



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

**Re: Requirements for Effectiveness
Amendments in Occupied Conversion
Plans under GBL § 352-eeee**

Date: April 13, 2015¹

Introduction:

By statute, there are specific requirements that must be met to declare an occupied conversion plan effective, and historically, the Department of Law has conducted investigations to ensure compliance therewith. This memo is a guidance document intended to assist sponsors in complying with the Martin Act and governing regulations for purposes of declaring an occupied conversion plan effective.

Statutory and Regulatory Requirement for Declaring the Offering Plan Effective:

In New York City, a sponsor of a non-eviction conversion plan may not declare it effective until purchase agreements have been executed and delivered for at least fifteen percent of all dwelling units in the building or group of buildings or development by bona fide tenants in occupancy or bona fide purchasers who represent that they intend that they or one or more members of their immediate family intend to occupy the unit when it becomes vacant.² See GBL § 352-eeee(1)(b).

¹ This memo replaces the Department of Law memo entitled “Distribution of Tenant and Non-Tenant Questionnaires and Effectiveness Amendment” dated April 5, 2013.

² For purposes of declaring the plan effective, the base units shall be determined at the time the plan is accepted for filing by the Department of Law, unless sponsor updates the plan to reduce base units due to unit combinations prior to or at the time of submission of the effectiveness amendment. The sponsor may further reduce the base units when declaring the plan effective if a purchaser buys more than one contiguous unit for purposes of unit combinations. This information must be provided in the posting notices required by GBL § 352-eeee(2)(c)(vii) as well as the effectiveness amendment.

The regulations include additional requirements for declaring the plan effective, including an affidavit from sponsor setting forth, *inter alia*, the following information:

- (i) the date the plan was accepted for filing by the Department of Law;
- (ii) the presentation date of the plan;
- (iii) a representation that all statements required pursuant to *G.B.L.*, §§ 352-*eee* or 352-*eeee* have been posted;
- (iv) a representation that all purchasers who are counted for purposes of declaring the plan effective:
 - (a) are bona fide purchasers; and
 - (b) are not purchasing as an accommodation to, or for the account or benefit of the sponsor or principals of sponsor; and
 - (c) have duly executed purchase agreements and have paid the full down payment as required in the procedure to purchase section of the offering plan.

13 N.Y.C.R.R. § 23.5(e)(6).

In addition to the sponsor affidavit set forth above, non-tenant purchasers must also provide an affidavit that sets forth the following representations:

- (a) a representation by the purchaser that he or she or one or more members of his or her immediate family intends to occupy the dwelling unit when it becomes vacant; and
- (b) a statement identifying the individuals who intend to occupy the dwelling unit when it becomes vacant and their relationship to the purchaser; and
- (c) a listing by the purchasers of any other purchase agreements in which they made similar representations of intent to occupy.

13 N.Y.C.R.R. § 23.5(e)(7)(iii).

The regulations also limit the use of purchase agreements by tenant purchasers that permit assignment for effectiveness purposes. In such cases where assignments are permissible, such purchase agreements may be used for purposes of declaring the plan effective so long as the following conditions are met:

- (i) a purchase agreement shall be signed by the tenant and the full downpayment paid by the tenant to the sponsor; and
- (ii) the assignee shall provide an affidavit stating that the assignee was not procured by sponsor, the selling agent, or the managing agent, and that the assignee intends that he or she or a specified member of his or her immediate family will personally occupy the dwelling unit. The form assignee affidavit shall appear in Part II of the plan.

13 N.Y.C.R.R. § 23.3(r)(2).³

Department of Law Investigation of Bona Fide Purchasers

In the past, the Department of Law required that all bona fide purchasers used to declare the plan effective complete detailed questionnaires to verify their status as bona fide, as well as the non-tenant purchaser affidavit referenced above. Such investigations have taken months to complete, and only infrequently revealed fraud on the part of a bona fide purchaser.

Given the limited history of fraud and the lengthy review process for occupied conversion plans, the Department of Law has decided it is in the best interest of all parties to expedite the review process for effectiveness amendments so that purchasers may take ownership and occupancy of their homes more quickly. The Department of Law will no longer require a questionnaire from purchasers used to meet the effectiveness threshold. Instead, the Department of Law will accept an affidavit from each bona fide purchaser used to declare the plan effective. This affidavit will be required of both tenant and non-tenant purchasers, and will be in addition to the non-tenant purchaser affidavit required by 13 N.Y.C.R.R. § 23.5(e)(7)(iii).⁴ The affidavit must be in the form attached hereto, and must be included as a backup exhibit to the effectiveness amendment (*i.e. not a part of the amendment*). Although the Department of Law reserves all rights to conduct in depth review of status of bona fide purchasers used to declare the plan effective, it is expected that this new affidavit process will significantly reduce the review time for effectiveness amendments for occupied conversion plans.

