



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

Re: Guidelines for Amendment Submission¹

Date: December 7, 2017²

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

Introduction

The New York State Department of Law's Real Estate Finance Bureau ("REF") strives to process all submissions, including amendments to offering plans ("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 used to answer those inquiries. Additionally, in February 2016, REF promulgated new regulations that require the submission of digital copies of offering plans and amendments in lieu of numerous paper copies of such documents.

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, REF's regulations, or the New York Executive Law. Each of the omissions or errors creates delays in processing submissions. In the past, each omission or error was individually addressed by REF's Record Room; however, that will no longer occur. Instead, to ensure that amendment submissions are processed as expeditiously as possible, submitters of amendments should comply with the "REF Record Room Checklist for Amendment Submissions" and all applicable laws, regulations, and REF guidance documents. The "REF Record Room Checklist for Amendment Submissions" is annexed hereto as **Exhibit A**.

¹ This guidance document concerns acceptance of the amendment for *submission*, not acceptance of the amendment for filing.

² This guidance document shall supersede and replace the previous versions dated February 4, 2016 and November 18, 2014.

The following is a summary of REF's amendment submission requirements. Any submission that does not comply with the requirements described herein **will be rejected for submission and returned the submitter.**

- Amendment Filing Fee: Each amendment submission must 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 other payee will be rejected. Please note that this check cannot be combined with any other filing fees (*e.g.*, the check for the amendment filing fee must be separate from the check for the M-10 filing fee). REF cannot process checks with combined filing fees, and amendments including such checks will be rejected for submission. A digital copy of the amendment filing fee check must also be included with the amendment submission.
- 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.
- One digital copy and one paper copy of the submitter's current M-10 Broker-Dealer Registration Statement: Effective January 1, 2018, REF requires all amendment submissions, excluding price-change only amendments, to include an accurate, complete, and current broker-dealer registration statement ("current M-10") submitted on behalf of the entity or person(s) submitting the amendment. If the submitter's M-10 is current at the time of amendment submission, the amendment must include evidence of the current M-10 in the form of either (i) a copy of the current M-10, (ii) a receipt/certificate issued by REF indicating a current M-10, or (iii) an affidavit attesting to the filing date of the submitter's current M-10, if the submitter's M-10 is current at the time of amendment submission but neither the copy of the current M-10 nor the M-10 receipt/certificate is available. The model "Affidavit of Current But Unavailable M-10" is annexed hereto as **Exhibit B**.

REF reserves the right to reject for submission substantive amendments that do not include a current M-10 submitted on behalf of the entity or person(s) submitting the amendment. If the submitter's M-10 is not current at the time of amendment submission, the DOL will not accept such amendment for submission unless it includes a new M-10. The DOL strongly recommends that a new M-10 be submitted simultaneously with the amendment submission in such instances. For further information, please refer to REF's guidance document entitled "Amendment Submissions and Broker-Dealer Registration Requirements Pursuant to New York General Business Law § 359-e and Amendment Submissions," available at the following web address:

https://ag.ny.gov/sites/default/files/amendment_submissions_and_broker-dealer_registration_requirements_pursuant_to_ny_gbl_359-e.pdf

- Filing Fee for M-10 Broker-Dealer Registration Statement (if applicable): If the amendment submission includes a new M-10, it must also include a separate check for the M-10 made payable to the "New York State Department of Law" or "NYS Department of Law," dated no earlier than 90 days before submission to REF. Checks for any other payee will be rejected. Please note that this check cannot be combined with any other filing fees (*e.g.*, the check for the M-10 filing fee must be separate from the check for the amendment filing fee). REF cannot process checks with combined filing fees, and applications including such checks will be rejected for submission. A digital copy of the M-10 check must also be included with the amendment submission.

