

# Oregon Real Estate News-Journal

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Commissioner  
Gene Bentley

## Law and Rule Changes Coming January 1

*Gene Bentley, Real Estate Commissioner*

The Oregon Real Estate Agency has revised Oregon Administrative Rules (OAR) chapter 863 in response to the new laws passed this year by the Oregon Legislature.

A workgroup consisting of industry members and the Oregon Real Estate Board reviewed the proposed rules.

The Board then recommended that the Agency proceed with the rulemaking process at its August meeting.

The Agency has scheduled a public hearing on the proposed rules for 10 a.m. on September 19, 2017, at the Agency's office.

The following is a summary of law and proposed rule changes in effect January 1, 2018.

### Registered Business Names (RBNs)

**RBNs must be renewed yearly.** (Senate Bill 67, Section 5. OAR 863-014-0095, 863-024-0095, 863-014-0097, 863-024-0097.)

- Renewals will start in January 2018.
- Each RBN must identify the principal broker or licensed property manager who will be responsible for renewing the RBN. (The Agency is currently gathering this information.)
- An RBN's expiration date will be based on the month the business name was first registered.
- The renewal fee will be \$50.
- **IMPORTANT NOTE:** Failure to renew a Registered Business Name on-time will result in all licenses with the business becoming inactive.

**Principal Broker Licensed Names (PBLNs) and Property Manager Licensed Names (PMLNs) will become RBNs.** (OAR 863-014-0095, 863-024-0095.)

The Agency will convert the registrations of principal brokers and property managers who currently conduct business under their licensed names (PBLNs or PMLNs) to RBNs.

*Please see **Law and Rule Changes** on page 3*



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## Views from the Board

# FIRPTA: An Overview for Residential Brokers

Patricia A. Ihnat, Oregon Real Estate Board Member



Patricia A. Ihnat

“Views from the Board” features the opinions of Real Estate Board members. The views expressed are not necessarily those of the *Oregon Real Estate News-Journal*, the Oregon Real Estate Agency or Agency staff.

## Introduction

Before 1980, a foreign seller of real property in the United States was not taxed on the gain or profit realized from the sale. Foreign investors were buying and selling real property at a profit without paying any capital gains tax. To address this problem, Congress passed the Foreign Investment in Real Property Tax Act (“FIRPTA”) as a tool to ensure payment of capital gains tax by foreign sellers. FIRPTA became effective after December 31, 1984.

The FIRPTA law consists of Section 1445 of the Internal Revenue Code (26 U.S.C. §1445) and the corresponding regulations set forth in Chapter 26 of the Code of Federal Regulations (26 CFR §§1.1445-1 through 1.1445-11T). Unless an exemption or reduced withholding applies, FIRPTA requires a buyer to withhold 15% of the sale price from a foreign seller and remit that withholding amount to the Internal Revenue Service. Until February 17, 2016, the withholding rate was 10%. The rate was increased to 15% as a result of the PATH Act of 2015 (Protecting American Taxpayers from Tax Hikes), and the increased withholding became effective for transactions closed on or after February 17, 2016. This article will discuss FIRPTA in the context of residential sale transactions where the seller is an individual. This discussion also applies to any transaction where the seller is a single-member limited liability company. While a single-member LLC is a recognized legal entity, it is considered a “disregarded entity” for tax purposes. The identity of the LLC’s sole member will determine whether FIRPTA applies.

## Withholding Requirements

Under FIRPTA, the buyer is the withholding agent who is required to withhold from a foreign seller and remit to the IRS 15% of the amount realized by the seller on a sale of a US real property interest. The amount realized by the seller is the gross sale price including the total amount of cash paid, value of any property transferred, and assumption of debt by the buyer. If a buyer fails to withhold and remit funds to the IRS in a purchase from a foreign seller, and if no exemption applies, the IRS will pursue collection of the tax and penalties from the buyer.

