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 An important step toward achieving these objectives is eliminating the outdated antitrust exemption that grants health insurers special status, and permits them to ignore the competitive rules that apply to every other U.S. business.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.

[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.