



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

**Re: Special Allocations of Common Expenses
Pursuant to N.Y. Real Prop. Law § 339-m**

Date: October 25, 2011

Introduction

The New York State Department of Law (“DOL”) has noted that certain offering plans fail to include disclosure of specially allocated common expenses in the Special Risks section of the offering plan. The following memorandum clarifies the disclosure obligations concerning such special allocations.

Relevant Authority

Pursuant to N.Y. Real Prop. Law (“RPL”) § 339-m, common expenses and profits (except as to insurance) must be charged and distributed in accordance with the allocation of common interests, unless otherwise permitted as provided in that statute. The RPL authorizes special allocations in the following three situations: 1) if authorized by the by-laws and declaration, common expenses and profits may be specially allocated by the board of managers to non-residential units; 2) if authorized by the by-laws and declaration, common expenses or profits allocated to certain units, including residential or non-residential, or a combination thereof, may be specially allocated based upon special or exclusive use or availability or exclusive control of particular units or common areas by particular unit owners; or 3) if authorized by the by-laws, declaration and regulatory agreement with a governmental entity, common expenses may be charged to owners of units subject to such regulatory agreement in a manner that (i) is not proportional to the respective common interests of such owners, (ii) limits the amount charged to such owners, or (iii) limits the rate at which the amount charged to such owners may increase. RPL § 339-m specifically states that, “[t]he existence of such special allocation of common expenses and its financial impact upon all units shall be disclosed as a special risk in any offering plan.” In addition, 13 NYCRR §§ 20.3(c) and 23.3(c) require disclosure of “[a]ll features of a plan which . . . are reasonably likely to affect disproportionately or unusually the common charges of unit owners” as special risks.

Disclosure as a Special Risk

In compliance with RPL § 339-m and the DOL's regulations, any offering plan that provides for specially allocated common expenses must disclose them as a special risk. The special risk should describe the special allocation and refer the reader to the relevant sections of the offering plan narrative for additional information. The special risk must also disclose where in the declaration or by-laws the special allocation is included and whether the requirements for amending such provision of the declaration or by-laws differ from those otherwise provided in the applicable governing documents. The special risk should also include disclosure as to the financial impact of the special allocation on all units.

For offering plans that include specially allocated common expenses pursuant to a regulatory agreement, the special risk should also refer to the section of the narrative portion of the plan and the declaration or by-laws that describes the method for calculating common expenses on the affected affordable units, the length of time the common expenses must remain specially allocated, and any other relevant restrictions included in the regulatory agreement (e.g., funding reserve requirements).

Schedule B

Any offering plan that includes specially allocated common expenses must include in Schedule B a clear delineation of which costs are specially allocated or eliminated for specified units. Moreover, in the footnotes to Schedule B, the sponsor must disclose which provision of RPL § 339-m is being relied upon for any specially allocated common expenses and also include a cross-reference to any section of the declaration or by-laws that provides for a special allocation.

Previously Submitted Offering Plans

For offering plans that disclosed specially allocated common expenses but did not highlight such allocations as a special risk, the sponsor should update the offering plan to include the special risk as part of the next amendment. For offering plans that did not disclose the existence of specially allocated common expenses, the sponsor must immediately update the offering plan to disclose such special allocations.