

Further Revised Proposed Revisions to 13 N.Y.C.R.R. § 21.3(b, l)

Plans submitted pursuant to this Part must comply with the format and minimal disclosure requirements set forth in subdivisions (a) through (bb) of this section in addition to the requirements of article 23-A of the General Business Law.

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(b) *Table of contents.* The format and order set forth in this subdivision must be followed in the table of contents. Include headings for the subjects not marked with an asterisk except that:

(1) a limited number of headings may be added to the plan; and

(2) headings for subjects that are marked with an asterisk may be omitted if the subject matter is not applicable to the offering. Omissions and additions should be expressly noted and explained in the transmittal letter. Alternative wording for headings to meet particular facts are set forth in parentheses.

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* * *

(l) *Procedure to purchase.* Describe the essential terms of the subscription agreement which must comply with this Part and contain the following provisions.

(1) State the amount or the percentage of the deposit.

(2) Statutory requirement. The sponsor shall comply with the escrow and trust fund requirements of [GBL sections 352-e\(2-b\)](#) and [352-h](#) and these regulations, and all funds paid by subscribers or purchasers shall be handled in accordance with these statutes and regulations.

(3) Escrow, trust fund. The following requirements shall apply to all offerings and shall be fully disclosed in all offering plans subject to this Part:

(i) Mandatory escrow agreement. ~~The account.~~ All deposits, down payments, or advances made by subscribers or purchasers prior to closing of each individual transaction, ~~whether received before or after the date of consummation of the plan, must shall~~ be placed within five business days after the agreement is signed by all necessary parties, in held pursuant to a written agreement entered into between the sponsor, the subscriber or purchaser, and the escrow agent. Said provisions may be included in a separate escrow agreement or in the subscription or purchase agreement, and are referred to in this paragraph (3) as the “escrow agreement.” The plan must set forth the material terms of the escrow agreement. The sponsor shall specify the exhibit in Part II of the plan that contains the escrow agreement. If a separate escrow agreement is used, a copy of the full agreement must be contained as a separate exhibit to the plan in Part II. Disclose, without limitation, any indemnity by the sponsor in favor of the escrow agent, provision for discharge of the escrow agent’s obligations by the sponsor upon payment of the deposit and interest in accordance with these regulations, any right of the escrow agent to represent the sponsor in any lawsuit, any compensation by the sponsor to the depository bank, any provision for payments by the sponsor under an indemnity in favor of the escrow agent and whether the sponsor will compensate the escrow agent for acting as such. The plan and escrow agreement must include language conforming to subsections (v) - (vii), below. However, the failure to include such language in the plan or escrow agreement shall not excuse the sponsor and the escrow agent from compliance with said subsections. ~~an attorney’s segregated special escrow account in a bank doing business in the State of New York which account is covered by federal bank deposit insurance. Sponsor shall include as a special risk that deposits in excess of \$100,000 will not be federally insured in excess of \$100,000. An attorney shall open and maintain such account in his or her own name, or in the name of a firm of attorneys of which he or she is a member, or in the name of the attorney or firm of attorneys by whom he or she is employed, separate from such attorney’s personal accounts or from any accounts in which assets belonging to the firm are deposited, and separate from any accounts maintained in the capacity of executor, guardian, trustee or receiver. A master escrow account with a sub-account for each subscriber or purchaser is acceptable. The name of the account, the bank, and the bank address must be stated in the plan. The word “escrow” must be included as part of the name of the account. Funds from this account may be released only by signature of the attorney who is named as escrow agent. Neither the sponsor nor any principal of the sponsor may be a signatory on the account. Funds must be placed in an interest bearing account, with all interest credited to the subscriber or purchaser, unless either the subscriber or purchaser defaults and the plan is consummated, or the sponsor elects to place the funds in a separate Interest On Lawyer’s Account (“IOLA”) for each offering plan pursuant to Judiciary Law section 497. The plan shall indicate whether the interest rate to be earned will be the prevailing rate for such accounts. State the current prevailing rate and when interest will begin to accrue. No fees of any kind may be deducted from the account principal or any interest earned thereon. Sponsor shall bear any administrative cost for maintenance of the account.~~

(ii) Payments. All funds received from subscribers or purchasers whether in the form of checks, drafts, money orders, wire transfers, or other instruments which identify the payor, shall be made payable to or endorsed by the subscriber or purchaser to the order of the attorney or law firm as escrow agent.

