

DEVELOPER/SPONSOR UPDATES – COVID EDITION

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I. Temporary Policies Issued by the State

Governor Cuomo issued the New York Executive Order Number 202 Declaring a Disaster Emergency in the State of New York (“Executive Order”), which enacts a number of temporary policies and procedures intended to promote public health and safety and provide limited relief in the face of economic crisis. Set forth below are some of the salient features of the Executive Order that relate to filings made to the New York State Department of Law Real Estate Finance Bureau (“Attorney General” or “AG”) and the regulations promulgated by the AG (“AG Regulations”).

A. Tolling of Statutory Deadlines

As previously communicated, Starr Associates LLP is proud to have worked alongside other industry leaders in an effort to have Governor Cuomo issue an amendment to the Executive Order to temporarily suspend or modify statutes and local laws thereby tolling important statutory deadlines for the period of time commencing on April 16, 2020 and continuing through May 16, 2020 (“Tolling Period”).

The Time Frame to Conduct a First Closing is Tolloed. According to the AG Regulations governing new construction and substantial rehabilitation condominium and cooperative offerings, a sponsor must offer purchasers the right to rescind their purchase agreements if the first closing does not occur within the first twelve (12) months of the anticipated commencement date of the first year of operation. As a result of the recent “stay at home” directives (essentially putting construction and the ability to procure a temporary certificate of occupancy at a stand-still), the Executive Order provides necessary relief by extending this 12-month deadline for the length of the Tolling Period. Therefore, sponsors are afforded additional time to conduct their first closings before being required to offer recession to purchasers under contract.

Timing to File an Updated Budget for First Year of Building Operation is Tolloed. Similar to the statutory deadline requiring a first closing to occur within the first twelve (12) months from the anticipated commencement date of the first year of building operation, a sponsor is also required to update their projected budget for the first year of operation if the first closing is delayed by more than 6 months. This requirement was also suspended for the length of the Tolling Period, now requiring any necessary update to the budget to take place within thirty (30) days from the expiration of the Tolling Period.

The 15-Month Deadline to Declare Effective in a Conversion Plan is Tolloed. In an occupied conversion offering plan, a sponsor is obligated to declare the offering plan effective within fifteen (15) months from the date the offering plan is accepted for filing, failing which sponsor is required to abandon the offering and provide rescission to all purchasers. Such 15-month deadline was also suspended for the length of the Tolling Period, affording sponsors additional time to meet these sales requirements.

B. Filing Fee Suspension

The Executive Order also temporarily suspends the payment of certain filing fees, which include the filing fees associated with offering plans, amendments, and no-action letter applications. Pursuant to the Executive Order, the payment of such filing fees may be delayed until ninety (90) days following the expiration of the Executive Order. Please note that this enactment only permits the delay of such payment and does not exempt such payment altogether. Accordingly, it is recommended that all filing fees be paid at the time they are due, to the extent possible, so as to avoid being retroactively liable

later for any unpaid sums. In the event that a sponsor chooses to delay the payment for any filing fees, it will be the sponsor's obligation under the Executive Order to timely submit payment for such unpaid filing fees within ninety (90) days of the expiration of the Executive Order. Therefore, it is important to take such measures as may be necessary to keep track of any and all unpaid filing fees.

II. Temporary Policies issued by the Attorney General Affecting Filings

The Attorney General recently issued a guidance document entitled "*Memorandum re: Temporary Submission and Review Policies and Procedures Due to COVID-19 State of Emergency*" ("AG Memo") which shall remain in effect for so long as the Executive Order remains in place ("Relief Period").

A. Price-Change Only Amendments

Pursuant to the AG Regulations, changes in the offering prices must first be reflected in a duly filed amendment where the change is an across-the-board increase or decrease, is to be advertised, or is a price increase for an individual unit ("Public Price Changes"). **Pursuant to the AG Memo, the Attorney General essentially suspended the requirement for the submission of Price Change Amendments for the duration of the Relief Period.**¹ The Attorney General further advises that, if a sponsor is required to submit a substantive amendment at any point, such substantive amendment must include any Public Price Changes not already disclosed in a duly filed amendment. Upon the expiration of the Relief Period, sponsors must amend the offering plan to disclose any Public Price Changes not already disclosed in a duly filed amendment.

