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SENATE BILL

55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

INTRODUCED BY

Bill Tallman

AN ACT

RELATING TO AGING; REQUIRING PROVIDERS TO INCLUDE CLOSURE PLAN DESCRIPTIONS IN CONTINUING CARE CONTRACTS; REQUIRING THE ATTORNEY GENERAL TO ACCEPT AND REVIEW ALLEGED VIOLATIONS OF THE CONTINUING CARE ACT REPORTED FROM ANY SOURCE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 24-17-4 NMSA 1978 (being Laws 1985, Chapter 102, Section 4, as amended) is amended to read:

"24-17-4. DISCLOSURE.--

A. A provider shall furnish a current annual disclosure statement that meets the requirements set forth in Subsection B of this section and the aging and long-term services department's and attorney general's consumer's guide to continuing care communities to the aging and long-term services department pursuant to Section 24-17-7 NMSA 1978, to

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1 each actual resident and to a prospective resident at least
2 seven days before the provider enters into a continuing care
3 contract with the prospective resident, or prior to the
4 prospective resident's first payment, whichever occurs first.
5 For the purposes of this subsection, the obligation to furnish
6 information to each actual resident shall be deemed satisfied
7 if a copy of the disclosure statement and the consumer's guide
8 is given to the residents' association, if there is one, and a
9 written message has been delivered to each actual resident,
10 stating that personal copies are available upon request.

11 B. The disclosure statement provided pursuant to
12 Subsection A of this section shall include:

13 (1) a brief narrative summary of the contents
14 of the disclosure statement written in plain language;

15 (2) the name and business address of the
16 provider;

17 (3) if the provider is a partnership,
18 corporation or association, the names, addresses and duties of
19 its officers, directors, trustees, partners or managers;

20 (4) the name and business address of each of
21 the provider's affiliates and a description of the business
22 relationship;

23 (5) a statement as to whether the provider or
24 any of its officers, directors, trustees, partners, managers or
25 affiliates, within ten years prior to the date of application:

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1 (a) was convicted of a felony, a crime
2 that if committed in New Mexico would be a felony or any crime
3 having to do with the provision of continuing care;

4 (b) has been held liable or enjoined in
5 a civil action by final judgment, if the civil action involved
6 fraud, embezzlement, fraudulent conversion or misappropriation
7 of property;

8 (c) has incurred a long-term debt that
9 has a maturity of twelve months or longer, including a
10 disclosure of any such long-term debt;

11 [~~(c)~~] (d) had a prior discharge in
12 bankruptcy or was found insolvent in any court action; or

13 [~~(d)~~] (e) had a state or federal license
14 or permit suspended or revoked or had any state, federal or
15 industry self-regulatory agency commence an action against the
16 provider or any of its officers, directors, trustees, partners,
17 managers or affiliates and the result of such action;

18 (6) the name and address of any person whose
19 name is required to be provided in the disclosure statement who
20 owns any interest in or receives any remuneration from, either
21 directly or indirectly, any other person providing or expected
22 to provide to the community goods, leases or services with a
23 real or anticipated value of five hundred dollars (\$500) or
24 more and the name and address of the person in which such
25 interest is held. The disclosure shall describe such goods,

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1 leases or services and the actual or probable cost to the
2 community or provider and shall describe why such goods, leases
3 or services should not be purchased from an independent entity;

4 (7) the name and address of any person owning
5 land or property leased to the community and a statement of
6 what land or property is leased;

7 (8) a statement as to whether the provider is,
8 or is associated with, a religious, charitable or other
9 organization and the extent to which the associate organization
10 is responsible for the financial and contractual obligations of
11 the provider or community;

12 (9) the location and description of real
13 property being used or proposed to be used in connection with
14 the community's contracts to furnish care;

15 (10) a statement as to the community's or
16 corporation's liquid reserves to assure payment of debt
17 obligations and an ongoing ability to provide services to
18 residents. The statement shall also include a description of
19 the community's or corporation's reserves, including a specific
20 explanation as to how the community or corporation intends to
21 comply with the requirements of Section 24-17-6 NMSA 1978;

