



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

**Re: Submitting Amended and Restated
Offering Plans when the Offering
Plan and All Previously Filed
Amendments Are Unavailable**

Issued: October 15, 2019¹

The Department of Law publishes this memorandum as a guidance document pursuant to State Administrative Procedure Act § 102(14). The following procedures are effective February 1, 2016.²

I. INTRODUCTION

On February 1, 2016, the Department of Law’s digital submission revisions to Parts 18, 20, 21, 23, 24, and 25 of Title 13 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (“13 N.Y.C.R.R.”) become effective. In brief, the revised regulations require sponsors³ of cooperative interests in realty to submit to the Department of Law fewer paper copies of their offering plans and amendments, and instead submit a digital copy of these documents. In addition, the revised regulations require sponsors, when submitting a new amendment to the Department of Law, to include a digital copy of the offering plan and all previously filed amendments with the first new amendment submission after February 1, 2016.

Sponsors that were previously granted an exemption from submitting the offering plan and all previously filed amendments through the Department of Law’s Cooperative Policy Statement #9 are now also required to submit a digital copy of the offering plan and all previously filed amendments with new amendment submissions.⁴ Cooperative Policy Statement #9 is repealed, effective February 1, 2016.

¹ This guidance document shall supersede and replace the previous version of this document dated February 4, 2016. This guidance document was updated on October 15, 2019 to incorporate the digital Certified Public Copy (“CPC”) requirements set forth in the DOL’s guidance document entitled “*Standards for Submission of Certified Public Copies of Offering Plans and Amendments*,” dated October 15, 2019 and effective November 15, 2019. All other substantive provisions of this document remain the same.

² Although the submission procedures described herein are effective as of February 1, 2016, the DOL’s requirement that a CPC and updated RS-2 be included with the submission of an amended and restated offering plan is not effective until November 15, 2019.

³ “Sponsor” means sponsor, successor sponsor, or holder of unsold shares wherever that term is used in this document.

⁴ Cooperative Policy Statement #9 granted sponsors an exemption from the requirement of submitting a copy of the offering plan and prior amendments with new amendments submissions.

The Department of Law will reject for submission new amendments that do not include the offering plan and all previously filed amendments.⁵ However, the Department of Law recognizes that records are sometimes destroyed, and, in some cases, the offering plan and all previously filed amendments cannot be located through a Freedom of Information Law (“FOIL”) request to the Department of Law or obtained through any other online repository system. To address this issue, the Department of Law will allow sponsors to submit an amended and restated offering plan to the Department of Law when they cannot locate the original filed offering plan along with all previously filed amendments. Please note that sponsors must submit an amended and restated offering plan to the Department of Law if they are not in receipt of the offering plan and/or any previously filed substantive amendments.

If the only unavailable previously filed amendments are *price change only amendments*, the sponsor or holder of unsold shares need not submit an amended and restated offering plan to the Department of Law. In such instances, the attorney transmittal letter must: (1) state that the submission contains missing price change only amendments, and (2) identify the specific price change only amendments that are missing (*e.g.*, amendments 3, 6, and 22). Please note that a digital copy of the offering plan and all substantive amendments must still be included with the first amendment submission subsequent to February 1, 2016.

The submission of a digital copy of the offering plan and all previously filed amendments is a *one-time* requirement; once a digital copy of the offering plan and all previously filed amendments has been submitted, it is not required to be resubmitted with subsequent amendments of any kind. Therefore, an amended and restated offering plan is not required if the sponsor or holder of unsold shares has submitted a digital copy of the offering plan and all previously filed amendments to the Department of Law after February 1, 2016. If the sponsor or holder of unsold shares has already submitted the offering plan and all previously filed amendments, the attorney transmittal letter must state the date on which the documents were submitted.