FIRPTA is intended as a collection tool for the United States Treasury, and the 15% withholding amount is not a representation of the capital gains tax actually owed by the seller. In many residential transactions, the FIRPTA withholding amount exceeds the seller’s capital gains tax obligation. If the seller’s capital gains tax obligation is less than the amount withheld and paid to the IRS, the seller can work with his or her accountant or tax professional to file a tax return documenting the seller’s claim for a refund under applicable IRS code provisions.

Note that FIRPTA does not apply to a purchase of real property by a foreign buyer. Eventually, FIRPTA may apply when the foreign buyer sells the property.

## Determine Seller’s Status Early in the Transaction

If a seller is not foreign, FIRPTA withholding is not required. Therefore, it is important to identify potential FIRPTA situations as

*Please see FIRPTA on page 8*

# Law and Rule Changes

Continued from page 1

These RBNs will be renewed annually as discussed above, with the expiration date based on the month when the PBLN or PMLN was originally created.

**RBN names can be changed.** (Senate Bill 68, Section 1, OAR 863-014-0095, 863-024-0095)

Currently, an RBN name change consists of closing the old business online, registering the new business name, and then transferring the licensees into the new business name.

Under the new laws and proposed rules, this complicated process will be eliminated.

The RBN name change fee will be \$300.

**Content of written supervisory agreements is clarified.** (Senate Bill 67, Section 21.)

Written supervisory agreements are required for businesses with two or more principal brokers and licensed property managers.

### *Two or more principal brokers*

If there are two or more principal brokers who work for the same business, the principal brokers must execute one or more written supervisory agreements that:

- Assign supervisory control and responsibility of the professional real estate activity of each broker in the business.
- Includes default supervisory control and responsibility for brokers who will come to the company in the future.
- Includes default supervisory control and responsibility for brokers who are omitted from the agreement.
- Includes any supervisory control and responsibility for one principal broker over another principal broker.

Additionally, the principal brokers must:

- Update the written supervisory agreement if a principal broker leaves and it affects the supervisory control and responsibility assignments.
- Share equal supervisory control and responsibility for any brokers with the business who are not otherwise covered by the written supervisory agreement.

### *A licensed property manager with other property managers or principal brokers.*

When a licensed property manager works with any combination of licensed property managers and principal brokers in a business, they must execute one or more written supervisory agreements that:

- Assigns supervisory control and responsibility for management of rental real estate conducted by all principal brokers and property managers in the business.
- Includes any arrangement for supervisory control and responsibility over the management of rental real estate conducted by the property managers and principal brokers.

Additionally, the licensed property managers and principal brokers must:

- Update the written supervisory agreement if another property manager or principal broker joins the business.
- Update the written supervisory agreement if a property manager or principal broker leaves and it affects the allocation of supervisory control or responsibilities.

Property managers and principal brokers who do not exercise administrative or supervisory control over each other are responsible for their own management of rental real estate.

**Suspension or revocation of a principal broker or property manager's license does not mean automatic suspension or revocation of associated licensees.** (Senate Bill 68, Section 2)

The new law clarifies that the suspension or revocation of a principal broker or property manager's license does not cause the suspension or revocation of an associated licensee. The exception would be if the Commissioner determined that the associated licensee had knowledge of the violations that resulted in the disciplinary action.

## Real Estate Transactions and Records

**Amendments and addendums must be in writing.** (OAR 863-015-0135.)

Please see *Law and Rule Changes* on page 4

## Law and Rule Changes

Continued from page 3

The proposed rule clarifies that all amendments and addendums to purchase agreements or counter-offers must be in writing.

### **Requirement to disclose license status for personal transactions is limited to this state.** (OAR 863-015-0145)

Currently, brokers or principal brokers who are buying or selling their own real property must disclose their license statuses. The disclosure must be on any advertising or display signs and in writing on the first written document of agreement of the offer or transaction.

The proposed rule clarifies that the requirement is only for real estate in this state.

