Senate Majority Coalition Legislative Forum on Regulatory Reform

Testimony Presented By:

James W. Clyne, Jr., President/CEO

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Introduction

My name is James W. Clyne, Jr., and I am the president and CEO of LeadingAge New York. Thank you for the opportunity to testify on recommended changes to the regulatory environment in New York. The following remarks will focus on a tremendous opportunity to address the over-regulation of Continuing Care Retirement Communities (CCRCs) in New York State.

Founded in 1961, LeadingAge New York is the only statewide organization representing the entire continuum of not-for-profit, mission-driven and public continuing care including home and community-based services, adult day health care, nursing homes, senior housing, continuing care retirement communities, adult care facilities, assisted living programs and Managed Long Term Care (MLTC) plans. LeadingAge New York's 600+ members serve an estimated 500,000 New Yorkers of all ages annually. LeadingAge New York also represents all of the CCRCs in the state.

By most anyone's standards, CCRCs are one of the most regulated communities and products in New York State. This is the result of CCRCs falling under the oversight of both the Department of Health (DOH) and the Department of Financial Services (DFS), leading to excessive regulation that is often duplicative. As a result, these communities can take years to build – if they get built at all – and regulations can significantly limit a CCRC's growth potential and even jeopardize its financial viability. Since the 1989 authorizing legislation was enacted 24 years ago, only 12 CCRCs have been built in the state to date.

This trend is unfortunate given the popularity of the model with seniors as well as the financial benefits to the state and local communities. CCRCs allow seniors to use their home equity and other assets to purchase an affordable residential and health care arrangement that provides access to housing, supportive services, social activities and long term health care services in a campus setting. The CCRC approach incentivizes keeping seniors at the lowest level of care and in their communities. At the same time, the consumer is guaranteed that their needs are met, regardless of how frail they may become. CCRCs encourage seniors to invest their assets in long term care services within a retirement community that largely prevents asset divestiture to qualify for Medicaid funded services, and encourages seniors with financial means to receive their services in New York rather than relocating to another state.

This is certainly a very popular option among seniors, with CCRCs proliferating along the east coast, particularly in many neighboring states. Unfortunately, with only 12 CCRCs scattered throughout New York State, many seniors are out-migrating to neighboring states to access services. Nationwide, there are approximately 1,900 CCRCs, according to the Ziegler National CCRC Listing and Profile, 80 percent of which are Not-for-Profit (NFP). Pennsylvania has 271 CCRCs, Florida has 70 CCRCs and New York's 12 CCRCs represent less than one percent of all CCRCs nationally. Our CCRC peers in Pennsylvania often joke that they don't want New York to change a thing, because they want to continue to care for our seniors.

Regulation Times Two

CCRCs are highly regulated in New York by both DOH and DFS, and they require approval by DFS and DOH before, during and after construction. These regulations make it extremely difficult for sponsors to construct communities, manage communities and gain access to financing. Here is just a sampling of the regulatory hurdles that CCRCs face:

- Construction cannot begin until at least 50 percent of the units have been pre-sold.
- Occupancy of CCRC housing also cannot begin until at least 50 percent of the residential units have been pre-sold.
- Contractual agreements, resident occupancy and all finances must be approved by both DOH and DFS.
- Once the CCRC has been built and is in operation, both agencies continue to meet with the CCRC on a regular basis to review and monitor finances.

In addition, CCRCs are regulated as several separate licensed entities rather than as one integrated service provider. As a result, CCRCs must adhere to duplicative and sometimes conflicting sets of regulations that hinder the seamless continuum of care they strive to offer residents. For example, a CCRC would be expected to follow individual licensing requirements and regulations through DOH, such as:

- a CCRC operating certificate under Article 46 of the Public Health Law;
- an adult care facility license;
- a residential health care facility (i.e., nursing home) license;
- a home care agency license; and
- a diagnostic and treatment center license (if it seeks to provide clinic services).