(iii) The escrow agent. The escrow agent must be an attorney or firm of attorneys admitted to practice in the State of New York or an attorney admitted in a foreign jurisdiction who submits to the jurisdiction of the State of New York for any cause of action arising out of the escrow provisions set forth in the escrow agreement ~~agreement or a firm of such attorneys.~~ The escrow agent shall be independent of the sponsor ~~authorized signatories on the escrow account must be a~~ Attorneys admitted or to practicing in the State of New York or admitted in a foreign jurisdiction who submit to the jurisdiction of the State of New York for any cause of action arising out of the escrow provisions set forth in the escrow agreement ~~must comply with the Appellate Division rules for the preservation of client funds of~~

~~the Judicial Department having jurisdiction over the attorney. Neither the escrow agent nor any authorized signatory on the account may be the sponsor, the selling agent, the managing agent, or a principal thereof. However, a law firm that which has a member who is a principal, shall not may be the escrow agent provided that, but one or more members of the firm who are signatories on the account are not themselves principals other than the principal may act as escrow agent. Only an attorney or a member of a firm acting as escrow agent shall be a signatory on the account and only such attorney shall be authorized to release funds. The name, address and telephone number of the escrow agent and of each attorney who is a signatory must be stated in the plan.~~

(iv) ~~The account. All deposits, down payments, or advances made by subscribers or purchasers prior to closing of each individual transaction, whether received before or after the date of consummation of the plan, must be placed within five business days after the escrow agreement is signed by all necessary parties in an attorney's segregated special escrow account in a bank doing business in the State of New York which account is covered by federal bank deposit insurance. Sponsor shall include as a special risk that deposits in excess of \$100,000 will not be federally insured in excess of \$100,000. An attorney shall open and maintain such account in his or her own name, or in the name of a firm of attorneys of which he or she is a member, or in the name of the attorney or firm of attorneys by whom he or she is employed, separate from such attorney's personal accounts or from any accounts in which assets belonging to the firm are deposited, and separate from any accounts maintained in the capacity of executor, guardian, trustee or receiver. A master escrow account with a sub- account for each subscriber or purchaser is acceptable. The name of the account, the bank, and the bank address must be stated in the plan. The word "escrow" must be included as part of the name of the account. Funds from this account may be released only by signature of the attorney who is named as escrow agent. Neither the sponsor nor any principal of the sponsor may be a signatory on the account. Funds must be placed in an interest-bearing account, with all interest credited to the subscriber or purchaser, unless either the subscriber or purchaser defaults and the plan is consummated, or the sponsor elects to place the funds in a separate Interest-On-Lawyer's-Account ("IOLA") for each plan pursuant to Judiciary Law section 497. The plan shall indicate whether the interest rate to be earned will be the prevailing rate for such accounts. State the current prevailing rate and when interest will begin to accrue. No fees of any kind may be deducted from the account principal or any interest earned thereon. Sponsor shall bear any administrative cost for maintenance of the account.~~

~~Escrow agreement. The material terms of the escrow agreement shall be disclosed in the plan and a copy of the full agreement must be contained as an exhibit to the plan in Part II. Include, without limitation, any indemnity by the sponsor in favor of the escrow agent, provision for discharge of the escrow agent's obligations by the sponsor upon payment of the deposit and interest in accordance with these regulations, any right of the escrow agent to represent the sponsor in any lawsuit, any compensation by the sponsor to the depository bank, any provision for payments by the sponsor under an indemnity in favor of the escrow agent and whether the sponsor will compensate the escrow agent for acting as such. A model form for the escrow agreement is available from the Department of Law; if such form is not used the attorney's transmittal letter should so indicate. If a different form of escrow agreement is used, all material terms of the Department of Law's model must be included in the agreement, and the agreement should be red-lined to indicate changes from or additions to the model form.~~

(v) ~~Notification to purchaser. Within 10 business days after tender of the deposit submitted with the subscription or purchase the escrow agreement is signed by all necessary parties,~~ the escrow agent shall notify the subscriber or purchaser that such funds have been deposited in the bank indicated in the offering plan, and shall provide the account number and the initial interest rate. If the subscriber or purchaser does not receive notice of such deposit within 15 business days after tender of the deposit, he or she may cancel the subscription or purchase and rescind within 90 days after tender of the deposit, ~~or may apply to the Attorney General for relief~~ Complaints concerning the failure to honor such cancellation requests may be referred to the New York State Department of Law, Real Estate Finance Bureau, 120 Broadway, 23rd Floor, New York, N.Y. 10271. Rescission may not be afforded where proof satisfactory to the Attorney General is submitted establishing that the escrowed funds were timely deposited in accordance with these regulations and requisite notice was timely mailed to the subscriber or purchaser.

