

ARTICLE 46  
New York State Public Health Law

CONTINUING CARE RETIREMENT COMMUNITIES

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§4600. Legislative findings and purpose.

The dramatic increase in the numbers of elderly people, especially those seventy-five years of age and older, coupled with the special housing and health care needs of this growing segment of the population, requires the development of new and creative approaches to help ensure the care of older people in

residential settings of their own choice. If carefully planned and monitored, life care communities have the potential to provide continuum of care for older people that will provide an attractive residential option for such persons, while meeting their long term care needs for life. To ensure that the financial, consumer, and health care interest of individuals who enroll in such communities will be protected, such communities must be effectively managed and carefully overseen. The intent of the legislature, therefore, is to allow for the prudent development of life care communities. The legislature further intends to require that the relevant state agencies coordinate the regulation of such communities in order to ensure that there are adequate safeguards for those elderly who become residents and to assist in the orderly development, of such communities. Although lead responsibility for the interagency coordination of the regulation and establishment of such communities is vested in the department of health, the legislature does not intend that such communities become or be perceived as primarily medically-oriented facilities. The legislature intends, instead, that such communities be viewed as an attractive and innovative residential alternative for older New Yorkers who are seeking to maintain, to the extent possible, an independent and active life in a community in which their long-term care needs will be met.

§4601. Definitions. As used in this article:

1. "Certificates" or "certificate of authority" shall mean an authorization in writing, approved by the council and issued by the commissioner, for an operator to operate a continuing care retirement community and to enter into continuing care retirement contracts pertaining to such community.

2. "Commissioner" shall mean the commissioner of health.

- 2-a. "Continuing care retirement contract" shall mean a single contract to provide a person the services provided by a continuing care retirement community.

- 2-b. "Continuing care retirement community" or "community" shall mean a facility or facilities established to provide a comprehensive, cohesive living arrangement for the elderly, oriented to the enhancement of the quality of life and which, pursuant to the terms of the continuing care contract, at a minimum:

- a. provides independent living units, and provides a meal plan. The independent living unit can be made available either through a non-equity arrangement or through an equity arrangement including, but not limited to a cooperative or condominium. For purposes of this article, the purchase price of an independent living unit in an equity arrangement, regardless of the form of the purchase agreement, shall not be considered an entry fee for purposes of calculating reserve liabilities, but shall be considered an entry fee for escrow purposes;

- b. provides a range of health care and social services, subject to such terms as may be included within the contract, which shall include home health care, nursing care, and at a minimum, sixty days of prepaid services of an on-site or affiliated nursing facility;

- c. provides access to health services as defined in the contract, prescription drugs, and rehabilitation services; and

- d. nothing in this article shall eliminate the obligation of a continuing care retirement community to provide at least sixty days of prepaid nursing facility services to all residents. The prepaid days

must include the first sixty days of nursing facility services, whether or not consecutive, not covered by Title XVIII of the federal social security act.

3. "Contracts" or "agreements" shall mean continuing care retirement contracts as defined in this article.

4. "Control", "controlling", "controlled by", and "under common control with" shall mean the possession, directly, or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities or voting rights, by contract (except a commercial contract for goods or non-management services) or otherwise; but no person shall be deemed to control another person solely by reason of his being an officer or director of such other person. Control shall be presumed to exist if any person directly or indirectly owns, controls, or holds with the power to vote ten percent or more of the voting securities or voting rights of any other person or is a corporate member of the legal entity.

5. "Council" shall mean the continuing care retirement community council, established pursuant to section forty-six hundred two of this article.

6. "Entrance fee" shall mean an initial or deferred transfer to an operator of a sum of money, made or promised to be made by a person or persons entering into a continuing care retirement contract, for the purpose of ensuring services pursuant to such a contract.

7. "Facility" shall mean any place in which an operator undertakes to provide a resident with the services of a continuing care retirement community, pursuant to a contract, whether such place is constructed, owned, leased, rented, or otherwise contracted for by the operator.

8. "Life care contract" shall mean a single continuing care retirement contract to provide a person, for the duration of such person's life, the services provided by the continuing care retirement community, which services shall include unlimited services of an on-site or affiliated nursing facility. Such term also shall mean a single continuing care retirement contract to provide a person, for the duration of such person's life, the services provided by the continuing care retirement community under an arrangement in which the costs of the residents' unlimited nursing home or home health care services are paid for in whole or in part by a long term care insurance policy approved by the superintendent in accordance with applicable regulations or by long term care insurance or medical assistance payments in accordance with the partnership for long term care program pursuant to the provisions of section three hundred sixty-seven-f of the social services law, section three thousand two hundred twenty-nine of the insurance law and section four thousand six hundred twenty-three of this chapter.

9. "Life care shall mean those services provided pursuant to a "life care contract".

10. "Living unit" shall mean an apartment, room, cottage, or other area within a community set aside for the exclusive use of one or more residents.

10-a. "Meal plan" shall mean an arrangement whereby the person entering into the continuing care retirement contract is provided with no fewer than five meals per month. Additional meals shall be available on a fee-for-service basis.

11. "Monthly care fee" shall mean the monthly cost to a resident for prepayment of any services, including rent, rendered pursuant to a contract, exclusive of entrance fees or other prepayments, and any other regular periodic charges to the resident, determined on a monthly basis, pursuant to the provisions of a contract.

12. "Operator" shall mean a legal entity operating a continuing care retirement community pursuant to a certificate of authority.

13. "Priority reservation agreement" shall mean a cancelable agreement between a prospective continuing care retirement community applicant, an applicant for a certificate of authority or an operator and a prospective resident, for the purpose of evaluating market demand for a proposed continuing care retirement community and for the purpose of guaranteeing to prospective residents an opportunity for priority placement in a continuing care retirement community, under which the prospective resident will pay a refundable priority reservation fee. A priority reservation agreement does not fall within the meaning of contracts or agreements as defined in subdivision three of this section.

14. "Priority reservation fee" shall mean the refundable sum of money paid by a prospective resident for deposit with the escrow agent for a prospective continuing care retirement community applicant, an applicant for a certificate of authority or an operator pursuant to a priority reservation agreement.

15. "Resident" shall mean any person who, pursuant to a contract, is entitled to reside in and receive services from a continuing care retirement community.

16. "Residential health care demonstration facility" shall mean a residential health care facility containing up to sixty beds, within the defined geographical boundary of each health systems agency established under the provisions of subdivision (c) of section twenty-nine hundred four of this chapter, provided that such residential health care facility is an integrated part of a comprehensive system of residential and support services for the elderly, providing either directly or through one or more affiliated entities, prior to the effective date of this subdivision, on or adjacent to the site of the proposed residential health care facility, independent living units, an adult care facility as defined in section two of the social services law and a range of health care and social services, which may include home health care, counseling, case management and information and referral.

16-a. "Social services" shall mean those services which may include, but not be limited to counseling, case management, and information and referral.

17. "Superintendent" shall mean the superintendent of insurance.

§4602. Continuing care retirement community council; powers and duties.

1. The continuing care retirement community council is hereby established, to consist of the following, or their designees: the attorney general; the commissioner; the superintendent of insurance; the director of the office for the aging; and eight public members appointed by the governor with the advice and consent of the senate. Such public members shall be representative of the public, and have a demonstrated expertise or interest in continuing care retirement communities; provided that no more than one such member shall be a sponsor, owner, operator, manager, member of a board of directors, or

shareholder of a continuing care retirement community. At least two public members shall be residents of a continuing care retirement community. At least one of the public members shall be a representative of an organization with demonstrated experience in representing the interests of senior citizens. The public members of the council shall have fixed terms of four years. The council shall be chaired by the commissioner or his or her designee. Members of such council shall serve without compensation for their services as members of the council, except that each of them may be allowed the necessary and actual expenses which he shall incur in the performance of his duties under this article.

2. The council shall meet as often as may be deemed necessary to fulfill its responsibilities, but in no event less than four times per year. The council shall have the following powers and duties:

- a. to approve or reject applications to obtain a certificate of authority for the establishment and operation of a continuing care retirement community. In reviewing applications, the council shall consider the extent to which the applications reflect various sponsorships, organizational structures, geographic dispersion, and the public benefit. In determining the public benefit of a community requiring construction of a total nursing facility component greater than or equal to ninety beds, the council shall obtain and consider the recommendation of the state hospital review and planning council with regard to the effect of the construction of the community's nursing facility beds upon existing facilities in the same geographic area;
- b. to require the reporting of such facts and information as the council may deem necessary to enforce the provisions of this article;
- c. to coordinate the oversight of operating communities and to assign review and regulatory responsibility for particular aspects of such communities to the appropriate agencies, consistent with their legal authority, to assure consistent state supervision without duplication of inspection or regulatory review;
- d. to make such recommendations to the governor and the legislature as may be necessary to encourage or further regulate the development of continuing care retirement communities;
- e. to establish and charge equitable and reasonable annual charges for operators, not to exceed fifty dollars per approved living unit, to subsidize, in part, expenditures incurred in reviewing applications for certificates of authority and in inspecting, regulating, supervising and auditing continuing care retirement communities;
- f. to review reports from the participating agencies regarding the operations and financial management of approved communities, including any reports regarding the financial condition of any community that may be in need of close supervision and any reports of deficiencies in the provision of health or social services to residents of any community;
- g. to adopt rules and regulations and amendments thereto to effectuate the provisions of this article;
- h. to revoke, suspend, limit, or annul a certificate of authority under conditions set forth in section forty-six hundred fifteen of this article, including when such action is taken at the specific request

of any participating council agency. When action has been taken by the commissioner pursuant to subdivision seven of section forty-six hundred three of this article, the council shall meet as soon as reasonably possible to approve or disapprove the action of the commissioner and shall take such further action as may be appropriate;

i. to develop guidelines for applications for certificates of authority;

j. to make a final determination regarding an application for authorization to enter into priority reservation agreements where the commissioner has proposed to reject such application;

k. to require the reporting of such facts and information as the council may deem necessary to determine whether characteristics of residential health care demonstration facilities such as comprehensive systems of residential and support services for the elderly may be successfully incorporated into existing or approved continuing care retirement communities;

l. to review and approve or reject applications by continuing care retirement community operators to use entrance fees to assist the operator in financing the construction or purchase of a proposed continuing care retirement community in accordance with paragraph b of subdivision six of section forty-six hundred ten of this article; and

m. to review and approve or reject any proposed financing by industrial development agencies of continuing care retirement communities pursuant to article eighteen-A of the general municipal law as authorized by section forty-six hundred four-a of this article.

