

POLICY STATEMENT 100

EXEMPTION APPLICATIONS UNDER SECTIONS 352-g(2) AND 359-f(2) OF THE GENERAL BUSINESS LAW FOR REAL ESTATE SYNDICATION OFFERINGS MADE PURSUANT TO RULES 504 AND 505 OF REGULATION D UNDER THE FEDERAL SECURITIES ACT OF 1933

This Policy Statement sets out the requirements for filing an exemption application with the New York State Department of Law (“Department of Law”) for real estate syndications made pursuant to Regulation D, Rules 504 and 505, adopted by the United States Securities and Exchange Commission (the “SEC”) pursuant to the Securities Act of 1933.

The New York General Business Law (the “GBL”) provides that the Attorney General may exempt from the filing requirement of GBL § 352-e securities that “have received an exemption” from registration with the SEC. GBL § 352-g(2). Accordingly, the Department of Law will accept applications pursuant to GBL § 352-g(2) for exemption from the requirement to submit an offering statement or prospectus pursuant to GBL § 352-e(1) on the grounds that the securities to be offered is exempt from registration with the SEC through compliance with Regulation D, Rules 504 or 505. The Department of Law will also consider an exemption from registration as a broker-dealer under GBL § 359-f(2)(d) if there will be no advertising or general solicitation by the issuer entity. But, if an issuer wishes to advertise or make general solicitations in New York, then it must submit a full filing pursuant to Part 16 of Title 13 NYCRR, regardless of whether the filing has been registered in another state. An issuer may continue to apply for exemption under GBL § 352-g(1) if the offering will be “made to persons not exceeding forty in number.”

GENERAL CONSIDERATIONS

This Policy Statement cannot be used: (1) for offerings exempt from federal registration pursuant to Rule 506 of Regulation D, for which a notification filing (Form 99) must be submitted; and (2) to offer cooperative interests in realty.

An issuer applying for an exemption must wait until it is granted before commencing any firm offering. However, preliminary offering literature may be used after the submission of the Application, provided that such literature states clearly that it does not constitute an offer to sell, nor is a solicitation of an offer to buy, securities. If such preliminary offering literature is to be used, the issuer must state in its submission letter or other supporting letter or affidavit that it will:

- (i) conform to such limitations of use of the preliminary literature;
- (ii) not allow any person to hold or receive any subscription payment, deposit or commitment until the Application is granted; and
- (iii) not make any firm offer unless and until the Application is granted.

The cover page of preliminary offering literature must bear the following legend in upper-case letters [adding the bracketed phrases if relevant]:

“THIS IS NOT A FIRM OFFER [IN THE STATE OF NEW YORK]. NO FIRM OFFER MAY BE MADE [IN NEW YORK], AND NO SUBSCRIPTION PAYMENT, DEPOSIT, OR SUBSCRIPTION COMMITMENT MAY BE RECEIVED UNLESS AN EXEMPTION IS GRANTED FROM THE FILING OF AN OFFERING STATEMENT OR PROSPECTUS UNDER NEW YORK LAW. THIS PRELIMINARY OFFERING LITERATURE IS SUBJECT TO REVISION AND AMENDMENT.”

COVER SHEET

Every application shall attach a cover sheet (or sheets, if necessary) titled “Policy Statement 100 Application.” The headings below should be typed flush left in the following order, using the words set out below. The relevant information should be provided for each line and not by cross-reference to the application, exhibits or other materials.

NAME OF ISSUER:

TYPE OF SECURITY:

OFFERING AMOUNT:

NAME AND ADDRESS OF RESPONSIBLE PERSON: [Person to whom the exemption letter is to be addressed]

NAME AND TELEPHONE NUMBER OF PERSON TO CONTACT:

PRINCIPALS: Should include names only of persons listed in paragraph 4 of the application.

CONTENTS OF APPLICATION

The application must be in the form of an affidavit sworn to or otherwise verified before a notary by an officer, general partner, managing member, trustee, or other principal of the issuer (“issuer” or “applicant”) who is a natural person and who has knowledge of the facts contained therein, stating in full the following information and representations:

