

ASSESSMENT OF PUBLIC COMMENT

The Department of Law's Notice of Proposed Rule Making entitled "Digital Submission Requirements for Cooperative Interests in Realty" was published in the New York State Register on October 21, 2015. A forty-five day public comment period followed the publication of the Notice of Proposed Rule Making, as required by State Administrative Procedure Act ("S.A.P.A.") Section 202(1)(a). During this period, the Department of Law received six public comments, many of which touched upon the same topics. The received comments fall into the following six categories: (1) Amendment Submission, (2) Submission Timing, (3) Digital Copy Format, (4) Privacy Concerns, (5) Clarification of Non-Material Changes, and (6) Effective Date.

Most public comments did not suggest significant alternatives to the proposed rule. Instead, the majority were framed as questions about the digital submission process. The Department of Law anticipated such logistical questions, and thus included the following provision in the proposed regulations: "The Department of Law shall periodically issue a Guidance Document as defined by S.A.P.A. Section 102(14), setting forth particular guidelines and procedures for the submission of digital copies. Such Guidance Document will be available on the Department of Law's website, as required by S.A.P.A. Section 202(e)." The proposed regulations do not contemplate the specifics of the submission process; rather, the regulations leave such procedural discussions to the guidance document.

Accordingly, on December 9, 2015, the Department of Law issued a detailed guidance document pursuant to S.A.P.A. Section 102(14), answering these questions and providing further information on compliance with the new submission requirements. The regulations and guidance document effectively address any questions or concerns raised in the public comments, and, for the reasons described below, the Department of Law does not believe any of the received public comments necessitate revising its proposed regulations. Therefore, the Department of Law has adopted the proposed regulations without any changes, effective as of February 1, 2016.

The received public comments, along with the Department of Law's responses thereto, are discussed below.

(1) Amendment Submission

Many of the public comments focused on the proposed requirement that sponsors and holders of unsold shares submit "[o]ne digital copy of the offering plan including all previously filed amendments, if not already submitted to the Department of Law" when submitting new amendments to the Department of Law.

Two commenters inquired about the status of the Department of Law's Cooperative Policy Statement #9, which exempts sponsors and holders of unsold shares from submitting a copy of the offering plan and all previously filed amendments with a new amendment submission. Because the regulations will now require amendment submissions to include one digital copy of the offering plan and all previously filed amendments, the Department of Law has determined Cooperative Policy Statement #9 is no longer appropriate. Therefore, the Department of Law will repeal Cooperative Policy Statement #9 as of February 1, 2016. The Department of Law will issue a formal memorandum repealing Cooperative Policy Statement #9; thus, no changes to the regulations are necessary.

Similarly, one commenter asked how the proposed regulations would affect the sponsors and holders of unsold shares who have received exemptions from filing amendments pursuant to the Department of Law's Cooperative Policy Statement #5. Under the regulations, Cooperative Policy Statement #5 will remain in full effect. However, if a Plan with Cooperative Policy Statement #5 treatment must be amended in accordance with the policy statement, the amendment must be submitted to the Department of Law pursuant to the revised submission requirements. The Department of Law's aforementioned guidance document describes the specifics in more detail.

Another commenter suggested that the Department of Law amend the sections of the proposed regulations that require the submission of "[o]ne digital copy of the offering plan including all previously filed amendments, if not already submitted to the Department of Law." This commenter suggested this provision

should instead read: “One digital copy of the offering plan, including digital copies of all previously filed amendments, unless digital copies of such previously filed amendments were submitted to the Department of Law prior to the date of submission of the subject amendment.” The Department of Law believes that such a change is unnecessary because the language already contained in the regulations is sufficiently similar to the suggested language. The Department of Law further believes that updated language is not needed due to the fact that other sections of the proposed regulations, as well as the guidance document, make explicitly clear that the submission of “[o]ne digital copy of the offering plan including all previously filed amendments” is a one-time requirement.

