



Continuing Care Bill Passes House and Senate

CS/CS/CS/HB 1033 by Rep. Clay Yarborough (CS/CS/CS/SB 1070 by Senator Tom Lee), a lengthy continuing care retirement community bill, passed the Florida Legislature on May 3rd and will soon be sent to Governor Ron DeSantis for final action. After receiving the bill, the Governor has 15 days to sign or veto it or allow the bill to become law without his signature.

The 104 page bill is the product of nearly four years of discussions and detailed analysis by LeadingAge Florida, FLICRA, and the Office of Insurance Regulation (OIR) as well as accountants, investment bankers, attorneys, and actuaries that work routinely with CCRCs. LeadingAge Florida took the advocacy lead over the past year, which included convening meetings to ensure that the bill was balanced in its efforts to address regulatory concerns and that provisions in it would not adversely affect the availability and cost of financing and refinancing, and working the bill through the legislative process.

We wish to thank the many members who graciously gave of their time to review multiple drafts of the bill, travel to Tallahassee to testify or meet with lawmakers, or provide technical information to legislative staff. We are also grateful to Rep. Yarborough, Senator Lee and Rep. Cyndi Stevenson (chair of the House Insurance & Banking Subcommittee) for their tireless efforts.

The bill amends 26 of the current 47 sections in Ch. 651, Florida Statutes, and creates another 6 sections. Almost a third of the bill relates to applications for a provisional certificate of authority (PCOA) and certificate of authority (COA); consolidation of PCOA and COA; acquisition and licensure of an acquired CCRC; and expansions. The remainder of the bill contains new or modified regulatory, enforcement, and disclosure requirements.

CS/CS/CS/HB 1033 takes effect on January 1, 2020 unless otherwise provided for in the bill. For example, management contracts entered into after July 1, 2019 must be in writing and state that the contract will be canceled upon issuance of an order by OIR. The January 1, 2020 effective date was chosen to allow time for rulemaking which could take a year or more.

In general, CS/CS/CS/HB 1033 does the following:

1. Addresses the problems that OIR encountered at University Village in Tampa in its attempt to obtain information from the provider and put the facility in receivership.

2. Creates financial triggers that OIR must use to identify financially challenged CCRCs early enough to intervene and remedy the situation before insolvency.
3. Strengthens current disclosure requirements for prospective residents and residents.
4. Updates sections of law to conform to current regulatory, accounting, and business practices.
5. Creates a new section on expansions (where most of the growth occurs in Florida) to include provisions that will benefit established, successful CCRCs.

Section by Section Summary of Changes to Ch. 651, Florida Statutes

Section 1: Section 651.011 Definitions -- Updates and adds definitions for terms used in the bill. The financial triggers included in the definitions of “impaired” (s.651.011 (15)) and “regulatory action level event” (s.651.011 (25)) will be used by OIR to identify and work with financially challenged CCRCs. As such, they are the most important new definitions in this section.

- **Regulatory Action Level Event** (Section 1 -- s. 651.011(25) -- Creates a “regulatory action level event” if any two of the following occur:
 - The provider’s debt service coverage ratio (DSCR) 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 OIR pursuant to s. 651.026, or, if the provider does not have a DSCR required by its lending institution, the provider's DSCR is less than 1.20:1 as the most recent annual report filed with OIR pursuant to s.651.026.
 - The provider’s days cash on hand (DCOH) is less than the greater of the minimum number of days cash on hand specify in the provider's bond covenants or lending agreement for long-term care or 100 days. If the provider does not have a DCOH required by its lending institution, the DCOH may not be less than 100 as of the most recent annual report filed with OIR.
 - Occupancy is less than 80 % averaged over the 12-month period immediately preceding the filing of the annual report.
 - If the provider is a member of an obligated group having cross-collateralized debt, the DCOH and DSCR for the group must be used.
- Impaired** (Section 1 -- s. 651.011(15) -- Creates a definition for “impaired” which means that either of the following has occurred: The provider fails to meet the minimum liquid reserve (MLR) requirements or

- Beginning January 1, 2021, for a provider with mortgage financing from a third-party institution or a public bond issue, the provider's DSCR is less than 1.00:1 and the provider's DCOH is less than 90; or for a provider without mortgage financing from a third-party or public bond issue, the provider's DCOH is less than 90.
 - If the provider is a member of an obligated group having cross-collateralized debt, the DCOH and DSCR for the group must be used.
- **Obligated group** (Section 1—s.651.011(20) – Defines obligated group as one or more entities that jointly agree to be bound by a financing structure containing security provisions and covenant applicable to the group. Debt issued under such a financial structure must be a joint and several obligation of each member of the group.

