

**Further Revised Proposed Revisions to 13 N.Y.C.R.R. § 23.3(b, q)**

Plans subject to this Part must comply with the format and minimum disclosure requirements set forth herein in addition to the requirements of provisions of article 23-A of the G.B.L. and article 9-B of the Real Property Law or the laws regulating condominiums in the state where the property is located.

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(b) *Table of contents.* The format and order set forth in this subdivision must 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 in 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 board of managers, such as the purchase agreement, the power of attorney, the unit deed, the condominium declaration, and the bylaws of the condominium shall be consistent with the disclosures in the plan and shall conform to the requirements of this section.

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(q) *Procedure to purchase.* Describe the essential terms of the purchase agreement which must comply with this Part. State the purchase procedure, including to whom and when the purchase 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 unit, or (ii) 10 percent of the offering price.

(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) ~~The account~~Mandatory escrow agreement. All deposits, down payments, or advances made by 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 purchase agreement, and are referred to in this paragraph (3) 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 contained 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 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 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 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 escrow agent shall be independent of the sponsor. Authorized signatories on the escrow account must be~~

~~attorneys admitted or to practicing in the State of New York or admitted in a foreign 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 must comply with the Appellate Division rules for the preservation of client funds of the Judicial Department having jurisdiction over the attorney. 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. However, a law firm which that has a member who is a principal of the sponsor shall not may be the escrow agent provided that, but one or more members of the firm who are signatories on the account are not themselves other than the principals may act as escrow agent. Only an attorney or a 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) Escrow agreement. The account. All deposits, down payments, or advances made by purchasers 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(s) who is/are named as an authorized signatory or signatories. Neither the sponsor nor any principal of the sponsor may be an authorized signatory on the account. Funds must be placed in an interest-bearing account, with all interest credited to the purchaser, unless the sponsor elects to place the funds in a separate Interest-On-Lawyer's- Account ("IOLA") for each 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. 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 tender of the escrow deposit submitted with the subscription or purchase agreement is signed by all necessary parties, 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 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 20.3(o)(4) of this Title. In such event, and only~~

after the Department of Law grants such exemption in writing, the provisions of section 20.3(o)(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 for~~seek 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 title to the unit;

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

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

~~(3) by a final, non-appealable judgment or order or judgment 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 (viii) of this paragraph so long as the 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 said 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 unit is located and shall give written notice to both parties of such deposit.

~~(e)~~ 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 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 any 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 purchaser.~~

(x) Exhibits to plan. Copies of the forms provided by the bank for opening the escrow account and the form of escrow agreement as proposed, if separate from the purchase agreement, must be included as Exhibit B-22 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-22 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 a 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 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 purchase price to be retained as liquidated damages, other than the actual cost incurred for any special work ordered by the purchaser. Highlight as a special risk if sponsor may seek specific performance of the purchase agreement.

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

(5) State that after the amendment declaring the plan effective has been accepted for filing, the sponsor will fix dates for closing title to all units for which purchase agreements have been executed by serving notice on all purchasers and tenants stating the date of the first closing and setting each closing date. Such notice will be served in compliance with section 23.1(d)(1) of this Part no less than 30 days before the date set for the closing of the units. Sponsor may permit purchasers to waive this 30-day provision by including such waiver in the plan or in an amendment thereto.

(6) Sponsor must make a written demand for payment after default 30 days before forfeiture of the deposit shall be declared.

(7) State whether and when the purchaser is required to sign a power of attorney to the board of managers of the condominium, the number of days within which the power of attorney must be returned to the selling agent or sponsor, and the consequences of not returning the power of attorney.

(8) The plan shall state that:

(i) at sponsor's option nontenant purchasers will be afforded:

(a) not fewer than seven days after delivering an executed purchase agreement together with the required deposit to rescind the purchase agreement and have the full deposit refunded promptly. The purchaser 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 fewer than three business days to review the offering plan and all filed amendments prior to executing a purchase agreement unless fewer than three business days remain in the statutory time period to declare the plan effective; and

(ii) tenants are afforded not fewer than three business days to review the offering plan and all filed amendments prior to executing a purchase agreement unless fewer than three business days remain in the statutory time period to declare the plan effective.

(9) A complete copy of the purchase agreement must be included in the plan.

(10) Highlight as a special risk if the purchaser's obligation to purchase is not contingent on obtaining financing. If purchaser's obligation is contingent upon obtaining a commitment for financing or actually obtaining financing, explain the terms of the contingency. State the time within which the purchaser must notify sponsor of any inability to obtain financing. Include the purchaser'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 purchasers' obligations are contingent on obtaining a financing commitment and the financing commitment lapses or expires prior to closing, and the purchaser has made a good faith effort to extend the commitment, sponsor must grant to such purchaser a right of rescission and a reasonable period of time to exercise the right.

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

(12) State that within a specified number of days after a purchaser delivers an executed purchase agreement together with the required deposit, the sponsor must either accept the purchase agreement and return a fully executed counterpart to the purchaser or reject the purchase agreement and refund the full deposit previously tendered. Discuss the outcome for the

purchaser if the sponsor takes no action within the time period specified in the plan.

(13) The purchase 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 purchase agreement to be used by tenant purchasers who purchase during any exclusive period may not be modified except by a duly filed amendment to the plan.