

Dear Stewart Partners,

In this week's Mid-Week Update, we are discussing the Foreign Investment in Real Property Tax Act (FIRPTA) and how to navigate it. In addition, we are discussing requirements for the inheritance tax lien in Rhode Island. Last, but definitely not least, we are including a link to register for the November webinar in the series "Stewart Underwriters Talk Title", brought to you by our Massachusetts Underwriters.



**Foreign Investment in Real Property Tax Act (FIRPTA) – It is Not Just an Affidavit** By: David Veleber, Esq. Connecticut Underwriting Counsel

**This is the first part of a two-part article on FIRPTA. The second part will appear in the November 20th edition of the New England Regional Midweek Update.**

FIRPTA is the IRS acronym for the Foreign Investment in Real Property Tax Act, 26 USC Sect. 897. While there are no prohibitions on non-US citizens holding title to real property, when those owners sell, they are subject to the same capital gains taxes as US citizens pay. In order to ensure that any such gains are reported and any tax due is paid, the US Congress legislated a withholding requirement at 26 USC Sec. 1445. The IRS has put regulations in place to implement that withholding requirement.

Why do you need to be concerned about these requirements? If you are the settlement agent in a transaction involving a non-resident seller who is subject to the tax and you fail to withhold the required amount, the buyer may be liable for the payment of any tax, interest and penalties that are due if the seller fails to pay. Even if the seller pays the tax, the buyer may be liable for the interest and penalties for late payment or non-filing. Because this liability does not arise until after the closing, and it is deemed to be a matter known to and assumed by the buyer, there will be no coverage under the owner's title policy.

In any disposition of a US real property interest by a foreign person, the transferee is required to withhold an amount equal to 10 percent or 15 percent of the amount realized from the transferor's proceeds and send it to the IRS along with the proper forms. For transactions after February 16, 2016, the withholding rate increased from 10 percent to 15 percent (with some exceptions). The chart below shows when 10 percent or 15 percent applies.

<b>Amount Realized</b>	<b>Transferee (or relative) intending to use the property as a residence?</b>
\$0-\$300,000	If yes: Exemption available If no: 15% withholding
\$300,001 - \$1,000,000	If yes: 10% withholding If no: 15% withholding
\$1,000,000+	If yes: 15% withholding If no: 15% withholding

The italicized words in the above statement all have defined meanings under the IRS regulations, 26 CFR Sect. 1.1445-1 *et seq.* The below are summaries of the definitions.

1. *"Disposition"* means any transaction that constitutes a transfer of property, including a sale, a distribution to shareholders, partners, members or beneficiaries, or a gift.
2. *"US real property interest"* means any interest in real property located in the United States or the US Virgin Islands (including an interest in a mine, well, or other natural deposit), including the sale or other transfer of an option. This term is further defined in 26 CFR Sect. 1.897-1(c), which should be referred to when dealing with a real estate investment trust (REIT) or a foreign corporation.
3. A *"foreign person"* includes a non-resident, non-US citizen, and non-US corporations (except those that have made an election under section 897(i) of the Internal Revenue Code to be treated as a domestic corporation), partnerships, trusts, estates and limited liability companies. A non-U.S. citizen who has resident status ("green card" or permanent resident status) is not a foreign person for FIRPTA purposes and is considered a lawful US resident. A person who meets the "Substantial Presence" test may also be considered a resident alien for tax purposes. There is a formula to determine that status and there are many exemptions and exceptions.
4. The *"transferee"* is the purchaser or recipient of the interest being transferred and the party which has the burden, under the regulations, to withhold and pay over the required amount.
5. The *"amount realized"* is the sum of: cash paid or to be paid, the fair market value of any other property transferred or to be transferred, and the outstanding amounts of any liabilities assumed by the transferee. Basically, the amount realized is the purchase price or the consideration paid. It is not just the net proceeds. The amount realized is the amount on which the 10 percent or 15 percent must be calculated. If the transfer is a gift and no liabilities are being assumed, the amount realized is zero and no withholding is required.
6. The *"transferor"* is the seller or grantor.

