair, House Committee of the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Tom Marino
Chair, House Subcommittee on Regulatory Reform, Commercial and Antitrust Law
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers Jr.
Ranking Member, House Committee of the Judiciary
United States House of Representatives
2142 Rayburn House Office Building
Washington, DC 20515

The Honorable David Cicilline
Ranking Member, House Subcommittee on Regulatory Reform, Commercial and Antitrust Law
United States House of Representatives
2142 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte, Ranking Member Conyers,
Subcommittee Chairman Marino, and Subcommittee Ranking Member Cicilline,

I am pleased to advise you of a Policy that the American Bar Association adopted in the attached Report No. 107. Passed by the House of Delegates of the American Bar Association with respect to the McCarran Ferguson Act. In pertinent part, the Resolution provides as follows:

B. THE MCCARRAN-FERGUSON ACT.

(1) The current McCarran-Ferguson exemption to the antitrust laws should be repealed and replaced with legislation containing the following features:

(1) Insurers should be made subject to general antitrust laws but provided with authorization to engage in specified cooperative activity that is shown to not unreasonably restrain competition in the industry.

(2) Insurers should be authorized to cooperate in the collection and dissemination of past loss experience data so long as those activities do not unreasonably restrain competition but should not be authorized to cooperate in the construction of advisory rates or the projection of loss experience into the future in such a manner as to interfere with competitive pricing.

(3) Insurers should be authorized to cooperate to develop standardized policy forms in order to simplify consumer understanding, enhance price competition and support data collection efforts, but state regulators should be given authority to guard against the use of standardized forms to unreasonably limit choices available in the market.

(4) Insurers should be authorized to participate in voluntary joint underwriting agreements and in connection with such agreements to cooperate with each other in making rates, policy forms, and other essential insurance functions so long as these activities do not unreasonably restrain competition.

(5) Insurers participating in residual market mechanisms should be authorized in connection with such activity to cooperate in making rates, policy forms, and other essential insurance functions so long as the residual market mechanism is approved by and subject to the active supervision of a state regulatory agency.

(6) Insurers should be authorized to engage in such other collective activities that Congress specifically finds do not unreasonably restrain competition in insurance markets.

(7) State regulation of insurance rates should not exempt insurers from the antitrust laws under the state action doctrine, except as specified in Recommendation B.1(1) to B.1(6). Other non-rate regulation by a state should not exempt insurers from the antitrust laws unless that regulation satisfies the requirements of the state action doctrine and the regulation is shown to not unreasonably restrain competition.

(2) States should retain the authority to regulate the business of insurance. The federal government should defer to state regulation except in those unusual circumstances where the regulatory objective can only be effectively accomplished through federal involvement.

We hope you find this policy to be helpful in your deliberations. Please do not hesitate to contact me if you have any questions.

Sincerely yours,

William MacLeod

Bill MacLeod

Attachment

AMERICAN BAR ASSOCIATION
RESOLUTION
ADOPTED BY THE HOUSE OF DELEGATES

February 6-7, 1989
Report No. 107

BE IT RESOLVED, That the American Bar Association adopts the following recommendations:

A. CAUSES OF LIABILITY INSURANCE AVAILABILITY AND AFFORDABILITY PROBLEMS

1) Efforts to improve the liability insurance system should recognize that temporary dislocations in private insurance markets may be an inevitable byproduct of competition in the face of uncertainty, and should focus on ways to reduce that uncertainty and to ameliorate the effects of the resulting market dislocations.

2) Because of the high level of public concern, an inquiry should be conducted by a special commission or agency or tribunal having full discovery and subpoena power to determine whether insurers participate or have participated in undesirable activity and, if so, the extent to which such activity may contribute or has contributed to problems of insurance availability and cost. Pending litigation, if brought to a final judgment after a plenary trial, might satisfy this recommendation.

3) If the tort system is evaluated, it should be evaluated on the basis of a wide set of criteria of which effect on the private insurance industry is but one. Careful attention should be focused on whether dislocations in insurance markets are temporary responses to perceived uncertainties or more permanent market responses to liabilities that do not respond to the insurance principle.

B. THE MCCARRAN-FERGUSON ACT.

1) The current McCarran-Ferguson exemption to the antitrust laws should be repealed and replaced with legislation containing the following features:

(1) Insurers should be made subject to general antitrust laws but provided with authorization to engage in specified cooperative activity that is shown to not unreasonably restrain competition in the industry.

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(7) State regulation of insurance rates should not exempt insurers from the antitrust laws under the state action doctrine, except as specified in Recommendation B.1(1) to B.1(6). Other non-rate regulation by a state should not exempt insurers from the antitrust laws unless that regulation satisfies the requirements of the state action doctrine and the regulation is shown to not unreasonably restrain competition.

2) States should retain the authority to regulate the business of insurance. The federal government should defer to state regulation except in those unusual circumstances where the regulatory objective can only be effectively accomplished through federal involvement.

C. INSURANCE DATA COLLECTION AND REPORTING

1) States should enact uniform legislation to improve the collection and reporting of data designed to document the costs and benefits of the tort system, including its effects on the cost and availability of insurance, on loss reduction, and on the compensation of injured victims. The American Bar Association should request the Conference of Commissioners on Uniform State Laws in consultation with state insurance regulators to draft a Uniform Insurance Data and Tort Litigation Reporting Act for consideration by the states. Such an act should be consistent with Recommendations C.2, C.3, C.4, and C.5.

2) Data collection and reporting requirements imposed on insurers should be:

(1) reasonably uniform in content and scope throughout the several states;

(2) limited to meaningful information related to clearly identified and significant objectives;

(3) applied, to the extent appropriate and feasible, to all segments of the insurance industry, including surplus lines, risk retention groups, and reinsurers;

(4) applied prospectively only.

3) Subject to the criteria in Recommendation C.2, a data collection and reporting statute should require companies to collect, among other matters, the following:

(1) data which would permit reports on profitability by-line and by-state and where appropriate by class of coverage within a particular state. The definition of "lines" used for reporting data should be continually reviewed and disaggregated where appropriate.

(2) data and descriptive materials that would permit insurers to disclose their methodology and the factors they employ in establishing reserves.

(3) loss and income data calculated on a policy year rather than a calendar year basis.

4) Subject to the criteria in Recommendation C.2, a data collection and reporting statute should require the collection of, among other matters, the following information on a case by case basis:

(1) the chronology of the dispute from the timing of the accident to the resolution of the dispute;

(2) the disposition of each case;

(3) a description of the subject matter of the dispute, the nature of the legal claims involved, and the nature of the injuries incurred;

(4) the legal characteristics of the parties;

(5) the manner and amount of compensation including recovery from collateral sources;

(6) the expenses of the litigation including the amount of attorneys fees incurred by each party.

5) Uniform state legislation should: (1) provide a mechanism, which assures participation by not only the industry and its regulators but also by insurance consumers and the public-at-large, to determine the type of data to be reported and the format of such reports, and (2) specify the conditions under which data collected by insurance companies will be accessible to the public.

D. FLEX RATING PLANS.

1) State regulators should closely monitor current experiments with "flex rating" plans in order to determine whether they can fulfill their promise to provide a measure of price stability without unduly restraining competition.

E. FORMATION AND MODIFICATION OF INSURANCE CONTRACTS: DECLINATIONS, NONRENEWALS, CANCELLATIONS, AND PRICE ADJUSTMENTS.

1) States should not impose substantive restrictions on the permissible grounds for cancellation, nonrenewal, or initial declination of liability insurance as a means to maintain the general availability of liability insurance.

2) State law should permit an insurer to cancel a liability insurance policy in midterm only when the insured has breached a policy condition under circumstances that would excuse the insurer from performing, the policy is voidable from inception, a midterm change in circumstances within the control of the insured has materially increased the risk to the insurer, or the state insurance regulator has determined that cancellation is necessary in order to preserve the solvency of the insurer.

3) State law should require that any cancellation or nonrenewal of liability insurance by the insurer be preceded by reasonable notice to the insured.

4) State law should require that any cancellation or nonrenewal of liability insurance be accompanied by a statement of the insurer's reasons for the adverse underwriting decision, and that any initial declination be accompanied by a statement of the insurer's reasons for the adverse underwriting decision. or notice that such a statement will be provided upon request. The statement of reasons should not only specify the grounds for the decision but also explain the particular reasons in the context of the particular situation.

5) State law should require each liability insurer doing business in a state to report periodically cancellation and nonrenewal data for major lines and classes of coverage to insurance regulatory officials, and should require that regulatory officials publish the data in a form reasonably accessible to prospective insureds.

