Advisory

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If you have any questions about this Advisory, please contact:

MAUREEN WEAVER
Chair
203.498.4384
mweaver@wiggin.com

New Law Establishes a Bill of Rights for CCRC Residents and Streamlines Several Statutory Requirements for CCRCs

On June 23, 2015, Governor Malloy signed into law Public Act. No. 15-115, An Act Establishing a Bill of Rights for Residents of Continuing-Care Retirement Communities ("the Act"). The Act establishes several protections for residents of continuing care retirement communities ("CCRCs") and also makes various changes to the statutes governing CCRC providers. The Act takes effect on October 1, 2015. Following is a summary of the new law and recommended steps that CCRCs should take to ensure compliance by the effective date. For purposes of this Summary, the CCRC may also be referred to as the "community" or the "provider."

SUMMARY

I. RESIDENT RIGHTS PROVISIONS

Public Act No. 15-115 provides that CCRC residents are entitled to five general protections that are addressed more specifically in other sections of the law:

- A voice in all decisions affecting the resident's health, welfare and financial security;
- Transparency regarding the financial stability of the provider operating the facility at which the resident resides;
- Timely notification of developments affecting the facility, including, but not limited to: (a) ownership changes of the provider operating the facility at which the resident resides, (b) a change in the financial condition of the provider operating the facility at which the resident resides, and (c) construction and renovation at the facility at which the resident resides;
- Independence in decisions regarding medical care and assisted living services; and
- Reasonable accommodations for persons with disabilities.

A. GOVERNANCE AND COMMUNICATION

1. Residents Council and Participation in Governance

The Act does not dictate specific governance requirements for CCRCs. Rather, each provider must develop a process "for facilitating communication between residents and the personnel, management, board of directors and owners of the provider." It then clarifies that this process must include, but is not limited to, the following:

- Permitting residents to form a residents council, which the Act defines as "a board duly elected by residents at a facility to advocate for residents' rights and function as an advisory board to the provider with respect to resident welfare and interests;"
- Allowing residents, including those who serve on the residents council, to serve as voting members of the board

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of directors or other governing body if the board or governing body rules allow for resident membership and the board or governing body approves the membership;

- If the provider does not have a board of directors or similar governing body, or has no residents council, then the CCRC must seek comments from residents before designing or adopting policies that affect the provider's ability to avoid financial distress (addressed separately in the Act and discussed below in Section II.F. of this Summary).

2. Resident Satisfaction Surveys

The CCRC must conduct a resident satisfaction survey at each community it operates in Connecticut on or before January 1, 2016 and at least every two years after that date. The Act requires that the CCRC make the survey results available to the residents council (or to the residents if there is no residents council) and also must post the survey results in a conspicuous location at the community.

B. HEALTH CARE DECISIONS AND REASONABLE ACCOMMODATIONS

1. **Right to Obtain Treatment.** Under the new law, a provider may not prevent or otherwise infringe on a resident's right to obtain treatment, care and services from persons providing health care who have not entered into a contract with or are not affiliated with the provider, subject to the provider's policies and procedures for protecting the health and safety of residents. The Act specifically references home health and hospice services as examples but indicates that services covered are not limited to those two types of care.

2. **Rights for Residents Receiving Assisted Living and Skilled Nursing Services.** The Act summarizes the following current rights under the statutes and regulations governing assisted living and nursing homes for CCRC residents who receive assisted living or skilled nursing services:

   - The resident is entitled to all rights and protections afforded under the law, including the right to refuse medications and treatments;
   - The provider may not prevent or otherwise infringe upon a resident's right to participate, as fully and as meaningfully as the resident is able, in making the decision about a permanent move to an assisted living facility or skilled nursing unit.
   - The provider must inform family members designated by the resident of the resident's medical condition and care plan.
   - A provider may not prevent or otherwise infringe upon a resident's right to refuse medications and treatments.

3. **Reasonable Accommodations.** The Act requires that each provider make reasonable accommodations in accordance with applicable federal and state fair housing and public accommodations laws to ensure that services and notices are accessible and communicated to residents who have hearing loss, low vision or other disabilities.

C. THREE YEAR LIMIT ON RETURN OF REFUNDS

The Act requires that for all continuing care contracts entered into after October 1, 2015, any refund due to the resident or resident's estate must be paid no later than three years from the date the contract is terminated, or when the contractual conditions for releasing the refund have been met, whichever occurs first. As noted in Section II.C. below, this new requirement must be included in contracts entered into after October 1, 2015.

