

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1033 Continuing Care Contracts

**SPONSOR(S):** Health & Human Services Committee, Insurance & Banking Subcommittee; Yarborough; Stevenson and others

**TIED BILLS:**           **IDEN./SIM. BILLS:** CS/SB 1070

| REFERENCE                            | ACTION              | ANALYST     | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--------------------------------------|---------------------|-------------|--|
| 1) Insurance & Banking Subcommittee  | 15 Y, 0 N, As<br>CS | Hinshelwood | Luczynski                                |
| 2) Health & Human Services Committee | 15 Y, 0 N, As<br>CS | Grabowski   | Calamas                                  |
| 3) Commerce Committee                |                     |             |  |

### SUMMARY ANALYSIS

Continuing Care Retirement Communities (CCRCs) offer a transitional approach to the aging process, accommodating residents' evolving needs as to their level of care. A CCRC can include independent living apartments or houses, as well as an assisted living facility or a nursing home. CCRCs may also offer at-home programs that provide residents with services while continuing to live in their own homes until they are ready to move to the CCRC. The fees associated with a CCRC include an initial entrance fee and monthly fees to cover costs related to health care and other aspects of community living.

Regulatory oversight responsibility of CCRCs in Florida is shared primarily between the Agency for Health Care Administration (AHCA) and the Office of Insurance Regulation (OIR). Although the OIR has enforcement authority over CCRCs, the CCRC statutes lack the framework that the OIR uses to protect consumers of other insurance products, including early intervention concepts like impairment, a statutory requirement to provide supplementary information to support or explain filings, and clear authority to prohibit certain individuals from exercising control over a CCRC.

The bill makes the following revisions to the regulation of CCRCs:

- Improves early warning signs of a CCRC's solvency issues and provides the OIR with administrative tools to address declining financial conditions.
- Remedies various ambiguities exploited in recent years by a distressed CCRC.
- Provides the OIR with authority to disapprove and remove unqualified management.
- Imposes an express duty on CCRC providers to produce records and gives the OIR standing to petition a court for production of such records.
- Requires that records be maintained in this state but permits cloud-based storage.
- Clarifies that CCRCs must appoint the Florida Chief Financial Officer for purposes of service of process.
- Creates a number of new requirements for the provider to give notice to the residents or residents' council.
- Provides an expanded process for resident complaints.
- Revises statutes and streamlines processes relating to applications for licensure, acquisition, and expansion of a CCRC.
- Revises annual, quarterly, and monthly reporting requirements for CCRCs.
- Revises minimum liquid reserve requirements, duties of escrow agents, and processes for withdrawals from a CCRC's reserve funds.
- Amends grounds for suspension or revocation of a CCRC provider's certificate of authority.
- Specifies grounds for the issuance of an immediate final order to cease and desist or immediate final order suspending a CCRC provider's certificate of authority.

The bill has no fiscal impact on local or state government and an indeterminate fiscal impact on the private sector.

The bill provides an effective date of January 1, 2020, except as otherwise expressly provided in the bill.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h1033b.HHS

**DATE:** 4/5/2019

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background: Continuing Care Retirement Communities (CCRCs)**

CCRCs offer a transitional approach to the aging process, accommodating residents' evolving needs as to their level of care. A CCRC can include independent living apartments or houses, as well as an assisted living facility or a nursing home. CCRCs may also offer at-home programs that provide residents with services while continuing to live in their own homes until they are ready to move to the CCRC.<sup>1</sup> The fees associated with a CCRC include an initial entrance fee and monthly fees to cover costs related to health care and other aspects of community living.<sup>2</sup>

Regulatory oversight responsibility of CCRCs in Florida is shared primarily between the AHCA and the OIR. The OIR regulates CCRC providers<sup>3</sup> as specialty insurers. The AHCA regulates aspects of CCRCs related to the provision of health care, such as nursing facilities, assisted living facilities, home health agencies, quality of care, and medical facilities.<sup>4</sup>

##### **Background: Regulatory Oversight**

###### *Certificate of Authority (COA) Granted by the Office of Insurance Regulation*

Because residents may pay, in some cases, considerable amounts in entrance fees and ongoing monthly fees, the OIR is given primary responsibility to regulate and monitor the operation of CCRCs and to determine facilities' financial condition and the management capabilities of their managers and owners.<sup>5</sup> If a provider is accredited through a process "substantially equivalent" to the requirements of ch. 651, F.S., the OIR may waive any requirements of the chapter.<sup>6</sup>

In order to operate a CCRC in Florida, a provider must obtain from the OIR a COA predicated upon first receiving a provisional COA.<sup>7</sup> The application process involves submitting various financial statements and information, and expectations of the financial condition of the project, and copies of contracts.<sup>8</sup> Further, the applicant must provide evidence that the applicant is reputable and of responsible character.<sup>9</sup> A COA will be issued once a provider meets the requirements prescribed in s. 651.023, F.S.<sup>10</sup>

###### *Continuing Care Contracts*

Continuing care services are governed by a contract between the facility and the resident of a CCRC. In Florida, continuing care contracts are considered an insurance product and are reviewed and

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<sup>1</sup> S. 651.057, F.S.

<sup>2</sup> AARP, *About Continuing Care Retirement Communities*, available at [http://www.aarp.org/relationships/caregiving-resource-center/info-09-2010/ho\\_continuing\\_care\\_retirement\\_communities.html](http://www.aarp.org/relationships/caregiving-resource-center/info-09-2010/ho_continuing_care_retirement_communities.html) (last visited Mar. 21, 2019); S.