(2) Submission Timing

One commenter suggested that the Department of Law require digital copies to be submitted at the same time as paper copies because emailing digital copies could create confusion regarding the submission date. The Department of Law agrees with this assessment and is implementing such a system (and, in fact, had always envisioned this method of submission). The Department of Law’s guidance document clarifies that digital copies of offering plans and amendments must be submitted simultaneously to the paper copies and details the process for so doing. Because the proposed regulations do not contemplate specific submission procedures, no change to the regulations is needed to reflect this requirement.

(3) Digital Copy Format

One commenter inquired whether the digital copies of offering plans and amendments must be printable. Another commenter wondered how the “[o]ne digital copy of the offering plan including all previously filed amendments” should be formatted. The Department of Law’s guidance document makes clear that all digital copies must be a read-only .pdf document, which is searchable and printable to the extent technologically possible. Additionally, the guidance document acknowledges that technology may limit the extent to which previously-accepted plans and amendments can be made searchable. The guidance document states that if

portions of such documents are not searchable by keyword, the documents nevertheless must be submitted to the Department of Law as digital copy, with the attorney transmittal letter clearly denoting that certain portions of the documents may not be searchable. Again, the Department of Law believes that the guidance document effectively addresses the above comments, and the regulations need not be amended to reflect these requirements.

(4) Privacy Concerns

Another commenter expressed concern that the use of digital copies would allow “sensitive material” (such as Social Security numbers) to be disseminated more easily, and suggested adding a provision to the proposed regulations to allow sponsors to redact “sensitive material” from digital copies. The Department of Law has determined that such a change is unwarranted, because, under the proposed regulations, the Agency’s Freedom of Information Law (“FOIL”) procedures will remain largely the same as at present. As described in the Department of Law’s Regulatory Impact Statement, the use of digital copies will allow members of the public making FOIL requests to obtain the requested documents digitally. But in order to obtain the requested documents, the public must still make a formal FOIL request and any sensitive information will be redacted by the Department of Law before the public can view the documents. At present, no information will be made generally available to the public through a web portal or other online database, and therefore privacy concerns should be allayed.

(5) Clarification Non-Material Changes

In addition to requiring digital copies of offering plans and amendments, the proposed regulations also amend several other related sections of Title 13 regarding submission requirements. For example, the proposed 13 N.Y.C.R.R. Section 18.5(b)(1)(vi), requires the attorney transmittal letter for amendments to disclose, “if there is currently an investigation pending by the Department of Law of the sponsor, a principal of sponsor, or

the property to be owned by the apartment corporation.” One commenter inquired about this particular change, asking whether “clarity [could] be added to what the term ‘investigation’ is meant to encompass”.

The Department of Law’s guidance document makes clear that such changes are non-material and simply ensure that the Department of Law’s submission requirements are consistent throughout Title 13. Nothing was added to any Part of Title 13 that was not already included in another Part of Title 13. The language that is included in the proposed 13 N.Y.C.R.R. Section 18.5(b)(1)(vi) is nearly identical to that contained in other corresponding sections of Title 13. The Department of Law has determined that any further changes or clarifications to 13 N.Y.C.R.R. Section 18.5(b)(1)(vi) would undermine its goal of streamlining its submission requirements throughout Title 13.

(6) Effective Date

The Department of Law originally planned for its regulations to go into effect on January 1, 2016. However, two commenters noted that the January 1 effective date did not give sponsors adequate time to comply with the new digital submission requirements. The Department of Law would like for the transition to the digital submission framework to be as seamless as possible; consequently, the Department of Law has decided to delay the effective date until February 1, 2016. The Department of Law believes this extra month will provide sponsors with sufficient time to familiarize themselves with the digital submission procedures. The Department of Law will update its guidance document to reflect the new effective date. The regulations themselves do not reference the effective date; therefore, no revisions are necessary to accommodate this change.