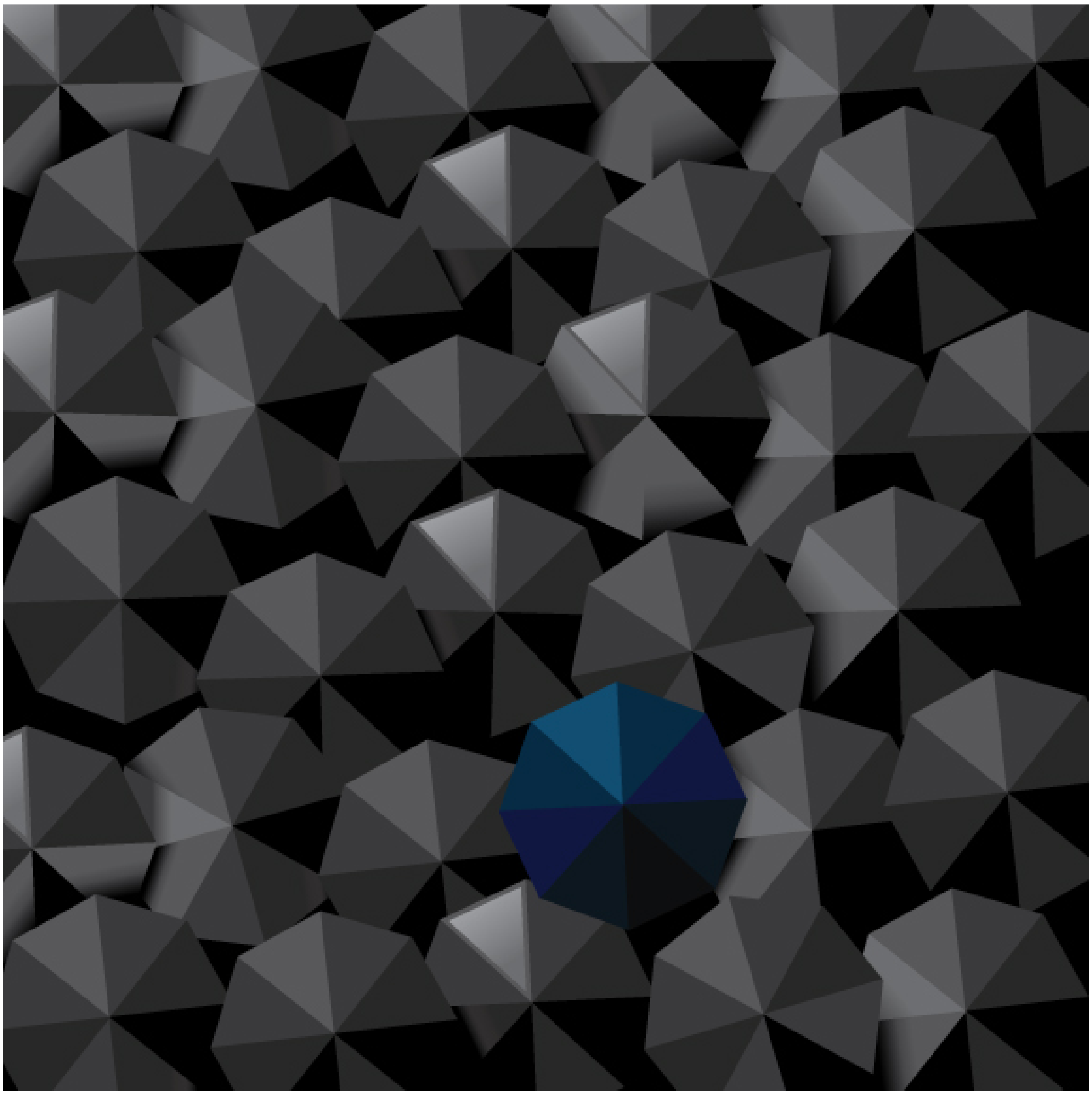
LONG TERM CARE INSURANCE

Looking Back and Thinking Ahead

June 7, 2023



I. Executive Summary

Most Americans, at some point in their lives, will face the difficult task of arranging long term care for themselves, their family members, or both. This care can be in a facility, such as a nursing home or assisted living facility, or at one's home, and can cover a variety of services, including healthcare services or assistance with everyday personal tasks.

The cost of these vital services can be staggering. In New York, just one year of care in a nursing home costs, on average, approximately $159,000 per person. Even if one receives care at home, the average annual cost in New York is approximately $66,000 per person. In 2018 alone, Americans paid approximately $55 billion in out-of-pocket expenses for long term care, and even that eye-popping sum was a distant second to the Medicaid program, which paid three times that amount — roughly $159 billion — toward long term care expenses. This incredible burden is expected to worsen over time as the country's population ages; by one estimate, long term care expenses could be 3% of U.S. gross domestic product by 2050, more than double what it was in 2010.

Faced with the prospect of depleting their remaining assets on long term care — through out-of-pocket expenses, spending down their assets to qualify for Medicaid, or both — some Americans have turned to long term care insurance ("LTC insurance"). In exchange for paying an insurance premium, policyholders have at least some portion of their long term care expenses covered when long term care is needed. New Yorkers have been able to purchase LTC insurance policies since 1988.

In the approximately 35 years since, however, the LTC insurance market has struggled. The number of New Yorkers who have LTC insurance policies today is roughly half of what it was at its peak, declining from approximately 754,000 in 2002 to only 394,000 policyholders in 2020. Further, only a fraction of the insurers that at some point sold long term care policies in New York still do so today, and several of those that do remain face financial instability. These struggles were evidenced this past February when the Department of Financial Services ("DFS") was forced to take over a New York-based insurer whose principal line of business is LTC insurance after its Pennsylvania-based parent insurance company was nearing the conclusion of its own liquidation.

Struggles in the LTC insurance market can in large part be traced to pricing errors made from its inception. Simply stated, LTC insurance plans across the country were initially offered at premium rates that were far lower than they should have been. Insurance pricing relies on assumptions about various things, including policyholder behavior, the costs of future heath care, and future market conditions, including the interest rate environment. When insurers began offering long term care policies (and when regulators across the country first approved the offering of those policies), insurers and regulators did not have a reservoir of historical data to inform these assumptions as they would have for other, traditional insurance products such as health and property insurance. Indeed, even after insurers began writing LTC insurance policies, it took many years to generate real-world data on how these policies would perform given the unusually long time lag between the issuance of an LTC insurance policy and the onset of claims for long term care benefits.

It was only with the passage of time that insurers and regulators across the country realized that the assumptions used when initially pricing premiums were inaccurate, and, as a result, premium rates were substantially underpriced for many years. As a result, insurers sustained significant losses, many stopped selling new LTC insurance policies, and the ability of some insurers to maintain adequate reserves to satisfy future claims was put in jeopardy.

When LTC insurers first sought approval from the New York State Insurance Department (the "Insurance Department"), DFS's predecessor agency, to significantly increase premium rates, those requests were either denied altogether or approved at lower-than-requested levels. An examination of the premium rate increase requests over time now shows, with the benefit of hindsight, that the Insurance Department's rate approval decisions were too conservative, particularly in the early part of the relevant period. Though those decisions were informed by the laudable consideration of trying to protect consumers from potentially unnecessary rate increases that they may not have been able to afford, the Insurance Department (as well as insurance regulators in many other states) should have confronted sooner the insurers' initial mispricing to better safeguard the sustainability of the LTC insurance market as a whole: earlier action on rates might have benefitted consumers in the long run by keeping more insurers in the market, thereby increasing consumer options, and avoiding financial instability that could imperil consumer benefits.

II. <u>Introduction</u>

LTC insurance plans were initially authorized by the New York Legislature in Chapter 245 of the Laws of 1986, and the first LTC insurance offerings were purchased by New York consumers in 1988. Since that time, the LTC insurance market has generated controversy and suffered from financial instability. Significantly higher than expected costs coupled with lower than expected income resulting from a lengthy low-interest-rate environment have put acute financial pressure on LTC insurance carriers notwithstanding substantial, unpopular, and burdensome premium increases on consumers.

