



# The Florida Senate

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Committee on Health Regulation

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## REVIEW THE MORATORIUM ON NURSING HOME CERTIFICATES OF NEED

### Issue Description

Florida regulates the entry of nursing homes into the market and the expansion of nursing home beds through the certificate of need (CON) process. Currently a moratorium is imposed on the issuance of a CON for additional nursing home beds, with certain exceptions, until July 1, 2011. The moratorium has been in place since 2001, after reenactment with modifications by the Legislature in 2006. The purpose of the moratorium is to contain nursing home placements and encourage other forms of assistance in a manner that is both more cost-effective and more in keeping with the wishes of elderly residents in this state. This report examines factors impacting an extension of the moratorium and recommends a legislative extension of the moratorium on the issuance of CONs for additional nursing home beds.

### Background

#### Certificates of Need

A CON is a written statement issued by the Agency for Health Care Administration (Agency) evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility, health service, or hospice.<sup>1</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.

The Florida CON program has three levels of review: full, expedited, and the granting of an exemption.<sup>2</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>3</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;

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<sup>1</sup> s. 408.032(3), F.S.

<sup>2</sup> s. 408.036, F.S.

<sup>3</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.

- 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>4</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).

### *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>5</sup> based on estimates of current and projected population as published by the Executive Office of the Governor.

The need formula<sup>6</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>7</sup> The Agency is required to approve at least one sheltered nursing home bed<sup>8</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.

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<sup>4</sup> This exemption is repealed upon the expiration of the moratorium by operation of s. 408.036(3)(f), F.S.

<sup>5</sup> The nursing home subdistricts are set forth in Rule 59C-2.220, F.A.C.

<sup>6</sup> Rule 59C-1.036, F.A.C.

<sup>7</sup> s. 651.118, F.S.

<sup>8</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.

### *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>9</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>10</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.

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>11</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>12</sup>

The Agency reviews CON applications for additional nursing home beds in context with the following criteria:<sup>13</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>14</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 agency decision embodied in the State Agency Action

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<sup>9</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>10</sup> Rule 59C-1.008, F.A.C.

<sup>11</sup> Rule 59C-1.010, F.A.C.

<sup>12</sup> s. 408.039, F.S.

<sup>13</sup> s. 408.035, F.S.

<sup>14</sup> Rule 59C-1.036, F.A.C.

Report within 21 days after publication in the Florida Administrative Weekly, the decision becomes final and the CON(s) are issued.<sup>15</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>16</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>17</sup> In 2006, the Legislature extended the moratorium until July 1, 2011.<sup>18</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>19</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>20</sup> if:
  - The nursing home has not had any class I or class II deficiencies<sup>21</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
  - 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;<sup>22</sup> 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

<sup>15</sup> *Supra* note 11.

<sup>16</sup> *Supra* note 11.

<sup>17</sup> Ch. 2001-45, L.O.F. s. 52.

<sup>18</sup> Ch. 2006-161, L.O.F.

<sup>19</sup> The request to add beds under this exception to the moratorium is subject to the full competitive review process for CONs.

<sup>20</sup> Twenty-two counties have under 50,000 residents. These counties include: Baker, Bradford, Calhoun, DeSoto, Dixie, Franklin, Gilchrist, Glades, Gulf, Hamilton, Hardee, Hendry, Holmes, Jefferson, Lafayette, Levy, Liberty, Madison, Okeechobee, Taylor, Union, and Wakulla. Source: The Florida Legislature Office of Demographic and Economic Research as of August 9, 2010, available at: <<http://edr.state.fl.us/>>, (Last visited on September 21, 2010).

<sup>21</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.)

<sup>22</sup> The requirement that the facility not have had any class I or class II deficiencies within the three timeframes is unclear, especially within the first two provisions. This language could be clarified.

- 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>

## Findings and/or Conclusions

### Nursing Home Occupancy Levels

There are 671 licensed nursing homes in Florida.<sup>24</sup> As of March 1, 2010, there were 82,598 licensed nursing home beds, with an additional 1,024 CON-approved beds that are not licensed currently. Of the licensed beds, 79,437 were community beds, 2,496 were sheltered nursing home beds, 600 were beds in Veteran's nursing homes and 65 beds were dedicated to pediatric residents.<sup>25</sup>

Over the last 10 years, the average nursing home occupancy level in Florida has remained below 90 percent and has been declining steadily. As might be expected, there are some subdistricts that exceed the 94 percent standard occupancy level. Specifically, 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>26</sup>

Year	Occupancy Level	Number of resident days per 1000 population aged 65+
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

The Agency projected the nursing home occupancy levels and need projections for January 2016 for purposes of the July 2012 planning horizon. Based on this calculation, 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 the following rural subdistricts: 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).<sup>27</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.