3. The council shall establish guidelines under which the commissioner, with the advice and consent of the superintendent of insurance, is authorized to approve or reject any proposed refinancing, if the council has already approved an application pursuant to paragraph a of subdivision two of this section.

§4603. Commissioner; powers and duties. The commissioner, in consultation with the council, shall have the following powers and duties:

1. to receive applications from potential operators of continuing care retirement communities and to distribute such applications for review to the participating agencies;

2. to collect and compile recommendations from the participating agencies and to present consolidated materials, including recommendations, to the council for its review and action;

3. to develop uniform forms for applications for certificates of authority, to review the status of such applications, and to coordinate the review of such applications in order to minimize duplication or delay;

4. to provide information to entities wishing to establish continuing care retirement communities and to persons interested in becoming residents of such communities and to assist operators and residents of such communities, to the extent appropriate, with concerns relating to the operation of such facilities;

5. to issue certificates of authority to those applicants approved by the council;

6. to coordinate the interagency regulatory review of the applications, development and operations of communities in order to minimize duplication or delay;

7. if the immediate health, safety, or financial needs of a community's residents are in jeopardy, to suspend or limit a certificate of authority pursuant to subdivision two of section forty-six hundred fifteen of this article. If the commissioner suspends a certificate of authority, he shall immediately notify the council;

8. to make recommendations concerning and to promulgate rules and regulations and amendments thereto that have been adopted by the council to effectuate the provisions of this article;

9. to carry out any other responsibilities entrusted to the commissioner pursuant to this chapter that may be necessary with regard to the health care activities of continuing care retirement communities;

10. to make available to all prospective operators all pertinent regulations regarding health and insurance necessary to comply with this article;

11. to approve or reject applications for authorization, by prospective continuing care retirement community applicants, entities that have filed an application for a certificate of authority and operators, to enter into cancelable priority reservation agreements and to collect refundable priority reservation fees from prospective residents; provided that in any case where the commissioner proposes to reject such application, the council shall meet within a reasonable period of time not to exceed ninety days to make a final determination regarding such application; and

12. to approve or reject any proposed refinancing consistent with the guidelines established pursuant to subdivision three of section forty-six hundred two of this article.

#### §4603-a. Residential health care demonstration facilities.

1. The commissioner, upon approval of the life care community council and the public health council shall issue a certificate of incorporation of up to three residential health care demonstration facilities. Notwithstanding any provision of article twenty-eight of this chapter or any other provisions of law to the contrary, the public health council may approve without regard to the requirement of public need as set forth in subdivision three of section twenty-eight hundred one-a of this chapter, a certificate of incorporation or application for establishment of such facilities.

2. Not more than one hundred eighty residential health care demonstration facility beds shall be authorized and established in this state pursuant to this article.

3. In determining an application filed under article twenty-eight of this chapter, the public health council shall consider the number of elderly persons residing in and receiving services from each health systems agency established under the provisions of subdivision (c) of section twenty-nine hundred four of this chapter and such other information as the public health council may require to determine whether such system will promote the health and welfare of the elderly persons to whom it proposes to provide services.

4. An operating certificate issued pursuant to an application filed by a residential health care demonstration facility shall be conditioned upon an agreement by the operator of the facility to provide services only to persons who have been residents of the independent living units or adult care facility within the comprehensive system for at least thirty days prior to the admission of such person to the residential health care facility, unless the commissioner for good cause shown approves a waiver of such condition which may be effective only during the first twenty-four months after the issuance of the operating certificate.

5. The provisions of this article shall not apply to residential health care demonstration facilities, unless otherwise provided in this section or subdivision three of section forty-six hundred four of this article.

6. An application for approval pursuant to this section must be filed with the department on or before June thirtieth, nineteen hundred ninety-two.

7. Notwithstanding any other provision of this article, a residential health care facility heretofore established as a residential health care demonstration facility may hereafter provide services to persons who, for at least thirty days prior to the admission of such person to the residential health care facility, have been residents of any independent living unit or adult care facility operated by any not-for-profit corporation affiliated with such residential health care facility and located within the same county, provided that such residential health care facility becomes duly qualified to provide services to persons eligible for medical assistance under title eleven of article five of the social services law, and further provided that such residential health care facility remains an integrated part of a comprehensive system of residential and support services for the elderly as such system is described in this section and in subdivision sixteen of section forty-six hundred one of this article.

§4604. Certificate of authority required; application and approval.

1. No person shall construct, expand, acquire, maintain, or operate a continuing care retirement community, or enter into a contract as an operator, or solicit the execution of any contract for continuing care retirement community services to be provided within the state or advertise itself or otherwise hold itself as a "continuing care retirement community", without obtaining a certificate of authority pursuant to this article; provided, however, nothing in this subdivision shall prohibit a person, authorized pursuant to section forty-six hundred twenty-one or forty-six hundred twenty-two of this article, from entering into priority reservation agreements, soliciting, collecting or receiving priority reservation fees, or constructing and maintaining sales offices and model units with respect to a proposed continuing care retirement community.

2. In order to receive a certificate of authority to enter into contracts with respect to a particular community, a person or persons, hereinafter designated as the applicant, shall apply for a certificate of authority on forms prescribed by the commissioner and, in addition, shall submit the following:

a. a feasibility study, including a market analysis describing the characteristics of the population to be served;

b. an actuarial study;



- c. an initial disclosure statement as provided pursuant to section forty-six hundred six of this title;
- d. a copy of the proposed forms of contracts to be entered into with residents of the community;
- e. complete details of any agreements with a licensed insurer, including copies of proposed contracts, requiring the insurer to assume, wholly or in part, the cost of medical or health related services to be provided to a resident pursuant to a continuing care retirement contract;
- f. a copy of each of the basic organizational documents and agreements of the applicant of all participating entities;
- g. a copy of the bylaws, rules and regulations and internal governing documents of the applicant;
- h. architectural program and sketches for the community;
- i. the proposed community plan, including the number of independent living units, skilled nursing facility beds, adult care facility beds, if any, and a description of other social and health services provided by the community;
- j. copies of financial and personal disclosure information as required by the council for the applicant and members of the board, officers, and controlling persons of the proposed continuing care retirement community, including:
  - (i) information necessary for the determination by the council of character, competence, and experience, where information adequate to make such determinations is not otherwise available to the council,
  - (ii) a list of continuing care retirement communities, adult care facilities and health care facilities owned or operated by the applicant, by any controlling persons of the applicant, or by entities with which the members of the applicant's board are affiliated; the address of each such facility; and the dates of ownership or operation of each such facility,
  - (iii) in the event that any such community or facility specified in this subdivision while under the control or operation of the applicant, or any controlling person has been subjected to a limitation, withdrawal, or refusal to grant accreditation by a recognized accreditation organization, because of failure to comply with standards governing the conduct and operation of the facility, information that describes the nature of the violation, the agency or body enforcing the standard (including its name and address), the steps taken by the facility to remedy the violation, and an indication of whether any accreditation has since been restored, and
  - (iv) a statement as to whether the applicant or any of its officers, directors, partners, managers or a principal, parent or subsidiary corporation:

(A) has been convicted of a crime or pleaded nolo contendere to a felony charge, or been held liable or enjoined in a civil action by final judgment if the criminal or civil action involved fraud, embezzlement, fraudulent conversion, or misappropriation of property,

(B) had a prior discharge in bankruptcy or was found insolvent in any court action,

(C) is or was subject to a currently effective injunctive or restrictive order or federal or state administrative order relating to business activity or health care as a result of an action brought by a public agency or department, including, without limitation, actions affecting a license to operate a hospital as defined by section twenty-eight hundred one of this chapter, or a facility required to be licensed or certified by the department of social services. The statement shall set forth the court or agency, date of conviction or judgment, the penalty imposed or damages assessed, or the date, nature and issuer of the order;

k. information which describes the populations to be served; and

l. any other information as may be required by regulations adopted pursuant to this article.

3. Nothing in this article shall be construed to enlarge, diminish or modify: a social services district's otherwise valid recovery under section three hundred sixty-nine of the social services law, nor medical assistance eligibility under title eleven of article five of the social services law nor applicable provisions of the estates, powers and trusts law. Except as otherwise provided in this article, the activities of continuing care retirement communities shall be subject to any other law governing such activities including but not limited to article twenty-eight of this chapter and article seven of the social services law and regulations promulgated thereunder; provided, however, that the provisions of paragraphs (d) and (e) of subdivision four of section twenty-eight hundred one-a and section twenty-eight hundred two of this chapter shall not apply, and provided that the provisions of paragraph (a) of subdivision one and the provisions of subdivision two of section four hundred sixty-one-b of the social services law with respect to public need and the provisions of subdivision one of section four hundred sixty-one-c of the social services law shall not apply to residents who have been admitted in accordance with a continuing care retirement community contract provided that, upon admission to the adult care facility, such residents shall be given a notice which shall include, at a minimum, information regarding facility services, resident responsibilities, supplemental services, resident rights and protections and circumstances that warrant transfer. The number of residential health care facility beds available pursuant to subdivision five of this section, without proof of public need therefor, shall be reduced by the number of residential health care demonstration facility beds that are approved pursuant to this article.

4. No certificate of authority shall be issued unless an application meeting the requirements of this section and all other requirements established by law has been approved by:

a.

(i) the superintendent of insurance as to the actuarial principles involved, the financial feasibility of the facility, the form and content of the proposed contracts to be entered into with residents and insurance contracts between an operator and an insurer requiring the insurer to assume, wholly or in part, the cost of medical or health related services to be provided to a resident;

(ii) the superintendent of insurance as to the rates and rating methodology, if any, to be used by the operator to determine any entrance fee, monthly care fee and/or any separate charges for the housing component of the continuing care contract including but not limited to a cooperative or condominium fee charged to the resident as proposed in said operator's application for certificate of authority. Subsequent increases in any entrance or monthly care fee in excess of fees calculated pursuant to the approved rating methodology shall require approval of the superintendent. The term "rating methodology" as used herein shall incorporate a combination of variables including but not limited to a pricing structure for comparable services, projected operating and health care costs and the applicable inflationary impact thereon, projected income and occupancy rates and the refundability component of the continuing care retirement contract.

(iii) the superintendent of insurance as to any monthly care fee charged to a resident which may be increased or decreased subject to approval by the superintendent of insurance, provided, that monthly care fees may be increased or decreased without specific approval as long as such increase or decrease does not exceed a relevant cost index or indices which reflect all components of continuing care including the costs associated with provision of health care as determined and promulgated at least annually by the superintendent, and provided further that the superintendent is notified of any such increase or decrease prior to its taking effect.