Indeed, the LTC insurance market in New York (and throughout the nation) is struggling. Despite legislative and regulatory initiatives intended to promote the purchase of LTC insurance policies to help address the rising costs of elder care, consumer adoption of LTC insurance remains lower than anticipated. Further, insurers have voiced concerns about the sustainability of the LTC insurance market given the financial losses they have sustained in connection with LTC insurance offerings. Despite substantial increases in LTC insurance premium rates that have been approved around the country to address these concerns, most insurance providers that entered the LTC insurance market no longer issue new policies, and several have ceased business operations altogether, necessitating governmental and regulatory intervention.

This report examines the LTC insurance market, including the root causes of the problems that the market has experienced. The report provides an overview of long term care and the LTC insurance market generally, including a discussion of the legislative incentives to promote the market to help address the rising costs of elder care. The report goes on to detail how the insurers made assumptions and projections when initially offering LTC insurance that were inaccurate with respect to both costs and income; as a result, the insurers initially priced (and regulators around the country approved) premium rates that were far too low, causing significant long term financial instability in the market. The report then reviews the history of LTC insurers' requests to increase LTC insurance premium rates in New York and the decisions by the Insurance Department (and later DFS) to approve or deny those premium rate increase requests. Finally, this report summarizes the current state of the LTC insurance market in New York and reiterates

DFS's commitment to the LTC insurance market and to promoting other solutions to the societal issue of the high cost of elder care.

In preparing this report, DFS reviewed a wide range of sources, including scholarly, industry, and regulatory agency publications; LTC insurance market research studies; and historical LTC insurance premium rate filings in New York. Additionally, DFS surveyed certain DFS-licensed LTC insurers that currently service or continue to offer LTC insurance policies in New York and reviewed documents relating to the insurers' past applications to increase LTC insurance premium rates and the information upon which the insurers relied to support those applications, such as actuarial studies and marketing studies and materials. The insurers' responses are referenced throughout this report.

III. Background and Origins of Long Term Care Insurance

A. The Basics of Long Term Care Funding

The term "long term care" refers to a wide range of services intended to assist people with long term physical or cognitive limitations who require ongoing attention and assistance in the performance of everyday personal tasks, often referred to as activities of daily living, such as bathing, dressing, using the bathroom, and eating. Long term care services can be provided in an institutional setting, such as a nursing home, or within the care recipient's home.

The nation is aging. More than half of Americans turning 65 today are estimated to develop a disability serious enough to require long term care.[1] Long term care and other support programs are expected to make up an increasing portion of the country's gross domestic product, with expenses potentially constituting 3% of GDP by 2050 (up from 1.3% in 2010).[2]

Long term care services are indeed very expensive. Current national estimates put the annual, per-person cost of nursing home care at $108,000 and home health care at $61,000.[3] These numbers are even higher for New Yorkers, where the per-person average annual nursing home cost is $159,000 and home health care cost is $66,000.[4] The costs for such services are most often funded through one or a combination of private, out-of-pocket payments; Medicaid; and LTC insurance.[5]

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[1] "Long-Term Services and Supports for Older Americans: Risks and Financing (2022)," U.S. Department of Health and Human Services, available at: https://aspe.hhs.gov/sites/default/files/documents/8f976f28f7d0dae32d98c7fff8f057f3/ltss-risks-financing-2022.pdf.

[2] "Long-Term Services and Supports for Older Americans: Risks and Financing Research Brief," Office of the Assistance Secretary for Planning and Evaluation (last modified June 2015), available at: https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//142116/ElderLTCrb-rev.pdf.

[3] "Annual Median Costs: New York - State (2021)," Genworth Cost of Care Survey, available at: https://www.genworth.com/aging-and-you/finances/cost-of-care.html.

[4] *Id*.

[5] "Paying for Long-Term Care," National Institute on Aging, available at: https://www.nia.nih.gov/health/paying-long-term-care. LTC insurance is also offered as a rider to combination life insurance and annuity vehicles. As of 2021, approximately 54,000 New Yorkers held combination annuity/LTC insurance policies.

Contrary to what some consumers think, Medicare — federal health insurance for people above 65 or those under 65 with certain disabilities or conditions[6] — does not cover long term care, as it does not cover custodial care.[7] Rather, Medicare covers only medically necessary care, such as physician visits and hospital care, if ordered by a doctor.[8] This arrangement is more akin to a traditional hospital stay than to long term care, as it is considered medically necessary, whereas LTC insurance covers the cost of assistance with activities of daily living that may not necessarily be medical in nature.[9] Thus, consumers who want long term care must consider other ways to finance it beyond Medicare benefits.

Medicaid, a federal program administered by states that covers medical costs for certain individuals with limited income and financial resources,[10] is the largest payer of long term care expenses. According to the Congressional Research Service, in 2020, Medicaid paid out roughly $200 billion in long term care expenses while individuals' out-of-pocket spending was approximately $64 billion.[11] However, Medicaid is need-based and has stringent asset and income requirements.[12] States have varying eligibility criteria for Medicaid, but, in general, individuals are not eligible if their assets exceed $2,000.[13] Given this requirement, as part of their estate planning, some individuals (and, if applicable, their spouses) "spend down," that is, shed, their assets to have their long term care covered through Medicaid.[14]

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[6] "What's the difference between Medicare and Medicaid?," U.S. Department of Health and Human Services, available at: https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html.

[7] "Nursing Home Care," Medicare.gov, available at: https://www.medicare.gov/coverage/nursing-home-care ("Medicare doesn't cover custodial care, if it's the only care you need. Most nursing home care is custodial care, which helps you with activities of daily living.")

[8] "An Overview of the U.S. LTC Insurance Market (Past and Present): The Economic Need for LTC Insurance, the History of LTC Regulation & Taxation and the Development of LTC Product Design Features," Society of Actuaries (2014), available at: https://www.soa.org/globalassets/assets/files/resources/essays-monographs/managing-impact-ltc/mono-2014-ltc-manage-narva.pdf.

[9] *See* "Inpatient Hospital Care," Medicare.gov, available at: https://www.medicare.gov/coverage/inpatient-hospital-care (Medicare Part A covers inpatient hospital care if insured is admitted to the hospital as an inpatient after an official doctor's order that states insured needs inpatient hospital care to treat their illness or injury.).

[10] "What's the difference between Medicare and Medicaid?", U.S. Department of Health and Human Services, available at: https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html.

[11] "Who Pays for Long-Term Services and Supports?" Congressional Research Service (2022), available at: https://crsreports.congress.gov/product/pdf/IF/IF10343.

[12] Mackenzie, George A. (Sandy), "Long-Term Care in the United States: History, Financing, and Directions for Reform." Kalamazoo, MI: W.E. Upjohn Institute for Employment Research(November 28, 2022), available at: https://doi.org/10.17848/9780880996891 ("Long-term care coverage is severely limited by the stringent asset and income tests that Medicaid requires for eligibility for nursing homes and HCBS.")

[13] The eligibility criteria for Medicaid in New York State is available at: https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/22ma14_att1.pdf

[14] "Long-Term Care Insurance: Recommendations for Improvement of Regulation," U.S. Department of the Treasury (August 2020), available at: https://home.treasury.gov/system/files/136/Report-Federal-Interagency-Task-Force-Long-Term-Care-Insurance.pdf.

For consumers eligible for Medicaid, New York State offers Managed Long Term Care ("MLTC") programs, which are designed to streamline the delivery of long term care services to people who are chronically ill or disabled and who wish to stay in their homes and communities.[15] The MLTC programs available in New York State include Medicaid Advantage Plus, Program of All-Inclusive Care for the Elderly ("PACE"),[16] and the MLTC Medicaid Plan.[17]

B. Long Term Care Insurance as a Funding Source

Continued reliance on Medicaid to fund long term care expenses may prove infeasible, however, due to chronic funding shortfalls at both federal and state levels. As a result, long term care may increasingly require more private, out-of-pocket expenditures, which could prove to be prohibitively expensive for many consumers.[18]

Regulators and legislators nationwide have sought to facilitate financial arrangements and payment structures to ease the burden of these increasing costs. One such method was to permit the sale of LTC insurance for purchase directly by consumers. Depending on the terms of the policy, LTC insurance may cover custodial care, hospice care, home healthcare, assisted living care, adult day care, and other forms of assistance. From the consumer's perspective, LTC insurance is structured much like other insurance policies: a consumer purchases an insurance policy to reflect the coverage they want, pays premiums so long as the policy is active, and submits a claim when they need to use coverage, *i.e.*, when a healthcare provider prescribes long

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[15] "Managed Long Term Care (MLTC)," New York State Department of Health (2023), available at: https://www.health.ny.gov/health_care/managed_care/mltc/; "Medicaid Managed Long Term Care, New York State Department of Health, available at: https://www.health.ny.gov/health_care/medicaid/redesign/docs/mltc_guide_e.pdf.

