

## Antitrust exemption likely to be repealed for health insurers

March 2, 2010

**What you need to know:**

Health insurers are poised to face broadened application of antitrust laws as a result of the House's vote to repeal their portion of the McCarran-Ferguson Act. Other insurance companies may soon face a similar repeal.

**What you need to do:**

Insurers should review their dealings with competitors to assess whether they may be targets for antitrust lawsuits.

### Background

Since 1945 the McCarran-Ferguson Act has provided a special antitrust exemption for "the business of insurance," where it is regulated by state law. On February 24 the House passed a repeal bill by the overwhelming vote of 406 to 19. If enacted, it will repeal the exemption with respect to health insurers.

The Bill's Congressional sponsors have exaggerated the case for repeal. Their press release proclaims: "This is about bringing sorely-needed competition back into an industry that has for too long wielded monopoly control over hard-working American families." In fact, the existing McCarran-Ferguson exemption is narrow, and its repeal is not likely to bring about dramatic changes in market performance.

### Popular misconceptions

The McCarran-Ferguson Act exempts "the business of insurance." The courts have narrowly construed this phrase. It does not exempt everything that insurance companies do; rather, it only exempts activities that are specific to insurers.

As a result, two popular views are misconceptions. The first is exemplified by Robert Reich's *New York Times* column, in which he wrote: "Astonishingly, the health insurance industry is exempt from federal antitrust laws, which is why a handful of insurers have become so dominant in their markets that their customers simply have nowhere else to go." In fact, however, the McCarran-Ferguson exemption does not apply when insurance companies engage in mergers and acquisitions, because this activity has not been viewed as "the business of insurance." Mergers and acquisitions of health insurers have always been subject to antitrust review.

Second, the Congressional sponsors declare: "It's time to end the monopoly protections that Washington has protected for decades as prices skyrocketed." In actuality, the chief components of the costs of health insurance are the amounts paid to hospitals, doctors and drug manufacturers. The McCarran-Ferguson exemption does not apply to such purchasing arrangements, because courts have held they are not within "the business of insurance." Thus the principal drivers of health insurance costs have not been affected by the McCarran-Ferguson exemption.

### **Longstanding efforts to reform**

Reform efforts have been advanced for more than 20 years with less rhetoric. Since 1989, the ABA Antitrust Section has advocated that there's no need for a special exemption for the insurance industry. The ABA has favored repealing the McCarran-Ferguson exemption, so long as it is replaced by safe harbors consistent with FTC/DOJ policy. In particular, sharing loss data may be important to the underwriting process for many insurance companies (usually outside the health area), and these joint activities may benefit consumers by lowering administrative costs. The McCarran-Ferguson exemption provides a partial shelter for such activities. The ABA has advocated preserving this shelter in another form.

### **The repeal legislation may prompt lawsuits**

The current repeal legislation will apply only to health insurers. It does not set forth any safe harbors. As passed by the House, the repeal legislation will modify the McCarran-Ferguson Act by stating simply that "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."

If it is enacted, the repeal may disrupt industry patterns in ways the drafters have not intended, and we will have to wait and see whether subtle effects emerge.

One thing we can predict, though: the removal of an antitrust exemption will encourage class action lawyers to look for targets. This will likely bring a wave of new antitrust lawsuits.

### **Conclusion**

Health insurers will face broadened antitrust scrutiny if the McCarran-Ferguson repeal is enacted. Other types of insurance companies can anticipate that the repeal movement may reach them soon as well. Insurance companies should review their dealings with competitors to assess whether they are likely targets for an antitrust suit.

### **For More Information**

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