# NAR FIRPTA Study Working Group Final Report

April 25, 2014

## EXECUTIVE SUMMARY

The Foreign Investment in Real Property Tax Act (FIRPTA) was enacted in 1980, initially as a response by Congress to popular concerns about increasing foreign ownership of farm land in the United States. The legislative history of FIRPTA indicates that a major reason for its enactment was to establish equity of tax treatment in U.S. real property between foreign and domestic investors. Nearly 35 years later, legislation pending in both the U.S. Senate and House of Representatives has attracted a great deal of support from commercial real estate stakeholders in the country, as well as an unusual amount of cosponsors in the Congress. This legislation, the Real Estate Investment and Jobs Act, would amend FIRPTA, and somewhat erode that equity of tax treatment principle as to foreign investment in U.S. real estate through Real Estate Investment Trusts (REITs).

Since NAR has no existing policy with respect to FIRPTA, a formal FIRPTA Working Group was created to study the issues surrounding the Foreign Investment in Real Property Tax Act (FIRPTA), develop any policy recommendations, and report any such recommendations for consideration by the relevant federal policy committees at the May 2014 REALTOR® Party Convention & Trade Expo meetings.

The working group was comprised of members of each of the three NAR policy committees with an interest in FIRPTA: Federal Taxation, Commercial, and Global Business and Alliances. The working group met twice, via webinar, on February 12, and March 13, 2014.

After studying the background of the issues involved, and listening to presentations by two outside experts about the genesis of the FIRPTA law and proposed changes to it included in legislation that is currently pending in the U.S. Senate and House of Representatives, the working group had a lively discussion. From this discussion emerged the general consensus that one of the major factors that gave rise to the enactment of FIRPTA in 1980 is still important and should be supported by NAR. This is the principle that the U.S. law should provide similar tax treatment for U.S. investors and foreign investors in real property in the United States.

However, at the same time, the group developed the general consensus that proposed minor changes to the FIRPTA law that could attract significant foreign investment to the U.S. commercial real estate market through real estate investment trusts (REITs) should also be worthy of NAR support, so long as these changes do not materially encroach upon the similar tax treatment principle.

Given a desire to develop policy recommendations that would provide guidance for NAR advocacy efforts in current and future legislation proposing to change the FIRPTA law, the working group determined that a set of policy principles is desirable to serve as a basis for evaluating such proposals.

The recommendations set forth below will be considered by the Federal Taxation Committee at the 2014 REALTOR® Party Convention & Trade Expo meetings in May. A copy of this report will be made available to each of the other policy committees that have an interest in the issue (*i.e.* Commercial and Global Business and Alliances), and their members will be encouraged to attend the Federal Taxation Committee meeting and the subsequent Public Policy Coordinating Committee (PPCC) meeting (assuming the Federal Taxation Committee approves the recommendations) if they have questions or concerns regarding the recommendations and principles. Specific details regarding the working group, its structure and activities follow the recommendations.

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**The final recommendations of the NAR FIRPTA Working Group are:**

NAR believes the interests of its members are best served by tax policies that encourage foreign investment in U.S. real estate and that provide, to the extent practicable, similar taxation between U.S. investors and foreign investors in U.S. real property. Accordingly, NAR policy should be guided by the following principles:

1. We affirm current NAR policy that states that "We support the rights of foreign citizens to acquire, own and sell U.S. real property and the right of U.S. citizens to acquire property outside the U.S. We also support the free flow of international capital for real estate and oppose laws and regulations that impede that flow."

2. We affirm current NAR policy that states that "We believe all resident owners of U.S. real estate should be subject to the same set of rules under the U.S tax system. In addition, any unique reporting and disclosure requirements regarding foreign buyers and/or their agents should be kept to a minimum."

3. We also believe all U.S. investors and foreign investors in U.S. real estate should be subject to similar sets of rules under the U.S. tax system.