22 (11) for communities that provide type A and
23 type B agreements:

24 (a) a summary of ~~[an]~~ a comprehensive
25 actuarial analysis within the last five years; and

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1 (b) an annual future-service obligation
2 calculation by an actuary who is a member of the American
3 academy of actuaries and who is experienced in analyzing
4 continuing care communities;

5 (12) an audited financial statement and an
6 audit report prepared in accordance with generally accepted
7 accounting principles applied on a consistent basis and
8 certified by a certified public accountant, including an income
9 statement or statement of activities, a cash-flow statement or
10 sources and application of funds statement and a balance sheet
11 as of the end of the provider's last fiscal year. The balance
12 sheet should accurately reflect the deferred revenue balance,
13 including entrance fees and any other prepaid services, and
14 should include notes describing the community's long-term
15 obligations and identifying all the holders of mortgages and
16 notes;

17 (13) a sample copy of the contract used by the
18 provider; and

19 (14) a list of documents and other information
20 available upon request, including:

21 (a) a copy of the Continuing Care Act;

22 (b) if the provider is a corporation, a
23 copy of the articles of incorporation; if the provider is a
24 partnership or other unincorporated association, a copy of the
25 partnership agreement, articles of association or other

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1 membership agreement; and if the provider is a trust, a copy of
2 the trust agreement or instruments;

3 (c) resumes of the provider and its
4 officers, directors, trustees, partners or managers;

5 (d) a copy of lease agreements between
6 the community and any person owning land or property leased to
7 the community;

8 (e) information concerning the location
9 and description of other properties, both existing and
10 proposed, of the provider in which the provider owns any
11 interest and on which communities are or are intended to be
12 located and the identity of previously owned or operated
13 communities;

14 (f) a copy of the community's policies
15 and procedures; and

16 (g) [~~other data~~] financial statements
17 [~~and pertinent information~~] with respect to the provider or
18 community, or its directors, trustees, members, managers,
19 branches, subsidiaries or affiliates, that a resident requests
20 and that is reasonably necessary in order for the resident to
21 determine the financial status of the provider, its sole member
22 or its principal and the community and the management
23 capabilities of the managers and owners, including the most
24 recent audited financial statements of comparable communities
25 owned, managed or developed by the provider, its sole member or

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1 its principal.

2 C. Each year, within one hundred eighty days after
3 the end of the community's fiscal year, the provider shall
4 furnish to actual residents the disclosure statement as
5 outlined in this section. For purposes of this subsection, the
6 obligation to furnish the required information to residents
7 shall be deemed satisfied if the information is given to the
8 residents' association, if there is one, and a written message
9 has been delivered to each resident, stating that personal
10 copies of the information are available upon request."

11 SECTION 2. Section 24-17-5 NMSA 1978 (being Laws 1985,
12 Chapter 102, Section 5, as amended) is amended to read:

13 "24-17-5. CONTRACT INFORMATION.--

14 A. A provider is responsible for ensuring that a
15 continuing care contract is written in clear and understandable
16 language.

17 B. A continuing care contract shall, at a minimum:

18 (1) describe the community's admission
19 policies, including age, health status and minimum financial
20 requirements, if any;

21 (2) describe the health and financial
22 conditions required for a person to continue to be a resident;

23 (3) describe the circumstances under which the
24 resident will be permitted to remain in the community in the
25 event of financial difficulties of the resident;

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1 (4) list the total consideration paid,
2 including donations, entrance fees, subscription fees, periodic
3 fees and other fees paid or payable; provided, however, that a
4 provider cannot require a resident to transfer all the
5 resident's assets or the resident's real property to the
6 provider or community as a condition for providing continuing
7 care and the provider shall reserve the right to charge
8 periodic fees;

