The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL:	SB 622
INTRODUCER:	Senator Yarborough
SUBJECT:	Continuing Care Contracts
DATE:	April 4, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	**Pre-meeting**
2.			AEG	
3.			FP	

I. Summary:

SB 622 revises many provisions of ch. 651, F.S., of the Insurance Code governing continuing care retirement communities (CCRC), which are regulated by the Office of Insurance Regulation (OIR). The CCRCs provide lifelong housing, household assistance, and nursing care in exchange for a significant entrance fee and monthly fees. A CCRC can include an independent living apartment or house, as well as an assisted living facility or a nursing home. The CCRCs may also offer at-home programs that provide residents CCRC services while continuing to live in their own homes until they are ready to move to the CCRC. The CCRCs appeal to older Americans because they offer an independent lifestyle for as long as possible but also provide the reassurance that, as residents age or become unable to care for themselves, they will receive the additional care they need. The bill provides the following changes relating to CCRCs:

Regulatory Oversight

- Revises standards and requirements of a feasibility study that must be submitted to the OIR as part of an expansion application. The bill no longer requires an independent certified public accountant to prepare an independent evaluation or examination opinion of the underlying assumptions used as a basis for the forecasts or projections in the study and that the assumptions are reasonable and proper and the project as proposed is feasible. Instead, a feasibility study can be prepared by an independent consultant. The scope of the study is revised so that the preparer would no longer need to certify that the study's assumptions are reasonable and proper, and the project, as proposed, is feasible.
- Makes it easier for a provider to access escrowed resident fees as part of an expansion, allowing access to the escrowed funds once 75 percent of the proposed units have been reserved rather than once payment in full has been received for 50 percent of the units.
- Reduces the time for OIR to approve or deny an expansion application from 45 days to 30 days from the date the application is deemed complete.
- Specifies that when a provider is using an escrow account held pursuant to a trust indenture or mortgage lien to meet its minimum liquid reserve requirement, the trust indenture, loan

agreement, or escrow agreement must require that the provider, trustee, lender, escrow agent, or another person designated to act in their place notify OIR in writing at least 10 days before the withdrawal of any portion of the debt service reserve funds required to meet the provider's minimum liquid reserve requirement. Further, the notice must include an affidavit sworn to by the provider, the trustee, or a person designated to act in their place which includes the amount of the scheduled debt service payment, the payment due date, the amount of the withdrawal, the accounts from which the withdrawal will be made, and a plan with a schedule for replenishing the withdrawn funds.

- Removes the requirement for a provider to obtain prior approval from OIR to withdraw funds from a debt service reserve required to be escrowed pursuant to a trust indenture of mortgage lien if the funds will be used to pay delinquent principal and interest payments.
- Expands the types of financial institutions that can provide a letter of credit to a provider to satisfy its minimum liquid reserve requirements by adding state-chartered financial institutions as well as federally-chartered financial institutions.
- Allows a provider to assess a cancellation penalty against a person who signs residency contract and rescinds it within seven days if the person had previously signed a reservation agreement and did not cancel it within 30 days.
- Requires OIR examinations of CCRCs to be commenced within 12 months after the end of the most recent fiscal year covered by the examination. Further, the scope of the examination is limited to events subsequent to the end of the most recent fiscal year and the events of any prior period, which affects the present financial condition of the provider.

Transparency for Residents

- Clarifies that a resident is eligible to participate in residents' council matter, including elections, if the person meets the definition of a resident, as provided in s. 651.011, F.S.
- Requires a provider that owns or operates more than one facility in Florida to have a designated resident representative at each facility.
- Requires that the designated resident representative be notified by the provider at least 14 days in advance of any meeting of the full governing body at which the annual budget and proposed changes in resident fees or services are on the agenda or will be discussed so that the resident can attend and participate in that portion of the meeting.
- Requires each facility to provide written notice to the president or chair of the residents' council within 10 business days after a change in management.
- Requires each facility to provide a copy of the OIR final examination report and corrective action plan, if applicable, to the president or chair of the residents' council within 60 days after issuance of the report.