6) State law should guarantee some form of efficient independent review of insurer decisions to cancel or nonrenew a contract of personal insurance in order to assure that such decisions meet regulatory standards.

7) State law should prohibit insurers from asking applicants for personal liability insurance about prior nonrenewals or cancellations.

8) State law should require that any increase in rate or premium and any significant decrease in coverage, during or at the end of a term of liability insurance, be preceded by reasonable notice to the insured.

9) The American Bar Association should request the Conference of Commissioners on Uniform State Laws in consultation with state insurance regulators to consider drafting a Uniform Insurance Cancellation and Nonrenewal Act for consideration by the states. Such an act should be consistent with these recommendations.

F. ASSURING AVAILABILITY OF ESSENTIAL LIABILITY INSURANCE.

1) Congress should amend the Risk Retention Act of 1986 to clarify uncertainties that may be inhibiting development of risk retention groups and purchasing groups, and state regulatory officials should not unreasonably resist implementation of the policies underlying the Act.

2) State legislation should give state insurance regulatory officials standby authority to create residual market mechanisms to provide essential liability insurance to eligible risks when the voluntary market does not.

G. CLAIMS MADE AND DEFENSE COSTS LIMITS.

(1) States should require that, prior to the sale of any claims made liability insurance policy, the insurer disclose in writing in plain language to the prospective insured the significant features of the policy, including

(a) an explanation of the differences between claims made and occurrence formats;

(b) a description of the principal aspects of the coverage being provided, including any exceptions, limitations or reductions in coverage; and

(c) an explanation of the particular retroactive date (nose coverage) and extended reporting period (tail coverage) under the policy.

(2) Where purchasers of liability insurance have no practical choice between claims made and occurrence policies, states should require that claims made policies include terms that assure that the retroactive date cannot be changed unilaterally and that effective tail coverage with limits at least equal to those in effect during the last year of regular coverage will be available at a price or pricing formula stated in the policy.

3) State law should prohibit liability insurance policy provisions that place financial limits on the obligation of the insurer to provide a defense, except where authorized by regulatory officials under conditions that assure that the provisions are the product of an informed decision by the insured to assume both some costs of the defense and a role in control of the defense.

H. LIABILITY INSURANCE FOR "MASS TORTS"

(1) In formulating liability rules for activities that have the potential to result in massive damage, policy makers should be particularly sensitive to the elements of the insurance principle that permit commercial insurers to provide insurance coverage.

(2) For liabilities that appear to fit the insurance principle, authorization should be provided for alternative market mechanisms, in accordance with the recommendations in Section F, to enhance insurance availability during periods of dislocations in private markets.

(3) For liabilities that appear not likely to evoke insurance coverage from commercial insurers, a mixture of public and private programs to provide insurance coverage should be considered.

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SBE COUNCIL
Small Business & Entrepreneurship Council

February 27, 2017

The Honorable Paul A. Gosar
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Gosar:

The Small Business & Entrepreneurship Council (SBE Council) and our nationwide membership of small business owners and entrepreneurs support the "Competitive Health Insurance Reform Act of 2017" (H.R. 372). Perhaps more than any other group, small business owners understand the need for increased competition in the health insurance marketplace. Indeed, it is the actions of entrepreneurs that bring down costs, enhance innovation, and boost quality in a competitive marketplace. H.R. 372 is a common sense and long-overdue step to repeal special-interest exemptions to federal antitrust laws for health insurance companies.

These exemptions have existed for more than 70 years, and were initially instituted to help newly formed insurance companies deal with data sharing. Given the dramatic changes in the industry over these past many decades, such special-interest treatment is no longer warranted.

Considering the government-imposed distortions within the health care industry as a result of the Affordable Care Act and other regulatory restrictions, full-blown review and reform of health care policies focused on expanding competition, and consumer choice are needed. That includes foundational changes, such as, in the case of H.R. 372, removing special-interest treatment that could reduce or retrain competition.

In order to bring down health insurance costs and utilize the models and technologies of our modern economy to drive value and innovation within this sector, entrepreneurs need a system that allows for such freedom and creativity. Your bill is an important step in bringing down artificial barriers that are preventing much needed innovation and competition. Thank you for your leadership on this important issue. Please let SBE Council know how we can help you advance H.R. 372 into law.

Sincerely,

Karen Kerrigan
President & CEO

301 Maple Avenue West • Vienna, VA 22180 • sbecouncil.org • @SBECouncil
Protecting Small Business, Promoting Entrepreneurship

ADA American Dental Association®

Statement for the Record

Submitted by the

American Dental Association

Before the

Subcommittee on Regulatory Reform, Commercial, and Antitrust Law
Committee on the Judiciary
United States House of Representatives

H.R. 372, the "Competitive Health Insurance Reform Act of 2017"

February 16, 2017

Washington Office: 1111 14th Street NW Washington DC 20005 (202) 898-2400

The American Dental Association ("ADA") is pleased to submit this written testimony for inclusion in the record of the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, hearing on H.R. 372, the "Competitive Health Insurance Reform Act of 2017."

I. About the ADA

The ADA is America's leading advocate for oral health. Established in 1859, the ADA today represents approximately 161,000 licensed dentists in the United States. Through its numerous initiatives, the ADA supports programs to improve access to high quality dental care for all Americans and to inform all Americans about their oral health. Consequently, the ADA has a vested interested in promoting a robustly competitive market for health insurance.

II. Repeal of the Health Insurance Industry's Antitrust Exemption

The McCarran-Ferguson Act's antitrust exemption extends to all conduct that constitutes the "business of insurance," not merely the activities of health insurers. Nevertheless, the repeal of the exemption within the health insurance industry is particularly important. The current debate regarding health care reform requires serious consideration of any and all means to introduce competition and make health insurance affordable for all Americans. An important step toward achieving these objectives is eliminating the outdated antitrust exemption that grants health insurers special status, and permits them to ignore the competitive rules that apply to every other U.S. business.

A. Antitrust Exemptions Are Disfavored as a General Rule

Even before addressing the merits of the specific antitrust exemption for the insurance industry, it is worth noting that, as a general rule, *all* such exemptions are disfavored. Although a number of industry-specific statutory exemptions remain on the books, no new exemptions have been added in decades. The bipartisan Antitrust Modernization Commission ("AMC") has concluded that "[t]ypically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation."[1] Consistent with the views of the AMC, the Antitrust Section of the American Bar Association has steadfastly advocated repeal of the specific McCarran-Ferguson Act exemption for the insurance industry for over 25 years.[2]

B. The McCarran-Ferguson Act Is Outdated

At the time of its passage in 1945, the McCarran-Ferguson Act was intended to resolve a perceived conflict between state and federal regulation of the insurance industry. Prior to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*,[3] regulation of the insurance industry was regarded as the exclusive province of the states. In *South-Eastern Underwriters*, however, the Court concluded that the insurance industry was within the regulatory reach of the federal government. Congress subsequently passed the McCarran-Ferguson Act to return exclusive regulatory

[1] Antitrust Modernization Comm'n, *Report and Recommendations* 335 (Apr. 2007), *at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[2] Statement of the ABA Antitrust Section Before the Subcommittee on Courts and Competition Policy, Judiciary Committee, U.S. House of Representatives, Concerning H.R. 3596, "The Health Insurance Industry Antitrust Enforcement Act of 2009" 2 (Oct. 8, 2009), *at* http://judiciary.house.gov/hearings/pdf/Gotts091008.pdf.

[3] 322 U.S. 533 (1944).

authority to the states, thereby eliminating the possibility of insurers being pulled in different directions by conflicting state and federal regulatory requirements.

Despite these relatively straight-forward and practical origins, the rationale for the McCarran-Ferguson Act has not withstood the test of time. The primary reason for this is that, in the 72 years since the Act's passage, a broader legal rule – the so-called state action doctrine, first articulated by the Supreme Court in *Parker v. Brown*[4] – has developed to resolve potential conflicts between state regulation and the federal antitrust laws. Pursuant to the state action doctrine, wherever a state clearly expresses an intention to regulate specific practices or conduct, the federal antitrust laws must give way. Because the state action doctrine has provided a more comprehensive and systemic solution to the problem the McCarran-Ferguson Act was originally intended to address – *i.e.*, state and federal regulatory conflict – the Act exists today primarily as an historical vestige whose complicated terms have resulted in misinterpretation and mischief.

