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 Appropriations

BILL:	CS/CS/SB 438
INTRODUCER:	Appropriations Committee (Recommended by Appropriations Subcommittee on General Government); Banking and Insurance Committee; and Senators Lee and Campbell
SUBJECT:	Continuing Care Contracts
DATE:	February 23, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	**Fav/CS**
2.	Sanders	Betta	AGG	**Recommend: Fav/CS**
3.	Sanders	Hansen	AP	**Fav/CS**
4.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 438 revises provisions within the Insurance Code governing continuing care retirement communities (CCRC) or providers, which are regulated by the Office of Insurance Regulation (OIR). Generally, the CCRCs provide lifelong housing, household assistance, and nursing care in exchange for a significant entrance fee and monthly fees. 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 sick or frail, they will receive the care they need.

The bill provides the following changes throughout ch. 651, F.S., relating to CCRCs:

Solvency/Financial Accountability:

- The bill creates an impairment framework to allow the OIR to work with the provider much earlier when negative financial trends are identified in order to mitigate or resolve any potential issues that would put residents' interests in jeopardy.
- The bill specifies that a provider is deemed to be experiencing a regulatory action level event and must submit a corrective action to the OIR if the provider's performance fails to meet certain requirements.
- The OIR must examine the provider and issue a corrective order specifying any corrective actions that the OIR deems necessary.

- Effective July 1, 2019, a provider is considered impaired if it does not meet the minimum liquid reserves requirements or debt service coverage ratios, as applicable.

Protections and Transparency for Residents:
- The bill requires the provider to make additional information, notices, and reports available to the residents or residents' council.
- The bill also provides an expanded process for resident complaints against providers, including the establishment of a complaint tracking system and a requirement that the OIR provide a written report to the complainant upon the disposition of a complaint.
- The bill provides the OIR with additional authority to approve or disapprove management. The bill would also allow the OIR to revoke, suspend, or take other administrative action in the event a CCRC does not remove a manager in a timely manner by the CCRC.

Regulatory Oversight:
- The bill clarifies the duty of a provider to respond to written correspondence from the OIR.
- The bill provides that the OIR has standing to petition a circuit court for mandatory injunctive relief to compel access to and require a provider to produce requested records.
- The bill provides that, if a facility or provider relies on a contractual or financial relationship with a parent, subsidiary, or affiliate in order to demonstrate that the financial condition of the provider or facility complies with ch. 651, F.S., the OIR is authorized to examine these entities.
- The bill clarifies and streamlines existing regulatory requirements. For example, the bill consolidates the application process for the acquisition of a facility and the issuance of certificate of authority (COA) into a single application.

The bill appropriates $74,141 from the Insurance Regulatory Trust Fund and one position with associated salary rate of 45,043. The OIR estimates it will need to modify current technology systems, which can be absorbed within existing resources.[1]

The bill provides an effective date of July 1, 2018.

II. Present Situation:

Continuing Care Retirement Communities (CCRC)

A provider or a CCRC offer 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 residents' changing level of care. A CCRC can include independent living apartments or houses, 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] In addition to the entrance fee, a CCRC also generally

[1] Conversation with Richard Fox, Budget Director, Office of Insurance Regulation (February 5, 2018).
[2] Section 651.011(2), F.S.
[3] Sections 651.057 and 651.118, F.S.

charges residents monthly fees to cover costs related to health care and other aspects of community living. [4]

Regulatory oversight responsibility of CCRCs in Florida is shared primarily between the Agency for Health Care Administration (AHCA) and the Office of Insurance Regulation (OIR).[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] About 30,000 residents live in CCRCs.[9]

Oversight by the Office of Insurance Regulation

Continuing care services are governed by a contract between the facility and the resident of a CCRC. In Florida, continuing care contracts are considered an insurance product and are reviewed and approved by the OIR.[10]

Certificate of Authority (COA)

The OIR has primary responsibility to regulate and monitor the operation of CCRCs and to determine facilities' financial condition and the management capabilities of their managers and owners.[11] If a provider is accredited through a process "substantially equivalent" to the requirements of ch. 651, F.S., the OIR may waive requirements of the chapter.[12]

In order to operate a CCRC in Florida, a provider must obtain from the OIR a COA predicated upon first receiving a provisional certificate of authority.[13] The application process involves submitting various financial statements and information, expectations of the financial condition of the project, and copies of contracts.[14] Further, the applicant must provide evidence that the applicant is reputable and of responsible character.[15] A certificate of authority will be issued once a provider meets the requirements prescribed in s. 651.023, F.S.[16]

