



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

Re: Withholding Condominium Units from the Initial Offer

Date: December 20, 2018

The New York State Department of Law (“DOL”) publishes this memorandum as a guidance document pursuant to New York State Administrative Procedure Act § 102(14).

I. INTRODUCTION

The DOL has begun to receive condominium offering plan submissions in which sponsor proposes to withhold certain residential units from the initial offer. For the purposes of this guidance document, the DOL will interpret withholding to mean instances in which the sponsor of an offering does not initially offer all of the residential units in such offering to the public, as indicated by the omission of an offering price for such unit(s) from the offering plan’s Schedule A. For example, sponsor will submit an offering plan which proposes the creation of a condominium with ten residential units, but will initially offer only six of the ten residential units to the public.

The DOL will permit sponsors to withhold units from the initial offer in this manner. This guidance document is intended to guide sponsors in the submission of condominium offering plans in which sponsor is withholding certain residential units from the initial offer. However, in order to provide adequate disclosures to prospective purchasers, sponsors must adhere to all requirements described herein.

II. APPLICABILITY AND LIMITATIONS

This guidance document shall apply only to condominium offering plans submitted pursuant to Title 13 of the New York Codes, Rules, and Regulations (“13 N.Y.C.R.R.”) Part 20 (newly constructed, vacant, or non-residential condominiums). Likewise, sponsors’ ability to withhold units from the initial offer shall apply only to offering plans submitted pursuant to 13 N.Y.C.R.R. Part 20. Sponsors may not withhold units from the initial offer in other submissions to the DOL without prior written approval from the DOL. Please note that the DOL will not permit sponsors to reserve the right to withhold units from the offer in the future (thereby effectively removing previously offered units from the market).

Many sponsors propose to withhold units from the initial offer in order to gauge the market and avoid the potential for filing price change amendments lowering the price of units. Some sponsors have attempted to bypass filing a price change amendment that would lower prices by amending and restating the offering plan. The DOL will reject such amended and restated offering plans for submission. Instead, the DOL encourages sponsors to either (1) withhold units from the initial offer as detailed in this guidance document; (2) submit an application to test the market pursuant to Cooperative Policy Statement #1; or (3) submit price change amendments as contemplated by the DOL's regulations.

Although the DOL will allow sponsors to withhold units from the initial offer, sponsors shall not use the withholding of units to deceive the public about the percentage of total units that have been sold. Marketing brochures and other advertising material that contain percentages of units sold must calculate the percentage of units sold using the **total** number of anticipated units in the condominium rather than the number of units offered at that time. In addition, sponsors must not offer any withheld units (*e.g.*, by engaging in sales activity such as marketing, executing purchase agreements, or transferring title to units) prior to amending the offering plan to offer such units. Any such sales activity may result in the DOL opening an investigation into sponsor and its principals for violation of the Martin Act.

Sponsors that withhold units from the initial offer must determine the number of contracted-for units required to declare the offering plan effective based upon the **total** number of anticipated units in the condominium, rather than the number of units sponsor offers at any given time. In practice, this means that a sponsor cannot declare the offering plan effective until it has accepted purchase agreements for at least 15% of the **total** units offered under the offering plan. See 13 N.Y.C.R.R. Part 20.3(q)(3). Similarly, prior to effectiveness, sponsor must at all times offer at least 15% of the total anticipated units in the condominium. Finally, sponsor must not rent withheld units before consummation of the offering plan.

As described in more detail in **Section IV** of this guidance document, sponsors withholding units from the initial offer must amend the offering plan prior to offering additional units. The DOL will permit sponsors to utilize price change amendments to offer withheld units if the only information not disclosed in the offering plan about the withheld units is the offering price. If the offering plan omits any information about the withheld units other than the offering price (such as floor plans), sponsor cannot utilize a price change amendment to offer the withheld units; instead, sponsor must file a substantive amendment¹ with the DOL prior to offering any withheld units. Additionally, sponsor must submit a substantive amendment if it decides to change the total number of units in the condominium (through unit combinations, for example).

