

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Health Regulation Committee

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BILL: SPB 7048

INTRODUCER: For Consideration by the Health Regulation Committee

SUBJECT: Certificates of Need

DATE: February 7, 2011

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall		<b>Pre-meeting</b>
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**I. Summary:**

The proposed committee bill is the result of a review of the moratorium on nursing home certificates of need, which is discussed in Florida Senate Interim Report 2011-125.<sup>1</sup>

The proposed committee bill extends, until July 1, 2016, the moratorium on nursing home certificates of need and the requirement for the Agency for Health Care Administration (Agency) to reduce upon request, the mandatory percentage of Medicaid patient days in certain nursing homes.

This bill substantially amends the following sections of the Florida Statutes: 408.040 and 408.0435.

**II. Present Situation:**

**Certificates of Need**

A certificate of need (CON) is a written statement issued by the Agency evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility, health service, or hospice.<sup>2</sup> Under this regulatory program, the Agency must provide approval through the CON review and approval process prior to a provider establishing a new nursing home or adding nursing home beds.

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<sup>1</sup> The Florida Senate Interim Report 2011-125 is available at [http://www.flsenate.gov/data/Publications/2011/Senate/reports/interim\\_reports/pdf/2011-125hr.pdf](http://www.flsenate.gov/data/Publications/2011/Senate/reports/interim_reports/pdf/2011-125hr.pdf) (Last visited on January 25, 2011).

<sup>2</sup> Section 408.032(3), F.S.

The Florida CON program has three levels of review: full, expedited, and the granting of an exemption.<sup>3</sup> The nursing home projects addressed in s. 408.036, F.S., related to CONs are as follows:

***Projects Subject to Full Comparative Review***

- Adding beds in community nursing homes; and
- Constructing or establishing new health care facilities, which include skilled nursing facilities (SNFs).<sup>4</sup>

***Projects Subject to Expedited Review***

- Replacing a nursing home within the same district; and
- Relocating a portion of a nursing home's licensed beds to a facility within the same district.

***Exemptions from CON Review***

- Converting licensed acute care hospital beds to Medicare and Medicaid certified skilled nursing beds in a rural hospital;
- Adding nursing home beds at a SNF that is part of a retirement community which had been in operation on or before July 1, 1949 for the exclusive use of the community residents;
- Combining licensed beds from two or more licensed nursing homes within a district into a single nursing home within that district if 50 percent of the beds are transferred from the only nursing home in a county and that nursing home had less than a 75 percent occupancy rate;<sup>5</sup>
- State veteran's nursing homes operated by or on behalf of the Florida Department of Veterans' Affairs;
- Combining into one nursing home, the beds or services authorized by two or more CONs issued in the same planning subdistrict;
- Separating into two or more nursing homes in the subdistrict, the beds or services that are authorized by one CON;
- Adding no more than 10 total beds or 10 percent of the licensed nursing home beds of that facility, whichever is greater; or if the nursing home is designated as a Gold Seal nursing home, no more than 20 total beds or 10 percent of the licensed nursing home beds of that facility for a facility with a prior 12-month occupancy rate of 96 percent or greater; and
- Replacing a licensed nursing home on the same site, or within 3 miles, if the number of licensed beds does not increase.

The CON program applies to all nursing home beds, regardless of the source of payment for the beds (private funds, insurance, Medicare, Medicaid, or other funding sources).

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<sup>3</sup> Section 408.036, F.S.

<sup>4</sup> Section 408.032(16), F.S., defines a SNF as an institution, or a distinct part of an institution, which is primarily engaged in providing, to inpatients, skilled nursing care and related services for patients who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons.

<sup>5</sup> This exemption is repealed upon the expiration of the moratorium by operation of s. 408.036(3)(f), F.S.

### *Determination of Need*

A CON is predicated on a determination of need. The future need for community nursing home beds is determined twice a year and published by the agency as a fixed bed need pool for the applicable planning horizon. The planning horizon for CON applications is 3 years. Need determinations are calculated for subdistricts within the Agency's 11 service districts<sup>6</sup> based on estimates of current and projected population as published by the Executive Office of the Governor.