(iv) An individual resident's monthly care fee shall not be modified because of the increased need for services of that resident;

b. the commissioner of social services as to those aspects of the application relating to adult care facility beds, if any;

c. the public health council under section twenty-eight hundred one-a of this chapter as to the establishment of a skilled nursing facility by the applicant and as to such other facilities and services as may require the public health council's approval of the application; provided, however, that the recommendations of the state hospital review and planning council and the health systems agency having geographical jurisdiction of the area where the continuing care retirement community is located shall not be required with respect to the establishment of an on-site or affiliated residential health care facility to serve residents as part of the continuing care retirement community, for up to the total number of residential health care facility beds provided for in subdivision five of this section in communities statewide;

d. the commissioner under section twenty-eight hundred two of this chapter; provided, however, that, the recommendations of the state hospital review and planning council and the health systems agency having geographical jurisdiction of the area where the continuing care retirement community is located shall not be required with respect to the construction of an on-site or affiliated residential health care facility to serve residents as part of the continuing care retirement community, for up to the total number of residential health care facility beds provided for in subdivision five of this section in communities statewide; and

e. the attorney general as to those aspects of the application relating to a cooperative, condominium or other equity arrangement for the independent living unit, if any.

5. Up to two thousand residential health care facility beds, as authorized herein, that may be approved as components of continuing care retirement communities shall not be considered by the department and the health systems agencies in the determination of public need for residential health care facility services; provided, however, that if the community seeking to construct such beds does not provide life care to all residents, it must adequately make the assurances required by subdivision two of section forty-six hundred twenty-four of this article.

6. If the approvals required by subdivision four of this section have been obtained, the council shall, by majority vote, either approve or reject the application within sixty days of the date on which the last such approval has been obtained. In order to approve the application, the council shall have determined that:

- a. the proposed community will meet a need and will fulfill the purposes of this article;
- b. the applicant has satisfied the requirements of this article;
- c. the applicant has demonstrated to the satisfaction of the council that the applicant and members of the board, officers, and controlling persons of the applicant, are of such character, experience, competence and standing in the community as to give reasonable assurance of their ability to conduct the affairs of the proposed continuing care retirement community in the best interest of the community and in the public interest, and to provide proper care to residents. In the case of an applicant that is controlled, the council must be satisfied that the controlling person has also acted in a manner that is consistent with the public interest;
- d. the applicant has otherwise demonstrated the capability to organize, market, manage, promote and operate the community and can be expected to meet its obligations in accordance with this article and in accordance with its contracts with residents;
- e. the applicant has demonstrated that the total number of beds for the nursing facility component and the adult care facility bears a reasonable relation to the number of independent living units proposed for such community; and
- f. with respect to communities which include a residential health care facility which does not require establishment approval under section twenty-eight hundred one-a of this chapter, the applicant has sufficient financial resources and sources of future revenues for the operation of the residential health care facility component.

7. Any change in the legal entity operating the continuing care retirement community, or in a controlling person of the community shall require approval in the same manner as an original application; provided, however, that the council may waive any requirement to provide information that is not relevant to such change and provided, further, that the continued public need for the community shall be presumed.

8. The operator shall designate and make knowledgeable personnel available to prospective residents to answer questions about any information contained in the disclosure statement or contract. The disclosure statement and the contract shall each state on the cover or top of the first page in bold twelve point print the following "This matter involves a substantial financial investment and a legally binding contract. In evaluating the disclosure statement and the contract prior to any commitment, it is recommended that you consult with an attorney and financial advisor of your choice, if you so elect, who can review these documents with you."

9. If the council approves the application, the commissioner shall issue the certificate of authority to the applicant.

§4604-a. Council approval required for industrial development agency financing in connection with continuing care retirement communities.

1. No person seeking financing in connection with a continuing care retirement community through an industrial development agency shall undertake such financing without the prior approval of the council. Upon approving a proposed financing pursuant to this section, the council shall issue a certificate of authorization to the applicant.

2. Prior to approving such financing, the council shall find that:

a. The operator has (i) executed contracts for at least seventy percent of all living units and has on deposit at least ten percent of the entrance fees or purchase price for such units; or (ii) executed contracts for at least sixty percent of all living units and has on deposit at least twenty-five percent of the entrance fees or purchase price for such units.

b. The operator has demonstrated capability to comply fully with the requirements for a certificate of authority and has obtained a contingent certificate of authority pursuant to section forty-six hundred four of this article and the operator has agreed to meet the requirements of article eighteen-A of the general municipal law.

c. The applicant is a not-for-profit corporation as defined in section one hundred two of the not-for-profit corporation law that is (i) eligible for tax-exempt financing under this section and (ii) is exempt from taxation pursuant to section 501(c)(3) of the federal internal revenue code, and either has (i) an equity position in the community equivalent to no less than fifteen percent of the amount to be financed in the aggregate; or (ii) covenants (A) to meet a ratio of cash and investments to outstanding debt (reserve ratio) of no less than twenty-five percent commencing at the end of the first quarter after twenty-four months from the receipt of a certificate of occupancy for the facility, and (B) to maintain that reserve ratio, as tested quarterly based upon the facility's interim financial statements and annually based upon audited financial statements, until debt reduction equal to twenty-five percent of total indebtedness is accomplished; and (c) to reduce total debt by twenty-five percent of the total indebtedness at the time the certificate of occupancy is received by no later than five years after the receipt of the certificate of occupancy.

d. The operator has submitted in connection with the proposed financing a financial feasibility study, including a financial forecast and market study prepared by an independent firm nationally recognized for continuing care retirement community feasibility studies, demonstrating to the satisfaction of the council the financial soundness of the financing. In addition, the operator has submitted an analysis of economic costs and benefits, including job creation and retention, the estimated value of tax exemptions provided, the project's impact on local businesses and the availability and comparative cost of alternative financing sources. Such analysis shall be prepared by an independent entity.

e. The operator will establish and maintain a fully funded debt service reserve equal to the sum of maximum annual debt service (interest plus annual scheduled principal payments, not including balloon maturities, if any) on bonds authorized thereby having a maturity of ten years or less, plus the maximum annual debt service on bonds authorized thereby having a maturity of greater than ten years, provided, however, that in the case of tax-exempt bond issues, such debt service reserve shall not exceed the maximum amount permitted by federal tax law.

f. The operator will provide for such remedies or limitations of remedies of bondholders as may be required by or consistent with the provisions of this article and any regulations in existence at the time of the issuance promulgated thereunder.

g. Unless all residents have life care contracts, the operator has adequately made the assurances required by subdivision two of section forty-six hundred twenty-four of this article and has agreed to fund the liability in the event that resident assets are insufficient to pay for nursing facility services for a one year period.

3. In addition, an operator which is subject to the provisions of this section shall:

a. provide the council or its designee with notice of any monetary default or covenant default in connection with such financing and shall further notify the council or its designee of any withdrawal from the debt service reserve fund established in connection with such financing;

b. respond in writing to the operational recommendations of the council or its designee with respect to protecting the interests of continuing care retirement community residents in the event of any monetary default or covenant default provided for in connection with such financing;

c. provide adequate security for the repayment of the bonds issued, including the granting of liens on real and personal property and the pledge of project revenues; the maintenance of minimum debt service coverage and other financial ratios as shall be required in regulations in existence at the time of issuance by the council; and restrictions on other debt and expenditures; and

d. undertake to maintain the financial feasibility of the facility, including the retention of an independent consultant to recommend and help implement remedial action.

4. The council may request, and shall receive, the technical assistance of any state agency or state public authority in performing its functions under this article.

§4605. Certificate of authority; authority of operator.

1. A certificate of authority shall authorize an operator:

a. to operate a continuing care retirement community and to enter into contracts pertaining to such community;

b. to prepare and make public information that details the terms of any contract relating to a community;

c. to advertise the community and the related services that will be provided pursuant to this article; and

d. to offer and execute contracts, including the collection of entrance fees and deposits pursuant to section forty-six hundred eight of this article.

2. a. The commissioner, in consultation with the council, may authorize an operator of a community with an on-site or affiliated residential health care facility to provide, for a limited period, residential health care facility services to persons, who are not residents of the community, provided, however, that the operator shall not discriminate in the admission, retention or care of any such person because such person is or will be eligible for, or receives or will receive, medical assistance benefits pursuant to title eleven of article five of the social services law.

b. The commissioner, in consultation with the council, may authorize an operator of a community with an on-site or affiliated adult care facility to provide, for a limited period, adult care facility services to persons, who are not residents of the community, provided, however, that the operator shall not

discriminate in the admission, retention or care of any such person because such person is or will be eligible for, or receives or will receive, medical assistance benefits pursuant to title eleven of article five of the social services law or supplemental security income benefits pursuant to title sixteen of the federal social security act and any additional state payments made under title six of article five of the social services law.

§4606. Initial disclosure statement. Prior to the execution of a contract, or before the transfer of any money, other than a refundable priority reservation fee or non-refundable priority reservation agreement application fee, to an operator by or on behalf of a prospective resident, whichever occurs first, the operator shall deliver to the person with whom the contract is to be entered into or the person's legal representative the most recent annual statement as required by section forty-six hundred seven of this article, and an initial disclosure statement which contains the following:

1. The information contained in the contract, unless a copy of such Contract is attached to and made a part of the initial disclosure Statement, together with full disclosure of the use of any fees and Charges in connection with the contract, including entrance fees;
2. The information required in paragraph i and subparagraphs (ii), (iii) and (iv) of paragraph j of subdivision two of section forty-six hundred four of this article;
3. The name and business address of the provider and a statement of whether the provider is an individual, partnership, corporation, or other legal entity;
4. The name and address of any person whose name is required to be provided pursuant to subdivisions two and three of this section and any professional service, firm association, foundation, trust, partnership, corporation, or any other business or legal entity in which such person has, or which has in such person, a ten percent or greater interest and which it is presently intended will or may provide goods, leases, or services to the provider of a value of five hundred dollars or more, within any year, including a description of the goods, leases or services and the probable or anticipated cost thereof to the provider;
5. If the facility is to be operated by a manager:
  - a. the identities of any other facilities managed by said individual or entity and a copy of the agreement currently in effect or to be entered into between the provider and the manager for the operation of the facility;
  - b. if the manager is incorporated or established and operated on a for-profit basis, the identity of all individuals or entities holding any ownership or beneficial interest in the manager, and fees or any other compensation anticipated to be paid by the provider to the manager for the operation of the facility; and
  - c. the method by which the manager was chosen to manage the facility and, if the manager was chosen because of a condition in a mortgage commitment to the provider, the identity of the mortgagee requiring the condition in the commitment.
6. A description of the proposed or existing facility, including the location, size and anticipated completion date if not completed;
7. A statement as to whether the applicant was or is affiliated, or has a contractual relationship, with a religious, charitable, or other nonprofit organization, the extent of any such affiliation or contractual relationship, and the extent to which the nonprofit organization will be responsible for the financial and contractual obligations of the applicant;
8. If the facility is already in operation or if the applicant operates one or more similar facilities within or outside of this state, a statement of the changes in the scope of or the rates for care or services provided, including tables showing the frequency and average dollar amount of each increase in periodic

rates at each such facility for the previous five years or such shorter period as the facility may have been operated by the provider;

