



100 Years of Leadership

Serving Title Professionals throughout Florida

Skip Straus, President  
Alexandra J. Overhoff, Executive Director

# Tallahassee Report

2016  
Issue #1

## In This Issue:

- > [A Message from The President](#) | Skip Straus - Pg.1
- > [Agents' Section Chair](#) | Gibbs Wilson - Pg. 3
- > [CLT Chair](#) | Marcia Cameron - Pg. 5
- > [FinCEN](#) | Len Prescott - Pg.6
- > [Membership Committee Chair](#) | Lisa Blythe – Pg. 9
- > [Welcome New Members](#) – Pg. 10
- > [Executive Director's Message](#) | Alexandra Overhoff – Pg. 11
- > [Unlawful Inducement](#) | Alexandra Overhoff – Pg. 12
- > [FIRPTA](#) | Jennifer Bloodworth and Wade Wallace - Pg.14

## A Message from the President

Arnold “Skip” Straus, Jr. | Enterprise Title, Inc.



## President's Report

We are now TRID plus a few months, FinCen is here, and Unlawful Inducement is now official. At least the excitement of the 2015 Legislative Session has finished. With all this, who has time to examine title or complete a closing?

Of course, you—our valuable Members—have not missed a beat. Our insurers prepared us so well for the CFPB changes; our agents have acquitted themselves with their usual excellent service to buyers, sellers, lenders, and real estate agents; our affiliate members have provided their services in a timely and efficient manner.

If only I did not have to keep running my credit card for the estoppel letters (more on that below)!

FLTA is re-committed to the Quarterly Newsletter. The format will change from time to time, but our goal is to disseminate information pertinent to your business, state and national politics, and in real estate trends.

As you know, I love to talk (or write). But my editor (wife Donna) tells me that brevity is best. So I will give you the short stories:

Notes from the Board and Executive Director: Lisa Blythe is running strong with new ideas for Membership. Pat Hancock is revising our ByLaws. Len Prescott is already working on new forms. Jeff Stein is pushing ahead on the Education Manual. Rachel McIntosh is helping revamp the way we present our accounting (so that I can understand it!). In 2015, Board members, Past Presidents and our Executive Director spent much time with Matt Guy and Ray Wenger of DFS to hone the rules for Unlawful Inducement (Rule 69B-186.010), which became effective February 9, 2016. The goal was to level the playing field to promote fair marketing. The U.S. Department of Treasury has determined that illicit

buyers are using corporate entities to launder money and purchase real estate, thus they have imposed certain requirements upon title underwriters involved in high end transactions. Initially, the two focus areas are Miami-Dade and Manhattan, but we expect expansion. FLTA will keep you informed.

Legislature: Unfortunately, the Estoppel Bill, filed by Sen. Stargel and Rep. Wood, did not pass. Despite yeoman efforts by FLTA Agent Section Lobbyist David Daniel and Executive Director Alex Overhoff, we were unable to accomplish our primary goal of “payment due at closing,” rather than in advance. Now DFS is offering a rule which may prohibit the payment in advance, so we look forward to your participation in the DFS workshop on April 7. Thanks to Alex Overhoff, Government Affairs Chair Shelley Stewart and Vice-Chair Mickey Godat for monitoring all of the bills which affect title insurance.

Data call Office of Insurance Regulation (OIR) is still collecting data, since some of the data elements in the transmissions for 2014 did not match the information requested in the forms. There will be some revisions to the directions in the forms for the 2015 submission. FLTA will work with OIR on the review of the data. The State and the industry will each employ an actuary to parse the numbers. Stay tuned.

Publicity I promised to get the word out about how well we perform our jobs. First, FLTA will increase its presence on the internet, using the phrase, “Florida Runs on Title Insurance”<sup>sm</sup> (are you wearing your shirt from the Convention?). Second, we are going to submit some “op-ed” pieces to the state’s newspapers to see if we can gain some well-deserved publicity.

Webinars These have been highly successful. Send your ideas for topics and speakers. Check your email for upcoming webinars.

Feedback We want to hear from you. Tell us what you like, what you would like to improve, and how you can be involved. My email is [sstraus@strauseisler.com](mailto:sstraus@strauseisler.com).

Speak with you soon

Skip

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## Please join us Tuesday, April 19<sup>th</sup> in Fort Lauderdale.

To help you learn how to educate consumers about the benefits of title insurance and promote your business by communicating directly with homebuyers, ALTA and the Florida Land Title Association will co-host a

### *Homebuyer Outreach Program Workshop*

on April 19<sup>th</sup> from 11 AM to 3:15 PM  
at the Renaissance Fort Lauderdale Cruise Port Hotel  
in Fort Lauderdale, Florida.

**Earn 1-2 Hours of CE/CLE credit in Florida.**

Click [HERE](#) to see the attached flyer for cost and registration information.



## Agent Roundtable Call-Adding Value by Collaboration

As Chairman of FLTA Agent Section, I pledge to add value to Florida Title Agents far beyond membership dues by facilitating the working together and mentoring from our seasoned and successful member agents. The best keep getting better and I am persuaded that all of us are smarter than any one of us. By regularly engaging with one another to share best ideas and practices, we will add value to our own agencies and more broadly, improve our industry.

Beginning April 12, 2016, our Agent Section Conference Calls will run from 10:00 am till 11:30 am to include time following our updates in which I will lead an interactive Agent Roundtable. This is added value that is included in your 2016 membership dues.