Regulation 140 Reform

In spite of the impact of these duplicative and burdensome regulations, the most detrimental regulation impacting CCRCs are the reserve and investment requirements, imposed by Regulation 140, which significantly limits investment potential. LeadingAge New York convened a Regulation 140 Workgroup to develop recommendations for DFS to amend Part 350 (Reg. 140) of Title 11 NYCRR on reserve requirements and allowable investment purchases by CCRCs, which are conservative and conventional among most long term care communities. The proposed amendments will enhance investment returns, which will ultimately accrue to the benefit of CCRC residents. The recommendations, which LeadingAge New York has advocated for with DFS, are summarized below.

- **Minimum Liquid Reserve (MLR) Investments and non-MLR Investments**

LeadingAge New York has proposed that all investments be included in the required investment policy, and that both MLR investments and non-MLR investments should be considered together in developing

investment policy. MLR investments can currently be invested in various fixed income securities including United States government bonds, agency bonds and other fixed income securities rated in the top four rating categories.

Yet another result of current Regulation 140 investment policy is that current CCRC residents' annual monthly fees are increased due to the loss of income caused by the required conservative investments. These higher fees can have a negative impact to some CCRC residents who are on a fixed income and who might have lost funds in their personal investment portfolio in recent years.

- **Mutual Funds Investment**

The current regulations are very specific as to the types of securities in which a CCRC may invest. For example, CCRCs may invest in equity securities. Yet, because there is not a specific provision for mutual funds or exchange traded funds, these investments are not permitted. Investment in mutual funds consisting of individual equity investments is widely acknowledged to be safer than investing in a single equity security. LeadingAge New York proposes that the language in Regulation 140 be changed to permit investments in mutual funds and exchange traded funds. LeadingAge New York could assist DFS in developing mutual fund guidelines taking into account fund size, style and other variables should this provision be adopted.

- **Asset Diversification**

To further reduce portfolio risk, the workgroup proposes that additional asset classes be included in permitted investments. LeadingAge New York proposes that these “diversifying” asset classes be limited to a certain percentage of total assets. The asset classes proposed to permit are Indexed Commodity Investment or Other Real Asset Portfolio; High Yield Bonds; and International Bonds.

LeadingAge New York’s proposals offer practical easy-to-implement risk guidelines that accommodate the financial needs of a wide range of CCRCs. On one end of the spectrum, some CCRCs will not have significant assets above and beyond the MLR; therefore, asset allocation will not change in any significant manner. On the other end of the spectrum of financial strength, CCRCs will be able to invest prudently so that residents are protected and long term growth in assets can keep pace with ever-changing needs.

Reserve Requirements and Actuarial Soundness

LeadingAge New York believes that by lowering reserve requirements for life care and modified CCRCs to be more in line with the reserve requirements in other states, while still protecting consumers’ interests and investments, CCRC development in New York will prosper. Pennsylvania, which boasts the most CCRCs of any state in the country, has low reserve requirements. As a matter of fact, Pennsylvania law requires life care communities to maintain 15 percent of their projected annual operating expenses, exclusive of depreciation, in liquid reserves.

Regulation 140 calls for the most stringent reserve requirements allowed under current law. This has inhibited CCRC growth; unlike in Pennsylvania, in which there is a smaller senior population compared to

New York, as well as collective wealth. “Life care” and “modified” CCRCs in New York (two different CCRC models that guarantee differing amounts of nursing home care for a CCRC resident), unfortunately, are required under Regulation 140 to reserve the equivalent of 12 months of principal and interest payments upon obtaining financing of the CCRC, while six months of projected operating costs, six months of projected refunds, 12 months of taxes and insurance, repairs and replacement reserves must be funded with resident entrance fees. These unrealistic reserve requirements have made it difficult to develop CCRCs and resulted in higher entrance fees and monthly fees for life care and modified CCRC residents than are necessary.

