

# Federal Law Unfairly Burdens Buyers When Buying From a 'Foreign Person'

This week's column is about a federal law that makes home buyers responsible for paying withholding tax owed when buying a home from a "foreign person." If you're not careful about this law, you could, for example, buy a home for \$500,000 only later to receive a bill from the US government for \$50,000 withholding owed by the seller. Pretty scary for a buyer, isn't it?

This law is 38 years old, but it only came to my attention this year because it is featured in the 2018 Real Estate Commission update class that all licensees must take. Most agents like to wait until year-end to take this 4-hour class, but it is our policy at Golden Real Estate to have all agents take it in January — a private class in our own office. Most of us were a bit shocked to learn about this law and its implications.

Researching it further, I discovered that most title companies have the seller sign an affidavit at closing attesting to their legal status at closing. It's my understanding, however, that not every title company takes this step, hence the need for buyers and their agents to perform their own due diligence.

Because of this provision of the **Foreign Investment in Real Property Tax Act of 1980**, buyer agents would be wise to insert in all contracts to buy and sell real estate a paragraph such as the following one inserted in a contract for one of my listings:

**Seller shall inform Buyer in writing whether Seller is a "foreign person" as defined by the Foreign Investment in Real Property Tax Act ("FIRPTA") no later than 10 days after Seller signs this Contract. If Seller is not a "foreign person" pursuant to FIRPTA, Seller shall provide to Buyer and Closing Agent, no later than 20 days after signing this Contract, a written certification of non-foreign status under FIRPTA, under penalties of perjury, certifying to Buyer and Closing Agent that no withholding is required by Buyer pursuant to FIRPTA. If Seller does not provide such certification of non-foreign status to Buyer and Closing Agent on or before twenty (20) days after signing this Contract, then Buyer, at buyer's sole option, may 1) withhold, pursuant to the provisions of FIRPTA, a portion of the Purchase Price as required by FIRPTA or, 2) terminate this Contract pursuant to Section 25 hereof. Buyer and Seller are advised to seek legal counsel and tax advice regarding their respective rights, obligations, reporting and withholding requirements pursuant to FIRPTA.**

I surveyed the owners of three title companies and the broker/owners of the three largest real estate brokerages in the Denver metro area and none of them have heard of a buyer being stung by this issue... yet. The unfortunate fact is, as long as FIRPTA

exists then so does the possibility that someone will be. One broker/owner, who is on the Forms Committee for the Colorado Real Estate Commission, says that the 2019 version of the Contract to Buy & Sell will contain language regarding FIRPTA. Copies of new forms are typically made available in September but can't be used until January 1st.

Land Title has an excellent web page — [www.ltgc.com/articles/firpta-increase](http://www.ltgc.com/articles/firpta-increase) — where it explains, among other things, how FIRPTA exempts from withholding homes sold for less than \$300,000 that will be used by the buyer as a residence. The withholding rate is 10% on homes between \$300,000 and \$1 million if it is to be used as the buyer's residence, but is 15%

otherwise. The withholding rate is 15% for homes above \$1 million, whether or not used as a residence.

To qualify as a "residence" the buyer or a member of his/her family must occupy the property at least 50% of the days that the property is occupied. Thus, if you buy a vacation home and you don't let others occupy it for more than the number of days your own family occupies it, the home is considered a "residence" no matter how few days that might be.

One tricky item is that if the buyer does not take title in his own name but in the name of an entity — for example, a family trust — then the rate would be

15%, irrespective of the sale price.

Sometimes a buyer will change plans and arrange at the last minute to take title in the name of an entity. That requires last-minute work by the title company and might delay closing briefly, so the appropriate forms can be prepared and signed. Don't forget that this withholding tax applies only in a situation which no one I know has yet experienced — that they unknowingly purchased a home from a "foreign person" and the withholding tax was not paid from seller's proceeds at the closing. Nevertheless, it's important to be aware of that possibility.

Land Title reports that they collect FIRPTA withholding 6 to 10 times a year, primarily on resort properties. Still, with foreigners purchasing more and more American real estate each year, this could become more of an issue in the future.

**Buyers' agents need to keep in mind that if that worse case situation arises and they didn't alert their buyer to the possibility, they could be at risk of having an errors & omissions claim filed against them.**

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By **JIM SMITH, Realtor®**

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## This Lakewood Home Backs to the Bear Creek Greenbelt

If there's any house for which the mantra "location, location, location" applies, it would be this one at **2976 S. Garrison Way** in Lakewood. It has one of the best lots you'll find backing to the Bear Creek greenbelt, with a gate connecting its amazing backyard to a walking path into the open space. And because of its elevated location above that greenbelt, it also offers great views of the mountains to the west. The home has 3 bedrooms, 3 baths, and 3,132 square feet. You'll love the hardwood floors and granite counters. It faces southwest, providing excellent shading for its flagstone patio during summer afternoons. That flagstone patio is truly a work of art — so much so that I plan to hire the same Vietnamese contractor to landscape my own backyard! In addition to backing to that greenbelt, the home's cul-de-sac is across the street from Rampart Park, one of Lakewood's nicer neighborhood parks. See more pictures and take a narrated video tour at [www.BearCreekHome.info](http://www.BearCreekHome.info), the come to my open house Sat., July 21, 1-3 p.m.



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