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PROPOSED CONSUMER PROTECTION REGULATIONS FOR ASSISTED LIVING RESIDENCES

1. *General Prohibitions* – Notwithstanding any specifically enumerated unfair and deceptive practice herein, It shall be an unfair or deceptive act or practice, in violation of M.G.L. c. 93A, § 2, for an the sponsor, owner, manager, or lessor of an Assisted Living Residence (“ALR”):
 - a. to fail to comply generally with any existing state or federal statute, rule, or regulation which provides protection to or for residents or prospective residents of an Assisted Living Residence, including, but not limited to, the residents’ rights set out in Massachusetts General Laws Chapter 19D and Code of Massachusetts Regulations Chapter 651 Section 12.¹
 - b. to fail to comply generally with relevant landlord-tenant laws or regulations, including, but not limited to, the regulations at Code of Massachusetts Regulations Chapter 940 Section 3.17, in the provision of rental housing to any resident, or in any dispute or action to evict a resident or to otherwise remove them from their home.²

¹ See 651 CMR 12.08(2)(a)(5) (requiring all ALR residency agreements to contain the ALR’s “covenant to comply with applicable federal and state laws and regulations concerning consumer protection and protection from abuse, neglect and financial exploitation of the elderly and disabled”). Cf. 940 CMR 4.02 (93A regulations for nursing facilities containing analogous language incorporating residents’ rights under other law).

² See 651 CMR 12.08(1)(r) (ALR resident right “[n]ot be evicted from the Assisted Living Residence except in accordance with the provisions of landlord/tenant law as established by M.G.L. c. 186 or c. 239 including, but not limited to, an eviction notice and utilization of such court proceedings as are required by law”). See also 651 CMR 12.08(2)(f) (“A Resident may not be evicted from the Resident’s Unit following termination of the Residency Agreement except in accordance with the provisions of landlord/tenant law as set forth in M.G.L. c. 186 and c. 239.”); 651 CMR 12.08(1)(a) (ALR resident right to “[l]ive in a decent, safe, and habitable residential living environment”). See generally *Ryan v. Mary Ann Morse Healthcare Corp.*, 483 Mass. 613, 623 (“The implication of such tenant protections within the ALR context also comports with the significant similarities between ALR residencies and residential tenancies. An ALR must enter into a written residency agreement with each resident that is akin to a lease Moreover, ALR residents are entitled to protections resembling the warranties of habitability and quiet enjoyment provided to residential tenants.”); 940 CMR 3.17(4) (Massachusetts Attorney General’s consumer protection regulations regarding landlord-tenant matters). Cf. 42 CFR 441.301(c)(4)(vi)(a) (defining rights of residents in Medicaid-contracted assisted

2. *Disclosures* – It shall be an unfair or deceptive act or practice, in violation of M.G.L. c. 93A, § 2, for an the sponsor, owner, manager, or lessor of an ALR:
- a. to fail to include any information required by law or statute in a resident’s residency agreement, disclosure statements, or any other residency documents.³
 - b. to fail to disclose in writing, upon admission, or at least yearly during a resident’s continued occupancy, the full nature of any subsidy programs which pay toward the resident’s assisted living services or the provision of rental housing, including, but not limited to, the general conditions on the resident’s continued involvement in those programs, the extent to which those programs cover the costs in full or in part of the resident’s residency, and the consequences of the resident’s termination or voluntary withdrawal from those programs.⁴
 - c. to fail to disclose in writing, the existence of any programs, including, but not limited to, Medicaid, Medicare, and/or housing subsidy programs, which might pay toward the resident’s basic medical care, assisted living services, or the provision of rental housing.⁵
 - d. to fail to obtain a resident’s written consent to have assisted living, home health, basic medical, or any other services provided by the ALR directly without coverage by Medicare and/or Medicaid funds, when such services otherwise may be covered by a third-party provider which is paid by Medicare and/or Medicaid funds.⁶
 - e. to fail to disclose in writing, upon admission, that, if a resident’s income is insufficient to pay for their full amount of monthly charges, and, if at any time the resident does not have sufficient access to other sources of funding, whether through family, personal assets, or otherwise, to pay the full amount of their monthly charges, the resident could be subject to eviction proceedings and cannot remain a resident at the ALR.⁷
 - f. to fail to provide any resident with copies, upon request, of all written policies and contractual obligations of the ALR and the resident, whether directly involving

living residences and including residents’ right to receive “at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity”).