<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 On September 2, 2010. 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 September 21, 2010).

<sup>25</sup> Source: 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.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

## Demographic Trends

The older population will burgeon between the years 2010 and 2030 when the “baby boom” generation<sup>28</sup> reaches age 65. On a national level, the population 65 and over will increase from 40 million in 2010 to 55 million in 2020. By 2030, there will be about 72.1 million older persons, almost twice their number in 2008. People 65 and over represented 12.8 percent of the population in the year 2008 but are expected to grow to be 19.3 percent of the population by 2030.<sup>29</sup> Most of the growth, especially over the next 10 to 15 years, will be among the young old (age 65-74) because of the aging of the baby boomers.<sup>30</sup> Within Florida, the population 65 and over will increase from 3.3 million in 2010 to 4.5 million in 2020, and to 6.2 million in 2030.<sup>31</sup> Nearly one in five U.S. residents will be aged 65 and older in 2030.

A better barometer for the potential demand for long-term care services is the growth in the 85 and over population (referred to as the “oldest-old”), not only because they have much higher rates of disability, but they also are much more likely to be widowed and without someone to provide assistance with daily activities.<sup>32</sup> Nationally, the population of the oldest old is projected to increase from 5.8 million in 2010, to 6.6 million in 2020, and to 8.7 million in 2030.<sup>33</sup> In Florida, the population of the oldest-old is projected to increase from 537,926 in 2010, to 739,069 in 2020, and to just over 1 million in 2030.<sup>34</sup> The baby boomers will begin to turn age 85 in 2031.<sup>35</sup>

## Trends and Conditions In Long-Term Care

The term long-term care refers to a variety of services which includes medical and non-medical care for people who have a chronic illness or disability. Long-term care helps meet health or personal needs. Most long-term care is to assist people with support services such as activities of daily living like dressing, bathing, and using the bathroom. Long-term care can be provided at home, in the community, in assisted living facilities (ALFs) or in nursing homes.<sup>36</sup>

The majority of Americans age 50 and over (89 percent) want to stay in their homes for as long as they can.<sup>37</sup> The average age of residents in nursing homes in Florida in 2007 was 80.21 years of age.<sup>38</sup> Nursing facility residents, beds, and occupancy rates have remained nearly constant over the last 5 years, despite an increase in the older population.<sup>39</sup> The stabilization of the nursing home population in Florida can at least partially be attributed to expanding home and community-based services,<sup>40</sup> including services available in ALFs.<sup>41</sup>

<sup>28</sup> The baby boomer generation consists of people born between 1946 and 1964.

<sup>29</sup> A Profile of Older Americans: 2009, U.S. Department of Health and Human Services, Administration on Aging, available at: <[http://www.aoa.gov/AoARoot/Aging\\_Statistics/Profile/2009/docs/2009profile\\_508.pdf](http://www.aoa.gov/AoARoot/Aging_Statistics/Profile/2009/docs/2009profile_508.pdf)>, (Last visited on September 21, 2010). (page 5)

<sup>30</sup> AARP Across the States, Profiles of Long-Term Care and Independent Living, Eighth Edition, 2009 available at: <[http://www.aarp.org/home-garden/livable-communities/info-03-2009/across\\_the\\_states\\_2009\\_profiles\\_of\\_long-term\\_care\\_and\\_independent\\_living.html](http://www.aarp.org/home-garden/livable-communities/info-03-2009/across_the_states_2009_profiles_of_long-term_care_and_independent_living.html)>, (Last visited on September 21, 2010).

<sup>31</sup> The Office of Economic and Demographic Research, The Florida Legislature, available at: <[http://edr.state.fl.us/population/Pop\\_Census\\_Day.pdf](http://edr.state.fl.us/population/Pop_Census_Day.pdf)>, (Last visited on September 21, 2010).

<sup>32</sup> *Supra* note 30.

