



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

Re: **Disclosure Requirements Regarding Building Smoking Policies Pursuant to Local Law 147**

Issued Date: **August 15, 2018**
Effective Date: **August 29, 2018**

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

1. INTRODUCTION

On August 28, 2017, New York City Mayor Bill De Blasio signed Local Law 147,¹ which goes into effect on August 28, 2018. Local Law 147 amends the Administrative Code of the City of New York (“NYC Administrative Code”) to require that all class A multiple dwellings—*i.e.*, buildings with three or more residential dwelling units—adopt a written smoking policy for the building that is disclosed to all residents and incorporated into all leases, purchase agreements, and building governing documents. Local Law 147 does not dictate the contents of a building’s smoking policy.

As such, Local Law 147 affects most condominiums and cooperative apartment corporations (“cooperatives”) located in New York City. This guidance document clarifies how Local Law 147 affects DOL disclosure requirements for sponsors of condominiums and cooperatives located in New York City with three or more residential dwelling units or apartments.² Solely for the purposes of this guidance document, the terms “condominium” and “cooperative” shall refer only to condominiums and cooperatives located in New York City with three or more residential dwelling units or apartments.

¹ NYC Int. 1585, 2017 Local Law 147.

² Please note that Local Law 147 applies to all owners of class A multiple dwellings in New York City, not only sponsors of condominiums and cooperatives. Sponsors of condominiums and cooperatives and all other owners of class A multiple dwellings in New York City are encouraged to consult with their respective attorneys to determine if they are in compliance with Local Law 147 and/or have additional obligations pursuant to Local Law 147. This guidance document pertains only to the DOL’s disclosure requirements for sponsors of condominiums and cooperatives with respect to building smoking policies.

2. LOCAL LAW 147

Pursuant to Local Law 147, the owner(s) of each building in New York City with three or more residential dwelling units must establish a written smoking policy for the building no later than August 28, 2018. In the context of condominiums or cooperatives, Local Law 147 defines “owner” as the board of managers or board of directors, respectively. NYC Administrative Code § 17-506.1.

The building’s smoking policy must address all indoor locations of the premises, including common areas and dwelling units, as well as all outdoor areas of the premises, including common courtyards, rooftops, balconies and patios and any outdoor areas connected to the dwelling units. The building’s smoking policy must apply to all its tenants,³ shareholders, and/or unit owners and their invitees as well as other persons on the premises. NYC Administrative Code § 17-506.1(a)(2).

A copy of the building’s smoking policy must be posted in a prominent location and/or provided to all tenants, shareholders, and/or unit owners. The building’s smoking policy also must be incorporated into any agreement to rent or purchase a dwelling unit, including a dwelling unit in a condominium or shares in a cooperative. Finally, the building’s smoking policy must be incorporated into the bylaws or rules of the condominium or cooperative. NYC Administrative Code §§ 17-506.1(b)(2)-(5).

Failure by owners to adopt and disclose the building’s smoking policy could result in civil penalties assessed by one of several New York City agencies. In addition, failure of any tenant-shareholder, condominium unit owner, or tenant who rents or leases a dwelling unit to another person to disclose the building’s smoking policy could result in civil penalties. NYC Administrative Code § 17-508(e).

For further information, the full text of Local Law 147 is available at the following web address:

<http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3028946&GUID=E8E7774B-D4D0-43BB-B7E9-919852FABED8&FullText=1>

3. CURRENT RESIDENTIAL SMOKING LAW IN NEW YORK CITY

The current law governing smoking in class A multiple dwellings in New York City is the Smoke-Free Air Act (“SFAA”). As of the date of this guidance document, SFAA prohibits smoking or using electronic cigarettes in common indoor areas of buildings with three or more residential dwelling units. SFAA does not prohibit smoking in private units or apartments or other private residences (except in areas where child day care centers or health care facilities operate and are open or employees are working). Owners of residential buildings are responsible for all violations reported concerning the SFAA and may incur penalties if they fail to comply with SFAA. NYC Administrative Code § 17-505.

Local Law 147 does not change the requirements of SFAA. Thus, a building cannot adopt a smoking policy permitting smoking in indoor common areas, lest the owners be in violation of SFAA.

³ “Tenant” means a tenant, tenant-shareholder of a cooperative apartment corporation, condominium unit owner, subtenant, lessee, sublessee or other person entitled to the possession or to the use or occupancy of a dwelling unit, when the term “tenant” is used in reference to a dwelling unit in a class A multiple dwelling. NYC Administrative Code § 17-502(xx).