651.011(2), F.S.

<sup>3</sup> A "provider" is "the owner or operator . . . which . . . provides continuing care or continuing care at-home for . . . a fee . . . for the period of care . . ." S. 651.011(12), F.S.

<sup>4</sup> Agency for Health Care Administration reports, available at <http://www.floridahealthfinder.gov/reports-guides/nursinghomesfl.aspx> (last visited Mar. 21, 2019); S. 651.118, F.S.

<sup>5</sup> Ss. 651.021, 651.22, 651.023, F.S.

<sup>6</sup> S. 651.028, F.S.

<sup>7</sup> S. 651.022, F.S.

<sup>8</sup> Ss. 651.021-651.023, F.S.

<sup>9</sup> S. 651.022(2)(c), F.S.

<sup>10</sup> S. 651.023(4)(a), F.S.

approved by the OIR.<sup>11</sup> A CCRC enters into contracts with residents to provide housing and medical care in exchange for an entrance fee and monthly fees. Entrance fees are a significant commitment by the resident, as entrance fees range from around \$100,000 to over \$1 million.<sup>12</sup> CCRCs offer different types of contracts that provide for varying amounts of monthly fees and levels of healthcare discounts.<sup>13</sup>

All CCRC contracts provide for a refund of a declining portion of the entrance fee if the contract is cancelled for reasons other than the death of the resident, during the first 4 years of occupancy by the resident, in the CCRC.<sup>14</sup> However, many contracts exceed this requirement and contain minimum refund provisions that promise a refund of a specified portion (typically 50 to 90 percent) of the entrance fee upon the death of the resident or termination of the contract regardless of the length of occupancy by the resident.<sup>15</sup>

### *Financial Requirements/Solvency*

CCRCs are required to file an annual report with the OIR, which includes an audited financial report, and other detailed financial information, such as a listing of assets maintained in the liquid reserve required under s. 651.035, F.S., and information about fees required of residents.<sup>16</sup> An audited financial report is one that includes financial data that has been verified by an independent external auditor. Private companies, including CCRCs, also prepare financial statements in accordance with a framework of generally accepted accounting principles. The presentation of information in these unaudited statements can then be evaluated by independent auditors using a framework of generally accepted auditing standards.<sup>17</sup>

The OIR also has the discretion to require unaudited quarterly reports from CCRCs if it determines that such reports are necessary to monitor the financial condition of a particular provider or facility.<sup>18</sup>

Section 651.033, F.S., prescribes requirements relating to the establishment and maintenance of escrow accounts. CCRCs are required to maintain a minimum liquid reserve, as applicable, as prescribed in s. 651.035, F.S.

### *Rights of Residents in a Continuing Care Retirement Community*

The OIR is also authorized to discipline a facility for violations of residents' rights.<sup>19</sup> These rights include: a right to live in a safe and decent living environment, free from abuse and neglect; freedom 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; and present grievances and recommend changes in policies, procedures, and services to the staff of the facility, governing officials, or any other person without restraint, interference, coercion, discrimination, or reprisal.<sup>20</sup>

Each CCRC must establish a resident's council to provide a forum for residents' input on issues that affect the general residential quality of life, such as the facility's financial trends, and problems, as well as proposed changes in policies, programs, and services.<sup>21</sup> CCRCs are required to maintain and make

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<sup>11</sup> S. 651.055(1), F.S.

<sup>12</sup> Office of Insurance Regulation, Agency Analysis of Senate Bill 1070, p.2 (Feb. 21, 2019).

<sup>13</sup> *Id.*

<sup>14</sup> S. 651.055, F.S.

<sup>15</sup> Office of Insurance Regulation, *supra* note 12, at 2.

<sup>16</sup> S. 651.026, F.S.

<sup>17</sup> PwC, *Understanding a Financial Audit Statement*, p. 2 (May 2017). Available at <https://www.pwc.com/im/en/services/Assurance/pwc-understanding-financial-statement-audit.pdf> (last accessed April 1, 2019).

<sup>18</sup> S. 651.0261, F.S.

<sup>19</sup> S. 651.083, F.S.

<sup>20</sup> *Id.*

<sup>21</sup> S. 651.081, F.S.

available certain public information and records, such as records of all cost and inspection reports pertaining to that facility, a concise summary of the last examination report issued by the OIR, a and summary of the most recent annual statement.<sup>22</sup>

### *OIR Enforcement Authority*

If a provider fails to meet the requirements of ch. 651, F.S., relating to a provisional COA or a COA, the OIR must notify the provider of any deficiencies and require the provider to make corrective action within a period determined by the OIR.<sup>23</sup> If the provider does not correct the deficiencies by the expiration of such time required by the OIR, the OIR may initiate delinquency proceedings as provided in s. 651.114, F.S., or seek other relief provided under ch. 651, F.S.<sup>24</sup> The OIR may deny, suspend, or revoke the provisional COA or the COA of any applicant or provider for grounds specified in s. 651.106, F.S.

Except in limited circumstances, the OIR's right to initiate delinquency proceedings against a provider is subordinate to the rights of a trustee or lender if the trustee or lender agrees that the rights of residents under a CCRC contract will be honored and will not be disturbed by a foreclosure.<sup>25</sup> If the OIR institutes receivership or liquidation proceedings against a CCRC, the continuing care contracts are deemed preferred claims against assets of the provider.<sup>26</sup> Such claims are subordinate, however, to any secured claim.

