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INDEPENDENT REGULATORY REVIEW COMMISSION

TO: Ms. Gail Weidman
Office of Long Term Living
Bureau of Policy and Strategic Planning
Bertolino Bldg., 6th Floor
1401 North 7th Street
Harrisburg, PA 17102

Mr. Arthur Coccodrilli, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

FROM: Robert Goyette, Senior Vice President of Operations
Senior Care, Inc.

DATE: September 12, 2008

RE: Regulation No. 14-514
Chapter 2800 Assisted Living Residence Regulations

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REFER TO

Senior Care is a privately owned senior housing/health care company dedicated to enriching the lives of the individuals who live and work with us by responding to their unique needs and universal desire for dignity and respect. Senior Care's support center is located at 9510 Ormsby Station Road, Suite 101, Louisville, Kentucky 40223. The telephone number is 502-753-6000.

Senior Care operates and manages 73 senior housing/health care facilities in 16 different states, as more particularly described in the table below:

Type of Facility	Number of Facilities	Location
Assisted Living Communities	44	Alabama (1); Arkansas (5); Florida (1); Georgia (2); Indiana (1); North Carolina (3); Ohio (6); Pennsylvania (15); South Carolina (1); Tennessee (7); Virginia (1); West Virginia (1)
Multi-Level Retirement Communities	7	California (7)

Skilled Nursing Facilities	19	Kentucky (18); Pennsylvania (1)
Inpatient Rehabilitation Hospitals	3	Kentucky (1); Ohio (1); Texas (1)
Total	73	16

In Pennsylvania, Senior Care operates and manages 15 licensed personal care homes, which all do business under the name Elmcroft. As such, Senior Care has a vested interest in the proposed Pennsylvania Assisted Living Residence regulations 2800, and we would like to take this opportunity to share our comments and concerns with the Independent Regulatory Review Commission (IRRC). We trust you will consider our comments, provided in earnest, as you deliberate fully on the impact of the new regulations governing assisted living residences in the Commonwealth.

Generally speaking, and based in part on our experience with the implementation of assisted living regulations in other states, it is our opinion that many providers in Pennsylvania will desire to have a progressive approach to convert from a personal care home to an assisted living residence. However, as providers analyze the increase in operating costs to become licensed as an assisted living residence, and realize they cannot increase costs for services in their markets, many providers will find it impossible to convert. This will likely include some of the Elmcroft communities in Pennsylvania. Other providers will find themselves in the painstakingly difficult position of converting only to pass the increased costs onto the residents. This is a lose-lose proposition for the provider and the consumer.

It is our understanding that there are specific criteria to be considered by the IRRC when determining whether a regulation is in the public interest, and we have attempted to identify the criteria in our discussion of each noted regulation below. We have attached a copy of the proposed regulations to this memo, for your convenience.

With that background, below are our specific comments and concerns regarding the proposed Assisted Living Residence regulations 2800:

1. §2800.11(c) - Procedural Requirements for Licensure or Approval of Assisted Living Residences, Relating to Licensure Fees

DISCUSSION: The proposed Assisted Living regulations provide that Assisted Living Residences must be licensed by the Department of Public Welfare of the Commonwealth, and the license application fee or renewal license fee is \$500. In addition, there is a \$105 per bed fee. By contrast, the licensing fee for a personal care home is 0-20 beds: \$15; 21-50 beds: \$20; 51-100 beds: \$30, 101 beds and over: \$50. The average number of beds of a Pennsylvania Elmcroft personal care home is 79 beds. The current licensing fee for this

average facility is \$30. Under the proposed assisted living residence regulations, the same average facility will pay a \$500 license application fee and a per bed fee of \$105 for a total of \$8,295, or a total licensing fee of \$8,795. This is an exponential increase of \$8,765. This dramatic increase in licensure fees will not only have a negative economic effect on the operator, but will negatively impact the residents as such an exorbitant increase will likely be passed on to and absorbed by the consumers. We encourage consideration of a more reasonable per bed fee, and would recommend a fee of \$25 per bed.

