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CLIENT ALERT

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**HEAD OF ANTITRUST DIVISION QUESTIONS  
THE CONTINUED NEED FOR AN INSURANCE INDUSTRY EXEMPTION**

Congress once again is considering a repeal of the McCarran-Ferguson Act. The Act currently provides insurers an exemption from the federal antitrust laws for the “business of insurance” to the extent that it is “regulated” by state law. The sixty-four year old Act was passed in reaction to a Supreme Court decision that Congress and others believed could undermine the states’ authority to regulate the business of insurance by exposing certain practices to scrutiny and lawsuits under the federal antitrust laws.

Last week, Christine Varney, Assistant Attorney General in charge of the Antitrust Division, provided testimony to the Senate Judiciary Committee regarding the proposed repeal. Not surprisingly, Varney indicated that “the Department is generally opposed to exemptions from the antitrust laws . . . in the absence of a strong showing of compelling need.” With regard to the MFA, Varney noted that “[r]epealing the . . . Act would allow competition to have a greater role in reforming health and medical malpractice insurance markets.”

Varney questioned whether the justifications for exemption remained valid in light of the more sophisticated economic analysis applied by today’s courts. “Some forms of joint activity that might have been prohibited under earlier, more restrictive doctrines are now clearly permissible, or at the very least analyzed under a rule of reason...”

Varney also expressed concern regarding the level of state regulation necessary to invoke

the exemption. According to Varney, the case law can be read to support the exemption “regardless of how perfunctory or ineffective” the state regulation may be. Varney would apparently prefer that the level of regulation be sufficiently active and pervasive to meet the “state action” defense criteria.

This is not the first time the issue of amending or repealing this exemption has arisen. And it may well not be the last. One thing is certain though, a defense based on the existence of an antitrust exemption typically is a lot cleaner, and a lot less expensive to litigate, than attempting to get a complaint dismissed based upon a rule of reason analysis.

**For more information please contact:**

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