(vi) ~~Escrow revisions. Before funds are transferred to a new escrow account, or if the escrow agent is replaced, the plan must be amended to provide the same full disclosure with respect to the new account, the escrow agent and the escrow agreement as was originally provided. A bond, letter of credit or other security may be substituted for the escrow account only after the Department of Law approves in writing the use of such alternate form of security, pursuant to the provisions of paragraph (1)(4) of this section.~~

(vii) Release of funds. The escrow agreement and the plan must set forth the requirements and procedures for the release of the escrowed funds. These shall include:

(a) Under no circumstances shall sponsor ~~apply for~~seek release of the escrowed funds of a defaulting subscriber or purchaser until after consummation of the plan. Consummation of the plan does not relieve the sponsor of its obligations pursuant to GBL section 352-h.

(b) The escrow agent shall ~~release~~hold the funds in escrow ~~until otherwise if so~~ directed ~~in~~:

(1) pursuant to terms and conditions set forth in the escrow agreement upon closing of the individual transaction;

(2) in a subsequent writing signed by both sponsor and subscriber or purchaser; or

~~(2) a determination of the Attorney General pursuant to subparagraph (viii) of this paragraph; or~~

(3) by a final, non-appealable order or judgment ~~or order~~ of a court ~~of competent jurisdiction; or~~

(4) by a final, non-reviewable determination of the Attorney General pursuant to subparagraph (viii) of this paragraph so long as the purchase agreement provides for dispute resolution by the Attorney General and was signed on or before March 1, 2013, or until released pursuant to clause (d) of this subparagraph.

(c) If the escrowed funds are not released pursuant to subparagraph (b), above, and the escrow agent receives a request by either party to release the funds, the escrow agent must give both parties prior written notice of not fewer than 30 days before releasing said funds. If the escrow agent has not received notice of objection to the release of the funds at the expiration of the 30 day period, the funds shall be released and the escrow agent shall provide further written notice to both parties informing them of such release. If the escrow agent receives a written notice from either party objecting to the release of the escrowed funds within said 30 day period, the escrow agent shall continue to hold said funds until otherwise directed pursuant to subparagraph (b), above. However, the escrow agent shall also have the right at any time to deposit the funds contained in the escrow account with the clerk of a court in the county in which the interest offered pursuant to the plan is located and shall give written notice to both parties of such deposit.

(ed) The sponsor shall not object to the release of the escrowed funds to:

(1) a subscriber or purchaser who timely rescinds in accordance with an offer of rescission contained in the plan or an amendment to the plan; or

(2) all subscribers or purchasers after an amendment abandoning the plan is accepted for filing by the Department of Law.

~~(d) If there is no written agreement between the parties to release the escrowed funds, the escrow agent shall not pay the funds to the sponsor until the escrow agent has given the subscriber or purchaser written notice of not fewer than 10 business days. Thereafter, the funds may be paid to the sponsor unless the subscriber or purchaser has already made application to the Department of Law pursuant to the dispute resolution provisions contained in these regulations and has so notified the escrow agent in accordance with such provisions.~~

(viii) Disputes.

(a) In the event of a dispute arising in connection with a subscription or purchase agreement providing for dispute resolution by the Attorney General that was signed on or before March 1, 2013, the sponsor shall apply and the subscriber or purchaser or the escrow agent holding the down payments in escrow may apply to the Attorney General for a determination on the disposition of the down payment and any interest earned thereon. Forms for this purpose will be available from the Department of Law. The party applying shall contemporaneously send to all other parties a copy of such application.

(b) Pending the determination of the Attorney General to grant or deny the application, the sponsor, the subscriber or

purchaser and the escrow agent shall abide by any interim directive issued by the Attorney General.

