SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 420

SPONSOR: Health, Aging and Long-Term Care Committee and Senator Clary

SUBJECT: Certificate-of-Need Regulation

DATE: March 27, 2000 REVISED: 03/29/00

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carter	Wilson	HC	Favorable/CS
2.	Peters	Hadi	FP	Fav/1 amendment
3.				
4.				
5.				

I. Summary:

The Committee Substitute for Senate Bill 420 modifies current certificate-of-need (CON) regulation as provided in statute. The bill defines the term "mental health services" for use in the CON context and revises the term "health services." Applications for the establishment of a home health agency and certain cost overruns are deregulated under CON review to the extent that the level of review to which they are subject is reduced from *comparative* (full) review to exemption review. Review of increases in licensed bed capacity of a health care facility is modified so only increases in *total* licensed capacity of such facilities will be subject to comparative CON review. The bill deregulates several projects, services, or activities (such as cost overruns and combination and division of CONs for nursing home beds or services) that are currently subject to *expedited* CON review by reducing the level of review to which they will be subject to *exemption* review. However, conversion of certain hospitals is made subject to expedited CON review. The bill authorizes the addition of a limited number of hospital beds or nursing home beds through an exemption request under certain circumstances. Exemption requests are subject to a $250 fee. Certain sheltered beds designated for inpatient hospice care that are operated by continuing care residential communities are excluded from a 5-year limit on the use of such beds in providing hospice services.

This bill amends the following sections of the *Florida Statutes* (F.S.): 400.471, 408.032, 408.033, 408.034, 408.035, 408.036, 408.037, 408.038, 408.039, 408.040, 408.044, 408.045, and 651.118; repeals subsection 400.464(3), F.S.; and creates one undesignated section of law.

II. Present Situation:

Beginning in the late 1960's, the federal government began regulating market entry of health care providers through CON regulation. The State of Florida, in compliance with federal law, enacted CON regulation in the early 1970's. In regulating market entry, CON is made a pre-requisite to licensure. The federal government repealed its CON requirements in 1981.

Certificate-of-need regulation was enacted when the health care marketplace was operating exclusively on a fee-for-service basis. Medicare and Medicaid reimbursed health care facilities on a cost basis that included, as continues today in a modified form, reimbursement for capital infrastructure costs. Cost containment mechanisms such as capitated reimbursements, diagnosis-related groups, or procedures used by managed care organizations to control costs were not a part of general business practices. Indeed, only the few professionals and academicians who closely followed health care economics were aware of the structural economic problems that were emerging that would result in rapid escalation of health care costs and rapid increases in the rate of health care inflation apart from the nation's overall inflation rate.

Under Florida's CON regulation, before a person (natural or corporate) may be granted a state license to operate a nursing home, hospital, home health agency, intermediate care facility, or hospice, or is authorized to provide certain services in a health care facility, the person must apply to the Agency for Health Care Administration (AHCA) for state recognition of market need for such a facility or service. Furthermore, once awarded a CON, as provided under ss. 408.031-408.045, F.S., the Health Facility and Services Development Act, and granted a license to operate, the person may need to subsequently obtain another CON before proceeding with the implementation of a business decision, such as pursuing conversion from one type of facility to another type of facility or offering a new service.

The state's CON regulation is designed to achieve four main policy objectives: (1) containing increases in overall health care expenditures, (2) ensuring a minimum level of quality of health care, (3) ensuring access to health care goods and services for insured and uninsured individuals, and (4) ensuring the availability of health care services by discouraging monopolies and promoting competition. Through control of the supply of health care facilities and services, CON regulation attempts to minimize the costs of excess supply, help prevent non-price competition, and slow the proliferation of new technology before its usefulness has been established. Additionally, CON regulation is designed to promote equal service and equal geographic access to quality health care, assure and reward quality care, and encourage responsiveness to community interests.

