



LEGAL UPDATE

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A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

WB-11 Residential Offer to Purchase – 2020 Edition – Part III

The Real Estate Examining Board (REEB) at the Department of Safety and Professional Services (DSPS) has approved an updated WB-11 Residential Offer to Purchase. The optional use date for the revised WB-11 is November 1, 2019, and the mandatory use date is January 1, 2020.

The current WB-11 was last revised in 2011. Although the existing offer form has generally served licensees well, after 10 years the time has come for an update.

In the big picture, the new WB-11 is not drastically different than the 2011 version, although the sequencing of the provisions has changed. At the same time a few WB-11 provisions have undergone some substantive changes to help bring the offer up to date with current practice and hopefully improve ease of use. The REEB has tried to make changes to make the residential offer a bit more understandable and user-friendly for consumers and licensees alike. Many revisions clarify and improve the provisions already in place.

This *Legal Update* reviews the new FIRPTA provision on lines 516-536 and the provisions on page 10 of the 2020 WB-11 Residential Offer to Purchase. The section-by-section discussion points out changes adopted by the REEB and provides practice tips for getting the best results with this new version of the WB-11. See the September and October 2019 *Legal Updates* for discussion of the other portions of the 2020 Offer.

① MORE INFO

An “educational use only” copy of the 2020 WB-11 Residential Offer to Purchase is available on the DSPS website at <https://dsps.wi.gov/Documents/BoardCouncils/REB/Forms/WB11FINALwatermarked.pdf>, and on the WRA Forms Update Resource page at www.wra.org/formsupdate. Visit the Forms Update Resource page regularly for information about forms availability and additional WB-11 resources.

The Updated Residential Offer

In the following discussions, the existing WB-11 (mandatory use date 7-1-11) is referred to as the “2011 Offer,” and the newly updated WB-11 (mandatory use date 1-1-20) is referred to as the “2020 Offer.”

Foreign Investment in Real Property Tax Act (Lines 516-536)

According to 2015 Census figures, approximately 5 percent of Wisconsin’s population was foreign born. While that may not seem like a lot, it certainly does raise the possibility of encountering real estate transactions where the seller is a “foreign person.” That fact can have significant consequences for the buyers, sellers and agents in the transaction.

Buyers purchasing a property from a person classified as a “foreign person” are subject to the federal tax law provisions of the Foreign Investment in Real Property Tax Act (FIRPTA). Although these transactions are infrequent, there can be significant adverse consequences for buyers who do not comply with FIRPTA, and there have been incidences where the blame – and the penalties – for noncompliant buyers was shifted to real estate agents, primarily because they did not alert the buyer to FIRPTA. Accordingly, Wisconsin is following the example set by several other states, including Minnesota, in including a FIRPTA provision on pages 9-10 of the 2020 Offer.

FIRPTA is tax law. FIRPTA is about the Internal Revenue Service (IRS) taxing foreign persons selling United States real estate. Their concern is foreign persons will sell their property and leave the country without paying the tax due on the sale. The IRS solution is to make the buyer responsible for making sure the tax is collected because the buyer will still be here, and they have an identifiable asset that can be attached with a lien if need be to ensure collection of the taxes. That is, the property purchased by the buyer in the transaction.

FIRPTA, as stated in § 1445 of the Internal Revenue Code (IRC), provides a buyer must pay or withhold up to 15 percent of the total amount realized in the sale if the seller is a “Foreign Person” and no exception from FIRPTA withholding applies.

What does the offer provision provide?

Walking through the FIRPTA provision in the 2020 Offer, it begins on lines 516-519 by advising the parties that under § 1445 of the IRC, a buyer of a United States real property must pay or withhold up to 15 percent of the total “Amount Realized” in the sale if the seller is a “Foreign Person” and no exception from FIRPTA withholding applies.

Lines 519-520 explain a “Foreign Person” is a nonresident alien

individual, foreign corporation, foreign partnership, foreign trust or foreign estate. Lines 520-521 explain the “Amount Realized” is the sum of the cash paid, the fair market value of other property transferred and the amount of any liability assumed by the buyer.

Lines 522-524 warn the parties of the unfortunate consequences that may befall the buyer if FIRPTA applies and the buyer does not comply:

CAUTION: Under this law if Seller is a Foreign Person, and Buyer does not pay or withhold the tax amount, Buyer may be held directly liable by the U.S. Internal Revenue Service for the unpaid tax and a tax lien may be placed upon the Property.

The FIRPTA provision in the 2020 Offer presumes the seller is not a Foreign Person. On lines 525-526 the seller represents the seller is not a Foreign Person and the parties agree to comply with FIRPTA requirements.

Lines 526-258 state that no later than 15 days prior to the closing, the seller shall execute and deliver to the buyer or a qualified substitute, which may include an attorney or title company, a sworn certification under penalties of perjury stating the seller’s non-foreign status in accordance with IRC § 1445. This action leads the seller down the pathway towards meeting the terms of one of the FIRPTA exceptions that would eliminate the need for any buyer withholding of seller’s proceeds per FIRPTA or any buyer payment of the tax owed by the seller to the IRS.



