NEW YORK CODES, RULES AND REGULATIONS

TITLE 11. INSURANCE DEPARTMENT
CHAPTER XIII. LIFE CARE COMMUNITIES
PART 350. (REGULATION 140) CONTINUING CARE RETIREMENT COMMUNITIES

11 NYCRR § 350.0 (2008)

*** AS AMENDED OCTOBER 17, 2007***

§ 350.0 Approval of the superintendent

In addition to any specifically stated requirements for approval of the superintendent, the continuing care retirement community shall make a demonstration of actuarial validity and show that the proposed action will not adversely affect the continued financial viability of the continuing care retirement community.

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Added 350.0 on 10/02/91; amended 350.0 on 10/17/07

§ 350.1 Definitions

For purposes of this Part, unless the context indicates otherwise, the following definitions shall apply:

(a) Capital assets means those assets related to the continuing care retirement community as follows:

(1) Class 1-land;

(2) Class 2-building;

(3) Class 3-equipment, furnishings, refurbishments; and

(4) Class 4-original start up costs actually incurred which may include, if applicable, but not be limited to architect fees, legal fees, original marketing costs, development fees, sewer construction and financing costs involved with development, if not included above.

(b) Capital expenses means those expenses related to capital assets (both original and replacements) associated with the continuing care retirement community. Capital expenses in any year shall consist of:

(1) Any expenses for insurance and taxes related to these capital items;

(2) The excess, if any, of the cost to acquire a capital asset over the value of the capital asset for the year of acquisition;

(3) The excess, if any, of the cost to repair or replace a capital asset over the increase in value of the capital asset for the year of repair or replacement; and

(4) The actual depreciation or amortization charged for capital assets for such year.

(c) Commencement of operations for a continuing care retirement community shall be after the first living unit has been occupied.

(d) Continuing care retirement community means a facility operated pursuant to a certificate of authority as defined in article 46 of the Public Health Law.

(e) Continuing care retirement contract means a single contract to provide a person services provided by the continuing care retirement community.

(f) Earned surplus means the surplus less the paid in surplus.

(g) Fiscal year means the January 1st through December 31st period. The superintendent may approve a different reporting year for a continuing care retirement community provided that the audited financial statement and the actuarial study are prepared in a manner consistent with the alternate fiscal year.

(h) The invested assets of a continuing care retirement community means assets meeting the requirements of section 350.6(a)(3) or 350.6(c)(1)-(4) of this Part.

(i) NRSRO means a nationally recognized statistical rating organization that has been approved by the superintendent.

(j) Net surplus means the surplus less the part 2 paid in surplus.

(k) Non resident means a person living in a continuing care retirement community who has not entered into a continuing care retirement contract with that community.

(l) Operating expenses means those expenses, other than capital expenses and refund expenses, associated with the services to be provided pursuant to the continuing care retirement contracts, such as expenses for administration, food service, housekeeping, maintenance, utilities, nursing care, health services, resident services, leases, taxes, and insurance.

(m) Operator means a legal entity operating a continuing care retirement community pursuant to a certificate of authority as defined in article 46 of the Public Health Law.

(n) Paid in surplus means any stock or funds contributed to the continuing care retirement community by the operator, increased by credits allowed, including any credits appropriate from the date of contribution, and decreased by any distributions of paid in surplus to the operator, which shall be allocated as follows:

(1) part 1 paid in surplus corresponding to assets eligible to support reserves and liabilities under section 350.6 of this Part;

(2) part 2 paid in surplus corresponding to assets not eligible to support reserves and liabilities under section 350.6 of this Part.

(o) Qualified consulting actuary means an individual who:

(1) is a member of the American Academy of Actuaries and has, based on the Academy's qualification standards, the necessary training and experience pertaining to continuing care retirement communities; or

(2) demonstrates to the satisfaction of the superintendent that based on the individual's knowledge, training and experience that the individual has the necessary knowledge pertaining to continuing care retirement communities.

(p) Rating methodology means the methodology and detailed formulas developed pursuant to section 4604.4(a)(ii) of the Public Health Law.

(q) Refund expenses means the amount returned to a resident from either entrance fees or monthly fees upon termination of the continuing care retirement contract because of the death of the resident or withdrawal or dismissal of the resident from the continuing care retirement community, or modification of the continuing care retirement contract.

(r) Resident means an individual residing in a continuing care retirement community who has entered into a continuing care retirement contract with that community.

(s) Satisfactory actuarial balance means that the most recent actuarial study of the community that is satisfactory to the superintendent indicates all of the following conditions are met:

(1) The net surplus as of the current valuation (reporting) date is greater than or equal to zero as demonstrated by the actuarial balance sheet in the actuarial study;

(2) The current fee schedule for each continuing care retirement contract type offered to new residents to the community contains positive margins as demonstrated by the new resident cohort pricing analysis included in the actuarial study. Any reliance on revenue from an endowment, foundation or other source that is used to satisfy this condition shall require justification satisfactory to the superintendent; and

(3) The invested assets of the community are greater than zero for each of the next ten projection years as demonstrated by the cash flow projection in the actuarial study.

(t) Surplus means the total assets less the total reserves and liabilities of the continuing care retirement community.

