

BUYING REAL PROPERTY IN THE UNITED STATES

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There may be many reasons for buying real property in the United States. These reasons could include having a winter home (for those living in the southern hemisphere), establishing a profit center for rents, using the purchase for tax purposes in one's home country, perhaps a lifestyle choice (including retirement) or even a political or cultural choice. In many cases, foreign nationals wish the home purchase to be the first step in immigrating to the United States. Whatever the reason, even savvy individuals will require local support in the United States to consummate a real property transaction there. We can help with those transactions, especially higher value transactions in Florida, Maryland, Oregon, and the District of Columbia (Washington, D.C.).

Contrary to many other countries that disallow non-citizens (or permanent residents) from purchasing property, the U.S. government does not place any such restriction.¹ It should then not come as a surprise that there are many entities, typically professional investors, and individuals that have and continue to procure real property in the United States, especially in major centers such as Miami (Florida), New York (New York), Los Angeles (California), and in the last few years, Portland, Oregon (and other areas in the Pacific Northwest ("*PNW*").² This article provides a non-exhaustive overview for non-Americans purchasing real property in the United States.

As is typical with the purchase of real property in other countries, including Brazil, in the United States, neither independent legal advisors nor realtors/agencies are required to complete a transaction. However, one or both may provide invaluable advice, which is especially true to a buyer purchasing property in a foreign land governed by various county, state, and federal laws. Additionally, contrary to other countries, like Brazil, that use certain specialized individuals in helping to first identify a particular property, i.e., brokers (*Procuradores*), in the United States, realtors, who must be licensed by the relevant state, and others typically fulfill this role. What

¹ Rather, these restrictions come from land or housing associations that govern, for example, a real property, a building, or a neighborhood. In order to enforce its rules against absentee owners, some states do allow certain restrictions. However, in practice, these restrictions are typically rare. For the typical high- or higher-value client, these restrictions are typically not applicable since such a client would not be purchasing in a housing cooperative, where foreign ownership is not allowed since they typically require U.S. sources for income and the majority of assets.

² According to the National Association of Realtors, approximately twenty-five percent (25%) of foreign home buyers in the U.S. purchase property in Florida (followed by California). However, this practitioner has noticed recently tremendous deal flow in and around Portland, Oregon.

can be quite useful is when all of the services previous listed can be bundled with one entity along with legal services (such as the Newman Law Offices and its agents).

Thus, an important consideration in conducting any transaction is having competent and trusted professionals guide you or even conduct the transaction by proxy. These trusted professionals may receive power of attorney from a prospective buyer that would make it unnecessary for the buyer to have to physically come to the United States. Aside from helping prospective buyers with other tasks, sometimes including assessing currency risks, these trusted professionals can review, for example, the lengthy sales contract,³ seller-disclosures, and provide advice on structuring title. Like anything else, investing in appropriate advisors as part of a total transaction necessarily reduces overall risk.⁴

Below are some other factors a prospective buyer should consider:

Treaties. It is incumbent for a foreign national to be aware of any treaty between the United States and other countries that may favorably affect a U.S.-based real property transaction.⁵ These treaties can help with eliminating an original document requirement (for obtaining ITINs) to decreasing or eliminating estate taxes, for example.

Title. Simply put, structuring title in a U.S. real property transaction has everything to do with various taxes and minimizing, if not eliminating them, through thoughtful guidance.⁶

U.S. Based-Mortgages. Contrary to other countries, for example, Brazil, foreign nationals can obtain a U.S.-based mortgage. Though the requirements may vary by lender, typically, a buyer will need to have a sizeable down-payment of roughly thirty to fifty percent (30-50%) at the time

³ Unlike other countries, for example, Brazil, which produce the formal contracts in both Portuguese and English, in the United States, the contract only is formally produced in English. Thus, even if translations are obtained, only the English version gets executed and controls the legalities of the transaction.

⁴ These advisors can also provide continuing advice after purchase. For example, the possible use of a qualified domestic trust (“*QDOT*”), which is not created at the time of purchase but rather post-purchase as part of comprehensive estate planning, can be explored to defer estate taxes that a surviving foreign national spouse would incur upon the death of the first spouse.

