

ASK THE FORMER REGULATOR

Expert Analysis

When HDFC Shareholders Want To ‘Go Private’

Question: *I recently read about an HDFC cooperative that “went private” and thought that wasn’t possible. If HDFC shareholders want to do the same and go private, what do they need to do?*

Answer: The question of whether a housing development fund company (HDFC) that operates as a housing cooperative can go private is subject to various factors. First, an HDFC cooperative is formed under Article XI of the Private Housing Finance Law (the PHFL) and §402 of the Business Corporation Law (the BCL). (In a limited number of cases, there are also membership HDFC cooperatives formed under the PHFL and the Not-for-Profit Corporation Law.) Therefore, both of these laws apply in determining whether the shareholders may “go private.”

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By
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Every certificate of incorporation for an HDFC cooperative states it was formed “exclusively to develop a housing project for persons of low income” (N.Y. Priv. Hous. Fin. Law §573(3)(a)) and such HDFC cooperative “shall be operated exclusively for the benefit of the persons or families who are entitled to occupancy in such [HDFC cooperative] by reason of ownership of shares in such [HDFC cooperative]” (id. at §573(4)). Furthermore, an HDFC cooperative cannot be formed without the consent of a supervising agency, which in New York City is usually the Department of Housing Preservation and Development (HPD) and is the Division of Housing and Community Renewal (DHCR) elsewhere throughout the

State. Finally, any amendment to the certificate of incorporation also requires the consent of such supervising agency. See id. at §573(5).

HDFC shareholders that are looking to “go private” are in fact looking to carry out a corporate dissolution, which must be done in accordance with not only the PHFL, but the BCL as well. While there may be an HDFC cooperative out there with express language in its certificate of incorporation on the dissolution process, I have yet to see or hear of one. Therefore, for purposes of this discussion, I will assume that the HDFC cooperative documents are silent on dissolution. In such cases, Article 10 of the BCL would require a vote of two-thirds of all outstanding shares entitled to vote to approve any plan of dissolution. See N.Y. Bus. Corp. Law §1001(a), applicable to corporations incorporated before Feb. 22, 1998 (the effective date of 1997 N.Y. Laws ch. 449 §63 which amended this BCL section). While this may seem like a simple threshold to meet, and

in many cases it might be, a vote of shareholders alone is not sufficient to actually effectuate a dissolution. This is because the BCL is not the only applicable law; the PHFL applies too.

So even if every shareholder in an HDFC cooperative voted to dissolve, a regulatory hurdle arises when the shareholders go to convey all of their shares or the building or buildings owned by the HDFC cooperative. As discussed above, PHFL §573(5) requires supervising agency consent to amend any certificate of incorporation of an HDFC cooperative, and a certificate of dissolution required under BCL §1003 is tantamount to an amendment, and the Department of State will not accept the certificate of dissolution unless it is accompanied with a consent certificate from the supervising agency of the HDFC cooperative.

This circular requirement is exactly why the New York Attorney General, HPD, and DHCR came together in 2015 and issued a guidance document entitled, “Guidance on Housing Development Fund Corporations Seeking to Transfer or Sell Property for, or Otherwise Convert Property to Market-Rate Use” (the 2015 AG Memo). In sum, both HPD and DHCR made clear that they would potentially consent to the dissolution of an HDFC cooperative if it was in furtherance of affordable housing. *See id.*

As of the date of this article, I am aware of one example of an HDFC cooperative that went private. (The author discloses that she and her

law firm, Nixon Peabody, handled this transaction.) As you note, it is now public knowledge that one HDFC cooperative did in fact get the consent from HPD to dissolve and reconstitute as a market-rate cooperative. See Darcey Gerstein, “West Village Houses Achieves Historic Conversion,” *The Cooperator New*

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York (July 15, 2020). In line with the 2015 AG Memo, HPD provided the necessary consent to effectuate the dissolution of the HDFC cooperative, because the dissolution and reconstitution was in furtherance of affordable housing. Prior to operating as an HDFC cooperative, the project in question was a Mitchell-Lama rental. Unlike Article XI of the PHFL, Article II of the PHFL, which governs Mitchell-Lamas, expressly provides for voluntary dissolution after the passage of time and satisfaction of certain terms and conditions. *See N.Y. Priv. Hous. Fin. Law §35.* When the prior owner of the Mitchell-Lama rental sought approval to voluntary dissolve, the tenants banded together and effectuated a tenant-sponsored cooperative conversion of the properties to HDFC cooperative status. One of the express terms of the pres-

ervation transaction was that the shareholders agreed to operate the property for persons and families of low income for at least 12 years, and thereafter, were eligible to dissolve in accordance with the BCL.

Since very few HDFC cooperatives are the result of a preservation deal with dissolution expressly baked in, there are many questions as to what else would be construed as “in furtherance of affordable housing” as mandated by the 2015 AG Memo. What seems clear is without some form of amendment to the PHFL, shareholders will need to get creative and be very strategic in order to obtain the consent they need to properly dissolve. And assuming they meet this essential hurdle, then the real work starts. Corporate dissolution requires careful planning on a myriad of issues from property disposition to tax implications, and if the property will continue to operate as a market-rate cooperative or condominium, then a new offering statement or prospectus must be filed with the Attorney General, as the corporate change would result in new real estate securities under the Martin Act. *See East Midtown Plaza Hous. Co. v. Cuomo*, 20 N.Y.3d 161 (2012).