

CHAPTER 33. CONTINUING CARE PROVIDERS [RETIREMENT FACILITIES]

SUBCHAPTER A. GENERAL PROVISIONS 28 TAC §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10

SUBCHAPTER B. CONTINUING CARE IN RESIDENCE 28 TAC §§33.101 – 33.105

INTRODUCTION. The Texas Department of Insurance proposes to amend the name of 28 TAC Chapter 33; amend 28 TAC §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10, concerning continuing care providers; and add 28 TAC §§33.101 – 33.105, concerning continuing care in residence. These proposed amendments and new sections implement House Bill 2697, 84th Legislature, Regular Session (2015).

EXPLANATION. The department proposes to amend Chapter 33, Subchapter A and to add new Subchapter B to implement HB 2697, 84th Legislature, Regular Session (2015). HB 2697 added continuing care in residence to the scope of continuing care under Health and Safety Code Chapter 246. The department proposes amending the name of Chapter 33; amending §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10; and adding §§33.101 – 33.105 to address the addition of continuing care in residence to provisions governing continuing care provided at retirement facilities. In addition, the department proposes amending CCRC Forms 6a and 9, and adding CCRC Forms 1a, 6b, and 14a, which are adopted by reference in §33.8. The other adoption by reference forms in §33.8 have been amended to update statutory references, provide for electronic submissions, and to reflect current department style guidelines.

Health and Safety Code §246.003 authorizes the department to adopt rules necessary to enforce and administer the continuing care provisions of the chapter.

Section 246.0737 requires the department to adopt rules for release of escrow funds for continuing care in residence, different from the §246.073 provisions for escrow funds related to facility-based continuing care.

Chapter Name Change.

The department proposes to amend the name of Chapter 33 from "Continuing Care Retirement Facilities" to "Continuing Care Providers" to reflect that Chapter 33 applies not only to continuing care in facilities, but also to continuing care in residence as amended by HB 2697.

Subchapter A. General Provisions.

The department proposes to amend and add new defined terms in §33.2. Existing definitions are renumbered as appropriate following addition of the proposed new defined terms.

The department proposes to amend the definition of "actuarial review" in §33.2(3), "continuing care" in §33.2(7), "entrance fee" in renumbered §33.2(13), "facility" in renumbered §33.2(14), "provider" in renumbered §33.2(20), and "resident" in renumbered §33.2(24) to clarify the application of each term to continuing care in residence.

The department proposes to add definitions for "continuing care in residence" and "financial statements" as new §33.2(9) and §33.2(15), respectively. The definition for "continuing care in residence" is consistent with Health and Safety Code §246.0025 and clarifies who is subject to the rule. The definition for "financial statements" clarifies that financial statements for all providers must be completed in accordance with generally accepted accounting principles of the U.S. and establishes additional requirements for continuing care in residence providers. The additional requirements are listed in

§33.2(15)(A) – (D). They include segmented income statement reporting, which report facility services and in-residence services separately based on an actuarial review; reporting balance sheet liabilities for facility services and in-residence services separately; disclosing in a supporting schedule entrance fee activity by resident; and disclosing the ratios described in §33.505 (b)(2) – (7).

The department proposes to amend §33.3 to reflect that the chapter applies to providers rather than facilities, because Health and Safety Code Chapter 246 was expanded from continuing care provided in facilities to include continuing care in residence.

The department proposes to amend §33.5 to update an outdated statutory citation to Insurance Code Chapter 82.

The department proposes to amend §33.6 to clarify that a certificate of authority is required to provide care under a continuing care contract as defined in Health and Safety Code Chapter 246, regardless of where the continuing care services are provided.

The department proposes to amend §33.8 to add three forms adopted by reference and amend existing forms adopted by reference. The amendments to §33.8 add references to the department's internal form numbering system ("FIN" numbers) for all CCRC forms for clarity, remove information stating that the forms can be obtained through the mail, and ensure that form names in the rule match the actual names on the adopted forms.

Forms listed in §33.8 that use the department's letterhead will use the most current version of that letterhead, as it may change from time to time. Nonsubstantive information on the listed forms is indicated in brackets, including the department's physical address, mailing addresses, and electronic addresses; submission locations; submission formats and methods; and contact information. Nonsubstantive information is subject to change. The most current versions of the forms will be available on the

department's website. The amended forms will encourage electronic submissions, which should result in greater efficiency and cost savings to persons submitting the forms to the department.

The department proposes to amend existing CCRC Form 6a (FIN389), previously adopted by reference. This form contains directions providers must follow to prepare and submit disclosure statements. The department proposes to amend existing CCRC Form 9 (FIN392), previously adopted by reference. This form is used by escrow agents to notify the department that a provider has requested release of entrance fee escrow funds. The adoption by reference forms are available for inspection on the department's website at www.tdi.texas.gov/rules/2018/index.html.

