

**Union Calendar No. 470**

103<sup>D</sup> CONGRESS  
2<sup>D</sup> SESSION

**H. R. 9**

**[Report No. 103-853]**

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**A BILL**

To modify the antitrust exemption applicable to the  
business of insurance.

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OCTOBER 7, 1994

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

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### IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 1993

Mr. BROOKS introduced the following bill; which was referred to the  
Committee on the Judiciary

JUNE 2, 1994

Additional sponsors: Mr. EDWARDS of California, Miss COLLINS of Michigan,  
Mr. KOPETSKI, and Mr. JOHNSTON of Florida

OCTOBER 7, 1994

Reported with an amendment, committed to the Committee of the Whole  
House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on January 5, 1993]

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## **A BILL**

To modify the antitrust exemption applicable to the business  
of insurance.

1        *Be it enacted by the Senate and House of Representa-*  
2        *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 *This Act may be cited as the “Insurance Competitive*  
3 *Pricing Act of 1994”.*

4 **SEC. 2. RULES OF CONSTRUCTION.**

5 *The amendments made by this Act preserve—*

6 *(1) the provisions relating to State taxing and*  
7 *regulatory authority in section 2 of the Act of March*  
8 *9, 1945 (59 Stat. 34; 15 U.S.C. 1012), commonly*  
9 *known as the McCarran-Ferguson Act;*

10 *(2) the availability, to persons engaged in the*  
11 *business of insurance, of the defense of State action in*  
12 *the same manner and to the same extent as such de-*  
13 *fense is available to other persons;*

14 *(3) the availability, to persons engaged in the*  
15 *business of insurance, of any antitrust immunity or*  
16 *defense that may be applicable under law other than*  
17 *the McCarran-Ferguson Act;*

18 *(4) the legal standards applicable under the*  
19 *McCarran-Ferguson Act, as in effect before such Act*  
20 *is amended by this Act, to all conduct described in the*  
21 *safe harbors found in subparagraphs (B), (C), (D),*  
22 *and (E) of section 2(b)(1) of the McCarran-Ferguson*  
23 *Act, as amended by this Act; and*

24 *(5) the provisions relating to boycott, coercion, or*  
25 *intimidation in section 3(b) of the McCarran-Fer-*  
26 *guson Act.*

1 **SEC. 3. AMENDMENTS.**

2 *Section 2 of the Act of March 9, 1945 (59 Stat. 34;*  
3 *15 U.S.C. 1012), commonly known as the McCarran-Fer-*  
4 *guson Act, is amended—*

5 *(1) in subsection (b) by striking “: Provided,”*  
6 *and all that follows through “law.” and inserting the*  
7 *following:*

8 *“except as follows:*

9 *“(1)(A) The antitrust laws shall be applicable to*  
10 *the business of insurance except as provided in sub-*  
11 *paragraphs (B), (C), (D), and (E).*

12 *“(B) The antitrust laws shall not be applicable*  
13 *to conduct that consists of making an agreement or*  
14 *engaging in joint conduct—*

15 *“(i)(I) to collect, compile, classify, or dis-*  
16 *seminate historical data;*

17 *“(II) to develop procedures to collect, com-*  
18 *pile, classify, or disseminate historical data; or*

19 *“(III) to verify that historical data is accu-*  
20 *rate and complete;*

21 *“(ii) to determine, using standard actuarial*  
22 *techniques, or disseminate, a loss development*  
23 *factor or developed losses;*

24 *“(iii) to develop or disseminate a standard*  
25 *insurance policy form (including a standard ad-*  
26 *dendum to an insurance policy form and stand-*

1           *ard terminology in an insurance policy form) if*  
2           *such agreement or joint conduct does not include*  
3           *an agreement to adhere to such standard form,*  
4           *or to require adherence to such standard form,*  
5           *except that the fact that 2 or more persons en-*  
6           *gaged in the business of insurance use such*  
7           *standard form—*

8                     *“(I) shall not be sufficient in itself to*  
9                     *support a finding that an agreement to ad-*  
10                    *here, or to require adherence, to such stand-*  
11                    *ard form exists; and*

12                    *“(II) may be used only for the purpose*  
13                    *of supplementing or explaining direct evi-*  
14                    *dence of the existence of an agreement to ad-*  
15                    *here, or to require adherence, to such stand-*  
16                    *ard form;*