Although the OIR has enforcement authority over CCRCs, ch. 651, F.S., lacks the framework that the OIR uses to protect consumers of other insurance products, including early intervention concepts like impairment, a statutory requirement to provide supplementary information to support or explain filings, and clear authority to prohibit certain individuals from exercising control over a CCRC.<sup>27</sup> The need for better regulatory oversight became apparent with the case of a CCRC in Tampa in which unapproved owners and managers failed to cooperate with examination by the OIR and with other provisions of state law.<sup>28</sup> That CCRC remains in bankruptcy.<sup>29</sup> Although a potential purchaser has been identified, the percentage of residents' refunds and administrative expenses that will be paid as part of the purchase and plan to exit bankruptcy have not been fixed.<sup>30</sup> Previously, a bankruptcy court in 1997 cancelled residents' contracts for a different CCRC in Tampa.<sup>31</sup> Additionally, a CCRC in St. Augustine filed for bankruptcy in 2013 and 2016, which resulted in former residents or their estates receiving only 20 percent of their entrance fee refunds.<sup>32</sup>

### *Involvement by the Department of Financial Services (DFS)*

The DFS may become involved with a resident after a CCRC contractual agreement has been signed by both parties or during a mediation or arbitration process.<sup>33</sup> Typically, residents will contact the DFS's Division of Consumer Services, which receives and resolves complaints involving products and persons regulated by the OIR or the DFS.<sup>34</sup>

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<sup>22</sup> S. 651.091, F.S.

<sup>23</sup> S. 651.105(4), F.S.

<sup>24</sup> *Id.*

<sup>25</sup> S. 651.114(8), F.S.

<sup>26</sup> S. 651.071, F.S.

<sup>27</sup> Office of Insurance Regulation, *supra* note 12, at 2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Office of Insurance Regulation, Agency Analysis of House Bill 783, p.2 (Nov. 27, 2017).

<sup>32</sup> Office of Insurance Regulation, *supra* note 12, at 2.

<sup>33</sup> Rules 69O-193.062 and 69O-193.063, F.A.C.

<sup>34</sup> S. 624.307, F.S.

Chapter 631, F.S., governs the rehabilitation and liquidation process for insurers in Florida. Federal law provides that insurance companies are not eligible to be a debtor in federal bankruptcy proceedings and are instead subject to state laws regarding receivership.<sup>35</sup> In Florida, the Division of Rehabilitation and Liquidation within the DFS is responsible for managing insurance companies placed into receivership. The goal of rehabilitation is to return the insurer to solvency. The goal of liquidation, however, is to liquidate the business of the insurer and use the proceeds to pay claims, including those of policyholders, creditors, and employees.

## **Effect of the Bill**

### *Financial Indicators & OIR's Remedial Rights*

Regulatory Action Level Event – Section 651.034, F.S., is created to establish a framework of required actions if a provider falls below specified levels of three key indicators: occupancy, days cash on hand, and the debt service coverage ratio. The key indicators were selected based on their tendency to highlight problematic financial developments. If the provider's performance falls below the specified levels on two of the following three key indicators, it is considered a "regulatory action level event":

- The 12-month average occupancy of the provider's facility is less than 80 percent over the 12-month period immediately preceding the annual report;
- The provider's days cash on hand is less than the minimum number of days cash on hand specified in the provider's bond covenants or lending agreement for long-term financing. If the provider does not have a days cash on hand required by its lending institution, the days cash on hand may not be less than 100 as of the most recent annual report filed with the office; or,
- The provider's debt service coverage ratio is less than the minimum ratio specified in the provider's bond covenants or lending agreement for long-term financing; or, if the provider does not have a debt service coverage ratio required by its lending institution, the provider's debt service coverage ratio is less than 1.20:1 as of the most recent annual report filed with the office.

Section 651.026, F.S., requires each CCRC to file annual audited financial statements with the OIR. The data included in these statements will be the basis for calculating the key indicators above. In the event that a "regulatory action level event" occurs, the provider is required to submit a corrective action plan; the OIR is required to perform an examination or analysis of the provider; and the OIR is required to issue a corrective order specifying any corrective actions that the OIR determines are required. For new CCRCs, the OIR may exempt a provider from the consequences of a regulatory action level event or impairment until the earlier of the CCRC reaching stabilized occupancy, the time projected to achieve stabilized occupancy, or five years from the date of issuance of the COA.

Impairment – The bill creates a definition for "impaired" to allow for earlier intervention by the OIR in an effort to prevent harm to Florida consumers. The impairment framework has been an effective tool in preventing, or minimizing the impact of, insurer insolvencies. The current intervention framework for CCRCs is triggered only after a provider becomes insolvent, meaning it is unable to pay its obligations as they come due in the normal course of business. The establishment of the impairment framework will allow the OIR to begin partnering with a provider much sooner in order to mitigate or resolve any potential issues that would put resident interests in jeopardy. A provider would be considered impaired if it fails to hold the minimum liquid reserve. Additionally, a provider without mortgage or bond financing would be considered impaired if it does not maintain the specified level of days cash on hand, and a provider with mortgage or bond financing would be considered impaired if it does not maintain specified levels of days cash on hand and debt service coverage ratio. If the provider is a member of an obligated group having cross-collateralized debt, the obligated group's debt service coverage ratio and days cash on hand must be used to determine if the provider is impaired. The OIR may forego taking

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<sup>35</sup> Historically and currently, Florida CCRCs have entered bankruptcy despite being regulated as a specialty insurer in Florida and despite the federal Bankruptcy Code precluding insurance companies from being a debtor in bankruptcy.

action for up to 180 days after an impairment occurs if the OIR finds there is a reasonable expectation that the impairment may be eliminated within the 180-day period.

