

## Questions and Answers

# Complying with the Foreign Investment in Real Property Tax Act (FIRPTA)

Questions answered by Linda Monaco, Esq., Legal Education Attorney

April 12, 2016

The recently-enacted Protecting American Taxpayers from Tax Hikes (PATH) Act (H.R. 2029, P.L. 114-113) includes two NAR-supported provisions affecting the Foreign Investment in Real Property Tax Act (FIRPTA) that are estimated to boost significantly foreign investment in U.S. commercial real estate. However, as part of a package of tax changes to offset the cost of the two provisions, Congress also included an increase in the FIRPTA withholding rate from 10% to 15%. But property acquired from foreign persons that is to be used as a personal residence is exempt from the increase if the sales price does not exceed \$1 million.

*To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in the text of this communication, is NOT intended or written to be used, and CANNOT be used, by any person for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code.*

**What if one of the sellers is a US citizen and the other is a foreign person and they are married? Also, what about if they are not married, just own it together?**

As to husband and wife, withhold against the foreign person. If they are not married and the deed is silent as to the portions of ownership then the presumption will be 50/50 or even if more than two people. Withhold and remit against the foreign person.

**If the seller is an US LLC corporation owned 80% by a foreigner but their main business is to improve properties do we need to withhold the 15% ?**

It depends upon how it is taxed. Seek advice of attorney for the particular transaction.

**If we are telling our members to ask if they are a U.S. citizen in order to comply with FIRPTA are we saying that it should be a standard in practice for all of our members to ask about citizenship status during all buyer or seller interviews? I think because of the protected status by national origin many want to be careful with that.**

Good point. However the inquire after the fully executed contract thus the inquire would not have an impact into fair housing. The question is not if you are a citizen, but if you are a foreigner. The nationality is irrelevant. If you are still concerned seek advice of an attorney for a form and the timing of having the form filled out.

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**If a property is owned by a US corporation which is 100% subsidiary of a French holding company. Will the shareholders of the French Holding Company be considered as Foreign sellers?**

It depends upon how the corporation is taxed.

**If I have a foreign seller willing to agree to a 15% withholding on a sale for a property he owns in the United States with no mortgage, what is the procedure to get a refund on the overpayment for taxes? He expects a minimal gain or even a possible loss.**

Seller's agreement is irrelevant – it is federal law to withhold. The seller should file for a tax return. The seller may file right away for tax refund.

**If a foreigner is selling a timeshare at a loss, do the FIRPTA rules apply?**

FIRPTA applies to timeshares. FIRPTA withholding of 15% is required even if the seller is selling at a loss.

**If a non US citizen Seller has formed a US-based entity for the original asset transaction, does Buyer still require that Seller withhold 15% of profit proceeds?**

It depends. Some US based entities are treated as flow through entities and would be subject to the FIRPTA withholding. In this case seek the advice of an attorney for your specific entity.

**In other words does Seller have to have the withholding?**

It depends upon the specific entity and how it is taxed, seek the advice of an attorney.

**Do real estate agents have any legal duties to check or verify or report if the foreign buyer or seller is in the United States legally or illegally?**

FIRPTA does not make that requirement. If the seller is going to lie about their status to the buyer, the real estate agent needs to provide notice to the buyer and the settlement agent not

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to rely upon statements or certifications of the seller. In that case the buyer should withhold and remit 15%.

**Do real estate agents have any duties to check or verify or report the source of funds used in real estate deals with foreign buyers or sellers? If so, any threshold amounts of money?**

FIRPTA does not impose this duty on real estate agents.

**Is E2 (investor visa) visa holder counted as foreigner?**

If they do not have a “green card” or meet the substantial presents test, withhold and remit.

**What if the seller or buyer is a mix of foreign and US citizen? Say husband is USA citizen but spouse is foreigner...or corporation is owned by mix of US citizens and foreigners...**

As to husband and wife, withhold against the foreign person. As to the corporation it depends upon how they have elected to be taxed – Seek advice of attorney for the particular transaction.

**If we have someone who we are not 100% certain on their immigration status, would it be good to ask them to consult with an immigration attorney then?**

Immigration status is not relevant. They might meet the substantial presence test, and thus not withholding required. Seek advice of attorney for the particular transaction.

**What if sellers are mix of USA citizens and foreigners? One spouse is USA citizen and one spouse is foreigner...or corporate owners are a mix of USA citizens and foreigners...**

As to husband and wife, withhold against the foreign person.

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**Can the sellers complete some sort of affidavit or government form that states what their gain in the transaction really is instead of taking withholding of 15% off the top?**

Seller may apply for a Withholding certificate 8288-B.

