

PUBLICATION

Will 2016 Be the Year for McCarran Repeal?

March 1, 2016

As the second session of the 114th Congress begins to pick up steam, five bills are currently pending in the House that, if enacted, would repeal the McCarran-Ferguson Act's antitrust exemption for at least some insurers. There are bills that have been introduced by Democrats (H.R. 99 and 2462), bills by Republicans (H.R. 494, 2653 and 3682), stand-alone bills (H.R. 99, 494 and 2462), and bills that are part of larger legislative proposals (H.R. 2653 and 3682). All told, Congress certainly has a variety of options and alternatives if it decides to make modifications to the McCarran-Ferguson Act. Will this be the year when McCarran repeal legislation – often introduced but never enacted – finally crosses the finish line?

Enacted into law in 1945, the McCarran-Ferguson Act provides insurers with a limited exemption from the federal antitrust laws. Specifically, Section 3 of the Act (15 USC 1013), provides that the "business of insurance" is exempt from the federal antitrust laws provided that such conduct is "subject to state regulation" and does not constitute an act of "boycott, coercion or intimidation." The exemption has long been a lightning rod for controversy, but calls for its repeal, particularly with respect to its application to health insurers, have been loudest and most sustained since the passage of the Affordable Care Act.

Reflecting this increase in zeal for McCarran repeal, five such bills, all introduced in the first session of the 114th Congress, sit poised for Congressional action this year. The first bill (H.R. 99), was introduced by Representative John Conyers (D – MI) in January of 2015. The "Health Insurance Industry Enforcement Act" would repeal McCarran's antitrust exemption for both health insurers and medical malpractice insurers, and is similar to McCarran repeal bills that Representative Conyers has introduced in prior years. Representative Conyers, a strong voice for McCarran repeal, has repeatedly claimed that passing his proposed legislation would "end the mistake that Congress made in 1945 when it added an antitrust exemption for insurance companies."

A second bill, the "Competitive Health Insurance Reform Act" (H.R. 494), was introduced by Representative Paul Gosar (R – AZ) in January 2015 as well. Representative Gosar's bill, like Representative Conyers' bill, would also repeal health insurers' antitrust exemption, but would not modify the exemption for medical malpractice insurers (or any other insurers). Echoing Representative Conyers' sentiments about McCarran, when introducing H.R. 494 Representative Gosar stated that "there is no reason in law, policy or logic for the insurance industry to have a special exemption" from the antitrust laws.

Another long-time proponent of McCarran repeal, Representative Peter DeFazio (D – OR), also has a McCarran repeal bill pending in the House. Representative DeFazio's bill the "Health Insurance Industry Fair Competition Act" (H.R. 2462) – was introduced last May. Like Representative Gosar's bill, Representative DeFazio's bill would repeal the exemption only as to health insurers, leaving it intact as to other insurers.

In addition, two additional bills that are much larger in scope than the three previously identified bills, but also contain McCarran repeal provisions, were introduced later last year. H.R. 2653, the "American Health Care Reform Act," was introduced by Representative Phil Roe (R – TN) in June of 2015. This legislation's principal focus is the repeal of the Affordable Care Act, but buried deep in its provisions, at Section 411, is a provision that would also repeal McCarran's antitrust exemption for health insurers and dental insurers. Representative Roe, like Representative Gosar, was a health care provider prior to entering Congress (in Representative

Roe's case, a physician) and perhaps for this reason, Representative Roe has taken a special interest in McCarran's application to health insurers.

Finally, in October of 2015, Representative Brett Guthrie (R – KY) introduced the "Reducing Employer Burdens, Unleashing Innovation, and Labor Development Act," (H.R. 3682). While this bill is even broader in scope than Representative Roe's legislation, similar to H.R. 2653, H.R. 3682 would also repeal the Affordable Care Act and, in section 723 of the bill, would repeal McCarran's antitrust exemption for health insurers. However, unlike H.R. 2653, Representative Guthrie's bill would also prohibit private class action lawsuits against health insurers for antitrust violations.

At present, each of these five bills is currently pending in the House Judiciary Committee for further action, and at this time, none of them have been scheduled for a hearing or a vote. (The larger bills are also before one or more other committees as well.) Whether any of these bills will be acted upon before the session ends later this year remains to be seen, and no companion legislation currently exists in the Senate.

Nevertheless, given the bi-partisan support for McCarran repeal this Congress (as reflected by the existence of both Republican and Democrat proposals), the prospects for action on McCarran are certainly enhanced. In addition, while the larger bills that contain McCarran repeal provisions (H.R. 2653 and H.R. 3682) are not likely to gain bi-partisan support in their current form given their Affordable Care Act repeal provisions (and even if passed, President Obama would likely veto any bill that would repeal the Affordable Care Act), the McCarran repeal provisions in those bills could be reintroduced as amendments to other, less controversial bills that are likely to come up for a vote later this year.

Ultimately, only time will tell whether the possibility of McCarran repeal turns out to be another "false alarm" this Congress, as it has been several times in the last decade. However, it certainly appears that the prospects for a repeal of McCarran's antitrust protections for health insurers has not been this great since 2010, when such legislation passed in the House by a large majority (but failed to be voted on in the Senate). Will this finally be the year for McCarran repeal? Stay tuned.