Sections 651.022 and 651.023, F.S., are amended to prohibit the OIR from approving an application for a provisional COA or COA if it includes in the financing plan any encumbrance on renewal or replacement reserves required by ch. 651, F.S.

Section 651.114, F.S., is amended to require that a provider, determined by the OIR to not be in compliance with ch. 651, F.S., submit to the OIR and the Continuing Care Advisory Council a plan for obtaining compliance with ch. 651, F.S., and solvency. The bill clarifies that the OIR is not prohibited from taking other regulatory action while a corrective action plan is under review. One CCRC in recent years successfully delayed receivership proceedings by asserting that the OIR was prohibited from further action. Although a court ultimately rejected the assertion, it is beneficial to make such clarification.

Section 651.114, F.S., is also amended to expand the circumstances under which OIR's remedial rights are not subordinated to the rights of a trustee or lender. Those circumstances include the following:

- The provider engaged in the misappropriation, conversion, or illegal commitment or withdrawal of minimum liquid reserve or required escrowed funds;
- The provider refused to be examined by the OIR; or
- The provider refused to produce any relevant accounts, records, and files requested as part of an examination.

Even if the OIR's remedial rights are suspended, an impaired provider must make available to the OIR copies of any corrective action plan approved by the trustee or lender to cure the impairment.

Section 651.071, F.S., is amended to state that resident contracts are Class 2 claims (policyholder loss claims) in the event of receivership or liquidation. This would put continuing care contracts in priority just behind secured creditors. Currently, in the event of receivership, continuing care contracts would receive a lower priority alongside unsecured creditors.

Section 651.1065, F.S., is created to require an impaired or insolvent provider to receive prior approval of the OIR before writing new contracts if its proprietor, general partner, member, officer, director, trustee, or manager knows, or reasonably should know, that the CCRC is impaired or insolvent, even if the provider has not been formally suspended. This would help to protect potential residents who may be considering investing substantial funds into the purchase of a CCRC contract. The OIR will have discretion to allow the issuance of new contracts where safeguards are adequate. Violating this section is a felony of the third degree, which is consistent with regulations for other entities.

### *Management*

The definition of "manager", "management", or "management company" is codified, and accompanying provisions close a loophole that has allowed management serving without a written contract to evade regulation. Currently, r. 690-193.002(13), F.A.C., defines a manager or management company as a person who agrees to administer the day-to-day activities of a facility pursuant to a written contract with the provider. However, the rule does not address situations where a manager or management company does not have a written contract with the provider. The bill requires that management contracts be in writing and that the provider will not be subject to a penalty or fee if such contract is cancelled upon issuance of an order by the OIR requiring removal of the manager or management company.

Section 651.043, F.S., is created to allow for disapproval and removal of unqualified management if the OIR finds, for example, that management is incompetent or untrustworthy or that management is affiliated with a person who has a history of involvement with business operations that have been marked by manipulation of assets or accounts or by bad faith, to the detriment of residents,

stockholders, investors, creditors, or the public. Currently, the OIR does not have authority to disapprove unaffiliated management except by taking action against the COA of the provider. This section allows providers to hire management when needed while requiring proper vetting of managers and management companies. To prevent actions that are detrimental to residents, the bill would also allow the OIR to institute an administrative proceeding in the event a disapproved manager is not timely removed.

#### *Examinations and Duty of Providers to Cooperate with the OIR*

Section 651.105, F.S., is amended to require that a CCRC provider give the OIR, upon request, documents and information for persons and entities related to the provider or facility if such persons or entities have a contractual or financial relationship with the provider or facility. The books and records of related entities often impact the financial condition of the CCRC provider and may be relevant to the ability of the CCRC to provide residents with the contracted level of care. One CCRC in recent years challenged the OIR on whether the OIR had authority to obtain books and records of affiliates. The bill specifies that the provider has a duty to respond to written correspondence from the OIR and to provide data, financial statements, and pertinent information as requested by the OIR. The bill also specifies that the OIR would have standing to petition for injunctive relief to compel access to or production of such documents and information.

Sections 651.013 and 651.105, F.S., are amended to add references to s. 624.318, F.S., which applies generally to insurers, in order to clarify the duty of every person being examined, and its officers, attorneys, employees, agents, and representatives, to “make freely available” to the OIR the accounts, records, documents during an examination or investigation. Section 624.318, F.S., also specifies that “any individual who willfully obstructs the department, the office, or the examiner in the examinations or investigations authorized by this part is guilty of a misdemeanor.” This proposal adds consequences to a person’s refusal to produce records upon request, as happened with one CCRC in recent years.

#### *Records Retention and Storage*

The definition of “records” is amended and clarified to include all documents and correspondence regardless of the physical form, characteristics, or means of transmission. The current definition refers to “permanent” records without specifying how permanence is determined, thus leaving open the possibility that providers could simply declare a record as nonpermanent in order to allow deletion.

