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115TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 115–36

COMPETITIVE HEALTH INSURANCE REFORM ACT OF 2017

MARCH 15 (legislative day, MARCH 13), 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 372]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 372) to restore the application of the Federal antitrust laws to the business of health insurance to protect competition and consumers, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

69–006

SECTION 1. SHORT TITLE.

This Act may be cited as the "Competitive Health Insurance Reform Act of 2017".

SEC. 2. RESTORING THE APPLICATION OF ANTITRUST LAWS TO THE BUSINESS OF HEALTH INSURANCE.

(a) AMENDMENT TO MCCARRAN-FERGUSON ACT.—Section 3 of the Act of March 9, 1945 (15 U.S.C. 1013), commonly known as the McCarran-Ferguson Act, is amended by adding at the end the following:

"(c)(1) Nothing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance (including the business of dental insurance and limited-scope dental benefits).

"(2) Paragraph (1) shall not apply with respect to making a contract, or engaging in a combination or conspiracy—

"(A) to collect, compile, or disseminate historical loss data;

"(B) to determine a loss development factor applicable to historical loss data;

"(C) to perform actuarial services if such contract, combination, or conspiracy does not involve a restraint of trade; or

"(D) to develop or disseminate a standard insurance policy form (including a standard addendum to an insurance policy form and standard terminology in an insurance policy form) if such contract, combination, or conspiracy is not to adhere to such standard form or require adherence to such standard form.

"(3) For purposes of this subsection—

"(A) the term 'antitrust laws' has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition;

"(B) the term 'business of health insurance (including the business of dental insurance and limited-scope dental benefits)' does not include—

"(i) the business of life insurance (including annuities); or

"(ii) the business of property or casualty insurance, including but not limited to—

"(I) any insurance or benefits defined as 'excepted benefits' under paragraph (1), subparagraph (B) or (C) of paragraph (2), or paragraph (3) of section 9832(c) of the Internal Revenue Code of 1986 (26 U.S.C. 9832(c)) whether offered separately or in combination with insurance or benefits described in paragraph (2)(A) of such section; and

"(II) any other line of insurance that is classified as property or casualty insurance under State law;

"(C) the term 'historical loss data' means information respecting claims paid, or reserves held for claims reported, by any person engaged in the business of insurance; and

"(D) the term 'loss development factor' means an adjustment to be made to reserves held for losses incurred for claims reported by any person engaged in the business of insurance, for the purpose of bringing such reserves to an ultimate paid basis.".

(b) RELATED PROVISION.—For purposes of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section applies to unfair methods of competition, section 3(c) of the McCarran-Ferguson Act shall apply with respect to the business of health insurance without regard to whether such business is carried on for profit, notwithstanding the definition of "Corporation" contained in section 4 of the Federal Trade Commission Act.

Purpose and Summary

In 1945, Congress passed the McCarran-Ferguson Act,[1] which exempts the business of insurance from Federal antitrust regulation to a limited extent. The "Competitive Health Insurance Reform Act" would have the effect of altering the McCarran-Ferguson Act's Federal antitrust exemption so that it no longer applies to the business of health insurance. The amended bill leaves unchanged the current treatment under McCarran-Ferguson for certain practices involving the collection, dissemination, and analysis of historical loss data, the performance of certain actuarial services, and the development and use of standardized forms. Moreover, the McCarran-

[1] 15 U.S.C. §§ 1011–1015.

Ferguson Act would remain in effect for other types of insurance (*e.g.,* car insurance or property insurance), thus maintaining a narrowly tailored Federal antitrust exemption for certain practices relating to the provision of those types of services.

Background and Need for the Legislation

A. Brief Overview of Insurance Regulation and the McCarran-Ferguson Act

Historically, the business of insurance was viewed as not falling within interstate commerce and thus was subject to state, not Federal, regulation.[2] In 1944, the Supreme Court effectively reversed itself on this question, holding that Federal antitrust laws were applicable to an insurance association's interstate activities in restraint of trade.[3] Both states and insurers decried the change, and Congress responded with the McCarran-Ferguson Act.[4] The Act exempts the "business of insurance" to "the extent it is regulated by state law" from Federal antitrust laws, including provisions of the Federal Trade Commission Act.[5] However, the exemption does not cover agreements to "boycott, coerce, or intimidate."[6]

