

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 749 Continuing Care Communities

**SPONSOR(S):** Van Zant and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 1126

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Innovation Subcommittee	10 Y, 0 N	Guzzo	Poche
2) Insurance & Banking Subcommittee	12 Y, 0 N, As CS	Bauer	Cooper
3) Health & Human Services Committee	16 Y, 0 N	Guzzo	Calamas

### SUMMARY ANALYSIS

Continuing care communities (CCCs) are retirement facilities that furnish residents with shelter and health care for an entrance fee and monthly payments. CCCs are regulated by the Department of Financial Services, the Agency for Health Care Administration and the Office of Insurance Regulation (OIR). Pursuant to chapter 651, F.S., CCCs are governed by a contract between the facility and the resident. In Florida, continuing care contracts are considered a kind of specialty insurance product and are reviewed and approved by OIR. The OIR authorizes and monitors a facility's operation as well as determines the facility's financial status and the management capabilities of its managers and owners. Currently, there are 71 CCCs in Florida.

A resident of a CCC must pay an entrance fee upon entering into a contract with a facility. The contract must include the terms under which a resident is due a refund of any portion of the entrance fee. If the contract provides that the resident does not receive a transferable membership or ownership right in the facility, and the resident has occupied his or her unit, the refund must be calculated on a pro-rata basis with the facility retaining up to two-percent per month of occupancy by the resident and up to a five-percent processing fee, the balance of which must be paid within 120 days after the resident gives notice of intent to cancel. Similarly, a contract may provide a one-percent declining-scale refund, but the refund must be paid from the proceeds of the next entrance fees received by the provider for units for which there are no prior claims.

The bill makes several changes to ch. 651, F.S. Specifically, the bill:

- Requires a CCC contract, paying a two-percent refund, to provide for payment to a resident within 90 days after the contract is terminated and the unit is vacated, instead of 120 days after notice of intent to cancel;
- Requires a CCC contract, paying a one-percent refund, to provide for payment to a resident for the unit that is vacated, or a like or similar unit, whichever is applicable, by specified time frames;
- Clarifies that CCCs must be accredited for OIR to waive equivalent requirements in rule or law;
- Makes a CCC contract a preferred claim against a provider in receivership or liquidation proceedings;
- Requires OIR to notify the executive office of the governing body of the CCC provider about all deficiencies found as part of an examination;
- Requires a CCC to provide a copy of any final examination report and corrective action plan to the executive officer of the governing body of the provider within 60 days after issuance of the report;
- Requires each CCC to establish a residents' council to provide input on subjects that impact the general residential quality of life;
- Authorizes the board of directors or governing board of a provider to allow a facility resident to be a voting member of the board or governing body of the facility; and
- Requires all CCCs to provide a copy of the most recent third-party financial audit to the president or chair of the residents' council within 30 days of filing the annual report with OIR.

The bill does not appear to have a fiscal impact on state or local government. The bill may have a positive impact on the private sector.

The bill provides an effective date of October 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Continuing Care Communities (CCCs)

A CCC is a residential alternative for older adults (usually age 65 and older) that provides flexible housing options, a coordinated system of services and amenities, and a lifetime continuum of care that addresses the varying health and wellness needs of residents as they grow older.<sup>1</sup> The foundation of the CCC model is based on enabling residents to move within the community if their health care needs change and they require supervision.<sup>2</sup> The services provided by the CCC and purchased by the resident are governed by contract, or resident service agreement. Entry fees can range from \$20,000 to more than \$1 million, depending on the geographic location of the CCC, features of the living space, size of the living unit, additional services and amenities selected, whether one or two individuals receive services, and the type of service contract.<sup>3</sup>

There are 1,926 CCCs in the United States.<sup>4</sup> The average number of units in a CCC is 280.<sup>5</sup> Over eighty-percent of CCCs are not-for-profit sponsored, and roughly half of CCCs are faith-based.<sup>6</sup> CCCs feature a combination of living arrangements and nursing beds. There are 71 CCCs in Florida, and a total of 24,775 CCC residents.<sup>7</sup>

The typical accommodations and services include:

- Independent living units – a cottage, townhouse, cluster home, or apartment; the resident is generally healthy and requires little, or no, assistance with activities of daily living.
- Assisted living – a studio or one-bedroom apartment designed for frail individuals who can still maintain a level of independence but need some assistance with activities of daily living.
- Nursing – nursing services are offered on-site or nearby the CCC to provide constant care for recovery from a short-term injury or illness, treatment of a chronic condition, or higher levels of services.
- Memory-care support – offers dedicated cognitive support care with the goal of maximizing function, maintaining dignity, preserving sense of self, and optimizing independence.<sup>8</sup>

In Florida, oversight of CCCs is primarily shared between the Agency for Health Care Administration (AHCA) and the Office of Insurance Regulation (OIR), pursuant to ch. 651, F.S. (“the Act”). AHCA regulates aspects of CCCs related to the provision of health care such as assisted living, skilled nursing care, quality of care, and concerns with medical facilities.

