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At one time, every state was required by the federal government to have a certificate of need (CON) program. The process was intended to keep down costs associated with the construction of new health facilities in the state, and prevent over development. When the federal requirement was lifted, however, a number of states did away with their programs. Some later restored them in some form, and many have kept their programs alive for years, requiring a governmental seal of approval for building new facilities such as hospitals and long-term care facilities or for acquiring major medical equipment.

Federal History

A 1974 federal law (PL 93-641) created the federal health planning program, intending to stop unnecessary health facility construction and acquisition of expensive major medical equipment. Critics felt the program represented excessive government intervention, while supporters said it helped curb rising health care expenditures. During the mid-80s debate, those who opposed the program said that federal regulatory changes--such as a restructuring of the Medicare payment system--would hold down costs, making a certificate of need program unnecessary.

In 1981, the Reagan administration recommended phasing out the program, but Congress chose to continue it for a year. While Congress granted a one-year extension, lawmakers reduced federal funding to \$102 million for FY 1982, down from a FY 1980 authorization of \$157.7 million.

In the summer of 1986, President Reagan signed a \$1.7 billion supplemental spending bill (PL 99-349) that included a provision allowing state planning agencies to continue their programs until their fiscal 1986 money ran out. But in November 1986, he signed a massive health care bill that repealed the program (by eliminating section XV of the Public Health Service Act). The repeal took effect Jan. 1, 1987.

Federal Repeal Impacts States

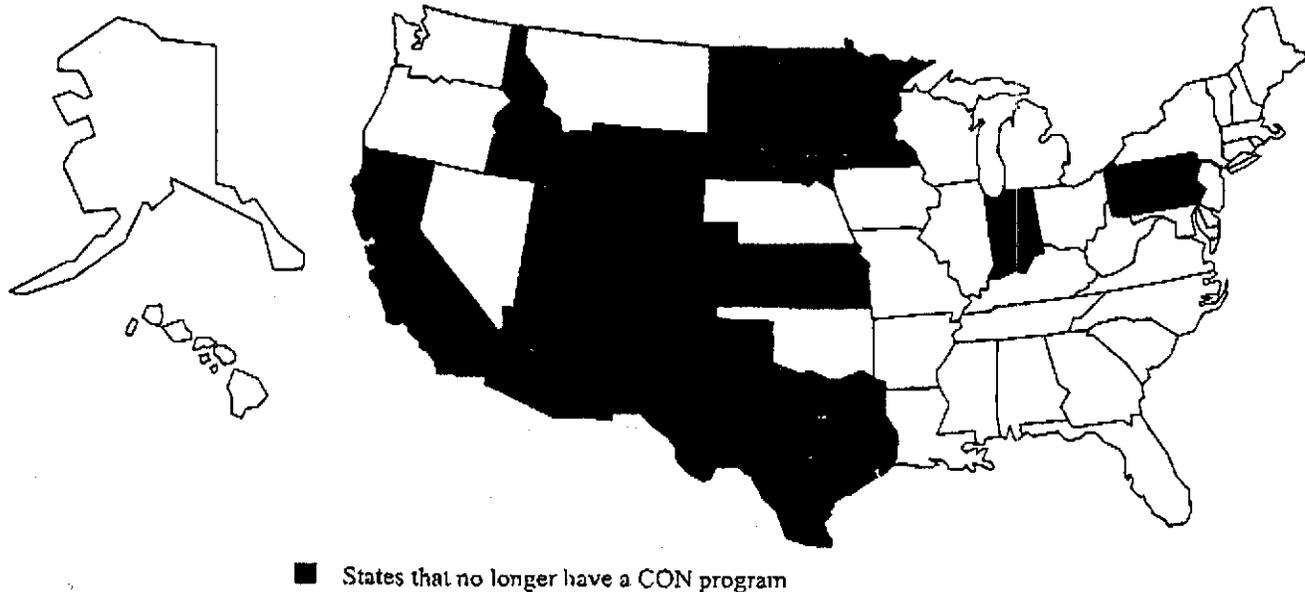
After the federal law was repealed and states no longer were required to maintain a certificate of need program, a number of states repealed their CON laws. Some states phased out their programs even before the federal repeal law was signed.

Currently, 14 states--Arizona, California, Colorado, Idaho, Indiana, Kansas, Minnesota, New Mexico, North Dakota, Pennsylvania, South Dakota, Texas, Utah and Wyoming--no longer have a CON program (see map below). Two states--Wisconsin and Indiana--initially abolished their programs but restored certain aspects of their review process, such as the long-term care portion, following repeal of the

law. When Indiana allowed the long-term care portion of its CON program to lapse in 1998, the state's program died.