The need formula<sup>7</sup> links the projected subdistrict need to a projected increase in the district need for nursing home beds. The district increase is based on the expected increase in the district population age 65 to 74 and age 75 and over, with the age group 75 and over given 6 times more weight in projecting the population increase. The projected district bed need total is then allocated to its subdistricts. The result for a given subdistrict is adjusted to reflect the current subdistrict occupancy of beds, and a desired standard of 94 percent occupancy. The subdistrict net need is the excess of the allocated beds over the licensed or approved beds in the subdistrict. If current occupancy of licensed beds is less than 85 percent, the net need in the subdistrict is zero regardless of whether the formula otherwise shows a net need.

The Agency is required to issue a CON to the holder of a provisional certificate of authority to construct nursing home beds for the exclusive use of the prospective residents of the proposed continuing care facility under a different bed-need assessment scheme.<sup>8</sup> The Agency is required to approve at least one sheltered nursing home bed<sup>9</sup> for every four proposed residential units. Additional sheltered nursing home beds must be approved based on actual utilization and demand by current residents. Sheltered nursing home beds are not included in the need formula for community nursing home beds.

### *Application Process*

Nursing home bed projects subject to competitive review are included in the batching cycle for "other beds and programs." The review process takes approximately 120 days.<sup>10</sup> The fixed bed need determination is published in the Florida Administrative Weekly. A letter of intent describing the applicant, the project type including the number of beds, and its location must be submitted to the Agency at least 30 days prior to the applicable batching cycle application due date.<sup>11</sup> A grace period after the initial letter of intent deadline provides an opportunity for other applicants to compete with an initial letter of intent. The grace period extends this initial phase by an additional 16 days for the submission of a competitor's letter of intent.

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<sup>6</sup> The nursing home subdistricts are set forth in Rule 59C-2.200, F.A.C.

<sup>7</sup> Rule 59C-1.036, F.A.C.

<sup>8</sup> Section 651.118, F.S.

<sup>9</sup> A sheltered nursing home bed is a nursing home bed located within a continuing care facility for which a CON is issued pursuant to s. 651.118(2), F.S. Generally these beds must be used for residents of the continuing care facility. However, the beds may be used for persons who are not residents of the continuing care facility for a period of up to 5 years after the date of issuance of the initial nursing home license. A continuing care community may request an extension of this timeframe for up to 30 percent of the sheltered nursing home beds based on demonstrated financial need.

<sup>10</sup> Presentation by the Agency on Florida CONs to the House Health Innovation Committee on January 8, 2008. A copy of the presentation slides is available from the Senate Committee on Health Regulation.

<sup>11</sup> Rule 59C-1.008, F.A.C.

The CON application must be submitted to the Agency by the date published for that batching cycle. The Agency must perform a completeness review of the application within 15 calendar days of the application submission deadline.<sup>12</sup> The applicant has 21 calendar days after receipt of the Agency's request for additional information to provide the requested information, otherwise the application is withdrawn from further consideration. The Agency must determine whether the application is complete or withdrawn within 7 calendar days after receipt of the requested information.

The Agency will conduct public hearings on the applications, if requested and the Agency determines that a proposed project involves issues of great local public interest.<sup>13</sup>

The Agency reviews CON applications for additional nursing home beds in context with the following criteria:<sup>14</sup>

- The need for the health care facilities and health services being proposed. An application for nursing facility beds will not be approved in the absence or insufficiency of a numeric need unless the absence or insufficiency of numeric need is outweighed by other information presented in a CON application showing special circumstances consistent with the additional criteria that follows;<sup>15</sup>
- The availability, quality of care, accessibility, and extent of utilization of existing health care facilities and health services in the service district of the applicant;
- The ability of the applicant to provide quality of care and the applicant's record of providing quality of care;
- The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation;
- The extent to which the proposed services will enhance access to health care for residents of the service district;
- The immediate and long-term financial feasibility of the proposal;
- The extent to which the proposal will foster competition that promotes quality and cost-effectiveness;
- The costs and methods of the proposed construction, including the costs and methods of energy provision and the availability of alternative, less costly, or more effective methods of construction;
- The applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent; and
- The applicant's designation as a Gold Seal Program nursing facility pursuant to s. 400.235, F.S., when the applicant is requesting additional nursing home beds at that facility.

