In June 2020, the Real Estate Examining Board (REEB) approved a new version of the WB-11 Residential Offer to Purchase form. Given this is the second WB-11 Residential Offer to Purchase released in 2020, the form will be referred to as WB-11 "Take 2." The optional use date is August 1, 2020, and the mandatory use date is September 1, 2020.

The major change to the WB-11 Take 2 was the revision of the Foreign Investment in Real Property Tax Act (FIRPTA) section. The 15-day time frame and the buyer’s right to rescind if the seller was a foreign person were removed and other modifications were made in the FIRPTA section to improve understanding and ease of use. Additional clarifications were made in the WB-11 Take 2 with regard to the Fixtures definition, the Earnest Money section, the Conditions Affecting the Property or Transaction definition, the Radon Testing Contingency, the Maintenance section and the lines for email addresses in the Delivery section.

This Legal Update reviews the changes made in the 2020 WB-11 Residential Offer to Purchase Take 2. The section-by-section discussion points out the new changes adopted by the REEB and provides practice tips for getting the best results with this newest version of the WB-11.

The Residential Offer Take 2

The WB-11 Take 2 maintains the transactional flow introduced in the 2020 WB-11. The following discussion of the newest round of changes follows the sequence of provisions in the offer.

Definition of Fixture (Line 35)

With regard to the in-ground pet containment systems (electric fences), the prior rendition of the Fixtures definition excluded the pet collars. There was a concern, however, that one cannot readily obtain new collars with the appropriate electronic chips in them to match and work with a previously installed system. Thus it was decided the language “(but not the collars)” should be removed such that collars are considered part of the pet containment system and thus part of the fixture. Instead the WB-11 Take 2 at line 35 indicates “in-ground pet containment systems, including receiver components” are Fixtures.

As a result, the WB-1 Residential Listing Contract and the WB-11 Take 2 have slightly different definitions of fixtures.

Closing (Lines 47-50)

The Closing provision calls for the parties to write in a specific date as the closing date in the blank line provided. The preprinted text no longer states the closing date as “on or before ______.” For those who were fond of the “on or before ______” language, the blank line for insertion of the date stretches for almost a line and a half and thus is long enough to write in that phrase or other language along with a date, as is desired.

There also is a safety net provision indicating if the stated date falls on a weekend or holiday, the closing will instead be held on the next business day. The language in that statement has been clarified and the word “weekend” has been replaced with “Saturday, Sunday” to avoid any disputes or confusion: “If the date for closing falls on Saturday, Sunday, or a federal or a state holiday, the closing date shall be the next Business Day.”

MORE INFO

An “educational use only” copy of the WB-11 Take 2 with yellow highlights indicating the changes made is available on the WRA Forms Update Resources page at www.wra.org/formsupdate as well as a new FIRPTA flow chart, Wisconsin Real Estate Magazine articles and videos noting the changes made. Check back regularly for additional WB-11 Take 2 resources.

MORE INFO


MORE INFO

Earnest Money (Lines 60-66)

All of the provisions relating to earnest money are gathered together on the top half of the second page of the 2020 Offer Take 2 under an Earnest Money heading.

Delivery of Earnest Money After Acceptance (Lines 60-62)

In recognition of the practice in some markets to have a title company hold the earnest money instead of a real estate firm, the language on lines 60-62 asks the drafter to make choices and strike out the language that does not apply. A default is provided with regard to whom the buyer will deliver the earnest money and who will hold it during the transaction.

With regard to who will hold the earnest money, changes were made in terminology to refer to the “drafting Firm” instead of the “Buyer’s agent’s Firm,” thinking that might be more accurate and easier to understand. “Buyer’s agent’s Firm” may have been interpreted to not include subagents working with the buyer and it is wordy and may have seemed technical to consumers. “Drafting Firm” has not been previously used in the forms and is not defined but may make intuitive sense to the parties as well as licensees. Everyone should be able to understand what it means – the real estate firm that has drafted the offer.

In addition, the prior language of “third party identified as ______” had been changed to read “other identified as ______.” This should be simpler to work with. As before, the “other” might be a title company the listing firm uses for holding earnest money in transactions.