Figure 1.

States That No Longer Have A Certificate of Need Program



Source: Missouri CON program, Health Policy Tracking Service, December 2002

Overview of States that have Repealed

In an attempt to ascertain the ramifications for states following repeal of their CON programs, the Health Policy Tracking Service interviewed current and former health department officials in 10 of those states, as well as officials in the two states that restored their programs. The results of those interviews, compiled below, examine how each state fared following the abolition of its CON program.

Please note that this section is not intended as a definitive analysis of the state's program, but rather a view from the perspective of those involved with the process at the state agency level. All the analysts are listed by the division of the health department with which they are or were affiliated. These comments were received in 1999.

Arizona

Last year of CON program: 1985

Phil Lopes, former chief, Bureau of Health Systems Development

Lopes says in the early 1980s, the state was involved in what Lopes terms a "nasty political fight" over competing ballot initiatives relating to health costs, pitting the hospital association against certain private companies. He says that when the debate emerged to disband CON, the public turned a deaf ear, exhausted from the previous battle over the initiatives.

Following CON's repeal, there was a rush to construct nursing home and psychiatric beds. Lopes, who "absolutely supported" CON when it was in place, says he believes the state suffered and continues to

suffer for repealing the program. But with occupancy rates down and a plethora of idle beds, he believes it is unlikely that there will ever be a movement to restore it.

Colorado

Last year of CON program: 1987

Susan Rehak, director, Rural/Primary Health Care

The process to remove CON was not a smooth one in Colorado, but without any legislative initiatives to resurrect it that Rehak can recall, there never has been any real possibility of the program being restored. The first movement to bring back CON emerged a year after the program's demise, but all attempts have been defeated.

After CON was repealed, there was a flurry of nursing home and hospital construction, prompting a decrease in occupancy rates. To curb over-bedding, the state's Medicaid office placed a moratorium on Medicaid-certified beds in nursing homes in 1990.

Idaho

Last year of CON: 1983

Richard Schultz, administrator, Division of Health

The CON law in Idaho was short-lived. Enacted in 1980, it had a three-year automatic repeal. According to Schultz, who directed the state's health planning agency when CON was in place, there was a push for its repeal when the debate came up in the legislature. There had never been much legislative support for it and he says the primary reason for its enactment was that the state did not want to be denied federal money.

The extent of any debate to bring the program back comes from a few legislators, but Schultz says there has been no formal movement to restore the program. Like other rural states, there is not the demand for construction of new facilities that there might be in more populous states that have larger urban centers. Rural hospitals in the state, which have lately been downsizing their staff, are considered to be doing well if their occupancy rates are near 20 percent. In urban areas, average occupancy rates hover between 40 and 70 percent.

According to Schultz, CON "didn't seem to have much of an effect" when it was in place and the state has not been affected significantly by its repeal.

Kansas

Last year of CON program: 1985

Richard Morrissey, director, Office of Local and Rural Health

Morrissey says there was not a large-scale fight to keep the program, but there were arguments. Providers supported its repeal and the health department did not take a strong stand one way or the other. In the years that followed, the nursing home industry sought to restore it, because a rash of new nursing home beds that resulted in a 10 percent bed increase had brought significant competition to the field.

For hospitals, the effect has not been as substantial, according to Morrissey. The number of beds has continued to decrease and most of the hospital construction has involved renovation or building outpatient facilities.

Morrissey says he is not convinced that CON stopped hospitals from placing a greater emphasis on outpatient facilities. As the industry evolves, outpatient facilities represent cost-cutting opportunities.

A direct result of repealing CON was the number of private psychiatric hospitals in the state. Within a few years of the program's lapse, the number of hospitals increased by about eight. During the mid-80s, the private psychiatric hospital industry was going through a boom but the state's department of health did not feel there was a need for such a high number of them. With CON, Morrissey said, they were able to keep down the number of hospitals. In recent years, that industry has reversed course, and hospitals in Kansas have decreased their work force.

Minnesota

Last year of CON program: 1984

Carol Hirschfeld, Supervisor, Program Assurance Unit

With moratoriums in place on Medicaid-certified nursing home beds and hospital beds since 1983 and 1990, there have been no new beds in Minnesota for years.

Hirschfeld says that although there have been legislative initiatives to alter the moratoriums, restoring CON is not part of the public debate, because there has been no movement in the legislature to restore it.