The Agency issues a State Agency Action Report which states the Agency's intent to grant or deny a CON for projects in their entirety or for identifiable portions thereof and states the conditions required, if any, of the CON holder. If there is no challenge to all or any part of the

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<sup>12</sup> Rule 59C-1.010, F.A.C.

<sup>13</sup> Section 408.039, F.S.

<sup>14</sup> Section 408.035, F.S.

<sup>15</sup> Rule 59C-1.036, F.A.C.

agency decision embodied in the State Agency Action Report within 21 days after publication in the Florida Administrative Weekly, the decision becomes final and the CON is issued.<sup>16</sup>

Applicants in the same batching cycle and exiting health care facilities in the same district that will be substantially affected by the issuance of any CON may challenge the issuance or denial of a CON. The Division of Administrative Hearings conducts the hearing, which must commence within 60 days after the administrative law judge has been assigned except upon unanimous consent of the parties or pursuant to a motion of continuance granted by the administrative law judge.<sup>17</sup> A party to an administrative hearing for an application for a CON may seek judicial review of the final order issued by the administrative law judge to the District Court of Appeal.

### **Moratorium on Nursing Home CONs**

In 2001, the Legislature enacted the first moratorium on the issuance of CONs for additional community nursing home beds until July 1, 2006.<sup>18</sup> In 2006, the Legislature extended the moratorium until July 1, 2011.<sup>19</sup> In addition, the Legislature provided for additional exceptions to the moratorium to address occupancy needs that might arise.

The Legislature has provided for certain exceptions to the moratorium on CONs as follows:

- Adding sheltered nursing home beds;
- Beds may be added in a county that has no community nursing home beds and the lack of beds is the result of the closure of nursing homes that were licensed on July 1, 2001;<sup>20</sup>
- Adding the greater of no more than 10 total beds or 10 percent of the licensed nursing home beds of a nursing home located in a county having up to 50,000 residents,<sup>21</sup> if:
  - The nursing home has not had any class I or class II deficiencies<sup>22</sup> within the 30 months preceding the request for addition;
  - The prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and the facility has not had any class I or class II deficiencies since its initial licensure; or

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<sup>16</sup> *Supra* fn. 12.

<sup>17</sup> *Supra* fn. 13.

<sup>18</sup> Chapter 2001-45, L.O.F. s. 52.

<sup>19</sup> Chapter 2006-161, L.O.F.

<sup>20</sup> The request to add beds under this exception to the moratorium is subject to the full competitive review process for CONs.

<sup>21</sup> Twenty-five counties have fewer than 50,000 residents. These counties include: Baker, Bradford, Calhoun, DeSoto, Dixie, Franklin, Gadsden, Gilchrist, Glades, Gulf, Hamilton, Hardee, Hendry, Holmes, Jefferson, Lafayette, Levy, Liberty, Madison, Okeechobee, Suwannee, Taylor, Union, Washington and Wakulla. Source: The Florida Legislature Office of Demographic and Economic Research as of April 1, 2010, *The Florida Legislature Econographic News*, 2010 Volume Ia, available at: <http://edr.state.fl.us/Content/population-demographics/reports/econographicnews-2010v1a.pdf>, (Last visited on January 28, 2011).

<sup>22</sup> Deficiencies in nursing homes are classified according to the nature and scope of the deficiency. A class I deficiency is a deficiency that the Agency determines presents a situation in which immediate corrective action is necessary because the facility's noncompliance has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in a facility. A class II deficiency is a deficiency that the Agency determines has compromised a resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. *See* s. 400.23(8), F.S.