In summary, the language on lines 60-62 of the WB-11 Take 2 has been revised to say:

All earnest money shall be delivered to and held by (listing Firm) (drafting Firm) (other identified as ____________________) (STRIKE THOSE NOT APPLICABLE)

(listing Firm if none chosen; if no listing Firm, then drafting Firm; if no Firm then Seller).

REALTOR® Practice Tip

This feature on lines 60-62 of the WB-11 Take 2 requires action by the drafter to strike two of the offered selections: “(listing Firm) (drafting Firm) (other identified as ______)” and to fill in the blank line if a firm is not receiving and holding the earnest money, such as when a title company is holding the earnest money. For example, if a title company were to hold the earnest money, the title company name would be written in the blank line and (listing Firm) and (drafting Firm) would be lined out.

In those situations where the agents fail to complete the provision and make a selection, the default is, first of all, the listing firm. If there is no listing firm in the transaction, then it will be the drafting firm. If there are no firms in the transaction, then the default is that the seller receives and holds the earnest money.

REALTOR® Practice Tip

Failing to complete the provision generally will mean the listing firm will hold the earnest money. The listing firm may need to counter the offer to modify the provision to correctly describe who will hold the earnest money if the listing firm does not have a trust account.

LISTING FIRM HAS NO TRUST ACCOUNT

If a listing firm chooses not to have a trust account, communication is key! The listing agent must inform the seller there is no trust account and advise the seller that it will be necessary to complete the offer provisions regarding earnest money to make that clear because the offer states, unless modified, the earnest money will be held by the listing firm. The listing firm should indicate this in the listing contract by deleting all or part of the earnest money paragraph (lines 272-279 of the WB-1), indicating in additional provisions who will hold the earnest money and providing this is non-confidential information to facilitate sharing in the MLS.

REALTOR® Practice Tip

The listing firm should alert cooperating firms if they do not have a trust account. If they intend to use a title company, they should provide cooperating firms with the name of the title company. The drafting agent then may strike “listing firm” and strike “drafting firm” on line 60 and write the name of the title company on the blank line. Alternately, the listing firm may choose to provide an earnest money addendum in associated documents in the MLS if their plan is to use a title company to hold earnest money.

Once the listing firm informs cooperating agents they have no trust account, it is then the buyer’s decision whether to draft the WB-11 to provide the listing firm will not be holding the trust funds and name the person who will. If the buyer fails to draft the offer to name the person receiving and holding the earnest money, the contract default will indicate the listing firm is holding the earnest money and the seller may need to counter the offer to correct this and name the correct person.

MORE INFO

See “So You Don’t Want to Have a Trust Account?” in the February 2016 Wisconsin Real Estate Magazine at www.wra.org/WREM/Feb16/TrustAccounts.

Another change made in the WB-11 Take 2 Earnest Money section was the elimination of the Held By subsection as it was seen as repetitive. The Balance of Purchase Price line was moved so that it now appears at line 66 after the Caution, and the language in the Caution on lines 63-65 was modified, resulting in a more concise and streamlined Earnest Money section.

Escrow agreement if money not held by firm

In the Caution on lines 63-65, the parties are urged to have an escrow agreement drafted if someone other than a firm holds the earnest money because the offer provisions for disbursement of earnest
money on lines 67-77 apply only to disbursements by a real estate firm. If a third person such as a title company holds the money, there are no automatic rules governing when the money is disbursed and to whom. In the absence of such provisions, third persons like title companies may require the signature of both parties before they will disburse, which defeats the purpose of having an escrow agreement to establish an automatic mechanism and predetermined standards.

Wis. Admin. Code § REEB 18.06 provides:

Escrow agreement for earnest money not held by the firm. If the parties to a transaction do not desire that the firm hold the earnest money in the firm's real estate trust account, and wish to designate an escrow agent other than the firm, the licensee may not draft the escrow agreement. The escrow agreement shall be drafted by the parties or an attorney. The firm may not hold the funds in the firm's real estate trust account, nor may the firm act in any way as custodian of the funds for the parties. The funds, pursuant to the escrow agreement, shall be held by a party other than the firm, such as: a bank, a savings and loan association, a credit union, or an attorney.

