

Preliminary Exposure Draft

For Comment and Review

Text of Model Financial Guarantee Act

1. This Law shall be known as "The Continuing Care Retirement Community Financial Guarantee Act" and may be referred to as the CCRC Guarantee Act.
2. As used in this Act:
 - (1) "Member" means an entrance fee CCRC or CCAH provider required to be a member of the Association except and to the extent that the member is participating in an insolvency program, if any, adopted by the United States government.
 - (2) "Insolvent provider" means a provider that was a member of the Association when the insured event occurred, and against which an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction.
 - (3) "Commissioner" shall mean the senior state official responsible for the financial oversight of CCRCs and CCAHs.
 - (4) "Coverage" shall mean all unfunded obligations of an insolvent CCRC or CCAH, including the obligation for sufficient reserve funds to ensure the CCRC's or CCAH's sound operation.
 - (5) "Coverage" does not include any obligations arising out of any reinsurance contracts, nor any obligations to a state or to the federal government.
 - (6) "Resident" means a resident of a CCRC or a person receiving contracted services under a CCAH agreement.
3. Within 60 days after the original effective date of this article, all Continuing Care Retirement Community (CCRC) providers, licensed to accept entrance fees and to offer services in this state, and all similarly licensed Continuing Care At Home (CCAH) providers shall establish the State Continuing Care Guarantee Association (the Association). Each licensed CCRC or CCAH

operator, as a condition of its authority to accept such entrance fees, shall participate in the Association whether established voluntarily, or by order of the Commissioner after the elapse of 60 days following the original effective date of this article, in accordance with rules to be established as provided in this article. It shall be the purpose of the Association to enable each member provider to provide for insolvency insurance against loss arising from the failure of an insolvent provider to discharge its obligations under its continuing care contracts.

4. The Association shall be managed by a board of governors, composed of nine persons, each of which shall be appointed by the Commissioner to serve initially for terms of one, two, or three years and thereafter for three-year terms so that three terms shall expire each year on December 31, and shall continue in office until his or her successor shall be appointed and qualified. The members of the board shall include:
 - (1) Three representatives of member CCRC providers, each of whom shall have offered continuing care services for at least five years prior to appointment. One member shall represent a multifacility provider, if any;
 - (2) Four CCRC residents of member providers who are not eligible for appointment pursuant to paragraph (1) but who are found by the Commissioner to have the needed financial and management background, all of whom shall be residents of CCRCs but not residents of the same provider unless there are fewer than four member providers in the state;
 - (3) A certified public accountant qualified by experience as a CCRC specialist but who is not employed by a CCRC or a CCRC management organization (priority in appointment is to be given to CCRC residents who otherwise meet these qualifications);
 - (4) An actuary qualified by experience as a CCRC specialist but who is not employed by a CCRC or a CCRC management organization

(priority in appointment is to be given to CCRC residents who otherwise meet these qualifications).

5. The nine members shall be representative, as nearly as possible and as applicable, of the provider organizations and of the residents they serve, with the member providers selecting representative board members pursuant to paragraphs (1) above by whatever means they deem appropriate, except that if Commissioner finds that there is bias in the selection of provider representatives, say, between nonprofit and for-profit operators or according to any other circumstance found by the Commissioner to be material, the Commissioner can realign the proportionality of the representation, beginning with the next ensuing term of office to conform with the changed proportion. Resident representatives pursuant to paragraph (3) shall be either self-nominated or nominated by resident councils or Associations with the Commissioner choosing the board members from among the list of resident nominees. The board members chosen pursuant to paragraphs (1) and (2) above shall then choose the paragraph (3) and (4) professionals, who may be residents, from among applications for those positions solicited by the Commissioner.
6. Only members chosen pursuant to paragraphs (1) and (2) shall be voting members. The paragraph (4) and (5) professionals shall deliberate fully, but without bias, with the board. If the board members have not been designated within 60 days following the original effective date of this article, then the Commissioner shall designate the board members in each category. In case of a vacancy for any reason on the board, the remaining members shall appoint a successor in keeping with the representation program set forth above with the Commissioner appointing a successor to fill the unexpired term if the board shall not have acted within 60 days of the vacancy occurring.
7. The Association shall adopt a plan of operations, and any amendments thereto, not inconsistent with the provisions of this article, necessary to assure the fair, reasonable, and equitable manner of administering the

Association, and to provide for other matters as are necessary or advisable to implement the provisions of this article. The plan of operations and any amendments thereto shall be subject to prior written approval by the Commissioner. All members of the Association shall adhere to the plan of operation.

