

**Further Revised Proposed Revisions to 13 N.Y.C.R.R. § 18.3(b, p)**

Plans subject to this Part must comply with the format and minimal disclosure requirements set forth in subdivisions (a) through (hh) of this section, in addition to the requirements of article 23-A of the G.B.L.

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(b) *Table of contents.* The format and order set forth below shall be followed in the table of contents. Include headings for the subjects not marked with an asterisk. In addition, a limited number of headings may be added to the plan. Headings for subjects that are marked with an asterisk may be omitted if the subject matter is not applicable to the offering. Omissions, other than headings marked with an asterisk on the table of contents, and additions, should be expressly noted and explained in the transmittal letter. Alternative wording for headings to meet particular facts are set forth in parentheses. Documentation listed in Part II of the table of contents shall be included in full in Part II of the plan. The texts of such documents which will be binding upon the sponsor or the apartment corporation, such as the subscription agreement, the proprietary lease, and the by-laws of the apartment corporation, shall be consistent with the disclosures in the plan and shall conform to the requirements with respect thereto set forth in this section.

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(p) *Procedure to purchase.* Describe the essential terms of the subscription (purchase) agreement which must comply with this Part. State the purchase procedure, including to whom and when the subscription agreement must be returned and the deposit payment made.

(1) State the amount or the percentage of the deposit, which may not be less than the lower of (i) \$1,000 per block of shares, or (ii) 10 percent of the cash amount.

(2) Escrow, trust fund. The following requirements apply to all offerings and shall be fully disclosed in all offering plans subject to this Part:

(i) Statutory requirement. The sponsor shall comply with the escrow and trust fund requirements of [GBL sections 352-e\(2-b\)](#) and [352-h](#) and these regulations, and all funds paid by purchasers shall be handled in accordance with these statutes and regulations.

(ii) Mandatory escrow agreement. ~~The account.~~ All deposits, down payments or advances made by subscribers or purchasers prior to closing of each individual transaction shall be held pursuant to a written agreement entered into between the sponsor, the purchaser, and the escrow agent. Said provisions may be included in a separate escrow agreement or in the subscription or purchase agreement, and are referred to in this paragraph (2) as the "escrow agreement." The plan must set forth the material terms of the escrow agreement. The sponsor shall specify the exhibit in Part II of the plan that contains the escrow agreement. If a separate escrow agreement is used, a copy of the full agreement must be included as a separate exhibit to the plan in Part II. Disclose, without limitation, any indemnity by the sponsor in favor of the escrow agent, provision for discharge of the escrow agent's obligations by the sponsor upon payment of the deposit and interest in accordance with these regulations, any right of the escrow agent to represent the sponsor in any lawsuit, any compensation by the sponsor to the depository bank, any provision for payments by the sponsor under an indemnity in favor of the escrow agent and whether the sponsor will compensate the escrow agent for acting as such. The plan and escrow agreement must include language conforming to subsections (vi) - (viii), below. However, the failure to include such language in the plan or escrow agreement shall not excuse the sponsor and the escrow agent from compliance with said subsections, whether received before or after the date of consummation of the plan, must be placed within five business days after the agreement is signed by all necessary parties, in an attorney's segregated special escrow account in a bank doing business in the State of New York which account is covered by federal bank deposit insurance. Sponsor shall include as a special risk that deposits in excess of \$100,000 will not be federally insured in excess of \$100,000. An attorney shall open and maintain such account in his or her own name, or in the name of a firm of attorneys of which he or she is a member, or in the name of the attorney or firm of attorneys by whom he or she is employed, separate from such attorney's personal accounts or from any accounts in which assets belonging to the firm are deposited, and separate from any accounts maintained in the capacity of executor, guardian, trustee or receiver. A master escrow account with a sub-account for each purchaser is acceptable. The name of the account, the bank, and the bank address must be stated in the plan. The word "escrow" must be included as part of the name of the account. Funds from this account may be released only by signature of the attorney who is named as Escrow Agent. Neither the sponsor nor any principal of the sponsor may be a signatory on the account. Funds must be placed in an interest-bearing account, with all interest credited to the purchaser, unless either the purchaser defaults and the plan is consummated, or the sponsor elects to place the funds in a separate Interest On Lawyer's Account ("IOLA") for each offering plan pursuant to Judiciary Law section 497. The plan shall indicate whether the interest rate to be earned will be the prevailing rate for such accounts. State the current prevailing rate and when interest will begin to accrue.

~~No fees of any kind may be deducted from the account principal or any interest earned thereon. Sponsor shall bear any administrative cost for maintenance of the account.~~

(iii) Payments. All funds received from purchasers or subscribers whether in the form of checks, drafts, money orders, wire transfers, or other instruments which identify the payor, shall be made payable to or endorsed by the subscriber or purchaser to the order of the attorney or law firm as escrow agent.