If the seller does not execute and deliver the certification, lines 529-531 indicate the buyer shall be entitled to either (1) withhold the amount required to be withheld from the transaction proceeds or (2) terminate the offer by written notice to the seller prior to closing. If the seller has not provided the certification swearing the seller is not a Foreign Person, this suggests the seller may be a Foreign Person and FIRPTA withholding and compliance is necessary. The 15-day time frame was included at line 526 to allow time for the parties and their advisors, the title company and others involved in the transaction time to implement FIRPTA withholding, satisfy the requirements of another FIRPTA exception or otherwise negotiate a resolution of the situation before the closing date. The seller could also still provide the certification after the 15-day benchmark as there is no time limit specified by the IRS as to when the seller certification must be provided. That would require that the buyer hold off on giving written notice of termination to the seller, which the buyer may do at any time before closing.

The last sentences on lines 534-536 say: “Firms, Agents, and Title Companies are not responsible for determining FIRPTA status or whether any FIRPTA exemption applies. The Parties are advised to consult with their respective independent legal counsel and tax advisors regarding FIRPTA.”

① MORE INFO

See the IRS video overviewing FIRPTA at www.irsvideos.gov/Individual/education/FIRPTA. Note: tax withholding rate increased from 10 percent to 15 percent in December of 2015.

Implementing the Firpta Provision in the Offer

Lines 525-533 of the 2020 Offer provide:

Seller hereby represents that Seller is not a Foreign Person. Buyer and Seller agree to comply with FIRPTA requirements under IRC § 1445. No later than 15 days prior to the closing, Seller shall execute and deliver to Buyer, or a qualified substitute (attorney or title company as stated in IRC § 1445), a sworn certification under penalties of perjury of Seller’s non-foreign status in accordance with IRC § 1445. Any representations made by Seller with respect to this issue shall survive the closing and delivery of the deed. If Seller fails to deliver certification of Seller’s non-foreign status, Buyer shall be entitled to either: (1) withhold the amount required to be withheld pursuant to IRC § 1445 from amounts otherwise payable to Seller under this Offer; or, (2) terminate this Offer by written notice to Seller prior to closing. Buyer and Seller shall complete, execute, and deliver, on or before closing, any other instrument, affidavit, or statement needed to comply with FIRPTA, including withholding forms.

First, all sellers in the transaction should confirm whether they are Foreign Persons, preferably at the time the property is listed.

Who is a Foreign Person?

A “Foreign Person” is a nonresident alien individual, foreign corporation that has not elected to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. It does not include a resident alien individual.

An alien is any individual who is not a U.S. citizen or U.S. national. In general terms, a nonresident alien is an alien who does not pass the green card test, the substantial presence test, or the first-year election test. Generally speaking, U.S. citizens, U.S. green card holders, and non-citizens who fulfill the requirement of the substantial presence test are not Foreign Persons under FIRPTA.

① MORE INFO

Read about the Green Card Test and the Substantial Presence Test at www.irs.gov/individuals/international-taxpayers/the-green-card-test-and-the-substantial-presence-test, the Substantial Presence Test at www.irs.gov/individuals/international-taxpayers/substantial-presence-test and the Alien Residency - Green Card Test at www.irs.gov/individuals/international-taxpayers/alien-residency-green-card-test. Also see IRS Topic No. 851, Resident and Nonresident Aliens, at www.irs.gov/taxtopics/tc851.

The tests that apply when the seller is an entity and not an individual may appear to be very simple but in some cases are more complicated. For example, when the seller is an LLC and the LLC is owned by one person, the LLC is typically disregarded for tax purposes. If the single owner of the LLC is a foreign individual, FIRPTA withholding rules would apply, since the seller for purposes of FIRPTA is the foreign individual, and not the domestic LLC. If there is more than one owner of the LLC, even if one or more of them are foreign, for tax purposes, the IRS generally considers such LLCs as “partnerships,” and U.S. partnerships are not subject to FIRPTA withholding. There are additional rules that are beyond the scope of this discussion. It is easy to see why the determination of whether the sellers are Foreign Persons is a job for the tax and legal experts, and never a job for licensees.

How does a buyer know if a seller is a Foreign Person?

In order to provide an indication of the seller's status, there is a bill before the Legislature to add the question of whether a property owner is a Foreign Person to the Real Estate Condition Report (RECR) and the Vacant Land Disclosure Report (VLDR), and the WRA Listing Questionnaire Regarding Title Issues and Property Conditions, available on zipForm, includes this question.

These tools will help raise the issue regarding whether the seller is a Foreign Person early on, before an offer is written. An RECR or Listing Questionnaire will give the seller's view of whether he or she or the entity is a Foreign Person. That representation may or may not be correct. Raising the issue may allow some time for sellers to resolve any uncertainties because the answer to the question of whether, for example, a U.S. citizen married to a foreign-born spouse, are Foreign Persons may not be easy or obvious. Each individual is to be evaluated separately. There are further complexities when the seller is an entity.

🏠 REALTOR® Practice Tip

Listing agents would be wise to discuss the issue of whether any sellers are Foreign Persons as part of the listing process. If they are, or if there is uncertainty, the sellers can get an early start to addressing the issue upon consultation with their tax and legal advisers. Listing agents can introduce the Seller Certification of Non-Foreign Status to the seller or familiarize the seller with the title company's process for seller certifications.