Many CCRC contracts provide for payment of the refund only after the CCRC has entered into a new continuing care contract and received an entrance fee deposit for the unit that the resident has vacated. The new law does not affect these existing contracts. For contracts entered into after October 1, 2015, the CCRC will be obligated to return the refund if the contract is terminated and the CCRC has been unable to find a new occupant for the vacated unit within three years.

D. REQUIRED RESIDENT NOTICES

1. **Increases to Periodic or Recurring Fees**

For continuing care contracts entered into after October 1, 2015, the provider may not increase periodic or recurring charges such as monthly fees unless the resident has been provided at least thirty (30) days' advance written notice of the fee increase. The notice must be

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accompanied by an explanation for the increase and the provider must give residents the opportunity for dialogue and comments concerning the increases. As noted in Section II.C. below, this new requirement must be included in contracts entered into after October 2015.

2. Major Construction, Modification, Renovation or Expansion

The provider must give a resident, either individually or through the resident's council, not less than 120 days advance written notice of any major construction, modification, renovation or expansion project. This requirement takes effect on October 1, 2015. The notice must contain at least the following information:

- project schedule and areas impacted;
- funding needed for project;
- financing plans;
- expected amount of debt to be incurred and
- projected income from the project

If the provider plans to use any incurred debt to fund a project at a location other than the CCRC, the provider must hold at least one meeting with residents to discuss the project and advise residents in writing of any impact on the resident's monthly service fee.

Notice is not required for immediate renovation or construction necessary to address a public safety or health issue or an issue related to a natural disaster, provided reasonable notice of the project is provided to the residents council or to each resident.

3. Change in Ownership

The new law requires that, effective October 1, 2015, the provider must notify the Commissioner and residents at all communities it operates not less than three (3) months in advance of any changes in ownership of the provider. On a case-by-case basis, the Commissioner may excuse a provider from this requirement if reasonable written notice of the change in ownership is provided to each resident's council at each facility that the provider operates or, if there is no resident's council, to each resident. Current law already requires prior written notice to the Commissioner when a provider refinances its existing debt or makes material changes to its business or corporate structure.

II. REVISIONS TO CCRC STATUTES GOVERNING PROVIDERS

In addition to the revisions discussed above concerning CCRC resident rights, the Act includes numerous revisions to the statutes governing CCRC providers, including provisions aimed at updating provisions and streamlining certain requirements, as well as provisions related to financial distress. These revisions include the following:

A. ELIMINATION OF ANNUAL FILING REQUIREMENT

Under current law, a CCRC must make an annual financial and actuarial filing with the Department. The Act eliminates the annual filing requirement. Instead, some financial and actuarial information now included in the annual filing must be included instead in the disclosure statement; certain information previously included in the annual financial filing is no longer required in the disclosure statement. The information requirements that were deleted include the statement of source and application of funds for five years beginning on the initial filing date; the basis for amortization assumptions for capital costs; and the requirement that financial and actuarial projections be determined on an actuarially sound basis using reasonable assumptions for mortality, morbidity and interest.

Consolidating information from the annual filing into the disclosure statement is helpful for both providers and residents because the annual filing and annually revised disclosure statement were often duplicative; now all relevant information will be in one document, the disclosure statement, which is updated annually. The Act also repealed the statute requiring that a CCRC make certain filings after its first year of operation.

B. DISCLOSURE STATEMENT

The Act made the following revisions to the list of items that must be included in the disclosure statement:

1. **Five Year Summary Deleted**. Deleted the requirement that the disclosure statement include a summary of the five year financial information in the annual filing. That summary had to include anticipated excess of future liabilities over future revenues set forth year by year and also describe the manner in which the provider planned to meet liabilities.
2. **Financial Statements**. Revised disclosure requirements concerning financial

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statements to now require that the provider include in the disclosure statement financial statements for the two most recent years, rather than the three most recent years, as required under current law. The financial statements must include a balance sheet, income statement and statement of cash flow with associated notes or comments to these statements. In addition, the statements must be audited by an independent certified public accounting firm. Although a five year statement of source and application of funds is no longer required, this requirement does remain if the operation of a CCRC has not commenced, or if construction is to be completed in stages.