The remaining changes to the definition section are important, but they are unrelated to the financial assessment of a CCRC.

Section 2: Section 651.013 Exempted facility and Section 3: Section 651.013 Chapter exclusive -- Technical changes

Section 4: Section 651.019 New financing, additional financing or refinancing – Requires a provider to disclose in writing a general outline of the amount and anticipated terms of any financing or refinancing and the intended use of proceeds to the Residents' Council at least 30 days before the closing date as well as any material changes that occur within 10 business days after the provider becomes aware of such change. Requires a provider to submit to OIR executed financing documents, escrow or trust agreements in support of such financing or refinancing transaction, and a copy of all documents required to be submitted to the Residents' Council.

Section 5: Section 651.021 Certificate of authority requirements -- Deletes the subsection that relates to expansions because all expansion requirements are moved to a newly created s. 651.0246.

Section 6: Section 651.0215 Consolidated application for a provisional certificate of authority (PCOA) and a certificate of authority (COA) -- Creates a new section consolidating the PCOA and COA applications into one application for developers that commit to the following:

- Escrow all reservation deposits;
- Not use or pledge any part of an initial entrance fee for the construction or purchase of the facility or as security for long-term financing;
- Charge a reservation fee of \$40,000 or 10% of the then entrance fee, whichever is less; and
- State in the resident contract that the balance of the entrance fee will not be collected until the resident is notified that the unit selected is ready for occupancy.

(This change will allow an eligible developer to begin construction of residential units and other buildings immediately rather than waiting until 50% of the planned units are reserved. Otherwise, the application content and criteria for OIR approval of the release of escrow funds is comparable to what is now required for a COA.)

Section 7: Section 651.022 Provisional certificate of authority; application – Updates accounting and financial information requirements for the feasibility study to conform to current CPA practices and lender requirements. Requires the applicant to notify OIR of any material change in the application during the review period. Otherwise, the PCOA application requirements remain the same as current law.

Section 8: Section 651.023 Certificate of authority; application -- Updates accounting and financial requirements for the feasibility study to conform to current CPA practices and lender requirements. Specifies that the feasibility study, if prepared by an accountant, must take into account an actuary's mortality and morbidity assumptions related to turnover, rates, fees, and charges. Requires the applicant to notify OIR of any material change in the application during the review period. Modifies the minimum deposit for a reservation from 10% of the current entrance fee to the lesser of \$40,000 or 10% of the current entrance fee for a unit. Specifies that a provider "may assess" rather than the current "shall assess" a forfeiture penalty of 2% of the entrance fee when a reservation contract is terminated after 30 days for reasons currently stated in law. Otherwise, the COA application requirements remain the same as current law.

Section 9: Section 651.024 Acquisition – Clarifies which applications are required for a stock ownership change or a change in general partner vs. the acquisition of a CCRC.

Section 10: Section 651.0245 Application for the simultaneous acquisition of a CCRC and the issuance of a COA – Creates a new section that consolidates the current three applications for the purchase of a CCRC and a COA into one application.

Section 11: Section 651.0246 Expansions – Creates a new section that consolidates all requirements for an expansion (where most of the growth in CCRCs is occurring in Florida) into one section. Allows a provider who exceeded the statewide median for DCOH, DSCR and occupancy for 2 consecutive annual reporting periods to expand the total number of existing units by up to 35% without OIR approval. Allows for the release of escrowed funds when payment has been received for 50% of the units instead of the current 70%. Retains the requirement that OIR approval is required for an expansion of 20% or more of existing units or continuing care at home contracts. Consequently, a provider may still increase existing units by up to 20% without submitting an application for OIR approval if the provider does not meet the criteria for an expansion of up to 35% without OIR approval as provided for in the bill. Otherwise, the application requirements for an expansion remain the same as current law.