17                    *“(iv) to develop or disseminate, for use in*  
18                    *providing insurance in a State, a manual that*  
19                    *is filed, before dissemination, with the State en-*  
20                    *tity that regulates the business of insurance*  
21                    *under State law, if such manual includes only—*

22                    *“(I) information and conduct described*  
23                    *in clauses (i), (ii), and (iii), including rel-*  
24                    *ativity factors;*

1           “(II) during the transition period, a  
2           trend factor or information to which a  
3           trend factor has been applied, to the extent  
4           permitted under subparagraph (C); and

5           “(III) explanations and instructions  
6           for using the manual (or any of the infor-  
7           mation contained in the manual), if such  
8           agreement or joint conduct does not include  
9           an agreement among competitors to adhere,  
10          or to require adherence, to any of such ex-  
11          planations or instructions;

12          “(v) to provide insurance pursuant to a  
13          public necessity market mechanism;

14          “(vi) to provide insurance as a historical  
15          underwriting capacity risk pool;

16          “(vii) to administer a public necessity mar-  
17          ket mechanism in a State, pursuant to the au-  
18          thorization of and under the supervision of such  
19          State, if all persons who provide insurance in  
20          such State pursuant to such mechanism, and all  
21          persons seeking to obtain insurance through such  
22          mechanism, have a reasonable opportunity to  
23          appeal determinations affecting them to a gov-  
24          ernmental entity;

1           “(viii) to develop or participate in a pro-  
2           gram to inspect commercial buildings and fire  
3           protection facilities, and evaluate government  
4           building code requirements and enforcement of  
5           such requirements, to determine the likelihood  
6           and potential extent of loss due to fire, wind,  
7           hail, earthquake, flood, or tidal wave, pursuant  
8           to a State law that provides procedures for mak-  
9           ing such a determination and provides a reason-  
10          able opportunity for an affected person to appeal  
11          such a determination to a governmental entity;  
12          or

13           “(ix) to develop or participate in a pro-  
14          gram, pursuant to a workers’ compensation in-  
15          surance plan filed with the State entity that reg-  
16          ulates the business of insurance under State law,  
17          to measure an employer’s experience with respect  
18          to occupational accidents and illnesses for which  
19          such employer is liable, against the comparable  
20          experience of other employers, and to make a  
21          modification for an individual employer based  
22          on such comparisons, if an affected employer has  
23          a reasonable opportunity to appeal a determina-  
24          tion under such program to a governmental en-  
25          tity;

1       to the extent that such conduct is regulated by State  
2       law.

3               “(C) During the transition period, the antitrust  
4       laws shall not be applicable to conduct that consists  
5       of making an agreement or engaging in joint conduct  
6       to determine or disseminate a trend factor, to the ex-  
7       tent that such conduct is regulated by State law.

8               “(D) The antitrust laws shall not be applicable  
9       to conduct by a director, officer, or employee of a na-  
10      tional trade association representing insurance  
11      agents, or of a State trade association representing  
12      insurance agents that is affiliated with such national  
13      trade association, acting within the scope of the au-  
14      thority vested in such director, officer, or employee by  
15      the trade association involved, that consists of prepar-  
16      ing, disseminating, or discussing a report or comment  
17      (including describing, evaluating, and suggesting pos-  
18      sible responses for members of the association whose  
19      directors, officers, or employees prepared such report  
20      or such comment to consider) with respect to any in-  
21      surer practice affecting the relationship between in-  
22      surers and insurance agents, if—

23                       “(i) such report or such comment includes  
24                       a conspicuous statement that each insurance  
25                       agent is expected to make his or her own decision

1        *regarding matters contained in such report or*  
2        *such comment and that anticompetitive agree-*  
3        *ments among insurance agents with respect to*  
4        *any response to such practice are illegal under*  
5        *the antitrust laws;*

6                *“(ii) such conduct does not involve—*

7                        *“(I) monitoring or policing the extent*  
8                        *to which any insurance agent follows, or*  
9                        *pressuring any insurance agent to follow,*  
10                        *any of such responses;*

11                        *“(II) initiating any communication*  
12                        *(including a mailing, association publica-*  
13                        *tion, or association meeting) with any*  
14                        *member of any such association with respect*  
15                        *to such report or such comment (including*  
16                        *any of such responses), other than by a*  
17                        *means designed to reach all members, or all*  
18                        *directors and officers, of such association;*