Section statutory authority: Public Health Law, § A46, § 4610

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Renumbered 350.1 to be 350.2 on 10/17/07; added 350.1 on 10/17/07.

§ 350.2 Reserves

After release of funds held in escrow pursuant to Section 4610 of the Public Health Law, the operator of a life care community operating pursuant to Article 46 of the Public Health Law shall maintain a reserve liability for amounts due and unpaid and a reserve liability for estimated future capital, operating and refund expenses provided for under the terms of the life care contracts.

Section statutory authority: Public Health Law, § A46, § 4610

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Added 350.1 on 10/02/91; renumbered 350.1 to be 350.2 on 10/17/07; amended 350.2 on 10/17/07.

§ 350.3 Reserve liability calculation

(a) At the end of each fiscal year, the sum of the reserve liabilities of a life care community shall be at least as great as the greatest of the following:

(1) A retrospective reserve liability defined as an accumulation of not less than:

(i) A percentage of the entrance fees received where such percentage is not less than 95% and consistent with the calculation of the entrance fees; plus

(ii) A percentage of the monthly fees where such percentage is not less than percentage of monthly fee used in the latest prospective valuation, including the initial actuarial study; plus

(iii) Revenues received from non residents for services rendered (such as for health care); plus

(iv) Interest received plus (minus) an adjustment for any difference between interest accrued at the end and beginning of the year from all interest bearing assets eligible under paragraphs (1), (2), (3) and (4) of Section 350.6(c) of this Part; plus (minus)

(v) An adjustment for capital gains (losses) both realized and unrealized on interest bearing assets eligible under paragraphs (1), (2), (3) and (4) of Section 350.6(c) of this Part for supporting reserve liabilities; plus (minus)

(vi) Adjustment for capital gains (losses) realized on sale or disposal of class 3 capital assets; plus

(vii) Capital gains both unrealized and realized on classes l and 2 capital assets; minus

(viii) Capital losses both unrealized and realized during the original assumed lifetime of classes 1 and 2 capital assets; minus

(ix) The actual operating expenses, excluding any prepayment of expenses; minus

(x) Any refunds to residents of either entrance fees or monthly fees; minus

(xi) The capital expenses; minus

(xii) The interest payment on any loans, bonds or any other debt obligation, including the interest payments on the mortgage and any interest attributed to Part 1 paid in surplus; minus

(xiii) The percentage used in subparagraph (ii) of this paragraph applied to the change in any unearned or advance payment liability; minus

(xiv) The expenses for non residents for services for which the revenues are included in subparagraph (iii) of this paragraph; minus

(xv) Any releases of the excess of the retrospective reserve over the prospective reserve approved under the provisions of section 350.5 of this Part; plus or minus

(xvi) Any revenue or expense which the operator can demonstrate as appropriate, subject to the approval of the Superintendent.

(2) A prospective reserve liability consisting of the following:

(i) Amounts due and unpaid, plus

(ii) The reserve for replacement as described in section 350.4(a)-(b) of this Part; plus

(iii) The present value of future operating expenses for services covered by the life care contract; plus

(iv) The present value of the following expenses:

(a) Future depreciation charges on current and future capital (fixed) assets; and

(b) Future imputed investment income to be credited each year to an amount equal to the depreciated value of the capital assets less any debt and less any part 1 paid-in surplus; and

(c) Future interest payments, if not included in subparagraph (iii) of this paragraph, on loans, bonds or other debt obligations used to acquire capital (fixed) assets and on part 1 paid-in surplus; and

(d) Future insurance and taxes related to the capital (fixed) assets; and

(e) Future cost of replacements (other than that provided by subparagraph (ii) of this paragraph (2)) and repairs to the extent that such costs are not included in clause (a) of this subparagraph; plus

(f) Future refund expenses; minus

(v) The present value of not less than 95% nor more than 100% of the future scheduled monthly fee payments; plus or minus

(vi) The present value of any future expense or revenue item which the operator can demonstrate as appropriate, subject to the approval of the Superintendent.

(3) The amount necessary to satisfy the requirements of subdivision (a) of Section 350.6 of this Part.

(b) At any other time, the reserve liability shall be at least as great as the amount determined in accordance with paragraph (1) of subdivision (a) of this section.

Section statutory authority: Public Health Law, § 4607

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Added 350.2 on 10/02/91; renumbered 350.2 to be 350.3 on 10/17/07; amended 350.3 (a)(1)(xv) on 10/17/07; amended 350.3 (a)(2)(ii) on 10/17/07.

§ 350.4 General rules regarding reserve liability calculation

(a) The minimum reserve for replacement for class l capital assets shall be the excess of any realized and unrealized capital gains on the land including any gains realized on sale of all or any portion of the land over any realized and unrealized capital losses and less the cost of any additional or replacement land. In the event of realized capital gains from the sale of land, which is not to be replaced, the operator may request approval of the Superintendent for the exclusion of such capital gains from the reserve for replacement.