🏠 REALTOR® Practice Tip

Questions about whether sellers are Foreign Persons should always be referred to the party's tax and legal advisers because the question of whether a person or entity is a Foreign Person as defined under FIRPTA is a tax law question to be answered on a case-by-case basis by tax, accounting or legal professionals. Applying the IRC to a specific situation is giving a legal opinion. This is a highly fact-based analysis that should never under any circumstances be undertaken by a licensee. Licensees must always send the parties to the experts regarding this issue.

① MORE INFO

See the IRS discussion of Foreign Persons at www.irs.gov/individuals/international-taxpayers/foreign-persons and “To Withhold, Or Not To Withhold, That Is the Question: A Step-By-Step Approach to the FIRPTA Income Tax Withholding,” in Vol. 92, No. 4 of the *Florida Bar Journal*, April 2018, page 14, at www.floridabar.org/the-florida-bar-journal/to-withhold-or-not-to-withhold-that-is-the-question-a-step-by-step-approach-to-the-firpta-income-tax-withholding.

🏠 REALTOR® Practice Tip

If one or more sellers in the transaction are Foreign Persons, they should huddle with their tax and legal advisers to look for other possible FIRPTA exceptions and develop a plan to present to buyers as to how to address FIRPTA in the offer. Otherwise the provision on lines 516-536 of the 2020 Offer may lead to the buyer terminating the offer or withholding proceeds in the transaction.



If the sellers in the transaction are not Foreign Persons, they should prepare to execute and deliver a sworn certification of non-foreign status.

What is the sworn certification the seller must execute and deliver?

A Seller Certification of Non-Foreign Status states under penalties of perjury that the seller is not a Foreign Person. The certification must state the seller's name, U.S. Social Security or employer identification number, and home address or business address for an entity.

Tax identification numbers

A Seller Certification of Non-Foreign Status must include the seller's United States taxpayer identification number. In most instances, this will be the individual's Social Security number or the entity's federal employer identification number. There may, however, be instances where a resident alien instead has a Tax Identification Number, most often assigned to nonresident aliens.

① MORE INFO

See the IRS Taxpayer Identification Numbers (TIN) resource at www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin.

When the seller gives either the buyer, or a qualified substitute, a sworn certificate of non-foreign status this is fulfilling one of the IRS exceptions to FIRPTA withholding. In other words, the process outlined on lines 516-536 of the 2020 Offer is leading the seller to comply with the criteria for a FIRPTA exception. If the seller complies the buyer should be exempt from FIRPTA and the transaction can proceed as normal.

REALTOR® Practice Tip

The executed Seller Certification of Non-Foreign Status is the buyer's golden ticket, the buyer's insurance policy that he or she will not be required to withhold proceeds from a transaction or be liable to the IRS for a Foreign Seller's unpaid tax. Whereas a seller's representation on an RECR of Listing Questionnaire that the seller is not a Foreign Person is instructive, it does not establish the exception under FIRPTA. As far as establishing the seller's non-foreign status, only the certification in accordance with IRS regulations exempts the buyer from FIRPTA compliance and liability.

① MORE INFO

See Exceptions from FIRPTA Withholding at www.irs.gov/individuals/international-taxpayers/exceptions-from-firpta-withholding and the IRS regulations in 26 CFR § 1.1445-2 at www.law.cornell.edu/cfr/text/26/1.1445-2 for the specific requirements of a Seller Certification of Non-Foreign Status.

If there are multiple sellers there may need to be multiple certifications. The seller in a transaction obviously may include one or more individuals and one or more entities.

Where does the seller get a Seller Certification of Non-Foreign Status form?

A certification form will be available in WRA zipForm and the PDF forms packet. Certification forms may also be available from various title companies that cooperate in the FIRPTA process.

REALTOR® Practice Tip

See the sample WRA Seller Certification of Non-Foreign Status form at on the Forms Update Resource page at www.wra.org/formsupdate and on page 10 of this *Update*.

REALTOR® Practice Tip

It is intended that sellers complete and sign their own WRA Seller Certification of Non-Foreign Status. There is language in the form about signing the form on behalf of the seller. That is intended to cover those situations where there is a guardian or other fiduciary signing for the seller in a representative capacity.

Who is a Qualified Substitute?

The offer indicates the Seller Certification of Non-Foreign Status is to be delivered to the buyer or a Qualified Substitute. The IRC definition of a Qualified Substitute includes an attorney or title company responsible for closing the transaction. The Qualified Substitute is to deliver a statement to the buyer, under penalty of perjury, advising they have the seller's certification and will deliver the certification to the IRS should they request it.

REALTOR® Practice Tip

Delivery of the seller's certification to the title company is the preferred resolution of the WB-11 FIRPTA provision from a party's and a licensee's perspective because the certification goes from the seller to the title company without licensees having to hold or transmit it and without having the certification be delivered to the buyer. The certification includes the seller's tax identification number (individual's Social Security number or entity's federal employer identification number), which is better protected if fewer people view, transmit or store the certification. Title companies generally have strong security measures.