19                        *“(III) referring to any of such re-*  
20                        *sponses in any discussion unless the discus-*  
21                        *sion emphasizes that each insurance agent*  
22                        *is expected to make his or her own decision*  
23                        *regarding matters contained in such report*  
24                        *or such comment and that anticompetitive*  
25                        *agreements among insurance agents with*

1           *respect to any response to such practice are*  
2           *illegal under the antitrust laws; or*

3           “(IV) *the formal endorsement of such*  
4           *report or such comment (including any of*  
5           *such responses) by any part of the member-*  
6           *ship of any such association, other than a*  
7           *statement that dissemination of such report*  
8           *or such comment has been approved by the*  
9           *directors or officers of the association whose*  
10           *directors, officers, or employees prepared*  
11           *such report or such comment; and*

12           “(iii) *the number of directors and officers of*  
13           *any such association who are involved in pre-*  
14           *paring, disseminating, or discussing such report*  
15           *or such comment (including any of such re-*  
16           *sponses) does not substantially exceed the number*  
17           *of directors and officers of such association serv-*  
18           *ing on April 30, 1994;*

19           *and if the business of insurance is regulated by State*  
20           *law.*

21           “(E) *The antitrust laws shall not be applicable*  
22           *to conduct of an insurance agent that is a member of*  
23           *an association referred to in subparagraph (D) that*  
24           *consists of independently initiating a communication,*  
25           *in an issue of a regularly scheduled association publi-*

1        *cation or at a regularly scheduled association meet-*  
2        *ing, to members of a local trade association represent-*  
3        *ing insurance agents of which such agent is a mem-*  
4        *ber, that describes or summarizes all or part of the*  
5        *contents of a report or comment described in such*  
6        *subparagraph provided to such agent by such associa-*  
7        *tion described in such subsection and that is made*  
8        *only by a means designed to reach all such members,*  
9        *if—*

10                *“(i) such conduct does not involve—*

11                        *“(I) monitoring or policing the extent*  
12                        *to which any insurance agent follows, or*  
13                        *pressuring any insurance agent to follow,*  
14                        *any of the possible responses contained in*  
15                        *such report or such comment;*

16                        *“(II) referring to any of such responses*  
17                        *unless the reference emphasizes that each in-*  
18                        *surance agent is expected to make his or her*  
19                        *own decision regarding matters contained*  
20                        *in such report or such comment and that*  
21                        *anticompetitive agreements among insur-*  
22                        *ance agents with respect to any response to*  
23                        *an insurance practice discussed in such re-*  
24                        *port or such comment are illegal under the*  
25                        *antitrust laws; or*

1                   “(III) the formal endorsement of such  
2                   report or such comment (including any of  
3                   such responses); and

4                   “(ii) the primary purpose of such meeting,  
5                   or of such issue of such publication, is not the  
6                   discussion of such report or such comment (in-  
7                   cluding any of such responses);

8                   and if the business of insurance is regulated by State  
9                   law.

10                  “(2) Subsequent to the transition period, the  
11                  independent purchase of a trend factor by a person  
12                  engaged in the business of insurance from a person  
13                  not engaged in providing insurance (and not affili-  
14                  ated with a person engaged in providing insurance)  
15                  shall be presumed not to violate the antitrust laws.

16                  “(3) The Federal Trade Commission Act shall be  
17                  applicable to the business of insurance to the extent  
18                  that such business is not regulated by State law, ex-  
19                  cept that, with respect to enforcement of the antitrust  
20                  laws, section 5 of such Act shall be applicable to the  
21                  business of insurance to the same extent as the other  
22                  antitrust laws.”, and

23                  (2) by adding at the end the following:

24                  “(c) For purposes of subsection (b)—

1           “(1) the term ‘antitrust laws’ has the meaning  
2 given it in subsection (a) of the first section of the  
3 Clayton Act (15 U.S.C. 12), except that such term in-  
4 cludes section 5 of the Federal Trade Commission Act  
5 (15 U.S.C. 45) as such section 5 applies to conduct  
6 that constitutes a violation of the Sherman Act or the  
7 Clayton Act;

8           “(2) the term ‘developed losses’ means aggregate  
9 paid losses and aggregate reserves held for received  
10 claims, as adjusted by a loss development factor;

11           “(3) the term ‘historical data’ means informa-  
12 tion respecting—

