

REAL ESTATE UPDATE

FALL 2018

Real estate investments are often favored for their tangible nature and tendency to hold – or increase – in value over time. But real estate, like everything else, is subject to a variety of economic and legal forces. Holm & O'Hara LLP's *Real Estate Update* provides a summary of some of the developments that are most likely to impact investors and other property owners.

WIRE TRANSFER FRAUD

In this electronic age, fraud is an increasing part of everyday life, so it is no surprise that resourceful thieves have turned their attention to the substantial sums involved in real estate transactions. Within the past year, several stories of wire transfer fraud have been in the news, including one involving a New York State Supreme Court Justice being defrauded of over \$1 million related to the purchase of an apartment. In that particular case, as reported by *The New York Post*, the judge received explicit emailed instructions that appeared to be from her attorney. Those instructions included enough context that the victim had little reason to doubt them. While the money was eventually recovered, it was not before the victim endured many weeks of anxiety and the original transaction was put at risk.

Hackers can obtain detailed information by hacking into the email accounts of real estate brokers, closing agents, and even attorneys. Once they have violated these accounts, they monitor correspondence for information related to upcoming transactions and then send out fraudulent wire instructions to an unsuspecting purchaser or seller or their agent. Hackers also can gain insight on upcoming transactions and potential wire transfers by hacking the client's computer.

There are several red flags that indicate wire fraud:

- A change in wire instructions coming from an email account almost identical to a customer's email account
- Communications from a foreign bank
- Emailed instructions marked as "immediate," "urgent," "high importance" or "secret"
- Wording that is grammatically incorrect or includes misspelled names or changed bank accounts

- Instructions changing a method of payment

Holm & O’Hara LLP has the following processes in place to prevent wire fraud:

1. Wire instructions are sent encrypted
2. Wire instructions are always verified by phone
3. Clients and third parties are instructed on how to relay wire instructions
4. Attorneys and staff receive biannual training for regarding best cybersecurity practices

While no system is completely secure, individuals can take several steps to protect against wire fraud:

- Never wire funds to any person or institution unless you have checked the wire instructions independently by voice or in person with a trusted representative of that institution, your attorney, closing agent or title company.
- If requesting funds be wired to you, dictate instructions by phone, email encrypted, or send by fax.
- Additionally, you may want to take the precaution of re-verifying instructions for wire transfers.
- Always protect your email and password, verify your email headers, call the other party to confirm and add multi-factor authentication.

Take extra precautions when wiring funds.

NEW YORK: TITLE INSURANCE RATES AND MARKETING PRACTICES

The Supreme Court of New York, County of New York, on July 5, 2018 overturned the New York State Department of Finance’s expense reporting requirements for title insurance companies that had been effective since December 18, 2017.

In *Matter of New York State Land Title Association Inc. v. New York State Department of Financial Services*, the Court struck down state regulation that barred title insurers from passing along marketing and client-development expenses to customers. The regulation had been intended to increase transparency in title insurance rate reporting, as well as to decrease rates and costs associated with closings. Additionally, the regulation was created to prevent title insurance companies from charging consumers for marketing expenses through premiums at closing, thereby reducing consumers’ closing costs. The Court held that the Department of Financial Services exceeded the scope of its statutory authority by banning title insurers from treating clients’ attorneys to such entertainment where the legislature had not intended DFS to prohibit “title insurance corporations from marketing themselves for business.” The Court also noted that arguments made by DFS were “irreconcilable and irrational,” and “devoid of economic or other analysis,” thus justifying its holding and the limitations imposed.

Since the ruling, title insurance representatives have resumed inviting attorneys to lunch and title closers are again collecting attendance fees at closings. While the decision is a victory for title insurers, the fight may not be over as DFS has appealed the decision. In the appeal, the state contends that the Court misread a part of the state law that the DFS used to create and

enforce the regulation. It is yet to be determined whether the Court's decision on the regulation will remain in effect or be subject to further revision.

Examine title invoices carefully at each closing and consult your attorney if an expense seems excessive or unclear.