4. We support policies that encourage foreign direct investment in U.S. real estate through Real Estate Investment Trusts (REITs) that do not materially encroach upon the principle that all U.S. investors and foreign investors in U.S. real estate should be subject to similar sets of rules under the U.S. tax system.

## DEVELOPMENT OF ISSUE

While NAR has existing policy on immigration reform that touches upon the principles that should ideally govern the taxation of foreign citizens investing in U.S. real estate, there is no policy that explicitly mentions the Foreign Investment in Real Property Tax Act (FIRPA). This lack of policy became an issue in the November 2013 Annual meetings, where the question of whether NAR should support pending legislation designed to attract more foreign investment to the U.S. commercial real estate market by easing certain restrictions under the existing FIRPTA rules arose in both the Federal Taxation and the Commercial Committees.

The pending legislation, known as The Real Estate Investment and Jobs Act of 2013 (S. 1181 and H.R. 2870), would modify FIRPTA to allow foreign investors in publicly traded Real Estate Investment Trusts (REITs) to own up to 10 percent of the stock of a U.S. REIT without triggering the application of FIRPTA, up from the current-law threshold of 5 percent. The proponents of the legislation are convinced that such a change would incentivize foreign investors to invest billions of new dollars in U.S. REITs, thus injecting much-needed new capital into the U.S. commercial real estate market, which is still reeling from some severe consequences brought about by the economic difficulties that have existed since 2008.

Many Members of the United States Senate and the House of Representatives apparently agree. The identical bills enjoy an unusual amount of bipartisan support. As of April 18, 2014, 40 senators had signed on to S. 1181, including 20 of the 24 members of the Finance Committee, which has jurisdiction over tax matters. In the House, 51 members have sponsored or cosponsored H.R. 2870, including 29 of the 38 members of the Ways and Means Committee, which also has jurisdiction over this legislation.

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When the question of whether NAR should support this legislation was discussed in the Federal Taxation Committee, some committee members expressed support and others stated concerns that doing so might give foreign investors an advantage over U.S. investors in real property. Other committee members were unsure and said the matter needed more study. Accordingly, Federal Taxation Committee Chairman Scott Griffith suggested a working group be formed to examine the issue more closely and make recommendations to the Committee, and he asked for volunteers to serve on the working group. There were no objections to this, and several members volunteered. Similar concerns were brought up in the Commercial Committee's meeting.

After the appropriate procedures for establishing a formal working group were followed, the FIRTPA Study Working Group was approved by NAR 2014 President Steve Brown in January 2014, and given the charge to: Study and understand the current FIRPTA law;

1. Understand the political and policy factors that brought FIRPTA to enactment in 1980;
2. Evaluate legislation introduced (most recently) in 2013 in both Houses of Congress to modify the FIRPTA law to liberalize its rules as to foreign ownership in Real Estate Investment Trusts (REITs);
3. Determine if and how the Act and the proposed modifications impact the business interests of REALTORS® and their clients; and
4. Determine if policy is needed and should be recommended by the Working Group to position NAR to advocate appropriately in 2014 and beyond.

**Working Group Structure and Proceedings**

Within the NAR policy committee structure, there are three committees with an obvious interest in the issues surrounding the Foreign Investment in Real Property Tax Act – the Federal Taxation Committee (which has primary jurisdiction), the Commercial Committee, and the Global Business and Alliances Committee. Each of the three committees submitted the names of committee members whom they recommended to serve on the working group. From that list of names, the Leadership Team appointed 15 individuals to the FIRPTA Working Group.

The 2014 chair of the Federal Taxation Committee, Douglas McCloud (OH), was selected to serve as the chairman of the working group. The Working Group roster is appended to this report as **Exhibit 1**.

The FIRPTA Study Working Group met twice via webinar conference calls. The following is a summary of each meeting:

**First Meeting.** The first meeting was held on February 12, 2014. Attendance was strong with all but two of the working group members participating.

