

**Testimony of Kevin M. McCarty
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Continuing Care Retirement Communities

**Before the
United States Senate Special Committee on Aging**

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Good afternoon Mr. Chairman and members of the Committee. My name is Kevin McCarty, Insurance Commissioner with the Florida Office of Insurance Regulation (OIR). Thank you for the invitation to appear before you today to share Florida's experience in regulating continuing care retirement communities (CCRCs). We are pleased the Committee has expressed an interest in these entities, and an interest in helping protect seniors with one of their most important financial and lifestyle decisions.

History of CCRC Regulation in Florida

In Florida, OIR and the Florida Agency for Health Care Administration (AHCA) regulate CCRCs jointly. AHCA regulates the health care quality of a CCRC while OIR regulates a CCRC's financial solvency, the residency contracts, and the disclosures made to prospective residents. OIR also works in conjunction with the Florida Department of Financial Services (DFS). DFS processes resident complaints not related to the quality of health care and also oversees mediation and arbitration between residents and CCRCs.

Florida Statutes define "continuing care" as furnishing shelter and either nursing care or personal services upon payment of an entrance fee pursuant to a contract.

Therefore, OIR does not regulate facilities that do not require an upfront entrance fee.

The first regulation of CCRCs by OIR and its predecessors began in 1953. The original law was limited to the regulation of communities, which exchanged care for a single fixed fee and typically required a resident to assign all of his or her assets to the community. The law did not apply to facilities charging an entrance fee and a monthly maintenance fee or those with a mutual right of contract termination. Consequently, OIR

regulated very few facilities and the regulation of these facilities was minimal. These facilities were known as “Life Care” facilities.

After several high-profile bankruptcies that occurred in Florida and nationally, the regulatory climate for CCRCs evolved. In 1977, the Florida Legislature strengthened statutes governing CCRCs by expanding the definition of continuing care and adding new requirements for CCRCs. The 1977 revision formed the foundation of the current regulatory framework governing CCRCs. However, the failure of several CCRCs in the late 1970s and early 1980s prompted the Florida Legislature to further strengthen the CCRC statute in 1981 and in 1983.

Florida CCRC law has continued to undergo modifications. Most recently the 2010 Florida Legislature opted to increase disclosures to prospective and current residents and to recognize that some residents purchase a CCRC contract as a form of long-term care insurance, intending to delay their occupancy of the facility.

Currently, there are 73 licensed CCRCs in Florida serving approximately 30,000 residents. Most of the growth in the industry in Florida has been from existing CCRCs adding units since the number of licensees has remained consistent over the last decade. In general, new CCRCs have been entering the market at nearly the same rate as existing CCRCs have surrendered their licenses to become non-CCRC, rental communities. The total revenue reported for Florida CCRCs during 2009 was approximately \$1.4 billion.

Residents’ Rights

It is important to note that the general population utilizing CCRCs are seniors. The decision to join a CCRC represents a substantial investment of an older person’s

assets, and Florida takes its responsibility to protect these consumers very seriously. In addition to the regulatory oversight structure of CCRCs discussed below, Florida law recognizes that residents of CCRCs are entitled to dignity and respect. Specifically, a section of Florida law governing CCRCs is entitled, “Residents’ rights.” This section states, among other things, that a resident of a CCRC may not be denied any civil or legal rights, that they are entitled to live in a safe environment, that they are entitled to be treated with dignity and respect, that they are entitled to present grievances and recommend changes in policies and procedures of the CCRC, and that they are entitled to a copy of the these residents’ rights.

Overview of Regulatory Structure

OIR’s regulatory emphasis focuses on four distinct areas:

- 1) Verifying that CCRC owners and management are reputable and responsible;
- 2) Ensuring information is properly disclosed to prospective and current residents;
- 3) Ensuring compliance with licensure requirements; and
- 4) Providing financial oversight.

CCRC Owners and Management

OIR considers the CCRC’s principals to be a key component of the success of a CCRC facility. Prior to approving an application for licensure, Florida Statutes require a CCRC to submit evidence that the facility’s owners and management are reputable and of responsible character and that they have sufficient experience to properly operate a CCRC. To make this determination, OIR requires each officer, director, owner and

manager of the CCRC to submit a biographical affidavit, a legible fingerprint card, and an investigative report obtained from an independent vendor. These biographical requirements also apply to any new officers, directors or management of existing CCRCs. These rigorous requirements ensure that people of questionable moral character are not in a position to harm Florida residents.

Disclosures to Residents

Another key component of Florida's CCRC regulation is disclosure requirements to residents. Florida Statutes contain a list of items that must be disclosed to prospective residents prior to entering into a continuing care contract. Some of the more significant items include a summary of the facility's ownership interests and its affiliations, plans for expansion, rules and regulations of the facility, the facility's policy concerning admission to and discharge from the various levels of care, a copy of the resident's rights and a summary of the most recent examination report issued by OIR. A copy of the facility's most recent annual report must also be accessible to prospective residents. A CCRC is required to submit a copy of these disclosure documents on an informational basis to OIR prior to their use.