3. **Pro Forma Statements.** Reduced the number of years covered by pro forma statements from five to three years and clarifies that the pro forma statements must be cash flow statements that include a summary of the projections used in the assumptions, including but not limited to, anticipated resident turnover rates, the number of health care facility admissions per year, days of care per year and the number of permanent transfers. These items are now included in the annual filing, which will no longer be required as of October 1, 2015.
4. **Fee Schedules and Occupancy Rates.** Added a requirement that the disclosure statement include current rate schedules for entrance fees, monthly fees, fees for ancillary services and current occupancy rates.
5. **Historic Entrance Fees and Periodic Charges**. Revised the requirement that the disclosure statement include a description of historic increases in entrance fees and periodic charges by reducing the number of years that must be reflected from seven to five.
6. **Prepaid Healthcare Obligations**. Deleted the requirement that the disclosure statement must include the total actuarial present value of prepaid healthcare obligations assumed by the provider under continuing care contracts.
7. **Sworn Statement of Escrow Agent**. Added the requirement that the disclosure statement include a sworn statement from the escrow agent(s) for entrance fee and debt service/operating reserve escrows verifying that the required escrows have been established and maintained or an independent certified public accounting firm has verified such escrow accounts. Current law requires that the CCRC file the escrow agent's sworn statement for the CCRC registration.

In addition to the disclosure statement, the Act includes several other requirements related to annual filings, timing and disclosure to residents:

1. **Annual Filing of Material Differences Narrative.** The Act requires that the provider file with the Commissioner a narrative describing any material differences between the pro forma income and cash flow statements included in the disclosure statement and the actual results of operations of the most recently concluded fiscal year. The Act does not require that this item be included in the disclosure statement, but providers must make it available to residents and therefore may find it makes sense to include this item in the disclosure statement.
2. **Annual Revised Disclosure Statement Filing**. The Act provides that the provider's registration with the Department will remain effective unless withdrawn or unless the provider fails to file the disclosure statement or other items required to be filed within 150 days following the end of the first fiscal year in which the registration is filed. Following that first year, the provider must file a revised disclosure statement annually with the Commissioner; the Act does not provide a deadline for the annual filing, but it would make sense to assume that the revised disclosure statement should be filed within 150 days of the close of the provider's fiscal year.
3. **Disclosure Statement Revisions At Any Time**. As under current law, a provider may revise a previously filed disclosure statement at any time, if, in the provider's opinion, revision is necessary to prevent the disclosure statement from containing a material misstatement of fact or from omitting a material fact required to be included in the statement. Only the most recently filed disclosure statement will be deemed to be current.
4. **Required Disclosure Statement Amendments Due to Major Construction, Renovation or Expansion or Change of Ownership**. The Act explicitly requires that the provider amend the most recently filed disclosure statement prior to undertaking major facility construction, renovation or expansion or change of ownership to avoid a material misstatement or omission of a material fact.

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5. **Resident Right to View or Obtain Copy of Filings**. Consistent with current law, the provider must make the disclosure statement (and any other filing such as the narrative comparing income and cash flow projections to actual operations if made separately from the disclosure statement) available to each resident for viewing during regular business hours and provide a copy of the most recent filing to any resident requesting it. In addition, the provider must notify each resident, at least annually, of the right to view filings and the right to obtain a copy of the most recent filing.
6. **Filing Fee Eliminated**. The Act eliminates the requirement that the Commissioner prescribe fees of up to $100 for filings, excluding the initial filing. It keeps intact the requirement that the provide pay an annual fee of $24 for each resident unit.

C. CONTINUING CARE CONTRACT

The Act requires that the continuing care contract contain the following terms ***for contracts entered into after October 1, 2015***:

1. **Construction**. If construction has not yet begun, that construction will not begin until half of the facility's units, or 50% of any designated part of the facility, as determined by the Commissioner, have been presold and a minimum deposit of $10,000 per unit has been received. This revision removed language about construction in stages and also simplified the minimum deposit requirement.
2. **Entrance Fee Refunds**. Any refund due to the resident will be delivered to the resident or the resident's estate not later than three years from the date the contract is terminated or when conditions for releasing the refund have been met, whichever occurs first.
3. **Monthly Fees**. No periodic charges or other recurring fees may be increased unless a resident has been provided not less than 30 days' advance written notice of the fee increase. Note that this revision is included in the provision requiring that the continuing care contract state the manner in which the provider may adjust periodic charges or other recurring fees, and it also deletes current language indicating that the provider also needs to make a "clear statement" when there is no limitation that the increases may be made at the discretion of the provider.