⁵ As of this writing, like other South American countries, Brazil does not have a treaty with the U.S. that fosters real property transactions, or, conversely stated, that helps Brazilians. Rather, the two countries have signed two agreements: 1) the Tax Information Exchange Agreement (“*TIEA*”), which allows at least government-to-government exchanges of information; and 2) the Intergovernmental Agreement (“*IGA*”), which supplements the TIEA and helps to implement the landmark U.S. legislation, the Foreign Account Tax Compliance Act (“*FATCA*”). Prior to the IGA, Brazilian financial institutions could not disclose information of a U.S. citizen to a foreign tax authority. Now, those institutions can, and Brazilian tax authorities can similarly obtain information on its citizens from U.S. institutions.

⁶ Some of these taxes may include gift taxes, estate taxes, and income taxes (capital gains, withholding, branch profits tax, etc.).

of the loan. Such a high percentage reduces risk, which is the reason that many U.S.-based loans for foreign nationals carry higher interest rates.⁷

Visa Eligibility. Currently, the act of purchasing real estate in the United States does not, in itself, afford an(y) *individual(s)* eligibility for a different type of visa or a change in stay.^{8,9} Thus, prospective buyers should factor the current 90-day limit, which can be extended to no more than 180 days, on annual-calendar stays in Brazil as a function of a ten-year tourist visa (that initially must be obtained at least 45 days prior to visiting Brazil). However, Brazilian investor visas may be obtained via a registered entity. Then, the registered company will then register any investment on behalf of the company that will then be the legal party in interest.

Identity Disclosure. For those individuals who are looking to keep their property interests discreet, entity ownership may be useful for non-disclosure to the general public. Similar to other countries, including Brazil, real property ownership information is public. In the case of all cash purchases employing extra-territorial U.S. companies, i.e., those not based in the U.S., that situation may require that the buyer's identity¹⁰ get disclosed by title insurance firms. A program initially beginning with purchases in Miami-Dade (Florida) and New York (New York) that was to have ended in August, 2016, this temporary program yielded so much information that it was re-instituted and expanded.¹¹ The cash threshold is different for different cities. There are ways to avoid disclosure.¹²

Condominiums. Ownership of condominiums can be fraught with perils: is the relevant association solvent or has it been sued, are there sufficient reserves, and among others, are the

⁷ Other reasonable requirements of the lender may include: at the financial institution, having an account and minimum deposits (in some cases, robust deposits of \$100,000 and more), having loan maximums, and having an in-person meeting with the prospective buyer, who may also be required to produce contemporaneous banking and other financial information.

⁸ Updating this article, President Trump had signed an executive order barring entry into the United States certain individuals, regardless of any permanent status, from certain countries of Muslim descent. At this time, we reserve thorough comment as to the effect of this ban and whether having other (real) property interests may affect what is already a tenuously written order concerning its constitutionality. However, there have already been multiple legal-challenges and the United States' independent judiciary has already stayed enforcement of this order.

⁹ Fortunately, there are other avenues that afford longer or even permanent stays. One of our partner law firms has a core focus in immigration, and we can help you with those legal services.

¹⁰ Actually, the disclosure requirements are more robust: any person connected to an all cash transaction must get reported to the government.

¹¹ Though there are so many unknowns about what regulations will remain under President Trump's new administration, this author believes these regulations will get extended at least one more time after February 23, 2017. However, President Trump also signed another executive order requiring two regulations to be eliminated for every new one. At this time, it is simply unknown how such an executive order will get applied, if it even does.

¹² The buyer in the all cash purchase can simply incur the risk of bad title by foregoing title insurance, conduct that would preclude any reporting since, at this time, only title insurance firms are required to report. Also, a real loop-hole is that using wire-transfers may avoid disclosure even if using a title insurance company. Of course, a buyer could purchase in a non-targeted geographic area. This area of law is in rapid flux, and the information on this topic may go stale fairly quickly.

number of units sufficiently small to introduce greater risk? This practitioner has litigated high-value condominiums, and reviewing the appropriate condominium documents is not simply a *pro forma* task to be taken lightly, but an exercise in risk analysis.