(b) The minimum reserve for replacement of class 2 capital assets shall be determined as follows:

(1) During the original assumed useful lifetime of the buildings (the useful lifetime of the assets used for purposes of calculating depreciation or amortization), the minimum reserve shall equal any excess of the realized and unrealized capital gains on the capital (fixed) asset (including that due to replacement or repair) over the realized and unrealized capital losses relative to that asset less the cost of any replacement or repairs.

(2) At any other time the minimum reserve shall be equal to the greatest of:

(i) the value of the reserve of the class 2 capital asset at the end of the original assumed useful lifetime;

(ii) the highest previous value of the reserve for a class 2 capital asset which has outlived its original assumed useful lifetime, as determined in accordance with this Paragraph; and

(iii) any excess of the realized and unrealized capital gains on the capital (fixed) asset over the realized and unrealized capital losses relative to that asset, less the cost of any replacement or repairs made since the end of the original assumed useful lifetime.

(3) In addition, an operator may use a plan for the systematic funding of a reserve for replacement over and above the requirements of Paragraphs (1) and (2) of this subdivision, subject to the approval of the Superintendent.

(4) Notwithstanding the requirements of Paragraphs (l) and (2) of this subdivision, the reserves held under those Paragraphs along with any reserves held under Paragraph (3) of this need not at any time exceed the current replacement cost.

(5) At the time of replacement of a capital (fixed) asset, the reserve for replacement may be reduced by the replaced capital (fixed) asset's portion of the reserve for replacement.

(c) Any reserve for replacement for class 3 capital assets shall be based on a plan submitted by the operator and approved by the Superintendent.

(d) For purposes of determining the depreciation or amortization on capital assets for use in the retrospective and prospective reserve calculations in section 350.3 of this Part, the following rules shall apply:

(1) Class 1 capital assets - no depreciation;

(2) Class 2 capital assets - depreciation over the useful lifetime, preferably 40 years at construction;

(3) Class 3 capital assets - depreciation over the useful lifetime of each asset or over the average useful lifetime of a grouping of assets;

(4) Class 4 capital assets - amortization over the lifetime of the associated class 2 assets. In the event of an accelerated reduction in the value of class 4 capital assets pursuant to section 350.5 of this Part, the annual amortization charge will remain unchanged, except for the final charge, and the period of time over which these assets will be amortized will be shortened in a manner consistent with the method of amortization used for class 4 assets; and

(5) Depreciation or amortization may be calculated using either the straight line method or the constant yield method or some intermediate method or any other method approved by the superintendent. The depreciation or amortization under the constant yield method is calculated as the change in value of an amortization schedule. Such schedule is calculated using an interest rate and a

pattern of charges, approved by the superintendent. The amortization schedule at any time equals the present value of the remaining charges.

(e) In determining the future expenses and future scheduled fee payments, inflation and increases in Social Security benefits shall be considered, where appropriate.

(f) The assumption as to scheduled monthly fee increases shall not exceed the assumption for increases for operating expenses on a percentage basis, unless otherwise approved by the Superintendent.

(g) The assumption as to average monthly fees per resident for the initial year of a prospective reserve liability calculation shall not exceed the average of the actual fees currently on file for that year unless otherwise approved by the superintendent upon demonstration that the proposed fees for the initial projection year are not excessive, inadequate, or unfairly discriminatory.

(h) In calculating the prospective reserve liability, the mortality, morbidity, and utilization of health care services shall be based on assumptions selected by the operator's actuary and approved by the superintendent based on the age, sex, and health characteristics of the entrants and of the residents. These characteristics should be considered in reserve calculations even if they are not distinguished in the fee structure for the continuing care retirement community.

(i) The prospective reserve liability calculations shall be done on an aggregate basis, which assumes that: (1) the residents at the date of valuation form a closed group, and (2) unit costs for operating expenses and capital expenses are based on an ongoing concern maintaining a reasonable occupancy rate. When performing the reserve calculation on a closed group basis, the projection shall be done until all current residents reach the last age of the assumed mortality table.

(j) The calculation of the prospective reserve shall periodically include a review of the assumptions relating to future rates of mortality and morbidity and future expenses. The review shall take into account the analysis of the actual to expected experience as set forth in the actuarial review contained in the facility's annual report required pursuant to Section 4607 of the Public Health Law.

(k) Reserve liabilities, at the option of the operator, may be subdivided and shown separately for various categories such as reserve for debt service, reserve for replacement, reserve for repair, reserve for operating expenses, reserve for refunds, and reserve for health care, even though such categories may not be so identified in the reserve calculations in section 350.3 of this Part.

Section statutory authority: Public Health Law, § 4607

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Added 350.3 on 10/02/91; renumbered 350.3 to be 350.4 on 10/17/07; amended 350.4 on 10/17/07.

§ 350.5 Adjustments to reserves

If the retrospective reserve liability calculated according to section 350.3(a)(1) of this Part is greater than the prospective reserve liability calculated according to section 350.3(a)(2) of this Part, then annually, upon a demonstration satisfactory to the superintendent, the retrospective reserve may be reduced in accordance with the priorities and conditions set forth in subdivisions (a), (b) and (c) of this section. The demonstration shall show that after such actions have been taken, the continuing care retirement community will continue to be in satisfactory actuarial balance, and the continuing care retirement community's projected invested assets will be at least equal to the requirements of section 350.6(a) of this Part for each of the next ten projection years.

