

## ASK THE FORMER REGULATOR

# Gauging Buyer Interest While Complying With the Martin Act

**Q**uestion: I am a commercial real estate broker working with a prominent New York condo developer that is looking to build a luxury condominium in Florida. How can my client and I take advantage of prospective New York City buyers without running afoul of New York law, including gauging initial interest in the project?

**Answer:** The offer and sale of condominium units located in Florida to New York residents is regulated by the Martin Act—New York’s Blue Sky Law. N.Y. Gen. Bus. Law §352-e(1)(a) provides that it shall be illegal to make or take part in a public offering “in or from” the state of New York without having filed an offering statement or prospectus with the New York Attorney General’s office. Therefore, the first step is to determine if the sale of condominium units is being made to the public, and if so, whether the offering is “in or from” as defined by the Martin Act.

The Martin Act does not define “public offering” and case law has provided limited guidance on what constitutes a public offering. Therefore, a developer must conduct an analysis based upon key factors such as the number of offer-ees and the relationship to the sponsor,

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the number of units being offered, the size of the offering, and the means of solicitation (e.g., interstate communications). See *People v. Michael Glenn Realty*, 106 Misc.2d 46 (1980). For purposes of this article, the author is assuming that the proposed activity is tanta-

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mount to a public offering governed by the Martin Act.

“In or from” the state of New York has been defined as making an offer to sell real estate securities to a person or entity in the state of New York from another state, including out-of-state condominiums. Moreover, mere advertise-

ments of condominium units in another state which are targeted to New York buyers are within the purview of the Martin Act. See *Ledgebrook v. Lefkowitz*, 77 Misc.2d 867 (1974). Therefore, an out-of-state developer looking to either test the market or offer condominium units located in Florida for sale to New York residents must comply with the disclosure requirements of the Martin Act in the same manner as a sponsor of a project located within the state of New York. See id.

### Testing the Market

The first step a developer should consider in planning to market an out-of-state project to New York residents is whether to take advantage of the New York Attorney General’s policy known as Cooperative Policy Statement #1—Testing the Market (CPS-1). CPS-1 provides a roadmap to permit a developer/sponsor the ability to make non-firm offers to the public of newly constructed cooperatives, condominiums, timeshares, and homeowners associations. Under CPS-1, a developer may test the market to gauge interest in a project by filing a short-form application and certification with the Real Estate Finance Bureau of the Attorney General’s office. In addition to the short-form application, a CPS-1 requires a developer to have the following information in place at the time of submission to the Attorney General’s office:

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- A copy of the deed or contract of sale for the property being offered,
- A copy of the floor plans for units being marketed (or a site plan for a homeowners association),
- Information on financing for the development of the property, and
- Estimated purchase prices and monthly carrying costs for units in the property.

CPS-1 applications are filed by an attorney for the developer, require a notice of appearance from the law firm, and a filing fee of \$225.00 required by N.Y. Gen. Bus. Law §352-e(7). Once accepted for filing by the Attorney General, a developer may engage in advertising and marketing for a year. Thereafter, the developer may seek a 12-month extension of time to continue marketing, subject to some exceptions if an offering plan has already been submitted to the Department of Law.

CPS-1 has strict advertising guidelines that both the developer and selling agent must abide by, and all ads should have a conspicuous legend thereon. Advertisements must be submitted to the Attorney General for review before they are utilized. Additional information on CPS-1 is available at the Attorney General's website by visiting <https://ag.ny.gov/sites/default/files/cps1.pdf>.

#### Offering Statement Exemptions For Out-of-State Projects

Assuming the developer has either received positive feedback from market testing under CPS-1 or has already complied with Florida's Condominium Act (Chapter 718, Florida Statutes), and the regulations promulgated by the Division of Florida Condominiums, Timeshares, and Mobile Homes, firm offers can be made to the public in New York upon issuance of an exemption from filing an offering statement or prospectus under the Attorney General's Policy Statement #12 (CPS-12). Under CPS-12, the Attorney General will exempt a developer from filing an offering statement or prospectus in New York for certain out-of-state projects

where the governing laws of the situs state are deemed to provide adequate protections to New York purchasers through either disclosure or other substantive legal protections. While CPS-12 does not expressly state that Florida is one of these states, the New York Attorney General has issued many CPS-12 applications for projects in Florida.

A CPS-12 application is a short-form filing that requires the developer fill out basic information about the property, sign a sponsor certification, and provide the following information at the time of submission:

- Legal description of the property being offered for sale to the public;

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- Schedule of purchase prices and carrying costs of the units being offered for sale, which must comply with 13 NYCRR §20.3(g);
- Existing operating budget for the condominium or projected budget for the condominium upon commencement of operations;
- Governing documents of the condominium such as the declaration and by-laws; and
- Escrow Agreement for down payments held for New York purchasers, which must comply with the Martin Act and governing regulations, unless a separate exemption is issued by the Attorney General. It should be noted that the requirement that funds be held in an account in the state of New York will be exempted if funds are held in a bank located outside of New York, the bank is a participating member of the Federal Deposit Insurance Corporation, and such funds are insured.

CPS-12 requires very few documents be created outside of the filing requirements

of Florida's Condominium Act, with the most onerous requirement being a separate escrow account for New York buyers, which does require that funds be held in strict accordance with N.Y. Gen. Bus. Law §§352-e(2-b) and 352-h.

Moreover, unlike CPS-1, a developer filing for an exemption under CPS-12 must comply with N.Y. Gen. Bus. Law §359-e by registering as a broker-dealer, which requires registration every four years, along with the payment of a filing fee of \$300.00, plus \$15.00 per named principal. See N.Y. Gen. Bus. Law §359-e(5). This fee is on top of the filing fee required by N.Y. Gen. Bus. Law §352-e(7), which ranges from \$750.00 to \$30,000.00 based on the size of the offering. Similar to a CPS-1, a CPS-12 must be submitted to the Attorney General's office by an attorney and accompanied by a notice of appearance.

CPS-12 is also meant to be the only filing requirement made to the Attorney General's office for qualifying out-of-state projects, and amendments are only necessary if there is a change in the developer/sponsor or a material change in the facts and circumstances involving the offering.

Additional information on CPS-12 is available at the Attorney General's website by visiting [https://ag.ny.gov/sites/default/files/pdfs/bureaus/real\\_estate\\_finance/CPS-12.pdf](https://ag.ny.gov/sites/default/files/pdfs/bureaus/real_estate_finance/CPS-12.pdf).

While New York City's market has quickly rebounded after the initial onset of the COVID-19 pandemic, buyers are still flocking to areas such as Florida. Luckily, condominium developers can gauge interest of prospective New York City buyers with simple and straightforward tools provided by the New York Attorney General that aim to protect the purchasing public while making the filing requirements with New York easy to comply with, thereby leaving no excuse for getting into compliance.