Qualified substitute statement

FIRPTA allows the seller to give the Seller's Certification of Non-Foreign Status to a Qualified Substitute such as the title company so the seller does not have to give the seller's taxpayer identification information to the buyer. Once the Qualified Substitute receives the seller's certification, the Qualified Substitute must furnish a Qualified Substitute Statement to the buyer stating, under penalty of perjury, that the Qualified Substitute has the seller certification in its possession. The Qualified Substitute must then retain the seller certification for five years. Providing a certification that does not affirm, under penalty of perjury, that the Qualified Substitute has the seller certification does not comply with FIRPTA and does not guarantee the buyer that golden ticket or insurance policy excusing the buyer from FIRPTA withholding.

The Qualified Substitute does not certify the accuracy of the certification, only that it is in their possession. This Qualified Substitute Statement could be delivered to the real estate agent working with the buyer or to the buyer or both since it will not contain any Social Security numbers or other sensitive information.



REALTOR® Practice Tip

Licensees may wish to reach out to the title companies in their market area and learn which title companies will act as a Qualified Substitute for the purposes of receiving and holding a Seller Certification of Non-Foreign Status and providing the buyer with a certification that the title company is in possession of the Seller Certification of Non-Foreign Status. Licensees may also wish to ascertain if there is a particular form or process they want a seller to use for the certification. Some title companies are creating secure portals for sellers to use for this process.



REALTOR® Practice Tip

Listing agents should be sure to alert their chosen title company once they take a listing. That way the title company can set up a file with the property address and other basic information so any Seller Certification of Non-Foreign Status that is received can be matched to and held in a file. If there is no file, early indications have been the title company may send the certification back. This why the WRA version of the Seller Certification of Non-Foreign Status includes the property address.

Security in transmitting the certification

For those concerned about security during transmission of the certification, title companies offering secure portals for sellers to use for this purpose are ideal. In other cases, the seller might transmit the certification to the title company acting as the Qualified Substitute by email, by certified mail, by title company courier services, if available, by commercial delivery services (taxi, Federal Express, UPS, etc.), by personal delivery or any other means considered safe.



REALTOR® Practice Tip

Licensees may wish to reach out to the title company acting as a Qualified Substitute and determine their preferred means of transmittal or delivery: what is the best way for the seller to transmit the certification to the title company?



REALTOR® Practice Tip

If the title company is unhappy with serving as a Qualified Substitute, a mailing address for the buyer may be provided, the seller can then mail the certification directly to the buyer via certified mail, and the firm might look for a different title company for the next transaction.

Ineffective certifications

Seller certifications are not effective if the buyer or the Qualified Substitute has actual knowledge or receives notice that they are false. Any agent or Qualified Substitute who knows the seller's certification is false should confer with legal counsel and advise the buyer in writing immediately.

One or more sellers are Foreign Persons

If one or more sellers are Foreign Persons, they should confer with their tax and legal advisors to determine how to best proceed with the transaction and alert the buyers to that fact. The seller may wish to determine if perhaps FIRPTA does not apply. If FIRPTA does apply, perhaps the seller can find an exception that can be implemented or find the least burdensome way to achieve compliance with FIRPTA.

Going back to square one, FIRPTA will not apply and withholding under IRC 1445 is not required if:

- (1) the property disposed of is not a U.S. real property interest,
- (2) the seller is not a Foreign Person or
- (3) an exception to FIRPTA applies.

Disposition of a U.S. real property interest

The IRC defines a U.S. real property interest to include any interest in real property located in the United States or the U.S. Virgin Islands including:

- Land and unsevered natural products of the land (crops, timber, mines, wells, etc.)
- Improvements (buildings or other permanent structures or components of either)
- Personal property (movable walls, furnishings, etc.) associated with use of the real property

Dispositions include, but are not limited to, sales, exchanges, like-kind exchanges under IRC § 1031, gifts, involuntary conversions, and liquidations or redemptions.

It can be expected that real estate transactions documented on a WB-11 will almost always be dispositions of U.S. real property interests. If it is not, then FIRPTA does not apply.

The evaluation of Foreign Persons is discussed on pages 2-4 of this *Update*. If the seller is a Foreign Person, there are other exceptions to FIRPTA.

FIRPTA Exceptions

One exception from FIRPTA withholding is for the seller to provide a sworn certification under penalties of perjury regarding his, her or its non-foreign status in accordance with IRC § 1445. The provision in the 2020 Offer presumes the seller is not a foreign person and provides for the seller to execute and deliver this certification to the buyer or a Qualified Substitute no later than 15 days prior to closing.



REALTOR® Practice Tip

If any seller is a foreign person, the parties should confer with legal and tax counsel to determine whether another exception might be available, for assistance with proper withholding if that will be required under FIRPTA and to modify the offer accordingly if the parties are going forward with the transaction.

Other FIRPTA exceptions are available. Generally, the buyer in the transaction does not have to withhold for FIRPTA in the following situations:

- 1. Residence exception.** The buyer acquires the property for use as a residence and the amount realized (sales price) is not more

than \$300,000. The buyer or a member of the buyer's family must have definite plans to reside at the property for at least 50 percent 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 transfer. When counting the number of days that the property is used, the days the property will be vacant are not counted. For this exception, the buyer must be an individual.