[16] "Program for All-Inclusive Care for the Elderly (PACE); Discussion of Structural Alternatives for PACE Expansion in New York" New York State Department of Health (June 2022), available at: https://www.health.ny.gov/facilities/public_health_and_health_planning_council/meetings/2022-06-02/docs/pace.pdf. Not all individuals are qualified to receive services under PACE: the program requires that an individual be age 55 or over, reside in a PACE organization service area, be eligible for a nursing home, and be able to live safely in a community setting. Benefits under PACE are broader than those offered in LTC insurance and can include primary care, hospital care, prescription drugs, nursing home services, and home health services. *See* "Programs of All-Inclusive Care of the Elderly (PACE)," Center for Medicare and Medicaid Services (June 9, 2011), https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/pace111c01.pdf.

[17] "Medicaid Managed Long Term Care," New York State Department of Health, available at: https://www.health.ny.gov/health_care/medicaid/redesign/docs/mltc_guide_e.pdf. The New York State Department of Health also regulates Assisted Living Programs ("ALP"), available to both Medicaid recipients and private payers who are medically eligible for, and would otherwise require, placement in a nursing home due to the lack of a home or suitable home environment.[17] ALPs do not, however, provide continual nursing care, a type of services typically covered by LTC insurance. *See* Assisted Living Program," New York State Department of Health, available at: https://www.health.ny.gov/health_care/medicaid/program/longterm/alps.htm.

[18] "An Overview of the U.S. LTC Insurance Market (Past and Present): The Economic Need for LTC Insurance, the History of LTC Regulation & Taxation and the Development of LTC Product Design Features," Society of Actuaries (2014), available at: https://www.soa.org/globalassets/assets/files/resources/essays-monographs/managing-impact-ltc/mono-2014-ltc-manage-narva.pdf ("Medicaid benefits may be scaled back in years ahead (or eligibility tightened) due to the severity of fiscal constraints at both the state and federal government levels.").

term care assistance.[19] However, the average LTC insurance policyholder holds the insurance policy and pays premiums over a lengthy span, often more than 20 years, before claiming any benefits.[20] As discussed more fully below, this lag has had an important impact on the predictability of the costs associated with these policies.

LTC insurance plans have been offered in New York for about 35 years. Chapter 245 of the Laws of 1986 added Section 1117 to the New York Insurance Law to permit certain insurers authorized by the Insurance Department to issue LTC insurance policies. The Insurance Department first approved LTC insurance plans in 1986,[21] and the initial LTC insurance offerings were purchased by New York consumers in 1988. In 1991, the Insurance Department amended Insurance Regulation 62 (11 NYCRR 52), establishing minimum standards and setting forth disclosure requirements for LTC insurance, which took effect on January 1, 1992. Additionally, as detailed further below, New York has introduced a number of initiatives to incentivize consumers to purchase LTC insurance policies.

As of 2021, 38 insurance companies were servicing existing LTC insurance policies purchased by New York policyholders. Of those 38 companies, however, only five currently offer new LTC insurance products for purchase; the remaining 33 insurers continue to service previously purchased LTC insurance policies but have discontinued writing new policies due in part to the financial challenges facing the market discussed below.

C. Legislative Incentives to Promote LTC Insurance

Although LTC insurance has been available since the late 1980s, only about 2% of Americans have purchased some form of LTC insurance (the proportion is slightly higher among New Yorkers, approximately 2.9%),[22] suggesting that private LTC insurance is underutilized relative to the potential demand.[23] To encourage consumer use, federal and state governments have

[19] In certain instances, however, LTC insurance policyholders are subject to an elimination period where the insured must cover cost of care before the policy will pay a claim, similar to a deductible.

[20] "Long-Term Care Insurance: Recommendations for Improvement of Regulation," U.S. Department of the Treasury (August 2020), available at: https://home.treasury.gov/system/files/136/Report-Federal-Interagency-Task-Force-Long-Term-Care-Insurance.pdf ("Unlike short-term medical insurance or publicly-funded Medicaid, the structure of LTCI relies on the pre-funding of benefits. Typically, purchasers buy LTCI at relatively younger ages, in their 50s or 60s, and then hold the insurance while paying premiums for a lengthy period, often over twenty years.").

[21] "A Report by the Superintendent of Financial Services to the Governor and the Legislature on Long Term Care Health Insurance Plans (Report for the Two-Year Period Ending December 31, 2020), Department of Financial Services, (2021), available at: https://www.dfs.ny.gov/system/files/documents/2022/02/ltc_report_2021.pdf ("2021 DFS LTC Insurance Report") at p. 5.

[22] American Association for Long-Term Care Insurance (2020), available at: www.aaltci.org ("7.5 million Americans have some form of long-term care insurance as of January 1, 2020.").

[23] "Long-Term Care Insurance: Recommendations for Improvement of Regulation," U.S. Department of the Treasury (2020), available at: https://home.treasury.gov/system/files/136/Report-Federal-Interagency-Task-Force-Long-Term-Care-Insurance.pdf.

devised various frameworks to incentivize consumers to purchase LTC insurance, mainly in the form of tax breaks.

In 1996, President Clinton signed into law the Health Insurance Portability and Accountability Act ("HIPAA"), which, in pertinent part, sought to improve accessibility and affordability of LTC insurance.[24] To that end, HIPAA provides favorable federal income tax treatment to holders of "qualified" LTC insurance policies.[25] To be a qualified LTC insurance policy, however, the policy, among other things, must exclude a cash surrender value. In other words, a policyholder cannot receive any cash value for terminating the policy irrespective of any prior premiums paid, and thus any lapse in the policy would result in the policyholder losing all benefits under the policy without recovering the value of any premiums already paid. Further, to qualify for the HIPAA tax benefit, the individual must have a policy requiring a showing, usually made through a physician's examination, that the individual is unable to perform, without substantial assistance from another person, at least two activities of daily living for a period of at least 90 days due to a loss of functional capacity before paying any claims.[26] For many individuals, these requirements, notwithstanding the tax incentives, make LTC insurance less desirable.[27]

For decades, New York policymakers and regulators have worked to make LTC insurance coverage more affordable and accessible to New Yorkers, including through the following:

- The New York State Legislature established the NYS Partnership for Long Term Care Program (the "NYS Partnership"), which became operational in 1993. Under this program, New York residents who purchase a qualified policy or certificate providing LTC insurance become eligible for Medicaid assistance without spending down their assets once the benefits from the policy or certificate are exhausted.[28]

- In 1997, pursuant to Chapter 659 of the Laws of 1997, New York began providing favorable state income tax treatment to consumers who purchased LTC insurance policies that qualified for favorable tax treatment under HIPAA.[29]

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[24] Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. No. 104-191, 110 Stat. 1936 (1996)).

[25] "Long-Term Care Insurance Tax-Deductibility Rules" American Association for Long Term Care Insurance, available at: https://www.aaltci.org/long-term-care-insurance/learning-center/tax-for-business.php.

[26] Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. No. 104-191, 110 Stat. 1936 (1996) Sec. 321(C)(2)(B)).

[27] "An Overview of the U.S. LTC Insurance Market (Past and Present): The Economic Need for LTC Insurance, the History of LTC Regulation & Taxation and the Development of LTC Product Design Features," Society of Actuaries (2014), available at: https://www.soa.org/globalassets/assets/files/resources/essays-monographs/managing-impact-ltc/mono-2014-ltc-manage-narva.pdf.

[28] 2021 DFS LTC Insurance Report at p. 11. Note that the NYS Partnership program is different from other states' Partnership programs, which have been established under the federal Deficit Reduction Act of 2005 ("DRA"). The NYS program — the first of its kind in the nation — pre-dated the DRA programs by 16 years.

[29] *Id.* at p. 2.

