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A Window into Washington: Report on Hearings for S. 1681 and H.R. 3596, Proposed Legislation to End Health Insurers' Antitrust Exemption

Overview

- *Congress recently conducted hearings on proposed legislation that would repeal the insurance exemption from the federal antitrust laws, the McCarran-Ferguson Act of 1945, as it relates to the health insurance industry.*

- *Witnesses at the hearings articulated different perspectives on the potential repeal. At one end of the spectrum, there was a call to end the exemption and increase federal oversight of the health insurance industry for the benefit of both competition and consumers. In contrast, at least one witness suggested that repeal would at best maintain status quo in the market or, worse, deter activities that enhance industry efficiency.*

- *On October 21, the House Judiciary Committee voted 20-9 to approve legislation aimed at repealing the antitrust exemption for health insurers. The Committee endorsed a middle-of-the-road approach by including safe harbors that permit joint action for data pooling and actuarial calculations.*

On October 8 and 14, 2009, the House Judiciary Committee's Courts and Competition Policy Subcommittee and the Senate Judiciary Committee, respectively, conducted hearings on proposed legislation eliminating the health insurance industry's exemption from the federal antirust laws under the McCarran-Ferguson Act of 1945. The proposed legislation, entitled the Health Insurance Industry Antitrust Enforcement Act of 2009, would specifically prohibit price-fixing, bid-rigging and market allocation in the health insurance industry. In his weekly address on October 17, President Barack Obama expressed support for Congress' review of the antitrust exemption, but did not directly endorse the proposed legislation.

The bill was introduced by Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee and is co-sponsored by the Senate Majority Leader, Senator Harry Reid (D-NV), as well as Senators Feinstein, Feingold, Schumer, Durbin, Specter and Franken. Although less ambitious than Senator Leahy's prior attempts to reform McCarran-Ferguson, the bill is of particular significance in the midst of Congress' health care reform efforts.

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Report on Hearing for S. 1681

Witnesses before the Senate Judiciary Committee on October 14 included Senator Reid; Christine Varney, Assistant Attorney General for Antitrust, U.S. Department of Justice (DOJ); J. Robert Hunter, Insurance Director, Consumer Federation of America (CFA); and Dr. Lawrence Powell, Associate Professor and Whitbeck-Beyer Chair of Insurance and Financial Services, University of Arkansas, Little Rock College of Business.

During his testimony, Senator Reid declared that "there is no reason why the insurance companies should have exemption from antitrust law" and added that "to the extent insurance companies need to share information, they should do what other industries have to do and seek prior authorization and guidelines from the Department of Justice."

Varney stated that the DOJ generally supports the idea of repealing antitrust exemptions but "take[s] no position as to how and when Congress should address this issue." Noting that the possible justifications for the McCarran-Ferguson Act (such as encouraging state regulation of the insurance business and countering more restrictive antitrust rulings of the past) are no longer valid, Varney added that repealing the Act would allow competition to have a greater role in reforming health and medical malpractice insurance markets than would otherwise be the case. Responding to questions regarding insurers' data sharing practices, Varney explained that as long as the data does not contain information as to its sources and is not used for price-fixing or market allocation, nothing in the antitrust laws would prevent insurers from sharing loss and risk data.

Hunter testified to CFA's support for a complete repeal of the antitrust exemption afforded the insurance industry"to unleash the Federal Trade Commission (or a new Consumer Financial Protection Agency) to protect insurance consumers." In contrast, Powell argued that the limited antitrust exemption provided by McCarran-Ferguson enhances competition in insurance markets and that repealing the exemption would at best maintain the status quo but could also stifle competition to the detriment of consumers. Specifically, Powell expressed concern that a repeal of the Act would prevent insurers from pooling data through independent statistical agents that produce advisory loss costs to aid insurers in the ratemaking process, thereby weakening efficiency and competition in the insurance markets.

Report on Hearing for H.R. 3596

At the hearing held on October 8 by the House Judiciary Committee's Courts and Competition Policy Subcommittee, H.R. 3596 was introduced by Subcommittee Chairman Hank Johnson (D-GA) as a first in a cycle of hearings on "an antitrust system for the 21st century." This hearing featured testimony from Ilene Knable Gotts, Esq., Chair of the American Bar Association (ABA) Section of Antitrust Law; Dr. Peter J. Mandell, Former President of the California Orthopedic Association and David Balto, Esq., Senior Follow at the Center for American Progress.

Gotts emphasized the ABA's consistent support of McCarran-Ferguson reform, which currently exempts the industry insurance from antitrust laws. She testified that the ABA considers such industry-specific exemptions unnecessary because of the simplicity and flexibility of the

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Sherman Act, which allows courts considerable discretion to apply the law based on the unique facts and circumstances of a particular case. The ABA advocates that the antitrust exemption in McCarran-Ferguson be repealed and replaced with "safe harbor" protections (currently absent from the proposed bill) that would permit insurance companies to cooperate with respect to certain procompetitive activities, such as collecting past loss-experience data, developing standardized policy forms and participating in voluntary joint-underwriting agreements—provided that the insurers' conduct does not unreasonably restrain competition in the relevant market.

According to the testimony of Dr. Mandel, H.R. 3596 falls short of addressing the real source of anticompetitive practices in the health insurance market, namely, the concentration of the market and the "virtual monopoly" of certain large insurance carriers.

Balto declared the health insurance market "severely dysfunctional" from both a competition and consumer protection perspective, due in part to regulatory neglect. Balto called for the bill to "go further" by allowing greater congressional oversight of health insurance markets and antitrust enforcers to reinvigorate enforcement against anticompetitive conduct by health insurers. More specifically, Balto recommended that the Federal Trade Commission and U.S. Department of Justice, Antitrust Division establish stronger standards for health insurance merger enforcement.

America's Health Insurance Plans, a lobbying group, was invited to testify, but instead submitted a statement critical of the bill. Similarly, ranking committee member Howard Coble (R-NC) - later echoed by Senator Orrin Hatch (R-UT) - noted that state regulators actively regulate the health insurance industry and expressed concern that the proposed legislation may be the beginning of a broader attempt to repeal McCarran Ferguson for all insurance providers.

The October 8 and 14 hearings are only two of many steps to reform both the McCarran-Ferguson Act and the market for health care services, and more constituents are expected to weigh in as Congress reviews the bill.

Update: On October 21, the House Judiciary Committee voted 20-9 to approve legislation aimed at repealing antitrust exemptions for health insurers. This legislation includes three safe harbors that would permit joint action by insurers for the purpose of (i) collecting, compiling or disseminating historical loss data; (ii) determining a loss development factor applicable to historical loss data; and (iii) performing actuarial services, provided that doing so does not involve a restraint of trade. Senate Democratic leaders have stated that they will push for a similar provision to be included in healthcare overhaul legislation.

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