The amended form can now be used for entrance fee escrow release requests for both facility-based and residence-based continuing care contracts. It provides additional notice to escrow agents about releasing continuing care in residence entrance fee escrow funds only after the department's approval.

The department also proposes new CCRC Forms 1a (FIN604), 6b (FIN605), and 14a (FIN607), to be adopted by reference in §33.8. A licensed provider must use the proposed new CCRC Form 1a (FIN604) to request authority to offer continuing care in residence. New CCRC Form 6b (FIN605) lists the contents continuing care in residence providers must include in disclosure statements, which are filed with the department and given to prospective residents. New CCRC Form 14a (FIN607) is the form a continuing care in residence provider must use to request that the department approve the release of continuing care in residence entrance fee escrow funds.

The department proposes to amend CCRC Form 3 (FIN384) and CCRC Form 4 (FIN885) to update the social security number requirement to note "Disclosure of Social Security Number is required under Texas Family Code §231.302." These two forms, and

the other forms listed in §33.8, will also have nonsubstantive updates for letterhead, submission addresses, and current department style guidelines.

The department proposes to amend §33.9 to describe how to submit inquiries, applications, and other filings to the department.

The department proposes to amend §33.10 to clarify that the Commissioner may investigate not only unauthorized continuing care facilities but also unauthorized continuing care in residence providers.

Subchapter B. Continuing Care in Residence.

The department proposes to add §33.101 to define the scope of Subchapter B relating to continuing care in residence. The subchapter addresses applying for authority, disclosure statements, and entrance fee escrow accounts for providers offering continuing care in residence.

The department proposes to add §33.102 to specify the information that must be provided and the process that must be followed to apply for authority to offer continuing care in residence.

The department proposes to add §33.103 to explain when and how a continuing care in residence provider must compile and file disclosure statements related to continuing care in residence. Continuing care in residence providers must file a disclosure statement with the department annually or more frequently, when amended for accuracy.

The department proposes new §33.104, regarding entrance fee escrow account requirements. Section 33.104(a) references the current rules that the department proposes to apply to the continuing care in residence entrance fee escrow accounts. Section 33.104(b) proposes to require continuing care in residence entrance fees be held in escrow. It also states that providers must request release of the escrow funds using

CCRC Form 14a (FIN607), and it provides that a request must be approved by the department before an escrow agent may release the funds. Section 33.104(c) establishes the information the department will consider when a provider requests the release of entrance fee escrow funds and the conditions that will prevent the department from approving the request. Section 33.104(d) states that the department will issue a determination on a provider's request to both the provider and the escrow agent.

The department proposes to add §33.105 to describe requirements for continuing care in residence form contracts. Section 33.105(a) requires providers to use a standard continuing care in residence contract. Section 33.104(b) lists requirements for the standard form, including that it must contain an amortization schedule for release of entrance fee escrow funds, a description of the provider's statutory duties and obligations, and a specific disclosure regarding cancellation rights. Health and Safety Code §246.056 requires a cancellation rights disclosure; subsection (d) of that section provides language for the disclosure and requires that at least a substantially similar version of that language be included in the contract. Consistent with that, the department's proposed required disclosure includes language clarifying the cancellation rights associated with a continuing care in residence contract.

In addition, the proposed amendments include non-substantive editorial and formatting changes to conform the sections to the department's current style and to improve the rule's clarity.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Jamie Walker, Deputy Commissioner of the Financial Regulation Division, has determined that during each year of the first five years the proposed new and amended sections are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections, other than that imposed by the statute. This

determination was made because the proposed amendments do not add to or decrease state revenues or expenditures and because local governments are not involved in enforcing or complying with the proposed amendments.

Ms. Walker does not anticipate a measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amended and new sections are in effect, Ms. Walker expects that administering and enforcing the proposed amended and new sections will benefit the public by ensuring that the department's rules conform to Health and Safety Code §246.0737, recognize the general impact of expanded continuing care services to individuals in-residence, and establish financial disclosure and escrow release standards to protect Texas consumers who contract for continuing care in their personal residences.

Ms. Walker expects that the proposed amended and new sections will impose an economic cost on providers who elect to offer continuing care in residence. Providers are already subject to regulatory requirements related to continuing care. The amended and new provisions will add costs related to applying for authority to offer continuing care in residence (including developing a business plan), preparing and filing disclosure statements, requesting releases of entrance fee escrow funds, broadening the scope of financial statement disclosures to include the continuing care in residence segment, and actuarial reviews. Costs will vary based on the provider's business decision to use its existing personnel or outside resources.

Applying for Authority to Offer Continuing Care in Residence.

