



**Property Casualty Insurers
Association of America**

Shaping the Future of American Insurance

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Antitrust Modernization Commission
Attn: Public Comments
1120 G Street, N.W.
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Washington, D.C. 20005

RE: Immunities and Exemptions – McCarran-Ferguson Act

Property Casualty Insurers Association of America Comments

The Property Casualty Insurers Association of America (PCI) offers the following comments concerning the McCarran-Ferguson limited antitrust exemption. PCI, a leading property and casualty trade association, represents over 1,000 companies that write 38 percent of the US property/casualty insurance market. PCI member companies write all lines of coverage, including automobile, homeowners, workers' compensation, surplus lines and reinsurance, in all 50 states and the District of Columbia. The membership is comprised of every type of insurance company – stock, mutual, reciprocal and Lloyds.

On behalf of our member companies, PCI respectfully submits the following comments and asks that they be made part of the official record.

Four federal laws principally affect antitrust issues: the Sherman Act (prohibits restraint of trade and monopolistic practices), the Clayton Act (prohibits anti-competitive practices), the Robinson-Patman Act (an amendment to the Clayton Act prohibits price discrimination among customers who compete against each other), and the Federal Trade Commission Act (prohibits unfair methods of competition and deceptive practices). State antitrust laws, which are becoming increasingly important in antitrust enforcement, must also be considered.

Criminal penalties for antitrust violations have been increasingly severe. Convicted individuals currently face a fine not to exceed \$1,000,000 or imprisonment not exceeding 10 years. Corporations must pay a minimum fine not to exceed \$100,000,000. Private parties have the right to bring an action for damages that shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation. The Justice Department, state governments, the

Federal Trade Commission and injured private persons or businesses may seek injunctions to prevent future violations of antitrust laws.

Through the years a number of statutory and court interpreted immunities and exemptions have arisen. Of particular interest to property/casualty insurers is the limited industry specific exemption provided under the McCarran-Ferguson Act.

McCarran-Ferguson Anti-Trust Exemption

These comments are provided in response to the Commissioner's questions in Federal Register page 28905, Part V A(2).

In response to the United States Supreme Court decision in *United States v. South-Eastern Underwriters Association*, Congress, in 1945, enacted the McCarran-Ferguson Act (15 USC 1011, *et seq.*). The McCarran-Ferguson Act provides a narrow exemption from the federal antitrust laws. The act is limited to:

1. The "business of insurance" (generally defined as the spreading of risks between policyholders and insurers);
2. Insurance company practices which are "regulated by State law"; and
3. Insurance company practices which do not constitute "an agreement to boycott, coerce or intimidate or an act of boycott, coercion or intimidation."

As such, the business of insurance is generally exempt from the anti-trust laws to the extent that the business is regulated by state law. However, to the extent that the business of insurance is not regulated by the states, antitrust laws would apply. Since 1945, state regulation of insurance has evolved within the framework of the McCarran-Ferguson Act, including the limited anti-trust exemption.

The limited anti-trust exemption provided by the McCarran-Ferguson Act has proved essential to property/casualty insurers and their policyholders. The existence of this exemption allows companies to exchange critical data regarding losses and other factors, facilitates the development and operation of assigned risk plans, facilitates participation and oversight of state guarantee funds, permits state control over liquidations of insurers, and promotes competition in the marketplace.

With respect to loss cost data, the McCarran-Ferguson Act provides a limited anti-trust exemption under which statistical agents can collect data, and insurance companies can pool and use aggregated loss data. The availability and reliability of loss cost data is essential to the effective operation of competitive insurance markets. In the absence of such data, all but a few insurers would confront increased operating expenses. Access to accurate and reliable data would become a barrier to market entry. Over time, it could threaten the small company franchise, prevent new entrants into the insurance industry and have a chilling effect on the ability of existing insurers to expand into new markets or new product lines.

The limited anti-trust exemption also facilitates an efficient marketplace by permitting insurers to form intercompany pools or syndicates to provide high-risk coverage or to allow small company

participation in writing risks that on an individual basis would be unavailable. The development and operation of assigned risk plans, such as those for auto and workers' compensation, with jointly determined rate schedules could be hampered by anti-trust concerns in the absence of the McCarran-Ferguson exemption. Likewise, participation in state guarantee funds that permit insurers to monitor the economic performance of competitors and distribute losses could be threatened by changes to the existing anti-trust exemption.

Over the years there have been a number of proposals to amend McCarran-Ferguson and limit or eliminate the limited anti-trust exemption. One proposal to amend McCarran-Ferguson would have eliminated the limited anti-trust exemption currently in force and replaced it with a "safe harbor" provision, specifically listing the practices of insurance companies that would be exempt from the anti-trust laws. The safe harbor approach has been rejected by insurers and by Congress as far back as the early 1990s. First, it is impossible to craft a list of safe harbors for all the data and informational needs of the industry now or in the future. Second, the safe harbor provisions serve as an invitation to litigation. The provisions of safe harbor provisions would need to be litigated just so insurance companies would know what activity was allowable and what was forbidden by the new law. Finally, safe harbor provisions, no matter how carefully drafted, simply are inefficient to protect current operations.

Overall, in the decades since its adoption, the McCarran Act's limited antitrust exemption has provided protections and benefits for consumers and facilitated greater competition. Clearly the specific exemption and years of interpretative case law should be preserved.

With these general comments on McCarran-Ferguson as background, PCI turns to the specific questions raised in the Federal Register, page 28905, Part V A(1).

1(a) PCI does not believe any general methodology can be used to assess benefits and costs of immunities and exemptions; rather, they must be examined on a case-by-case basis. The limited antitrust exemption for the insurance industry and accompanying regulatory framework are unique. The high degree of regulation of insurance companies by the states and their required participation in residual market entities, guaranty funds and other mechanisms essential to insurance consumers set this industry apart and demand the limited antitrust protection afforded by McCarran-Ferguson. From a general cost-benefit perspective, the proven track record in the 50 years since McCarran's enactment and the accompanying refinement of state regulation occurring in that time clearly shows that the Act has benefited consumers. As noted above the limited exemption for exchange of critical data helps insurers compete, enter new markets, and offer more products for consumers.

1(b) As stated above, PCI maintains that especially in light of the unique industry and unique exemption, for the insurance industry, different immunities and exemptions need to be carefully (and differently) analyzed.

1(c) PCI maintains the McCarran Act limited antitrust exemption, accompanying state regulatory framework and benefits for consumers can withstand scrutiny at any time. Periodic evaluation of this exemption and others may enhance knowledge by public policy makers and members of the general public regarding the benefits produced by the McCarran Ferguson Act. A "sunset" provision requiring regular review of the McCarran Act and other exemptions, however, would

not be in the interest of consumers, especially in light of the resources needed to thoroughly and appropriately conduct a full analysis.

Respectfully submitted,

A handwritten signature in black ink that reads "Julie Leigh Gackenbach". The signature is written in a cursive, flowing style.

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