II. Present Situation:

Continuing Care Retirement Communities (CCRC)

A provider[1] or a CCRC offers shelter and nursing care or personal services upon the payment of an entrance fee.[2] The CCRCs offer a transitional approach to the aging process, accommodating

[1] Section 651.011(23), F.S., defines a provider as an owner or operator that provides continuing care.
[2] Section 651.011(13), F.S.

residents' changing level of care. A CCRC can include an independent living apartment or a house, as well as an assisted living facility or a nursing home. The CCRCs may also offer at-home programs that provide residents CCRC services while continuing to live in their own homes until they are ready to move to the CCRC.[3] A CCRC enters into contracts with seniors (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.[4]

Regulation of CCRCs

In Florida, regulatory oversight responsibility of CCRCs is shared between the Agency for Health Care Administration (AHCA) and the Office of Insurance Regulation (OIR).[5] The OIR regulates CCRC providers[6] 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.[7] There are currently 70 licensed continuing care retirement communities in Florida.[8]

Oversight by the Office of Insurance Regulation

The OIR has primary responsibility to license, regulate, and monitor the operation of CCRCs and to determine facilities' financial condition and the management capabilities of their managers and owners.[9] Continuing care services are governed by a contract between the facility and the resident of a CCRC, which is subject to approval by the OIR.[10] As part of the regulation of CCRCs, OIR reviews applications for licensure, reviews expansion applications, conducts solvency monitoring through the review of financial statements and other documents, monitors minimum liquid reserve levels, and conducts examinations of each facility every three to five years. 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 (Certificate of Authority) or COA. One may not avoid such criminal liability by simply being in pursuance of a COA.[11]

In order to operate a CCRC in Florida, a provider must generally obtain from the OIR a certificate of authority predicated upon first receiving a provisional certificate of authority.[12] A provisional certificate of authority is issued once a provider meets the requirements prescribed in s. 651.023, F.S. The application process for a provisional certificate of authority and a certificate of authority involves submitting audited financial reports, feasibility studies, copies of contracts,

[3] Sections 651.057 and 651.118, F.S.
[4] Office of Insurance Regulation, Analysis of SB 622 (Feb. 15, 2023).
[5] Chapter 651, F.S., and s. 20.121, F.S.
[6] Section 651.011(12), F.S., a provider means an owner or operator.
[7] Agency for Health Care Administration available at Consumer Guides | FloridaHealthFinder.gov (last viewed Mar. 21, 2023) and s. 651.118, F.S.
[8] Office of Insurance Regulation, Summary and Comparison of CCRC Data (2022) Re-Open Florida Task Force Meeting: Insurance (floir.com) last visited (Mar. 23, 2023).
[9] See ss. 651.021, 651.22, and 651.023, F.S.
[10] Sections 651.055 and 651.057, F.S.
[11] Section 651.125, F.S,
[12] Section 651.022, F.S.

and other information.[13] Further, the applicant must provide evidence that the applicant is reputable and of responsible character.[14]

The issuance of a provisional COA allows the applicant to collect entrance fees and reservation deposits from prospective residents. All entrance fees and reservation deposits must be placed in an escrow account or on deposit with Department of Financial Services (DFS).[15] The requirements for a provisional COA application and a COA application[16] require that the feasibility study must show projections for the first five years of operations. For a provisional COA, the preparer of the feasibility study may be the provider or a contracted third party.[17] Like the provisional COA application, an application for a COA requires the submission of various information, such as an audited financial report. For a COA application, a feasibility study must be prepared by an independent consultant. If the feasibility study is prepared by an independent certified public accountant (CPA), it must contain an examination opinion[18] or a compilation report[19] containing financial forecasts and projections.

A COA may not be issued until documentation evidencing that the project has a minimum of 50 percent of the units reserved for which the provider is charging an entrance fee is provided to the OIR. For a COA application, in order for a unit to be considered reserved, the provider must collect a minimum deposit of the lesser of $40,000 or 10 percent of the entrance fee.[20]

Consolidated Application for a Provisional Certificate of Authority and a Certificate of Authority Applications – Section 651.0215, F.S., provides 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. The applicant must provide a feasibility study prepared by an independent consultant[21] as well as audited financial statements,[22] and other specified information to the OIR. If the feasibility study is conducted by an independent certified public accountant, it must contain an examination report, or a compilation report[23] acceptable to the OIR.

