

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 80992 / June 21, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-18040

In the Matter of

New York REIT, Inc. and
New York Recovery Advisors,
LLC,

Respondents.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, IMPOSING CIVIL PENALTIES, AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against New York REIT, Inc. (“NY REIT”) and New York Recovery Advisors, LLC (“NY Advisors”) (collectively, the “Respondents”).

II.

In anticipation of the institution of these proceedings, each Respondent has submitted an Offer of Settlement (the “Offers”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, Imposing Civil Penalties, and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents’ Offers, the Commission finds¹ that:

¹ The findings herein are made pursuant to each Respondent’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Summary

1. These proceedings arise out of the failure of NY REIT, a public, non-exchange listed (“non-listed”) real estate investment trust (“REIT”), to make accurate and complete disclosures concerning revisions to its corporate charter. NY REIT’s corporate charter revisions limited the applicability of certain shareholder protections, including the right to an independent appraisal of NY REIT’s assets, in the event of a “Roll-Up Transaction.” NY REIT’s corporate charter defined a Roll-Up Transaction as involving the acquisition, merger, conversion or consolidation of the company and the issuance of securities of the acquiring entity to shareholders of NY REIT’s common stock.

2. NY REIT was required to register its offerings of common stock in states in which its securities were sold. Many state securities regulators required NY REIT to include certain provisions in its corporate charter that were contained in guidelines applicable to REITs adopted by an association of securities regulators, including provisions relating to Roll-Up Transactions. The definition of a Roll-Up Transaction contained in NY REIT’s corporate charter prior to the Certificate of Correction conformed to those guidelines.

3. On January 23, 2012, NY REIT changed the phrase “the Company” to “a company” in its corporate charter and filed a “Certificate of Correction” with the state of Maryland. The effect of this seemingly minor change on shareholders’ rights limited the applicability of independent appraisal rights and other shareholder protections in the event of a Roll-Up Transaction.

4. NY REIT included the Certificate of Correction as an exhibit to its Form 10-K for the fiscal year ended December 31, 2011 (“Form 10-K”), which it filed with the Commission on February 29, 2012. Aside from attaching the Certificate of Correction as an exhibit, NY REIT made no other disclosures in the Form 10-K concerning the change to its corporate charter.

5. In so doing, NY REIT violated Section 15(d) of the Exchange Act and Rules 15d-1 and 12b-20 thereunder which require that information in its Form 10-K is accurate and complete. NY Advisors was the external advisor responsible for managing the day-to-day operations of NY REIT including assisting in the preparation of the Form 10-K in consultation with other professional advisors to NY REIT. NY Advisors was a cause of NY REIT’s violation pursuant to Section 21C of the Exchange Act.

Respondents

6. NY REIT, formerly known as American Realty Capital New York Recovery REIT, Inc., is a Maryland Corporation headquartered in New York, NY that was a public reporting, non-listed REIT until April 15, 2014, at which point it listed its securities on the New York Stock Exchange (“NYSE”).

7. During the relevant period, NY REIT was subject to the reporting requirements of Section 15(d) of the Exchange Act as it had filed a registration statement that had become effective on September 2, 2010 and several post-effective amendments thereto that became

effective in 2011 and January 2012. NY REIT subsequently registered a class of securities pursuant to Section 12(g) of the Exchange Act on Form 8-A on April 30, 2012.

8. NY Advisors, a Delaware limited liability company, managed the day-to-day activities of New York REIT pursuant to a written advisory agreement, including preparing or causing to be prepared all reports required under the Exchange Act.

Facts

Roll-Up Transaction Protections

9. The Roll-Up Transaction language in NY REIT's corporate charter was modeled after the Statement of Policy Regarding Real Estate Investment Trusts adopted by the North American Securities Administrators Association, Inc. ("NASAA REIT Guidelines"). NASAA is an international association devoted to investor protection whose membership includes, among others, state securities administrators in the 50 states and the District of Columbia. Non-listed REITs generally must comply with state securities registration requirements in the states in which their securities are sold. Many state securities regulators, including some in states in which NY REIT registered its offerings of common stock, have adopted the NASAA REIT Guidelines and require provisions from the NASAA REIT Guidelines, including provisions relating to Roll-Up Transactions, to be incorporated into issuers' corporate charters.