New Mexico

Last year of CON: 1983

Sue Ellen Rael, assistant to the secretary, Department of Health

After CON was repealed, New Mexico maintained a review process until 1987. Rael does not recall that anyone was particularly unhappy with CON being repealed, but says having the process in place helped the health department disperse facilities so that rural areas were not underserved. Rael says the department was able to continue that practice for some years under the modified review process that succeeded CON.

The state has worked to keep costs down, especially those incurred by Medicaid. When the Medicaid program in New Mexico developed a reimbursement plan for the state's nursing homes during the mid-1980s, it reimbursed very little for capital expenditures.

Rael does not recall an inordinate amount of overbedding or major hospital expansion after CON's repeal. As in other states, a changing health care industry has prevented overdevelopment.

North Dakota

Last year of CON program: 1995

Fred Larson, policy analyst; former director of North Dakota CON program.

Larson helped draft CON repeal legislation five times before it was finally enacted. He says that "most people were pretty happy to see it go away" because there had been so many debacles associated with the program over the years.

One of the primary concerns in abolishing the program was how it would affect Medicaid, so the state placed a moratorium on construction of new nursing home beds. The nursing home industry has been supportive of maintaining that moratorium.

The transition has not been without problems. Larson says that construction of new facilities around the state, including medical and private psychiatric hospitals, combined with a diminishing population has had a significant enough effect on state money to frustrate policymakers.

Still, there has not been any serious debate about restoring CON, and no measures to bring it back have been introduced in the legislature.

South Dakota

Last year of CON: 1988

Kevin Forsch, director, Health Systems Development and Regulation Division

Forsch says CON was repealed because the process became entangled in the threat of lawsuits by providers who had been denied approval for construction projects. Rather than save the state money, the law gave way to legal bills and a heavy financial burden for the state.

Although legislators in recent years have suggested bringing back the program, there has not been a groundswell of support for the idea. Forsch says the downfall of the program was the legal issue. Even providers have changed their stance, and no longer see a need for CON. Forsch recalls the director of a provider association who once commented that "the only ones that really benefited from [the CON] process were the attorneys."

The year CON was repealed, a moratorium was placed on the construction of new long-term care beds in the state. The original moratorium was set to expire on June 30, 2000, but lawmakers enacted legislation extending the moratorium until June 30, 2005. Under the moratorium, no nursing facility may be constructed, operated or maintained unless the facility is serving as a replacement for an existing facility and is required for special purposes. According to Forsch, the moratorium has been credited with saving the state roughly \$50 million to \$70 million in Medicaid dollars. That is because people who might have moved into nursing homes or other long-term care facilities were able to utilize home and community-based services, which generally are cheaper. The trend toward those services has made the need for long-term beds less urgent. In the meantime, South Dakota's assisted living industry is booming.

Forsch says that, without any consensus within the Legislature or among providers to bring back CON, the program is dead, and will not be resurrected any time in the near future.

Utah

Last year of CON program: 1984

Patrick J. Johnson, executive director, Health Policy Commission

While restructuring of the health care market has served some of the same purposes as CON in preventing overdevelopment in Utah, Johnson wonders if CON might have helped prevent more recent debacles, such as the closing of a hospital owned by Family Health Plan, a California-based HMO, just three years after it opened. With a trend toward renovating or converting existing facilities, a move to keep Medicaid recipients out of nursing homes as long as possible, and an industry need to cut costs where possible, Johnson does not see a renewed public or governmental demand for regulation modeled on the CON review process.

One of the direct results of the law's repeal was a proliferation of private psychiatric hospitals the year after the law was abolished. Those facilities either have closed or been bought out as a result of an overall downsizing of that industry.

A nursing home bed moratorium has been in place since the late 1980s, enacted by the health department without the Legislature's participation. Johnson acknowledges that "there's been some grumbling" about the fact that the moratorium did not go through the Legislature, but says the Legislature was relieved not to have to sort through what could have been a tough political fight. From the health department's perspective, it was important to enact the moratorium to keep Medicaid costs down.

Currently, occupancy rates are not at a level that would compel the state to lift the moratorium, and the state is trying to cut costs by moving the elderly and disabled into home and community-based services.

Wyoming

Last year of CON program: 1985

Douglas Thiede, manager, Office of Rural Health

After federal money for state CON programs was taken away, the Legislature supported the idea of doing away with the program altogether. Although there was some controversy in some of Wyoming's larger cities, he says the only groups that complained were the ones who were being prevented from constructing new or expanded health facilities.