D. ENTRANCE FEE AND RESERVE ESCROW ACCOUNTS

The Act modernizes the statutory provisions governing entrance fee escrow accounts and accounts that are required to be held in reserve to cover debt service and operating expenses as follows:

1. **Escrow Agent for Entrance Fee Account - Place of Business in Connecticut**

   Under current law, CCRCs must deposit entrance fee payments made by residents before occupancy into an escrow account established with a bank or trust company. Current law requires that if a CCRC resident is a Connecticut resident when the continuing care contract is signed, then the bank or trust company serving as the escrow agent for CCRC resident's entrance fee payment must have its principal place of business in Connecticut. The Act changes the law to simply require that the bank or financial institution serving as escrow agent for the entrance fee account have a place of business in Connecticut; the bank's principal place of business need not be in Connecticut. **Place of Business in Connecticut Revision for**
2. **Reserve Fund Accounts**

   As with entrance fee escrow accounts, escrow accounts for debt service and operating reserves no longer need to be held in a bank with its principal place of business in Connecticut as long as these accounts the institution has a place of business in Connecticut.
3. **Changes to Debt Service and Operating Reserve Requirements**

   The Act gives providers greater flexibility in meeting the debt service and operating reserve requirements:

   - First, the Act limits the debt service reserve to six months rather than twelve months.
   - Second, it clarifies that providers may use reserves they are required to hold pursuant to mortgage loans, bond indenture or other long term financing in computing required reserve amounts, as long as the funds are available to make payments when operating funds are insufficient for that purpose.
   - Third, the Act permits a provider to apply to its operating reserve requirement any cash amounts pursuant to mortgage loan, bond indenture or other long-term financing terms requiring maintenance of a

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certain number of days of cash on hand.

- Finally, the Act provides the Commissioner with the discretion to accept the reserve covenants regarding maintenance of reserve or escrow funds or financial ratios in mortgage loan, bond indentures and other long-term financing as an alternative to the statutory reserve requirements.

4. **Pledging Funds Held in Escrow As Collateral**

   Under current law, entrance fee and reserve escrows may not be pledged as collateral. The Act modifies this restriction by providing that a reserve fund escrow may be pledged as collateral for a first mortgage loan or other long-term financing obligation of a facility; the general prohibition on pledging entrance fee escrow funds as collateral remains in place.

E. CONSTRUCTION OF CCRC

1. **Minimum Presold Units Required for Construction**. Under current law, construction of a CCRC may not begin until a minimum number of living units have been presold. The minimum is one-half or, if construction is to be completed in phases, one-half of the designated part of the facility that shows financial feasibility. The Act simplifies this requirement by deleting the "financial feasibility" language. Under the Act, the minimum of presold living units for start of construction is one-half of the units in the facility, or, if construction is completed in phases, 50% of any designated part or parts as determined by DSS.
2. **Minimum Deposit Requirements for Presold Units**. The Act changes the minimum deposit requirement for presold units in advance of construction to a minimum of $10,000; current law requires the lesser of $10,000 or five per cent of the entrance fee.
3. **Construction in Stages**. The Act eliminates current law requirements governing construction of a CCRC in stages, including the requirement for evidencing feasibility through a written notice from DSS.

F. MODIFICATION TO FINANCIAL COVENANTS AND FINANCIAL DISTRESS

Current law permits the Commissioner to require a CCRC provider to file such information as the Commissioner may request if the Commissioner finds that the provider is in "financial distress." "Financial distress" is defined as failure to meet debt service payments, drawing down on debt service reserve, or the issuance of a negative going concern opinion (i.e., a report from an auditor or accountant expressing doubts about the company's ability to stay in business). The new law modifies and expands the current section of the CCRC statutes that addresses provider reporting and financial distress:

1. **Reports on Modification, Waiver, Extension of Material Financial Covenants**. It requires that a provider report in writing to the Commissioner when the provider seeks modification, waiver or extension of any material financial covenants or material payment terms under a mortgage loan, bond indenture or other long-term financing agreement. The provider must send the written notice within seven days after making the request and must provide a copy of the request to the residents council of any facility operated in Connecticut.
2. **Determination of Financial Distress**. If the Commissioner determines that a facility is in financial distress, the provider must propose a remediation plan to improve the provider's financial health. The remediation plan must be submitted to the Commissioner and disclosed to the provider's residents council.
3. **Quarterly Reports**. On a quarterly basis (or on an alternative schedule established by the Commissioner), the provider must file reports on the provider's progress in meeting the remediation plan with the Commissioner and the provider's residents council.

