Senate Bill 62 – "An Act repealing the certificate of need program for health care facilities"

Alaska's Certificate of Need Program – AS 18.07

What is a Certificate of Need Program?

Certificate of Need (CON) programs originated to regulate the number of beds in hospitals and nursing homes and to prevent purchasing more equipment than necessary. The intent was that new or improved facilities or equipment would be approved based primarily on a community's genuine need. Statutory criteria often were created to help planning agencies decide what was necessary for a given location. By reviewing the activities and resources of hospitals, the agencies made judgments about what needed to be improved. Once need was established, the applicant organization was granted permission to begin a project. These approvals generally are known as Certificates of Need."

Source: National Conference of State Legislators

Alaska's Certificate of Need Program Overview

- Alaska's Certificate of Need (CON) program was enacted in 1976 in response to the National Health Planning and Resources Development ACT (P.L. 93-641) which tied federal funding to the enactment of CON laws. These laws restrict the addition of healthcare facilities (including expansion) by requiring that persons obtain state approval for certain projects, which is given based on calculated need. The rationale is that controlling supply will help to reduce costs of healthcare services. Healthcare services are not a typical economic product because consumers are generally more restrained in their choices. However, the federal government repealed its mandate in 1987. 14 states have since repealed their Certificate of Need laws, despite their controversial nature.
- Persons in favor of Certificate of Need laws argue that they do limit healthcare costs, and are in favor of a transparent process allowing for stakeholder input before large projects are undertaken. Those in favor of amending or abolishing Certificate of Need laws argue that they have the opposite effect on health care costs-increasing rather than decreasing them by limiting competition; that they are difficult to administer and not always addressed consistently; and that these laws give more control to bigger businesses and those with more political clout.
- *Source: Department of Health & Social Services*

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Alaska's Certificate of Need Program Overview

- Current Alaska Certificate of Need laws require persons expending more than $1,500,000 to construct, remodel, or purchase equipment for a healthy facility to obtain a Certificate of Need. The office is currently staffed by one (busy) individual. The office is represented by the Department of Law in two civil lawsuits and two appeals (one before the administrative appeals office; the other before the superior court). Staff recommends that the statutes and regulations be updated to reflect the current status of the healthcare industry, including an evaluation of the monetary threshold and the current methodologies. The statutes could also be amended to limit the applicability of Certificate of Need laws to those services, such as skilled nursing facilities, that are most likely to have a direct increase or burden on the state budget.

- *Source: Department of Health & Social Services*

Purpose of Certificate of Need Programs

Certificate of Need laws are state-level regulatory initiatives that require individuals in the healthcare industry to obtain permission to make significant capital expenditures or to construct or expand facilities and services, based on the theory that controlling the supply of facilities, equipment, and services is the best method to restrain rising healthcare costs.

The Certificate of Need laws were created to set-up health planning agencies to control future healthcare expansion based on need.

Certificate of Need laws are to regulate and evaluate healthcare facilities and services to prevent the overbuilding of healthcare facilities and services beyond a community's capacity.

National History of Certificate of Need

1974: National Health Planning Resources Development Act (NHPRDA), required states to establish oversight agencies for the submission of proposals for any major capital spending on health care reprices (e.g. new construction, building expansions, new technology). This required all states seeking federal funding for health programs implement a Certificate of Need program.

1974-1982: Health care costs continue to rise nationwide despite 100% state participation in NHPRDA.

1982: Congress initiates review of Certificate of Need programs and the Congressional Budget Office study doesn't offer a recommendation but reports that problems with NHPRDA has limited the program's success in achieving cost savings.

1983-1985: Seven states abandon Certificate of Need despite NHPRDA is still in effect.

1987: Congress repealed the National Health Planning Resources Development Act, which required states to implement a Certificate of Need program. Following the repeal, 14 states terminated their Certificate of Need programs.

Alaska's History of Certificate of Need

Alaska's participation in a certificate of need program started in 1976 and seven pieces of legislation have been enacted since then.

1976: HB 665 (Ch. 275, SLA 1976), which repealed and replaced all of AS 18.07 to establish the certificate of need program and regulation of healthcare facilities.

1982: HB 591 (Ch. 59, SLA 1982), covers only a temporary but not an emergency certificate of need for a health care facility and added a definition of certificate of need dealing with the issuance of certificates.

1982: HB 591 (Ch. 25, SLA 1981), clarified that Pioneer Homes are not subject to certificate of need.