I have participated in several peer advisory round tables since 2002 such as TEC/Vistage (the largest CEO development organization in the world), C-12 (a national faith-based peer advisory group) and the CEO Council of Tampa Bay. The round tables in each of these groups have provided invaluable ideas, relationships and solutions. The peer advisory concept has proven to be successful by the tens of thousands of executives that choose to continue to participate in them.

Topics to be discussed will include issues relevant to our title agencies, such as:

1. Mission, Vision & Values
2. Goal setting, Objectives and Accountability
3. Communicating Effectively w/ our Team & Clients
4. Teamwork- creating a Culture of working together
5. Excellence in Customer Service
6. Profitability- Increasing income & decreasing expenses
7. Rewarding employees for team work & contribution to profits
8. Education- purposing to improve our industry knowledge
9. Processes to enhance accuracy & minimize losses
10. Marketing and Public Relations
11. Having fun inside and outside the office
12. Compliance with Federal and State Regulators

Please feel free to e-mail me at [gwilson@alpha-omegatitle.com](mailto:gwilson@alpha-omegatitle.com) as to your most desired topics, including any which have not been mentioned. If you feel that you have expertise in a particular area, I welcome you to let me know so that we may make time to include your feedback during the Roundtable call. By working together, we will help one another to improve our agencies and our industry.



Join us this November 9, 10 and 11 in St. Augustine, Florida for the FLTA 2016 convention!

Click [HERE](#) to let us know if you would like to participate in a golf tournament (and be eligible to win Exciting Prizes!).



Please contact [alex@flta.org](mailto:alex@flta.org) to learn about convention sponsorship opportunities.

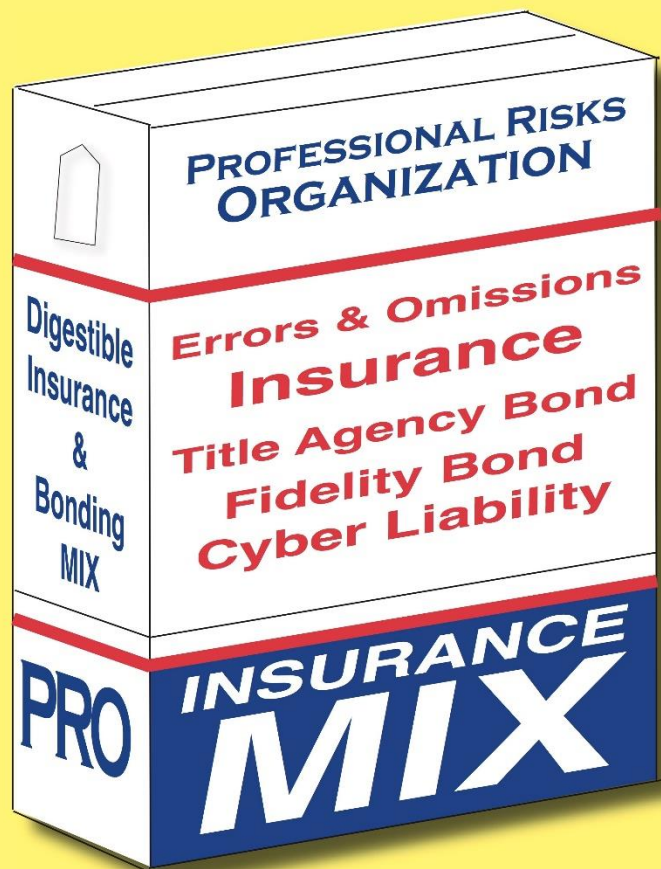


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(Your Name Here), CLS/CLC

### 3 (or 6) Letters That Mean SO MUCH!

I am proud to be part of the Certified Land Title Institute! The Institute sets the bar pretty high. We are committed to making sure that our members have the tools to be proficient, experienced and highly educated professionals. And with that commitment to professionalism, comes our focus on education. With this designation, you will be immediately recognized by your peers and the industry for your understanding of the importance of proper procedure. Earning your Certification is an accomplishment that will translate into all aspects of your work. Additionally, having the Certification will not only put your employers at ease knowing that they have a committed and informed employee representing their business, but

it will affirm to your clients that you are foremost in your field in knowledge, professionalism and commitment to your chosen craft.

Whether you are a closer, searcher or examiner, please take a moment to look over the information on the [Certified Land Title Institute page of the FLTA](#). On top of all the other benefits, you will have the distinct honor of being recognized at our annual Convention held in November.

To obtain the certification of CLC (Certified Land Closer) or CLS (Certified Land Searcher), one must work for a title company (in the capacity of the designation) for a minimum of 5 years, at the time of application. The purpose of this time frame, is to assure the applicant is completely familiar with a great deal of what is part of the position of a closer or searcher. We want the applicants to pass the exams. Having the full 5 years of experience will increase that wish, along with studying for the exam. The exams are divided into a morning and afternoon session, and the both combined are expected to take 8 hours to complete. We split the exams into one being more technical directed questions and the other more practical, packages for closers and legal descriptions for searchers.

As employers, in searching for a candidate to fill a closer or searcher/examiner position, I would think one who holds a CLC or CLS would be put at the top of the list for hire. In addition, marketing would be easy to state you have certified personnel by the CLT Institute in your office. Another plus, when one receives the designation, 10 hours of credit (7 hours practical and 3 hours ethics) are awarded by the state!

We are hopeful that all who are qualified to sit for the exam do so. We want our industry to be strong and keep the professionalism to the highest degree.

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## *CLS & CLC Test Information*

The application deadline for the CLS & CLS test is April 18, 2016

The test date is June 11, 2016

Click [HERE](#) for the Application Packet

Click [HERE](#) to order The Basic Title Insurance Handbook with the Booth Supplement Chapters.



