

**Title Alert 2016-02**

**February 23, 2016**

## **Changes to FIRPTA Withholding Requirements**

**Purpose:** To notify Approved Attorneys of changes to the Foreign Investor in Real Property Tax Act ("FIRPTA") withholding requirements.

**Advisory:** On December 18, 2015, President Obama signed the *Protecting Americans from Tax Hikes Act of 2015* ("PATH Act"). As part of the PATH Act, certain provisions concerning withholding under FIRPTA were amended. These amendments will go into effect for transactions closing on and after **February 16, 2016**<sup>1</sup> and are summarized as follows:

1. **Increase to 15%:** Unless an exemption or reduced rate applies, **the withholding amount has been increased from ten percent (10%) to fifteen percent (15%) of the sales price.**<sup>2</sup>
2. **Personal Residence Exemption:** If both of the following conditions are met:
  - a. the buyer is acquiring property that will be used as the buyer's residence, and
  - b. the sales price is \$300,000 or less,

then the buyer may elect to waive withholding under Section 1445(b)(5) of the Tax Code. This exemption and the requirements for same are unchanged from the current law.

3. **Reduced Rate of Withholding:** If both of the following conditions are met:
  - a. the buyer is acquiring property that will be used as the buyer's residence, and
  - b. the sales price is greater than \$300,000, but not more than \$1,000,000,

then the buyer may elect to withhold a reduced withholding amount equal to ten percent (10%) of the sales price rather than the unreduced rate of fifteen percent (15%).

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<sup>1</sup> According to the strict reading of the PATH Act, the amendments to FIRPTA apply to transactions in which the closing, or disposition of real property, occurs on or after February 17, 2016; however, it has come to our attention that the IRS may be interpreting the language to mean that February 16, 2016, is the effective date. While compliance is ultimately the buyer's obligation, we use the date that the IRS will be using.

<sup>2</sup> FIRPTA uses the phrase "amount realized," which typically is the sales price; however, if any party to the transaction has questions, the buyer should consult with legal counsel of buyer's choosing to ensure that the proper figure is being used when calculating the withholding amount.

The following chart may help Penn Attorneys/Ohio Bar Title Insurance Company Approved Attorneys and parties determine whether the Personal Residence Exemption or Reduced Rate of Withholding is available.

<b>Does Buyer intend to use property as buyer's residence?</b>	<b>Yes (and Buyer has elected to Waive or Reduce Withholding)</b>	<b>No (or Buyer has not so elected)</b>
Sales Price is \$300,000 or less	\$0	15%
Sales Price is \$300,001 - \$1,000,000	10%	15%
Sales Price is greater than \$1,000,000	15%	15%

It is important to remember that the responsibility and liability to the IRS with respect to FIRPTA withholding rest with the buyer – not the settlement agent or the transferor. **As such, the buyer is not required to make this election, even if the facts may support an exemption or reduced rate.** While the buyer has the ultimate liability to the IRS, the collection and disbursement of funds to the IRS as part of the closing process creates a responsibility and potential liability for the settlement agent if the matter is not properly handled and documented.

**Note:** This Title Alert does not include an exhaustive list of all available exclusions or reduced rates under FIRPTA, and is only a summary of the changes to the withholding requirements under FIRPTA that may impact Penn Attorneys/Ohio Bar Title Insurance Company Approved Attorneys. It is not intended to be, and is not, a summary of the entire PATH Act. This Title Alert is provided as a notification as to the change in law. Approved Attorneys should seek legal advice and/or other expert assistance in order to ensure compliance with the law. It is the Approved Attorney's responsibility to review changes in laws, regulations and accounting practices that affect them.

If you have any questions, please feel free to contact us.

Note: Under the Approved Attorney system, the scope of our relationship is limited to the functions of underwriting and the issuance of title insurance policies on your behalf and does not include closing or escrow services. We sometimes provide information and recommendations with regard to your closing or escrow business as a courtesy to you. Moreover, some communications, depending on whether noncompliance could impact on liability under our policies or closing protection letters, should be considered directives. This Advisory is being provided to you with those considerations in mind.

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