1983: SB 85 (Ch. 95, SLA 1983), added a $1,000,000 ($1.0 million) floor for requiring a certificate of need.

1990: HB 85 (Ch. 85, SLA 1990), provided authorization to Dept. of Health & Social Services to charge a fee for the certificate of need.

1991: SB 86 (Ch. 21, SLA 1991), deleted the federal statutes and changed the title section.

1996: HB 528 (Ch. 84, SLA 96), Placed a moratorium on nursing home beds and established a legislative working group on long-term care.

2004: HB 511 (Ch. 48, SLA 04), Included Residential Psychiatric Treatment Centers.

**Alaska's CON laws are not working, regulations are confusing and result in legal actions between hospitals, surgery centers, imaging centers, and other health care providers.*

U.S. Department of Justice/Antitrust Division and the Federal Trade Commission's Analysis on Certificate of Need Programs

- The U.S. Department of Justice-Antitrust Division and the Federal Trade Commission have jointly studied the effects of Certificate of Need laws across the country, hearing from 250 panelists, elicited 62 written submissions, and generated almost 6,000 pages of transcripts over two years. The group also included attorneys and economists that focused on healthcare markets. Antitrust economists holding doctorates on the study of markets and their performance, with a specialization in healthcare markets.
- This group has studied markets across the country involving hospitals, physicians, ambulatory surgery centers, stand-alone radiology programs, medical equipment, pharmaceuticals and other healthcare products.
- Through this work, the group understands the competitive forces that drive innovation in and contain the cost of healthcare. The goal is to ensure a competitive marketplace in which consumers will have the benefit of high quality, cost-effective healthcare and a wide range of choices. The mission is to preserve and promote competition, rather than preserve any particular marketplace rival or group of rivals.
- The nine antitrust principals were derived from their work over many years, including:
- Importance of Competition and the Harm Caused by Regulatory Barriers to Entry:
  - Healthcare services are different than other sectors of the economy but the basic truth should not be lost – market forces improve the quality and lower costs of healthcare services. Increased competition in healthcare does not require us to choose between the benefits of competition or the delivery of high-quality healthcare.

- Source: The Federal Trade Commission & The Department of Justice-Antitrust Division, February 23, 2007

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U.S. Department of Justice/Antitrust Division and the Federal Trade Commission's Analysis on Certificate of Need Programs

- Certificate of Need Laws Create Barriers to Beneficial Competition:
  - Certificate of Need laws are a classic government-erected barrier. When the federal government enacted Certificate of Need laws, private insurance reimbursed healthcare expenses predominantly on a "cost-plus basis." The desired effect of the "cost-plus basis" was to incentivized over-investment. Certificate of Need laws were adopted because excessive capital investments, spurred by the then-current cost plus basis method of reimbursement, were driving up healthcare costs.
- Protecting Revenues of Incumbents Does Not Justify Certificate of Need Laws.
  - The rational for keeping the Certificate of Need laws is that incumbent hospitals should be protected against competition so that they can use their profits to cross-subsidize care for the uninsured or under-insured patients. If new competitors were to enter the market, community hospitals could not continue to exploit their existing market power over consumers. There are other methods to explore for legislators so they won't choose between covering the healthcare for the indigent without impeding the proper function of the healthcare markets.
  - MedPAC found that community hospitals responded to the competition by improving efficiencies, adjusting their prices, and expanding profitable lines of business. *MedPAC is a clinical research organization based in Cincinnati, Ohio.
- Source: The Federal Trade Commission & The Department of Justice-Antitrust Division, February 23, 2007

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U.S. Department of Justice/Antitrust Division and the Federal Trade Commission's Analysis on Certificate of Need Programs

- Certificate of Need laws Impose Other Costs and May Facilitate Anti-Competitive Behavior:
  - Competitors at times go farther and enter into agreements not required by Certificate of Need laws but nonetheless facilitated by them. Examples include:
  - West Virginia hospital used the threat of objection during a Certificate of Need process, and delayed and increased costs, to induce a hospital seeking a Certificate of Need not to apply for the Certificate of Need that would have well served Charleston consumers and provided greater competition for business.
  - Vermont home health agencies entered into territorial market allocations, using the protection of Certificate of Need laws, to gain exclusive geographic markets. The U.S. Department of Justice-Antitrust Division and the Federal Trade Commission found that Vermont consumers were paying higher prices then consumers where home health agencies competed against each other.