REALTOR® Practice Tip
The listing firm may wish to place an escrow agreement as an associated document in the MLS if they intend for a title company to hold the earnest money. Ideally the escrow agreement will become an attachment to the offer or be delivered concurrently. That way signatures of the parties and the third person holding the funds can be obtained and the parties can be assured there is a process in place for disbursement of the earnest money by the third person.

Conditions Affecting the Property or Transaction (Lines 112-177)

Additional changes have been made with regard to the definition of Conditions Affecting the Property or Transaction on pages 2-4 of the WB-11 Take 2. The content of the definition has been modified so that it matches the content of the updated Real Estate Condition Report (RECR) that was required for use beginning July 1, 2018, and to add disclosure items in legislation that was anticipated to pass in early 2020 but was delayed due to the coronavirus pandemic. Although it appears legislation with the added disclosure items may now have to wait until 2021, the new disclosures are nonetheless being added to the WRA version of the RECR.

The list of RECR defects in the offer definition of Conditions Affecting the Property or Transaction informs sellers who have not completed an RECR as to their disclosure obligations (assuming they are not exempt). It also reveals to buyers the disclosures they have not received in cases where the buyers have not received an RECR. Restating the RECR items in the definition of Conditions Affecting the Property or Transaction encourages sellers to make disclosures or explain why they are not doing so (for example, an “as is” sale). This supports the philosophy of Wis. Stat. Ch. 709 to encourage seller disclosure regarding the condition of the property. The seller is in the best position to know the true condition of the property. Getting this information to buyers enables buyers to make better-informed decisions.

Some of the changes in the WB-11 Take 2 definition of Conditions Affecting the Property or Transaction are corrections, and others come from the anticipated legislation.

The additions in item p. on lines 155-156 are based on anticipated legislation clarifying the disclosures relate to private, not public, rights-of-way and easement (additions are underlined):

p. Nonconforming uses of the Property; conservation easements, restrictive covenants or deed restrictions on the Property; or, other than public rights of way, nonowners having rights to use part of the Property, including, but not limited to, private rights-of-way and easements other than recorded utility easements.

The additions in item v. on lines 168-169 are based on the anticipated legislation establishing riparian rights for properties on flowages:

v. A pier attached to the Property not in compliance with state or local pier regulations; a written agreement affecting riparian rights related to the Property; or the bed of the abutting navigable waterway is owned by a hydroelectric operator.

Item y. on line 174 and the additions to item aa. on lines 176-177 are corrections to match the offer disclosures with the RECR content:

y. Agreements binding subsequent owners such as a lease agreement or extension of credit from an electric cooperative.

aa. Other Defects affecting the Property, including, without limitation, drainage easement or grading problems; or excessive sliding, settling, earth movement or upheavals.

The new item z. on line 175 is from the anticipated legislation revising the RECR and relates to the FIRPTA section of the offer:

z. Owner is a foreign person as defined in the Foreign Investment in Real Property Tax Act in 26 IRC § 1445(f).

MORE INFO

Radon Testing Contingency (Lines 227-246)
The Radon Testing Contingency on the bottom of page 4 and the top of page 5 of the WB-11 Take 2 calls for the buyer to arrange for radon testing to be performed by a qualified third party in a manner consistent with applicable U.S. Environmental Protection Agency (EPA) and Wisconsin Department of Health Services (DHS) protocols and standards. The test results must show the radon level is less than 4.0 picoCuries per liter (pCi/L) to satisfy the contingency.

Two modifications were made in the Radon Testing Contingency in the WB-11 Take 2. The first is to express the contingency in terms of the buyer obtaining test results indicating “an EPA average radon level” of less than 4.0 pCi/L rather than indicating “the radon level” is less than 4.0 pCi/L.
Although the test results report for a radon test may refer to the average reading, there is a difference between the overall average and the EPA average radon concentration levels. The overall average is based on the total hours the electronic monitor or testing device was in place in the property, while the EPA average excludes the first 4 hours the testing device is in place. The reason for the four-hour delay on the EPA average is so the radon monitor reaches equilibrium in the home. When the monitor is first placed, it takes a while for the air in the home to actually circulate through the monitor. The first four hours are discounted under EPA standards and protocols to be sure the air being tested is actually from the inside of the home being tested.