C. The McCarran-Ferguson Act Is Not Tailored to Unique, Insurance-Industry Needs

Insurers frequently argue that, without the protection of the McCarran-Ferguson Act exemption, they will be unable to engage in procompetitive joint conduct, such as developing standardized policy forms or collecting and disseminating past loss experience data. However, there is little support for these concerns. Firms in other industries routinely carry out these sorts of activities through trade associations and other industry collaborative bodies without fear of undue antitrust enforcement. As the Antitrust Division of the Department of Justice ("DOJ") has noted in prior Congressional testimony, antitrust enforcement has changed significantly since 1945. Modern antitrust

[4] 317 U.S. 341 (1943).

law is flexible enough that the insurance industry practices at issue, rather than being automatically condemned under the *per se* rule, would now be analyzed under the rule of reason, pursuant to which a particular practice's potential procompetitive benefits are weighed against its potential anticompetitive harms.[5] Reducing the legal uncertainty and business risk still further, DOJ and the Federal Trade Commission ("FTC") have issued detailed joint guidance on the operation of antitrust-compliant industry-wide information exchanges,[6] as well as the structuring of other competitor collaborations.[7] Finally, when even this guidance is insufficient, insurers can request a business review letter from DOJ, or an advisory opinion from the FTC, to assess the antitrust risk associated with a new business practice before implementing it in the marketplace.

D. The McCarran-Ferguson Act Does Not Benefit Consumers

Both patients and providers have been hurt over the years by the false argument that the McCarran-Ferguson Act exemption protects patients by serving to control the cost of health care. This is simply not the case. Promoting lower prices, greater consumer choice, and increased innovation through robust competition is the role of the antitrust laws. The Supreme Court has characterized the antitrust laws as "the Magna Carta of free enterprise,"[8] and the Sherman Act, 15 U.S.C. §§ 1-7, has proven sufficiently versatile to spur efficiency-enhancing competition in markets spanning the full range of

[5] Statement of the Antitrust Division of the Dep't of Justice Before the Judiciary Committee, U.S. Senate, Concerning "Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry" 5 (Oct. 14, 2009), *at* http://judiciary.senate.gov/pdf/10-14-09%20Varney%20Testimony.pdf.

[6] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N STATEMENTS ON ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, Statement 6 (1996).

[7] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000).

[8] *United States v. Topco Associates*, 405 U.S. 596 (1972).

the U.S. economy – largely without the need for industry specific exemptions – for over one hundred years. The McCarran-Ferguson Act, in contrast, was intended to protect the insurance industry from a perceived threat of conflicting state and federal regulation – a threat that has proven illusory in the seven decades since the legislation's passage. This should be borne in mind by those who argue that the Act somehow protects consumers. It was promoted by the insurance industry to benefit itself.

E. The McCarran Ferguson Act Chills Needed Antitrust Oversight

Repeal of the McCarran-Ferguson Act will substantially improve, even potentially eliminate, the problem of one-sided federal antitrust enforcement. According to a 2008 study by the American Medical Association, within the 314 metropolitan statistical areas surveyed, 94% of commercial health insurance markets qualified as "highly concentrated" under standards established by DOJ and FTC.[9] Yet, currently, dentists and other health care providers facing monopoly health plans have little recourse. If individual providers or practices band together to increase their negotiating clout, they are likely to trigger an antitrust investigation, if not an enforcement action. And, for decades, when health care providers have brought antitrust concerns regarding insurers to the attention of federal enforcers, agency staff have been reluctant to proceed for fear of crossing the line that McCarran-Ferguson draws. Repeal of the Act would enable both DOJ and FTC to focus their attention on specific anticompetitive practices by insurers that may adversely affect patients and dentists, thereby leveling the playing field and ensuring that providers and health plans are abiding by the same set of competitive rules.

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[9] Emily Berry, *Most Metro Areas Dominated by 1 or 2 Health Insurers*, AMERICAN MEDICAL NEWS, Mar. 9, 2009.

If insurance companies had to observe the antitrust laws when setting rates and designing coverage, they would have to compete more aggressively with each other for both individual customers and purchasers of large group policies by keeping premiums comparatively low and benefits comparatively high. They would have to strive to differentiate themselves in other ways as well. This would include offering plans that the most qualified professionals would want to participate in, which in turn would help make such plans more attractive to consumers.

The better plans that would result from insurance company competition would likely provide for a greater selection of dental treatment options and better coverage for them. These positive developments could result in new insurance companies, different pricing, different coverage options, and different contractual terms. In other words, competition for insurance business would compel insurance companies to deal more fairly, effectively, and creatively with both consumers of dental services and with providers. Competition like this works in other sectors and, given the chance, it will work here.

III. Support the "Competitive Health Insurance Reform Act"

To facilitate assertive and fair enforcement, the ADA strongly supports H.R. 372, the Competitive Health Insurance Reform Act. H.R. 372, which would authorize the Federal Trade Commission and the Justice Department to enforce the federal antitrust laws against health insurance companies engaged in anticompetitive conduct. It would not interfere with the states' ability to maintain and enforce their own insurance regulations, antitrust statutes, and consumer protection laws. Because states vary in their enforcement efforts, the impact of repeal on health insurance companies would differ from state to state. This is no different from the situation faced by other businesses. The bill is narrowly drawn to apply only to the business of health insurance, including dental insurance, and would not affect the business of life insurance, property or casualty insurance, and many similar insurance areas.

Passage of H. R. 372 would help interject more competition into the insurance marketplace by authorizing greater federal antitrust enforcement in instances where state regulators fail to act. When competition is not robust, consumers are more likely to face higher prices and less likely to benefit from innovation and variety in the marketplace.

Conclusion

The ADA appreciates the opportunity to participate in the Committee's hearing by submitting this statement for the record. We look forward to the opportunity to work with the Committee's members and staff to address the important issues raised by the hearing.

Statement on
"The Unintended Consequences and Harmful Impact of Repealing the McCarran-Ferguson Act's Antitrust Exemption"

Submitted to the
House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

February 16, 2017

America's Health Insurance Plans (AHIP) is the national association whose members provide coverage for health care and related services to millions of Americans every day. Through these offerings, we improve and protect the health and financial security of consumers, families, businesses, communities and the nation. We are committed to market-based solutions and public-private partnerships that improve affordability, value, access and well-being for consumers.

We appreciate this opportunity to comment on the McCarran-Ferguson Act and competition in health insurance markets. Our members strongly support competitive markets at all levels of health care. While we recognize that concerns have been raised about the narrow antitrust exemption in the McCarran-Ferguson Act, the actual significance and scope of the exemption is often overstated and its critics fail to appreciate that repealing or weakening the exemption would unleash litigation that would chill pro-competitive activity and would not benefit consumers.

Our statement focuses on two topics:

- Why repeal of the McCarran-Ferguson antitrust exemption for insurance would have *no beneficial impact on health insurance markets*, which are both extensively regulated and subject to a wide range of antitrust oversight.
- Why repeal of the McCarran-Ferguson antitrust exemption for insurance would have a harmful impact on health insurance markets, by *encouraging litigation challenging pro-*

consumer activities and chilling other pro-consumer activities by the threat of such litigation.

I. Why Consumers Would Not Benefit From Repeal of the McCarran-Ferguson Antitrust Exemption for Insurance

A. What Repeal Would Not Do

To understand why repeal of the McCarran-Ferguson antitrust exemption would produce no benefit for consumers, it is helpful to begin with what the antitrust exemption in the Act does *not* do. It does *not* prevent the United States Department of Justice from reviewing, and potentially challenging, every proposed merger of health insurers. It does *not* prevent the United States Department of Justice from investigating, and potentially challenging, a range of health insurer activities. It does *not* prevent state attorneys general from investigating, and potentially challenging, health insurer activities. It does *not* prevent state insurance regulators from engaging in what is widely acknowledged to be among the most extensive systems of oversight, review, and regulation faced by any industry in the country.[1] In short, it does not allow health insurers to violate antitrust laws, prevent health insurers from being extensively regulated at the federal and state level, or stand in the way of competition within or across states.

As the Committee examines these issues, we want to emphasize that McCarran-Ferguson does not cause mergers, that insurers are not free from the reach of antitrust laws, and that repeal of the narrow McCarran-Ferguson antitrust exemption is not necessary to achieve competition in insurance markets or if Congress decides to pursue legislative proposals to allow sales across state lines.

