



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

MEMORANDUM

**Re: Disclosure Requirements Regarding
Changes to Amendment Exhibits**

Date: August 6, 2018

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

INTRODUCTION

The DOL reviews and accepts for filing offering plans and amendments thereto that comply with all applicable laws and regulations. Section 352-e of the New York General Business Law (“GBL”) and the DOL’s governing regulations mandate that an offering plan contain detailed disclosure of the terms of a proposed transaction, as well as “such additional information that will afford potential investors, purchasers and participants an adequate basis upon which to found their judgment and shall not omit any material fact or contain any untrue statement of a material fact.” *See* GBL § 352-e(1)(b). Additionally, an offering plan must “not contain any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase sale.” *See e.g.*, 13 NYCRR § 20.1(b).

The aforementioned requirements apply to amendments to offering plans with the same force and effect as is applicable to offering plans. *See e.g.*, 13 NYCRR § 20.5(a). However, the DOL has recently encountered amendment submissions which fail to provide the requisite level of disclosure, particularly as it relates to revised or updated exhibits to the offering plan. This guidance document is intended to clarify and reiterate sponsor’s obligation to provide comprehensive and adequate disclosure in any amendment to an offering plan.

DOL AMENDMENT DISCLOSURE REQUIREMENTS

Amendment submissions must include adequate disclosure of all pertinent information as to any changes to the offering plan. This obligation extends to any changes made to or reflected in an attached exhibit to the proposed amendment. Simply attaching a revised or updated exhibit to an amendment does not rise to the level of adequate disclosure, as material changes reflected in said exhibit may not be readily discernible.

To ensure sufficient disclosure, modifications made to Schedules A or B, expert opinion letters, or any other supplementary documentation submitted to the DOL as part of the offering plan, must not be reflected only in the exhibits attached to the proposed amendment, but must also be clearly described in the body of the proposed amendment. It is not sufficient solely to state that the revised or updated document is attached as an exhibit to the proposed amendment. Rather, the body of the proposed amendment must disclose the salient change(s) reflected in any such exhibit and, if applicable, include a general explanation of the underlying root or cause of the change(s). Depending on the nature of the change(s), an expert opinion letter or other documentation substantiating the disclosures made in the proposed amendment may also be required.

Furthermore, if a proposed amendment includes a revised Schedule A reflecting any changes other than a price change, sponsor cannot submit a price change amendment in lieu of a substantive amendment.¹ Price change amendments are limited solely to price changes (*see e.g.*, 13 NYCRR § 20.5(d)). Consequently, sponsor must submit a substantive amendment complying with the disclosure requirements set forth in applicable regulations and this guidance document if there are any additional changes included in the proposed amendment. For example, if the Schedule A includes both a price change and a change in the percentage of common interest allocated to units, sponsor must submit a substantive amendment that clearly discloses both changes in the body of the amendment and includes an updated and accurate Schedule A as an exhibit to the substantive amendment.

The DOL reserves the right to reject amendment submissions 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. Failure to adequately disclose relevant changes in an amendment constitutes a violation of Article 23-A of the GBL, which could result in the Attorney General enjoining permanently Sponsor from selling or offering for sale to the public any securities issued or to be issued (*see* GBL § 353(1)).

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.

¹ 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.