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**Buyers from Foreign Sellers of U.S. Real Property Beware
IRS Warns that Disregarded Entities Cannot Certify Domestic Transferor Status
for the Purpose of Withholding under FIRPTA**

The Internal Revenue Service (“IRS”) recently issued Chief Counsel Advice 200836029 which reiterated existing policy that an entity which has made an election to be disregarded may not certify that it is the transferor of a United States real property interest for purposes of FIRPTA (an acronym standing for “Foreign Investment in Real Property Tax Act” contained in Internal Revenue Code (“IRC”) Sections 897 and 1445).

The IRS has been made aware that some buyers of United States real property are not withholding the required 10% of the sales price when purchasing from domestic entities which have made an election to be treated as disregarded by their foreign owners. A disregarded entity may not certify that it is the transferor of a United States real property interest for the purpose of avoiding this withholding. The owner of the disregarded entity is treated as the transferor for United States income tax purposes, and as such must provide the certificate of non-foreign status to avoid the withholding.

If the owner of the disregarded entity is an individual United States tax payer, he or she must provide the certificate of non-foreign status to avoid withholding under IRC Section 1445. If the owner of the disregarded entity is another entity, the Treasury Regulations provide a model form for the entity to use, which includes a certification that the owner of the disregarded entity is not a foreign corporation, a foreign partnership, a foreign trust or a foreign estate as well as a certification that the entity is not also a disregarded entity under United States tax law.

If the owner of the disregarded entity cannot or does not certify its non-foreign status and that it is not itself a disregarded entity, the buyer must withhold 10% of the purchase price. As a practical matter, since purchasers of real property may ultimately be responsible for withholding, interest and penalties, the purchaser should obtain a non-foreign certificate which includes representations that the entity is not a disregarded entity for United States income tax purposes when purchasing real property from any domestic entity.

Should you wish to discuss this issue in more detail or have any questions, please contact us at steve@cantorwebb.com.