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Antitrust Enforcement Agencies Issue Joint Statement Encouraging Repeal of Virginia's Certificate of Need Program

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On October 26, 2015, the ***Federal Trade Commission ("FTC")*** and the Antitrust Division of the ***U.S. Department of Justice ("DOJ")*** (collectively the "Agencies") issued a joint statement to the Virginia Certificate of Public Need ("COPN") Work Group encouraging the Work Group and the Virginia General Assembly to repeal or restrict the state's certificate of need process. The Virginia COPN Work Group was tasked by the Virginia General Assembly to review the current COPN process and recommend any changes that should be made to it.

Thirty-six states currently maintain some form of certificate of need ("CON") program. Although there are variations in the programs, in general, new entrants and incumbent providers are required to obtain state-issued approval before constructing new facilities, or in some cases prior to offering certain health care services, or making major capital expenditures—such as expanding the number of beds in a hospital or investing in robotic surgery equipment.

In their statement, the Agencies outlined their concerns that state certificate of need ("CON") laws fail to achieve their original conceived goals of improving access to care and reducing health care costs. Instead, the Agencies remarked that programs like the Virginia COPN process "prevent the efficient functioning of health care markets" in numerous ways:

- By creating barriers to entry and expansion, limiting consumer choice, and stifling innovation;
- By allowing incumbent firms to use CON laws to thwart or delay market entry by new competitors;
- By denying consumers of an effective remedy following the consummation of an anticompetitive merger (specifically referencing the *FTC v. Phoebe Putney* case, which we previously reported on here); and
- By failing to assist states in controlling health care costs or improving care quality (based on studies referenced by the Agencies).

For these reasons, the Agencies have historically taken the position that state CON laws should be repealed or limited.

In a concurring statement, FTC Commissioner Julie Brill agreed that the FTC was capable to advise the Virginia COPN Work Group about the impact of CON laws on competition. But Commissioner Brill took exception to the FTC's comments concerning non-competition-related public policy goals, noting that the FTC lacks evidence of the impact of repealing CON laws.

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The Virginia COPN Work Group issued its final report to the General Assembly in December 2015, recommending several changes to the COPN requirement but stopping short of recommending that Virginia repeal it. The Work Group noted that the program currently lacks a statement of purpose and urged the General Assembly to draft one. In addition, the Work Group suggested several steps to make the current application submission and review process more efficient and streamlined, including adopting a 45-day expedited review process for projects that are non-contested and raise few health planning concerns. The Work Group also suggested making the COPN program more transparent, including improved online access to COPN filings and other related documents.

On January 11, 2016, the Agencies submitted a similar joint statement, upon the request of South Carolina Governor Nikki Haley, regarding the competitive implications of CON laws and South Carolina House Bill 3250—a bipartisan bill that ultimately would repeal South Carolina's CON program effective January 1, 2018. While the Agencies observed certain flaws in the legislation, they expressed broad support for the proposed repeal of South Carolina's CON program. FTC Commissioner Brill also issued a dissenting statement, noting in large part the commendable non-competition policy goals advanced by CON programs.

Virginia's COPN law also survived a recent constitutional challenge in the U.S. Court of Appeals for the Fourth Circuit. In the case, *Colon Health Centers v. Hazel*, No. 14-2283 (4th Cir. Jan. 21, 2015), two providers of medical imaging services alleged that Virginia's COPN law violated the dormant aspect of the Commerce Clause. The Fourth Circuit affirmed the district court's holding that the COPN requirement neither discriminated against nor placed an undue burden on out-of-state health care providers (and granting summary judgment to the Commonwealth). This recent Fourth Circuit precedent may decrease the likelihood of the Agencies formally challenging Virginia's COPN program following their joint statement encouraging that it be repealed.