

Dear Stewart Partners,

In this week's update, we are providing you with some Stewart resources we hope you find useful, including information about the ALTA 29 endorsement series for interest rate swap transactions and Part 2 of our two-part series regarding FIRPTA – Foreign Investment in Real Property Tax Act.

We are also including a reminder for Connecticut licensed attorneys about the upcoming CLE filing deadline and some course offerings. In addition, we are providing information on the Corporate Transparency Act, the new federal law that requires an initial filing for businesses by January 1, 2025. Many small businesses, including title agents and law firms will be impacted by these filing requirements. For more information, see our resources below.



ALTA 29 Series: Swap Endorsements By: Katherine F. Fletcher, Esq., Associate Senior Underwriting Counsel

As a result of the constantly evolving interest rate environment, interest rate swap agreements are becoming more popular with lenders and borrowers. Borrowers in a commercial loan setting often use interest rate swap agreements to leverage risk involved with a variable rate transaction. If a borrower obtains a variable rate loan from a lender, the borrower can enter into an interest rate swap agreement with a swap provider (a third party or the same lender) to secure a fixed cost of debt service without obtaining a traditional fixed-rate loan.

If a lender is making a loan to a borrower and entering into an interest rate swap agreement with the borrower, often the lender will require the mortgage to also secure the borrower's obligations under the interest rate swap agreement. The ALTA 29 Endorsement series provides coverage in the form of a swap endorsement ensuring the priority of the mortgage will not change based upon the swap of the interest rate from the fixed to the adjustable or vice versa.

Specifically, the ALTA 29 Interest Rate Swap – Direct Obligation Endorsement provides the insured lender with coverage in the event of the invalidity or unenforceability of the insured mortgage as security for the repayment of the obligations or a lack of priority of the lien of the insured mortgage as security for the repayment of the said obligations. The ALTA 29.1 Interest Rate Swap – Additional Interest Endorsement is similar to ALTA 29 but instead of giving coverage as to the swap obligation, the endorsement provides coverage to the

insured lender if the insured mortgage is invalid, unenforceable, or lacks priority as security for the repayment of the “Additional Interest” at the date of the endorsement. “Additional Interest” means the additional interest calculated pursuant to the formula provided in the loan documents secured by the insured mortgage at date of policy for repayment of the obligations under the interest rate agreement.

The ALTA Endorsement 29.2-06 (Interest Rate Swap Endorsement - Direct Obligation - Defined Amount) is the same as the ALTA 29 except the ALTA 29.2 provides the lender with additional insurance beyond the face amount of the policy. Similarly, the ALTA Endorsement 29.3-06 (Interest Rate Swap Endorsement - Additional Interest - Defined Amount) is the same as the ALTA 29.1 except the ALTA 29.3 provides the lender with additional insurance beyond the face amount of the policy. If the ALTA 29.2 or ALTA 29.3 is being issued, the premium of the loan policy is based on the total of the insured amount of the policy and the additional insurance added by the endorsement.

The ALTA 29 endorsements do contain exclusions from coverage related to interest rate swap agreements entered into after the policy date, creditors' rights, calculations of the swap obligation made by a court and unpaid recording fees or similar taxes.

Stewart considers the ALTA 29 series endorsements to be extra hazardous risks, and the following requirements need to be satisfied prior to issuing:

1. Verify the mortgage expressly secures the swap obligation and complies with applicable state requirements for disclosure of swap obligations, if applicable.
2. For the ALTA 29.2 and ALTA 29.3, verify the mortgage states the additional amount to be secured under the swap agreement, in addition to the loan amount. Insert this value in the Additional Amount of Insurance section of the endorsement.
3. Verify the swap obligation is evidenced by an existing master swap agreement to which lender and borrower are parties (typically called an ISDA Master Agreement).
4. Once the swap is executed, obtain a copy of the confirmation of swap transaction signed by lender (this confirmation confirms the swap transaction concluded).
5. If the date of endorsement is after the date of the policy, add applicable datedown exceptions in Section 3.e of the endorsement.
6. As noted above, if the ALTA 29.2 or ALTA 29.3 is being issued, the premium of the loan policy is the total of the insured amount of the policy and the additional insurance added by the endorsement.
7. Obtain approval of a Stewart underwriting counsel.