B. What the McCarran-Ferguson Statute Actually Does

What, in fact, does the McCarran-Ferguson statute do? The McCarran-Ferguson statute is broader than the antitrust provision it includes. The statute as a whole reflects Congress' judgement that states should remain the primary regulators of the business of insurance. This

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[1] "[I]nsurance companies are different than other businesses in terms of current state oversight. The rates insurance companies charge are typically reviewed by the insurance commissioners, which is very different from other business sectors. If an insurance rate is not justified by claims experience, it is not permitted. As to other business sectors, they set their rates without any oversight." Letter of Roger Sevigny, President of National Association of Insurance Commissioners to Senator Patrick Leahy and Representative John Conyers, Jr. (Oct. 21, 2009).

had been called into question by a Supreme Court decision that held in 1944, for the first time, that the business of insurance falls within "interstate commerce." In response, Congress made it clear in the McCarran-Ferguson Act of 1945 that "[t]he continued regulation and taxation by the several States of the business of insurance is in the public interest and silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such businesses of the several states."[2] States, indeed, have extensively regulated the business of insurance. Thus, in testifying on behalf of the National Association of Insurance Commissioners (NAIC) in a previous hearing on this subject, Illinois Director of Insurance Michael McRaith noted that "[a]s a result of the unique challenges associated with the insurance business, every state has laws that require regulators to monitor and intervene to make insurance markets more stable and fair."[3]

McCarran-Ferguson does *not* prevent the purchase of insurance across state lines if the Congress decides to pursue such proposals. In fact, McCarran-Ferguson does not prevent any federal legislation regulating insurance (as evidenced by the expansive federal regulatory oversight of health insurers imposed by the Affordable Care Act). It simply requires that the desire to preempt conflicting state regulation be clearly expressed. Thus, the Act expressly allows federal law to preempt state enactments if the law "specifically relates to the business of insurance." A federal statute that: (1) states clearly that the Congress intends to regulate interstate commerce through the legislation and (2) meets the standards of ordinary legal preemption would not be "reverse preempted" by McCarran-Ferguson.

Within the McCarran-Ferguson statute is a narrow antitrust exemption that fits into the overall approach of ensuring that federal statutes not specific to "the business of insurance" do not preempt state regulation. Thus, the narrow McCarran-Ferguson antitrust exemption only applies if three requirements are met:

1. The business of insurance in the state is regulated by state law;
2. The activity at issue falls within "the business of insurance"; and
3. The activity at issue does not involve an agreement to, or the act of, boycott, coerce, or intimidate.

Courts have further narrowed the scope of the exemption by creating a three-factor test to determine whether a particular activity qualifies as the business of insurance:

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2 15 U.S.C. § 1011.

3 Testimony of the National Association of Insurance Commissioners Before the United States Committee on the Judiciary, United States Senate (June 20, 2006).

1. Does the practice have the effect of transferring or spreading a policyholder's risk;
2. Is the practice an integral part of the policy relationship between the insurer and the insured; and
3. Is the practice limited to entities within the insurance industry?[4]

Again, all of this narrowing applies only to the scope of the exemption within federal antitrust law. McCarran-Ferguson does not limit the scope of state antitrust law or state insurance regulation *whatsoever*. Because of the narrowness of the exemption, and because of the extensive regulation of insurance at the state level, it is inaccurate to suggest that McCarran-Ferguson leads to any harm in insurance markets or that its repeal would create any benefits. The NAIC has stated clearly that "[t]he notion that McCarran-Ferguson in any way encourages collusion or is the cause of high health insurance …premiums is not supported by the facts."[5] This perspective has been echoed by the Congressional Budget Office (CBO)[6], which noted that "state laws already bar the activities that would be prohibited under federal law" if the McCarran-Ferguson exemption were repealed.

II. Why Repeal of the McCarran-Ferguson Antitrust Exemption Would Harm Consumers by Reducing, Instead of Increasing, Pro-Competitive Activity

As discussed above, the McCarran-Ferguson antitrust exemption is much closer to a scalpel than it is to the sledgehammer described by repeal advocates. It protects a narrow category of activities that: (1) have been shown to be pro-competitive rather than restraints on competition; (2) are extensively regulated by state insurance commissioners; and (3) are confined by the prospect of state and federal antitrust exposure if the activities stray outside of the exemption.

As health insurance markets face new legislation, regulations, and structures and the individual market faces significant challenges, it is in fact a particularly ill-suited time to repeal a statute that allows for activities that may be important in the new markets and regulatory structures that will follow. Several examples demonstrate why this is the case:

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[4] *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).
[5] Letter of Roger Sevigny, President of National Association of Insurance Commissioners to Senator Patrick Leahy and Representative John Conyers, Jr. (Oct. 21, 2009).
[6] Cost Estimate for H.R. 3596, Health Insurance Industry Antitrust Enforcement Act of 2009, Congressional Budget Office (October 23, 2009).

- It is highly likely that forthcoming changes to federal health insurance laws will allow more authority and flexibility to *individual states*. It would be at cross-purposes with such changes to hamstring state flexibility by subjecting their oversight of insurance markets to the potentially chilling effect of private antitrust litigations of the core areas of *the business of insurance* that they regulate.
- It is likely that changes to federal and state health insurance laws will need to grapple with the issue of how to deal with coverage for "high risk" individuals. The types of *information pooling and risk pooling mechanisms* protected by McCarran-Ferguson may very well be important tools in the state regulatory toolkits to craft the best policy approaches to these issues.
- It is likely that changes to federal and state health insurance laws and the evolution of health care markets will continue the movement to *providing consumers with actionable data* on costs and providing them with incentives in their health benefits to use that data. Some initiatives may well benefit from broad market pooling of data.
- It is likely that changes to federal and state health insurance laws and the evolution of health care markets will put a premium on *simplifying administrative aspects of the market*. Historically, such simplification efforts have included standardized claims forms. Prospectively, it is likely that such simplification efforts will leverage technology.

Such activities are beneficial in any environment. They are particularly important, however, in a changing environment in which state flexibility, insurer innovation, and consumer empowerment are guiding principles.

Unfortunately, repeal of the McCarran-Ferguson exemption is directly at odds with efforts to advance these principles. As noted by the American Bar Association, repeal of the exemption is likely to lead to "*unwarranted* private litigation testing the limits of permissible insurer conduct absent an exemption" (emphasis added).[7] Such unwarranted private litigation leads to two harms for consumers. First, defending litigation is costly, even when litigation is unwarranted. This is akin to the excess costs imposed on our health care system through frivolous medical malpractice suits; inevitably, it increases administrative costs that add no value yet put upward pressures on

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[7] Comments to the Antitrust Modernization Commission Regarding the McCarran-Ferguson Act, Section of Antitrust Law, American Bar Association (April 2006). The American Bar Association suggests the use of safe harbor exemptions to protect procompetitive forms of conduct from such unwarranted private litigation. While certainly preferable to repeal without such safe harbors, we respectfully suggest that the best way to prevent such unwarranted private litigation, and to prevent the chilling of procompetitive conduct not yet contemplated at the time of the legislation, is to leave the exemption in place as it is.

premiums. Second, to avoid the costs of unwarranted litigation, insurers are more likely to avoid *pro-competitive* activities, such as those above, when such activities are likely to attract the interest of private plaintiffs. Higher costs and less innovation is the exact opposite of what the antitrust laws are designed to achieve. Unfortunately, McCarran-Ferguson repeal would promote both.

Conclusion

We commend the Committee for seeking to find ways to ensure that health care markets are competitive, flexible, and vibrant. Unfortunately, repeal of the McCarran-Ferguson Act will achieve none of these ends. Instead, it would open the door to potential litigation to pro-competitive proposals that could become increasingly important in evolving market environments. We encourage the Committee and other stakeholders to look to areas of immediate impact in improving market competition in health care. We stand ready to assist the Committee and other stakeholders in these efforts.

American Insurance Association

WRITTEN STATEMENT OF
THE AMERICAN INSURANCE ASSOCIATION (AIA)

J. Stephen Zielezienski
Senior Vice President and General Counsel

H.R. 372, THE "COMPETITIVE HEALTH INSURANCE REFORM ACT OF 2017"
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

February 16, 2017

The American Insurance Association (AIA) appreciates the opportunity to submit this written statement concerning H.R. 372, the Competitive Health Insurance Reform Act of 2017. H.R. 372 would repeal certain antitrust provisions of the McCarran-Ferguson Act (McCarran), as they apply to the business of health insurance (including dental insurance).

Celebrating its 150th year in 2016, AIA is the leading U.S. property-casualty insurance trade organization, representing approximately 320 insurers that write more than $125 billion in U.S. property-casualty premiums each year. AIA member companies offer all types of property-casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage, specialty, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance. All of our members are state-regulated insurance companies, so we have a vested interest in any potential changes to McCarran.