In the second part of this article, which will be published in November, we will discuss submitting funds to the IRS, exceptions to and exemptions from the need to withhold, and withholding certificates for the seller.

FIRPTA should be a consideration in every closing you do. If you represent a buyer, or you are acting as settlement agent, you should obtain a certification of non-foreign status in every instance to protect your client/buyer. If you represent a seller, you should determine early in the process whether they are a foreign person within the meaning of FIRPTA and explore the withholding requirement. Early action will avoid a closing disruption.

Stewart has issued Bulletin SLS2016001 relating to FIRPTA that outlines a buyer's requirements and provides a brief overview of the buyer's obligations and filing responsibilities, which is available on Stewart's Virtual Underwriter and can be viewed by following this link: <https://www.virtualunderwriter.com/en/bulletins/2015-120/sls2016001.html> Further, and for reference, a prior article on FIRPTA was written in the September 27, 2023 edition - [New England Mid Week Update 9-27-23](#)



**The Inheritance Tax Lien in Rhode Island** By: Eileen C. O'Shaughnessy, Esq. Rhode Island Underwriting Counsel

The inheritance tax lien is an automatic lien on real estate located in Rhode Island and is valid for ten years from the date of death pursuant to R.I.G.L. § 44-23-38. The lien applies to all holders of title at the date of their death, except a life tenant who received the property by a grant in a deed as compared to a reservation by the grantor of a life estate.

It is good practice to inquire early on in the closing process as to whether any record owners of the property are deceased, especially if you suspect that you are dealing with a surviving spouse. Client sellers often hold the mistaken belief that if they own the property jointly, such as, as tenants by the entirety or joint tenants, because the decedent's interest in the property automatically passes by rights of survivorship and outside of the probate court process, there is nothing that the surviving spouse/owner(s) need to do. This is not true. Upon the death of a spouse or an unmarried joint tenant, although the decedent's interest automatically passes to the surviving spouse/owner(s), there is, by operation of law, an inheritance tax lien (ITL) that automatically attaches to the property. To eliminate the ITL, the personal representative of the decedent must file an estate tax return with the Rhode Island Division of Taxation (Taxation Division) and obtain a discharge of the ITL covering the property from the Taxation Division. The Taxation Division will record the discharge of the ITL in the land evidence records of the municipality in which the property is situated. Failure to obtain a discharge of the ITL can cause last-minute delays and frustrate the parties in their attempt to get to the closing table.

If the tenancy is either by the entirety (married couple) or joint, title is vested automatically in the survivor and no probate is necessary to transfer ownership. However, the ITL will still need to be released if the death occurred less than ten years prior. See R.I.G.L. § 44-23-38. The survivor should provide a recitation in a deed out of the death of the joint owner to provide the examiner with notice of the missing interest.

The Taxation Division requires the filing of an ITL release upon the death of the settlor(s) of a trust. According to the current administration, the Taxation Division does not distinguish between a revocable or irrevocable trust on this matter. It is the practice in Rhode Island to file inheritance tax lien releases on revocable trusts only.

An ITL is eliminated by a non-judicial foreclosure only if it's a lien that arose subsequent to the recording of the mortgage, and therefore junior. The ITL will be eliminated in a judicial foreclosure provided the Taxation Division is named as a defendant.

Once the discharge of the ITL is recorded, a death certificate need not be recorded, and the discharge serves as proof of death.



## **Massachusetts Underwriters Talk Title Series – next installment: November 6th**

Our Massachusetts underwriters continue their series of educational presentations on title law with their next installment covering the topic of Mass Health Liens. Join us for a discussion of these liens, their impact on title, and recent case law interpreting the impact of these liens on title.

**Wednesday, November 6, 2024 | 11:00 AM - 11:30 AM EST**

To register follow this link: [Register](#)



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