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New Hampshire real estate transfer tax primer - include your legal and tax professionals

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New Hampshire, like many other states, imposes a real estate transfer tax upon the sale of real estate. Unlike in other states, the tax applies broadly to all transfers of interests in real estate, with limited exceptions. In addition to conventional real estate sales, the tax encompasses easements, foreclosures, transfers of timber rights, and transfers between a partnership, corporation, or LLC and its principals. Furthermore, even if there is no change in title to real estate, the tax applies to transfers of ownership interests in real estate holding companies.

The tax is imposed on both buyer and seller at a rate of \$0.75 per \$100 of the consideration paid, usually the purchase price. For transfers between an entity and its owner, or between two related entities, the tax is calculated based on the fair market value of the property, regardless of whether any actual monetary consideration is exchanged. For transfers of interests in a real estate holding company, the transfer tax is not calculated on the purchase price, but on the fair market value of all real property held by that company, multiplied by the percentage of ownership interest transferred.

The tax is usually paid to the Registry of Deeds at the time of recording of the deed, and the buyer and seller must each file a "Declaration of Consideration" with the Department of Revenue Administration within 30 days after the transfer. Until this form is filed, the DRA's three year statute of limitations will not begin.

Some types of transactions are statutorily exempt from the tax, including transfers to government entities, mortgages, tax sales, transfers as part of a divorce, and gifts. Transfers to and from revocable trusts created for estate planning purposes technically are subject to the tax, but the amount of the tax in those situations is the minimum (\$40).

The core components of the transfer tax have remained largely intact for several decades, although the legislature has added, deleted, and modified particular exemptions. The legislature has occasionally attempted to clarify the scope of the statute's applicability to transfers of interests in real estate holding companies. Recent litigation concerning the transfer tax has centered around whether transfers among related business entities and their owners are subject to the tax, with somewhat mixed results.

In 2014, the DRA modified its regulations to clarify some of the statute's ambiguity and reconcile the statutory language with the related litigation. For example, the 2014 regulations include an exception related to "carried interests" (i.e., rights to share in the profits of an entity). Under the new rules, there is no transfer tax on changes in an owner's carried interests in a real estate holding company or in an entity owning a real estate holding company.

The 2014 rules also include an exception for a transfer of interest in an entity that holds an interest in a real estate holding company that has a "de minimis impact on the overall ownership of the real estate holding company, based on the number of owners and interests held." Although the

regulations do not provide further guidance on when a particular transfer qualifies as de minimis, this new exception mitigates the overly broad language of the transfer tax statute that would arguably impose the tax on nearly any transaction in stock of a corporation that owns, even indirectly, a real estate holding company.

Another category of exceptions included in the new regulations address corporate restructurings. For example, the rules now confirm that the transfer tax does not apply to single entity reorganizations under federal tax law involving mere changes in identity, form, or place of organization or recapitalization. Somewhat similarly, the 2014 regulations provide that, although a conversion of a business entity into an LLC is a taxable transfer, it is only subject to the minimum tax.

One proposed provision that was ultimately not included in the new rules has some importance: a proposal that ground leases with a term of 30 years or longer would be subject to the transfer tax. This proposed rule ran contrary to the accepted interpretation that only ground leases with terms of 99 years or longer are subject to the transfer tax. While the 99 year provision remains in the current rules, the DRA apparently maintains that ground leases of shorter durations may also be taxable.

New Hampshire's real estate transfer tax is complex and applies in surprising ways. Your legal and tax professionals should be included in the planning of any significant transaction involving real estate or a real estate holding company.

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