³ See generally 651 CMR 12.08(2)-(4) (outlining all required information and disclosures, which ALR must provide to residents).

⁴ See *infra* notes 8, 10 & 11.

⁵ See 651 CMR 12.08(2)(a)(11) (ALR residents’ right to “[a]n explanation of the eligibility requirements for any available subsidy programs, including a statement of any costs associated with services beyond the scope of the subsidy program for which the Resident or his or her Legal Representative would be responsible.”)

⁶ See 651 CMR 12.08(1)(g) (ALR residents’ right to “[d]irectly engage or contract with licensed or certified health care providers to obtain necessary health care services in the Resident’s Unit or in such other space in the Assisted Living Residence as may be available to Residents to the same extent available to persons residing in their own homes, and with other necessary care and service providers[.]”).

⁷ See *supra* note 2.

the resident or any third-parties with whom the ALR contracts in order to provide goods or services to the resident.⁸

- g. to fail to explain, both orally and in writing, to the resident and/or any authorized representative the ramifications of signing any arbitration agreement and, specifically, to state in writing that by signing such an agreement the resident surrenders fundamental rights including the right to file or participate in litigation (including class action litigation), the right to a jury trial, and the right, as a consumer, to prosecute a claim under M.G.L. c.93A in court, and, instead, requires the resident to submit to mandatory arbitration to prosecute any such claim.⁹
 - h. to fail to inform a resident or an authorized representative of the resident, directly and through posting in a conspicuous location in accessible print, of the name and contact information of the ALR Ombudsman office.¹⁰
3. *Provision of Services* – It shall be an unfair or deceptive act or practice, in violation of M.G.L. c. 93A, § 2, for an the sponsor, owner, manager, or lessor of an ALR:
- a. to fail to provide or arrange to provide, and to disclose in writing, in consultation with the resident, all services included in a resident’s individual service plan, developed pursuant to the requirements of law or statute, and provided by personnel meeting the standards for professional qualifications and training required by regulation.¹¹
 - b. to fail to comply with any corrective actions ordered by the ALR certification at the Executive Office of Elder Affairs, or orders issued by any other government agency with authority over the ALR.¹²
 - c. to operate an ALR without certification by the Executive Office of Elder Affairs, as an assisted living residence with or without the provision of basic health service, before receiving an initial certification, or to admit any new residents, after a revocation, suspension, or termination of the ALR’s certification.¹³

⁸ See 651 CMR 12.08(1)(o) (“Obtain from a person designated by the Residence a copy of any rules or regulations of the Residence which apply to his or her conduct as a Resident”); *Cf.* 940 CMR 4.02(2)-(8) (analogous nursing facility regulations).

⁹ *Cf.* 42 CFR 483.70(n) (federal CMS regulations forbidding mandatory arbitration clauses in nursing facility contracts).

¹⁰ See 651 CMR 12.08(1)(u) (resident right to “[h]ave a written notice of the Residents’ Rights [which] shall include the address, and telephone number of the EOEAs Assisted Living Ombudsman Program, and the telephone number of the Elder Abuse Hotline”).

¹¹ See 651 CMR 12.04(2)(a) (“The Sponsor of the Assisted Living Residence shall provide or arrange for the provision of the following services by personnel meeting standards for professional qualifications and training set forth in 651 CMR 12.05, 12.07, and 12.08.”); 651 CMR 12.04(8) (“Each service plan shall be based on a current assessment of the Resident, and indicate . . . [t]he services needed, including the minimum service package provided for a monthly fee and any additional services the Resident needs [and] . . . [t]he Resident’s goals, and the frequency and duration of all services provided to address the Resident’s particular physical, cognitive, psychological and social needs[.] . . . All service plans shall be in writing, signed and dated by the Resident or his or her Legal Representative, and by the Sponsor or his or her representative. . . . [T]he Service Coordinator or nurse shall review the Service Plan not less than every six month[.]”).