9 (5) describe in detail all items of service to
10 be received by the resident, such as food, shelter, medical
11 care, nursing care and other health services, and whether
12 services will be provided for a designated time period or for
13 the resident's lifetime;

14 (6) as an addendum to the contract, provide a
15 description of items of service, if any, that are available to
16 the resident but that are not covered in the entrance or
17 monthly fee;

18 (7) specify taxes and utilities, if any, that
19 the resident must pay;

20 (8) specify that deposits or entrance fees
21 paid by or for a resident shall be held in trust for the
22 benefit of the resident in a federally insured New Mexico bank
23 until the resident has taken possession of the resident's unit
24 or the resident's contract cancellation period has ended,
25 whichever occurs later;

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1 (9) state the terms under which a continuing
2 care contract may be canceled by the resident or the community
3 and the basis for establishing the amount of refund of the
4 entrance fee;

5 (10) state the terms under which a continuing
6 care contract is canceled by the death of the resident and the
7 basis for establishing the amount of refund, if any, of the
8 entrance fee;

9 (11) state when fees will be subject to
10 periodic increases and what the policy for increases will be;
11 provided, however, that the provider shall give advance notice
12 of not less than thirty days to the residents before the change
13 becomes effective and increases shall be based upon economic
14 necessity, the reasonable cost of operating the community, the
15 cost of care and a reasonable return on investment as defined
16 by rules promulgated by the aging and long-term services
17 department;

18 (12) state the entrance fee and periodic fees
19 that will be charged if the resident marries while living in
20 the community, the terms concerning the entry of a spouse to
21 the community and the consequences if the spouse does not meet
22 the requirements for entry;

23 (13) indicate funeral and burial services that
24 are not furnished by the provider;

25 (14) state the rules and regulations of the

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1 provider then in effect and state the circumstances under which
2 the provider claims to be entitled to have access to the
3 resident's unit;

4 (15) list the resident's and provider's
5 respective rights and obligations as to any real or personal
6 property of the resident transferred to or placed in the
7 custody of the provider;

8 (16) describe the rights of the residents to
9 form a residents' association and the participation, if any, of
10 the association in the community's decision-making process;

11 (17) describe the living quarters purchased by
12 or assigned to the resident;

13 (18) provide under what conditions, if any,
14 the resident may assign the use of a unit to another;

15 (19) include the policy and procedure with
16 regard to changes in accommodations due to an increase or
17 decrease in the number of persons occupying an individual unit;

18 (20) state the conditions upon which the
19 community may sublet or relet a resident's unit;

20 (21) state the fee adjustments that will be
21 made in the event of a resident's voluntary absence from the
22 community for an extended period of time;

23 (22) include the procedures to be followed
24 when the provider temporarily or permanently changes the
25 resident's accommodations, either within the community or by

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1 transfer to a health facility; provided that the contract shall
2 state that such changes in accommodations shall only be made to
3 protect the health or safety of the resident or the general and
4 economic welfare of all other residents of the community;

5 (23) if the community includes a nursing
6 facility, describe the admissions policies and what will occur
7 if a nursing facility bed is not available at the time it is
8 needed;

9 (24) in the event the resident is offered a
10 priority for nursing facility admission at a facility that is
11 not owned by the community, describe with which nursing
12 facility the formal arrangement is made and what will occur if
13 a nursing facility bed is not available at the time it is
14 needed;

15 (25) include the policy and procedures for
16 determining under what circumstances a resident will be
17 considered incapable of independent living and will require a
18 permanent move to a nursing facility. The contract shall also
19 state who will participate in the decision for permanent
20 residency in the nursing facility and shall provide that the
21 resident shall have an advocate involved in that decision;
22 provided that if the resident has no family member, attorney,
23 guardian or other responsible person to act as the resident's
24 advocate, the provider shall request the local office of the
25 human services department to serve as advocate;

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1 (26) specify the types of insurance, if any,
2 the resident is required to maintain, including medicare, other
3 health insurance and property insurance;