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[4] AARP, *About Continuing Care Retirement Communities*, available at http://www.aarp.org/relationships/caregiving-resource-center/info-09-2010/ho_continuing_care_retirement_communities.html (last viewed Jan. 7, 2018).
[5] Chapter 651, F.S.
[6] Section 651.011(12), F.S., a provider means an owner or operator.
[7] Agency for Health Care Administration reports, available at *http://www.floridahealthfinder.gov/reports-guides/nursinghomesfl.aspx* (last viewed Jan. 7, 2018) and s. 651.118, F.S.
[8] Office of Insurance Regulation, *Presentation to the Governor's Continuing Care Advisory Council* (Aug. 2017), available at https://www.floir.com/siteDocuments/CCRCAdvisoryCouncilOIRPresentation08172017.pdf (last viewed Jan. 11, 2018).
[9] *Id.*
[10] Section 651.055(1), F.S.
[11] See ss. 651.021, 651.22, and 651.023, F.S.
[12] Section 651.028, F.S.
[13] Section 651.022, F.S.
[14] See ss. 651.021-651.023, F.S.
[15] Section 651.022(2)(c), F.S.
[16] Section 651.023(4)(a), F.S.

Continuing Care Contracts

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. The CCRCs offer different types of contracts that provide for varying amounts of monthly fees and levels of healthcare discounts.

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 four years of occupancy in the CCRC by the resident.[17] However, many contracts exceed this requirement and contain minimum refund provisions that guarantee a refund of a specified portion (typically 50 to 90 percent) of the entrance fee upon the death of the resident or termination of the contract regardless of the length of occupancy by the resident.[18]

Financial Requirements/Solvency

Each CCRC is required to file an annual report with the OIR, which includes an audited financial report and other detailed financial information, such as a listing of assets maintained in the liquid reserve required under s. 651.035, F.S., and information about fees required of residents.[19] Section 651.033, F.S., prescribes requirements relating to the establishment and maintenance of escrow accounts. Providers are required to maintain a minimum liquid reserve, as applicable, as prescribed in s. 651.035, F.S.

Rights of Residents in a Continuing Care Retirement Community

The OIR is authorized to discipline a facility for violations of residents' rights.[20] 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.[21]

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.[22] The CCRCs are required to maintain and make available certain public information and records.[23]

[17] Section 651.055, F.S.
[18] *See* Office of Insurance Regulation, *Analysis of SB 438* (Oct. 11, 2017) (on file with the Senate Committee on Banking and Insurance).
[19] Section 651.026, F.S.
[20] Section 651.083, F.S.
[21] *Id*.
[22] Section 651.081, F.S.
[23] Section 651.091, F.S.

OIR Enforcement Authority

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

If the OIR institutes receivership or liquidation proceedings against a CCRC, the continuing care contracts are deemed preferred claims against assets of the provider. Such claims are subordinate, however, to any secured claim. Florida law does not specify the claim status of continuing care contracts in a bankruptcy proceeding.

Department of Financial Services

The Department of Financial Services (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.[24] Typically, residents will contact the DFS's Division of Consumer Services, which receives and resolves complaints involving products and entities regulated by the OIR or the DFS.[25]

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. In Florida, the Division of Rehabilitation and Liquidation (division) 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.

III. Effect of Proposed Changes:

Section 1 amends s. 651.011, F.S., to create definitions of the following terms: actuarial opinion, actuarial study, actuary, corrective order, days cash on hand, debt service coverage ratio, impaired, manager or management company, obligated group, occupancy, and regulatory action level event. The term, "impaired," means any of the following has occurred:

- A provider has failed to maintain its minimum liquid reserve as required in s. 651.035, F.S., unless the provider has received prior written approval from the office for a withdrawal pursuant to s. 651.035(6), F.S., and is compliant with the approved payment schedule; or
- Beginning July 1, 2019:
  - For a provider with mortgage financing from a third-party lender or public bond issue, the provider's debt service coverage ratio is less than 1:1 and the provider's days cash on hand is less than 90; or

[24] *See* Rules 69O-193.062 and 69O-193.063, F.A.C.
[25] Section 624.307, F.S.