### **Written authorization for broker to close a transaction is kept in transaction file.** (OAR 863-015-0150)

Under current rule, a principal broker can authorize an associated broker to handle the closing of a real estate transaction in writing only if the principal broker directly supervises the activity of the broker.

The proposed rule will require the authorization document to be kept in the transaction file.

### **Brokers must turn records of professional real estate activity into principal brokers within 3 banking days.** (OAR 863-015-0250.)

This requirement is in current rule OAR 863-015-0255,

It was moved in the proposed rule to a location that will hopefully make it easier for brokers to find and understand their responsibilities.

## **Transferring Brokers and Principal Brokers**

### **A broker or principal broker changing registered business names can continue working on a transaction started with the previous business.** (Senate Bill 67, Section 5. OAR 863-014-0063.)

The new law and proposed rules now set out a process that will allow a broker or prin-

cipal broker moving from one business to another to continue to work on a sale, exchange, purchase, or lease transaction that was started while with the previous business.

#### *Transferring Broker*

- There must be a fully executed contract, an active written offer or counter-offer, or a letter of intent.
- It may only be done with client's documented approval.
- It may only be done with a written agreement between the sending principal broker with the old business and receiving principal broker with the new business. The agreement must:
  - Identify which principal broker is responsible for supervision, including record retention.
  - Identify the transaction or transactions included.
  - State the effective date.
  - Address agency relationships.
  - Specify how compensation will be handled.
  - Be signed by both principal brokers and the transferring broker.

#### *Transferring Principal Broker*

- There must be a fully executed contract, an active written offer or counter-offer, or a letter of intent.
- It may only be done with client's documented approval.
- It may only be done with a written agreement between the transferring principal broker and the sending principal broker from the old business. The agreement must:
  - Identify responsibilities for supervision, as appropriate
  - Identify responsibilities for record retention.
  - Identify the transaction or transactions included.
  - State the effective date.
  - Address agency relationships.
  - Specify how compensation will be handled.
  - Be signed by the transferring princi-

pal broker and the sending principal broker.

## Final Agency Disclosure Acknowledgement Form

**Text for the required form updated.** (OAR 863-015-0200.)

At the request of the real estate industry, the term "agent" is now used to reflect the agency relationships, hopefully eliminating confusion for both licensees and consumers.

## Sharing Compensation

**Real estate licensees cannot share compensation with a nonlicensed individual exempt from real estate licensing.** (Senate Bill 67, Section 7 and 19)

Individuals listed in ORS 696.030 may not make a demand for a share of the compensation of a real estate licensee.

A real estate licensee who shares compensation with an individual listed in ORS 696.030 risks disciplinary action by the Agency.

## Clients' Trust Accounts

**A check made out to a seller or property owner can be delivered without depositing into a clients' trust account.** (Senate Bill 67, Section 15. OAR 863-015-0257, 863-025-0065.)

Under current law, any funds received by a real estate licensee on behalf of another must be deposited into a clients' trust account.

The new law and proposed rules will allow a licensee to deliver a check made out to a seller or property owner without depositing into a clients' trust account as long as the licensee follows timeframe and documentation requirements.

### *Earnest money checks*

If the earnest money is a check made out to the seller:

- The check may be held by the broker or principal broker until the offer or counter offer is accepted or rejected.

- Upon acceptance of the offer or counter-offer, the check being held must be delivered to the seller within 3 banking days.
- The principal broker must keep the following information about the check:
  - Date received.
  - Name of payor.
  - Purpose of payment.
  - File reference assigned to the offer or transaction.
  - Date delivered to seller.
  - Documentation of delivery to the seller.

### *Other checks in a sale*

For any other check made out to the seller:

- The check must be delivered to seller within 5 banking days.
- The principal broker must keep the following information about the check:
  - Date received.
  - Name of payor.
  - Purpose of payment.
  - File reference assigned to the offer or transaction.
  - Date delivered to seller.
  - Documentation of delivery to the seller.