2. **Withholding certificates.** In certain circumstances, the seller may be able to apply for a withholding certificate from the IRS that excuses withholding.
3. **Non-recognition of gain.** The seller may be able to give the buyer written notice that no recognition of any gain or loss on the transfer is required because of a nonrecognition provision in the Internal Revenue Code or a provision in a U.S. tax treaty. The buyer must file a copy of the notice by the 20th day after the date of transfer with the Ogden Service Center, P.O. Box 409101, Ogden, UT 84409.
4. **Zero amount realized.** The amount the seller realizes on the transfer of a U.S. real property interest is zero.

There are other exceptions, many of which apply to corporations or entities. All exceptions require tax law expertise and are best handled by the parties' professional advisers.

① MORE INFO

See Exceptions from FIRPTA Withholding at www.irs.gov/individuals/international-taxpayers/exceptions-from-firpta-withholding.



Buyer residency exceptions to FIRPTA withholding

There are buyer residency exceptions that may apply to avoid or reduce FIRPTA withholding on the sale of property acquired for use as a residence.

- FIRPTA withholding is not required if the sales price is \$300,000 or less and the buyer intends to use the property as a personal residence for at least 50 percent of the time the property is in use for the next two 12-month periods following the sale.
- Under certain circumstances FIRPTA regulations allow for a reduction of the normal FIRPTA 15-percent withholding rate to 10 percent. To qualify for this 5-percent reduction, the sales price cannot exceed \$1 million and, just like for the exception to FIRPTA withholding, the buyer must intend to use the property as a residence.

Buyer purchases residence priced at \$300,000 or less

There are certain elements that must be met for this exception:

1. The buyer must be one or more individuals. An entity such as a partnership, corporation, estate or trust does not qualify.
2. The property is acquired for use as a residence. Vacant land where the buyer intends to build a home does not qualify. The property need not be the buyer's principal residence.
3. The purchase price is not more than \$300,000.

The FIRPTA regulations for this exception state the buyer should intend to reside at the property for at least 50 percent of the number of days that the property is used by any person during each of the first two years following the date of the purchase. Specifically, no withholding is required if the buyer, including the buyer's family members, has definite plans to use the property as a residence for at least 50 percent of the time the property is in use by any person for the next two 12-month periods following the transaction. The days the property is unoccupied are not counted in the 50-percent calculation. Simplistically, if the buyer and/or the buyer's family members plan to reside at the property more than it will be rented out over each of the next two 12-month periods, the sale is potentially eligible for the exemption.

For example, a Foreign Person sells a residence to the buyers for \$275,000. The buyer plans to rent out the property for four months each year, personally use it for five months, leaving it vacant for the remaining three months of the year. The property is in use for nine months of the year. Since the buyer intends to use the property for personal purposes for five of the nine months the property is in use, this meets the 50-percent test. If this holds true for at least two years following the purchase of the property, the buyer will be exempt from the 15-percent withholding requirement. The title company or an attorney for one of the parties may ask the buyer to complete and sign a sworn statement indicating the buyer's intentions.



REALTOR® Practice Tip

Buyers relying on this exemption as the basis for not withholding should understand if they do not end up residing in the property for the required minimum number of days, they will be liable for the foreign seller's unpaid tax, along with penalties and interest, unless the buyer is able to establish the failure to reside there the minimum number of days was caused by changed circumstances that could not reasonably have been foreseen at the time of the purchase.

The following is the IRS regulation for this exception:

26 CFR § 1.1445-2 - Situations in which withholding is not required under section 1445(a).

(d) Exceptions to requirement of withholding –

(1) Purchase of residence for \$300,000 or less. No withholding is required under section 1445(a) if one or more individual transferees acquire a U.S. real property interest for use as a residence and the amount realized on the transaction is \$300,000 or less. For purposes of this section, a U.S. real property interest is acquired for use as a residence if on the date of the transfer the transferee (or transferees) has definite plans to reside at the property for at least 50 percent of the number of days that the property is used by any person during each of the first two 12-month periods following the date of the transfer. The number of days that the property will be vacant is not taken into account in determining the number of days such property is used by any person. A transferee shall be considered to reside at a property on any day on which a member of the transferee's family, as defined in section 267(c)(4), resides at the property. No form or other document need be filed with the Internal Revenue Service to establish a transferee's entitlement to rely upon the exception provided by this paragraph (d)(1). A transferee who fails to withhold in reliance upon this exception, but who does not in fact reside at the property for the minimum number of days set forth above, shall be liable for the failure to withhold (if the transferor was a foreign person and did not pay the full U.S. tax due on any gain recognized upon the transfer). However, if the transferee establishes that the failure to reside the minimum number of days was caused by a change in circumstances that could not reasonably have been anticipated at the time of the transfer, then the transferee shall not be liable for the failure to withhold.

Buyer purchases residence priced more than \$300,000 and less than \$1 million

If the purchase price exceeds \$300,000 but does not exceed \$1 million, the exception eliminating the requirement for withholding will not be available, but the amount required to be withheld and paid to the IRS is reduced to 10 percent of the amount realized, rather than the 15 percent generally required by FIRPTA. The buyer must meet the same tests regarding individual buyers, a residential property and the 50-percent test.



REALTOR® Practice Tip

Licensees may consult the flowchart on page 11 of this *Update* and on the WRA Forms Update Resource page at www.wra.org/formsupdate for an overview of the process for Seller Certification of Non-Foreign Status and the buyer residency exceptions.