Following opening comments from Chairman Douglas McCloud, introductions were made, and then the Chairman brought up the issue for discussion. Next, the draft "scope and charge" document for the working group was discussed and approved by the group.

Chairman McCloud then asked staff executive Evan Liddiard to give an overview of the FIRPTA law and the policy and political issues surrounding its inception. Evan also covered the basics of the current legislative proposals the working group is to evaluate.

A discussion among working group members then ensued, with several different viewpoints about the FIRPTA law being expressed. Also, various questions were asked, which are outlined in **Exhibit 2** of this report.

Chairman McCloud directed Evan to research these questions and be prepared to discuss them at the next meeting. The Chairman also requested Evan to find, if possible, one or more outside experts who could speak to the working group in an in-depth manner during our second meeting about the genesis of the FIRPTA law and its policy and political implications and also about the pending legislation.

The group seemed unified that it would be able to accomplish its objectives by the Midyear meetings, and that the second meeting would be held in late February or early March. The meeting was then adjourned.

**Second Meeting.** The second meeting was held on March 13, 2014. Ten of the 15 members of the Working Group were in attendance.

Following the welcome and opening comments by Chairman Douglas McCloud, the Chair led the group through a recap of the first meeting. Two questions had come up in the first meeting, which the Chair restated, and then he turned to Staff Executive Evan Liddiard to answer the questions, which he did. The questions and their answers can be found in **Exhibit 2** of this report.

Next, the Chair introduced the first of two outside presenters. This was Linda Carlisle, of the Washington, DC-based law firm of Miller & Chevalier. Linda is a recognized tax law expert with experience in the FIRPTA law from both the policy and practice sides. She was with the U.S. Treasury Department during the years shortly after FIRPTA was enacted, and during the years leading up to and during the enactment of the 1986 Tax Reform Act. Linda then proceeded with her presentation about the political and policy factors that drove the enactment of FIRPTA in 1980. She also discussed unsuccessful attempts to repeal the law in 1983 and the fact that there was no discussion about modifying the law during the 1986 Tax Reform Act.

After a short question and answer period, the Chair introduced the second presenter, Ryan McCormick of The Real Estate Roundtable. Ryan worked in the U.S. Senate for 11 years, serving with several members of the Finance Committee. Ryan then proceeded with his presentation, which was a detailed history and description of S. 1181 / H.R. 2870, The Real Estate Investment and Jobs Act of 2013 (Menendez, D-NJ; Enzi, (R-WY) and Brady, R-TX; Crowley, D-NY). Following the presentation, Ryan answered several questions from the Working Group.

After thanking the presenters, the Chairman opened up the meeting to discussion. After the expression of several viewpoints, the Chair indicated that staff had discovered that some existing NAR policy might be applicable to the charge of the Working Group. This had been brought to the attention of staff by a member of the Working Group who had participated in a President's Advisory Group (PAG) on immigration reform several years ago.

The Chair suggested that the group could perhaps best serve the Association by affirming the existing policy that is applicable and then developing a set of policy principles to cover areas where the existing principles are lacking for the FIRPTA discussion. Together, he suggested, these could serve as a basis for evaluating not just the presently pending legislation, but future FIRPTA-related measures as well. Such an approach has worked

well in a number of other issue areas, *e.g.* tax reform, health care reform, GSE reform, etc., when multiple pieces of legislation are expected to be considered.

The Chair described the tax-related portions of the existing immigration reform policy, which are as follows:

1. We support the rights of foreign citizens to acquire, own and sell U.S. real property and the right of U.S. citizens to acquire property outside the U.S. We also support the free flow of international capital for real estate and oppose laws and regulations that impede that flow.
2. We believe all resident owners of U.S. real estate should be subject to the same set of rules under the U.S tax system. In addition, any unique reporting and disclosure requirements regarding foreign buyers and/or their agents should be kept to a minimum.

