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STATE OF NEW YORK

DEPARTMENT OF LAW

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REAL ESTATE FINANCE BUREAU

MEMORANDUM

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Re: Guidelines for Amendment Submission<sup>1</sup>

Dated: February 4, 2016<sup>2</sup>

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

**Introduction**

The Real Estate Finance Bureau (“REF”) strives to process all submissions, including offering plan amendments, as expeditiously and efficiently as possible. REF is also committed to developing methods to improve its processes. For example, REF created the online Real Estate Finance Database to enable sponsors and the public to check the status of offering plan and amendment submissions, thus freeing up employee time that was being used to answer those inquiries. Recently, REF also promulgated new regulations that require the submission of digital copies of offering plans and amendments, effective February 1, 2016. This guidance document has been amended to take into account those new requirements.

**Guidelines for Amendment Processing**

Accuracy and Completeness of Submissions to REF

The best way to ensure that a submission to REF is processed timely is to ensure it is complete, current, and accurate. More than 50% of all submissions to REF fail to comply with the Martin Act, the governing regulations, or the New York Executive Law. Each of the omissions or errors creates delays in processing your submission because, until now, they were individually addressed. That will no longer occur. Instead, to ensure that submissions are processed as expeditiously as possible, the filer should comply with the “REF Record Room Checklist for Amendment Submissions,” attached hereto, and all applicable laws. Any submission that does not comply with the below requirements ***will be rejected and sent back to the filer***. Summaries of the amendment submission requirements are as follows:

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<sup>1</sup> This guidance document concerns acceptance of the amendment for *submission*, and not acceptance of the amendment for filing.

<sup>2</sup> This guidance document shall supersede and replace the previous version dated November 18, 2015.

- Amendment Filing Fee: Include a filing fee check for \$225, made payable to “New York State Department of Law” or “NYS Department of Law,” dated no earlier than 90 days before submission to REF. Checks for any payee other than the New York State Department of Law or NYS Department of Law will be rejected. Also, do not combine fees for multiple submissions (e.g., one check for M-10 *and* amendment submission). These checks cannot be processed and the amendment will be rejected for submission. A digital copy of the check must also be included.
- One digital copy and one paper copy of the Form RS-2/CD-2: The form must be completed by the sponsor or holder of unsold shares and signed before a notary with an active notary license, unless a certified digital signature is provided.
- M-10: The filer should ensure that the sponsor and/or holder of unsold shares has a valid M-10 on file. Because REF checks the status manually, filers *may* expedite this process by providing a paper copy of proof of registration issued by REF. If not available, filers may also include a copy of the M-10 to expedite the internal verification process.
- One digital copy and one paper copy of the Notice of Appearance: As required by New York Executive Law, an attorney must submit the Notice of Appearance. Submissions by non-attorneys, including paralegals, will not be accepted. REF is not authorized to fill out the form for filers who fail to provide a properly executed Notice of Appearance.
- One digital copy and one paper copy of the Attorney Transmittal Letter: Each amendment submission must include an attorney transmittal letter that complies with the disclosure requirements set forth in the regulations. Letters signed by paralegals or non-attorneys will be rejected.
- Attorney Registration Status: An attorney authorized to practice law must sign the transmittal letter. A signature by a paralegal or representative from a management company is unacceptable. REF verifies the registration status of attorneys. To expedite this step, filers *may* include a paper copy of their registration status with the submission.
- One digital copy of the offering plan and all previously filed amendments for the first amendment submitted after February 1, 2016.<sup>3</sup> Please note that the submission 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 have been submitted, they are not required to be resubmitted with subsequent amendments of any kind.
- One digital copy and one paper copy of the proposed amendment. The amendments should be numbered in accordance with the last amendment accepted according to the REF Database.

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<sup>3</sup> 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, after May 1, 2016, the first amendment submitted after February 1, 2016 must include a digital copy of the offering plan and all previously filed amendments, regardless of whether it is a substantive amendment or a price change only amendment.

If possible, amendments should be submitted one at a time. REF recognizes that this may present issues for unaffiliated holders of unsold shares, and we will make every effort to process multiple amendments that are submitted by more than one holder of unsold shares. But, multiple holders of unsold shares or co-sponsors are encouraged to coordinate submissions to avoid the confusion and delay that may result from multiple submissions. If the sponsor or holder must submit a price change amendment, it should be numbered in sequence.