2. §2800.11(d) - Procedural Requirements for Licensure or Approval of Assisted Living Residence, Relating to Use of the Term “Assisted Living”

DISCUSSION: The proposed Assisted Living regulations state “No person, organization or program shall use the term ‘assisted living’ in any name or written materials, except as a licensee in accordance with this chapter.” To deny use of the term “assisted living” by a personal care home is unnecessarily restrictive and frankly this requirement is totally unreasonable. This restriction of use of the term will adversely affect the operations of personal care homes in Pennsylvania, and will confuse the consumer. As discussed below, the proposed assisted living residence regulations are duplicative in many respects of the existing personal care home regulations. Therefore, it would be impossible for a personal care home not to use the term “assisted living” because those are the services provided by personal care homes. Personal care homes in Pennsylvania use the term “assisted living” in advertising and marketing materials and community outreach and education programs. Providers have also invested considerable resources to improve relevancy on the internet via search engine optimization. Search engine optimization generally refers to making your web site achieve a higher organic ranking when being searched. The key term providers utilize is “assisted living”. Because web sites have been continually refined to include this term, a consistent ranking has been established. This makes it easier for the consumer to obtain information. As a result of the foregoing efforts, the consumer has become knowledgeable of assisted living services and associates these services with personal care homes. Failure to utilize this term would negate the vast resources already invested in marketing, undermine the impact of community outreach and education programs and confuse the consumer. Personal care home providers would need to rebrand their services and consumers would need to be re-educated to ensure they understand they will still receive the same assisted living services they have become accustomed to receiving in the many exceptional personal care homes throughout Pennsylvania despite the new “assisted living” licensure category.

In accordance with §2600.4 of the Personal Care Homes regulations, a *personal care home* is defined as “a premise in which food, shelter and personal assistance or supervision are provided for a period exceeding 24 hours, for four or more adults who are not relatives of the operator, who do not require the services in or of a licensed long-term care facility, but who do require assistance or supervision in activities of daily living or instrumental activities of daily living.” By comparison, §2800.4 of the Assisted Living Residences regulations defines an *assisted living residence* as “any premise in which

food, shelter, personal care, assistance or supervision and supplemental health care services are provided for a period exceeding 24 hours for four or more adults who are not relatives of the operator, who require assistance or supervision in such matters as dressing, bathing, diet, financial management, evacuation from the residence in the event of an emergency or medication prescribed for self-administration.” Personal care services under both regulations are defined identically as “assistance or supervision in ADL or IADL, or both.” The definition of the *activities of daily living* (ADLs) in the Personal Care Home regulations and the Assisted Living Residences regulations are likewise identical: “The term includes eating, drinking, ambulating, transferring in and out of a bed or chair, toileting, bladder and bowel management, personal hygiene, securing health care, managing health care, self-administering medication and proper turning and positioning in a bed or chair.” The definition of *instrumental activities of daily living* (IADLs) in the Personal Care Homes regulations “includes the following when done on behalf of a resident: (i) doing laundry, (ii) shopping, (iii) securing and using transportation, (iv) managing finances, (v) using a telephone, (vi) making and keeping appointments, (vii) caring for personal possessions, (viii) writing correspondence, (ix) engaging in social and leisure activities, (x) using a prosthetic device, (xi) obtaining and keeping clean, seasonal clothing” which are identical to the definition of IADLs as defined in the Assisted Living Residences regulations except that the Assisted Living Residences regulations include “(xi) Housekeeping.” Please note that housekeeping services are indeed provided in the personal care home setting although not defined as IADLs in the Personal Care Home regulations.

3. §2800.25 - Resident-Residence Contract

DISCUSSION: The proposed Assisted Living regulations require that the resident provide a 14 day notice to terminate the resident-residence contract. We believe this would have a negative financial impact on providers who operate more than one Pennsylvania facility. We incur expenses based on a projected census, and to allow for a 14 day notice to terminate rather than a 30 day notice would impact the efficacy of our multi-facility operations. For example, we purchase food and schedule staff in advance based on our projected census. We submit that a 30-day notice to terminate by the resident is a more reasonable approach that would allow operators to better control expenses.