  The American free market system is built on the premise that open competition and consumer choice maximize consumer welfare – even when complex products and services such as healthcare are involved. The Federal trade Commission and the Department of Justice play an important role in safeguarding the free-market system from anticompetitive conduct by brining enforcement actions against parties that violate antitrust and consumer protection laws.
- Source: The Federal Trade Commission & The Department of Justice-Antitrust Division, February 23, 2007

How is Alaska's Certificate of Need program working today?

- Is Alaska's Certificate of Need program working effectively to reduce healthcare costs to consumers within the state? Why are healthcare costs still on the rise?

- Alaska's Certificate of Need laws have led healthcare providers to sell state of the art medical equipment and buy lessor, lessor quality priced medical equipment to remain under the Certificate of Need $1.5 million threshold. Wouldn't those dollars better serve Alaskans if they were invested in healthcare facilities and services?

- Alaska's Certificate of Need laws result in territorial disputes and legal costs between healthcare providers because one healthcare provider objects to another healthcare provider's plans to add healthcare services. Does this improve or provide better quality healthcare to Alaskans?

Pennsylvania Healthcare Entities Support Repealing Virginia's Certificate of Need

- Pennsylvania repealed their Certificate of Need laws and the Pennsylvania Hospital Association testified at a Virginia Legislative hearing where Virginia is trying to repeal their Certificate of Need laws.
- Pennsylvania Hospital Association stated, "Reinstating an admintratively cumbersome and costly process will result in unintended consequences, including stifling innovation in health care delivery in hospital settings and potentially preventing the appropriate availability of services within communities."
- Also opposed to Certificate of Need laws is the Pennsylvania Medical Society. They opposed Certificate of Need laws because, "Certificate of Need laws politize the healthcare approval process and are not effective at holding down costs. Pennsylvania's experience how a free market has done a better job of ensuring that citizens have access to care.

Articles on Repealing Certificate of Need

Federal Trade Commission (FTC) & Dept. of Justice (DOJ) Joint Report

Consumers want high-quality, affordable, accessible health care, vigorous competition promotes the delivery of high-quality, cost-effective health care.

US Dept. of Justice, Antitrust Division (Vol. 30 No. 1 Fall 2015): Original Certificate of Need laws cost-savings rationale fails to deliver-Certificate of Need laws are simply output restrictions mandated by government. Normally, if you want the price to decline, creating an artificial shortage of it isn't the way to achieve that. Output restrictions restrain the social benefits of free market competition.

Certificate of Need laws inhibit competition-Certificate of Need laws help to insulate incumbent providers from competition. Powerful economic reasons drive incumbents to oppose an applicant from providing similar healthcare services. Certificate of Need laws insulate politically powerful incumbents from market forces. Limited exemption from competition in a non-transparent way to achieve indigent care is not good public policy, because the cost of Certificate of Need laws is never disclosed or even evaluated.

Certificate of Need laws and indigent care: Some providers do a poor job of indigent care and benefit from Certificate of Need laws, while others do an excellent job and gain little to nothing.

Articles on Repealing Certificate of Need

National Conference of State Legislators: Unintended Consequences: Decrease competition; reduce access to healthcare; barriers to new competition, may increase healthcare costs.

Mercatus Center-George Mason University: "Our collective research finds no evidence that Certificate of Need programs control costs or increase charity care, and that in reality, they appear to pushing patients to seek care in non-Certificate of Need states.

Mercatus Center-George Mason University: Certificate of Need states have 13% fewer beds; decrease of 4.7 hospital beds per 100,000; decreases in CT scan, MRI services, and optical and virtual colonoscopy services.

Nat'l Institute for Healthcare Care Reform (2011): Certificate of Need applicants experience "being caught in the competitive crossfire during review and process (appeals, public hearings, court battles); Existing competitors are more often involved in contesting approval of competitors' applications causing delays and costing money; hospitals use Certificate of Need process to protect existing market share and block competitors; smaller community hospitals tend to view Certificate of Need process as uneven due to the lack of financial resources to through lengthy court battles with larger hospitals; physicians support repeal due to market barrier; Certificate of Need laws can be a barrier to new technologies and innovation due to lengthy process and cost.

Despite hospitals love-hate view of Certificate of Need regulations, a consultant concluded that hospitals believe they are better off with regulations in place then without them. One state hospital association respondent said member hospitals initially had mixed views about the benefits of Certificate of Need but banded together to support the process after realizing it was a valuable tool to block new physician owned facilities.

Thank you for support of SB 62 - Senate Bill 62 – "An Act repealing the certificate of need program for health care facilities"