



**FL070**      **BULLETIN**

**From:**      **Stacy Ossin, Underwriting Counsel**

**To:**      **All Agents of Commonwealth Land Title Insurance Company; Lawyers Title Insurance Corporation and LandAmerica offices in Florida**

**Date:**      **November 12, 2002**

**Subject:**    **Foreign Investment in Real Property Tax Act (FIRPTA)**

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### **What is FIRPTA?**

The Foreign Investment in Real Property Tax Act (FIRPTA), 26 U.S.C. § 1445, provides that a transferee (buyer) must withhold 10% of the *amount realized* by the transferor (foreign seller) in the sale of an interest in U.S. real property. U.S. real property generally includes real property located within the U.S. and U.S. Virgin Islands. The *amount realized* by the transferor (foreign seller) includes not only cash paid and the fair market value of any other property transferred or to be transferred, but also the outstanding amount of any liability assumed by the transferee. The amount of tax withheld is payable to the Internal Revenue Service (IRS) and cannot exceed the transferor's maximum tax liability. Under certain circumstances, the 10% rule can also be modified if the transferor and/or transferee submit Form 8288-B (Application for Withholding Certificate for Disposition by Foreign Persons of U.S. Real Property Interests) to the IRS to request a reduction or elimination of the withholding tax. In the case of an option to purchase, no withholding is required until the transferee exercises the option.

### **Who is Considered a Foreign Person?**

A foreign person is a non-resident alien individual; a foreign corporation not treated as a domestic corporation; or a foreign partnership, trust or estate. Under FIRPTA, a resident alien is not considered a foreign person. A person is a resident alien if they meet either the "green card test" or the "substantial presence test." Typically, a person has alien resident status if the Immigration and Naturalization Service has issued him/her an alien registration card, also known as a "green card." A person who meets the "substantial presence test" for the calendar year is also considered a U.S. resident for tax purposes. The "substantial presence test" requires that a person be physically present in the U.S. for a certain time period (the 183 day rule pursuant to IRS Code § 7701).

For purposes of calculating the withholding tax of U.S. real property owned jointly by foreign and non-foreign persons, the *amount realized* will be allocated among the owners (based on capital contributions) or one-half to each when the transferors are husband and wife.

## Are there Exceptions to FIRPTA?

The transferee is exempt from withholding in certain circumstances, including the following:

1. If the property is acquired by the transferee for use by him as a residence and the amount realized for that property is \$300,000.00 or less. It should be noted that there is no reference in FIRPTA as to whether the property will be used as a primary or secondary residence. However, FIRPTA does consider the amount of time that the transferee will be spending in the residence. The transferee will be held liable for the withholding tax if the transferee fails to reside on the property for the required amount of time, unless the transferee can establish that the failure was caused by an “unanticipated change in circumstances.”

**Q:** Harold Homeowner, a foreign person, is selling a condominium to Betty Buyer for \$99,000.00. Betty plans to use the condominium as an investment property. Will Betty be exempt from withholding?

**A:** No. The transferee (Betty) must have definite plans to reside at the property.

2. If the transferor furnishes to the transferee a Non-Foreign Status Certification containing the transferor’s U.S. taxpayer identification number and stating that the transferor is not a foreign person.

The Treasury Regulations use the term “certification”, not “affidavit” to indicate that the document does not have to be executed before a notary public. It is only necessary that the document be executed under penalties of perjury. The transferee may rely on the Certification without conducting an investigation to verify the truthfulness of the statements made therein. However, the transferee may not rely on the Certification if the transferee has actual knowledge that it is false.

**A sample Non-Foreign Status Certification is attached to this Bulletin.**

**Q:** Peggy Pesadilla, the seller of a piece of property, gives Susy Simpatica, her Agent, a Non-Foreign Status Certification. Suzy knows that the Certification is false. What are Suzy’s obligations?

**A:** If Suzy has actual notice that the Certification is false, Suzy must notify the transferee, or she will be held liable for the tax. Suzy’s liability, however, will be limited to the amount of compensation she receives from the transaction. Withholding will still be required. *See discussion of Who is an Agent and What is their Role below.*

3. The transferee may withhold at a lower rate if the transferee receives a Qualifying Statement indicating that the transferor has reached an agreement with the U.S. Treasury for the payment of any tax imposed on any gain recognized by the transferor on the disposition of the U.S. real property interest or that the transferor is exempt from any such tax.

**Q:** Paul Procrastinator, the transferee, has not yet received a Qualifying Statement. Paul wants to close the transaction tomorrow. Can Paul close tomorrow without withholding tax?

**A:** No. If Paul hasn't received the statement, then he can't close unless he withholds tax.

### **What is the Role of the Transferee?**

Transferees must use Forms 8288 (U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests) and 8288-A (Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests) to report and pay to the IRS any tax withheld on the acquisition of U.S. real property interests. Generally, the transferee must forward the amount withheld to the IRS along with Forms 8288 and 8288-A within 20 days after the date of transfer. The IRS Regulations define the date of transfer as the date the transferee first paid consideration including assumption of liability, but excluding earnest money or deposits. If you receive a Withholding Certificate from the IRS and withholding is still required, a copy of the Withholding Certificate must be attached to Form 8288 (you must withhold the entire 10% withholding tax if you have not received the Withholding Certificate prior to the closing of the transaction). Failure of the transferee to withhold the proper amount may cause the transferee not only to be liable for the payment of tax plus penalties and interest, but may subject the transferee to criminal penalties.

### **Who is an Agent and What is their Role?**

An Agent is any person who represents the transferor or transferee in any negotiation with another person (or that person's Agent) in connection with or in settling the transaction. A Settlement Agent is not deemed to be an Agent for the transferor or transferee as a result of the following: (1) receiving/dispersing any part of the consideration; (2) performing clerical tasks such as typing and copying; (3) transmitting or delivering documents between the parties; (4) recording documents; and (5) obtaining title insurance reports and other reports relating to the condition of the real property being transferred.

It is the transferee's responsibility to determine the transferor's status and withhold the tax. However, the majority of LandAmerica's internal employee closers and LandAmerica's Attorney-Agents and even Corporate Agents will perform more than ministerial duties and will need to be familiar with FIRPTA. In cases where Agents act in more than a ministerial role, it is not unreasonable for the parties to the transaction to expect that the Agent will coordinate all of the closing details. Where the buyers and/or sellers rely on the Agent to provide assistance with FIRPTA in connection with preparation of the HUD-1, deed or mortgage, it is foreseeable that the Agent may be liable for the transferee's failure to comply with FIRPTA. As a reminder, all Agents should keep accurate records regarding FIRPTA matters (i.e., copies of Withholding Certificates, Certifications, etc.).

In addition, if the transferee received a transferor's Non-Foreign Status Certification and the transferee's or the transferor's Agent knows that the document is false, the Agent must provide notice to the transferee. If the notice is not provided, the Agent will be liable for the tax that should have been withheld to the extent of the Agent's compensation from the transaction.

**To obtain IRS contact numbers, forms and publications, the IRS website is [www.irs.gov](http://www.irs.gov).**