The Chair then asked for a motion that the Working Group recommend the affirmation of this policy for purposes of the FIRPTA Working Group. Such a motion was made and seconded. A voice vote was taken with no dissent heard.

The Chairman next asked if any group members might wish to offer a motion to recommend adoption of a policy that would allow NAR to support actively the enactment of The Real Estate Investment and Jobs Act. It was so moved and seconded and a voted followed, again with no dissent heard.

Following this action, the meeting was adjourned. After the meeting, staff wrote up the motions adopted in the form of a recommended statement of principles, which appears in the executive summary of this report. The statement of principles was sent to each member of the Working Group, who was asked to register any objections. No one had any.

**EXHIBIT 1**

**FIRPTA Study**
**Working Group Members**

**Chair:** Douglas McCloud, OH
**Staff Executive:** Evan Liddiard, DC

**Members:**

**From the Federal Taxation Committee**
Douglas McCloud, OH
Toby Bradley (CA)*
Carolyn Dozois (OR)
Scott Griffith (MI)
George Peek (NV)
Michael Roberts (CA)
David Schoepf (KY)
H. Blaine Walker (UT)

**From the Commercial Committee**
Jim Helsel (PA)**
Alan Huffman (KS)
Dan Wagner (IL)

**From the Global Business and Alliances Committee**
Adrian Arriaga (TX)
Carlos Fuentes (FL)
Madeline Veissi (FL)***
Jerome Youngberg (ND)

* former member and Chair of Federal Taxation Committee
** former member and Chair of Commercial Committee
*** former member and Chair of Global Business and Alliances Committee

**EXHIBIT 2**

**Questions and Answers Discussed in**
**The FIRPTA Study Working Group Meetings**

**Questions Raised During First Meeting of the Working Group:**

1. What is the estimated lost revenue cost to the Treasury of the pending legislation?

2. Will the real estate industry would be required to "give up" some current tax benefit in order to offset the cost of the FIRPTA legislation?

**Answers Put Forward During Second Meeting of the Working Group:**

1. The best information on the estimated cost of the main provision in the bill (to increase the percentage of a publicly-traded REIT that can be owned by a foreign investor) is $1.1 billion over 10 years. This was the estimate in 2010, when the provision last passed the House.

2. There is no way of knowing for sure how a provision like the REIT-FIRPTA bill might be paid for, or even if it would be paid for. If the provision is passed in a tax reform bill, or another large bill, it would likely be offset by a large number of other provisions. It is generally recognized that just because a Member of Congress or a group supports a particular change, they do not necessarily support the offset. Occasionally, the Finance or Ways and Means Committees might turn to the industry asking for a change and ask them to come up with a way to offset the cost of the change from within the industry. However, these instances are rare and when they have happened, the offset is often one that is not onerous, and the committee staff have helped find it. In summary, we probably do not need to be overly concerned about the cost of this REIT-FIRPTA proposal because the cost is relatively modest and any offset is unlikely to affect real estate.

## EXHIBIT 3

### Frequently Asked Questions About The Foreign Investment in Real Property Tax Act (FIRPTA)

1. **What is FIRPTA, and why was it enacted?**
The Foreign Investment in Real Property Tax Act (FIRPTA) was enacted in 1980, largely as a response by Congress to popular concerns about increasing foreign ownership of farm land in the United States. A 1979 study by the Treasury Department concluded that foreign ownership of real property in the U.S. was not significant. However, the study also pointed out that unlike U.S. citizens or non-citizens living in the United States, non-resident foreign persons rarely paid capital gains tax when they sold their U.S. real property holdings. The report went on to suggest legislative solutions to this perceived unfair advantage that the law gave to foreign investors in U.S. real estate.

   Upon considering the legislation, the Senate Finance Committee said it "believes that it is essential to establish equity of tax treatment in U.S. real property between foreign and domestic investors."