III. OFFERING PLAN DISCLOSURE REQUIREMENTS FOR WITHHOLDING UNITS FROM THE INITIAL OFFER

Offering plans in which sponsor proposes to withhold units from the initial offer must contain the disclosures detailed in this section.

(a) Cover

The cover of the offering plan must include a clear notice that sponsor is withholding certain units from the initial offer. The cover must also disclose the total number of anticipated units in the condominium,

¹ The DOL deems amendments that are not price change only amendments to be "substantive" amendments.

as well as the number of units being offered initially. However, the cover need not contain the total offering price; rather, only the prices of the units being offered initially must be disclosed.

The cover of the offering plan must also state the following in a **bold-faced font**:

BECAUSE SPONSOR IS WITHHOLDING UNITS FROM THE INITIAL OFFER, THIS PLAN MAY NOT RESULT IN THE CREATION OF A CONDOMINIUM IN WHICH A MAJORITY OF THE UNITS ARE OWNED BY OWNER-OCCUPANTS OR INVESTORS UNRELATED TO THE SPONSOR. (SEE SPECIAL RISKS SECTION OF THE PLAN).

If sponsor is also reserving the unlimited right to rent units after consummation of the offering plan, sponsor may combine this statement with the disclosures required by 13 N.Y.C.R.R. Part 20.3(c)(1) as follows:

BECAUSE SPONSOR IS RETAINING THE UNCONDITIONAL RIGHT TO RENT RATHER THAN SELL UNITS AFTER THE PLAN HAS BEEN CONSUMMATED AND IS WITHHOLDING UNITS FROM THE INITIAL OFFER, THIS PLAN MAY NOT RESULT IN THE CREATION OF A CONDOMINIUM IN WHICH A MAJORITY OF THE UNITS ARE OWNED BY OWNER-OCCUPANTS OR INVESTORS UNRELATED TO THE SPONSOR. (SEE SPECIAL RISKS SECTION OF THE PLAN).

(b) Special Risks

The offering plan must include a prominent Special Risk disclosure that sponsor initially is offering only a portion of the total anticipated units in the condominium. Such disclosure must also include the following information:

- A statement that because sponsor is withholding units from the initial offer, and there is no commitment to sell more than the 15% of the total units in the condominium necessary to declare the offering plan effective, the offering plan may not result in the creation of a condominium in which a majority of the units are owned by owner-occupants or investors unrelated to sponsor, and owner-occupants may never gain effective control and management of the condominium;²
- A statement that sponsor will determine the number of contracted-for units required to declare the offering plan effective based upon the total number of anticipated units in the condominium, rather than the number of units sponsor initially offers;
- A statement that sponsor will at all times offer at least 15% of the total number of anticipated units to the public prior to effectiveness;
- A statement that advertising material that contains percentages of units sold must calculate the percentage of units sold using the **total** number of anticipated units in the condominium rather than the number of units offered at that time;

² If sponsor is also reserving the unlimited right to rent units after consummation of the offering plan, sponsor may combine this statement with the disclosures required by 13 N.Y.C.R.R. Part 20.3(c).

- A statement that sponsor will not rent the withheld units before consummation of the offering plan;
- A statement that sponsor will amend the offering plan when it begins to offer withheld units;
- A statement as to whether sponsor's withholding of units will affect the timetable for the projected completion of the condominium's amenities and services (if any); and
- A general timeline for the release of units onto the market, if available. If such is unavailable, the disclosure must state that there is no current timeline for the release of units onto the market.

(c) Introduction

The Introduction section of the offering plan must include all disclosures required in the Special Risks section. Sponsor must also disclose the particular units sponsor is withholding from the initial offer. *See* 13 N.Y.C.R.R. Part 20.3(d)(5).

(d) Description of Property

The Description of Property in Part I of the offering plan must include a timetable for the projected completion of the condominium's amenities and services (if any) and disclose whether sponsor's withholding of units will affect that timeline (if at all). *See* 13 N.Y.C.R.R. Part 20.3(e)(4).