Issuer Information

1. The name, address, and legal nature (corporation, trust, limited partnership, limited liability company, etc.) of the issuer entity.
2. The name, residence address and affiliation of the individual affiant, his or her business or profession, and his or her business address.
3. A representation that the affiant is duly authorized to submit the application on behalf of the issuer and, if applicable, the sponsor or other entities in a Multi-Tier Structure. For purposes of this Policy Statement, “Multi-Tier Structure” means an organizational structure in which one or more operating entities or an intermediate entity receives the net proceeds of an offering, all or portions of which are held out in the offering literature as intended to provide capital funds to other operating entities for such purposes as may be described in the literature, such as acquisition of property investments.
4. The names and residence addresses of all officers, directors, general partners, managing members, trustees, and other principals (including sponsors and promoters), together with a representation that there are no other principals or controlling persons of the issuer, and that attached to and made part of the application are forms RI-1 for each of the principals mentioned.
5. A statement whether or not, to the best of affiant’s knowledge after reasonable investigation, the issuer, sponsor, or any officer, director, trustee, general partner, managing member, or other principal was adjudged a bankrupt, made an assignment for benefit of creditors, or was an officer, director, trustee, general partner, managing member, or other principal of any entity reorganized in bankruptcy, adjudged a bankrupt or which made an assignment for benefit of creditors. If so, specify details.
6. A statement whether or not, to the best of affiant’s knowledge after reasonable investigation, any officer, director, trustee, general partner, managing member, or other principal ever was convicted of any crime excluding minor traffic violations, or the subject of any injunction, cease and desist order, suspension or restraining order, revocation of a license to practice a trade, occupation or profession, or denial of an application to renew same, stipulation or consent to desist from any act or practice, including an assurance of discontinuance accepted by the Attorney General, or any other disciplinary action by any court or administrative agency, or whether any such action or proceeding is presently pending. If so, specify details.
7. List any offering of securities, or transaction involving securities, in the last six (6) years by any person or entity affiliated with the applicant, including the sponsor and/or the principals of the applicant, stating the approximate date, the issuer, any amounts raised in the offering, and whether a filing under GBL § 352-e or § 359-e or an exemption application under § 352-g or § 359-f(2) was submitted in respect thereof.

8. Disclose whether there are any lawsuits, administrative proceedings, arbitrations or other proceedings, the outcome of which may materially affect the offering or the issuer's capacity to perform its obligations under the offering.

Transaction Information

9. The total dollar amount of the offering, including any optional units and any shares underlying warrants, the number of units to be offered, and the minimum dollar amount of the interest that will be offered to any one person.

10. The purpose of the offering (*e.g.*, to purchase one or more noted properties at a stated location); the issuer's intended activities; the primary properties to be acquired; and whether any of these will be acquired from the sponsor or any related entity, affiliate, controlling person, or principal of the applicant.

11. The uses of proceeds of the offering, in reasonable detail, in narrative or tabular form. Highlight any proceeds to be paid to the sponsor or any affiliated entity, or to any principal. If the offering has minimum and maximum total amounts, state the uses of proceeds in both cases, and the priorities if the total raised is between the minimum and the maximum. Do not use a cross-reference to appended offering literature as the response.

12. (a) Whether the offering relates to any offers of cooperative interest in realty, including shares in cooperatives; condominium units; interests in homeowners associations; fractional interests in timeshares, or senior communities; describing the type of cooperative interests, or options to purchase same.

(b) State that no cooperative interests in realty will be allocated, transferred or sold to an investor unless an offering plan is submitted to the Department of Law, and is accepted for filing.

Qualification Under SEC Regulation D

13. That the application is made pursuant to GBL § 352-g(2) on the grounds that the offering and sale of the securities will be, through compliance with Regulation D, Rule 504 or Rule 505, exempt from registration with the Securities and Exchange Commission as an offering within §3(b) of the Securities Act of 1933, specifying which Rule applies.

14. That the affiant, on behalf of the issuer, acknowledges that he or she is familiar with SEC Regulation D and represents that the affiant and the issuer in good faith intend to make the offering in accordance with all of the conditions and limitations of SEC Regulation D and will use their best efforts to do so.

15. That the applicant has consulted an attorney regarding the conditions and limitations of SEC Regulation D, Rule 504 or Rule 505, and its availability to this specific offering, stating the name, address, and telephone number of the attorney consulted.

16. That if SEC Regulation D is, or becomes, unavailable for any reason, such as any failure to comply with its limitations and conditions: (i) all offers and sales of the securities will

immediately cease; (ii) all monies collected prior to cessation of the offering will be retained in trust for the benefit of investors; (iii) applicant will submit an Amendment to the Application, stating the facts and showing any other basis for exemption under GBL § 352-g, and (iv) if such an Amendment is not submitted, or if a GBL § 352-g exemption is not granted on such Amendment, all funds collected will be returned to the investors. Nothing in this paragraph shall be construed as authorizing the release of funds before consummation of the transaction, as governed by GBL § 352-h.

