

New COPA Policy Now in Effect as of June 2, 2019

San Francisco "Qualified Nonprofits" Granted Right of First Offer and Right of First Refusal to Purchase Residential Buildings with Three or More Units

NOTE: This article does not contain the most up to date information.

[Please visit the updated version of this article here »](#)

On April 23, 2019, the San Francisco Board of Supervisors unanimously approved the Community Opportunity to Purchase Act (COPA), a policy designed to stabilize communities by preventing displacement and preserving affordable housing. The Mayor signed the legislation on May 3, 2019 and it went into effect on June 2, 2019. The Mayor's Office of Housing and Community Development (the "City Agency") must, within ninety (90) days of the effective date, promulgate appropriate rules or regulations interpreting and implementing COPA.

COPA confers upon certain "Qualified Nonprofits" a first right to purchase real property in San Francisco improved with three or more residential rental units (whether or not the property also includes non-residential uses) *and* property on which three or more residential units *could* be or *are* being built (all such lots or buildings will be referred to hereafter as a "multi-family residential building"). The first right to purchase consists of both a right of first offer as well as a right of first refusal. A multi-family residential building acquired by a Qualified Nonprofit under COPA must be maintained as rent-restricted affordable housing in perpetuity.

The impact of COPA on owners of multi-family residential buildings in San Francisco is monumental and fraught with practical questions and legal implications. The conundrum created by COPA is exacerbated by the lack of interpretative rules and regulations. Those regulations should be in place by September 3 and hopefully will provide more direction and clarity as to how to navigate and fulfill the new law's requirements. In the interim, the seller of a multi-family residential building in San Francisco will be subjected to transactional delays and related costs. Even with the regulations in place, the logistics of complying with the law are complex and easily misunderstood and delays of up to four (4) months can be anticipated. This article attempts to explain the law and the logistics of being in compliance with the law.



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What is a "sale"?

COPA likely will affect a wide range of transactions in San Francisco. A sale is broadly defined and includes not only the transfer of a fee interest in the building for money or anything of economic value but certain transfers of interests in trusts, corporations, or other entities. There are exceptions to a sale, including but not limited to: transfers made under a mortgage, deed of trust, or deed in lieu of foreclosure; transfers to heirs; and transfers among defined family members. Note also that COPA is to be construed so as not to impair any purchase contract, option to purchase, or any right of first offer or right of first refusal in existence before its effective date.

Although we are expecting more interpretative guidance as to when an ownership transfer triggers COPA, the legislation contemplates that transfers akin to the transfer of a fee interest in a multi-family residential building will be enough. For example, if a trust owns an interest in a multi-family residential building, the transfer of a beneficial interest in the trust in exchange for money or any other thing of economic value, where the beneficial interest in the trust is substantially equal to the value of the fee interest in the multi-family residential building, will trigger COPA. Similarly, if an interest substantially equal to the value of the fee interest of a multi-family residential building is held by any kind of corporation, partnership or other entity, and if that interest is substantially equal in value to the total value of assets held by the entity, the transfer, in exchange for money or any other thing of economic value, of a controlling interest, will trigger COPA.

What is a "Qualified Nonprofit"?

The City Agency is required to establish a process for certifying nonprofit organizations that meet certain specified criteria, including demonstrating (i) a commitment to the provision of affordable housing for low and moderate-income residents and to preventing the displacement of such residents, and (ii) the capacity (including the legal and financial capacity) to effectively acquire and manage residential real property at multiple locations in San Francisco. The City Agency has indicated that it intends to publish the list within the first ninety (90) days along with the initial rules or regulations interpreting and implementing COPA. Without a list of Qualified Nonprofits, it is impossible to fulfill the requirements for notice set forth in the legislation. Accordingly, the City Agency has advised us in writing that until it has completed the qualification of nonprofits under COPA, property owners will not be required to take action to comply with the new legislation.

What is the "right of first offer"?

COPA raises a number of questions that may well require legal analysis, including what constitutes an "offer of sale" or an "offer to purchase". For example, it is clear that the solicitation of an offer triggers a right of first offer, but what about less formal expressions of a wish to sell a property, such as emails to friends or family or to a real estate agent?

Before a seller may offer a multi-family residential building for sale to any purchaser, other than a Qualified Nonprofit, or otherwise solicit any offer to purchase, such as placing the property on the MLS, the seller must notify each Qualified Nonprofit of its intent to sell and allow those nonprofits an opportunity to make an offer to purchase. The notice must identify the number of rental units and the address and rental rate for each unit. Each Qualified Nonprofit has five (5) calendar days within which to notify the seller of its intent to further consider whether to make an offer to purchase. Upon receipt of any such notice of intent from a Qualified Nonprofit, the seller must disclose to each such Qualified Nonprofit the names of, and any available contact information for, any tenant in each rental unit. The Qualified Nonprofit then has twenty-five

(25) additional calendar days to make and submit to the seller an offer to purchase. The seller is free to accept or reject any offer. If the seller rejects all offers, or if no Qualified Nonprofit makes an offer, the seller can offer the multi-family residential building for sale to the public, subject to the right of first refusal described below.