### *Property management checks*

If security deposit funds or any other funds are presented as a check made out to the property owner:

- Deliver to the property owner within 5 banking days.
- Keep the following information:
  - Date received.
  - Name of payor.
  - Purpose of payment.
  - Identifying code.
  - Date delivered to owner.
  - Documentation of delivery to owner.

**Shorter name for clients' trust accounts allowed.** (OAR 863-015-0255, 863-025-0025)

Principal brokers and property managers must make sure that clients' trust account records and checks be labelled with a specific phrase designating it as a clients' trust account.

*Please see **Law and Rule Changes** on page 6*

## **Law and Rule Changes**

*Continued from page 5*

The proposed rules will offer a shortened version to use.

- Either “Clients’ Trust Account” or “Client Trust Account” must appear on accounts used to disburse trust funds.
- Either “Clients’ Trust Account – Security Deposit” or “Client Trust Account SD” must appear on accounts used to disburse security deposit funds.

### **Notice of Clients’ Trust Account form will be revised.** (Senate Bill 67, Section 17)

The new form is called the “Notice of Clients’ Trust Account and Authorization to Examine” form. Within 10 business days of opening a clients’ trust account, the principal broker or property manager must:

- Fill out the Notice of Clients’ Trust Account and Authorization to Examine form.
- Have a bank representative acknowledge receipt of the form.
- Notify the Agency of the new account by:
  - Logging in to eLicense.
  - Adding the account to the Registered Business Name’s inventory
  - Uploading a copy of the completed and signed Notice of Clients’ Trust Account and Authorization to Examine form.

### **Mail-In Audits will become Reconciliation Mail-In Reviews.** (OAR 863-015-0092, 863-025-0090.)

The name change better reflects the process the Agency uses.

Clients’ trust accounts will be selected for a Reconciliation Mail-In Review each month. The principal broker or property manager must respond with to the Agency’s request with the required documents about the selected clients’ trust account.

### **Commingling is still not allowed.** (OAR 863-015-0265.)

The rule previously said a principal broker could make arrangements with a bank to deposit the principal broker’s funds into a fixed-term, interest-bearing clients’ trust account to keep the account open. This, however, is commingling. Commingling is not allowed by

law because it could put clients’ funds at risk.

Somehow this provision had been missed in past rule reviews, but the Agency has corrected it in this review.

## **Property Management**

### **Tenant representation will be limited for property managers.** (Senate Bill 67, Section 3.)

A property manager license allows a licensee to perform the activities listed under the definition of management of rental real estate in ORS 696.010. The definition of the management of rental real estate was changed by Senate Bill 67.

A property manager will only be able to represent tenants in the renting or leasing of rental real estate if the property manager has a signed property management agreement with the owner of the rental real estate.

### **There will be additional requirements for tenant or lease agreements.** (OAR 863-025-0045.)

The proposed rule will require that a licensee make sure that:

- The agreement states who will hold refundable security deposits.
- The agreement is signed and dated by the licensee.
- A legible copy is promptly delivered to the tenant.

### **Delegation of authority must be signed by individual receiving authority.** (OAR 863-025-0015.)

A property manager or principal broker is allowed to delegate some of the property manager or principal broker’s authority pertaining to the management of rental real estate. This delegation must be in writing.

The proposed rule will require that the person receiving the authority for the following activities must sign the written document.

- Negotiate and sign property management agreements.
- Review and approve reconciliations and receive and disburse funds.
- Review, approve, and accept tenant rental

and lease agreements.

## Continuing Education Providers

**Continuing education credit hours issued for a course must be based on the time it takes the licensee to complete the course.** (OAR 863-020-0007.)

**Course providers must notify licensee of the length of time required to complete the course.** (OAR 863-020-0007.)

**Sample certificate of attendance no longer needed as part of a certified continuing education provider application.** (OAR 863-022-0030.)

**Law firms can now apply to be a certified continuing education provider.** (Senate Bill 67, Section 11.)

Previously, individual attorneys were on the list of people and companies allowed to apply to be certified continuing education providers. But law firms had to petition the Board for permission to apply.