(a) If the earned surplus is negative, the retrospective reserve may be reduced by an amount not to exceed the lesser of:

(1) the excess of the retrospective reserve over the prospective reserve; and

(2) the absolute value of any negative earned surplus.

(b) If earned surplus is positive and class 4 assets are not fully amortized, the retrospective reserve may be reduced by an amount not to exceed the lesser of:

(1) the excess of the retrospective reserve over the sum of the prospective reserve plus five percent of the portion of the prospective reserve calculated pursuant to section 350.3(a)(2)(iv) of this Part; and

(2) the amount of any accelerated reduction in the value of class 4 capital assets pursuant to section 350.6(c)(5)(iv) of this Part.

(c) If earned surplus is positive and class 4 assets are fully amortized, the retrospective reserve may be reduced by an amount not to exceed one half of the excess of the retrospective reserve over the sum of the prospective reserve plus five percent of the portion of the prospective reserve calculated pursuant to section 350.3(a)(2)(iv) of this Part. There must be a reduction of scheduled fees, and/or additional services must be provided so that the sum of fee reductions plus the value of the additional services is at least as great as the reduction in the retrospective reserve under this paragraph.

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Added 350.5 on 10/02/91; repealed 350.5 on 10/17/07; renumbered 350.4 to be 350.5 on 10/17/07; amended 350.5 on 10/17/07.

§ 350.6 Assets supporting reserve liabilities

(a) Once a continuing care retirement community has commenced operations and funds held in escrow are released pursuant to section 4610 of the Public Health Law, the continuing care retirement community shall maintain a debt reserve fund as described in paragraph (1) of this subdivision and an operating reserve fund as described in paragraph (2) of this subdivision.

(1) A continuing care retirement community shall maintain liquid assets in an amount greater than or equal to the aggregate of all interest and principal payments becoming due within the next 12 months under a mortgage loan, bond indenture or other long term financing of the community. Assets used to meet this requirement, which can include assets held in a debt service reserve fund established by or pursuant to a mortgage loan, bond indenture or other long term financing agreement, must be available to pay long term debt interest and principal payments should the operating revenues be insufficient for these purposes and must meet the eligibility requirements in paragraph (3) of this subdivision. Assets used to meet this requirement shall exclude assets used to meet the requirement in paragraph (2) of this subdivision.

(2)(i) A continuing care retirement community shall maintain liquid assets in an amount greater than or equal to 35 percent of the sum of the following amounts:

(a) the projected operating expenses of the community during the next 12 months, which shall include such comparable expenses related to providing services to non residents of the community during the next 12 months;

(b) the projected aggregate of all taxes and insurance expenses that are related to the capital assets of the community and the responsibility of the community and due within the next 12 months;

(c) the projected debt interest payments of the community becoming due within the next 12 months, excluding debt interest payments included in paragraph (1) of this subdivision; and

(d) the projected and/or actual refund expenses of the community becoming due within the next 12 months, except where such refund is dependent on the resale of the unit.

(ii) Assets used to meet the requirement in subparagraph (i) of this paragraph:

(a) shall exclude assets used to meet the requirement in paragraph (1) of this subdivision;

(b) can include assets, other than a debt service reserve fund, established by or pursuant to a mortgage loan, bond indenture or other long term financing agreement;

(c) must be available to pay operating expenses, refund expenses, and taxes and insurance expenses related to the capital assets of the community should the operating revenue be insufficient for these purposes; and

(d) shall meet the eligibility requirements in paragraph (3) of this subdivision.

(3) Eligible liquid assets shall include all of the following:

(i) cash;

(ii) demand accounts at any solvent national or state chartered bank or savings and loan association and valued at surrender value;

(iii) commercial paper with an original maturity of 270 days or less and which is rated and monitored by at least one NRSRO and valued at market value. If the security is rated and monitored by one NRSRO it must be rated the equivalent of A-1+ or A-1 by Standard and Poor's or P-1 by Moody's Investors Service. If the security is rated and monitored by more than one NRSRO it must be rated by at least two NRSROs the equivalent of A-1+ or A-1 by Standard and Poor's or P-1 by Moody's Investors Service;

(iv) non negotiable certificates of deposit with a remaining maturity of one year or less or that are redeemable at any time prior to the scheduled maturity date and that meet the criteria of subdivision (c)(2) of this section and valued at the surrender value;

(v) publicly traded fixed income securities that meet the requirements of subdivision (c)(3) of this section and valued at market value; and

(vi) publicly traded fixed income securities other than commercial paper that are rated in one of the top three generic rating categories by either Standard and Poor's or by Moody's Investors Service and that meet the requirements of subdivision (c)(4) of this section and valued at market value.

(4) A continuing care retirement community shall, within 30 days of the end of each fiscal quarter, test whether it meets the requirements of paragraphs (1) and (2) of this subdivision. Documenta-

tion of the testing and results shall be maintained with the community's business records. The continuing care retirement community shall immediately notify the superintendent if the requirements of paragraphs (1) and (2) of this subdivision are not met. Within 30 days following such notification, the continuing care retirement community shall submit to the superintendent a report setting forth in detail, the reasons for not meeting the requirements and the specific action steps to be adopted to achieve the requirements of paragraphs (1) and (2) of this subdivision.