For further information, the full text of SFAA is available at the following web address:

<http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1526765&GUID=15D04C6D-C760-40EA-88A4-2E40C0374E43&Options=ID|Text|&Search=1210-2013>

4. DOL DISCLOSURE REQUIREMENTS REGARDING THE SMOKING POLICY

An offering plan must afford potential purchasers an “adequate basis upon which to found their judgment and shall not omit any material fact.” New York General Business Law (“GBL”) § 352-e(1)(b). To provide prospective purchasers and contract vendees with “complete, current, and accurate” information regarding their purchase and be in compliance with Local Law 147, sponsors of condominiums and/or cooperatives must disclose the building’s smoking policy in the offering plan or an amendment thereto, as applicable. 13 NYCRR Parts 18.1(b)(1); 20.1(b)(1); 21.1(b)(1); and 23.1(b)(1). The DOL will deem most changes to a condominium or cooperative’s existing written smoking policy, or the adoption of a new smoking policy where there was no previously disclosed written smoking policy, to be a change in fact or circumstances that is sufficiently material to necessitate an amendment to an offering plan in which the updated or new smoking policy is disclosed. *See* 13 NYCRR Parts 18.5(a)(1), (2); 20.5(a)(1), (2); 21.5(a)(3), (4); and 23.5(a)(1), (2).

The smoking policy disclosure in the offering plan and/or amendment must address all indoor locations of the premises, including common areas and dwelling units, as well as all outdoor areas of the premises, including common courtyards, rooftops, balconies and patios and any outdoor areas connected to the dwelling units.⁴ The disclosure must be included in the Special Risks and Rights and Obligations of Unit Owners sections of the offering plan. Additionally, the building’s smoking policy must be incorporated into the interim lease (if applicable), purchase agreement, and bylaws or rules that are included in Part II of the offering plan pursuant to DOL regulations.

5. PROCEDURE FOR DISCLOSURE OF THE SMOKING POLICY IN OFFERING PLANS AND AMENDMENTS

Effective August 29, 2018, the DOL will require sponsors of the following categories of condominium and cooperative offering plans to adhere to the specific procedures for disclosing the building’s smoking policy described herein.

(a) Offering Plans Submitted to the DOL on or After August 29, 2018

Sponsors of condominium or cooperative offering plans first submitted to the DOL on or after August 29, 2018 must disclose the building’s smoking policy in the offering plan. The disclosure must be in

⁴ Where a non-sponsor-controlled board either fails to adopt a building smoking policy or adopts one that is not in compliance with Local Law 147 (*i.e.*, the building’s smoking policy cannot comply with the disclosure requirements cited in section 4 of this guidance document), the sponsor must disclose the following in the body of an amendment to the offering plan: (1) the building’s smoking policy as adopted by the non-sponsor-controlled board (or the lack of a current building smoking policy, if applicable); (2) that the building’s smoking policy may not be in compliance with Local Law 147; and (3) the building’s smoking policy may be required to be amended in the future to comply with Local Law 147.

accordance with the parameters set forth in **section 4** of this guidance document.

(b) Offering Plans the DOL Has Accepted for Submission But Not Yet Accepted for Filing as of August 29, 2018

Sponsors of condominium or cooperative offering plans that the DOL has accepted for submission but not yet accepted for filing as of August 29, 2018 must revise their pending offering plan to disclose the building's smoking policy prior to acceptance of the offering plan for filing. The disclosure must be in accordance with the parameters set forth in **section 4** of this guidance document.

(c) Offering Plans Filed with the DOL Prior to August 29, 2018

Sponsors of condominium or cooperative offering plans that the DOL has accepted for filing prior to August 29, 2018 must amend their offering plans to disclose the building's smoking policy, unless the smoking policy is already disclosed in the Special Risks and Rights and Obligations of Unit Owners sections of the offering plan and incorporated into the interim lease (if applicable), purchase agreement, and bylaws or rules. The disclosure must be in accordance with the parameters set forth in **section 4** of this guidance document and be included in the body of the amendment. The portions of the interim lease, purchase agreement, and bylaws or rules that have been updated to include the building's smoking policy must be attached as an exhibit to the amendment, as applicable (to the extent possible, such updated portions should be submitted in blacklined or redlined format).

However, sponsors of such offering plans are **not** required to immediately amend the offering plan to disclose the building's smoking policy prior to marketing or selling units or apartments (although the DOL highly encourages such sponsors to do so). Instead, the DOL will permit sponsors to disclose the building's smoking policy as detailed in **section 4** of this guidance document in the next substantive amendment⁵ to the offering plan submitted to the DOL on or after August 29, 2018. In such amendment, sponsor also must offer a right of rescission to all contract vendees whose contracts remain executory and who did not receive written notice of the building's smoking policy prior to executing the purchase agreement, unless (1) sponsor is not required to offer contract vendees a right of rescission pursuant to **section 6** of this guidance document, or (2) sponsor has already provided such contract vendees a right of rescission due to a change in the condominium or cooperative's smoking policy (as discussed in the following two paragraphs).

