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REPORT
111–322

HEALTH INSURANCE INDUSTRY ANTITRUST ENFORCEMENT ACT OF 2009

NOVEMBER 2, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 3596]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3596) to ensure that health insurance issuers and medical malpractice insurance issuers cannot engage in price fixing, bid rigging, or market allocations to the detriment of 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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89–006

THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Health Insurance Industry Antitrust Enforcement Act of 2009".

SEC. 2. PURPOSE.

It is the purpose of this Act to ensure that health insurance issuers and medical malpractice insurance issuers cannot engage in price fixing, bid rigging, or market allocations to the detriment of competition and consumers.

SEC. 3. PROHIBITION OF ANTI-COMPETITIVE ACTIVITIES.

Notwithstanding any other provision of law, nothing in the Act of March 9, 1945 (15 U.S.C. 1011 et seq., commonly known as the "McCarran-Ferguson Act"), shall be construed to permit health insurance issuers (as defined in section 2791 of the Public Health Service Act (42 U.S.C. 300gg–91)) or issuers of medical malpractice insurance to engage in any form of price fixing, bid rigging, or market allocations in connection with the conduct of the business of providing health insurance coverage (as defined in such section) or coverage for medical malpractice claims or actions.

SEC. 4. APPLICATION TO ACTIVITIES OF STATE COMMISSIONS OF INSURANCE AND OTHER STATE INSURANCE REGULATORY BODIES.

Nothing in this Act shall apply to the information gathering and rate setting activities of any State commission of insurance, or any other State regulatory entity with authority to set insurance rates.

SEC. 5. EXCLUSIONS.

(a) EXCLUDED CONDUCT.—This Act shall not apply to making a contract, or engaging in a combination or conspiracy—

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

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

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

(b) DEFINITIONS.—For purposes of this section—

(1) 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

(2) 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.

PURPOSE AND SUMMARY

H.R. 3596, the Health Insurance Industry Antitrust Enforcement Act of 2009, will remove the antitrust immunity currently provided to the insurance industry under the McCarran-Ferguson Act[1] in instances of price fixing, bid rigging, and market allocation by health or medical malpractice insurers. The amended bill leaves unchanged the current treatment under McCarran for information-gathering and rate-setting activities of State regulatory entities with authority to set insurance rates, for certain practices involving the collection, dissemination, and analysis of historical loss data, and for the performance of certain actuarial services.

Price fixing (including bid rigging and other forms) and market allocation are part of a limited class of so-called per se violations of the antitrust laws, practices so poisonous to competition that they have long been deemed to have no redeeming justification.

[1] 15 U.S.C. §§ 1011–1015.

They invariably result in fewer choices, higher prices, and lower quality products and services for consumers.

BACKGROUND AND NEED FOR THE LEGISLATION

The Committee began seriously considering legislation to repeal or scale back the McCarran-Ferguson antitrust exemption in the late 1980's. The history of the insurance business, the developments leading to enactment of the McCarran-Ferguson Act, and prior legislative efforts to repeal or scale back the exemption are discussed in some detail in the Committee's report on the Insurance Competitive Pricing Act of 1994, H.R. 9 (103rd Cong.).[2] A short summary of this history follows.

MCCARRAN-FERGUSON ACT

The McCarran-Ferguson Act was enacted in 1945 in response to a 1944 Supreme Court decision, *U.S. v. South-Eastern Underwriters Association,*[3] declaring for the first time that insurance contracts are interstate commerce, and therefore subject to the antitrust laws. McCarran-Ferguson prevents the application of the antitrust laws to the business of insurance—except as to boycott, coercion, or intimidation—to the extent that the business of insurance is regulated by State law.

Prior to that Supreme Court decision, insurance had been regulated for more than 75 years solely by the States. An 1868 Supreme Court decision, *Paul v. Virginia,*[4] had turned aside an insurance company challenge to Virginia's licensing and bonding requirements, holding that issuing a policy of insurance was not commerce. When the Sherman Act was enacted 22 years later, there was an assumption, based on *Paul,* that its prohibitions did not reach insurance contracts.

