

March 8, 2017

Office of Information and Regulatory Affairs
Office of Management and Budget, Attention: Desk Officer for Treasury
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RE: OMB Control Number 1545-0997

Dear Ladies and Gentlemen:

This letter is being sent in reaction 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).”

This new requirement carries a substantial new burden. In reviewing all the issues of the Federal Register for 2016 and early 2017 to-date, we could not locate any Notice of this new requirement. In fact the most recent proposed collection we could find for this control number was in the Federal Register of June 20, 2013 and had no relationship to this new requirement. We are accustomed to issuance of a Paperwork Reduction Act of 1995 (“PRA”) Notice for an IRS Form and/or Regulations requiring new collections, together with an opportunity for comment before clearance and application. Absent such public notice, we question the validity of this new requirement until such time as the PRA Notice and opportunity for comment occurs.

This matter is of great concern to the real estate settlement industry. Accurate and timely completion of the 1099-S under the treasury regulations is the responsibility of tens of thousands of real estate settlement agents all across the United States. To be accurate, settlement agents must rely on information obtained from the transferor including certifications of status. This new collection and reporting requirement will be a substantial burden. The form and instructions require the box to be checked only for certain types of entities who are transferors. Namely the four (4) types of persons/entities indicated above.

An equally critical consideration is the related burden of the withholding requirements of the Foreign Investment in Real Property Tax Act of 1980 (“FIRPTA”). These requirements most certainly relate to the

burden of collecting the information now required for that Box 5. Under the current income tax code, Section 1445(a) generally imposes a withholding obligation on the transferee (and NOT the settlement agent) when a transferor (namely the person whose transaction is being reported on the 1099-S) who is a foreign person disposes of a United States real property interest. Under section 1445(f)(3), a foreign person is any person other than a United States person. An aide to practical applications of this requirement is addressed in section 1445(b)(2) of the Code as an exception to 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.”

To the extent such a certification is obtained in the closing process, all parties can rely on it; and any question of withholding is answered. As a result, in what is otherwise a very complex tax matter, the withholding duty of the transferee can be handled by them in reliance on that certification.

Because of the specificity of entity status now required for the new Box 5, the current standard certification is not sufficient. We urge that before this new 1099-S requirement becomes effective, the IRS must develop, propose and issue a new certification on which the settlement agent, transferee and others can rely. The parties could rely on this new certification to determine not only whether the transferor is treated as a foreign person for 1099-S reporting and FIRPTA withholding, but also to determine if the transferor is one of the four (4) designated entity types.

For these reasons, please confirm our belief that this new requirement will not become effective until after the new PRA collections of information are proposed and an opportunity for comment is provided. In the alternative, that the current display of the control number 1545-0997 does not require a response from the person preparing the 1099-S until a future date specified in the Federal Register sometime after a PRA proposal occurs with opportunity for comment on that control number. I am available at the contact email address and telephone number shown below.

Submitted on behalf of Phil Dryden (WA), 2016-2017 President and Sheryl Oldham (NE), President-Elect and Government Affairs Committee Chair and the members of the American Escrow Association.

Sincerely,

/s/Art Davis

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