A continuing care provider may incur a cost if it decides to apply for authority to offer continuing care in residence in addition to its facility-based continuing care. The

cost of first acquiring a license to operate a continuing care facility is a cost imposed by statute. Health and Safety Code §246.111 provides a lien to protect both facility-based residents as well as in-residence residents. That lien attaches to the provider's real and personal property located at the provider's facility. The statute contemplates that continuing care in residence providers also maintain a continuing care facility.

Rule-based costs of applying for authority will include the expense of preparing and submitting an application for expanded license authority. The application process involves completing a CCRC Form 1a (FIN604), preparing a business plan with financial projections and assumptions, and compiling a proposed disclosure statement for the continuing care in residence operations. Because CCRC Form 1a (FIN604) is essentially a checklist for information required to apply, the department estimates it will require less than one hour of clerical time at approximately \$21.77 an hour to complete the form and time for senior management to review and sign the form at approximately \$82.65 an hour. These hourly figures are based on the national mean hourly wage for each classification as reported online in the May 2017 National Industry-Specific Occupational Employment and Wage Estimates at www.bls.gov/oes/current/naics4_525100.htm.

A provider must submit a business plan with its application for authority to offer continuing care in residence. While it is not feasible for the department to determine the exact personnel or time needed, the department estimates approximately \$82.65 an hour for general and operations managers and \$37.82 an hour for accountants and auditors to prepare a business plan with projections and assumptions for its proposed continuing care in residence operations.

This hourly figure is based on the national mean hourly wage for each classification as reported online in the May 2017 National Industry-Specific Occupational Employment and Wage Estimates at www.bls.gov/oes/current/naics4_525100.htm.

Disclosure Statements.

A provider must develop a continuing care in residence disclosure statement, which has many of the same requirements as the facility-based continuing care disclosure statement. Because the provider will have already produced disclosure statements for its facility-based operations, the provider already has access to most of the information to satisfy disclosure statement requirements imposed by these rules. There may be costs related to including this existing information in a new disclosure statement.

While it is not feasible to determine the actual cost of any employees needed to compile the disclosure statement, the department estimates individual employee compensation at approximately \$21.77 an hour for clerical time to complete the form and \$82.65 an hour for senior management to review and sign the form. These hourly figures are based on the national mean hourly wage for each classification as reported online in the May 2017 National Industry-Specific Occupational Employment and Wage Estimates at www.bls.gov/oes/current/naics4_525100.htm. While it is not feasible to determine the actual cost for every situation, the department estimates the additional cost solely to submit a continuing care disclosure statement to the department would be less than \$5 if mailed and less than that if submitted electronically.

Entrance Fee Escrow Accounts.

Providers will also incur costs related to calculating and filing entrance fee escrow fund release requests. Accounting personnel will have to calculate the amount of the escrow fund releases using the contractual amortization schedules. Clerical staff will have to complete and submit CCRC Form 14a (FIN607). Senior management will likely review the forms before they are filed. Because the complexity and frequency of those requests is a matter of provider discretion, it is not feasible for the department to determine the

exact cost of completing those requests; providers can expect to incur costs of approximately \$34.08 an hour for accounting personnel, \$21.77 an hour for clerical staff, and \$82.65 an hour for senior management.

These hourly figures are based on the national mean hourly wage for each classification as reported online in the May 2017 National Industry-Specific Occupational Employment and Wage Estimates at www.bls.gov/oes/current/naics4_525100.htm.

Audited Financial Statements.

Under the existing rules, providers already incur costs for accountants to prepare and disclose financial information related to their facility-based continuing care operations. Under the proposed rules, providers may incur additional incremental cost related to the additional disclosure related to their continuing care in residence operations. They will also incur a cost related to senior management's review of the accountant's work. The department is unable to estimate the time required to disclose the additional continuing care in residence financial statement information because a provider's operations, financial reporting systems, and processes will vary. The mean hourly average wage for accountants is approximately \$34.08, and for senior management it is approximately \$82.65.

These hourly figures are based on the national mean hourly wage for each classification as reported online in the May 2017 National Industry-Specific Occupational Employment and Wage Estimates at www.bls.gov/oes/current/naics4_525100.htm.

Under the existing rules, providers pay independent auditors to annually audit their financial statements. The department is unable to estimate the additional time required to audit the provider's continuing care in residence financial statement segment associated with the proposed rules, because a provider's operations, financial reporting systems, and processes will vary.

According to AccountingWEB, the hourly rate for a Certified Public Accountant audit ranges from \$149 to \$179 (www.accountingweb.com/practice/practice-excellence/survey-public-and-private-company-audit-fees-went-up-in-2013).

Actuarial Reviews.

The proposed rules require that a provider have an initial and annual actuarial review performed for its continuing care in residence operations. Cost of initial and annual actuarial reviews required under §33.102(c)(3)(C) and §33.103(e)(2) will vary based on market prices and availability. While it is not feasible to determine the actual cost of actuarial services, the department estimates approximately \$55.21 per hour.

