

FIRPTA Withholding Rates Have Been Increased to 15%.

Until a few days ago, *The Foreign Investment in Real Property Tax Act of 1980* ("FIRPTA"), IRC Sec. 1445, provided generally that the transferee (i.e., the purchaser) of U.S. real property or a qualified substitute must withhold from closing proceeds 10% of the gross purchase price paid for the U.S. real property and forward that amount to the IRS as a withholding tax on the transferor (i.e., the seller) whenever the transferor is a foreign person (as that term is defined in the act). Real estate attorneys, escrow agents and qualified intermediaries routinely act as qualified substitutes in these transactions. If the transferor or a qualified substitute fails to forward FIRPTA withholding in a timely fashion, that party can be liable for the funds it should have withheld plus penalties and interest. The liability of qualified substitutes however, is generally limited to the compensation it received on the transaction.

The Consolidated Appropriations Act, 2016, Public Law 114-113 is a massive omnibus financial and tax bill (6.75 Meg. in Word format) that recently became law. Division Q of that law is titled the "Protecting Americans from Tax Hikes Act of 2015" (the "PATH Act"). Section 324 increases the FIRPTA withholding rate from 10 percent of the gross sales price to 15 percent of the gross sales price. The 10% withholding rate continues to apply to properties acquired by the transferee as a residence and sold for not more than \$1,000,000. The complete exemption from FIRPTA withholding provided by IRC § 1445(5), where the property was acquired by the transferee as a residence and it is sold for not more than \$300,000 also continues to apply.

Although the increased withholding rate went into effect on February 16, 2016, the change was very easy to miss. Until roughly March 8, the change was not reflected in the Westlaw text of IRC Sec. 1445. That is probably because the official US Code had not yet been amended to reflect the change. The change is not reflected in much of the literature on the IRS website, although the change is reflected in the 2016 version of IRS Pub. 515 and elsewhere.

On February 19, 2016, three days after the withholding increase went into effect, the IRS issued final and temporary regulations amending regulations that deal with FIRPTA withholding, §§ 1.1445-1(h), 1.1445-2(e), and 1.1445-5(h). Those amendments reflect the new 15% withholding rate. They are explained in by the IRS in PATH Act Changes to Section 1445, February 19, 2016, 81 FR 8398-01, 2016 WL 642618(F.R.).