In determining whether conduct constitutes the "business of insurance" under McCarran-Ferguson, courts consider: (1) whether the activity has the effect of transferring a policyholder's risk; (2) whether the activity is an integral part of the policy relationship between the insurer and a policyholder; and (3) whether the activity is limited to entities within the insurance industry.[7] It should be noted that a wide range of practices of health insurers do not constitute the business of insurance under this test. As evidenced by the Justice Department's challenges to both the Anthem/Cigna and Aetna/Humana transactions, health insurance mergers are still reviewed by antitrust agencies and may be subject to conditions when the reviewing agency or a court has determined that a merger raises anti-competitive concerns.[8]

As a direct result of McCarran-Ferguson, every state has its own regulations and regulatory agency to protect consumers and competition in the insurance market. These regulations include bans on the types of anticompetitive conduct by insurers that the Federal antitrust laws would reach if they applied.[9] The Congressional Budget Office noted when analyzing a prior bill similar to H.R. 372: "According to state insurance regulators, state laws already prohibit issuers of health insurance and medical malpractice insurance from engaging in practices such as price fixing, bid-rigging, and market allocations."[10]

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[2] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868) (find that "[i]ssuing a policy of insurance is not a transaction of [interstate] commerce.").

[3] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

[4] 15 U.S.C. §§ 1011–1015.

[5] 15 U.S.C. § 1012.

[6] 15 U.S.C. § 1013(b).

[7] Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982).

[8] Bid-rigging also has been held not to constitute the business of insurance and thus not within the exemption. *See In re* Ins. Brokerage Antitrust Litig., 2006 WL 2850607, MDL No. 1663 (D.N.J. Oct. 3, 2006).

[9] Congressional Budget Office, *Cost Estimate: H.R. 3596 Health Insurance Industry Antitrust Enforcement Act of 2009,* Oct. 23, 2009, at 2, *available at* https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/hr35960.pdf.

[10] *Id.*

B. Narrow Exemption

A review of cases addressing what constitutes the "business of insurance" shows that the McCarran-Ferguson exemption has been judicially narrowed in the 70 years since its enactment. The cases are highly specific. However, certain general conclusions can be drawn:

- Activities among insurers involving cooperative ratemaking and related functions constitute the business of insurance.[11] Insurers may enter into agreements or arrangements that do not involve such matters, but the more arrangements involve functions that are not unique to the insurance business, or the primary impact of which is not on the insurance market, the less likely courts are to apply the exemption.[12]
- Activities involving the relationship between the insurer and the insured constitute the business of insurance.[13] If the activity does not involve risk-spreading, however, or if its primary impact on competition is not in the insurance industry, courts are less likely to apply the exemption.[14]
- Activities involving arrangements between insurers and third-party providers of non-insurance goods and service do not constitute the business of insurance.[15]

DOJ testified to Congress in 1999 that "the McCarran-Ferguson Act does not give insurers leverage."[16] The Department described the exemption as a "limited one" and stated that the Act "provides no obstacle to prosecution of [appropriate] claims either by the affected providers or by state or Federal antitrust enforcement agencies." DOJ has since shifted its position, saying that the Act's exemption is "very broad" although it did not indicate why its position shifted.[17]

C. Data Aggregation and Standardized Forms

In addition to protecting state primacy in insurance regulation, the McCarran-Ferguson Act also gives states the flexibility to allow some types of regulated coordination between insurance companies that actually improve competition. To be competitive, an insurer needs accurate and comprehensive actuarial data so it can gauge the risk associated with its policies and set premiums accordingly.[18] For this reason, state insurance regulators have histori-

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[11] California League of Indep. Ins. Prods. v. Aetna Cas. & Sur. Co., 175 F. Supp. 857, 860 (N.D. Cal. 1959) ("It is common knowledge that the rate of commission paid to agents is a vital factor in the ratemaking structure.").

[12] *See, e.g.,* United States v. Title Ins. Rating Bur. of Arizona, Inc., 700 F. 2d 1247 (9th Cir. 1983) (provision of escrow services by title insurance companies is not the business of insurance).

[13] SEC v. National Securities, Inc., 393 U.S. 453, 459–60 (1969).

[14] *See, e.g.,* Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981) (finding that insurer's policy of refusing to pay for services of clinical psychologist unless they were billed through a physician to not be the business of insurance.).

[15] *See, e.g.,* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

[16] *Hearing on the Quality Health Care Coalition Act of 1999 Before the H. Comm. On the Judiciary* (1999) (statement of Joel I. Klein, Asst. Atty. Gen., Antitrust Division, Dept. of Justice).