In response to *South-Eastern Underwriters,* the insurance industry expressed concern that the decision would jeopardize the system of joint rate-making and other collective practices that had developed in the wake of *Paul.* For their part, the States expressed concern that State authority to regulate and tax the business of insurance—insurance premium taxes were an important source of revenue in many States—might be in question, especially after insurers began refusing to pay those taxes, as well as refusing to abide by State licensing and other regulatory requirements.

To address these concerns, in January 1945, the U.S. Senate introduced legislation to reaffirm State authority to regulate the business of insurance, which would eventually become the McCarran-Ferguson Act.

The Senate bill included a 2-3 year moratorium on application of the antitrust laws. Both the House and the Senate passed the bill essentially unchanged. The Senate made a minor clarifying amendment, however, which the House rejected, sending the bill to conference.

The conference committee added an entirely new phrase, providing that after the moratorium expired, the antitrust laws would apply to the business of insurance only "to the extent such business

[2] H.R. Rep. No. 103–853 (1994).
[3] 322 U.S. 533 (1944).
[4] 8 Wall. 168 (1868).

is not regulated by State law." The courts have interpreted this proviso as triggering antitrust immunity with something far short of the active State regulatory supervision that is ordinarily needed under the judicially-created "state action doctrine."

While the courts have limited the scope of what constitutes the business of insurance for purposes of the exemption to the risk-transferring function of the insurer-insured relationship,[5] they have held that rates, coverage, and other key policy terms are all covered by it.[6]

The McCarran-Ferguson exemption has been invoked by insurers to shield from legal scrutiny alleged price fixing, market division, and other anticompetitive behavior.[7] For example:

In *Schwartz v. Commonwealth Land Title Insurance. Co.*[8] the court dismissed a price fixing claim brought by title insurance vendors alleging that insurance companies had used a rating bureau as an intermediary to fix the price of the closing fees charged to sellers of real estate at inflated levels.

In *Steingart v. Equitable Life Assurance Society,*[9] the court dismissed a suit by policyholders alleging price fixing by mutual life insurance companies.[10]

In *Grant v. Erie Insurance Exchange,*[11] the court dismissed a claim alleging conspiracy among insurance companies to deny work loss benefits to individuals killed in motor vehicle accidents.[12]

In *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island,*[13] the court overturned a jury verdict against the dominant health insurer for using its monopoly power to put financial pressure on area employers to refuse to do business with a competing HMO.

In *Feinstein v. Nettleship Co. of Los Angeles,*[14] the court affirmed the dismissal of a claim by physicians that an insurer had monopolized the market for medical malpractice insurance by forcing the local medical association to deal with it exclusively in order for the association's members to obtain coverage.

RECONSIDERATION OF THE MCCARRAN-FERGUSON ANTITRUST EXEMPTION

Criticism of the antitrust exemption and concerns about its harmful effects began to arise even before the McCarran-Ferguson Act became law. During the final Senate debates, Senator Claude Pepper of Florida expressing concern that the conferees had quietly transformed a temporary moratorium into a permanent exemption,

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[5] Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129 (1982); Hahn v. Oregon Physicians Service, 689 F.2d 840 (C.A.9 (Or.) 1982), cert. denied, 462 U.S. 1133.

[6] McIlhenny v. American Title Ins. Co., 418 F.Supp. 364 (E.D.Pa. 1976).

[7] Jay Angoff, Insurance Against Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property-Casualty Insurance Industry, 5 Yale J. on Reg. 397, 402 (1988).

[8] 374 F. Supp. 564 (E.D. Pa. 1974).

[9] 366 F. Supp. 790 (S.D.N.Y. 1973).

[10] See also Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178 (6th Cir. 1971); Fleming v. Travelers Indem. Co., 324 F. Supp. 1404 (D. Mass. 1971); and California League of Indep. Ins. Producers v. Aetna Casualty & Sur. Co., 175 F. Supp. 857 (N.D. Cal. 1959).