[13] See ss. 651.021-651.023, F.S.
[14] Section 651.022(2)(c), F.S.
[15] Section 651.023(5), F.S.
[16] Section 651.023, F.S.
[17] Section 651.022 (3)(j), F.S., provides that the preparer of the feasibility study for a provisional COA may be the provider or a contracted third party.
[18] This is undefined term in ch. 651, F.S.
[19] An audit is the highest level of assurance service that a CPA performs and is intended to provide a user comfort on the accuracy of the financial statements. The CPA performs procedures in order to obtain "reasonable assurance" (defined as a high but not absolute level of assurance) about whether the financial statements are free from material misstatement. In contrast, the CPA does not obtain any assurance for a compilation because the CPA is not required to verify the accuracy or completeness of the information provided or otherwise gather evidence for the purposes of expressing an audit opinion or a review conclusion. The compilation report states that the CPA did not audit or review the financial statements and accordingly does not express an opinion, a conclusion or provide any assurance on them. See American Institute of Certified Public Accountants financial-statement-services-guide.pdf (aicpa.org) (last visited Mar. 18, 2023)
[20] Section 651.023(4)(b), F.S.
[21] Section 651.0215(2)(b), F.S.
[22] Section 651.0215(2)(f), F.S.
[23] *Supra* FN 19.

Expansion Applications – Section 651.0246, F.S., specifies the application process and information required to obtain approval from OIR 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 the most recent 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.

A feasibility study, prepared by an independent certified public accountant, is required to be submitted as part of an expansion application. The study includes an independent evaluation and examination opinion as to whether the assumptions contained in the study are reasonable and that the project is feasible.[24] A minimum of 75 percent of the moneys paid for all or any part of an initial entrance fee or reservation deposit collected for units in the expansion and 50 percent of the moneys paid for all or any part of an initial fee collected for continuing care at-home contracts in the expansion must be placed in an escrow account or on deposit with DFS, as prescribed in s. 651.033, F.S.[25]

The provider may secure release of the moneys held in escrow within 7 days after the receipt by the OIR of an affidavit by the provider that the following conditions have been satisfied:

- A certificate of occupancy has been issued.
- The provider has received payment in full for at least 50 percent of the total units of a phase or of the total of the combined phases constructed.
- Documents evidencing that commitments have been secured or that the provider's long-term financing has been approved by the OIR.
- Documents evidencing that the provider has sufficient funds to meet the minimum liquid reserve requirements of s. 651.035, F.S., which may include funds deposited in the initial entrance fee account.[26]

Within 30 days after receipt of an application for expansion, the OIR must examine the application and notify the applicant in writing, requesting any additional information.[27] Within 15 days after the OIR receives all the requested information, the OIR must notify the applicant in writing that the requested information has been received.[28] If the OIR fails to notify the applicant within the 15-day period, the application is deemed complete for purposes of the review.[29] Within 45 days of the OIR deeming the application complete, the OIR must complete its review and approve an expansion and issue a determination that the application meets all of the requirements of law.[30]

[24] Section 651.0246(2)(a), F.S.
[25] Section 651.0246(3), F.S.
[26] Section 651.0246((4), F.S.
[27] Section 651.0246(5)(a), F.S.
[28] *Id*.
[29] *Id*.
[30] Section 651.0246(6), F.S.

Continuing Care Contracts

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 in the CCRC.[31] However, some contracts may exceed this requirement and contain minimum refund provisions that guarantee a refund of a specified portion of the entrance fee upon the death of the resident or termination of the contract regardless of the length of occupancy by the resident.[32] The CCRC may assess a forfeiture fee equal to 2 percent of the entrance fee if the resident cancels his or her reservation after 30 days for reasons that are within the control of the resident.[33]

Reserving and Escrow Requirements

Section 651.035, F.S., which contains minimum liquid reserve requirements, requires 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. Each facility is required to maintain a minimum liquid reserve for operations, debt service, and facility upkeep based on the facility's expenses and debt service obligations. OIR approval is required to be obtained prior to withdrawing all or a portion of the funds used to satisfy a facility's minimum liquid reserve requirement. Facilities who want to use a letter of credit to fund their minimum liquid reserve are limited to those institutions that participate in the State of Florida Treasury Certificate of Deposit Program.[34]

A provider may withdraw funds held in escrow without the approval of the OIR if the amount held in escrow exceeds the requirements of s. 651.035, F.S., and if the withdrawal will not affect compliance with this section.[35] Any other proposed withdrawals are subject to approval by the OIR. Within 30 days after a filing for such a request for withdrawal is deemed complete, the OIR must notify the provider of its approval or disapproval of the request.[36]

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.[37] 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.[38] Further, the section authorizes OIR authority to require the transfer of reserve funds into the custody of the DFS Bureau of Collateral Management if OIR finds that the provider is impaired or insolvent in order to ensure the safety of those assets.[39]

Section 651.033, F.S., contains requirements for a provider’s escrow account and the duties that apply to escrow agents, including the prohibition that an escrow agent may not release or

[31] Section 651.055, F.S.
[32] Supra FN 4.
[33] *Id.*
[34] Section 651.035(5), F.S.
[35] Section 651.035(7)(a), F.S.
[36] Section 651.035(7)(b), F.S.
[37] Section 651.035(10), F.S.
[38] Section 651.035(11), F.S.
[39] Section 651.035(8), F.S.

