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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 each actual resident and to a prospective resident at least seven days before the provider

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

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

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

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

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

19 (4) the name and business address of each of
20 the provider's affiliates;

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

24 (a) was convicted of a felony, a crime
25 that if committed in New Mexico would be a felony or any crime

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1 having to do with the provision of continuing care;

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

6 (c) had a prior discharge in bankruptcy
7 or was found insolvent in any court action; or

8 (d) had a state or federal license or
9 permit suspended or revoked or had any state, federal or
10 industry self-regulatory agency commence an action against the
11 provider or any of its officers, directors, trustees, partners,
12 managers or affiliates and the result of such action;

13 (6) the name and address of any person whose
14 name is required to be provided in the disclosure statement who
15 owns any interest in or receives any remuneration from, either
16 directly or indirectly, any other person providing or expected
17 to provide to the community goods, leases or services with a
18 real or anticipated value of five hundred dollars (\$500) or
19 more and the name and address of the person in which such
20 interest is held. The disclosure shall describe such goods,
21 leases or services and the actual or probable cost to the
22 community or provider and shall describe why such goods, leases
23 or services should not be purchased from an independent entity;

24 (7) the name and address of any person owning
25 land or property leased to the community and a statement of

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1 what land or property is leased;

2 (8) a statement as to whether the provider is,
3 or is associated with, a religious, charitable or other
4 organization and the extent to which the associate organization
5 is responsible for the financial and contractual obligations of
6 the provider or community;

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

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

17 (11) for communities that provide type A and
18 type B agreements:

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

21 (b) an annual future-service obligation
22 calculation by an actuary who is a member of the American
23 academy of actuaries and who is experienced in analyzing
24 continuing care communities;

25 (12) an audited financial statement and an

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

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

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

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

17 (b) if the provider is a corporation, a
18 copy of the articles of incorporation; if the provider is a
19 partnership or other unincorporated association, a copy of the
20 partnership agreement, articles of association or other
21 membership agreement; and if the provider is a trust, a copy of
22 the trust agreement or instruments;

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

25 (d) a copy of lease agreements between

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1 the community and any person owning land or property leased to
2 the community;

3 (e) information concerning the location
4 and description of other properties, both existing and
5 proposed, of the provider in which the provider owns any
6 interest and on which communities are or are intended to be
7 located and the identity of previously owned or operated
8 communities;

9 (f) a copy of the community's policies
10 and procedures; and

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

21 C. Each year, within one hundred eighty days after
22 the end of the community's fiscal year, the provider shall
23 furnish to actual residents the disclosure statement as
24 outlined in this section. For purposes of this subsection, the
25 obligation to furnish the required information to residents

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1 shall be deemed satisfied if the information is given to the
2 residents' association, if there is one, and a written message
3 has been delivered to each resident, stating that personal
4 copies of the information are available upon request."

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

7 "24-17-5. CONTRACT INFORMATION.--

8 A. A provider is responsible for ensuring that a
9 continuing care contract is written in clear and understandable
10 language.

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

12 (1) describe the community's admission
13 policies, including age, health status and minimum financial
14 requirements, if any;

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

17 (3) describe the circumstances under which the
18 resident will be permitted to remain in the community in the
19 event of financial difficulties of the resident;

20 (4) list the total consideration paid,
21 including donations, entrance fees, subscription fees, periodic
22 fees and other fees paid or payable; provided, however, that a
23 provider cannot require a resident to transfer all the
24 resident's assets or the resident's real property to the
25 provider or community as a condition for providing continuing

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1 care and the provider shall reserve the right to charge
2 periodic fees;

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

8 (6) as an addendum to the contract, provide a
9 description of items of service, if any, that are available to
10 the resident but that are not covered in the entrance or
11 monthly fee;

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

14 (8) specify that deposits or entrance fees
15 paid by or for a resident shall be held in trust for the
16 benefit of the resident in a federally insured New Mexico bank
17 until the resident has taken possession of the resident's unit
18 or the resident's contract cancellation period has ended,
19 whichever occurs later;

20 (9) state the terms under which a continuing
21 care contract may be canceled by the resident or the community
22 and the basis for establishing the amount of refund of the
23 entrance fee;

24 (10) state the terms under which a continuing
25 care contract is canceled by the death of the resident and the

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1 basis for establishing the amount of refund, if any, of the
2 entrance fee;

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

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

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

19 (14) state the rules and regulations of the
20 provider then in effect and state the circumstances under which
21 the provider claims to be entitled to have access to the
22 resident's unit;

23 (15) list the resident's and provider's
24 respective rights and obligations as to any real or personal
25 property of the resident transferred to or placed in the

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1 custody of the provider;

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

5 (17) describe the living quarters purchased by
6 or assigned to the resident;