[11] 542 F. Supp. 457 (M.D. Pa. 1982).

[12] See also Dexter v. Equitable Life Assurance Soc'y, 527 F.2d 233 (2d. Cir. 1975) (McCarran-Ferguson required dismissal of allegations of a tying violation against an insurance company that required the purchase of unrelated life insurance policies in order to secure a mortgage loan); Lawyers Title Co. v. St. Paul Title Ins. Corp., 526 F.2d 795 (8th Cir. 1975) (McCarran-Ferguson required dismissal of alleged predatory pricing tactics by a title insurance company).

[13] 692 F. Supp. 52 (D.R.I.1988), aff'd, 883 F.2d 1101 (1st Cir. 1989).

[14] 714 F.2d 928 (9th Cir. 1983).

giving "the States the privilege of enacting some mild form of legislation, which they may call regulatory, thereby defeating the purpose of the *[South-Eastern Underwriters]* decision," [15] and struggled in vain to persuade his colleagues to send the bill back to conference to remove the newly added phrase.

Reconsideration of the exemption began in earnest in the mid-1970's. A Department of Justice study issued in early 1977 advocated a move toward increasing reliance on price competition, pointedly questioning whether the exemption was in the public interest.[16] Two years later, a Presidentially-appointed National Commission for the Review of Antitrust Laws and Procedures issued a report calling, with near unanimity, for legislation repealing the exemption while affirming the lawfulness of a limited number of essential collective activities that did not raise competitive concerns—chief among them the collection and use of historical loss data.[17]

More recently, in the 2007 report of the Congressionally-created Antitrust Modernization Commission [18] (AMC), AMC Commissioner Jonathan Jacobson, joined by Commissioners Debra Valentine and John Warden, elaborating on the AMC's recommendation that all antitrust exemptions be revisited with a strong presumption of disfavor, called special attention to the McCarran-Ferguson exemption. They stated that it has "outlived any utility [it] may have had and should be repealed." [19] In a separate statement, Commissioner John Shenefield called it "among the most ill-conceived and egregious examples" of antitrust exemptions and said its repeal "should not be delayed." [20]

The National Association of Attorneys General has long urged Congress to "repeal the special immunity from the antitrust laws granted under the McCarran-Ferguson Act to the insurance industry and to subject insurance companies to the rules of the competitive marketplace applicable to other firms." [21]

Reconsideration of the exemption as it applies to health insurers and medical malpractice insurers is particularly timely now, as Congress considers other measures to reform the health insurance marketplace. According to a recent study by the American Medical Association, there have been more than 400 mergers among health care insurers in the past 14 years.[22] Fully 96 percent of all health insurance markets are "highly concentrated," at levels often far exceeding the thresholds that trigger antitrust concerns.[23] Mean-

[15] 91 Cong. Rec. 1443 (1945).

[16] U.S. Department of Justice, The Pricing and Marketing of Insurance (1977).

[17] Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures 225 (1979).

[18] The AMC was a bipartisan commission created by Congress in Pub. L. No. 107–273 to identify and study significant issues of antitrust law.

[19] Antitrust Modernization Commission, Report and Recommendations 422 (2007).

[20] Id. at 442.

[21] E.g., National Association of Attorneys General, Policy Positions: A Compilation of Actions Taken on Legislative and Other Issues Through Adopted Resolutions 17 (1993). This position has been reaffirmed repeatedly, as recently as 2007.

[22] American Medical Association, Competition in Health Insurance: A Comprehensive Study of U.S. Markets 2007 Update 1 (2007), available at http://www.ama-assn.org/ama1/pub/upload/mm/368/compstudy_52006.pdf.