The new law has fixed this

## Fees

**Increased fees beginning January 1, 2018.** (Senate Bill 68, Section 1)

The Legislature approved the first real estate-related fee increase in 20 years.

The following is a list of the increased fees.

- Apply for a broker, principal broker, or property manager license: \$300
- Renew an active broker, principal broker, or property manager license: \$300

- Renew an inactive broker, principal broker, or property manager license: \$150
- Late renewal fee: \$150
- *This fee, in addition to the new fee to renew a license, will apply to licenses that expire before January 1, 2018 but are renewed on or after that date.*
- Reactivate an inactive license: \$150
- Register a business name: \$300
- Register a branch office: \$50
- Apply for an escrow agent license: \$450
- Renew an escrow agent license: \$450
- Register an escrow branch office: \$225

**New fees beginning January 1, 2018.** (Senate Bill 68, Section 1)

These are some of the new approved fees:

- Renew a registered business name: \$50
- Apply for continuing education provider certification: \$300
- Renew continuing education provider certification: \$50

## Complete Laws and Proposed Rules

Find the links to the laws and rules below. They will be effective on January 1, 2018.

- [Chapter 234, Oregon Laws 2017](#) (Senate Bill 67)
- [Chapter 193, Oregon Laws 2017](#) (Senate Bill 68)
- [Proposed changes to Oregon Administrative Rules Chapter 863](#) (redline version)

Please direct questions about the new laws and proposed rules to myself, Gene Bentley, at (503) 378-4770 or Deputy Commissioner Dean Owens at (503) 378-4407. ■

## ***A Warning about Late License Renewal***

***Does your real estate license expire before January 1, 2018? Renew promptly!***

If you renew your license after January 1, you will be subject to the new, increased license renewal fees and late renewal fees.

**This means the cost of renewing your active license late will be \$450.**

*Please note: You cannot renew your license early to avoid the new fees effective January 1, 2018.*

## **FIRPTA**

*Continued from page 2*

early as possible. Many brokers address this issue with their sellers during the listing appointment. Or, a broker submitting a buyer's offer may want to confirm seller's status with the listing broker. If a FIRPTA situation is not discovered until closing, the parties are left with few alternatives except to withhold and remit the tax or delay the transaction. Early knowledge that a seller is subject to FIRPTA withholding provides an opportunity for seller and buyer to consult with their tax attorneys, accountants, or other tax professionals who can advise them as to how best to handle the FIRPTA issues, thus avoiding closing delays.

### **Exemption from Withholding if Seller is not a Foreign Person**

If a seller is not a "foreign person" as that term is defined under FIRPTA, the transaction is exempt from withholding. FIRPTA defines the term "foreign person" by stating who is not a foreign person. An individual seller is not foreign under FIRPTA if the seller is (1) a United States citizen, or (2) a permanent legal resident alien, or (3) a resident alien who meets the "substantial presence test" set forth in the FIRPTA law.

A permanent legal resident alien has a current Permanent Resident card issued by United States Citizenship and Immigration Services. Sometimes referred to as a "green card" (cards issued before 1976 were green), the Permanent Resident card is plastic and includes the individual's photograph, name, country of birth, date of birth, sex, issue date, and expiration date. Style and background color of permanent resident cards vary depending on the year of issuance. If the seller is a permanent resident, has a U.S. taxpayer identification number, and reports and pays U.S. income tax, then FIRPTA withholding is not required.

The substantial presence test requires that a resident alien must have been present in the United States for at least a certain number of days during and prior to the year of the sale, as provided in the regulation. A

buyer who is considering this exemption as a basis for not withholding should consult with a tax professional.

### **Protecting the Buyer**

Given the buyer's obligation and potential tax liability under FIRPTA, obtaining reliable information about the seller's non-foreign status is important. Title companies do not determine seller's status as non-foreign or initiate FIRPTA withholding. This is the buyer's responsibility.

