

FIRPTA AFFIDAVITS – A NEW TWIST

For decades, at closings, sellers have been required to sign an affidavit certifying that he/she is not a foreign person. This practice is based upon a federal statute, the Foreign Investment in Real Property Tax Act (“FIRPTA”), that requires persons who buy property from foreign persons or entities to withhold a portion of the sale proceeds and pay them to the IRS to cover the seller’s potential tax liability. FIRPTA applies to all commercial property and to residential property with a value of over \$300,000. While purchasers have the primary responsibility for complying with this law, real estate agents and lawyers involved in the transaction are also responsible for compliance.

If a seller is not a “foreign person,” then no withholding is required. In order for a purchaser to be protected, a non-foreign seller is typically required to sign an affidavit stating that he or she is not a foreign person (*i.e.*, a “FIRPTA affidavit”). If the seller certifies that he/she is exempt (*e.g.*, a United States citizen or a United States green card holder), nothing else is required. A purchaser is entitled to rely on the seller’s affidavit, unless the purchaser or his agent has actual knowledge that the affidavit is false. If a seller cannot provide, or is unwilling to provide, a “FIRPTA affidavit,” then the purchaser must make certain that 10% of the “amount realized” by the seller in the transaction is withheld. The “amount realized” is generally the amount paid for the property. If the purchaser does not obtain an affidavit or withhold 10% of the sale price, then the purchaser could be responsible for the foreign seller’s unpaid taxes on the transaction.

It came to our attention recently that at least one Michigan title company is asking purchasers to sign a form at closing purporting to release the title company from any FIRPTA compliance responsibility. An example of such a form is attached. Since this “release” is

contained in a closing form entitled “FIRPTA affidavit,” it is easy to see how a Realtor® could overlook it. Realtors® are cautioned to keep an eye out for this type of affidavit. (In the ordinary course, only sellers should be signing a FIRPTA affidavit and the fact that the purchaser is being asked to sign the FIRPTA affidavit should be a red flag.) Under no circumstances should purchasers sign a release such as the one contained in Part D on the attached Form.

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EXHIBIT A

Foreign Investment in Real Property Tax Act (FIRPTA) Affidavit of Disclosure (Internal Revenue Code Section 1445)

Instructions: Section A and EITHER Section B, C or D (as applicable) must be completed and signed on ALL transactions involving a sale/transfer.

A

Notice Regarding "Foreign Investment in Real Property Tax Act" Section 1445 of the Internal Revenue Code

Effective January 1, 1985, Section 1445 of the Internal Revenue Code, requires that every Buyer of real property from a foreign seller, withhold ten percent of the gross purchase price and transmit that sum to the IRS for application against the Seller's tax liability.

Certain exceptions may apply, such as the purchase by a buyer of a property acquired for use as the buyer's residence and the amount paid is \$300,000.00 or less. Also, the Buyer may rely on an Affidavit from the Seller as shown below, subject to certain limitations.

If withholding is required, and the Buyer fails to make the necessary withholding, FIRPTA states that the Buyer shall be responsible for the payment.

Title Agency is not authorized by law to advise you on this tax matter. We suggest that you consult with your attorney or tax advisor.

This form must be signed and returned by each named Buyer and Seller, or by an authorized agent for each named Buyer and Seller.

B

Certification of Non-foreign Status (Individual)

Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a U.S. real property interest must withhold tax if the transferor (seller) is a foreign person. To inform the transferee (buyer) that withholding of tax is not required upon my disposition of a U.S. real property interest, I _____, certify the following:

1. I am not a non resident alien for purposes of U.S. income taxation;
2. My U.S. taxpayer identification number (Social Security Number) is on file with Title Agency; and
3. My home address is _____.

I understand that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement I have made here could be punished by fine, imprisonment or both.

Under penalties of perjury, I declare that I have examined this certification and, to the best of my knowledge and belief, it is true, correct and complete.

C

Certification of Non-foreign Status (Corporation, Partnership, Transferor Estate)

Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a U.S. real property interest must withhold tax if the transferor (seller) is a foreign person. To inform the transferee that withholding of tax is not required upon disposition of a U.S. real property interest by:

_____ (Signatory), the undersigned hereby certifies the following on behalf of

_____ (Transferor),

1. Transferor is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulation);
2. Transferor's employer identification number is _____; and
3. Transferor understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment or both.

Under penalties of perjury, I declare that I have examined this certificate and, to the best of my knowledge and belief, it is true, correct and complete, and I further declare that I have the authority to sign this document on behalf of the Transferor.

D

Instructions Regarding the Withholding of Tax on Dispositions of United States Real Property Interests

You have informed us that effective January 1, 1985, the Internal Revenue Code was amended by adding new Section 1445, which requires the transferee to deduct and withhold a tax equal to thirty-five (35) percent of the amount realized on the disposition of a United States Real Property Interest by a foreign person; that the transaction that is the subject matter of this escrow may fall within the requirements of Section 1445; and that we should independently contact our lawyer or tax advisor to determine how to proceed under the circumstances.

We have elected to deal with the applicability or non-applicability of Section 1445 outside of the escrow and, therefore, instruct you that you should not concern yourself with the application of Section 1445 to this transaction.