[23] Common Dreams.org, Study: Health Insurers Are Near Monopolies, April 18. 2006, available at http://www.commondreams.org/headlines06/0418-09.htm. See also Health Care for America NOW!, Premiums Soaring in Consolidate Health Insurance Market, available at http://hcfan.3cdn.net/5d6e7f78cc5132f791_dem6bxw84.pdf.

while, the cost of health insurance premiums has increased almost 87% in just the last 6 years.[24]

PREVIOUS JUDICIARY COMMITTEE EFFORTS TO SCALE BACK THE INSURERS' EXEMPTION

In the 100th Congress, the Committee on the Judiciary's Subcommittee on Monopolies and Commercial Law favorably reported H.R. 2727, the Fairness in Insurance Act of 1987. As reported, the bill would have removed insurers' antitrust immunity with respect to price-fixing, monopolization, allocation of territories, and unlawful tying arrangements. It also created safe harbors for the joint collection of historical loss data and loss development data.

In the next two Congresses, the full Committee favorably reported similar versions of the bill, H.R. 1663 in the 101st Congress and H.R. 9 in the 102d.

In the 103d Congress, a version of the bill was reported favorably by the Judiciary Committee and incorporated into the draft of H.R. 3600, the "Health Security Act," being prepared for consideration by the full House. The 103d Congress adjourned before H.R. 3600 could be considered.

Other bills to repeal or scale back the exemption have been introduced in subsequent Congresses, including more recently the Insurance Industry Competition Act of 2007[25] and the Insurance Industry Competition Act of 2009.[26] Like the earlier bills reported by the Judiciary Committee, these bills addressed the exemption in all sectors of the insurance industry, not just health care sectors.

Chairman Conyers and two cosponsors, Representatives Hank Johnson and Diana DeGette, introduced H.R. 3596 on September 17, 2009, the same day that identical legislation, S. 1681, was introduced by Senator Patrick Leahy and seven others.[27] As introduced, the bill would eliminate the antitrust immunity provided under the McCarran-Ferguson Act as to price fixing, bid rigging, and market allocation by health or medical malpractice insurers, while leaving unchanged the antitrust immunity for information-gathering and rate-setting activities by State insurance commissions and other State regulatory entities with authority to set insurance rates.

On March 18, 2009, Representative Peter DeFazio, along with seven co-sponsors,[28] introduced the Insurance Industry Competition Act, H.R. 1583, which would repeal the antitrust exemption completely for all sectors of insurance industry.

On September 16 and 17, 2009, Representative Dennis Kucinich chaired a two-day hearing of the Domestic Policy Subcommittee of the Committee on Oversight and Government reform related to this issue. On the first day, the Subcommittee heard from a number of doctors, patients, and health policy experts about their treatment and experiences with State-regulated health insurance companies and about the policies and actions of State-regulated health insurers that interfere with Americans' ability to obtain affordable

[24] Id.
[25] S. 618, 110th (2007); H.R. 1081, 110th (2007)
[26] H.R. 1583 (2009).
[27] Sens. Cantwell, Durbin, Feingold, Feinstein, Reid, Schumer, and Specter.
[28] The original co-sponsors of H.R. 1583 were Representatives Baird, Kaptur, Nadler, Taylor, Hare, Massa, and Slaughter. In addition to Judiciary, the bill has secondary referrals to the Committees on Energy and Commerce and Financial Services.

health care—even Americans with insurance coverage. Wendell Potter, a former Cigna executive who has become a leading critic of health insurance industry practices, also testified. On the second day, executives from a number of the Nation's largest insurers—United Healthcare, Wellpoint, Aetna, Humana, Cigna, and Healthcare Service Corp.—testified regarding their practices.

On October 8, 2009, the House Judiciary Committee held a legislative hearing on H.R. 3596. Testimony was heard from James D. Hurley, with the American Academy of Actuaries; Dr. Peter Mandell, of the California Orthopaedic Association; Ilene Knable Gotts, chair of the American Bar Association (ABA) Section on Antitrust Law; and David Balto, with the Center for American Progress. Ms. Gotts reiterated the ABA's long-held view that the insurance industry should not be the beneficiary of an antitrust exemption.