(5) If a continuing care retirement community fails to meet the requirements of paragraph (1) of this subdivision because of a debt balloon payment maturing during the next 12 months, the calculation for paragraph (1) of this subdivision may be done excluding the debt balloon payment provided that a plan for refinancing the debt and/or repaying the debt with existing assets is submitted to the superintendent and is satisfactory to the superintendent.

(b) The amount and composition of assets qualifying under Paragraphs (1), (2), (3) and (4) of subdivision (c) of this section shall be such that the scheduled maturities and interest payments are not less than the amount which, together with the future revenues from entry and monthly fees from current and future residents and fees from non residents as estimated under the open group method, is needed to meet the cash flow for operating and capital cash expenditures, as tested as part of the actuarial review required by Section 4607(2)(d) of the Public Health Law, for the next 10 years or such longer period as required by the Superintendent. If there is a scheduled major debt retirement of at least the sum of regular payments of principal and interest for three years, then the Superintendent may require the cash flow projection for a period of at least five years beyond the scheduled major debt retirement.

(c) After satisfying the requirements of subdivisions (a) and (b) of this section, assets supporting reserve liabilities may be invested in any of the following:

(1) common or preferred stock, provided that any such investment shall be limited to no more than 5% of the market value of total assets supporting reserve liabilities, and to no more than 25% of any assets in excess of those supporting reserve liabilities, exclusive of assets not supporting reserve liabilities but encumbered by loan. No such investment shall exceed 5% of the securities of any one issuer at any one time. No more than 10% of the maximum hereunder shall be invested in the securities of any one issuer at any one time. Market value of common stocks shall be based on values assigned by a recognized national stock exchange;

(2) certificates of deposit issued by any national or state chartered bank or savings and loan association; and valued at the surrender value;

(3) United States Government or Canadian Government issued or guaranteed bonds, bills, or notes, or United States Government money market funds, and valued at market.

(4) other fixed income assets, provided that at least 90% of the market value thereof shall consist of publicly traded obligations rated among the top 4 generic rating categories by either Standard and Poor or by Moody's rating services and valued at market. Any obligations rated lower shall be valued at 90% their market value. No more than 10% of the assets supporting reserve liabilities shall be invested into the fixed income securities of any one issuer at any one time and no more than 5% of the securities of any one issuer shall be included among the assets supporting reserve liabilities. Market values of fixed income securities shall be based on a recognized national exchange or if no such value is available, a value that reflects the price needed to yield the same as the average current yields on new investments of similar quality and maturity;

(5) Capital (fixed) assets - with all values reduced by any outstanding loans.

(i) Class 1 assets - up to the market value thereof;

(ii) Class 2 assets - up to the market value thereof;

(iii) Class 3 - up to the original cost less depreciation charge;

(iv) Class 4 - up to the unamortized or depreciated cost, less any amount included in any other class;

(v) The market value of the class 1 and 2 assets shall be determined at least once every three years through an affidavit updating their value fixed by the operator, unless, if requested by the Superintendent, by an independent real estate appraiser.

(6) the unearned portion of any prepaid operating expenses, covering periods not in excess of three years from the date of valuation;

(7) accounts receivable subject to the restrictions that they are expected to be paid and not more than:

(i) 90 days overdue when the payor is not a government agency; and

(ii) 12 months overdue when the payor is a government agency;

(8) any other asset which the operator can demonstrate as appropriate, subject to the approval of the Superintendent.

(d) Nothing herein shall preclude on operator, subject to the approval of the Superintendent, from reporting the present value of future fees as an asset, provided the operator reports the present value of future operating, refund, and capital expenses and the excess of the retrospective reserve liability over the prospective reserve liability as liabilities.

(e) Nothing herein shall preclude an operator from reporting the full value of capital assets as assets, provided the operator also reports the values of outstanding loans against such assets as liabilities.

(f) A continuing care retirement community shall develop formal investment guidelines and policies, to be approved by its board of directors, in order to invest in any of the assets described in subdivision (c)(1)-(4) of this section. Investment guidelines and policies shall include broad statements about fixed income investment policies, stock investment policies, and a statement as to whether the community's investment function is managed by an outside firm. Notwithstanding any delegation, the responsibility for oversight of the investment program shall be retained by the community's board of directors. All investment policies and guidelines and any subsequent changes shall be submitted to the superintendent within 30 days of the board of directors adopting such policies and guidelines; provided, however, that a continuing care retirement community that has commenced operations prior to January 1, 2008, shall submit to the superintendent an investment policy and guideline statement approved by its board of directors within 90 days of January 1, 2008.

(g) Assets supporting reserve liabilities shall consist of the assets specified in subdivisions (a) and (c) of this section except that the value of these assets need not exceed the minimum reserve liabilities.

Section statutory authority: Public Health Law, § 4607

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Added 350.6 on 10/02/91; amended 350.6 on 10/17/07.