8. If for any reason the Association fails to adopt a suitable plan of operation within 90 days following the original effective date of this article, or if at any time thereafter the Association fails to adopt suitable amendments to the plan of operation, the Commissioner shall after hearing adopt and promulgate reasonable rules as are necessary or advisable to effectuate the provisions of this chapter. These rules shall continue in force until modified by the Commissioner after hearing or superseded by a plan of operation, adopted by the Association and approved by the Commissioner.
9. In accordance with its plan of operation, the Association may designate one or more of its member providers as a servicing facility, but a member may decline this designation. Alternatively, the Association may designate another qualified entity to act as servicing facility. Each servicing facility shall be reimbursed by the Association for all reasonable expenses it incurs and for all payments it makes on behalf of the Association. Each servicing facility shall have authority to perform any functions of the Association that the board of governors lawfully may delegate to it and to do so on behalf of and in the name of the Association. The designation of servicing facilities shall be subject to the approval of the Commissioner.
10. The Association shall have authority to borrow funds when necessary to effectuate the provisions of this article, and may provide in its plan of operations for any of the following:
 - (a) The issuance of notes, bonds, or debentures, or the establishment of a special purpose trust or other entity, solely for the purpose of facilitating a financing.

(b) The securing of that borrowing or those notes, bonds, or debentures by pledging or granting liens or mortgages, or by otherwise encumbering its real or personal property, including, but not limited to, insolvency insurance or administrative premiums levied upon member provider to carry out the purposes of this Act.

11. The Association, either in its own name or through servicing facilities, may be sued and may use the courts to assert or defend any rights the Association may have by virtue of this article as reasonably necessary to fully effectuate the provisions thereof.

12. The Association shall have the right to intervene as a party in any proceeding wherein liquidation of a member CCRC or CCAH is sought.

13. The Association shall conduct its affairs in a businesslike manner.

(e) The Association shall have an annual audit of its financial condition conducted by an independent certified public accountant. The audit shall be conducted, to the extent possible, in accordance with generally accepted auditing standards (GAAS) and the report of the audit shall be submitted to the Commissioner.

(f) The Association shall annually report on its operations and its efforts to maintain a financially sound CCRC industry in the state. The report provided pursuant to this paragraph shall be submitted annually to the Commissioner for review, and the Commissioner shall have the authority, if the actions taken by the Association are deemed by the Commissioner to be inadequate, to achieve the protective purposes of this Act.

14. The Commissioner shall examine the Association to the same extent as, and in accordance with, the examination requirements applicable to licensed CCRCs or CCAHs. A copy of the examination report shall be publicly available and filed with the leaders of applicable legislative committees relating to CCRCs or CCAHS no later than December 31 of the year the report is completed.

15. Powers and duties of Association.

(a) Domestic impaired CCRC or CCAH - Before order of liquidation or rehabilitation.- For a domestic CCRC or CCAH that is impaired, before an order of liquidation or rehabilitation and subject to any conditions imposed by the Association that do not impair the contractual obligations of the impaired CCRC or CCAH, if the impaired CCRC and/or CCAH and Commissioner approve, the Association may:

- (1) guarantee or reinsure, or cause to be guaranteed, assumed, or reinsured, the impaired domestic CCRC's or CCAH's contractual obligations in this state;
- (2) provide moneys, pledges, notes, guarantees, or other appropriate means to:
 - (i) carry out item (1) of this subsection; and
 - (ii) ensure payment of the contractual obligations of the impaired CCRC or CCAH, pending action under item (1) of this subsection; and
- (3) lend money to the impaired CCRC or CCAH.