<sup>33</sup> *Supra* note 29, and THE NEXT FOUR DECADES The Older Population in the United States: 2010 to 2050, US Census Bureau, Issued May 2010, available at: <<http://www.census.gov/prod/2010pubs/p25-1138.pdf>>, (Last visited on September 21, 2010).

<sup>34</sup> *Supra* note 31.

<sup>35</sup> *Supra* note 30.

<sup>36</sup> Definition from Medicare.gov, found at: <<http://www.medicare.gov/longtermcare/static/home.asp>>, (Last visited on September 21, 2010).

<sup>37</sup> Providing More Long-term Support and Services at Home: Why It’s Critical for Health Reform. AARP Public Policy Institute, June 2009, available at: [http://www.aarp.org/health/health-care-reform/info-06-2009/fs\\_hcbs\\_hcr.html](http://www.aarp.org/health/health-care-reform/info-06-2009/fs_hcbs_hcr.html)

<sup>38</sup> “Shaping Long Term Care in America Project at Brown University funded in part by the National Institute on Aging (1P01AG027296).” available at: <<http://ltcfocus.org/StateTable.aspx>>, (Last visited on September 21, 2010).

<sup>39</sup> *Supra* note 30.

<sup>40</sup> Home and community-based service programs for the elderly, funded in whole or part by public funds, include the Alzheimer’s Disease Initiative, Alzheimer’s Disease Waiver, Community Care for the Elderly, Contracted Services, Home Care for the Elderly, Local Services Program, Channeling, Consumer Directed Care Plus, Frail/Elderly Program, Medicaid

Florida, like most states, is now spending considerably more on home and community based long-term care services than 10 years ago. The Legislature has determined that the continued growth in the Medicaid budget for nursing home care constrained the ability of the state to meet the needs of its elderly residents through the use of less restrictive and less institutional methods of long-term care. Accordingly, the Legislature has limited the increase in Medicaid nursing home expenditures in order to provide funds to invest in long-term care that is community-based and provides supportive services in a manner that is both more cost-effective and more in keeping with the wishes of the elderly residents of this state.<sup>42</sup>

The Nursing Home Diversion Waiver Program is one of the primary alternate nursing home programs in Florida.<sup>43</sup> This program, as well as others, have helped increase the percentage of individuals who are eligible for Medicaid services to be diverted from nursing home placement. On average, Medicaid dollars can support nearly three older people and adults with physical disabilities in home and community-based settings for every person in a nursing facility.<sup>44</sup> All of Florida's home and community based waiver programs are relatively cost-effective alternatives to nursing home care for several thousand poor and frail elderly persons, especially those without caregivers. Even the most expensive program, the Nursing Home Diversion Waiver Program, is about \$2,500 less expensive per person per month than Medicaid-funded nursing home care.<sup>45</sup>

The percentage of nursing home bed days in Florida paid for by Medicaid has also been declining on an annual basis. The following chart reflects total state spending and caseload for nursing home care paid for by Medicaid and the caseload and spending in the Nursing Home Diversion Waiver Program for 10 years:

State Fiscal Year	Medicaid Occupancy (Calendar Year)	Medicaid Nursing Home Caseload	Total Medicaid Expenditures	Nursing Home Diversion Caseload	Total Nursing Home Diversion Expenditures
2001-2002	64.43%	46,892	\$1,837,866,321	857	\$ 24,089,345
2002-2003	64.28%	47,704	\$2,091,999,715	899	\$ 25,228,532
2003-2004	63.48%	48,203	\$2,238,956,267	1,871	\$ 49,863,602
2004-2005	62.36%	47,465	\$2,216,008,576	5,333	\$131,404,123
2005-2006	61.14%	46,558	\$2,296,156,032	6,252	\$135,380,277
2006-2007	60.62%	45,856	\$2,342,856,744	8,831	\$188,774,446
2007-2008	60.69%	43,009	\$2,350,109,632	11,083	\$237,625,279
2008-2009	61.26%	42,535	\$2,488,017,780	13,650	\$266,191,975
2009-2010 based on February Social Services Estimating Conference	information not available	43,268	\$2,760,065,260	18,114	\$338,177,729
2010-2011 based on General Appropriations Act	information not available	44,077	\$2,785,799,739	18,617	\$347,885,072

Aged and Disabled Adult Waiver, Medicaid Assisted Living for the Elderly, Nursing Home Diversion Waiver Program, Program of All Inclusive Care for the Elderly, and Assistive Care Services. A description of each of these programs is available in the Florida Master Plan on Aging 2007-2009, prepared by The Florida Department of Elder Affairs, beginning on page 21, available at: <<http://elderaffairs.state.fl.us/english/pubs/pubs/MasterPlan/FullCopy.pdf>>, (Last visited on September 21, 2010). See also Profile of Florida's Medicaid Home and Community-Based Services Waivers, Report No. 10-10, issued January 2010 by the Office of Program Policy Analysis and Government Accountability for a description of the scope and availability of services under each of the Medicaid waiver programs, available at:

<<http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1010rpt.pdf>>, (Last visited on September 21, 2010).