This amount is based on the mean hourly wage for actuaries in the insurance industry, as reported online in the May 2017 National Industry-Specific Occupational Employment and Wage Estimates at www.bls.gov/oes/current/oes152011.htm. The method of compliance is a business decision, including the decision whether to employ staff or contract for these services. Neither the American Academy of Actuaries nor the Society of Actuaries was able to provide the department with information about independent actuary billing rates. It is not feasible for the department to estimate either the rates charged by independent actuary firms or the time it will take an actuary to conduct the required review.

Forms.

Except as otherwise discussed in this Cost Note, the department's changes to forms in this proposal should not result in any additional costs for the person required to prepare or submit the form, because the forms will not require any additional information than required under the existing form and will not require that anyone resubmit a form. In addition, updating the form templates and providing in these rules

a means to submit the forms electronically should result in greater efficiency and cost savings for persons requirement to submit the forms.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code §2006.002(c), the department has determined that the proposal will not produce an adverse economic effect on small or micro-businesses, or on rural communities. As a result, and in accordance with Government Code §2006.002(c), the department is not required to prepare a regulatory flexibility analysis.

A small business under Government Code §2006.002(c) must be (1) for profit; (2) independently owned and operated; and (3) have fewer than 100 employees or less than \$6 million in annual gross revenue. Based on filings with the department, none of the licensed continuing care providers qualify as a small business. All but one of the licensed providers are non-profit entities. The remaining for-profit entity reported gross revenues for 2017 of over \$14 million. No rural communities are licensed continuing care providers.

Facility-based continuing care providers are not required to offer continuing care in residence. For both the non-profit providers and the single for-profit provider, expanding services to provide continuing care in residence is strictly a business decision and not one required by either statute or rule.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. The department has determined that proposed §§33.102 – 33.105 may impose a cost on regulated persons. Providers who elect to offer continuing care in residence may have incremental additional costs related to requesting authority to offer continuing care in residence or in modifying, expanding, or filing their disclosure statements, financial statements, and entrance fee escrow account release requests.

Because continuing care providers are statutorily required to prepare and submit disclosure statements and to maintain entrance fee escrow fund accounts, the requirements in these proposed rules are designed to enable the department to monitor the provider's continuing care in residence activities. The department uses the disclosure statements to monitor the financial health of providers, safeguard entrance fee escrow fund accounts, and monitor providers' operations to determine whether it is necessary to exercise remedies such as supervision and receivership, as set out in Health and Safety Code §§246.091 – 246.097.

Although providers will incur additional incremental costs to comply with the proposed rules should they elect to offer continuing care in residence, no additional rule amendments or repeals are required under Government Code §2001.0045. The proposed amended and new sections are necessary to implement HB 2697; they include entrance fee escrow release provisions for continuing care in residence different from those in Health and Safety Code §246.0073, applicable to facility-based providers. The proposed amended and new sections also include financial safeguards and reporting requirements necessary to protect the health, safety, and welfare of the persons who enter into continuing care contracts with the providers for continuing care in residence. Providers that encounter financial difficulties might reduce expenditures for care and services to residents. These reductions would affect the health, safety, and welfare of continuing care residents. The new and amended provisions equip the department to effectively monitor continuing care in residence providers' financial health to protect the health, safety, and welfare of their residents.

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that each year of the first five years the proposed amendments are in effect the proposed rule:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the department;
- will not require an increase or decrease in fees paid to the department;
- will create new regulations in §§33.101 - 33.105 to implement HB 2697;
- will expand existing regulations in §§33.2(3) and (9), 33.6, and 33.8(2) and (19) to include continuing care in residence;
- will not limit or repeal other existing regulations;
- will not increase or decrease the number of individuals subject to the rule's applicability; and
- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. The department will consider any written comments on the proposal received by the department no later than 5 p.m., Central time, on February 19, 2019. Send your comments to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. The department will consider requests for a public hearing on the proposal received by the department no later than 5 p.m., Central time, on February

19, 2019. Submit the request to ChiefClerk@tdi.texas.gov; or to the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. If the department holds a public hearing, the department will consider written and spoken comments presented at the hearing.

SUBCHAPTER A

28 TAC §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10

STATUTORY AUTHORITY. The department proposes amendments to §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10 under Health and Safety Code §246.003(b) and §246.0737, and Insurance Code §36.001.

Health and Safety Code §246.003(b) authorizes the department to adopt rules to implement Health and Safety Code Chapter 246.

Health and Safety Code §246.0737 charges the department with adopting rules that establish a different set of criteria for release of continuing care in residence entrance fees from escrow.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. The proposed amendments and additions to Chapter 33 implement Health and Safety Code §§246.0025, 246.003, and 246.0737, enacted by HB 2697, 84th Legislature (Regular Session) (2015).

TEXT.

