

Title

FREQUENTLY ASKED ^ QUESTIONS

April 2013

Q What is the Foreign Investment in Real Property Tax Act (FIRPTA) and what does it have to do with title insurance?

A. The Foreign Investment in Real Property Tax Act (FIRPTA) is a provision of the Internal Revenue Code [Section 1445] which requires the buyer of real estate to withhold 10% of the 'amount realized' from the sale of the real property where the seller is a 'foreign person.'

The Act places the responsibility to withhold the 10% on the buyer of real property or his agent. If he/she fails to withhold the proper amount, he/she may be held liable for the payment of the tax plus penalties and interest.

There are several exceptions to the 10% withholding requirement. The following two are most relevant to residential real estate closings:

- (1) An individual *buyer* is acquiring real property for use as a residence and the 'amount realized' is \$300,000 or less. The seller's use of the property is not relevant. This exemption does not apply if the actual transferee (usually the grantee in the deed) is not an individual, even if the property is acquired for use by an individual. As proof of the exclusion from FIRPTA withholding, a buyer's exemption affidavit setting forth the sales price and that the property is being acquired for residential use is necessary.
- (2) The seller is not a 'foreign person.' Withholding will be exempted if the transferor furnishes a Non-Foreign Status Affidavit (NFSA) which sets forth the seller's taxpayer identification number (i.e. social security number or identification number for business entity) and contains a statement that the transferor is not a 'foreign person.' The NFSA can be executed by a US citizen, a US green card holder, a proper corporate officer of a foreign corporation, a general partner of a foreign partnership or fiduciary of a foreign trust or estate. A transferee is not permitted to rely upon a NFSA if he or she has actual knowledge that it is false. He or she must then comply with FIRPTA withholding, unless another exemption applies.

The forms and instructions for FIRPTA withholding may be accessed on the Internal Revenue Service's website – www.irs.gov – by choosing form number 8288.

Settlement agents must be careful not to exceed the boundaries of their responsibilities in closing transactions. While one should be aware of the existence of this law, a settlement agent should not provide any advice concerning legal and tax ramifications of a transaction and should not prepare or determine the necessity of obtaining any of the affidavits discussed herein. Generally, it is the buyer's responsibility to determine the seller's status and to withhold the tax

As always, feel free to address any questions to a member of our underwriting staff.