Withholding certificate process

If the actual tax on the transaction is less than the withholding, the seller may apply for a withholding certificate from the IRS. For example, if the seller will incur a loss on the sale and no tax will be payable on the

transaction, the seller may submit a completed IRS Form 8288-B to the IRS showing evidence the transaction will result in a loss. This must be submitted to the IRS no later than the date of closing. It usually takes the IRS 90 days to issue the withholding certificate. A foreign seller intending to obtain such a certificate should work with its tax and real estate advisors in advance of a sale to prepare for it. If the withholding certificate states withholding on the sale has been reduced to zero and it is received in time, the closing can take place without withholding. In other circumstance the result may call for reduced withholding at a rate less than 15 percent. If the withholding certificate is not received in time, the buyer should proceed with the 15-percent withholding and the seller may apply for a refund.

① MORE INFO

See Withholding Certificates Related to U.S. Real Property Interest at www.irs.gov/individuals/international-taxpayers/withholding-certificates, IRS Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities at www.irs.gov/pub/irs-pdf/p515.pdf and IRS Form 8288-B at www.irs.gov/pub/irs-pdf/f8288b.pdf.



REALTOR® Practice Tip

Neither the real estate licensees nor the title company is permitted to provide legal or tax advice about FIRPTA or any other matter. Therefore, parties must be advised to seek professional legal or tax advice regarding FIRPTA compliance.

While exceptions help avoid the FIRPTA withholding requirement at the time of sale, the seller is still required to file a U.S. income tax return and pay the tax on any gains recognized.

Delivery (Lines 543-562)

Just like in the 2011 Offer, personal delivery is the default method of delivery that will always apply in the 2020 Offer per lines 546-547. Personal delivery may be made to the party or the party's recipient for delivery, if any. In addition, the parties may authorize other delivery methods by checking the boxes in this section. Other than the email provision, the language regarding the other delivery methods is similar to that found in the 2011 Offer.

- 1. Personal Delivery (Lines 546-549).** Personal delivery is always a permissible means of delivery (unless lined out). In personal delivery the document or notice is personally given to either the party or the party's designated recipient for delivery. The individual who hands the document to the party can confirm, ideally in an affidavit, exactly when the delivery occurred. Lines 548-549 were modified to indicate that the naming of a recipient for delivery is not required by stating, for example, "Name of Seller's recipient for delivery, if any." The language in the 2011 Offer reportedly was causing some confusion. Note that the recipients for delivery, if any, come into play with regard to personal delivery, commercial delivery and U.S. mail.
- 2. Fax (Lines 550-550).** For fax delivery the document or notice must be transmitted via fax to the fax number provided by the party in the offer. The document is deemed delivered when the fax is transmitted, not when it is received.

3. **Commercial Delivery (Lines 552-554).** In commercial delivery the document or notice must be deposited with a commercial delivery service such as UPS or Federal Express with all fees prepaid or charged to an account with the delivery service. It must be addressed to either the party or the party's recipient for delivery at the party's delivery address specified in the offer. The document or notice is deemed delivered when it is deposited with the commercial delivery service, not when it is received.
4. **U.S. Mail (Lines 555-558).** In mail delivery a document or written notice must be placed in the U.S. mail with all postage prepaid. It must be addressed to either the party or the party's recipient for delivery at the party's delivery address specified in the offer. The document or notice is deemed delivered when it is deposited in the mail, not when it is received.
5. **E-Mail (Lines 559-560).** E-mail is a permitted form of delivery of documents and written notices to a party using the e-mail address at line 560 on the last page of the 2020 Offer. This represents a change from the 2011 Offer.

Simplification of email provisions

With guidance from NAR, the WRA in 2017 provided some clarification for the situation in which one consumer wants to conduct the real estate transaction in the electronic world, which could include electronic signatures, electronic records and email delivery, while the other does not have the ability to use electronic means or will not or does not provide electronic consent. The consumer not using electronic means may authorize the use of the consumer's agent's email address to be used for delivery of transactional documents on the consumer's behalf and allow the other party's use of electronic means. Rather than shutting down one party's use of technology when the other party does not or cannot use technology and thus will not provide electronic consent, the offer allows each party to authorize delivery of documents in a practical method.

If a consumer wants email as a form of delivery, but wants the licensee's email to be used on his or her behalf in the offer or other contract, then the consumer must consent to the licensee using the licensee's email for delivery, but the consent does not need to be given electronically and is not required to be in writing. Verbal consent is sufficient. The 2020 Offer removes the 2011 Offer language referencing electronic consent from consumers and allows the parties, by signing the offer, to thereby authorize the use of their respective agents' emails on their behalf.

Agents may email one another because they are not consumers or parties to the transaction. Agents emailing documents to parties, however, will need electronic consent.

Electronic consent needed when agents email documents and notices to clients and customers

Federal E-Sign law provides, with respect to consumers, that whenever a statute, regulation or other rule of law requires that information relating to a transaction be provided in writing, electronic documents (documents sent on the computer by e-mail) may be used only if certain disclosures are first provided to the consumer and the consumer consents electronically. Wisconsin E-Commerce law does not override this federal requirement.