- For a provider without mortgage financing from a third-party lender or public bond issue, the provider's days cash on hand is less than 90.

Solvency/Financial Accountability

Section 12 amends s. 651.026, F.S., to provide that the annual report submitted to the Office of Insurance Regulation (OIR) must include the reporting of the management's calculation of the provider's debt service coverage ratio and days cash on hand for the current reporting period, and an opinion from an independent certified public accountant of the management's calculations. The OIR is required to publish an annual industry benchmarking report that contains specified information about the industry's performance.

Section 13 amends s. 651.0261, F.S., to codify the current discretionary monthly financial reporting rule[26] and revises the quarterly financial reporting requirements. This section provides the conditions that trigger a monthly financial reporting to the OIR. The OIR may waive the quarterly reporting requirements if a written request from a provider that is accredited or that has obtained an investment grade credit rating from a U.S. credit rating agency. Further, the section requires a provider to submit a detailed listing of assets in the minimum liquid reserve with the quarterly and monthly unaudited financial statement filings, if applicable, which will enable the OIR to determine whether the provider is impaired and to take action to assist providers who may fall below the impairment threshold.

Section 14 amends s. 651.028, F.S., relating to waivers of ch. 651, F.S., requirements. The section provides that if a provider or obligated group has obtained an investment grade credit rating from Moody's Investors Services, Standard & Poor's, or Fitch Ratings, the OIR may waive any requirements of ch. 631, F.S., if the OIR finds that such waivers are not inconsistent with the protections intended by this chapter. Currently, the OIR may waive ch. 631, F.S., requirements if a provider is accredited.

Section 15 amends s. 651.033, F.S., to clarify the terms and conditions relating to an escrow account and the duties of escrow agents. The section provides that an escrow agent must receive the OIR's prior approval before releasing escrowed funds with some exceptions. According to the OIR, these changes are based on conversations with escrow agents who expressed confusion over their statutory responsibilities because some of the requirements are beyond those customarily undertaken by escrow agents. The section also clarifies permissible investments (e.g., cash, cash equivalents, mutual funds, equities, or investment grade bonds) of escrowed funds and removes references to part II of ch. 625, F.S.

Section 16 creates s. 651.034, F.S., to establish a financial and operating framework of required actions if a regulatory action level event or impairment occurs. A regulatory action level event occurs when a provider fails to meet minimum requirements of two of the three following key indicators: occupancy rate, day's cash on hand, and debt service coverage ratios. If the provider is a member of an obligated group with an investment grade credit rating, the indicators of the obligated group may be substituted. Once a regulatory action level event is triggered, the OIR is

[26] Rule 69O-193.005, F.A.C.

required to examine the provider, review the provider's corrective action plan, and issue a corrective order specifying any corrective actions that the OIR deems necessary.

Further, this section details the information the provider must submit to the OIR if a regulatory action level event occurs, which would include the submission of a corrective action plan within 30 days after the regulatory action level event. The OIR must approve or disapprove the corrective plan within 15 days. If an impairment occurs, the OIR must take action, which could include "any remedy available under ch. 631, F.S." An impairment is sufficient grounds for the Department of Financial Services (DFS) to be appointed as receiver, as provided in ch. 631, F.S. The section provides that the OIR may exempt a provider from provisions relating to the regulatory action level event and impairment if certain conditions are met.

Section 17 amends s. 651.035, F.S., relating to the minimum liquid reserve requirements and reporting. Each facility must file annually with the OIR a calculation of the minimum liquid reserve along with the annual report. The section allows a provider to withdraw funds held in escrow without the approval of the OIR if the amount in escrow exceeds the requirements of this section and the withdrawal will not affect compliance with this section. For all other proposed withdrawals, the provider must file information documenting the necessity of the withdrawal. Within 30 days after the file is deemed complete, the OIR must notify the provider of its approval or disapproval of the withdrawal request. The section also requires a provider that does not have a mortgage loan or other financing on the facility, to deposit monthly in escrow one-twelfth of its annual property tax liability. This change modifies the current requirement that a provider hold funds equivalent to one year's property taxes in escrow as a reserve. The section authorizes the OIR to require the transfer of up to 100 percent of the funds held in the minimum liquid reserve to the custody of the Bureau of Collateral Management of the DFS if the OIR finds that the provider is impaired or insolvent in order to ensure the safety of those assets.

