

PUBLICATION

Bill to Eliminate Health Insurers' Antitrust Exemption Passes in the House

May 01, 2017

On March 22, the House of Representatives passed H.R. 372, the "Competitive Health Insurance Reform Act of 2017," by a vote of 416-7. The legislation would repeal the antitrust exemption that the health insurance industry (and the dental insurance industry) currently enjoy under the McCarran Ferguson Act (15 USC 1011 et seq.), and was introduced by Congressman Paul Gosar (R-AZ) in January. Enacted in 1945, the McCarran Ferguson Act provides all insurers (not just health and dental insurers) with an exemption from the federal antitrust laws for 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." The legislation would not change the law with respect to other insurance products, including auto, home and life insurance products.

Notably, prior to the bill's passage by the House, several amendments to the legislation were made to its provisions. HR 372 now contains "safe harbors" that would continue to provide health insurers with an antitrust exemption when engaged in joint conduct designed to (1) "collect, compile, or disseminate historical loss data;" (2) "to determine a loss development factor applicable to historical loss data;" (3) "to perform actuarial services if such contract, combination, or conspiracy does not involve a restraint of trade;" and (4) "to develop or disseminate a standard insurance policy form . . . if such contract, combination, or conspiracy is not to adhere to such standard form or require adherence to such standard form." These "safe harbors" had been included in several bills introduced in prior years that also addressed McCarran repeal. However, other suggested amendments, including a proposal to include medical malpractice insurance within the scope of HR 372, was ultimately not included in the legislation passed by the House.

HR 372 now moves on to the Senate for consideration by that body. Whether the legislation will be taken up by the Senate this year is uncertain. Notably, several similar bills have been passed by the House over the last few years, but in each circumstance the Senate failed to consider the legislation. However, there are some signs that this year may, perhaps, be different. For example, at the February hearing on HR 372, Congressman Bob Goodlatte (R-VA), who chairs the House Judiciary Committee, stated that, in his opinion, the current "political climate" in Washington makes repeal of the McCarran Ferguson antitrust exemption "likely" this Congress. Whether Congressman Goodlatte's prediction turns out to be correct remains to be seen. Stay tuned.