



**Main Office:** 1601 Kapiolani Boulevard, Suite 1110, Honolulu, HI 96814  
**Diamond Head Office:** 614 Kapahulu Avenue, Suite 101, Honolulu, HI 96815

## The Foreign Investment in Real Property Tax Act

The Foreign Investment in Real Property Tax Act (FIRPTA), codified in Internal Revenue Code § 1445, seeks to ensure that foreign persons - individuals and entities - report and pay applicable capital gains tax when they sell United States real property interests.

As a general rule, every buyer/transferee of real property must withhold ten (10) percent of the "amount realized" (generally the sales price) in a transaction and transmit that amount to the State Tax Department within 20 days after closing unless an exemption applies and the buyer/transferee receives proof of that exemption prior to closing. No withholding if the purchase price does not exceed \$300,000. 15% rate applies if the purchase price is over \$1 million. If the buyer/transferee does not withhold an amount that should be withheld, the buyer/transferee may be liable for the entire amount that should be withheld, the buyer/transferee may be liable for the entire amount plus late fees and penalties.

It is not escrow's responsibility to withhold the amount, but does so pursuant to the contract.

It is the seller's burden to prove that an exemption applies and to provide that proof to the buyer prior to closing in order to avoid withholding.

Although escrow officers do not give legal or tax advice, understanding how the process that escrow officers generally follow in complying with withholding requirements, the forms that are typically used, and what must be provided before escrow can avoid the withholding can help avoid delays and frustrating situations. The following will provide you with an overview of the process at Premier Title:

The Purchase Contract instructs escrow to withhold under FIRPTA unless seller provides buyer with an authorized exemption or waiver prior to closing. Purchase Contract P-2.

Escrow sends all sellers a form FIRPTA Certification under FIRPTA in the seller's opening package and asks the seller to sign if it applies, certifying that the seller is exempt from FIRPTA. The Certification is to be signed by a seller, under penalty of perjury, if that the seller is not a non-resident alien or foreign corporation or entity under the United States income tax laws or regulations. If the seller claims that he/she or it is not a foreign person, a tax identification number must be provided. Please see your escrow officer for a Certification form for specification requirements.

If escrow receives a complete and signed Certification from the seller, escrow will provide a copy to the buyer to acknowledge receipt and sign instructions that escrow need not withhold and will be held harmless from any liability for not withholding. Escrow does not provide a copy to the IRS. If the Buyer signs the instruction, escrow will not withhold the amount at closing.

In some circumstances, the seller may apply for and obtain a Withholding Certificate from the IRS wherein the IRS waives or reduces the withholding amount for some other reason that the seller may prove to the IRS. These forms are typically prepared with the assistance of a tax professional. The application, Form 8288B for some situations, must be filed with the IRS in sufficient time for the IRS may review and issue a Withholding Certificate prior to closing.

If escrow does not receive a properly completed Certification to provide to the buyer or a Withholding Certificate from the IRS prior to closing, escrow will generally withhold from seller's proceeds and forward it to the IRS. Escrow will ask the parties to sign instructions directing that the tax be withheld and sent to the IRS along with Forms 8288 and 8288A as a courtesy.

**DISCLAIMER** - This flyer is for general informational purposes only, and should not be relied upon for any legal, business, economic, or tax decision. It is not intended to provide legal or business advice. Before making any decision regarding this matter, you should consult with a qualified advisor.



**Main Office:** 1601 Kapiolani Boulevard, Suite 1110, Honolulu, HI 96814  
**Diamond Head Office:** 614 Kapahulu Avenue, Suite 101, Honolulu, HI 96815

## *The Hawaii Real Property Tax Act Applications for Withholding Certificate For Dispositions by Nonresident Persons*

As a general rule, every buyer/transferee of real property must withhold **7.25 percent** of the "amount realized" (generally the sales price) and transmit that amount to the State Tax Department within 20 days after closing unless an exemption applies and the buyer/transferee receives proof of that exemption. It is not escrow's responsibility to withhold the amount, but does so as directed by the parties in the purchase contract. It is the seller's burden to prove that an exemption applies and to provide that proof to the buyer. A common exemption applies when the seller is a Hawaii "resident" as defined by Hawaii Revised Statutes (HRS) § 235-1.

Although escrow officers do not give legal or tax advice, understanding how the process that escrow officers follow in complying with withholding requirements, the forms that are used, and what must be provided before escrow can avoid the withholding can help avoid delays and frustrating situations. This flyer discusses the situation where a nonresident seller applies for a certificate for a reduction or waived withholding prior to closing.

- As a general rule, if escrow does not receive a properly completed N-289 to provide to the buyer before closing or an N-288B withholding certificate, escrow will withhold the appropriate amount from seller's proceeds and forward it to the State Tax Department.
- In some circumstances, the seller may obtain a withholding certificate from the State Tax Department wherein the State approves a waiver or reduction of the withholding amount because the seller shows that it will not recognize gain on the transfer or there will be insufficient proceeds to pay the withholding after payment of all costs, including payoffs.
- The application, Form N-288B, must be filed with the State Tax Department no later than 10 working days prior to closing and an application filed later than 10 days working days prior to the scheduled closing date will not be accepted. As a general rule, Escrow will withhold unless an approval for waiver or adjustment form is received from the State Tax Department prior to closing.
- Escrow does not complete the Form N-288B, and it is recommended that the seller work with a qualified attorney or tax advisor.
- Form N-288B instructs that if two or more non-resident transferors jointly transfer a Hawaii real property interest, a separate Form N-288B should be filed for each non-resident transferor/seller.

Copies of Form N-288B and accompanying Instructions are available at: [http://www.state.hi.us/tax/a1\\_forms.htm](http://www.state.hi.us/tax/a1_forms.htm)

**DISCLAIMER** - This flyer is for general informational purposes only, and should not be relied upon for any legal, business, economic, or tax decision. It is not intended to provide legal or business advice. Before making any decision regarding this matter, you should consult with a qualified advisor.