



OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

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FIRPTA and Short Sales: To Withhold or Not to Withhold?

■ *By Wilhelmina F. Kightlinger, Esq.
Florida State Counsel*



Every agent should be familiar with The Foreign Investment in Real Property Tax Act of 1980 ("**FIRPTA**") which requires withholding when a foreign person or entity disposes of an interest in real property located in the United States unless the transaction meets one of the exemptions from the withholding requirement. FIRPTA is usually satisfied by obtaining the standard Non-Foreign Affidavit at closing. The general FIRPTA requirements and compliance with FIRPTA are addressed in our Bulletin No. 03-04. However, what do you do when you have a short sale involving a foreign seller?

Many fall into a trap thinking that there is no FIRPTA withholding in a short sale because

the seller does not receive any net proceeds from the closing. This is not true; there is no exemption from FIRPTA withholding for a short sale simply because it is a short sale. The misconception may be the result of misapplication of an existing exemption from FIRPTA withholding if the amount the seller realizes on the sale is "zero." This is a trap; just because the seller does not receive cash at closing does not mean that the "amount realized" by the seller is zero dollars. Under the Treasury Regulations (Treasury Reg. 1.1445-1(g)(5)), the "amount realized" by the seller for the purposes of determining whether to withhold under FIRPTA is the sum of:

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Guidelines for Deleting the Standard Survey Exception

■ by Jeanne F. Mott, Esq., Florida State Counsel

Many agents are still unaware that a number of years ago, Old Republic National Title Insurance Company significantly relaxed its requirements for deleting the standard survey exception for most residential real estate transactions. The following guidelines apply to both sales and refinances of residential (1-4 family) transactions where the amount of insurance is \$1 million or less, and where the lands to be insured are part of a recorded plat.

The standard survey exception may be deleted on either an Owner's or Mortgagee's policy, or both, provided you retain for your file either a policy (original or copy) providing survey coverage to the current owner or one of his lenders, or a survey (original or copy), regardless of age and to whom it was certified, as long as it was certified to someone in your chain of title.

Whether you are relying on a prior policy or a prior survey you must also:

(A) Obtain an Affidavit from the current owner, which certifies the following:

1. The Seller(s) are the owner(s) of the land described in the survey certified to _____, dated _____, by _____, a registered and licensed Florida land surveyor;

2. The Seller(s) has/have examined said survey and is/are familiar with the land, building(s) and other improvements located upon said land;
3. The Seller(s) know(s) that no buildings, fences, driveways or other improvements have been constructed upon the land that are not shown on the aforesaid survey and that no buildings, fences, driveways or other improvements have been constructed upon the adjoining land since the date of the aforesaid survey;
4. The Seller(s) has/have not granted or caused to be granted any easement of any nature across, above or beneath the aforesaid land; has/have not granted or caused to be granted any license to use or any right to enter upon said land; and has/have not entered into or caused to be entered into any contract or other agreement affecting said land.

(B) Make exception for any survey-related matters shown on the prior policy or revealed by the survey. Your examination of the title must not disclose any matter(s) not shown on the old survey or title



policy relied upon, such as easements, rights-of-way, etc. Of course, the legal description on the survey or policy relied upon must be the same as the record description.

If a lender requires a new survey in the current transaction, then these provisions do not apply and you must comply with the closing instructions and require the borrower to obtain a new survey. Also, if the buyer requests a 9.1 or 9.2 endorsement, they would need to obtain a new survey.

Comments and information

We invite your feedback and welcome your suggestions regarding "In The Title Corner" and the publication of future articles. Address correspondence to:

In The Title Corner

Old Republic National Title Insurance Co.
1410 N. Westshore Blvd., Suite 800
Tampa, FL 33607-4547
Phone: 800-342-5957
Fax: 813-228-0301
www.orfl.com

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- The cash paid or to be paid,
- The fair market value of other property transferred or to be transferred, and
- The amount of any liability assumed by the buyer **or to which the property is subject immediately before and after the transfer.**

The key in a short sale is the last part of the last factor in the above calculation – the amount of the loan to which the property was subject immediately before and after the transfer is included in the amount

realized. The IRS issued a private letter ruling on this matter in February, 2009. In the private letter ruling, the IRS confirmed that in a short sale transaction, FIRPTA withholding would be due on the “amount realized” of the sales price PLUS the amount of the debt not paid to the lender in connection with the short sale. For example, if the existing loan amount is \$800,000.00, and the owner sells the property in a short sale for \$750,000.00, the amount realized under the Treasury Regulations upon which the FIRPTA withholding is

based would be \$800,000.00.

As a closing agent, you must comply with the FIRPTA withholding requirements in a short sale even though the seller is not receiving any proceeds unless your transaction qualifies for one of the exemptions from FIRPTA withholding (such as receipt of a withholding certificate, buyer will use as principal residence and sales price is less than \$300,000.00). Please contact Old Republic underwriting counsel if you have any questions regarding FIRPTA withholding in connection with a short sale.

Discounts For Agents

Remember, there are a number of vendors who offer Old Republic Agents a discount on their products and services. The following is a list of the vendors who offer this discount. You can view more details by visiting www.oldrepublictitle.com/orstarslink, [Agent Services](#), [Star Services](#) and [Supplies](#).

- Appliances - Whirlpool VIPLINK Promotions
- Car Rental - Avis, Budget, Hertz and National
- Clothing - JoS. A. Bank
- Communications - eFax
- Computers - Dell
- Document Scanning - Fort Dox
- Floral - FTD
- Food Specialties - Cheryl&Co., Edible Arrangements, Mrs. Fields and Omaha Steaks
- Identity Protection - IdentityTruth
- Lender Directory - Lane Guide
- Office Furniture - Cubicles Plus
- Office Equipment - Kyocera
- Office Supplies - Innovative Office Solutions and InteGrand Solutions
- Personal Development - ExecuTrain and RightNow
- Printers - InteGrand Solutions
- Promotional Items - Bryan Advertising, Cannon Advertising and Healy Holm Productions
- Reconciliation Services - EscrowPROS and PRS
- Research - LexisNexis
- Shredding Services - Shred-it
- Software - RamQuest, TSS Software and InWare
- Wireless Phone Services - Verizon





Ask Your Underwriter

■ By *Laura Licastro, Florida State Counsel*

Question: I was given a power of attorney without any witnesses, but it was executed in another state where witnesses are not required for powers of attorney and the document states that it shall be governed by the laws of that state. The seller still lives in the state where the power of attorney was executed, as does the attorney-in-fact, and the deed will be executed in that state. Can I rely on this document to insure a deed for Florida real property?

Answer: No. While the fact that the document was executed in another state by a resident of that state and even provides that its interpretation shall be governed by the laws of that state, the fact is that all conveyances of Florida real property are governed by Florida law. Since Florida law (709.015(2), F.S.) requires that any power of attorney used to execute a deed have two witnesses, this document cannot be relied upon for title insurance purposes.



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1410 N. Westshore Boulevard, Suite 800
Tampa, FL 33607-4547

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