

# What Happened to Healthcare Regulatory Reform in South Carolina? The Saga is To Be Continued

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As of the end of the legislative session last month, the strong effort to repeal the Certificate of Need Program—CON is the regulatory program by which providers of important healthcare services must first submit an application to the South Carolina Department of Health and Environmental Control for an evaluation of whether the proposed service or facility is “needed”—came to an unceremonious halt. The effort, which found success in the South Carolina Senate, was not so successful in the South Carolina House of Representative’s Ways and Means Committee, and the legislation was ultimately left to die on the proverbial table. Despite the failure of repeal to take hold, those of us watching closely expect another concerted effort to address CON early in the next session of the General Assembly that begins in January 2023.

For those unfamiliar with the origins of CON, in 1964, New York was facing the issue of overbuilding hospitals, which affected the cost of healthcare in the state. In efforts to remedy the overbuilding, New York passed a state statute allowing facilities to be built only on an as-needed basis—Metcalf-McCloskey Act. Other states followed. In 1965, the federal government established landmark healthcare programs, such as the Medicare and Medicaid programs, where the government took control over much of the financial cost of healthcare in the United States. Congress later passed the National Health Planning and Resources Development Act, incentivizing states to implement CON requirements in order to receive funding through federal programs. By the 1980s, every state except Louisiana had implemented a version of CON laws.

However, in 1986, Congress made a full turn by repealing the 1974 National Health Act and federal CON law requirements. Congress left it to the individual states to determine whether to keep the regulatory program in place. Today, 15 states have partially or completely repealed their CON regulations—yet a majority of states still maintain CON programs. South Carolina is one of 35 states that has continuously maintained Certificate of

Need laws since the 1970s, aimed at guiding the development of needed healthcare services throughout the state.

A number of other states have repealed the program, which has had varying impacts on the healthcare industry. Florida, for example, repealed CON regulation for all but nursing home and hospice care programs. Consequently, because of the narrowing of the CON process, the state requires that providers meet other thresholds to continue their licensure. In other words, if certain thresholds are not met year-to-year, the provider risks loss of licensure, which places significant recurring pressure on providers.

Back to present day, though, the recent push for repeal of CON in South Carolina was driven in large part by differences in the perspectives of hospital providers and independent physicians (primarily surgeons) and the ways in which healthcare cost reform is putting pressure on all providers. For hospitals, the burden of certain federal obligations to provide services to all persons regardless of ability to pay, means that services that allow for some profit margin have increasing importance as a means to offset services that lead losses (namely emergency services). Independent physicians do not have these same obligations to provide indigent care, but do experience the pressure of third-party payers to push services into the lowest-cost setting—which for surgeons is often a freestanding ambulatory (or same day) surgery setting. By utilizing an ambulatory facility in which they have an ownership interest, physicians earn both a professional fee for his or her services, as well as the fee paid for the facility itself.

While repeal was not ultimately successful this year, neither was an attempt at reform that had been proposed to the Senate. We believe the program remains ripe for improvement through reform—it has been well over a decade since the framework had any updates. A few important improvements would be modifying what triggers the requirement of CON review, like the dollar thresholds for capital expenditures and equipment purchases which have not been increased for two decades. Currently, the threshold for equipment is \$600,000, and capital expenditure is \$2 million. Unlike the programs of our neighbors in North Carolina and Georgia, South Carolina has not incorporated any threshold adjustments to keep in line with inflation. Another noteworthy area for reform is the litigation and appeal process for approvals and denials. It benefits providers and the people of South Carolina to lessen the time and expense of administrative appeals. Through concerted and collaborative efforts, reform of CON in South Carolina could bring tremendous improvement to a process whose overriding goal is to ensure the people of South Carolina have access to high-quality health services that are distributed in line with community need and with a goal of containing costs. We will keep an eye on 2023's legislative session for the next chapter in CON.

Co-authored by Faylynn Edwards, 2022 law clerk