[17] *Hearing on Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry Before S. Comm. On the Judiciary* (2009) (statement of Christine A. Varney, Asst. Att'y General, Antitrust Division, Dept. of Justice).

[18] *See* Janice E. Rubin and Baird Webel, Congressional Research Service, *Limiting McCarran-Ferguson Act's Antitrust Exemption for the "Business of Insurance": Impact on Health Insurers*

cally allowed insurance companies to share actuarial and loss information, often through a ratings bureau, so that they can more accurately estimate risk and price their policies.[19] At the most basic level, companies gather data from various insurers, aggregate and analyze this data, and provide aggregated data back to the individual insurers for use in setting future rates.

This cooperation is especially valuable to small insurance companies and start-ups, which would otherwise lack the scale of information they need to price policies accurately.[20] By making it possible for small and independent insurance companies to compete, information-sharing within the insurance industry arguably increases competition and lowers prices for consumers.[21] Repeal proponents claim that the market is different today; data-sharing is largely permitted under Federal antitrust laws and the bigger problem is market consolidation.

In addition to data sharing, ratings bureaus are also involved in the creation and filing of insurance policy forms. Insurance policy forms are complex legal documents, and, as controversies over insurance coverage for New York's World Trade Center and for buildings damaged in Hurricane Katrina have shown, millions of dollars may ride on the interpretation of a handful of words. Supporters of the McCarran-Ferguson Act assert that standardized forms promote comparison shopping by consumers by reducing the confusion that could result from multiple policy forms being offered by different companies. Since the states generally require the filing of policy forms for state approval, using a jointly created form that has already been filed with the states significantly reduces the regulatory burden on a single insurer. The uniformity of policy forms, however, also may reduce consumer choice.

If the McCarran-Ferguson antitrust protection for "the business of insurance" is, in fact, curtailed or abolished, many lawsuits challenging some of these insurer practices as violations of the Federal antitrust laws are likely. It is possible that many of the cooperative activities that insurers engage in may be found to be permissible under the "state action" doctrine, which immunizes from the Federal antitrust laws: (1) all actions of state public entities; and, (2) those of private entities that are legislatively mandated or authorized and are "actively supervised" by the states. The question then becomes to what extent do the requirements of the McCarran-Ferguson exemption (under which current practices have been developed) differ from requirements of the "state action" doctrine, which dictates both that there be a "clear articulation" of state policy and that a state engage in "active supervision" of the private activity that occurs in response to that articulation.

If the cited examples of cooperation were found to be in violation of Federal antitrust laws, it would likely necessitate significant changes in the operation of insurers, particularly small insurers which do not have large pools of information from their own experience. Should additional data be unavailable to small insurers in some way, it may spur further consolidation in the insurance in-

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and Issuers of Medical Malpractice Insurance at 5 (Jan. 14, 2010), *available at* http://www.crs.gov/reports/pdf/R40968 (hereinafter "CRS Report").

[19] *Id.*

[20] *Id.*

[21] *Id.*

dustry, as small insurers merge in order to gain the competitive advantage of additional information.

D. Sale of Insurance Across State Lines

Current interest surrounding McCarran-Ferguson repeal for health insurance appears to be related to interest in the passage of a Federal law to permit the sale of insurance across state lines. However, the general consensus, including among witnesses at the most recent Judiciary hearing on the Competitive Health Insurance Reform Act, is that if Congress decides to allow insurers to sell across state lines, such action does not necessarily require a repeal of McCarran-Ferguson.[22] For example, Robert Woody, Vice President—Policy, Property Casualty Insurers Association of America, testified that "Congress reserved the right to apply Federal laws to the business of insurance whenever it wants to. All that is required is that Congress make clear that the Federal law applies to insurers."[23]

Insurers already can (and a number do) sell across state lines, to the extent permitted by the individual states. While instances of this are limited, it is unclear how much is a result of protectionist state policy rather than the actual viability of selling across state lines. Several parties have spoken of the general difficulty involved in setting up a provider network in one state from another. Importantly, a repeal of McCarran-Ferguson would not prohibit the states' ability to regulate the health insurance market outside of the antitrust sphere any more than regulations provided under existing Federal law.

