



**NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL**

**Real Estate Finance Bureau  
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**POLICY STATEMENT 104**

**EXEMPTION APPLICATION UNDER SECTION 359-f(2)  
OF THE GENERAL BUSINESS LAW FROM THE  
FILING REQUIREMENTS FOR REAL ESTATE  
OFFERINGS UNDER SECTION 352-e**

## POLICY STATEMENT 104

### EXEMPTION APPLICATION UNDER SECTION 359-f(2) OF THE GENERAL BUSINESS LAW FROM THE FILING REQUIREMENTS FOR REAL ESTATE OFFERINGS UNDER SECTION 352-e

General Business Law ("GBL") §352-e provides that a real estate securities offering may be exempted from the filing requirements of §352-e if it is exempted under GBL §359-f(2) "by rule or action of the attorney general." Policy Statement 104 provides an exemption application procedure for most issuers falling within one of the subdivisions of §359-f(2), including §359-f(2) (c). Issuers of governmental securities described in GBL §359-f(1)(a) should use Policy Statement 103.

Issuers of mortgage-related securities as defined in the Secondary Mortgage Market Enhancement Act of 1984, in all respects meeting the requirements of the Act, are automatically exempt from filing and are not required to apply to the Attorney General for an exemption.

Policy Statement 104 may not be used to obtain an exemption under §359-f(2)(d) for offerings to not more than forty persons. Offerings of real estate securities to "persons not exceeding forty in number" may be exempted under GBL §352-g(1), and applications for such exemption should be made pursuant to Policy Statement 101. Issuers seeking exemption pursuant to GBL §352-g(2) on the grounds that they are fully registered with the SEC or exempt from registration with the SEC under Regulation D should use Policy Statement 102 or Policy Statement 100, respectively.

Issuers may apply for exemption under §359-f(2)(d) when in the issuer's opinion the exemption falls within the purposes of §359-f(2), although the basis for the exemption is not specifically stated in the statute. One kind of offering given an exemption under the residual clause of §359-f(2)(d) involves an issuer, usually the subsidiary of a bank, that buys and sells highly rated preferred shares at regularly held auctions, the underlying assets of which are primarily GNMA, FNMA and FHLMC certificates. A reorganization to effect a change of domicile may be exempted under §359-f(2)(d). Technical reorganizations may also be exempted under §359-f(2)(d), for instance, one in which the shares in a corporation are exchanged for units of limited partnership interest, and the partnership is the successor of the corporation.

A reorganization is not technical where the resulting entity owns property or is engaged in a business different from that of the original entity. A merger of several limited partnerships into a single master limited partnership, therefore, would not qualify for exemption under Policy Statement 104 unless the ownership of the individual limited partnerships was substantially identical prior to the merger.

Securities listed on a New York exchange or securities senior to listed securities will be required to register or obtain a §352-g exemption the first time securities of the issuer are offered in New York. However, subsequent offerings of such securities may be exempted under §359-f(2)(b) using Policy Statement 104 if a §352-g exemption has been previously granted for such securities, or for the exchange listed common stock of the company.

Securities which under the laws of New York are a legal investment for savings banks or trust funds may be exempted under §359-f(2)(c) by using Policy Statement 104. An exemption application for such securities must state that the securities constitute legal investments for savings banks or trust funds and enclose the rating letter(s) pertaining thereto. If the offering is filed with the Securities and Exchange Commission (SEC) as a Shelf Registration, there must be an undertaking to file rating letters for each takedown. At the time of a takedown, or within 10 days thereafter, an issuer must submit (1) a copy of the rating letter(s) pertaining to the securities encompassed in the takedown and (2) either an amendment to the Policy Statement 104 application, or an affidavit from a principal of the issuer (or of its sponsor) or a letter from the issuer's attorney explaining that the underlying facts set forth in the original application which formed the basis for the exemption are unchanged.

Applications for exemption using Policy Statement 104 must be made, and the exemption obtained, prior to first offering the securities in or from New York.

## COVER SHEET

Every application should have attached to the top of it a cover sheet (or sheets, if necessary) headed "Policy Statement 104 Application." The headings below should be typed flush left and in the order and words used; the relevant information should be provided for each line. (The advisory matter to the right of the colon for each heading below should not be typed on the cover sheet.)

ISSUER NAME:

NATURE OF SECURITY:

OFFERING AMOUNT:

NAME AND ADDRESS

OF RESPONSIBLE PERSON: Person to whom exemption letter will be addressed. Indicate preferred form of address -- Mr., Ms., Mrs., Miss or Esq.

NAME AND TELEPHONE

NUMBER OF PERSON TO CONTACT:

PRINCIPALS: The names only of the persons and entities listed in paragraph 3 of the application.

## CONTENTS OF APPLICATION

The application must be in the form of an affidavit signed, or a petition verified, before a notary by an officer, general partner, trustee or other principal of the issuer having knowledge of the facts contained therein, stating in full the following information, representations and undertakings:

1. The name, address and legal nature of the issuing entity; the business of the issuer; its place and date of organization; and whether it is a successor to another entity within the last two years.

2. The name, title and affiliation of the individual affiant, his or her business or profession and business address.

3. The names and business addresses of all officers, directors, general partners, trustees, selling shareholders and other principals of the issuer, including principals of a general partner when it is itself a corporation or partnership, and a statement that there are no other principals or controlling persons.

4. Whether any principal (including every person named in paragraph 3) was ever adjudged a bankrupt, made an assignment for benefit of creditors, or was an officer, director or principal of any entity which was reorganized in bankruptcy, adjudged a bankrupt, or which made an assignment for the benefit of creditors. (If so, provide details.)

5. Whether any principal (including every person named in paragraph 3) was ever convicted of a crime, or was the subject of an injunction, cease and desist order, or restraining order, revocation of a license to practice a trade, occupation or profession, or denial of an application to renew same, stipulation or consent to desist from any act or practice, Executive Law §63(15) assurance of discontinuance, or any other disciplinary action by any court or administrative agency, or whether such action or proceeding is presently pending. (If so, provide details.)

6. The purpose of the offering, the total dollar amount of the offering and the number of units and classes of securities to be offered, including optional units, shares underlying warrants and conversion privileges. Do not refer to the accompanying offering material; however a separate table containing the requested information may be attached as an exhibit to the application.

7. Whether any offering literature will be used, and if so, state an undertaking to file a copy of such offering literature, including all amendments and exhibits, with the Department of Law.

8. The basis for the exemption sought, with a reference to the applicable subdivision of §359-f(2) and of §359-f(1) if §359-f(2) (c) is used.

The application should conclude, prior to subscription or verification, with the following clause: "WHEREFORE, it is hereby requested that the offering for sale of the securities of [the issuer] be exempted under General Business Law §359-f(2) from the provisions of §352-e and subdivisions two through six of §359-e."

## SUBMISSION

The executed application, accompanied by a check in the amount of \$300 payable to the New York State Department of Law, together with all relevant exhibits and offering material, should be sent to: Real Estate Finance Bureau, Syndication Section, New York State Department of Law, 28 Liberty Street, New York, NY 10005.

Note that the §359-f(2) exemption does not cover §359-e(8), and therefore a Further State Notice form must still be filed with the Department of State unless §359-f(1) makes §359-e(8) inapplicable to the transaction. Note also that non-resident issuers should file a designation of the Secretary of State as agent for service of process pursuant to §352-a and §352-b of the General Business Law. These forms with proper fees should be sent to NYS Department of State, Miscellaneous Records Bureau, 99 Washington Avenue, Albany, New York 12231. State in the cover letter whether such forms have been or are being filed.

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