To view the issuing guidelines for each endorsement discussed, follow these links to Stewart's Virtual Underwriter:

[Guideline: ALTA Endorsement 29-06 and 29.1-06 \(Interest Rate Swap Endorsement\) \(virtualunderwriter.com\)](#)

[Guideline: ALTA Endorsement 29.2-06 and 29.3-06 \(Interest Rate Swap Endorsements\) \(virtualunderwriter.com\)](#)

Some states may require an additional premium for any of the ALTA 29 series endorsements (please contact your local Stewart underwriting counsel for specific information).

Please note this list is a general guide to refer to when issuing policies that include an ALTA 29 series endorsement; every transaction is different and may require additional information or procedures depending on the circumstances at hand. Your Stewart underwriters are here to help.



Foreign Investment in Real Property Tax Act (FIRPTA) – It is Not Just an Affidavit (PART 2) By: David Veleber, Esq. Connecticut Underwriting Counsel

This is Part 2 of a two-part series on FIRPTA. The first part appeared in the October 16th edition. To read Part 1, please follow this link: ([New England Midweek Update 10-16-24 - Part 1 - Firpta](#))

In the first part, we discussed the basics of FIRPTA and when and how much to withhold in case your seller is a foreign person under the Act. Now, we continue by talking about the actual withholding of the funds and exceptions and exemptions to withholding.

If funds are to be withheld, the amount withheld must be remitted to the IRS along with Form 8288 (U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interest) and Form 8288-A, (Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests). Both of these forms require that the transferee's and transferor's Taxpayer Identification Number (TIN) be provided. In the case of a foreign person who does not have a social security number or does not qualify for one, a Form W-7 must also be completed and submitted along with the Forms 8288 and 8288-A. An Individual Taxpayer Identification Number or ITIN will be assigned and can be used to file the subsequent tax return. Please visit IRS.gov for the most up to date forms and instructions.

The tax on Form 8288 is due to the IRS by the 20th day after the date of transfer. Interest and penalties will begin to run on that date if the tax is not received, unless an extension is requested. An extension of the time to pay over the withholding is permitted if the taxpayer has filed an application for a certificate of waiver from the withholding requirement (a withholding certificate) and has not yet received a decision. Once the IRS has made a determination on the withholding certificate and on what funds (if any) are due, the funds are due to the IRS within 20 days of that determination.

Are there exceptions to the filing requirement? Yes. If the transfer is a gift and no liabilities are being assumed, the amount realized is zero, and no withholding is required. Also, if the transferor is not a foreign person within the definition set out in 26 CFR Sect. 1.1445-2(b)(2), no withholding or filing is required. This is why the non-foreign affidavit is so important.

How can you determine whether your seller is a foreign person subject to withholding? Section 1.1445-2(b)(2) of the Code of Federal Regulations allows the transferee to demand and to rely on a certification of non-foreign status obtained from the transferor (aka the non-foreign or FIRPTA affidavit). If the transferee obtains such a certification (without actual knowledge it is false) and it is later discovered that the transferor is a foreign person and withholding should have occurred, the transferee is excused from liability. (26 CFR Sect. 1.1445-2(b)(1)) The certification must be retained for five years.

There are four certification forms – Individual, Entity, Owner of Disregarded Entity – Individual, and Owner of Disregarded Entity - Other Entities.

A “disregarded entity” is defined in 26 CFR Sect. 1.1445-2(b)(2)(iii) as an entity that is disregarded as an entity separate from its owner under §301.7701-3 of the Treasury regulation, a qualified REIT subsidiary as defined in section 856(i), or a qualified subchapter S subsidiary under section 1361(b)(3)(B). The most common form of disregarded entity is the single member LLC where the member uses their own social security number for the entity tax identification number. A disregarded entity may not certify that it is the transferor of a US real property interest, as the disregarded entity is not the transferor for US tax purposes, including sections 897 and 1445. Rather, the owner of the disregarded entity is treated as the transferor of property and must provide a certificate of non-foreign status to avoid withholding.