(c) If the application permitting release of funds is granted, the deposit and any interest earned thereon shall be disposed of in accordance with ~~the a final, non-reviewable~~ determination of the Attorney General, ~~subject to any court action in which preliminary relief is granted.~~

(d) The Attorney General shall act upon the application within 30 days after its submission to the Department of Law, by either making a determination or notifying the parties that an extension of time in which to do so is necessary for stated reasons.

(e) If the application seeking release of funds is denied, the escrow agent shall continue to hold the deposit and any interest earned thereon until:

(1) both the sponsor and subscriber or purchaser direct payment to a specified party in accordance with a written direction signed by both the sponsor and subscriber or purchaser; or

(2) a ~~final, non-appealable order or~~ judgment ~~or order~~ of a court ~~of competent jurisdiction~~ is served on the escrow agent; or

(3) the escrow agent deposits the disputed amount into court.

~~(f) In no event shall the escrow agent release funds in dispute, other than a payment of such funds into court, until such dispute is finally resolved either by determination of the Attorney General or by order or judgment of a court of competent jurisdiction or by written agreement of the sponsor and the subscriber or purchaser.~~

(ix) Exhibits to plan. Copies of the forms provided by the bank for opening the escrow account and the form of escrow agreement, if separate from the subscription or purchase agreement, as proposed must be included as Exhibit B-19 of the submission. Upon first deposit, a copy of the escrow agreement as executed and a copy of the bank forms as executed must be submitted as supplements to Exhibit B-19 of the submission.

(x) Records on file. The escrow agent shall maintain all records concerning the escrow account for seven years after release of the funds. Upon the dissolution of any law firm which was the escrow agent, the former partners or members of the firm shall make appropriate arrangements for the maintenance of these records by one of them or by the successor firm and shall notify the Department of Law of such transfer.

(xi) Review and audit. The Department of Law may perform random reviews and audits of any records involving escrow accounts to determine compliance with statute and regulation.

(xii) Waiver void. Any provision of any contract or agreement, whether oral or in writing, by which a subscriber or purchaser purports to waive or indemnify any obligation of the escrow agent holding trust funds is absolutely void. The provisions of this section of the regulations shall prevail over any conflicting or inconsistent provision in the offering plan or in a subscription or purchase agreement.

(xiii) Trust obligation of sponsor. Nothing contained herein shall diminish or impair the sponsor's statutory obligation to each subscriber or purchaser pursuant to [GBL section 352-h](#) to hold in trust all deposits, advances or payments made in connection with the offer until consummation of the transaction with such subscriber or purchaser. Consummation of the plan does not relieve sponsor of its obligations pursuant to [GBL section 352-h](#). Funds from the escrow account remain the property of the subscriber or purchaser until employed in connection with the consummation of the transaction. Such funds shall not be a part of the estate of the sponsor or the escrow agent upon any bankruptcy, incapacity or death.

(xiv) Transition. All funds required to be held pursuant to [GBL sections 352-e](#) (2-b) and [352-h](#) on the effective date of this section shall be transferred into escrow accounts in compliance with this regulation within 60 days thereafter.

(4) Alternatives to escrow account. A sponsor may apply to the Attorney General to use security in the form of surety

bonds or a letter of credit in lieu of escrow of such funds for use in newly constructed or gut rehabilitated developments upon showing of adequate insurance of such funds to the satisfaction of the Attorney General.

(i) Application for alternate security. Sponsor must submit an affidavit which contains full information as to the proposed usage of such funds, the sponsor's financing of construction or rehabilitation work, expected completion date, the terms and conditions of the proposed surety bonds or letter of credit, and required undertakings and covenants.

(ii) Documentation. The proposed form of surety bond or letter of credit, any underlying agreement or related agreement, and any undertaking or covenant required hereunder, shall be appended to the application and also filed as Exhibits to the plan in Exhibits Part B section 21.2(c)(3)(ii)(r)(B-19), or as exhibits to an amendment to the plan.

(iii) Change from escrow account. Where surety bonds are or a letter of credit is to be provided under an amendment to the plan calling for release of funds already deposited in escrow, the amendment shall provide for, and annex a form for, the written consent of each affected subscriber or purchaser and shall provide for continuation of escrow of funds of any subscriber or purchaser who does not execute and deliver such written consent to the sponsor.

(iv) Disclosure. If an application for alternate security is approved, the terms of such alternate security shall be disclosed in the plan or in an amendment to the plan promptly submitted.