<sup>41</sup> Florida Master Plan on Aging 2007-2009, prepared by The Florida Department of Elder Affairs, available at:

<<http://elderaffairs.state.fl.us/english/pubs/pubs/MasterPlan/FullCopy.pdf>>, (Last visited on September 21, 2010) (page 4).

<sup>42</sup> s. 408.0435(2), F.S.

<sup>43</sup> The Nursing Home Diversion program is a managed care option under a 1915(c) waiver that is designed to provide community-based services to people who would qualify for Medicaid nursing home placement. The objective of the program is to provide elders community-based care to avoid nursing home placement at a cost less than Medicaid nursing home care.

<sup>44</sup> *Supra* note 30.

<sup>45</sup> Florida's State Profile Tool, July 2009, published by the Florida Department of Elder Affairs, available at:

<<http://elderaffairs.state.fl.us/english/pubs/pubs/Florida'sStateProfile.pdf>>, (Last visited on September 21, 2010). (page 31)

The Department of Elder Affairs' (DOEA) Comprehensive Assessment and Review for Long-Term Care Services (CARES) Program is Florida's federally mandated pre-admission screening program for nursing home applicants. The purpose of the applicant assessment is to identify long-term care needs, establish level of care (medical and functional eligibility for nursing facility care and Medicaid waivers), and recommend the least restrictive, most appropriate placement. Emphasis is placed on enabling people to remain safely in their homes or return to the community after a nursing home stay, through provision of home based services or with alternative community placements such as ALFs.<sup>46</sup>

Nursing home transition is another program intended to reduce nursing home days by selecting nursing home residents from institutions who can be returned home with support. The nursing home transition effort formally began in Florida in March, 2009. As of July 10, 2010, 2,350 individuals have been considered for transition, 1,119 individuals have been transitioned from a nursing home, and 794 of them went into a Medicaid Waiver Program.<sup>47</sup>

The DOEA is also focusing efforts on four important issues facing Florida's seniors and retirees who are not enrolled in Medicaid programs: (1) transportation, (2) housing, (3) employment, and (4) volunteerism. This increased focus has resulted in part from many requests for assistance from elders who wish to maintain an independent lifestyle for as long as possible. These efforts also provide opportunities for elders who require long-term care to find appropriate home- and community-based care options that are less restrictive and less costly than skilled nursing care.<sup>48</sup> However, tens of thousands of individuals who do not qualify for Medicaid are on waiting lists or are assisted by programs exclusively funded by the state. As the population ages and service demand increases, Florida will be challenged to adequately meet this demand.<sup>49</sup>

Similarly, at the federal level, The Affordable Care Act<sup>50</sup> (the Act) addresses, among other things, long-term care. The Act expresses the sense of the Senate that Congress should address long-term services and supports in a comprehensive way that guarantees elderly and disabled individuals the care they need; and long term services and supports should be made available in the community in addition to institutions. The Act provides incentives for home-based care rather than the individual residing in a nursing home, including but not limited to: a new Community First Choice Option<sup>51</sup> for individuals who are otherwise eligible for Medicaid-institutional coverage; expansion of the spousal impoverishment provisions;<sup>52</sup> and the expansion and modification of home and community-based services. The Florida Medicaid program has submitted a letter of intent to the Centers for Medicare and Medicaid Services to apply for a Money Follows the Person grant offered under Section 2403 of the Act.<sup>53</sup>

In addition, the Act requires the Secretary of HHS to adopt regulations to, among other things, ensure that all states develop service systems that are designed to:

- Allocate resources for services in a manner that is responsive to the changing needs and choices of beneficiaries receiving non-institutionally-based long-term services and supports (including services and supports that are provided under programs other than Medicaid), and that provides strategies for

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<sup>46</sup>*Id.*, at 27.