2. **Before FIRPTA, how were foreign investors able to avoid paying U.S. tax upon selling U.S. real estate?**
Prior to the enactment of FIRPTA in 1980, a foreign person was subject to tax on the gain from disposing of capital assets within the U.S. only if the gain was "effectively connected" with a business in the United States in which the foreign person was engaged in the year of the gain, or if the foreign person was present in the U.S. for 183 days or more during that year. This made the avoidance of tax upon sale of U.S. real estate relatively easy, whether the property interest was owned directly or through a corporation or other entity.

3. **How did FIRPTA change the law?**
FIRPTA equalized the tax treatment between U.S. and foreign investors in real estate by treating the gain from the disposition of a "U.S. real property interest" by of a nonresident foreign individual investor or a foreign corporation as if the foreign investor were engaged in a U.S. business and if such gain were effectively connected with such business. As a result, the gain is subject to the same tax rules and rates that apply to U.S. taxpayers.

4. **Did FIRPTA equalize the tax treatment of U.S. investments between domestic investors and foreign investors?**
Yes, but only in one sense. FIRPTA equalized the tax treatment between foreign and domestic investors as to U.S. real estate investments, which was its goal.

   However, critics point out that U.S. tax policy has long welcomed foreign investment by not taxing capital gains earned on U.S. assets, unless those gains were effectively connected with a U.S. business. Certain interest income is also not taxed for foreign investors. This means that foreign investors have long been given an incentive to buy such U.S. assets as Treasury bills, notes, and bonds, the stocks and bonds of U.S. corporations, and to deposit money in U.S. bank accounts. Many economists believe that such foreign investment is a great benefit to the U.S. economy, and that not taxing foreign investors on such investments is sound public policy.

Until the enactment of FIRPTA, foreign investment in commercial real estate in the United States was treated the same as foreign investment in other passive U.S. assets, so long as the real estate was not connected with a U.S. business.

After FIRPTA, however, real estate investments in the U.S. no longer share in this favored treatment. As a result, critics such as the Real Estate Roundtable (RER) and the National Association of Real Estate Investment Trusts (NAREIT), and others believe that FIRPTA has had the effect of making U.S. commercial real estate less attractive to foreign investors than other kinds of U.S. investments, and that this has harmed the commercial real estate sector and the U.S. economy.

5. **Has FIRPTA harmed the U.S. commercial real estate market and held back the U.S. economy?**
   Some economists think so. A study released in October 2009 by Martin Neil Baily and Matthew J. Slaughter entitled "How FIRPTA Reform Would Benefit the U.S. Economy" concludes that FIRPTA has reduced foreign investment in U.S. commercial real estate, and discourages foreign investment at a time when falling real estate prices and loan defaults threaten the U.S. economic recovery. The authors of the study recommended that FIRPTA be repealed or reformed.

6. **Are there legislative proposals pending in Congress to repeal or reform FIRPTA?**
   There has been no legislation introduced to repeal FIRPTA, but there are bipartisan bills pending in both the Senate and House of Representatives to modify the FIRPTA rules.

   The Real Estate Investment and Jobs Act of 2013 (S. 1181 and H.R. 2870) was introduced by Senators Robert Menendez (D-NJ) and Mike Enzi (R-WY) and Representatives Kevin Brady (R-TX) and Joe Crowley (D-NY).

7. **How would these bills reform FIRPTA?**
   The Real Estate Investment and Jobs Act would make two specific changes to the FIRPTA rules that deal with Real Estate Investment Trusts (REITs).

   The first change is in connection with the present-law rule that provides that REIT stock is a U.S. Real Property Interest (USRPI) only in the case of an owner who holds more than 5 percent of such stock. The legislation would increase this 5 percent threshold to 10 percent. Therefore, under the proposal, foreign persons holding up to 10 percent of the stock of a REIT would not be subject to the FIRPTA rules. The purpose of the change is to increase the number of potential foreign investors in U.S. real estate through REITs who would not be adversely affected by the FIRPTA rules.