- For a facility that has been licensed for less than 24 months, the prior 6-month average occupancy rate for the nursing home beds at the facility meets or exceed 94 percent and the facility has not had any class I or class II deficiencies since its initial licensure; and
- Adding the greater of no more than 10 total beds or 10 percent of the number of licensed nursing home beds if:
  - The facility has not had any class I or class II deficiencies within the 30 months preceding the request for addition;
  - The prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 96 percent;
  - The prior 12-month occupancy rate for the nursing home beds in the subdistrict is 94 percent or greater; and
  - Any beds authorized for the facility under this exception in a prior request have been licensed and operational for at least 12 months.<sup>23</sup>

**Nursing Home Occupancy Levels**

As of January 1, 2011, there are 674 licensed nursing homes and 82,562 licensed nursing home beds in Florida.<sup>24</sup>

Over the last 10 years, the average nursing home occupancy level in Florida has remained below 90 percent and has been declining steadily. However, since the moratorium was reenacted in 2006, the Leon and Okeechobee subdistricts have exceeded slightly the 94 percent occupancy level. The number of resident days for persons aged 65 and older has been declining steadily. The annual statewide nursing home occupancy levels are presented below:<sup>25</sup>

<b>Year</b>	<b>Occupancy Level</b>	<b>Number of resident days per 1000 population aged 65+</b>
2000	85.29 %	8849
2001	85.07 %	8679
2002	86.75 %	8639
2003	87.67 %	8655
2004	88.12 %	8445
2005	87.17 %	8346
2006	88.22 %	8094
2007	88.05 %	7942
2008	87.35 %	7756
2009	86.92 %	7618

<sup>23</sup> The request to add beds under the exception to the moratorium is subject to the procedures related to an exemption to the CON requirements.

<sup>24</sup>Source: Agency for Health Care Administration, as of January 1, 2011. Data available at: [http://www.fdhc.state.fl.us/MCHQ/Long\\_Term\\_Care/FDAU/docs/SummaryAllActive.pdf](http://www.fdhc.state.fl.us/MCHQ/Long_Term_Care/FDAU/docs/SummaryAllActive.pdf), (Last visited on January 27, 2011).

<sup>25</sup> Agency for Health Care Administration report provided to professional staff of the Florida Senate Health Regulation Committee on July 28, 2010, a copy of which is available upon request from the Senate Health Regulation Committee.

The Agency projected the nursing home occupancy levels and need projections for January 2016 and the statewide occupancy level is projected at 86.55 percent. However, three subdistricts will exceed the desired standard of 94 percent occupancy based on the Agency's projection. This calculation projects additional nursing home beds will be needed in three rural subdistricts.<sup>26</sup> Exceptions to the moratorium currently authorized in law will enable nursing homes which have not been poor performers that are located in these areas to incrementally expand to meet increased demand if it materializes as projected.

### **CON Conditions**

Section 408.040, F.S., authorizes the Agency to impose conditions on the issuance of a CON or an exemption. Each nursing home participating in the Medicaid program provided a statement of intent in its application for a CON that includes a specified percentage of the annual patient days at the facility that will be utilized by patients eligible for care under the Medicaid program. The Medicaid-patient-days condition is included on the CON or exemption for these nursing homes.

The holder of a CON or an exemption with conditions may be granted a modification of the conditions by the Agency based on a demonstration of good cause. Additionally, if a nursing home is located in a county in which a long-term care community diversion pilot project has been implemented or in a county with a managed care program for Medicaid recipients who are 60 years of age or older, the Agency must grant a nursing home's request to reduce its annual Medicaid-patient-days condition by not more than 15 percent. A nursing home may submit only one request every 2 years for the automatic reduction. The authority for the automatic reduction expires June 30, 2011.<sup>27</sup>

Since 2006, when this provision authorizing the automatic reduction went into effect,<sup>28</sup> the Agency has granted the automatic 15 percent reduction 230 times.<sup>29</sup> Some licensed nursing homes have been granted reductions on three separate occasions.

### **Senate Interim Report 2011-125**

During the 2010-2011 interim, professional staff of the Senate Committee on Health Regulation examined factors impacting an extension of the moratorium on nursing home certificates of need.

