# Health Insurance Compliance Steps After Antitrust Reform

By **Lisl Dunlop and Thomas Rohback** (April 7, 2021)

Lisl Dunlop

Thomas Rohback

On Jan. 13, the Competitive Health Insurance Reform Act became law, ending over 75 years of federal antitrust protection for health insurers under the McCarran-Ferguson Act.

The McCarran-Ferguson Act exempted from federal antitrust laws the business of insurance if it is regulated by state law and is not an "agreement to boycott, coerce, or intimidate, or [an] act of boycott, coercion, or intimidation."[1]

Supporters of the repeal see a potential for meaningful enforcement changes in the health insurance industry.

The U.S. Department of Justice, in a statement following the repeal's passage, said the "exemption has sometimes been interpreted by courts to allow a range of harmful anticompetitive conduct in health insurance markets," and that the repeal "will assist the Antitrust Division in its mission to enforce the antitrust laws by narrowing this defense."[2]

Now is the right time for insurers to review their antitrust risk exposure and rethink their antitrust compliance programs. There has been a wide range of recent government enforcement actions focused on the health care industry. And, even if an organization's conduct is perfectly legal, overzealous plaintiffs lawyers may view the repeal of McCarran-Ferguson as an opportunity to file antitrust complaints.

A robust and up-to-date compliance program not only helps avoid antitrust lawsuits, but also frames an insurer in a positive light if forced to defend itself against meritless claims, and may also assist in responding to government enforcement.

**Types of Conduct Previously Protected**

Courts have in the past applied the McCarran-Ferguson exemption to preclude several types of antitrust claims. Without analyzing the merit — or lack thereof — of the specific claims, these include:

- Unilateral refusal to cover certain services;[3]
- Agreements to not cover certain products;[4]
- Exclusive broker agreements;[5]

- Plan design and pricing policies that favor certain plans;[6]

- Unilateral refusal to offer a requested plan;[7] and

- Offering a pharmacy benefit that favors an in-house pharmacy.[8]

Many of the claims made in these cases would likely have been dismissed under existing antitrust law even if there had been no McCarran-Ferguson exemption. Most of these types of claims are analyzed under the rule of reason, requiring an assessment of both harms to competition and procompetitive effects, and not automatically illegal, which can be a relatively high bar to success.

Whether an antitrust rule-of-reason claim is meritorious is very much a fact-based question. Further, certain types of information-sharing and other competitor collaborations can be procompetitive, and less likely to be condemned under a rule-of-reason analysis.

The repeal also includes some important exceptions for competitor collaboration that may protect some types of conduct — joint efforts to collect loss data, determine loss development factors, perform some actuarial services and develop some standard insurance policy forms.

**Analyzing Risk in a World Without McCarran-Ferguson**

America's Health Insurance Plans — the national trade association representing health insurers — has warned that the repeal will "unnecessarily add layers of bureaucracy, destabilize markets, create conflicting federal and state oversight requirements, and lead to costly litigation."[9]

This is the worst-case scenario, but not the most likely. Each insurer will need to judge its level of risk individually, and the actions they take now will shape how this repeal might ultimately affect them.

Without McCarran-Ferguson protection, it will be important to take a close look at the antitrust merits of any conduct that may be in question. While approximately 150 years of federal antitrust exemption may have limited the merits-based precedent specific to health insurers, certain antitrust claims may fail if applied to any industry.

Even so, the plaintiffs bar may view this repeal as an invitation to launch antitrust claims. For this reason, health insurers should consider undertaking a broad review of all their business practices with a specific focus on the federal antitrust laws. Below are some suggested steps to help health insurers get started on an antitrust compliance checkup.

***1. Conduct a risk assessment of areas and practices in the organization that may pose heightened antitrust risks.***

Even if an insurer relied on McCarran-Ferguson for federal protection, insurers were likely still complying with state antitrust laws that are similar to the federal laws. Nonetheless,

antitrust enforcers are broadening the scope of investigations, even bringing criminal indictments for some offenses. It is an opportune time for an in-house antitrust audit.

***2. Identify areas and practices that may benefit from remaining antitrust protections.***

As noted above, the repeal specifically left in place certain protections for health insurer collaboration.

The applicability of some of these protections may require in-depth analysis, such as whether jointly performing certain actuarial services "does not involve a restraint of trade" and whether agreeing to establish a standard policy form "is not to adhere to such standard form or require adherence to such standard form."[10]

Insurers can use these exceptions and general antitrust guidelines to make sure these practices remain protected going forward.

***3. Analyze whether conduct that is no longer protected under McCarran-Ferguson actually violates federal antitrust laws before ending procompetitive business practices.***

Just because conduct was previously protected under McCarran-Ferguson does not mean it would have violated antitrust laws if not protected. The conduct may be unlikely to impact competition in a manner that would fall on the wrong side of a rule-of-reason analysis.

Other federal antitrust exemptions, such as the state-action doctrine and filed-rate doctrine, also may protect some conduct. In other words, there are still valuable defenses even if the threshold defense of McCarran-Ferguson is no longer available.

***4. Update internal antitrust compliance policies.***

Even if all of an insurer's conduct is legal under the antitrust laws, an up-to-date internal antitrust compliance policy will best protect an insurer and its employees.

A compliance program will not only protect an insurer from running afoul of antitrust laws, but will also best position an insurer in a positive light when faced with meritless complaints and investigations, and in some circumstances may mitigate penalties for antitrust violations that have occurred.

---

*Lisl Dunlop and Thomas Rohback are partners at Axinn Veltrop & Harkrider LLP.*

*Former Axinn member Adam Cella contributed to this article. He is now serving as attorney adviser to Commissioner Christine Wilson of the Federal Trade Commission.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] 15 U.S.C. §§ 1012-1013.

[2] Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Welcomes Passage of The Competitive Health Insurance Reform Act of 2020, (January 13, 2021), https://www.justice.gov/opa/pr/justice-department-welcomes-passage-competitive-health-insurance-reform-act-2020.

[3] See, e.g., Health Care Equalization Comm. of the Iowa Chiropractic Soc'y v. Iowa Med. Soc'y, 851 F.2d 1020 (8th Cir. 1988).

[4] LifeWatch Servs., Inc. v. Highmark, Inc., No. CV 12-5146, 2020 WL 7690179 (E.D. Pa. Dec. 28, 2020).

[5] Oscar Ins. Co. of Fla. v. Blue Cross & Blue Shield of Fla., Inc., 413 F. Supp. 3d 1198 (M.D. Fla. 2019).

[6] Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101 (1st Cir. 1989).

[7] Anglin v. Blue Shield of Va., 693 F.2d 315 (4th Cir. 1982).

[8] Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276 (9th Cir. 1983).

[9] AHIP Issues Statement on Repeal of McCarran-Ferguson Act Exemptions for Business of Health Insurance, America's Health Insurance Plans, AHIP (December 22, 2020) (quoting Matt Eyles, President and CEO of AHIP),https://www.ahip.org/ahip-issues-statement-on-repeal-of-mccarran-ferguson-act-exemptions-for-business-of-health-insurance/.

[10] Competitive Health Insurance Reform Act of 2020, Pub. L. No. 116-327, § 2(a), 134 Stat. 5097, 5097 (to be codified at 15 U.S.C. § 1013(c)(2)(A-D)).