(e) Schedule A

The Schedule A included in the offering plan must list all anticipated units in the condominium. The Schedule A need not list the offering price for those units being withheld from the initial offer. However, the Schedule A must include a footnote disclosing that sponsor is withholding certain units from the initial offer and that the Schedule A will be amended as sponsor begins to offer additional units.

(f) Schedule B

The Schedule B (budget) included in the offering plan must reflect the **total** number of anticipated units in the condominium, not just the units being offered initially. If sponsor anticipates that the withholding of units from the initial offer will affect the condominium's budget, the footnotes to the Schedule B must describe the anticipated impact in detail.

(g) Effective Date

The Effective Date section of the offering plan must include a statement that sponsor will determine the number of contracted-for units required to declare the offering plan effective based upon the **total** number of anticipated units in the condominium, rather than the number of units sponsor initially offers.

(h) Interim Leases

The Interim Leases section of the offering plan must disclose that sponsor will not rent any withheld units prior to consummation of the offering plan.

IV. AMENDMENT REQUIREMENTS FOR OFFERING WITHHELD UNITS

Sponsors withholding units from the initial offer must amend the offering plan prior to offering additional units.

The DOL will permit sponsors to utilize price change amendments to offer withheld units if the only information not disclosed in the offering plan about the withheld units is the offering price. If sponsor is able to submit a price change amendment to offer withheld units, the price change amendment must include the following:

- The attorney transmittal letter must disclose in a **bold-faced font** that sponsor is adding additional units to the offer;
- The body of the amendment must disclose clearly that sponsor is adding additional units to the offer; and
- The amendment must include as a backup document a **CD-11 Price Change Form**,³ which lists the “last filed price” for any withheld units being added to the market as \$0.

If the offering plan omitted information about the withheld units other than the offering price (such as floor plans), sponsor must file a substantive amendment with the DOL prior to offering any withheld units. If sponsor is required to submit a substantive amendment to offer withheld units, the substantive amendment must include the following:

- The attorney transmittal letter must disclose in a **bold-faced font** that sponsor is adding additional units to the offer;
- The body of the amendment must disclose clearly that sponsor is adding additional units to the offer;
- The amendment must disclose all information about the withheld unit(s) that was not included in the offering plan; and
- The amendment must include as a backup document a **CD-11 Price Change Form**, which lists the “last filed price” for any withheld units being added to the market as \$0.

If at any time while units remain withheld sponsor amends the offering plan to include an updated Schedule A (either in a price change amendment or a substantive amendment), the Schedule A must differentiate between units that do not contain a price because they are withheld and units that do not contain a price because they have been sold.

As previously discussed herein, sponsor must at all times offer at least 15% of the total anticipated units in the condominium prior to effectiveness.

³ The CD-11 Price Change Form is available at the following web address:
https://ag.ny.gov/sites/default/files/cd_11_price_change_form.pdf

V. FILING FEES

The filing fees paid to DOL for an offering plan submission should be based on the unit prices for those units being offered at the time of initial offering plan submission and acceptance rather than based on the unit prices for all the units in the building. As additional units are added to the offer, sponsor should increase the filing fees as appropriate. Sponsor may also choose to pay the maximum offering plan filing fee.

VI. FAILURE TO COMPLY WITH REQUIREMENTS FOR WITHHOLDING UNITS FROM THE INITIAL OFFER

The DOL reserves the right to reject offering plans and amendments thereto that include withheld units and fail to comply with this guidance document and all other applicable laws, regulations, and guidance documents. Additionally, the Attorney General has the authority under Article 23-A of the General Business Law to investigate and strictly enforce violations of the statutes and regulations governing disclosure requirements. Nothing contained in this guidance document shall be construed to be a waiver of or a limitation on the Attorney General's authority to take enforcement action pursuant to Article 23-A of the General Business Law and other applicable provisions of law, except as expressly stated herein.