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February 10, 2020

House Human Services Committee
State of Vermont House of Representatives
115 State Street
Montpelier, Vermont 05633-5301

Re: H. 635 (an Act relating to long-term care facilities; receivership)

Dear Chair and Members of the Committee:

Thank you again for having provided me opportunity to testify last week regarding H. 635. The Attorney General's Office ("AGO") supports this bill.

At your request, I write to describe the three amendments H. 635 proposes. As a general reminder, these amendments reflect "lessons learned" from the AGO's recent *Pillsbury* trial. In that trial, we successfully asked a Vermont court to appoint a "receiver" over three long-term care facilities with 200+ residents.

Amendment 1

First, H. 635 would add "mental harm" as a basis for "Immediate Enforcement Action" by the Department of Disabilities, Aging and Independent Living ("DAIL"). To explain: generally, when DAIL determines that a long-term care facility has violated long-term care laws, it is required to provide the facility with the opportunity to correct the wrong by a certain date before it takes further enforcement actions. *See* 33 V.S.A. § 7110(a). These actions can include mandated corrective action plans, fines, bans on the admission of new residents, and the suspension or revocation of a license. *See* 33 V.S.A. § 7111.

There is one primary exception. Under 33 V.S.A. § 7110(b), DAIL can take "immediate enforcement actions"—actions without corrective opportunity. DAIL can take these actions "when necessary to eliminate a condition which can reasonably be expected to cause death or serious physical harm to residents or staff before it can be eliminated" by conventional enforcement processes. *Id.*

H. 635 would add "mental harm" as a basis for "immediate enforcement action." Of note, Vermont's long-term care regulations already treat "mental harm" as a basis for "immediate enforcement action." Vt. Admin. Code 12-4-202:2 (providing that "mental harm" is a basis for "immediate enforcement action" in residential care homes). And Vermont's receivership statute already treats "mental harm" as a basis for receiverships. *See* 33 V.S.A. § 7202 (a)(2) (providing that "mental harm" is a basis for receivership over long-term care facilities); 33 V.S.A. § 7203(b)(1)(B) (providing that "mental harm" is a basis for temporary receivership over long-term care facilities). Indeed, in the *Pillsbury* case, the court found that one of the grounds for receivership was that the facilities' residents were experiencing mental harms.

The proposed amendment would simply align the statute governing "immediate enforcement action" with other long-term care laws and regulations that treat "mental harm" as a valid basis for urgent agency action. Such an amendment is worthy. As in the case of *Pillsbury*, there may be more mental harms than physical harms occurring at a long-term care facility. In those instances, immediate enforcement and relief are still warranted.[1]

Amendment 2

Second, H. 635 would add a definition of "insolvent" to the long-term care statute. *See* 33 V.S.A. § 7201 *et seq*. Currently, the State can request the appointment of a receiver over a long-term care facility if, among other reasons, the facility is "insolvent." 33 V.S.A. § 7202(a)(4). However, the long-term care statute does not define "insolvent." As a result, the State and courts lack clarity on when a facility qualifies as "insolvent" for the purposes of receivership.

The Vermont Uniform Commercial Code (VT-UCC) does, however, define "insolvent." 9A V.S.A. §1-201(b)(22). It defines "insolvent" to mean: "(A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute; (B) being unable to pay debts as they become due; or (C) being insolvent within the meaning of federal bankruptcy law." *Id.*

The AGO supports amending the long-term care statute to include the definition of "insolvent" that the VT-UCC uses.[2] This definition would be broadly protective of long-term care facility residents. This is particularly so in cases, like *Pillsbury*, where a facility-owner's failure to pay debts "in the ordinary course of business" is more readily established than the facility-owner's economic inability to pay these debts. As the court in *Pillsbury* found, either way, the residents are at grave risk, and receivership is warranted.

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[1] Such an approach is consistent with the policy behind Vermont's regulation of long-term care facilities: "to promote safe surroundings, adequate care, and humane treatment, safeguard the health of, safety of, and continuity of care to residents, and protect residents from the adverse health effects caused by abrupt or unsuitable transfer of such persons cared for in these facilities." 33 V.S.A. § 7101.

[2] Definitions are set forth in 33 V.S.A. § 7102.

Amendment 3

Third and finally, H. 635 would clarify that a court must judge a State's complaint for receivership based on a facility's conditions at the time the State files that complaint—not a later date.

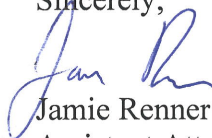
To explain: under the receivership statute, after the State files a complaint requesting receivership, the State must then prove at trial that the allegations set forth in that complaint are true. *See* 33 V.S.A. § 7202; 33 V.S.A. § 7204. Because those allegations invariably regard facility conditions at or before the time the complaint was filed, proof of those allegations is invariably proof of past conditions (even if those conditions happen to be ongoing).

However, the receivership statute does not explicitly *preclude* courts from considering evidence of facility conditions *after* the complaint's filing. In fact, in the recent *Pillsbury* litigation, the court required the State to demonstrate that a receiver was justified based on the facilities' conditions as of the *conclusion* of trial (January 2019)—not their conditions at the time the State filed its complaint (November 2018).

While the *Pillsbury* court ultimately found that a receiver was warranted, the existing statutory construction could lead to undesirable results, absent amendment. For example, a bad actor could seek to temporarily "cure" problematic facility conditions during the course of a receivership trial in an attempt to avoid receivership. Similarly, if a court appointed an emergency temporary receiver to operate a facility *during* the receivership trial (as it may under 33 V.S.A. 7203), that temporary receiver's work improving the facility's conditions could potentially undercut the State's ability to demonstrate that a receiver is warranted as of the *end* of that trial. In a worst-case scenario, the result would be that control of the facility therefore reverts to the problematic owner/operator. The receivership statute does not intend for these results.[3]

For these reasons, the AGO supports an amendment to Title 33, Chapter 71, Subchapter 4 clarifying that a complaint for receivership must be judged by the court as of the time of the complaint's filing.[4]

Sincerely,



Jamie Renner
Assistant Attorney General

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[3] As happened in the *Pillsbury* case, the State can always argue—and the Court may rule—that, despite a temporary receiver's improvement of facility conditions, receivership is warranted because reversion of control to the initial problematic owner/operator would likely cause a return to the conditions that justified a temporary receivership in the first place. The proposed amendment would eliminate any need for the State or a court to prove or find as much. The result would benefit the intent of the long-term care statute and judicial economy alike.

[4] 33 V.S.A. § 7216 provides for a receivership's termination.