**REALTOR® Practice Tip**

The radon testing results often provide the overall average – the long-term average since the last memory clear on the testing device – and the EPA average which is the long-term average less the first 4 hours of data. The modified contingency language tells the parties they should use the EPA average when determining whether the contingency is satisfied or whether the buyer might give notice objecting to the radon level.

The second modification added a NOTE at line 246 of the WB-11 Take 2 regarding sources for radon information to try to head off legislation that had been proposed calling for a radon brochure that would be given to all buyers, similar to the federal lead-based paint pamphlet, and for additional radon language in the RECR.

**NOTE:** For radon information refer to the EPA at [epa.gov/radon](http://epa.gov/radon) or the DHS at [dhs.wisconsin.gov/radon](http://dhs.wisconsin.gov/radon).

**MORE INFO**


**Title Evidence (Lines 382-425)**

Very few changes were made in the WB-11 Take 2 provisions regarding title evidence. However, a few language changes were made in the Title Not Acceptable for Closing subsection on lines 410-415 to clarify and simplify the provisions:

**TITLE NOT ACCEPTABLE FOR CLOSING:** If title is not acceptable for closing, Buyer shall notify Seller in writing of objections to title by the time set for closing. Seller shall have a reasonable time, but not exceeding 15 days, to remove the objections, and the time for closing shall be extended as necessary for this purpose. If Seller is unable to remove said objections, Buyer shall have five days from receipt of notice thereof, to deliver written notice waiving the objections, and the time for closing shall be extended accordingly. If Buyer does not waive the objections, this Offer shall be null and void. Providing title evidence acceptable for closing does not extinguish Seller’s obligations to give merchantable title to Buyer.

**Maintenance (Lines 465-467)**

The language in the Maintenance provision was modified in the WB-11 Take 2 to refer to the date on line 1 of the offer instead of the date of acceptance of the offer to pinpoint that point in time more precisely, as was done in other parts of the WB-11. There was also an addition with regard to the condition in which the seller is expected to maintain the property to allow not only ordinary wear and tear but also changes agreed to by the parties.

Accordingly this provision now states: “Seller shall maintain the Property and all personal property included in the purchase price until the earlier of closing or Buyer’s occupancy, in materially the same condition it was in as of the date on line 1 of this Offer, except for ordinary wear and tear and changes agreed upon by Parties.” This helps clarify the seller has the obligation to maintain the real and personal property until closing, but that changes due to ordinary wear and tear and the changes agreed upon by the parties are allowed.

**Foreign Investment in Real Property Tax Act (Lines 513-542)**

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). FIRPTA is tax law. FIRPTA is about the Internal Revenue Service (IRS) taxing foreign persons selling United States property. 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 to make 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.

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

**WB-11 Take 2 primary changes**

The FIRPTA section in the WB-11 Take 2 underwent several changes, and is now divided into small subsections and headings have been inserted for ease of use.

A seller who is not a foreign person is still asked to provide a certification of non-foreign status, but that can be provided before or at closing in the WB-11 Take 2, rather than no later than 15 days prior to closing as was the case in the earlier version. Ideally this will allow the seller to complete the certification along with the other closing documents the seller executes with the title company for closing. This eliminates the need to send or deliver the certification with the seller’s Social Security number written in it to the title company and reduces the likelihood of having the completed certification mistakenly delivered to the agents in the transaction.

The other frequently-discussed change is with regard to the buyer’s options if the seller fails to deliver certification of the seller’s non-foreign status. The first option remains the same: the buyer can withhold 15% of the amount realized by the seller in accordance with IRC § 1445.

As far as the second option, in the 2020 WB-11, if the seller failed to deliver the certification the buyer could, no later than closing, give the seller written notice to terminate the transaction. By way of contrast, under the WB-11 Take 2, the buyer may declare the seller in default of
the offer and pursue the default remedies in the offer if the seller fails to
timely deliver the certification. The buyer’s remedies under the default
section include the option to terminate the offer along with suing for
specific performance. Depending upon the circumstances the change
may not lead to a functional difference.

