



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

MEMORANDUM

**Re: Procedure for Submitting a Price
Change Only Amendment for
Consideration Prior to Acceptance
of a Pending Substantive Amendment**

Dated: October 15, 2019¹

The New York State Department of Law (“DOL”) publishes this memorandum as a guidance document pursuant to New York State Administrative Procedure Act § 102(14).

I. INTRODUCTION

The DOL’s Real Estate Finance Bureau’s Record Room is charged with the responsibility of processing all incoming offering plan and amendment submissions to the DOL. Often, sponsors² submit price change only amendments while a substantive amendment³ is pending (*i.e.*, the substantive amendment has been submitted to, but not yet accepted for filing by, the DOL). This guidance document details the procedures for submitting price change only amendments prior to acceptance of a pending substantive amendment. The submission procedures detailed herein are effective as of the date of this guidance document.⁴

¹ This guidance document supersedes and replaces the previous versions of this guidance document dated March 4, 2019, February 4, 2016, and September 16, 2015. This guidance document was updated on October 15, 2019 to incorporate the digital Certified Public Copy (“CPC”) requirements set forth in the DOL’s guidance document entitled “*Standards for Submission of Certified Public Copies of Offering Plans and Amendments*,” dated October 15, 2019 and effective November 15, 2019. All other substantive provisions of this document remain the same.

² “Sponsor” means sponsor, successor sponsor, or holder of unsold shares wherever that term is used in this document.

³ For the purposes of this guidance document, “substantive amendment” shall refer to all amendments submitted to the DOL that are not solely limited to price changes.

⁴ Although the submission procedures described herein are effective as of the date of this guidance document, the DOL’s requirement that a CPC and updated RS-2 be included with amendment submissions is not effective until November 15, 2019.

II. PROCEDURE FOR SUBMITTING A PRICE CHANGE ONLY AMENDMENT FOR CONSIDERATION PRIOR TO ACCEPTANCE OF A PENDING SUBSTANTIVE AMENDMENT

Price change only amendments that are submitted to the DOL while a substantive amendment is pending must comply with the Martin Act, the DOL's governing regulations, applicable DOL guidance documents, and New York Executive Law. Materials, including documentation and checks, from the pending substantive amendment cannot be used or duplicated for submission of the price change only amendment.

In addition, sponsors must include the following when submitting a price change only amendment while a substantive amendment is pending:

- (1) One digital copy⁵ and one paper copy⁶ of the transmittal letter, signed by the individual attorney who prepared the price change only amendment that:
 - (i) states the date the offering plan was filed and the DOL file number;
 - (ii) identifies the subject price change only amendment in numerical order (for example, if the pending substantive amendment was identified as the first amendment, the subject price change only amendment should be identified as the second amendment);
 - (iii) states that there is a prior substantive amendment that has been submitted to but not yet filed by the DOL, and identifies the amendment number and submission date of the pending substantive amendment;
 - (iv) identifies, if possible, the attorney in the DOL who is currently reviewing the pending substantive amendment; and
 - (v) identifies in the subject line of the letter that this is a price change only amendment by including the following language in bold-faced font: **NON-SEQUENTIAL PRICE CHANGE ONLY AMENDMENT**.

- (2) One digital copy and one paper copy of the proposed price change only amendment that:
 - (i) states in the body of the amendment that there is a prior substantive amendment that has been submitted to but not yet filed by the DOL; and
 - (ii) identifies the amendment number and submission date of the pending substantive amendment.

⁵ A "digital copy" is a copy that is identical in content to a paper copy except that it is recorded electronically in read-only .pdf format or other electronic format that the DOL determines to be acceptable. For further information regarding the DOL's digital submission requirements, please refer to the DOL's guidance document entitled "*Digital Submission Requirements for Cooperative Interests in Realty*."

⁶ A "paper copy" is a copy that is printed on paper.