Section 651.051, F.S., is amended by clarifying that all records and assets be maintained in the state unless prior written approval from the OIR allows for the removal. It also permits electronic storage of records on a web-based, secured storage platform so long as the records are readily accessible to the OIR. One CCRC in recent years created and maintained documents and records outside of the state, and the OIR was not able to gain access to them.

#### *Service of Process*

Section 651.013, F.S., is amended by adding references to ss. 624.307 and 624.422, F.S., in order to clarify that CCRCs must appoint the Florida Chief Financial Officer for the purposes of service of process and to clarify the role of the DFS’s Division of Consumer Services for the purposes of consumer complaints. These provisions are applicable to other insurance licensees, as well.

#### *Increased Transparency to Residents*

The bill creates a number of new requirements for the provider to give notice to the residents or residents’ council. These would help residents and prospective residents to remain apprised of the status and stability of the provider and to take action to protect their interests.

Under current law, the OIR receives advance notice of new financing and receives financing documents after the transaction closes, and the residents' council receives notice of all financing documents filed with the OIR. Although the OIR receives advance notice of a financing transaction, the OIR has no authority to disapprove or otherwise intervene in the financing transaction if it considers it a hazardous transaction. The amendments to ss. 651.019 and 651.091(2), F.S., shift the notice requirements so that financing documents are first received by the residents' council. A provider will be required to provide to the residents' council, at least 30 days before the closing date of the transaction, a general outline of the amount and terms of the transaction and the intended use of proceeds for any new financing or refinancing. This will allow residents the ability to object to financing transactions that concern them. Additionally, it will remove the illusion that the OIR can prevent a provider from securing new financing, additional financing, or refinancing that may be hazardous to the residents.

Section 651.091(2), Florida Statutes, is amended to require the provider to furnish the following information to the chair of the residents' council: a notice of the issuance of any examination reports, a notice of the initiation of any legal or administrative proceedings by the OIR or the DFS, a notice of any change in ownership filing submitted to the OIR, and any master plans approved by the provider's governing board and any plans for expansion or phased development. Additionally, a provider must post in a prominent place in the facility a notice that contains the OIR's website and phone number and the website and toll-free consumer helpline for the DFS's Division of Consumer Services. The notice must also state that either the OIR or DFS's Division of Consumer Services may be contacted for the submission of inquiries and complaints with respect to potential violations of law.

Section 651.091(3), F.S., is amended to require the following disclosures to prospective residents: a notice of the issuance of any examination reports; a notice of the initiation of any legal or administrative proceedings by the OIR or the DFS; notice of a resident's 7-day right to rescind the contract and that, after the expiration of the 7-day period, the entrance fee is the property of the provider; a statement that distribution of the provider's assets or income may occur or a statement that such distribution will not occur; and a disclosure of any holding company system or obligated group of which the provider is a member.

Section 651.055(3), F.S., is amended to inform residents, through a contract disclosure, that CCRC facilities in Florida are regulated by the OIR but that there is no guaranty fund to ensure that residents of insolvent CCRC providers are protected as to the ongoing provision of continuing care services or as to a refund of any portion of their entrance fee.

In addition, amendments to s. 651.111, F.S., provide an expanded process for resident complaints against providers, including a requirement that the OIR provide a written acknowledgement of any complaint within 15 days of receipt of the complaint and a written statement to the complainant specifying any violations of law and any actions taken.

### *Applications*

Licensing Applications – The bill creates s. 651.0215, F.S., to provide a consolidated application process, including requirements for handling escrowed funds, in order for an applicant to obtain a COA without first obtaining a provisional COA. This section allows an applicant to avoid the current provisional COA reservation phase in exchange for escrowing 100 percent of all resident funds (reservation deposits and entrance fees) until after the facility is constructed and the provider qualifies for release of the escrowed funds.

The bill amends the statute relating to an application for a provisional COA, s. 651.022, F.S., and the statute relating to an application for a COA, s. 651.023, F.S., to clarify that an applicant must disclose material changes that occur while a provisional COA or COA application is pending before the OIR, which is consistent with other requirements in the Insurance Code. The requirements for a provisional COA and COA application are amended such that the feasibility study must show projections for the first five years of operations. For COA applications, the bill lowers the reservation deposit requirements

from 10 percent of the entrance fee to the lower of 10 percent of the entrance fee or \$40,000. The bill also removes the requirement, though leaves the option, for a CCRC to assess a forfeiture fee equal to 2 percent of the entrance fee if the prospective resident cancels their reservation after 30 days for reasons that are within the control of the resident.

The bill amends s. 651.125, F.S., to clarify that it is a felony of the third degree for any person to maintain, enter into, or perform any continuing care or continuing care at-home contract without actually having a valid provisional COA or COA; one may not avoid such criminal liability by simply being in pursuance of a COA.

Acquisition Applications – The bill clarifies in s. 651.024, F.S., that the assumption of the role of a general partner of a CCRC or the assumption of ownership, or possession of, or control over, 10 percent or more of a provider's assets requires an acquisition filing. In the case of one CCRC in recent years, the CCRC had a limited partnership structure, and in early 2014 there was a change in the limited partners. The OIR's position, requiring a person acquiring the general partnership in a CCRC to file an acquisition application, was upheld in litigation. Codifying the ruling in statute will make this requirement clear to those seeking to acquire partnership interests in the future.