## FinCEN Geographic Targeting Orders – Which Stage of Grief Are You In?

The seven emotional stages of grief are commonly understood to be shock or disbelief, denial, bargaining, guilt, anger, depression and finally acceptance and hope. Do you recall which stage you were in when you first heard the news in early January that the United States Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) had issued a Geographic Targeting Order (GTO) creating new reporting requirements for certain cash, residential, real estate transactions in Miami-Dade County? Which stage are you in now?

I am not being flippant by asking this question. After all, when this news was announced, luxury home developers, real estate brokers, attorneys, title companies, and pretty much anyone involved in real estate settlement services in Miami, were already confronted with a number of challenging issues. Slumping prices and slowing of demand were driven in Miami by the strong dollar and the drop in the world equity markets turning away foreign buyers and concerns over increased inventory, with as many as 36,000 new condo units in the construction pipeline for Miami-Dade County. So this news that the United States Government had decided to start scrutinizing all cash buyers was met with some disbelief. After all, many of us were still in the midst of working through the new TRID implementation required by the CFPB and the anticipated changes to FIRPTA in February. We were just starting to really looking forward to the next cash residential real estate transaction, and now this!

There were a lot of conversations over those first few weeks between real estate attorneys, developers, and title agents that demonstrated some disbelief, denial, and even anger. What does title insurance have to do with this new regulatory enforcement anyway? What about privacy and attorney-client privilege? We had to learn that the information necessary to comply with a GTO cannot be withheld from the government based upon a claim of privilege. Why us? Why only here in Miami-Dade and Manhattan? And why now? Why exclude personal and business checks and wires from the GTO? It seems that we are going to have more work and potential liability but we aren't even going to catch the bad guys! Those that demonstrated the acceptance phase were doing so with a collective shrug rather than hope. "The GTO is going to have very little impact on us because we only accept wires."

But the bottom line is that none of us should have been surprised. Did you know that the Currency and Foreign Transactions Reporting Act of 1970, frequently referred to as the Bank Secrecy Act (BSA), includes "persons involved in real estate closings and settlements" within the definition of a financial agency which is subject to the reporting requirements? Or that FinCEN was created in 1990 as a Bureau within the US Treasury Department charged with collecting and analyzing financial transaction information in support of federal, state, local and international enforcement of anti-money laundering (AML) laws?

FinCEN's role was fundamentally changed after the attacks of 9/11, with the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" (USA Patriot Act). [And you thought the title industry loved its acronyms.] It was at this time that we realized that AML was not just about drugs, fraud and crime, but also about terrorism, national defense and security. Congress gave a clear mandate through Title III of the Patriot Act to deter the ability of international criminals and terrorists to fund their activities with money laundered through banks and other assets such as real estate. But because this was such a large undertaking, the Treasury Department provided a "temporary exemption" from Title III to "persons involved in real estate closings and settlements."



The Treasury Department has been studying what AML program requirements might be imposed upon our industry ever since. Did you know that imposing AML requirements upon attorneys and real estate closing and settlement agents has been the international standard for some time? This makes sense because cash is the dominant method of purchasing real estate in most foreign jurisdictions. But in the United States (thanks in no small part to the benefits of our Title Insurance Industry), Seventy-eight percent (78%) of property transactions involve a mortgage. This unique aspect of American real estate allowed FinCEN to first direct its regulatory focus toward bank financing to address its Congressional mandate.

But with these GTOs, FinCEN is signaling that it is now ready to direct its attention once again to “persons involved in real estate closings and settlements.” Consider this statement from the FinCEN January 13, 2016, Press Release:

With these GTOs, FinCEN is proceeding with its risk-based approach to combating money laundering in the real estate sector. Having prioritized anti-money laundering protections on real estate transactions involving lending, FinCEN’s remaining concern is with the money laundering vulnerabilities associated with all-cash real estate transactions. This includes transactions in which individuals use shell companies to purchase high-value residential real estate, primarily in certain large U.S. cities.

“We are seeking to understand the risk that corrupt foreign officials, or transnational criminals, may be using premium U.S. real estate to secretly invest millions in dirty money,” said FinCEN Director Jennifer Shasky Calvery. “Over the years, our rules have evolved to make the standard mortgage market more transparent and less hospitable to fraud and money laundering. But cash purchases present a more complex gap that we seek to address. These GTOs will produce valuable data that will assist law enforcement and inform our broader efforts to combat money laundering in the real estate sector.”

In other words, these GTOs are a pilot program - an information collecting tool that FinCEN hopes will inform what regulatory AML program requirements should be placed upon our industry and come next. There are influential people arguing that real estate closing and settlement agents should be covered with regulatory AML program requirements whether the transaction involves institutional financing or not. For those of you that have only shrugged acceptance because the GTO doesn’t include wires or checks, or institutional financing, do you still believe that nothing more will happen?

