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FLORIDA BULLETIN 03-04

TO: ALL AGENTS AND TITLE PLANT OPERATIONS
FROM: UNDERWRITING DEPARTMENT
DATE: DECEMBER 2, 2003
RE: FIRPTA WITHHOLDING AND REGULATIONS CHANGE

The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) imposes U.S. Federal income tax obligations on dispositions of U. S. real property interests by foreign persons.

When a foreign person disposes of a U. S. real property interest and FIRPTA withholding is required, the buyer is required to withhold ten (10%) percent of the amount of the sales price at closing and remit those funds to the IRS no more than twenty (20) days after the transfer. As most of us realize, title agents often assume this responsibility by collecting and remitting these funds.

In the alternative, and in order to avoid excess withholding when the required amount exceeds the tax actually due, the seller may file an application for a withholding certificate with the IRS prior to closing. These forms and other notices require the seller's and buyer's Taxpayer Identification Number (TIN). (An individual's identification number is the social security number or the identification number assigned by the IRS.)

Historically, the closing agent identified a FIRPTA situation by whether or not the seller had a social security number. More recently, the test is whether or not the seller pays income taxes in the United States. If so, the seller can probably sign a Non-Foreign Person/Entity Affidavit at closing without event and no FIRPTA issue exists. If not, however, unless the transaction meets one of the FIRPTA exceptions, the closing agent is confronted with a withholding or FIRPTA situation. As a rule, Non-Foreign Affidavits should be obtained for **every** sales transaction and retained in the file. Samples of both Individual and Entity Non-Foreign Transferor Affidavits are provided herewith.

It is important to identify potential FIRPTA situations as early as possible for a variety of reasons. The closing table is not the place to first find out there is a FIRPTA issue, because then, it is too late for the seller to get help. A closing agent has no alternative at that point but to withhold and remit to IRS. Consequently, it is imperative that closing agents educate their realtor/broker clients about FIRPTA. They are the persons who have the first contact with the parties. Early in the transaction, these same realtors and brokers can refer the FIRPTA seller to tax attorneys or certified public accountants who can better advise them as to how best to handle their particular situation. Suggest that your clients include questions about foreign status even in their listing agreements.

In turn, title agents can aid the identification process by asking the realtor/broker some simple questions at the time of obtaining the title insurance order. For example, does the seller have a social security number? Is he paying taxes in the United States? If there is any question about that, the agent can request copies of the prior years income tax returns for the file as well as the usual Non-Foreign

**This Bulletin is to become a permanent part of your Bulletin Manual,
and you are to comply with the requirements contained herein.**

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Individual Transferor Certification. If the realtor/broker has not yet done so, the title agent still has the opportunity early enough to refer the FIRPTA seller to a tax professional.

Early identification gives the seller the opportunity to request reduced withholding or even a waiver from the IRS. Recent changes in the IRS regulations now make this even more important because they require a foreign person to provide a TIN at the time of filing **any** return, statement or other document required under the Internal Revenue Code. This means that **all** parties to a FIRPTA transaction should have an identifying number before any notice or application is submitted. (In the past, if a foreign seller or buyer did not already have a TIN, the regulations and forms accepted "Applied For" and, the seller's TIN was not required until it filed its U.S. federal income tax return reporting its disposition of the real property interest.)

Obviously, this new requirement is particularly important to the seller who intends to request a reduced withholding or a waiver. Unless IRS Form 8288-B includes the seller's TIN, the form will be deemed incomplete and will not be processed. The regulations still require the buyer (or the closing agent) to report the withholding on Form 8288 and remit the funds within twenty (20) days from the date of disbursement. Also, the seller cannot obtain credit for the payment and the 8288-A will not be stamped to show receipt nor will it be mailed to the seller. Lastly, the seller cannot obtain a tax refund on the basis of a Form 8288-A that does not include the TIN.

The rationale given for this most recent change is that the IRS believes that accelerating the requirements for TINs better allows them to identify foreign taxpayers and more easily match applications, withholding tax returns, notices, and elections to the transferor's income tax return. In situations where the seller, buyer or both have **not** obtained TINs before closing, we strongly recommend that you obtain an Acknowledgement and Hold-Harmless Agreement executed by both. A sample form is attached.

