

May 19, 2017

Laurie Brimmer
Internal Revenue Service
Room 6526
1111 Constitution Avenue NW
Washington DC 20224

BY USPS first class mail and by email transmission to Laurie.E.Brimmer@irs.gov

RE: OMB Control Number 1545-0997,
Proposed Collection: Response to Request for Comments.

Dear Ms. Brimmer:

This letter is being sent in response to the Notice and request for comments of March 23, 2017 at 82 FR 14941 relating to changes to the IRS Form 1099-S which carries OMB control number 1545-0997. The 2017 version of the Form, released late in 2016, contains a new collection of information requirement—Box 5, “If checked, transferor is a foreign person (nonresident alien, foreign partnership, foreign estate, or foreign trust).”

The proposed collection per the notice is a revision “to identify foreign investors in US Real Property.” A number of our comments that follow are based on this stated reason, because the change is about specified foreign person transferors only and thus necessarily brings in withholding issues under the Foreign Investment in Real Property Tax Act (“FIRPTA”).

Our comments address the specific requests made in clauses (a) through (e) set out in the notice.

Background

The abstract in the notice states that “persons treated as real estate brokers” under Section 6045(e) of the Internal Revenue Code report real estate transactions on the 1099-S. We first note that the applicable Code section more precisely describes the person who reports as the “real estate reporting person” (hereinafter “reporting person”) because under the statutory ordering rules that person is almost always the person responsible for closing the transaction (often called a “settlement agent.”) and not a real estate broker. The American Escrow Association represents settlement agents, in particular escrow style settlement agents, throughout the United States. We have commented on Form 1099-S issues since the inception of the requirements.

It is critical in applying these reporting rules to recognize that settlement agents provide their services under written instructions. A purchase transaction primarily involves instructions:

- (a) from the principals; i.e, the transferor and transferee (hereinafter also called “seller” and “buyer”);

- (b) from the lender if a loan is involved; and
- (c) from the real estate contract, as may be applicable.

Hence the term “agent” must be viewed in that manner; namely a real estate settlement agent is a specific and limited purpose agent only. The relevant tax statutes and implementing regulations reflect that limited role. Specifically, the reporting person is guided by a specific set of requirements contained in the implementing regulations under section 6045(e) which are cognizant and protective of their limited role and include:

- The reporting is as to the seller only and not the buyer.
- Sellers are not required to be distinguished by type. Foreign person sellers are included in general (and not by specific type) by being part of the general universe of sellers covered. Hence the proposed collection does not have a basis in these regulations for the new box.
- There is a specific taxpayer identification number (“TIN”) solicitation requirement in the regulations and the reporting person may rely on that and is protected from penalty (if a TIN is not provided by the seller) based on their good faith attempts to obtain the TIN from the seller.
- The reporting person is not a payor for purposes of section 3406 of the Internal Revenue Code (relating to backup withholding) under Treasury policy decision.
- Specificity of coverage or exclusions is and should be addressed through Revenue Procedures that both prescribe the requirements and protect the reporting person. For example the exclusion of reporting certain principal residence sales is addressed in a certification on which the reporting person may rely and provided by IRS in Rev Proc. 2007-12, 2007-4 IRB. It explicitly says:
“A real estate reporting person who relies on a certification made in compliance with this revenue procedure will not be liable for the penalties under § 6721 for failure to file an information return, or under § 6722 for failure to furnish a payee statement to the seller, unless the real estate reporting person has actual knowledge that any assurance is incorrect.”

The statute and regulations under FIRPTA (section 1445 of the Internal Revenue Code) also provide the same level of protection.

- FIRPTA is a buyer’s responsibility.
- The settlement agent may be a conduit of basic information but is not an agent under tax law for FIRPTA withholding, transmission and reporting.
- The FIRPTA statute-- section 1445-- exempts the transaction from withholding “if the transferor furnishes to the transferee an affidavit by the transferor stating, under penalty of perjury, the transferor’s United States taxpayer identification number and that the transferor is not a foreign person.” Otherwise the buyer is required to treat the seller as a foreign person for those rules. This applies to the buyer and not the settlement agent.
- The same statute also provides a qualified protection to settlement agents from agency liability (section 1445(d)(5)) when, as is normally the case, they merely perform ministerial actions.