Under one of the applicable FIRPTA regulations, a seller can provide a certification of non-foreign status to inform the buyer that withholding is not required. Section 14(8) of the 2017 Oregon Real Estate Form Residential Real Estate Sale Agreement (OREF 001) includes a seller representation that "Seller is not a 'foreign person' under the Foreign Investment in Real Property Tax Act ('FIRPTA')". However, this representation is not sufficient to protect the buyer from tax liability if the buyer closes without withholding under FIRPTA and if it turns out that the seller is foreign. So, how does a buyer with no relation to or knowledge about a seller protect himself from potential tax liability under FIRPTA?

An acceptable form of certification of non-foreign status by an individual seller is set forth in the FIRPTA regulations. See 26 CFR §1.1445-2(b)(iv)(A). The language is below.

#### *CERTIFICATE OF NON-FOREIGN STATUS*

*Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a U.S. real property interest must withhold tax if the transferor (seller) is a foreign person. To inform the transferee (buyer) that withholding of tax is not required upon my disposition of a U.S. real property interest, I, [name of transferor], hereby certify the following:*

- 1. I am not a nonresident alien for purposes of U.S. income taxation;*

2. *My U.S. taxpayer identifying number [or Social Security number] is \_\_\_\_\_; and*

3. *My home address is: \_\_\_\_\_*

*I understand that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement I have made here could be punished by fine, imprisonment, or both.*

*Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete.*

*[Seller's Signature]      [Date]*

A buyer who obtains seller's signed and dated certification of non-foreign status prior to the conveyance is entitled to rely on the certification as a basis for not withholding under FIRPTA. A buyer's right to rely on the information provided in the certification presumes that the buyer has no other knowledge that the seller is foreign. The certification alone is not sufficient if the buyer has other actual knowledge that the seller's statements are not true. The buyer must retain the seller's signed certification until the end of the fifth taxable year after the tax year in which the transfer of title occurred.

Of course a buyer is not obligated to obtain a seller's certification of non-foreign status and, in many instances, there will be no reason for a buyer to do so. However, if the buyer relies on other means to ascertain the seller's non-foreign status, such as seller's representations in the purchase and sale agreement, and if the seller is foreign, then the buyer will be liable to IRS for the FIRPTA withholding and applicable penalties and interest. Under the FIRPTA regulations, a buyer is entitled to demand a certification of non-foreign status from a seller. If the seller does not provide a certification, the buyer may require that the FIRPTA tax be withheld and remitted in order to complete

the transaction. See 26 CFR §1.1445-2(b).

Note that Section 3 of the FIRPTA Addendum OREF 093 requires the seller to sign a certificate of non-foreign status "in a form compliant with current federal regulations" if the seller declares that seller is not a foreign person "but does not currently hold a taxpayer identification number, social security number, or employer identification number." This is not consistent with the federal regulation which requires that the certification must include the seller's "identifying number." See 26 CFR §1.1445-2(b)(2)(i)(B). An identifying number is a social security number or individual tax identification number. A buyer who is asked to accept a seller's certification that does not include the individual seller's U.S.-issued SSN or ITIN should consult with a tax professional.

Brokers also can find themselves liable under FIRPTA in certain circumstances. FIRPTA defines agent as "any person who represents the transferor [seller] or transferee [buyer] in any negotiation relating to the transaction or in settling the transaction." 26 USC § 1445(d)(3)-(4). Both the listing and selling brokers are required to provide notice to the buyer if they know that the seller's non-foreign certification is false. Any broker who fails to provide notice will be liable for the tax that the buyer should have withheld. However, the broker's tax liability cannot exceed the amount of compensation the broker earned from participating in the transaction. 26 CFR §1.1445-1(d)(2)(B). A broker who aids in the preparation of or fails to disclose knowledge of a false certification also may be liable for civil and criminal penalties. 26 CFR §1.1445-4(e).