## Agent Section Lobby Fund

**The Florida Land Title Association is unique in retaining a political consulting firm in Tallahassee specifically to advise and represent the Agents Section. The cost of these professionals is paid from voluntary contributions to the Agent Section Lobby Fund. Please donate to support your industry by mailing a check to:**

**FLTA  
249 East Virginia Street  
Tallahassee, FL 32301**

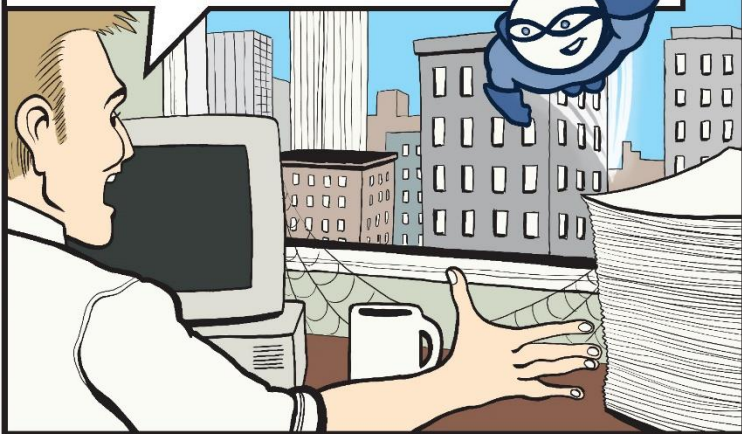
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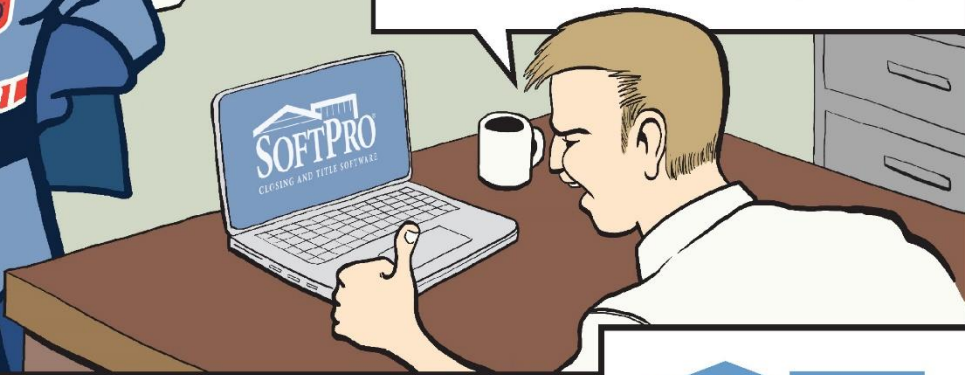
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The FLTA Membership Committee is embarking on a statewide effort to educate non-members on the benefits of being part of the state's only trade association supporting the title insurance industry AND we're endeavoring to maintain existing membership with outreach from our board members and other industry leaders.

Our plans for 2016 include connecting with title agents around the state through a reinvigorated social media presence, good old-fashioned phone calls, regional educational presentations and underwriter outreach. It is our responsibility to provide the latest information regarding the data call, Unlawful Inducement, the Estoppel Bill and potential new legislation to agents and underwriters throughout the state so they can make informed

decisions.

You can help by

- 1) Like the Facebook page <https://www.facebook.com/flta.org>, and follow us on LinkedIn. Plus look for our Twitter and Instagram feeds coming soon.
- 2) Tell one of your non-member friends about the benefits of joining FLTA and supporting the only organization in Florida that represents the interests of title agents and underwriters
- 3) Participate in the Agents Section conference calls

Help us promote the fact that you are a member of FLTA. Send us pictures of your events and we'll post them on our Facebook page. Send us stories of how title insurance has truly protected the investment of a Florida for us to use in our blog. And join us on our next FLTA Membership Committee Conference call to find out the next steps toward making sure everyone knows Florida Runs on Title Insurance!

If you would like to get involved in the Membership Committee and help share the benefits of FLTA, please contact Lisa Blythe at [lblythe@stitle.com](mailto:lblythe@stitle.com) or 386-316-3141.

**FLTA IS THE VOICE OF TITLE  
INSURANCE IN FLORIDA, AND YOU ARE  
FLTA.**

**THANK YOU FOR BEING A MEMBER!!!!!!**

# Welcome New Members! We're so glad to have you with us!

**Agent Title Services LLC**

Rhonda Konley  
Cape Coral, FL

**Amerifirst Title Services Corp.**

Eva Mishkoff  
Miami, FL

**Berlin Patten Eblin, PLLC**

Vicki Klavins  
Sarasota, FL

**Bogin, Munns & Munns, P.A.**

Jennifer Hilgert  
Orlando, FL

**Carefree Title Agency**

Jill Kayser  
Scottsdale, AZ

**Community Champions**

David Mulberry  
Melbourne, FL

**Devine Goodman Rasco & Watts****– FitzGerald, LLP**

Lane Atkins  
Coral Gables, FL

**Diamond Title Agency Inc.**

Ashley Diamond Stacy  
Panama City Beach, FL

**First National Title Insurance  
Company**

DJ Horn  
Plano, TX

**Flamingo Title Services, Inc.**

Marcia Garcia  
Miami, FL

**Greenspoon Marder**

Chad Tamaroff  
Ft. Lauderdale, FL

**Guaranteed Florida Title, Inc.**

Myron Siegel  
Hallandale Beach, FL

**Insured Title Agency, LLC**

Amanda Hunter  
Tampa, FL

**Investors Title Insurance  
Company**

Mike Aiken  
Chapel Hill, NC

**Land Title Services**

Joanne Asztalos  
Mt. Laurel, NJ

**Miller Johnson Law, P.L.**

Gary Miller  
Orlando, FL

**NextDeal/1 Tract**

Robert Reich  
Orlando, FL

**Pennington, P.A.**

Susan Spurgeon  
Tampa, FL

**Premier Title**

Desiree Sanchez  
Orlando, FL

**Realty Title Solutions LLP**

Crystal Reyes  
Cape Coral, FL

**Seminole Title Company**

Angela Durham  
Seminole, FL

**Sonshine Title Services, Inc.**

Cathy Skelly  
Starke, FL

**Tax Title Services, Inc.**

Ryan Meredith  
Newport Beach, CA

**Thomas Flanagan**

Ed Claffy  
Chicago, IL

**Title Insurance Agency**

Judy Otano  
Port Saint Lucie, FL

**Wood & Smith, P.A.**

Amanda Smith  
Fernandina Beach, FL

## Title Industry of Florida - PC

**Help your voice be heard in  
Tallahassee by donating today!**





FLTA's 2016 has been wild already, and it's only March!