CHAPTER 33. CONTINUING CARE PROVIDERS ~~[RETIREMENT FACILITIES]~~

SUBCHAPTER A. GENERAL PROVISIONS

§33.2. Definitions.

The following words and terms, when used in this chapter, ~~[shall]~~ have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Continuing Care Facility Disclosure and Rehabilitation Act, Health and Safety Code, Chapter 246.

(2) Actuarial funded status--The ratio of actuarial assets plus net accounting assets to actuarial liabilities plus actuarial refund liabilities.

(3) Actuarial review--An analysis ~~[which is]~~ performed by a qualified actuary in accordance with actuarial standards of practice of ~~[generally accepted accounting principles (GAAP) and which addresses]~~ the current actuarial balance of the financial condition of a facility and of the provider's continuing care in residence operations, if any. An actuarial review includes ~~[should include]~~, but is not ~~[be]~~ limited to, the following:

- (A) an actuarial report;
- (B) a statement of actuarial opinion;
- (C) an actuarial balance sheet;
- (D) a cash flow projection; and
- (E) disclosure of the actuarial methodology, formulas ~~[formulae]~~, and assumptions, including justification for continuing care in residence entrance fee escrow account amortization schedules.

(4) Affiliate--A person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the person

specified.

(5) Audited financial statements--Statements prepared by an independent Certified Public Accountant (CPA), which includes an audit opinion from the CPA concerning the financial statements.

(6) Commissioner--The Commissioner of Insurance of the Texas Department of Insurance.

(7) Continuing care--The furnishing of a living unit, together with personal care services, nursing services, medical services, or other health-related services, to an individual who is not related by consanguinity or affinity to the provider of the care under a continuing care contract, regardless of whether the services and the living unit are provided at the same location. The term "continuing care" includes continuing care in residence.

(8) Continuing care contract--An agreement that requires the payment of an entrance fee by or on behalf of an individual in exchange for the furnishing of continuing care by a provider and that is effective for:

(A) the life of the individual; or

(B) more than one year.

(9) Continuing care in residence--continuing care services provided to an individual in the individual's residence or otherwise enabling the individual to remain in the individual's residence, as authorized under Health and Safety Code §246.0025.

(10) [(9)] Control--The possession, direct or indirect, of the power to direct or cause the direction of management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or non-management services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. This definition also includes the terms "controlling," "controlled by," and "under common control with." Control is ~~shall~~

~~be~~] presumed to exist if any person, directly or indirectly, owns, controls, or holds with the power to vote, or holds irrevocable proxies representing, 10 percent [%] or more of the voting securities or authority of any other person. This presumption may be rebutted to show that control does not in fact exist.

(11) ~~[(10)]~~ Debt service coverage ratio--Total excess (deficit) of revenues and gains in excess of expenses and losses plus interest expense plus depreciation expense plus amortization expense minus amortization of deferred revenues from entry fees plus net proceeds from entry fees, divided by annual debt service (annual principal and interest payment or maximum annual debt service).

(12) ~~[(11)]~~ Department--The Texas Department of Insurance.

(13) ~~[(12)]~~ Entrance fee--An initial or deferred transfer of money, or other property valued at an amount in excess of three months' payments for rent or services, made, or promised to be made, as full or partial consideration for acceptance by a provider of a specified individual entitled to receive continuing care under a continuing care contract [~~rent, made or promised to be made as full or partial consideration for acceptance by a provider of a specified individual as a resident in a facility~~]. The term does not include a deposit made under a reservation agreement.

(14) ~~[(13)]~~ Facility--A place in which a person undertakes to provide continuing care. A place is an establishment, complex, campus, or group of living units at which a provider engages in the business of providing continuing care. If two or more establishments, complexes, campuses, or groups of living units are located on one premise, they must [~~shall~~] be treated as one facility if their operations are controlled by the same provider. If two or more establishments, complexes, campuses, or group of living units are located on one premise but controlled by separate providers, they must [~~shall~~] be treated as separate facilities. A facility that is constructed on an as-needed basis and for which a certificate of authority is obtained from the department prior to

facility construction will [~~shall~~] be considered a phase-in facility. The term does not include an individual's residence if the residence is not a living unit provided by a provider.

(15) Financial Statements--Financial statements completed in accordance with generally accepted accounting principles. Financial statements for providers with continuing care in residence operations must:

(A) include segmented financial statement reporting, separating the facility services and in residence services, including an actuarial review;

(B) include a balance sheet that reports liabilities for obligations for facility-based services and obligations for in residence services separately;

(C) disclose entrance fee activity for the fiscal year including the amount held in escrow at the beginning of the year, any amount collected during the year, any amounts released during the year, and the total amount held in escrow at the end of the year; and

(D) disclose the ratios addressed in §33.505(b)(2) – (7) of this title.