9. If the applicant is the subsidiary corporation or the affiliate of another corporation, a statement identifying the parent corporation or the other affiliate corporation, the primary activities of such parent, or other affiliate corporation, the interest in the applicant held by such parent or other affiliate corporation, and the extent to which the parent corporation will be responsible for the financial and contractual obligations of the subsidiary;

10. Most recent financial statement of the provider prepared in accordance with generally accepted accounting principles applied on a consistent basis and certified by an independent certified, or public accountant, including a balance sheet as of the end of the provider's last fiscal year and income statements for the last two fiscal years, or such shorter period of time as the provider has been in operation;

11. If construction, lease, rental, or purchase of the facility has not yet been completed, a statement of the anticipated source and application of the funds to be used in such purchase, lease, rental, or construction, including but not limited to:

a. an estimate of the cost of purchasing, leasing, renting, constructing and equipping the facility, including, but not limited to, such related costs as financing expense, legal expense, land costs, occupancy development costs, and all other similar costs that the provider expects to incur or become obligated for prior to the commencement of occupancy;

b. an estimate of the total entrance fees to be received from residents upon completion of occupancy;

c. a description of any mortgage loan or the other long-term financing intended to be used for the financing of the facility, including the anticipated terms and costs of such financing;

d. an estimate of any funds which are anticipated to be necessary to fund start-up losses and to assure full performance of the obligations of the operator pursuant to life care contracts including, but not limited to, any reserves required pursuant to section forty-six hundred eleven of this article;

e. a projection of estimated income from fees and charges other than entrance fees, a description of individual rates anticipated to be charged, and the assumptions used for calculating the estimated occupancy rate of the facility;

f. a projection of estimated operating expenses of the facility, including a description of the assumptions used in calculating the expenses and separate allowances, if any, the replacement of equipment and furnishings and any anticipated major structural repairs or additions;

g. identification of assets pledged as collateral for any purpose;

h. an estimate of assets pledged as collateral for any purpose; and

12. A statement indicating that community residents who are enrolled in a health maintenance organization may have nursing facility benefits available under both the health maintenance organization subscriber contract and the continuing care retirement contract. Such statement shall also indicate that if the health maintenance organization and the community cannot reach an agreement on appropriate financial arrangements, then the resident may have to be admitted to a facility approved by the health maintenance organization in order to receive their Medicare benefit for nursing facility services under the health maintenance organization subscriber contract.

13. The initial disclosure statement and marketing materials of a continuing care retirement community must clearly include a description of the services offered as part of its contract, including, but not limited to, any limitations on nursing facility services. The initial disclosure statement and marketing materials of a continuing care retirement community which offers various types of contracts, which may include life care contracts, must clearly differentiate among the various types of contracts which it may offer.



14. In accordance with regulations promulgated by the council, the operator shall prepare a standard information sheet for each approved continuing care retirement community, which must be approved by the department of health, distributed with the community's marketing materials and attached to the initial disclosure statement prepared in accordance with this section. The standard information sheet shall be prepared in plain language and in twelve point type and shall include but shall not be limited to the following information:

- a. a brief description of the community, including its name and location and amenities and services available;
- b. the name, address, and telephone number of the operator and a contact person employed by the operator;
- c. the number and types of independent living units, adult care facility units and nursing home beds and whether such beds are on-site or off-site;
- d. the types of contracts available;
- e. a listing of all fees, charges, and refund options and the services covered by such fees and charges;
- f. any insurance coverage required of residents; and
- g. any other information which the continuing care retirement community council determines will assist a consumer in comparing the benefits and costs of different continuing care retirement communities.

15. Any other information as may be required by regulations promulgated by the council.

#### §4607. Annual statement.

1. Within four months of close of the operator's fiscal year, unless an extension of time to file has been granted, the operator shall file an annual statement with the commissioner and superintendent showing the condition as of the last day of the preceding calendar or fiscal year. If the commissioner and superintendent do not receive the annual statement within four months of the end of the operator's fiscal year or have not granted an extension of time to file, the council may charge a late fee.

2. The annual statement shall be in such form as the council prescribes and shall contain at least the following:

- a. Any change in status with respect to the information required to be submitted pursuant to section forty-six hundred four of this article;
- b. Financial statements audited by an independent certified public accountant, which shall contain, for two or more periods if the community has been in existence that long, the following:
  - (i) an accountant's opinion and, in accordance with generally accepted accounting principles:
    - (A) a balance sheet,
    - (B) a statement of income and expenses,
    - (C) a statement of equity or fund balances,
    - (D) a statement of changes in financial position,
  - (ii) notes to the financial statements considered customary or necessary to ensure full disclosure of the financial statements, financial condition, and operation;
- c. A detailed listing of the assets maintained for the reserves;
- d. A copy of the most recent actuarial review of the community, including such information as may be required by the superintendent including an opinion of a qualified consulting actuary, as to the current and projected soundness of the community, provided however that a new actuarial review must be submitted triennially; and

e. Such other reasonable financial and other information as the council may require with respect to the operator or the community, or its directors, controlling persons, trustees, members, branches, subsidiaries or affiliates to determine the financial status of the community and the management capabilities of the operator.

3. Sixty days before commencement of each calendar or fiscal year or official opening date, whichever is applicable, each operator shall file with the commissioner and superintendent a computation of the annual long-term debt service and a projected annual revenue and expense summary for the next ten years.

§4608. Continuing care retirement contract. A continuing care retirement contract shall contain all of the following information in no less than twelve point type and in plain language, in addition to any other terms or matter as may be required by regulations adopted by the council and issued by the superintendent:

1. The amount of all money transferred, including, but not limited to, donations, subscriptions, deposits, fees, and any other amounts paid or payable by, or on behalf of, the resident or residents;

2. A description of all services which are to be furnished by the operator, a description of any fees in addition to the entrance fee and periodic charges provided for in the contract, and the conditions under which the fees may be adjusted, provided that an operator shall not charge any non-refundable application fee to a prospective resident who has paid a non-refundable priority reservation agreement application fee;

3. The procedures of the community relating to a resident's failure to pay the required monthly fees;

4. A statement of the figures and terms concerning the entry of a spouse to the community and the consequences if the spouse does not meet the requirements for entry;

5. A statement of the terms and conditions under which a contract may be cancelled by the operator or by a resident and the conditions under which all or any portion of the entrance fee will be refunded by the operator, including the mandatory refund provisions set forth in sections forty-six hundred nine and forty-six hundred ten of this article;

6. a. The procedures and conditions under which a resident may be transferred from his or her living unit including a statement that, at the time of transfer, the resident will be given the reasons for the transfer; the process by which a transfer decision is made; the persons with the authority to make the decision to transfer; a description of any change in charges to be paid by the resident for services not covered by the contract fees as a result of the transfer; and a statement regarding the disposition of and the right to return to the living unit in cases of temporary and permanent transfers.

b. The circumstances under which a living unit may be considered vacant and eligible for transfer or resale to a new resident, either due to the permanent transfer of a resident to the community's nursing or other specialized facility or due to the permanent transfer of a resident to a hospital or other facility outside of the community; provided, however, that nothing therein shall relieve a community from its obligations to provide or to insure provision of all contractually required care pursuant to the terms of a continuing care retirement contract. Should a resident's chronic condition require placement in a more specialized chronic care facility that provides services beyond those provided through the community's nursing facility, the liability of community pursuant to the terms of a continuing care retirement contract shall be equal to the current per diem rate of the nursing facility minus the pro rata apportionment of the resident's monthly fee for the period of care required by the contract. Nothing herein shall obligate a continuing care retirement community which does not have a life care contract with a resident to provide or pay for a level of nursing facility services nor for any duration beyond what is specifically described in its continuing care retirement contract

with that resident. This section shall not affect the operator's obligation under subdivision two of section forty-six hundred twenty-four of this article;

7. A statement that, if the resident dies prior to occupancy date or, through illness, injury, or incapacity is precluded from becoming a resident under the terms of the contract, the contract is automatically rescinded and the resident or his or her legal representative shall receive a full refund of all moneys paid to the facility, except for those costs specifically incurred by the facility at the request of the resident and set forth in writing in a separate addendum, signed by the parties to the contract;

8. A statement of the conditions under which all or any portion of the entrance fee will be released to the operator before the living unit becomes available for occupancy, and a statement of the conditions under which all or any portion of that fee will be refunded in the event of the death of the resident and/or spouse following occupancy of a living unit, including the mandatory refund provisions set forth in section forty-six hundred nine of this article;

9. A statement of the advance notice to be provided the resident, of not less than sixty days, of any change in fees or charges or scope of care or services;

10. A statement that no act, agreement, or statement of any resident, or of an individual purchasing care for a resident under any agreement to furnish care to the resident, shall constitute a valid waiver of any provision of this article or of any regulation enacted pursuant thereto intended for the benefit or protection of the resident or the individual purchasing care for the resident;

11. A description of the reinstatement policies if a resident leaves the facility or the contract is cancelled;

12. A statement that internal procedures to resolve disputes and grievances have been established, and residents notified of them;

13. A statement of the grace period, if any, for the payment of periodic fees without a penalty, and the extent of any penalty for the late payment thereof;

14. A statement that:

a. the resident shall, if eligible, enroll in medicare parts a and b or the equivalent and shall continue to maintain that coverage, together with medicare supplement coverage at least equivalent in benefits to those established by the superintendent as minimum benefits for medicare supplement policies;

b. if the resident fails to maintain medicare coverage and a medicare supplement coverage, or is ineligible for such coverage and fails to purchase the equivalent of such coverage, the community shall purchase the coverage or equivalent coverage on behalf and at the expense of the resident and shall have the authority to require an appropriate adjustment in payments by the resident to the community;

c. if the community cannot purchase medicare coverage and medicare supplement coverage or the equivalent, the community shall have the authority to require an adjustment in monthly fees, subject to the approval of the superintendent, to fund the additional risk to the facility; and

d. if the resident fails to purchase or maintain medicare coverage and medicare supplement coverage or the equivalent, and the community has not purchased such coverage, the community will be responsible for any expenses which would have been covered by medicare and medicare supplement coverage. The community may add the amount of such expenses to the resident's monthly fees.

