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Health Care Certificate-of-Need (CON) Laws: Policy or Politics?

Original CON Focus on State Health Planning Often Overshadowed by Provider Competitive Strategies

WASHINGTON, D.C.—Originally intended to ensure access to care, maintain or improve quality, and control capital expenditures on health care services and facilities, the certificate-of-need (CON) process has evolved into an arena where providers often battle for service-line dominance and market share, according to a new study conducted by the Center for Studying Health System Change (HSC) for the nonpartisan, nonprofit National Institute for Health Care Reform (NIHCR).

Over time, the state health planning activities that initially guided CON regulations have diminished considerably, but CON laws remain in 36 states and the District of Columbia, according to the study, which focused on CON requirements in six states—Connecticut, Georgia, Illinois, Michigan, South Carolina and Washington.

In five of the six states studied—all except Michigan—the CON approval process can be highly subjective and tends to be influenced heavily by political relationships, such as a provider’s clout, organizational size, or overall wealth and resources, rather than policy objectives, according to many respondents in the six states interviewed for the study.

Michigan respondents cited several elements of the state’s CON apparatus that contribute to greater objectivity and transparency. The state divides responsibility for setting CON review standards and the actual review of CON applications between an appointed commission and the state Department of Community Health, respectively. Michigan also is the only state studied with a formal advisory role for industry stakeholders, employers, consumers and other interested parties through a CON standards advisory committee and a new medical technology advisory committee.

“While health care certificate-of-need requirements are by all accounts imperfect, most respondents believe that CON programs should remain in place in their state and could be strengthened by moving away from a process driven by political influence to one focused on planning based on solid data,” said HSC Researcher Tracy Yee, Ph.D., coauthor of the study with Lucy B. Stark, an HSC research assistant; Amelia M. Bond, an HSC research assistant; and HSC Senior Researcher Emily Carrier, M.D., M.S.C.I.

The study’s findings are detailed in a new NIHCR Research Brief—*Health Care Certificate-of-Need Laws: Policy or Politics?*—available online at www.nihcr.org/CON_Laws.html. Researchers conducted 42 telephone interviews with representatives of state agencies, hospitals, physician groups, medical societies, hospital associations, payers, consultants, attorneys and policy groups that work directly with the certificate-of-need process in the six states.

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While the CON process across states is similar, no two states are exactly alike, according to the study. Some states, such as Michigan, require providers to document the community need for all regulated services regardless of cost, while others, such as South Carolina, do not require CON approval for any project under certain cost thresholds. Other key findings include:

- **CON Agency Experiences.** Given the competitive stakes providers have in the process, CON authorities face intense scrutiny. Applications can be challenged at various stages, and decisions can be overturned by hearing officers, administrative courts or sometimes state legislatures. The basic function of CON boards and related state agencies is to process and review CON applications, but many reported being caught in the competitive crossfire between providers during appeals, public hearings and legislative battles.
- **Hospital Experiences.** Hospitals typically view CON regulations opportunistically. Hospitals use the process to protect existing market share—either geographic or by service line—and block competitors, but they find the CON process onerous if they are attempting to enter a market. Certificate-of-need approval from the hospital perspective is usually viewed as a license to claim ownership of a service line or geographic area.
- **Physician Experiences.** Most physicians interested in establishing for-profit facilities viewed CON programs as overly restrictive and supported repeal of the regulations entirely. Physician respondents frequently cited the CON process as the primary barrier to market entry, either from the state itself or because of opposition from other providers. Reflecting physician views, medical societies in the six states studied all support repeal of CON regulations.

The study points out that health reform coverage expansions and payment reforms will likely alter local health care market dynamics and that the CON process might be a way to help plan for the changes. Along with ensuring adequate funding for CON programs, key approaches for policy makers to consider include:

- **Renewing the focus of CON on state health planning.** Inadequate information to estimate changes in population and demand for services weakens CON programs. Without solid state health planning, CON decisions may continue to be seen as inconsistent, arbitrary and based on a poor projection of actual need.
- **Setting, evaluating and enforcing standards.** Most respondents, including CON regulators, believed evaluation and enforcement of CON requirements could be improved. With few means to enforce commitments made by providers in their applications, the intended influence of CON on access and quality may remain limited.

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The National Institute for Health Care Reform contracts with the Washington, D.C.-based Center for Studying Health System Change to conduct high-quality, objective research and policy analyses of the organization, financing and delivery of health care in the United States. The nonpartisan, nonprofit 501 (c)(3) organization was created by the International Union, UAW; Chrysler Group LLC; Ford Motor Company; and General Motors to help inform policy makers and other decision-makers about options to expand access to high-quality, affordable health care to all Americans.

The Center for Studying Health System Change is a nonpartisan policy research organization committed to providing objective and timely research on the nation's changing health system to help inform policy makers and contribute to better health care policy. HSC, based in Washington, D.C., is affiliated with Mathematica Policy Research.