ADA American Dental Association®

STATEMENT OF THE

AMERICAN DENTAL ASSOCIATION

TO THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS

APRIL 16, 2013

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The American Dental Association (ADA) is pleased to submit this written testimony for inclusion in the record of the Subcommittee on Antitrust, Competition Policy and Consumer Rights' hearing on "Oversight of the Enforcement of the Antitrust Laws" held on April 16, 2013.

The ADA believes it is important to restore application of the full range of federal antitrust laws to the business of health insurance in order to encourage competition and protect consumers. Specifically, the ADA supports the approach to reform taken in legislation introduced in the House of Representatives by Rep. Paul Gosar (R-AZ) titled the "Competitive Health Insurance Reform Act of 2013," H.R. 911. The Association requests support from members of the subcommittee for introduction of a companion bill to H.R. 911 in the Senate.

The ADA is America's leading advocate for oral health. Established in 1859, the ADA today represents approximately 157,000 licensed dentists in the United States. Through its numerous initiatives, the ADA supports programs to improve access to high quality dental care for all Americans and to inform all Americans about their oral health. Consequently, the ADA has a real and abiding interest in promoting a robustly competitive market for health insurance.

The McCarran-Ferguson Act's antitrust exemption extends to all conduct that constitutes the "business of insurance," not merely the activities of health insurers. Nevertheless, the repeal of the exemption within the health insurance industry is particularly important. H. R. 911 would amend the McCarran-Ferguson Act with respect to the business of health insurance, including dental benefit plans. The current debate regarding rising health care costs requires serious consideration of any and all means to introduce competition and make health insurance affordable for all Americans. An important step toward achieving these objectives is eliminating the unwarranted antitrust exemption that grants health insurers special status, and permits them to ignore the competitive rules that apply to every other business in the United States.

Repeal of the McCarran-Ferguson Act should substantially improve the problem of one-sided federal antitrust enforcement. A 2012 American Medical Association (AMA) study found that anticompetitive market conditions are common among managed care plans, concluding that a significant absence of health insurer competition is present in 70 percent of the metropolitan areas and that in over 65 percent of the metropolitan areas one HMO or one PPO had a 50 percent or greater share of the market. The study points to increased premiums, watered-down benefits and insurers' growing profitability as evidence that highly concentrated markets harm patients and physicians.[1] If health insurance companies have to observe federal antitrust laws to the same extent as U.S. business does generally, they would have to compete more aggressively for purchasers of large group policies by keeping premiums comparatively low and benefits high. Enhanced competition when designing coverage would likely provide for greater selection of treatment options, as well.

Yet, currently, consumers, payers, physicians, and dentists facing health plans with monopoly power have little recourse. If individual providers or practices band together to increase their negotiating clout, they are likely to trigger an antitrust investigation, if not an enforcement action. For decades, however, when health care providers have brought antitrust concerns regarding insurers to the attention of federal enforcers, agency staff has been reluctant to proceed for fear of crossing the line that McCarran-Ferguson draws. Repeal of the Act would enable both the Department of Justice and the Federal Trade Commission to focus their attention on specific anticompetitive practices by insurers that may adversely affect patients and providers, thereby leveling the playing field and ensuring that providers and health plans are abiding by the same set of competitive rules.

Furthermore, the McCarran-Ferguson Act, by severely limiting federal antitrust enforcement in the insurance industry, places virtually all of the oversight responsibility on state regulators. This allocation of responsibility functions relatively more effectively in those states having better developed and funded regulatory structures, and decidedly less well in the ones that do not. Consequently, repeal of McCarran-Ferguson will lead not only to better, but also to more consistent, antitrust enforcement, as health insurer conduct that is currently subjected to antitrust scrutiny in only some states will be subjected to equivalent scrutiny nationwide.

[1] http://www.ama-assn.org/ama/pub/news/news/2012-11-28-study-finds-anticompetitive-market-conditions-common.page.

At the time of its passage in 1945, the McCarran-Ferguson Act was intended to resolve a perceived conflict between state and federal regulation of the insurance industry. Prior to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*,[2] regulation of the insurance industry was regarded as the exclusive province of the states. In *South-Eastern Underwriters*, however, the Court concluded that the insurance industry was within the regulatory reach of the federal government. In response to insurance industry lobbying, Congress subsequently passed the McCarran-Ferguson Act to return exclusive regulatory authority to the states. This precluded for the decades that followed much of the important federal antitrust scrutiny that has been so highly effective in combating anticompetitive conduct in other industrial sectors. Whatever justification there may have been for the McCarran-Ferguson Act exemption originally, it serves no legitimate purpose today, especially because the insurance industry will be able to avail itself of the same "safe harbors" that have been developed over the years and that are utilized by other businesses that are subject to the federal antitrust laws.

Conclusion

The ADA appreciates the opportunity to participate in the "Oversight of the Enforcement of the Antitrust Laws" hearing by submitting this written testimony. We look forward to the opportunity to work with the subcommittee's members and staff to address the important issues raised by the hearing. As stated above, the ADA supports the approach to reform taken in legislation introduced in the House of Representatives by Rep. Paul Gosar (R-AZ) titled the "Competitive Health Insurance Reform Act of 2013," H.R. 911, as it narrowly targets the health insurance industry. The Association requests support from members of the subcommittee for introduction of a companion bill to H.R. 911 in the Senate.

[2] 322 U.S. 533 (1944).