On October 14, 2009, the Senate Judiciary Committee held a hearing titled "Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry." Senate Majority Leader Harry Reid and the Assistant Attorney General for the Department of Justice's Antitrust Division, Christine Varney, testified, as well as consumer advocate Robert Hunter and law professor Lawrence Powell. Assistant Attorney General Varney testified that the rationale for McCarran-Ferguson had eroded—"There are strong indications that possible justifications for the broad insurance antitrust exemption in the McCarran-Ferguson Act when it was enacted in 1945 are no longer valid today"—and noted that "the Department of Justice generally supports the idea of repealing antitrust exemptions."[29] Senator Reid urged support for the Senate bill, of which he is a cosponsor.

In his October 17, 2009, radio address, President Barack Obama criticized health insurance companies for "earning [large] profits and bonuses while enjoying a privileged exemption from our antitrust laws, a matter that Congress is rightfully reviewing."[30]

Hearings

The Subcommittee on Courts and Competition Policy, Committee on the Judiciary, held one day of hearings on H.R. 3596 on October 8, 2009. Testimony was received from James D. Hurley, a member of the Medical Professional Liability Subcommittee of the American Academy of Actuaries, Peter J. Mandell, former President of the California Orthopaedic Association, Ilene Knable Gotts, Chair of the Section of Antitrust Law, American Bar Association, and David Balto, Senior Fellow at the Center for American Progress.

Committee Consideration

On October 21, 2009, the Committee met in open session to consider the bill H.R. 3596. Representative Dan Lungren offered 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. These safe harbors were an integral part of the bills the Judiciary

[29] Oct. 14, 2007, Prepared Testimony of Assistant Attorney General Christine Varney before the Senate Judiciary Committee.

[30] Peter Baker, Obama Threatens Insurers' Anti-Trust Exemption, N.Y. Times, Oct. 18, 2009.

Committee considered in the 100th–103d Congresses. The amendment was agreed to by voice vote. The Committee ordered the bill favorably reported, as amended by the Lungren amendment, by a roll call vote of 20 to 9, 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 the following recorded vote occurred during Committee consideration of H.R. 3596:

1. Motion to report H.R. 3596 favorably as amended. Passed 20 to 9.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Gutierrez			
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz	X		
Mr. Maffei	X		
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Lungren	X		
Mr. Issa			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert	X		
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Rooney	X		
Mr. Harper		X	
Total	20	9	

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. 985, 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, October 23, 2009.

Hon. JOHN CONYERS, Jr., *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. 3596, the Health Insurance Industry Antitrust Enforcement Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 3596—Health Insurance Industry Antitrust Enforcement Act of 2009.

CBO estimates that implementing H.R. 3596 would have no significant cost to the Federal Government. Enacting the bill could affect direct spending and revenues, but any such effects would not be significant.

Companies that provide health and medical malpractice insurance are currently exempt from the Federal antitrust laws insofar as they are engaging in the business of insurance. H.R. 3596 would prohibit such companies from price fixing, bid rigging, or allocating markets while providing coverage for health insurance or medical malpractice claims. The bill's restrictions would not apply to certain collaborative activities involving actuarial services.

Because the bill would establish a new offense, the government would be able to pursue cases that it otherwise would not be able to prosecute. Based on information from the Department of Justice and insurance industry experts, CBO expects that H.R. 3596 would apply to a small number of offenders, however, so any increase in

costs for law enforcement, court proceedings, or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 3596 could be subject to criminal fines, the Federal Government might collect additional amounts if the legislation is enacted. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent. CBO estimates that any additional revenues and direct spending would not be significant because of the small number of cases likely to be affected.

