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Escrow Tech Memo #120-2010
Distribution: All Direct Operations

Date: January 4th, 2010
To: County Manager/Escrow Managers
From: Lisa Tyler, National Escrow Administrator
Subject: Foreign Investment in Real Property Tax Act (FIRPTA)

PLEASE DUPLICATE THIS MEMORANDUM AND DISTRIBUTE TO ALL APPROPRIATE EMPLOYEES IMMEDIATELY

Make a copy of this Memorandum and place it in your Escrow Tech Manual for future reference. It may also be accessed via the Company's Intranet at home.fnf.com

In June of 2008 the Housing Bill was signed. Included in the bill was a change to the Foreign Investment in Real Property Tax Act (FIRPTA) which took affect immediately. This change along with the continuing problems, claims and losses caused by the mishandling of FIRPTA withholding payments has prompted a revision to our policies and procedures.

In order to properly follow these policies and procedures it is important to understand the settlement agents role in processing a FIRPTA withholding payment. IRS Publication 515 defines F.I.R.P.T.A. as:

*" . . .withholding obligation under section 1445 is generally imposed on the **buyer** or other transferee (withholding agent) when a U.S. real property interest is acquired from a foreign person...This withholding serves to collect U.S. tax that may be owed by the foreign person."*

Anytime real property is transferred 10% of the gross sales price must be withheld and remitted to the IRS *UNLESS* the seller or the transaction is exempt from withholding. It is the buyer's obligation to determine if an exemption applies, not the settlement agent's obligation. Under the Act there are ten exemptions from withholding. One of the ten exemptions is a statement by the seller of their non-foreign status. The exemption is very specific as to what the statement must include and that is must be signed under penalty of perjury. Here's what it says:

"You (meaning the BUYER – no one else, but the buyer) receive a certification of non-foreign status from the transferor (AKA Seller), signed under penalties of perjury, stating that the transferor is not a foreign person and containing the transferor's name, address, and identification number (social security number (SSN) or employer identification number (EIN)). If you receive a certification, the withholding tax cannot be collected from you unless you knew that the certification was false or you received a notice from your agent or the transferor's agent that it was false. The certification must be signed."

Our Company's Non-Foreign Certification was designed to meet the above requirements. It is the buyer's responsibility to receive this certification which includes the seller's social security number. For years settlement agents assisted the buyer in getting this certification completed and signed by the seller and then giving the completed form to the buyer. This practice made the sellers, their real estate agents and settlement agents uncomfortable since the Non-Foreign Certification contained the seller's social security number. Unfortunately, the exemption requires it and in order for the buyer to protect themselves against an adverse action by the IRS post closing, they must retain a copy of the certification.

Qualified Substitutes

The Housing Bill included a provision for the buyer and seller to appoint a Qualified Substitute to be responsible for collecting and retaining the required information. The exception did not change. The seller still has to provide a statement as described above, but the receiver of the statement can be one of several parties. Here's what it says:

*"(i) the affidavit specified in paragraph (2) is furnished to a qualified substitute, and
"(ii) the qualified substitute furnishes a statement to the transferee stating, under penalty of perjury, that the qualified substitute has such affidavit in his possession.*

"(6) QUALIFIED SUBSTITUTE.—The term 'qualified substitute' means, with respect to a disposition of a United States real property interest— "(A) the person (including any attorney or title company) responsible for closing the transaction, other than the transferor's agent, and "(B) the transferee's agent."

Clearly this adds an enormous amount of liability to the settlement agent. Upon receipt of the statement of non-foreign status by the seller the Qualified Substitute must provide a statement to the buyer, signed under penalty of perjury they are in receipt of said certification.

The Company's additional liability is *"the amount of compensation...derived from the transaction."* If the buyer was provided with the affidavit by the settlement agent who later is unable to provide a copy of the original certification submitted by the seller at the request of the IRS the fine to the Qualified Substitute is equal to the all the escrow or closing and title fees collected in the particular file.

Remember, FIRPTA is and always has been the buyer's responsibility. Not the settlement agent's. The settlement agent is not required to act as the Qualified Substitute. As indicated above the buyer's real estate agent or attorney may accept that responsibility.

New Procedure

We have eliminated the Non-Foreign Certification. Instead, the buyer will waive the settlement agent's responsibility. In states where Escrow Instructions are used the following clause is being added to the General Provisions: .