¹² See 651 CMR 12.09(4) (EOEA administrative authority to issue correction orders to ALRs).

¹³ See MASS. GEN. LAW ch. 19D, § 6 (granting EOEAs authority to deny, modify, or suspect an ALR certification); *id.* at § 8 (granting EOEAs authority to issue citations for unlicensed operation of an ALR).

- d. to fail to comply with acceptable staffing levels and requirements, as required by law or regulation, with respect to any ALR or any “special care residences” within an ALR.¹⁴
4. *Payments and Billing* – It shall be an unfair or deceptive act or practice, in violation of M.G.L. c. 93A, § 2, for an the sponsor, owner, manager, or lessor of an ALR:
 - a. to demand, as a condition of admission or continued occupancy, more than the total value of (a) the first month’s service charges and (b) one month’s rent as a security deposit, in full compliance with the laws with respect to security deposits, notwithstanding any fees for upfront assisted living service assessments which may be separately charged.¹⁵
 - b. to fail to itemize in a clear and conspicuous manner all bills for fees, charges, expenses, and other assessments for the provision of rental housing, resident services, personal care services, and additional services, including enumeration of all bulk and bundled fees.¹⁶
 - c. to fail to respond within seven (7) business days to any request by a resident, or on behalf of a resident by an authorized person, for an accounting of any charges for rent or services alleged to have been provided, or for any record or ledger of payments by the resident or any individual or organization on their behalf.¹⁷
 - d. to fail to or refuse to cooperate with or otherwise comply with a resident’s request to participate as a member in a Senior Care Organization, a PACE program, a Group Adult Foster Care program, or similar health maintenance program, which assists a resident in obtaining assisted living or other services from a third-party provider, notwithstanding an ALR’s right to refuse to accept direct contractual payments from such a program if the program, either in whole or in part when combined with direct payments from the resident, or another individual on the resident’s behalf, will not cover the market rate for the provision of assisted living services needed by the resident.¹⁸

¹⁴ See 651 CMR 12.08(4)(5) (requiring minimum staffing levels in ALRs, including in special care residences).

¹⁵ See generally *Ryan*, 483 Mass. at 628 (“In summary, we conclude that the significant differences between ALRs and residential landlords, combined with the explicit language of the statute and the EOE’s interpretation thereof, indicate a legislative intent to allow ALRs to charge incoming residents initial fees that correspond to initial ALR-specific services inapplicable to ordinary landlord-tenant relationships, without violating the security deposit statute.”).

¹⁶ See 651 CMR 12.08(1)(t) (ALR resident right to “[r]eceive an itemized bill for fees, charges, expenses and other assessments for the provision of Resident services, Personal Care Services, and optional services”), 12.08(2)(a)(9) (resident right to a lease which contains “[a] clear explanation of the services included in any fees, a description and itemization of all other bundled services as well as an explanation of other services available at an additional charge”).

¹⁷ See *supra* note 3.

¹⁸ Cf. 940 CMR 4.03 (93A regulations regarding non-discrimination on source of funds for nursing facility admissions); 651 CMR 12.08(2)(a)(5) (right in a resident’s lease to “[a]n explanation of the eligibility requirements for any available subsidy programs, including a statement of any costs associated with services beyond the scope of the subsidy program for which the Resident or his or her Legal Representative would be responsible”).

