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Reviving an Old Threat in Health-Insurance Battle

President Obama and some Democrats want to repeal the federal antitrust exemption for insurers. That may not be easy -- or effective

By **Esme E. Deprez**

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As the battle over health-insurance reform heats up, a 64-year-old decision to shield insurers from federal regulation is being reconsidered.


Last week, the insurance industry finally broke with its tentative support for President Barack Obama's health-care reform efforts. The industry's trade group issued a report claiming a bill just passed by the Senate Finance Committee would hike insurance premiums faster than if no bill were passed. The President fired back in his weekly radio and Internet address on Oct. 17, blasting insurers for "making this last-ditch effort to stop reform even as costs continue to rise and our health-care dollars continue to be poured into their profits, bonuses, and administrative costs that do nothing to make us healthy." The industry is "earning these profits and bonuses while enjoying a privileged exception from our antitrust laws," he said, adding that this is "a matter that Congress is rightfully reviewing."

That was a specific reference to efforts to repeal the McCarran-Ferguson Act of 1945, a piece of legislation that exempted insurance companies from federal antitrust scrutiny. Leading Democrats have been targeting McCarran-Ferguson for some time as a way to inject pricing competition into the industry. Senate Majority Leader Harry Reid [D-Nev.] has called it "anticompetitive and damaging to the American economy." House Speaker Nancy Pelosi [D-Calif.] has spoken of "tremendous interest in our caucus" to overturn the act. Senator Patrick Leahy [D-Vt.], chairman of the Senate Judiciary Committee, is behind a bill that would eliminate the antitrust exemption for the insurance industry. Such lawmakers as Senator Charles Schumer [D-N.Y.] want to add it to the broader health-care-reform legislation.

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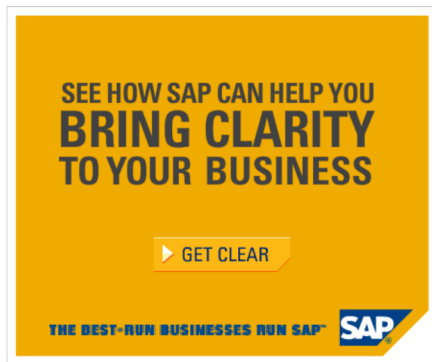
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For a number of reasons, though, repealing McCarran-Ferguson serves better as a threat to get insurers back on board with reform than as an actual device to drive down pricing. "They're sending a signal to the industry -- if you throw everything at us, we'll throw everything at you," says Andy Laperriere, a Washington-based policy analyst and managing director at ISI Group.

Most U.S. Markets: One or Two Main Players

McCarran-Ferguson paved the way for state authorities, rather than federal officials, to regulate the industry. According to a 2005 report by the U.S. Government Accountability Office, the act gave the industry a "very limited exemption from the federal antitrust laws. Although Congress had clear authority to regulate insurance, it determined in McCarran-Ferguson that it would be beneficial, as a matter of public policy, to allow the states to continue regulating and taxing such business in most instances."

Proponents of federal insurance regulation say that its absence is one reason why local markets are dominated by massive insurance companies with little incentive to keep consumer costs low. In January, the American Medical Assn. found in its annual survey of the country's commercial health insurance industry that just one or two companies dominate most markets -- 94% of the 314 metropolitan markets surveyed. "Without rivals to compete against, a large health-insurance company can take advantage of patients by raising premiums and dictating important aspects of patient care without fear of losing business," said AMA President-elect J. James Rohack in a statement.

Health-insurance companies contend that McCarran-Ferguson simply allows them to cooperate with one another to advance policies that are beneficial both to them and their consumers, such as sharing data to prevent fraud, assessing medical malpractice risk, and maintaining consistent policy language. "The argument here is that the insurance industry is unregulated and that is completely untrue," says Robert Zirkelbach, press secretary of America's Health Insurance Plans, or AHIP, the industry's major organization. He says health care is one of the most regulated industries in the country. Rather than addressing competition in the marketplace, he says, "The focus on this issue is a political ploy and designed to distract attention away from the real issues."

Could Repeal Hurt Competition?

Even some independent analysts question whether repealing McCarran-Ferguson alone would be enough to change pricing. The immediate effect would be to subject insurance companies -- including automobile insurers and life insurers -- to federal antitrust law for purposes of conduct, such as day-to-day decisions about how to price products, where to offer them, and what they'll look like, says David Hyman, a professor of law and medicine at the University of Illinois College of Law and adjunct scholar at the Cato Institute. Hyman considers it unlikely that repeal would fundamentally change the nature of the market. While it might increase competition in some markets, he says, it could actually decrease it in others, such as those where small insurers survive because they have access to larger providers' data.

Changes to the act could therefore hurt smaller companies more than larger ones, he says.

Because the act doesn't outlaw the existence of a dominant provider but simply prohibits collusion, says Hyman, a repeal would fall short of breaking up existing market monopolies that are blamed for artificially inflating prices. The current move against McCarran-Ferguson, he says, "has more to do with the politics of pushing back against the insurance industry's opposition to health reform than it does with increasing competition in health-insurance markets."

Repeal wouldn't be a simple process. "There would be quite a bit of confusion and legal action on the state and federal level as regulators try to figure out who's responsible for regulating what," says Joseph Paduda, principal of Health Strategy Associates, a managed-care consulting firm in Madison, Conn. Austin Frakt, a health economist and assistant professor at Boston University's School of Public Health, says lawmakers also would have to take into account the other parties that contribute to driving up health-care costs -- including doctors, hospitals, and drug companies -- which McCarran-Ferguson does not address.

Threatening a repeal of McCarran-Ferguson "doesn't seem like it has been thoroughly thought through," says Frakt. As with every aspect of the proposed reform, the question of whether to regulate insurance at the federal or state level "requires a nuanced approach."

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