(5) Surety bonds. A sponsor whose application to use alternate security is approved by the Attorney General, may meet its obligation to insure the availability of such funds to subscribers or purchasers by effectuating the issuance of surety bonds to such subscribers or purchasers by a licensed insurance company which agrees to act as surety for the amount of such down payments or deposits.

(i) Deposits into escrow account. All down payments and deposits, received after the Attorney General's approval of the use of surety bonds as alternate security, shall be placed, within five business days after the ~~subscription or purchase~~escrow agreement is signed by all necessary parties, in an attorney's segregated special escrow account, established pursuant to and in compliance with paragraph (3) of this subdivision. Such funds shall be released by the escrow agent to the sponsor upon receipt by the escrow agent of a copy of the surety bond issued to the subscriber or purchaser whose funds are being released.

(ii) Payments. All funds received from subscribers or purchasers whether in the form of checks, drafts, money orders, wire transfers, or other instruments which identify the payor, shall be made payable to or endorsed by the subscriber or purchaser to the order of the attorney or law firm as escrow agent.

(iii) Requirements to act as surety. The surety company must be licensed to write insurance in the State of New York by the New York State Department of Insurance, whether or not the property which is the subject of the plan is located in the State of New York unless the law of the State where the property is located requires otherwise. If the property is located outside New York State and the sponsor claims that the law of such state conflicts and is controlling, the sponsor's application must specify the conflicting law. In order for the application for alternate security to be approved by the Attorney General, the applicant must show that the surety company with which the sponsor proposes to contract has a current rating for debt securities no lower than the third highest grade conferred by at least two of the national reporting services regularly evaluating insurance companies.

(iv) Agreement between sponsor and surety. The plan must fully disclose the material terms of the agreement between the insurance company as surety and the sponsor, including the premium to be paid by the sponsor, any agreement by which sponsor provides collateral to secure its obligations to the surety and any agreement by the sponsor indemnifying the surety. The agreement must provide that the surety will abide by directives in conformity with these regulations.

(v) Provisions of the bond. The surety bond must specify the name and address of the sponsor as principal; the name and address of the surety company to which claims for payment may be made; provision for the name and address of the subscriber or purchaser as obligee on the bond; provision for the amount of the down payment or deposit secured and the rate of interest, if any, to accrue on such funds; the term of the bond, and, if the bond is for a finite period, a guarantee by the surety that it will pay the amount secured to the subscriber-obligee prior to expiration of the bond or a guarantee by the sponsor that the bond will be renewed before expiration.

(vi) Term and continuation. Each surety bond and any accompanying agreement shall provide that it will continue in effect or that it will be renewed periodically until consummation and closing of the sale of the respective shares the down payment for which is secured by such surety bond or until the secured funds of a subscriber or purchaser have been returned in full, or until the funds secured by the surety bond have been placed in the escrow account pursuant to paragraph (7) of this subdivision or until there is an undisputed subscriber or purchaser default or a final, non-reviewable determination by the Attorney General or final, non-appealable order or judgment of a court ~~of competent jurisdiction~~ that the subscriber or purchaser has defaulted and that the sponsor is entitled to the secured funds.

(vii) Delivery of the surety bond. The sponsor shall cause the surety to mail or personally deliver the surety bond to the subscriber-obligee before the funds are released to the sponsor from the escrow account. The sponsor, the escrow agent and the surety company shall each retain a copy of the surety bond.

(viii) Invoking the bond. The subscriber-obligee shall have the right to demand payment of the amount secured by the surety bond directly from the surety, without first requesting payment from the sponsor. The surety shall be obligated to pay the amount secured by the bond to the subscriber-obligee without the consent or despite the objection of the sponsor, upon the following events or circumstances:

(a) timely rescission of a subscription or purchase agreement by a subscriber or purchaser pursuant to an offer of rescission contained in the plan or an amendment to the plan;

(b) acceptance for filing by the Department of Law of an amendment abandoning the plan;

(c) pursuant to terms and conditions set forth in the escrow agreement, upon closing of the individual transaction;

(d) in a subsequent writing signed by both sponsor and subscriber or purchaser;

(e) by a final, non-appealable order or judgment of a court; or

(f) for subscription or purchase agreements providing for dispute resolution by the Attorney General that were signed on or before March 1, 2013, by final, non-reviewable determinations by the Attorney General pursuant to subparagraph (x) of this paragraph that rescission or the return of funds is required;

~~(g)~~ failure by the sponsor to obtain a commitment by the surety company to renew the surety bond 60 days prior to its expiration; or

(h) direction by the sponsor upon request by the subscriber or purchaser.