   The second change would effectively overturn a position taken by the IRS in 2007 (Notice 2007-55). For many years, tax practitioners concluded that certain payments from a REIT made as part of a liquidation or redemption should be considered a sale of its stock (to which FIRPTA generally does not apply) instead of a capital gain distribution (to which FIRPTA can apply). The 2007 Notice concluded that liquidating distributions and redemptions should be treated as capital gain liquidations that are subject to FIRPTA if paid to foreign shareholders.

   Thus, the legislation is limited to making it easier for foreign persons to invest in U.S. commercial real estate through REITs without having to pay tax under FIRPTA. These are relatively modest changes that stop far

short of repealing FIRPTA.

8. **What groups are pushing enactment of the Real Estate Jobs and Investment Act?**
Primarily, it appears that members of the Real Estate Roundtable and the National Association of Real Estate Investment Trusts (NAREIT) have been the most active in promoting the bills and encouraging Members of Congress to cosponsor.

9. **What is the outlook for enactment of the legislation?**
This is difficult to predict at the present time. Because of the current push for tax reform by both the House Ways and Means and the Senate Finance Committees, and the cloudy legislative landscape for such reform, the short-term outlook for the Real Estate Jobs and Investment Act is not particularly good.

However, the legislation enjoys wide and deep bipartisan support from key Members of the tax-writing committees. It is certainly possible that the provisions of the bill could be added to a tax reform initiative or, in the absence of tax reform, the legislation could move once it appears that tax reform is not possible or is not likely to occur soon.

10. **What are the prospects for complete repeal of FIRPTA?**
From a practical standpoint, not very good. Complete repeal of FIRPTA would likely be considered a fairly radical idea. The tax equity arguments that form the basis of the reason for the Act's enactment in the first place likely still resonate. Moreover, there have always been those who believe FIRPTA was originally enacted to keep foreign interests from owning "too much" U.S. real estate, and that this concern was justified. Those in this camp will likely resist a bill that would seemingly open the U.S. real estate market to the tax-free exploitation of wealthy foreign interests.

While there are probably Members of Congress who would support a full repeal of FIRPTA, there likely would not be nearly the bipartisan support that the Real Estate Jobs and Investment Act enjoys.

Finally, complete repeal would cost more, in terms of lost revenue to the Treasury, than would S. 1181 and H.R. 2870. This would make it more difficult to offset the lost revenue and thus harder to enact.

11. **How does FIRPTA affect REALTORS®?**
If a REALTOR® is an agent to a buyer or a seller where a U.S. Real Property Interest (USRPI) is transferred, his or her client may have certain tax withholding and/or reporting obligations in connection with the transfer of the property. In addition, the REALTOR® as the agent may have liabilities in certain circumstances.

These rules will apply only to a disposition (generally a sale) of a USRPI by a foreign (non-U.S. citizen or resident) investor.

12. **What is a "U.S. Real Property Interest"?**
FIRPTA applies only to a disposition (including sales, exchanges, and gifts) by a foreign (non-resident alien) investor of a "United States Real Property Interest" (USRPI). The statute defines USRPIs quite broadly to include:
    - An interest in real property located in the United States or the U.S. Virgin Islands, including the

following:
- Land;
- Improvements and personal property associated with the use of real property;
- Standing timber, growing crops;
- Mines and mineral interests, wells and other natural deposits;
- Buildings;
- Leaseholds and options.

**13. What is FIRPTA withholding and why is it required?**
If a foreign (non-resident alien) property owner sells a U.S. Real Property Interest, the buyer is required to deduct from the sales proceeds and withhold a tax equal to 10 percent of the "amount realized" by the seller.

The "amount realized" is generally the sales price of the property. If the buyer assumes any liability to which the property is subject (such as an existing mortgage), the amount assumed is included with the amount to be paid in cash to determine the amount realized.