E. Previous Legislative Activity

The Committee has from time to time considered legislation to repeal or scale back the McCarran-Ferguson antitrust exemption since at least the late 1980's. Some prior legislative efforts to repeal or scale back the exemption are discussed in detail in the Committee's report on the Insurance Competitive Pricing Act of 1994, H.R. 9 (103d Cong.).[24]

More recently, in the 114th Congress, there were five varying bills introduced to repeal the McCarran-Ferguson Act. Mr. Gosar (R-AZ) introduced a bill which applied to health and dental insurance, but not medical malpractice insurance.[25] House Judiciary Committee Ranking Member Conyers (D-MI) introduced a bill which included health insurance and medical malpractice, but specifically permitted data-sharing activities.[26] Mr. Guthrie (R-KY) introduced a similar bill, but prohibited private class action lawsuits against health insurers for antitrust violations.[27] The other two bills were introduced by Messrs. Defazio (D-OR) and Roe (R-TN).[28]

Rep. Gosar introduced H.R. 372, the "Competitive Health Insurance Reform Act of 2017", on January 9, 2017. This bill is identical to Mr. Gosar's bill introduced during the 114th Congress. The Com-

[22] *See H.R. 372, the "Competitive Health Insurance Reform Act of 2017: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary* (2017) (hereinafter *RRCAL Subcomm. Hearing*).
[23] *RRCAL Subcomm. Hearing, supra* note 22, at 6 (written testimony of Mr. Robert Woody).
[24] H.R. Rep. No. 103–853 (1994).
[25] *See* H.R. 494, 114th Cong.
[26] *See* H.R. 99, 114th Cong.
[27] *See* H.R. 3682, 114th Cong.
[28] *See* H.R.s 2462, 2653, 114th Cong.

petitive Health Insurance Reform Act of 2017 would have the effect of altering the McCarran-Ferguson Act's Federal antitrust exemption so that it no longer applies to the business of health insurance. The McCarran-Ferguson Act would remain in effect for other types of insurance (*e.g.,* car insurance or property insurance), thus maintaining a narrowly tailored Federal antitrust exemption for certain practices relating to the provision of those types of services.

H.R. 372 as amended by the Committee has been made similar in a number of respects to repeal legislation that was introduced in the 111th and 112th Congresses. During the 111th Congress, the Committee reported out a prior version of Ranking Member Conyers' bill, limited to health insurance and medical malpractice. Ranking Member Conyers' bill contained carve-outs for information-gathering and for rate-setting activities of state regulatory agencies. Moreover, when reported out of the Committee, the bill included an amendment "to add safe harbors for collecting and distributing historical loss data, developing a loss development factor, and performing actuarial services that do not involve a restraint of trade."[29] The full House ultimately voted on and passed during the 111th Congress a different bill in a bipartisan vote by 406–19.[30] This legislation was not acted on by the Senate. In the 112th Congress, it was included in comprehensive health care legislation introduced by Rep. Gingrey (R-GA) that passed the House 223–181.[31] Again, this legislation was not acted on by the Senate.

Hearings

On February 16, 2017, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a legislative hearing on the Competitive Health Insurance Reform Act.[32] At this hearing, the Subcommittee received testimony from: Congressman Paul Gosar; Congressman Austin Scott (GA-08); Thomas P. Miller, Resident Fellow at the American Enterprise Institute; David Balto, Principal, Law Offices of David Balto and Health Policy Program Fellow, New America Foundation; Robert Woody, Vice President—Policy, Property Casualty Insurers Association of America; and George Slover, Senior Policy Counsel, Consumers Union. Both Congressmen Gosar and Scott discussed the importance of the Competitive Health Insurance Reform Act and their reasons for filing the bill.

Mr. Miller testified generally against the bill and noted that McCarran-Ferguson provides no exemption against scrutiny under state antitrust laws and that merger enforcement authority over insurers remains at both the state and Federal level.[33] Mr. Miller admitted that an argument could be made that many of the activities insurers are concerned with may be exempt from existing Federal antitrust laws through the court developed rule of reason.[34] However, the uncertain risks of new litigation challenges and organizational change pressures would produce offsetting costs.[35] Mr.

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[29] *See* Health Insurance Industry Antitrust Enforcement Act of 2009, H.R. Rep. No. 111–322 (2009).
[30] H.R. 4626, 111th Cong.
[31] *See* H.R. 5, 112th Cong.
[32] *See RRCAL Subcomm. Hearing, supra* note 22.
[33] *RRCAL Subcomm. Hearing, supra* note 22, at 8 (testimony of Mr. Thomas Miller).
[34] *Id.* at 10–11.
[35] *Id.* at 11.

Miller specified that cooperative activities essential to the current health care market include aggregation of trending/signaling rate and historical loss data, utilizing of common forms, and joint underwriting.