Let's start with January. The 2016 Legislative Session's opening day was January 12<sup>th</sup>, and it closed down a few weeks ago. Session was filled with all the usual anticipation and excitement. Consumers and the title insurance industry scored wins in passing legislation relating to insurer reserves, but struck out when estoppel legislation did not pass. Good thing the 2017 Legislative Session will be here before you know it!

Our regulators were also active. The new Unlawful Inducement rule went into effect February 9<sup>th</sup>, and thereafter DFS issued two letters intended to clarify the rule. In the letters, DFS Division of Agent and Agency Services Director Gregory M. Thomas explained that the Department believes that the rule provides that agents who pay for an estoppel certificate without being reimbursed violate Unlawful Inducement and Unlawful

Rebates rules. In order to amend the rule to clarify its intent and scope, DFS has started the rule making process, and is holding a rule development workshop in Tallahassee on April 7<sup>th</sup>. FLTA committees have been working to provide guidance and information to our regulators, and FLTA members will be in the workshop. We will keep you informed.

Hopefully you have enjoyed our increasingly popular webinars, such as the Unlawful Inducement webinar, presented by DFS' own Matthew Guy on February 9, the day the rule went into effect. We have received great feedback about the Powers of Attorney, Ethics, TRID and MRTA webinars as well. Going forward, we'll present webinars approximately every other month. Our next webinar will be in May, presented by FLTA Insurer Section chair Karla Staker and vice chair Kevin Thomas, covering Sovereignty Lands, and July's webinar will likely cover 1031 Exchanges. Stay tuned for the rest!

If you miss those webinars, you can earn up to 5 hours of CE/CLE credit, have a TON of fun, learn about hot title insurance topics, mingle with your friends and live it up in beautiful St. Augustine as you attend this year's FLTA annual convention November 9, 10 and 11. You can "Perfect Your Title Game," and your golf game, as you enjoy the afternoon air and some cool drinks in the golf tournament. For those who would rather learn about St Augustine's history and architecture, try a trolley tour. Also, if you are in St. Augustine November 8<sup>th</sup>, plan on joining me for a casual election night get-together.

We are lining up convention speakers and filling the agenda. If you would like to get involved in this year's convention, a little or a lot, please let me know. Our convention committee is looking for you! If you would like your name (almost) in lights, please contact me at [alex@flta.org](mailto:alex@flta.org) to learn about sponsorship opportunities.

Speaking of committees.... Use your marketing and people skills to expand FLTA's footprint in Tallahassee, the business community and your neighborhood, by joining our membership committee. You can learn more by reading Membership Committee Chair Lisa Blythe's article in this newsletter.

Maybe you love helping people learn. If so, join the Education Committee. We are updating the Basic Title Insurance Handbook, and investigating producing local seminars and other meetings. We need your expertise!

You can read about all our committees by clicking [HERE](#).

FLTA works because our members are involved. Thank you for being a part of this association, and helping Florida's title insurance industry constantly adapt and stay relevant, even as increasing amounts of information must be analyzed and acted upon in what often seems like decreasing amounts of time. Florida really does Run on Title Insurance, and FLTA members and FLTA are the energy, heart and soul of that machine.



## Unlawful Inducement – To Be or Not to Be?

On February 5<sup>th</sup>, the Department of Financial Services issued a letter to the sponsor of estoppel bill HB203, Representative John Wood. The letter, written by DFS Insurance Agent and Agency Services Division Director Greg Thomas, issued DFS' interpretation of subparagraph 626.9541(1)(h)(3), Florida Statutes, and subsection 69B-186.010(4)(a), Florida Administrative Code, stating that "the advanced payment by a title insurance agent and/or agency for an estoppel certificate out of the funds of the agent would be an inducement to title insurance and therefore a violation of the Florida Insurance Code." Offering "an abundance of clarity to the Florida Legislature and the real estate industry," Director Thomas wrote that such advanced payment would be an "unlawful inducement," and that DFS anticipates beginning rule making proceedings to amend the rule to specifically include the advanced payment of estoppel certificates. The letter sent shockwaves through the title industry and immediately generated an outcry of opinions on the issue of estoppel certificates and unlawful inducement.

In response to the "significant amount of discussion" that followed the first letter, Director Thomas issued a second letter on February 11<sup>th</sup>, stating that while DFS believes the information provided in the initial letter was correct, it was "incomplete." Director Thomas wrote that while the "beginning paragraph of the letter properly addressed inducements [it] should have continued to place them in the context of 'Unlawful Rebates.'" Stating that the Department believes it is a violation of Florida Administrative Code for an agent and/or agency to pay for an estoppel without reimbursement for the expenditure, Director Thomas added that if an agent and/or agency pays for an estoppel and the agent or agency is reimbursed at closing, such advancement "does not constitute an unlawful rebate." As indicated in both letters, on February 22<sup>nd</sup>, DFS filed a Notice of Development of Rulemaking to Rule 69B-186.010. In the notice, DFS said that "the purpose of the intended rulemaking is to amend the rule to conform it to statutory language regarding unfair methods of competition and deceptive practices in the transaction of title insurance. The Department also intends to develop new language regarding the payment of fees and the rebate or the reimbursement of such fees in connection with such transactions." To begin this process, DFS has scheduled a rule development workshop in Tallahassee on April 7<sup>th</sup>, 2016.

