

Proposed FIRPTA Changes

The OREF Forms Committee is currently considering (a) modifications to all real estate sale agreements (OREF 001, 005, 006, 007, 008 and 011) and the FIRPTA Addendum (OREF 093) and (b) creating two new forms (*Certification of Non-Foreign Status* and *Qualified Substitute Statement*). The proposed changes are intended to better organize the FIRPTA related provisions and ensure that the buyer is protected against FIRPTA risk in all transactions.

Under FIRPTA, the buyer is responsible for determining whether the seller is foreign and, if so, ensuring that the seller withholds FIRPTA taxes and remits such taxes to the IRS if no exemption applies. If FIRPTA withholding is required but does not occur, the buyer and seller are jointly and severally liable for the FIRPTA taxes, penalties and interest.

A key protection built into FIRPTA is the ability of the buyer to rely on a seller signed *Certification of Non-Foreign Status*, which contains a certification under penalty of perjury that the seller is not a foreign person and other information required by the IRS (including the seller's Social Security Number/Taxpayer Identification Number). If the seller is foreign, but lies to avoid FIRPTA withholding taxes by providing the buyer with a *Certification of Non-Foreign Status*, the buyer is not liable for the seller's FIRPTA taxes ... unless the buyer knows that the seller lied. So it is critically important for the buyer to walk away from the closing with a seller signed *Certification of Non-Foreign Status*.

As mentioned above, the *Certification of Non-Foreign Status* contains the seller's Social Security Number/Taxpayer Identification Number; however, most sellers do not want the buyer to have his/her Social Security Number/Taxpayer Identification Number. Under FIRPTA, the escrow agent, buyer's agent or buyer's attorney can agree to act as a Qualified Substitute, in which case the Qualified Substitute reviews the seller signed *Certification of Non-Foreign Status* and, if acceptable, provides the buyer with a *Qualified Substitute Statement* (in lieu of the *Certification of Non-Foreign Status*). The *Qualified Substitute Statement* provides the buyer with the same protection as the *Certification of Non-Foreign Status* – but it does not contain the seller's Social Security Number/Taxpayer Identification Number,

Over the past year, OREF learned that not all escrow companies provide forms of the *Certification of Non-Foreign Status* and *Qualified Substitute Statement*, so the OREF Forms Committee is proposing OREF versions of these forms to fill the gap and better protect buyers from FIRPTA risk.

The proposed changes to the real estate sale agreements and FIRPTA Addendum are mostly organizational. The OREF Forms Committee thinks that is best to limit the FIRPTA provisions in the real estate sale agreements to dealing with the most common scenario -- the seller is not foreign. If the seller is foreign, the real estate sale agreements will direct the parties to complete the FIRPTA Addendum, which will just deal with FIRPTA exemptions and withholding requirements.