NON-RESIDENT ALIEN. The Foreign Investment in Real Property Tax Act (FIRPTA), Title 26 U.S.C., Section 1445, and the regulations there under, provide in part, that a transferee (buyer) of a U.S. real property interest from a foreign person (non-resident alien) must withhold a tax equal to ten percent (10%) of the amount realized on the disposition, report the transaction and remit the withholding to the Internal Revenue Service within twenty (20) days after the transfer. **{insert company name}** has not and will not participate in any determination of whether the FIRPTA tax provisions are applicable to the subject transaction, nor act as a Qualified Substitute nor furnish tax advice to any party to the transaction. **{insert company name}** is not responsible for determining whether the transaction will qualify for an exception or an exemption and is not responsible for the filing of any tax forms with the Internal Revenue Service as they relate to FIRPTA. **{insert company name}** is not the agent for the buyer for the purposes of receiving and analyzing any evidence or documentation that the Seller in the subject transaction is a U.S. citizen or resident alien. The buyer is advised they must independently make a determination of whether the contemplated transaction is taxable or non-taxable and the applicability of the withholding requirement to the subject transaction, and should seek the advice of their attorney or accountant. **{insert company name}** is not responsible for the payment of this tax and/or penalty and/or interest incurred in connection therewith and such taxes are not a matter covered by the Owner's Policy of Title Insurance to be issued to the Buyer. The Buyer is advised they bear full responsibility for compliance with the tax withholding requirement if applicable and/or for payment of any tax, interest, penalties and/or other expenses that may be due on the subject transaction.

For the states which do not use escrow instructions, the attached Waiver is being added to your escrow production systems. The Waiver should be signed by the buyer only. Since all of the liability falls on the buyer it is not necessary to have the seller sign it.

If FIRPTA Withholding Applies

If the seller or transaction is not exempt and withholding applies the principals often look to the settlement agent to gather the required IRS forms and submit the payment to the IRS as a part of their closing. Our policy and procedure in this instance has not changed.

The settlement agent often gathers forms and makes payments in order to facilitate the transfer of ownership on behalf of the principals. For example, settlement agents regularly order the statement which notifies the HOA of a pending transfer of ownership and pay any outstanding dues and transfer fees required. As the settlement agent we are simply gathering the forms and remitting them and any payments on behalf of the principals. The same is true for FIRPTA withholding payments.

However, if the withholding payment is not handled correctly the Company suffers stiff penalties for late remittance, inaccurate or incomplete forms. Publication 515 defines the buyer as the transferee and the withholding agent. The buyer cannot appoint the settlement agent (escrow holder or the title company) as the withholding agent. For IRS purposes, the Company is considered the settlement agent and not responsible for the withholding. The instructions included in Form 8288 clearly state:

*In Part I, enter the name, address, and identifying number of the buyer or other transferee responsible for withholding under section 1445(a). **Do not enter the name, address, and identifying number of a title company, mortgage company, etc. unless it happens to be the actual buyer or transferee.***

The Seller is the Transferor. If the Seller does not qualify for an exemption from withholding the Transferee "...*must withhold 10% of the amount realized on the disposition by the transferor.*"

Settlement agents must follow these steps when remitting a withholding payment on behalf of the principals:

1. Review the FIRPTA Withholding Escrow Instructions attached to ensure that all the parties perform their required actions BEFORE THE CLOSE OF ESCROW.
2. Have the principals COMPLETE and sign the FIRPTA Withholding Escrow Instructions.
3. The principals (not the settlement agent) must complete and deposit the required IRS forms into escrow. Buyer and Seller can obtain the most current IRS forms at www.irs.gov. Submitting outdated forms will result in a rejection of the withholding.
4. Review the IRS forms provided by the principals for completeness and accuracy. The Buyer must be shown as the withholding agent, not the Company. You may forward the forms to National Escrow Administration at settlement@fnf.com for review.
5. Exchange the trust account check for a cashier's check payable to the INTERNAL REVENUE SERVICE. Our Company name should not appear on anything remitted to the IRS.
6. Collect and remit the withholding to the IRS within 20 calendar days of closing. It must be sent by some traceable means (certified mail return receipt requested, overnight delivery, etc.).
7. RESIST the urge to provide any assistance. Do not complete the IRS forms on behalf of the principals. If the parties ask if they can find a creative way around the withholding direct them to the buyer. The decision is up to the buyer. They must work it out and provide written mutual instructions on how to proceed but do not close without mutual instructions. Once the file is closed the principals have no motivation to resolve a FIRPTA issue.

Withholding Certificates

The seller may apply for a waiver or reduction of the withholding. The seller has up until the day of closing to apply, but this does not have to delay the closing. If the buyer agrees to close they may look to the settlement agent to hold the withholding payment pending the issuance of a Withholding Certificate issued by the IRS. If the principals elect to go this route, follow the instructions contained in Tech Memo 65-2006 FIRPTA Holdback.

Any variance from the above must be approved by your Underwriter or National Escrow Administration.

Comprehensive instructions for handling most FIRPTA situations can be found at:
home.fnf.com > Business Tools > Training > Escrow Training Modules > FIRPTA.

By adhering to the above procedures we can help minimize the risk to our Company. Should you have any questions regarding the content of this memorandum, please contact the National Escrow Administration team. We can be contacted by email at settlement@fnf.com or by telephone at 949/622.4425.