**If seller is reinvesting in US property, does this need to still be done (15%, etc)?**

If it is a like kind simultaneous exchange and there is no "boot" (cash to seller) then the buyer may rely upon the notice of non-recognition. Seek advice of attorney for the particular transaction.

**Can a foreign seller enter into a section 1031 exchange and avoid the FIRPTA withholding requirements?**

Treasury regulations allow the buyer to rely upon a "notice of non-recognition" sent by a foreign seller and not make a FIRPTA withholding if the like kind exchange is a simultaneous exchange and there is no "boot" (cash to seller). However, if the like kind exchange is not completed at the same time, the buyer may not rely upon the notice of non-recognition but the seller may still apply for a withholding certificate.

**How does the 15% withholding impact 1031 exchanges?**

If the like kind exchange is a simultaneous exchange and there is no "boot" (cash to seller) then the buyer may rely upon the notice of non-recognition.

If the like kind exchange is not completed at the same time the buyer may not rely upon the notice of non-recognition. However the seller may apply for a withholding certificate.

Seek advice of attorney for the particular transaction.

**Are there similar tax withholding laws for foreign seller financing or foreign seller leasing or foreign seller lease to own arrangements where the foreign seller is making money?**

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First withholding is required on the underlying sale. Next lease payments or rental payment are also subject to FIRPTA withholding. Finally as a seller financier, taxes would be owed on the profits. Seek advice of attorney for the particular transaction.

### **Do these rules change if the foreign seller regularly files US income tax returns?**

It depends. Usually if the foreigner is filing regular US income tax they will meet the substantial presents test and you will not have to withhold.

### **Can the 15% be held in escrow for the withholding certificate answer from IRS? Or does the money have to go to IRS within a certain timeframe after closing?**

If a timely withholding certificate application is made, then the time to remit is tolled. However, this may or may not comply with the contract. Please review the contract to see if the waiting for the withholding certificate is required or permitted.

### **When is the 15% withheld, paid from the IRS to the foreign person or corporation?**

The 15% is withheld from the proceeds of the transaction. The 15% is due 20 days after the transaction date. The seller will need to file a tax return, which they can do right away. The IRS will send the refund, if any, when they complete their review.

### **What if the sale is performed in a currency other than US dollars?**

15% is 15% regardless of the currency. Check the contract to see if it permits the transaction to be an currency other than US dollars.

### **What if the sale is performed outside of the United States?**

If the sale is for US real property then it is subject to FIRPTA withholding, even if the buyer is foreign.

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**What if the transaction is an exchange of real estate? Seller trades their real estate for the real estate owned by the buyer...**

If the like kind exchange is a simultaneous exchange and there is no “boot” (cash to seller) then the buyer may rely upon the notice of non-recognition.

If the like kind exchange is not completed at the same time the buyer may not rely upon the notice of non-recognition. However the seller may apply for a withholding certificate.

**Does the 15% apply to a sales price that does not exceed \$1 million if the property is used as a personal residence? Isn't the withholding 10% for sales prices above \$300,00 but less than \$1 mil?**

Please review the [FIRPTA withholding rate flowchart](#). The rate is 15% however the IRS has carved out an exception and a reduced rate.

**Does any of this apply if the buyer is foreign or only on the sell side?**

A foreign buyer will need to apply for an ITIN with the W-7 form. If the seller is also foreign, then the foreign buyer will need to withhold against the foreign seller. If the seller is not foreign then the foreign buyer only needs to apply for and ITIN.

**Do I need to ask if seller is foreign person to list a single family under \$300,000?**

Yes. I would ask after I had the listing agreement signed.

**As a realtor, if you don't ask whether the seller is foreign and the seller ends up lying on the affidavit, could the realtor be liable for not even asking?**

No. The real estate agent does not need to ask. If the real estate agent finds out about the lie, then they need to send written notice to the buyer and the settlement agent.

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**If the seller is a LLC registered in Florida, but the owner of the LLC is a foreigner? How do we have to proceed?**

It depends upon how many members in the LLC and if the members are husband and wife. Seek advice of attorney for the particular transaction.

**In some US states, especially California, illegal aliens are given driver licenses for political purposes. What is the Realtor liability if a seller is an illegal alien foreigner with a US driver license, who lies about being a foreigner?**

If you know that the seller is going to lie. Send written notice to the buyer not to rely upon statements or certifications of the buyer and you will not have liability.

**If buyer intends to live in the property for two 12-month periods, but he is transferred to work in a different city, is the buyer in default and liable?**

This is a legal question. Was it foreseeable that the buyer might be transferred? If so, he may be liable.

**If we are unsure if someone is an undocumented person, how should we proceed?**

Treat them as a foreign individual and withhold and remit. For the ITIN, write "applied for" in the box requesting the same.