(iv) The escrow agent. The escrow agent must be an attorney or a firm of attorneys admitted to practice in the State of New York or an attorney admitted in a foreign jurisdiction who submits to the jurisdiction of the State of New York for any cause of action arising out of the escrow provisions set forth in the escrow agreement ~~or a firm of such~~

attorneys. The signatories on the escrow account must be attorneys. Escrow agent shall be independent of the sponsor. Attorneys admitted or practicing in the State of New York or admitted in a foreign jurisdiction must comply with the Appellate Division rules for the preservation of client funds of the Judicial Department having jurisdiction who submit to the jurisdiction of the State of New York for any cause of action arising out of the escrow provisions set forth in the escrow agreement. Neither the escrow agent nor any authorized signatory on the account may be the sponsor, the selling agent, the managing agent, or a principal thereof, over the attorney. However, a law firm that which has a member who is a principal of the sponsor may shall not be the escrow agent provided that members of the firm who are, but one or more members of the firm other than the principal may act as escrow agents signatories on the account are not themselves principals. Only an attorney or member of a firm acting as escrow agent shall be a signatory on the account and only such attorney shall be authorized to release funds. The name, address and telephone number of the escrow agent and of each attorney who is a signatory must be stated in the plan.

(v) The account: All deposits, down payments, or advances made by subscribers prior to closing of each individual transaction, whether received before or after the date of consummation of the plan, must be placed within five business days after the escrow agreement is signed by all necessary parties in an attorney's segregated special escrow account in a bank doing business in the State of New York which account is covered by Federal bank deposit insurance. Sponsor shall include as a special risk that deposits in excess of \$100,000 will not be federally insured in excess of \$100,000. An attorney shall open and maintain such account in his or her own name, or in the name of a firm of attorneys of which he or she is a member, or in the name of the attorney or firm of attorneys by whom he or she is employed, separate from such attorney's personal accounts or from any accounts in which assets belonging to the firm are deposited, and separate from any accounts maintained in the capacity of executor, guardian, trustee or receiver. A master escrow account with a sub-account for each purchaser is acceptable. The name of the account, the bank, and the bank address must be stated in the plan. The word "escrow" must be included as part of the name of the account. Funds from this account may be released only by signature of the attorney who is named as Escrow Agent. Neither the sponsor nor any principal of the sponsor may be a signatory on the account. Funds must be placed in an interest-bearing account, with all interest credited to the purchaser, unless either the purchaser defaults and the plan is consummated, or the sponsor elects to place the funds in a separate Interest-On-Lawyer's- Account ("IOLA") for each offering plan pursuant to Judiciary Law section 497. The plan shall indicate whether the interest rate to be earned will be the prevailing rate for such accounts. State the current prevailing rate and when interest will begin to accrue. Escrow agreement. The material terms of the escrow agreement shall be disclosed in the plan and a copy of the full agreement must be contained as an exhibit to the plan in Part II. Include, without limitation, any indemnity by the sponsor in favor of the escrow agent, provision for discharge of the escrow agent's obligations by the sponsor upon payment of the deposit and interest in accordance with these regulations, any right of the escrow agent to represent the sponsor in any lawsuit, any compensation by the sponsor to the depository bank, any provision for payments by the sponsor under an indemnity in favor of the escrow agent and whether the sponsor will compensate the escrow agent for acting as such. A model form for the escrow agreement is available from the Department of Law; if such form is not used the attorney's transmittal letter should so indicate. If a different form of escrow agreement is used, all material terms of the Department of Law's model must be included in the agreement, and the agreement should be red-lined to indicate changes from or additions to the model form.

(vi) Notification to purchaser. Within 10 business days after the escrow agreement is signed by all necessary parties ~~the deposit submitted with the subscription or purchase agreement~~, the escrow agent shall notify the purchaser that such funds have been deposited in the bank indicated in the offering plan, and provide the account number, and the initial interest rate. If the purchaser does not receive notice of such deposit within 15 business days after tender of the deposit, ~~he or she may cancel the purchase and rescind within 90 days after tender of the deposit, or may apply to the Attorney General for relief.~~ Complaints concerning the failure to honor such cancellation requests may be referred to the New York State Department of Law, 120 Broadway, 23<sup>rd</sup> Floor, New York, N.Y. 10271. Rescission may not be afforded where proof satisfactory to the Attorney General is submitted establishing that the escrowed funds were timely deposited in accordance with these regulations and requisite notice was timely mailed to the subscriber or purchaser.

(vii) Escrow revisions. Before funds are transferred to a new escrow account, or if the escrow agent is replaced, the plan must be amended to provide the same full disclosure with respect to the new account, the escrow agent and the escrow agreement as was originally provided. A bond, letter of credit or other security may not be substituted for the escrow account, unless a special exemption under exceptional circumstances is first requested by the sponsor and is granted by the Attorney General, following the procedures of section 21.3(1)(4) of this Title. In such event, and only

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after the Department of Law grants such exemption in writing, the provisions of section 21.3(l)(5), (6) and (7) of this Title are applicable.