³ Notwithstanding the foregoing, assignments that purport to allow a purchaser to transfer their rights and obligations in the purchase agreement to an ownership entity such as an LLC or trust for estate planning or privacy purposes are permissible. In cases where such an assignment exists, the purchaser should include the information in the affidavit.

⁴ For purposes of complying with 13 N.Y.C.R.R. § 23.5(e)(7) and this memo, sponsors may either combine the requirements into one affidavit or provide the representations separately.

The Department of Law will continue to require along with the submission of the effectiveness amendment an Excel spreadsheet that contains the following information:

- Unit Number
- Name of Purchaser(s)
- Status of Purchaser(s) (*i.e.* Tenant or Non-Tenant)
- Purchaser(s) Phone Number(s)
- Purchaser(s) E-mail
- Name of Law Firm Representing Purchaser(s)
- Name of Individual Attorney Representing Purchaser(s)
- Attorney's Mailing Address
- Attorney's Phone Number
- Attorney's E-mail Address

By way of example, the Department of Law has created an Excel spreadsheet entitled "Effectiveness Amendment Questionnaire Spreadsheet" that is available online by visiting the Department of Law website under Forms: <http://www.ag.ny.gov/real-estate-finance-bureau/forms>

Applicability:

For existing conversion plans that have been accepted for filing but not yet declared effective, sponsor may provide a copy of this memo along with the model affidavit to any purchaser used for purposes of declaring the plan effective. For pending conversion plans not yet accepted for filing and all future plans, sponsor must disclose the affidavit requirement in the procedure to purchase section of the plan and include a copy of the model affidavit in Part II.

An example of acceptable disclosure for a non-eviction plan includes the following:

To declare the plan effective, 15% of purchasers must be "bona fide," which is defined as: 1) a tenant in occupancy on the date the plan is declared effective; or 2) a purchaser who represents that they or one or more members of their immediate family intend to occupy the unit when it becomes vacant. For purposes of effectiveness, the purchase of contiguous units (*i.e.* unit combinations) shall be treated as one unit. Notwithstanding the foregoing, the purchase of non-contiguous units by one purchaser for more than one bona fide purchaser (*e.g.* one unit for parents and one for adult child) shall be treated as individual units for effectiveness purposes.

The Department of Law requires an affirmative representation from each bona fide purchaser as a part of an investigative process. A purchaser who is bona fide, as defined above, will be required to execute an affidavit entitled "Affidavit of Bona Fide [Tenant/Non-Tenant] Purchaser For Purposes of Declaring Offering Plan Effective." Copies of the affidavits are attached hereto as Exhibit ___ in Part II of the plan.

Purchasers are advised to seek the advice of an attorney before executing the affidavit. The submission of any misinformation to the Department of Law, including a false instrument, shall be deemed a violation of the Martin Act, and may also subject both the sponsor and the purchaser to both civil and criminal liability.

Disclaimer:

The Department of Law reserves the right to request additional information from sponsor and any and all purchasers used for purposes of declaring the plan effective. Failure to provide such information to the Department of Law within the timeframe requested may result in the rejection of sponsor's effectiveness amendment. Furthermore, the submission of any misinformation to the Department of Law, including a false instrument, shall be deemed a violation of the Martin Act, and may also subject both the sponsor and the purchaser to both civil and criminal liability.

Affidavit of Bona Fide Tenant Purchaser
For Purposes of Declaring Offering Plan Effective

[insert name of tenant purchaser(s)]
[insert address of Condominium or Cooperative project name and property address]
File No. [insert NYAG File Number]
Unit No. [insert unit number(s)]
Purchase Price: [insert purchase price]
Down Payment: [insert down payment]

STATE OF NEW YORK _____)

: SS.:

COUNTY OF _____)

I/We, a purchaser[s] under the offering plan for the above-referenced [condominium/cooperative] hereby affirm, under the penalty of perjury, the following information:

