

MEMORANDUM

TO: REF Attorneys & Paralegals

DATE: 4/15/92

FROM: Stephen Gaines *A.G.*RE: Cooperatives & Condominiums Seeking Investors
Among Shareholders or Unit Owners

The syndication section has received several inquiries from attorneys representing cooperatives concerning our office policy on raising funds from shareholders by means of a voluntary investment rather than an assessment. Traditional methods of borrowing money through banks and other lenders have become either unavailable or extremely burdensome. Thus, cooperatives are seeking new sources of funding for, among other things, building repairs and the added expenses of taking over sponsor apartments (negative cash flow, maintenance, repairs, etc.).

The two such proposals we have seen involve:

- (1) raising money for building repairs by issuing unsecured notes to investing shareholders at 10% interest.
- (2) raising money to fund the negative cash flow on apartments owned by the cooperative by establishing a limited partnership of investing shareholders. Any profits from the sale of these apartments would be split between the partnership and the cooperative.

Generally such offerings would either have to be registered or to have obtained an exemption from registration. Both the fees and the filing requirements, however, may be difficult for a cooperative in need of additional financing. In light of these concerns, the syndication section will consider issuing no-filing letters for such offerings on the ground that the investors form a cohesive group. The offering must fully comply with Policy Statement 105 (a copy of which is annexed) and the additional guidelines and disclosure requirements set forth below.

I Guidelines

- (a) The issuance of such no-filing letters is entirely discretionary and does not constitute a precedent for future submissions.
- (b) The offer must be open to all shareholders or unit owners.

- (c) The non-sponsor shareholders or unit owners must control the Board of Directors or Board of Managers.
- (d) The decision to seek investors to raise funds must be approved by a majority of non-sponsor controlled shareholders or unit owners.
- (e) If the offer raises more money than originally sought, no shareholder may be excluded from investing. The amount of each investment must be proportionally reduced to reach the amount sought.

II Disclosure

The no-filing letter application must contain the following representations:

- (a) Whether there is any security for the notes or bonds that are issued. If there is none, such disclosure to prospective investors must list this as a special risk and disclose the consequences of a lack of security.
- (b) That each potential investor will be provided with a copy of an up-to-date financial statement and budget. The budget must include any expenses associated with the offering to investors.
- (c) That the minimum and maximum amounts of funds to be raised and the specific use of such funds will be disclosed.
- (d) That each investor shall be given access to the books and records of the limited partnership (or other investment entity). If notes or bonds are issued, investors shall be given access to the books and records of the issuer.
- (e) That each investor and the Department of Law will be provided with a copy of the limited partnership agreement, notes or any other documents reflecting the investment offered to shareholders or unit owners.
- (f) That each investor will be provided with a copy of the no-filing letter application after the Department of Law has granted such application.
- (g) That the Department of Law will be provided with a copy of the shareholder or unit owner resolution approving the investment option.

- (h) That, in compliance with General Business Law §§ 352-e(2-b) and 352-h, any funds raised will be held in trust for the benefit of the investors and will be used only for the purposes set forth in the application.
- (i) That investors will sign the following statement before any monies are received from them:

"I understand that I am purchasing this interest in
without being furnished any offering literature or prospectus [other than a copy of a no-filing letter application with exhibits dated _____]
and that this transaction has not been scrutinized by the Attorney General of the State of New York as a full registration because of the offeror's representations of the small number of persons solicited and the private aspects of the offering. This interest is being purchased for my own account, not for the interest of any other and not for resale to others. I represent that I have adequate means of providing for my current needs and possible personal contingencies, and that I have no need for liquidity of this investment. I understand that there is no guarantee of a return on my investment or of any profit earned and I understand that I may lose my entire investment."

SG:md

POLICY STATEMENT 105

INSTRUCTIONS FOR ISSUERS OF REAL ESTATE SYNDICATION OFFERINGS REQUESTING NO-FILING LETTERS FROM THE ATTORNEY GENERAL

Any person or entity intending to offer or sell real estate interests in or from the State of New York may request a no-filing letter from the Attorney General of the State of New York stating that the Attorney General will take no action with respect to such person or entity's failure to file an offering statement pursuant to §352-e of the General Business Law of the State of New York ("GBL") or obtain an exemption from filing pursuant to GBL §352-g, and to register as a broker-dealer pursuant to GBL §359-e or obtain an exemption from registration pursuant to GBL §359-f. This Policy Statement describes the form in which requests should be made, the supplementary material to be submitted, and the statutory fee pursuant to GBL §352-e (7).