§ 350.7 Surplus

(a) Part 1 paid In surplus may be increased by credits based by applying an interest rate to such surplus where the interest rate is not greater than the higher of the mortgage interest rate and of the current average interest rate on all assets qualifying under paragraphs (1), (2), (3) and (4) of Section 350.6(c) of this Part based on the sum of investment income and capital gains (losses) on such assets and shall be reduced by any payments or distributions of such surplus. If there is no mortgage then the "prime rate" shall be used in place of the mortgage interest rate. The "Prime Rate" is the prime rate published in the Wall Street Journal. The prime rate published in the Wall Street Journal will either be a range showing the highest and lowest prime rates of the 20 largest U.S. commercial banks or a single prime rate. If the prime rate published in the Wall Street Journal is a range, the "Prime Rate" is the average of the highest and lowest prime rates in the range. If the prime rate published in the Wall Street Journal is a single prime rate, the "Prime Rate" will be the single prime rate.

(b) Any portion of the monthly fees and entrance fees over the amount used in calculating the retrospective and the prospective reserves in section 350.3 of this Part may be distributed to the operator or be retained as surplus at the option of the operator. If the continuing care retirement community is not in satisfactory actuarial balance, or if the requirements of section 350.6(a) of this Part are not met, such amounts must be retained as surplus and distributed to the operator only as provided in subdivision (c) of this section. If retained as surplus, it will be credited to Part 1 paid in surplus.

(c) Provided that the continuing care retirement community is in satisfactory actuarial balance and the requirements of section 350.6(a) of this Part are met, the distribution of Part l paid in surplus or a conversion of Part 1 paid in surplus to Part 2 paid in surplus may be made with the approval of the superintendent upon a satisfactory demonstration that the distribution or conversion:

(1) would not reduce the net surplus of the continuing care retirement community to less than zero;

(2) would not adversely affect the requirements of section 350.6(a), (b) and (c) of this Part;

(3) would not cause the continuing care retirement community to no longer be in satisfactory actuarial balance; and

(4) would not cause the continuing care retirement community's projected invested assets to become less than the requirements of section 350.6(a) of this Part for any of the next ten projection years.

(d) All assets not eligible to support reserves and liabilities under section 350.6 of this Part shall be allocated to Part 2 paid in surplus and shall be accounted for separately, with all investment income and realized and unrealized capital gains (losses) of such assets assigned thereto. No investment income on assets eligible to support reserves and liabilities under section 350.6 of this Part shall be assigned to Part 2 paid in surplus. Such Part 2 paid in surplus shall be disregarded in determining sufficiency of assets to support reserves and liabilities. Distribution or payment of Part 2 paid in surplus is not subject to the approval of the superintendent provided that the requirements of section 350.6(a) of this Part are currently satisfied and the continuing care retirement community has demonstrated to the superintendent's satisfaction during the prior 12 months that the community is in satisfactory actuarial balance.

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Added 350.7 on 10/02/91; amended 350.7 on 10/17/07.

§ 350.8 Test for solvency

(a) If an operator of a continuing care retirement community submits an actuarial study that indicates that the continuing care retirement community is not in satisfactory actuarial balance, the operator shall prepare a plan designed to achieve satisfactory actuarial balance and submit the plan to the superintendent for approval.

(1) The operator's plan shall include a discussion of the reasons causing the continuing care retirement community not to be in satisfactory actuarial balance, the detailed action steps to be taken that are designed to achieve satisfactory actuarial balance, and a discussion of each of the action steps included in the plan.

(2) The continuing care retirement community's qualified consulting actuary shall prepare an actuarial study or other appropriate actuarial communication that reflects the action steps in the operator's plan, the actuary's discussion of the operator's plan, and the actuary's estimate of when the community is projected to achieve satisfactory actuarial balance and how this estimate was developed.

(3) The operator's plan prepared pursuant to paragraph (1) of this subdivision and the appropriate actuarial communication prepared pursuant to paragraph (2) of this subdivision shall be submitted to the superintendent within 90 days of the preparation date of the actuarial study indicating that the continuing care retirement community is not in satisfactory actuarial balance.

(b) If the operator's plan prepared pursuant to subdivision (a) of this section is disapproved by the superintendent, or if the approved plan is not projected to achieve satisfactory actuarial balance within seven years or by the end of the community's fifteenth fiscal year of operation if later, then the continuing care retirement community shall be deemed to be insolvent.

(c) If, during monitoring of an operator's approved plan prepared pursuant to subdivision (a) of this section, the superintendent determines that the approved plan will not achieve satisfactory actuarial balance within the time frame indicated in subdivision (b) of this section, the operator upon notice shall have a 90 day period to prepare and submit for the superintendent's approval a revised plan as described in subdivision (a) of this section. If the operator's revised plan to achieve satisfactory actuarial balance is disapproved by the superintendent, or if the approved revised plan is not projected to achieve satisfactory actuarial balance within seven years or by the end of the community's fifteenth fiscal year of operation if later, then the continuing care retirement community shall be deemed to be insolvent.

Section statutory authority: Insurance Law, § A74; Public Health Law, § 4602

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Added 350.8 on 10/02/91; repealed and added 350.8 on 10/17/07.