<sup>47</sup> Source: DOEA email communication to Senate Health Regulation professional staff, dated August 5, 2010, a copy of which is available upon request from the Senate Health Regulation Committee.

<sup>48</sup> DOEA 2010 Summary of Programs and Services, published March 2010. Available at: <[http://elderaffairs.state.fl.us/english/pubs/pubs/sops2010/First\\_page\\_2010SOPS.html](http://elderaffairs.state.fl.us/english/pubs/pubs/sops2010/First_page_2010SOPS.html)>, (Last visited on September 21, 2010) (page 11).

<sup>49</sup> *Supra* note 45, at 5.

<sup>50</sup> The Patient Protection and Affordable Care Act (H.R. 3590, Public Law 111-148) as amended by the Health Care Education Reconciliation Act of 2010 (H.R. 4872, Public Law 111-152).

<sup>51</sup> Sec. 2401 of Subtitle E of The Affordable Care Act.

<sup>52</sup> Under the spousal impoverishment provisions, the spouse of a nursing facility resident may keep a minimum share of the couple's combined income and assets. The Act extends the current spousal impoverishment provisions to spouses of Medicaid beneficiaries receiving home and community based services.<sup>52</sup> This avoids the institutional bias for a spouse to reside in a nursing home. This provision begins on January 1, 2014, and ends December 31, 2019.

<sup>53</sup> Florida Administrative Weekly, Volume 36, Number 36, September 10, 2010, page 4409.



beneficiaries receiving such services to maximize their independence, including through the use of client-employed providers; and

- Provide the support and coordination needed for a beneficiary in need of such services (and their family caregivers or representative, if applicable) to design an individualized, self-directed, community-supported life.

Trends in supply and demand for elder services and care can be explained on the basis of population growth patterns and disability rates. Disability rates<sup>54</sup> are dependent on demographic factors, particularly age, health conditions and available medical and assistive technologies. Survey data indicates that the impairment rate of Florida's elder population is seven percent less than the national rate, contributing to a relatively low nursing home occupancy rate in comparison with other states. Additional evidence comes from the 2000 Census, which reports that, even though Floridians have overall slightly higher physical disability rates, their disabilities are less likely to be of the type concomitant with the need for supportive care. The Census also reports that the prevalence of severe disability (two or more disabilities, including a self-care disability) among elder Floridians is 17 percent lower than the national average.<sup>55</sup> More recently, the State of Aging and Health in America Report for 2007 published by the Centers for Disease Control and Prevention ranked Florida as the second best state in the country, tied with Connecticut, in terms of the lowest population of elders with a disability.<sup>56</sup> Lower disability rates reduce the number of people requiring nursing home care on two accounts. It reduces the number of disabled persons potentially requiring nursing home care and, at the same time, increases the supply of able caregivers who can provide care longer and at a higher intensity. Family caregivers are the main providers of long-term care services in all states.<sup>57</sup>

Migratory patterns also influence Florida's demand for nursing home care. The large majority of elders who relocate to Florida after retirement are "amenity seeking" retirees. They are characterized by good health and economic self-sufficiency, and most are married. These retirees are usually young elders in their sixties and generally do not place a high demand on nursing home beds. Florida has a net outflow of elders relocating due to increasing frailty, severely disabled migrants, who relocate seeking nearness to adult children, and readily available nursing home facilities. According to Census 2000 figures, Florida had a net migratory loss of persons age 85 and older.<sup>58</sup> Although more current data is not available for the oldest old age group in particular, similar migratory trends have been reported for retirees in the 2007 Florida Aging Population Report published by the Pepper Institute.<sup>59</sup> The Brookings Institute reported net migratory losses for Florida's general population when comparing migratory trends between 2006 – 2007 and 2007 – 2008, with almost a 50 percent reduction in Florida's net migration for the age 65 and older between 2004 – 2005 and 2007-2008.<sup>60</sup>

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<sup>54</sup> *Supra* note 41, at 141.

<sup>55</sup> *Supra* note 41, at 123.

<sup>56</sup> The State of Aging and Health in America report assesses the health status and health behaviors of U.S. adults aged 65 years and older and makes recommendations to improve the mental and physical health of all Americans in their later years. The report includes national- and state-based report cards that examine 15 key indicators of older adult health. The disability indicator measures the percentage of older adults who report having a disability based on an affirmative response to either of the following two questions: "Are you limited in any way in any activities because of physical, mental, or emotional problems?" or "Do you now have any health problem that requires you to use special equipment, such as a cane, a wheelchair, a special bed, or a special telephone?" The report is available at: <http://apps.nccd.cdc.gov/SAHA/Default/IndicatorDetails.aspx?IndId=DIS~N>, (Last visited on September 21, 2010).