- In 2000, the New York State Legislature provided residents with the opportunity to receive a tax credit equal to 10% of LTC insurance premiums.[30]

- In 2012, DFS amended Insurance Regulation 144 (11 NYCRR 39), to establish a lower cost minimum insurance plan, enabling insureds to protect all assets upon Medicaid eligibility.[31]

- In 2013, DFS amended Insurance Regulation 144 (11 NYCRR 39), to set forth minimum daily benefit amounts for the five NYS Partnership plan designs from January 1, 2014, through December 31, 2023.[32]

Despite these initiatives to help consumers purchase LTC insurance policies, consumer adoption of LTC insurance remains low. The number of LTC insurance policies in New York has steadily declined from a peak of 754,000 policies in 2002 to only approximately 394,000 sold in 2020.[33]

One factor for the low consumer adoption rate is that LTC insurance policies can be cost prohibitive to some consumers relative to other insurance products, such as health and life insurance.[34] The relatively higher cost of LTC insurance has been attributed to the rapidly increasing cost of long term care itself. Moreover, the various "unknowns" associated with long term care make an LTC insurance policy inherently a less certain proposition for the consumer than traditional health or life insurance — there is a possibility, for example, that a consumer may never use long term care benefits, as opposed to the level of certainty of return on a life insurance policy or the higher likelihood of utilization for traditional health insurance benefits.[35]

Another reason for lower adoption of LTC insurance is the increased use of Medicaid estate planning. Medicaid estate planning involves the transferring or sheltering of assets to access Medicaid for coverage of the consumer's long term care needs to allow a consumer to meet the asset test for Medicaid eligibility and receive long term care services without having to "spend down" their assets to become Medicaid eligible. Many consumers see the use of Medicaid estate

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[30] *Id*. at p. 3. In 2020, legislation capped the tax credit for LTC insurance premiums at $1,500 and made the tax credit applicable only to tax returns where the adjusted gross income is below $250,000 for taxable years beginning in 2020. *Id*. at p. 8.

[31] *Id*. at p. 3.

[32] *Id*.

[33] "The State of Long-Term Care Insurance: The Market, Challenges and Future Innovations," National Association of Insurance Commissioner, (May 2016), available at: https://content.naic.org/sites/default/files/inline-files/cipr_current_study_160519_ltc_insurance_0.pdf; 2021 DFS LTC Insurance Report at p. 38.

[34] *Id*. at p.27, available at https://content.naic.org/sites/default/files/inline-files/cipr_current_study_160519_ltc_insurance_0.pdf.

[35] "Exiting the Market: Understanding the Factors behind Carriers' Decision to Leave the Long-Term Care Insurance Market," Office of the Assistance Secretary for Planning and Evaluation (June 30, 2013), available at: https://aspe.hhs.gov/reports/exiting-market-understanding-factors-behind-carriers-decision-leave-long-term-care-insurance-market-1 ("Thus, the actual required capital is very high per dollar of earned premium or reserves because of the perceived product risk, the long-term nature of the guaranteed renewable coverage, and the fact rating action impacts are muted as policyholders continue to age."); 2021 DFS LTC Insurance Report at p. 17.

planning as a viable alternative to purchasing LTC insurance for their long term care needs.[36] However, consumer reliance on Medicaid in its current form is an untenable solution to the problem of the high costs of long term care.

IV. Roots of the Crisis: Inaccurate Assumptions Regarding LTC Insurance Pricing

As noted at the outset of this report, the LTC insurance market has struggled. LTC insurers have suffered financial losses despite substantial rate increases borne by consumers, and these losses have prompted the majority of LTC insurers to stop writing new policies. Some of the insurers that remain suffer from significant financial challenges, putting their viability (and consumers' future benefits) at risk. Consumers, meanwhile, have also suffered as they have shouldered the burden of increased LTC insurance premium rates.

This challenging situation stems from a series of inaccurate assumptions that insurers made about long term care when LTC insurance policies were first written. In essence, the insurers underestimated how much the coverage they were offering would cost while simultaneously overestimating how much they could earn on reserves.

Insurers are supposed to set LTC insurance premiums at a price sufficient to ensure that the insurance product is self-supporting; that is, that the premium payments received will be sufficient to cover all future claims.[37] Initial rates must be approved by DFS. Estimating what future claims will cost to determine an appropriate premium to charge requires the creation of mathematical models based on probability distributions and confidence intervals. In essence, insurance companies must make projections as to what will happen in the future to impact the cost of whatever coverage is being offered. These models make assumptions about various factors that, in the case of LTC insurance, include lapse rates, mortality rates, morbidity rates, and interest rates (each of which is discussed more fully below).[38] The initial assumptions made by insurers with respect to LTC insurance in New York and nationwide have proven to be less accurate than the assumptions made with regard to most other lines of insurance, for a number of reasons:[39]

- **Lack of Experience Data.** When LTC insurance was initially offered, the product's relative novelty increased the difficulty of pricing the risk. Most other insurance products are older than LTC insurance, and companies have the benefit of years of data of how insurance claims actually occur in real life — so called "experience data" — to use as

[36] *See* 2021 DFS LTC Insurance Report at p. 16.

[37] *See* New York Insurance Law § 1117(f)(3).

[38] "Understanding the Volatility of Experience and Pricing Assumptions in Long-Term Care Insurance," Society of Actuaries (2014), available at: https://www.soa.org/resources/research-reports/2014/research-2014-understanding-volatility/.

[39] *See* "Exiting the Market: Understanding the Factors behind Carriers' Decision to Leave the Long-Term Care Insurance Market," Office of the Assistance Secretary for Planning and Evaluation (June 30, 2013), available at: https://aspe.hhs.gov/reports/exiting-market-understanding-factors-behind-carriers-decision-leave-long-term-care-insurance-market-1.

inputs to create accurate pricing models.[40] In the case of LTC insurance, for which claims were expected years or even decades later, no such actual experience data existed. In the absence of reliable data, insurers relied on so-called "proxy" data from health and life insurance policies and long term disability experience data, as well as nursing facility studies containing morbidity rates. Unfortunately, the insurers erred in relying on those sources, and therefore substantially underestimated the costs of long term care claims made in real life.

- **Guaranteed Renewability.** While most insurance policies renew on an annual basis and are thus subject to changing premiums from year to year, LTC insurance is a guaranteed renewable product. This means that the policyholder has the right to continue the policy in force so long as premiums are paid.[41] Moreover, although premium rate increases are possible with DFS approval, unlike other products such as health insurance for which the rate is expected to change each year, premiums in the LTC insurance market are generally designed to (and for many years did in fact) remain the same year after year. Because of these factors, LTC insurers were not able to adjust premiums quickly to adapt to changing economic and public policy factors on an annual basis, as insurers can do with most other products.

- **Policy Length.** Because of the uniquely long "tail" of the risk associated with LTC insurance — that is, the length of time between issuance of an LTC insurance policy and the onset of a claim for long term care benefits — actual insured experience data did not become available until decades after the initial rollout of LTC insurance products.[42]

As referenced above, in connection with the preparation of this report, DFS surveyed LTC insurers to obtain industry insight on the challenges faced by the industry. Insurers consistently noted that in determining initial LTC insurance premiums, they relied on erroneous assumptions that failed to accurately predict LTC claims. The following is a summary of these insurers' anecdotal insights on the factors that caused initial underwriting failures.

- **Lapse Rates.** Lapse rates — the rates at which policies are discontinued or cancelled before benefits are claimed — for LTC insurance policies were much lower in reality than initially expected. Insurers examined lapse rates of other insurance products as references when initially pricing LTC insurance premiums, but in practice, a higher percentage of policyholders retained their LTC insurance policies (and subsequently

[40] *See* "An Overview of the U.S. LTC Insurance Market (Past and Present): The Economic Need for LTC Insurance, the History of LTC Regulation & Taxation and the Development of LTC Product Design Features," Society of Actuaries (2014), available at: https://www.soa.org/globalassets/assets/files/resources/essays-monographs/managing-impact-ltc/mono-2014-ltc-manage-narva.pdf; "Understanding the Volatility of Experience and Pricing Assumptions in Long-Term Care Insurance," Society of Actuaries (May 2014), available at: https://www.soa.org/resources/research-reports/2014/research-2014-understanding-volatility/.