The Act gives OIR primary responsibility of licensing CCCs, examining them for compliance with applicable laws and rules, and monitoring their financial condition for the protection of the public from insolvency risks and unethical practices.<sup>9</sup> In addition, the Department of Financial Services (DFS) shares some solvency regulatory authority with OIR pursuant to s. 651.114(6), F.S., which provides that

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<sup>1</sup> Continuing Care Retirement Community Task Force, Leading Age, American Seniors Housing Association, *Today's Continuing Care Retirement Community*, at page 2 (Jane E. Zarem ed. 2010).

<sup>2</sup> Id.

<sup>3</sup> Id., at page 9.

<sup>4</sup> Ziegler, *Senior Living Overview* (October 8, 2014), at page 26, available at [www.flicra.com/pdfs/FLiCRA%20Presentation%2010-8-14.pdf](http://www.flicra.com/pdfs/FLiCRA%20Presentation%2010-8-14.pdf) (last visited March 7, 2015).

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Presentation to the Governor's Continuing Care Advisory Council, September 29, 2014, available at <http://www.floir.com/siteDocuments/CouncilPresentation.pdf>. (last visited March 7, 2015).

<sup>8</sup> See supra, FN 1, at 4.

<sup>9</sup> OFFICE OF INSURANCE REGULATION, *Specialty Product Administration*, [http://www.floir.com/Sections/Specialty/is\\_sp\\_index.aspx](http://www.floir.com/Sections/Specialty/is_sp_index.aspx) (last visited February 6, 2015).

OIR and DFS may intervene in CCCs with “all the necessary powers and duties” they possess under the Insurers Rehabilitation and Liquidation Act<sup>10</sup> in regard to delinquency proceedings of insurance companies. As with insurers and other risk-bearing entities, OIR and DFS have coordinated authority to determine the basis for and to initiate delinquency proceedings against CCCs and place them under administrative supervision, rehabilitation, or liquidation.<sup>11</sup>

### *CCC Certificate of Authority*

In order to offer continuing care<sup>12</sup> services in Florida, a provider must be licensed by obtaining a certificate of authority (COA) from OIR.<sup>13</sup> To obtain a COA, each applicant must first apply for and obtain a provisional COA.<sup>14</sup> The OIR is responsible for receiving, reviewing and approving or denying applications for provisional COAs within a specified time period.<sup>15</sup> Upon receipt of a provisional COA, a provider may collect entrance fees and reservation deposits from prospective residents of a proposed continuing care facility.<sup>16</sup>

To obtain a COA, each provider holding a provisional COA must submit additional documentation regarding financing of the proposed facility, receipt of aggregate entrance fees from prospective residents, completed financial audit statements, and other specific information.<sup>17</sup> The OIR is required to issue a COA once it determines that a provider meets all requirements of law, has submitted all necessary information required by statute, has met all escrow requirements, and has paid appropriate fees set out in s. 651.015(2), F.S.<sup>18</sup> Further, a COA will only be issued once a provider submits proof to OIR that a minimum of fifty-percent of the units available, for which entrance fees are being charged, are reserved.<sup>19</sup> Upon receiving a COA, a provider may request the release of entrance fees held in escrow.<sup>20</sup>

Pursuant to s. 651.028, F.S., if a provider is accredited by a process found by the OIR to be acceptable and substantially equivalent to the provisions of ch. 651, F.S., the OIR may, pursuant to rule of the Financial Services Commission, waive any requirements of ch. 651, F.S., with respect to the provider if the OIR finds that such waivers are not inconsistent with the security protections of ch. 651, F.S.

### *CCC Contracts*

Continuing care services are governed by a contract between the facility and the resident of a CCC. In Florida, continuing care contracts are considered a kind of specialty insurance product, and are reviewed and approved for the market by the OIR.<sup>21</sup> Each contract for continuing care services must:

- Provide for continuing care of one resident, or two residents living in a double occupancy room, under regulations established by the provider;
- List all properties transferred to the facility and their market value at the time of transfer;
- Specify all services to be provided to each resident;

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<sup>10</sup> Part I, ch. 631, F.S. is the Insurers Rehabilitation and Liquidation Act.