<sup>57</sup> *Supra* note 30.

<sup>58</sup> The State of Aging in Florida – A Monograph and Needs Assessment, DOEA, available at: <http://elderaffairs.state.fl.us/english/pubs/stats/StateOfAging.pdf>, (Last visited on September 21, 2010).

<sup>59</sup> Florida's Aging Population, Critical Issues for Florida's Future 3rd Edition, 2007, published by the Florida State University Pepper Institute on Aging and Public Policy, available at: [www.pepperinstitute.org/Population/2007FloridaAgingPopulationReport.pdf](http://www.pepperinstitute.org/Population/2007FloridaAgingPopulationReport.pdf), (Last visited on October 4, 2010) (page 33).

<sup>60</sup> The Great American Migration Slowdown: Regional and Metropolitan Dimensions, published by the Metropolitan Policy Program at the Brookings Institute, December 2009, available at: [http://www.brookings.edu/~media/files/rc/reports/2009/1209\\_migration\\_frey/1209\\_migration\\_frey.pdf](http://www.brookings.edu/~media/files/rc/reports/2009/1209_migration_frey/1209_migration_frey.pdf), (Last visited on October 4, 2010) (pages 7 and 8, and Appendix F).

## Provider Survey Responses

In early-August 2010, an online survey was made available to nursing home administrators statewide to generate opinions on the continuation of the moratorium on the CON. The ten-question survey included three sections: Facility identification, Future Construction Plans, and General Questions on the Moratorium and CON. The survey closed on September 14, 2010. During this time, over 100 responses were received from facilities statewide.<sup>61</sup>

Survey respondents were asked to indicate the age of the facility they represent. Based on responses, the majority of facilities, approximately 30 percent, were between 21-30 years old, and have not undergone any major renovations. A respondent stated that “many facilities need to make changes, renovate or expand, but may not have the capital at this time; however, they may be able to acquire the capital within that time frame.” Additionally, approximately 70 percent of the respondents indicated that building a new facility or an expansion to their current facility within the next 10 years is “not likely.” Survey results indicated that if a facility were to expand or new facilities were to be built, the number of licensed beds would remain unchanged. According to survey results, if any changes were to occur to a facility, changes would more than likely occur as a culture change concept.<sup>62</sup> Another respondent stated, “It is critical that Florida not be building additional nursing homes unless it is capable of adequately funding its existing providers.”<sup>63</sup>

Based on survey results, approximately 71 percent of respondents were in favor of extending the moratorium on issuing certificates of need for nursing homes for an additional five years. Many of the respondents expressed that allowing the moratorium to expire would cause occupancy issues for established nursing homes. Some facilities felt that there are an adequate number of beds to suit community needs, with many beds often remaining unfilled. A respondent stated, “Current census levels indicat[e] that the supply of beds available exceeds demand.” Unfilled beds have become commonplace since “people are seeking more at-home care. Currently, [nursing homes] are never full and most residents are coming for rehab back to home.” A respondent expressed, “With the shift on ALF placements and the NH transfer and Medicaid Diversion program SNF occupancy and competition has increased. Each year the ability to maintain 95 percent occupancy has declined.” Some responses cited the economic downturn as a reason to extend the moratorium. One response explained, “With the economic situation in Florida, we are not seeing the snow birds like we used to as well as the decline in population coming into our State. In fact there still exists a dramatic decline due to hurricanes and cost of living.” Consequently, “existing nursing homes already have a difficult time keeping census at level[s] that allow for meeting budgeted expectations.”

In addition to occupancy, funding was also a major concern to those respondents in favor of extending the moratorium as reflected in the following comments:

- “Census figures show that adding additional beds along with reduced reimbursement would be a devastating combination to existing providers;”
- “Funding at the hospital level encourages discharges to home, reducing SNF admissions, and there is an increased number of ALFs which also reduces SNF admissions;” and
- “The expiration of the moratorium will not only cause problems for providers in figuring out how to continue to care for Medicaid residents in an increasingly competitive market, but will also sky rocket costs for the state as additional supply will encourage the use of this setting for aged Medicaid residents versus the exploration of less costly settings for care.”