Certificate-of-Need Review

Before an individual or entity may apply for licensure of certain health care facilities or proceed with plans to provide certain specified health care services (collectively referred to as "projects"), a CON must be obtained. There are three levels of review to which a CON application may be subjected, based on statutory requirements. The most thorough scrutiny of a CON application is referred to as comparative review as provided in s. 408.036(1), F.S. Such review requires AHCA to compare the applications submitted, in accordance with statutory review criteria as provided in s. 408.035, F.S., and a review process as provided in s. 408.039, F.S., during a batching cycle in response to a need for a specified type of health care facility or health service, as indicated by AHCA in documents it publishes on a periodic basis.

Certain projects are expressly made subject to an expedited review process, as provided in subsection 408.036(2), F.S. An applicant applying to establish or modify a project that must undergo expedited review is not required to comply with some of the application time frames and requirements that projects which are subject to comparative review must meet. Such applicants may submit applications at any time, unlike applicants for projects regulated under comparative

review that must submit applications during batching cycles specified by AHCA. Consequently, although projects that are subject to expedited review must meet all other requirements that projects subject to comparative review must meet, expedited review projects, generally, experience a shorter approval or denial period, from submission of the application through final AHCA processing, than projects that undergo comparative review.

Health care services or projects that are otherwise subject to CON review may be exempted from review, as provided in subsection 408.036(3), F.S. This provision is comprised of an enumeration of services and projects that AHCA is required to exempt from review based upon the request of the service provider or health care facility operator when supported by documentation required by AHCA.

Certificate-of-Need Conditions

As provided in s. 408.040, F.S., AHCA may approve a CON application, with conditions. For CON applicants, AHCA includes Form CON-1, Schedule C in the application packet for the applicant to indicate whether, or to what extent, it is willing to meet the stated local health council preference, if any, for providers to make a stated amount of services available to Medicaid recipients who seek services in the area where the applicant intends to operate. Once a condition is imposed on a CON, it continues in effect for the duration of the facility's or service's existence under that CON.

A condition may require the health care provider who will license and operate the facility or provide a service, such as hospice, to provide service to a needy population group, most typically Medicaid recipients (in recent years). Such a condition may require provision of a minimum of 3 percent of a provider's total annual facility patient days to Medicaid recipients or charity care or 30 percent of the local market's total Medicaid patient days, for example. Conditions are usually imposed only on CONs pursued through the comparative review process. The CON program reported that for at least the past 10 years, it has not awarded a nursing home CON that did not impose a condition that the applicant certify a portion of its beds for Medicaid reimbursement. While not all CON conditions are imposed on nursing homes and not all CON conditions pertain to the Medicaid program, the majority of CON conditions currently in effect are applicable to Medicaid nursing home beds.

III. Effect of Proposed Changes:

Section 1. Amends s. 400.471, F.S., providing for licensure of home health agencies, to delete the requirement that a CON be obtained as a prerequisite to licensure as a Medicare-certified home health agency.

Section 2. Amends s. 408.032, F.S., providing definitions used in CON regulatory law, to: add a definition of the terms "exemption" and "mental health services;" modify the definition of the terms "health care facility" and "health services;" and delete the terms "home health agency," "institutional health service," "intermediate care facility," "multifacility project," and "respite care."

Section 3. Amends s. 408.033, F.S., relating to local and state health planning, to delete references to the state health plan.

Section 4. Amends s. 408.034, F.S., providing AHCA's duties and responsibilities pertaining to CON regulation, to delete a cross reference to part IV of chapter 400, F.S., relating to licensure regulation of home health agencies, and to acknowledge exemption under CON regulation as a valid basis for the issuance of a license to certain health care facilities and health service providers.

Section 5. Amends s. 408.035, F.S., providing review criteria for the CON program, to delete obsolete CON review criteria and revise other criteria, generally simplifying the review of CON applications.

