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BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

HOUSE COMMITTEE ON THE JUDICIARY

ON

H.R. 372, THE "COMPETITIVE HEALTH INSURANCE REFORM ACT OF 2017"

February 16, 2017

Chairman Marino, Ranking Member Cicilline, Subcommittee Members, thank you for the opportunity to be here today, to discuss the proposal to remove the antitrust exemption in the McCarran-Ferguson Act as it applies to health insurance.

Consumers Union has long supported the removal of this antitrust exemption, to enable insurance markets to function under the rules of competition that apply throughout the American free market economy. The antitrust laws are a key to making sure that the free market works for consumers, and the insurance industry should not be left out.

Congress created this exemption in the midst of the Second World War, when attentions were rightly directed elsewhere, in the wake of a Supreme Court decision clarifying that the antitrust laws did apply to insurance. It started out to be a temporary three-year breathing spell, to allow insurers to familiarize themselves with the antitrust laws and adjust their practices to the accepted rules of competition. Instead, it has become an obstinate and persistent single-industry exemption from those rules.

This Committee has been re-examining this exemption over several decades, as a series of expert bodies has called for removing it or significantly scaling it back. The Antitrust Modernization Commission, established in 2002 by legislation authored in this Committee, singled out this exemption for particular skepticism as to any justification for it.[1]

The consensus that consumers and the economy would be better off without the exemption is now particularly strong with respect to health insurance, as demonstrated by passage of legislation to repeal the exemption as to health insurance, on the House floor seven years ago, by a roll call vote of 410-19. We are hopeful that, with bills now sponsored from both sides of the aisle, the stars may finally be aligned to take care of this.

Consumers Union is the public policy and mobilization arm of Consumer Reports. Our mission is to work for a fair, just, and safe marketplace for all

[1] Antitrust Modernization Commission, Report and Recommendations (April 2007) at 351, http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

consumers, and to empower consumers to protect themselves. And one key to empowering consumers to protect themselves is working to ensure meaningful consumer choice, through effective competition.

By meaningful choice, we mean easy for consumers to understand and compare, and sensitive to what's important to consumers. When consumers have meaningful choice, businesses are motivated to provide more affordability, better quality, and new thinking.

From our founding more than 80 years ago, one of our top priorities has been to make health care available and affordable for all Americans. We continue to be actively engaged at the federal and state level in working for policies to better ensure that consumers have good health care and health insurance options, and that those options are understandable and affordable.

We are strong supporters of the Affordable Care Act, which has significantly improved the availability and affordability of health care for many millions of Americans, including millions who previously had *no* health insurance.

We would be very concerned by any move to repeal it without having an effective new plan already figured out and in place that maintains comparable coverages and comparable consumer choices and protections. Such a move would be a grave threat to the financial and health security of American families, and to the very stability of our nation's health care system overall.

As we know, the health care marketplace is complex in how it operates and how it motivates providers, insurers, and consumers. An effective regulatory framework is needed to shape that complex environment, to help safeguard consumers, help keep costs under control, and help make a full range of health care services available. Our country's long experience shows you can't expect a health care system to run effectively on competition alone.

As just one example, we needed to legally prohibit insurance companies from limiting their obligations and lowering their costs by excluding coverage for pre-existing conditions, or jacking up rates for covering them. This is a key consumer

protection that the free market has shown it will not take care of on its own. In this and numerous other ways, effective regulation can promote improved health care delivery and improved cost control, by ensuring that all insurance companies are required to follow certain basic consumer-friendly "rules of the road."

But while our regulatory framework sets important requirements and safeguards, and it standardizes plan and benefit descriptions for easier comparison, consumers benefit from also having effective competition, at all levels in the supply chain. Even the best regulatory framework works better where competition, within the bounds of that framework, gives businesses a market-driven incentive to want to improve service while holding down prices and providing better value.

Regulation and competition both work best when they can work hand in hand.

For these reasons, we support the legislation the Subcommittee is considering today. The other levels of the health care supply chain are already subject to the antitrust laws, and it will be beneficial to the health care marketplace, and to consumers, if the insurance level joins them.

As the health care marketplace evolves, there will continue to be opportunities for health insurers to improve the way health insurance coverage is provided to consumers, with higher quality, better choice, and more affordability. The question is: *will* they? If a health insurer can increase its income by declining to make those improvements, or by delaying them, or even by taking things in a backwards direction, there would be a natural temptation to do so.

