

THE McCARRAN-FERGUSON ACT:

What a Repeal Could Mean for Dentistry



By Jeanie Kennedy

On March 23, the U.S. House of Representatives passed Rep. Paul A. Gosar, DDS's (R-Ariz.) sponsored bill, H.R. 372, the *Competitive Health Insurance Reform Act of 2017*, by a vote of 416-7. The House bill was referred to the U.S. Senate Judiciary Committee. As of print date, no Senate language yet exists.

H.R. 372 amends the McCarran-Ferguson Act to declare that nothing in that act modifies, impairs or supersedes the operation of antitrust laws with respect to the business of health insurance, including the business of dental insurance, according to www.congress.gov. Republicans, Democrats, dentists,

physicians, patients, consumers and a broad swath of stakeholders support H.R. 372. The insurance industry is largely against it.

H.R. 372 is under the authority of the House and Senate Judiciary Committees. The bill could be added to health reform legislation. In terms of the reconciliation process, only the jurisdictions of the House Energy and Commerce and House Ways and Means committees were included in the repeal-and-replace bill, the *American Health Care Act of 2017* (H.R. 1628).

The Senate Parliamentarian would likely find H.R. 372 to be non-germane, thus not include it in a larger health care vehicle. However, indications are such that the president of the Senate (Vice

President Mike Pence) could overrule the Senate Parliamentarian and deem H.R. 372's language germane. If this process was employed, the McCarran-Ferguson repeal could be signed into law if it was packaged in a vehicle such as the Affordable Care Act (ACA) repeal and replacement bill. Additionally, the bill could be passed into law as a freestanding bill.

Background

The McCarran-Ferguson Act exempts conduct of the dental insurance industry that is considered to be within the "business of insurance" from the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914, both that ensure competition.

Signed into law March 9, 1945, the act was a response to the Supreme Court decision, *U.S. v. South-Eastern Underwriters Association*. The court held that the federal government could regulate insurance companies under the Commerce clause of the U.S. Constitution. Because of the court decision, there was a perceived conflict of federal vs. state regulation of the insurance industry. Subsequently, Congress acted and passed McCarran-Ferguson into law.

The McCarran-Ferguson Act protects state supremacy in insurance regulation and gives states flexibility to allow some types of regulated coordination between insurance companies. Regulators have allowed insurance companies to share actuarial and loss information, in order to calculate risk assessments. It is argued that the act provides for unfair methods of competition with respect to the business of health insurance, and, effectively, establishes state insurance cartels.

The (partial) repeal of McCarran-Ferguson is expected to restore the application of federal antitrust and competition laws to the health

insurance industry. It should be noted that H.R. 372 is not seeking to entirely repeal the McCarran-Ferguson Act; rather, it adds an addendum to section 3 of the act (15 U.S.C. 1013).

The purpose of the “repeal” would be to ensure that the conduct of health insurance insurers is subject to the same antitrust and unfair trade laws as the conduct of other types of businesses. If passed into law, dental insurers would be subject to federal laws against bid rigging, price fixing and market allocations.

The carve-out from competition exists even though the insurance market has changed dramatically since 1945. The McCarran-Ferguson Act is credited with creating artificially higher premiums, unfair insurance restrictions, policy exclusions and a lack of choice.

Discussion

State and federal regulation of health care insurers is extensive. Nonetheless, almost no other sector — not dentists, physicians, hospitals or pharmacies — in the health care industry is shielded by antitrust protections.

H.R. 372 also makes clear that the Federal Trade Commission would have greater oversight on unfair or deceptive practices in the health insurance industry rather than relying on state insurance commissioners to investigate consumer complaints. State oversight is presently inconsistent. Only a few states, such as Florida and California, aggressively pursue consumer insurance grievances.

Since the passage of the ACA on March 23, 2010, health insurance markets have become less competitive, lacking in transparency, while providing consumers with fewer choices. Additionally, health care premiums and deductibles have increased, as have the costs our nation spends on health care.

When considering health care reform, the repeal of McCarran-Ferguson is one part of a broader reform effort in the United States. The repeal could assist in allowing free-market principles to begin to permeate the health insurance and would be a key step to providing more competition to the state insurance markets.

Bottom Line

Economic models generally assume that when markets have more competition, the consequences are lower prices, better quality, more variety and better service. If H.R. 372 is signed into law, prognosticators forecast cheaper health insurance premiums and more choices. However, in and of itself, the repeal of McCarran-Ferguson may provide only incremental changes; broader health care reform may be needed to enact policies that would decrease government control and allow free-market principles to thrive. Coupled with other legislation designed to activate the free market economy, dentists can anticipate an even lower consumer cost of insurance and more availability of choices. ♦

McCarran-Ferguson Repeal FAQs

Question: Will dentists' reimbursements stop decreasing?

Answer: If McCarran-Ferguson is repealed, the health insurance companies could no longer control the dental insurance market to their current extent. As a result, other insurance companies may decide to form, or existing insurance companies may create other dental specific divisions. With greater competition in the marketplace, insurance reimbursements could be expected to increase in the long-term.

Question: What effect would the McCarran-Ferguson repeal have on dental coverage?

Answer: If McCarran-Ferguson is repealed, dental coverage may, but not necessarily, increase down the road due to lower anticipated premiums.

Question: Would the McCarran-Ferguson repeal create a boon for my practice?

Answer: Not necessarily. As discussed, the McCarran-Ferguson repeal would be a step toward allowing market forces to operate. Other legislation would also assist in that effort. Allowing each state to compete for business is another potential solution that would interject even more free-market principles into the dental market.

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