STATE OF NEW YORK **DEPARTMENT OF LAW**

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

Re: Disclaimers of Liability In Offering Plans[1] **November 16, 2015**

The 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 has observed that sponsors of offerings of cooperative interests in realty, most frequently timeshare offerings, include disclaimers of liability in their offering plans and/or purchase agreements for representations made in marketing materials as well as oral misrepresentations made by salespersons. Article 23-A of N.Y. Gen. Bus. Law ("GBL"), the "Martin Act," and applicable governing regulations expressly prohibit sponsors from disclaiming liability in the offering plan and/or purchase agreement for any representations that are contrary to the offering plan. This memorandum sets forth the DOL's position on the use of such disclaimers.

II. STATUTORY AND REGULATORY AUTHORITY PROHIBITING DISCLAIMERS OF LIABILITY

A. The Martin Act

The Martin Act prohibits fraud in the offering and sale of real estate securities. GBL § 352-e *et seq*. Accordingly, sponsors are prohibited from making or taking part in any public offering or sale of real estate securities unless it is based solely on the information set forth in the offering plan:

No offering or sale whatever of securities described in subdivision one of this

[1] For the sake of simplicity, this memorandum references disclaimers of liability in timeshare offering plans. However, the legal analysis contained herein applies to all offerings of cooperative interests of realty.

> section shall be made except on the basis of information, statements, literature or representations constituting the offering statement of statements or prospectus described in such subdivision, and no information, statements, literature or representations shall be used in the offering or sale of securities described in such subdivision unless it is first so filed and the prospective purchaser furnished with true copies thereof.

GBL § 352-e(5).

In addition, all advertising must be consistent with the representations set forth in the offering plan: "All advertisements in connection with an offering of securities described in this subdivision shall be consistent with the representations and information required to be set forth … in [GBL § 352-e(1)(b)]." GBL § 352-e(1)(c); *see also People v. Federated Radio Corp.*, 244 N.Y. 33 (1926) (fraud under the Martin Act includes untrue and misleading advertising).

B. The Part 24 Timeshare Regulations

The 13 N.Y.C.R.R. Part 24 ("Part 24 Regulations") further prohibit sponsors from disclaiming their obligations under the Martin Act by inserting such provisions in the offering plan, as follows:

> The requirements set forth in section 24.3 of this Part apply to the offering plan generally, and shall not be negated or contradicted … by provisions purporting to discharge liability…. Disclaimer provisions … may not be included unless permitted in this Part.

13 N.Y.C.R.R. § 24.1(l).[2]

Also, "the subscription agreement and plan may not contain, or be modified to contain, a provision waiving purchaser's rights or abrogating sponsor's obligations under article 23-A of the General Business Law." 13 N.Y.C.R.R. § 24.3(m)(17).[3]

III. EXAMPLES OF IMPERMISSIBLE DISCLAIMERS OF LIABILITY

Sponsors have used general and specific disclaimers, both of which are prohibited. With a general disclaimer, sponsors attempt to discharge liability for all of the statements made by a salesperson. An example of a general disclaimer is as follows:

> PURCHASER HAS BEEN GIVEN THE OPPORTUNITY TO REVIEW THE PURCHASE AGREEMENT AND HAS NOT RELIED ON ANY INFORMATION PROVIDED TO OR

[2] For other cooperative interests in realty, see 13 N.Y.C.R.R. §§ 18.1(q), 20.1(m), 21.1(g), 22.1(n), 23.1(p), and 25.1(l).

[3] For other cooperative interests in realty, see 13 N.Y.C.R.R. §§ 18.3(p)(14), 20.3(o)(21), 21.3(l)(19), 22.3(k)(18), 23.3(q)(13), and 25.3(l)(19).

PROMISED TO PURCHASER EXCEPT WHAT IS WRITTEN IN THE PURCHASE AGREEMENT.

With a specific disclaimer, sponsors attempt to discharge liability for specific representations such as statements referring to exchange reservations, hotel use rights, rental, resale, or buyback provisions, to name a few. An example of a specific disclaimer is as follows:

> PURCHASER ACKNOWLEDGES THAT HE OR SHE HAS NOT RELIED UPON AND CANNOT RELY UPON ANY OTHER ORAL STATEMENTS OR WRITTEN REPRESENTATIONS BY ANY SALESPERSON OR SELLER REGARDING AVAILABILITY OF EXCHANGE RESERVATIONS, HOTEL USE RIGHTS, OR RENTAL, RESALE, OR BUYBACK OF THE PURCHASED VACATION OWNERSHIP INTEREST.

Because all advertising, including oral representations, must be consistent with the representations in the offering plan, sponsors cannot avoid liability for different representations or false representations through a disclaimer. These types of general and specific disclaimers violate the Martin Act and the applicable governing regulations and shall not be included in any offering plan, including the purchase agreement.

IV. CONCLUSION

The Martin Act and applicable governing regulations expressly prohibit sponsors from including disclaimers of liability in the offering plan, including purchase agreements, and prohibit any advertising that is inconsistent with the offering plan. Accordingly, the DOL will refuse to accept for filing any offering plan or amendment that contains provisions purporting to disclaim the sponsor's liability. For any existing offering plans that include such disclaimers, sponsors have 30 days from the date of this memorandum to update their offering plans to remove such disclaimers.