If there is competition, the insurer won't be able to confidently get away with that. Other insurers will see making those improvements as a way to attract consumers away. But if the one insurer could get the others to agree to also hold back, then it wouldn't have to worry about being undercut by the others offering consumers a better deal.

And that's where the antitrust laws come in to protect consumer choice. It's a violation of those laws for competing companies to cheat the market by banding

together and agreeing to withhold benefits from consumers, or to slow-walk them, for the purpose of protecting everyone's profits.

Just to pick one possible example, consumers like to have a choice about which doctors they can see, and which hospitals they can go to. Some insurers have been moving in the direction of narrower provider networks in their plans, as a cost-cutting measure. If there's effective competition, along with effective transparency, consumers (and employers acting for their employees) who don't want a narrow network can switch to a plan that offers more providers. But if the health insurers can band together and agree that they will all move to narrow networks, consumers no longer have a choice.

Regulation can address that problem by setting a minimum baseline for what qualifies as an adequate network. But we don't want health insurers agreeing among themselves that they will treat the regulatory floor as also the ceiling. Here is an instance where competitive incentives can augment whatever regulation may require.

The McCarran-Ferguson antitrust exemption applies to the "business of insurance." The courts have made clear that that does not cover every business activity an insurance company might engage in, even as part of its insurance operations. The exemption doesn't cover insurance company mergers, for example, has we have recently seen with the Justice Department's successful antitrust challenges to the Aetna-Humana and Anthem-Cigna mergers.

The antitrust exemption also doesn't cover arrangements between an insurance company and a provider, unless the arrangement has an impact on consumers, and some relation to the spreading of risk. Many kinds of arrangements, such as if insurers were to require providers to restrict the quality of care they offer consumers, or to impose higher cost-sharing, in order to participate in a network, could be covered. But arrangements that are not covered are already subject to the antitrust laws.

And just to be clear, making an activity subject to the antitrust laws is not the same as automatically outlawing it. Passing this bill won't suddenly warp the antitrust laws into a straitjacket that stops insurers from engaging in activities that

benefit consumers. To violate the antitrust laws, the activity has to significantly *harm* competition and consumers.

Like price fixing, for example.

Or the kinds of innovation-stalling agreements I described a minute ago.

Or agreeing to freeze out providers who won't cut corners on essential quality of care.

Or making restrictive deals with providers that keep new insurance companies from getting the access they need to come in and offer consumers other choices.

This bill won't be the cure-all for everything that ails the health insurance marketplace. But it is a constructive step toward bringing the beneficial forces of market competition more into play, and that's going to help give consumers better choices, and as a result, help promote better value.

Health insurers play a key role in our health care system. And better competition will help more strongly focus insurer incentives in line with benefiting consumers.

As the Justice Department has explained, where there is effective competition, coupled with transparency, in a consumer-friendly regulatory framework, insurers will compete against each other by offering plans with lower premiums, reducing copayments, lowering or eliminating deductibles, lowering annual out-of-pocket maximum costs, managing care, improving drug coverage, offering desirable benefits, and making their provider networks more attractive to potential members.[2]

We want those motivations to be strong. Providing those kinds of benefits costs insurers more than not providing them. What makes it in their interest to provide them anyway is that doing so attracts customers who might otherwise go

[2] *See, e.g.*, Competitive Impact Statement, United States v. Humana, United States v. Humana Inc. and Arcadian Management Services, Inc., No. 12-cv-464 (D.D.C., March 27, 2012), at 8, www.justice.gov/atr/case/us-v-humana-inc-and-arcadian-management-services-inc.

elsewhere. For that to work, there needs to be an elsewhere for customers realistically to go and hope to obtain those benefits. Health care markets, for all their complexities and special characteristics, are no exception to this fundamental economic fact.

Ultimately, we hope the McCarran-Ferguson antitrust exemption is removed for all insurance, not just health insurance. We'd like the antitrust laws to apply across the economy. But that discussion is for another day. We support your proposal to remove the exemption now for health insurance.

And if the focus is to limit this to health insurance, the exclusions you set out would appear to make sense, except that we're not sure why you would exclude hospital indemnity insurance.[3] We would urge you to take another look at that.

Thank you again for the opportunity to testify on this important issue for consumers.

[3] 26 USC 9832(c) (3)(B).