FIRPTA requires the buyer to withhold the 10 percent amount because foreign investors who are not residents of the U.S. generally do not file tax returns with the IRS. Also, other than the sale of the U.S. real property interest, the foreign investor may have no connection with the U.S., and thus the IRS may have no ability to find the foreign investor and little or no jurisdiction to assert that taxes are owed once the investor leaves the United States or no longer has a real property investment here. Therefore, FIRPTA uses withholding of part of the sales proceeds as a way to ensure collection of tax that is due under the law but is difficult or impossible to collect otherwise.

**14. Why is the withholding rate set at 10 percent?**
The FIRPTA law provided for a default withholding rate of 10 percent. This rate is a proxy for the actual tax owed by the foreign investor/seller of the property, which could be more or less. If the amount withheld by the buyer exceeds the seller's maximum tax liability, the seller may obtain a refund of the excess tax paid.

The actual tax due will depend on the gain from the sale, if any. This, of course, is determined by comparing how much greater the sales price is than the amount the foreign investor paid for the property. In some cases, there may be little or no tax due, because there is little or no gain. In other cases, 10 percent may not be enough to cover the tax liability.

**15. What if the seller believes the correct amount of tax is less than 10 percent – must the buyer still withhold the full 10 percent amount?**
No. If the seller's maximum tax liability from the sale of the property is less than 10 percent, either the buyer or the seller may request the Internal Revenue Service to determine the maximum tax liability. If the IRS determines that it is less than 10 percent, the IRS may permit a reduced amount of withholding.

**16. Are there exceptions to the FIRPTA withholding requirements?**
Yes, there are several. Here are the most important ones"
- The buyer of the real property buys it for use as a home and the sales price is not more than $300,000 (this does not have to be the buyer's main home);

- The seller gives the buyer a certificate stating (under penalties of perjury) that he or she is not a foreign person. Such certificate must include the seller's name, taxpayer ID number, and home address;
- The buyer receives a withholding certificate from the IRS that excuses withholding;
- The amount the seller realizes on the sale of the U.S. real property interest is zero;
- The property is acquired by the U.S. government, a state (including the District of Columbia) or possession, or a political subdivision thereof.

**17. Can REALTORS® have any obligations for FIRPTA withholding?**

Yes, in some limited cases. If a REALTOR® represents either the buyer or a seller of real property that is subject to FIRPTA withholding, he or she could be liable for the tax that should have been withheld by the buyer in certain circumstances.

- If the buyer of the real property receives a certificate from the seller that the seller is not a foreign person, and is therefore exempt from withholding, and a REALTOR® as the agent for either the seller or the buyer has knowledge that the certificate is false, he or she must notify the buyer of this fact. Failure to do so could mean that the REALTOR®, as the agent, is liable for the tax that should have been withheld but was not.
    - However, the agent's potential liability in this case is limited to the amount of commission he or she earns from the transaction.
    - In addition, if a REALTOR® serves as a "withholding agent," he or she may be personally liable for the full amount of FIRPTA withholding tax required to be withheld, plus interest and penalties.
    - A "withholding agent" is any person having the control, receipt, custody, disposal, or payment of income that is subject to withholding. Generally, this is the person who pays an amount to the foreign person that is subject to withholding.

**18. What tax forms are involved with FIRPTA transactions?**

There are two tax forms that buyers and other transferees must use to report and pay the withheld tax to the IRS, as follows:

- Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests
    - The tax withheld by the buyer of a U.S. Real Property Interest (USRPI) from a foreign person is reported and paid to the IRS using this form.
    - The form is due by the 20th day after the date of the transfer.
- Form 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests
    - This form is prepared and filed by the withholding agent (generally, the person who pays the sales proceeds to the foreign seller) for each person for whom tax has been withheld. Copies A and B of this form are to be attached
    - IRS will stamp Copy B and send it to the person from whom the tax was withheld (the foreign seller). The seller will then attach this stamped Copy B to his or her U.S. income tax return to document the payment of the withheld tax.