13                   “(A) losses paid by, claims received by, re-  
14 serves for such claims set aside by, or units of ex-  
15 posure to loss in insurance policies sold by any  
16 person engaged in the business of insurance; or

17                   “(B) insurance premiums received by any  
18 person engaged in the business of insurance, if  
19 such information is not disseminated in a form  
20 from which information respecting premiums re-  
21 ceived by any separately identifiable person en-  
22 gaged in the business of insurance may be de-  
23 rived;

1           “(4) the term ‘historical underwriting capacity  
2 risk pool’ means an underwriting capacity risk pool  
3 established prior to April 30, 1994—

4           “(A) the purpose of which is to provide in-  
5 surance for a commercial risk relating to—

6           “(i) an airport, aviation, or aerospace  
7 activity;

8           “(ii) a large commercial or industrial  
9 property (including machinery, boilers, and  
10 pressure vessels);

11           “(iii) a grain elevator or feed mill;

12           “(iv) an oil, gas, or chemical peril;

13           “(v) the construction or operation of a  
14 nuclear energy facility;

15           “(vi) an inland marine peril or an  
16 ocean marine enterprise;

17           “(vii) a natural disaster;

18           “(viii) an occupational accident or ill-  
19 ness;

20           “(ix) transportation of currency, mail,  
21 securities, bullion, or other valuables by a  
22 person with fiduciary responsibility for  
23 their safe transport;

1           “(x) foreign commercial activities un-  
2           dertaken in cooperation with the United  
3           States Export-Import Bank; or

4           “(xi) a war, rebellion, riot, or similar  
5           civil commotion;

6           “(B) whose conduct has not materially  
7           changed from the conduct described in accord-  
8           ance with subparagraph (C)(ii) in which such  
9           pool—

10           “(i) was authorized to engage under its  
11           charter, bylaws, or other documents of orga-  
12           nization or governance filed in accordance  
13           with subparagraph (C)(iii); and

14           “(ii) did engage as so authorized;  
15           prior to April 30, 1994; and

16           “(C) that, before the effective date of the In-  
17           surance Competitive Pricing Act of 1994, filed  
18           with the Attorney General of the United States,  
19           in accordance with such rules as the Attorney  
20           General may have issued, a notification—

21           “(i) disclosing the identities of the  
22           members of such pool on April 30, 1994;

23           “(ii) describing the nature and scope of  
24           the activities of such pool, and the lines of

1           *insurance in which such pool was engaged,*  
2           *prior to April 30, 1994; and*

3                   “(iii) *containing the charter, bylaws,*  
4                   *and other documents of organization or gov-*  
5                   *ernance of such pool in effect on or before*  
6                   *April 30, 1994;*

7           “(5) *the term ‘insurance agent’ means a person*  
8           *that is—*

9                   “(A) *engaged as an independent contractor*  
10                  *in the business of selling insurance;*

11                  “(B) *licensed under the law of a State as an*  
12                  *insurance agent or insurance broker; and*

13                  “(C) *neither an insurer in any State in*  
14                  *which such person is so engaged, nor an em-*  
15                  *ployee of an insurer;*

16           “(6) *the term ‘insurance policy’ means a con-*  
17           *tract under which insurance is sold to an insured;*

18           “(7) *the term ‘insurer’ means a person that is—*

19                   “(A) *engaged in the business of providing*  
20                   *insurance; and*

21                   “(B) *obligated to pay losses under the in-*  
22                   *surance policies under which it provides insur-*  
23                   *ance;*

24           “(8) *the term ‘loss’ means an amount paid or to*  
25           *be paid by a person engaged in the business of insur-*

1     *ance to (or for the benefit of) a claimant to satisfy*  
2     *a claim on an insurance policy, and includes any at-*  
3     *torney, investigatory, or litigation expenses that are*  
4     *separately incurred, identified, and allocated by such*  
5     *person with respect to that particular claim;*

6             *“(9) the term ‘loss development factor’ means an*  
7     *adjustment to be made to the aggregate of losses in-*  
8     *curring during a prior period of time that have been*  
9     *paid or for which claims have been received and re-*  
10    *serves are being held, in order to estimate the aggre-*  
11    *gate of the losses incurred during such period that*  
12    *will ultimately be paid;*

13            *“(10) the term ‘loss incurred’ means a loss for*  
14    *which the event has occurred that ultimately gives*  
15    *rise to liability on a claim on an insurance policy,*  
16    *without regard to whether a claim based on such*  
17    *event has been received;*