Another significant modification in the WB-11 Take 2 involves the new
presumptive representation that the seller is not a foreign person unless
the seller communicates differently in the property condition report or
in a notice delivered to the buyer within 10 days after acceptance. If
the seller has completed a condition report that indicates the seller’s
status, then there is a seamless process with no additional steps for
the seller to take in making an affirmative indication of their status. That
is preferable to assuming the seller read the FIRPTA provision, saw the
representation as to their status and agreed with it when in fact they
may have never read it and the buyer is believing they were affirmatively
representing they are non-foreign persons.

What does the FIRPTA section provide in the WB-11 Take 2?

Walking through the FIRPTA section in the WB-11 Take 2, the initial
provisions are the same as those in the 2020 WB-11 Take 1. The section
begins on lines 513-516 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% of the total “Amount Realized” in the sale if the seller is a “Foreign
Person” and no exception from FIRPTA withholding applies. Lines 516-
517 explain a “Foreign Person” is a nonresident alien individual, foreign
corporation, foreign partnership, foreign trust or foreign estate. Lines
517-518 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 519-521 warn the parties of the
unfortunate consequences that may befall the buyer if FIRPTA applies
and the buyer does not comply: the 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 they are buying. These provisions are the
same as the provision in the WB-11 Take 1, and thus the FIRPTA section
of the offer begins the same as before.

MORE INFO

For more information about FIRPTA see the November 2019
Legal Update, “WB-11 Residential Offer to Purchase – 2020

The FIRPTA provision in the WB-11 Take 1 and the WB-11 Take 2
both next represent the seller is not a foreign person. There are two
exceptions stated, however, in the WB-11 Take 2 on lines 522-524:

Seller hereby represents that Seller is a non-Foreign Person, unless
(1) Seller represents Seller is a Foreign Person in a condition report
incorporated in this Offer per lines 105-108, or (2) no later than 10
days after acceptance, Seller delivers notice to Buyer that Seller is
a Foreign Person, in which cases the provisions on lines 530-532
apply.

The WRA’s real estate condition report and vacant land disclosure
report forms will be updated to include a question for the seller to
answer as to the seller’s foreign status as defined in FIRPTA and stated
in 26 IRC § 1445. This will cause sellers to make representations either
confirming or contradicting the presumptive representation in the offer
that the seller is a non-foreign person.
Line 525 begins with the subheading “If Seller is a Non-Foreign Person.” Under lines 525-529 of the WB-11 Take 2 the seller certification ideally will be done at or just before closing – directly with the title company, which would then, in turn, provide the qualified substitute certification to the buyer and thus ensure the buyer is protected from any withholding responsibility or liability.

Line 530 begins with the subheading “If Seller is a Foreign Person.” Lines 530-532 of the WB-11 Take 2 indicate if the seller is a foreign person, then the buyer will withhold unless the parties can agree on a FIRPTA exemption or find another way to resolve the situation.

Compliance with FIRPTA is addressed on lines 533-538 with new details for the parties should the buyer need to withhold under § 1445.

The information on lines 539-542 regarding parties conferring with their advisors and emphasizing that real estate licensees and title companies are not responsible for making FIRPTA determinations is the same as in the prior WB-11, although the indication that all representations regarding FIRPTA will survive the closing is now in bold.

A closer look at the subsections is in order.

### Seller Representation of Foreign Person Status

On lines 522-524 of the WB-11 Take 2 the language says the seller represents the seller is a non-foreign person. If this is not the case the seller is offered two ways to counteract that representation. The representation is counteracted if the seller, in the Real Estate Condition Report or another condition report referenced and incorporated on lines 105-108 of the WB-11 Take 2, represents the seller is a foreign person. The language also indicates the seller may counteract the representation of non-foreign status by delivering notice to the buyer indicating the seller is a foreign person. The notice would need to be delivered to the buyer no later than 10 days after acceptance. If neither of these happens the buyer may conclude the seller is not a foreign person and proceed under lines 525-529.