Florida Statutes also require a number of disclosures in the residency contracts. Each contract must be filed with and approved by OIR prior to its use to ensure that all required disclosures are contained in the contract, the contract meets statutory requirements for items such as refunds provisions, and to ensure the contract is written in plain language.

Florida Statutes require additional items to be disclosed to existing residents on an on-going basis. For example, existing residents are entitled to inspect the facility's annual financial reports and audited financial statements and receive 60-day advance notice of any changes in fees and services. Management is also required to conduct quarterly meetings with residents to discuss items of concern including reasons for fee increases.

To ensure that CCRCs comply with these disclosure requirements, OIR conducts examinations of each facility at least every three years unless they are accredited by an accreditation agency such as Commission for Accreditation of Rehabilitation Facilities-Continuing Care Accreditation Commission (CARF-CCAR). Accredited CCRCs are required to be examined at least once every five years. Currently, 19 of Florida's 73 CCRC facilities are accredited through CARF-CCAC. Florida Statutes also allow OIR to conduct an examination of a facility at any time on a discretionary basis.

Licensure Requirements

The third emphasis of Florida's CCRC regulation concerns licensure requirements. For example, one of the licensure requirements is that a prospective CCRC must provide evidence of demand for a new facility. Since the viability of a CCRC is primarily governed by occupancy, it is imperative that a CCRC demonstrate sufficient demand for a facility prior to placing the residents' funds at risk. Florida accomplishes this objective by requiring a prospective CCRC to submit a feasibility study with its application for licensure, which follows a two-step application process, and through the escrowing of residents' entrance fees.

A CCRC first obtains a Provisional Certificate of Authority (PCOA) which allows the CCRC to market the facility and collect reservation deposits equal to at least 10% of each entrance fee. A CCRC is prohibited from beginning construction of the facility while under a PCOA. During the PCOA period, prospective residents' deposits are 100% escrowed.

To obtain a full Certificate of Authority (COA), a CCRC must collect a reservation deposit on a minimum of 50% of the independent living units, and submit a second feasibility study -- this one being from an independent consultant. In addition, the CCRC must prove the CCRC has secured financing for the project. OIR has found these requirements to be very important as many projects that have failed in Florida did so during the PCOA phase; these failures were primarily due to the CCRC's failing to meet the 50% reservation requirement. As a result, these facilities were halted prior to construction and the residents received full refunds.

If a facility does obtain the necessary deposits, OIR authorizes the CCRC to begin construction. Under a COA, a CCRC is allowed to access 25% of residents' deposits and entrance fees. The CCRC must maintain the remaining 75% of residents' deposits and entrance fees in escrow to reduce the financial risk to residents until the CCRC demonstrates the facility has a likelihood of success. To obtain release of the remaining initial entrance fees, a CCRC must provide evidence to OIR that the facility is constructed, a certificate of occupancy has been issued, and 70% of the independent living units are paid-in-full. In addition, CCRCs must show statutory reserve requirements have been met and an independent consultant certifies that there have been no material adverse changes with regard to the feasibility study that was submitted with

the COA application. After the release of initial entrance fees has occurred, a facility is required to escrow entrance fees for seven days during Florida's rescission period and escrow all wait list deposits which are over \$1,500.

Financial Oversight

Another critical area of Florida's regulatory emphasis is financial oversight. Each facility is required to file with OIR an annual financial report, audited financial statements and a minimum liquid reserve calculation. Facilities are also required to file quarterly financial reports unless they are accredited. OIR has maintained the financial information from annual reports filed since 1990 and quarterly financial information since 1996.

OIR has used this information to construct spreadsheets that calculate a series of financial ratios to assist OIR in determining the financial viability of a facility. These ratios address a facility's profitability, liquidity, debt levels and occupancy. OIR then uses the ratios and its historical data to analyze the financial trends of a facility to determine whether OIR should take any action in regards to that facility. OIR may require a facility that is experiencing declining financial trends to submit more frequent reports for closer monitoring or OIR may require the CCRC to submit a corrective action plan to address the issues causing the financial problems. A facility with more significant problems may become subject to administrative supervision where an OIR designee oversees the operations of the facility, or a facility may ultimately have its COA suspended. A CCRC with a suspended COA is restricted from finalizing new residency contracts. A facility that experiences severe problems may have its license revoked or it

may be placed into Rehabilitation with DFS pursuant to a court order. Another option for assisting troubled CCRCs in Florida is to refer the facility to the Florida Continuing Care Advisory Council. The Advisory Council consists of three CCRC residents, three CCRC Executive Directors and four professionals familiar with the CCRC industry. The Advisory Council is charged with acting in an advisory role to OIR and assisting with any corrective action plan, rehabilitation or cessation of business plan of a CCRC upon the request of OIR.

In the unfortunate event that a facility is liquidated, Florida Statutes contain provisions to assist residents financially to relocate to other facilities. This process includes DFS becoming a creditor of the facility or through an assessment levied on other CCRCs. Fortunately, this has been a rare event and has not occurred in almost 20 years.

