Submitted Testimony of the
National Association of Insurance Commissioners

to the
House Judiciary Subcommittee on Regulatory
Reform, Commercial and Antitrust Law

for the hearing on
H.R. 372, the Competitive Health
Insurance Reform Act of 2017

February 16, 2017

On behalf of state insurance regulators and the National Association of Insurance Commissioners[1] (NAIC), we write today to express our appreciation for your holding a hearing on antitrust issues in the health insurance market. The potential for bid rigging, price fixing, and market allocation is of great concern to state insurance regulators and we share your view that such practices are harmful to consumers and cannot be tolerated.

We want to assure you that such activities are not permitted under the McCarran-Ferguson Act and are not tolerated under state law. We also want to raise awareness that the legislation your hearing will examine – The Competitive Health Insurance Reform Act, H.R. 372 – could have far-reaching implications which could hinder competition, harm consumers and weaken the health insurance market. Lastly, we want to make clear that the current McCarran-Ferguson Act does not prevent states from allowing health insurance carriers to engage in inter-state insurance sales.

First, every state has its own antitrust and unfair competition laws. State regulators and attorneys general play complimentary and mutually supportive roles in monitoring and investigating insurers, agents, and brokers to prevent and punish activities prohibited by those state laws. Monitoring involves reacting to conditions and changed circumstances. It also involves taking an active role and making adjustments to our methods and policies which anticipate new challenges that threaten consumers and market stability. State regulators' primary responsibility is to regulate the "business of insurance" in order to maintain a stable insurance market which provides products that offer reasonable benefits to consumers. Every day conscientious and highly skilled regulatory professionals monitor and investigate business activities related to the two major obligations insurers owe to consumers: issuing sound policies and paying claims on time.

State insurance regulators supervise the market conduct of industry participants by reviewing their business operations through market analysis, periodic examinations, and investigation of specific consumer complaints. When consumers have complaints about their health insurance plan – or other insurance plan, for that matter - they can readily contact their state insurance departments which have systems in place to implement the appropriate safeguards in a timely manner.

Insurers, agents, and brokers also must accept responsibility for maintaining a competitive and fair marketplace by reporting business practices that appear to be harmful, anti-competitive, or unethical to state regulators. Preventing and correcting market conduct problems requires that regulators and responsible business participants work together toward a common goal of strengthening stability and fairness in the marketplace. We achieve such stability through extensive daily monitoring of solvency, review of rates and policy forms, and evaluating market behavior.

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[1] Founded in 1871, the NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and the five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

In short, state experience with the business of insurance is long-standing. Existing state consumer protection, antitrust, and unfair trade practice laws provide the necessary tools needed to help stop anti-competitive conduct. Adding a layer of federal review would only lead to increased costs, confusion, and possible conflicts in federal and state courts.

Second, the Competitive Health Insurance Reform Act is a relatively short bill with far-reaching implications which must be taken into careful consideration. To refresh, the Congress passed the McCarran-Ferguson Act in direct response to the U.S. Supreme Court's decision in *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944). The Supreme Court held, contrary to 70 years of precedence, that insurance transactions constitute interstate commerce and thus are subject to federal regulation under the Commerce Clause of the United States Constitution. Following the decision, the NAIC became concerned about the threat to state insurance supervision in general and, specifically that insurance rate regulation would be found to violate the Sherman Act. Therefore, state insurance officials asked the Congress for a limited antitrust exemption.

The NAIC's fundamental concern in the 1940s—a concern that continues to define the NAIC's position on antitrust reform today—was that the competitive benefits of collectively developing loss costs and policy language would be jeopardized by the insertion of federal antitrust authority in the insurance markets. The jeopardized benefits include: 1) standardized risk classifications and policy form language to make data more credible; 2) consolidated collection and analysis of data to improve quality and aid smaller insurers with responsible rate-settings; and 3) publication of advisory loss costs and common policy forms to make it less costly for competitors to enter or expand in the market.

Recognizing the primacy of state supervision of insurance, the McCarran-Ferguson Act states: "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business, unless such act specifically relates to the business of insurance." In addition to assigning the regulatory responsibility over insurance to the states, McCarran-Ferguson exempts certain limited insurance activities from federal antitrust laws.

This limited exemption allows insurers to share loss data, which promotes healthy insurance markets by increasing the level and competence of the competition. Advisory organizations collect statistical information from many insurers and provide compiled information on loss costs to all their members. This statistical information, in turn, allows small and medium-sized insurers to compete as those insurers do not generate sufficient business volume or claims data to predict the future loss costs of policies. Loss costs published by advisory organizations are absolutely vital to effective policy pricing; without published loss costs, many insurers would be forced to limit policy offerings or even leave the business to the much larger insurers.

Contrary to the claims by the bill's proponents that the exemption was an "error" or an "oversight", the exemption from federal antitrust rules in McCarran-Ferguson was carefully considered and adopted for good reasons. These reasons still exists today and the exemption should not be eliminated.

Third, nothing in the McCarran-Ferguson Act inhibits the ability of states to allow insurance carriers from selling policies across state lines, and nothing in the Competitive Health Insurance Reform Act would "restore" an insurance carrier's ability to engage in inter-state sales. States have strict laws governing the licensing of insurance carriers to sell policies in the states and these laws are critical to protecting consumers and ensuring healthy markets. Licensure is the key that allows state regulators to take action to protect consumers. Any federal pre-emption of this requirement would result in less protections for the most vulnerable populations and the collapse of individual markets across the country. If the federal government pre-empts state licensure requirement out-of-state insurers would be able to lure healthy enrollees away from existing risk pools, which would become progressively sicker and more expensive until they ultimately fail, leaving consumers in those states with, possibly, no carriers in their states and no in-state networks of participating providers.

States already have the authority to enter into compacts with each other to allow for the sales of health plans, under agreed upon rules, across state lines. Several states have already adopted such authorizing language. This is the proper way to achieve more competition through sales across state lines, and McCarran-Ferguson does not impact this option one way or the other.

In conclusion, the NAIC respectfully asks the members of the Subcommittee to carefully consider the potential pitfalls and unintended consequences of amending or repealing the McCarran-Ferguson antitrust exemption for the business of health insurance. We know there are persuasive arguments that there is a lack of competition in some states, with few insurance companies competing against one another. Such a situation normally raises serious anti-trust concerns, but health insurance companies are different than other businesses in terms of current state and federal oversight. Their rates face rigorous actuarial review and if they are not justified they are not permitted. In addition, they are subject to state unfair trade practices and antitrust laws that punish bad actors, while allowing important cooperative activities to continue.

Finally, we would note that eliminating the antitrust exemption in McCarran-Ferguson for health carriers will do nothing to address the real drivers of higher health insurance premiums: the cost of health care and utilization. In fact, as proposed, state regulators believe the Competitive Health Insurance Reform Act would lead to higher administrative costs, more confusion and uncertainty, and more instability in the health insurance markets and, therefore, higher premiums. More competition is a laudable goal to give consumers more options and improve service, but premiums will not go down unless the underlying cost drivers are addressed.

While we cannot support amending or repealing the McCarran-Ferguson antitrust exemption for the business of health insurance, we do support your goal of reducing the cost of health care in this country and also assuring that we have fair and competitive insurance markets across the country. State regulators and the NAIC offer our expertise to assist you in attaining these important goals.