Section 12: Section 651.026 Annual reports -- Requires management's calculation of the provider's DSCR and DCOH for the reporting period to be included in the annual report

submitted to OIR. Requires OIR to publish an annual report of providers on its website by August 1 for the preceding calendar year with the following information:

- The median DSCR, median DCOH, and median occupancy campus-wide;
- Documentation of OIR's compliance with statutory requirements for triennial audits/examinations; and
- The number of annual reports submitted to OIR in the preceding calendar year and the percentage of such reports reviewed by OIR in order to determine whether a regulatory action level event has occurred.

Section 13: Section 651.0261 Quarterly and monthly statements – Specifies that a quarterly report must be filed within 45 days after the end of fiscal quarter and that it must contain:

- An unaudited financial statement;
- A calculation of DSCR for the 12-month period ending on the reporting date, DCOH over the same time period, and occupancy; and
- A detailed listing of assets maintained in the minimum liquid reserve.

Provides that a quarterly report for a fiscal year is not required if the provider does not have a regulatory action level event pending, impairment, or corrective action. Requires a provider that falls below 2 of the 3 criteria for a regulatory action level event (see s.651.011(25)) at the end of a reporting quarter to submit with the report an explanation of the circumstances and a description of the action that will be taken to meet the minimum criteria. Codifies into law criteria currently in rule for OIR to use when determining if a CCRC should report monthly. Specifies that monthly reports are due within 25 days after the end of a month, and that they must contain a detailed listing of the assets maintained in the MLR and any other data, financial information, and pertinent information that OIR may reasonably require to determine the financial status of the facility and the capabilities of its managers and owners.

Section 14: Section 651.028 Accredited facilities – Defines accredited facility or provider as one that is accredited without stipulations or conditions by a process found by the commission to be acceptable, and substantially equivalent to the provisions in Ch. 651. Deletes current provisions allowing OIR to waive any regulatory requirements that do not adversely affect the security protections in Ch. 651. As a result of this change, OIR will no longer waive quarterly reports for accredited CCRCs. However, OIR's authority to conduct a regular examination every 5 years instead of every 3 years for an accredited facility or provider will continue under the provisions in s. 651.105 (1).

Section 15: Section 651.033 Escrow accounts -- Mostly technical changes but also specifies that escrow funds may be deposited in a national bank that is chartered and supervised by the Office of the Comptroller of the Currency within the U.S. Dept. of Treasury and has a branch in Florida.

Section 16: Section 651.034 Financial and operating requirements -- Creates a new section to operationalize the financial triggers that are created in the definition section for a “regulatory action level event” and an “impairment.” Includes steps that OIR must take if either occurs. If a regulatory action level event occurs, specifies that OIR must:

- Require the provider to prepare and submit a corrective action plan or a revised corrective action plan, if applicable;
- Perform an examination or an analysis of the assets, liabilities, and operation of the provider, including a review of the corrective action plan or revised corrective action plan; and
- Issue a corrective order after the examination or analysis, if necessary, specifying any corrective actions that are required.

Gives OIR the authority to use the Continuing Care Advisory Council, individually or as a group, or to retain actuaries, investment experts, or other consultants (at the provider's expense) to review the provider's corrective action plan or revised corrective action plan, examined or analyze the assets, liabilities, and operations of the provider, and formulate a corrective order for the provider. In the event of an impairment, requires OIR to petition DFS to appoint a receiver unless OIR's remedial rights are subordinate to those of a lender or trustee pursuant to s. 651.114 (11)(a). If OIR's remedial rights are suspended, requires the provider to make available to OIR copies of any corrective action plan approved by the third-party lender or trustee to cure the impairment and any related required report. Authorizes OIR to forgo taking action for up to 180 days after an impairment if there is a reasonable expectation that the impairment will be eliminated within the 180-day period. Gives OIR the discretion to exempt a new CCRC from a regulatory action level event or impairment until stabilized occupancy as projected in the last feasibility study required by OIR is reached but no longer than 5 years. Specifies that this section is supplemental to other laws and does not preclude or limit the duty of OIR under those laws.