Offering Materials and Offering Method

17. Disclose and append any prospectus, offering memorandum or other offering literature to be used, as well as the organizational agreement, subscription agreement, and any other documents to be executed by investors or which define or limit the investors' rights.

18. Specify the Suitability Standard for the offering and state that all of the offerees will have sufficient means for the investment. For purposes of this Policy Statement, "Suitability Standard" means a standard of comparison of the investor's net worth and gross income against the investment amount, which may be considered sufficient by a prudent investor to afford taking the risks of the investment and putting the invested amount into non-liquid form. An accredited investor, as defined by SEC Regulation D, Rule 501, is in all cases deemed to meet the suitability standard.

19. Identify any broker, dealer, agent, or other intermediary through whom the offering will be made.

Representations

20. A representation that the offering will comply with the requirements of 13 NYCRR Part 16.

21. A representation that the proceeds of the offering will be received and held in trust for the benefit of the investors and will be retained in trust after closing to be used only for the purposes set forth in paragraph 11, above. State the name and location of the bank(s) where the proceeds will be deposited in trust.

22. A representation that upon request by the Department of Law, a true copy of each material document, including but not limited to property purchase contracts, options, financing commitments, loan agreements, deeds, mortgages, development and/or construction contracts, subscription agreements, investors' questionnaires, bank deposit records, escrow records, and all offering materials, will be furnished to the Department of Law within ten (10) days after the request is made.

23. (a) A representation that beginning after the closing of the offering, all investors will be provided annually with the issuer's financial statements, including a balance sheet and the related statements of income and retained earnings and changes in financial position, accompanied by a report of an independent public accountant stating that an audit of such financial statements has been made in accordance with generally accepted auditing standards, stating the opinion of the accountant in respect of the financial statements and the accounting principles and practices reflected therein and as to the consistency of the application of the accounting principles, and identifying any matters to which the accountant takes exception and stating, to the extent practicable, the effect of each such exception on such financial statements. (The representation may state that financials need not be audited unless requested by investors holding interests of 30% or more in the issuer, if this is disclosed in the offering material. If the records are kept on a cash basis and the accountant can opine that the financial statements fairly present the financial position, the changes therein and the results of operations on a cash basis consistently applied, then the financial statement can be on a cash basis.)

(b) A representation that any offering memorandum or prospectus used in connection with this offering will set forth the above representation to provide annual certified financial statements and, if an offering memorandum containing the above representation is not used, that the statement which paragraph 25, below requires each investor to sign will contain the above representation to provide audited financial statements.

24. A representation that the issuer will maintain the books and records of the issuer, and of each associated entity if in a Multi-Tier Structure, at its principal place of business, and to make the books and records thereof available at the main offices thereof, upon reasonable notice, for inspection by any of the issuer's investors at reasonable hours during the business day.

25. A representation that all purchasers who are offered these securities within or from the State of New York will be required to sign and submit the following statement BEFORE ANY MONIES ARE RECEIVED FROM THEM:

"I understand that this offering of interests in _____ has not been reviewed by the Attorney General of the State of New York because of the issuer's representations that this is intended to be an offering pursuant to SEC Regulation D, and that if all of the conditions and limitations of SEC Regulation D are not complied with, the offering will be resubmitted to the Attorney General for amended exemption. I understand that any offering literature used in connection with this offering has not been pre-filed with the Attorney General and has not been reviewed by the Attorney General. This interest is being purchased for my own account for investment, and not for distribution or resale to others. I agree that I will not sell or otherwise transfer these securities unless they are registered under the Federal Securities Act of 1933 or unless an exemption from such registration is available."

“I understand that all documents, records and books pertaining to this investment have been made available for inspection by my attorney or my accountant or my offeree representative and myself, and that the books and records of the issuer will be available upon reasonable notice for inspection by investors at reasonable hours at its principal place of business.” (If a private offering memorandum or prospectus containing the financial statements representation in the above paragraph 23 is not used, add that representation to this statement.)

26. A representation that any offering memorandum or prospectus used in connection with this offering will contain:

(a) the following legend on its cover page:

“THIS OFFERING MEMORANDUM (OR PROSPECTUS) HAS NOT BEEN REVIEWED BY THE ATTORNEY GENERAL PRIOR TO ITS ISSUANCE AND USE. THE ATTORNEY GENERAL OF THE STATE OF NEW YORK HAS NOT PASSED ON OR ENDORSED THE MERITS OF THIS OFFERING. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.”