(viii) Release of funds. The escrow agreement and the plan must set forth the requirements and procedures for the release of the escrowed funds. These shall include:

(a) Under no circumstances shall sponsor ~~apply seek for~~ release of the escrowed funds of a defaulting purchaser until after consummation of the plan. Consummation of the plan does not relieve the sponsor of its obligations pursuant to [GBL section 352-h](#).

(b) The escrow agent shall ~~hold~~release the funds in escrow ~~until otherwise if so~~ directed ~~in~~:

~~(1) pursuant to terms and conditions set forth in the escrow agreement upon closing of the individual transaction; or~~

~~(2) in a subsequent writing signed by both sponsor and purchaser; or~~

~~(2) a determination of the Attorney General; or~~

~~(3) by a final, nono-appealable order or judgment or order of a court of competent jurisdiction, or until released pursuant to clause (d) of this subparagraph; or~~

~~(4) by a final, non-reviewable determination of the Attorney General pursuant to subparagraph (ix) of this paragraph, so long as the subscription or purchase agreement provides for dispute resolution by the Attorney General and was signed on or before March 1, 2013.~~

~~(c) If the escrowed funds are not released pursuant to subparagraph (b), above, and the escrow agent receives a request by either party to release the funds, the escrow agent must give both parties prior written notice of not fewer than 30 days before releasing said funds. If the escrow agent has not received notice of objection to the release of the funds at the expiration of the 30 day period, the funds shall be released and the escrow agent shall provide further written notice to both parties informing them of such release. If the escrow agent receives a written notice from either party objecting to the release of the escrowed funds within said 30 day period, the escrow agent shall continue to hold said funds until otherwise directed pursuant to subparagraph (b), above. However, the escrow agent shall also have the right at any time to deposit the funds contained in the escrow account with the clerk of a court in the county in which the interest offered pursuant to the plan is located and shall give written notice to both parties of such deposit.~~

~~(ed)~~ The sponsor shall not object to the release of the escrowed funds to:

~~(1) a purchaser who timely rescinds in accordance with an offer of rescission contained in the plan or an amendment to the plan; or~~

~~(2) all purchasers after an amendment abandoning the plan is accepted for filing by the Department of Law.~~

~~(d) If there is no written agreement between the parties to release the escrowed funds, the escrow agent shall not pay the funds to the sponsor until the escrow agent has given the purchaser written notice of not fewer than 10 business days. Thereafter, the funds may be paid to the sponsor unless the purchaser has already made application to the Department of Law pursuant to the dispute resolution provisions contained in these regulations and has so notified the escrow agent in accordance with such provisions.~~

(ix) Disputes.

(a) In the event of a dispute arising in connection with a subscription or purchase agreement providing for dispute resolution by the Attorney General that was signed on or before March 1, 2013, the sponsor shall apply and the purchaser or the escrow agent holding the down payments in escrow may apply to the Attorney General for a determination on the disposition of the deposit and any interest earned thereon. Forms for this purpose will be available from the Department of Law. The party making such application shall contemporaneously send to all other parties a copy of such application.

(b) Pending the determination of the Attorney General to grant or deny the application, the sponsor, the purchaser and the escrow agent shall abide by any interim directive issued by the Attorney General.

(c) If the application permitting release of funds is granted, the deposit and any interest earned thereon shall be disposed of in accordance with ~~the a final, non-reviewable~~ determination of the Attorney General, ~~subject to any court action in which preliminary relief is granted.~~

(d) The Attorney General shall act upon the application within 30 days after its submission to the Department of Law, by either making a determination or notifying the parties that an extension of time in which to do so is necessary for stated reasons.

(e) If the application seeking release of funds is denied, the escrow agent shall continue to hold the deposit and any interest earned thereon until:

(1) both the sponsor and purchaser direct payment to a specified party in accordance with a written direction signed by both the sponsor and purchaser; or

(2) a ~~final, non-appealable order or judgment or order~~ of a court ~~of competent jurisdiction~~ is served on the escrow agent; or

(3) the escrow agent deposits the disputed amount into court.

~~(f) In no event shall the escrow agent release funds in dispute, other than a payment of such funds into court, until such dispute is finally resolved either by determination of the Attorney General or by order or judgment of a court of competent jurisdiction or by written agreement of the sponsor and the subscriber or purchaser.~~

(x) Exhibits to plan. Copies of the forms provided by the bank for opening the escrow account and the form of escrow agreement, ~~if separate from the subscription or purchase agreement, as proposed~~ must be included as Exhibit B-19 of the submission. ~~Upon first deposit, a copy of the escrow agreement as executed and a copy of the bank forms as executed must be submitted as supplements to Exhibit B-19 of the submission.~~

(xi) Records on file. The escrow agent shall maintain all records concerning the escrow account for seven years after release of the funds. Upon the dissolution of any law firm which was the escrow agent, the former partners or members of the firm shall make appropriate arrangements for the maintenance of these records by one of them or by the successor firm and shall notify the Department of Law of such transfer.