While AIA can appreciate the underlying intentions of H.R. 372 to protect insurance consumers from purported anti-competitive behavior and the attempts to confine the legislation to "traditional" health insurance (and to specifically exclude property-casualty insurance from the scope), we must respectfully urge caution on H.R. 372 or any piece of legislation that alters the balance of regulatory and antitrust policy struck in McCarran. Further, AIA is concerned that the term "health insurance" is not defined, but instead is viewed in the context of other excluded lines (life and property-casualty insurance). As a result, it is difficult to discern how an emerging insurance product will be characterized.

In order to understand AIA's recommendation to exercise caution, it is important to appreciate the evolution of state insurance regulation and the application of federal antitrust law in the wake of McCarran. Enacted in 1945, McCarran is a power-sharing statute that reflects Congress' considered judgment to delegate – not abdicate – its authority over insurance to states that regulate the business of insurance themselves. In doing so, McCarran provides insurers with an antitrust regime that recognizes the insurance regulatory role entrusted to the states. Because of the delicate balance of power contained in McCarran, we believe that discussion of a repeal or limitation of McCarran's antitrust provisions can not be divorced from a corresponding discussion of state insurance regulation. Altering that balance in one direction (application of federal antitrust law) will inevitably trigger unintended consequences in the other direction for state regulation.

I. An Historical Introduction to the McCarran-Ferguson Act

McCarran is the outgrowth of two U.S. Supreme Court decisions that defined the course of U.S. insurance regulation. The first was Paul v. Virginia, in 1869. Paul held that the insurance transaction was so intrinsically a local matter that Congress had no constitutional authority under the Commerce Clause to regulate it at all.

As a practical matter, the Paul decision ceded insurance regulation to the states. It remained the law of the land for the next 75 years, until – on the eve of the Normandy invasion in June 1944 – it was overturned by the Court in United States v. South-Eastern Underwriters. South-Eastern Underwriters held that insurance did, in fact, move in interstate commerce and was, therefore, subject to congressional jurisdiction.

The notion that insurance is a product in interstate commerce seems matter-of-fact today. However, at the time, that notion threatened the viability of the insurance system, particularly since Southeastern Underwriters was a "price fixing" case, which immediately made many necessary, collective insurance activities subject to federal antitrust laws. Over the next nine months, there was urgency in Congress to determine the impact of South-Eastern Underwriters, with fundamental questions surrounding the situs of insurance regulation, the extent of taxation, the application of federal antitrust law, and the impact on collaborative efforts.

As Congress and industry struggled with these questions in 1944, a formula ultimately emerged for dealing with them. That formula became the McCarran-Ferguson Act. McCarran addressed three important goals for the Congress: (1) delegation of authority to the states to the extent that the states regulate the business of insurance; (2) creation and maintenance of a broad insurance regulatory system; and (3) balancing regulatory objectives against antitrust policy objectives.

McCarran's enactment furthered all three congressional goals. It entrusted to the states the authority to regulate and tax "the business of insurance," and said that no federal law should be presumed to interfere with that authority, unless it was clearly designed to do so. It gave the states three years from the 1945 enactment to put their regulatory systems in place. Finally, McCarran said that the federal antitrust laws would apply to the business of insurance "to the extent that such business is not regulated by State Law," or in any case where insurers had engaged in – or attempted to engage in – an act of boycott, intimidation or coercion. (15 U.S.C. Chapter 20, §§ 1012(b), 1013(b).)

During the three years between the 1945 enactment and the 1948 effective date, all states enhanced their regulatory systems by enacting state unfair competition and trade practices laws directed specifically to insurers. Those state laws included what were referred to as "little Federal Trade Commission (FTC)" statutes, because they adopted the FTC's unfair trade practices requirements and placed them on insurers directly through state law. States also adopted their own prohibitions on acts of boycott, intimidation or coercion by insurers, as well as Sherman Act and Clayton Act-type prohibitions on unfair restraints of trade.

In establishing their insurance regulatory systems and adopting unfair competition and deceptive trade practices standards, the states faced the same question that is always raised when dealing with a regulated industry: How do you balance the role of regulation against the role of antitrust policy? Their answer mirrored the one adopted for other industries. Specifically, where there is a regulatory system, antitrust laws can not be used as a way to undercut it. Conversely, where activity takes place outside the regulatory system, antitrust laws will apply. With this approach as their roadmap, the states placed all collective activity by insurers under regulatory control, scrutiny and review – effectively replacing antitrust litigation with regulatory oversight of collective activity, including activity to: (1) gather, analyze, and make predictions about data; (2) establish final rates; and, (3) create standardized insurance policy forms. Over the years, this basic approach has remained unchanged, except that state laws now overwhelmingly prohibit insurers from agreeing on final rate, even under regulatory oversight.

Moreover, every organization that engages in data collection and analysis, or in the development of common policy forms, must be registered with the state and is subject to direct regulation by it. Any collective activity by insurers not done through a registered entity (generally called an "advisory organization") is subject to both the antitrust provisions in the state's insurance code and to the state's antitrust laws. *All insurance activity is thus subject to regulatory supervision or antitrust exposure in the states—and sometimes both*.

This balancing of regulatory supervision and antitrust litigation – as noted earlier – is not unique to insurance; it also takes place in other financial services industries (i.e., banks and the securities business) where federal courts have held that understanding the balance is critical and that antitrust scrutiny is inappropriate where the activity is subject to regulation. (See, e.g., Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975).)

If this were not the case, there would be nothing but chaos, with private antitrust litigation – including massive class actions – constantly at war with the federal regulatory systems established by the government. This would create enormous uncertainty for these businesses and their customers, to the benefit of neither.

The difference between banking and securities regulation, on the one hand, and insurance regulation, on the other, is that the banking and securities businesses are principally regulated by the federal government, while insurance is principally regulated by the states. This is a particularly important difference when looked at from an antitrust perspective. When federal antitrust law is balanced against federal regulation for a specific industry, the courts have a long and appropriate history of giving precedence to the specific regulatory system that Congress has set up for that industry over the broad, non-specific language of the antitrust laws that did not have that specific industry in mind.

Since insurance regulation, however, resides primarily at the state level, McCarran is necessary to provide the kind of balance of "regulation vs. antitrust" for insurance as exists for federally regulated banking and securities businesses. This central point in understanding the true role of McCarran merits special emphasis, and is worth repeating: *The McCarran-Ferguson Act balances regulation and antitrust for state regulated insurance, just as that same type of balance has been established for the other two legs of the financial services sector, federally regulated banks and securities firms*.

If McCarran did not exist, then the balance between state insurance regulation and federal antitrust law would be quite different. It would be governed by the "state action" doctrine – an antitrust principle first adopted by the courts in the years immediately prior to McCarran taking effect.

Under the "state action" doctrine, federal antitrust laws take precedence over "state" regulation, unless that state regulation is particularly intrusive. Even in these circumstances, the primacy of the state regulation is dependent on whether the regulatory oversight meets an "active supervision" test, which can be determined only through litigation and which, therefore, means that there will be much litigation. As previously noted, creating an environment that pits constant litigation against regulatory oversight does not lead to stability or certainty in that marketplace.

So, for AIA's members, the issue is not whether a balance needs to exist between antitrust principles and regulation, but where that balance ought to be drawn. For the purposes of state insurance regulation, that balance would be dangerously imperiled if McCarran were repealed, even if the repeal is only intended to apply to traditional health insurance.

II. The McCarran Discussion in the Public Arena: How Should Problems of Insurance Affordability and Availability Be Resolved?

The McCarran-Ferguson Act has been periodically controversial over its 71-year life. Ironically, whenever there is an affordability/availability problem in any specific line of insurance, there is outcry that this problem results from the alleged ability of insurers to collectively fix prices under McCarran. The first "solution" is to call for the repeal of McCarran.

However, when the problem subsides in that particular line of insurance, the call for repeal generally also subsides, with those who had argued that McCarran was the cause of the problem never saying that perhaps McCarran should now be credited for curing the problem, as well. If insurer activities under McCarran were the reason that prices went up, then insurer activities under McCarran surely must be the reason that those very same prices went down.

When the Senate Judiciary Committee held McCarran hearings in 1989, the issue was the cost of commercial liability insurance and the limited availability of certain types of insurance; these problems long ago were resolved in the marketplace, with McCarran remaining on the books. When that Committee again held hearings on McCarran in June 2006, the issue was alleged activity involving contingent commissions. Yet, again, as we learned from that hearing, the state regulators, in coordination with the state attorneys general, were well along in resolving these issues, armed appropriately with state law, including state antitrust law. And, equally important, the marketplace adapted accordingly.