Mr. Balto testified in favor of the bill and asserted that the health care market desperately needs Federal antitrust oversight due to its highly-concentrated nature, complex and opaque transactions, and high barriers to entry.[36] According to Mr. Balto, the state insurance commissioners whom McCarran-Ferguson defers antitrust regulation to, do not "have the capacity to fully address the problems that their states' residents are experiencing."[37] Rather, Mr. Balto believes that FTC oversight is necessary to provide a high standard of uniform protection.[38]

Mr. Woody testified against the bill and cautioned that while the current bill is limited to health insurance, expanding of the scope seems likely, and the importance of maintaining the McCarran-Ferguson exemption to protect the data sharing activities of smaller and less concentrated property and casualty insurers cannot be overstated. Mr. Woody noted that "[e]ven larger insurers of any size seeking to enter new states, markets, classes of business, or product lines depend upon industry wide data that is available to them only because of the McCarran limited exemption."[39] In his testimony, Mr. Woody also noted that while competitive concentration is high in the case of health insurance, it is significantly lower in property and casualty insurance. Because McCarran impacts both industries equally, the disparate concentrations cannot be blamed solely on McCarran-Ferguson.[40]

Mr. Slover testified in favor of the bill and believes that repeal would add a much-needed dose of competition in the health insurance market. Specifically, increased competition would prevent insurers from "agreeing among themselves that they will treat the regulatory floor as also the ceiling."[41] Moreover, in discussing the risks associated with maintaining the exemption, Mr. Slover noted that "many kind 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" under the exemption.[42]

Committee Consideration

On February 28, 2017, the Committee met in open session and ordered the bill H.R. 372 favorably reported, with an amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that no recorded votes were taken during the Committee's consideration of H.R. 372.

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[36] *RRCAL Subcomm. Hearing, supra* note 22, at 2 (written testimony of Mr. David Balto).
[37] *Id.*
[38] *Id.*
[39] *RRCAL Subcomm. Hearing, supra* note 22, at 5 (written testimony of Mr. Robert Woody).
[40] *Id.* at 7.
[41] *RRCAL Subcomm. Hearing, supra* note 22, at 4 (written testimony of Mr. George Slover).
[42] *Id.*

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 372, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 10, 2017.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 372, the "Competitive Health Insurance Reform Act of 2017."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Stephen Rabent and Scott Laughery, who can be reached at 226-2860.

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 372—Competitive Health Insurance Reform Act of 2017.

As ordered reported by the House Committee on the Judiciary on February 28, 2017.

Under current law, some activities of companies that provide health insurance are exempt from certain Federal antitrust laws if the companies are engaged in the business of insurance and are regulated at the state level. H.R. 372 would remove that exemption and subject such businesses to Federal antitrust laws, but would retain the antitrust exemption for certain collaborative activities between health insurance businesses.

Based on an analysis of information from the Federal Trade Commission (FTC) about the commission's current enforcement capabilities, CBO estimates that implementing H.R. 372 would increase costs by less than $500,000 for the FTC and the Department of Justice (DOJ) to enforce the expanded antitrust laws. Such spending would be subject to the availability of appropriated funds.

H.R. 372 could affect the size and costs of premiums charged by private health and dental insurance companies, but those effects would probably be quite small. Changes in health or dental insurance premiums can affect Federal revenues because of the favorable tax treatment that is accorded to employment-based coverage under current law. Premiums might be lower to the extent that enacting the bill would prevent insurers from engaging in practices currently exempted from antitrust law. (That effect would probably be small because the range of insurer practices that fall under the antitrust exemption is narrow and such practices are subject to state regulation.) On the other hand, insurers could become subject to additional litigation and thus their costs and premiums might increase. Based on information from the National Association of Insurance Commissioners, the FTC, and DOJ, CBO estimates that both of those effects would be small. Thus, enacting the bill would have no significant net effect on the premiums that private insurers would charge for health or dental insurance and any effect on Federal revenue would be negligible.

Because those prosecuted and convicted under H.R. 372 could be subject to criminal fines, Federal collections may increase. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation action; therefore, pay-as-you-go procedures apply. CBO expects that any additional revenues and subsequent direct spending would not be significant because the legislation would probably affect only a small number of cases.

CBO estimates that enacting H.R. 372 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 372 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

H.R. 372 would impose a private-sector mandate, as defined in UMRA, on issuers of health insurance by repealing their exemptions from Federal antitrust laws with some exceptions. Because state laws generally prohibit or regulate activities that would be prohibited under the bill, CBO estimates that the incremental cost for health insurers to comply with the mandate would fall below the annual threshold established in UMRA for private-sector mandates ($156 million in 2017, adjusted annually for inflation).