Section 6. Amends s. 408.036, F.S., relating to projects subject to CON review, to revise the requirements relating to--

(1) projects that are subject to CON comparative review by: (a) deleting language relating to nursing home conversions, (b) restricting reviewability of increases in licensed bed capacity to increases in the *total licensed bed capacity* of a health care facility, (c) deleting review of the establishment of a Medicare-certified home health agency, (d) adding a reference to *hospice inpatient facilities* and providing a cross reference to s. 408.043, F.S., relating to special provisions for hospice applications, (e) deleting a requirement for a health care facility or a health maintenance organization (HMO) to obtain a CON to operate a Medicare-certified home health agency or a hospice, (f) deleting the requirement for a CON for certain acquisitions by or on behalf of a health care facility or HMO, (g) deleting a requirement for review of an acquisition of existing health care facilities under certain conditions, (h) deleting reviewability of certain CON-approved project cost increases, and (i) adding a list of beds and services that are subject to CON review before an increase in the number of beds may be implemented;

(2) projects that are subject to CON expedited review by: (a) deleting certain cost overruns, (b) deleting combination of nursing home beds or services authorized by two or more CONs issued for the same planning subdistrict, (c) deleting division into two or more nursing home facilities of beds or services authorized by one CON, (d) adding conversion of mental health services beds, licensed under chapter 395, F.S., the hospital licensure law, or hospital-based distinct part skilled nursing unit beds to general acute care beds and the conversion of mental health services beds between or among the licensed bed categories defined as beds for mental health services or the conversion of general acute care beds to beds for mental health services, subject to the caveat that such conversions will not result in establishing a new bed category at the hospital but will apply only to categories of beds licensed at that hospital and subject to the requirement that applicants must license and operate such converted beds for 12 months before they will attain eligibility to apply for conversion of more beds of the same type, and (e) authorizing AHCA to reduce application content requirements for an expedited review; and

(3) projects exempt from CON review by: (a) revising language and deleting obsolete language; (b) deleting initiation or expansion of obstetric services; (c) deleting respite care services; (d) deleting home health services provided by a rural hospital; (e) deleting establishment of a Medicare-certified home health agency by a continuing care retirement community or a residential facility that serves only retired military personnel, the dependents, and the surviving dependents of

deceased military personnel; (f) deleting language making the exemption of Medicare-certified home health agencies contingent upon the development of certain factors; (g) deleting expenditures by or on behalf of a health care facility to provide a health service exclusively on a outpatient basis; (h) revising language relating to delicensure of beds to replace a reference to *bed classification* with a reference to *category of beds*; (i) deleting obsolete language that prohibited the grant of a CON exemption until rules have been adopted or March 1, 1998, whichever came first; (j) adding the combination within one nursing home facility of the beds or services authorized by two or more CONs issued within the same planning subdistrict; (k) adding the division into two or more nursing home facilities of beds or services authorized by one CON issued in the same planning district; (l) adding the addition of a limited number of hospital beds, except for beds for tertiary services, under certain circumstances, including temporary beds to alleviate high seasonal occupancy or emergency or crisis situations; and (m) adding the addition of a limited number of community nursing home beds under certain circumstances.

The bill specifies that a request for exemption may be made at any time and is not subject to the batching requirements for CON comparative review. A request for exemption must be supported by documentation required by rules adopted by AHCA. The agency is directed to assess a $250 fee for each exemption request. Other technical and conforming changes to existing law are made.

Section 7. Amends s. 408.037, F.S., providing requirements for the contents of a CON application, to delete a reference to the state health plan.

Section 8. Amends s. 408.038, F.S., providing for CON application fees, to make conforming changes to existing law by replacing references to *department* with *agency*.

Section 9. Amends s. 408.039, F.S., relating to the CON review process, to make conforming changes to existing law by replacing references to *department* with *agency*, and to add a cross reference.

Section 10. Amends s. 408.040, F.S., providing for conditions on a CON and AHCA compliance monitoring of such conditions, to require that any conditions imposed on a CON appear on the face of the CON when such conditions are based on statements of intent by an applicant in the application for the CON. Language is deleted that: (1) requires a CON for the construction of a new hospital or for the addition of beds to include a statement of the number of beds approved by category of service, (2) specifies the designation of approved beds as general beds that are not covered by any specialty-bed need methodology, (3) refers to a multifacility project to conform to changes made elsewhere in the bill that delete similar references, and (4) provides guidelines for determining the validity period of a CON for which an application has been filed to divide the CON to cover two or more facilities or consolidate two or more CONs. Other technical and conforming changes to existing law are made.