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.

Financial Reporting

Section 651.026, F.S., requires the provider to submit annually the management's calculation of the provider's debt service coverage ratio, occupancy, and days cash on hand. The OIR is required to publish on its website by August 1 of each year an industry 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., requires that each provider must 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 reserves within 45 days after the end of each fiscal quarter.[40] This information is intended for the OIR to use for monitoring the financial condition of a provider or facility on an ongoing basis. If a CCRC falls below the thresholds set for two or more of the key indicators (days cash on hand, debt service coverage ratio, or occupancy) at the time of the quarterly report, the CCRC must submit to the OIR an explanation of the circumstances and a description of the actions the CCRC will take to meet the requirements. The last quarterly statement for a fiscal year is not required if a provider does not have pending a regulatory action level event, an impairment, or a corrective action plan.

Section 651.0261, F.S., authorizes 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.[41] The section also specifies certain circumstances under which monthly filings may be required, such as a provider being subject to delinquency, receivership, or bankruptcy proceedings.[42]

Financial Indicators and Solvency Framework

Regulatory Action Level Event[43] – Section 651.034, F.S., provides a framework of required actions if a provider falls below specified levels of three key indicators at the time of the annual report: 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 at the time of the annual report, it is considered a "regulatory action level event":

- The provider's debt service coverage ratio is less than the greater of the minimum ratio specified in the provider's bond covenants or lending agreement for long-term financing or 1.20:1 as of the most recent annual report filed with the OIR; 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 OIR;
- The provider's days cash on hand is less than the greater of the minimum number of days cash on hand specified in the provider's bond covenants or lending agreement for long-term

[40] Section 651.0261(1), F.S.
[41] Section 651.0261(2), F.S.
[42] Section 651.0261(3), F.S.
[43] Section 651.011(25), F.S., defines "regulatory action level event."

financing or 100 days. 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 OIR; or,

- The occupancy of the provider's facility is less than 80 percent averaged over the 12-month period immediately preceding the annual report filed with the OIR.

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 a regulatory action level event has occurred. 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" or impairment" 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 is considered impaired if it fails to hold the minimum liquid reserve.[44] 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.[45] 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.[46] The OIR may forego taking 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., 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., requires that a provider, determined by the OIR to not be in compliance with ch. 651, F.S., must submit to the OIR and the Continuing Care Advisory Council a plan for obtaining compliance with ch. 651, F.S., and solvency. The OIR is not prohibited from taking other regulatory action while a plan for obtaining compliance or solvency is under review.

[44] Section 651.011(15)(a), F.S.
[45] Section 651.011(15)(b), F.S.
[46] Section 651.011(15), F.S.

Section 651.114, F.S., provides circumstances under which OIR's remedial rights are not subordinate 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 651.1065, F.S., requires 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's COA has not been formally suspended. This is intended to help protect potential residents who may be considering investing substantial funds to enter into 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.

Examinations of Providers

Section 651.105, F.S., requires OIR to examine at least once every 3 years any applicant for a COA and any provider engaged in the execution of care contracts or engaged in the performance of obligations under such contracts. If a provider is accredited under s. 651.028, F.S., such examinations must occur at least once every 5 years. Further, any duly authorized officer, employee, or agent of the office may have access to, and examine any records, with or without advance notice, to secure compliance with, or to prevent a violation of, any provision of this chapter.[47]

Rights of Residents; Transparency

Rights of Residents – The OIR is also authorized to discipline a facility for violations of residents' rights.[48] 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.[49]

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.[50] CCRCs are required

[47] Section 651.105(2), F.S.
[48] Section 651.083, F.S.
[49] *Id*.
[50] Section 651.081, F.S.

to maintain and make 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, and a summary of the most recent annual statement.[51]

Disclosures and Notices – Chapter 651 requires provider to give many types of notices to the residents or residents' council. These assists residents and prospective residents to remain apprised of the status and stability of the provider and to take action to protect their interests.

