**U.S. DEPARTMENT OF JUSTICE**
Antitrust Division

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

January 15, 2021

Hon. David J. Smith
Clerk of Courts
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street, NW
Atlanta, GA 30303

Re: *Oscar Insurance Co. of Florida v. Blue Cross & Blue Shield of Florida, Inc.*, No. 19-14096

Dear Mr. Smith:

I write pursuant to Circuit I.O.P. 28.1 to advise the Court that, on January 13, 2021, the Competitive Health Insurance Reform Act of 2020 (the Act) (Attachment A) became law. The Act reapplies the antitrust laws to the business of health insurance, providing that the McCarran-Ferguson Act (the MFA) does not "modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance." Pub. L. No. 116-327, § 2(a).

The Act confirms that the district court's judgment should be reversed. Now, the conduct at issue—Florida Blue's exclusivity policy—either (1) is not the "business of insurance," and thus not protected by the MFA, *see, e.g.*, Gov't Br. at 9-10, or (2) constitutes "the business of *health* insurance," Pub. L. No. 116-327, § 2(a) (emphasis added); *see, e.g.*, Am. Compl. ¶76 (relevant market is individual health insurance plans), and thus subject to federal

antitrust law pursuant to the Act. Either way, the district court's holding that the MFA exempts Florida Blue's exclusivity policy cannot stand.[1]

The presumption against retroactive legislation is inapplicable to plaintiff-appellant's request for injunctive relief.[2] "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994). Thus, even if the exclusivity policy is "the business of insurance," it is also "the business of health insurance," and the Act preserves Oscar's request for injunctive relief. *See, e.g.*, *Miccosukee Tribe v. United States*, 619 F.3d 1286, 1288 (11th Cir. 2010).

Accordingly, the United States respectfully requests that the Court reverse the district court's decision and remand this matter for further proceedings regarding the request for injunctive relief.

Respectfully submitted,

/s/ Patrick M. Kuhlmann

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[1] The Act does apply the MFA to certain contracts involving historical loss data, loss-development factors, actuarial services, and policy forms, Pub. L. No. 116-327, § 2(a), but Florida Blue's exclusivity policy does not fall within any of these categories.

[2] The United States takes no position on whether the Act applies to the requests for damages and other relief.

# ATTACHMENT A

PL 116-327, January 13, 2021, 134 Stat 5097

UNITED STATES PUBLIC LAWS

116th Congress - Second Session

Convening January 03, 2020

**THIS DOCUMENT IS A SLIP COPY. FURTHER EDITORIAL ENHANCEMENTS TO BE ADDED (SEE SCOPE)**
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stricken material by ~~**Text**~~.

PL 116–327 [HR 1418]
January 13, 2021
COMPETITIVE HEALTH INSURANCE REFORM ACT OF 2020

An Act To restore the application of the Federal antitrust laws to the business of health insurance to protect competition and consumers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

## SECTION 1. SHORT TITLE.

This Act may be cited as the "Competitive Health Insurance Reform Act of 2020".

## SEC. 2. RESTORING THE APPLICATION OF ANTITRUST LAWS TO THE BUSINESS OF HEALTH INSURANCE.

(a) AMENDMENT TO MCCARRAN-FERGUSON ACT.—Section 3 of the Act of March 9, 1945 (15 U.S.C. 1013), commonly known as the McCarran-Ferguson Act, is amended by adding at the end the following:

  

"(c)(1) Nothing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance (including the business of dental insurance and limited-scope dental benefits).

"(2) Paragraph (1) shall not apply with respect to making a contract, or engaging in a combination or conspiracy—

"(A) to collect, compile, or disseminate historical loss data;

"(B) to determine a loss development factor applicable to historical loss data;

"(C) to perform actuarial services if such contract, combination, or conspiracy does not involve a restraint of trade; or

"(D) to develop or disseminate a standard insurance policy form (including a standard addendum to an insurance policy form and standard terminology in an insurance policy form) if such contract, combination, or conspiracy is not to adhere to such standard form or require adherence to such standard form.

"(3) For purposes of this subsection—

"(A) the term 'antitrust laws' has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition;

"(B) the term 'business of health insurance (including the business of dental insurance and limited-scope dental benefits)' does not include—

"(i) the business of life insurance (including annuities); or

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"(ii) the business of property or casualty insurance, including but not limited to—

"(I) any insurance or benefits defined as 'excepted benefits' under paragraph (1), subparagraph (B) or (C) of paragraph (2), or paragraph (3) of section 9832(c) of the Internal Revenue Code of 1986 (26 U.S.C. 9832(c)) whether offered separately or in combination with insurance or benefits described in paragraph (2)(A) of such section; and

"(II) any other line of insurance that is classified as property or casualty insurance under State law;

  

"(C) the term 'historical loss data' means information respecting claims paid, or reserves held for claims reported, by any person engaged in the business of insurance; and

"(D) the term 'loss development factor' means an adjustment to be made to reserves held for losses incurred for claims reported by any person engaged in the business of insurance, for the purpose of bringing such reserves to an ultimate paid basis.".

(b) RELATED PROVISION.—For purposes of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section applies to unfair methods of competition, section 3(c) of the McCarran-Ferguson Act shall apply with respect to the business of health insurance without regard to whether such business is carried on for profit, notwithstanding the definition of "Corporation" contained in section 4 of the Federal Trade Commission Act.

**SEC. 3. DETERMINATION OF BUDGETARY EFFECTS.**

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled "Budgetary Effects of PAYGO Legislation" for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Approved January 13, 2021.

LEGISLATIVE HISTORY—H.R. 1418:

HOUSE REPORTS:

SENATE REPORTS:

CONGRESSIONAL RECORD, Vol. ():

DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS ():

PL 116-327, 2020 HR 1418

## CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, I electronically filed the foregoing letter with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users that that service will be accomplished by the CM/ECF system.

/s/ Patrick M. Kuhlmann

*Attorney*