4. §2800.56 - Administrator Staffing

DISCUSSION: The proposed Assisted Living regulations require that the administrator be present in the residence an average of 40 hours or more per week, in each calendar month. At least 30 hours per month shall be during normal business hours. This requirement is unreasonable during times of transition. We submit that the reasonableness of the regulation is flawed, and suggest that the Department acknowledge this requirement is difficult to be met during the inevitable times of transitioning from one administrator to another.

5. §2800.96 - First Aid Kit

DISCUSSION: The proposed Assisted Living regulations require that the residence have a first aid kit that includes an automatic electronic defibrillation device (AED). In connection with the use of AED, the American Heart Association (AHA) recommends the following:

- Persons that acquire an AED notify the local EMS office.
- A licensed physician or medical authority provides medical oversight to ensure quality control.
- Persons responsible for using the AED are trained in CPR and how to use an AED.

This requirement will definitely increase operating costs for the provider. In addition to the cost to purchase the AED, the provider will need to bear the expense of maintaining the equipment in good operating condition. There will also be expenses for the training hours involved, and the cost of a physician who will provide consulting services for the oversight to ensure quality control. As is the case when a provider experiences a dramatic increase in costs of doing business, the provider has no choice but to pass the costs onto the consumer. An AED is not required in a skilled nursing facility licensed in the Commonwealth of Pennsylvania which makes the requirement of an AED in an assisted living residence confusing and unreasonable.

6. §2800.98 - Indoor Activity Space, Relating to Common Area Square Footage

DISCUSSION: The proposed Assisted Living regulations require that the residence shall have at least one furnished living room or lounge area for residents, their families and visitors. The combined living room or lounge areas shall accommodate all residents at one time. There must be at least 15 square feet per living unit up to fifty living units. There must be a total of 750 square feet if there are more than 50 living units. We surmise that many existing providers will not be able to meet this requirement, and therefore will be prohibited from converting. We submit this requirement is unreasonable, and suggest that a more reasonable approach is to grandfather the square footage of existing facilities.

7. §2800.101 - Resident Living Unit

DISCUSSION: The proposed Assisted Living regulations require that for existing homes, the resident living unit must have 175 square feet, excluding bathroom and closet, and an additional 80 square feet for shared rooms. Contrast these requirements with the current personal care home regulations, which require that each single bedroom have at least 80 square feet of floor space, with an additional 60 square feet for a shared bedroom. The square footage requirement of 175 square feet for existing living units will undoubtedly exclude many providers from converting to an assisted living residence thereby affecting competition. In addition, an extreme increase in provider cost will ultimately impact the consumers and have to be passed on to and absorbed by them. We

respectfully request that the current square footage available to existing personal care home operators be grandfathered or, in the alternative, a more reasonable square footage requirement be considered, such as 150 square feet with 50 additional square feet for shared rooms.

8. §2800.101(d) - Kitchen Capacity

DISCUSSION: The proposed Assisted Living regulations require that facilities converting to assisted living residences after the effective date must provide a small refrigerator and microwave oven in each living unit. We suggest the following, and propose that clarification is needed. Our experience has shown that residents of senior housing do not utilize kitchens in their living units, including microwaves. For many, the unrestricted use of a microwave would prove an unsafe situation for the resident, and a potentially unsafe environment for the community-at-large. We suggest these items not be mandatory, and allow the residence to document that the resident has opted out of having a refrigerator or microwave in his/her living unit. In addition, we suggest the regulations be clarified to state that the requirement to provide these items does not mean the provider cannot charge for such items.

Regarding new construction, the proposed regulations require that the living units have a "kitchen," which again increases the cost for providers and is, in many cases, an amenity that most seniors will not use. The majority of individuals who reside in senior housing have chosen this life style because they do not want to cook meals and recognize that their daily nutrition will not be compromised if the facility provides three meals a day and snacks.