Section 17: Section 651.035 Minimum liquid reserve -- Specifies that for a provider that does not have a mortgage loan or other financing on the facility, the provider must deposit monthly in escrow an amount equal to 1/12 of the annual property tax liability as indicated in the most recent tax notice, and must annually pay property taxes out of such escrow. Clarifies that a provider may withdraw funds without OIR permission if the withdrawal will not affect compliance with MLR requirements. Requires a provider to request and obtain consent from OIR for all other proposed withdrawals. Gives OIR authority to order the immediate transfer of up to 100% of the funds held in the MLR (excluding any separate debt service reserve) to the custody of DFS if the CCRC is impaired or insolvent. Codifies into law the current provision in rule which gives a provider 61 days to fund any increase in the MLR resulting from the MLR calculation filed with the annual report. Gives a provider up to 10 business days to come into compliance with the MLR requirement if the MLR is less than the required amount at the end of any fiscal quarter due to a change in the market value of investment funds for a quarter.

Section 18: Section 651.043 Approval of change in management -- Creates a new section to address OIR challenges at University Village where OIR encountered legal loopholes in its effort to remove noncompliant management. Requires that a contract with a management company entered into after July 1, 2019 must be in writing, and include a provision that the contract will be canceled upon issuance of an order by OIR. Specifies that a separate contract is not required for an individual manager employed by a management company or contractor hired by the management company to oversee a CCRC. Requires a provider to notify OIR, in writing or electronically, of any change in management within 10 business days. Requires a provider to submit a copy of the written contract to OIR along with the background information required in s.651.022(2).

Gives OIR the authority to disapprove new management or order the removal of new management if a provider is found to be impaired or has a regulatory action level event pending. Gives OIR the authority to disapprove new management and order the removal of new management for other providers if OIR determines that new management:

- Is incompetent or untrustworthy;
- So lacking in managerial experience as to make the proposed operation hazardous to the residents or potential residents;
- So lacking in experience, ability, and standing as to jeopardize the reasonable promise of successful operation; or
- Is affiliated directly or indirectly through ownership, control, or business relations with any person or persons whose business operations are or have been marked by manipulation of assets or accounts or by bad faith, to the detriment of residents, stakeholders, investors, creditors, or the public.

Gives OIR 30 business days after the filing of a change in management to issue a notice of disapproval. Gives OIR the authority to revoke suspended or take administrative action against a COA if a provider:

- Fails to remove disapproved management;
- Fails to notify OIR of a change in management;
- Appoints new management without a written contract when one is required; or
- Repeatedly appoints management that was previously disapproved or that is not approvable.

Requires a provider to remove management immediately if either of the following occurs:

(1) The manager has been found guilty of, or has pleaded guilty or no contest to, a felony charge, or has been held liable or has been enjoined in a civil action by final judgment, if the felony or civil action involving fraud, embezzlement, fraudulent conversion, or misappropriation of property; or

(2) A manager is now, or was in the past, affiliated directly or indirectly, through ownership interest of 10% or more in, or control of, any business, corporation, or other

entity that has been found guilty of or has pleaded guilty or no contest to a felony charge, or has been held liable or has been enjoined in a civil action by final judgment, if the felony or civil action involved fraud, embezzlement, fraudulent conversion, or misappropriation of property.

Specifies that failure to remove such management is grounds for revocation or suspension of the provider's COA.

Section 19: Section 651.051 *Management of assets and records* – Updates this section to allow for electronic storage of records in another state for CCRCs owned by an out-of-state company provided that the records are readily accessible to OIR.

Section 20: Section 651.055 *Continuing care contracts* -- Allows for use of the term "life plan community." Specifies that the contract must include the following statement: "*The 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 a continuing care provider. You may wish to consult an attorney or financial advisor before entering into such contract.*"

Section 21: Section 651.057 *Continued care at home contracts* -- Technical changes. (Only one Florida CCRC offers these contracts which provide for a variety of services to individuals who preferred to remain in their own homes in the community-at-large. Contract holders get priority consideration for placement in the assisted living and nursing home on campus if such care is needed.)

Section 22: Section 651.071 *Contracts as preferred claims*: Specifies that CCRC contracts are Class 2 claims pursuant to general insurance law. (This change is intended to protect the interest and investment of residents. Current law is retained specifying that such claims are subordinate to any secured claim.)

