§ 4674. 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 fee-for-service 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 fee-for-service 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 community applicant or an entity having 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 fee-for-service continuing care retirement community and for the purpose of guaranteeing to prospective residents an opportunity for priority placement in a fee-for-service continuing care retirement community. A priority reservation fee shall not exceed two thousand dollars unless the commissioner, in the discretion of such commissioner, establishes that a priority reservation fee may exceed two thousand dollars. A non-refundable priority reservation agreement application fee shall not exceed the maximum amount established by the commissioner, in such commissioner's discretion.

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 and the provisions of the fee-for-services rates;

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 state bank, New York state savings and loan association or New York state 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 fee-for-service continuing care retirement community and to guarantee prospective residents an opportunity for

priority placement in a fee-for-service 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 article, 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 fee-for-service continuing care retirement community and to enter into fee-for-service continuing care contracts, and the prospective resident has entered into a fee-for-service continuing care 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 sixty-two 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 canceled. 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 shall 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 fee-for-service continuing care retirement community and to offer prospective residents an opportunity for a guaranteed priority placement in a fee-for-service 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 fee-for-service continuing care contract and may be canceled 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 fee-for-service 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 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 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, 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;

k. a statement of the effective period of the agreement not to exceed the duration of the commissioner's authorization; and

l. an outline of the fees, their associative service, and guidelines used for changing the residency status of a resident.

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 fee-for-service 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 fee-for-service 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 an 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 recision 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 recision 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.