[41] "Comparing LTC Policies," New York State Department of Financial Services, available at: https://www.dfs.ny.gov/consumers/health_insurance/long_term_care_insurance/comparing_policies,

[42] *See* "Exiting the Market: Understanding the Factors behind Carriers' Decision to Leave the Long-Term Care Insurance Market," Office of the Assistance Secretary for Planning and Evaluation, (June 30, 2013), available at: https://aspe.hhs.gov/reports/exiting-market-understanding-factors-behind-carriers-decision-leave-long-term-care-insurance-market-1.

made claims) than policyholders of other insurance products. Because fewer policies were dropped before claims were made than initially expected, the costs of coverage were higher than anticipated which, in turn, meant that the initial premium rates proved too low.

- **Mortality Rates.** Mortality rates also were much lower than initially projected.[43] Some LTC insurers relied on data from Group Annuity Mortality Tables from the 1980s published by the Society of Actuaries as a proxy for anticipated mortality rates to calculate initial LTC insurance premium rates. Subsequent LTC insurance experience data, however, showed that actual mortality rates were much lower, meaning that more policyholders reached an older age at which they were likely to file LTC insurance claims, and thus more claims were initiated than had been expected. Again, this meant that the initial premium rate calculations were too low.[44]

- **Morbidity Rates.** Morbidity rates — the rates at which policyholders file claims pursuant to their LTC insurance benefits — were much higher than expected. The calculations used to make morbidity rate assumptions are based on several other assumptions about factors, such as incidence rates (*i.e.*, the rate at which policyholders claim benefits for long term care services), claim continuance patterns (*i.e.*, the frequency and/or time periods that policyholders claim benefits for long term care services), and unpredictable disability patterns and disability recovery rates that may impact the necessity and provision of long term care services.[45] Because of the lack of historical data for long term care products at the time of their initial offering, there was no standard long term care morbidity rate calculation that insurers could use to make morbidity assumptions.[46] Further, the time it takes to establish a reliable long term care morbidity rate assumption is typically longer than the time it takes to establish reliability with respect to other assumptions — such as lapse rates — that LTC insurers use to determine premium rates. When initial LTC insurance products were offered to New York consumers, insurers relied on the results of the 1985 National Nursing Home Survey, the 1982 Long Term Care Survey, and the 1984 follow up to the Long Term Care Survey to determine initial morbidity rate assumptions. In the decades that followed, insured experience data showed that actual morbidity rates were much higher than initially expected, that is, more policyholders used LTC insurance benefits at higher rates than

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[43] "Exiting the Market: Understanding the Factors behind Carriers' Decision to Leave the Long-Term Care Insurance Market," Office of the Assistance Secretary for Planning and Evaluation (June 30, 2013), available at: https://aspe.hhs.gov/reports/exiting-market-understanding-factors-behind-carriers-decision-leave-long-term-care-insurance-market-1.

[44] *Id*.

[45] "An Overview of the U.S. LTC Insurance Market (Past and Present): The Economic Need for LTC Insurance, the History of LTC Regulation & Taxation and the Development of LTC Product Design Features," Society of Actuaries (2014), available at: https://www.soa.org/globalassets/assets/files/resources/essays-monographs/managing-impact-ltc/mono-2014-ltc-manage-narva.pdf.

[46] "Exiting the Market: Understanding the Factors behind Carriers' Decision to Leave the Long-Term Care Insurance Market," Office of the Assistance Secretary for Planning and Evaluation (June 30, 2013), available at: https://aspe.hhs.gov/reports/exiting-market-understanding-factors-behind-carriers-decision-leave-long-term-care-insurance-market-1.

initially projected. This factor, like the ones above, once again meant that the initial premium rates were too low.[47]

- **Interest rates.** For much of the period since LTC insurance policies were first written, interest rates have been significantly lower than projected by insurers at the time of initial offering. Insurers use projected interest rates to calculate projected investment earnings on premiums paid; the higher the earnings that an insurance company makes on premiums already paid, the more reserves are available from which LTC insurance claims would be paid to policyholders.[48] In practice, lower-than-projected interest rates have resulted in less return on investment and therefore smaller reserves held by insurers, once again meaning that premium rates were too low.[49]

In sum, when first writing LTC insurance in the late 1980s and 1990s, the insurers made inaccurate projections (and regulators approved premium rates based upon those projections) as to both the cost and income sides of the equation: the costs of the long term care claims were much higher than expected due to lower lapse rates, lower mortality rates, and higher morbidity rates, while the income made on reserves was lower than expected due to the lengthy low-interest-rate environment.

These inaccurate projections led to premium rates being set substantially lower than were needed to sustain policies. As a result, insurers sustained significant losses,[50] and their ability to maintain adequate reserves for satisfaction of policyholders' claims going forward has in some cases been seriously jeopardized. Those financial losses (and projected losses into the future) prompted insurers to ask the Insurance Department (and later DFS) to authorize significant increases in LTC insurance premium rates and, in many cases, to discontinue selling new LTC insurance policies.

Today, one LTC insurer is in the process of being rehabilitated. American Independent Network Insurance Company of New York ("AINIC") is a New York-domiciled insurer that sold LTC insurance in New York. AINIC's parent company is domiciled in Pennsylvania and is in the process of winding up its liquidation by the Pennsylvania Insurance Department.[51] As a result of the Pennsylvania Insurance Department's action, DFS filed for rehabilitation to oversee the liquidation of AINIC, the New York subsidiary, which itself faces significant financial troubles. A Petition for Receivership was filed for AINIC with the Supreme Court of the State of New

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[47] *Id*.

[48] *See id*..

[49] *See id*. Insurers surveyed in connection with this report claimed that investment earnings on held reserves were significantly lower than originally projected due to the sustained low-interest-rate environment.

[50] One insurer surveyed in connection with this report stated that it had sustained upward of $3.5 billion in losses on legacy LTC insurance policies.

[51] In the Matter of the Application of Adrienne A. Harris, Superintendent of Financial, Services of the State of New York, for an order to take possession and rehabilitate the business and affairs of American Independent Network Insurance Company of New York (AINIC), Verified Petition (February 22, 2023), available at: https://www.penntreaty.com/Portals/3/AINIC%20Petition%20%28incl_%20exhibits%29%28as%20filed%29.pdf.

York, New York County on February 22, 2023. That matter is ongoing as of the time of the issuance of this report.

V. LTC Insurance Premium Rates Did Not Increase Fast Enough to Address Initial Mispricing of Policies

Pursuant to New York Insurance Law § 1117(f)(3), DFS is authorized to approve applications from insurers requesting increased LTC premium rates upon the determination that an insurer's proposed premium rate is reasonably related to the benefits provided and that the premium rate is self-supporting, that is, that the premium payments received by the insurer are sufficient to cover future claims from policyholders.[52] Upon DFS's approval of an LTC insurance premium rate increase request, LTC insurance policyholders are provided with notice of the increased premium rate along with information relating to the options available to retain, modify or terminate their policy. The implementation of some premium rate increases were phased in over time, providing the policyholder with time to consider their options and make a determination with respect to their LTC insurance policy.

A. The Insurance Department's Initial Reluctance to Approve Requests for LTC Insurance Premium Rate Increases

As discussed above, the assumptions relied upon when LTC insurance policies were first offered in the late 1980s and early 1990s were inaccurate. By the mid-2000s, LTC insurers began to realize the initial assumptions were inaccurate after collecting more reliable insured experience data that was not previously available to them. At that time, LTC insurers began to ask for LTC insurance premium rate increases to both mitigate the financial losses they had already sustained, as detailed above, and to be able to pay future claims while avoiding insolvency.

When considering any request for rate increases, DFS must balance the needs for a sound and substantial insurance market with the impact to consumers who will be paying higher premiums.[53] Concerns about consumer impact are particularly acute when looking at increases to LTC insurance rates, as LTC policyholders tend to be elderly and on fixed incomes, meaning that they are particularly vulnerable to cost increases, and the policyholders typically budget for premiums in their long term financial planning, which can be difficult to alter.[54] Further, unlike long term investments in many types of life insurance policies, LTC policies often have no surrender value so, should policies become unaffordable after years or decades of paying premiums, policyholders lose their entire investment. Together this means that increases in LTC premiums can have a very significant adverse impact on consumers.[55] In addition to consumer concerns, the unique nature of LTC insurance — in particular, the long tail between purchase and use of the policy — has meant that, for many years, it was not clear to regulators whether the

[52] New York Insurance Law § 1117(f)(3).