(ix) Failure by subscriber-obligee or purchaser-obligee to produce a copy of the bond. A subscriber's or purchaser's inability to produce a copy of the surety bond shall not be a basis for the surety to reject the subscriber's or purchaser's claim. The surety shall retain a copy of the bond and shall pay the secured funds to the subscriber-obligee or purchaser-obligee without a copy of the bond as long as the subscriber or purchaser is able to provide proof of identity as the obligee on the bond.

(x) Disputes.

(a) In the event of a dispute arising in connection with a subscription or purchase agreement providing for dispute resolution by the Attorney General that was signed on or before March 1, 2013, the sponsor shall apply and the subscriber or purchaser or the surety issuing the bond may apply to the Attorney General for a determination on the disposition of the down payment secured by the bond and any interest earned thereon. Forms for this purpose will be available from the Department of Law. The party applying shall contemporaneously send to all other parties a copy of such application.

(b) Pending the determination of the Attorney General to grant or deny the application, the sponsor, the subscriber or purchaser and the surety shall abide by any interim directive issued by the Attorney General.

(c) If the Attorney General determines:

(1) that the subscriber or purchaser is entitled to the disputed funds secured by the surety bond, the Attorney General shall direct that the surety ~~shall~~ pay the funds to the subscriber or purchaser ~~in accordance with the determination of the Attorney General~~; or

(2) that the subscriber or purchaser is not entitled to the disputed funds secured by the surety bond, ~~such determination may provide~~ the Attorney General shall direct either that the surety bond shall be continued in effect or that the surety bond ~~may shall~~ be cancelled.

(d) The Attorney General shall act upon the application within 30 days after its submission to the Department of Law, by either making a determination or notifying the parties that an extension of time in which to do so is necessary for stated reasons.

(e) In no event shall the funds secured by the bond be paid to the subscriber or purchaser nor shall the surety bond be discharged until any dispute is finally resolved either by written agreement of the parties directing payment of the funds or discharge of the surety bond, or, for purchase agreements providing for dispute resolution by the Attorney General that were signed on or before March 1, 2013, by a final-non-reviewable determination of the Attorney General or by a final, non-appealable order or judgment of a court ~~of competent jurisdiction~~.

(6) Letters of credit. A sponsor whose application to use alternate security is approved by the Attorney General, may meet its obligation to insure the availability of such funds to subscribers or purchasers by effectuating the issuance of a letter of credit for the benefit of the subscribers or purchasers by an issuer qualifying hereunder.

(i) Amount. The amount of the letter of credit shall be at least 125 percent of the aggregate of all subscription deposits or down payments or payments expected to be received from subscribers or purchasers, and not retained in escrow, during such period of time as the letter of credit will be needed, as estimated by the sponsor in the application to the Department of Law. The amount of the letter of credit may be reduced or increased as warranted by circumstances and pursuant to a filed amendment to the ~~offering~~ plan.

(ii) Irrevocability. The letter of credit must be irrevocable during the stated term and any renewal term.

(iii) Beneficiary. The beneficiary must be an attorney, or firm of attorneys, acting as or qualified under paragraph (3)(iii) of this subdivision to act as escrow agent under the plan, who shall act as a fiduciary for the benefit of subscribers and purchasers under the plan.

(iv) Authority to draw. The letter of credit must provide that the beneficiary shall have sole power to draw upon the letter of credit without the consent or despite the objection of the sponsor or of any provider of underlying credit, at such times or upon such events as are set forth in subparagraph (ix) of this paragraph.

(v) Issuer. The issuer must be a bank authorized to act as a commercial bank or savings institution under supervision of the New York State Banking Department or a federally supervised banking institution located in the State of New York, unless the property is located in another state and the letter of credit is issued by a bank located within such state. In order for the application for alternate security to be approved by the Attorney General the applicant must show that the issuer bank has surplus funds and net worth of at least ten times the amount of the letter of credit, and must have a current rating with respect to its debt securities that is within "investment grade" by one of the generally accepted national reporting services regularly rating the debt securities of banking institutions and that the provisions of the letter of credit include the right of the beneficiary to draw down the letter of credit in conformity with these regulations.