Section 27 amends s. 651.114, F.S., relating to delinquency proceedings and remedial rights. A provider must develop a plan for obtaining compliance or solvency within 30 days after a request from the advisory council or the office. The OIR or advisory council is required to respond within 30 days after receipt of a plan. If the financial conditions of the provider is impaired or the provider fails to submit a plan or submits a plan that is insufficient to correct the condition, the OIR may specify a plan. However, the section clarifies that the availability of remedial rights will not delay or prevent the OIR from taking regulatory measures it deems necessary.

The section requires a provider to give residents a written notice of a delinquency proceeding under ch. 631, F.S., within three business days of initiation. If a ch. 631, F.S., show cause order is issued, the provider must respond within 20 days after service, but no less than 15 days prior to the hearing. Any hearing must be held within 60 days after the order to show cause. A hearing to determine whether cause exists for DFS to be appointed a receiver must be commenced within 60 days after an order directing a provider to show cause. Further, the section provides that, notwithstanding s. 631.011, F.S., impairment of a provider, for purposes of s. 631.051, F.S., is defined according to the term, "impaired" in s. 651.011, F.S.

Regulatory Oversight

Section 3 amends s. 651.013, F.S., to expand the scope of laws applicable to continuing care retirement communities (CCRCs). Sections 624.307, 624.308, 624.310, 624.102, 624.311, 624.312, 624.318 and 624.422, F.S., are added. These provisions provide the OIR with additional authority to take enforcement authority against licensed entities, affiliates, and unlicensed entities subject to OIR's regulation. Further, these provisions specify that CCRCs must appoint the Chief Financial Officer for service of process; clarify the role of the DFS Division of Consumer Services in resolving consumer complaints; specify requirements for the retention of records by the OIR; and provide immunity from civil liability for persons providing the DFS, Financial Services Commission (FSC), or the OIR with information about the condition of an insurer and clarify the authority of the OIR in regards to examinations and investigations. Section 624.318, F.S., which applies generally to insurers, provides that it is the duty of every person being examined, and its officers, attorneys, employees, agents, and representatives, to "make freely available" to the OIR the accounts, records and documents during an examination or investigation. This section also specifies, "any individual who willfully obstructs the DFS, the OIR, or the examiner in the examinations or investigations authorized by this part is guilty of a misdemeanor." Finally, s. 624.312, F.S., provides that reproductions and certified copies of records are admissible as evidence. These requirements are consistent with the oversight of other licensees and consumer complaint handling subject to the Insurance Code.

Section 5 amends s. 651.021, F.S., which relates to the certificate of authority process, to move provisions relating to expansion of a certified facility to the newly created s. 651.0246, F.S.

Section 6 creates s. 651.0215, F.S., to allow an applicant to qualify for a certificate of authority without first obtaining a provisional certificate of authority if the following conditions are met:

- Placement of all reservation deposits and entrance fees in escrow and not pledging initial entrance fees for construction or purchase of the facility or a security for long-term financing;
- Compliance with the requirement of s. 651.022(2), F.S.;
- Submission of a feasibility study, financial forecasts or projections, an audited financial report, and quarterly unaudited financial reports;
- Evidence of compliance with lenders' conditions;
- Documentation evidencing that aggregate amount of entrance fee received by or pledged by the applicant and other specified sources equal at 100 percent of the aggregate cost of constructing, acquiring, equipping, and furnishing the facility plus 100 percent of the anticipated losses of the facility;
- Evidence that the applicant will meet minimum liquid requirements; and
- Such other reasonable data and information requested by the OIR.

Section 7 amends s. 651.022, F.S., which relates to the provisional certificate of authority process, to clarify that an applicant must disclose material changes that occur while a provisional certificate of authority application is pending before the OIR. This change is consistent with other requirements in the Insurance Code.

Section 8 amends s. 651.023, F.S., relating to the requirements for a certificate of authority application. After issuance of a provisional certificate of authority, the OIR will issue the holder a certificate of authority if the holder provides certain information. For example, an applicant

must submit a feasibility study that contains specified information, such as information evidencing commitments had been made for construction financing and long-term financing or a documented plan acceptable to the OIR. Further, audited financial reports are required. The bill clarifies the deadlines for the OIR's approval or denial of completed applications.

