

ASK THE FORMER REGULATOR

Expert Analysis

COVID-19, Executive Orders and Pending Condo Offering Plans

Question: I am a sponsor and have a number of new condominium offering plans pending review with the New York Attorney General's Real Estate Finance Bureau. Do any of the Governor's recent Executive Orders regarding COVID-19 affect the Real Estate Finance Bureau? If not, what should be done at this critical point in time with regard to my offering plans and my business?

Answer: First, it is important to note that the government continues to operate. While New York state is essentially on pause pursuant to Executive Order 202.8, this does not apply to government. Notwithstanding, government offices are, for the most part, operating remotely, and the Real Estate Finance Bureau (the Bureau) is no exception. On Monday, March 16, 2020, the Bureau issued a notice stating that most of the staff in the Bureau are telecommuting, and that additional guidance would be forthcoming. See REF Updates email

By
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from the Real Estate Finance Bureau dated March 16, 2020.

Governor Cuomo's executive orders address certain issues relevant to the Bureau and sponsors.

Executive Order 202.7, Effective Through April 18, 2020

- Suspends §§73 and 74 of the State Executive Law by permitting those who volunteer or who are nominally paid to assist the state of New York without being subject to the revolving-door restrictions. This means that the Real Estate Finance Bureau could employ attorneys or other professionals in a volunteer capacity to assist in managing the state of emergency; and

- Suspends the need for any notarial act to take place in person, and permits notaries to carry out functions by using audio-video technology. This would apply to various notarized documents that are regularly submitted to the Bureau.

Executive Order 202.8, Effective Through April 19, 2020

- Tolls all time limits for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding under all applicable laws, rules, and regulations. This tolling applies to all actions or special proceedings that would otherwise be commenced by the New York Attorney General, as well as private-party disputes involving real estate securities; and

- Except those that provide "essential services," says that all businesses and not-for-profit entities in New York must reduce in-person workforces by 100% no later than March 22 at 8:00 p.m. The Governor has already publicly stated that this applies to the in-person showing of apartments.

See Sylvia Varnham O'Regan, et al., "Cuomo Orders Real Estate Agents to Stop Showing Homes," *The Real Deal*, (March 20, 2020).

Other than the foregoing, there is little to no guidance for sponsors to rely on at this point in time. Therefore, sponsors need to exercise extreme caution while proceeding with business operations until there is more official guidance.

Based upon Executive Order 202.8, all sponsors should close sales offic-

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es and direct their selling agents to refrain from providing any in-person showings. The industry will have to wait for additional guidance about any other modifications pertaining to marketing and sales activity, which, to the extent such activity requires any person-to-person contact, is likely to be seen as non-essential.

For sponsors with existing submissions pending review, all statutory deadlines remain applicable. For new construction condominium offering plans, the Bureau will still have 30 days to issue deficiency comments from the date of submission to the Bureau. See N.Y. Gen. Bus. Law §352-e(2). Unless otherwise exempted by an executive order, the failure on the part of the Bureau to issue comments renders the submission accepted for filing. See *Gonkjur Associates v. Abrams*, 57 N.Y.2d 853 (1982). Notwithstanding the strict time constraints facing the Bureau, this must be balanced against the obligation of a sponsor to ensure that the offering plan includes up-to-date and accurate information. See *Whalen v. Lefkowitz*, 36 N.Y.2d 75 (1975). This means that even if a sponsor were to treat a submission as filed due to the Bureau's failure to review on time, this would not otherwise preclude the Attorney General from commencing an investigation into the accuracy and truthfulness of the offering plan and its amendments at a later date. See *Charles H. Greenthal & Co. v. Lefkowitz*, 32 N.Y.2d 457 (1973).

In the near future, we are likely to see more guidance from the Bureau. I would expect such guidance to address the impact of COVID-19 on pending submissions, future submissions, and marketing and sales activity. Moreover, the Bureau is likely to

take advantage of emergency regulations to modify existing submission procedures that are burdensome during the state of emergency, or at least encourage sponsors to take advantage of waiver requests under each part of the regulations. For example, the Part 20 regulations governing new construction condominiums permit a sponsor to request a waiver from complying with the regulations if such waiver would not contravene the intent of the Martin Act. The Bureau will probably be amenable to providing exemptions to the need for original signatures, or perhaps even delayed payment of filing fees.

The language of the regulations is as follows:

(h) *Waiver*. In the interests of justice, the Department of Law may waive compliance with any provision of these regulations and can permit variations of regulations so long as the variation is consistent with the purpose and intent of the regulation and statute or unless prohibited from doing so by statute or by final court order.

(i) *Exemptions*. Upon written application of the sponsor, or sponsor's attorney, the Department of Law, in its discretion, may exempt a plan from the application of any provision of this Part where it is found that enforcement of the provision is not necessary to effectuate the purposes of the General Business Law or to protect the investing public. The application shall:

(1) be annexed to and be submitted with the attorney's transmittal letter;

(2) set forth the provisions from which the exemption is sought and the grounds for the exemption; and

(3) be signed by sponsor or the sponsor's attorney.

The transmittal letter and certifications required by Section 20.4 of this Part shall be in the form required by this Part, without modification, and shall be based on the assumption that any exemption sought pursuant to this section has been granted. In the event that the Department of Law denies the application for exemption, the Department of Law may issue a deficiency letter as provided in subdivision (f) of this section. No additional fee is required for an exemption application.

13 N.Y.C.R.R. §§20.1(h) and (i).

What's Next?

Until more guidance is available, sponsors should work closely with counsel before proceeding with transactions such as closings. Sponsors will also have to evaluate carefully what impact, if any, they believe the COVID-19 pandemic may have on individual projects, including but not limited to material changes to budgets and the first year of operations. It is also clear that the industry and the Attorney General's office will have to work together on equitable solutions in handling the impact of the COVID-19 pandemic on all parties, perhaps with the ability of the Bureau to seek guidance from resources such as the New York State Bar Association, especially since Executive Order 202.7 has made it possible for members of the legal community to volunteer their time with no revolving-door repercussions.