[53] *See* New York Insurance Law § 1117; 11 NYCRR § 52.40.

[54] Pursuant to New York Financial Services Law § 102, the goals of DFS include the promotion of insurance products at affordable costs to New York citizens and consumers and the protection of the public interest of policyholders.

[55] Some LTC insurers, however, offer non-forfeiture benefits that provide the insured with the amount of the premiums paid prior to lapse, and DFS has required non-forfeiture benefits to be offered in connection with approving large rate increases in the past.

insured experience data relied upon by insurers in connection with their requests was in fact reliable.

Given these concerns, as reflected in the table below, insurers' early requests to increase LTC insurance premium rates in New York (roughly, prior to 2010) were largely denied by the Insurance Department.[56] Further, even when requests were granted, rate increases were approved at levels lower than those requested by the insurers.[57] Although the insurers' requests often showed anticipated future losses on the LTC insurance portfolios, the Insurance Department's decisions to deny premium rate increase requests early in the relevant period took into account the fact that, notwithstanding that LTC insurance policies had been available for years, the claim experience data remained relatively unsettled and there was uncertainty concerning factors that could have, over time, improved insurers' future financial condition and therefore solidified insurers' ability to pay anticipated policyholder claims despite the original mispricing of the insurance. For example, the low-interest-rate environment could reverse (which has in fact recently occurred), meaning that insurance companies could make a better return on investments made with premiums, thereby ensuring that funds would be available to pay policyholder claims. Moreover, medical advances and other improvements in health care could decrease future claims and thus mean that future rate increases would prove unnecessary. In sum, at least during the early part of the relevant period, inherent uncertainties led the Insurance Department to be very conservative with respect to approving rate increases.

Although a denial of a rate increase request protects policyholders from increased rates in the short-term, it might also have negative consequences to consumers over time: rate increase denials could trigger an insurer to cease development of further LTC insurance products or to cease offering new LTC insurance products altogether.[58] Indeed, over the past 15 years, many LTC insurance providers decided to stop marketing and selling LTC insurance products in New

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[56] LTC insurance premium rate increase requests were submitted to and approved or denied by the Insurance Department up until the establishment of DFS in 2011.

[57] Some LTC insurers — in New York and nationwide — have reported that decisions to deny or only partially approve premium increase requests have contributed to discouraging insurers from continuing to sell new LTC insurance products in New York. *See*, *e.g.*, "Exiting the Market: Understanding the Factors behind Carriers' Decision to Leave the Long-Term Care Insurance Market," Office of the Assistance Secretary for Planning and Evaluation (June 30, 2013), available at: https://aspe.hhs.gov/reports/exiting-market-understanding-factors-behind-carriers-decision-leave-long-term-care-insurance-market-1 (insurers surveyed cited "the ability to obtain rate increases in a timely manner or at all" as influencing the insurer's decision to exit the LTC insurance market). Other insurers have cited the delays in approving requested premium rate increases — *i.e.*, denying rate increase requests early on, but approving at a later date — as impeding insurers' ability to achieve their targeted loss ratio and negatively impacting the insurers' available reserves from which policyholders draw their claims.

[58] "The State of Long-Term Care Insurance: The Market, Challenges an Future Innovations," National Association of Insurance Commissioners (May 2015), at p.25, available at: https://content.naic.org/sites/default/files/inline-files/cipr_current_study_160519_ltc_insurance_0.pdf ("Product performance — not hitting profit objectives — was the most cited reason for leaving the market. Incorrect assumptions about two underlying pricing assumptions — voluntary lapses and interest rates — have had a lot to do with this and have been key drivers behind the need of many insurers to increase rates on products."); *id*. ("The concern about the ability to obtain needed rate increases from state insurance departments was the second most cited reason for market exit.").

York.[59] This trend is not unique to New York: nationwide, more than half of insurers that offered LTC insurance products had stopped selling new policies by 2016.[60]

B. Decisions on Requests for LTC Insurance Premium Rate Increases

The table on the following page sets forth a summary of the requested and approved LTC insurance premium rate increases from 2006 through 2021. The table details: the number of companies that made a premium rate increase for each year, along with the total number of policyholders associated with the premium rate increase requests, the total number of filing requests made,[61] the total number and the percentage of filing requests that were denied across all companies for each year. The chart also includes, for approved premium rate increase requests, the average premium rate request increase and the average approved premium rate increase weighted by the number of members associated with the approved premium rate increase policies for each year.

[59] "Exiting the Market: Understanding the Factors behind Carriers' Decision to Leave the Long-Term Care Insurance Market" Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services (June 2013), available at: https://aspe.hhs.gov/reports/exiting-market-understanding-factors-behind-carriers-decision-leave-long-term-care-insurance-market-1 (containing survey of executives from 26 LTC carriers that exited the market or segment of the market and analysis of the NAIC Experience Exhibit Reports from 2000, 2009, 2010, and 2011).

[60] "The State of Long-Term Care Insurance: The Market, Challenges and Future Innovations," National Association of Insurance Commissioners (May 2015), at p. 25, available at: https://content.naic.org/sites/default/files/inline-files/cipr_current_study_160519_ltc_insurance_0.pdf.

[61] A separate request is made with respect to each policy form, so one insurance company can (and did in this case) file more than one rate request in a given year.

Premium Rate Increase Requests from LTC Insurers, 2006-2021

						Only For Approved Rate Increases	
Year	# Companies	# Members	# Filings	# Denied	% Denied	Requested Rate	Approved Rate
2006	4	38,049	9	6	67%	25.0%	15.0%
2007	4	25,894	7	6	86%	30.0%	15.0%
2008	4	67,433	13	11	85%	13.6%	12.2%
2009	6	71,848	9	7	78%	22.8%	15.0%
2010	7	46,578	17	6	35%	18.5%	11.3%
2011	5	50,695	20	3	15%	24.1%	12.6%
2013	15	248,615	51	12	24%	37.6%	21.0%
2014	7	49,474	19	4	21%	51.2%	6.5%
2015	7	244,949	22	-	0%	50.9%	27.8%
2016	6	59,734	23	-	0%	73.0%	13.2%
2017	6	268,806	34	1	3%	47.7%	12.3%
2018	6	137,385	23	1	4%	72.9%	13.1%
2019	13	270,709	58	2	3%	45.8%	10.7%
2020	3	22,794	7	-	0%	49.6%	8.8%
2021*	13	281,525	54	4	7%	65.5%	14.7%

Note: only rate filings with members included in weighted average table above

** partial year*

C. DFS's Methodology for Considering Requests for LTC Insurance Premium Rate Increases

In later years, with the benefit of more historical consumer experience data and claim histories, it became clearer to the Insurance Department (and later to DFS) that the premium rates at the time LTC insurance was first offered in New York were insufficient, largely due to the earlier erroneous assumptions on lapse rates, morbidity rates, mortality rates, and interest rates discussed above. As a result, as seen in the chart above, beginning in roughly 2010, the Insurance Department started approving LTC insurance premium rate increase requests with greater frequency, albeit still typically at rates substantially lower than those requested by insurers.

Through most of the period reflected in the chart above, though LTC insurance experience data was more robust than it was at the time of initial offering, it was still not entirely reliable given the long tail nature of the product. The Insurance Department, in light of this uncertainty and mindful of the impact of increased rates to consumers, developed a framework that examined, among other things, three components of the actuarial data provided by the insurer in an attempt to balance these competing interests. The Insurance Department's methodology attributed a potential 5% rate increase to each component:

- First, the actual versus expected loss ratio (*i.e.*, the ratio of policyholder claims to "gross" premiums at the particular point in time the request is made). If the actual loss ratio was higher than the expected loss ratio, a rate increase may have been justified for this component.

- Second, the lifetime loss ratio (*i.e.*, the ratio of the present value of expected claims to the present value of expected premiums projected over the life of a policy), taking into account an insurer's adjustments to morbidity, mortality, or interest rate assumptions. If the modified lifetime loss ratio (on a cumulative basis) was 5% or more above the minimum New York State lifetime loss ratio or the originally filed lifetime loss ratio, then a maximum 5% rate increase may have been justified for this component.