10. During the relevant period, NY REIT's corporate charter defined a Roll-Up Transaction as a transaction involving the acquisition, merger, conversion or consolidation either directly or indirectly of the REIT and the issuance of securities of a "Roll-Up Entity" (*i.e.*, the surviving entity following a Roll-Up Transaction) to the REIT's common shareholders. NY REIT's corporate charter was filed (or incorporated by reference) as an exhibit to numerous public filings including its registration statements on Form S-11 and most of its annual reports on Form 10-K as required by Item 601(a) of Regulation S-K.

11. Consistent with the NASAA REIT Guidelines, NY REIT's corporate charter excluded from the definition of a Roll-Up Transaction transactions "involving securities of the Company that have been for at least twelve (12) months listed on a national securities exchange" The term "the Company" was defined in the corporate charter to mean NY REIT.

12. In the event of a Roll-Up Transaction, NY REIT's corporate charter provided that, among other things, shareholders had the right to an appraisal of the REIT's assets from a competent independent expert. Shareholders also had the choice of whether to accept securities of the Roll-Up Entity offering the proposed Roll-Up Transaction, to remain a shareholder of the REIT, or to receive cash in the amount of the shareholder's pro rata share of the appraised value of the REIT's net assets. NY REIT described the restrictions on Roll-Up Transactions and related shareholder protections found in its corporate charter in its registration statement on Form S-11, and stated that the term Roll-Up Transaction did not include "a transaction involving *our* securities that have been listed on national securities exchange for at least 12 months..." (emphasis added).

Certificate of Correction

13. On January 23, 2012, NY REIT filed a Certificate of Correction with the Maryland State Department of Assessments and Taxation to change the definition of a Roll-Up Transaction in its corporate charter. Section 1-207 of Maryland's Corporations and Associations Code provides that if any charter document or other corporate document filed with the Maryland State Department of Assessments and Taxation contains "any typographical error, error of transcription, or other error or has been defectively executed, the document may be corrected by the filing of a certificate of correction."

14. Prior to the Certificate of Correction, NY REIT's corporate charter excluded from the definition of a Roll-Up Transaction transactions involving securities of the REIT that had been listed for at least 12 months. The Certificate of Correction changed this language to exclude transactions involving the securities of *any* company— not just the REIT – that had been listed for at least 12 months. Specifically, the Certificate of Correction changed the term "the Company," which was defined in the corporate charter to mean NY REIT, to the broader term, "a company."

15. The change made in the Certificate of Correction expanded the exclusion and limited the applicability of the Roll-Up Transaction protections thereby making substantive changes to the rights of shareholders under the corporate charter.²

Rationale for Changes

16. NY REIT's expressed basis for concluding that there was a correctable error in the definition of Roll-Up Transaction was a determination that the NASAA REIT Guidelines contained an error that NY REIT copied into its corporate charter.

17. The NASAA REIT Guidelines defined "Roll-Up" as "[a] transaction involving the acquisition, merger, conversion, or consolidation either directly or indirectly of the REIT and the issuance of securities of a [Roll-Up Entity]." "Roll-up Entity" was defined as "[a] partnership, real estate investment trust, corporation, trust, or other entity that would be created or survive after the successful completion of a proposed [Roll-Up] transaction." The NASAA REIT Guidelines exclude from the definition of Roll-Up, among other things, transactions "involving securities of *the* REIT that have been for at least 12 months listed on a national securities exchange or traded through the National Association of Securities Dealers Automated Quotation National Market System..." (emphasis added).

18. NY REIT based its conclusion that NASAA erred in part on the fact that other regulatory frameworks restricting roll-up transactions that were adopted around the same time as the NASAA REIT Guidelines contained exclusions for transactions involving the issuance of securities of the acquiring entity that had been listed on a national securities exchange for at least 12 months, sometimes called a "Seasoned Issuer" or "Seasoned Company" exclusion.