15. A statement that any amendment to the contract and any change in fees or charges, other than those within the guidelines of an approved rating system, must be approved by the superintendent of insurance; and

16. A statement that property shall not be substituted as payment for either the entrance fee or monthly fee.

17. A statement whether the continuing care retirement contract includes any ownership, beneficial or trust interest in the assets of the operator, the assets of the facility, or both. Assets shall include, but are not limited to, property, trusts, reserves, interest and other assets.

§4609. Withdrawal, death or dismissal of person; refund.

1. Upon the giving of written notice of cancellation by certified mail of at least thirty days, the contract may be cancelled by a resident for any reason, or by an operator if the applicant has willfully mismanaged assets needed to pay monthly care fees. A resident shall not be discharged for inability to pay the monthly fee except where a showing of the willful mismanagement of assets needed to pay monthly care fees has been made.

2. If the notice required by subdivision one of this section is given within the first ninety days of occupancy, the resident shall receive a refund of not less than the entry fee and any other pre-payments less the actual cost of any services actually provided and the actual cost of refurbishing the unit for resale. After the first ninety days of occupancy, any refund shall be not less than the entrance fee, except that the operator may retain no more than two percent per month of occupancy by the resident of such fee and no more than a four percent fee for processing.

3. Refunds upon death will be made on the same basis as refunds upon withdrawal.

4. Any refund made pursuant to this section must be paid no later than thirty days after the formerly occupied unit has been resold, but in no event later than one year after the formerly occupied unit has been vacated.

§4610. Entrance fee escrow account. As a condition for approval to advertise and collect refundable entry fees/deposits:

1. The operator shall establish an interest-bearing account with a New York bank, New York savings and loan association, or New York trust company for any entrance fees received by the operator, which escrow funds shall be subject to release as provided by subdivision seven of this section.

2. An escrow agreement shall be entered into between the bank, savings and loan association, or trust company and the operator of the community. The agreement shall state that its purpose is to protect the resident or the prospective resident and that, upon presentation of evidence of compliance with applicable portions of this article, or upon order of a court of competent jurisdiction, the escrow agent shall release and pay over the funds, or portions thereof, together with any interest accrued thereon or earned from investment of the funds, to the operator or resident as directed.

3. Checks, drafts, and money orders for deposit from prospective residents shall be made payable to the escrow agent only.

4. All funds deposited in the escrow account shall remain the property of the resident until released to the operator in accordance with this section, and the funds shall not be subject to any liens or charges by the escrow agent or judgments, garnishments, or creditor's claims against the operator or community.

5. At the request of the operator, the commissioner, or the superintendent, the escrow agent shall issue a statement indicating the status of the escrow account.

6. Escrowed funds shall not be released to the operator unless:

a. construction or purchase of the community has been substantially completed, an occupancy permit covering the living unit has been issued by the local government having authority to issue such permits, and the living unit becomes available for occupancy; or

b. the operator has submitted an application to the commissioner, on forms approved by the department, for authorization to use escrowed entrance fees to assist the operator in financing the construction or purchase of a proposed community and the commissioner, with the advice of the superintendent, and in accordance with such regulations as may be promulgated by the council, has approved such application. The commissioner shall not approve such application over the objection of the superintendent, and shall not approve it unless satisfied that the following conditions have been met:

(i) the operator has executed contracts accompanied by an entrance fee or entrance fee deposit for at least sixty percent of all proposed living units;

(ii) the aggregate entrance fees or deposits received by the operator pursuant to executed contracts equal at least twenty-five percent of the total of the entrance fees due at occupancy for at least sixty percent of all proposed living units, or at least ten percent of the total entrance fee due at occupancy for at least seventy percent of all proposed living units, whichever is less;

(iii) the operator has entered into a contract for the construction or purchase of the community which contract has a fixed maximum price and, if a construction contract, the contractor has secured a performance or completion bond for the benefit of the operator;

(iv) the operator has received a firm commitment for a permanent mortgage loan or other long term financing and conditions to the commitment prior to disbursement of funds thereunder, other than completion of construction or purchase, are substantially satisfied;

(v) the total amount of escrowed entrance fees or deposits that may be approved for release under this paragraph shall not exceed fifteen percent of the total costs of acquiring, constructing and equipping the proposed community;

(vi) use of the entrance fees or deposits shall not impair the operator's ability to comply with the requirements of section forty-six hundred eleven of this article;

(vii) the operator's executed contracts or amended contracts referred to in subparagraph (i) of this paragraph, and all contracts generating the entrance fees for which release is sought, contain a provision conspicuously disclosing the intended use of entrance fees, and that all refunds shall be in accordance with the otherwise applicable provisions of this article, the regulations adopted pursuant thereto and the contract;

(viii) the use of the entrance fees or deposits under this paragraph will promote the efficient and cost-effective acquisition or development of the proposed community; and

(ix) the release, availability and use of the entrance fees comply with any other conditions the council shall establish.

7. If the funds in an escrow account under this section and any interest thereon are not released to the operator within such time as provided by rules and regulations adopted by the council, then such funds shall be returned by the escrow agent to the persons who had made payment to the operator.

8. An entrance fee held in escrow may be returned by the escrow agent to the person who paid the fee upon receipt by the escrow agent of notice from the operator that such person is entitled to a refund of the entrance fee.

9. Nothing in this section shall be interpreted as requiring the escrow of any nonrefundable application fee, designated as such in the contract, received by the operator from a prospective resident.

10. Construction of housing or other facilities shall not begin until:

a. the operator has executed contracts accompanied by a deposit of at least ten percent of the entry fee payment for fifty percent of all units; and

b. all permits and approvals necessary for operation of the community have been granted except those that depend upon construction; Provided, nothing in this subdivision shall prohibit an operator, upon the approval of the council, or an applicant or prospective applicant upon the approval of the

commissioner pursuant to section forty-six hundred twenty-one of this article, from constructing model units and a sales office.

11. Any entry fee deposit required by an operator shall be fully refundable if the contract is cancelled within seventy-two hours of its execution. In the event of cancellation, the entry fee deposit shall be refunded within three business days of receipt of cancellation.

#### §4611. Reserves and supporting assets.

1. An operator shall maintain reserve liabilities and supporting assets in an amount and for the purposes set forth in a regulation issued by the superintendent of insurance. Liquid assets must be maintained for the following reserve liabilities:

- a. Principal and interest payments and payments for taxes and insurance for up to twelve months;
- b. Total estimated operating costs for up to six months as set by the superintendent;
- c. Repairs and replacements for up to twelve months; and
- d. In addition, the amount of liquid assets must meet any cash flow requirements and conditions as set forth in a regulation.

2. The assets in support of reserve liabilities of subdivision one of this section shall meet quantitative and qualitative standards set forth in regulations issued by the superintendent.

#### §4612. Residents' organizations.

1. Residents living in a community authorized by this article shall have the right of self-organization, the right to be represented by one or more individuals of their own choosing, and the right to engage in concerted activities for the purpose of keeping informed of the operation of the community in which they live.

2. The board of directors, a designated representative, or other such governing body of a continuing care retirement community shall meet at least four times a year with residents' representatives and shall hold a general meeting of all residents once a year for the purpose of discussing subjects including, but not limited to, the financial position of the community, the quality of social and health services at the community, and any proposed changes in policies, programs or services.

§4613. Advertisements. No person, partnership, corporation, company, trust or association, or any agent or employee thereof, shall publish or cause to be published, circulated, or disseminated any financial statement, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective residents of continuing care retirement communities that contains statements or illustrations that are untrue, deceptive, misleading, or omit material facts or omit any other information required by regulations appropriate to a continuing care retirement community.

#### §4614. Audits.

1. The commissioner, or designee; the superintendent, or designee; and, with regard to communities for which the department of social services has regulatory responsibility, the commissioner of social services, or designee, may at any time, and shall at least once every three years, visit each community and examine the business of any applicant for a certificate of authority and any operator engaged in the execution of continuing care retirement contracts or engaged in the performance of obligations under

such contracts. Routine examinations may be conducted by having documents designated by and submitted to such commissioners or superintendent, which shall include financial documents and records conforming to commonly accepted accounting principles and practices. The final written report of each such examination conducted by such commissioners or superintendent shall be filed with the commissioner and, when so filed, shall constitute a public record. A copy of each report shall be provided to members of the continuing care retirement community council. Any operator being examined shall, upon request, give reasonable and timely access to all of its records. The representative or examiner designated by the commissioners or superintendent, respectively, may, at any time, examine the records and affairs and inspect the community's facilities, whether in connection with a formal examination or not.

2. Any duly authorized officer, employee, or agent of the health department, social services department, or insurance department may, upon presentation of proper identification, have access to, and inspect, any records maintained by the community relevant to the respective agency's regulatory authority, with or without advance notice, to secure compliance with, or to prevent a violation of, any provision of this article.

3. Reports of the results of such examinations and inspections shall be kept on file by the commissioner and shall be open to public inspection at the community, provided any records, reports, or documents which by state or federal law or regulation are deemed confidential may not be distributed or made available unless and until such confidential status has expired.

#### §4615. Revocation, suspension or annulment of certificate of authority.

1. The council may revoke, suspend, limit or annul the certificate of authority of an operator upon proof that:

- a. The operator failed to continue to meet the requirements for the authority originally granted;
- b. The operator lacked one or more of the qualifications for the certificate of authority as specified by this article;
- c. The operator made a material misstatement, misrepresentation, or committed fraud in obtaining the certificate of authority, or in attempting to obtain the same;
- d. The operator lacked fitness or was untrustworthy;
- e. The operator engaged in fraudulent or dishonest practices of management in the conduct of business under the certificate of authority;
- f. The operator converted or withheld funds;
- g. The operator failed to comply with, or violated, any proper order, rule or regulation of the council or violated any provision of this article;
- h. The unsound business practices of the operator renders its further transactions in this state hazardous or injurious to the public;
- i. The operator has refused to be examined or to produce its accounts, records, and files for examination, or its officers, employees, or controlling persons have refused to give information with respect to the affairs of the community or to perform any other legal obligation as to such examination;
- j. The superintendent of insurance has made a determination that the operator is insolvent within the meaning of section one thousand three hundred nine of the insurance law; or
- k. The commissioner or the commissioner of social services has found violations of applicable statutes, rules or regulations which threaten to affect directly the health, safety, or welfare of a resident of a continuing care retirement community.