## Concerns About Privacy

Many sellers are not comfortable providing their Social Security numbers or individual tax identification numbers to buyers. This is an understandable concern. FIRPTA provides an alternative procedure for a seller to furnish and a buyer to retain the seller's non-foreign certification. The buyer is protected

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## **FIRPTA**

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if the non-foreign certification is delivered by the seller to a “qualified substitute” and the qualified substitute furnishes a statement to the buyer stating under penalty of perjury stating that the qualified substitute has the seller’s signed certification in his possession. 26 USC §1445 (b)(9). Title companies generally will not act as qualified substitutes. The broker who negotiated the transaction for the buyer, or the buyer’s attorney can act as the qualified substitute to receive and hold seller’s certification. A buyer will want assurances from the qualified substitute that the certification will be retained for the required number of years.

### **Other Exemptions From FIRPTA Withholding**

What if the seller is foreign? There are other exemptions from FIRPTA withholding, or reductions of the withholding rate. Keep in mind that the determination whether to withhold and how much to withhold must be made by the buyer. Below are some exceptions to the FIRPTA withholding requirement.

1. **Buyer’s Personal Residence and Sale Price \$300,000 or Less:** If the buyer purchases the property for use as a personal residence and the sale price is \$300,000 or less, the transaction is exempt from FIRPTA withholding regardless of whether seller is a foreign person under FIRPTA. Note that this exemption will not apply if the land is vacant at the time of the conveyance; the land must be improved with a dwelling.
2. **Buyer’s Personal Residence and Reduced Withholding:** If the buyer purchases the property for use as a personal residence and the sale price is higher than \$300,000 and does not exceed \$1,000,000, the withholding rate is reduced to 10% of the sale price.

In order to qualify for the exceptions discussed above, the buyer or a member of the buyer’s family must have definite plans to reside at the property for at least half the

number of days the property is occupied by any person during each of the two 12-month periods after the date of closing. In either instance, the decision whether to withhold or apply the reduced rate must be made by the buyer. A buyer will want to consult with a tax professional who is knowledgeable about FIRPTA before making either of these reduced withholding elections.

3. **Seller Receives Withholding Certificate from IRS:** If a seller believes that the seller’s capital gains tax liability will be zero or less than the FIRPTA withholding amount, or if the seller’s net proceeds will not be sufficient to pay the FIRPTA withholding, a seller may apply for and receive a withholding certificate from the IRS that reduces or eliminates the withholding requirement.

For example, a seller who qualifies for the exclusion from income or non-recognition of gain from the sale of a principal residence, as provided in 26 USC §121, may wish to apply for a withholding certificate to avoid payment of the withholding at closing. Otherwise, the FIRPTA withholding must be remitted at closing and the seller will have to file a tax return in order to claim any refund to which the seller may be entitled.

Another example is the situation where a seller’s net proceeds will not be sufficient to pay the FIRPTA withholding. Because FIRPTA withholding requirements are based on the sale price, not the seller’s net proceeds, the seller must either deposit funds sufficient to pay the entire FIRPTA withholding or apply for reduced withholding from the IRS. It is important to note that the IRS does not respond immediately to applications for reduced withholding, and it can take up to 90 days to receive a written response from the IRS. The IRS form 8288-B Application for Withholding Certificate and applicable instructions can be reviewed at [www.irs.gov](http://www.irs.gov).

If the seller submits an application for withholding certificate to the IRS before the closing date, and if the application is still pending with the IRS on the closing date,

the full amount must be withheld. However, the FIRPTA withholding does not have to be reported and paid at closing as long as the seller's application was received by the IRS before the conveyance. Payment must be made within 20 days after the date the IRS mails its withholding certificate in response to seller's request. Some title companies will hold the FIRPTA withholding in escrow pending receipt of a withholding certificate from the IRS. This will require a discussion of the title company's requirements early in the transaction to avoid delays.

