

# CLIENT ALERTS

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## Certificate of Need Change?

4.12.2016

On January 11, 2016, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) released a Joint Statement regarding legislation in South Carolina House Bill 3250 (the “Bill”) which would narrow the application and ultimately repeal South Carolina’s Certificate of Need (“CON”) laws. CON laws regulate beds allowed for hospitals and nursing homes as well as numerous other health services such as CT scans, MRIs and surgery centers.

The Joint Statement recited the reasons why CON laws were originally enacted – to reduce costs and improve access to care. The Joint Statement provides, however, that the experience has been that CON laws can prevent the efficient functioning of health care markets that undermine those goals. The Joint Statement says in defense of this proposition that:

“First, CON laws create barriers to entry and expansion, limit consumer choice and stifle innovation. Second, incumbent firms seeking to thwart or delay entry or expansion by new or existing competitors may use CON laws to achieve that end. Third, as illustrated by the FTC’s recent experience in the Phoebe Putney case, CON laws can deny consumers the benefit of an effective remedy following the consummation of an anticompetitive merger. Finally, the evidence to date does not suggest that CON laws have generally succeeded in controlling costs or improving quality”. The conclusion was that South Carolina should repeal its CON laws.

The general inference of the Joint Statement is that more targeted policies might be more effective in ensuring access to care and not inflict anticompetitive costs. The authors also indicate that quality of care arguments should not preclude CON reform and further the use of CON laws have failed to control costs.

### Related Services

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As far back as the first term of Governor Engler, Michigan toyed with the idea of eliminating or narrowing its CON legislation. The Joint Statement may provide new fuel to arguments to reduce or eliminate CON laws by taking the position it has regarding the Bill. Michigan might be well served by initiating an unbiased review of the Joint Statement and whether the CON laws need to be scrutinized to determine whether or not they have been effective in achieving their original goals.

Those impacted by CON laws might also be well served by engaging their lobbyists in ongoing dialogue regarding the prospects of a modification or repeal of Michigan's CON law. No matter which side of the issue an interested party may support, being prepared for any change could be very valuable to the future of an affected entity.

If you have questions regarding CONs, other employer health plan issues or other health care law matters generally, please contact your regular Butzel Long attorney, the author of this alert, or any member of Butzel Long's Health Care Industry Groups.

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