§ 350.9 Actuarial study

(a) Once a continuing care retirement community has commenced operations, the first actuarial study shall be due within four months following the third fiscal year end that the community has been in operation. Thereafter, the continuing care retirement community shall submit a new actuarial study at least triennially and such study shall be due within four months of the close of the community's fiscal year. For each actuarial study, the current valuation date (reporting date) shall be the last day of the fiscal year just ended.

(b) A continuing care retirement community shall submit a new actuarial study upon request by the superintendent.

(c) An actuarial study shall contain at a minimum the following information:

(1) The name of the continuing care retirement community for which the study was prepared;

(2) The current valuation date of the study;

(3) The preparation date of the study;

(4) (i) An opinion signed by a qualified consulting actuary that identifies the actuary and the scope of the project and opines on the following items:

(a) the appropriateness of the data and assumptions;

(b) whether the methods employed are consistent with sound actuarial principles and practices;

(c) the adequacy of the reserve liabilities and other liabilities;

(d) the adequacy of the fee schedule for each type of continuing care retirement contract available to new residents to the community; and

(e) whether the community meets the definition of being in satisfactory actuarial balance, and the implications if the community does not meet the definition of being in satisfactory actuarial balance.

(ii) If the actuary does not express an opinion as to the accuracy and completeness of underlying listings and summaries used in the actuary's evaluation, there shall be attached to the actuarial study a statement by an officer of the continuing care retirement community, management company, or accounting firm, who prepared the underlying data, affirming that the listings and summaries prepared for and submitted to the actuary were prepared under the direction of the officer, and, to the best of the officer's knowledge and belief, are accurate and complete.

(iii) If the actuary is unable to form a needed opinion, or if the opinion is adverse or qualified, the statement of actuarial opinion and the actuarial study shall specifically state the reason;

(5) Discussion of the various projection starting points, projection assumptions, and projection methodology, including but not limited to the following information:

(i) the resident entrance fees, resident monthly fees, and health center non resident fees assumed for the first projection year and the percentage change to the initial fees assumed for each projection year thereafter;

(ii) how the expenses for the first projection year were developed and the expense inflation rate assumed for each projection year thereafter;

(iii) investment income rate of return assumed for each projection year and the methodology used to project the investment income amounts;

(iv) interest rate used for discounting purposes in calculating the prospective reserve;

(v) interest rate used in calculating imputed interest;

(vi) assumptions and methodology used in the depreciation and amortization calculations including the assumed lifetimes for the class 2, 3 and 4 capital assets;

(vii) the different continuing care retirement contract types that apply to current and new residents of the community and the methodology used to composite these different contract types in the projected data;

(viii) the mortality, morbidity, transfer and withdrawal factors;

(ix) methodology used in projecting the open group population and the closed group population;

(x) methodology used in projecting the annual cash flows;

(xi) methodology for allocating expenses to each of the levels of care;

(xii) methodology for determining projected Medicare, other insurance and third party reimbursements to the continuing care retirement community on behalf of residents;

(xiii) assumptions and methodology used for projecting the expense of using offsite facilities, if needed;

(xiv) any projected change to the Part 1 paid in surplus or Part 2 paid in surplus;

(xv) any projected distributions to the operator;

(xvi) any reliance by the continuing care retirement community on assistance from benevolence funds, an affiliate, or other outside source;

(xvii) any financial assistance subsidies assumed to apply to residents; and

(xviii) any material changes in actuarial assumptions or methodology from those used in the prior actuarial study prepared on behalf of the continuing care retirement community, to the extent known by the actuary;

(6) An actuarial balance sheet that shows the assets, liabilities and reserves as of the current valuation date. The actuarial balance sheet shall include the amount of the net surplus, and the amount of the earned surplus if different than the net surplus. The actuarial balance sheet shall include the amount of any Part 1 paid in surplus or Part 2 paid in surplus if the amount is positive;

(7) A cash flow projection that shows the projected revenues, expenses, surplus distributions, and cash flows for at least the next ten projection years assuming an open group projection method. The total projected amount of invested assets of the continuing care retirement community shall be shown as of the beginning and end of each projection year;

(8) A new resident cohort pricing analysis for each continuing care retirement contract type available to new residents to the community;

(9) An exhibit showing the configuration of the continuing care retirement community for each projection year shown on the cash flow page of the actuarial study by each of the levels of care included in the community;

(10) The open group population flow projection by level of care for each projection year shown on the cash flow page of the actuarial study, including any projected use of offsite facilities. This shall include information sufficient to determine the number of independent living units occupied in total and the number of independent living units occupied by more than one person;

(11) An exhibit showing the expected time in whole and fractional years that a new resident to the community would spend in each of the levels of care and in total. This exhibit shall show information separately for male and female new residents and by assumed entry ages into the community of at least 70, 75, 80, 85 and 90;

(12) An exhibit summarizing the distribution of residents as of the beginning of the first projection year by type of continuing care retirement contract, by gender, by single versus joint occupancy status, and by level of care;

(13) An exhibit summarizing the expected distribution of new residents to the community by age and gender, by single versus joint occupancy status, and by type of continuing care retirement contract;

(14) A summary by each independent living unit type of the assumed single versus joint occupancy percentage for such unit type, and over all the independent living units combined;

(15) Documentation showing the development of the retrospective and prospective reserves as defined in section 350.3 of this Part, and of the minimum liquid requirement as defined in section 350.6(a) of this Part, as of the valuation date of the study. The documentation shall include the closed group population projection used to develop the prospective reserve; and

(16) Documentation of how the depreciation and amortization charges for the capital assets were developed. A summary shall be included showing the capital expenditures for each actual and projection year by class and assumed lifetime.