Another important part of financial solvency is each facility's minimum liquid reserve (MLR) which is held in an escrow account. The MLR can be used by the CCRC with OIR approval in an emergency or by DFS if the facility is in rehabilitation as Florida does not have a guaranty fund for CCRCs.

Each facility's MLR consists of a debt service reserve equal to one year of debt service payments, an operating reserve equal to 15% of annual operating expenses, and a renewal and replacement reserve which is equal to 15% of the lesser of annual operating expenses and accumulated depreciation. The operating reserve and renewal and replacement reserve are required to be unencumbered. OIR assists facilities to properly calculate their reserve requirements and then monitors the escrow accounts to ensure that the facility maintains adequate reserve funding.

In addition to emergency funding, the renewal and replacement reserve can serve as a source of inexpensive financing for facilities since the CCRC can access a portion of the renewal and replacement reserve each year to fund capital expenditures. The withdrawals are then required to be repaid in equal installments over a 36 month period.

OIR conducts its financial oversight by assigning each CCRC to one of four CCRC examiners who are responsible for their CCRCs. It is this examiner that reviews and analyzes the financial reports and ensures that a CCRC's reserves are adequately funded. In addition, the examiner reviews any new financing documents such as loan agreements, reviews and approves the escrow agreements that govern the reserve and entrance fee accounts, reviews the CCRC's investments to ensure that they comply with diversification requirements, reviews management agreements, reviews and approves any acquisition filings if a CCRC is acquired, maintains the public records for each facility and serves as a point of contact for any questions from OIR's field auditors, the public or from the CCRC. The CCRC section supervisor provides oversight of the four CCRC examiners and also performs secondary reviews of all financial reports of CCRCs that are deemed to have a higher priority level usually as a result of some financial difficulties.

Regulatory Outreach

OIR receives information from various sources concerning regulatory problems or concerns about CCRCs. For example, each year OIR hosts a meeting of the Advisory Council to discuss industry trends, issues and the regulatory environment. The residents and Executive Directors on the Advisory Council are frank in giving their opinions of areas where OIR should focus its resources. In addition, during each on-site examination,

the examiner meets with the President or Chair of the facility's residents' council to discuss any resident concerns. Furthermore, OIR maintains good relations and frequent contact with an industry association that represents many of the Florida CCRC residents (Florida Life Care Residents Association) and an industry association that represents many of the Florida CCRCs (Florida Homes and Services for the Aging). These associations often bring the concerns of their constituents to our attention.

CCRC Trends

CCRCs have continued to evolve to adapt to the changing needs of seniors. Over the last ten years Florida has seen a significant increase in the quantity and quality of services that CCRCs offer to their residents both for the convenience of residents and to obtain additional sources of revenue. For example, several CCRCs in Florida have opened their own home health care agency on campus. The resident receives the benefit of being able to live independently for a longer period of time rather than having to move to the facility's assisted living or skilled nursing units. The resident also gains the benefit of receiving services from a familiar person on campus rather than from a stranger with an outside agency. In turn, the facility gains an additional source of revenue. The facility also may use this program as a marketing tool if they provide the extra services to individuals outside the facility. We have also seen an increase in the number of CCRCs operating their own pharmacies which also provides more convenience to the resident while providing additional revenue for the CCRC.

Another new development in Florida is the "CCRC at Home" concept that may also be characterized as a "CCRC without walls." The main difference between a

“CCRC at Home” and a traditional CCRC is that the resident’s independent living occurs in his or her own home rather than at an independent living unit at the facility. Therefore, a “CCRC at Home” resident eventually moves to the facility when he or she needs assisted living or skilled nursing services rather than when the residency contract has been signed. As a result, the resident typically pays a much smaller entrance fee than if he or she immediately moved into an independent living unit at the facility.

OIR has received requests from CCRCs that wish to add a “CCRC at Home” program to their existing facilities to generate more revenue. Florida also has a proposed facility that, if successful, will consist mostly of “CCRC at Home” residents. This CCRC proposed this model in response to the poor real estate market resulting in potential residents being unable to sell their homes -- the proceeds of which are typically used to pay the entrance fee due when the residency contract is signed.

Conclusion

It has been almost 20 years since a CCRC has failed in Florida, which is perhaps the greatest testament to the success of Florida’s regulatory framework. (The residents affected were successfully moved to other facilities.) With that being stated, several Florida CCRC facilities have experienced financial difficulties in recent years, which is partially due to the economy, and more specifically, the depressed housing market. The housing market is especially critical as many residents need to sell their current homes (at reasonable prices) to be able to pay the entrance fees required by a CCRC facility.

OIR continues to monitor several trends in the CCRC industry as these entities adapt to changing economic circumstances. Some of these trends may be favorable,

including an expansion of services that will help generate additional revenue, and add to the diversification of CCRC revenue, which will add to these entities' financial stability.