

# PUBLICATION

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## Hearing Held on McCarran Repeal Legislation

February 28, 2017

**On February 16, the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing to consider H.R. 372, the "Competitive Health Insurance Reform Act of 2017." The legislation, introduced by Congressman Paul Gosar (R-AZ) on January 9, would repeal the antitrust exemption that the health insurance industry currently enjoys under the McCarran-Ferguson Act (15 U.S.C. 1011 et seq.). Enacted in 1945, the McCarran-Ferguson Act exempts all insurers (not just health insurers) from the federal antitrust laws with respect to conduct that is: (1) "the business of insurance;" (2) is "subject to state regulation;" and (3) does not constitute an act of "boycott, coercion or intimidation." Congressman Gosar's bill would strip the health insurance industry of the exemption, but leave the exemption in place for other insurers.**

When introducing H.R. 372, Congressman Gosar announced that "since the passage of Obamacare, the health insurance market has mutated into one of the least transparent and most anti-competitive industries in the United States," and he asserted that H.R. 372 would address these concerns. Congressman Gosar also noted that similar McCarran repeal legislation was passed in the House during the 111th Congress (2009 – 2011) by a vote of 406 to 19, and by the 112th Congress (2011 – 2013) by voice vote, and proclaimed that "now is the time" for this legislation to be enacted into law.

During the hearing, the Subcommittee heard from several proponents of McCarran repeal, including Congressman John Conyers (D-MI), who has also introduced his own McCarran repeal legislation this Congress (H.R. 143), and representatives from the Consumer Union and several health care provider organizations. These witnesses testified that (1) the insurance industry is one of only a handful of industries that have an antitrust exemption; (2) that while the exemption may have been justified when enacted, it is no longer necessary or appropriate; and (3) that the result of the exemption is higher prices for health care for consumers. All urged the Subcommittee to repeal the exemption.

The Subcommittee also heard from several witnesses that opposed the repeal. They maintained that there is no need to repeal the exemption, that it is only a limited exemption from the federal antitrust laws and that the States have antitrust enforcement authority that ensures that, even in circumstances where McCarran might exempt insurers from federal antitrust scrutiny, insurers are not able to engage in anticompetitive conduct without consequence. Repealing the exemption, they claimed, would create legal uncertainty that would only serve to increase health insurance costs. These witnesses also noted that the National Association of Insurance Commissioners opposes the legislation, and a representative of the property and casualty insurance industry testified that even if the exemption might no longer be appropriate for health insurance, the exemption should be retained as to all other forms of insurance.

Finally, perhaps most notably, Congressman Bob Goodlatte (R-VA), who is an ex officio member of the Subcommittee and Chair of the full House Judiciary Committee, stated during the hearing that, in his view, the current "political climate" in Washington made repeal of the McCarran-Ferguson antitrust exemption "likely" this Congress. Whether Congressman Goodlatte turns out to be correct remains to be seen; McCarran repeal has been predicted for many years, and despite some close calls, the advocates for repeal have never been successful in having such legislation enacted into law. Will the 115th Congress be the time? Stay tuned.

