

NEW JERSEY COMMERCIAL REAL ESTATE LAW

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Filing Bulk Sales Declarations in New Jersey Real Estate Deals

Principals and attorneys who have not done a real estate deal in New Jersey in a few years (or ever) continue to be surprised by the breadth of changes to the bulk sales law enacted in the past few years. As originally enacted, the bulk sales law only applied to entities that collected sales tax; as most real estate was held by special purpose entities, it was not necessary to file a bulk sales declaration when selling real estate. However, in the past few years, the bulk sales law has been expanded to the point where a bulk sales declaration must be filed in almost all real estate transactions. Why, you ask?

Because the bulk sales law now applies to any sale, transfer or assignment in bulk of any part or all of a person's or entity's "business assets," unless done in the ordinary course of business (e.g., the bulk sales law would not apply to a homebuilder selling homes, as they would be considered inventory). This definition includes almost all commercial real estate (a recent statute provided an exemption for certain residential real estate). The Division has stated that transactions involving distressed loans (i.e., short sales and deeds in lieu) are subject to the bulk sales law, though an exception is provided for sheriff's deeds given in connection with a foreclosure. If a sale is subject to the bulk sales law, the purchaser/transferee/assignee is required to notify the New Jersey Division of Taxation of the proposed sale and, among other things, the terms thereof at least ten business days prior to the purchaser taking possession of or paying for the assets.

After receipt of a completed bulk sales declaration (on a Division prescribed form), the Division can respond by informing the purchaser that it will either (i) require that an escrow be held at the closing or (ii) will allow the closing to proceed without an escrow. If the Division receives a complete, accurate and timely bulk sales notice and fails within ten business days of its receipt of the notice to send the purchaser notice that an escrow must be held at closing, the purchaser will have no liability under the



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bulk sales law. Note that the ten business day time frame is for the Division to send the notice, not for the purchaser to receive the notice. However, if the Division demands that an

escrow be held, the purchaser, or an escrow agent controlled solely by the purchaser, must hold the escrow until told otherwise by the Division.

A purchaser's failure to

comply with the bulk sales law (e.g., by failing to file an accurate and timely bulk sales declaration or by not holding an escrow when instructed to do so) results in the purchaser being jointly and severally liable with the seller for all of the seller's New Jersey taxes, including interest, penalties and other additions (such liability can exceed the purchase price). The scope of transfers subject to the New Jersey bulk sales law is broad, and the penalty for non-compliance can be very harsh; purchasers should, therefore, carefully comply

with the bulk sales law and consult their attorneys and tax advisors when acquiring assets subject thereto.

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