The state's number of long-term care beds went up after CON was repealed, prompting lawmakers to pass a limit on the number of long-term care beds. That law, still in effect, would put the limit in place if more than 92 percent of long-term care beds have been filled for more than three years. If the percentage decreases, more beds could be built. According to Thiede, that is the only real restriction on health planning, and there has never been a movement in the Legislature to restore CON.

In part because of Wyoming's rural geography and because companies are trying to cut costs by shortening inpatient hospital stays, Thiede says "there's not really much clamoring to build health facilities in Wyoming." Because of that, he believes the program will not be resurrected.

States That Restored Review Process Following Repeal

Indiana

Last year of CON: 1986

Last year of long-term care portion of CON: 1998 (*CON program died after long-term care portion lapsed*)

Tom Reed, public health administrator, Indiana Department of Health

There currently is no formal review process in Indiana, because the legislation authorizing the long-term care portion of CON lapsed in July 1998.

As occupancy rates in nursing homes decreased, the health department felt that CON was not as effective as it was intended to be, according to Reed. The program originally lapsed in 1996, when Governor Evan Bayh (D) vetoed a bill that would have renewed CON for two years. Reed says there were about 3,000 new long-term care beds built during that period, bringing the state total to roughly 30,000. After that year, the state restored the review process.

The Department of Health drafted a white paper last year that asserted there was no need for a CON program in the state, saying that marginal facilities would close by themselves and, without a barrier to adding additional beds, competition would come in where it was appropriate.

Reed says that historically, smaller nursing homes (40 beds or less) have had higher levels of deficiency in their survey process, and may have stayed in business longer when CON prevented larger nursing homes from building facilities.

Reed says that although he believes there is a general consensus that CON is better off dead, the nursing home industry would like to see it restored. There is an abundance of beds and facilities in the state, and although Reed believes it is more important for the Legislature to spend its time increasing fines for nursing homes with violations, the industry may want to see a market that is not overrun with empty beds.

Wisconsin

Last year of original CON law: 1983

Currently covers: long-term care, intermediate care facilities for the mentally retarded, subacute care

Connie Miller, lead analyst, Resource Allocation Program

Miller says provider groups originally helped do away with the state's CON program. After it initially was abolished, about five psychiatric hospitals moved in and there was increased construction. Eventually, three of those hospitals closed down, and a Cost Containment Commission was appointed to evaluate the issue.

Miller says abolishing the remainder of the CON program is "not a big deal" to the Legislature, and providers would like to see it go.

2004 Legislative Activity

In 2004, 14 states--**Alaska, Connecticut, Florida, Hawaii, Illinois, Kentucky, Maine, Minnesota, Mississippi, Oklahoma, Rhode Island, Tennessee, Virginia and Washington**--enacted legislation to address the applicability of their certificate of need (CON) programs. An emerging trend, particularly in Connecticut and Florida, concerned the certificate of need process and specialty hospitals. In addition, a number of state legislatures enacted laws to create exemptions to the CON process.

Specialty Hospitals

The Connecticut General Assembly enacted legislation concerning the transfer of ownership of specialty hospitals. House Bill 5531 states that a request for permission to transfer ownership of a surgical facility will not be required if the following conditions are met:

- the outpatient surgical facility is owned and controlled exclusively by persons licensed; and
- the transfer or change of ownership or control does not give ownership or control, in whole or in part, to any unlicensed person, and involves 49 percent or less of the outpatient surgical facility's

ownership or control.

Florida Governor Jeb Bush (R) signed two bills, HB 329 and SB 182, to reform the state's certificate of need process. Governor Bush asserted that the legislation would improve quality outcomes and reduce lengthy litigation that often delays access to care. In addition, the laws effectively prevent the Agency for Health Care Administration (AHCA) from licensing specialty hospitals that limit access to elective surgery, orthopedic services, and cardiac care without providing full emergency department services. House Bill 329 specifically prohibits AHCA from issuing or renewing a license if 65 percent or more of the facility's patients receive care for cardiac, orthopedic, or cancer-related disorders. In addition, AHCA is unable to issue a license to a hospital that restricts services primarily or exclusively to cardiac, orthopedic, or oncology specialties.

Tennessee HB 3449 adds a section to state statutes that requires outpatient diagnostic centers to obtain licenses and certificates of need. In addition, independent outpatient centers must pay an \$800 annual license fee; however, the law exempts hospital-based outpatient diagnostic centers. The law also requires the centers to report claims data on every discharge to the Department of Health on a quarterly basis.

Exemptions to Certificate of Need Laws and Moratoriums

Hawaii HB 2539 provides an exemption to existing facilities seeking to expand or modify an existing facility. However, in order to receive an exemption, the facility must possess a statement issued by a state agency that they are not required to hold a certificate of need.