2. No certificate of authority shall be revoked, suspended, limited or annulled without a hearing, except that a certificate of authority may be temporarily suspended or limited prior to a hearing for a

period not in excess of sixty days upon written notice to the operator following a finding by the commissioner that the public health or safety is in imminent danger or there exists any condition or practice or a continuing pattern of conditions or practices that pose an imminent danger to the health or safety of any resident. Any delay in the hearing process occasioned by the operator shall toll the running of said suspension or limitation and shall not abridge the full time provided in this subdivision.

3. Any state agency which seeks to revoke, suspend, limit or annul the certificate of authority or any other license or certificate required to be obtained by an operator of a continuing care retirement community pursuant to law, shall request the council to commence a hearing pursuant to this section.

4. The council shall fix a time and place for the hearing. The commissioner shall cause to be served in person or mailed by registered or certified mail to the operator at least ten days before the date fixed for the hearing a copy of the charges, together with the notice of the time and place of the hearing. The operator shall file with the commissioner not less than three days prior to the hearing a written answer to the charges. The agency which initiated the proceeding shall be responsible for providing evidence in support of the charges to the commissioner in order to prepare a statement of charges and shall provide evidence in support of the charges at the hearing.

5. All orders hereunder shall be subject to review as provided in article seventy-eight of the civil practice law and rules. Application for such review must be made within sixty days after service in person or by registered or certified mail of a copy of the order upon the operator.

§4616. Appointment of a caretaker. Upon a determination by the council that there exists operational deficiencies in a continuing care retirement community that show:

1. a condition or conditions in substantial violation of the standards for health, safety or patient care established under federal or state law or regulations;

2. or that there exists in the facility a pattern or practice of habitual violation of the standards of health, safety or patient care established under federal or state law or regulations, the council shall take the actions prescribed by section forty-six hundred fifteen of this article, and, where the council deems it to be in the public interest, the council may request that the commissioner, and upon request of the council the commissioner shall, petition a court of competent jurisdiction to appoint a caretaker as defined in section twenty-eight hundred one of this chapter. The petition, the proceedings, and the procedures for appointment of a caretaker shall be governed by the provisions of section forty-six hundred seventeen of this article, and the powers, duties and rights of a caretaker appointed pursuant to such section shall be the same as those authorized by subdivision four of such section.

§4617. Receiverships.

1. The council may, if it determines that serious operational deficiencies exist or serious financial problems exist and such action is desirable, enter into an agreement with the operator or owners of a continuing care retirement community with respect to the appointment of a receiver to take charge of the community under conditions as found acceptable by both parties. Receivership commenced in accordance with the provisions of this subdivision shall terminate at such time as may be provided in the receivership agreement, or at such time as either party notifies the other in writing that it wishes to terminate such receivership.

2. Upon request of the council, the commissioner shall, at the time of revocation, suspension or temporary suspension of a certificate of authority, apply to the supreme court where the community is situated for an order directing the owner of the land and/or structure on or in which the community



is located, to show cause why a receiver should not be appointed to take charge of the community. In those cases where the certificate of authority has been revoked, suspended or temporarily suspended, the supreme court shall appoint a receiver that, where reasonably possible, is a legal entity that holds a valid certificate of authority. Such application shall contain proof by affidavit that the facility has had its certificate of authority revoked, suspended, or temporarily suspended. Such order to show cause shall be returnable not less than five days after service is completed and shall provide for personal service of a copy thereof and the papers on which it is based, on the owner or owners of the land and/or structures on or in which the community is located. If any such owner and manager cannot with due diligence be served personally within the county where the property is located and within the time fixed in such order, then service may be made on such person by posting a copy thereof in a conspicuous place within the community in question, and by sending a copy thereof by registered mail, return receipt requested, to such owner at the last address registered by him with the department or in the absence of such registration to the address set forth in the last recorded deed with respect to the facility. Service shall be deemed complete on filing proof of service thereof in the office of the county clerk, or the clerk of the city of New York, as the case may be.

3. On the return of said order to show cause, the matter shall have precedence over every other business of the court unless the court shall find that some other pending proceeding, having a similar statutory precedence, shall have priority. The court may conduct a hearing at which all interested parties shall have the opportunity to present evidence pertaining to the application. If the court shall find that the facts warrant the granting thereof, then any such qualified and approved agency, person or corporation, or the commissioner or any person designated by the commissioner, shall be appointed receiver to take charge and assume operation of the community. However, such receiver may make application to the appointing court for decision, reformation or such other relief as may be appropriate to protect the best interests of the residents residing within such community. No security interest in any real or personal property comprising the community shall be impaired or diminished in priority by the receiver. The receiver shall compensate the owner or owners of any goods held in inventory for those goods which he or she uses or causes to be used by reimbursing the costs of such goods, except that no such compensation shall be made for any goods for which the owners or operators of the community have already been reimbursed.

4. Any receiver appointed pursuant to this section shall have all of the powers and duties of a receiver appointed in an action to foreclose a mortgage on real property, together with such additional powers and duties as are herein granted and imposed. The receiver may correct or eliminate those deficiencies in the facility that seriously endanger the life, health, safety or finances of such residents subject to such terms as the court may direct. The receiver shall operate the community in such a manner as intended to assure safety and adequate care for such residents. Any receiver who is an official or employee of the state of New York shall not be required to file any bond. The receiver shall honor all existing leases, mortgages and chattel mortgages that had previously been undertaken as obligations of the owners or operators of the community.

5. The appointing court, upon application of the receiver, may make such provision as justice may require for reasonable compensation and reimbursement of the reasonable expenses of the receiver. The receiver shall be liable only in his or her official capacity for injury to person and property by reason of conditions of the community in a case where an owner would have been liable; provided that he or she operates such facility in compliance with the terms of his or her appointment, the receiver shall not have any liability in his or her personal capacity, except for gross negligence and intentional acts.

6. a. The court shall terminate the receivership only under the following circumstances:

(i) when the community is issued a new certificate of authority for the community; or  
(ii) at such time as all of the residents in the community have been provided alternate residential and health care services.

b. At the time of termination, the receiver shall render a full and complete accounting to the court and shall make disposition of surplus money at the discretion of the court.

7. a. Any person who is served a copy of an order of the court appointing the receiver shall, upon being notified of the name and address of the receiver, make all payments for goods supplied by the community, or services rendered by the community, to the receiver. A receipt shall be given for each such payment, and copies of all such receipts shall be kept on file by the receiver. The amount so received shall be deposited by the receiver in a special account which shall also be used for all disbursements made by the receiver.

b. Any person refusing or omitting to make such a payment after such service and notice may be sued therefor by the receiver. Such person shall not in such suit dispute the authority of the receiver to incur or order such expenses, or the right of the receiver to such payments made to him. The receipt provided by the receiver for any sum paid to him shall, in all suits and proceedings and for every other purpose, be as effectual in favor of any person holding the receipt as actual payment of the amount thereof to the operator or other person or persons who would, but for the provisions of this section, have been entitled to receive the sum to be paid. No resident shall be discharged, nor shall any contract or rights be forfeited or impaired, nor any forfeiture or liability be incurred, by reason of any omission to pay any operator, owner, contractor, or other person any sum so paid to the receiver.

8. Any other provision of this article notwithstanding, the council may, if it deems appropriate, grant to any community operating or scheduled to operate under a receivership authorized by this section a certificate of authority, the duration of which shall be limited to the duration of the receivership.

9. a. No provision contained herein shall be deemed to relieve the operator, owner, or manager of any civil or criminal liability incurred, or any duty imposed by law, by reason of acts or omissions of the operator, owner, or manager prior to the appointment of any receiver hereunder, nor shall anything contained herein be construed to suspend during the receivership any obligation of the owner for the payment of taxes or other operating and maintenance expenses of the community nor of the owner or any other person for the payment of mortgages or liens.

b. The receiver shall not be responsible for any obligations incurred by the owner, manager, or prime lessor, if any, prior to the appointment of the receiver, other than those obligations to residents pursuant to the continuing care retirement contracts.

c. The receiver shall be entitled to use for operating and maintenance expenses and the basic needs of the residents of the community a portion of the revenues due the operator during the month in which the receiver is appointed which portion shall be established on the basis of the amounts of the unpaid operating and maintenance expenses for such month.

§4618. Civil action. Any person who, as or on behalf of an operator, enters into a contract without having first delivered to the prospective resident the disclosure statement and annual report required by sections forty-six hundred six and forty-six hundred seven of this article; or delivers to the prospective resident a disclosure statement or annual report that omits a material fact or makes an untrue or misleading statement of material fact shall be liable to the individual contracting for services pursuant to such contract for damages and repayment of all entrance, application, periodic charge, or other fees paid by such person, less the reasonable cost of care and housing provided until discovery of the

violation or until the violation should reasonably have been discovered, together with interest, costs, and reasonable attorney's fees.

§4619. Criminal penalties.

1. A person, partnership, corporation, controlling person, or agent or employee thereof, who knowingly uses or employs any act or practice in violation of this article shall be guilty of a class A misdemeanor.

2. Nothing under this article limits the power of the state to punish any person for any conduct which also constitutes a separate crime under any other statute.

3. The council may refer such evidence as is available concerning violations of this article to the appropriate district attorney who may, with or without such reference, institute appropriate criminal proceedings.

§4620. Separability. If any clause, sentence, paragraph, section or part of this article shall be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part of this article directly involved in the controversy in which the judgment shall have been rendered.

§4621. Priority reservation agreements; prior to obtaining a certificate of authority. The provisions of this section shall apply to entities that seek approval to enter into priority reservation agreements and to solicit, collect or receive priority reservation fees, with respect to a proposed continuing care retirement community, prior to obtaining a certificate of authority under this article.

1. No person, partnership, corporation or other entity shall solicit, collect or receive any priority reservation fee or enter into any agreement relating to the payment of any priority reservation fee with respect to any continuing care retirement community to be operated within the state without first obtaining the written authorization of the commissioner. The commissioner shall not grant such authorization to an entity that has not yet obtained a certificate of authority unless the requirements of this section and any applicable regulations are met. Upon obtaining the authorization of the commissioner under this section, a prospective continuing care retirement community applicant or an entity that has filed an application for a certificate of authority may enter into cancelable priority reservation agreements with prospective residents and solicit, collect and receive refundable priority reservation fees for direct deposit into an escrow account, prior to obtaining a certificate of authority, for the purpose of evaluating market demand for a proposed continuing care retirement community and for the purpose of guaranteeing to prospective residents an opportunity for priority placement in a continuing care retirement community. A priority reservation fee shall not exceed two thousand dollars. A non-refundable priority reservation agreement application fee shall not exceed the maximum amount for such fee as set forth in regulations adopted by the council.