A certificate of authority may not be issued until documentation is submitted to the OIR evidencing the project has a minimum of 50 percent of the units reserved for which the provider is charging an entrance fee. 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 then-current entrance fee for that unit. The provider may assess a forfeiture penalty of two percent of the entrance fee due to termination of the reservation contract after 30 days for any reason other than death or serious illness of the resident, the failure of the provider to meet obligations under the reservation contract, or other circumstances beyond the control of the resident.

Section 9 amends s. 651.024, F.S., relating to acquisitions, to clarify which filing or application for acquisition statutory provision applies to each type of transaction, including the new, consolidated provisions of s. 651.0245, F.S. The section clarifies that the assumption of the role of a general partner of a CCRC or the assumption of ownership, or possession of, or control over, 10 percent or more of a provider's assets requires an acquisition filing. However, this type of acquisition is not subject to the filing requirements pursuant to s. 651.022, s. 651.023, or s. 651.0245, F.S.

A person who seeks to acquire and become the provider for a facility will be subject to s. 651.0245, F.S., and will not be required to make filings pursuant to ss. 651.4615, 651.022, and 651.023, F.S. The section provides that a person may rebut a presumption of control by filing a disclaimer of control form with the OIR. The federal Securities and Exchange Commission (SEC) Schedule 13G form may be filed in lieu of a disclaimer of control form. This SEC filing is used to report a party's ownership of stock in a company. Insurers are permitted to use this filing, and some CCRCs have requested that the OIR accept such filings from them.

Section 10 creates s. 651.0245, F.S., to establish an application for the simultaneous acquisition of a facility and issuance of a certificate of authority. The section provides that a person must obtain the OIR's prior approval before acquiring a facility operating under an existing Certificate of Authority (COA) and engaging in the business of continuing care. Under current law, if a person applies to acquire an existing facility and become the provider, the person must submit an acquisition application, a provisional certificate of authority application, and a certificate of authority application. This section streamlines the application process by creating a single application.

Section 11 creates s. 651.0246, F.S., relating to expansions, to clarify the requirements and approval process. The section establishes requirements for an expansion of a facility equivalent to the addition of at least 20 percent of the existing units or 20 percent more continuing care at-home contracts. Such expansion applications will require the submission of a feasibility study to the OIR. The section prescribes the factors the OIR must consider in deciding whether to approve the application. It also requires 75 percent of the initial entrance fees/reservation deposits for continuing care contracts, and 50 percent of the moneys paid for initial fees for continuing care at-home contracts be placed in escrow or on deposit with the Department of

Financial Services (DFS). Up to 25 percent of these funds may be used for construction or financing. The escrow funds may be released once certain conditions are met. Only the provider, escrow agent, and the Office of Insurance Regulation (OIR) have standing under ch. 120, F.S., to seek redress regarding the OIR's decision regarding the release of escrow funds. The OIR has 90 days to review and act upon complete expansion applications. If a provider has exceeded the current statewide median for certain indicators, the provider is automatically granted authority to expand the total number of existing units by up to 35 percent upon submission of specified information and an attestation to the OIR.

Section 18 creates s. 651.043, F.S., relating to changes in management. This section establishes criteria for the OIR to use in determining whether management meets minimum qualification standards and allows for the disapproval and removal of unqualified management. This section requires management contracts be in writing and providers to file notices of a change in management within 10 days of the appointment of new management. The OIR must approve or disapprove the filing within 15 days after the filing is deemed complete. Disapproved management must be removed within 30 days after receipt of the OIR's notice. Currently, the OIR does not have authority to disapprove unaffiliated management except by taking action against the certificate of authority (COA) of the provider.

Effective July 1, 2018, management contracts must be in writing. Currently, Rule 690-193.002(13), F.A.C., specifies that a manager or management company agrees to administer the day-to-day activities of a facility pursuant to a written contract with the provider. However, the rule does not address situations where a manager or management company does not have a written contract with the provider. This change closes a loophole that has allowed management serving under an oral contract to evade regulation by the OIR.

Section 19 amends s. 651.051, F.S., to clarify the requirements relating to the maintenance of records and assets. The section provides that the records and assets of a provider must be maintained in Florida, or, if the provider's corporate office is located in another state, they must be electronically stored in a manner that will ensure the records are accessible to the OIR.