- e. to fail to or refuse to cooperate with or otherwise comply with a resident's request to participate as a member of housing subsidy program in order to assist in payment of their rental housing costs, notwithstanding an ALR's right to refuse to accept a resident's participation in such a program if the program, either in whole or in part when combined with the resident's own payments, will not cover the market rate for the provision of rental housing.¹⁹
 - f. to include in the Account Annexed of any Summary Process complaint, brought pursuant to Massachusetts General Laws Chapter 239, any charges for assisted living services not related to the amount of monthly rent.²⁰
5. *Personal and Privacy Rights* – It shall be an unfair or deceptive act or practice, in violation of M.G.L. c. 93A, § 2, for an the sponsor, owner, manager, or lessor of an ALR:
- a. to refuse to permit a resident visitation from family, friends, social, legal, or medical supports, or any other guests of a residents' choice or to restrain a residents' participation in community life outside of the residence, notwithstanding essential policies to control and monitor the safety of residents and staff, which are narrowly tailored to balance the rights of residents to visitors and community participation in the manner of their choice.²¹
 - b. to fail or refuse to effectuate the right of any resident to be free from verbal, sexual, physical and mental abuse, discrimination or harassment on the basis of a status protected by state or federal law, corporal punishment, and/or involuntary seclusion.²²
 - c. to fail or refuse to effectuate the right of any resident to be free from any physical or chemical restraints, except in accordance with state and federal law.²³
 - d. to administer or permit the administration of any anti-psychotic drug without a resident's clear informed consent or to any resident who has been adjudged incapacitated in making treatment decisions other than pursuant to a court-ordered substituted judgment establishing a treatment plan in accordance with the

¹⁹ See *id.* See generally MASS. GEN. LAW ch. 151b, § 4(10) (forbidding discrimination on the basis of public assistance in the provision of rental housing).

²⁰ See generally MASS. GEN. LAW ch. 239, § 3 (“[I]f the court finds that the plaintiff is entitled to possession, he shall have judgment and execution for possession and costs, and, if rent is claimed as provided in section two and found due, the judgment and execution shall include the amount of the award.”).

²¹ See 651 CMR 12.08(1)(f) (ALR resident right to “[f]reedom to participate in and benefit from community services and activities and to achieve the highest possible level of independence, autonomy, and interaction within the community”). Cf. 940 CMR 4.06 (nursing facility regulations generally protecting residents’ rights to participate in community life); 42 CFR 441.301(c)(4)(vi)(c)-(d) (defining rights of residents in Medicaid-contracted assisted living residences and including residents’ “freedom and support to control their own schedules and activities, and have access to food at any time” and freedom to be “able to have visitors of their choosing at any time.”).

²² Cf. 940 CMR 4.08(16) (nursing facility regulations generally requiring a nursing facility to ensure that residents are free from verbal, sexual, physical and mental abuse, corporal punishment, and involuntary seclusion).

²³ Cf. 940 CMR 4.08(15) (nursing facility regulations generally requiring a nursing facility to ensure that residents are free from physical or chemical restraints).

standards set forth in *Rogers v. Commissioner of Department of Mental Health*, 390 Mass. 489 (1983), and subsequent case law.²⁴

- e. to require a resident or a prospective resident, or their representative, as a condition for admission, or continued occupancy in the ALR, to agree to treatment by a physician chosen by the ALR or otherwise to limit the resident's right to choose their own personal physician.²⁵
- f. to require a resident or a prospective resident, or their representative, as a condition of initial or continued occupancy to provide a third party guarantee of payment to the ALR, notwithstanding an ALR's right to refuse occupancy to a prospective resident who cannot provide verification of sufficient income, benefits, and/or assets to pay for all monthly charges.²⁶
- g. to fail or refuse to assure a resident privacy during the provision of assisted living services, including but not limited to bathing, dressing and toileting, basic medical services, or any other services provided by the ALR.²⁷
- h. to fail or refuse to permit residents to participate in the development of their service plan or in any decisions relating to changes in such a service plan, except where a resident has been adjudged incapacitated under Massachusetts state law, in which case, the participation of a legal representative who shall act on the resident's behalf.²⁸
- i. to fail or refuse to permit a resident, or their representative, upon an oral or written request, to access within 24 hours all records pertaining to any services provided by the ALR or its contractors to the resident, including access to copies of such records.²⁹
- j. to release a resident's personal records to any individual outside the ALR without the prior written authorization of the resident, or their representative, except to the

²⁴ Cf. 940 CMR 4.08(18)-(19) (nursing facility regulations generally forbidding a nursing facility from administering psychotropic medication without the informed consent of the resident or else, the case of a resident who lacks decisional capacity, without a proper court order pursuant to the requirements of state law applicable to such situations).

²⁵ Cf. 940 CMR 4.04(4) (nursing facility regulations generally guaranteeing a nursing facility resident's right to a physician of their choice).