2. In order to receive authorization by the commissioner to enter into cancelable priority reservation agreements and to solicit, collect or receive any refundable priority reservation fee, a person, partnership, corporation or other entity, hereinafter designated as the applicant, shall apply for such authorization on forms or in a format prescribed by the commissioner and, as part of such application, shall submit the following information:

a. a description of the applicant's plan to implement the process of entering into cancelable priority reservation agreements and to solicit, collect or receive refundable priority reservation fees;

b. a general description of the proposed community, including the location and description of the proposed community site; the components to be included in the community, such as independent living units, skilled nursing facility and adult care facility; the estimated number of each type of unit or beds; and the services to be provided;

c. an estimate of the pricing structure of the community including entrance fees and monthly care fees;

d. a description of the anticipated market to be served;

e. anticipated methods and sources of financing for the proposed community;

f. organizational structure of the applicant;

g. the name and address of the escrow agent and a copy of the escrow agreement required pursuant to this section;

h. a copy of the instructions to the escrow agent regarding the issuance of refunds;

i. a copy of the forms to be used to document a request for a refund of a priority reservation fee and the issuance of such refund;

j. a copy of the most recent set of financial statements of the applicant prepared in accordance with generally accepted accounting principles and certified to be true and accurate by an independent certified public accountant;

k. draft copies of all proposed marketing materials, including final marketing materials as soon as available; provided that the provision of such material shall not be construed to require approval of such materials by the department or the council;

l. a description of the sales office and a copy of the preliminary site plans and drawings of any proposed model units;

m. a copy of the proposed priority reservation agreement; and

n. any other information as may be required by regulations adopted pursuant to this article.

3. Any change in the legal entity authorized under this section to enter into cancelable priority reservation agreements and to solicit, collect or receive refundable priority reservation fees shall require approval in the same manner as the original application; provided, however, that the commissioner may waive any requirement to provide information that is not relevant to such change.

4. a. As a condition to receiving the commissioner's authorization under this section, an applicant shall establish a government insured interest-bearing account, which earns interest at a rate which is consistent with prevailing interest rates, and enter into an escrow agreement with a New York bank, New York savings and loan association or New York trust company for the deposit of any priority reservation fees collected by the applicant pursuant to this section, which escrow funds shall be subject to release as provided for in this section.

b. The escrow agreement shall state that its purpose is to protect prospective residents who have paid a priority reservation fee to the applicant in furtherance of the applicant's efforts to evaluate market demand for a proposed continuing care retirement community and to guarantee prospective residents an opportunity for priority placement in a continuing care retirement community and that, upon presentation of evidence of compliance with applicable portions of this article, or upon order of a court of competent jurisdiction, the escrow agent shall release and pay over the funds, or portions thereof, together with any interest accrued thereon or earned from investment of the funds, to the applicant, the prospective resident or the prospective resident's legal representative as directed, within fifteen business days of receipt of the notice by the escrow agent.

c. Checks, drafts, and money orders for deposit from prospective residents shall be made payable to the escrow agent only.

d. All funds deposited in the escrow account shall remain the property of the prospective residents until released to the applicant in accordance with this section, and the funds shall not be subject to any liens or charges by the escrow agent or judgments, garnishments, or creditors' claims against the applicant.

e. At the request of the applicant, the commissioner, or a prospective resident, the escrow agent shall issue a statement indicating the status of the escrow account.

f. A prospective resident's escrowed funds shall not be released to an applicant unless the applicant obtains a certificate of authority to operate the proposed continuing care retirement community and to enter into continuing care retirement contracts, and the prospective resident has entered into a continuing care retirement contract with the applicant and has elected to apply the priority reservation fee to an actual entrance fee or deposit on an entrance fee. Upon release to the approved applicant, a prospective resident's escrowed priority reservation fee funds shall be deposited into the entrance fee escrow account provided for in section forty-six hundred ten of this article.

g. If the funds in an escrow account under this section, and any interest thereon, are not released to the applicant within such time as provided by rules and regulations adopted by the council, then such funds shall be returned by the escrow agent to the person who had made the payments or the person's legal representative.

h. A priority reservation fee, and the interest accrued thereon, held in escrow shall be returned by the escrow agent to the person who paid the fee upon receipt by the escrow agent of notice from the applicant or the person who paid the fee or the person's legal representative that the priority reservation agreement has been cancelled. Any priority reservation fee, and the interest accrued thereon, shall be returned by the escrow agent to the person who paid the fee or the person's legal representative within fifteen business days of receipt by the escrow agent of notice of cancellation of the priority reservation agreement.

i. Refunds of priority reservation fees upon the death of a prospective resident will be made upon the same basis as refunds upon cancellation of a priority reservation agreement.

j. Nothing in this section shall be interpreted as requiring the escrow of any non-refundable priority reservation agreement application fee, designated as such in the cancelable priority reservation agreement, which fee is received by the applicant from a prospective resident.

5. Any marketing materials, including all materials associated with a sales office and model units, used in the solicitation of priority reservation agreements or priority reservation fees shall, at a minimum, contain the following:

a. a statement that the purpose of the marketing material is to determine the market demand for a proposed continuing care retirement community and to offer prospective residents an opportunity for a guaranteed priority placement in a continuing care retirement community by entering into cancelable priority reservation agreements and accepting refundable priority reservation fees;

b. a statement that the cancelable priority reservation agreement is not a continuing care retirement contract and may be cancelled by the person entering the agreement or the person's legal representative at any time, without cause; and

c. a statement that any priority reservation fees paid shall be held in escrow and shall be refunded, together with interest accrued at prevailing rates, to the person paying the fee or the person's legal representative upon request and cancellation of the priority reservation agreement.

6. Any priority reservation fees with respect to a proposed continuing care retirement community may be collected only after issuance of a cancelable priority reservation agreement to the person paying the fee, which agreement shall contain the following information:

- a. the name and location of the proposed community;
- b. the name and address of the applicant;
- c. the name, address and phone number of a contact person;
- d. the name and address of the person paying the fee;
- e. the name and address of the escrow agent;
- f. the type of unit being reserved;
- g. the estimated entry fee and monthly care fee clearly identified as an estimate;
- h. the amount of any non-refundable priority reservation agreement application fee;
- i. a notice in bold twelve point type that the cancelable priority reservation agreement does not obligate the person entering into the agreement in any way; that there is no guarantee by the applicant that the fees estimated in the agreement will not change; that the community described is only a proposed community and any model units are only representative of units in a proposed community which is subject to the submission of a formal application by the applicant and the subsequent approval or disapproval by the council; that there is no guarantee that the unit described in the agreement or represented by any model will be built or otherwise made available as described in the agreement or at all; that the person paying the priority reservation fee may receive a refund of the fee plus interest accrued at prevailing rates upon request; and that should a certificate of authority be granted that he or she shall be entitled on a priority basis to apply the priority reservation fee to an actual entrance fee or entrance fee deposit on a unit not already under contract;
- j. the signature of the person paying the fee and the signature of the applicant or the applicant's agent; and
- k. a statement of the effective period of the agreement not to exceed the duration of the commissioner's authorization.

7. a. In order to approve an application under this section, the commissioner shall have determined, as applicable, that:

- (i) the applicant has satisfied the requirements of this section and any applicable regulations; and
- (ii) the applicant has demonstrated the capability to conduct a market analysis of the demand for the proposed continuing care retirement community and can be expected to meet its obligations in accordance with this section and in accordance with its priority reservation agreements with prospective residents.

b. If the commissioner approves an application, the commissioner shall issue a written authorization to the applicant authorizing the applicant to enter into cancelable priority reservation agreements and collect refundable priority reservation fees from prospective residents concerning the proposed continuing care retirement community.

c. The commissioner's authorization shall remain in effect for a period not to exceed eighteen months from the date of the commissioner's authorization the commencement of said period to be specifically stated in such authorization subject to the following:

(i) the commissioner may rescind the authorization, including any extension thereof, at any time for just cause, including any material misstatement of fact or misrepresentation in any of the application materials or any materials subsequently disseminated;

(ii) the authorization may be extended upon written application to and approval of the commissioner for the duration of time specified in the commissioner's written approval;

(iii) unless already expired, the authorization shall be extended automatically if an application for a certificate of authority is submitted pursuant to this article, and such authorization shall remain in effect as long as the application for a certificate of authority remains active; and

(iv) unless already expired, the authorization shall be extended automatically if a certificate of authority is obtained by the applicant pursuant to this article, and such authorization shall remain in effect as long as the certificate of authority remains in effect.

d. The applicant shall provide written notice to all parties who have entered into cancelable priority reservation agreements of the following:

(i) notice of the commissioner's rescission of authorization to enter into cancelable priority reservation agreements;

(ii) notice of the commissioner's extension of authorization to enter into cancelable priority reservation agreements including the new expiration date and the reason for such extension; and

(iii) notice upon issuance of a certificate of authority pursuant to this article that the party to the agreement has the option on a priority basis to apply the priority reservation fee to an actual entrance fee or a deposit on an entrance fee.

e. The commissioner shall provide written notice to the escrow agent of the commissioner's rescission of authorization to enter into cancelable priority reservation agreements, including instructions to release funds held in escrow to the persons who have paid refundable priority reservation fees.

§4622. Priority reservation agreements; after obtaining a certificate of authority. The provisions of this section apply to entities that seek approval to enter into priority reservation agreements and to solicit, collect or receive priority reservation fees, with respect to a continuing care retirement community, after obtaining a certificate of authority under this article.

1. No person, partnership, corporation or other entity shall solicit, collect or receive any priority reservation fee or enter into any agreement relating to the payment of any priority reservation fee with respect to any continuing care retirement community operated or to be operated within the state without first obtaining the written authorization of the commissioner. The commissioner shall not grant such authorization to an entity that has obtained a certificate of authority unless the requirements of this section and any applicable regulations are met. Upon obtaining the authorization of the commissioner under this section, an operator may enter into cancelable priority reservation agreements with prospective residents and solicit, collect and receive refundable priority reservation fees for direct deposit into an escrow account for the purpose of guaranteeing to prospective residents an opportunity for priority placement in the continuing care retirement community for which the operator has obtained a certificate of authority. A priority reservation fee shall not exceed two thousand dollars. A non-refundable priority reservation agreement application fee shall not exceed the maximum amount for such fee as set forth in regulations adopted by the council.