1. **MORE INFO**


### The Unusual Cases

A seller may address this issue in other ways if the seller is a foreign person. Sellers may want to immediately correct the assertion. More likely, sellers may be initially unsure about their status, may reach out to tax or legal advisers who do not immediately provide the needed advice, may find they are changing what they believed was the correct assertion and so forth. In each of these cases the seller may indicate the seller is a foreign person, lines 522-524 are deleted and lines 530-532 apply:

1. The seller may counter the offer to assert the seller is a foreign person or ask the buyer to draft the offer to indicate the seller is a foreign person.
2. The seller may propose an amendment to change the assertion.

3. If the seller does not do anything to inform the buyer that the seller is a foreign person and lets the representation that the seller is not a foreign person ride until closing, the seller will have breached the contractual obligation to provide a certification of non-foreign status and allowed the buyer to pursue their default remedies including termination of the offer. Should the parties decide they want to close the transaction there may be a delay so the buyer can confer with their advisors and properly prepare and submit the paperwork required by the IRS for § 1445 withholding.

4. If the seller did not provide a property condition report, the seller might counter the offer in order to include a representation that the seller is a foreign person on lines 109-111. The seller may need to also indicate the representation on line 522 to the contrary is deleted.

Obviously, it is far better if the seller works within the choices provided on lines 522-524 whenever possible to avoid confusion.

### If Seller Is a Non-Foreign Person

If the seller is not a foreign person, as in the WB-11 Take 1, the seller is asked to complete a Certification of Non-Foreign Status and deliver it to the buyer or the Qualified Substitute (attorney or title company), preferably the title company. The difference in the WB-11 Take 2 is the timing: no later than closing is now the time frame, replacing the “no later than 15 prior to closing” from the prior rendition.

**IF SELLER IS A NON-FOREIGN PERSON.** Seller shall, no later than closing, 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. If Seller fails to timely deliver certification of Seller's non-foreign status, Buyer shall: (1) withhold the amount required to be withheld pursuant to IRC § 1445; or, (2) declare Seller in default of this Offer and proceed under lines 494-501.

Therefore, listing agents who had the practice of providing the WRA’s non-foreign status certification or some other version of a non-foreign status certification form may no longer need to take that step because the certification will typically be executed in conjunction with the closing. Some title companies may have their own version of the certification form that they prefer be executed.

### REALTOR® Practice Tip

The listing agent could consider alerting the title company when title is ordered that the seller needs to complete the certification. The listing agent also may want to reach out to the title company to find out what process, timing and form they prefer the seller to use when completing the seller certification of non-foreign status.

1. **MORE INFO**

See the IRS regulations in 26 CFR § 1.1445-2 at [www.law.cornell.edu/cfr/text/26/1.1445-2](http://www.law.cornell.edu/cfr/text/26/1.1445-2) for the specific requirements of a Seller Certification of Non-foreign Status.
As before under the WB-11 Take 1, the preferred sequence of events would be for the seller to provide a completed seller certification of non-foreign status to the title company as the Qualified Substitute and the title company would then 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.

**REALTOR® Practice Tip**
The agent working with the buyer may want to reach out to the title company and confirm that the title company will furnish a Qualified Substitute Statement to the buyer and perhaps ask that a copy also be furnished to them for their files.

One possible downside of the seller providing the certification just before or at closing is the buyer may not find out definitively until closing that the seller, contrary to any representations, is a foreign person. If the parties still want to close the closing may need to be delayed to arrange for 15% withholding from the seller proceeds in accordance with IRS § 1445 or to find and document an exception under FIRPTA.

**If a non-foreign seller does not provide a seller certification**
The WB-11 “Take 2” now indicates if the seller fails to timely deliver the seller certification of non-foreign status, then the buyer has a choice. The buyer can either:

- withhold from the seller’s proceeds the amount required by the Internal Revenue Code (IRC) § 1445.
- or declare the seller in default and proceed under the offer’s default provisions.

While this new language removed the buyer’s right to immediately give the seller notice of termination because the seller did not provide the certification, it still allows the buyer the opportunity to assert the seller did not meet the seller’s contractual obligation to provide the certification. If the seller has defaulted, the buyer can proceed under the seller default provisions on lines 494-496 of the WB-11 Take 2:

*If Seller defaults, Buyer may:*

1. sue for specific performance; or
2. terminate the Offer and request the return of the earnest money, sue for actual damages, or both.