4 (27) specify the circumstances, if any, under
5 which the resident will be required to apply for any public
6 assistance, including medical assistance, or any other public
7 benefit programs;

8 (28) in bold type of not less than twelve-
9 point type on the signature page, state that a contract for
10 continuing care may present a significant financial risk and
11 that a person considering a continuing care contract should
12 consult with an attorney and with a financial advisor
13 concerning the advisability of pursuing continuing care;
14 provided, however, that failure to consult with an attorney or
15 financial advisor shall not be raised as a defense to bar
16 recovery for a resident in any claims arising under the
17 provisions of the Continuing Care Act;

18 (29) in bold type of not less than twelve-
19 point type on the front of the contract, state that nothing in
20 the contract or the Continuing Care Act should be construed to
21 constitute approval, recommendation or endorsement of any
22 continuing care community by the state of New Mexico;

23 (30) contain a provision describing the
24 community's plan for resident relocation upon closure or
25 circumstances that necessitate relocation;

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1 [~~(30)~~] (31) in immediate proximity to the
2 space reserved in the contract for the signature of the
3 resident, in bold type of not less than twelve-point type,
4 state the following:

5 "You, the buyer, may cancel this transaction at any time
6 prior to midnight of the seventh day after the date of this
7 transaction. See the attached notice of cancellation form for
8 an explanation of this right."; and

9 [~~(31)~~] (32) contain a completed form, in
10 duplicate, captioned "Notice of Cancellation", which shall be
11 attached to the contract and easily detachable, and which shall
12 contain in twelve-point boldface type the following information
13 and statements in the same language as that used in the
14 contract.

15 "NOTICE OF CANCELLATION

16 Date: _____

17 (enter date of transaction)

18 You may cancel this transaction without any penalty or
19 obligation within seven days from the above date. If you
20 cancel, any payments made by you under the contract or sale and
21 any negotiable instrument executed by you will be returned
22 within ten business days following receipt by the provider of
23 your cancellation notice, and any security interest or lien
24 arising out of the transaction will be canceled.

25 To cancel this transaction, deliver a signed and dated

1 copy of this cancellation notice or any other written notice,
2 or send a telegram, to: _____

3 (Name of Provider)

4 at _____

5 (Address of Provider's Place of Business)

6 not later than midnight of _____

7 (Date)

8 I hereby cancel this transaction.

9 _____

10 (Buyer's Signature)

11 _____

12 (Date)\"."

13 SECTION 3. Section 24-17-7 NMSA 1978 (being Laws 1985,
14 Chapter 102, Section 7) is amended to read:

15 "24-17-7. DISCLOSURE STATEMENTS FILED WITH THE [STATE
16 AGENCY-ON] AGING AND LONG-TERM SERVICES DEPARTMENT FOR PUBLIC
17 INSPECTION.--No later than July 1, 2022 and each year
18 thereafter, within one hundred eighty days after the end of a
19 community's fiscal year, a provider shall [file] provide a copy
20 of the disclosure statement and any amendments to that
21 statement [with] to the [state agency on] aging and long-term
22 services department for public inspection during regular
23 working hours."

24 SECTION 4. Section 24-17-16 NMSA 1978 (being Laws 1991,
25 Chapter 263, Section 5) is amended to read:

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1 "24-17-16. IDENTIFICATION AND PROCEDURES FOR CORRECTION
2 OF VIOLATIONS.--

3 A. The aging and long-term services department
4 shall review disclosure statements filed pursuant to the
5 Continuing Care Act for compliance with that act.

6 [~~A.~~] B. If the [~~state agency on~~] aging and long-
7 term services department determines that a person or an
8 organization has engaged in or is about to engage in an act or
9 practice constituting a violation of the Continuing Care Act or
10 any rule adopted pursuant to that act, the [~~state agency on~~]
11 aging and long-term services department shall issue a notice of
12 violation in writing to that person or organization and send
13 copies to the resident association of any facility affected by
14 the notice.

