

New To RMLS™ – Foreign Investment in Real Property Tax Act (FIRPTA)

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Upon closing of a real estate transaction in the U.S., a Federal law, known as the Foreign Investment in Real Property Tax Act (“FIRPTA”), may require that escrow withhold a portion of the seller’s proceeds if the property is located within the United States and seller is a “foreign person.” A “foreign person” includes a non-resident alien individual, foreign corporation, foreign partnership, foreign trust and foreign estate (hereinafter “a foreign entity”). The amount deducted from seller’s proceeds is ten percent (10%) of the gross sales price and is required to be remitted to the Internal Revenue Service (“IRS”).

The **buyer** may become responsible for payment if FIRPTA applies and escrow is not instructed to withhold the funds. *This means that if a transaction closes and funds are distributed to the seller, who was legally a “foreign person,” the buyer may be on the hook. There are some instances in which the real estate agents may become liable as well.*

Here are the major FIRPTA exclusions: (a) The sale price is \$300,000 or less; (b) The property is to be used by buyer as a residence; and, (c) The buyer is an individual and not a foreign entity.

Under the OREF Residential Real Estate Sale Agreement (“Sale Agreement”), the seller represents that he/she is not a “foreign person” (i.e. their “Non-FIRPTA Status”). If the seller is unsure about their legal status, he/she should first confer with their tax counsel or a CPA before entering into the real estate transaction. If FIRPTA is applicable, the Sale

Agreement recommends that buyer and seller agree to execute and deliver such instruments, affidavits or statements, as may be requested by escrow to carry out the provisions of FIRPTA.

In addition, the Sale Agreement contains the following:

Buyer has no knowledge, information, or belief that Seller is a foreign person or that this transaction is subject to FIRPTA. Seller acknowledges that Buyer, Listing and Selling Licensees, their respective Firms, and Escrow, its agents, employees and representatives shall have the absolute right to rely upon Seller's representation of Seller's Non-FIRPTA Status at Section 12, above. This right of reliance shall continue through the Closing Date and thereafter, unless Seller has disclosed otherwise in a written counter-offer to this Sale Agreement. If at any time during this transaction, it is determined that Seller's representation of Seller's Non-FIRPTA Status was incorrect, for any reason, Seller and Buyer hereby appoint and instruct Escrow to act as the Qualified Substitute for purposes of preparing the necessary paperwork, withholding the necessary funds, and remitting the same to the IRS. Seller and Buyer acknowledge that if FIRPTA applies to this transaction, Escrow's role as a Qualified Substitute may result in a delay in closing this transaction. Unless otherwise provided in this Sale Agreement or any subsequent signed written agreement between Seller and Buyer, confirmation of Seller's Non-FIRPTA Status is not a contingency in this transaction.

The reason that the Sale Agreement goes to such great lengths regarding FIRPTA is because commencing with the listing of real property, there was no vetting of the seller's FIRPTA status. This has recently changed, thanks to RMLS™'s cooperation in dealing with this issue. The RMLS™ Listing Agreement will now contain the following required field:

16. FIRPTA. In general, the sale or other disposition of a U.S. real property interest by a foreign person is subject to

income tax withholding under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). A "foreign person" includes a non-resident alien individual, foreign corporation, foreign partnership, foreign trust and foreign estate. If

FIRPTA applies, the buyer or other qualified substitute may be legally required to withhold this tax at closing. In order to avoid closing delays, SELLER is requested to initial one of the two statements:

_____ / _____ SELLER warrants and represents to BROKER and BROKER'S Firm that SELLER is not a foreign person under FIRPTA.

_____ / _____ SELLER is a foreign person under FIRPTA.

Date of BROKER'S signature

BROKER Signature

FIRM NAME

Date of PRINCIPAL BROKER'S signature

PRINCIPAL BROKER Signature

Phone

Conclusion

Now, listing agents will be the initial point of contact on the FIRPTA issue. This is a good thing, as it will now permit all Realtors® to be aware, *at the commencement of the transaction*, that there may be some federal tax withholding requirements imposed on the seller as a part of the closing. In such instances, company policy and managing brokers should mandate that the transactional file be properly flagged, and that escrow be immediately notified that the parties request that it handle all FIRPTA compliance obligations. ***Caveat: Escrow will not do this automatically, and in most cases, the standard closing documents provide that the escrow company is***

exempted from handling FIRPTA compliance matters. So, be aware that if they are not asked, they will not undertake the responsibility.

Phil has served as legal counsel for the Portland Metropolitan Association of REALTORS® for the past 20 years, and serves on the PMAR Brokerage Risk Management Committee. Phil is also legal counsel to the OREF Forms Committee.

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