March 21, 2017

Dear Representative:

The undersigned organizations urge your support for H.R. 372, the "Competitive Health Insurance Reform Act of 2017." This bill takes an important step in bringing consumers the benefits of competition under the antitrust laws, in the way health insurance is offered, marketed, and sold.

The rules of competition apply to every other part of the health care system; health insurance is an aberration. The antitrust laws are a key to making sure that the free market works for consumers, and the insurance industry should not be left out.

Congress created this antitrust exemption almost by accident, in the midst of the Second World War – when attentions were rightly directed elsewhere – in the wake of a Supreme Court decision clarifying that the antitrust laws did apply to insurance. It started out to be a temporary three-year breathing spell, to allow insurers to familiarize themselves with the antitrust laws and adjust their practices to the accepted rules of competition. Instead, a few poorly-understood words added in conference committee turned the temporary delay into an unintended exemption from those rules.

It is long since time to correct that error. Among other experts who have called for doing so, the Antitrust Modernization Commission, established in 2002 by legislation authored in this Committee, singled out this exemption for particular skepticism as to any justification for it. While we would ultimately like to see this antitrust exemption removed for all insurance, focusing on the health insurance industry now is a logical and important positive step to take at this time.

We note that the proposed manager's amendment would preserve the antitrust exemption in "safe harbors" for four described activities – (1) compilation of historical loss data, (2) development of what is known as a "loss development factor" to fill holes in the historical data, (3) some actuarial services, and (4) some standardization of policy forms. In our view, the most effective way to remove this exemption is to do so cleanly, without new safe harbors. Further, the kinds of insurance industry activities commonly described as the justification for these particular safe harbors do not raise antitrust issues, as they are described. Nonetheless, we believe these safe harbors, as written, do not significantly risk inadvertently immunizing anticompetitive conduct that would violate the antitrust laws, and therefore that they do not diminish the beneficial purpose and effect of the bill.

There is also another set of "safe harbor" antitrust exemptions imbedded in the definition of "business of health insurance (including the business of dental insurance)" in the new subsection 2(c)(3)(B)(ii)(I) as added by the bill. They include a number of types of benefits referenced in the Internal Revenue Code as "excepted benefits." While the lead-in to (3)(B)(ii) characterizes these as types of property-casualty insurance, there are three that by their terms in the Internal Revenue Code do not fit within what is considered property-casualty insurance, and that consumers would consider to be types of health insurance.

Among these are hospital indemnity insurance, 26 U.S.C. 9832(c)(3)(B); coverage for a specified disease or illness, 26 U.S.C. 9832(c)(3)(A); and an open-ended "such other similar, limited benefits as are specified in regulations," 26 U.S.C. 9832(c)(2(C). This last one is found in the same Internal Revenue Code provision that lists dental coverage as an excepted benefit, meaning that the "similar" benefits that could be potentially excluded by regulation – and thereby get an automatic antitrust exemption – could be anything similar to a category such as dental coverage – which might be any kind of specified benefit.

While there may have been justification for excepting these categories of benefits from federal regulatory requirements such as portability under the Affordable Care Act – which is what 26 U.S.C. 9832(c) is in reference to – that does not mean it makes sense to exempt them from the antitrust laws. The bill recognizes this for dental coverage, and explicitly takes the cross-reference to it out of the safe harbor, to ensure that it is covered by the bill. We hope that, as the bill moves forward, the three new antitrust exemptions in the cross references described above will also be removed, so that these types of health-related insurance coverage will likewise be subject to the antitrust laws.

We remain strong supporters of the Affordable Care Act,[1] which has significantly improved the availability and affordability of health care for many millions of Americans, including millions who previously had no health insurance. We would be very concerned by any move to repeal the Affordable care Act without having an effective new plan already figured out and in place that maintains comparable coverages and comparable consumer choices and protections. Such a move would be a grave threat to the financial and health security of American families, and to the very stability of our nation's health care system overall.

At the same time, we also strongly support bringing the antitrust laws into play in this important sector of the health care marketplace. That marketplace is complex in how it operates and how it motivates providers, insurers, and consumers. An effective regulatory framework is needed to shape that complex environment, to help safeguard consumers, help keep costs under

[1] Consumers Union and Consumer Action have been prominent supporters of the Affordable Care Act. Consumer Federation of America is not active on health care policy issues generally, and did not take an official position on the ACA.

control, and help make a full range of health care services available. Our country's long experience shows you can't expect a health care system to run effectively on competition alone.

But consumers will benefit from also having effective competition, at all levels in the supply chain. Even the best regulatory framework works better where competition, within the bounds of that framework, gives businesses a market-driven incentive to want to improve service while holding down prices and providing better value. Regulation and competition both work best when they can work hand in hand.

As the health care marketplace evolves, having the antitrust laws apply will give health insurers competition-based incentives to improve the way they provide coverage to consumers, with higher quality, better choice, and more affordability. Better competition will help bring insurer incentives better in line with benefiting consumers.

As the Justice Department has explained, where there is effective competition, coupled with transparency, in a consumer-friendly regulatory framework, insurers will be spurred to compete against each other by offering plans with lower premiums, reducing copayments, lowering or eliminating deductibles, lowering annual out-of-pocket maximum costs, managing care, improving drug coverage, offering desirable benefits, and making their provider networks more attractive to potential members.[2]

Competition will be beneficial to consumers in the health insurance marketplace just as it is everywhere else in our economy.

We urge your support for H.R. 372.

Respectfully,

George P. Slover	J. Robert Hunter	Linda Sherry
Senior Policy Counsel	Director of Insurance	Director of National Priorities
Consumers Union	Consumer Federation of America	Consumer Action

[2] *See, e.g.,* Competitive Impact Statement, United States v. Humana Inc. and Arcadian Management Services, Inc., No. 12-cv-464 (D.D.C., March 27, 2012), at 8, available at www.justice.gov/atr/case/us-v-humana-inc-and-arcadian-management-services-inc.