(vi) Term and continuation. The letter of credit and related agreement and any accompanying undertaking shall provide that it will continue in effect or that it shall be periodically renewed until consummation and closings of sales of all shares referred to in the application for alternate security pursuant to paragraph (4)(i) of this subdivision or until the covered funds of subscribers and purchasers have been returned to them in full.

(vii) Undertaking. If the letter of credit will expire prior to the latest date of closings of sales of all such shares, provision

for renewal of the letter of credit without loss of irrevocability and without any change of terms shall be afforded by:

(a) an “evergreen” or automatic renewal clause, if obtainable; and

(b) the irrevocable undertaking and covenant of the sponsor and by any other provider of underlying credit to provide successive renewals thereof until consummation and closings of sales of all shares or until the covered funds of subscribers and purchasers have been returned in full.

(viii) Operative provisions. Upon approval of a sponsor's application for use of a letter of credit as alternate security:

(a) Deposits into escrow account. All down payments and deposits received shall be placed, within five business days after the ~~subscription or purchase~~escrow agreement is signed by all necessary parties, in an attorney's segregated special escrow account established pursuant to and in compliance with paragraph (3) of this subdivision. The escrow agent shall release such funds to the sponsor provided that the escrow agent has documentation showing that the letter of credit or a renewal or replacement letter of credit has been issued and is in effect. Such escrow agent shall no longer release funds from escrow if the escrow agent receives notice or information warranting draw down of the letter of credit under paragraph (6)(ix) of this subdivision.

(b) Payments. All funds received from subscribers or purchasers whether in the form of checks, drafts, money orders, wire transfers, or other instruments which identify the payor, shall be made payable to or endorsed by the subscriber or purchaser to the order of the attorney or law firm as escrow agent.

(ix) Right to draw upon letter of credit. The escrow agent as the beneficiary of the letter of credit, acting as a fiduciary for the benefit of subscribers and purchasers under the plan whose funds were released from escrow by reason of the grant of sponsor's application, shall have the duty and the right to draw upon and collect the proceeds of the letter of credit, 10 business days after notice to the sponsor and sponsor's failure or refusal to restore such funds to the escrow agent, without the consent or despite the objection of the sponsor or the provider of the credit, upon the following events or circumstances:

(a) timely rescission of a subscription or purchase agreement by a subscriber or purchaser pursuant to an offer of rescission contained in the plan or an amendment to the plan;

(b) acceptance for filing by the Department of Law of an amendment abandoning the plan;

(c) pursuant to terms and conditions set forth in the escrow agreement upon closing of title to the unit;

(d) in a subsequent writing signed by both sponsor and subscriber or purchaser;

(e) by a final, non-appealable order or judgment of a court;

(f) for purchase agreements providing for dispute resolution by the Attorney General that were signed on or before March 1, 2013, by a final, non-reviewable determination by the Attorney General pursuant to subparagraph (x) of this paragraph mandating that rescission or the return of funds is required;

~~(g)~~ failure by the sponsor to obtain a renewal or replacement letter of credit no later than 60 days prior to the expiration of the existing letter of credit;

~~(h)~~ direction by the sponsor upon request of the subscriber or purchaser; or

~~(i)~~ notice of impending cancellation of the letter of credit has been given or received, or the issuer has filed a bankruptcy or insolvency petition or has been taken over by a Federal or state authority, and no proper replacement of the letter of credit has been furnished although continuation of the same in effect is required under paragraph (4)(i) of this subdivision or subparagraph (vi) of this paragraph.

(x) Disputes.

(a) In the event of a dispute arising in connection with a subscription or purchase agreement providing for dispute resolution by the Attorney General that was signed on or before March 1, 2013, the sponsor shall apply, and the subscriber or purchaser, the escrow agent or the bank issuing the letter of credit may apply to the Attorney General for a determination on the disposition of funds secured by the letter of credit, the deposit and any interest earned thereon. Forms for this purpose shall be available from the Department of Law. The party making such application shall contemporaneously send to the other three parties a copy of such application.

(b) Pending the determination of the Attorney General to grant or deny the application, the sponsor, the subscriber or purchaser, the escrow agent and the bank shall abide by any interim directive issued by the Attorney General.