No-filing letters have been issued by the Attorney General in his discretion for offerings falling substantially within one or more of the six no-filing categories described below. The Attorney General will also issue no-filing letters for transactions not described herein if it appears that such transactions otherwise do not fall within the purview of GBL §352-e. Policy Statement 105 is not intended to describe the exclusive circumstances under which an offering will be considered to be outside of the filing requirements of §352-e. Failure to obtain a no-filing letter in any transaction does not by itself give rise to liability under Article 23-A of the General Business Law, if filing is not required by the statute.

Policy Statement 105 does not apply to offers of interests in a cooperative corporation, condominium or homeowners association.

A no-filing letter is granted based on representations made by the issuer of securities, and any set of facts or circumstances different from those represented to be true in the request letter may result in the Attorney General taking a different position with respect to the failure to file or obtain an exemption. The no-filing letter states a representation that the Attorney General will take no enforcement action with respect to the issuer's failure to file or obtain an exemption, and does not purport to express any legal conclusion on that or any subsequent transaction or offering. The issuance of the letter shall not be construed to be a waiver of or limitation on the Attorney General's authority to take enforcement action for violations of Article 23-A of the General Business Law and other applicable provisions of law, except with respect to the failure to file an offering statement or register as a broker-dealer.

No-filing letters must be requested prior to the receipt of deposits or subscription agreements from the investors covered by the no-filing request.

NO-FILING CATEGORIES

(1) **Small Private Offerings.** A small private offering is one in which sales are made to nine or fewer investors within and without the State of New York who are sophisticated, have sufficient means for the investment and have a pre-existing relationship with the promoters of the offering. A husband and wife and any relative of either of them sharing the same principal residence may be counted as one person. Any trust or estate in which a purchaser has more than 50% of the beneficial interest, or in which a relative of the purchaser has more than 50% of the beneficial interest and the purchaser is the trustee or executor, may be counted together with the purchaser as one person. Any corporation or other organization of which a purchaser is the beneficial owner of more than 50% of the equity securities (excluding directors' qualifying shares) or equity interests may be counted together with the purchaser as one person. Institutions defined as "accredited investors" by SEC Regulation D, Rule 501(a)(1)-(3), savings and loan associations, registered broker-dealers and corporations having total assets in excess of \$5,000,000 are not included in the count. The promoters of the offering are not counted as persons to whom sales are made if they take an active part in the formation of the partnership. Initial limited partners who relinquish their interests at the closing of the sale to investing limited partners are not counted as persons to whom sales are made.

(2) **Isolated Sales Incidental to an Offering Outside of New York.** An isolated sale in New York is one in which sales are made to no more than two persons in New York and those persons are sophisticated, have sufficient means for the investment and have a pre-existing relationship with the promoters of the offering, and where the offering is otherwise made outside of New York to persons who are not residents of New York and the property is not located in New York.

(3) **Offerings to Institutional Investors in New York.** An offering only to institutional investors in New York and elsewhere may be made without limitation on the number of offers or sales in New York. The offering may also be made to individual investors outside of New York unless the offering involves property located in New York or is otherwise made from New York. Institutions defined as "accredited investors" by SEC Regulation D, Rule 501(a)(1)-(3), savings and loan associations, registered broker-dealers and corporations having total assets in excess of \$5,000,000 are considered institutional investors for purposes of this no-filing category.

(4) Offerings to a Cohesive Group. Offerings may be made without limitation on the number of offers or sales in New York where the investors are all members of one or more cohesive groups and the transaction is negotiated at arm's length with the offeror by and on behalf of the members of the group(s). Recognized cohesive groups include senior executives of a corporation, partners of a professional partnership, and members of a family. This category is not applicable to investment clubs or other entities organized to provide a pool of investors to whom investment opportunities may be offered.

(5) Non-Real Estate Offerings. These are offerings in which it appears that the interests offered are not interests in real estate as defined in GBL §352-e. No-filing letters for this category of offering are recommended only where there is some doubt concerning the applicability of §352-e. Note that no-filing letters for this category of offering do not exempt issuers from the requirements of GBL §359-e governing broker-dealers.

(6) Non-Promoter Transactions. A non-promoter transaction is one in which there is no separate promoter or promoter group selling interests to investors, each of the investors has a pre-existing relationship with a substantial number of the other investors, the terms of the transaction have been negotiated by the investors as a group, and no syndication fees or commissions are paid to any person or entity other than the ordinary expenses of forming a business entity, including fees paid to attorneys and accountants. The Attorney General has provided no-filing letters in this category to tenants of apartment buildings who want to buy the premises from the landlord for continued ownership in the form of a corporation or partnership or for later conversion to a cooperative or condominium. The right to occupy space in the premises and the amount and location of space occupied may not be based on the individual's investment in the entity owning the premises. Any offering of cooperative shares or condominium units must be by offering statement filed with the Attorney General pursuant to GBL §§352-e, 352-ee, 352-eee and 352-eeee and the regulations promulgated under these sections.