The CBO staff contacts for this estimate are Stephen Rabent and Scott Laughery (for Federal costs) and Amy Petz (for private-sector mandates). The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 372 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the

Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 372 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 372 repeals the McCarran-Ferguson Act's Federal antitrust exemption as it applies to the business of health insurance (including the business of dental insurance and limited scope dental benefits), while maintaining safe harbors for pro-competitive cooperative activities.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 372 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title. Provides that the bill may be referred to as the "Competitive Health Insurance Reform Act of 2017."

Section 2. Restoring the Application of Antitrust Laws to the Business of Health Insurance.

- Sec. 2(a)(c)(1): The McCarran-Ferguson Act provides that Federal antitrust law, including the Sherman Act, Clayton Act, and FTC Act shall not apply to the "business of insurance." The Competitive Health Insurance Reform Act amends this section to provide that the exception for the business of insurance does not apply to "the business of health insurance (including the business of dental insurance and limited scope dental benefits)."
- Sec. 2(a)(c)(2): Provides that the repeal of the McCarran-Ferguson Act for the business of health insurance does not apply to specified safe-harbored activities. These activities include making a contract, or engaging in a combination or conspiracy for the collection, compilation and dissemination of historical loss data, the determination of a loss development factor, the performance of actuarial services that do not involve a restraint of trade, and the development or diminution of a standard insurance policy form, if such contract, combination or conspiracy is not to adhere to or require adherence to such standard form.
- Sec. 2(c)(3)(A): Clarifies that the term "antitrust laws" shall have the meaning provided in the Clayton Act as well as sec-

tion 5 of the FTC Act, to the extent the FTC Act applies to "unfair methods of competition."

- Sec. 2(c)(3)(B): Explicitly provides that the term "business of health insurance" does not include the business of life insurance (including annuities), property or casualty insurance, other specific "excepted benefits" as stated in the Internal Revenue Code.
- Sec. 2(c)(3)(C): Provides that the term "historical loss data" means information respecting claims paid, or reserves held for claims reported, by any person engaged in the business of insurance.
- Sec. 2(c)(3)(D): Provides that the term "loss development factor" means an adjustment to the aggregate of losses incurred during a prior period of time that have been paid or for which claims have been incurred and reserves are being held, in order to estimate the aggregate of the losses incurred during such period that will ultimately be paid.
- Sec. 2(b): Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." The Competitive Health Insurance Reform Act clarifies that section 5 of the FTC Act applies to the business of health insurance regardless of whether such business is carried on for profit.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

SECTION 3 OF THE ACT OF MARCH 9, 1945

AN ACT to express the intent of the Congress with reference to the regulation of the business of insurance.

SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

(c)(1) Nothing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance (including the business of dental insurance and limited-scope dental benefits).

(2) Paragraph (1) shall not apply with respect to making a contract, or engaging in a combination or conspiracy—

(A) to collect, compile, or disseminate historical loss data;

(B) to determine a loss development factor applicable to historical loss data;

(C) to perform actuarial services if such contract, combination, or conspiracy does not involve a restraint of trade; or

(D) to develop or disseminate a standard insurance policy form (including a standard addendum to an insurance policy form and standard terminology in an insurance policy form) if such contract, combination, or conspiracy is not to adhere to such standard form or require adherence to such standard form.

(3) For purposes of this subsection—

(A) the term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition;

(B) the term "business of health insurance (including the business of dental insurance and limited-scope dental benefits)" does not include—

(i) the business of life insurance (including annuities); or

(ii) the business of property or casualty insurance, including but not limited to—

(I) any insurance or benefits defined as "excepted benefits" under paragraph (1), subparagraph (B) or (C) of paragraph (2), or paragraph (3) of section 9832(c) of the Internal Revenue Code of 1986 (26 U.S.C. 9832(c)) whether offered separately or in combination with insurance or benefits described in paragraph (2)(A) of such section; and

(II) any other line of insurance that is classified as property or casualty insurance under State law;

(C) the term "historical loss data" means information respecting claims paid, or reserves held for claims reported, by any person engaged in the business of insurance; and

(D) the term "loss development factor" means an adjustment to be made to reserves held for losses incurred for claims reported by any person engaged in the business of insurance, for the purpose of bringing such reserves to an ultimate paid basis.

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