Section 11. Amends s. 408.044, F.S., authorizing injunctive action or other process by AHCA to restrain or prevent anyone pursuing a project that is subject to CON regulation who has not obtained a valid CON, to change the reference to *department* to *agency.*

Section 12. Amends s. 408.045, F.S., providing for a competitive sealed process relating to award of certain CONs, to make conforming changes to existing law by replacing references to *department* with *agency*.

Section 13. Creates a 30-member workgroup to study issues pertaining to the CON program, including the impact of trends in health care delivery and financing and implementation of the program. The Governor, President of the Senate, and the Speaker of the House of Representatives are each required to appoint 10 members to the workgroup as specified. The workgroup will be staffed by AHCA. It must select a chairperson by majority vote of a quorum (16 members) present, and is required to meet at least annually, at the request of the chairperson. Workgroup participants are made responsible for only the expenses that they generate individually through workgroup participation. The agency is made responsible for incidental expenses relating to production of required data or reports. The workgroup is required to submit an interim report by December 31, 2001, and a final report by December 31, 2002. The workgroup is abolished effective July 1, 2003.

Section 14. Amends s. 651.118, F.S., relating to sheltered community nursing home beds in continuing care facilities, to exclude up to five sheltered community nursing home beds designated for inpatient hospice care as a part of a contractual arrangement with a Florida-licensed hospice from the limitation, of up to 5 years after the issuance of the initial nursing home license, on the use of such sheltered beds for persons who are not residents of such a facility and who are not parties to a continuing care contract.

Section 15. Repeals subsection 400.464(3), F.S., requiring a CON as a prerequisite to licensure as a home health agency.

Section 16. Preserves the applicability, to a CON application, of the CON law in effect at the time the application was submitted when the application was submitted prior to the effective date of the bill and clarifies that such CON law governs such applications.

Section 17. Provides for the bill to take effect on July 1, 2000, except as otherwise provided in the bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill 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 this bill have no impact on public records or open meetings issues under the requirements of Article I, Subsections 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. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

The Agency for Health Care Administration is required to assess a fee of $250 for each request for an exemption for projects already subject to this level of CON regulation and to add a limited number of hospital or nursing home beds as created under s. 408.036(3), F.S.

B. Private Sector Impact:

The repeal of comparative CON review under s. 408.036(1), F.S., for the affected projects will mean that instead of incurring application fees ranging from $5,000 to $22,000, applicants that are pursuing projects that will now be subject to CON exemption review will be required to submit an exemption request fee of $250. Applicants should obtain even more savings related to the other tangential and incidental costs of preparation of some CON applications. Such costs, reportedly, could reach into the hundreds of thousands of dollars. Additionally, the monetary costs of litigation can approach $5,000,000 along with extraordinary opportunity costs that could result in years of lost revenue, goodwill, brand development, and other business asset development as a consequence of impeded operation of the business or the service authorized by an awarded CON due to unresolved legal challenges.

C. Government Sector Impact:

There is an estimated loss of $350,000 annually in CON fees and an estimated savings of $260,719 in expenditures in the Health Care Trust Fund by the elimination of 4 FTEs.

Agency for Health Care Administration	**FY 2000-2001**	**FY 2001-2002**
1. Recurring Revenues (loss of CON fees)	($350,000)	($350,000)
2. Expenditures (elimination of staff)		
Salaries and Benefits (4 FTE)	($216,491)	($216,491)
Expenses (4 FTE)	($44,228)	($44,228)
Total	($260,719)	($260,719)
NET (revenues minus expenditures)	($89,281)	($89,281)

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Fiscal Policy:
Reduces the allocation to the Agency for Health Care Administration for Fiscal Year 2000-2001 by four positions and $260,719 from the Health Care Trust Fund.