The reality is that insurance is like the canary in the coal mine. When an insurance price spikes or availability shrinks, it is because an underlying problem (e.g., a particular cost driver) needs to be addressed. To be fair to all customers – not to mention to be able to stay in business – insurers must be able to price their policies to cover their likely losses. If they can not do that, they will be forced to look at ways to reduce availability or otherwise limit their exposure. This reaction is as inevitable as Newton's apple finding its way from tree to ground. Instead of looking at insurer activity under the McCarran-Ferguson Act as the issue, it would be better to look at the underlying problems and fix them.

There also seems to be a persistent misperception that McCarran provides a blanket exemption for insurers from federal antitrust law application, allowing insurers an unfettered right to engage in anticompetitive behavior. It does not do so. First, McCarran does <u>not</u> provide a blanket exemption from the antitrust laws for insurers. It is a targeted exemption that balances the goals of regulation with the goals of antitrust law. It works exactly the same way as those two goals are balanced for the two other federally regulated financial services industries, the banking and securities industries. Congress has enacted significant antitrust exemptions for public policy reasons in a variety of other areas. So, it is simply not accurate to single out insurance, especially since the exemption is so clearly limited to those insurance activities that government regulates.

Second, there is a significant body of state antitrust statutes that apply to insurers. Every state provides some form of antitrust regulation of insurers, whether through broad state laws based on the federal Sherman and Clayton Acts, antitrust provisions in their insurance codes, or language barring unfair competition in the little FTC acts. Often, states have multiple avenues to address alleged anticompetitive behavior. So there is no lack of state antitrust authority with regard to insurers.

Third, while measures to repeal McCarran have called for removal of so-called McCarran protection for price fixing, the truth is that states acting under McCarran do not allow insurers to privately agree on price. Moreover, except in the limited number of jurisdictions that have state-administered pricing for discrete lines of business such as workers' compensation, today, insurers are not allowed to agree on price even under regulatory scrutiny. What the states do permit and regulate is data collection and analysis through state-approved "advisory organizations." In each case, however, this only is done within a state's regulatory law and is subject to regulatory scrutiny.

Fourth, repeal of McCarran – even if it could be successfully limited to health insurance – might impact legitimate information gathering undertaken pursuant to state law and regulation, thus undercutting the ability of the states to decide the types of information they want to allow insurers to collect, share and analyze under state supervision.

Nor would repeal of the McCarran antitrust protection be sound public policy. Because of the relative absence of judicial decisions on the applicability of the federal antitrust laws absent the McCarran exemption, it is impossible to determine with precision what current insurance practices no longer would be permissible under those laws. In the final analysis, the federal courts would be responsible – through litigation – for determining the legality of any such conduct based on the factual circumstances and the application of federal antitrust law to those circumstances.

III. Viability of Other Alternatives to Repeal of the McCarran Antitrust Protection

While H.R. 372 is intended to be a straightforward repeal measure limited to health and dental insurance, other more circumscribed repeal alternatives, involving the legislative creation of so-called federal antitrust "safe harbors," would not appealing either. For example, in 2006, the American Bar Association suggested the repeal of McCarran-Ferguson, with safe harbors to permit certain activities to continue. The ABA policy on the McCarran antitrust exemption described the "safe harbor" protections as follows:

(1) Insurers should be authorized to cooperate in the collection and dissemination of past loss-experience data so long as those activities do not unreasonably restrain competition, but insurers should not be authorized to cooperate in the construction of advisory rates or the projection of loss experience into the future in such a manner as to interfere with competitive pricing.

(2) Insurers should be authorized to cooperate to develop standardized policy forms to simplify consumer understanding, enhance price competition and support data collection efforts, but state regulators should be given authority to guard against the use of standardized forms to unreasonably limit choices available in the market.

(3) Insurers should be authorized to participate in voluntary joint-underwriting agreements and, in connection with such agreements, to cooperate with each other in making rates, policy forms, and other essential insurance functions, so long as these activities do not unreasonably restrain competition.

(4) Insurers participating in residual market mechanisms should be authorized in connection with such activity to cooperate in making rates, policy forms, and other essential insurance functions so long as the residual market mechanism is approved by and subject to the active supervision of a state regulatory agency.

(5) Insurers should be authorized to engage in any other collective activities that Congress specifically finds do not unreasonably restrain competition in insurance markets.

(See Statement of Donald C. Klawiter on behalf of the American Bar Association, before the United States Senate Committee on the Judiciary, at 6 (June 20, 2006).)

These are not true safe harbors, but merely the illusion of safe harbors. The ABA safe harbors are illusory because they do not provide protection against uncertainty and litigation. In particular, the ABA's so-called principal safe harbors for pricing, forms development and joint underwriting condition the protection on the activity not resulting in an "unreasonable restraint of competition." This is no protection at all, but, rather, a backdoor application of the antitrust laws. The "exemption" would only become available if there were first a finding that the practice would not violate the antitrust laws in the absence of an exemption. In effect, with this type of limitation, the safe harbor is merely restating antitrust litigation standards and inviting litigation over whether the activity has met those standards. In antitrust litigation, that is at the heart of the parties' dispute; specifically, whether the challenged activity is a reasonable or unreasonable restraint of competition. The ABA "safe harbors" thus would be little different from a complete repeal of McCarran protection.

Moreover, the ABA position did not account for the fact that state insurance departments exercise a great deal of rate and policy form regulation already, which substantially narrows the opportunity for the competitive market to operate. For example, ABA Safe Harbor #2 suggests that state insurance regulators be given the authority to "guard against" the use of standardized forms that can be used to limit market choices. Yet, state form review and approval laws often accomplish the exact opposite: perpetuate the use of increasingly commoditized products. Thus, more state regulatory authority is not the answer to decreased product differentiation.

In addition, in other areas such as participation in state residual markets, the safe harbors mimic the state action doctrine's "active supervision" test and therefore do not provide any additional antitrust protection than would otherwise be provided in the absence of the McCarran-Ferguson Act.

Because the ABA safe harbors do not provide any protection for insurers, allowing federal antitrust oversight without changing the state regulatory environment would guarantee that any collective activity by insurers could be open to constant, duplicative and overlapping enforcement actions. It is precisely these types of confusing, overlapping regulatory enforcement standards that McCarran was designed to avoid.

It is also important to add that, at one time, AIA did support the adoption of McCarran safe harbors, but we reject that option now. During 1994, the House Judiciary Committee favorably reported a version of H.R. 9 that maintained McCarran safe harbors in several areas of collective insurance activity. Those areas were:

- ► Data Collection: Joint conduct to collect, compile, classify, or disseminate historical data, including development of procedures with respect to handling of historical data, and verification of accuracy and completeness of such data.

- ► Loss Development: Joint conduct to determine and disseminate loss development factors or developed losses.

- ► Common Policy Forms: Joint conduct to develop and disseminate standard insurance policy forms, provided there was no joint agreement to adhere to the forms, and the parties developing a form made their own decisions whether or not to use them.

- ► Manuals: Joint conduct to develop and disseminate manuals filed with a state that provide information, explanations and instructions relating to data, statistics, losses, policy forms, or any other matter otherwise protected by McCarran, as long as there was no agreement to adhere to the manual.

- ► Residual Market Pooling Arrangements: Joint conduct for participation in plans designed to make insurance available to persons who would not otherwise be able to purchase it in the voluntary market.

- ► Historic Voluntary Pooling Arrangements: Providing insurance pursuant to one of the insurance industry's historic pooling arrangements.

- ► Administration of Residual Markets: Administering a state residual market, as long as authorized and supervised by the states.

- ► Inspection of Commercial Buildings and Fire Protection Facilities: Joint conduct to develop and participate in programs to evaluate building codes or inspect commercial buildings and fire protection facilities for the purpose of determining likelihood of loss, pursuant to state law.

- ► Workers' Compensation Experience Rating Programs: Participation in joint efforts to measure employer experience with respect to work-related accidents and illness against comparable experience of other employers, and to make modifications for that employer based on the comparison.

- ► Trending: During the 2-year transition period following enactment, joint conduct to determine and disseminate trend factors, to the extent regulated by state law. After the transition period, general antitrust principles, including the "state action" doctrine, would govern use of collective trending. In addition, independent purchase of a trend factor by an individual insurer from "a person not engaged in providing insurance" would be presumed not to be an antitrust violation.