Again, we urge reconsideration of the kitchen capacity requirement. We agree with the Pennsylvania Assisted Living Association (PALA) that a "country kitchen" would suffice for those residents in either existing or new construction assisted living residences. The premise that residents prefer to purchase groceries and prepare their own food in their living units, unless it is unsafe for them to do so as documented in their support plan, is flawed. We believe there is no need for this regulation, and that the market will support our position.

9. §2800.101(o) - Separate Bedroom Door

DISCUSSION: In living units with a separate bedroom, the proposed Assisted Living regulations require there must be a door to the bedroom. This fails to take into consideration efficient floor plan designs, such as an alcove design. This requirement is unreasonable and is not needed. It will result in an unwarranted increase in cost to the provider, which will ultimately be passed on to and absorbed by the consumer without the consumer receiving any substantive benefit.

10. §2800.102(c) -Bathrooms

DISCUSSION: The proposed Assisted Living regulations require there shall be at least one bathtub or shower in the bathroom of the living unit. We do not agree that a tub or shower must be in each room so long as the resident has unrestricted access to a common tub/shower room/spa. This requirement is unreasonable and is not needed. It will result in an unwarranted increase in cost to the provider, which will ultimately be passed on to and absorbed by the consumer without the consumer receiving any substantive benefit.

11. §2800.108(c) - Fire Arms and Weapons

DISCUSSION: The proposed Assisted Living regulations require that firearms, weapons and ammunition shall be permitted on the licensed premises of the residence only when the stated conditions are met. We request clarification and confirmation that notwithstanding the proposed regulation, the facility may implement a policy to ensure the safety of its residents, staff and visitors that no weapons or firearms are permitted on the premises of the facility, including the resident living units. We understand that no weapons are allowed in skilled nursing facilities in the Commonwealth, and question the need for this regulation in the Assisted Living setting.

12. §2800.131 - Fire Extinguishers

DISCUSSION: The proposed Assisted Living regulations provide there shall be at least one operable fire extinguisher with a minimum 2-A rating for each floor, living unit, including the basement and attic. The costs to implement the foregoing (i.e., purchasing, maintaining and inspecting the equipment; training on use of the equipment, etc.) would be prohibitive. This requirement is unreasonable and is not needed. It will result in an unwarranted increase in cost to the provider, which will ultimately be passed on to and absorbed by the consumer without the consumer receiving any substantive benefit. In the alternative, we suggest that the requirement be extinguishers must be located throughout the community, on every floor, every 75 feet.

13. §2800.171 - Transportation

DISCUSSION: The proposed Assisted Living regulations require a residence shall be required to provide transportation or coordinate transportation to and from medical and social appointments. Additionally, if a residence supplies its own vehicle for transporting residents to and from medical and social appointments, any vehicle used for this purpose shall be accessible to resident wheelchair users and any other assistive equipment the resident may need. The proposed regulation also requires the vehicle must have at least one first aid kit, complete with AED. We request confirmation or clarification with respect to this proposed regulation. We typically provide scheduled transportation for medical appointments two days per week to a limited service area and this charge is included in the basic rate. For unscheduled transportation to medical appointments, or for personal errands, we charge a pre-disclosed rate. We request confirmation that while the proposed regulation requires that we provide transportation, providers can indeed

charge for the provision of transportation. We do not agree that all vans should be equipped with a first aid kit that includes the AED. As stated previously, use of the AED requires specialized training and quality control and we believe that this additional operating cost will negatively financially impact providers, and therefore consumers.

14. §2800.225 - Initial and Annual Assessment

DISCUSSION: The proposed Assisted Living regulations require that a resident shall have a written initial assessment that is documented on the Department assessment form within 15 days of admission. The administrator or designee, or LPN, under the supervision of a registered nurse may complete the initial assessment. We request clarification as to the specific requirement for the “supervision of a registered nurse.” Does this imply a registered nurse on staff? Does this imply a contractual arrangement with a nurse who is available to come into the facility on an as needed basis? If a contract nurse, does it require that the nurse be available at all times by phone, and available to come into the building in the event of an emergency? A 24-hour on call arrangement with a registered nurse would be very costly to providers. In addition, locating the person or persons who are available for this type of on-call coverage would be challenging. This requirement is unreasonable and is not needed. It will result in an unwarranted increase in cost to the provider, which will ultimately be passed on to and absorbed by the consumer without the consumer receiving any substantive benefit.