(b) Foreign or alien impaired CCRC or CCAH - Before order of liquidation, rehabilitation, or conservation.- For a foreign CCRC or CCAH or alien CCRC or CCAH that is impaired, before an order of liquidation, rehabilitation, or conservation and subject to any conditions imposed by the Association that do not impair the contractual obligations of the impaired CCRC or CCAH, if the impaired CCRC or CCAH and the Commissioner approve, the approve may, with respect to the covered obligations in this state of the CCRC or CCAH:

- (1) guarantee or reinsure, or cause to be guaranteed, assumed, or reinsured, the impaired CCRC's or CCAH's covered contracts with residents;

(2) provide moneys, pledges, notes, guarantees, or other appropriate means to:

- (i) carry out item (1) of this subsection; and
- (ii) ensure payment of the contractual obligations of the impaired CCRC or CCAH to residents, pending action under item (1) of this subsection; and

(3) lend money to the impaired CCRC or CCAH.

(c) Domestic impaired CCRC or CCAH - Under order of liquidation or rehabilitation.-

- (1) For a domestic CCRC or CCAH that is an impaired CCRC or CCAH under an order of liquidation or rehabilitation, if the Commissioner approves, the Association shall:

 - (i) guarantee, assume, or reinsurance, or cause to be guaranteed, assumed, or reinsured, the impaired CCRC or CCAH's covered contracts with residents and all other obligations needed to ensure the fulfillment of those contracts;
 - (ii) ensure payment of the contractual obligations of the impaired CCRC or CCAH; and
 - (iii) provide moneys, pledges, notes, guarantees, or other means reasonably necessary to carry out this paragraph.

- (2) If the Association fails to act within a reasonable period of time with respect to the domestic impaired CCRC or CCAH, the Commissioner shall have the powers and duties of the Association under this subtitle.

(d) Foreign or alien impaired CCRC or CCAH - Under order of liquidation, rehabilitation, or conservation.-

(1) For a foreign CCRC or CCAH or alien CCRC or CCAH that is an impaired CCRC or CCAH under an order of liquidation, rehabilitation, or conservation, if the Commissioner approves, the Association shall:

- (i) guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the impaired CCRC or CCAH's covered contracts with residents;
- (ii) ensure payment of the contractual obligations of the impaired CCRC or CCAH to residents; and
- (iii) provide moneys, pledges, notes, guarantees, or other means reasonably necessary to carry out this paragraph.

(2) If the Association fails to act within a reasonable period of time with respect to the foreign or alien impaired CCRC or CCAH, the Commissioner shall have the powers and duties of the Association under this subtitle.

(e) **Liability.**- The Association is not liable under this section for coverage of a foreign CCRC or CCAH or alien CCRC or CCAH whose domiciliary jurisdiction or state of entry provides, by statute or regulation, protection for residents of this State substantially similar to that provided under this subtitle for residents of other states.

(f) **Help and advice to Commissioner.**- On request of the Commissioner, the Association may give help and advice to the Commissioner about rehabilitation, operations, repurposing of redundant facilities, or the performance of other contractual obligations of an impaired or potentially impaired (in the judgment of the Commissioner) CCRC or CCAH. The aim of the Commissioner and any help or advice that he may receive pursuant to this section shall be to shield residents from financial harm attributable to decisions made by management or by other nonresident investors in the CCRC or CCAH, to facilitate continuity of living facilities and services to the residents or those served, and to

make any transitions that may be necessitated by the rehabilitation as stress free as possible for the residents or those served.

(g) Standing.-

- (1) The Association has standing to appear before any court in the State with jurisdiction over an impaired CCRC or CCAH as to which the Association is or may become obligated under this subtitle.
- (2) The standing extends to all matters germane to the powers and duties of the Association, including proposals for reinsuring or guaranteeing the covered contracts with residents of the impaired CCRC or CCAH and the determination of the covered contracts and contractual obligations.

(h) Assignment of rights.-

- (1) A person receiving benefits under this subtitle, whether the benefits are payments of contractual obligations or continuation of services, is deemed to have assigned all rights under the covered contract to the Association to the extent of the benefits received because of this subtitle.
- (2) The Association may require anyone benefitted by this statute to assign to the Association all rights to the extent of benefits received as a condition precedent to the receipt of any rights or benefits accorded by this statute.
- (3) The Association is subrogated to the rights assigned under this subsection against the assets of the impaired CCRC or CCAH.
- (4) The subrogation rights of the Association under this subsection have the same priority against the assets of the impaired CCRC or CCAH as those of the person entitled to receive benefits under this subtitle.