H.R. 3596 could affect the costs of and premiums charged by private health insurance companies; whether premiums would increase or decrease as a result is difficult to determine, but in either case the magnitude of the effects is likely to be quite small. To the extent that insurers would otherwise engage in the prohibited practices and be prevented from doing so by enactment of this bill, premiums might be lower. (That effect is likely to be small because State laws already bar the activities that would be prohibited under Federal law if this bill was enacted.) To the extent that insurers would become subject to additional litigation, their costs and thus their premiums might increase. Based on information from the Justice Department, the Federal Trade Commission, the National Association of Insurance Commissioners, consumer groups, and private attorneys, CBO estimates that both of those effects would be very small, and thus that enacting the legislation would have no significant effect on the premiums that private insurers would charge for health insurance. Changes in those premiums can affect Federal revenues because of the favorable tax treatment that is accorded to employment-based coverage under current law, but any such effects of the legislation would be negligible in CBO's estimation.

H.R. 3596 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

H.R. 3596 would impose a private-sector mandate, as defined in UMRA, on issuers of health insurance and medical malpractice insurance by partially repealing their exemptions from Federal antitrust laws. 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. CBO estimates the cost of this mandate would not exceed the annual threshold established in UMRA for private-sector mandates ($139 million in 2009, adjusted annually for inflation).

The CBO staff contacts for this estimate are Mark Grabowicz (for Federal costs) and Patrick Bernhardt (for the private-sector impact). The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

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. 3596 is intended to eliminate the antitrust immunity provided to the insurance industry under the McCarran-Ferguson Act in instances of price fixing, bid rigging, and market allocation by health or medical mal-

practice insurance issuers, and to allow appropriate antitrust enforcement and private actions to deter, arrest, and remedy such practices.

Constitutional Authority Statement

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clauses 3 and 18 of the Constitution.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2102 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:

Sec. 1. Short Title. This section designates the short title of the bill as the "Health Insurance Industry Antitrust Enforcement Act of 2009."

Sec. 2. Purpose. This section states that the purpose of the bill is to prohibit price fixing, bid rigging, or market allocation by issuers of health and medical malpractice insurance and to allow government enforcement and private civil actions to prevent and deter such conduct.

Sec. 3. Prohibition on Anti-Competitive Activities. This section removes acts of price fixing, bid rigging, and market allocation by health insurance issuers or medical malpractice insurance issuers from the broad antitrust immunity provided to the insurance industry under the McCarran-Ferguson Act.

Sec. 4. Application to Activities of State Commissions of Insurance and Other State Insurance Regulatory Bodies. This section preserves current antitrust treatment under McCarran of information-gathering and rate-setting activities by any State regulatory entity with authority to set insurance rates, such as State insurance commissions.

Sec. 5. Exclusions. This section makes clear that the current antitrust treatment under McCarran remains unchanged for specified conduct involving compilation and dissemination of historical loss data and development of a loss development factor, as well as performance of actuarial services that do not involve a restraint of trade.

Additional Views

We did not oppose H.R. 3596, the "Health Insurance Industry Antitrust Enforcement Act of 2009," because we think that health insurers and medical malpractice insurers should be allowed to fix prices, rig bids, or allocate markets. No industry in America—including the insurance industry—should be able to engage in those practices.

Rather, we opposed H.R. 3596 because we are concerned about the unintended consequences of a federal ban on conduct that existing state regulatory and antitrust law already prohibits. We are

also concerned about why this bill singles out a narrow subset of insurers for McCarran-Ferguson repeal and what that says for the future of state insurance regulation.

The McCarran-Ferguson Act's federal antitrust exemption allows small and medium-sized insurers to aggregate information for underwriting purposes so they can compete effectively against larger national companies. In other words, McCarran-Ferguson promotes competition by making small and medium-sized underwriters viable.

McCarran-Ferguson is not intended to reduce competition through price-fixing, bid-rigging, or market allocation. Instead, the Act clarifies that insurers are regulated by the states, which ensure that firms do not engage in these per se antitrust violations, either through regulation or through their own laws.

Antitrust exemptions should be rarely granted or created, and if they are necessary, should be written in as limited a way as necessary to meet a compelling public policy goal. That said, when repealing an existing antitrust exemption, we must be very careful of the unintended consequences of our actions.