15. §2800.227 - Development of the Support Plan

DISCUSSION: The proposed Assisted Living regulations provide a residence may use its own support plan for if it includes the same information as the Department’s support plan form. A licensed practical nurse, under the supervision of a registered nurse, must review and approve the support plan. As stated above, we request clarification, and ask the same questions asked in completion of the initial and annual assessment: Does “supervision of a registered nurse” imply a registered nurse on staff? Does this imply a contractual arrangement with a nurse who is available to come into the facility on an as needed basis? If a contract nurse, does it require that the nurse be available at all times by phone, and available to come into the building in the event of an emergency? For reasons stated in the prior paragraph, we submit this requirement is unreasonable. It will result in an unwarranted increase in cost to the provider, which will ultimately be passed on to and absorbed by the consumer without the consumer receiving any substantive benefit.

16. §2800.228 - Transfer and Discharge

DISCUSSION: The proposed Assisted Living regulations provide for a discharge or transfer of the resident upon a 30 day advance notice. In addition, the proposed regulations require that the notice of discharge or transfer to the resident and designated person include an explanation of the measures they can take if they disagree with the residence’s decision to transfer or discharge which shall include the name, mailing address and telephone number of the “State and the local long-term care ombudsman.”

For less than a 30 day notice to discharge or transfer, the proposed regulations require "certification by a physician or the Department" that a delay in transfer or discharge would jeopardize the health, safety and well-being of the resident or others in the residence. We respectfully submit that too often we have found that physicians are reluctant to cooperate with such a certification, and we submit this requirement is unreasonable. In any event, we request clarification that the certification by the Department or the physician can be verbal, and not written.

The proposed regulations also provide if the residence determines that a resident's functional level has advanced or declined so that the resident's needs cannot be met in the residence, the residence shall notify the resident, the designated person and the local ombudsman. If the resident or designated person disagrees with the residence's decision, the residence shall contact the local ombudsman. If the residence decides to proceed, then the ombudsman will notify the Department, and the Department "may take an appropriate licensure action it deems necessary based upon the report of the ombudsman." The residence must be permitted to maintain control of transfers and discharges of its residents. Involvement of the ombudsman as an active participant in the process is inappropriate. The ombudsman should be an advocacy resource for the resident, not their legal representative. We submit this requirement is unreasonable and there is no need for the regulation. In any event, should the proposed regulation be promulgated, we submit that there should be a time limit in which the resident and designated person shall decide if they disagree with the residence's decision to transfer.

17. Pharmacy Services, Relating to Required Packaging Requirement

DISCUSSION: We request clarification of the proposed Assisted Living regulations with respect to the ability of the residence to limit the resident's choice of pharmacies and to require each resident to select a pharmacy that meets the medication packaging requirements established by the facility. In the Personal Care Homes regulations, this is set forth in §2600.42 (y) which states that "A resident has the right to choose his own health care providers without limitation by the home. This includes the right to select the resident's own pharmacist provided that the pharmacy agrees to supply medications in a way that is compatible with the home's system for handling and assisting with the self-administration of resident medications." We found no similar regulation in the proposed Assisted Living regulations and, in the interest of public health, safety and welfare, we encourage consideration of a regulatory requirement allowing the residence to require residents to provide medications in special packaging, such as unit-dose or multi-dose packaging. Multiple medication delivery systems have yielded undesirable results. They are time consuming, costly, and unsafe.

We must provide an efficient, effective method of medication delivery that is safe for our residents and our staff, and encourage the regulatory requirement for a consistent style of medication packaging, such as unit-dose, for all residents for whom we provide medication administration. Reducing process variation is a standard principle of continuous quality improvement thereby reducing the risk of medication errors.