(16) [(14)] Fund balance--Assets as shown on the balance sheet minus liabilities shown on the balance sheet.

(17) [(15)] Living unit--A room, apartment, cottage, or other area within a facility that is set aside for the exclusive use or control of one or more specified individuals.

(18) [(16)] Long-term nursing care--Nursing care provided for a period longer than 365 consecutive days.

(19) [(17)] Person--An individual, corporation, association, or partnership, including a fraternal or benevolent order or society.

(20) [(18)] Provider--A person who undertakes to provide continuing care under a continuing care contract, whether in a facility or in an individual's residence [~~in a facility~~].

(21) [(19)] Qualified actuary--A member of the American Academy of Actuaries or the Society of Actuaries or a person recognized by the Commissioner[~~commissioner~~] as having comparable training or experience.

(22) [(20)] Reservation agreement [~~Agreement~~]~~--~~An agreement that requires the payment of a deposit to reserve a living unit for a prospective resident. A deposit made under a reservation agreement is not considered an entrance fee.

(23) [(21)] Reservation agreement deposit [~~Agreement Deposit~~]~~--~~A deposit paid under a reservation agreement.

(24) [(22)] Resident--An individual entitled to receive continuing care from a provider under a continuing care contract [~~in a facility~~].

§33.3. Scope.

This chapter applies [~~shall apply~~] to a provider [~~facility~~] if the provider:

(1) provides continuing care [~~is provided~~] under a continuing care contract agreement;

(2) enters into, offers, or solicits a [~~or~~] continuing care contract [~~contracts have been or are being entered into, offered, or solicited~~]; or

(3) enters into, offers, or solicits a reservation agreement [~~is entered into, offered or solicited~~] on or after September 1, 1993.

§33.5. Violation of Rules.

A violation of any provision of this chapter or of any order of the Commissioner or the department entered under this chapter may subject the violator to penalties,

including those stated in ~~the~~ Insurance Code Chapter 82 ~~[, Article 1.10, §7]~~.

§33.6. Fees for Filing Application for Certificate of Authority.

An ~~The~~ applicant filing for a certificate of authority ~~[to operate a facility]~~ under Health and Safety Code §246.022 must ~~[, shall]~~ pay ~~[to]~~ the department a nonrefundable ~~[non-refundable]~~ filing fee of \$10,000. No fee is required for a §33.102 application for authority for continuing care in residence.

§33.8. Forms.

The forms listed in this section are available on the department's website. ~~[published by the department and filed with the Office of the Secretary of State, Texas Register Division. Copies of the forms may be obtained from the Texas Department of Insurance, CCRC Section, Insurer Services, Mail Code 305-2C, P.O. Box 149104, Austin, Texas 78714-9104.]~~ The department adopts and incorporates by reference the forms listed in paragraphs (1) – (19) of this subsection ~~[(1)–(16)]~~, and their use is required, where applicable, for compliance with the provisions of this chapter. Forms that are on the department's letterhead will use the most current version of that letterhead, as it may change from time to time. Bracketed information in the forms is subject to change, including the department's physical, mailing, and electronic addresses; submission locations; submission formats and methods; and contact information. Persons submitting the forms should verify that they are using the most recent online version before submitting. [;]

(1) CCRC Form ~~[Number]~~ 1 (FIN382)--Application for certificate of authority to do business ~~[Certificate of Authority to do Business]~~ in the State of Texas under Health and Safety Code Section 246.022 ~~[the Act, §246.022]~~;

(2) CCRC Form 1a (FIN604)--Application for authority to offer continuing

care in residence in Texas under Health and Safety Code Section 246.0025(b);

(3) [(2)] CCRC Form [Number] 2 (FIN383)--Application for [Approval by the] Commissioner approval to release excess loan reserve escrow fund amounts under Health and Safety Code Section 278.078 [for Release of Loan Reserve Fund Escrow Account Amounts in Excess of that allowed Under the Act, §246.078(a)];

(4) [(3)] CCRC Form [Number] 3 (FIN384)--Officers and directors page [Directors Page];

(5) [(4)] CCRC Form [Number] 4 (FIN385)--Biographical data form [Data Form];

(6) [(5)] CCRC Form [Number] 4a (FIN386)--Biographical data form [Data Form] for not-for-profit CRCC board members [Not-for-Profit CCRC Board Members];

(7) [(6)] CCRC Form [Number] 5 (FIN387)--Delivery of disclosure statement [Acknowledgment of Delivery of Disclosure Statement];

(8) [(7)] CCRC Form [Number] 6 (FIN388)--Format for disclosure statement for continuing care facility [Form for Disclosure Statement];

(9) [(8)] CCRC Form [Number] 6a (FIN389)--Instructions for preparing a continuing care retirement community disclosure statement for filing [Preparation of CCRC Disclosure Statement for Filing] with the Texas Department of Insurance;

