

## FIRPTA FAQs

Q1. What is FIRPTA?

A1. FIRPTA is the Foreign Investment in Real Property Tax Act of 1980. FIRPTA requires withholding on the sale of US real property by a nonresident alien.

Q2. Who is responsible for the withholding?

A2. Generally, the obligation is on the buyer. If the buyer does not comply with the withholding obligation, and the seller does not timely file a return and pay the tax owed, the buyer will be held responsible for the tax plus interest and penalties. Even if the seller timely files a return and pays the tax owed, if the buyer does not comply with the withholding obligation, the buyer can be held responsible for interest. In some circumstances, other parties (such as the buyer's agent) may be responsible. Note that because the withholding is the buyer's responsibility, the buyer's US SSN or TIN (taxpayer identification number) must be provided to the IRS.

Q3. How much must the buyer withhold?

A3. The withholding is 10% or 15% of the gross sale proceeds, regardless of the amount of tax owed by the seller. If the property is not purchased as a residence for the buyer and/or if the sale price is over \$1,000,000, the withholding is 15% of gross sale proceeds. Otherwise it is 10%. Special rules apply to sales by entities (trust, partnerships, etc.).

Q4. Are there exceptions?

A4. There is no required withholding if one or more individual transferees acquire a US real property interest for use as a residence and the amount realized on the transaction is \$300,000 or less. The buyer must reside at the property for at least 50% of the number of days the property is used by any person during each of the first two 12-month periods following the date of the sale (calculated without including the number of days the property will be vacant). If the buyer does not use the property as a residence, the withholding tax may be collected from the buyer. The exception does not apply to the sale of vacant land, or to sales to a non-individual buyer (e.g. a trust or corporation).

Q5. What must be submitted to the IRS?

A5. IRS Forms 8288 and 8288-A must be filed along with the withheld funds.

Q6. Do the buyer and seller need US tax ID numbers?

A6. According to Treasury Regulation §1.1445-1 the withholding reports (Forms 8288 and 8288-A) must provide the US identifying number of the transferor and the transferee.

Q7. If the seller already has a US TIN or SSN does the buyer still need to withhold?

A7. Yes, if the seller is a nonresident alien, the withholding requirement still applies.

Q8. What if the withholding obligation exceeds actual tax amounts owed by the seller?

A8. On or before the closing, the seller can apply to the IRS for a withholding certificate, which is a determination that the withholding obligation exceeds the actual tax owed, and the withholding should be reduced or eliminated. The withholding is still required, but the withheld funds do not have to be submitted to the IRS while the application for the withholding certificate is pending. The funds are returned to the seller upon receipt of the withholding certificate. Alternatively, the seller can claim a refund when the seller files their US income tax return reporting the sale of the property.

Q9. What happens if the seller's mortgage is paid at closing, and there are insufficient funds for the withholding?

A9. The seller must provide the additional funds from another source. In the alternative, the seller can apply for a withholding certificate at least 90 days before the closing. If the seller receives the withholding certificate prior to the closing, the withholding requirement may be reduced or eliminated.

Q10. What does attorney Lori B. Miller do as withholding agent?

A10. We provide instructions for the title company regarding withholding, gather information from the buyer and seller, prepare the necessary withholding reports, and remit the reports and the withheld funds to the IRS. We respond to any inquiries from the IRS with regard to the withholding submission, and we make every effort to ensure that the submission is properly received and processed. We can also assist with the application for a withholding certificate, and applications for individual taxpayer identification numbers (ITINs).

Q11. How much does it cost to have the attorney act as withholding agent?

A11. It is a flat fee of \$725 inclusive of all copies and certified mailings. Services to apply for a withholding certificate and to apply for ITINs are billed separately.

Q12. When do I get started?

A12. The withholding paperwork must be completed before closing, and it can take up to 10 days to gather necessary information and prepare the paperwork. It is important to consider withholding issues and make arrangements for withholding before there is a signed buy sell agreement.

*The preceding information is general information and may not apply in all circumstances. This information is current through November 19, 2019. For more information or to discuss a specific withholding matter, contact Lori B. Miller at (406) 730-2752. For forms and other general information, visit our website at [www.lorimillerlaw.com](http://www.lorimillerlaw.com).*