(d) The continuing care retirement community shall submit additional exhibits or documentation as requested by the superintendent.

Section statutory authority: Public Health Law, § 4607

Statutory authority: Insurance Law, §§ 201, 301, 1119; Public Health Law, § 4611

Renumbered 350.9 to be 350.11 on 10/17/07; added 350.9 on 10/17/07.

§ 350.10 Fee schedule submission

(a) Fee schedules submitted pursuant to an approved rating methodology.

(1) The fee schedule shall be submitted to the superintendent at least 45 days prior to the scheduled effective date of the fee schedule and shall include the following:

(i) A certification by an officer of the continuing care retirement community, or of the management company for the community, that the submission has been prepared pursuant to an approved rating methodology; and

(ii) Supporting exhibits showing how the rating methodology was applied and how the rating methodology calculations produced the fees in the schedule submitted.

(2) Provided that the submission is in accordance with the approved rating methodology, the submission shall be deemed approved unless the superintendent notifies the continuing care retirement community of deficiencies in the submission with 30 days of receipt of the submission. If the community does not correct all deficiencies within 30 days from the date of the deficiency letter, the fee submission shall be deemed disapproved.

(3) A rating methodology shall not be used by a continuing care retirement community until it has been approved by the superintendent.

(4) A rating methodology that is submitted to the superintendent for approval shall include all of the following items:

(i) The specific source data to be used in the calculations;

(ii) The step-by-step calculations that shall be followed. The calculation steps shall be coordinated with any plan that an operator submits to the superintendent pursuant to section 350.8 of this Part;

(iii) The minimum and maximum fee schedule changes resulting from the rating methodology;

(iv) The timing of when the rating methodology will be applied to determine an updated fee schedule;

(v) A discussion of the appropriateness of the proposed methodology, how the calculation steps are impacted by the level of earned surplus, and how the proposed methodology will maintain the community in satisfactory actuarial balance or achieve satisfactory actuarial balance (if the community is not currently in satisfactory actuarial balance); and

(vi) An illustrative numerical example showing the application of the methodology and how it produces the resulting revised fee schedule.

(5) A continuing care retirement community that does not have an approved rating methodology may develop and submit a rating methodology to the superintendent for approval.

(6) An already approved rating methodology may be revised by submitting a revised rating methodology to the superintendent for approval.

(7) A previously approved rating methodology may be withdrawn by submitting a written notice of withdrawal to the superintendent, and the rating methodology shall not be used beginning with the effective date of the withdrawal notice.

(8) A continuing care retirement community that has an approved rating methodology shall either use the approved rating methodology to determine an updated fee schedule according to the timing provision incorporated into the rating methodology and submit a fee schedule pursuant to subdivision (a) of this section, or shall submit a fee schedule pursuant to subdivision (b) of this section.

(9) Submission of a rating methodology to the superintendent for approval is optional. A continuing care retirement community that does not have an approved rating methodology shall submit all fee schedule changes pursuant to subdivision (b) of this section.

(b) Fee schedules submitted outside of an approved rating methodology.

(1) The fee schedule shall be submitted to the superintendent at least 75 days prior to the proposed effective date of the fee schedule;

(2) Sufficient documentation shall be included with the submission to justify the need for the fee change and the magnitude of the proposed fee change; and

(3) The fee schedule shall not be implemented until it has been approved by the superintendent.

(c) Each fee schedule submission shall include the following information:

(1) For each continuing care retirement contract type an exhibit showing the current fee, the revised fee, and the percentage change in the fee. Entrance fees and monthly care fees shall be shown separately. Entrance fees shall be shown separately for the residential component and the health care component, if applicable;

(2) For each continuing care retirement contract type an exhibit showing the overall weighted average current entrance fee and overall weighted average revised entrance fee, separately for first persons and second persons, or single occupancies and joint occupancies, and the percentage change in each of the overall weighted average entrance fees;

(3) For each continuing care retirement contract type an exhibit showing the overall weighted average current monthly care fee and overall weighted average revised monthly care fee, separately for first persons and second persons, or single occupancies and joint occupancies, and the percentage change in each of the overall weighted average monthly care fees;

(4) The effective date of the current fees and the proposed effective date of the revised fees shall be clearly indicated; and

(5) The material indicated in subdivision (a) or (b) of this section, as appropriate.

Added 350.10 on 10/17/07.

§ 350.11 Information requests

In addition to any information provided in the annual statement required by Section 4607 of the Public Health Law, the Superintendent may require that an operator provide such information as the Superintendent deems necessary in order to demonstrate compliance with the requirements set forth in this regulation.

Section statutory authority: Public Health Law, § 4607

Added 350.9 on 10/02/91; renumbered 350.9 to be 350.11 on 10/17/07.