- (3) One Certified Public Copy (“CPC”) of the price change only amendment, **effective November 15, 2019**;
- (4) One digital copy and one paper copy of the completed C-11/CD-11 Price Change Form;
- (5) One digital copy and one paper copy of the completed Form RS-2 (“RS-2”),⁷ which must be signed by the sponsor, successor sponsor, or holder of unsold shares and at least one principal of sponsor, successor sponsor, or holder of unsold shares before a notary with an active notary license;
- (6) A filing fee check (certified or uncertified) for \$225 made payable to “New York State Department of Law” or “NYS Department of Law,” dated no earlier than 90 days before the amendment’s submission to the DOL. Checks for any other payee will be rejected. The check should be stapled or clipped to the transmittal letter, and a digital copy of the check must also be included with the amendment submission;⁸
- (7) One digital copy and one paper copy of the Notice of Appearance pursuant to Executive Law § 166, signed by the individual attorney who prepared the amendment; and
- (8) One paper copy of the attorney registration status for the individual attorney that prepared the amendment and signed the Notice of Appearance (optional, but highly recommended).

Please note that previously issued versions of this guidance document required that price change only amendments submitted prior to acceptance of a pending substantive amendment be numbered prior to the pending substantive amendment and include in the submission replacement cover pages for the pending substantive amendment. The DOL no longer requires that price change only amendments submitted prior to acceptance of a pending substantive amendment be numbered prior to the pending substantive amendment, and thus will no longer require that such submissions include replacement cover pages for the pending substantive amendment. **Because price change only amendments are deemed accepted for filing upon submission, this change will result in the DOL sometimes accepting higher-numbered amendments for filing prior to accepting lower-numbered amendments for filing.**

⁷ Please note that the RS-2 has been updated to include additional certifications. The updated RS-2 is effective on November 15, 2019 and will be required for all amendments submitted to REF on or after November 15, 2019. For further information, please see REF’s guidance document entitled “Digital Submission Requirements for Cooperative Interests in Realty.” The updated RS-2 is annexed to that guidance document. Please be advised, however, that the DOL reserves the right to make changes to the RS-2 in the future without updating that guidance document. Accordingly, after November 15, 2019, sponsors should use the version of the RS-2 posted on the REF website.

⁸ If the maximum filing fee has not been paid by sponsor, then a separate check must be submitted to the DOL to cover any increase in the offering price. Sponsor must continue to pay filing fees until the maximum amount of \$30,000 has been paid at a rate of 4/10 of 1% of the total offering price. Such checks must be (1) made payable to “New York State Department of Law” or “NYS Department of Law;” (2) dated no earlier than 90 days before the amendment’s submission to the DOL; and (3) stapled or clipped to the transmittal letter. A digital copy of such checks must also be included with the amendment submission.

III. FAILURE TO COMPLY WITH THE DOL'S PROCEDURE FOR SUBMITTING A PRICE CHANGE ONLY AMENDMENT FOR CONSIDERATION PRIOR TO ACCEPTANCE OF A PENDING SUBSTANTIVE AMENDMENT

If a price change only amendment submitted prior to acceptance of a pending substantive amendment fails to comply with this guidance document and all other applicable laws and regulations, the DOL will not accept the amendment for submission until all deficiencies are cured.⁹ The DOL will notify sponsor's attorney of the deficiencies, at which point sponsor will have the opportunity to remedy any deficiencies. The submission date of the price change only amendment will be the date it was initially received by the DOL, unless returned to sponsor's attorney for failure to remedy any deficiencies of which it was notified.

The Attorney General has the authority under Article 23-A of the New York General Business Law to investigate and strictly enforce violations of the statutes and regulations governing disclosure requirements. Nothing contained in this guidance document shall be construed to be a waiver of or a limitation on the Attorney General's authority to take enforcement action pursuant to Article 23-A of the New York General Business Law and other applicable provisions of law, except as expressly stated herein.

⁹ Please note that the DOL will deem deficient price change only amendments submitted pursuant to previously issued versions of this guidance document (*i.e.*, newly submitted price change only amendments numbered prior to a pending substantive amendment) and will not accept such amendments for submission until the deficiencies are cured (*i.e.*, until the newly submitted price change only amendment is numbered after the pending substantive amendment).