Section 651.0245, F.S., is created in order to provide a streamlined application process for simultaneously acquiring a facility that is operating under a subsisting COA and obtaining a COA to engage in the business of providing continuing care at the acquired facility. Under current law, if a person wants to acquire an existing facility and become the provider, as well, they must submit an acquisition application, a provisional COA application, and a COA application. This proposed new statute streamlines the application process by creating a single combined application and removing the requirement for an applicant to file three separate filings. The language used for this hybrid acquisition statute comes directly from the existing application sections (ss. 628.4615, 651.022, and 651.023, F.S.) but eliminates duplicate requirements.

The bill establishes that a Schedule 13G form may be filed in lieu of a disclaimer of control or acquisition application. For situations where a parent company of a CCRC provider is publicly traded, this change would allow the filing of a 13G in lieu of a disclaimer of control or acquisition filing. A 13G is a SEC filing used to report a party's ownership of stock in a company. Insurers are able to use this filing, and some CCRCs have requested that the OIR accept such filings from them.

Expansion Applications – The existing law on expansions requires a provider to submit an expansion application to the OIR if the expansion will result in an increase of 20 percent or more additional units. A minimum of 30 percent of the new units must be reserved before an expansion application can be filed, but marketing of units may not begin before 50 percent of units are reserved. The bill resolves this conflict in the law by requiring only initial approval from the OIR to expand. This proposal is driven by multiple inquiries received from providers requesting guidance on this conflict. The bill creates s. 651.0246, F.S., which specifies the application process and information required to obtain such approval for expansion. This section also provides that automatic approval is granted for expansions up to 35 percent of the existing units if the provider exceeds the statewide median for days cash on hand, debt service coverage ratio, and total facility occupancy for two consecutive reporting periods. In order to obtain this automatic approval, the provider must submit a letter to the OIR indicating the planned number of units, the proposed sources and uses of funds, and an attestation that they understand and will comply with all minimum liquid reserve and escrow account requirements. The bill clarifies that the feasibility study required for expansion applications must be prepared by an independent consultant, which is consistent with the application requirements for a certificate of authority.

### *Financial Reporting*

Section 651.026, F.S., is amended to require that the provider annually submit management's calculation of the provider's debt service coverage ratio, occupancy, and days cash on hand for the current reporting period. The OIR is required to publish annually, by August 1, an industry

benchmarking report for the preceding calendar year that contains the median days cash on hand for all providers, median debt service coverage ratio for all providers, and median occupancy rate for all providers by setting (independent living, assisted living, skilled nursing, and the entire facility.)

Section 651.0261, F.S., is amended to require that, within 45 days after the end of each fiscal quarter, each provider submit a quarterly unaudited financial statement of the provider or of the facility, days cash on hand, occupancy, debt service coverage ratio, and a detailed listing of the assets maintained in the liquid reserve. This would allow the OIR to determine whether a regulatory action level event has been triggered or whether the provider is impaired. The OIR could then take action to assist providers who may fall below the defined thresholds. The last quarterly statement for a fiscal year is not required if a provider does not have pending a regulatory action level event or a corrective action plan. The quarterly reporting requirement may be waived by the upon a provider's written request if the provider is accredited without conditions or stipulations or if the provider has obtained an investment grade credit rating from a United States credit rating agency. However, the OIR may not waive the quarterly reporting requirement for any provider that is impaired, or does not comply with a requirement for debt service coverage ratio, days cash on hand, or average facility occupancy, and may not waive the quarterly reporting requirement for at least 12 months following the end of such condition.

Section 651.0261, F.S., is also amended to codify the current discretionary monthly reporting rule into statute. The bill permits the OIR to require monthly reporting of certain information if it finds that such information is needed to properly monitor the financial condition of a provider or facility, or is otherwise needed to protect the public interest. The bill also specifies certain circumstances under which monthly filings may be required, such as a provider being subject to delinquency, receivership, or bankruptcy proceedings. Monthly filings would allow the OIR to monitor the status of a provider.

Section 651.028, F.S., currently permits the OIR to waive any requirement of ch. 651, F.S., for a provider that is accredited without stipulations or conditions by a process found by the OIR to be acceptable and substantially equivalent to the provisions of ch. 651, F.S. The OIR has typically used this provision to waive the requirement to file quarterly reports for those CCRCs that are accredited by a national accrediting organization. The bill repeals s. 651.028, F.S., to ensure a more uniform adherence to quarterly reporting requirements and remove the regulatory flexibility previously provided to OIR.

#### *Reserving and Escrow Requirements*

Section 651.035, F.S., which contains minimum liquid reserve requirements, is amended to require providers that do not have a mortgage loan or other financing on the facility, to deposit monthly in escrow one-twelfth of their annual property tax liability and to pay property taxes out of such escrow. The bill provides a framework for CCRCs to request a withdrawal of reserve funds and grants the OIR authority to require the transfer of reserve funds into the custody of the DFS's Bureau of Collateral Management if the OIR finds that the provider is impaired or insolvent in order to ensure the safety of those assets. Any increase in the minimum liquid reserve must be funded no later than 61 days after the minimum liquid reserve calculation is due to be filed. If the minimum liquid reserve is less than the required minimum amount at the end of any fiscal quarter due to a change in the market value of the invested funds, the provider must fund the shortfall within 10 business days.

Section 651.033, F.S., contains requirements for a provider's escrow account and is amended to clarify the duties that apply to escrow agents, including the prohibition that an escrow agent may not release or otherwise allow the transfer of funds without the written approval of the OIR, unless the withdrawal is from funds in excess of specified statutory requirements. Additionally, the bill will permit an escrow account to be held in a national bank that has a branch in this state.