- Third, the threshold year (*i.e.*, the projected year in which the New York State minimum lifetime loss ratio[62] is reached, evaluated on a cumulative basis since inception of the policies). If the threshold year (as developed in the revised projection of the rate increase request) was reached within ten years of the request, a maximum 5% rate increase may have been justified for this component. If the threshold year was 15 or more years into the future, no increase for this component would have been granted. If the threshold year was between ten and 15 years into the future, the percentage increase would vary taking other metrics into account.

In addition, the Insurance Department also evaluated factors that may vary from one insurer to another, including the financial stability of the requesting insurance company, the historical

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[62] The New York State minimum lifetime loss ratio is 65% for policies issued to insureds age 65 and over and 60% for policies issued to insureds age 64 and under. *See* 11 NYCRR 52.45(h).

premium rates for the LTC insurance policies at issue, and the percentage of LTC insurance policies relative to the insurer's entire book of business.[63]

DFS's approvals of premium-rate increases in recent years, generally at more moderate levels, were warranted to sustain the continued offering and service of LTC insurance policies to consumers. It is worth noting that, though current adoption of new LTC insurance policies is lower than when they were initially offered, according to surveyed insurers, for those that already hold LTC insurance policies, New York policyholders have overwhelmingly opted to retain their policies even at increased premium rates. Because the time between the purchase of an LTC insurance policy and the time at which a claim may be made (if one is made at all) is so long, some insurers have speculated that one reason policyholders are likely to keep their policy as-is and pay the higher premium rate is because of the amounts they have already invested in the policy.

With the benefit of hindsight and acknowledging the factors that make pricing LTC insurance so difficult, the Insurance Department's (and later DFS's) approach may have been too conservative, and premium rate increases in many cases could have been granted sooner and in larger amounts in order to better stabilize the market as a whole and to flatten out eventual rate increases for consumers. As vital as it is to protect consumers from burdensome rate increases whenever possible, the Insurance Department and DFS probably could have confronted sooner the insurers' initial mispricing through earlier (and larger) rate increases to better safeguard the sustainability of the LTC insurance market as a whole. In this troubled insurance market, it is fair to ask whether earlier rate increases, though no doubt painful to consumers, might have led to less consumer burden in the long run by reducing the need for later, even larger, rate increases; by keeping more insurers in the LTC insurance market, thereby increasing competition and consumer choice; and by shoring up LTC insurers that could otherwise suffer from financial distress that could threaten consumer benefits.

VI. Going Forward: Continued Stabilization and Encouraging the Continued Availability and Development of LTC Insurance

The echoes of the initial mispricing in the LTC insurance market still trouble the market today, and at least some of the insurers continue to suffer losses that jeopardize their viability and thus the future payment of benefits. As a result, the unfortunate truth is that in some cases, substantial additional premium increases will be required to stabilize the situation. Although DFS is very mindful that such increases are burdensome to consumers, they are necessary to safeguard policyholder benefits over the long term.

There are, however, reasons to hope that rate increases now will put the LTC insurance marketplace on firmer ground for a more stable, predictable future in the years and decades to come. Although predicting costs of benefits in the LTC insurance market has, for the reasons discussed above, proven to be very difficult, LTC insurers and regulators alike now have the benefit of decades of real world experience data to better guide realistic pricing. Further, interest

[63] For example, everything else being equal, in order to ensure the viability of an insurer's business (thus protecting consumers' benefits in the long term), a larger premium rate increase may be justified for financially insecure insurers; for insurers that had relatively lower initial premium rates; and for insurers where LTC insurance policies largely comprise their books of business, among other things.

rates are higher than they have been in recent years, meaning that insurance companies can make a better return on payments made, bolstering the financial condition of LTC insurers and better ensuring that sufficient funds will be there in the future to pay the benefits to which policyholders are entitled. In sum, moving forward, once premium rates are necessarily increased to be more aligned with current assumptions and actuarial justifications, assumptions behind the rate making should be more predictable and rates should be less likely to increase over time.[64]

Going forward, the question becomes how to hold LTC insurers accountable to their actuarial assumptions and marketed premium rates while allowing for sufficient premium increases, if necessary, to maintain LTC insurers' solvency and the market's viability. DFS's efforts to strike this balance are discussed below.

A. Review and Reform Premium Rate Approval Methodologies

As a consumer-focused insurance regulator, DFS must continue to review applications for new LTC policies or rate increases rigorously to ensure they are sound and justified. In responses to surveys for this report, some LTC insurers noted there is a lack of clarity in how rate increases are assessed and a lack of consistency in how these rate requests are handled by different insurance regulators.[65] Approval of LTC insurance premium rate increase requests can vary widely from state to state. Therefore, consumers from different states are paying substantially different amounts for the same policy and benefits. While some of that variation is attributable to differences in the cost of care across states, consistency and cooperation among states and regulators in arriving at a consistent framework for calculating LTC insurance premium rates would provide greater certainty to insurers in the calculation of their projections and greater transparency into the processes insurers currently have to navigate across each jurisdiction in which they operate.

DFS continues to examine and refine its own methodology with respect to reviewing LTC insurance rate increase requests. In April 2022, the NAIC Long-Term Care Insurance Task Force and NAIC Long-Term Care Insurance Multistate Rate Review Subgroup of the task force issued the "Long Term Care Insurance Multistate Rate Review Framework," setting forth a process for multi-state review of rate applications.[66] Interestingly, even that multi-state task force did not reach consensus on the single best actuarial methodology, reflecting the difficulty in determining accurate premium rates for LTC insurance even today.[67] DFS is reviewing the approaches set forth by the NAIC as well as the work of the Society of Actuaries, other states, and other experts

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[64] "Long-Term Care Insurance," National Association of Insurance Commissioners Center for Insurance Policy and Research (last updated April 3, 2023), available at: https://content.naic.org/cipr-topics/long-term-care-insurance.

[65] It is worth noting that the National Association of Insurance Commissioners has assembled a multi-state working group to outline a consistent national approach for the review of LTC insurance rates. *See* https://content.naic.org/industry/long-term-care-insurance-multistate-rate-review. Insurers surveyed in connection with this report support the adoption of the NAIC's framework and a more consistent methodology to reduce state-by-state inequities.

[66] *See* "Long-Term Care Insurance Multistate Rate Review Framework," National Association of Insurance Commissioners (April 2022), available at: https://content.naic.org/sites/default/files/inline-files/MSA%20Framework_040822_Adopted.pdf.

[67] *See id*. at pp. 13-15 (setting forth the "Minnesota Approach" and "Texas Approach" methodologies.

in the field in developing an updated methodology in connection with a number of pending LTC insurance premium rate increase requests.

B. Establish Affordability Measures to Help Consumers Manage LTC Insurance Premium Rate Increases

The fact that rate increases have been (and may continue to be) necessary to protect future benefit payments gives little solace to policyholders who cannot afford to pay those higher rates. Indeed, as noted above, given the vulnerable nature of the consumers in the LTC insurance market, many of whom are on fixed incomes, higher rates can quickly become prohibitively expensive, which would force some policyholders to abandon their policies (and in essence forfeit all past premiums paid) and lose the protection afforded by the policy. In an effort to provide some relief from this all-or-nothing dilemma, DFS and LTC insurers continue to work together to provide consumers with additional options to modify their LTC insurance policies to allow consumers to maintain LTC policies, albeit with reduced benefits, within their financial means.

One example of such collaboration between DFS and LTC insurers was the development of the concept of a “landing spot,” which was introduced to allow policyholders to mitigate, either partially or fully, large LTC insurance premium rate increases. Policyholders were given a fixed set of options — the so-called landing spot — to lower policy benefits as an alternative to paying a higher premium rate. In order to be authorized to offer this mitigating option, insurers had to demonstrate to DFS that the landing spot option was actuarially equivalent to the approved premium rate increase. One insurer surveyed in connection with this report indicated that, when offered a landing spot option in connection with an approved premium rate increase, nearly half of its LTC insurance policyholders chose that option to offset the cost of rate increases. Another provider surveyed cited some difficulties in implementing mitigation options but noted that engagement with DFS was productive in arriving at a mitigation measure that would support its ability to pay future claims.