(10) CCRC Form 6b (FIN605)--Format for disclosure statement for continuing care in residence;

(11) [(9)] CCRC Form [Number] 7 (FIN390)--[Application for] Change of control statement for [Control of] CCRC;

(12) [(10)] CCRC Form [Number] 8 (FIN391)--Certification of changes to disclosure statement [Changes to Disclosure Statement];

(13) [(11)] CCRC Form [Number] 9 (FIN392)--Notice of request to release entrance fee escrow funds [Request to Release Entrance Fee Escrow Account Funds];

(14) [(12)] CCRC Form [Number] 10 (FIN393)--Notice of request to release funds from the reserve fund escrow account [Request to Release Funds from the Reserve Fund Escrow Account];

(15) [(13)] CCRC Form [Number] 11 (FIN394)--Notice by provider of repayment of previously released funds to the reserve fund escrow account [Provider of Repayment of Previously Released Funds to the Reserve Fund Escrow Account];

(16) [(14)] CCRC Form [Number] 12 (FIN395)--Affidavit of re-payment of previously released funds to the reserve fund escrow account [Repayment of Previously Released Funds to the Reserve Fund Escrow Account];

(17) [(15)] CCRC Form [Number] 13 (FIN396)--Notice of lien [Lien]; [and]

(18) [(16)] CCRC Form [Number] 14 (FIN397)--Calculations concerning conditions [Concerning Conditions for Release of Entrance Fees to Provider]; and

(19) CCRC Form 14a (FIN607)--Provider request for release of continuing care in residence entrance fee escrow funds.

§33.9. Address for Filings.

(a) All inquiries, correspondence, applications, and other filings under this chapter must be sent to the appropriate physical, mailing, or electronic address:

(1) specified on the applicable department form being used; or

(2) listed on the department website. [addressed to the Texas Department of Insurance, CCRC Section, Mail Code 305-2C, P.O. Box 149104, Austin, Texas 78714-9104.]

(b) Notwithstanding a requirement in this chapter to make a submission in a paper form, any inquiry, correspondence, application, or other filing under this chapter may be submitted electronically to the department, unless specifically requested in a specified format by the department.

**§33.10. Unauthorized Providers Required to ~~[Unregistered Facilities Required To]~~
Respond to Inquiries.**

If the Commissioner becomes aware of an unauthorized provider [~~unregistered facility~~] and makes inquiries to determine the applicability of this chapter and the Act to the provider [~~facility~~], the recipient of an inquiry must respond within 30 days. The Commissioner may conduct any necessary investigation or examination regarding the inquiry and, if warranted, take action against the provider.

SUBCHAPTER B

28 TAC §§33.101 – 33.105

STATUTORY AUTHORITY. The department proposes new §§33.101 – 33.105 under Health and Safety Code §246.003(b) and §246.0737, and Insurance Code §36.001.

Health and Safety Code §246.003(b) authorizes the department to adopt rules to implement Health and Safety Code Chapter 246.

Health and Safety Code §246.0737 directs the Commissioner to establish escrow release requirements for continuing care in residence different from those applicable to facility-based entrance fee escrow funds.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. The proposed addition to Chapter 33 implements Health and Safety Code §§246.0025, 246.022, 246.057, 246.071, and 246.0737, enacted by HB 2697, 84th Legislature, Regular Session (2015).

TEXT.

SUBCHAPTER B. CONTINUING CARE IN RESIDENCE

§33.101. Scope.

This subchapter establishes the requirements and procedures for certificates of authority, disclosure statements, and entrance fee escrow accounts applicable to continuing care in residence under Health and Safety Code §246.022. With respect to continuing care in residence, this subchapter governs in case of conflict with other provisions of this chapter.

§33.102. Adding Authority for Continuing Care in Residence.

(a) Sections 33.202, 33.203, 33.205, and 33.206 of this title apply to continuing care in residence.

(b) A person must also hold a certificate of authority to provide continuing care at a facility before the person is eligible to receive authority to provide continuing care in residence. A provider must have authority to provide continuing care in residence before accepting any consideration or entering into any contracts for continuing care in residence.

(c) To apply for authority to provide continuing care in residence, an applicant must submit a CCRC Form 1a (FIN 604), including the following:

(1) the provider's CCRC certificate of authority license number;

(2) format for disclosure statement for continuing care in residence (CCRC Form 6b (FIN605));

(3) a business plan which includes:

(A) a three-year financial projection with associated assumptions;

(B) the geographic region proposed for continuing care in residence services;

(C) evidence of the actuarial review for entrance fee (and related amortization schedule) and service fee amounts;

(D) information regarding resident qualification;

(E) information regarding marketing and advertising activities; and

(F) information regarding refund procedures applicable before a resident receives continuing care in residence services; and

(4) a certified copy of assumed name certificate, if applicable.