(c) If the Attorney General determines:

(1) that the subscriber or purchaser is entitled to the disputed funds secured by the letter of credit, the Attorney General shall direct that the issuer of the letter of credit pay the funds to the subscriber or purchaser; or

(2) that the subscriber or purchaser is not entitled to the disputed funds secured by the letter of credit, the Attorney General shall direct either that the letter of credit shall be continued in effect or that the letter of credit shall be cancelled.

~~If the application permitting release of funds is granted, such funds secured by the letter of credit, and any interest earned thereon shall be disposed of in accordance with the determination of the Attorney General, subject to any court action in which preliminary relief is granted.~~

(d) The Attorney General shall act upon the application within 30 days after its submission to the Department of Law, by either making a determination or notifying the parties that an extension of time in which to do so is necessary for stated reasons.

(e) In no event shall the disputed funds secured by the letter of credit be paid to the subscriber or purchaser nor shall the letter of credit be terminated until any dispute is finally resolved either by written agreement of the parties directing payment of the funds, or by a final, non-appealable order or judgment of a court, or, for subscription or purchase agreements providing for dispute resolution by the Attorney General that were signed on or before March 1, 2013, a final, non-reviewable determination of the Attorney General ~~or by order or judgment of a court of competent jurisdiction.~~

(7) Change to escrow account. Where alternate security as provided under a filed offering plan is no longer needed by the sponsor, or new or additional alternate security cannot be obtained by a sponsor or its successor, sponsor shall submit an amendment for filing which provides that any future subscription or purchase deposits or down payments shall be held in the escrow account in accordance with paragraph (3) of this subdivision. Such amendment shall not affect the sponsor's obligation to account for funds previously released to the sponsor unless the funds representing all such deposits or down payments are restored to the escrow account.

(8) Highlight as a special risk any provision allowing sums in excess of 10 percent of the cash purchase price to be retained as liquidated damages other than the actual cost incurred for any special work ordered by the purchaser. Highlight as a special risk if sponsor may seek specific performance.

(9) State that the balance of the purchase price is to be paid after written demand is made and specify the minimum number of days to make the payment after sending the demand notice. If payment is due in advance of the closing, state the maximum number of days between the scheduled closing date and the date payment is due.

(10) Any "time is of the essence" provision concerning purchaser's obligations must be explained in easily understandable terms and be highlighted as a special risk.

(11) Purchasers must be given written notice of the closing date, of their obligation to pay the balance of the purchase price, and of their right to inspect the unit and property a specified number of days in advance of the closing date.

(12) Sponsor must make a written demand for payment 30 days before a purchaser is declared to be in default.

(13) Disclose whether the risk of loss from fire or other casualty remains with the sponsor unless and until either a purchaser is given the right to possession of a unit pursuant to a written agreement with the sponsor or legal title to the property has been conveyed to the apartment corporation. Highlight as a special risk and explain the need for insurance if the risk of loss passes to the purchaser before closing except where the purchaser is given the right to possession prior to closing.

(14) Purchasers must be afforded either (i) not less than three days to review the offering plan and all filed amendments prior to executing a subscription agreement; or (ii) not less than seven days after delivering an executed subscription agreement together with the required deposit to rescind the subscription agreement and have the full deposit refunded promptly.

(15) A complete copy of the subscription agreement must be inserted in the plan.

(16) Highlight as a special risk if purchaser's obligation to purchase is not contingent on obtaining financing. If purchaser's obligations are contingent upon obtaining a commitment for financing or actually obtaining financing, the details must be fully disclosed and explained. State the time the purchaser has to notify sponsor of inability to obtain financing. Include the purchaser's time to obtain financing or a commitment and the risk, if any, that the commitment may expire or that the terms of the commitment may change prior to actual closing and the purchaser's obligations in either event.

(17) The plan and subscription agreement must provide that any conflict between the plan and the subscription agreement will be resolved in favor of the plan.

(18) Within a specified number of days after the purchaser delivers an executed subscription agreement together with the required deposit, the sponsor must either accept the subscription agreement and return a fully executed counterpart to the purchaser or reject the subscription agreement and refund the full deposit previously tendered.

(19) The subscription agreement may not contain, or be modified to contain, a provision waiving purchaser's rights or abrogating sponsor's obligations under the offering plan or under article 23-A of the General Business Law.