If the sponsor of such an offering plan chooses not to immediately amend the offering plan to disclose the building's smoking policy, sponsor must attach a rider to the interim lease and/or purchase agreement disclosing the smoking policy prior to entering into any interim lease or purchase agreement. The rider must be limited solely to disclosure of the condominium or cooperative's smoking policy. An example of a rider to an interim lease or purchase agreement is New York City's "Sample Policy of Smoking for a Residential Building," which can be accessed at the following web address:

<https://www1.nyc.gov/assets/doh/downloads/pdf/smoke/smoking-sample-policy-residential.pdf>

⁵ For the purposes of this guidance document, "substantive amendment" shall refer to all amendments submitted to the DOL that are not solely limited to price changes.

In addition, if the sponsor of such an offering plan chooses not to immediately amend the offering plan to disclose the building’s smoking policy, sponsor must timely inform all persons who were contract vendees as of August 28, 2018 of the building’s smoking policy prior to closing on the unit or apartment.⁶ Sponsor also must simultaneously offer such contract vendees a right of rescission, unless sponsor is not required to offer contract vendees a right of rescission pursuant to section 6 of this guidance document. When sponsor eventually submits to the DOL the amendment disclosing the building’s smoking policy, sponsor must (1) include the rider as a back-up document to the amendment, and (2) disclose in the attorney transmittal letter whether a right of rescission was offered to contract vendees (and if rescission was not offered to contract vendees, the attorney transmittal letter must detail why rescission was not offered).⁷ If the DOL determines the disclosure in the rider and/or the offer of rescission was inadequate, the DOL may require sponsor to provide a right of rescission to all contract vendees whose contracts remain executory regardless of whether such contract vendee was previously offered a right of rescission.

(d) Amendments to Offering Plans Accepted for Submission But Not Yet Accepted For Filing as of August 29, 2018

Sponsors of condominium or cooperative offering plans with an amendment that the DOL has accepted for submission but not yet accepted for filing as of August 29, 2018 must revise the pending amendment to disclose the building’s smoking policy prior to acceptance of the amendment for filing, unless the smoking policy is already disclosed in the Special Risks and Rights and Obligations of Unit Owners sections of the offering plan and incorporated into the interim lease (if applicable), purchase agreement, and bylaws or rules. The disclosure must be in accordance with the parameters set forth in section 4 of this guidance document and be included in the body of the amendment. The portions of the interim lease, purchase agreement, and bylaws or rules that have been updated to include the building’s smoking policy must be attached as an exhibit to the amendment, as applicable (to the extent possible, such updated portions should be submitted in blacklined or redlined format).

In such amendment, sponsor also must offer a right of rescission to all contract vendees whose contracts remain executory and who did not receive written notice of the building’s smoking policy prior to executing the purchase agreement, unless (1) sponsor is not required to offer contract vendees a right of rescission pursuant to section 6 of this guidance document, or (2) sponsor has already provided such contract vendees a right of rescission due to a change in the condominium or cooperative’s smoking policy (as discussed in section 5(c) of this guidance document).

⁶ Sponsor must also timely inform all other contract vendees of the building’s smoking policy if such contract vendees did not have prior written notice of the building’s smoking policy (e.g., sponsor enters into a purchase agreement with a purchaser on August 30, 2018, but does not provide such purchaser with written notice of the smoking policy prior to executing the interim lease and/or purchase agreement). Sponsor also must also offer such contract vendees a right of rescission, unless sponsor is not required to offer contract vendees a right of rescission pursuant to section 6 of this guidance document.

⁷ In instances in which a right of rescission was offered to purchasers in conjunction with a rider to the purchaser agreement, the DOL reserves the right to request a copy of sponsor’s rescission offer and proof of service on contract vendees.

(e) Offering Plans with an Exemption Pursuant to Cooperative Policy Statement #5

Pursuant to Cooperative Policy Statement #5 (“CPS-5”),⁸ condominiums or cooperatives with a CPS-5 exemption are required to amend the offering plan only in the scenarios delineated in CPS-5, and not all material changes to the offering plan require an amendment. Accordingly, the DOL will not deem a change to the building’s existing written smoking policy, or the adoption of a new smoking policy where there was no previously disclosed written smoking policy, to be a change necessitating the submission of an amendment to the offering plan or a new or updated CPS-5 application. Therefore, sponsors of such offering plans are not required to amend the offering plan to disclose the building’s smoking policy prior to marketing or selling units or apartments nor required to submit a new or updated CPS-5 application (unless specifically requested by the DOL). Additionally, the adoption and disclosure of an updated or new building smoking policy will not automatically terminate a sponsor’s existing CPS-5 exemption.