Section 23 amends s. 651.105, F.S., relating to examinations and inspections by the OIR. The section requires a provider to respond to written correspondence from the OIR. Further, the section provides that the OIR has standing to petition a circuit court for mandatory injunctive relief to compel access to and require a provider to produce requested records. Unless a provider or facility is impaired or subject to a regulatory level event, any parent, subsidiary, or affiliate is not subject to examination by the OIR as part of a routine examination. However, an exception is provided if a facility or provider relies on a contractual or financial relationship with a parent, subsidiary, or affiliate in order to demonstrate that the financial condition of the provider or facility is in compliance with ch. 651, F.S. The books and records of affiliates often reflect on the financial state of the provider and may be relevant to the ability of the continuing care retirement community (CCRC) to provide the care promised to residents.

Section 24 amends s. 651.106, F.S., to provide additional grounds for the OIR to refuse, suspend, or revoke a COA. The section provides that the OIR may deny an application, suspend, or revoke the provisional certificate of authority or certificate of authority if the provider is

impaired or the owners, managers, or controlling persons are not reputable or lack sufficient management expertise or experience to operate a CCRC. Other grounds are delineated.

Section 25 creates s. 651.1065, F.S., relating to soliciting or accepting new contracts by impaired or insolvent facilities or providers. This section prohibits an impaired or insolvent provider from soliciting or accepting new contracts after the proprietor, general partner, its member, officer, director, trustee, or manager knew, or reasonably should have known, that the CCRC is impaired or insolvent, even if a delinquency hearing had not been initiated. According to the OIR, this provision will help to protect potential residents who may be considering investing substantial funds into the purchase of a CCRC contract. The OIR will have discretion to allow the issuance of new contracts where safeguards are adequate unless the facility had declared bankruptcy. The provision provides that a violation of this section is a felony of the third degree, which is consistent with regulations for other insurance entities.

Section 28 creates s. 651.1141, F.S., to clarify that certain statutory violations are an immediate danger to the public health, safety, or welfare, which allows the OIR to issue an immediate final order to cease and desist. These violations are:

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

This section will allow the OIR to take more expedited action to protect the assets of the provider and the significant investments of the residents.

Section 30 amends s. 651.125, F.S., relating to criminal penalties and injunctive relief, to clarify that any person who assists in entering into, maintaining, or performing any continuing care or continuing care at-home contract subject to ch. 651, F.S., without a valid provisional certificate of authority or certificate of authority commits a felony of the third degree.

Increased Transparency and Protections for Residents

Section 4 amends s. 651.019, F.S., provisions relating to CCRC financing. A provider must notify the residents' council of any new financing or refinancing at least 30 days before the closing date of the transaction. This allows residents to object to financing transactions that concern them. Under current law, the residents' council receives notice of all financing documents filed with the OIR. Such documents must be submitted to the OIR within 30 days after the closing date to remove the perception that the OIR can prevent a provider from securing new financing, additional financing, or refinancing that may be hazardous to the residents. Currently, providers are required to file a general outline and intended use of proceeds with the OIR prior to the closing date of the financing.

Section 21 amends s. 651.071, F.S., to deem all continuing care and continuing care at-home contracts preferred claims or policyholder loss claims pursuant to s. 631.271(1)(b), F.S., in the

event the provider is liquidated or put into receivership. The intent of this provision is to protect the claims of residents in the event of a liquidation.

Section 22 amends s. 651.091, F.S., to create additional provider reporting requirements to the residents or residents' council. These reports will help residents and prospective residents to remain apprised of the status and stability of the provider and to take action to protect their interests. The section requires the provider to furnish information to the chair of the residents' council, such as, 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, and the reasons for any increase in the monthly fee that exceeds the consumer price index.

Section 26 amends s. 651.111, F.S., relating to resident complaints and inspections by the OIR to provide more guidance as to inspections or investigations by the OIR regarding the status and resolution of the complaint. The section requires the OIR to acknowledge receipt of a complaint within 15 days and issue a written closure statement to the complainant upon the final disposition of the complaint.

Section 29 amends s. 651.121, F.S., relating to the Continuing Care Advisory Council, to increase the number of residents on the council from three to four and remove the requirement that one of the 10 members is an attorney.

Sections 2 and 20 provide technical, conforming changes.

Section 31 provides the bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill provides additional consumer protections for current and potential residents of a continuing care retirement community (CCRC).

A CCRC whose performance falls below the key indicators may incur increased costs in providing additional information to the OIR. Costs of acquisition may decrease due to the consolidation of the three filings currently required into one filing.