<sup>11</sup> ss. 631.031 and 651.114(6), F.S. *Administrative supervision* allows DFS to supervise the management of a consenting troubled insurance company in an attempt to cure the company’s troubles rather than close it down. In *rehabilitation*, DFS is authorized as receiver to conduct all business of the insurer in an attempt to place the insurance company back in sound financial condition. In *liquidation*, DFS is authorized as receiver to gather the insurance company’s assets, convert them to cash, distribute them to various claimants, and shut down the company.

<sup>12</sup> s. 651.011(2), F.S., defines continuing care as “furnishing shelter or nursing care or personal services to a resident who resides in a facility, whether such nursing care or personal services are provided in the facility or in another setting designated in the contract for continuing care, by an individual not related by consanguinity or affinity to the resident, upon payment of an entrance fee.”

<sup>13</sup> s. 651.011(9), F.S.

<sup>14</sup> s. 651.022, F.S.; see also s. 651.022(2) and (3), F.S., for detailed description of information, reports and studies required to be submitted with an application for a provisional COA.

<sup>15</sup> s. 651.022(5) and (6), F.S.

<sup>16</sup> s. 651.022(7), F.S., which requires the fee to be deposited into escrow or placed in deposit with DFS, until a COA is issued by OIR.

<sup>17</sup> s. 651.023(1), F.S.

<sup>18</sup> s. 651.023(4), F.S.

<sup>19</sup> s. 651.023(4)(a), F.S.

<sup>20</sup> s. 651.023(6), F.S.

<sup>21</sup> s. 651.055(1), F.S.

- Describe terms and conditions for cancellation of the contract;
- Describe the health and financial conditions required for a person to be accepted as a resident and to continue as a resident;
- Describe the circumstances under which the resident will be permitted to remain in the facility in the event of financial difficulties of the resident; and
- Provide the fees that will be charged if the resident marries while at the designated facility, the terms concerning the entry of a spouse to the facility, and the consequences if the spouse does not meet the requirements for entry.<sup>22</sup>

The contract is also required to provide that it may be canceled by giving at least 30 days' written notice by the provider, the resident, or the person who provided the transfer of property or funds for the care of such resident.<sup>23</sup>

In the event of receivership or liquidation proceedings against a provider, all continuing care contracts executed by a provider must be deemed preferred claims against all assets owned by the provider.<sup>24</sup>

### *Entrance Fee Refunds*

A resident of a CCC must pay an entrance fee upon entering into a contract with a facility, which does not secure the resident an ownership interest in the CCC unit, but allows the resident to occupy the unit and to access the CCC's services. According to CCC providers, entrance fees can range from \$100,000 to \$1 million,<sup>25</sup> and vary according to local housing markets, geographic location, and the level of service and amenities of the CCC.<sup>26</sup> In addition to the entrance fee, CCCs charge *monthly fees* which typically cover housing costs, amenities, meals, and health care. The pricing of a CCC's entrance fees and monthly fees is typically accomplished through actuarial analysis.<sup>27</sup>

Traditionally, entrance fees were non-refundable, amortizing over 4 years. However, due to growing demand from residents and their estates, several CCCs allow for partial or full refunds with declining-scale features.<sup>28</sup> Current law requires that the contract include the terms for which a resident is due a refund of any portion of the entrance fee.<sup>29</sup> If the contract provides that the resident does not receive a transferable membership or ownership right in the facility, and the resident has occupied his or her unit, the refund must be calculated on a pro-rata basis with the facility retaining up to two-percent per month of occupancy by the resident and up to a five-percent processing fee, the balance of which must be paid within 120 days after the resident gives notice of intent to cancel. This is known as a two-percent declining-scale refund and provides a resident with up to 47.5 months of residency before the refund is reduced to zero. Similarly, a contract may provide a one-percent declining-scale refund and is allowed to have the timing of any resident refund dependent on the resale of any unit but is not allowed to make the timing dependent on the resale of a particular unit or type of units.<sup>30</sup>

### *Resident Rights and Residents' Council*

Section 651.081, F.S., provides for the creation of a single statewide residents' council. Section 651.085, F.S., requires the governing body of a provider, or the designated representative of the provider, to hold quarterly meetings with the residents of the CCC for the purpose of free discussion of issues and concerns of residents, as well as the facility's financial condition and potential fee increases.

<sup>22</sup> Id.

<sup>23</sup> s. 651.055(1)(g), F.S.

<sup>24</sup> s. 651.071, F.S.

<sup>25</sup> AMERICAN ASSOCIATION FOR RETIRED PERSONS, *About Continuing Care Communities*, [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 viewed Mar. 12, 2015).