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

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

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

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

17 (22) include the procedures to be followed
18 when the provider temporarily or permanently changes the
19 resident's accommodations, either within the community or by
20 transfer to a health facility; provided that the contract shall
21 state that such changes in accommodations shall only be made to
22 protect the health or safety of the resident or the general and
23 economic welfare of all other residents of the community;

24 (23) if the community includes a nursing
25 facility, describe the admissions policies and what will occur

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1 if a nursing facility bed is not available at the time it is
2 needed;

3 (24) in the event the resident is offered a
4 priority for nursing facility admission at a facility that is
5 not owned by the community, describe with which nursing
6 facility the formal arrangement is made and what will occur if
7 a nursing facility bed is not available at the time it is
8 needed;

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

20 (26) specify the types of insurance, if any,
21 the resident is required to maintain, including medicare, other
22 health insurance and property insurance;

23 (27) specify the circumstances, if any, under
24 which the resident will be required to apply for any public
25 assistance, including medical assistance, or any other public

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1 benefit programs;

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

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

17 (30) contain a provision describing the
18 community's plan for resident relocation upon closure or
19 circumstances that necessitate relocation;

20 [~~30~~] (31) in immediate proximity to the
21 space reserved in the contract for the signature of the
22 resident, in bold type of not less than twelve-point type,
23 state the following:

24 "You, the buyer, may cancel this transaction at any time
25 prior to midnight of the seventh day after the date of this

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1 transaction. See the attached notice of cancellation form for
2 an explanation of this right."; and

3 [~~(31)~~] (32) contain a completed form, in
4 duplicate, captioned "Notice of Cancellation", which shall be
5 attached to the contract and easily detachable, and which shall
6 contain in twelve-point boldface type the following information
7 and statements in the same language as that used in the
8 contract.

9 "NOTICE OF CANCELLATION

10 Date: _____

11 (enter date of transaction)

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

19 To cancel this transaction, deliver a signed and dated
20 copy of this cancellation notice or any other written notice,
21 or send a telegram, to: _____

22 (Name of Provider)

23 at _____

24 (Address of Provider's Place of Business)

25 not later than midnight of _____

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(Date)

I hereby cancel this transaction.

(Buyer's Signature)

(Date)"."

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

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

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

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

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

[A.] B. If the [state agency on] aging and long-

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1 term services department determines that a person or an
2 organization has engaged in or is about to engage in an act or
3 practice constituting a violation of the Continuing Care Act or
4 any rule adopted pursuant to that act, the [~~state agency on~~
5 aging and long-term services department shall issue a notice of
6 violation in writing to that person or organization and send
7 copies to the resident association of any facility affected by
8 the notice.

9 ~~[B.]~~ C. The notice of violation shall state the
10 following:

11 (1) a description of a violation at issue;
12 (2) the action that, in the judgment of the
13 [~~state agency on~~ aging and long-term services department, the
14 provider should take to conform to the law or the assurances
15 that the [~~state agency on~~ aging and long-term services
16 department requires to establish that no violation is about to
17 occur;

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

20 (4) the requirements for filing a report of
21 compliance; and

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

25 ~~[C.]~~ D. At any time after receipt of a notice of

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1 violation, the person or organization to which the notice is
2 addressed or the ~~[state agency on]~~ aging and long-term services
3 department may request a conference. The ~~[state agency on]~~
4 aging and long-term services department shall schedule a
5 conference within ~~[seven]~~ thirty days of a request.

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

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

19 ~~[F.]~~ G. Upon receipt of the report of compliance,
20 the ~~[state agency on]~~ aging and long-term services department
21 shall take steps to determine that compliance has been
22 achieved."

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

25 "24-17-17. RULES AND REGULATIONS AUTHORIZED.--The aging
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1 and long-term services department shall promulgate all rules
2 and regulations necessary or appropriate to administer the
3 provisions of the Continuing Care Act [~~including but not~~
4 ~~limited to requirements regarding financial reserves,~~
5 ~~disclosure and actuarial studies~~]."

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

8 "24-17-18. REPORT TO ATTORNEY GENERAL--CIVIL ACTION--
9 CIVIL PENALTIES.--

10 A. A person may report an alleged violation of the
11 Continuing Care Act or rules promulgated pursuant to that act
12 to the attorney general or to the aging and long-term services
13 department.

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

19 C. Upon receipt of [~~that~~] a report from any source
20 alleging a violation of the Continuing Care Act or rules
21 promulgated pursuant to that act, the attorney general shall
22 promptly [~~conduct an investigation to determine whether grounds~~
23 ~~exist for formally finding a violation. If the attorney~~
24 ~~general makes that finding, he~~] review the allegation. Upon
25 finding that an allegation received pursuant to this subsection

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1 is credible, the attorney general shall file an appropriate
2 action against the alleged violator in a court of competent
3 jurisdiction.

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