26 CFR Sect. 1.1445-2 does provide that a transferee may rely on means other than the transferor's certification of non-foreign status. However, if the transferee does so and does not obtain the certification, the transferee will be subject to the liability if the transferee is mistaken, and the transferor is actually a foreign person.

An exemption from the requirement to withhold is found at 26 CFR 1.1445-2(d): if the transferee is acquiring the property for \$300,000 or less and, at the date of the transfer, the transferee or member of the transferee's family, has definite plans to reside in the property for at least 50% of the time the property is occupied over each year of the two-year period following the transfer. The transferee must be an individual. This residency distinction is also what determines whether withholding is 10 or 15% for properties not subject to this exemption as discussed in Part 1.

If you intend, as the buyer's counsel, to rely on this exemption, you should obtain written confirmation from your clients of their present intent to occupy the property in the manner required by the regulations. If some circumstance arises in the future that causes them to be unable to fulfill the two-year residency requirement and their transferor was a foreign person, they could be subjected to an IRS demand that they pay the tax, interest, and penalties unless they are able to demonstrate an unforeseen change in circumstances. See 26 CFR Sect. 1.1445-2(d). Although the exemption may be available, the buyer does not need to proceed under the exemption and can still require the requisite amount to be withheld.

In some cases, foreign persons who are about to transfer title to real estate may avoid withholding under certain circumstances if they apply for and obtain a withholding certificate pursuant to 26 CFR Sect. 1.1445-3. Grounds for requesting a withholding certificate include situations where the amount to be withheld exceeds the taxpayer's maximum tax liability, the reduced amount would not jeopardize collection, the transferor is exempt from the payment of U.S. tax, or the transferor has entered into a separate agreement with the IRS for payment of the tax.

There are six categories of applications for a withholding certificate. IRS Publication 515 provides a good discussion of the six categories and the instructions for requesting the certificate. The three most common (nonrecognition treatment or claim of exemption from tax, calculation of maximum tax liability, or special installment sales rules) would use a Form 8288-B to apply for the withholding certificate. For the other categories, the form and

instructions depend on the request type and IRS regulations. Regardless of the form of the request, if the foreign person does not have a taxpayer identification number or an ITIN, an application (using Form W-7) to obtain the tax identification number must be submitted and an identification number obtained before the request can be processed.

Processing such an application for a withholding certificate takes time. If you are representing a foreign person selling real property, you should consult with the client's accountant or check with a tax attorney to determine if the client qualifies for a withholding certificate. Application should be made as soon as possible and, preferably, before the date of closing. Remember, the transferee is required to withhold and pay over the withheld amount within 20 days of closing if application has not been made. While you may seek an extension, that may not give you adequate time to have the client's request processed before payment must be made. Your client will then have to apply for a refund.

As stated in the first part, FIRPTA should be a consideration in every closing you do. If you represent a buyer, you should obtain a certification of non-foreign status in every instance to protect your client. 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.



Important Reminders:

FOR CONNECTICUT LICENSED ATTORNEYS: All CT licensed attorneys are reminded that they must have completed at least 12 hours of CLE (at least two hours of which must be ethics/professionalism) before December 31st. You can work on your credits through Stewart Academy. Log in and get credits from the comfort of your home or office and on your own time. [Stewart Academy](#)

For assistance in accessing Stewart Academy and qualifying courses, please contact your ASR for credentials.

CORPORATE TRANSPARENCY ACT: The filing deadline under the Corporate Transparency Act is approaching. Existing reporting companies that were formed before January 1, 2024, must file their initial reports no later than January 1, 2025. Newly-formed reporting companies created after January 1, 2024, must file their initial reports 90 days after receiving notice of their creation or registration. To view our Midweek article on the Act published in January of this year, follow this link: [New England Mid- Week Update 1-17-24](#)

To learn more about the Corporate Transparency Act, you can view a free recorded ALTA insights webinar which was hosted by the American Land Title Association. To view the webinar, follow this link: [ALTA Insights Webinar - Corporate Transparency Act](#)

The PDF of the presentation can also be downloaded from the ALTA website: [ALTA Insights Archive](#)



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