



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

MEMORANDUM

Re: FAQ Regarding New Escrow Regulations

Date: 1/15/2013

Q: *My client had previously applied for CPS-5 treatment and has not amended the Plan in years. Does the Plan need to be amended, and if so, to what extent.*

A: The DOL takes the following position regarding CPS-5 exemptions: 1) for existing plans with a CPS-5 exemption, the Plan doesn't need to be amended to incorporate the new regulations. However, if the sponsor is updating the Plan, as required pursuant to CPS-5, then the sponsor should incorporate the new escrow provisions into the Plan; and 2) for new requests for a CPS-5 exemption, the sponsor must first amend the Plan to incorporate the new escrow provisions. If a sponsor applies for a CPS-5 exemption and has not updated the Plan, the application will be rejected.

Q: *Do CPS-7 applications and no-action letter applications for homeowners associations need to be amended to comply with the new escrow regulations in Part 22?*

A: The DOL takes the following position regarding CPS-7 applications and no-action letter applications for homeowners associations. For existing CPS-7 applications and no-action letter applications, the sponsor only needs to amend its application if the facts and circumstances in the application change. If there are new facts or circumstances, the sponsor should include a copy of a new escrow agreement along with the amended affidavit. For new CPS-7 applications and no-action letter applications for homeowners associations, the sponsor should include a copy of the proposed escrow agreement with the application, and the sponsor should not provide the form for dispute resolution to any prospective purchaser.

Q: *Do I need to comply with the new escrow regulations before I can file a price change amendment?*

A: No, but sponsors will be expected to comply with the new regulations when submitting a substantive amendment to the Plan, and all Plans must be updated to comply with the new escrow regulations by December 31, 2013.

Q: *Are IOLA accounts permissible under the new regulations?*

A: Yes, so long as the criteria set forth in N.Y. Judiciary Law § 497 is met. If the escrow agent plans on using an IOLA account, the Plan should state why the use of such account is permissible.

Q: *The regulations require sponsors to disclose the prevailing interest rate on the escrow account in the Plan. Because this number changes over time, should there be a blank in the Plan that is filled out at a later date?*

A: No, rather the Plan should include either the interest rate on a date certain or a range for the current market at the time the Plan is drafted. Examples of acceptable disclosure would be: “The current prevailing interest rate on segregated escrow accounts is .95% as of January 14, 2012. The actual interest rate for the purchasers deposit shall be set forth in the notice of deposit sent to purchaser by escrow agent.”

Q: *In our Plans, the escrow agent and attorney for the sponsor are the same. In practice, contracts are forwarded to the sponsor’s attorney who immediately places the purchaser’s deposit into an IOLA account while the contract is delivered to sponsor for signature. Is this acceptable under the new regulations?*

A: While the new regulations do not specifically speak to this, the DOL has no objection to such practice. The Plan should include this disclosure along with representations that once the purchase agreement is fully executed, the escrow agent will withdraw the monies from the IOLA account and deposit the funds into the segregated escrow account within 5 days, along with providing notice to purchaser of said deposit.

Q: *Some Plans contemplate and require the delivery of a W-9 or W-8 with the purchase agreement. This form is needed to place the down payment into the escrow account on behalf of the purchaser. If the form isn’t delivered with the down payment, the escrow agent would like to place the deposit into an IOLA account until the form is returned. Is this acceptable?*

A: Yes.

- Q:** *Can any of the provisions regarding escrow trust funds be incorporated by reference into either the purchase agreement or escrow agreement?*
- A:** The regulations explicitly contemplate a trilateral agreement that is signed by all parties. Incorporation by reference was not contemplated by the regulations, and therefore is unacceptable.
- Q:** *I am updating my Plan and I have purchasers in contract who have not closed. Do I need to get them to sign onto this new regime?*
- A:** No. Existing purchasers in contract will still be able to avail themselves of the escrow trust fund dispute resolution process. Furthermore, the sponsor does not need to amend any purchase agreement or escrow agreement for existing purchasers in contract. The new regulations apply only to new purchasers and are not retroactive.
- Q:** *My client wants the escrow agent to represent the sponsor in a possible action arising out of a contract dispute. The DOL models are silent on this. Is this permissible?*
- A:** Yes, so long as the relationship is disclosed in the Plan and the trilateral agreement. The DOL models do not contemplate every situation that might arise. Attorneys for sponsor need to read the actual regulations to determine what is permissible.
- Q:** *The DOL models state that a fiduciary relationship exists between the escrow agent and purchaser. This seems to be an incorrect reading of N.Y. Gen. Bus. Law § 352-h. Is this the position of the DOL?*
- A:** Yes. The DOL takes the position that the fiduciary relationship exists between the escrow agent and purchaser with regard to the deposited funds. The funds are exclusively the property of the purchaser until consummation of the transaction, and therefore the escrow agent's fiduciary duty is to the purchaser.
- Q:** *Our client would like to use the purchase agreement as the trilateral agreement. Can we include the escrow provisions in a rider to the contract, which will be signed by all parties?*
- A:** Yes, a rider to the purchase agreement is acceptable, so long as the rider is signed by all parties.