Senate professional staff recommended in Interim Report 2011-125 that the Legislature reenact and continue the moratorium on the CON for community nursing home beds through the year 2016 based on the following findings:

- The public prefers home and community-based residency options;
- Projected nursing home occupancy levels through 2016 are to decrease;
- The economic climate continues to affect existing nursing homes; and

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<sup>26</sup> Okeechobee will need 16 additional nursing home beds (currently it has 180 licensed beds), Columbia/ Hamilton/ Suwannee will need 86 additional nursing home beds (currently it has 766 licensed beds), and Putnam will need 39 additional nursing home beds (currently it has 337 licensed beds). *See supra* fn. 25.

<sup>27</sup> Section 408.040(1)(d), F.S.

<sup>28</sup> Chapter 2006-161, L.O.F.

<sup>29</sup> Source: Agency for Health Care Administration email to Senate Health Regulation professional staff dated August 19, 2010, a copy of which is available from the Senate Health Regulation Committee.

- The Legislature continues to place an emphasis on, and facilitates, the ability of Floridians to reside in less restrictive settings than nursing homes.

In addition, Senate professional staff recommended that the exceptions and exemptions that the Legislature has enacted to implement the moratorium and address potential surges in occupancy levels be retained. Staff also suggested that language regarding the exception to the moratorium in a county having up to 50,000 residents should be clarified to reflect that a facility requesting additional beds must certify that it has not had any class I or class II deficiencies within 30 months or since it was initially licensed if licensed within 25 – 29 months preceding the request for additional beds.

Furthermore, Senate professional staff recommended that the Legislature reenact the automatic 15 percent reduction of the annual Medicaid-patient-days condition for nursing homes located in a county in which a long-term care community diversion pilot project has been implemented or in a county with a managed care program for Medicaid recipients who are age 60 years or older. The recommendation for continuing the automatic reduction is based on the ongoing emphasis to reduce nursing home care in favor of community-based care. Staff recommended that the automatic reduction expire on a date that coincides with the date for continuation of the moratorium in order to allow a reassessment of the long-term care environment and help ensure that reduction requests do not eliminate the availability of Medicaid nursing home beds below future needs.

This proposed committee bill implements the committee's instruction to draft a proposed committee bill in accordance with the professional staff's recommendations.

### III. Effect of Proposed Changes:

**Section 1** amends s. 408.040, F.S., to extend until July 1, 2016, the requirement that the Agency automatically grant to certain nursing homes<sup>30</sup> their request to reduce the condition on their CON requiring a percentage of annual patient days to be utilized by patients eligible for care under the Medicaid program.

**Section 2** amends s. 408.0435, F.S., to extend until July 1, 2016, the moratorium on certificates of need for additional community nursing home beds.

This section clarifies that a nursing home requesting, under one of the statutory exceptions, a CON during the moratorium must certify that it has not had any class I or class II deficiencies within 30 months preceding the request for additional beds or since initial licensure if licensed less than 30 months. In addition, the facility must certify that it has had an average occupancy rate for nursing home beds that meets or exceeds 94 percent for the designated timeframe. A facility that has been licensed 24 months or longer must certify that the prior 12-month average occupancy rate met or exceeded 94 percent, while a facility that has been licensed for less than 24 months must certify that the prior 6-month average occupancy rate met or exceeded 94 percent.

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<sup>30</sup> Section 408.040, F.S., provides that only nursing homes located in a county in which a long-term care community diversion pilot project has been implemented or in a county with a managed care program for Medicaid recipients who are 60 years of age or older or dually eligible for Medicare and Medicaid are eligible for the automatic reduction.



**Section 3** provides that the bill will take effect upon becoming a law.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

The provisions of this CS have no impact on municipalities and the counties under the requirements of article VII, section 18, of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of article I, section 24(a) and (b), of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of article III, subsection 19(f), of the Florida Constitution.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill continues the current moratorium on certificates of need for additional community nursing home beds. Therefore, unless an exception or exemption applies, new nursing home facilities may not be built and existing facilities may not be expanded to provide additional community nursing home beds.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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