<sup>61</sup> Survey conducted by professional Senate staff of the Health Regulation Committee. Responses are available from the Senate Health Regulation Committee.

<sup>62</sup> “Culture change” is the common name given to the national movement for the transformation of older adult services, based on person-directed values and practices where the voices of elders and those working with them are considered and respected. Core person-directed values are choice, dignity, respect, self-determination and purposeful living. Culture change transformation may require changes in organization practices, physical environments, relationships at all levels and workforce models – leading to better outcomes for consumers and direct care workers without inflicting detrimental costs on providers. See Pioneer Network, available at: <<http://www.pioneernetwork.net/CultureChange/Whatis/>>, (Last visited on September 21, 2010).

<sup>63</sup> *Supra* note 61.

## CON Conditions

Section 408.040, F.S., authorizes the Agency to impose conditions on the issuance of a CON or an exemption. These conditions may be predicated upon statements of intent expressed by an applicant in the application for a CON or an exemption. Any conditions imposed on the CON or exemption that are based on the statements of intent must be stated on the face of the CON or exemption. Each nursing home participating in the Medicaid program provided a statement of intent 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>64</sup>

Since 2006 when this provision authorizing the automatic reduction went into effect,<sup>65</sup> the Agency has granted the automatic 15 percent reduction 230 times.<sup>66</sup> Some licensed nursing homes have been granted reductions on three separate occasions.

## Conclusions

Demographic changes projected for Florida within the next 5 to 10 years are not expected to create a surge in the need for additional nursing home beds statewide. Contrary to common notions, nursing home residents do not necessarily follow a downhill, or even static, trajectory in their overall condition. Many stabilize, improve, or adapt. Even if their condition declines, their circumstances and desires may change; for example, family members may come forward as caregivers for them, or they may choose to spend their last days at home, or in hospice care. The state is expanding programs and devoting resources to enable the frail elderly to realize their preference to remain in community settings for as long as possible. This effort is critical to avoiding increased demand for nursing home beds. The challenge for policy makers is to maintain funding and flexibility so that nursing homes are not the default option for older adults and people with disabilities.<sup>67</sup>

## Options and/or Recommendations

### Options

The 2011 Legislature is confronted with the decision whether to extend the moratorium on the CON for community nursing home beds or allow the moratorium to expire on June 30, 2011.

If the moratorium expires on June 30, 2011, the CON application process for the addition of community nursing home beds would be reactivated. This will increase the regulatory responsibility of the Agency as well as potentially increase the caseload at the Division of Administration Hearings and the court system if challenges to the Agency's decisions regarding CON applications ensue. The Agency has indicated that typically applications for CONs work by precedent. If the moratorium expires and approvals for new community nursing home beds begin to occur, it is likely that more and more new beds might be approved. The industry has expressed concern that this would undermine the solvency of nursing homes in Florida.

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<sup>64</sup> s. 408.040(1)(d), F.S.

<sup>65</sup> Ch. 2006-161, L.O.F.

<sup>66</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.

<sup>67</sup> Diversion, Transition Programs Target Nursing Homes' Status Quo, by Susan C. Reihnard, Health Affairs 29, no. 1 (2010): 44-48, doi: 10.1377/hlthaff.2009.0877.

Data suggests that there is currently, and projected to be, an adequate supply of community nursing home beds in the state for the next several years. Authorization exists for the addition of beds if the need arises while the moratorium is in place. In addition, future Legislatures may readdress the moratorium if conditions significantly change that would warrant an earlier expiration of the moratorium should the 2011 Legislature choose to extend the moratorium.

### **Recommendations**

Based on the public's preference for home and community-based residency options, current and projected nursing home occupancy levels through 2016, the economic climate, and the ongoing emphasis that the Legislature has placed on facilitating the ability of Floridians to reside in less restrictive settings than nursing homes, Senate professional staff recommend that the Legislature reenact and continue the moratorium on the CON for community nursing homes beds through the year 2016.

Senate professional staff also recommend that the exceptions and exemptions that the Legislature has enacted to implement the moratorium and address potential surges in occupancy levels be retained. 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 recommend 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 through diversion and transition programs. Although not directly related to the moratorium on CONs for nursing homes, we recommend that the automatic reduction expire on a date that coincides with the date for continuation of the moratorium. The expiration date will 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.