What is the "right of first refusal"?

Before accepting any offer of purchase or offer of sale from a party other than a Qualified Nonprofit (unless such acceptance is expressly subject to the condition that no Qualified Nonprofit exercises its right of first refusal), the seller must offer to sell the multi-family residential building to (i) any Qualified Nonprofit that previously submitted an offer to purchase and (ii) any Qualified Nonprofit that was not previously given the right of first offer to purchase. Such offer is required to contain the same terms and conditions as the offer to purchase or offer to sell that the seller desires to accept, with the exception of the time period within which such offer may be accepted.

If a Qualified Nonprofit did, in fact, receive a right of first offer and make an offer to purchase that the seller rejected, any such Qualified Nonprofit has five (5) calendar days after the seller's submission of an offer of sale to notify the seller (and every other Qualified Nonprofit) of its decision to accept the offer of sale. The first Qualified Nonprofit to submit its decision to accept the offer of sale is then obliged to purchase the multi-family residential building. If a Qualified Nonprofit did not receive the right of first offer (regardless of the reason), any such Qualified Nonprofit has thirty (30) calendar days after the seller's submission of an offer of sale to notify the seller (and every other Qualified Nonprofit) of its decision to accept the offer of sale. The legislation provides no guidance as to what happens in the event you have both (i) Qualified Nonprofits that have received a right of first offer (and must respond within five (5) calendar days) and (ii) Qualified Nonprofits that have not received a right of first offer (and must respond within thirty (30) calendar days).

If no Qualified Nonprofit elects to proceed with the purchase or the applicable time period within which they are required to do so expires, the seller may proceed with the sale of the multi-family residential building *consistent* with the offer of purchase or offer of sale. If the terms of the proposed sale, however, are materially different than those submitted to the Qualified Nonprofits in the right of first refusal notice, the materially different offer of purchase or offer of sale will be considered a new offer subject to the right of first refusal. This is true whether or not the materially different terms occur in the normal course of due diligence and related negotiations customary in real estate sales transactions. The difficult problem and question presented here, as is generally true with rights of first refusal, is whether or not a change in terms results in a materially different offer. Whether there is a material difference will depend on the facts of each case. We suggest that you engage an attorney when changes occur so that there can be an accurate analysis (based on interpretations of California court decisions) as to whether or not a particular change is, in fact, material.

What incentives exist for sellers under COPA?

COPA expressly provides that the City Agency will maintain and publicize the list of Qualified Nonprofits to facilitate voluntary sales to Qualified Nonprofits in a manner that avoids or minimized the need for a broker, other search costs or other transaction costs. Also, those who sell to a Qualified Nonprofit will not be subjected to increased incremental transfer taxes for property with a value equal to or greater than \$5,000,000. COPA further requires that a Qualified Nonprofit that purchases a multi-family residential building under a right of first offer work with the seller in good faith to facilitate a 1031 exchange.

What happens if you violate COPA?

Every seller of a multi-family residential building in San Francisco must, within fifteen (15) days of the close of escrow, submit to the City Agency a signed Declaration under penalty of perjury affirming that the sale substantially complied with the requirements of COPA. If a multi-family residential building is sold in violation of COPA, Qualified Nonprofits are permitted to bring a legal action against the seller. Potential remedies include damages, attorneys' fees and, if the violation is knowing or willful, civil monetary penalties presumptively tied to the value of the property. These remedies are imposed *only* against the seller or a party that has willfully colluded with the seller to violate COPA. This latter party clearly could include brokers and others listing multi-family residential buildings for sale in San Francisco as well as purchasers. Absent evidence of collusion, however, any remedy imposed under COPA will not affect any property interest of a purchaser of a multi-family residential building.

What impact will COPA have on sales?

Because this law will slow down sales for a minimum of five (5) days, and perhaps as long as three (3) to four (4) months, owners who live in their buildings and have to sell in a timely way to help fund a move to a new location perhaps due to a job transfer or other reasons, and sellers needing to meet a 1031 exchange deadline, will be greatly affected. Also, this could affect those who have a deadline related to settling an estate or completing a court settlement. Moreover, if nonprofits claim that deal changes on a property sale they did not choose to purchase are material, the right of first refusal process may have to be started over, causing even longer delays.

How will COPA be funded?

At this time, very few nonprofits have sufficient money to be able to close many deals. However, there will be a \$500 to \$600 million affordable housing bond on the ballot this November to provide low-income housing, and it appears that this bond will become the primary funding vehicle for the COPA program.

Will COPA be ruled illegal?

Two (2) San Francisco property owner associations have teamed up to hire litigation counsel, and we understand that a lawsuit will be filed within the next hundred (100) days. Those groups hope to obtain an injunction to stop implementation of the law. Without an injunction, it may take over a year for the law to be declared illegal, and compliance will be required in the interim. Many San Francisco Superior Court judges are very progressive, and it is sometimes the case that property owners do not succeed until a case is heard by an appellate court.

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