At the time, these safe harbors were included in H.R. 9 because of an agreement that they represented necessary collective activity by insurers that might be subject to federal antitrust litigation if McCarran's antitrust exemption were simply repealed. We continue to believe that all of these areas – importantly including the collection and analysis of data – represent pro-competitive collective activities and that they should pass antitrust scrutiny under normal antitrust rules, but we also know that we should assume that there will be potentially disruptive litigation over these issues. Therefore, today, AIA believes that merely amending McCarran is not enough. Rather, AIA believes that the question of the application of federal antitrust laws can not be divorced from the state regulatory environment in which insurers operate.

For this reason, AIA does not today support adoption of antitrust safe harbors within the current state system.

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Again, AIA appreciates the opportunity afforded by this hearing to provide our written perspective on the McCarran-Ferguson Act and H.R. 372. Because of our long experience dealing with the state insurance regulatory system that has evolved post-McCarran, and with appreciation to the bill's sponsors for excluding property-casualty insurance, AIA must continue to urge caution going forward. This is a more complex issue that will impact the dynamics of state insurance regulation, and, perhaps more importantly, adversely affect the insurance marketplace that the bill is intended to help.

Submitted Testimony of the
National Association of Insurance Commissioners

to the
House Judiciary Subcommittee on Regulatory
Reform, Commercial and Antitrust Law

for the hearing on
H.R. 372, the Competitive Health
Insurance Reform Act of 2017

February 16, 2017

On behalf of state insurance regulators and the National Association of Insurance Commissioners[1] (NAIC), we write today to express our appreciation for your holding a hearing on antitrust issues in the health insurance market. The potential for bid rigging, price fixing, and market allocation is of great concern to state insurance regulators and we share your view that such practices are harmful to consumers and cannot be tolerated.

We want to assure you that such activities are not permitted under the McCarran-Ferguson Act and are not tolerated under state law. We also want to raise awareness that the legislation your hearing will examine – The Competitive Health Insurance Reform Act, H.R. 372 – could have far-reaching implications which could hinder competition, harm consumers and weaken the health insurance market. Lastly, we want to make clear that the current McCarran-Ferguson Act does not prevent states from allowing health insurance carriers to engage in inter-state insurance sales.

First, every state has its own antitrust and unfair competition laws. State regulators and attorneys general play complementary and mutually supportive roles in monitoring and investigating insurers, agents, and brokers to prevent and punish activities prohibited by those state laws. Monitoring involves reacting to conditions and changed circumstances. It also involves taking an active role and making adjustments to our methods and policies which anticipate new challenges that threaten consumers and market stability. State regulators' primary responsibility is to regulate the "business of insurance" in order to maintain a stable insurance market which provides products that offer reasonable benefits to consumers. Every day conscientious and highly skilled regulatory professionals monitor and investigate business activities related to the two major obligations insurers owe to consumers: issuing sound policies and paying claims on time.

State insurance regulators supervise the market conduct of industry participants by reviewing their business operations through market analysis, periodic examinations, and investigation of specific consumer complaints. When consumers have complaints about their health insurance plan – or other insurance plan, for that matter - they can readily contact their state insurance departments which have systems in place to implement the appropriate safeguards in a timely manner.

Insurers, agents, and brokers also must accept responsibility for maintaining a competitive and fair marketplace by reporting business practices that appear to be harmful, anti-competitive, or unethical to state regulators. Preventing and correcting market conduct problems requires that regulators and responsible business participants work together toward a common goal of strengthening stability and fairness in the marketplace. We achieve such stability through extensive daily monitoring of solvency, review of rates and policy forms, and evaluating market behavior.

[1] Founded in 1871, the NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and the five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

In short, state experience with the business of insurance is long-standing. Existing state consumer protection, antitrust, and unfair trade practice laws provide the necessary tools needed to help stop anti-competitive conduct. Adding a layer of federal review would only lead to increased costs, confusion, and possible conflicts in federal and state courts.

Second, the Competitive Health Insurance Reform Act is a relatively short bill with far-reaching implications which must be taken into careful consideration. To refresh, the Congress passed the McCarran-Ferguson Act in direct response to the U.S. Supreme Court's decision in *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944). The Supreme Court held, contrary to 70 years of precedence, that insurance transactions constitute interstate commerce and thus are subject to federal regulation under the Commerce Clause of the United States Constitution. Following the decision, the NAIC became concerned about the threat to state insurance supervision in general and, specifically that insurance rate regulation would be found to violate the Sherman Act. Therefore, state insurance officials asked the Congress for a limited antitrust exemption.

The NAIC's fundamental concern in the 1940s—a concern that continues to define the NAIC's position on antitrust reform today—was that the competitive benefits of collectively developing loss costs and policy language would be jeopardized by the insertion of federal antitrust authority in the insurance markets. The jeopardized benefits include: 1) standardized risk classifications and policy form language to make data more credible; 2) consolidated collection and analysis of data to improve quality and aid smaller insurers with responsible rate-settings; and 3) publication of advisory loss costs and common policy forms to make it less costly for competitors to enter or expand in the market.

Recognizing the primacy of state supervision of insurance, the McCarran-Ferguson Act states: "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business, unless such act specifically relates to the business of insurance." In addition to assigning the regulatory responsibility over insurance to the states, McCarran-Ferguson exempts certain limited insurance activities from federal antitrust laws.

This limited exemption allows insurers to share loss data, which promotes healthy insurance markets by increasing the level and competence of the competition. Advisory organizations collect statistical information from many insurers and provide compiled information on loss costs to all their members. This statistical information, in turn, allows small and medium-sized insurers to compete as those insurers do not generate sufficient business volume or claims data to predict the future loss costs of policies. Loss costs published by advisory organizations are absolutely vital to effective policy pricing; without published loss costs, many insurers would be forced to limit policy offerings or even leave the business to the much larger insurers.

Contrary to the claims by the bill's proponents that the exemption was an "error" or an "oversight", the exemption from federal antitrust rules in McCarran-Ferguson was carefully considered and adopted for good reasons. These reasons still exists today and the exemption should not be eliminated.

Third, nothing in the McCarran-Ferguson Act inhibits the ability of states to allow insurance carriers from selling policies across state lines, and nothing in the Competitive Health Insurance Reform Act would "restore" an insurance carrier's ability to engage in inter-state sales. States have strict laws governing the licensing of insurance carriers to sell policies in the states and these laws are critical to protecting consumers and ensuring healthy markets. Licensure is the key that allows state regulators to take action to protect consumers. Any federal pre-emption of this requirement would result in less protections for the most vulnerable populations and the collapse of individual markets across the country. If the federal government pre-empts state licensure requirement out-of-state insurers would be able to lure healthy enrollees away from existing risk pools, which would become progressively sicker and more expensive until they ultimately fail, leaving consumers in those states with, possibly, no carriers in their states and no in-state networks of participating providers.

States already have the authority to enter into compacts with each other to allow for the sales of health plans, under agreed upon rules, across state lines. Several states have already adopted such authorizing language. This is the proper way to achieve more competition through sales across state lines, and McCarran-Ferguson does not impact this option one way or the other.

In conclusion, the NAIC respectfully asks the members of the Subcommittee to carefully consider the potential pitfalls and unintended consequences of amending or repealing the McCarran-Ferguson antitrust exemption for the business of health insurance. We know there are persuasive arguments that there is a lack of competition in some states, with few insurance companies competing against one another. Such a situation normally raises serious anti-trust concerns, but health insurance companies are different than other businesses in terms of current state and federal oversight. Their rates face rigorous actuarial review and if they are not justified they are not permitted. In addition, they are subject to state unfair trade practices and antitrust laws that punish bad actors, while allowing important cooperative activities to continue.

Finally, we would note that eliminating the antitrust exemption in McCarran-Ferguson for health carriers will do nothing to address the real drivers of higher health insurance premiums: the cost of health care and utilization. In fact, as proposed, state regulators believe the Competitive Health Insurance Reform Act would lead to higher administrative costs, more confusion and uncertainty, and more instability in the health insurance markets and, therefore, higher premiums. More competition is a laudable goal to give consumers more options and improve service, but premiums will not go down unless the underlying cost drivers are addressed.

While we cannot support amending or repealing the McCarran-Ferguson antitrust exemption for the business of health insurance, we do support your goal of reducing the cost of health care in this country and also assuring that we have fair and competitive insurance markets across the country. State regulators and the NAIC offer our expertise to assist you in attaining these important goals.

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NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

Statement

of the

National Association of Mutual Insurance Companies

to the

United States

House Judiciary

Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on

H.R. 372, the “Competitive Health Insurance Reform Act of 2017”

February 16, 2017

The National Association of Mutual Insurance Companies (NAMIC) is pleased to provide comments to the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law on H.R. 372, the "Competitive Health Insurance Reform Act of 2017."

