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. 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

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.”

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.”

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:

---

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 \textit{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.

\section*{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:

\begin{flushleft}
\footnotesize
\begin{enumerate}
\item Letter of Roger Sevigny, President of National Association of Insurance Commissioners to Senator Patrick Leahy and Representative John Conyers, Jr. (Oct. 21, 2009).
\end{enumerate}
\end{flushleft}
• 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

\(^7\) 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.