



## *CS/CS/CS/HB 1033 Specifies Action Required When Regulatory Action Level Event or Impairment Occurs*

As you know, CS/CS/CS/HB 1033 creates an early warning system that the Office of Insurance Regulation (OIR) must use to identify and work with a financially challenged continuing care retirement community, also known as life plan community. Failure of a community (or obligated group, if applicable) to meet specific financial measures can trigger either a “regulatory action level event” or an “impairment.” Please refer to the May 2019 technical assistance article on “Financial Triggers” for definitions of these two types of events.

If a regulatory action level event occurs, s. 651.034, F.S., (financial and operating requirements for providers) requires the OIR to do the following:

- Require the provider to prepare and submit a corrective action plan or, if applicable, a revised corrective action plan within 30 days after the event occurs;
- Perform an examination pursuant to s. 651.105, F.S., or an analysis of the assets, liabilities, and operations of the provider, including a review of the corrective action plan or the revised corrective action plan; and
- After the examination or analysis, issue a corrective order, if necessary, specifying any corrective actions that OIR determines are required.

The OIR must review and approve or disapprove the corrective action plan or revised corrective action plan within 45 business days. In determining what corrective actions should occur when a regulatory action level event is triggered, the OIR must consider any relevant factors identified through the examination or analysis conducted of the community.

At the provider's expense, the OIR may retain actuaries, investment experts, and other consultants to review a provider's corrective action plan or revised corrective action plan; examine or analyze the assets, liabilities and operations of the provider; and formulate a corrective order. As an alternative, the OIR may enlist the help of members of the Governor's Continuing Care Advisory Council, individually or as a group, to do the same. As revised by CS/CS/CS/HB 1033, the Advisory Council is a 10-member body composed of four residents, three providers, a representative of the business community with management expertise, a representative of the financial community (banker), and a certified public accountant.

If an impairment occurs, the OIR must take action necessary to place the provider under regulatory control, including any remedy available under part I of chapter 631, F.S., (general insurance law pertaining to insolvent insurers which provides “a comprehensive scheme for administering insurer receiverships” along with “methods for rehabilitating insurers”). An impairment is sufficient grounds for the Department of Financial Services to be appointed as receiver, except when the OIR's remedial rights are subordinate to those of a trustee or lender. Section 651.114(11)(a), F.S., specifies that the OIR “may not exercise its remedial rights provided under this section and ss. 651.018 (fines), 651.106 (grounds for discretionary refusal, suspension, or revocation of a certificate of authority), 651.108 (administrative supervision), and 651.116 (delinquency proceedings; additional

provisions)with respect to a facility that is subject to a lien, mortgage, lease, or other encumbrance or trust indenture securing bonds or notes issued in conjunction with the financing of the facility, if the trustee or lender, by inclusion or by amendment to the loan documents or by a separate contract with the office, agrees that the rights of residents under a continuing care or continuing care at-home contract will be honored and will not be disturbed by a foreclosure or conveyance of liens thereof as long as the resident:

1. Is current in the payment of all monetary obligations required by the contract;
2. Is in compliance and continues to comply with all provisions of the contract; and
3. Has asserted no claim inconsistent with the rights of the trustee or lender.

When the OIR's remedial rights are subordinate to those of a lender or trustee, the impaired provider must make available to the OIR copies of any corrective action plan approved by the third-party lender or trustee to cure the impairment and any related required report.

It is important to note that the remedial rights of the OIR will be reinstated if OIR determines that any of the following occurred:

- The trustee or lender is not in compliance with the loan agreement;
- A lender or trustee has assigned or has agreed to assign all or a portion of a delinquent or defaulted loan to a third party without the OIR's written consent;
- The provider engaged in the misappropriation, conversion, or illegal commitment or withdrawal of minimum liquid reserves or escrowed funds required under chapter 651;
- The provider refuses to be examined by the OIR; or
- The provider refuses to produce any relevant accounts, records and files requested as part of an examination.

The OIR may forgo taking action for up to 180 days after an impairment occurs if there is a reasonable expectation that the impairment will be eliminated within that time period, but this is completely at OIR's discretion. S. 651.034, F.S., also gives the OIR discretion from taking action when a regulatory action level event or an impairment occurs if a community is new or expanding until stabilized occupancy is reached or until the time projected to achieve stabilized occupancy as reported in the last feasibility study required by the OIR as part of an application has elapsed, but no longer than five years after the date of issuance of the certificate of occupancy. It is not known to what extent the OIR will use this discretionary authority.

The OIR must transmit a notice that may result in regulatory action by registered or certified mail or any other method of transmission which includes documentation of receipt by the provider. Notice is effective when the provider receives it.

This article is based on the newly created s. 651.034, F.S., and changes to s. 651.114(11)(a), F.S. The OIR may provide more guidance on these two sections of CS/CS/CS/HB 1033 through rule. In the meantime, keep in mind that the effective date of the bill is January 1, 2020 unless specified otherwise in the bill, which is the case for the financial measures for an impairment. Failure to meet the minimum liquid reserve requirements unless the provider has received prior approval from OIR takes effect on January 1, 2020, but the other two financial measures for an impairment do not take effect until January 1, 2021.

included in upcoming e-newsletters. If you have any questions or comments, please contact Mary Ellen Early, Public Policy Liaison, 386/734-7681 or [mearly@earthlink.net](mailto:mearly@earthlink.net).