Attachments:

Waiver of Escrow Responsibility
Escrow Instructions for FIRPTA Withholding

WAIVER OF SETTLEMENT AGENT RESPONSIBILITY

Date:

File No:

Settlement Agent:

Seller:

Purchaser:

Property:

To: Escrow Holder

Escrow Holder is releases from and shall have no liability, obligation or responsibility with respect to, (a) withholding of funds pursuant to Section 1445 of the Internal Revenue Code 1986 as amended, (b) advising the parties as to the requirements of such Section or (c) determining whether the transferor is a foreign person under such Section, acting as the Qualified Substitute or otherwise making any inquiry concerning compliance with such Section for any party to the transaction.

PURCHASER(S):

**ESCROW INSTRUCTIONS
FOR F.I.R.P.T.A. WITHHOLDING**

To: [Name of Company]

Escrow No.:

Property:

It has been determined by the Parties that one or more of the Sellers in the above captioned transaction is a foreign transferor and may be subject to F.I.R.P.T.A. withholding under Section 1445 of the Internal Revenue Code.

Prior to close of escrow, Buyer shall hand you completed Internal Revenue Service ("IRS") Tax forms:

1. **8288** US Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests

AND

2. **8288-A (Copies a, b & c)** Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests with respect to Section 1445 of the Internal Revenue Code.

If a seller does not have a U.S. Taxpayer Identification Number (T.I.N.), seller shall, prior to the close of escrow, hand you completed IRS tax form:

- **W-7** (if seller is an individual) and any supporting documentation required pursuant to the instructions contained therein

OR

- **SS-4** (if seller is an entity) and any supporting documentation required pursuant to the instructions contained therein.

Note: The same process applies, if the buyer does not have a U.S. Taxpayer Identification Number.

The escrow holder shall not be responsible or liable for the accuracy or sufficiency of these forms or their content.

Escrow holder is hereby irrevocably authorized and instructed as follows:

On or before the day of closing, the escrow holder shall:

1. Complete the transfer date on all tax forms handed to you as of the settlement date shown on the HUD-1 Settlement Statement or Closing Statement

2. Deduct from funds due the foreign seller at close of escrow, the amount of \$_____ which is the withholding required under Section 1445 of the Internal Revenue Code, or the amount shown on the withholding certificate issued by the IRS, if any, and PAY said amount to the INTERNAL REVENUE SERVICE.
3. Remit such amount within 20 days of closing, together with the applicable, completed IRS forms and the withholding certificate attached thereto, if any, to the INTERNAL REVENUE SERVICE at the address listed in the instructions on IRS form 8288 unless the seller (or buyer) is applying for a U.S. T.I.N. If the seller (or buyer) is applying for a U.S. T.I.N., escrow holder shall send all forms and payment to the address listed in the instructions attached to IRS form **W-7 or SS-4**. The escrow holder is further instructed to send the package via some traceable means, the cost for which will be paid by the _____.

1099-S Reporting for Foreign Seller without a U.S. Taxpayer Identification Number

Escrow holder is authorized to file 1099-S without a US Taxpayer Identification Number. Escrow holder will indicate to the IRS that the seller is Foreign and has applied for a US T.I.N.

Upon receipt of the US T.I.N., Seller shall provide a completed IRS Form **W8-BEN** to escrow holder. Escrow holder will file an amended 1099-S to include the seller's US T.I.N.

If after payment is made, any correspondence, tax forms or a refund of any monies are received into escrow from the IRS, the Escrow Holder shall, and is hereby authorized to remit such amounts, forms, and any correspondence to the BUYER named herein without any further instruction. Thereafter, the escrow holder is relieved of and shall have no further responsibility in this regard.

RIGHT TO SEEK LEGAL AND FINANCIAL ADVICE. DUE TO THE COMPLEXITY OF THE TAX LAWS, AND THE INTEREST AND PENALTY PROVISIONS THAT MAY BE ASSESSED, IT IS RECOMMENDED THAT BOTH BUYER AND SELLER CONSULT WITH THEIR RESPECTIVE ATTORNEYS OR FINANCIAL ADVISORS AS TO THEIR OBLIGATIONS THEREUNDER, IF ANY, PRIOR TO THE CLOSE OF ESCROW.

By signing below, Buyer and Seller, jointly and severally, hereby agree to hold the Escrow Holder harmless from any and all responsibility, liability and risk of loss whatsoever (including but not limited to taxes, interest, penalties, court costs and attorney fees) that may arise by reason of or as a result of the Escrow Holder's compliance with these instructions.

THESE INSTRUCTIONS ARE BINDING UPON ALL PARTIES AND MAY NOT BE CHANGED EXCEPT IN WRITING AND SIGNED BY ALL PARTIES TO THIS ESCROW.

Buyer

Seller

Buyer

Seller

Escrow holder please replace this page with a current version of IRS form W-8 BEN for the seller if they do not have a taxpayer identification number. The most current version of W-8 BEN can be found at www.irs.gov.

If the seller has a taxpayer identification number, please discard this page.