A provider is required 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.[52] 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 Division of Consumer Services.[53] The notice must also state that either the OIR or DFS 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., requires 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 that, if the resident does not exercise the right to rescind a continuing care contract within seven days after executing the contract, the resident's funds held in escrow will be released to 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. Additionally, the provider must obtain written acknowledgment that the prospective resident or his or her legal representative received the disclosures required by s. 651.091(3), F.S.

Section 651.055(3), F.S., requires that contracts with a resident disclose that CCRC facilities in Florida are regulated by the OIR. Additionally, the contract disclosure must state that "[t]he financial structure of a continuing care provider can be complex, and the decision to enter into a contract for continuing care is a long-term commitment between a resident and the continuing care provider. You may wish to consult an attorney or financial advisor before entering into such contract."

Section 651.111, F.S., provides for the handling of 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. Such additional procedures will keep residents better informed as to the status and outcome of a complaint.

[51] Section 651.091, F.S.
[52] Section 651.091(2), F.S.
[53] Section 651.091, F.S.

Continuing Care Advisory Council

Section 651.121, F.S., creates the council and provides membership and duties of the ten members comprising the council is an advisory contains requirements for membership of the Continuing Care Advisory Council. The members include three members representing facilities with active COAs, one representative of the business community, one representative of the financial community, a certified public accountant, and four residents who hold continuing care contracts with a facility certified in Florida.

Department of Financial Services' Oversight of CCRCs

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.[54] Typically, residents will contact the DFS Division of Consumer Services, which receives and resolves complaints involving products and persons regulated by the OIR or the DFS.[55]

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.[56] 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.

Emergency Powers of the Governor

The Governor is responsible for meeting the dangers presented to this state and its people by emergencies.[57] "Disaster" means any natural, technological, or civil emergency that causes damage of sufficient severity and magnitude to result in a declaration of a state of emergency by a county, the Governor, or the President of the United States.[58] Disasters are identified by the severity of resulting damage, as follows:

- "Catastrophic disaster" means a disaster that will require massive state and federal assistance, including immediate military involvement.
- "Major disaster" means a disaster that will likely exceed local capabilities and require a broad range of state and federal assistance.
- "Minor disaster" means a disaster that is likely to be within the response capabilities of local government and to result in only a minimal need for state or federal assistance.[59]

[54] Rules 69O-193.062 and 69O-193.063, F.A.C.
[55] Section 624.307, F.S.
[56] The Bankruptcy Code expressly provides that "a domestic insurance company" may not be the subject of a federal bankruptcy proceeding. 11 U.S.C. s. 109(b)(2). The exclusion of insurers from the federal bankruptcy court process is consistent with federal policy generally allowing states to regulate the business of insurance. See 15 U.S.C. s. 1012 (McCarran-Ferguson Act).
[57] Section 252.36(1), F.S.
[58] Section 252.34(2), F.S.
[59] *Id.*

The term, "emergency," means any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.[60]

The Governor may issue executive orders, proclamations, and rules and may amend or rescind them.[61] Such executive orders, proclamations, and rules shall have the force and effect of law. An executive order, a proclamation, or a rule must be limited to a duration of not more than 60 days and may be renewed as necessary during the duration of the emergency,[62] and identify whether the state of emergency is due to a minor, major, or catastrophic event.[63] If renewed, the order, proclamation, or rule must specifically state which provisions are being renewed.[64] In addition to any other powers conferred upon the Governor by law, she or he may:

> suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of any state agency, if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency.[65]

Commissioner of Insurance Regulation; Powers in a State of Emergency

When the Governor declares a state of emergency pursuant to s. 252.36, F.S., the commissioner may issue one or more general orders applicable to all insurance companies, entities, and persons, as defined in s. 624.04, that are subject to the Florida Insurance Code and that serve any portion of the area of the state under the state of emergency.[66] An order issued by the commissioner becomes effective upon issuance and continues for 120 days unless terminated sooner by the commissioner.[67] The commissioner may extend an order for one additional period of 120 days if he or she determines that the emergency conditions that gave rise to the initial order still exist. By concurrent resolution, the Legislature may terminate any order issued under this section.[68]

III. Effect of Proposed Changes:

Section 1 amends s. 651.011, F.S., to create definitions for the following terms:

- "Designated resident representative" means a resident elected by the residents' council to represent residents on matters related to changes in fees or services as specified in s. 651.085(2) and (3).

