

United States Senate

WASHINGTON, DC 20510

July 20, 2021

Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Dear Attorney General Garland and Chair Khan:

We write today regarding the recently expanded antitrust authorities of the Department of Justice (DOJ) and Federal Trade Commission (FTC) over the health insurance industry following the enactment of the Competitive Health Insurance Reform Act (CHIRA) of 2020.

The CHIRA protects consumers from anticompetitive practices by repealing the McCarran-Ferguson Act's outdated antitrust exemption for the health insurance industry. Decades of consolidation by health insurance brokers has primed the industry for abuse, allowing insurers to exert market power in order to raise premiums, restrict competition, and deny consumers choice.¹ Despite the clearly anticompetitive nature of these practices, before the CHIRA was enacted, regulators lacked the power to stop insurers' misconduct due to the industry's antitrust exemption. For example, as recently as last December, a U.S. District Court dismissed antitrust claims against the Blue Cross Blue Shield Association for allegedly conspiring with its members to deny patients and providers insurance coverage for telemetry monitors, holding that the Association was immune from suit.²

The CHIRA's enactment will help antitrust authorities promote competition and transparency in the health care industry by actually empowering them to examine—and take action against, where justified—potentially anticompetitive practices by the health care, dental, and vision insurance companies. It was for these reasons that the DOJ lauded the CHIRA's passage after it was signed into law on January 13, 2021.³ While the FTC has not commented officially on the CHIRA, at least one commissioner has similarly voiced support for legislation to repeal or restrict the health insurance industry's exemption from our antitrust laws.⁴

Since the CHIRA's enactment in January 2021, however, not much is publicly known about what the DOJ or the FTC have done to exercise their expanded authorities under the law. In January, the DOJ cited

¹ See Leemore Dafny, Marc Duggan, and Subramaniam Ramnarayanan, *Paying a Premium on Your Premium? Consolidation in the U.S. Health Insurance Industry*, 102 AMER. ECON. REV. 1161 (2012).

² See *LifeWatch Servs. v. Highmark, Inc.*, No. CV 12-5146, 2020 WL 7690179 (E.D. Pa. Dec. 28, 2020).

³ U.S. Dept. of Justice, *Justice Department Welcomes Passage of The Competitive Health Insurance Reform Act of 2020*, January 13, 2021, available at <https://www.justice.gov/opa/pr/justice-department-welcomes-passage-competitive-health-insurance-reform-act-2020>.

⁴ Remarks of Commissioner Rebecca Kelly Slaughter, *Antitrust and Health Care Providers: Policies to Promote Competition and Protect Patients*, Center for American Progress, May 14, 2019, available in video format at <https://www.americanprogress.org/events/2019/05/06/469478/antitrust-health-care-providers/>.

the CHIRA in a notice of supplemental authority submitted in support of a private case before the Eleventh Circuit, arguing that the law's passage further clarified that defendant-insurers' exclusivity rules were not immune from antitrust suits.⁵ But aside from this action, public information is lacking as to what, if any, steps either the DOJ or the FTC has taken to extend antitrust enforcement to the health insurance industry.

In order for Congress to better understand how the DOJ and the FTC are exercising their expanded authorities pursuant to the CHIRA to oversee, examine, and take action against potentially anticompetitive practices within the health insurance industry, we respectfully request answers to the following questions no later than August 4, 2021. Each question is directed at both the DOJ and FTC unless otherwise specified:

1. Since January 13, 2021, what legal actions, if any, has your department taken to enforce antitrust laws against companies in the business of health insurance that are no longer exempt from enforcement under the McCarran-Ferguson Act? Please provide as much detail as you can.
2. Specifically, what has your department done since January 13, 2021 to investigate unlawful price fixing, bid rigging, or market allocation by health insurers?
3. Aside from the case highlighted in this letter, has your department submitted any *amicus* briefs, notices of supplemental authority, business advisory opinions, or other filings regarding the legal consequences of the CHIRA in any private litigation? If so, which cases?
4. What steps, if any, has your department taken to craft new enforcement guidelines that account for the CHIRA and its application to the health insurance industry?
5. *For the FTC:* What, if any, potential regulations has the Commission considered—or might consider—issuing with regard to unfair or deceptive practices by health insurance companies no longer exempt from antitrust law?

Thank you for your attention to this important matter.

Sincerely,



Patrick Leahy
United States Senator



Steve Daines
United States Senator

⁵ See Notice of Supplemental Authority, *Oscar Ins. Co. of Fla. v. Blue Cross & Blue Shield of Fla.*, No. 19-14096 (11th Cir. January 15, 2021).