Listing brokers will have often obtained the electronic consent of the seller for purposes of the transaction to sell the listed property in conjunction with the listing contract. Buyer's agents will typically obtain the electronic consent of the buyer for the transaction involving the desired property acquisition in conjunction with the buyer agency agreement. When working with a buyer-customer who wishes to use email delivery when communicating with his or her agent, the selling agent will have to provide the required disclosures and receive electronic consent from the buyer.

Electronic platforms

If the buyer and seller have used electronic signature platforms, such as Digital Ink, DocuSign or Dotloop for the offer to purchase, electronic consent is automatically obtained. When using these platforms, the parties are required to provide an electronic consent via a click-through mechanism prior to gaining access to the documents. There is no need to use the WRA electronic consent form when the consent has been already given electronically via the forms platform.

Electronic consent in consumer real estate transactions

If electronic consent is being obtained outside of an electronic platform there are other techniques that may be used, some involving email. An example of the disclosures a consumer must receive appear in the document entitled Consent for Use of Electronic Documents and Signatures in Consumer Real Estate Transactions, available at the bottom of the E-Commerce REALTOR® Resource page at www.wra.org/ecommerce as both a PDF and a Word document. The disclosures may be copied into the text of an email, used as an attachment to an email, posted on a website, etc., so that the party may read them and then give consent electronically. The consumer's electronic consent may consist of the consumer replying to an email where the consumer has typed in his or her name (as his or her signature) on the reply email; or signing a paper disclosure document, scanning it and emailing it back. Electronic consent also may be given on a website where the consumer clicks the appropriate button to indicate he or she has read and agrees to the disclosures.



REALTOR® Practice Tip

Applicable federal E-commerce law requires electronic consent when documents that are required to be in writing, by law, are to be delivered by email to consumers. When a party who is a consumer wants to be able to receive documents and notices by email from his or her agent, the party must receive the federally-mandated disclosures and consent electronically to electronic signatures and electronic documents delivered by email.

① MORE INFO

For a step-by-step example of how to achieve electronic consent outside of an electronic platform, see the Electronic Consent Overview of the Law Cheat Sheet at www.wra.org/Resources/BusPractice/RelatedDocs/Electronic_Consent_Cheat_Sheet_PDF.

**REALTOR® Practice Tip**

REALTORS® should not lose sight of the fact that when agents' email addresses are used in the offer, the agent is undertaking the responsibility of checking the email, alerting the actual party, and forwarding messages and documents to the party. Agents must understand the possible liability. Email is considered delivered upon transmission and it may be used in situations where the timeframe is very short. The slightest delay may impact the outcome of a contingency or the validity of the contract itself.

Personal Delivery/Actual Receipt (Lines 561-562)

The Personal Delivery/Actual Receipt provision stands for the proposition that if there are multiple individuals who are the buyers or the sellers, personal delivery to one of the buyers, for instance, constitutes personal delivery to all of the buyers. Similarly, actual receipt by one of the multiple sellers constitutes actual receipt by all of those sellers.

① MORE INFO

See "Ah ... Finally Some Electronic Consent Relief: A recent clarification from NAR provides insight on electronic consent" in the June 2017 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/June17/ElectronicConsent. Also see the Electronic Consent Overview of the Law Cheat Sheet at www.wra.org/Resources/BusPractice/RelatedDocs/ElectronicConsentCheatSheetPDF, the May 2017 *Legal Update*, "Electronic Issues," at www.wra.org/LU1705 and the LegalTalks video, "Electronic Consent Clarification 2017 with Cori Lamont," at www.wra.org/LegalTalks/ElectronicConsent.

**REALTOR® Practice Tip**

Be sure that when the offer is delivered to the seller and when it is returned to the buyer that ALL the pages are included. Submit all nine pages to the seller; when the seller delivers an accepted offer back to the buyer (or a rejection or a counter-offer), the seller should sign or initial at the bottom of the page 10 and then send back all 10 pages.

① MORE INFO

For further information about the rest of the 2020 WB-11 Residential Offer to Purchase, see the September *Legal Update*, "WB-11 Residential Offer to Purchase - 2020 Edition - Part I," at www.wra.org/LU1909 and the October *Legal Update*, "WB-11 Residential Offer to Purchase - 2020 Edition - Part II," at www.wra.org/LU1910. Also please regularly visit the WRA Forms Update Resource page at www.wra.org/formsupupdate for information about forms availability and additional WB-11 resources.

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SELLER CERTIFICATION OF NON-FOREIGN STATUS

Property Address: _____

Section 1445 of the Internal Revenue Code provides that a transferee (Buyer) of a United States real property interest must withhold tax if the transferor (Seller) is a foreign person.

To inform _____
_____ (Buyer) that withholding of tax is not required upon
the disposition of a United States real property interest by _____

_____, the undersigned hereby certifies the following on behalf of the Seller:

1. Seller is not a foreign person, foreign corporation, foreign partnership, foreign trust, or foreign estate, as those terms are defined in the Internal Revenue Code and Income Tax Regulations.
2. Seller's United States Taxpayer Identification Number (Social Security Number or Employer Identification Number) is _____.
3. Seller's address is _____

_____.
4. Seller understands Buyer may disclose this certification to the Internal Revenue Service and any false statement contained herein 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, and I further declare that I have authority to sign this document on behalf of Seller.

Dated this _____ day of _____, 20_____.