<sup>26</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *Older Americans: Continuing Care Retirement Communities Can Provide Benefits, but Not Without Some Risk* (GAO-10-611) (June 2010), available at <http://www.gao.gov/new.items/d10611.pdf>.

<sup>27</sup> Kelly Greene, *Continuing-Care Retirement Communities: Weighing the Risks*, THE WALL STREET JOURNAL (Aug. 7, 2010), <http://www.wsj.com/articles/SB10001424052748704499604575407290112356422> (citing the National Investment Center for the Seniors Housing and Care Industry).

<sup>28</sup> See footnote 1, at p. 8.

<sup>29</sup> s. 651.055(1)(g), F.S.

<sup>30</sup> Id.

The residents' council is tasked with different duties associated with the quarterly meetings between residents and the governing body of the provider, as provided in s. 651.085, F.S.

References to the residents' council in s. 651.085, F.S., may be confused or misinterpreted to allow for multiple councils instead of the singular council as created by s. 651.081, F.S. Currently, it is optional to both establish a residents' council and to do so through the election process outlined in statute.

### *Examinations and Inspections*

The OIR is authorized to examine at any time, and at least once every three years, the business of any applicant for a certificate of authority and any provider engaged in the execution of care contracts in the same manner as provided for the examination of insurance companies<sup>31</sup> pursuant to s. 624.316, F.S.<sup>32</sup> The OIR is required to notify the provider in writing of all deficiencies in its compliance with the provisions of ch. 651, F.S., and must set a reasonable length of time for compliance by the provider.<sup>33</sup> At the time of routine examination, OIR must determine if all disclosures required under ch. 651, F.S., have been made to the president or chair of the residents' council. According to the OIR, the OIR gives a copy of its examination findings to a member of the CCC's management (typically, the executive director). However, these findings are not always shared with the CCC's board of directors, so that the board is unaware of regulatory issues.<sup>34</sup>

### **Effect of Proposed Changes**

#### Refunds of Entrance Fees for Cancelled CCC Contracts

The bill amends s. 651.055, F.S., to modify the timing of refunds paid by CCCs to their residents for certain contracts. A CCC contract, paying a two-percent declining-scale refund, must provide for payment to a resident within 90 days after the contract is terminated and the unit is vacated, instead of 120 days after notice of intent to cancel as required by current law. Similarly, the bill requires a CCC contract, paying a one-percent declining-scale refund, to provide for payment to a resident from:

- The proceeds of the next entrance fees received by the provider for units for which there are no prior claims by any resident;
- The proceeds of the next entrance fee received by the provider for a like or similar unit as specified in the residency or reservation contract signed by the resident for which there are no prior claims by any resident until paid in full; or
- The proceeds of the next entrance fee received by the provider for the unit that is vacated if the contract is approved by the OIR before October 1, 2015. Providers may not use this refund option after October 1, 2016, and must submit a new or amended contract with an alternative refund provision to the office for approval by August 2, 2016.

For contracts entered into on or after January 1, 2016, that provide for a refund from the proceeds of the next entrance fee received by the provider for a like or similar unit, the bill requires any refund that is due upon the resident's death or relocation of the resident to another level of care that results in the termination of the contract to be paid the earlier of:

- Thirty days after receipt by the provider of the next entrance fee received for a like or similar unit for which there is no prior claim by any resident until paid in full; or
- No later than a specified maximum number of months or years, determined by the provider and specified in the contract, after the contract is terminated and the unit is vacated.

<sup>31</sup> s. 624.316, F.S., "...The office shall examine the affairs, transactions, accounts, records, and assets of each authorized insurer and of the attorney in fact of a reciprocal insurer as to its transactions affecting the insurer as often as it deems advisable, except as provided in this section. The examination may include examination of the affairs, transactions, accounts, and records relating directly or indirectly to the insurer and of the assets of the insurer's managing general agents and controlling or controlled person, as defined in s. 625.012. The examination shall be pursuant to a written order of the office. Such order shall expire upon receipt by the office of the written report of the examination."

<sup>32</sup> s. 651.105(1), F.S.

<sup>33</sup> s. 651.105(4), F.S.

<sup>34</sup> Office of Insurance Regulation, Agency Analysis of House Bill 749, p. 2 (Mar. 2, 2015).

Further, the bill requires any refund that is due to be paid to a resident who vacates the unit and voluntarily terminates a contract after the seven-day rescission period, to be paid within thirty days of receipt by the provider of the next entrance fee for a like or similar unit for which there are no prior claims. A contract is voluntarily terminated when a resident provides written notice of intent to leave and moves out of the CCC after the seven-day rescission period. The bill defines the term “like or similar units” to mean a residential dwelling categorized into a group of units which have similar characteristics such as comparable square footage, number of bedrooms, location, age of construction, or a combination of one or more of these features. A CCC that offers such contracts must have a minimum of the lesser of five-percent of the total number of independent living units or ten units in each category unless the category consists of single family home, in which case there is no limit.