1. I/We [am/are] [a] bona fide purchaser[s] as defined by the New York General Business Law § 352-eeee (the “Martin Act”) because I/we am/are: [a] tenant[s] in occupancy at the above-referenced property;
2. I/we represent that I/we am/are not purchasing the unit as an accommodation to, or for the account or benefit of the sponsor or principals of sponsor;
3. I/we have duly executed a purchase agreement and have paid the down payment as required in the plan and any amendment thereto;
4. The purchase agreement I/we have executed for the above-referenced unit does not contain any right of rescission that has not yet expired or been waived;
5. The purchase agreement I/we have executed for the above-referenced unit does not permit the assignment or transfer of the rights afforded therein; *[If a tenant in occupancy has assigned the purchase agreement, include the following, and distinguish between an assignment that is for purposes of transferring the rights to an ownership entity such as an LLC or trust on behalf of the purchaser, if applicable:*
 - a. The purchase agreement has been signed by purchaser as a bona fide tenant in occupancy in the above-referenced property; and

- b. The assignment was not procured by the sponsor, selling agent, or the managing agent of the property, and I/we represent that [I/we or a specified member of his or her immediate family will personally occupy the dwelling unit; and
 - c. I/we have obtained an assignee affidavit.]
6. I/We signed the purchase agreement for the above-referenced unit in good faith, without fraud and with no discriminatory repurchase agreements or other discriminatory inducements;
 7. I/we am/are not the sponsor, selling agent, or a principal of the sponsor, the selling agent or the managing agent nor am/are I/we related to the sponsor, selling agent or the managing agent or any principal of the sponsor, the selling agent or the managing agent by blood, marriage or adoption, or as a business associate, an employee, a shareholder or a limited partner, or member thereof.
 8. [*for plans that have not been updated prior to the date of the effectiveness amendment*] I/we have been provided with a copy of the Department of Law memorandum entitled “Requirements for Effectiveness Amendments for Occupied Conversion Plans Under GBL § 352-eeee” and understand that I/we am/are providing this affidavit for purposes of declaring the plan effective.

 [Tenant Purchaser]

Sworn to before me this _____

day of _____, 20_____

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Affidavit of Bona Fide Non-Tenant Purchaser
For Purposes of Declaring Offering Plan Effective

[insert name of non-tenant purchaser(s)]

[insert address of Condominium or Cooperative project name and property address]

File No. [insert NYAG File Number]

Unit No. [insert unit number(s)]

Purchase Price: [insert purchase price]

Down Payment: [insert down payment]

STATE OF NEW YORK _____)

: SS.:

COUNTY OF _____)

I/We, a purchaser[s] under the offering plan for the above-referenced [condominium/cooperative] hereby affirm, under the penalty of perjury, the following information:

1. I/We [am/are] [a] bona fide purchaser[s] as defined by the New York General Business Law § 352-eeee (the “Martin Act”) because I/we am/are [a] purchaser[s] who intends that I/we or one or more members of my immediate family members intends to occupy the unit when it becomes vacant;
2. I/we represent that I/we are not purchasing the unit as an accommodation to, or for the account or benefit of the sponsor or principals of sponsor;
3. I/we have duly executed a purchase agreement and have paid the down payment as required in the plan and any amendment thereto;
4. The purchase agreement I/we have executed for the above-referenced unit does not contain any right of rescission that has not yet expired or been waived;
5. The purchase agreement I/we have executed for the above-referenced unit does not permit the assignment or transfer of the rights afforded therein, [*unless the assignment is for purposes of transferring the rights to an ownership entity such as an LLC or trust on behalf of the purchaser. In such cases, state so*];

6. I/We signed the purchase agreement for the above-referenced unit in good faith, without fraud and with no discriminatory repurchase agreements or other discriminatory inducements;
7. I/we am/are not the sponsor, selling agent, or a principal of the sponsor, the selling agent or the managing agent nor am/are I/we related to the sponsor, selling agent or the managing agent or any principal of the sponsor, the selling agent or the managing agent by blood, marriage or adoption, or as a business associate, an employee, a shareholder or a limited partner, or member thereof.
8. [*for plans that have not been updated prior to the date of submission of the effectiveness amendment*] I/we have been provided with a copy of the Department of Law memorandum entitled “Requirements for Effectiveness Amendments for Occupied Conversion Plans Under GBL § 352-eee” and understand that I/we am/are providing this affidavit for purposes of declaring the plan effective.

[Non-Tenant Purchaser or
Authorized Signatory]

Sworn to before me this _____
day of _____, 20_____

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