[60] Section 252.34(4), F.S.
[61] An example of an executive order issued by Governor DeSantis, relating to Hurricane Ian https://www.flgov.com/wp-content/uploads/2023/03/EO-23-60.pdf (Mar. 17, 2023) (last visited March 23, 2023).
[62] Section 252.36(1)(b), F.S.
[63] Section 252.36(4)(c), F.S.
[64] Section 252.36(6)(a), F.S.
[65] *Id.*
[66] Section 624.04, F.S., "Person" includes an individual, insurer, company, association, organization, Lloyds, society, reciprocal insurer or interinsurance exchange, partnership, syndicate, business trust, corporation, agent, general agent, broker, service representative, adjuster, and every legal entity.
[67] An example of an emergency order issued by the commissioner related to Hurricanes Nicole and Ian. SKM_80822111012460 (govdelivery.com) (Nov. 10, 2022) (last visited Mar. 23, 2023).
[68] Section 252.63, F.S.

- "Residents' council" means an organized body representing the resident population of a certified facility. A residents' council shall serve as a liaison between residents and the appropriate representative of the provider.

Section 2 amends s. 651.0246, F.S., relating to expansions. Subsection (2) removes the requirement that an independent certified public accountant (CPA) must conduct the feasibility study and replaces the CPA with an independent consultant. Further, the subsection revises the scope of the feasibility study prepared by an independent consultant by eliminating the requirement that the independent consultant is required to determine whether the underlying assumptions are reasonable and proper and the project as proposed is feasible. Currently, the feasibility study must include an independent evaluation and examination opinion for the first 5 years of operations. The term, "examination opinion," is undefined. If a CPA issues a compilation report, the CPA does not obtain any assurance of the underlying financial information because the CPA is not required to verify the accuracy or completeness of the information provided or otherwise gather evidence for the purposes of expressing an audit opinion or a review conclusion. A compilation report must disclose that the CPA did not audit or review the financial statements and accordingly does not express an opinion, a conclusion or provide any assurance on them.

Subsection (4) is revised to allow a provider to have easier access to escrowed resident fees as part of an expansion. The bill provides that the provider can access the escrowed funds once 75 percent of the proposed units have been reserved rather than only allowing access to the escrowed funds if payment in full has been received for 50 percent of the units.

Subsection (6) is revised to reduce the time for OIR to approve or deny an expansion application from 45 days to 30 days from the date the application is deemed complete.

Section 3 amends s. 651.026, F.S., relating to annual reports, to clarify that a provider whose financial statements are consolidated with other CCRCs, other entities, or are members of an obligated group can submit consolidated financial statements to meet its annual reporting requirement as long as the combined financial statements also show the individual financial statements for each CCRC.

Section 4 amends s. 651.033, F.S., relating to escrow accounts, to expand the number of eligible escrow agents by removing the requirement that the financial institution must have a branch in Florida. The section also authorizes a provider to hold a resident's check for 7-day rescission period without receiving a request from the resident.

Section 5 amends s. 651.034, F.S., relating to financial and operating requirements. Subsection (6) expands the time OIR may exempt a provider from certain regulatory actions, such as the submission of a corrective action plan, when the provider's financial results, do not meet certain levels. The change in time frame is from 5 years from the date the provider received its certificate of occupancy to 5 years after the end of the provider's fiscal year in which the certificate of occupancy was issued.

Subsection (4) is amended to authorize OIR to temporarily suspend all or a portion of financial and operating requirements due to an extraordinary event rendering the provider incapable of

continuing normal operations such as, but not limited to, a pandemic, a fire, or a federal or state executive order declaring a natural disaster which forces the provider to evacuate, curtail operations, restrict admissions, or suspend marketing for life safety reasons or repairs related to the event. Such temporary suspension may be granted by OIR if the provider submits its annual and quarterly reports, meets its minimum liquid reserve requirements, and the provider is not insolvent or impaired. The provider is required to comply with any reporting requested by OIR, including the estimated time for completing repairs or remediating problems related to restrictions on admissions or marketing. When determining whether to grant a suspension of specific regulatory requirements, OIR is required to consider any formal action or amendments approved by a lender or trustee to the provider's lending agreements or bond covenants as a result of the event.

