

Written Agency Disclosure Required for Condominiums and Cooperative Apartments as of January 1, 2011

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When Governor David Paterson signed into law (August 30, 2010) amendments to Real Property Law §443 which take effect on January 1, 2011 (“§443” or the “Law”), he ensured that condominiums and cooperative apartment units previously exempt from Agency Relationship Disclosure would now be included under this important section of the Law.

The Real Property Law - January 1, 1991

Section 443 originally became effective on January 1, 1991 after the Department of State had concluded that brokers in residential transactions often failed to articulate whether they were representing the sellers or the buyers. Regulation §175.7 of the Department of State’s Regulations which then required, and still require, disclosure in every real estate transaction regarding the person or entity on whose behalf the agent is acting, was deemed insufficient. Written disclosure became the requirement in residential transactions. The definition of “residential real property” under subsection 1.f of §443 (definitions) indicated that residential real property would not refer to “condominium or cooperative apartments in a building containing more than four units.” As a result, many real estate salespersons in the City of New York and its surrounding areas who are focused on cooperative and condominium properties have seldom been required to comply with the written agency disclosure requirements of §443.

Governor Paterson’s signing of the new law eliminates the exclusion of condominiums and cooperative apartments and makes the law applicable to condominiums and cooperative apartments, uniformly. Moreover, the new Law will bring New York State in alignment with virtually every other state in the United States so that buyers and sellers can authorize a broker in advance (when the form is signed) to act as a consensual dual agent when dual agency applies. The new revised forms, which will take effect on January 1, 2011, will permit sellers and buyers, as well as landlords and tenants, to consent in advance to dual agency or dual agency with designated sales agents, by indicating same in the newly revised disclosure form.

What Does Real Property §443 Require?

Subsections 3(a), 3(b) and 3(c) of §443, respectively, address the listing agent (“a”), a seller’s or landlord’s agent (“b”) and a buyer’s or tenant’s agent (“c”). The licensee’s obligation is to provide the disclosure forms at the time of “first substantive contact” with each of the parties in the transaction. In the case of a buyer’s agent or tenant’s agent, obligations also accrue to cooperating brokers. “First substantive contact” has been construed to mean in person (“warm body”) contact. Accordingly, a listing agent

for the sale of property or a buyer's agent for a prospective purchaser must obtain a disclosure form before entering into a listing agreement or an exclusive right to represent agreement. When the buyer's agent brings the buyer to the residence of the seller or meets with the seller's agent, the disclosure form must be provided to the seller, the seller's agent, the landlord or the landlord's agent. A buyer's agent is required to obtain a signed acknowledgement from the seller, the landlord or the listing agent that the buyer's agent is working on behalf of the buyer (Subsection c - agent's obligation to provide the form). The salesperson that provides the Agency Relationship Disclosure Form, which is set forth fully in §443, must provide the parties who sign the document with a copy and also maintain a copy for not less than 3 years (subsection d).

Refusal to Sign: "Written Declaration"

In some instances a seller, buyer, landlord or tenant will refuse to sign an acknowledgment that the broker or salesperson has delivered the Agency Relationship Disclosure Form. The agent is required under subsection 3.e of §443 to create a written declaration of the facts of the refusal and maintain a copy of the declaration for not less than 3 years.

It has been the practice of many reputable brokers through the years to prepare such a declaration and also forward a letter to the seller, the buyer, the landlord or the tenant, as the case may be, who has refused to sign the Agency Relationship Disclosure Form confirming that it was provided to the person, indicating that he or she has refused to sign same and that a written declaration of the facts has been placed in the file of the agent.

The Form of Disclosure

The actual disclosure form is set forth in subsection 4(a) and 4(b) of §443. The Department of State usually publishes the form on its website so that copies can be downloaded and printed directly from the Department of State website. Brokers must set forth the disclosure directly from the Law itself but are not permitted to modify the disclosure form in any way. The New York State Association of Realtors® has already published the form of the new Disclosures which will become effective January 1, 2011, on its website at www.NYSAR.com. The identical form with the Department of State logo is likely to appear shortly. There is a separate form utilized for purchase and sale transactions and a separate form for landlords and tenants.

Agency Capacities

Real estate agents in the cooperative and condominium market will need to refresh their understanding of agency rules and be able to articulate them when presenting the forms to prospective purchasers, sellers, landlords and tenants. The disclosure form sets forth simple and clear explanations of the various roles that an agent can play:

“A seller’s agent is an agent who is engaged by a seller to represent the seller’s interest.”

“A buyer’s agent is an agent who is engaged by a buyer to represent the buyer’s interest.”

“A broker’s agent is an agent that cooperates or is engaged by a listing agent or a buyer’s agent (but does not work for the same firm as the listing agent or the buyer’s agent) to assist the listing agent or buyer’s agent in locating a property to sell or buy, respectively for the listing agent’s seller or the buyer agent’s buyer.”

“A real estate broker may represent both the buyer and the seller if both the buyer and seller give their informed consent in writing (a dual agent).”

Until December 31, 2010, dual agency remains “transactional” in New York State. What this means is that there must be a known buyer, known seller and a known property (or a known landlord, a known tenant and a known property) for dual agency consent to be obtained. As of January 1, 2011, advance informed consent to dual agency is permissible. The new provision of the Law will read “a landlord or tenant may provide advance informed consent to dual agency by indicating the same on this form”.

Existing disclosure forms have also permitted designated sales agents to be used in the context of dual agency. The designated agency applies when a specific salesperson is designated to represent the buyer and another salesperson is designated to represent the seller. Under the new Law, “a landlord or tenant may provide advance informed consent to dual agency with designated sales agents by indicating the same on this form.”

Notification Requirements Regarding Advance Informed Consent to Dual Agency

The Department of State has indicated that once a buyer, seller, landlord or tenant has authorized advance informed consent to dual agency or advance consent to dual agency with designated sales agents, no notification will be required when a property is shown. All parties can reasonably be anticipated to expect that dual agency will come about at some point. When, however, there is a showing that produces interest on the part of any party, the salesperson showing the property will be required to notify the seller or the seller’s designated agent by telephone, e-mail, fax or by letter that a prospective buyer or tenant is interested in the property and dual agency is applicable. While the Department of State has indicated to the New York State Association of Realtors® that a telephone communication is sufficient, NYSAR has recommended that such notice be in writing so that the salesperson has documentary proof of the communication.

Re-Education and New Education

For brokers familiar with the use of the §443 Agency Relationship Disclosure Form, it will be important to understand the mechanics of the advance informed consent to dual agency and dual agency with designated sales agents. For salespersons who have been engaged primarily in condominium and cooperative offerings for which the agency Relationship Disclosure Forms have been the exception rather than the rule, a full understanding of §443 of the Real Property Law is imperative. The new forms and documents relating to the newly amended §443 are available online and seminars and comprehensive classes will soon be offered.

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