B. Extension Amendments

The AG Regulations provide that a sponsor is not permitted to engage in marketing and sales activities after the term of an offering plan expires and therefore is obliged to regularly file amendments extending the term of the offering. In the AG Memo, the Attorney General indicates that the requirement for "amendments that principally serve to extend the term of the offering plan" ("Extension Amendments") is essentially suspended for the duration of the Relief Period.² Unfortunately, the AG Memo does not provide a timeframe by which an extension amendment must be submitted subsequent to the expiration of the Relief Period. As such, any sponsor whose Offering Plan remains stale upon the expiration of the Relief Period may be obligated to refrain from all marketing and sales activities in order to avoid violating the Martin Act, unless the AG grants a grace period following the expiration of the Relief Period. Based on this uncertainty, it is not advisable to allow any offering plan to expire during this time.

¹ In the AG Memo, the Attorney General states that it "does not intend to pursue enforcement actions against sponsors or principals based solely upon the failure to file price change amendments with [the Attorney General] prior to offering or selling units/apartments/homes at prices different than the most recently disclosed and filed offering price" and goes on to provide that it will not consider such failures "to be an act triggering a right of rescission for purchasers" for the duration of the Relief Period.

² In the AG Memo, the Attorney General states that it "does not intend to pursue enforcement actions against sponsors or principals based solely upon the marketing or sale of units/apartments/homes pursuant to an expired or 'stale' offering plan" and goes on to provide that it will not consider such act "to be an act triggering a right of rescission for purchasers" for the duration of the Relief Period.

C. Original Signatures & Notarizations

Pursuant to the AG Regulations, numerous documents are required to be submitted to the AG with “wet ink” original signatures and/or notarizations. **Pursuant to the AG Memo, for the duration of the Relief Period, the Attorney General will accept photocopies and scanned copies of an original signature in lieu of such “wet ink” originals and will accept signatures without notarizations provided that certain certifying language is added next to the signature.**

Annexed to this Memo as Exhibit “A” are more detailed instructions for this alternative method. We would like to emphasize that, for forms that require a notarized signature, it is not acceptable to simply submit a signed document without any notarization or certifying language, as the Attorney General will reject such submission.

D. Electronic Distributions and Service Requirements (“CPS-10”)

Typically the Attorney General does not permit electronic versions (pdfs) of the offering plan and amendments to be distributed to prospective purchasers as part of a sales effort unless sponsor first submits an application pursuant to Cooperative Policy Statement #10 (“CPS-10”) for the Attorney General’s approval and complies with all the CPS-10’s requirements and procedures. Also, pursuant to the AG Regulations, sponsors are required to serve hard copies of certain documents (typically recently accepted amendments, and other notices) on “all offerees” (e.g. purchasers, unit owners, shareholders, etc.). **Pursuant to the AG Memo, for the duration of the Relief Period, electronic versions of the offering plan, amendments, and other notices may be circulated and served on prospective purchasers and “offerees,” provided that the sponsor/sales team complies with the instructions set forth in the AG Memo (regardless if there is no approved CPS-10 application).**

Annexed to this Memo as Exhibit “B” are the instructions from the AG Memo with respect to the electronic distribution of the offering plan and amendments.

E. Offering Plans under Parts 18 and 23 (Occupied Conversions)

Pursuant to the AG Regulations, the benefits of the CPS-10 application (described in the previous section) did not extend to offering plans under Parts 18 and 23 (occupied conversions), and sponsors of offering plans under Parts 18 and 23 are also typically bound under the “service” requirements set forth in the regulations to serve only hard copies (e.g. accepted amendments, postings, “red herrings” and blackbooks, and other notices) on all “offerees” (e.g. tenants, purchasers, unit owners, shareholders, etc.). **For the duration of the Relief Period, the Attorney General is permitting sponsors of offering plans under Parts 18 and 23 to circulate and serve electronic versions of the offering plan, amendments, and other notice requirements, provided that the sponsor/sales team complies with the instructions set forth in the AG Memo.**

Annexed to this Memo as Exhibit “C” are the instructions from the AG Memo with respect to the electronic distributions applicable to offering plans under Parts 18 and 23.

III. Attorney General's New E-Payment System

The Attorney General recently launched an electronic payment (“e-payment”) portal that allows sponsors to pay the filing fees associated with almost all types of submissions³ electronically, in lieu of hard-copy, paper checks. On May 1, 2020, the Attorney General released a guidance memorandum entitled “Guidelines for the Submission of Electronic Payments of Filing Fees During COVID-19 State of Emergency” (“E-Payment Memo”) to detail how the e-payment portal works.

The E-Payment Memo provides that, while the Attorney General is still accepting payment of filing fees via paper check during the Relief Period: (1) the Attorney General **strongly** recommends sponsors pay filing fees via the e-payment portal, and (2) a sponsor who pays filing fees via paper check **cannot** avail itself of the electronic submission process, and therefore must make its entire submission via mail.