Potential Taxes and Fees. There are a number of taxes or fees that may or must get paid as a result of the purchase (or sale) of real property in the United States.

- **Agent Fees.** These include the fees associated with hiring a lawyer, a realtor, and/or a financial institution. Similar to many other countries, including Brazil, the seller pays his agent, who in turn pays the buyer's realtor agent, typically a split of 6% (though the split may not always be even). However, if legal services are required by and for the buyer, attorneys fees are typically paid by the buyer.
- **Title Search and Insurance Fees.** All lenders require a title search to ensure a seller may transfer title free of defect. All cash buyers may avoid these fees, but generally, such is almost never advised.
- **Pre-Purchase Government Taxes and Fees.**
 - **Recording Tax.** Depending on the jurisdiction, this tax is applied as a function of the purchase price, the mortgage, or both.
 - **Mansion Tax.** Depending on the locale and the real property, this tax may apply.
 - **Transfer Tax.** This tax is typically paid by the seller of a condominium; however, in new construction, the developer or builder usually tries to roll this into the price.
 - **Home-country Tax.** Due to, among others, various treaties, the buyer might need to pay a tax in his home country.
- **Post-Purchase Government Taxes and Fees.**
 - **Property Taxes.** These taxes attach to the property and not to the buyer. Thus, an owner must pay the property taxes or risk losing the property to satisfy any delinquency. However, if the real property is financed, the lender will typically demand that the tax is rolled into the monthly payment, thus ensuring timely payment.
 - **Monthly Maintenance Fees.** If the real property is a condominium, the buyer should factor the monthly maintenance fees. For some very high value real property, these fees can total \$30,000 to \$70,000 annually; for average condominiums, the fees are much lower, but certainly not at the levels as found in other countries, especially Brazil.

- Capital Gains Tax (“CGT”). Unless exempted if reinvesting the profit into other U.S. real property via a 4797 reinvestment, similar to other countries like Brazil, the CGT is calculated by the final selling price less the buying price less, *inter alia*, certain costs incident to the real property and its ownership and depreciation, i.e., net income. This tax will get resolved via the filing of a U.S. tax return¹³ and either a further payment or a refund may be in order. However, with rare exception, the foreign-national seller will automatically have ten percent (10%) of the gross purchase price of the property withheld by the U.S. Internal Revenue Service (IRS).
- Estate Tax (“ET”). Unlike U.S. citizens that enjoy an over \$5 million ET credit, foreign nationals get none (unless a valid treaty exists and even then, the amounts are typically low). This is one reason why structuring title is so important.¹⁴
- Income Tax.¹⁵ State and federal income taxes are mandatory when using the real property for income. Thus, regardless of profit or loss, returns must be filed, conduct incentivized by a thirty percent (30%) penalty on gross income for failure to file.

In the final analysis, there are many reasons for buying real property in the United States and any or many will be personal to the prospective buyer. Whatever the reason, even savvy individuals will require local support to consummate the transaction and nurture confidence in the transaction. We can help with those transactions.

¹³ Prior to filing any return, a foreign national must first apply—a process made more difficult that does not automatically produce a positive result—and obtain an Individual Tax Identification Number (“*ITIN*”).

¹⁴ Depending on the real property and the age of the buyer(s), life insurance can act as a hedge against the harsh ET that a foreign national, including Brazilians (and his or her spouse and heirs) will incur. Regardless, an IRS ET return must always get filed, conduct that will clear title by lifting any potential lien, which hampers future sales.

¹⁵ Non-resident aliens are not taxed on their world-wide income; residents are. One may acquire residency status for tax purposes if one is not very mindful of the number of days in the U.S., i.e., 183 days or more. The formula, which is a function of a three year period, is simple. However, one can always pass the “substantial presence test” if one never exceeds a stay of 121 days in a given year. If failed, one may avoid the test if she can establish a “closer connection” to a foreign country or if a treaty reduces or eliminates income tax exposure. For Brazilians, as no treaty exists, attention to annual days stayed in the U.S. is critical.