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NEW YORK SIMPLIFIES REGISTRATION REQUIREMENTS FOR CERTAIN OUT-OF-STATE REAL ESTATE PROJECTS

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Viewed as a sale of a security, the New York law known as the Martin Act requires real estate developers to register out-of-state properties before such properties can be marketed and advertised within NY. Such registrations requirements apply to condominium projects, communities governed by homeowners associations, timeshare and fractional ownership properties, and other sales of real estate which include an obligation on the part of the buyer to share in the maintenance or costs of administering the property with others. Such properties are referred to as "cooperative interests in real estate". Developers seeking to market Florida real estate projects in New York are, therefore, required to complete an extensive and costly registration which includes the preparation of a detailed offering plan. Advertising in publications circulated in New York or mailing marketing materials to potential buyers in New York trigger the registration requirements. The ramifications for failing to properly register and make full disclosures can lead to serious fines. While some developers have been unable to pursue the New York market for its out-of-state projects due to this high barrier of entry, others choose to take the risk and do business there without abiding by the regulatory requirements.

The New York Attorney General previously issued guidelines regarding Internet advertising indicating that advertising through the Internet is not considered an offer for sale or purchase of property made within New York which requires registration so long as (a) the company whose real estate is being offered is not incorporated in the New York State and has no offices in New York State, (b) the person or entity making the offer is not incorporated or located in New York State, (c) the advertisement indicates that the offer is not being made to residents of the New York State, (d) the advertisement is not specifically directed to any person or entity in the New York State, and (e) no sales or purchases are made in or from New York State as a result of the offer until such time as all registration requirements are fulfilled.

On August 5, 2015, the Real Estate Finance Bureau of the New York Department of Law issued a memorandum of guidance for advertising out-of-state offerings, providing seemingly harsher guidance than what was previously articulated by the New York Attorney General. The August 5, 2015 memorandum mandates that an out-of-state developer is required to file an offering plan with the New York Department of Law prior to engaging in the advertising, offering and sale of regulated real estate in New York State unless (a) adequate measures are taken to prevent New York residents from accessing the advertisement such as requiring input of the state of residency or zip code prior to accessing a Web site OR (b) the following disclosures are "clearly and conspicuously" included on the offering and advertisement (including a Web site, social media or other Internet advertisement):

(i) The person or entity and its principals taking part in the offering or sale are not incorporated in, located in, or resident in the State of New York;

(ii) The offering is not directed to any person or entity in the State of New York nor made to the residents of the State of New York;

(iii) The offering is not directed to any person or entity in the State of New York by, or on behalf of, the offeror or anyone acting with the offeror's knowledge; and

(iv) No offering or purchase or sale will take place as a result of the offering until all state registration and filing requirements are complied with.

On May 5, 2016, the Real Estate Finance Bureau of the New York Department of Law published Cooperative Policy Statement #12 ("**CPS-12**") which simplifies registration requirements for out-of-state developers contemplating the sale of regulated properties to residents of New York State by providing "exemptions" from the full registration requirements for certain out-of-state real estate offerings. While CPS-12 streamlines the registration and approval process, it does not eliminate the obligation to register out-of-state real estate offerings prior to advertising and marketing within New York State.

CPS-12 applies to offerings that "(i) involve realty situated exclusively outside the State of New and (ii) are situated within a jurisdiction that has enacted laws to protect realty purchasers through legal protections that are comparable to those of New York such as full disclosure of the terms of sale".

For out-of-state real estate projects that meet the requirements of CPS-12, some of the burdensome requirements of the registration process have been eliminated. For example, the preparation of a separate Offering Plan with supporting reports, certifications and other exhibits is not necessary. However, CPS-12 requires an affidavit from the developer that the offering materials do not omit any material information required to be disclosed by the Martin Act and confirming, among other things, that the documents submitted are complete, current and accurate and do not contain any untrue statement of a material fact, fraud or deception.

The developer of an offering meeting the requirements of CPS-12 will not be required to deposit escrowed funds from New York purchasers in a bank located in the State of New York. However, the existing regulations and requirements on the handling of deposits from buyers in and from New York remain.

Because the determination of whether the exemption from the full registration requirements is applicable is entirely discretionary, the scope and availability of the exemption is unclear. It is clear, however, that CPS-12 was issued against the backdrop of an increased awareness on the part of the New York Department of Law of the extent of out-of-state properties being marketed in New York and increased enforcement of New York Law as it relates to out-of-state properties being offered and advertised to residents of New York State.

A copy of CPS-12 12 can be found here: http://www.ag.ny.gov/real-estate-finance-bureau/coopolicy

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