The e-payment portal itself is very straight-forward and should streamline the process of making filing fee payments and electronic submissions. Essentially, as detailed in the E-Payment Memo, sponsors (or their authorized representatives or counsel) are able to create an e-payment portal account, specify the particular filing being made, and pay the corresponding filing fee.⁴

While sponsors may make these payments directly, we would **strongly** recommend that our firm make **all** payments on each sponsor’s behalf in order to ensure a seamless e-payment and e-submission process. By allowing our firm to make such payments on behalf of the sponsor, we can ensure that all filing receipts, upload links, and other important information from the Attorney General is properly received, stored, and handled and that all correspondences from the Attorney General are properly and timely addressed.

While the e-payment portal and associated guidelines were launched to facilitate payments during the Relief Period, the E-Payment Memo indicates that the Attorney General intends to make e-payment of filing fees permanent and, at some point, required in all circumstances.

IV. Temporary Policies Issued by the Department of Finance

With regard to the condominium apportionment application to the New York City Department of Finance, in normal circumstances the official letters issued by the AG accepting the offering plan and the “effectiveness” amendment must be included in the application. However, pursuant to the AG Memo, the Attorney General has suspended the issuance of “official” acceptance letters for the duration of the Relief Period. **Notwithstanding the foregoing, the AG Memo advises that the “New York City Department of Finance has informed [the AG] that it will accept [the AG]’s email acceptance letters in lieu of**

³ Currently, the e-payment portal supports payment of filing fees associated with the follow submission types: (1) offering plans; (2) amendments; (3) amended and restated offering plans; (4) amendments to amended and restated offering plans; (5) no-action letter applications; (6) amended no-action letter applications; and (7) broker-dealer or salesperson registration statements submitted in tandem with one of the foregoing submissions (i.e., Forms M-2, M-3, and M-10).

⁴ Certain filing fees (e.g., broker-dealer and salesperson registration statements, forms M-2, M-3, and M-10) **must** be paid (with proof of payment submitted to the Attorney General) before the Attorney General will provide a sponsor with a cloud link to which electronic filings can be uploaded. As explained in Part I of the Memo, while the Attorney General has deferred the requirement to pay certain filing fees until after the Relief Period, the Attorney General highly encourages sponsors to submit **all** filing fees associated with a submission via the e-payment portal prior to making the submission.

“official” acceptance letters during the relief period.” We recommend informing your expeditor of these changes.

V. Tightening of Lending Requirements

We have been advised that the financing requirements surrounding condominium/cooperative sales transactions have become significantly more burdensome, in part, we suspect, as a further ramification of the COVID-19 pandemic. In fact, we are told that over the past several weeks Wells Fargo, along with many other institutions, has updated their condominium/cooperative portfolio lending guidelines, which will affect how lenders will underwrite both new and existing condominium/cooperative projects. It is also being reported that Chase has exited the portfolio lending arena, with few, if any, exceptions for the foreseeable future. The impact will be increased pre-sale requirements for new construction properties and heightened purchaser credit and asset requirements. Additionally, lenders reportedly will be requiring a reserve fund line item in the annual budget (either based upon a reserve study or ten percent (10%) percent of the overall budget) and more stringent notice provisions in the governing documents. In light of these changes, all offering plans should be reviewed to either ensure compliance with these new requirements or to include the appropriate disclaimers. As our firm works closely with the country’s leading advisors for condominium and cooperative project approval, lending compliance, and reserve fund studies, we are happy to share this information as it becomes available.

VI. Conclusion

We will continue to update the real estate community on these items as events unfold and ask that you please not hesitate to reach out to us to discuss these, or any other related issues, policies and procedures in more depth.

Exhibit A
Alternative Method for Notarization

Excerpt from the AG Memo (in effect for Relief Period):

“[D]uring the relief period, [the AG (“REF”)] will not require notarization on any documents that it usually would require to be notarized. Instead, REF will accept documents executed either within or without the United States of America with the following language included above the signature line:

“I declare [or *certify, verify, or state*] under penalty of perjury under the laws of the State of New York and the United States of America that the foregoing is true and correct. Executed on [*date*]. [*Signature*].”

During the relief period, REF also will accept documents that are notarized in accordance with the parameters set forth in New York Executive Order Number 202.7.15 REF reserves the right to request that any documents submitted to it be notarized in accordance with the parameters set forth in Executive Order 202.7 rather than using the procedures detailed above.”