### **Multiple Sellers and All are Not Foreign**

Buyers must determine whether FIRPTA withholding is required for each seller separately. If the sellers are spouses, and if only one of them is foreign under FIRPTA, the IRS deems each spouse owns 50% of the interest being sold. For multiple sellers, the withholding amount will apply to the foreign seller's percentage of ownership. For example, if a foreign seller owns an undivided one-third interest and the other sellers are not foreign, the FIRPTA withholding will be based on one third of the sale price.

### **Withholding Payment and Reporting to the IRS**

If the buyer is required to pay FIRPTA withholding, the funds must be sent to the IRS together with IRS Forms 8288 and 8288-A within 20 days after the closing date unless an application for withholding certificate was made prior to closing. The buyer is

responsible for completing the IRS reporting forms. Most buyers will consult with a tax professional in order to complete the required forms. A title company handling the escrow will accept instructions from seller and buyer to remit the FIRPTA withholding to the IRS along with the required reporting forms if prepared and deposited by the buyer.

### **Tax Identification Numbers Required**

IRS regulations require all buyers and foreign sellers to provide their tax identification numbers, names, and addresses on the FIRPTA withholding tax forms and applications for withholding certificates. It is best to make sure that the parties have US-issued SSNs or ITINS prior to closing. Information about applying for an ITIN is found in an IRS publication entitled "ITIN Guidance for Foreign Property Buyers/Sellers," which is available at [www.irs.gov](http://www.irs.gov).

### **Conclusion and Summary**

While the seller is the person who owes tax on the gain from a sale of real property, it is the buyer's responsibility under FIRPTA to withhold and pay to the IRS a percentage of the sale price when purchasing any real property interest in the United States from a foreign person. If the buyer does not withhold, the buyer may be liable to the IRS for the tax that should have been withheld plus interest and penalties. Early identification of FIRPTA issues is key to closing a transaction without complications and delays. ■

#### **Next Board Meeting**

## **Springfield**

**Monday, October 2, 2017, 10:00 a.m.**

**Holiday Inn, 919 Kruse Way**

The public is welcome. Continuing education is available to licensees by pre-registering with the [Oregon Association of Realtors](http://www.oregonrealtors.org).

**OREGON REAL ESTATE  
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# Administrative Actions

The Oregon Real Estate Agency is required by law to publish disciplinary actions. The final order for each action can be viewed by clicking on the individual names listed below.

Please note that there are individuals with real estate licenses that may have similar or the same names as those listed below, even in the same market area. If you are in doubt if an individual listed here is someone you know or with whom you are working, please contact the Agency for verification.

Stipulated settlements do not necessarily reflect all the factual violations initially alleged by the Agency. Sanctions may have been adjusted as part of the negotiation process. Such settlement may not, therefore, directly compare in severity/sanction with other cases.

## REVOCATION

[O'Neal, Debra Lynn](#) (Oakridge) Property Manager 201110063. Default final order dated July 10, 2017.

## SUSPENSION

[Stohl, Susan J.](#) (Lake Oswego) Broker 201206237. Stipulated order issued April 10, 2017 for a 90-day suspension and a subsequent 5-year limited license.

## REPRIMAND

[Stiles, Jeffrey Allen](#) (The Dalles) Property Manager 200502010. Stipulated final order dated April 10, 2017.

[Steele, Gregory A.](#) (Tigard) Property Manager 960800136. Stipulated final order dated May 1, 2017.

[Walls, Donald G.](#) (Hermiston) Principal Broker 970900218. Stipulated final order dated June 2, 2017.

[Westphal, Linda A.](#) (Florence) Principal Broker 900500059. Stipulated final order dated June 13, 2017.

## CIVIL PENALTIES

### Unlicensed Activity

[Berrey, Dan Lee](#) (Sisters) Unlicensed. Stipulated final order to cease and desist dated March 29, 2017 issuing a \$1,100 civil penalty.

[Hitchcock, Lawrence William](#) (Happy Valley) Broker 201215620. Stipulated final order dated June 1, 2017 issuing a \$750 civil penalty.