If the sponsor of such an offering plan chooses not to amend the offering plan to disclose the building’s smoking policy, sponsor must attach a rider to the interim lease and/or purchase agreement disclosing the smoking policy prior to executing any interim lease or purchase agreement. In so doing, the sponsor must adhere to all parameters set forth in **section 5(c)** of this guidance document, including, but not limited to, all rescission requirements. If sponsor chooses to amend the offering plan to disclose the building’s smoking policy in lieu of using a rider, sponsor must also adhere to all parameters set forth in **section 5(c)** of this guidance document, including, but not limited to, all rescission requirements.

If the DOL determines the disclosure in the rider and/or the offer of rescission was inadequate, the DOL may require sponsor to provide a right of rescission to all contract vendees whose contracts remain executory regardless of whether such contract vendee was previously offered a right of rescission. Please note that each time a condominium or cooperative with an exemption pursuant to CPS-5 updates its smoking policy, the sponsor must attach an updated rider to the interim lease and/or purchase agreement unless it amends the offering plan.

6. CHANGES TO THE SMOKING POLICY

As discussed in **section 4** of this guidance document, most changes to a condominium or cooperative’s existing written smoking policy, or the adoption of a new smoking policy where there was no previously disclosed written smoking policy, are changes in fact or circumstances that are sufficiently material to necessitate an amendment to an offering plan in which the updated or new smoking policy is disclosed. See 13 NYCRR Parts 18.5(a)(1), (2); 20.5(a)(1), (2); 21.5(a)(3), (4); and 23.5(a)(1), (2). Furthermore, a **material and adverse** change to a condominium or cooperative’s existing smoking policy, or the adoption of a new smoking policy where there was no previously disclosed written smoking policy, may trigger a right of rescission for contract vendees. See 13 NYCRR Parts 18.5(a)(5); 20.5(a)(5); 21.5(a)(5); and 23.5(a)(5).

However, the DOL will not require sponsors to offer contract vendees a right of rescission due to a

⁸ Cooperative Policy Statement #5 can be accessed at the following web address:
https://ag.ny.gov/sites/default/files/cooperative_policy_statement_5.pdf

change in the smoking policy in the following scenarios:

- The condominium or cooperative did not have a previously disclosed written smoking policy, but the newly adopted smoking policy substantially mirrors SFAA (*i.e.*, smoking is prohibited in all common areas, but not prohibited in most individual residences);
- The condominium or cooperative's current smoking policy was disclosed to the contract vendee prior to executing the purchase agreement;
- The condominium or cooperative had a previously disclosed written smoking policy and such smoking policy has changed, but the change is not material and adverse.⁹

All other **material and adverse** changes to a condominium or cooperative's smoking policy while a contract vendee's contract is still executory will require the sponsor to provide all such contract vendees with a right of rescission and a reasonable period of time that is not less than fifteen (15) days after the date of presentation to exercise the right of rescission. See 13 NYCRR Parts 18.5(a)(5); 20.5(a)(5); 21.5(a)(5); and 23.5(a)(5).

Although Local Law 147 does not require purchase agreements signed prior to August 29, 2018 to disclose the building's smoking policy, the building's smoking policy created pursuant to Local Law 147 will be binding on purchasers who signed purchase agreements prior to August 29, 2018.

Therefore, the enactment of a material and adverse change to a building's smoking policy, or the adoption of a new smoking policy pursuant to Local Law 147 where there was no previously disclosed written smoking policy, may trigger a right of rescission for any contract vendee who executed a purchase agreement prior to August 29, 2018 if such purchase agreement remains executory and the contract vendee did not receive written notice of the building's smoking policy prior to executing the purchase agreement.

7. FAILURE TO DISCLOSE OR ADEQUATELY DISCLOSE THE SMOKING POLICY OR CHANGES TO THE SMOKING POLICY

The DOL reserves the right to reject offering plans and amendments thereto that fail to comply with this guidance document and all other applicable laws and regulations. Additionally, the Attorney General has the authority under Article 23-A of the GBL 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 GBL and other applicable provisions of law, except as expressly stated herein.

⁹ Examples of changes to a building's smoking policy that the DOL would not deem to be material and adverse changes requiring rescission would be if the only change to the building's smoking policy is a change to the penalties associated with violating the smoking policy, or if smoking was previously permitted in an outdoor common area during certain hours and such hours change slightly.