## *Suspension and Revocation*

Section 651.106, F.S., is amended to add the following to the list of grounds for suspension or revocation of a COA:

- Impairment.
- The ownership, control, or management of the organization includes any person:
  - Who is not reputable and of responsible character;
  - Who is so lacking in management expertise as to make the operation of the provider hazardous to potential and existing residents;
  - Who is so lacking in management experience, ability, and standing as to jeopardize the reasonable promise of successful operation;
  - Who is affiliated, directly or indirectly, through ownership or control, with any person or persons whose business operations are or have been marked by business practices or conduct that is detrimental to the public, contract holders, investors, or creditors, or by manipulation of assets, finances, or accounts or by bad faith; or
  - Whose business operations are or have been marked by business practices or conduct that is detrimental to the public, contract holders, investors, or creditors, or by manipulation of assets, finances, or accounts or by bad faith.
- The provider has not filed a notice of change in management, fails to remove a disapproved manager, or persists in appointing disapproved managers.
- The bill also expressly provides that the OIR may suspend or revoke a COA if owners, managers, or controlling persons violate the change in third-party management approval procedures or persist in appointing disapproved managers.

## *Immediate Final Orders*

Section 651.1141, F.S., is created to state that the following actions constitute an imminent and immediate threat to the public health, safety, and welfare of the residents of the state:

- The installation of a general partner of a provider or assumption of ownership or possession or control of 10 percent or more of a provider's assets in violation of s. 651.024, F.S., or 651.0245, F.S.;
- The removal or commitment of 10 percent or more of the required minimum liquid reserve funds in violation of s. 651.035, F.S.; or
- The assumption of control over a facility's operations in violation of s. 651.043, F.S.

If the Office finds that a person or entity is engaging or has engaged in one or more of the above activities it may issue a final order under s. 130.569, F.S., directing such person or entity cease and desist or suspending a CCRC provider's COA.

Section 120.569, F.S., applies when the substantial interests of a party have been affected by an agency action. Notification to the parties of the agency action, including a final order, is required. The notice must inform the party of any administrative hearing or judicial review available, the appropriate procedure to follow to obtain the hearing or judicial review, and the applicable time limits. A notice of appeal or petition for review must be filed within 30 days after the order being appealed is issued.

A court may stay the enforcement of an agency action. If the agency's action either suspends or revokes a license, then a stay will be granted as a matter of right unless the agency petitions the court for a determination that staying the enforcement would constitute a probable danger to the health, safety, or welfare of the state. If the court grants a stay of the legal proceedings, it must specify if there are any conditions. However, merely filing a petition for appeal or review does not itself stay the agency action.<sup>36</sup>

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<sup>36</sup> S.120.68(3),F.S.

### *Continuing Care Advisory Council*

Section 651.121, F.S., contains requirements for membership of the Continuing Care Advisory Council. The statute is amended to remove the requirements that the members be residents of this state. The three council members representing facilities may be “representatives” rather than “administrators” of facilities. Additionally, the designated attorney council member is deleted due to the fact of vacancy for some time, and a resident council member is added in its place.

### *Life Plan Communities*

Some CCRC providers may prefer to brand themselves as a “life plan community” rather than a “continuing care retirement community.” Thus, s. 651.095, F.S., is amended to prohibit a person from using the terms “life plan” and “life plan at-home” in advertisements unless such persons are licensed under ch. 651, F.S. Additionally, the contract disclosure required by s. 651.055(3), F.S., is amended to reference this new name by which CCRCs may be known.

Except as otherwise expressly provided in the bill, the bill takes effect January 1, 2020.

#### B. SECTION DIRECTORY:

- Section 1.** Amends s. 651.011, F.S., relating to definitions.
- Section 2.** Amends s. 651.012, F.S., relating to exempted facility; written disclosure of exemption.
- Section 3.** Amends s. 651.013, F.S., relating to chapter exclusive; applicability of other laws.
- Section 4.** Amends s. 651.019, F.S., relating to new financing, additional financing, or refinancing.
- Section 5.** Amends s. 651.021, F.S., relating to certificate of authority required.
- Section 6.** Creates s. 651.0215, F.S., relating to consolidated application for a provisional certificate of authority and a certificate of authority; required restrictions on use of entrance fees.
- Section 7.** Amends s. 651.022, F.S., relating to provisional certificate of authority; application.
- Section 8.** Amends s. 651.023, F.S., relating to certificate of authority; application.
- Section 9.** Amends s. 651.024, F.S., relating to acquisition.
- Section 10.** Creates s. 651.0245, F.S., relating to application for the simultaneous acquisition of a facility and issuance of a certificate of authority.
- Section 11.** Creates s. 651.0246, F.S., relating to expansions.
- Section 12.** Amends s. 651.026, F.S., relating to annual reports.
- Section 13.** Amends s. 651.0261, F.S., relating to quarterly and monthly statements.
- Section 14.** Repeals s. 651.028, F.S., relating to accredited or certain credit-rated facilities.
- Section 15.** Amends s. 651.033, F.S., relating to escrow accounts.
- Section 16.** Creates s. 651.034, F.S., relating to financial and operating requirements for providers.