Recognizing the significance of DFS' stance on the issue and seeing an opportunity to positively influence the course of estoppel and unlawful inducement, FLTA immediately established a working group to address industry concerns, provide DFS with information and to offer technical assistance. In order to have a clear understanding of the perspective of their membership and to advocate successfully on their behalf, the group decided to solicit direct feedback in the form of a concise opinion survey. The eight question survey was sent to all agent members.

Response was immediate and far reaching, and covered real property transactions in every county in Florida. When asked for a breakdown of the various procedures used by an agent or agency to pay the cost of a needed estoppel certificate and whether or not they seek reimbursement, respondents said that 36.5% of their transactions involved advancing the fee, getting reimbursed at closing and seeking reimbursement if the closing did not occur. 27% of transactions involved advancing the fee, getting reimbursed at closing but not seeking reimbursement if the closing did not occur. 21.5% of the transactions required the seller to provide funds or a credit card before the estoppel certificate is ordered, with 14% of the transactions requiring the seller to order and pay for the estoppel certificate in advance of the closing. Only 1% of transactions involved the advancement of the fee with no intention of seeking reimbursement at closing or otherwise.

Respondents were asked to estimate the average dollar amount their agency had outstanding in advanced fees. The majority of agencies reported an average between \$1,000 and \$5,000 in outstanding fees. Several agencies

reported having less than \$1,000 outstanding at any one time with several more reporting a zero liability, stating that they simply no longer advance the fees. A few agencies reported having more than \$5,000 in outstanding fees. On the far end of the spectrum, four agencies reported having more than \$50,000 in fees with the highest outstanding amount at \$300,000, though it was noted that these fees were advanced through a vendor.

Notably, of those who sought reimbursement from a CAM or HOA on a cancelled transaction, fewer than half were successful, explaining that most of their requests for reimbursement were either denied or ignored.

Finally, respondents were given the opportunity to add comments and suggestions. Almost all who responded noted that, regardless of who covers the cost of the estoppel certificates, the fees and associated add-on fees, “rush” charges, plus the new fees (such as “foreclosure monitoring fee” for a property that was current) etc., that are charged are “ridiculous”, “a rip off” and “have gotten out of hand”. Many called for caps on the amounts that can be charged for providing the information while several others called for regulations specifically prohibiting the collection of the fees in advance all together. As Chairwoman Passidomo stated in committee during Legislative Session, many recalled that estoppel certificates were once provided at NO cost.

The overwhelming majority of respondents suggested that “pay at close” is the most equitable solution, as the association will collect the fees as it maintains a lien on the property, whereas the title agent has little recourse, should the transaction fail to close. A few felt that advancing fees with a signed agreement requiring reimbursement for the certificate would be an acceptable solution. One or two respondents felt that any regulation of estoppel fees was tantamount to dictating business practices, stating that an agent advancing the fee was simply a “calculated risk and cost of doing business.”

Interestingly, as to the potential regulation of estoppel fees, results were basically evenly split, with approximately half in favor of regulation and the other half preferring no restrictions at all. Clearly discernable from the results you provided in responding to the survey are the significant impacts of this issue throughout the industry. Using your survey responses, the FLTA working group held conference calls designed to outline FLTA’s position and set the direction for moving forward.

Several FLTA members will attend the DFS workshop on April 7<sup>th</sup> to ensure that DFS has a clear understanding of actual current practices occurring in the market place, and the ways consumers will be adversely affected by an across the board prohibition of advance payment of estoppel certificate fees. FLTA will present suggested language to DFS for the purpose of rulemaking.

Thank you to all who responded to the survey. Your voice counts, and helps FLTA assist our regulators and legislators by providing information they need to protect Florida home owners, and to maintain Florida’s vital real estate industry as the backbone of our economy.

As always, with your help, FLTA will continue to advocate for the title industry.

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**Do you have questions about Unlawful Inducements and recently issued DFS letters? Click [HERE](#) to view our Unlawful Inducement Q and A page, which will be updated periodically, and send your questions to [desiree@flta.org](mailto:desiree@flta.org).**

**FLTA members will attend the DFS Unlawful Inducement Workshop in Tallahassee on April 7<sup>th</sup>, and, as always, we’ll keep you posted.**



## Top 10 Questions About FIRPTA

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Title



### 1. WHAT IS FIRPTA?

United States tax law requires that all persons, whether foreign or domestic, pay income tax on the disposition of U.S. real property interests. Domestic persons or entities typically are subject to this tax as part of their regular income tax; however, the U.S. needed a way to collect taxes from *foreign* persons on the sale of U.S. real property interests. The Foreign Investor in Real Property Act (“FIRPTA”) was enacted to provide such a mechanism and requires that a buyer withhold and remit to the IRS a certain percentage of the sales price in anticipation of the taxes that will be due from the foreign seller on such transaction.<sup>1</sup> FIRPTA applies in nearly all transactions, residential and commercial, in which a foreign owner of a U.S. real property interest sells such interest. The amount withheld is not the tax itself, but is payment on account of the taxes that ultimately will be due from the seller.