Life care communities, which guarantee unlimited nursing home care to their residents, typically achieve an actuarial surplus within 8-10 years after opening. The start-up losses naturally incurred by new communities are typically recovered within that 8-10 year period. New York regulations require communities to have an actuarial surplus in the third year of operations, essentially requiring all start-up losses to be recovered from the initial residents, thereby placing an unfair burden on the shoulders of those residents. By requiring an actuarial surplus by the third year, entrance fees and monthly fees inhibit marketing of new communities and prohibit all but the wealthiest of New York’s seniors from enjoying all the benefits of the CCRC. LeadingAge New York has recommended changing this requirement to allow the certified actuarial study submitted initially and every third year thereafter by each CCRC to DFS, to act as the basis for determining the actuarial validity and financial stability of the CCRC. The CCRC study would be required to confirm to practices adopted by the Actuarial Standards Board of the American Academy of Actuaries (AAAs); the national standard for actuarial validity of CCRCs. Doing so would provide for a more streamlined, flexible and updated method for assuring actuarial soundness.

Modern Portfolio Theory maintains that to minimize risk for a given level of return, a careful selection of the proportions of various assets be held. Currently, portfolios held by CCRCs typically have fixed income positions in excess of 90 percent. LeadingAge New York believes that the current policy in favor of fixed income will fail to keep up with inflation over certain periods of time. LeadingAge New York remains convinced that CCRC business models are being negatively impacted by the limitations presented by permissible investments under Regulation 140 and respectfully request consideration of increased equity positions coupled with investments in mutual funds and Exchange Traded Funds (ETFs). LeadingAge New York believes that access to mutual funds and ETFs warrants immediate consideration as this investment allows for low cost access to managed funds.

Conclusion

To encourage the development of CCRCs in New York, LeadingAge New York and its membership are seeking regulatory reform from DOH and DFS, which will make regulations more flexible like those LeadingAge New York see in states like Pennsylvania and Florida. In a fiscal climate that calls for encouraging economic development and reduced public spending, increased CCRC development would meet both of these important goals. Residents of CCRCs invest their assets into the CCRC for residential and health-related services, which in turn, obviates the need to rely on Medicaid to cover such costs. In addition, the residents of the CCRC spend their income in the community, contributing to the economic

growth of local communities. The market for CCRCs is expected to expand as baby boomers age and begin planning for their retirement, resulting in job creation and a brighter economic future for the state.

In order to make New York a contender among its neighbors, LeadingAge New York encourages lawmakers and regulators to recognize the market for CCRC development so New York's aging citizens can remain in their communities and most importantly in the state. The LeadingAge New York proposal offers practical easy-to-implement risk guidelines that accommodate the financial needs of a wide range of CCRCs, allowing CCRCs to invest prudently so that residents are protected and long term growth in assets can keep pace with ever-changing needs.

The experience of other states, indeed the tremendous growth of CCRCs across the country, demonstrates beyond any doubt that this is a product that seniors desire and need. As a result of our onerous, regulatory environment, New York seniors are being denied access to a service that has become the standard of senior care across the nation. In addition, for those seniors that are able to access the service, they face higher fees and reduced freedom of choice as to how to invest their resources towards their own care. Likewise, the construction of CCRC campuses, including the jobs included in construction and development of CCRCs is curtailed by the exceedingly stringent business requirements imposed by Regulation 140.

Perhaps worst of all, the lack of access to affordable CCRC services helps to perpetuate the perverse incentives for individuals to impoverish themselves by divesting assets to qualify for Medicaid. The CCRC model, as proven in other states, provides a dignified alternative to the humiliating process of self-imposed poverty that many seniors now endure.

If ever one needed to look at an example of how regulatory overreach negatively impacted the availability of health care services and job development, one need only compare the New York CCRC experience with our neighbors. Along with our LeadingAge national affiliate, LeadingAge New York is prepared to provide additional information and statistics to demonstrate how New York has really missed the boat on this.

As always our staff is available to provide additional information and support for the cause of much needed reform of our regulatory environment.