(b) The trust fund representation in the above paragraph 25; and

(c) The following representation: “This offering memorandum (or prospectus) does not contain an untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they are made, not misleading. It contains a fair summary of the material terms of documents purported to be summarized herein.”

27. A representation that three copies of any prospectus or other offering literature and all amendments thereto used in connection with the offering shall be filed with the Department of Law within 10 days after the time such material is first used to offer these securities to any person within or from the State of New York.

28. A representation that, if not included with the application, a copy of the issuer’s Form D will be submitted to the Department of Law within five (5) days of filing with the SEC.

29. A representation that within 30 days after the closing of this offering the applicant will submit to the Department of Law a copy of a letter from its counsel, addressed to the issuer, containing an opinion of counsel that the offering is exempt from the registration requirements of the Securities Act of 1933 under § 3(b) thereof, pursuant to Rule 504 or Rule 505 as applicable, which opinion shall state the basis on which it is rendered.

30. A representation that upon the completion of the offering the issuer will file with the Department of Law copies of its final or amended organizational documents, and, if requested, the names and addresses of participants in the offering and the extent of their participation: or, if terminated without completion, a Report on Form RS-3 with schedules attached as required, including an affidavit that all funds received in the offering to the investors have been returned.

31. A representation that the submission includes a letter signed by each of the principals whose names appear in paragraph 4, listing all real estate syndications the person has taken part in during the last six (6) years that have any New York residents as investors and stating whether filings were made pursuant to § 352-e and § 359-e or exemptions were obtained pursuant to § 352-g and § 359-f(2) as to each such syndication having New York resident investors. If such person has not taken part in any such syndication in the last six (6) years, so state.

Concluding Statements

32. A statement whether any previous application or filing under § 352-e, § 352-g, § 359-e or § 359-f of the General Business Law has been made by the applicant, its sponsor, its principals, or any affiliate regarding the property involved in this application. If so, specify the date of each prior application, the name of the issuer and the disposition of the application.

33. Conclude with “WHEREFORE, it is respectfully requested that the offering for sale of the securities of [insert name of the issuer] be exempted under GBL §§ 352-g(2) and 359-f(2)(d) from the filing provisions of GBL §§ 352-e and 359-e(2,3,4,5 and 6).” Note that the GBL § 359-f(2)(d) exemption is not available if the issuer itself will engage in advertising or other general solicitation as may be the case in a Rule 504 offering.

The application must be sworn to or verified by the affiant.

DESIGNATION FOR SERVICE OF PROCESS

Out-of-state issuers must file a Designation of the Secretary of State as Agent for Service of Process. State in the covering letter whether such has been or is being filed, and submit a copy of the Designation with the application.

FEES

The current fee for the § 352-g exemption is two-tenths of one percent of the amount of the offering of securities; however, the minimum fee is \$750 and the maximum fee is \$30,000. This fee is based on the aggregate offering amount without apportionment for the amount to be offered within New York. The fee for the § 359-f (2) exemption is currently \$300. Checks

should be made payable to the New York State Department of Law. These fees will not be refunded after the exemptions are granted.

No fee is required to amend an application for exemption previously granted, unless the total dollar amount of the offering is increased and the maximum of \$30,000 has not already been met.

BROKER-DEALER REQUIREMENTS

The exemption granted pursuant to § 359-f(2) from the provisions of § 359-e does not exempt the issuer, the underwriter or any broker-dealer from the provisions of § 359-e(8). Therefore, the “further state notice” required by GBL § 359-e(8) must be filed with the New York State Department of State in Albany, New York. Disclose in the cover letter whether such has been or is being filed.

If exemption is not sought under GBL § 359-f (2) from the provisions of GBL § 359-e, attention is directed to the issuer’s dealer registration requirements under GBL § 359-e. This requires the issuer to file a Broker-Dealer (Issuer) Statement, Form M-11, with the Department of Law (with fee paid by separate check), and to file separately a State Notice and Further State Notice with the New York State Department of State, Albany, New York.

SUBMISSION

Submissions must include at least two copies of the draft prospectus or offering memorandum and copies of any financial projections to be used in the offering. Applicants should be prepared to provide the Department of Law with copies of the partnership or operating agreement, recent appraisal reports, rental histories and financial statements for the property upon request where available, and are invited to submit such material with the application. Applications with supporting documents and fees should be sent to: New York State Department of Law, Real Estate Finance Bureau, Syndication Section, 28 Liberty Street, New York, NY, 10005.

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