### 2. WHAT ARE THE WITHHOLDING REQUIREMENTS?

Unless an exemption or reduced rate applies, FIRPTA requires that the *buyer* withhold fifteen percent (15%) of the sales price in all transactions in which the seller of a U.S. real property interest is a “Foreign Person.”

### 3. WHO IS A “FOREIGN PERSON”?

FIRPTA defines a “Foreign Person” by defining who is *not* a Foreign Person, so it is important to understand the following definitions:

- a. A “Foreign Person” is defined as any person other than a “United States Person.”
- b. A “United States Person” is any of the following: (i) a U.S. Citizen; (ii) a resident alien who has a Green Card; (iii) a resident alien who meets the Substantial Presence Test; (iv) a domestic (U.S.) corporation, partnership or other legal entity (except a “Disregarded Entity” as defined by IRS Regulations), trustee or other fiduciary; (v) a Disregarded Entity, the owner of which qualifies as a “United States Person” under (i), (ii), (iii), or (iv), above; or (vi) a foreign entity which has elected to be treated as a domestic corporation (as evidenced by acknowledgement copy of election furnished by IRS).
- c. The Substantial Presence Test: Under FIRPTA, a Foreign Person is considered a U.S. Person for the calendar year of sale if they are present in the United States for at least:
  - i. 31 days during year of sale AND
  - ii. 183 days during the 3 year period that includes year of sale and the 2 years preceding year of sale, but only counting:
    - a. All days during year of sale;
    - b. 1/3rd of the days during the first preceding year; and
    - c. 1/6th of days during the second preceding year.

When counting days, you may not include the days that a Foreign Person is present in the U.S. as a representative of a foreign government (e.g. foreign diplomat), as a teacher or student under a “J”, “Q”, “F” or “M” Visa, or as a professional athlete in a charitable sports event.



- d. A “Disregarded Entity” is any single-owner domestic business entity (such as a single-member limited liability company) other than a corporation, unless it has elected to be treated as a domestic association for tax purposes.

#### 4. WHAT IF THE SELLER IS A DOMESTIC LLC?

*Single-Member LLC:* A single-member domestic limited liability company, while a recognized legal entity, is considered a “Disregarded Entity” for tax purposes. Accordingly, if the seller is a single-member limited liability company, then you have to look to the identity of the sole member of the limited liability company. If the sole member is a “Foreign Person,” then the FIRPTA withholding rules apply in the same manner as if the foreign sole member was the seller.

*Multi-Member LLC:* A domestic limited liability company with more than one owner is not considered a “Disregarded Entity” and is taxed differently than single-member limited liability companies. Accordingly, the FIRPTA rules regarding withholding do not apply to multi-member domestic limited liability companies.

#### 5. WHAT ARE SOME EXCEPTIONS TO THE WITHHOLDING REQUIREMENTS?

While there are several exceptions to FIRPTA withholding requirements that eliminate or reduce the required withholding, the most common exceptions are discussed below.

- a. Seller not a “Foreign Person.” One of the most common and clear exceptions under FIRPTA is when the seller is not a Foreign Person. In this case, the seller must provide the buyer with an affidavit that certifies the seller is not a Foreign Person and provides the seller’s name, U.S. social security number or taxpayer identification number (“TIN”), and address.
- b. Personal Residence Exemption. Under the Personal Residence Exemption, no withholding is due when (1) the buyer is acquiring property that will be used as the buyer’s residence, (2) the sales price is \$300,000 or less, and (3) the buyer elects to waive withholding. See additional requirements set forth, below, under “Reduced Rate of Withholding.”
- c. Reduced Rate of Withholding: This new exception, which goes into February 16, 2016, is similar to the Personal Residence Exemption, but provides for a reduced rate instead of a full exemption.<sup>ii</sup> Under this exception, a reduced withholding equal to ten percent (10%) of the sales price is due when (1) the buyer is acquiring property that will be used as the buyer’s residence, (2) the sales price is more than \$300,000 but not more than \$1,000,000, and (3) the buyer elects to waive withholding.

In order to qualify for, either, the Personal Residence Exemption or the Reduced Rate of Withholding, the buyer or a member of the buyer’s family must have definite plans to reside at the property for at least 50% of the number of days the property is occupied by any person during each of the two 12-month periods following the date of closing. If the buyer fails to meet the occupancy requirements, the buyer may become liable to the IRS for the difference between the amount that was actually withheld, if any, and the amount that should have been withheld, plus interest and penalties. Under this exception, **the buyer is not required to make this election, even if the facts may support the exemption or reduced rate** and the settlement agent should advise the buyer that, neither, the exemption nor the reduced rate automatically applies. Instead, if the buyer opts to invoke the exemption or the reduced rate, the buyer must make an affirmative election to do so. This election should be in the form of an affidavit from the buyer setting forth the buyer’s decision and, if applicable, the facts that entitle the buyer to the exemption or reduced rate.

- d. Seller Obtains Withholding Certificate. In some cases, the seller has applied for and received a withholding certificate from the IRS that reduces or eliminates the withholding requirement. A buyer relying on this exception must obtain a copy of the Withholding Certificate and retain a copy in buyer’s records for five (5) years.

- e. Foreign Corporation or Single-Member LLC has “checked the box.” There is an exception for foreign corporations or single-member limited liability companies that are subject to FIRPTA withholding that have “checked the box” on the applicable IRS form to be taxed as a domestic corporation. Domestic corporations are not subject to the withholding rules under FIRPTA, so withholding will not be required in cases where entities otherwise subject to withholding have elected to be taxed as a domestic corporation. Importantly, to take advantage of this exemption from withholding, the entity must file Form 8832 with the IRS, obtain IRS approval, and provide evidence of this status to the buyer. The buyer will need to retain a copy of this approval in buyer’s records for five (5) years.