Example of Acceptable Alternative to Notarization:

This certification is made under penalty of perjury for the benefit of all persons to whom this offer is made. We understand that violations are subject to the civil and criminal penalties of the General Business Law and Penal Law.	
	SPONSOR: MICKEY MOUSE LLC
	By: <u> Jane Doe </u> Name: Jane Doe Title: Authorized Signatory
<i>I certify under penalty of perjury under the laws of the State of New York and the United States of America that the foregoing is true and correct. Executed on January 1, 2020. Jane Doe</i>	PRINCIPALS OF SPONSOR: <u> Jane Doe </u> Jane Doe <u> Jonathan Doe </u> Jonathan Doe
Severally sworn to before me <u>this</u> _____ day of _____, 2020	<i>I certify under penalty of perjury under the laws of the State of New York and the United States of America that the foregoing is true and correct. Executed on January 1, 2020. Jonathan Doe</i>
_____ Notary Public	

Exhibit B
Electronic Distribution Generally (except Parts 23 & 18)

Pursuant to the AG Memo, below are the conditions that must be met in order to circulate digital versions of (i) the offering plan and all amendments on prospective purchasers as part of a sales effort or (ii) newly accepted amendments and other notices on “all offerees,” e.g. existing purchasers, unit owners, shareholders, etc., as applicable (“Offerees”) as required by the AG Regulations:

1. The digital copy must be identical to the final version accepted for filing by the Attorney General’s office;
2. The sponsor must provide a paper copy to any purchaser or Offeree who so requests;
3. For any documents distributed digitally to purchasers and/or Offerees during the Relief Period, the sponsor must provide paper copies to those same purchasers and/or Offerees within thirty (30) business days after the expiration of the Relief Period;
4. The sponsor must include a cover letter with the digital distribution stating either of the following:

(a) *For digital distributions directly to purchasers/Offerees:*

“Attached please find a Digital Copy of the [(amendment number ___ to the offering plan)] for the [insert name of property], located at [insert complete address of property], File Number [insert AG file number]. Due to the COVID-19 State of Emergency, the New York State Department of Law has advised that Purchasers may receive digital copies of amendments in lieu of paper copies. Within thirty (30) business days after the conclusion of the Relief Period, Purchasers will be sent a paper copy of the [amendment(s)]. PLEASE REVIEW THE CONTENTS OF THIS DOCUMENT IMMEDIATELY TO DETERMINE WHETHER TO EXERCISE ANY RIGHTS INCLUDED IN IT.”

(b) *For digital distributions to the attorneys for the purchasers/Offerees (to be used only if electronic contact information for the purchasers/Offerees is not available):*

“Attached please find a Digital Copy of the [(amendment number ___ to the offering plan)] for the [insert name of property], located at [insert complete address of property], File Number [insert AG file number]. Due to the COVID-19 State of Emergency, the New York State Department of Law has advised that Purchasers may receive digital copies of amendments in lieu of paper copies. Within thirty (30) business days after the conclusion of the Relief Period, Purchasers will be sent a paper copy of the [amendment(s)]. The attached amendment has been provided to your office because we are not in possession of the electronic contact information of the Purchaser. Please immediately forward this email and attachment(s) directly to Purchaser upon receipt. PLEASE REVIEW THE CONTENTS OF THIS DOCUMENT IMMEDIATELY TO DETERMINE WHETHER TO EXERCISE ANY RIGHTS INCLUDED IN IT.”

Exhibit C
Electronic Distribution for Parts 23 & 18

Pursuant to the AG Memo, below are the conditions **specific to offering plans submitted under Parts 18 and 23** that must be met in order to circulate digital copies of (i) the offering plan and all amendments on prospective purchasers as part of a sales effort or (ii) newly accepted amendments, postings, and other notices on “all offerees,” e.g. existing purchasers, unit owners, shareholders, tenants, etc., as applicable (“Offerees”) as required by the AG Regulations:

- (i) The sponsor must fully comply with all the requirements set forth on the previous Exhibit B (i.e. #1-4), as if repeated at length herein.
- (ii) The sponsor must send digital copies to all purchasers and Offerees – for example, the sponsor cannot send digital copies only to just purchasers but not tenants, nor can a sponsor send digital copies to just certain tenants to the exclusion of others, etc.
- (iii) For digital copies of notices and postings: promptly after distributing any digital copies, it must be emailed to the reviewing attorney at the AG (who most recently accepted the offering plan or an amendment thereto).
- (iv) The sponsor must receive an affirmative response from every Offeree who was served digitally, in order to constitute receipt. The AG will not accept a copy of the email sent to any Offeree as “proof of receipt,” but rather requires proof of an affirmative response from the Offeree served.