Section 6 amends s. 651. 035, F.S., relating to minimum liquid reserves. Subsection (1) is amended to eliminate the requirement for a provider to obtain prior approval from OIR to withdraw funds from a debt service reserve required to be escrowed pursuant to a trust indenture of mortgage lien if the funds will be used to pay delinquent principal and interest payments.

The subsection requires that when a provider is using an escrow account held pursuant to a trust indenture or mortgage lien to meet its minimum liquid reserve requirement, the trust indenture, loan agreement, or escrow agreement must require that the provider, trustee, lender, escrow agent, or another person designated to act in their place must notify OIR in writing at least 10 days before the withdrawal of any portion of the debt service reserve funds required to meet the provider's minimum liquid reserve requirement. The notice must include an affidavit sworn to by the provider, the trustee, or a person designated to act in their place which includes the amount of the scheduled debt service payment, the payment due date, the amount of the withdrawal, the accounts from which the withdrawal will be made, and a plan with a schedule for replenishing the withdrawn funds. If the plan is revised by a consultant that is retained as prescribed in the provider's financing documents, the revised plan must be submitted to OIR within 10 days after approval by the lender or trustee.

Subsection (5) also expands the types of financial institutions that can provide a letter of credit to a provider, and can be used to satisfy its minimum liquid reserve requirement by adding Florida banks, Florida savings and loan associations, Florida trust companies, and national banks that are chartered and supervised by the Office of the Comptroller of the Currency.

Section 7 amends s. 651.055, F.S., relating to continuing care contracts; right to rescind. The section is amended to authorize a provider to assess a cancellation penalty against a person who signs residency contract and rescinds it within 7 days if the person had previously signed a reservation agreement and did not cancel it within 30 days. A prospective resident who has signed a reservation agreement who cancels their agreement after 30 days is generally subject to a cancelation penalty. Currently, a person who rescinds a residency contract receives a full refund. As a result, a resident who wants to avoid the reservation agreement cancellation penalty may sign a residency contract and then rescind the contract 7 days, and receive a full refund. This change in this section would not allow this type of transaction to avoid the cancellation penalty.

Section 8 amends s. 651.081, relating to residents' council, to clarify that a residents' council can establish and maintain its own governance documents, such as bylaws or operating agreements, policies, and operating procedures, which may include establishment of committees. It also gives a resident the right to participate in residents' council matters including elections. The section removes the provision that the residents must allow for open meetings when appropriate.

Section 9 amends s. 651.083, F.S., relating to residents' rights, to clarify that residents have access to ombudsman staff.

Section 10 amends s. 651.085, F.S., relating to quarterly meetings between residents and the governing body of the provider, to require that each CCRC have its own designated resident representative and to clarify that the designated resident representative must be a resident and is to be nominated and elected by the residents' council. This section also clarifies that the designated resident representative be notified by the provider at least 14 days in advance of any meeting of the full governing body at which the annual budget and proposed changes in resident fees or services are on the agenda or will be discussed so that the resident can attend and participate in that portion of the meeting. It also requires that any resident who serves as a member of a board or governing body of the facility perform their duties in a fiduciary manner, including the duty of confidentiality, duty of care, duty of loyalty, and duty of obedience, as required of any individual serving on the board or governing body.

Section 11 amends s. 651.091, F.S., relating to availability of reports and records, to require each facility to provide a copy of the final examination report and corrective action plans, if applicable, to the executive officer of the governing body of the provider and the president or chair of the residents' council within 60 days after issuance of the report. It also requires the CCRC to notify the president or chair of the residents' council in writing of a change in management within 10 business days after the change and to disclose to prospective residents whether the provider has one or more residents serving on its board or governing body and whether that individual has a vote or is serving in a nonvoting, ex officio capacity.

Section 12 amends s. 651.105, F.S, relating to examinations, to require the OIR that each examination must cover the preceding 3 or 5 years of the provider, whichever is applicable, and must be commenced with 12 months after the end of the most fiscal year covered by the examination. The section provides that the scope of OIR's examination may include events subsequent to the end of the most recent fiscal year and the events of any prior period which affects the present financial condition of the provider. Further, the OIR is required to conduct an interview with the current president or chair of the residents' council or their designee, as part of the examination.

Section 13 amends s. 651.118, F.S, relating to sheltered beds, to removes the 5-year limit for accepting non-residents into sheltered nursing beds if the sheltered beds are designated for post-acute care as part of a contractual agreement with a health care delivery system with at least one facility licensed under ch. 395, F.S.