Further, DFS has approved premium rate increases containing a tiered rate increase for policyholders in certain age ranges and carving out older policyholders from the increased rates. For example, in August 2021, DFS approved a request from an LTC insurer for an increase of 80% for policyholders aged 68 or younger, 45% for policyholders aged between 69-74, and no increase for policyholders aged 75 or older, all to be phased in over time in order to provide policyholders with time to consider their options and make a determination regarding their policy. This approved rate increase was also accompanied by a lifetime premium rate guarantee, meaning those LTC insurance policies will not be subject to any future premium rate increases, providing those policyholders with certainty regarding the cost of their policies going forward.

DFS will continue working with the industry to develop options to help mitigate the impact of necessary rate increases.

C. Promote the Adoption of LTC Insurance Offerings in New York

As of 2021, only five of the 38 insurance companies that at one point offered LTC insurance in the state continue to sell new policies. Those insurers surveyed that still sell LTC insurance products, however, believe that there is room for growth in this market. Certain insurers that currently market and sell LTC insurance to New York consumers have indicated their continued commitment to remaining in the LTC insurance market in New York and are offering a variety of new LTC insurance products to New York consumers.

The LTC insurance products currently offered to New York consumers include standalone LTC insurance as well as linked-benefit LTC insurance options, like life insurance with an LTC insurance rider and an annuity contract with an LTC insurance rider.[68] Another LTC insurance offering recently approved by DFS gives New Yorkers the option of electing varying levels of cost-sharing. The addition of deductibles or coinsurance provides New York consumers who are willing to self-fund a portion of their care the choice of a lower premium rate policy with pre-determined benefit amounts. DFS will continue to monitor, evaluate, and establish options to consumers at different benefit levels and costs to encourage increased adoption of LTC insurance.

D. Enactment of the New York Health Insurer Guaranty Fund to Protect Consumer Investments

Another issue facing consumers who have already purchased LTC insurance policies is the possibility that an LTC insurer may no longer be able to service an LTC insurance policy because the company ceases business operations or is in the process of liquidation. In this event, in order to ensure that affected policyholders maintain their benefits, DFS may exercise its authority to establish a rehabilitation plan for an LTC insurer that applies for rehabilitation or ceases business operations. To support future rehabilitation plans for LTC insurers, DFS strongly recommended, and New York State legislature approved, the enactment of a New York health insurer guaranty fund as part of New York's 2023-2024 Executive Budget.[69] A guaranty fund is a basic safety net used to protect consumers when and if their insurer becomes insolvent. The New York Health Insurer Guaranty Fund is based on the NAIC's Life and Health Insurance Guaranty Association Model Act, upon which every other state bases its fund. Enactment of a health insurer guaranty fund in New York will close this consumer protection gap and provide a safety net for New York consumers as they age.

VII. Policymakers Must Address Long Term Care Funding Beyond LTC Insurance

It is very likely that the cost of long term care will continue to increase, and, as the country's population continues to get older, funding long term care will constitute a growing challenge. Even assuming that the actions DFS is currently taking are successful in stabilizing the LTC insurance market, LTC insurance is expensive and will not be a viable option for many consumers. The Medicaid program, which is, as discussed above, the largest source of long term care funding, is itself under extreme stress as states struggle to maintain funding levels. There can be little doubt that policymakers in New York and nationwide must take a hard look at how long term care will be funded in the future.

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[68] A combination life insurance policy with an LTC rider allows consumers the option of accelerating the life insurance death benefit prior to death to assist in funding their long term care. A combination annuity contract with an LTC insurance rider allows a consumer to access annuity funds to assist in funding their long term care.

[69] *See* New York Senate Bill S.4007-C/A.3007-C, Part Y, Subpart D.

New York has taken an important first step in such an examination. On November 4, 2022, Governor Hochul signed an Executive Order to create the New York State Master Plan for Aging (the "MPA"), the first of its kind in the state, to address the needs of aging New Yorkers across all state programs and policies.[70] The MPA, coordinated by the New York State Department of Health and New York State Office for the Aging, is intended to coordinate existing and new state policy and programs, and to create a blueprint of strategies to be implemented to address the needs of older New Yorkers.[71] One of Governor Hochul's stated objectives of the MPA is to provide the state with tools to ensure aging New Yorkers have access to quality long term care, and the MPA Advisory Council has announced it is developing an aging and long term care landscape report in connection with the creation of the MPA.[72] The Department is a member of the MPA Advisory Council and is working with other members and stakeholders on preparation of the long term care landscape report and to develop strategies to address the current issues faced by consumers in the New York LTC insurance market.

It will also be worth watching developments in other states. In 2019, Washington state became the first state to enact legislation, the WA Cares Fund, that provides workers with access to a lifetime earned benefit amount that can be used to pay for long term care services.[73] Workers in Washington state will begin contributing $0.58 per $100 of earnings to the WA Cares Fund in July 2023, and benefits will be available to qualified, eligible workers in July 2026.[74] Workers, but not employers, contribute to the WA Cares Fund and the benefits provided also can be supplemented by the purchase of private LTC insurance.[75]

VIII. Conclusion

As the population ages and long term care costs continue to rise, consumers' access to reliable and affordable LTC insurance is perhaps more important than it has ever been. Unfortunately, the LTC insurance market has long struggled financially, stemming in large measure from overly optimistic pricing assumptions made by the LTC insurance companies decades ago. Over time, the economic instability caused by these struggles triggered financial distress in some insurers, thereby putting consumer benefits at risk, and prompted other insurers to stop offering LTC insurance products, thereby limiting competition and consumer choice. For their part, insurance regulators across the country, including the Insurance Department in New York, were hesitant to grant large premium increases in an effort to minimize consumer harm but in doing so failed to

[70] Executive Order No. 23 Establishing the New York State Master Plan for Aging (November 4, 2022), available at: https://www.governor.ny.gov/sites/default/files/2022-11/EO_23.pdf.

[71] *Id*.

[72] "Governor Hochul Signs Executive Order to Create New York's First-Ever Master Plan for Aging," New York State Office of the Governor (November 4, 2022), available at: https://www.governor.ny.gov/news/governor-hochul-signs-executive-order-create-new-yorks-first-ever-master-plan-aging; "A Master Plan for Aging Council Meeting #3", New York State Department of Health and New York State Office for the Aging (February 22, 2023), available at: https://www.ny.gov/sites/default/files/2023-02/StateAgencyCouncilMeeting3.pdf.

[73] "About the WA Cares Fund," WA Cares Fund, available at: https://wacaresfund.wa.gov/about-the-wa-cares-fund/.

[74] *Id*.

[75] *Id*.

fundamentally address the inherent pricing issues, thereby inadvertently allowing the crisis to fester.

New York has begun to course correct. As noted above, now equipped with the benefit of more reliable policyholder data, DFS has revised its methodology for approving premium rate increase requests from LTC insurers. In doing so, DFS has taken a thoughtful approach that seeks to protect its most vulnerable consumers and to ensure that New York consumers will have affordable, reliable access to LTC insurance. DFS is also encouraging the adoption of a variety of different types of LTC insurance policies so that more consumers can find benefits that suit their needs at a cost that is manageable. And, thanks to the recently enacted New York Health Insurer Guaranty Fund, New Yorkers now have a safety net should their LTC insurer become insolvent. Moving forward, the agency remains committed to working with all stakeholders to transparently address the issues affecting the LTC insurance industry and its vulnerable consumers.

About The New York State Department of Financial Services

The New York State Legislature created the Department of Financial Services in 2011 from the merger of the former Banking and Insurance Departments, and widened DFS's purview to include "the regulation of new financial services products" by establishing "a modern system of regulation, rulemaking and adjudication" responsive to the needs of New York consumers. DFS is the primary regulator of a broad spectrum of financial services providers that operate in the State of New York, including insurance companies and their agents and brokers, state-chartered banks, foreign banks with branches in New York, virtual currency businesses, non-depository lenders, money transmitters, and check cashers. DFS supervises and examines licensed entities, promulgates applicable regulations, and enforces the law through investigations and, where necessary, administrative proceedings.

DFS seeks to build an equitable, transparent, and resilient financial system that benefits individuals and supports business. Through engagement, data-driven regulation and policy, and operational excellence, DFS and its employees are responsible for empowering consumers and protecting them from financial harm; ensuring the health of the entities we regulate; driving economic growth in New York through responsible innovation; and preserving the stability of the global financial system.