Section 23: Section 651.091 *Posting of reports and records* -- Expands the list of disclosure and posting requirements to the President or Chair of the Residents' Council, residents, or prospective residents to include the following:

- Contact information for OIR and the Division of Consumer Services for the submission of inquiries or complaints related to the violation of Ch. 651;
- Notice of the issuance of a final OIR examination report or the initiation of any legal or administrative proceedings by OIR or DFS;
- Notice of a change of ownership;
- Disclosure of whether or not there will be a distribution of facility assets or income;
- Disclosure of the existence of a holding company of which the CCRC is a part;
- Information about required quarterly meetings and rate increases as requested by the Residents' Council President or Chair; and

- Disclosure that if a resident does not rescind a contract within 7 days of executing it, the resident funds will be released to the provider. (The disclosure checklist developed by LeadingAge Florida will be updated with the new requirements and made available to members in the near future.)

Section 24: Section 651.095 *Advertisements* – Specifies that a provider may use the term “life plan” and “life plan at home” in their advertisement.

Section 25: Section 651.105 *Examinations* – Requires a provider to respond to requests from OIR for data, financial statements and pertinent information. Gives OIR standing to petition the circuit court for mandatory injunctive relief to require a provider to produce requested documents, data, records, or other information. Clarifies that unless a provider is impaired or subject to a regulatory action level event, any parent, subsidiary or affiliate is not subject to examination by OIR as part of a routine examination. Gives OIR the authority to examine a parent, subsidiary, or affiliate that has a contractual or financial relationship with the provider if the CCRC relies on that entity to meet the financial obligations of Ch. 651.

Section 26: Section 651.106 *Grounds for discretionary refusal, suspension, or revocation of a license* -- Adds criteria related to ownership and management that OIR may use to deny, revoke, or suspend a license.

Section 27: Section 651.1065 *Soliciting or accepting new contracts* – Creates a new section that prohibits CCRC providers, staff, and board members from facilitating or accepting new contracts without OIR approval if the facility is impaired or insolvent unless the CCRC has declared bankruptcy, in which case, the bankruptcy court or trustee has jurisdiction over such matters. Specifies that a violation of this section constitutes a felony of the third degree.

Section 28: Section 651.111 *Requests for inspections* – Clarifies that the term “inspection” “means an inquiry into a provider’s compliance with Ch. 651.” Adds timeframe for OIR to respond to complaints from a resident or interested party and provide the complainant and the provider with a written statement specifying any violation and any actions taken or that no violation was found.

Section 29: Section 651.114 *Delinquency proceedings* -- Gives a provider 30 days to make a plan to attain compliance or solvency after a request is received from either the Continuing Care Advisory Council or OIR. Authorizes OIR to direct the provider to formulate and file a corrective action plan if the CCRC is impaired or continued operation without a change would result in insolvency. Gives OIR the authority to specify a plan and direct the provider to implement it if the provider fails to submit a plan within 30 days or submits a plan that is insufficient to improve its financial condition. Requires a provider to give written notice to residents and prospective residents within 3 business days after the initiation of delinquency proceedings by OIR or DFS. Provides specific timeframe for a provider to respond to an order of conservation, rehabilitation, liquidation, or seizure. Specifies that a hearing to appoint a

receiver must be held in accordance with the timeframe specified in s. 631.031(4). Adds to the criteria that OIR may use to override the subordination rights of a lender or trustee in the event of an impairment to include: the provider engages in the misappropriation, conversion or illegal commitment or withdrawal of required MLR funds; refuses to be examined by OIR; or refuses to produce relevant accounts, records, or files requested as part of an examination.

Section 30: Section 651.1141 Immediate and final orders: Creates a new section that creates a legislative finding that the following actions constitute an imminent and immediate threat to the public health, safety, and welfare of the residents of this state:

- The installation of a general partner or provider or assumption of ownership or possession or control of 10% or more of a provider's assets violate provisions in Ch. 651;
- 10% or more of the required MLR has been withdrawn or committed in violation of s.651.035; or
- The assumption of control over a facility's operation has occurred without OIR approval.

Gives OIR the authority to issue an immediate final order to a person or entity to cease and desist engaging in one or more of the aforementioned activities or to suspend the COA for the CCRC.

Section 31: Section 651.121 Governor's Continuing Care Advisory Council -- Revises appointment criteria to the Council by eliminating the in-state resident requirement and replacing the attorney with a resident representative.

Section 32: Provides for an implementation date of January 1, 2020 unless indicated otherwise in the text of the bill, of which there are two. They are in s. 651.011(15) related to criteria for an impairment and s. 651.043(1) related to management contracts.

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