#### Notice of Examination Report and Corrective Action Report; Disclosure of Audit

The bill amends s. 651.105, F.S., to require the OIR to notify the executive office of the governing body of the CCC provider about all deficiencies found as part of an examination, and requires a CCC to provide a copy of any final examination report and corrective action plan to the executive officer of the governing body of the provider within 60 days after issuance of the report.

#### Residents’ Councils and Quarterly Meetings

The bill amends s. 651.081, F.S., to require each CCC to establish a residents’ council to provide a forum for residents’ input on subjects that impact the general residential quality of life, and requires that the council must be established through an election by the residents. The bill provides mandatory attributes of a residents’ council. Residents’ council activities must be independent of the CCRC provider. Additionally, the CCRC provider is not responsible for the costs of the residents’ council or ensuring the council’s compliance with statute. The residents’ council must adopt its own bylaws and governance documents, subject to the residents’ vote and approval. The governing documents may include term limits for council members.

The council must also provide for open meetings when appropriate. The council’s governing documents must define the process by which residents may submit such inquiries and issues and the timeframe for the council to respond. The council must also serve as a liaison to provide input on such matters to the appropriate representative of the CCRC.

If a licensed CCRC files for federal chapter 11 bankruptcy, the CCC must include in its required filing with the United States Trustee the 20 largest unsecured creditors, the name and contact information of a designated resident of the residents’ council, and, if appropriate, a statement explaining why the designated resident was chosen by the residents’ council to serve as a representative of the residents’ interest on the creditors’ committee.

The bill amends s. 651.085, F.S., to authorize the board of directors or governing board of a licensed provider to allow a facility resident to be a voting member of the board or governing body of the facility. The bill also amends s. 651.091, F.S., to require all CCCs to provide a copy of the most recent third-party financial audit to the president or chair of the residents’ council within 30 days of filing the annual report to OIR.

#### Priority of Claims in Receivership or Liquidation Proceedings

The bill amends s. 651.071, F.S., to make CCC contracts and continuing care at-home contracts preferred claims against a provider in receivership and liquidation proceedings, subordinate to any secured claims.<sup>35</sup>

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<sup>35</sup> “Preferred claims” are not interests in any particular property; they are similar to priority claims in bankruptcy, which are satisfied from all assets after secured claims (including valid statutory liens) have been paid in full. See Nathalie D. Martin, *The Insolvent Life Care Provider: Who Leads the Dance Between the Federal Bankruptcy Code and State Continuing-Care Statutes?* 61 Ohio St. L.J. 267, 310-311 (2000).

## Waiver of CCC Requirements

The bill amends s. 651.028, F.S., to require that a CCC must be accredited without stipulations or conditions for the OIR to waive any statutory requirements under ch. 651, F.S.<sup>36</sup>

### B. SECTION DIRECTORY:

**Section 1:** Amends s. 651.055, F.S., relating to continuing care contracts; right to rescind.

**Section 2:** Amends s. 651.028, F.S., relating to accredited facilities.

**Section 3:** Amends s. 651.071, F.S., relating to contracts as preferred claims on liquidation or receivership.

**Section 4:** Amends s. 651.105, F.S., relating to examination and inspections.

**Section 5:** Amends s. 651.081, F.S., relating to resident's council.

**Section 6:** Amends s. 651.085, F.S., relating to quarterly meetings between residents and the governing body of the provider; resident representation before the governing body of the provider.

**Section 7:** Amends s. 651.091, F.S., relating to availability, distribution, and posting of reports and records; requirement of full disclosure.

**Section 8:** Provides an effective date of October 1, 2015.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive fiscal impact on the private sector by providing clearer processes to refund entrance fees to residents and improving disclosures between CCCs and their residents.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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<sup>36</sup> Typically, the only requirement that OIR waives is the requirement to submit quarterly reports. OIR Analysis, p. 2.

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

No additional rulemaking authority is necessary to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 18, 2015, the Insurance & Banking Subcommittee considered and adopted two amendments and reported the bill favorably as a committee substitute. The first amendment removed reference to bankruptcy, so that the treatment of continuing care contracts as preferred claims applies only in receivership and liquidation proceedings. The second amendment clarified that a residents' council shall adopt its own bylaws and governance documents, subject to the residents' vote and approval.

The analysis is drafted to the committee substitute as passed by the Insurance & Banking Subcommittee.