18            *“(11) the term ‘public necessity market mecha-*  
19    *nism’ means a plan established by State law or by*  
20    *the State entity that regulates the business of insur-*  
21    *ance under State law—*

22            *“(A) for providing a type of insurance in a*  
23    *State;*

24            *“(B) in which the persons providing such*  
25    *type of insurance pursuant to such mechanism*

1           *represent a substantial number of the persons en-*  
2           *gaged in the business of providing such type of*  
3           *insurance in such State and are either required*  
4           *by State law, or formally requested or ordered by*  
5           *such State entity, to participate;*

6           *“(C) the purpose of which is to make such*  
7           *type of insurance available to persons who would*  
8           *not otherwise be able to obtain such type of in-*  
9           *surance at affordable cost; and*

10           *“(D) in which the rate for such type of in-*  
11           *surance is subject to the approval or disapproval*  
12           *of such State;*

13           *“(12) the term ‘relativity factor’ means a ratio*  
14           *comparing one classification of historical data to an-*  
15           *other such classification, or comparing developed*  
16           *losses in one such classification to developed losses in*  
17           *another such classification;*

18           *“(13) the term ‘transition period’ means the 2-*  
19           *year period beginning on the effective date of the In-*  
20           *surance Competitive Pricing Act of 1994;*

21           *“(14) the term ‘trend factor’ means an adjust-*  
22           *ment to be made to developed losses in order to ac-*  
23           *count for any change that is anticipated to affect*  
24           *losses; and*

1           “(15) the term ‘underwriting capacity risk pool’  
2           means a business arrangement or association—

3                   “(A) whose members consist of 2 or more  
4                   persons engaged in the business of insurance;  
5                   and

6                   “(B) that operates for the purpose of pro-  
7                   viding insurance under which the liability for  
8                   paying losses is spread among such members.”.

9   **SEC. 4. PUBLICATION AND AVAILABILITY OF HISTORICAL**  
10                   **UNDERWRITING CAPACITY RISK POOL NOTI-**  
11                   **FICATIONS.**

12           The Attorney General shall, not later than 30 days  
13   after receiving a notification filed in accordance with sec-  
14   tion 2(c)(4)(C) of the Act of March 9, 1945 (59 Stat. 34;  
15   15 U.S.C. 1012), commonly known as the McCarran-Fer-  
16   guson Act—

17                   (1) publish in the Federal Register—

18                           (A) a summary of such notification; and

19                           (B) notice that such notification is available  
20                   to the public; and

21                   (2) make such notification available to the pub-  
22                   lic.

23   **SEC. 5. BUSINESS REVIEW.**

24           If a person engaged in the business of insurance sub-  
25   mits a written request to the Attorney General in accord-

1 *ance with section 50.6 of title 28 of the Code of Federal*  
2 *Regulations (July 1, 1992), as amended from time to time,*  
3 *for a business review letter with respect to the application*  
4 *of the antitrust laws to specified activities of an underwrit-*  
5 *ing capacity risk pool (as defined in section 2(c)(15) of the*  
6 *Act of March 9, 1945, commonly known as the McCarran-*  
7 *Ferguson Act) of which such person is, or intends to become,*  
8 *a member, then the Attorney General shall issue such letter*  
9 *in accordance with such section.*

10 **SEC. 6. STUDY AND REPORT.**

11 *(a) STUDY.—During the 5-year period beginning on*  
12 *the effective date of this Act, the Attorney General shall con-*  
13 *duct a study to determine the effect of this Act, and the*  
14 *amendments made by this Act, on the business of insurance.*

15 *(b) REPORT.—Not later than 1 year after the expira-*  
16 *tion of the 5-year period referred to in subsection (a), the*  
17 *Attorney General shall submit, to the Speaker of the House*  
18 *of Representatives and the President pro tempore of the*  
19 *Senate, a report summarizing the results of the study re-*  
20 *quired by subsection (a).*

21 **SEC. 7. EFFECTIVE DATES.**

22 *(a) GENERAL EFFECTIVE DATE.—Except as provided*  
23 *in subsection (b), this Act shall take effect 1 year after the*  
24 *date of the enactment of this Act.*

1           (b) *EFFECTIVE DATE OF SECTIONS 4 AND 5.*—Sections  
2 4 and 5 shall take effect on the date of the enactment of  
3 this Act.

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