- Section 17.** Amends s. 651.035, F.S., relating to minimum liquid reserve requirements.
- Section 18.** Creates s. 651.043, F.S., relating to approval of change in management.
- Section 19.** Amends s. 651.051, F.S., relating to maintenance of assets and records in state.
- Section 20.** Amends s. 651.055, F.S., relating to continuing care contracts; right to rescind.
- Section 21.** Amends s. 651.057, F.S., relating to continuing care at-home contracts.
- Section 22.** Amends s. 651.071, F.S., relating to contracts as preferred claims on liquidation or receivership.
- Section 23.** Amends s. 651.091, F.S., relating to availability, distribution, and posting of reports and records; requirement of full disclosure.
- Section 24.** Amends s. 651.095, F.S., relating to advertisements; requirements; penalties.
- Section 25.** Amends s. 651.105, F.S., relating to examination.
- Section 26.** Amends s. 651.106, F.S., relating to grounds for discretionary refusal, suspension, or revocation of certificate of authority.
- Section 27.** Creates s. 651.1065, F.S., relating to soliciting or accepting new continuing care contracts by impaired or insolvent facilities or providers.
- Section 28.** Amends s. 651.111, F.S., relating to requests for inspections.
- Section 29.** Amends s. 651.114, F.S., relating to delinquency proceedings; remedial rights.
- Section 30.** Creates s. 651.1141, F.S., relating to immediate final orders.
- Section 31.** Amends s. 651.121, F.S., relating to Continuing Care Advisory Council.
- Section 32.** Amends s. 651.125, F.S., relating to criminal penalties; injunctive relief.
- Section 33.** Provides an effective date of January 1, 2020, except as otherwise expressly provided in the bill.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments section below.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may result in increased costs to CCRC providers by requiring more filings and reports to the OIR as well as more disclosures to current and prospective residents. However, the bill consolidates and streamlines some application processes, thereby decreasing costs, for CCRC providers. As for CCRC residents, better regulatory oversight of CCRCs may lead to fewer losses as a result of a facility or provider filing for bankruptcy, which has resulted in residents receiving little to no refund of their entrance fees. Given the difficulty in quantifying any effect on costs to CCRC providers and quantifying avoidance of future losses to CCRC residents, the impact on the private sector is indeterminate.

D. FISCAL COMMENTS:

The bill modifies an existing unranked third degree felony (s. 651.125, F.S.) and creates an unranked third degree felony (s. 651.1065, F.S.). To the extent that persons are arrested for, charged with, and convicted of, the criminal offenses modified and created in the bill, this bill will have an indeterminate, but expected to be insignificant, fiscal impact on state and local governments as these cases are processed through the criminal justice system. The Criminal Justice Impact Conference has not yet reviewed the CS/HB 1033.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill will require significant revisions to the rules and forms governing CCRCs to conform to the statutory changes.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 26, 2019, the Insurance & Banking Subcommittee considered a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute made the following changes to the bill:

- Conforms the House bill to the Senate bill.
- Provides that a regulatory action level event is triggered upon the occurrence of any two, rather than just one, of the financial metrics defined in the bill (days cash on hand, debt service coverage ratio, and occupancy).
- Permits a regulatory action level event to be triggered by quarterly reporting of the financial metrics rather than only by annual reporting of the financial metrics.

- Removes from various application processes language that purports to prohibit the OIR from extending the application timeline if the applicant provides additional requested information within 5 business days.
- Removes language that would have limited the categories of persons who have standing to challenge the OIR's decision regarding release of escrow funds in the course of the process relating to the consolidated application for a provisional COA and COA.
- Adds to the statute relating to the expansion application a requirement of a continuing duty to report material changes.
- Amends the date by which the OIR must publish the industry benchmarking report.
- Provides circumstances under which the OIR may not waive the quarterly reporting requirement.
- Lengthens the amount of time within which the OIR must approve or disapprove a corrective action plan.
- Provides that any increase in the minimum liquid reserve must be funded not later than 61 days after the minimum liquid reserve calculation is due to be filed.
- Lengthens the amount of time within which the OIR may disapprove new management.
- Adds a contract disclosure regarding the fact that there is no guaranty fund to ensure that residents of insolvent continuing care providers are protected as to the ongoing provision of continuing care services or as to a refund of any portion of their entrance fee.
- Removes a provision that would have precluded the OIR from using any recommendations made by an actuary as a measure of performance if the provider voluntarily contracted with the actuary for the actuarial study. This removed provision would have also precluded the OIR from requesting as part of an examination documents associated with the actuarial study that are marked "restricted distribution" if the study is not required by ch. 651, F.S.
- Amends the immediate final order authority to provide a legislative finding that certain actions constitute an imminent and immediate danger to the public health, safety, and welfare of residents of this state. The OIR is authorized to not only issue a cease and desist order but also to suspend a COA upon the occurrence of any of the defined actions constituting the basis for an immediate final order.
- Makes other technical and clarifying changes.

On April 3, 2019, the Health and Human Services Committee adopted two amendments to the committee substitute. The first clarifies the calculation for one of the three key indicators that can trigger a regulatory action level event under the bill: if the average occupancy of a facility over the 12-month period preceding the filing of an annual financial report is below 80 percent, a regulatory action may be triggered.

The second amendment limits the OIR's ability to waive quarterly reporting requirements established by the bill, and repeals S. 651.028, F.S., which allowed OIR to waive these requirements for CCRCs meeting certain accreditation standards. The amendment also requires CCRCs that are subject to a regulatory action level event to submit an explanation of the circumstances and a description of corrective actions to OIR when submitting a quarterly financial statement.

The staff analysis has been updated to reflect the committee substitute as adopted by the Health and Human Services Committee.