Another significant change is the position the IRS has taken regarding a **disregarded entity**—it will not be treated as the transferor for U. S. tax purposes such as FIRPTA withholding. A disregarded entity is an entity such as a single member limited liability company or a qualified Subchapter S corporation that the IRS disregards to look directly to the individual as the taxpayer. The owner of the disregarded entity is treated as the transferor of property and must provide a certificate of non-foreign status in order to avoid withholding under Section 1445. IRS' new sample Non Foreign Entity Transferor Certification or Affidavit is attached.

This position presents still more issues for the closing agent. How far does the agent have to go to ascertain whether or not an entity is likely to be treated as "disregarded?" It is apparent that the agent needs to check corporate status **and** the principal to see if there are any clues. If the principal or a majority of the principals are foreign, they will likely be treated as such and withholding will be required. Again, the agent should educate the realtors and brokers with whom they work. The information requested on the attached forms should be obtained early for all the reasons already discussed.

Finally, the last change to the FIRPTA regulations requires that all written communication with the IRS shall be directed to:

**Director, Philadelphia Service Center
P. O. Box 211086
Drop Point 8731, FIRPTA Unit
Philadelphia, PA 19114-0586**

Should you have any questions, please contact your Old Republic Underwriting Department.

AFFIDAVIT AS TO FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT

(Seller/Entity) Effective 11/3/03

STATE OF FLORIDA)
COUNTY OF _____) ss.

Before me, the undersigned authority, personally appeared:

_____, as _____,
(Name) (Title)
of _____, seller, who, being first duly sworn according
(Entity/Corporate Name)
to the law, deposes and says as follows:

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. For U.S. tax purposes (including Section 1445), the owner of a disregarded entity (which has legal title to a U.S. real property interest under local law) will be the transferor of the property and not the disregarded entity. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by _____, hereinafter referred to as the transferor,

(Entity/Corporate Name)
the undersigned hereby certifies the following on behalf of _____:
(Entity/Corporate Name)

- 1. _____ is not a foreign corporation, foreign partnership, foreign trust, or
(Entity/Corporate Name)
foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. _____ is not a disregarded entity as defined in §1.1445-2(b)(2)(iii);
(Entity/Corporate Name)
3. _____'s U.S. employer identification number is _____; and
(Entity/Corporate Name)
4. _____'s office address is: _____
(Entity/Corporate Name)

_____ understands that this certification may be disclosed to the Internal Revenue
(Name)

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 certification and to the best of my knowledge and belief, it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of
(Entity/Corporate Name)

FURTHER AFFIANT SAITH NOT.

ATTEST: _____
(Corporate Name)

BY: _____ BY: _____
Corporate Secretary (Printed Name/Title)

STATE OF FLORIDA)
COUNTY OF _____) ss.

The foregoing instrument was hereby acknowledged before me this _____ day of _____,
20____, by _____, _____ of
_____, a Florida corporation, on behalf of the corporation. He/she
is personally known to me or has produced _____ as identification.

My Commission Expires: _____ Notary Public

Foreign Investment in Real Property Tax Act (FIRPTA)
Acknowledgement and Hold-Harmless

The undersigned are parties to a real estate purchase and sale transaction involving land sold by a "foreign person" as defined by the Internal Revenue Code. The transaction is identified as follows:

Seller: _____

Buyer: _____

Land: _____

The undersigned understand and acknowledge that the Buyer (Transferee) or their agent, _____, (closing agent) is required to remit withholding to the Internal Revenue Service in the amount of 10% of the sales price and is required to report this transaction under the seller's name and taxpayer ID number. If the seller has no taxpayer ID number, the reporting and remittance must still take place and the seller may never receive credit for such remittance because the seller did not provide the transferee or the closing agent with the seller's taxpayer ID number for submission to the IRS. The parties hold the closing agent harmless from any and all liability, expense, cost, action or demand, including attorney fees, that may in any way result from the submission and remittance of the information and monies withheld to the IRS.

Signed this ____ day of _____, 20__.

Seller

Buyer

Seller

Buyer

Closing Agent

By: _____
Closing Agent