

Insurance Antitrust

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March 2016

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Will 2016 Be the Year for McCarran Repeal?

By [James M. Burns](#)

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.”

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### Will 2016 be the Year for McCarran Repeal?, *continued*

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.

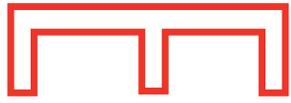


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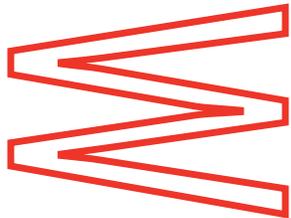
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## Will 2016 be the Year for McCarran Repeal?, *continued*

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.



## UnitedHealth Settles NY Attorney General Antitrust Probe

By [James M. Burns](#)

In early January, the New York Attorney General’s Office announced that it had reached an agreement with UnitedHealth that would conclude the AG Office’s investigation into UnitedHealth’s marketing of elder care and nursing home insurance products. The investigation focused on whether UnitedHealth had conditioned a nursing home’s ability to obtain in-network status in UnitedHealth’s Medicare Advantage plans on its participation in UnitedHealth’s institutional special needs plans (“I SNP” plans), which provide seniors with nursing home care for chronic conditions for periods over 90 days. The Attorney General’s Office maintained that UnitedHealth’s practice had the potential to limit the ability of other insurers offering “I-SNP” plans to compete in that market, and that United Health’s conduct ultimately limited consumer choice for such services.

While denying any wrongdoing, UnitedHealth agreed to pay a fine of \$100,000 to the New York Attorney General’s Office to resolve the investigation. In addition, UnitedHealth agreed that, going forward, it would not “(a) require participation in the United I-SNP as a necessary condition for participation by a [nursing home] in United’s network for any non-I-SNP insurance plan, (b) terminate or decline to renew the contract for non-I-SNP United insurance plans on that basis, or (c) penalize a [nursing home] for declining to participate in United’s I-SNP insurance plans by offering the [nursing home] lower reimbursement rates than those offered to similarly situated [nursing homes] who do not participate in United’s I-SNP.” The agreement further provides that these restrictions on UnitedHealth’s conduct shall remain in effect for a period of seven years.



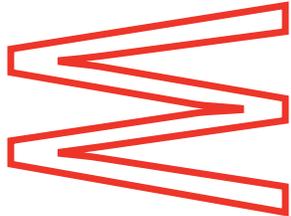
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# California Insurance Department Holds Hearing on Centene/Health Net Merger

By [James M. Burns](#)



Since the summer of 2015, a great deal of attention has focused on whether the proposed Anthem/Cigna and Aetna/Humana mergers will be approved by federal and state antitrust regulators. These transactions have been the subject of Congressional hearings and state insurance department hearings, and to date, while some states have approved the transactions, the DOJ Antitrust Division’s examination of each of these mergers remains ongoing without any indication regarding how or when it will ultimately be completed.

In the meantime, the proposed merger of Centene and Health Net, which was announced at approximately the same time as the Anthem and Aetna deals, and is itself quite a significant deal (valued at almost \$7 billion), has received far less attention and scrutiny. However, the Centene/Health Net transaction requires many of the same regulatory approvals as do the Anthem and Aetna deals, and the Centene/Health Net deal has already been cleared for antitrust approval by federal regulators and every state from which the parties require approval, except California.

On January 22, the California Department of Insurance held a hearing to consider the implications of the deal. Notably, the California Department of Insurance has oversight over this deal because Health Net is domiciled in California. The Insurance Department does not have oversight over the Anthem and Aetna deals because they are not domiciled in California; those transactions require approval from the California Department of Managed Health Care, which has concurrent authority over the Centene deal with the Insurance Department.

During a six-hour public hearing, California Insurance Commissioner Dave Jones heard from the parties, their economic experts and various consumer groups regarding the proposed transaction. Commissioner Jones expressed some potential concerns about the Centene/Health Net transaction, and noted that he has the authority to disapprove the transaction in its entirety if he believes it is not in the public interest. Notwithstanding that authority, the more likely result – if past practice holds – would be for the Insurance Commissioner to, at most, impose some conditions on the deal. Such was the case, for example, when Anthem acquired Wellpoint in 2004, with the then-Commissioner John Garamendi agreeing to approve the transaction only after Anthem offered approximately \$100 million in concessions to gain approval and permit the deal to close.

Whether Insurance Department approval will turn out to be nothing more than a “speed bump” in the approval process, or something significantly more, remains to be seen. With the hearing record now closed, Insurance Commissioner Jones’s decision on the proposed transaction is likely to be issued in the next 30 days.





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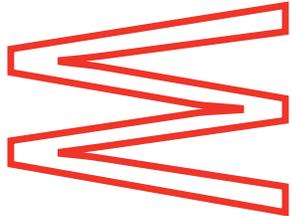
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## DOJ Antitrust Division and FTC Seek Additional Funds and More Attorneys in 2017 Budget

By [James M. Burns](#)



In early February, the DOJ Antitrust Division and the FTC each announced their proposed budget requests for the federal government’s 2017 fiscal year (October 1, 2016 – September 30, 2017). The Antitrust Division and the FTC are each seeking an increase of approximately 10 percent in funding for 2017, which is a significant increase from last year.

Notably, as explained in the DOJ budget request, the Antitrust Division has plans to hire almost 100 additional attorneys (increasing the size of the division from 380 attorneys to 478 attorneys) in the coming year. The DOJ maintains that this additional staffing is necessary to address an increase in workload in both its civil merger enforcement and criminal cartel enforcement programs. A sizable portion of the Antitrust Division’s increased civil merger workload is undoubtedly its review of the proposed Anthem/Cigna and Aetna/Humana mergers, which is ongoing and will likely continue for some time. The FTC budget proposal also includes a request to hire additional employees, although in smaller numbers (20 in total). The majority of those new hires, however, would be dedicated to the FTC’s Bureau of Competition, which reviews mergers at the FTC, thus reflecting an increase in merger-related activity at the FTC as well.



If approved, the Antitrust Division budget request would increase to approximately \$180 million, while the FTC’s funding would increase to approximately \$340 million. Notably, in addition to these requested amounts, the Antitrust Division and the FTC also share the premerger filing fees collected under the Hart-Scott-Rodino Act, which are projected to add approximately \$125 million to each of their overall budgets next year.

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