Sections 14 and 15 (ss. 651.012 and 651.0261, F.S.) provide conforming changes.

Section 16 provides this act takes effect July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Providers will be able to access escrowed resident fees as part of expansion sooner since the provider can access the escrowed funds once 75 percent of the proposed units have been reserved rather than only allowing access if payment in full has been received for 50 percent of the units.

The bill expands the number of eligible escrow agents by removing the requirement that the financial institution must have a branch in Florida.

The bill expands the types of financial institutions that can provide a letter of credit to a provider to use to satisfy its minimum liquid reserve requirement by adding Florida chartered banks, Florida chartered savings and loan associations, Florida charted trust companies, and national banks that are chartered and supervised by the Office of the Comptroller of the Currency.

The cost of feasibility studies required as part of an expansion application should decrease since the scope and expertise required for the study have been reduced. For example, an independent consultant is no longer required to be a certified public accountant and the preparer does not have to certify that the study's assumptions are reasonable and the project as proposed is feasible.

C. Government Sector Impact:

Section 2. This section of the bill reduces the amount of time the OIR has to approve or deny an expansion application from 45 days to 30 days from the date the application is deemed complete. This reduction in time to approve or deny could be an issue if a consent order is issued as part of the application approval process. It is unclear whether the OIR would need additional staff to address this potential issue.

Section 12. This section of the bill requires OIR to commence examinations of CCRCs within 12 months of the scope period of the examination. Currently, examinations must be conducted at least once every 3 years for non-accredited providers and at least once every 5 years for accredited providers. The OIR may need additional staff to meet this requirement.

VI. Technical Deficiencies:

Section 2. The new language in lines 167-176 is ambiguous. As drafted, it seems to say that the 75 percent requirement applies to a phase or the whole project, but also that it applies separately to each phase. Further, the new language is not specific about what reserved means in this context. It would be helpful to add a definition for reservation deposit that is consistent how the term is used elsewhere in Chapter 651, F.S. Revising the draft language as provided below would clarify these issues:

Section 3. This section allows a facility to submit a consolidated financial statement. The language at lines 222-227 would require a separate accountant's opinion for each CCRC, which is usually not in a consolidated financial statement.

Section 5, the language at lines 284-302, regarding suspending financial and operating requirements, is ambiguous. The authority of the Commissioner to waive such reporting requirements during a catastrophe may already be addressed in statute. See sections in Present Situation regarding the Powers of the Governor and the Commissioner of Insurance Regulation. See also s. 624.307(2), F.S.

Section 6 allows a provider to withdraw funds from its debt service reserve without prior approval from OIR. This section also requires the loan documents to require that a notice of the withdrawal be sent to OIR 10 days before the withdrawal is made. However, s. 651.035(7), F.S., does not explicitly state that the notice must be sent prior to the funds being withdrawn. This would be much clearer, and possibly avoid future litigation, if s. 651.035(7), F.S., explicitly states that the notice specified in section 651.035(1)(b), F.S., must be sent to OIR 10 days before the funds can be withdrawn without prior approval.

Lines 357-365, relating to financial institutions eligible to issue letters of credit include “a Florida bank, a Florida savings and loan association, a Florida trust company.” This may need to be clarified to specify a state-charted financial institution. The language describing federally chartered financial institutions may need technical changes, too. Section 655.005(1)(w), F.S., defines the term, “state financial institution” to mean a state chartered or state-organized financial institution.”

Section 12. The changes in this section may limit OIR's ability to investigate possible violations of Chapter 651, F.S., which occurred prior to a date certain. It is unclear whether the 12-month window to examine a CCRC for the prior 3-year or 5-year period would be forfeited it the OIR was unable to conduct the examination within the 12-month period.

VII. Related Issues:

The term, "office," refers to the Office of Financial Regulation. However, the term, "office," is not defined in ch. 651.011, F.S. The term is used throughout ch. 651, F.S.

The term, "examination opinion," is not defined in ch. 651, F.S. The term is used in sections 651.023 and 651.0246, F.S.

VIII. Statutes Affected:

This bill amends sections 651.011, 651.0246, 651.026, 651.033, 651.034, 651.035, 651.055, 651.081, 651.083, 651.085, 651.091, 651.105, 651.118, 651.012, and 651.0261 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.