**If Seller Is a Foreign Person**
The new subsection on lines 530-532 of the WB-11 Take 2 indicates the parties’ choices if the seller is a foreign person:

*IF SELLER IS A FOREIGN PERSON.* If Seller has represented that Seller is a Foreign Person, Buyer shall withhold the amount required to be withheld pursuant to IRC § 1445 at closing unless the Parties have amended this Offer regarding amounts to be withheld, any withholding exemption to be applied, or other resolution of this provision.

If the seller represented that he or she is a foreign person, the buyer shall withhold up to 15% of the amount realized by the seller at closing per IRC § 1445. However, the language acknowledges the parties may make other arrangements by including the following language: “unless the Parties have amended this Offer regarding amounts withheld, any withholding exemption to be applied, or other resolution of this provision.” If the seller is a foreign person the parties can huddle with their legal and tax advisors, determine what exceptions may be available under the circumstances and amend the offer to provide for the necessary elements of the exception to be applied.

**The FIRPTA Flowchart**
The FIRPTA Flowchart illustrates the process of a non-foreign seller providing a seller certification of non-foreign status, and the personal residence exceptions the parties might use if one or more of the sellers is a foreign person and the parties want to avoid withholding seller proceeds at closing.

**MORE INFO**
Compliance with FIRPTA

The new Compliance with FIRPTA subsection on lines 533-538 of the WB-11 Take 2 creates agreements between the parties to some of the details that may arise if the buyer withholds from the seller’s proceeds at closing.

**COMPLIANCE WITH FIRPTA.** Buyer and Seller shall complete, execute, and deliver, on or before closing, any instrument, affidavit, or statement needed to comply with FIRPTA, including withholding forms. If withholding is required under IRC § 1445, and the net proceeds due Seller are not sufficient to satisfy the withholding required in this transaction, Seller shall deliver to Buyer, at closing, the additional funds necessary to satisfy the applicable withholding requirement. Seller shall also pay to Buyer an amount not to exceed $1,000 for actual costs associated with the filing and administration of forms, affidavits, and certificates necessary for FIRPTA withholding and any withholding agent fees.

First and foremost, the parties agree to complete and deliver any documents or statements required to comply with FIRPTA. If the buyer is withholding from the seller’s proceeds at closing, and net proceeds are due to the seller, the WB-11 Take 2 provides that if the net proceeds are not sufficient to satisfy the withholding, the seller shall deliver additional funds at closing to make up for the deficit. The idea is to avoid any shortage in the withholding required to comply with the IRS § 1445 or any other withholding amount agreed to in the offer. If the amount of the proceeds is not enough the seller must make up the difference so the buyer is not put on the spot.

If the transaction is one where the buyer will withhold from the proceeds, a fair amount of paperwork and calculations need to be done to ensure full compliance with the IRC. To that end the buyer may enlist the assistance of a FIRPTA withholding agent who can make sure the appropriate forms are properly completed and filed. The compliance provision indicates the seller shall pay the buyer up to $1,000 for the buyer’s actual costs associated with the filing, administration of forms, affidavits and other items necessary for FIRPTA. In this situation the buyer is not required to bear all of the expenses involved in working with the IRS and complying with IRC § 1445.

**Delivery of Documents and Written Notices**

The observation was made that both the seller’s and buyer’s email addresses are to all be written into one line and sometimes there are multiple email addresses or email addresses that are too long to fit. Thus, there are two lines for email addresses in the WB-11 Take 2. There is one line for seller email addresses (line 569) and a separate line for buyer email addresses (line 570) to make sure there is ample space.

1  MORE INFO

Our Plus coverage includes exclusive risk management resources from webinars and monthly newsletters to a legal hotline and video library.

We do our best to ensure you won’t get weighed down by a claim.

But if the unthinkable happens, we’ve got you covered.

- Comprehensive coverage designed by industry peers
- Expert service team under one roof for faster turnarounds and greater efficiency
- 90% renewal rate among current customers
- Seasoned real estate claims management team
- Over 50% of claims resolved without damages owed

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