C. Government Sector Impact:

Office of Insurance Regulation

The OIR[27] indicates that it needs one additional full time equivalent employee (FTE), a Reinsurance Financial Specialist, at a cost of $74,141, to implement the provisions of the bill.[28] In addition, the OIR estimates it will need to modify current technology systems. The OIR indicates the required technology systems modifications can be absorbed within existing resources.[29]

VI. Technical Deficiencies:

Consumer Complaints, Examinations, Investigations, and Inspections

The handling of complaints and inspections, as provided in Section 26 of the bill, may create confusion and duplication with the existing provisions found in s. 624.307, F.S., and s. 651.105, F.S. Section 651.105, F.S., relates to the Office of Insurance Regulations' (OIR's) authority to conduct examinations and inspections. Currently, s. 624.307(10), F.S., authorizes the Department of Financial Services' (DFS') Division of Consumer Services (division) to receive and respond to complaints concerning products or services regulated by the DFS or the OIR, which would include continuing care retirement communities (CCRCs). According to the DFS, these types of inquiries are usually handled through coordination between the OIR and the division because the OIR lacks personnel to handle consumer inquiries but the division lacks access to financial documents as well as the technical knowledge to interpret and understand financial reports. Consumer inquiries are logged into the division's database and follow the same timelines and requirements as other entities regulated by the OIR.[30] Consumers may initiate contact with the DFS through the DFS website or by telephone.

Section 26 of the bill amends s. 651.111, F.S., relating to complaints and inspections received by the OIR. Under current law, the OIR is required to make an inspection unless the OIR determines a complaint is without reasonable basis. The language appears to require the OIR to make an inspection if one is requested even if the OIR determines the request is without merit. The term, "inspection," is used in ss. 651.105 and 651.111, F.S.; however, the term is undefined.

[27] Office of Insurance Regulation, *Analysis of SB 438* (Oct. 11, 2017) (on file with the Senate Banking and Insurance Committee).
[28] *Id* at pp. 8-9.
[29] Conversation with Richard Fox, Budget Director, Office of Insurance Regulation (February 5, 2018).
[30] Department of Financial Services, *Analysis of SB 438* (Dec. 28, 2017) (on file with Senate Banking and Insurance Committee).

Solvency

Currently, chapters 631, F.S., relating to insurer insolvency, and 651, F.S., do not define the term "impaired." However, s. 631.051, F.S., does use the term as one of the grounds for the initiation of delinquency proceedings. In addition, The Insurance Code uses the terms "impaired" and "impairment" throughout but does not define either term. **Section 1** of the bill contains a definition of "impaired" and given that term is not defined in ch. 631, F.S., it is unclear how the receivership court would treat actions based on the amended definition of "impaired." [31]

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 651.011, 651.012, 651.013, 651.019, 651.021, 651.022, 651.023, 651.024, 651.026, 651.0261, 651.028, 651.033, 651.035, 651.051, 651.057, 651.071, 651.091, 651.105, 651.106, 651.111, 651.114, 651.1151, 651.121, and 651.125.

This bill creates the following sections of the Florida Statutes: 651.0215, 651.0245, 651.0246, 651.034. 651.043, 651.1065, and 651.1141.

IX. Additional Information:

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

CS/CS by Appropriations on February 22, 2018:
The committee substitute provides an appropriation of $74,141 and one full time equivalent position with associated salary rate of 45,043 to the Office of Insurance Regulation.

CS by Banking and Insurance on January 16, 2018:
The CS provides the following changes:

- Revises definitions.
- Creates consolidated application for provisional certificate of authority and certificate of authority.
- Revises and clarifies escrow account requirements.
- Revises requirements for expansions.
- Revises annual and quarterly report requirements.
- Allows the Office of Insurance Regulation (OIR) to waive requirements of ch. 651, F.S., if a provider or obligator group has obtained an investment grade credit rating and has met certain conditions.

[31] Department of Financial Services, *Analysis of SB 438* (Oct. 16, 2017) (on file with Senate Banking and Insurance Committee).

- Revises minimum liquid reserve requirements.
- Revises provisions relating to approval of changes in management.
- Revises maintenance of record provisions.
- Revises provisions relating to examinations and inspections.
- Revises grounds for discretionary refusal, suspension, or revocation of a certificate of authority.
- Provides technical, conforming changes.

B. Amendments:

None.