15 [~~B.~~] C. The notice of violation shall state the
16 following:

17 (1) a description of a violation at issue;
18 (2) the action that, in the judgment of the
19 [~~state agency on~~] aging and long-term services department, the
20 provider should take to conform to the law or the assurances
21 that the [~~state agency on~~] aging and long-term services
22 department requires to establish that no violation is about to
23 occur;

24 (3) the compliance date by which the provider
25 shall correct any violation or submit assurances;

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1 (4) the requirements for filing a report of
2 compliance; and

3 (5) the applicable sanctions for failure to
4 correct the violation or failure to file the report of
5 compliance according to the terms of the notice of violation.

6 [~~C.~~] D. At any time after receipt of a notice of
7 violation, the person or organization to which the notice is
8 addressed or the [~~state agency on~~] aging and long-term services
9 department may request a conference. The [~~state agency on~~]
10 aging and long-term services department shall schedule a
11 conference within [~~seven~~] thirty days of a request.

12 [~~D.~~] E. The purpose of the conference is to discuss
13 the contents of the notice of violation and to assist the
14 addressee to comply with the requirements of the Continuing
15 Care Act. Subject to rules that the [~~state agency on~~] aging
16 and long-term services department may promulgate, a
17 representative of the resident association at any facility
18 affected by the notice shall have a right to attend the
19 conference.

20 [~~E.~~] F. A person receiving a notice of violation
21 shall submit a signed report of compliance as provided by the
22 notice. The [~~state agency on~~] aging and long-term services
23 department shall send a copy to the resident association of any
24 facility affected by the notice.

25 [~~F.~~] G. Upon receipt of the report of compliance,

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1 the ~~[state agency on]~~ aging and long-term services department
2 shall take steps to determine that compliance has been
3 achieved."

4 SECTION 5. Section 24-17-17 NMSA 1978 (being Laws 1991,
5 Chapter 263, Section 6, as amended) is amended to read:

6 "24-17-17. RULES ~~[AND REGULATIONS]~~ AUTHORIZED.--The aging
7 and long-term services department shall promulgate all rules
8 ~~[and regulations]~~ necessary or appropriate to administer the
9 provisions of the Continuing Care Act ~~[including but not~~
10 ~~limited to requirements regarding financial reserves,~~
11 ~~disclosure and actuarial studies]."~~

12 SECTION 6. Section 24-17-18 NMSA 1978 (being Laws 1991,
13 Chapter 263, Section 7) is amended to read:

14 "24-17-18. REPORT TO ATTORNEY GENERAL--CIVIL ACTION--
15 CIVIL PENALTIES.--

16 A. A person may report an alleged violation of the
17 Continuing Care Act or rules promulgated pursuant to that act
18 to the attorney general or to the aging and long-term services
19 department.

20 B. Any time after the ~~[state agency on]~~ aging and
21 long-term services department issues a notice of violation, the
22 ~~[state agency on aging]~~ department may send the attorney
23 general a written report alleging a possible violation of the
24 Continuing Care Act or any rule adopted pursuant to that act.

25 C. Upon receipt of ~~[that]~~ a report from any source

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1 alleging a violation of the Continuing Care Act or rules
2 promulgated pursuant to that act, the attorney general shall
3 promptly ~~[conduct an investigation to determine whether grounds~~
4 ~~exist for formally finding a violation. If the attorney~~
5 ~~general makes that finding, he]~~ review the allegation. Upon
6 finding that an allegation received pursuant to this subsection
7 is credible, the attorney general shall file an appropriate
8 action against the alleged violator in a court of competent
9 jurisdiction.

10 D. Upon finding violations of any provisions of the
11 Continuing Care Act or any rule adopted pursuant to that act,
12 the court may impose a civil penalty in the amount of five
13 dollars (\$5.00) per resident or up to five hundred dollars
14 (\$500), in the discretion of the court, for each day that the
15 violation remains uncorrected after the compliance date
16 stipulated in a notice of violation issued pursuant to the
17 Continuing Care Act."