(i) Contractual obligations of impaired or insolvent CCRC or CCAH.-

(1) Subject to paragraphs (2) and (3) of this subsection and unless the contractual obligations of the impaired CCRC or CCAH or insolvent CCRC or CCAH are reduced under subsection (e) of this section, the contractual obligations of the impaired CCRC or CCAH or insolvent CCRC or CCAH for which the Association is or may become liable shall be as great as, but no greater than, the contractual obligations that the impaired CCRC or CCAH or insolvent CCRC or CCAH would have had in the absence of the impairment or insolvency.

(2) Benefits for which the Association may become liable may not exceed the contractual obligations for which the CCRC or CCAH is or would have been liable if it were not an impaired CCRC or CCAH or insolvent CCRC or CCAH.

16. Each time a CCRC or CCAH becomes insolvent then, to the extent necessary to secure funds for the Association for the fulfillment of the obligations of that insolvent CCRC or CCAH and also for payment of reasonable administrative costs, the Association shall collect premium payments from its member CCRC or CCAHs sufficient to discharge its obligations. The rate of premium charged shall be a uniform dollar amount per resident in the case of a CCRC or person served for a CCRC in the preceding calendar year, except that the amount per CCRC resident shall be double the rate per person served by a CCAH. The rate of premium charges to each member in the appropriate categories shall initially be based on the CCRC's resident census or CCAH's number of persons served for each CCRC or CCAH as shown in the latest year's annual statement on file with the Commissioner. The initial premium shall be adjusted by applying the same rate of premium charge as initially used to each CCRC's resident census or CCAH's number of persons served for each CCRC or CCAH as shown on the annual statement for the second year following the year on which the initial premium charge was based. The difference between the initial premium charge and the adjusted premium charge shall be charged or credited to each member CCRC or CCAH by the Association as soon as practical after the filing of the

annual statements of the member CCRC or CCAHs with the Commissioner for the year on which the adjusted premium is based. In cases of a dispute as to a CCRC's resident census or CCAH's number of persons served for each CCRC or CCAH between the Association and one of its members the written decision of the Commissioner shall be final. The premium charged to any member CCRC or CCAH shall not be more than 2 percent of the CCRC's or CCAH's gross revenues in this state for that member per year. The Association may exempt or defer, in whole or in part, the premium charge of any member CCRC or CCAH, if the premium charge would cause the member CCRC or CCAH's financial statement to reflect an amount of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member CCRC or CCAH is authorized to operate and in which it has active operations. However, during the period of deferment, no fees shall be reduced, employee salaries increased, nor management fees paid, except as authorized by the Association, by the company whose premium charge was deferred. Such deferred premium charges shall be paid when the payment will not reduce capital or surplus below required minimums. These payments shall be credited against future premium charges to those companies receiving larger premium charges by virtue of the deferment. After all covered claims of the insolvent CCRC or CCAH and expenses of administration have been paid, any unused premiums any funds remaining in the accounts of the liquidator shall be retained by the Association and applied to reduce future premium charges. However, a CCRC or CCAH which ceases to be a member of the Association, other than an CCRC or CCAH that has become insolvent, that is entitled to a refund based upon an adjusted assessment as provided above in this section, shall have no right to a refund of any premium previously remitted to the Association. The Commissioner may suspend or revoke the authority to transact business in this state of a member CCRC or CCAH which fails to pay a premium when due and after demand has been made. Interest at a rate equal to the current Federal Reserve discount rate plus 2 1/2 percent per annum shall be added to the premium of any member CCRC or CCAH which fails to submit the premium requested by the

Association within 30 days after the mailing request. However, in no event shall the interest rate exceed the legal maximum.