FEDERAL: REMINDER – DECREASED MORTGAGE INTEREST DEDUCTION

While many real estate owners and investors have already considered this, it is important to remember that the "Tax Cuts and Jobs Act of 2017" significantly limits itemized deductions for individuals, including those for mortgage interest. Under the Act:

- Mortgage interest deductions for a first home will be capped at \$750,000 (down from the previous limit of \$1,000,000) for mortgages taken out after December 15, 2017.
- Mortgage interest deductions for second homes are subject to the same \$750,000 cap.
- Home equity loan interest will be deductible only if the loan was used to substantially improve the taxpayer's residence. After 2025, home equity loan interest will no longer be deductible.

These changes are expected to have a significant impact on homeowners in expensive markets, such as the greater New York City area, beginning with tax filings for 2018. Small real estate investors who also live in their properties and treat them as primary residences for tax purposes may wish to consider revising title or ownership structures.

Work with your accountant and tax attorney to come up with a comprehensive tax strategy so that you are not unduly affected by these changes.

FEDERAL: FINCEN MAY REQUIRE INCREASED REPORTING REQUIREMENTS FOR REAL ESTATE TRANSACTIONS

The Financial Crimes Enforcement Network (FinCEN) is a bureau of the United States Department of the Treasury that collects and analyzes information about financial transactions in order to identify financial crimes. FinCEN has long been interested in the New York real estate market because of the typically high value of transactions and significant international activity. Over the past couple of years, FinCEN has implemented increased reporting requirements for real estate transactions in designated areas, including all five boroughs of New York City.

To date, FinCEN has been particularly interested in transactions that involve wire transfers, are funded with cash rather than institutionally-financed and involve legal entities, rather than individuals.

When a specific geographic area is subject to additional scrutiny, reporting requirements for a covered transaction have typically included:

- IRS Form 8300, which was historically used for disclosure of cash transactions in excess of \$10,000.00, now needs to be completed by the title company.
- Supporting FinCEN Affidavit, which includes the identity of any 25%+ beneficial owner of the legal entity, accompanied by a photo ID of each such owner, to be completed by the buyer representative and filed by the title company.

If required, title companies must file these documents with the relevant underwriters within 30 days of the closing.

Plan ahead to make sure that you have any required information – particularly ownership information – available prior to closing. Your real estate attorney will work with your title company to ascertain if your particular transaction is covered by FinCEN’s increased reporting requirements.

HOLM & O'HARA LLP REAL ESTATE TEAM

These are just a few recent developments for your consideration. The Real Estate Team at Holm & O'Hara LLP is prepared to discuss these items, your goals and other concerns with you. Whether you are managing a significant real estate investment portfolio, leasing a commercial property or buying/selling a family home, we can help you navigate the legal nuances and complexities to ensure that your transaction supports your overarching needs and objectives. The real estate team at Holm & O'Hara LLP offers more than 35 years of experience in dealing with the particular complexities of the greater New York metro area real estate market, including facility in dealing with the various government agencies that are frequently involved in this dynamic environment.

Our team includes:



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Mr. Landsman's real estate practice focuses on investors, including particularly those who own multifamily properties and those who wish to enjoy the tax advantages of IRC §1031 like-kind exchanges. He is a frequent presenter on topics of interest to investors, brokers and other real estate investors.



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Mr. Simari's practice focuses on complex and large-scale commercial real estate transactions, including: acquisition, development and financing of commercial and retail properties. Mr. Simari's deep experience with complex transactions makes him an excellent addition as the newest member of our team.



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Clients trust Mr. Holm to take on tough legal problems and to get the right answers to even the most complicated questions. Mr. Holm's real estate practice focuses on commercial leasing, sale and acquisition of townhouses and integration of real estate sales/purchases with estate and financial planning.



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Ms. Kozhich's attention to detail makes her a go-to attorney for a wide range of complex transactions. She is particularly adept at handling the multifaceted issues that arise in commercial leasing contracts. She frequently represents non-U.S. nationals in the sale and purchase of real estate.