²⁶ Cf. 940 CMR 4.04(4) (nursing facility regulations generally forbidding a nursing facility from requiring a third party guarantee of payments to the ALR).

²⁷ Cf. 940 CMR 4.06(1) (nursing facility regulations generally protecting a nursing facility resident's right to privacy during the provision of medical services and other forms of assistance with activities of daily living).

²⁸ Cf. 940 CMR 4.08(3) (nursing facility regulations generally protecting a nursing facility resident's right to participate in the planning of their healthcare.).

²⁹ Cf. 940 CMR 4.08(3) (nursing facility regulations generally protecting a nursing facility resident's right to access copies of their records kept by the facility.).

extent necessary to protect the resident's, another ALR resident's, guest's, or staff member's health and safety from an urgent threat.³⁰

- k. to fail or refuse to immediately inform the resident, the resident's representative, and emergency responders, in the case of a genuine emergency which poses an urgent threat to health and safety, if there is (a) an accident involving the resident which results in injury and has the potential for requiring physician intervention, (b) a significant change in the resident's physical, mental or psychosocial status (e.g., a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications), and/or (c) a need to alter the service plan significantly (e.g., a need to discontinue an existing service, or to augment services, including by providing or altering the provision of basic medical services, as may or may not be offered by the ALR).³¹
 - l. to fail or refuse to ensure that all alleged violations involving mistreatment, neglect or abuse, including injuries of unknown source and/or misappropriation of resident property, are reported immediately to the administrator of the residence and other officials in accordance with state law through established procedures.³²
6. *Anti-Waiver and Anti-Retaliation* – It shall be an unfair or deceptive act or practice, in violation of M.G.L. c. 93A, § 2, for an the sponsor, owner, manager, or lessor of an ALR:
- a. to engage in any sort of restraint, interference, coercion, discrimination, or reprisal against a resident's right to report or pursue legal accountability or liability for any suspected or actual violations of law, regulation, or policy undertaken by the ALR.³³
 - b. to require a resident, or their representative, as a condition of initial or continued occupancy in the ALR to waive any benefit or right conferred by any statute or regulation, either state or federal, intended to provide protection to or for residents of ALR, unless otherwise expressly authorized by statute or regulation.³⁴
 - c. to require a resident, or their representative, as a condition of initial or continued occupancy in the ALR, to agree to waive or limit the ALR's liability for loss of

³⁰ Cf. 940 CMR 4.08(12) (nursing facility regulations generally prohibiting a nursing facility from sharing a resident's records without the resident's consent.).

³¹ Cf. 940 CMR 4.08(13) (nursing facility regulations generally requiring a nursing facility to notify the resident, the resident's physician, and the resident's representative of certain changes in the resident's health circumstances).

³² Cf. 940 CMR 4.08(17) (nursing facility regulations generally requiring a nursing facility to report potential abuse of residents).

³³ See 651 CMR 12.08(1)(j) (ALR resident right to "[p]resent Present grievances and recommended changes in policies, procedures, and services to the Sponsor, Manager or staff of the Assisted Living Residence, government officials, or any other person without restraint, interference, coercion, discrimination, or reprisal").

³⁴ Cf. 940 CMR 4.04(8) (nursing facility regulations generally prohibiting nursing facilities from requiring waivers or limitations on a resident's rights as a condition of occupancy).

personal property or any injury, financial, personal, or otherwise, suffered as a result of actions on the part of the ALR or of the ALR's employees or agents.³⁵

- d. to require a resident, or their representative, as a condition of initial or continued occupancy in the ALR, to agree to pay attorney's fees, or any other additional costs or premiums, incurred in collecting payment from the resident or in seeking their removal from the ALR following termination of their residency agreement.³⁶

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³⁵ *Cf.* 940 CMR 4.04(3) (nursing facility regulations generally prohibiting nursing facilities from requiring waivers or limitations on liability as a condition of admission or continued occupancy).

³⁶ *Cf.* 940 CMR 4.04(7) (nursing facility regulations generally prohibiting nursing facilities from seeking collection of attorneys' fees or other costs incurred in seeking to collect payments from a resident).