DEFINITIONS

Pre-Existing Relationship: a relationship between a principal of an issuer and an investor that may be either a close family relationship or a significant business or social relationship of at least one year's duration.

Sophisticated Investor: a person having experience in real estate investments, investments in securities or other substantial business or financial experience, or a person having a personal advisor with such experience who is neither a principal of the issuer nor receiving commissions from the issuer for the sale of interests

in the issuer. An Accredited Investor as defined by SEC Regulation D, Rule 501 is assumed in every case to be a sophisticated investor.

Sufficient Means for the Investment: a combination of net worth and income of the prospective investor measured in comparison to the size of the investment (also known as the suitability standard). A person with a net worth minus home, home furnishings and automobile equal to three times the total investment plus an annual adjusted gross income equal to the total investment, or a net worth minus home, home furnishings and automobile equal to five times the total investment without regard to income, will in most instances be considered as having sufficient means for the investment. A person's net worth and income may be aggregated with that of his or her spouse. An Accredited Investor as defined by SEC Regulation D, Rule 501 is assumed in every case to have sufficient means for the investment.

APPLICATION COVER SHEET

Every request for a no-filing letter should have attached to the top of it a cover sheet (or sheets, if necessary), headed "Policy Statement 105 Request for No-Filing Letter". 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.) Applicants providing this cover sheet are not required to submit a separate form Transmittal Sheet.

ISSUER NAME:

NATURE OF SECURITY:

NAME AND ADDRESS

OF RESPONSIBLE PERSON: , Person to whom no-filing 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.

NO-FILING CATEGORY REQUESTED:

APPLICATION FORM AND CONTENTS

The application must be in the form of an affidavit signed before a notary by an officer, general partner, trustee or other principal of the issuer having knowledge of the facts contained therein, or a letter signed by an individual attorney representing the issuer or its principals, stating in full the information requested below. Statements about the sophistication and suitability of investors should be made upon reasonable belief after reasonable investigation. The affidavit or letter may contain other information at the option of the writer, but should include numbered paragraphs corresponding to the paragraphs of this Policy Statement. Note that the information required in paragraphs 5 and 6 varies depending on the no-filing category.

1. The name, address and legal nature of the issuing entity.
2. The name, title and affiliation of the individual signing the request, 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. The business of the issuer and purpose of the offering, a description of the property involved, the total dollar amount of the offering and the number of units and classes of securities to be offered.

Small Private Offering

5. List the name, address and nature and duration of the pre-existing relationship to the promoters of each of the prospective investors, including both residents and non-residents of New York. State whether any of the relationships is based on the role of any promoter as financial advisor of the investor.

6. State the suitability standards for the investment and represent that each of the listed investors is sophisticated and meets the suitability standards.

Isolated Sales

5. List the name, address and nature and duration of the pre-existing relationship to the promoters of each of the prospective New York investors. State whether any of the relationships is based on the role of any promoter as financial advisor of the investors.

6. State the suitability standards for the investment and represent that each of the listed investors is sophisticated and meets the suitability standards.

Offering to Institutional Investors

5. Represent that sales in New York will be made only to institutional investors.

Offering to a Cohesive Group

5. State the name of the group to which the offering will be made, the nature of the group, the purpose and business of the group, and the length of time the group has been in existence.

6. State that the transaction has been negotiated at arm's length with the offeror by and on behalf of members of the group.

Non-Real Estate Offering

5. Describe the business of the issuer in sufficient detail to support a conclusion that the issuer is not engaged primarily in the business of real estate as defined in GBL §352-e.

Non-Promoter Transaction

5. State that there is no separate promoter group selling interests to investors, and that no syndication fees or commissions have been or will be paid to any person or entity other than the ordinary expenses of forming a business entity, including fees paid to attorneys and accountants.

6. State that each of the investors has a pre-existing relationship with a substantial number of the other investors, and that the terms of the transaction have been negotiated by the investors as a group.

SUBMISSION

The signed and (where applicable) notarized application should be accompanied by a check payable to New York State Department of Law in the amount of \$225, together with a copy of any offering material to be used in connection with the offering. Submissions should be sent to: Real Estate Finance Bureau, Syndication Section, New York State Department of Law, 120 Broadway, New York, NY 10271.

April 2008