This guidance document outlines the submission requirements for amended and restated offering plans in situations where the offering plan and all previously filed amendments cannot be located. The Department of Law recognizes that there are circumstances in which a sponsor or holder of unsold shares may want to submit an amended and restated offering plan other than when the offering plan and all previously filed amendments cannot be located. *This guidance document does not address those situations.*

II. UNIQUE REQUIREMENTS OF AN AMENDED AND RESTATED OFFERING PLAN

The amended and restated offering plan must include all disclosure requirements set forth in Parts 18, 20, 21, 22, 23, 24, and 25 of 13 N.Y.C.R.R. Attorneys for sponsors may request exemptions from including certain disclosures in the amended and restated offering plan. These exemption requests must be listed in the attorney transmittal letter. *The Department of Law reserves the right to reject any such exemption requests.* Unlike with new offering plan submissions, the Department of Law will not require any binder documents to be submitted with amended and restated offering plan submissions.

⁵ The Department of Law will accept a price change only amendment for filing without the requisite digital copy of the offering plan and previously filed amendments until May 1, 2016. However, if after May 1, 2016 the first amendment submitted since February 1, 2016 is a price change only amendment, the sponsor or holder of unsold shares must include a digital copy of the offering plan and all previously filed amendments with the submission.

The amended and restated offering plan must include a “Certification of Sponsor and Principal(s) Concerning Partial Digital Copies” stating that although the sponsor or holder of unsold shares has done its due diligence, the offering plan and previously filed amendments are unavailable through the Department of Law, online repositories, and other such resources.⁶ A sample certification is annexed to this guidance document as Exhibit A.

Additionally, the amended and restated offering plan must include a digital copy of all documents currently available to the sponsor or holder of unsold shares that the Department of Law has previously accepted for filing (such as the offering plan and any previously filed amendments). For example, if the sponsor or holder of unsold shares currently is in receipt of the original offering plan and several, but not all of the previously filed amendments, the sponsor or holder of unsold shares must submit all of those available documents along with the amended and restated offering plan.

Finally, all amended and restated offering plan submissions must include an attorney transmittal letter, signed by the individual attorney who prepared the amended and restated offering plan. The attorney transmittal letter must:

- (1) State the date the original offering plan was filed and the Department of Law file number;
- (2) Identify that this is an amended and restated offering plan because the offering plan and all previously filed amendments are not available;
- (3) Specify which documents previously filed with the Department of Law are unavailable to the sponsor or holder of unsold shares (*e.g.*, the offering plan and amendments 1-4);
- (4) Specify the documents previously filed with the Department of Law that *are* included with the amended and restated offering plan, if any (*e.g.*, amendments 4-8);
- (5) Include any exemption requests from including certain sections in the amended and restated offering plan; and
- (6) Comply with Parts 18.5(a), 20.5(a), 21.5(a), 22.5(a), 23.5(a), 24.5(a), and 25.5(a) of 13 N.Y.C.R.R.

The Department of Law reserves the right to reject for filing amended and restated offering plans that do not adhere to these requirements.

III. PROCEDURE FOR SUBMITTING AN AMENDED AND RESTATED OFFERING PLAN TO THE DEPARTMENT OF LAW

Sponsors must include the following documents when submitting an amended and restated offering plan to the Department of Law:

- (1) Amended and Restated Offering Plan
 - One digital copy and one paper copy of the amended and restated offering plan
- (2) Certified Public Copy (“CPC”), **effective November 15, 2019**
 - One CPC of the amended and restated offering plan

⁶ The “Certification of Sponsor and Principal(s) Concerning Partial Digital Copies” is not required for amended and restated offering plans submitted for reasons other than the unavailability of the offering plan and all previously filed amendments.

