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REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

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**Re: Guidelines for Advertising Out-of-State  
Real Estate Securities Offerings on  
An Internet Web Site or App**

**August 5, 2015<sup>1</sup>**

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This memorandum is a guidance document pursuant to State Administrative Procedure Act Section 102(14).

**I. Introduction**

This memorandum clarifies when an offer, advertisement, or sale of an out-of-state condominium, cooperative, homeowners' association, senior residential community or timeshare ("real estate securities") on an Internet Web site or App<sup>2</sup> will not be considered as taking place "in the state of New York" thereby exempting the sponsor from registering as a broker-dealer and filing an offering plan with the New York State Department of Law ("DOL") pursuant to the New York General Business Law ("GBL") Article 23-A, the "Martin Act."

**II. Statutory and Regulatory Requirements for Registering and Filing Any Out-of-State Public Offering or Sale**

Prior to engaging in any public offering or sale of real estate securities in the State of New York, a sponsor must comply with registration and filing requirements of the Martin Act even if the property is located outside of New York.

*A. Broker-Dealer Registration*

The Martin Act requires a sponsor to first register as a broker-dealer with the DOL prior to engaging in the public offering or sale of real estate securities within or from the State of New York:

It shall be unlawful for any dealer, broker or salesman to sell or offer for sale to or purchaser or offer to purchase from the public within or from this state, any securities issued or to be issued,

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<sup>1</sup> This guidance document supersedes "Guidelines for Offers to Sell or Purchase Real Estate Securities on the Internet" dated April 15, 1997.

<sup>2</sup> An application is typically a small, specialized program downloaded onto mobile devices.

unless and until such dealer, broker or salesman shall have filed with the department of law a registration statement as provided herein.

GBL § 359-e(3).

*B. Martin Act Filing Requirements*

The Martin Act also requires sponsors to file an offering plan or prospectus prior to engaging in the offer, advertisement, or sale of any real estate securities in the State of New York:

Unless otherwise provided by regulation issued by the attorney general, the offering statement or statements or prospectus required in subdivision one of this section shall be filed with the department of law at its office in the city of New York, prior to the public offering of the security involved. No offer, advertisement, or sale of such securities shall be made *in or from the state of New York* until the attorney general has issued to the issuer or other offerer a letter stating that the offering has been filed.

GBL § 352-e(2)(emphasis added).

*C. Governing Regulations and Disclosure Requirements*

The Attorney General's regulations governing disclosure requirements specifically states that a sponsor must first file an offering plan with the DOL if sponsor markets to purchasers in or from the State of New York even if the property is located out-of-state: "A sponsor of a condominium located outside of New York State which makes or takes part in a public offering or sale in or from the State of New York of condominium units must file an offering plan with the Department of Law." 13 NYCRR § 20.1(j)<sup>3</sup>; *In re Cenvill Communities, Inc.*, 82 Misc. 2d 418 (N.Y. Sup. Ct. 1975)("the Martin Act provisions apply equally to property located within and without the State provided it is offered for sale in New York"); *Ledgebrook Corp. v. Lefkowitz*, 77 Misc. 2d 867 (N.Y. Sup. Ct. 1974)(Connecticut based sponsors placing advertisements in New York newspapers for the sale of the condominium units located in Connecticut are subject to the Martin Act registration requirements).

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<sup>3</sup> For purposes of this memo, only the regulations governing condominiums pursuant to Part 20 of Title 13 of the New York Codes, Rules and Regulations are cited. Nonetheless, this guidance document applies equally to cooperatives, homeowners' associations, senior residential communities and timeshares.

### III. Internet Web Sites and Apps for Out-of-State Offerings

For some entities, it can be difficult to control which state’s residents are able to access any particular Internet Web site or App. Accordingly, an out-of-state sponsor that publishes content about a real estate securities offering on an Internet Web site or App will not be deemed as engaging in an offering or sale of real estate securities “in the state of New York” and will not be required to comply with the Martin Act’s registration and filing requirements *if the sponsor does not target New York State residents and implements additional safeguards as set forth in the “Guidance” section below.*

### IV. Guidance

An out-of-state sponsor will not be required to register with the DOL as a broker-dealer and file an offering plan or prospectus with the DOL prior to engaging in the offering and sale of out-of-state real estate securities on an Internet Web site or App where:

- A. Sponsor takes adequate measures to prevent New York state residents from accessing the advertisement such as requiring the purchaser to input his state of residence or zip code prior to access the Web site or App and prior to the sale;

or

- B. Sponsor discloses the following on the offering Web site or App in a manner that is “clear and conspicuous”<sup>4</sup>:
  - (i) the sponsor and principal(s) taking part in the public offering or sale are not incorporated in, located in, or resident in the State of New York;
  - (ii) the offering is neither made in the State of New York nor made to the residents of the State of New York;

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<sup>4</sup> “Clear and conspicuous” as used herein means that such disclosure (i) is readily noticeable and understandable (ii) is in readily understandable language and syntax and (iii) is in a type size, font, appearance and location sufficiently noticeable for a consumer to read and comprehend it, in a print that contrasts with the background against which it appears is in a manner that clearly calls attention to the language by either being (A) in larger type than the surrounding text, (B) in contrasting type, font or color to the surrounding text of the same size, and/or (C) is set off from the surrounding text of the same size by symbols or other marks, and (D) is in contrasting type, font or color to the surrounding text of the same size. Such disclosure must be presented in direct proximity to the information it modifies in a manner that is readily noticeable and understandable. The disclosure shall be placed in locations on the same webpage or App as the offer, term or description of property to which it relates where it will be sufficiently prominent and readily seen, shall be labeled and presented in such a way to indicate its importance and relevance, be in text that can be easily read and understood by the reader, and be placed on the webpage or screen in a position in direct proximity to the offer, term or description of property. Further, a disclosure is not clear and conspicuous if, among other things, it is obscured by the background against which it appears or there are other distracting elements, or the net impression of the statement, disclosure, or other information is inconsistent with, contrary to, or in mitigation of the disclosure itself.

- (iii) the offering is not directed to any person or entity in the State of New York by, or on behalf of, the offeror or anyone acting with the offeror's knowledge; and
- (iv) no offering or purchase or sale of the security shall take place as a result of this offering, until all registration and filing requirements under the Martin Act and the Attorney General's regulations are complied with; a written exemption is obtained pursuant to an application is granted pursuant to and in accordance with Cooperative Policy Statements #1 or #7; or a "No-Action" request is granted.

For existing offerings of out-of-state real estate securities, sponsors will have 30 days from the date of this memorandum to update their Internet Web sites or Apps to comply.

**V. No Waiver of Attorney General's Enforcement Rights**

Nothing contained herein shall be construed to be a waiver of limitation on the Attorney General's authority to take enforcement action for violations of Article 23-A of the General Business Law or any other applicable provisions of law.