2. In order to receive authorization by the commissioner to enter into cancelable priority reservation agreements and to solicit, collect or receive any refundable priority reservation fee, an operator shall apply for such authorization on forms or in a format prescribed by the commissioner and, as part of such application, shall submit the following information:

a. a description of the applicant's plan to implement the process of entering into cancelable priority reservation agreements and to solicit, collect or receive refundable priority reservation fees;

b. the name and address of the escrow agent and a copy of the escrow agreement required pursuant to this section;

c. a copy of the instructions to the escrow agent regarding the issuance of refunds;

d. a copy of the forms to be used to document a request for a refund of a priority reservation fee and the issuance of such refund;

e. draft copies of all proposed marketing materials, provided that copies of the final marketing materials must be submitted as soon as they are available provided further that provision of

such materials shall not be construed to require approval of such materials by the department or the council;

- f. a description of the sales office and drawings of any proposed model units;
- g. a copy of the proposed priority reservation agreement; and
- h. any other information as may be required by regulations adopted pursuant to this article.

3. a. As a condition to receiving the commissioner's authorization under this section, an operator shall establish a government insured interest-bearing account, which earns interest at a rate which is consistent with prevailing interest rates, and enter into an escrow agreement with a New York bank, New York savings and loan association or New York trust company for the deposit of any priority reservation fees collected by the operator pursuant to this section, which escrow funds shall be subject to release as provided for in this section.

b. The escrow agreement shall state that its purpose is to protect prospective residents who have paid a priority reservation fee to the operator in order to guarantee prospective residents an opportunity for priority placement in the continuing care retirement community for which the operator has been issued a certificate of authority and that, upon presentation of evidence of compliance with applicable portions of this article, or upon order of a court of competent jurisdiction, the escrow agent shall release and pay over the funds, or portions thereof, together with any interest accrued thereon or earned from investment of the funds, to the operator, the prospective resident or the prospective resident's legal representative as directed, within fifteen business days of receipt of the notice by the escrow agent.

c. Checks, drafts, and money orders for deposit from prospective residents shall be made payable to the escrow agent only.

d. All funds deposited in the escrow account shall remain the property of the prospective residents until released to the operator in accordance with this section, and the funds shall not be subject to any liens or charges by the escrow agent or judgments, garnishments, or creditors' claims against the operator.

e. At the request of the operator, the commissioner, or a prospective resident, the escrow agent shall issue a statement indicating the status of the escrow account.

f. A prospective resident's escrowed funds shall not be released to an operator unless the prospective resident has elected to apply the priority reservation fee to an actual entrance fee or deposit on an entrance fee. Upon release to the operator, a prospective resident's escrowed priority reservation fee funds shall be deposited into the entrance fee escrow account provided for in section forty-six hundred ten of this article; provided that the operator may retain such funds and shall not be required to deposit them into the entrance fee escrow account if the prospective resident's living unit is available for occupancy.

g. If the funds in an escrow account under this section, and any interest thereon, are not released to the operator within such time as provided by rules and regulations adopted by the council, then such funds shall be returned by the escrow agent to the persons who had made the payments or the person's legal representative.

h. A priority reservation fee, and the interest accrued thereon, held in escrow shall be returned by the escrow agent to the person who paid the fee upon receipt by the escrow agent of notice from the operator or the person who paid the fee or the person's legal representative that the priority reservation agreement has been cancelled. Any priority reservation fee, and the interest accrued thereon, shall be returned by the escrow agent to the person who paid the fee or the person's legal representative within fifteen business days of receipt by the escrow agent of notice of cancellation of the priority reservation agreement.



i. Refunds of priority reservation fees upon the death of a prospective resident will be made upon the same basis as refunds upon cancellation of a priority reservation agreement.

j. Nothing in this section shall be interpreted as requiring the escrow of any non-refundable priority reservation agreement application fee, designated as such in the cancelable priority reservation agreement, which fee is received by the operator from a prospective resident.

4. Any marketing materials, including all materials associated with a sales office and model units, used in the solicitation of priority reservation agreements or priority reservation fees shall, at a minimum, contain the following:

a. a statement that the purpose of the marketing material is for the operator to offer prospective residents an opportunity for a guaranteed priority placement in a continuing care retirement community by entering into cancelable priority reservation agreements and accepting refundable priority reservation fees;

b. a statement that the cancelable priority reservation agreement is not a continuing care retirement contract and may be cancelled by the person entering the agreement or the person's legal representative at any time, without cause; and

c. a statement that any priority reservation fees paid shall be held in escrow and shall be refunded, together with interest accrued at prevailing rates, to the person paying the fee or the person's legal representative upon request and cancellation of the priority reservation agreement.

5. Any priority reservation fees with respect to a continuing care retirement community may be collected only after issuance of a cancelable priority reservation agreement to the person paying the fee, which agreement shall contain the following information:

a. the name and location of the community;

b. the name and address of the operator;

c. the name, address and phone number of a contact person;

d. the name and address of the person paying the fee;

e. the name and address of the escrow agent;

f. the type of unit being reserved;

g. the current entry fee and monthly care fee, together with a statement explaining that these fees are subject to change and may be changed by the time the prospective resident enters into a continuing care retirement contract with the operator;

h. the amount of any non-refundable priority reservation agreement application fee;

i. a notice in bold twelve point type that the cancelable priority reservation agreement does not obligate the person entering into the agreement in any way; that there is no guarantee by the operator that the current fees set forth in the agreement will not change; that the person paying the priority reservation fee may receive a refund of the fee plus interest accrued at prevailing rates upon request; and that he or she shall be entitled on a priority basis to apply the priority reservation fee to an actual entrance fee or entrance fee deposit on a unit not already under contract;

j. the signature of the person paying the fee and the signature of the operator or the operator's agent; and

k. a statement that the effective period of the agreement shall not exceed the duration of the commissioner's authorization.

6. a. In order to approve an application under this section, the commissioner shall have determined that:

(i) the operator has satisfied the requirements of this section and any applicable regulations; and

(ii) the operator can be expected to meet its obligations in accordance with this section and in accordance with its priority reservation agreements with prospective residents.

b. If the commissioner approves an application, the commissioner shall issue a written authorization to the operator authorizing the operator to enter into cancelable priority reservation agreements and collect refundable priority reservation fees from prospective residents concerning the continuing care retirement community.

c. The commissioner's authorization shall remain in effect as long as the operator's certificate of authority for its community remains in effect; provided that the commissioner may rescind the authorization at any time for just cause, including any material misstatement of fact or misrepresentation in any of the application materials or any materials subsequently disseminated.

d. The operator shall provide written notice to all parties who have entered into cancelable priority reservation agreements of the commissioner's rescission of authorization to enter into cancelable priority reservation agreements.

e. The commissioner shall provide written notice to the escrow agent of the commissioner's rescission of authorization to enter into cancelable priority reservation agreements, including instructions to release funds held in escrow to the persons who have paid refundable priority reservation fees.

#### §4623. Long term care insurance for continuing care retirement contracts.

1. The council may approve an application for a certificate of authority and the commissioner may issue a certificate of authority for the establishment and operation of a continuing care retirement community under an arrangement which otherwise complies with the requirements of this article except that the costs of nursing facility or home health care services are paid for in whole or in part by

(a) long term care insurance obtained and paid for by the resident or by medical assistance payments in accordance with the partnership for long term care program pursuant to section three hundred sixty-seven-f of the social services law and section three thousand two hundred twenty-nine of the insurance law or

(b) other group or individual long term care insurance approved by the superintendent and the council in connection with the application. The council, in consultation with the superintendent, shall provide for adequate disclosure to residents of their options, rights and obligations under such an arrangement, and shall establish standards for the remittance and collection of premiums and monthly care fees.

2. With regard to nursing facility or home health care services which are part of the continuing care retirement contract, any elimination or waiting periods and any deductibles, copayments, or other amounts not paid for by such long term care insurance or medical assistance payments shall be the responsibility of the continuing care retirement community. The resident shall not be liable to pay any such amounts.

3. The continuing care retirement community operator shall not require that long term care insurance be purchased from a specified insurer or group of insurers and the operator shall not, without the approval of the council and the approval of the superintendent, specify a minimum acceptable benefit level different from that established under the partnership for long term care program.

4. Entrance fees and monthly care fees shall reflect that the cost of a resident's nursing facility and home health care services are or will be paid for in whole or in part in accordance with

(a) the partnership for long term care program or

(b) other group or individual long term care insurance approved by the superintendent and the council in connection with the application.

5. a. If a resident fails to maintain minimum long term care insurance coverage in accordance with this section, the continuing care retirement community operator shall purchase, if possible, such

coverage on behalf of and at the expense of the resident and may require an appropriate adjustment in payments by the resident to the operator.

b. If the continuing care retirement community operator cannot purchase long term care insurance coverage under paragraph a of this subdivision, the operator may require an adjustment in the resident's monthly fees, subject to the approval of the superintendent, to fund the additional risk to the facility.

c. If the resident fails to maintain long term care insurance coverage in accordance with this section and the community operator has not purchased such coverage, the operator shall be responsible for any expenses which would have been covered under the long term care insurance policy which the resident failed to maintain. The operator may add the amount of such expenses to the resident's monthly fees.

§4624. Continuing care retirement communities making assurances regarding long term care.

1. Nothing in this article shall obligate a continuing care retirement community to offer life care contracts; provided, however, that only continuing care retirement communities which offer life care contracts or which comply with the requirements set forth in subdivision two of this section shall be eligible for the following:

a. An exemption from a public need determination and establishment approval regarding an on-site or affiliated residential health care facility in accordance with subdivision five of section forty-six hundred four of this article; and

b. Industrial development agency financing in accordance with section forty-six hundred four-a of this article; or

c. Financing by any public benefit corporation authorized to make loans to continuing care retirement communities under the laws of this state.

2. A continuing care retirement community not exclusively offering life care contracts but desiring eligibility for an exemption from a public need determination and establishment approval and/or for industrial development agency financing or financing by any public benefit corporation authorized to make loans to continuing care retirement communities under the laws of this state must assure that all residents and prospective residents have the ability to fund the estimated cost of nursing facility services for a period of one year. Such assurances may be demonstrated through the terms of the continuing care contract, resident assets, resident income, long term care insurance or refund of all, or a portion of, the entrance fee and shall be in accordance with regulations adopted by the council. The community must pay for such care in the event that resident assets are insufficient to fund the cost of nursing facility care for a one year period.

(As of August 29, 2007)