This is a real concern. For more than 60 years, the states have regulated the business of insurance and built a record that provides guidance about permissible activity. In fact, the National Association of Insurance Commissioners submitted a letter for the record in which they stated, "bid rigging, price fixing and market allocation is of great concern to state insurance regulators and . . . such practices are harmful to consumers and cannot be tolerated. *However, we want to assure you that these activities are not permitted under the McCarran-Ferguson Act and are not tolerated under state law.* Indeed, state insurance regulators actively enforce prohibitions in these areas." By inviting federal intervention, this bill creates a dual regulatory system that only confuses the health insurance and medical malpractice industry.

That is particularly true given that many key terms in the legislation, including "issuers of medical malpractice insurance," "price fixing," "bid rigging," and "market allocations" are undefined. While the latter three phrases are used as terms of art in antitrust litigation, there will be significant litigation to define what they mean as a part of this legislation. The amendment that the Committee adopted goes some way toward addressing these concerns. However, other legitimate activities may be punished or otherwise deterred in the trial attorneys' efforts to collect treble damage awards from the health insurance and medical malpractice insurance companies.

According to news reports, Speaker Pelosi plans to fold H.R. 3596 into a larger health care bill to be considered by the House of Representatives next month. One hearing on the subject and no subcommittee markup was not an adequate basis on which to bring this bill to a Full Committee markup, much less to the Floor as part of a larger package. In fact, what little record has been established on this bill has shown that medical malpractice should perhaps not be covered by it at all. That is because many doctors choose to either self-insure or buy their medical liability insurance through mutual companies made up of other doctors. Why would these doctors try to fix prices, rig bids, or allocate territories if the only impact of those practices would be to pay higher medical mal-

practice premiums? The short answer is that they would not, since they would only be stealing from themselves. That was, in essence, the testimony of the Majority's own witness, Dr. Peter J. Mandell, who advocated eliminating medical malpractice insurers from the bill.

It is unclear whether health insurers should be subject to the bill either, given that no health insurance organization testified at the lone hearing on the subject. What is clear is that this legislation targets an industry that is highly unpopular, both with the American people, but particularly with this Administration. During his weekly radio address, President Obama strongly chastised the health insurers for criticizing his health reform plans and suggested that Congress was right to consider repealing McCarran-Ferguson for health insurers. But picking on an industry because they are unpopular or because they disagree with you should not be the basis of making laws that could affect not just the unpopular business, but, ultimately, all insurers.

Health care reform is an important issue and the House Judiciary Committee does have an important role to play in that discussion. The better focus for our attention is on the frivolous lawsuits against medical personnel that create real problems and real costs. According to a study by the Harvard School of Public Health, 40 percent of medical malpractice suits filed in the United States are "without merit." So every doctor must purchase malpractice insurance at great expense to protect against frivolous lawsuits.

A Department of Health and Human Services study found that unlimited excessive damages add $70 billion to $126 billion annually to health care costs. Doctors are so concerned about frivolous lawsuits that they order unnecessary tests and procedures that do not benefit the patient. HHS estimates the national cost of defensive medicine is now more than $60 billion.

All these costs are then passed on to patients in the price of health care.

A report released by the Congressional Budget Office just a week before the Committee's consideration of H.R. 3596 found that tort reforms would reduce health care spending by an estimated $11 billion in 2009. The CBO also found that a national tort reform package would reduce federal budget deficits by roughly $54 billion over the next 10 years. Among the reforms reviewed in the study, CBO considered a cap on pain and suffering damages first on its list of tort reforms that would lead to significant cost savings.

The Committee is rushing consideration of H.R. 3596. This Committee has not established the record for the need for this legislation. Nor has it adequately addressed its potential unintended consequences. The Committee could have spent its limited time investigating a more pressing problem in health care: runaway medical malpractice costs caused by excessive damage claims in often frivolous lawsuits. But it did not. The American people deserve better.

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