G. RIGHT OF ACTION, PENALTIES, ENFORCEMENT AND INVESTIGATIONS

1. **Provider Liability.** The Act clarifies that none of the revisions it makes to existing statutes, or new provisions it creates, will be construed to limit remedies that a CCRC resident has under any provision of the law. The Act does not change the statutory basis for a private right of action by a CCRC resident. Specifically, an individual has the right under current law to bring a claim against a CCRC or entity/person acting on behalf of a CCRC to enter into a contract with the individual (i) without first providing a disclosure

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statement or (ii) when the individual has relied on a disclosure statement that omits a material fact required or necessary to prevent the disclosure statement from being misleading under the circumstances. Liability exists only when the CCRC (or person/entity acting on its behalf) knew or should have known of the violation, misstatement or omission. The resident can collect damages and repayment of all fees made, less the reasonable value of any care and lodging provided. li>

2. **Penalty for Violations.** The Act extends the penalties under current law for violation of the CCRC statutes to include the Act's new resident rights provisions as well as the Act's revisions to existing statutes. Current law authorizes a fine of no more than $10,000, imprisonment not to exceed one year, or both for any person who willfully and knowingly violates these provisions.
3. **Attorney General's Investigation and Enforcement.** The Act also extends the Attorney General's authority to investigate and enforce CCRC statutory provisions to the Act's provisions, including the new resident rights sections.

H. REGULATIONS

The Act amends the statute requiring that the Commissioner adopt regulations to carry out the CCRC statutes to (i) provide that that Commissioner "may" rather than "shall" adopt regulations and (ii) include the Act's revisions to the CCRC statutes and the new resident rights provisions on the list of statutes that could be the subject of regulation.

I. CCRC ADVISORY COMMITTEE

Under the Act, the Advisory Committee on Continuing Care must include a designee of the Commissioner. The Commissioner's designee currently participates on the Committee but does not hold a formal appointment as a Committee member. The Act also requires that the Commissioner's designee report to the Commissioner after every meeting on actions taken and recommendations made at the meeting.

III. RECOMMENDED ACTION STEPS

By October 1, 2015:

- Revise Disclosure Statement per items listed in Section II.B of this Summary (and including forms of continuing care contract).
- Revise Continuing Care Contract to include terms listed in Section II.C of this Summary.
- Review new law, including resident rights governance provisions, with Board of Directors
- Review resident rights provisions and other relevant changes in the law with management/marketing staff as appropriate
- If necessary or applicable, develop or revise policies and procedures related to resident rights provisions
- Discuss new three year refund limit with actuarial and financial consultants
- Review current reserves/escrows to ensure compliance with law and determine whether to take advantage of greater flexibility based on revisions to statutes (e.g. debt service reserve limited to 6 months)

By January 1, 2016:

- Conduct resident satisfaction survey (make results available to residents council and post in a conspicuous location)

Annually (150 days after close of fiscal year), file with Department and make available to residents:

- Revised Disclosure Statement
- Narrative describing material difference between Pro Forma income and cash flow statements and actual results of operation for most recently concluded fiscal year

For more information, please feel free to contact Maureen Weaver at mweaver@wiggin.com or 203-498-4384.

WIGGIN AND DANA OFFICE LOCATIONS

New Haven Office
One Century Tower
265 Church Street
P.O. Box 1832
New Haven, Connecticut 06508-1832
p 203.498.4400
f 203.782.2889

Hartford Office
20 Church Street
Hartford, Connecticut 06103
p 860.297.3700
f 860.525.9380

Stamford Office
Two Stamford Plaza
281 Tresser Boulevard
Stamford, Connecticut 06901
p 203.363.7600
f 203.363.7676

Philadelphia Office
Two Liberty Place
50 S. 16th Street, Suite 2925
Philadelphia, Pennsylvania 19102
p 215.988.8310
f 215.988.8344

New York Office
450 Lexington Avenue, 38th Floor
New York, New York 10017-3913
p 212.490.1700
f 212.490.0536

Greenwich Office
30 Milbank Avenue
Greenwich, Connecticut 06830
p 203.363.7600
f 203.363.7676