² NY REIT did not engage in any Roll-Up Transaction before or after the corporate charter was revised.

Disclosures Concerning the Changes to the Corporate Charter

19. NY REIT made representations in the Form 10-K as well as in its corporate charter, which was incorporated by reference in the Form 10-K, concerning shareholders' right to vote on corporate charter amendments. NY REIT's decision to use the Certificate of Correction mechanism, rather than to amend the corporate charter by shareholder vote, resulted in substantive shareholder Roll-Up protections being altered without a shareholder vote.³

20. NY REIT filed the Certificate of Correction as an exhibit to its Form 10-K, which it filed with the Commission on February 29, 2012. Aside from filing the Certificate of Correction as an exhibit, which described the specific language changed, NY REIT made no other disclosure in the Form 10-K concerning the Certificate of Correction.

21. NY REIT was obligated to disclose sufficient further material information in the Form 10-K to avoid misleading shareholders. NY REIT failed to include information concerning the impact the change had on substantive shareholder rights. The Certificate of Correction described the language change in terms of correcting an error – using phrases such as “...the title of the document being corrected...” and “the definition of Roll-Up Transaction ... as corrected...” – even though the revision did not correct any typographical or transcription-type error on the part of the REIT, but rather “corrected” a perceived error in the NASAA REIT Guidelines.

22. Thus, given the use of the Certificate of Correction mechanism and disclosures in the Form 10-K concerning shareholders' right to vote on corporate charter amendments, the failure to make additional disclosures rendered the required statements in the Form 10-K materially misleading.

Role of NY Advisors

23. NY Advisors managed the day-to-day operations of NY REIT, which had no employees, pursuant to an advisory agreement. According to the advisory agreement, NY Advisors provided “daily management for [NY REIT] ... and perform[ed] and supervise[d] the various administrative functions necessary for the day-to-day management of the operations of [NY REIT]” NY Advisors also “assist[ed] [NY REIT] in filing all reports required to be filed by it with the Securities and Exchange Commission, the Internal Revenue Service and other regulatory agencies...”

24. NY Advisors should have known that, prior to filing the Certificate of Correction, NY REIT made disclosures concerning the applicability of the Roll-Up Transaction protections as well as concerning shareholders' right to vote on corporate charter amendments, including those involving the Roll-Up Transaction provision and those affecting the rights, privileges and preferences of shareholders. NY Advisors also should have known that, in light of the circumstances described above, NY REIT's failure to disclose additional material information as described above was misleading to shareholders.

³ In 2014, the NY REIT shareholders voted to remove the corporate charter's provisions on Roll-Up Transactions.

Conclusions

25. As a result of the conduct described above, NY REIT violated Section 15(d) of the Exchange Act and Rules 15d-1 and 12b-20 thereunder, which require issuers that have filed a registration statement that has become effective pursuant to the Securities Act of 1933 to file with the Commission annual reports in conformity with the Commission's rules and regulations, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading. NY Advisors was a cause of NY REIT's violations of Exchange Act Section 15(d) and Rules 15d-1 and 12b-20 thereunder pursuant to Section 21C of the Exchange Act.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondents cease and desist from committing or causing any violations and any future violations of Section 15(d) of the Exchange Act and Rules 15d-1 and 12b-20 thereunder.

B. Respondent New York Recovery Advisors, LLC shall, within 20 days of the entry of this Order, pay a civil money penalty in the amount of \$165,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying New York Recovery Advisors, LLC as a Respondent in these proceedings, and the file number of these

proceedings; a copy of the cover letter and check or money order must be sent to Reid A. Muoio, Deputy Chief, Complex Financial Instruments Unit, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

C. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent New York Recovery Advisors, LLC agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent New York Recovery Advisors, LLC agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent New York Recovery Advisors, LLC by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields
Secretary