

First American Title Insurance Company of New York
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CURRENT DEVELOPMENTS

This is another in a series of bulletins for clients of First American. Fax recipients are requested to send their email addresses to Michael Berey, Senior Underwriting Counsel, at mberey@firstam.com, for future issues of Current Developments.

Limited Liability Companies and Limited Partnerships – The Limited Liability Company Law and the Partnership Law were amended effective August 31, 1999 by Chapter 420 of the Laws of 1999. The amendments made by the Chapter do not apply to LLCs and Partnerships formed prior to the effective date unless the changes are adopted and reflected in an entity's operating or partnership agreement.

Sections 402 and 1002 of the Limited Liability Company Law have been amended to provide that, except as may otherwise be set forth in the operating agreement, the vote of a majority in interest of the members, instead of a two-thirds vote, is required to approve a dissolution, a merger or consolidation with or into another foreign or domestic LLC or other business entity, or the sale, lease or transfer of all or substantially all of the assets of the LLC.

Section 121-801 of the Partnership Law has been amended to provide that the written consent of all the general partners and of a majority in interest of each class of limited partners, instead of a two-thirds vote, is required to dissolve a Limited Partnership unless it is stated otherwise in the partnership agreement.

Section 606 of the Limited Liability Company Law has been amended to provide that a member may only withdraw upon the occurrence of an event specified in the operating agreement. Unless the operating agreement provides otherwise, a member may not assign its interest or withdraw from an LLC prior to dissolution and winding up. The right to assign or withdraw an interest in a limited partnership prior to

dissolution and winding up has been similarly restricted in an amendment by this Chapter to Partnership Law, Section 121-603.

Sections 701, 705 and 1002 of the Limited Liability Company Law have been amended to provide that absent an occurrence specified in its operating agreement, an LLC shall have perpetual duration. Death, retirement, resignation, bankruptcy or dissolution of a member is not an event of dissolution unless it is so provided in the operating agreement. For further information contact Stephen Farber at (212) 922-9700.

Mergers and Consolidations – Corporations – On September 7, 1999, the Business Corporation Law (“BCL”) was amended by Chapter 485 of the Laws of 1999 effective September 7, 1999 to add Section 904-b which provides for domestic business corporations to merge with or consolidated into domestic not-for-profit corporations. The Plan of merger or consolidation must comply with Section 902 of the Not-For-Profit Corporation Law, and set forth the manner in which shares are converted into membership interests of the surviving or consolidated entity. An Order approving the Plan of merger or consolidation must be obtained from the Supreme Court. The merger or consolidation is effective upon filing the certificate of merger or consolidation approved by the court with the Department of State, or within no later than thirty days thereafter if so provided in the certificate.

A copy of the certificate of merger or consolidation, certified by the Department of State, is thereafter to be filed in the public records of the counties in which both the office and the real property of the constituent corporations, other than the surviving corporation, are located. The merged or consolidated entity is subject to the Not-For-Profit Corporation Law. For further information contact Stephen Farber at (212) 922-9700.

Mortgage Tax – Warren County has imposed an additional mortgage recording tax effective November 1, 1999. The mortgage tax rate for Warren County is now \$1.00 for each \$100 of principal indebtedness secured.

New York City Real Property Transfer Tax - The City of New York's Department of Finance, at its October 27 "Tax Representatives and Practitioners Program", made known Amendments it issued to the Rules Relating to the Real Property Transfer Tax ("RPT") on application of the mere change of identity exemption to the transfer of controlling economic interests. The Amendments, effective May 28, 1999, can be found at <http://www.titlelaw-newyork.com> under "Transfer Taxes".

The Administrative Code of the City of New York was amended by Chapter 170 of the Laws of 1994 to provide an exemption from the RPT for transfers on and after June 9, 1994 which effect a mere change of identity or form of ownership or organization to the extent the beneficial ownership in the entity owning the interest in real property remains the same. The Amendments include two significant, "new" positions on application of the exemption. The examples set forth below have been extracted from illustrations in the Amendments.

First, for transfers or transactions occurring *on and after January 1, 1999*, the determination of the RPT rate to be applied to a controlling interest transfer will be determined based on the amount of consideration prior to application of the exemption. This is a change from the Department's prior position which remains applicable to transfers before January 1, 1999.

For example, X Corporation, having two shareholders each owning 50% of the corporation's stock, owns 100% of the stock of Y Corporation, which owns unencumbered real property in the City of New York having a fair market value of \$1,000,000. X Corporation distributes in liquidation 25% of the Y Corporation stock to A and 75% of the Y Corporation stock to B. The transfer of Y Corporation stock is exempt as a mere change of identity or form of ownership or organization *except* to the extent of the additional 25% stock interest distributed to B. The RPT due is \$6,562.50 determined by multiplying \$250,000 (25% of the fair market value of the real property) by the tax rate of 2.625%. The higher tax rate applies since the "measure of tax" for the distribution of the Y Corporation stock is \$1,000,000, which is greater than the \$500,000 threshold for application of the increased rate

Second, for transactions involving economic interests, a determination of whether a controlling interest has been transferred is to be made prior to application of the exemption. Interests that are not exempt will be subject to tax even if they represent less than 50% of the capital, profits or other beneficial interests in the entity owning the interest in real property if the total of the interests being transferred, without consideration of the no change exemption, is 50% or more.

For example, Limited Partnership X has four limited partners and one general partner. A, B, C, and D, limited partners, have, respectively, 29%, 29%, 24% and 14% interests in the partnership. E, the general partner, has a 4% interest in the partnership. X owns a parcel of unencumbered real property in the City of New York with a fair market value of \$1,000,000. Limited Partnership X merges into Limited Partnership Y in which A, B and C each have a 24% interest, D has a 14% interest, and E has a 4% interest, for an aggregate interest in Partnership Y amongst these partners of 90%. The merger is exempt as a mere change of identity or form of ownership or organization to the extent of 90%. RPT is imposed on the 10% interest that is not a mere change. The tax due is \$2,625 determined by multiplying \$100,000 (the fair market value of the real property apportioned to the 10% interest in Partnership Y not covered by the mere change exemption) by the tax rate of 2.625%. The applicable rate of tax is determined by the full value of the consideration prior to application of the exemption, which in this example is \$1,000,000, greater than the \$500,000 threshold for application of the higher tax rate.

The Amendments state that the second point does not reflect a change in the policy of the Department of Finance. According to the “Basis and Purpose of Amendments” section of the Notice of Rulemaking, “(s)ince June 4, 1994, Department policy has been that for all transactions occurring on or after that date, the determination of whether a transaction constitutes a transfer of a controlling economic interest is made prior to the application of the mere change exemption”.

November 8, 1999