(3) Backup Documents to the Amended and Restated Offering Plan

- One digital copy and one paper copy of the transmittal letter signed by the individual attorney who prepared the amended and restated offering plan
 - Please note that an attorney transmittal letter must be submitted each time a new version of the amended and restated offering plan is submitted to the Department of Law, including when submitting revisions to the amended and restated offering plan.
- Checks (certified or uncertified) for filing fees pursuant to G.B.L. § 352-e(7) payable to the New York Department of Law, dated no more than 90 days from date of submission
 - A digital copy of the check is also required.⁷
- One digital copy and one paper copy of the Notice of Appearance pursuant to Executive Law § 166, signed by the individual attorney who prepared the amended and restated offering plan
- One paper copy of proof of submitting attorney's active registration status with the New York State Courts
 - Please note that the inclusion of this document is optional, but strongly encouraged.
 - If this document is included with the submission, the Department of Law does not require a digital copy. The Department of Law will, however, accept digital copies in addition to paper copies.
- One digital copy and one paper copy of the Form RS-2,⁸ **effective November 15, 2019**
- One digital copy of the "Certification of Sponsor and Principal(s) Concerning Partial Digital Copies"⁹ (See [Exhibit A](#))
 - Sponsors do not need to submit a paper copy of this certification. However, the Department of Law reserves the right to request a paper copy of the certification.
 - Please note that only the sponsor and one principal of the sponsor must sign this certification; the signatures of all the principals of the sponsor are not required (but are encouraged).

(4) Previously filed documents (if available)

- One digital copy of the plan and all previously filed amendments (if available)
 - Please note that a paper copy of the previously filed documents is not required.
 - Please also note that if the sponsor or holder of unsold shares cannot locate any previously filed documents through a FOIL request or other means, no previously filed documents will be included with the submission. However, as described above, the attorney transmittal letter must indicate which documents are unavailable.

The digital copy of the amended and restated offering plan must be submitted *simultaneously* with the paper copy.

⁷ In most cases, the digital copy of the check will be a scanned copy of the executed physical check.

⁸ Please note that the Form RS-2 ("RS-2") has been updated to include additional certifications. The updated RS-2 is effective on November 15, 2019 and will be required for all offering plans submitted to the DOL on or after November 15, 2019. For further information, please see the DOL's guidance document entitled "*Digital Submission Requirements for Cooperative Interests in Realty*." The updated RS-2 is annexed to that guidance document. Please be advised, however, that the DOL reserves the right to make changes to the RS-2 in the future without updating that guidance document. Accordingly, after November 15, 2019, sponsors should use the version of the RS-2 posted on the REF website.

⁹ Again, the "Certification of Sponsor and Principal(s) Concerning Partial Digital Copies" is not required for amended and restated offering plans submitted for reasons other than the unavailability of the offering plan and all previously filed amendments.

Revisions to amended and restated offering plans prior to their acceptance for filing can be submitted to the review attorney/paralegal/architect/engineer via email using the saving and naming conventions described in the Department of Law's guidance document entitled "*Digital Submission Requirements for Cooperative Interests in Realty*." However, the Department of Law reserves the right to request these documents on a CD-ROM, DVD, USB flash drive, or external hard drive. No paper copy of the revisions is required; however, if the revisions comprise more than 25 pages, the review attorney/paralegal/architect/engineer shall have the right to request a paper copy of the revisions.

The Department of Law reserves the right to reject for submission amended and restated offering plans that do not include *all* of the above documents, submitted in the prescribed format. Because an amended and restated offering plan is processed as an amendment by the Department of Law, submitting attorneys should refer to the Department of Law's guidance document entitled "*Guidelines for Amendment Submission*" for additional details on amendment submission procedures. Furthermore, amended and restated offering plans must be submitted to the Department of Law pursuant to the digital submission requirements described in the Department of Law's guidance document entitled "*Digital Submission Requirements for Cooperative Interests in Realty*."

IV. PROCEDURE FOR SUBMITTING SUBSEQUENT AMENDMENTS TO AN AMENDED AND RESTATED OFFERING PLAN

After the Department of Law files the amended and restated offering plan, sponsors may submit subsequent amendments to the amended and restated offering plan. Such amendments must be submitted in accordance with the procedures detailed in Department of Law's guidance document entitled "*Guidelines for Amendment Submission*." Subsequent amendments must also be submitted to the Department of Law pursuant to the digital submission requirements described in the Department of Law's guidance document entitled "*Digital Submission Requirements for Cooperative Interests in Realty*."