## 6. ARE TINs REQUIRED FOR ALL PARTIES?

IRS regulations require all buyers and foreign sellers of U.S. real property interests to provide their TINs, names, and addresses on withholding tax returns, applications for withholding certificates, notice of non-recognition, and other related IRS documents when disposing of a U.S. real property interest. While it is best practice to have the TINs for all parties at the time of closing, it is possible to close without the TINs under the following guidelines:

1. If the buyer does not have a TIN, the buyer must remit the proper withholding forms within 20 days after closing; however, the buyer will also need to remit, *to a separate address in a separate package*, a properly completed application (Form W-7) for a TIN simultaneously with remitting the withholding forms. Please refer to the instructions for each form for further instructions and mailing addresses.
2. If the seller does not have a TIN, the buyer must remit the proper withholding forms within 20 days after closing, but the seller’s TIN information will be left blank. While the TIN is not necessary for closing, it should be noted that the seller will have to obtain a TIN in order for the IRS to process the funds and, in fact, upon receipt of the withholding documentation, the IRS will follow up with the seller instructing the seller to apply for a TIN. For this reason, many settlement agents provide the friendly advice that the seller submit its separate application for a TIN by the time of closing.

Additional information can be found in the IRS publication entitled “ITIN Guidance for Foreign Property Buyers/Sellers,” which is available at [www.irs.gov](http://www.irs.gov).

## 7. WHAT IF THIS IS A SHORT SALE OR THERE ARE OTHERWISE INSUFFICIENT PROCEEDS FOR WITHHOLDING?

There are times, such as short sales, when the proceeds from the sale are insufficient for withholding under FIRPTA. However, FIRPTA withholding requirements are based on the sales price, not the seller’s proceeds, so **there is no automatic exemption for transactions in which the seller is receiving zero or insufficient proceeds**. In these cases, the seller will need to apply for an exemption or reduced withholding from the IRS. As with applying for a TIN, this process can take some time, so it is imperative that the settlement agent raise these issues with the foreign seller as early as possible in the process.

## 8. WHAT IF LESS THAN ALL SELLERS ARE “FOREIGN PERSONS”?

The analysis of whether the buyer must withhold funds under FIRPTA must be undertaken with respect to each seller separately, even if the seller is a married couple. Generally, withholding is required for each Foreign Person based on such person’s percentage of ownership. For example, if there are four joint owners, each owning a 25% interest, and one of the sellers is a Foreign Person, then the buyer is required to withhold only 25% of the required withholding. If the seller owns the real property interest as a married couple, the IRS deems each spouse to own 50%. In this case, if only one spouse is a Foreign Person, then withholding only as to such spouse’s one-half interest is required.

## 9. WHO IS RESPONSIBLE FOR COMPLYING WITH FIRPTA?

While the seller is the party subjected to the tax, it is up to the *buyer* to withhold the appropriate percentage of the sales price when purchasing U.S. real property from a “Foreign Person.” In the event the buyer does not properly withhold, the buyer may be liable to the IRS in an amount equal to the amount of taxes that should have been withheld, plus interest and penalties.

While the buyer has the ultimate liability to the IRS, the collection and disbursement of funds to the IRS as part of the closing process creates a responsibility and potential liability for the settlement agent if the matter is not properly handled and documented. Accordingly, it is important that your file reflect specific written direction from the buyer if anything other than fifteen 15% is being withheld. For example, if a buyer elects to waive the withholding or withhold a reduced rate, settlement agents should obtain an affidavit from the buyer setting forth the buyer's decision and, if applicable, the facts that entitle the buyer to the exemption or reduced rate along with an acknowledgement that the buyer has been given the opportunity to obtain independent tax or legal advice.

## 10. HOW IS THE WITHHOLDING SUBMITTED AND REPORTED?

Generally, the funds withheld must be forwarded, together with IRS Forms 8288 and 8288-A, to the IRS within 20 days after the closing date. However, if an application for a withholding certificate is submitted to the IRS before the date of a sale and the application is still pending with the IRS on the closing date, the correct withholding tax must be withheld, but does not have to be reported and paid immediately. The amount withheld (or lesser amount as determined by the IRS) must be reported and paid within 20 days following the day on which a copy of the withholding certificate or notice of denial is mailed by the IRS.

### MORE QUESTIONS?

If you have any further questions about FIRPTA withholding, please feel free to contact a First American underwriter; however, please understand that First American cannot provide *legal* advice to any party regarding FIRPTA. This article is intended as informational only and should any party need legal advice, the settlement agent should advise such party to engage legal counsel.

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<sup>i</sup> FIRPTA uses the phrase "amount realized," which *typically* is the sales price; however, if you or any of the parties involved have any questions, the buyer should consult with legal counsel of buyer's choosing to ensure that the proper figure is being used when calculating the withholding amount.

<sup>ii</sup> This amount recently was increased from 10%. According to the strict reading of the effective date for recent amendments to FIRPTA, the fifteen percent (15%) withholding applies to transactions in which the closing, or disposition of real property, occurs on or after February 17, 2016; however, it has come to our attention that the IRS may be interpreting the language to mean that February 16, 2016, is the effective date. While this is ultimately up to the buyer to decide, we recommend using the date that the IRS will be using.

***Florida Runs On Title Insurance<sup>sm</sup>***

