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STATE OF NEW YORK

DEPARTMENT OF LAW

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REAL ESTATE FINANCE BUREAU

MEMORANDUM

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**Re: Applications for Closing Waivers Prior to the Filing of an Amendment Naming a Successor Attorney or Escrow Agent, in Lieu of Harold L. Gruber, Esq. and Harold L. Gruber, P.C. December 20, 2013**

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On December 4, 2013, the Supreme Court, New York County preliminarily restrained Harold L. Gruber, Esq. and Harold L. Gruber, P.C. (together, the “Gruber Parties”) from engaging in any act directly or indirectly related to the offer or sale of securities, which includes representing sponsors before the Department of Law (“DOL”). Given this court order, the Gruber Parties cannot act as a sponsor’s offering plan attorney, closing attorney or escrow agent. Therefore, any sponsor engaged in the offer or sale of condominium units using an offering plan that currently discloses either of the Gruber Parties as sponsor’s attorney or escrow agent must immediately submit an amendment to update the plan.

Notwithstanding the foregoing, the DOL is aware that certain purchasers in contract may need to close title, to complete the transaction, prior to or during such time it will take to amend an offering plan to reflect the required changes set forth above – something the DOL anticipates should take no more than 90 days from the date of this memorandum. Therefore, for the next 90 days, provided that a sponsor has submitted to the DOL a draft amendment that discloses the required changes, a purchaser may request from the DOL a letter stating that the DOL will take no action with respect to a particular unit closing prior to the DOL’s acceptance of the amendment for filing. This memorandum sets forth eligibility requirements, and the form in which sponsors’ amendments and purchasers’ requests should be made to the DOL. A model amendment that sets forth the language to include in the required amendment accompanies this memorandum.

**Guidelines for Applying for a Closing Waiver**

- I. A real estate securities transaction is ineligible for a closing waiver if:
  - a. The term of the offering has expired;

- b. The sponsor's broker-dealer registration statement has expired and has not yet been renewed;
- c. The sponsor has not yet complied with the revised escrow trust fund regulations for existing offering plans;<sup>1</sup> or
- d. The sponsor, a principal of the sponsor, or the condominium property is the subject of a pending DOL investigation, including a stale sales investigation.

II. Prior to any purchaser submitting to the DOL an application for a closing waiver, the sponsor must submit to the DOL three copies of an amendment that discloses the Gruber Parties will no longer serve as sponsor's attorney, or agent, and identifies a successor attorney or agent, including:

- a. Revised disclosure concerning the identity of parties section, to disclose the change in sponsor's offering plan attorney, closing attorney or escrow agent, as applicable;
- b. Revised disclosure concerning unit closing costs and adjustments section, to disclose a change in fees payable to sponsor's closing attorney, if applicable; and
- c. Revised disclosure concerning the procedure to purchase section, to disclose a change in sponsor's nominee for escrow agent, if applicable.

III. The amendment must be accompanied by:

- a. A transmittal letter that conforms with the requirements of 13 NYCRR Part 20 or Part 23.
- b. A signed affirmation by the attorney who drafted the amendment that states:

[Insert name], hereby affirms, pursuant to CPLR 2106, as follows:

- 1. I am the attorney who prepared the attached amendment and any exhibits based on information from the sponsor. This submission discloses a substitution of sponsor's attorney or agent.
- 2. Sponsor filed a broker-dealer registration statement on [date], less than four years ago.
- 3. The offering plan for [insert name of condo], identified by the Department of Law as Plan File No. [insert file no.], was accepted for filing by the Department of Law on [date].
- 4. Sponsor complied with the Department of Law's revised escrow fund regulations in [the offering plan] [the # amendment to the offering plan], that was accepted for filing by the Department of Law on [date].

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<sup>1</sup> See Real Estate Finance Bureau Memoranda available at <http://www.ag.ny.gov/real-estate-finance-bureau/revised-escrow-regulations> (last visited Dec. 20, 2013).

5. On information and belief, there is no investigation pending by the DOL against the sponsor, any of the sponsor's principals, or the property being offered.
6. I have no actual knowledge of any violation of the Martin Act or the regulations promulgated by the Department of Law by any person involved in sponsor's condominium offering, nor do I have any actual knowledge of any misrepresentation or omission of material fact in the offering plan, or in sponsor's broker-dealer registration statement.
7. Sponsor's successor closing attorney is [successor attorney's name]. All future closings will occur at [successor attorney's law firm] located at [address].
8. [If applicable:] Sponsor has nominated [law firm], with an office at [address], as the successor escrow agent. The successor attorney shall cause the trilateral escrow agreement to be updated to disclose the new escrow agent, with consent of the parties thereto.

Dated: [insert date]  
[insert city, state]

\_\_\_\_\_  
[insert name]

- c. A check for the filing fee, pursuant to General Business Law § 352-e(7), payable to the New York State Department of Law, stapled or clipped to the transmittal letter.
- d. One copy of the offering plan including all filed amendments, unless a CPS-9 exemption has previously been granted by the DOL.
- e. One Notice of Appearance.
- f. One Amendment Filing Form (form CD-2), signed by a principal of the sponsor.

IV. To apply for a closing waiver, a purchaser must submit an affidavit that states:

- a. the identity of condominium unit for which the purchaser seeks a closing waiver;
- b. the application for a closing waiver is made at the purchaser's request;
- c. the purchaser has been provided with a copy of the draft amendment submitted to the DOL, and understands that such draft amendment has not yet been accepted by the DOL for filing;
- d. the reason why the purchaser needs to close prior to the DOL's acceptance of the amendment for filing; and

- e. the purchaser is represented by legal counsel and has been advised of any risks associated with closing prior to the DOL's acceptance of the amendment to the plan for filing.<sup>2</sup>
- V. A closing may **not** occur until a DOL attorney issues a no action letter with respect to the particular condominium transaction.

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<sup>2</sup> Purchasers may utilize the DOL, Real Estate Finance Bureau's database, *available at* [offeringplan.datasearch.ag.ny.gov/REF/welcome.jsp](http://offeringplan.datasearch.ag.ny.gov/REF/welcome.jsp), to determine the identity of the attorney who is reviewing sponsor's amendment, and should direct the application for a closing waiver to such attorney.