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Revoking Insurers' Antitrust Exemption No Solution to High Premiums

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H.L. Mencken once observed that for every human problem, there is a solution that is "neat, plausible, and wrong." Exhibit A is the House Democrats' successful effort to eliminate the antitrust exemption granted to health insurance companies by the McCarran-Ferguson Act. This law permits insurers to share information without running afoul of federal antitrust laws.

The ostensible purpose of repeal is to increase competition in the health insurance market. But, as the Congressional Research Service [recently noted](#), removing the exemption could actually *reduce* competition, if enough small and mid-size insurers decide they can't enter (or remain in) the market without the ability to share information.

The proposal is widely seen as payback for an October 2009 report by the health-insurance lobby finding that the Democrats' legislation would result in higher premiums. A contemporaneous press release by Sen. Charles Schumer (D-NY) [blared](#), "Two days after health insurance lobby tried to sucker-punch health care reform effort...Schumer [says] revoke health insurance industry's antitrust exemption." The Obama Administration has thrown its support behind the proposal, which will likely pass the House of Representatives today.



Senate Majority Leader Harry Reid (D-NV) [argues that](#) "there is no reason why insurance companies should be allowed to form monopolies and dictate health choices." Rep. Betty McCollum (D-MN) [asserts](#) that repeal "will save every family in America who purchases health insurance at least 10 percent" on their premiums.

A bit of background will help evaluate these claims. In 1944, the Supreme Court overturned prior case law and held that the antitrust laws should apply to insurance.

Congress responded with the McCarran-Ferguson Act, which created a limited exemption from federal antitrust law for the "business of insurance." To qualify for the exemption, each state had to engage in oversight of its insurance market. States responded by creating insurance commissioners and regulating insurer conduct.

The logic of the exemption was that prior to 1944, insurance had been regulated by the states anyway. No one felt any compelling need for intrusion by the federal government, or to allow private litigants to bring federal antitrust suits against insurers. In addition, insurers — particularly smaller insurers — can more accurately price risk if they can share information on their actuarial experience. The exemption created a safety zone for insurers to share information free from the threat of private antitrust suits.

McCarran-Ferguson still left insurers subject to state regulatory oversight and federal antitrust scrutiny for matters that don't involve "the business of insurance." Contrary to Sen. Reid's claim, the federal government already scrutinizes mergers for anticompetitive consequences, and has brought several challenges.

What should we expect if the exemption is repealed?

With states already regulating insurer conduct and mergers, and the feds able to challenge mergers, adding federal antitrust exposure for "the business of insurance" doesn't seem likely to result in much change for the better.

The Congressional Budget Office [concludes](#) that repeal "would have no significant effects on either the federal budget or the premiums that private insurers charged for health insurance." University of Pennsylvania economist [Scott Harrington says](#), "This is just barking up the wrong tree...It might sound good, but I can think of very few things ...that would be less consequential for consumers of health insurance." [Professor Austin Frakt of Boston University notes](#), "Repeal of the exemption is popular, but like a lot of things done in anger, it isn't particularly wise and won't be very effective."

Insurers fear that losing the exemption would force them to deal with an additional (federal) regulator and expose them to private federal antitrust suits. State insurance commissioners also want to keep the exemption, because they prefer to remain the dominant regulator. On the other hand, federal antitrust authorities want to scrap the exemption because they don't like exemptions — although they don't seem to be claiming that repeal would result in greater competition.

The exemption doesn't make much sense. As a matter of antitrust law, we should certainly get rid of it. But doing so is unlikely to increase competition in the market for health insurance. The House vote is more about political payback, and the desire to "do something" rather than a serious attempt to address the real problems that beset the American health system.

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