The **Kentucky** General Assembly enacted legislation to authorize a critical access hospital to increase its acute care bed capacity to 25 beds without obtaining a certificate of need.

In **Minnesota**, lawmakers enacted a measure that provides an exception to the nursing home moratorium and grants a license and certification to a new 60-bed nursing facility.

Virginia Governor Mark Warner (D) signed legislation to rescind the requirement to obtain a certificate of public need (COPN) for intermediate care facilities for the mentally retarded that will have no more than 12 beds. These facilities must be located in an area identified as in need of residential services for people with mental retardation by the Department of Mental Health, Mental Retardation and Substance Abuse Services.

Washington SB 6485 allows a critical access hospital to increase and redistribute its total number of licensed beds for acute and nursing home care without undergoing a certificate of need review.

Certificate of Need Requirements

Alaska Governor Frank Murkowski (R) signed legislation to subject Residential Psychiatric Treatment Centers (RPTC) to the requirements of the state's certificate of need law.

The **Kentucky** General Assembly enacted a similar measure, HB 90, to require a CON for all psychiatric residential treatment facilities. The application for a certificate of need must include formal written agreements of cooperation that identify the nature and extent of the working relationship between the proposed psychiatric residential treatment facility and each of the agencies, organizations, or facilities located in the service area of the proposed facility.

Mississippi HB 1345 directs the State Department of Health to issue a certificate of need for Mississippi State University and a public private health care provider to jointly acquire and operate a linear accelerator and a magnetic resonance imaging unit.

Oklahoma Governor Brad Henry (D) signed legislation to amend the state Long-Term Care Certificate of Need Act. House Bill 2723 requires a certificate of need for the following:

- Any capital investment or lease of \$1,000,000 or more;

- Acquisition of the ownership or operation of a facility whether by purchase, lease, donation, transfer of stock or interest, management contract, corporate merger, assignment, or through foreclosure; and
- An increase in licensed beds, whether through establishment of a new facility or expansion of an existing facility.

Miscellaneous Legislation

Illinois HB 1659 authorizes the Health Facilities Planning Board to require dialysis facilities and licensed nursing homes to report statistical information on a quarterly basis to the Board. This information will be used to conduct analyses on the need for proposed kidney disease treatment centers.

Kentucky HB 59 creates a moratorium on continuing care retirement community nursing home beds after July 31, 2008.

The **Maine** Legislature enacted a measure to refine the criteria for issuing a certificate of need. In making a determination, the Department of Human Services will use data available in the state health plan from the Maine Health Data Organization and other information available to the commissioner. Particular weight must be given to information that indicates that the proposed health services are innovations in high quality health care delivery, that the proposed health services are not reasonably available in the proposed area, and that the facility proposing the new health services is designed to provide excellent quality health care.

Lawmakers in **Rhode Island** enacted legislation to extend the moratorium on new initial licenses for nursing facilities to July 1, 2006. Existing statutes list the date as 2004. In addition, lawmakers amended state statutes pertaining to the review and approval of new health care equipment and new institutional health services. Senate Bill 2317 adds the following factors to be considered by the health services council in conducting reviews and determining need:

- The input of the community to be served by the proposed equipment and services and the people of the neighborhoods close to the health care facility who are impacted by the proposal; and
- The relationship of the proposal to any long-range capital improvement plan of the health care facility applicant.

2003 Legislative Activity

In 2003, twelve states amended statutes concerning certificate of need laws or the building of new hospitals or nursing homes—**Connecticut, Florida, Louisiana, Maryland, Maine, Minnesota, Mississippi, North Dakota, New Hampshire, South Carolina, Tennessee, and Virginia**.

Florida SB 460 provides an exemption from CON requirements for certain open-heart-surgery programs and requires the Agency for Health Care Administration to report to the Legislature on the number of exemption requests granted or denied each year.

Louisiana SB 500 extends the moratorium on mental health clinics and centers, long-term care hospital facilities, nursing facilities, and home health agencies through July 1, 2008.

Similarly, **North Dakota** HB 1400 continues the moratorium on basic care bed capacity and long-term care bed capacity. The law extends the moratorium from August 1, 2003 to July 31, 2007.

2002 Legislative Activity

In 2002, a number of states addressed the applicability of their certificate of need (CON) programs. Twenty states—**Alabama, California, Connecticut, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Vermont and Virginia**—moved a total of 36 bills past at least one chamber of the legislature. This number is similar to the number of bills that passed one chamber in 2000 and 2001. By

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