17. All proceedings in which the insolvent CCRC or CCAH is a party or is obligated to defend a party in any court in the state shall, subject to waiver by the Association or by the Commissioner, be stayed for 60 days from the date that an order of liquidation or an order of receivership with a finding of insolvency has been entered by a superior court in this state or by a court in the state of domicile of the CCRC or CCAH, and an additional time thereafter as may be determined necessary by the court to permit proper defense or conduct of all pending causes of action by the Association or the Commissioner, as applicable. The stay as to matters to which the insolvent CCRC or CCAH is a party shall be superseded by and when an injunction or stay order is entered by the court in this state having jurisdiction of the liquidation or the ancillary liquidation.
18. The liquidator, receiver, or statutory successor of an insolvent member CCRC or CCAH shall permit reasonable access by the Association to the insolvent CCRC or CCAH's records as is necessary for the Association to carry out its duties with regard to covered claims. In addition, the liquidator, receiver, or statutory successor shall provide the Association with copies of these records upon the reasonable request of the Association and at the expense of the Association.
19. When a liquidator, domiciliary or ancillary, is appointed in this state for any member CCRC or CCAH, the liquidator shall promptly give notice of his or her appointment and a brief description of the contents of this article and of the nature and functions of the Association by prepaid first-class mail, to:
 - (a) all persons known or reasonably expected to have or be interested in claims against the CCRC or CCAH, at the last known address within this state;
 - (b) all residents of the CCRC or persons served by the CCAH, or their designator agents, at the last known address within this state, accompanied by a notice of the effective date the appointment; and
 - (c) the board of governors of the Association.

20. Notwithstanding any other provision of law, the Association shall be exempt from all license fees, income, franchise, privilege, property, or occupation taxes levied or assessed by this state, any municipality, county, or other political subdivision of this state. The rules of the Commissioner promulgated pursuant to this article may exempt the Association from: filing an annual statement, maintaining minimum required capital, paying any fees or reimbursements, or meeting any other requirement or doing any other thing required by this code or other laws.

- (a) The operation of the Association shall at all times be subject to the regulation of the Commissioner. The Commissioner, or any deputy or examiner, or any person whom the Commissioner shall appoint, shall have the power of visitation and examination into the affairs of the Association and free access to all books, papers, and documents that relate to the business of the Association, may summon and qualify witnesses under oath, and may examine officers, agents or employees, or any other person having knowledge of the affairs, transactions, or conditions of the Association.
- (b) Any member CCRC or CCAH aggrieved by any action or decision of the Association may appeal to the Commissioner within 30 days after the action or decision of the Association and after exhaustion of administrative remedies may seek court relief.

21. All orders or decisions of the Commissioner shall be subject to judicial review.

22. The Commissioner may, upon notice and opportunity for all interested parties to be heard, issue such rules, regulations and orders as may be necessary to carry out the provisions of this article.

- (a) The Association, its member CCRC or CCAHs, and its officers, directors, agents or employees of the Association, or its member CCRC or CCAHs, shall under no circumstances be liable for any sum in excess of the amount of any financial deficiency of the insolvent CCRC or CCAH, and

the costs of administration, investigation and defenses relating to the operations of the Association and the costs related to the insolvency.

- (b) Any person or member made a party to any action, suit or proceeding because such person or member served on the board of governors or on a committee or was an officer or employee of the Association shall be held harmless and be indemnified by the Association against all liability and costs (including the amounts of judgments, settlements, fines or penalties) and expenses incurred in connection with such action, suit or proceeding; provided, however, such indemnification shall not be provided on any matter in which the person or member shall be finally adjudged in any such action, suit or proceeding to have committed a breach of duty involving gross negligence, dishonesty, willful misfeasance or reckless disregard of the responsibilities of his office.
- (c) The costs and expenses of such indemnification shall be prorated and paid for by the members in the same manner as provided in the plan of operations for the proration of premiums.
- (d) The provisions of this section shall not be construed as creating any right in any third person, and shall be applicable only as between the Association and its member CCRC or CCAHs and its officers, directors, agents, or employees of the Association or its member CCRC or CCAHs.

23. The plan of operation adopted pursuant to this statute shall contain provisions whereby each member CCRC or CCAH is permitted to recoup over a reasonable length of time a sum reasonably calculated to recoup the assessments paid by the member CCRC or CCAH under this article by way of a reduction in any taxes otherwise required to be paid to this state.