### Confirmation of Delivery

REF receives multiple inquiries daily seeking confirmation that packages were received, many times even before the packages are routed to the REF Record Room. Responding to such inquiries takes time away from processing submissions. As such, please refrain from calling, emailing, or requesting fax confirmation of receipt of submissions prior to the time it is logged into the REF Database.<sup>4</sup> Instead, filers are encouraged to utilize the REF Database available online at:

<http://offeringplan.datasearch.ag.ny.gov/REF/>.

Once an amendment is accepted for submission, the information will be available online. Using the time it takes to respond to such inquiries to instead process submissions should ensure that submissions appear in the database sooner. Note that a submission will not appear in the database until it is accepted for submission and assigned to a review attorney. Currently, it takes REF up to two weeks on average to process a submission.

Instead of calling, Sponsors should consider the following suggestions for tracking packages and for further speeding up the process:

- If delivery confirmation is desired, the filer should utilize a form of mail delivery service that provides tracking (*e.g.*, Federal Express).
- Filers are discouraged from utilizing hand-delivery; doing so only delays processing your submission because hand-deliveries are centralized before they are delivered to the REF Record Room. If a filer does use hand-delivery, they should be aware that this will not expedite the process, and they must provide a separate letter to be date stamped that is not enclosed within the package, if desired, at the time of drop-off. Packages cannot be opened at the point of drop-off.
- Do not email electronic copies of the proposed amendment to a particular review attorney before the submission has been assigned. REF has a rotation schedule, and the review attorney may be different from the one who reviewed a prior amendment. Your submission will not get reviewed any quicker and in fact may be delayed.

### Applicability and Scope of Memorandum:

REF implemented these procedures on November 18, 2014 for paper submissions. Such procedures are hereby updated to reflect the digital submissions requirement effective February 1, 2016. REF will

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<sup>4</sup> If immediate confirmation is required for due diligence purposes, filers may hand-deliver submissions to the office with an extra copy of the cover letter on the top of the package that will be date stamped.

reject submissions that fail to comply with the Martin Act, the governing regulations, and New York Executive Law. ***The submission will be returned to the filer by regular U.S. mail.*** A copy of the checklist noting the deficiencies will be included with the submission along with the return of the filing fee. Thereafter, the filer may then resubmit a new amendment that addresses the deficiencies along with a new filing fee. If a filer wishes to avoid having an amendment returned via regular mail, then a pre-paid Fed Ex label should be included with every submission. The filer may also indicate in their cover letter if they wish to receive an email notifying them that the submission has been rejected. However, the filer will not be able to correct submission deficiencies via email.

REF recognizes that in the past, REF contacted filers to obtain information and assisted with completing the submission, including compliance with the above checklist. However, incomplete submissions cause unnecessary delays that affect everyone, which is unfair. Therefore, all filers are encouraged to become familiar with the legal requirements and to follow the checklist included herein ensuring their submissions will be processed expeditiously.

**REF RECORD ROOM  
CHECKLIST FOR AMENDMENT SUBMISSIONS**

Required:

- Check for filing fee of \$225, made payable to the New York State Department of Law or NYS Department of Law, dated no earlier than 90 days from submission date. A digital copy of the check for the filing fee must also be included.
- Separate checks for the M-10 or other submissions, if applicable. A digital copy of the separate check for the fee for M-10 or other submissions must also be included.
- Current broker-dealer registration for each sponsor/holder of unsold shares. If the broker-dealer registration is expired, submit one digital copy and one paper copy of a completed Form M-10 executed by the principals of the sponsor and holder of unsold shares along with the required filing fee.
- One digital copy and one paper copy of the RS-2/CD-2 executed by sponsor or holder of unsold shares.
- 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 amendment.
- One digital and one paper copy of the Attorney Transmittal letter signed by an attorney currently registered to practice law.
- One digital and one paper copy of the proposed amendment.
- Correct amendment number on cover/first page of the proposed amendment (per REF database).
- One digital copy of the offering plan and all previously filed amendments (if any), if the amendment is the first amendment submitted to the Department of Law after February 1, 2016.
- One digital copy and one paper copy of the completed C-11/CD-11, if applicable (for amendments including a price change).

Optional:

- Copy of Broker-Dealer Registration Statement (M-10) and proof of registration issued by the DOL.
- Proof of Sponsor's attorney's active registration status with New York State Courts or situs state. REF will accept a printed copy of the attorney's registration using the following web address:

<http://iapps.courts.state.ny.us/attorney/AttorneySearch>.

- Pre-paid Federal Express Shipping Label.