



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

MEMORANDUM

**Re: Martin Act Disclosure Requirements When an
Attorney Is Indicted, Sued Civilly or Under
Investigation by the New York Attorney General**

December 12, 2013¹

This memorandum clarifies Martin Act and conflict of interest disclosure requirements that arise when an attorney is indicted, sued civilly, or has notice that he or she is the subject of an investigation by the New York Attorney General.

Martin Act Disclosure

An attorney who represents a sponsor of real estate securities in connection with any submission to the DOL who has been indicted, sued civilly, or has notice that he or she is under investigation should disclose this fact in such submission, as it is a material fact. If the attorney also serves as sponsor's escrow agent or closing agent, such fact must be disclosed. Moreover, if a sponsor's attorney is the subject of a DOL investigation, or any other investigation or lawsuit where the outcome could affect the attorney's ability to appear before the DOL or otherwise practice law, this material fact must also be disclosed to the purchasing public.

Disclosure of such an action or investigation should be made in the Special Risks section of the offering plan, or on the first page of an amendment, in bold type, all capital letters, of at least 12 point font, as follows, deleting where applicable:

[INSERT NAME], ESQ. IS [UNDER INVESTIGATION] [THE SUBJECT OF AN ENFORCEMENT ACTION] BY THE NEW YORK ATTORNEY GENERAL FOR POSSIBLE VIOLATIONS OF THE MARTIN ACT. [INSERT NAME] DRAFTED THIS [OFFERING PLAN] [AMENDMENT] [AND AMENDMENTS THERETO]. [INSERT NAME] IS ALSO [SPONSOR'S DESIGNATED AGENT RESPONSIBLE FOR HOLDING PURCHASERS' DOWN-PAYMENTS IN ESCROW, IN ACCORDANCE WITH GENERAL BUSINESS LAW §§ 352-e and 352-h, AND THE NEW

¹ Replaces memo dated 5/27/1993 entitled "Counsel Who Are Indicted or Sued By The Department of Law"

YORK ATTORNEY GENERAL'S REGULATIONS PROMULGATED THEREUNDER] [AND] [SPONSOR'S CLOSING ATTORNEY]. THE OUTCOME OF THIS [INVESTIGATION] [ENFORCEMENT ACTION] COULD AFFECT [INSERT NAME]'S ABILITY TO APPEAR BEFORE THE DEPARTMENT OF LAW, OR OTHERWISE PRACTICE LAW, AND THEREFORE, COULD DELAY OR HINDER THE CONSUMMATION OF TRANSACTIONS AT THIS [INSERT NAME OF CONDOMINIUM/APARTMENT CORPORATION].

The DOL reserves the right to determine the relevant disclosure based upon the circumstances of each situation. This may include allowing an attorney to add an explanation or narrative, such as a denial or disclaimer, to the disclosure.

Conflict of Interest

A conflict of interest may arise when the attorney who represents a sponsor before the DOL has been indicted, sued civilly, or has notice that he or she is the subject of an investigation by the New York Attorney General for actions relating to real estate securities. Rule 1.7(a) of the Rules of Professional Conduct defines a conflict of interest to exist where a reasonable attorney would conclude that "there is a significant risk that the attorney's professional judgment on behalf of a client will be adversely affected by the attorney's own financial business, property or other personal interests." An attorney who has been indicted, sued civilly, or has notice that he or she is the subject of an investigation by the New York Attorney General must comply with the New York Rules of Professional Conduct regarding representing a client where a conflict of interest exists. In situations where a client consents to being represented by an attorney with a disclosed conflict of interest, the DOL may require proof that the client has consented in writing, as required by Rule 1.7(b) of the Rules of Professional Conduct.