NAMIC is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies representing 39 percent of the total market. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies serve more than 170 million policyholders and write more than $230 billion in annual premiums. Our members account for 54 percent of homeowners, 43 percent of automobile, and 32 percent of the business insurance markets.

Introduction

The Competitive Health Insurance Reform Act of 2017 (H.R. 372) amends the McCarran-Ferguson Act to declare that nothing in that Act modifies, impairs, or supersedes the operation of antitrust laws with respect to the business of health insurance, including the business of dental insurance. Sponsors of the legislation assert that there is no basis supporting exemption of the health insurance industry from Federal antitrust and unfair competition laws. Representative Paul Gosar (R-AZ) in introducing the legislation has argued that elimination of the McCarran-Ferguson exemption for health insurers would increase competition and patient choice in health insurance. NAMIC strongly disagrees that the McCarran-Ferguson exemption is anti-competitive or harms insurance consumers.

McCarran-Ferguson Act

In response to the United States Supreme Court decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), that insurance was "interstate commerce" and subject to regulation by the federal government, Congress, in 1945, enacted the McCarran-Ferguson Act (15 USC 1011, et seq.). The McCarran-Ferguson Act provided for the continued regulation of insurance by the states and provided a narrow exemption from the general federal antitrust laws.[1] Specifically, the exemption

[1] The Sherman Act (prohibits restraint of trade and monopolistic practices), the Clayton Act (prohibits anti-competitive practices), the Robinson-Patman Act (an amendment to the Clayton Act prohibits price discrimination among customers who compete against each other), and the Federal Trade Commission Act (prohibits unfair methods of competition and deceptive practices).

is limited to activities that (1) constitute the "business of insurance," (2) are "regulated by State law," and (3) do not constitute "an agreement to boycott, coerce or intimidate or an act of boycott, coercion or intimidation." In addition, like other exemptions from antitrust laws, this exemption is to be construed narrowly.

The application of the McCarran-Ferguson limited federal antitrust exemption has worked well for decades to promote and maintain a healthy, vibrant, and competitive insurance marketplace in the United States. There are more than 7,500 insurers operating in the U.S., the majority of which are relatively small. These insurers span the range from large multi-state writers, to single county and niche writers, to surplus lines carriers. Studies over the years, including those done by the U.S. Department of Justice, state insurance departments and respected economists and academics, have consistently concluded that the insurance industry is very competitive under classic economic tests.

The competitiveness and diversity in the insurance market is reflected in NAMIC's membership in terms of size, geographic dispersion, lines of business and corporate structure. The McCarran-Ferguson exemption has contributed to this diversity and increasing the number and competence of insurers by making it easier for small and medium size insurers to compete. The existence of the exemption promotes competition in the insurance marketplace by allowing companies to exchange critical data regarding losses and other factors, facilitating participation and oversight of state guaranty funds, permitting state control over liquidations, and enabling the development and operation of assigned risk plans.

Over the years there have been numerous proposals to limit or repeal the McCarran-Ferguson limited antitrust exemption. Proponents often ground their calls for repeal or limitation on unproven assertions that the antitrust exemption has led to collusion within the industry; however, there has been no evidence to support these assertions. The industry is highly regulated by state insurance regulators who monitor not only safety and soundness issues, but also any potential anticompetitive and unfair trade practices.

Data Sharing and Standardization

In support of his legislation, Rep. Gosar contends that permitting data sharing between insurance companies leads to "artificially higher premiums, unfair insurance restrictions, and harmful policy exclusions." NAMIC believes that this assertion is based on a failure to understand the fundamental operation of the business of insurance. In fact, data sharing allows insurers to properly underwrite coverage, permits smaller insurers to compete and new insurers to break into the market and facilitates the operation of guaranty funds. Standardized risk classification and policy language make data more credible and enable consumers to better compare offers. Standardization affords consumers greater opportunity to assess competing price and coverage options and reduces litigation over interpretation, streamlining the claims process.

Insurance is fundamentally different from other products, including other financial products, in that insurance is a promise of future financial obligations. As such, insurers lack complete information about the ultimate cost of the product at the time of the sale. Consequently, the policy premium is based on a best estimate of those costs. To develop these best estimates insurers rely on information from a large number of losses over a significant period of time. Few insurers, however, have enough information on their own to evaluate every type of risk they underwrite. These companies are not able to develop actuarially credible rating information through their internal loss experience alone. This is particularly important for smaller and medium sized companies. Without advisory loss cost data, they would be unable to compete with larger companies. In addition, many insurers rely on the availability of supplemental rating information developed by licensed advisory organizations to administer their rating programs. This information would not be available if all insurance companies did not report data or were constrained from reporting data as the result of antitrust exposure. Even if the data were available, the cost could be prohibitive if statistical agents had fewer companies over which to spread their production costs.

The state regulatory systems respect the value of advisory loss cost and similar data to competition by compelling insurers to report data and authorizing the compilation and publication of the data by licensed organizations. Regulators themselves also use such data to analyze trends and evaluate the appropriateness of rates and rating plans. It is the McCarran-Ferguson limited antitrust exemption that provides the legal framework under which the statistical agents collect and analyze the data and insurance companies pool and use the aggregated information.

Consolidated collection and analysis of data and publication of advisory loss costs improve the quality of the market by making it easier for smaller insurers to compete, and offer consumers greater choice. The availability and affordability of advisory loss cost data helps to maintain a blend of both large national firms and smaller regional and state level underwriters in the insurance market. In the absence of such data, smaller and medium sized insurers would confront increased operating expenses which over time could threaten their franchise and participation in the market. The absence of data or significantly increased expense of data would also have a chilling effect on the ability of some insurers to expand into new markets or new product lines, further reducing competition and consumer choice.

The limited antitrust exemption also facilitates efficient marketplaces by allowing insurers to form intercompany pools or syndicates to provide high-risk coverage and/or to allow small companies to participate in writing risks that would be unavailable on an individual basis. In addition, the McCarran-Ferguson limited antitrust exemption is key to other cooperative functions such as joint underwriting associations and residual market mechanisms. The development and operation of assigned risk plans, such as those for auto and workers' compensation, with jointly determined rate schedules could be thwarted by limitation or repeal of McCarran-Ferguson. Similarly, participation in state guaranty funds, including monitoring the economic performance of competitors and distribution of losses, could be threatened. The insurance industry by necessity and design plays a hands-on role in administering state guaranty funds. Guaranty funds do not merely serve to replace funds, but to ensure swift and prudent payment of claims, including fraud prevention. These cooperative industry activities provide a critical safety net for insurance consumers and are essential to efficiently operating insurance markets, filling the gap for individuals and businesses otherwise unable to find coverage and ensuring prompt coverage in the event of insolvency.

Conclusion

The existence of the McCarran-Ferguson limited antitrust exemption serves to make the industry more competitive, not less. Proposals to repeal or limit the exemptions would threaten activities that have increased competition and provided significant benefits to America's consumers. It is highly likely that rather than increasing competition, repeal or limitation of the McCarran-Ferguson limited exemption would perversely reduce competition, increase insurance costs, reduce availability for some high-risk coverages and potentially disrupt insurance markets.

Congress should be wary of the unintended consequences of changes to the current limited antitrust exemption. Any change that precludes, restricts or even merely discourages the production and exchange of advisory loss costs and supplementary rating information could place smaller and regional firms at a distinct disadvantage, increase consumer costs, reduce consumer choice, and seriously undermine competition. There is no credible evidence that the cost, availability, or quality of insurance products would be enhanced if the McCarran-Ferguson limited antitrust exemptions were repealed or modified. Any change in the existing antitrust regime and repeal or modification to the current limitations could decrease market stability, reduce affordability and availability of products, stifle innovation and expansion, diminish industry efficiency and ultimately, inhibit rather than increase competition in the insurance marketplace.

As Congress confronts the difficult task of health care reform, NAMIC urges Congress to beware of efforts that could in fact make that job harder and harm, rather than help, the health insurance marketplace. Changes to the McCarran-Ferguson antitrust exemptions we believe fall into that category. The property/casualty insurance industry has significant interactions with the health care system and NAMIC looks forward to working with Congress to improve its operation. We encourage the Committee and Congress to recognize and respect the critical role that the McCarran-Ferguson exemptions play in the efficient operation of our industry, which is vital to the economic health and vitality of our economy, and reject efforts to amend the current well-functioning antitrust regime.