



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

**Re: Real Estate Syndication Offerings That Include
Rights to Acquire Condominium Units**

June 19, 2013

Introduction

The New York State Department of Law (DOL) has seen an increasing number of syndication offerings (defined below) in which offerees are afforded the right to acquire a condominium unit in the development as part of the syndication offering.

The DOL has received requests for guidance as to the regulatory obligations of offerors in these transactions. Such transactions include offerings of two distinct types of securities: (1) an interest in a real estate “syndication” (the participation interest in the entity that acquires and develops the property); and (2) a condominium unit. Because these transactions involve offerings of two distinct types of securities, they require two separate filings with the DOL. Thus, the offeror must make a syndication filing (or notification filing where appropriate) before offering interests in the entity that acquires and develops the property, and must file an offering plan before offering or selling condominium units.

This memorandum addresses the obligations of the offeror in such offerings. In brief, a syndication offering that includes a right to acquire a condominium will not be considered by the DOL to be an unregistered offering of condominium units in violation of General Business Law (GBL) § 352-e(1) if the offerees have the right to opt not to acquire condominium units as part of the syndication offering at no additional cost to them.

This memorandum does not address situations in which a syndication is coupled with a right to acquire a condominium unit in a residential rental building undergoing conversion to cooperative or condominium status pursuant to GBL §§ 352-e(2-a), 352-eee, 352-eeee, and/or 13 NYCRR Part 23.

The Registration Requirement

The GBL requires the filing of an offering statement or prospectus before an offeror offers or sells:

securities constituted of participation interests or investments in real estate, mortgages or leases, including stocks, bonds, debentures, evidences of interest or indebtedness, limited partnership interests or other security or securities as defined in section three hundred fifty-two of this article, when such securities consist primarily of participation interests or investments in one or more real estate ventures, including cooperative interests in realty.

GBL § 352-e. This section of the Martin Act governs both syndications and cooperative interests in realty, including condominium units.

Syndications

Syndication offerings occur where a group of participants contribute as investors (whether in the form of loans or capital contributions) in a real estate investment venture, whether by pooling their resources or by solicitation by an offeror.

Offering Plans for Condominiums

GBL § 352-e(1) specifically requires that offerors file offering plans with the DOL before offering or selling cooperative interests in realty, including condominium units.

Rights to Acquire Condominium Units Included as Part of Syndication Offerings

An offeror must file an offering plan with the DOL before offering or selling cooperative interests in realty, GBL §352-e(1), even where the offer of the cooperative interest in realty is limited to a right to acquire a condominium unit as part of a syndication offering. This is true regardless of the federal laws applicable to the syndication offering, inasmuch as cooperative interests in realty are securities under New York law, but generally are not securities under federal law. GBL § 352-e; *see, e.g., Revak v. SEC Realty Corp.*, 18 F.3d 81, 88-89 (2d Cir. 1994).

Based on the foregoing, a syndication offeror shall not require offerees to purchase condominium units pursuant to a syndication offering. Nor shall a syndication offeror offer or sell condominium units to offerees without filing an offering plan for such interests. As a matter of policy, the DOL will not grant a “no action” letter in lieu of filing an offering plan for sales of condominium units related to syndication offerings.

Offering Plan Filed Before Syndication

Ideally, an offeror should provide offerees with offering materials for both types of real estate security--syndication interest and condominium --simultaneously. In practice, this means filing an offering plan with the DOL before offering syndication interests that will include a right to acquire a condominium unit.

Offering Plan Filed After Syndication

If the offeror has not filed an offering plan before offering syndication interests, it will not be deemed to have made an unregistered offering of condominium units so long as, pursuant to the terms of the syndication offering:

1. the offerees may without penalty or additional expense choose not to acquire the condominium unit;
2. the offeror describes the condominium unit being reserved for the offeree as part of the right to acquire the unit; and
3. the offeror includes the following disclaimer in bold type of at least 12 points, all capital letters, stating that:

THIS RIGHT TO ACQUIRE A CONDOMINIUM UNIT UPON THE FILING OF AN OFFERING PLAN FOR [SPECIFY NAME OF CONDOMINIUM] IS NOT AT THE PRESENT TIME AN OFFERING OF A COOPERATIVE INTEREST IN REALTY. NO SUCH OFFER WILL BE MADE UNTIL THE FILING OF AN OFFERING PLAN WITH THE NEW YORK STATE DEPARTMENT OF LAW. INVESTORS MAY CHOOSE NOT TO EXERCISE SAID RIGHT WITHOUT PENALTY OR ADDITIONAL EXPENSE.

Escrow Requirements

GBL § 352-h requires that the offeror shall hold “all monies received in connection” with the sale of “securities described in” GBL § 352-e(1) “in trust until actually employed in connection with the consummation of the transaction.” When an offeror acquires funds in connection with a participation interest in a real estate syndication, part of which includes a right to acquire a condominium unit, he or she holds them in trust for the consummation of two separate securities transactions. Consequently, the offeror must create two separate escrow accounts, one for the offer of the syndication interest and a second for the offer of a cooperative interest in realty. The down payment for the purchase agreement for the condominium unit must be maintained pursuant to GBL § 352-h and 13 NYCRR § 20.3(o). However, the syndication offeror may give a credit to purchasers at closing of title to the condominium unit for sums invested pursuant to the syndication portion of the offering.

Declaring the Offering Plan Effective

Generally speaking, the DOL's regulations require that the offeror of condominium units enter into purchase agreement for sale of 15 percent of those units to declare the offering plan effective. 13 NYCRR § 20.3(q)(3). Units allocated to the sponsor itself or its principals as defined in GBL § 359-e(1)(d) and 13 NYCRR §§ 20.1 are excluded from both the numerator (i.e., the units counted toward a declaration of effectiveness) and the denominator (the units offered pursuant to the offering plan). 13 NYCRR § 20.3(e)(5). For purposes of this definition, both the managing member and officers or directors of the syndication offeror, as well as any other persons in control of the syndication offeror, are considered principals of the sponsor of the offering of cooperative interests in realty. Units sold to bona fide offerees who are not principals are included in the denominator and may be included in the numerator. In other words, the sale of such units does count toward the 15 percent needed to declare an offering plan effective. Such offerees acquire their units pursuant to the offering plan and have the same rights and obligations as any other purchaser for investment pursuant to an offering plan.

If any principal, as defined in the previous paragraph, wishes to offer his or her unit for sale, the offering plan must be amended to disclose the offering of that unit pursuant to the terms of the offering plan.