The first amendment to the Amended and Restated Offering Plan should be entitled "Amendment 1." Sponsors should *not* number the Amendment following the sequence of the original offering plan. For example, if the originally filed offering plan had 10 amendments prior to being amended and restated, the first amendment submitted to the Department of Law subsequent to the filed amended and restated offering plan should be named "Amendment 1," not "Amendment 11." However, the amendment and the attorney transmittal letter should clearly state the amendment number to both the amended and restated offering plan *and* the originally filed offering plan. To illustrate, in the above example, the amendment and attorney transmittal letter would read, "Amendment 1 to the Amended and Restated Offering Plan and Amendment 11 to the originally filed Offering Plan."

Please note that if the Department of Law accepted the amended and restated offering plan for filing subsequent to February 1, 2016, the first amendment to the amended and restated offering plan need not include a digital copy of all available previously filed documents because the Department of Law will have already received these documents with the submission of the amended and restated offering plan. However, the attorney transmittal letter must state the date on which the Amended and Restated Offering Plan was accepted for filing by the Department of Law.

V. FAILURE TO COMPLY WITH THE DEPARTMENT OF LAW'S DIGITAL SUBMISSION REQUIREMENTS

The Department of Law reserves the right to reject for submission amendments that do not meet the above requirements. Please note that all digital copies must be submitted to the DOL on one CD-ROM, DVD, USB flash drive, or external hard drive, which is in a jewel case, sleeve, or other similar container. The CD-ROM, DVD, USB flash drive, or external hard drive containing the digital copy of the offering plan must be submitted simultaneously to the paper copy. Additionally, all digital copies must be saved and named following the conventions detailed in the DOL's guidance memorandum entitled "*Digital Submission Requirements for Cooperative Interests in Realty*." Furthermore, the CPC included with the amended and restated offering plan or amendment submission must comply with all requirements and standards detailed in the DOL's guidance document entitled "*Standards for Submission of Certified Public Copies*."

The Attorney General has the authority under Article 23-A of the New York 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 New York General Business Law and other applicable provisions of law, except as expressly stated herein.

EXHIBIT A

**CERTIFICATION OF SPONSOR AND PRINCIPAL(S)
CONCERNING PARTIAL DIGITAL COPIES**

We are the Sponsor and principal(s) of the Sponsor of the Offering Plan for [*insert property name, complete address, and Department of Law file number*] (“Offering Plan”). The Department of Law accepted the Offering Plan for filing on [*insert date*]. The Offering Plan has been amended [*insert number of times amended*] times.

We understand that we have primary responsibility for compliance with the provisions of Article 23-A of the General Business Law, the regulations promulgated by the Department of Law in Part [*insert applicable Part*] of Title 13 of the New York Code of Rules and Regulations and such other laws and regulations as may be applicable.

We jointly and severally certify that we have attempted to obtain copies of the originally filed Offering Plan and/or all previously filed Amendments for [*insert property name*] through Freedom of Information Law Requests to the Department of Law, online document repositories, and any other such resources.

We jointly and severally certify that, despite our best efforts, we cannot obtain copies of the originally filed Offering Plan and/or all previously filed Amendments for [*insert property name*].

We jointly and severally certify that all previously filed documents available to us as of [*insert current date*] are included with the submission of the Amended and Restated Offering Plan for [*insert property name*].

This certification is made under penalty of perjury for the benefit of all persons to whom the offer under the Offering Plan is made. We understand that violations are subject to the civil and criminal penalties of the General Business Law and Penal Law.

SPONSOR/SUCCESSOR SPONSOR/HOLDER OF UNSOLD SHARES (underline one):

Name of Sponsor/Successor Sponsor/Holder of Unsold Shares

Signature of Authorized Signatory

Date

Print Name and Title of Authorized Signatory

PRINCIPAL(S):

Principal’s Signature

Date

Print Name of Principal

SWORN TO BEFORE ME

THIS ____ DAY OF _____, 20____.

NOTARY PUBLIC

[Affix stamp]