- One digital copy and one paper copy of the Notice of Appearance: Each amendment submission must include a Notice of Appearance submitted by a licensed attorney pursuant to New York Executive Law § 166. REF will not accept submissions by non-attorneys, including paralegals. REF is not authorized to complete the Notice of Appearance for applicants who fail to provide a properly executed Notice of Appearance. Submitters can access the Notice of Appearance at the following web address:
https://ag.ny.gov/sites/default/files/pdfs/bureaus/real_estate_finance/Notice%20of%20Appearance%202005.pdf
- 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 REF regulations and applicable guidance documents. REF will reject transmittal letters signed by paralegals or non-attorneys.
- One digital copy and one paper copy of the proposed amendment: The amendment must be numbered sequentially based upon the most recently filed amendment listed in the REF Database.
- One digital copy of the offering plan and all previously filed amendments for the first amendment submitted after February 1, 2016:³ 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 Certification of Sponsor and Principal(s) Concerning Digital Copies: The certification must be signed by the sponsor and at least one of its principals before a notary with an active notary license. Submitters can access a model “Certification of Sponsor and Principal(s) Concerning Digital Copies” at the following web address:
https://ag.ny.gov/pdfs/ref/2_4_16_Sample_Certification_Concerning_Digital_Copies.pdf
- Attorney Registration Status (optional, but highly recommended): REF verifies the registration status of all submitting attorneys. To expedite this step, the submitting attorney may include a paper copy of her or his registration status with the submission.

If possible, amendments should be submitted one at a time (*i.e.*, one amendment is accepted for filing before another amendment is submitted). REF recognizes that this may present issues for unaffiliated holders of unsold shares, and REF will make every effort to process multiple amendments that are submitted by more than one holder of unsold shares. However, 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 only amendment, it should be numbered in sequence.

³ 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.

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.⁴ To determine whether a submission has been received, submitters instead are encouraged to utilize the REF Database, available at the following web address:

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

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.

Rather than calling REF, submitters are advised to consider the following suggestions for further expediting and tracking the submission process:

- If delivery confirmation is desired, the submitter should utilize a form of mail delivery service that provides tracking (*e.g.*, Federal Express).
- Submitters 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 submitter does use hand-delivery, she or he should be aware that this will not expedite the process, and, if desired, she or he must provide a separate letter that is not enclosed within the package to be date-stamped at the time of drop-off. Packages cannot be opened at the point of drop-off.
- Submitters should not email electronic copies of the proposed amendment to a particular attorney before the submission has been assigned. REF has a rotation schedule, and the attorney assigned the amendment may be different from the attorney who reviewed a prior amendment. The submission will not be reviewed any more quickly and, in fact, may even be delayed.

Applicability and Scope

REF implemented the amendment submission procedures described herein on November 18, 2014 for paper submissions. On February 4, 2016, REF updated these amendment submission procedures to reflect its digital submissions requirement. REF hereby updates its amendment submission procedures to reflect its M-10 broker-dealer registration statement submission requirements, which are **effective January 1, 2018**.

REF will reject submissions that fail to comply with the Martin Act, the governing regulations, applicable guidance documents, and New York Executive Law. **Rejected submissions will be returned to the submitter 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 submitter may resubmit a new amendment that addresses the deficiencies along with a new filing fee. If a submitter

⁴ If immediate confirmation is required for due diligence purposes, submitters 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.

wishes to avoid having an amendment returned via regular mail, the submitter should include a pre-paid Fed Ex label with each submission. The submitter may also indicate in their cover letter if they wish to receive an email notification that the submission has been rejected. Please note, however, that the submitter will not be able to correct submission deficiencies via email.

REF recognizes that in the past, REF contacted submitters 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, to ensure all submissions are processed expeditiously, all submitters are encouraged to become familiar with the legal requirements governing amendment submissions and follow the checklist included herein.

EXHIBIT A

REF RECORD ROOM CHECKLIST FOR AMENDMENT SUBMISSIONS

Required:

- Check for the amendment 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 filing fee or other submissions, if applicable. A digital copy of the separate check for the M-10 filing fee or other submissions must also be included.
- One digital copy and one paper copy of the submitter's current M-10 broker-dealer registration statement and/or a receipt/certificate issued by the DOL indicating a current M-10.
 - If the submitter's M-10 is current at the time of amendment submission but neither the copy of the current M-10 nor the M-10 receipt/certificate indicating a current M-10 is available, the amendment submission must include an affidavit attesting to the filing date of the submitter's current M-10.
 - If the M-10 is not current at the time of amendment submission, the amendment submission must include one digital copy and one paper copy of an accurate, complete, and current M-10 on behalf of the entity or person(s) submitting the amendment, along with the required M-10 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 New York 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, with the sequentially 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 REF after February 1, 2016.
- One digital copy and one paper copy of the "Certification of Sponsor and Principal(s) Concerning Digital Copies"
- One digital copy and one paper copy of the completed C-11/CD-11, if applicable (for amendments including a price change).

Optional:

- Proof of the submitting 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.

EXHIBIT B