As the result of the interaction between the section 6045 reporting rules and the section 1445 withholding rules, the common information in the file of the settlement agent (among other items) includes information on both (plus principal residence exclusion) as follows:

- Seller TIN Certification, under penalties of perjury—“YOU ARE REQUIRED BY LAW TO PROVIDE US [or NAME OF SETTLEMENT AGENT] WITH YOUR CORRECT TAXPAYER IDENTIFICATION NUMBER. IF YOU DO NOT PROVIDE US [or NAME OF SETTLEMENT AGENT] WITH YOUR CORRECT TAXPAYER IDENTIFICATION NUMBER, YOU MAY BE SUBJECT TO CIVIL OR CRIMINAL PENALTIES IMPOSED BY LAW.”
- Seller certification of excluded principal residence sale including protective reliance for settlement agent in accordance with the Rev Proc. language.
- FIRPTA nonforeign person affidavit also provided by the seller under penalties of perjury that the seller is not a foreign person. In general it informs the parties of the buyer’s duty to withhold unless the affidavit is provided and certifies that the seller is not a foreign person.

As a very important side note to the new proposed box, “foreign person” under these FIRPTA rules means any of the following--nonresident alien individual, foreign corporation that has not made an election under section 897(i) of the Internal Revenue Code to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. The new box only proposes to cover the non-corporate entities listed and thus is not consistent with the FIRPTA coverage rules.

Comments on proposed collection

- (a) *“Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”*

We believe the collection of information will have very limited utility. The 1099-S has seller information and not buyer. Hence in contradiction to the purpose statement in the notice the box will not identify foreign investors in US Real Property at acquisition. As a compliance matter on a foreign seller reporting their taxable transactions--and withholding under FIRPTA by buyer, where required, to promote that-- providing for notice of responsibilities to buyers is the key. Not a partial designation on the Form 1099-S. We are convinced this adequately occurs through the TIN solicitation and FIRPTA affidavit process already in place. Through that notice the actual forms (e.g., Form 8288 and related forms) and requirements are made known or knowable to the buyer.

- (b) *“The accuracy of the agency’s estimate of the burden of the collection of information.”*

The estimate in the notice indicates a change from 8 minutes to 10 minutes per response from the existing collection. We believe that may be understated. To be administrable by settlement

agents there needs to be a proper protective certification provided by IRS, consistent with other provided forms of certifications as discussed above. *See below also.*

(c) *“Ways to enhance the quality, utility and clarity of the information to be collected.”*

If the box is to be limited to some but not all foreign persons under FIRPTA, a proper certification needs to be added that amplifies on the existing affidavit for this purpose. Presumably that would be something along the lines that the seller is not a foreign person; or, if they are, that they are either a nonresident alien, foreign partnership, foreign estate or foreign trust. Further it would need to include the penalty protection for settlement agents that is in Rev. Proc. 2007-12, as stated above. However such a modified affidavit from the seller that does not cover foreign sellers who are corporations would seem quite self-contradictory or at least inconsistent with the purposes of FIRPTA. Hence, and as before, a reason this proposal should be reconsidered before adoption, if at all.

(d) *“Ways to minimize the burden of the collection of information on respondents.....”*

Same as (c) above.

(e) *“estimates of capital or start-up costs and costs of operation....”*

Substantial programming costs for all data processing systems to add the information from the new box along with the requested new form of protective certification.

While not requested for comment we also note questions and concerns on effective date. The 2017 Form 1099-S was changed prior to this Notice and issued before the start of 2017. The 1099-S reports individual transactions based on date of closing. Hence many reportable events have already occurred in 2017. The previous collection approved does not reflect this revision and expires 6/30/17. (Per the OMB website under OIRA (ICR)). As the Notice itself indicates the IRS cannot conduct or sponsor, and a person is not required to respond to a collection of information unless the collection of information displays a valid OMB control number. Because the collection has not yet been submitted to OMB for clearance and approval the OMB number of 1545-0997 cannot be valid for this new collection. For that reason we respectfully request that if this proposed collection is submitted for approval as is, a further Notice be issued by IRS regarding its future effective date that is after clearance. In any event clarity on effective date is needed.

Consistent with these comments, our overall request is a reconsideration and withdrawal of the proposal for the reasons stated; or a delayed effective date until 2018 or later if the proposed collection is

submitted (as is or with revisions) for approval.

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Submitted for myself and on behalf of Sheryl Oldham, President-Elect and Government Affairs Committee Chair and the members of the American Escrow Association.

Sincerely,



Phil Dryden
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