(d) Information and filings under this subchapter must be submitted, as applicable, on paper or in an electronic format that is acceptable to the department. The department's submission locations, formats, and contact information are subject to change; persons submitting forms or information must confirm that they are using the most recent version before submitting to the department. CCRC forms are available on the department's website.

(e) The time period specified in Health and Safety Code §246.022 begins when the department has received all required material and information and deems the application complete.

(f) Incomplete applications will expire without refund one year from the date of receipt of the applicant's initial CCRC Form 1a (FIN604) Application for Authority to Offer Continuing Care in Residence Services in the State of Texas under Health and Safety Code §246.0025(b).

33.103. Disclosure Statement Requirements.

(a) Sections 33.302, 33.303, 33.305, 33.307, and 33.308 of this title apply to continuing care in residence.

(b) The organization and elements of the disclosure statement, including any revisions, must follow the format in CCRC Form 6b (FIN605). The disclosure statement or revision must be submitted in compliance with CCRC Form 6a (FIN389).

(c) The disclosure statement must be submitted to the department before any of the following occur:

(1) the provider contracts to provide continuing care in residence in Texas;

(2) the provider extends the term of an existing contract to provide continuing care in residence in Texas; or

(3) the provider or provider's agent solicits a continuing care contract in Texas for an individual who resides in Texas at the time of the solicitation. A continuing care contract is considered solicited if, during the 12-month period preceding the date on which the continuing care contract is signed or accepted by either party, information concerning the availability of the continuing care in residence contract is given:

(A) by personal, telephone, mail, or other communication directed to and received by a person at a location in Texas; or

(B) in paid advertisements published or broadcast from within Texas, other than in a publication in which more than two-thirds of the circulation is outside Texas.

(d) The provider must submit the initial and annual revisions of the disclosure statement not later than 120 days after the end of the provider's fiscal year. If the 120th day falls on a weekend or on a recognized state or federal holiday, the due date is the next business day.

(e) The disclosure statement must also include the following:

(1) annual audited financial statements as defined in §33.2 of this title;

(2) annual actuarial review; and

(3) information about how the amortization schedules in care in residence contracts are calculated and applied to releases described under §33.104(b) of this title.

(f) No less than 30 days before entering into a contract with a third-party to manage the provider's continuing care in residence operations, a provider must submit one copy of the management contract to the department as set out in §33.9 of this title.

33.104. Entrance Fee Escrow Account Requirements.

(a) Sections 33.401(b) – (e) and 33.402(a) of this title apply to continuing care in residence.

(b) Entrance fees must be held in escrow as set forth in Health and Safety Code §246.071. An escrow agent cannot release, and the provider cannot request or accept, entrance fee funds from the escrow agent without department approval. A provider must file CCRC Form 14a (FIN607) to request release of entrance fee escrow funds for identified residents. An escrow agent must file a CCRC Form 9 (FIN392) when a provider requests the agent release entrance fee escrow account funds.

(c) To obtain department approval:

(1) a provider must verify in Form 14a (FIN607) that:

(A) the identified residents are receiving continuing care in residence;

(B) the requested amount complies with amortization schedules contained in the continuing care in residence contracts; and

(C) the provider's assets exceed the actuarial present value of the expected costs of performing all remaining obligations to all residents under continuing care contracts; and

(2) the provider must disclose its operating ratio and current ratio. A

provider is not eligible for a release of continuing care in residence entrance fee escrow funds if the provider's:

(A) operating ratio is greater than 100 percent, unless there is a cash flow analysis acceptable to the department; or

(B) current ratio is no greater than 150 percent.

(d) The department will issue a determination on the request for release of continuing care in residence entrance fee escrow funds to both the provider and escrow agent.

§33.105. Contract Requirements for Continuing Care in Residence.

(a) Providers must use a standard form to contract with residents for continuing care in residence.

(b) The standard contract form must:

(1) contain an amortization schedule showing when the provider will be entitled to release of a resident's entrance fee from escrow;

(2) include or reference all the provider's statutory duties and obligations, including the refund provisions of Health and Safety Code §246.057; and

(3) include the following information about the resident's cancellation rights, in bold, capitalized, or underlined type so as to be conspicuous: "You may cancel this contract at any time before midnight of the seventh day, or a later day if specified in the contract, after the date on which you sign this contract, or you receive the provider's disclosure statement, whichever occurs later. If you elect to cancel the contract, you must do so by written notice and you will be entitled to receive a refund of all assets transferred other than periodic charges applicable to your receiving continuing care in residence services."

CERTIFICATION. This agency certifies that legal counsel has reviewed the proposal and found it to be within the agency's authority to adopt.

Issued in Austin, Texas, on January 4, 2019.

/s/ Norma Garcia _____

Norma Garcia
General Counsel
Texas Department of Insurance