(xii) Review and audit. The Department of Law may perform random reviews and audits of any records involving escrow accounts to determine compliance with statute and regulation.

(xiii) Waiver void. Any provision of any contract or agreement, whether oral or in writing, by which a purchaser purports to waive or indemnify any obligation of the escrow agent holding trust funds is absolutely void. The provisions of this section of the regulations shall prevail over any conflicting or inconsistent provision in the ~~offering plan~~ or in the escrow agreement or subscription or purchase agreement.

(xiv) Trust obligation of sponsor. Nothing herein contained shall diminish or impair the sponsor's statutory obligation to each purchaser or subscriber pursuant to GBL section 352-h to hold in trust all deposits, advances or payments made in connection with the offer until consummation of the transaction with such purchaser or subscriber. Consummation of the plan does not relieve sponsor of its obligations pursuant to GBL section 352-h. Funds from the escrow account remain the property of the purchaser until employed in connection with the consummation of the transaction. Such funds shall not be part of the estate of the sponsor or the escrow agent upon any bankruptcy, incapacity or death.

(xv) Transition. All funds required to be held pursuant to GBL sections 352-e(2-b) and 352-h on the effective date of this section shall be transferred into escrow accounts in compliance with this regulation within 60 days thereafter.

(3) Highlight as a special risk any provision allowing sums in excess of 10 percent of the cash purchase price to be retained as liquidated damages, other than the actual cost incurred for any special work ordered by the subscriber. Highlight as a special risk if sponsor may seek specific performance of the purchase agreement.

(4) State that the balance of the purchase price is to be paid after written demand is made and that the purchasers will have not less than 15 days to make the payment after receipt of the demand notice. If payment is due in advance of the closing, state the maximum number of days between the scheduled closing date and the date payment is due.

(5) Any "time is of the essence" provision concerning subscriber's obligations must be explained in easily understandable terms and must be highlighted as a special risk.

(6) Purchasers must be given written notice of the closing date at least 30 days in advance of the closing of title on the building to the apartment corporation.

(7) Sponsor or the apartment corporation must make a written demand for payment 30 days before a forfeiture of the subscription agreement shall be declared.

(8) State when the subscriber (purchaser) is required to sign a proprietary lease, the number of days within which the lease must be returned to the selling agent or sponsor, and the consequences if the lease is not returned.

(9) The plan shall state that:

(i) Nontenant subscribers or purchasers are afforded either:

(a) not less than seven days after delivering an executed subscription agreement together with the required deposit to rescind the subscription agreement and have the full deposit refunded promptly. The subscriber must either personally deliver a written notice of rescission to the sponsor or selling agent within the seven-day period or mail the notice of rescission to the sponsor or selling agent and have the mailing postmarked within the seven-day period; or

(b) not less than three business days to review the offering plan and all filed amendments prior to executing a subscription agreement.

(ii) Tenants are afforded not less than three business days to review the offering plan and all filed amendments prior to executing a subscription agreement.

(10) A complete copy of the subscription agreement must be inserted in the plan.

(11) Highlight as a special risk if the subscriber's obligation to purchase is not contingent on obtaining financing. If the subscriber's obligations are contingent upon obtaining a commitment for financing or actually obtaining financing, the details must be fully disclosed and explained. State the time within which the subscriber has to notify sponsor of inability to obtain financing. Include the subscriber's time to obtain financing or a commitment and the risk, if any, that the commitment may expire or that the terms of the commitment may change prior to actual closing. If subscriber's obligations are contingent on obtaining a financing commitment and the financing commitment lapses or expires prior to closing and the subscriber has made a good faith effort to extend the commitment, sponsor must grant to such subscriber a right of rescission and a reasonable period of time to exercise the right.

(12) The plan and subscription agreement must provide that any conflict between the plan and the subscription agreement will be resolved according to the terms of the plan.

(13) State that within a specified number of days after a subscriber delivers an executed subscription agreement, together with the required deposit, the apartment corporation or sponsor must either accept the subscription agreement and return a fully executed counterpart to the subscriber or reject the subscription agreement and refund the full deposit previously tendered. Discuss the outcome for the subscriber if the apartment corporation or sponsor takes no action within the time period specified in the plan.

(14) 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 G.B.L. The subscription agreement to be used by tenant purchasers who subscribe during the exclusive period may not be modified except by a duly filed amendment to the plan.