_____ (Seller signature)

Print name: _____

_____ (Seller signature)

Print name: _____

Seller Entity Name (if any): _____

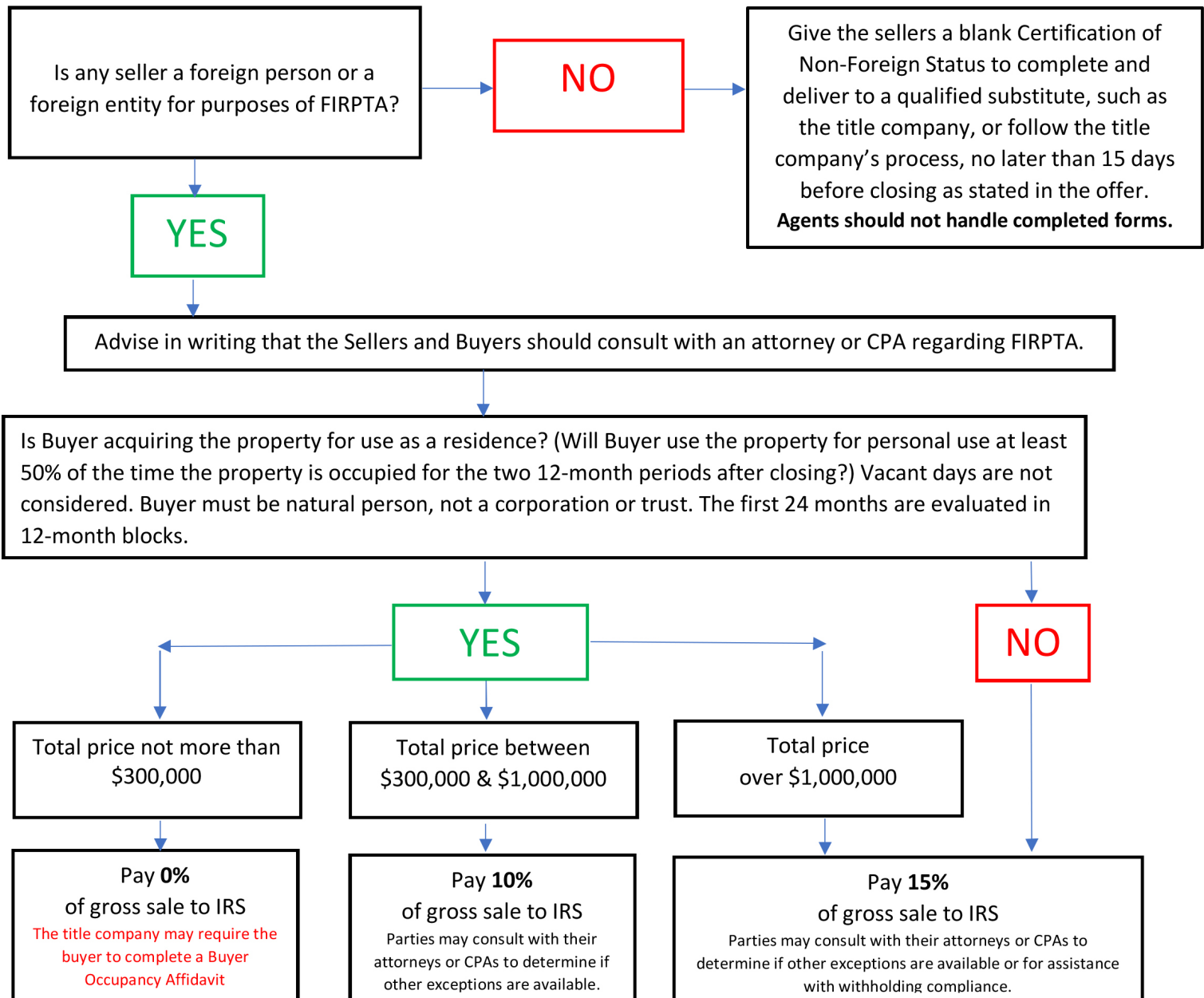
Print Name Here ▲

(x) _____

Authorized Signature ▲ Print Name & Title Here ► _____

Foreign Investment in Real Property Tax Act (FIRPTA) Compliance - ALL LISTINGS

Notify all sellers at time of listing that, as a condition of any offer on their property, they will likely be required to fill out a FIRPTA Certification of Non-Foreign status and deliver that completed form to either an IRS qualified substitute (title company closing the transaction or the Buyer's attorney) or directly to the Buyer, 15 days prior to closing. This form will include all sellers' SSN or EIN numbers. Failure to complete and deliver Certification of Non-Foreign status in a timely manner may allow the Buyer to terminate offer. All sellers should consult with their attorney or tax advisor.



FIRPTA compliance may require payment of 10% or 15% of gross sale price to IRS and the filing of form 8288 with timely remittance. This chart is a general overview and not intended to provide tax or legal advice to sellers or buyers about FIRPTA. There are additional details to the FIRPTA exceptions and other FIRPTA exceptions not included in this overview. This chart is for use only by real estate licensees as a quick general reference guide to assist in basic discussions regarding FIRPTA. This chart is not intended to be a substitute for the tax or legal advice that sellers and buyers should obtain from their attorneys or tax advisers. Sellers and buyers should consult with their legal or tax counsel regarding any FIRPTA matters or questions.

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