OKLAHOMA REAL ESTATE COMMISSION

NON-FOREIGN SELLER INFORMATION SHEET

FIRPTA EXPLAINED. FIRPTA is the Foreign Investment in Real Property Tax Act of 1980 (26 USC § 1445 et. Sec.) ("FIRPTA"). Under FIRPTA, nonresident Sellers are taxed similarly to U.S. real estate owners when selling their properties by placing the tax-remittance onus on the resident Buyer.

BUYER'S OBLIGATIONS UNDER FIRPTA. In transactions with foreign persons, the Buyer MUST submit ten percent (10%) of the amount realized from the sale of the property to the Internal Revenue Service ("IRS") within 20 days of closing. Generally speaking, the "amount realized" is the sales/purchase price of the Real Estate. The Buyer must determine the Seller's status as a foreign or non-foreign person. If the Seller is foreign, but an exemption applies, then the Buyer must obtain proof of qualification to avoid IRS sanctions. If a Seller asserts that he/she is a non-foreign person, the Buyer should obtain an Affidavit of Non-Foreign Seller or a Qualified Substitute Statement.

A "FOREIGN PERSON" UNDER FIRPTA. A foreign person includes: a nonresident alien individual; a foreign corporation, partnership, trust, or estate; and any other person that is not a U.S. person. A nonresident alien is defined as an individual who is neither a U.S. citizen nor a resident of the U.S. within the meaning of section 770 1 (b) of the Internal Revenue Code. Two tests apply. Under the "green-card" test, an alien individual is a resident of the U.S. if he/she has been admitted for U.S. permanent residence (i.e., has a green card) at any time during the calendar year. Under the substantial-presence test, an alien individual is a resident for U.S. federal tax purposes if the alien is physically present in the U.S. for 183 days or more during the current calendar year. Alternatively, if the alien is physically present for at least 31 days during the current year, the alien may be treated as a U.S. tax resident in the current year under a three-year look-back test which requires an analysis of the alien's presence over the preceding three years. If the alien is from a country that has an income tax treaty with the United States, the treaty may act to change these results.

EXCEPTIONS TO WITHHOLDING UNDER FIRPTA. The following are the most common:

1) the property is purchased for less than $300,000 AND the Buyer is using the property as a primary residence;
2) the Seller has an IRS statement that specifies the Seller is exempt from withholding, is entitled to a reduced withholding amount, has provided adequate security for payment or has made arrangements with the IRS for payment;
3) **the Seller provides the Buyer with a Non-Foreign Seller Affidavit;**
4) **a Qualified Substitute provides the Buyer with a Qualified Substitute Statement; or**
5) the Seller is participating in a SIMULTANEOUS Section 1031 Exchange. In order for the home to be considered the Buyer's "primary residence" for purposes of the exception, 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 used by any person during each of the first two 12-month periods following the date of transfer. When counting the number of days the property is used, do not count the days the property will be vacant.

AFFIDAVIT OF NON-FOREIGN SELLER (FORM 2303) AND QUALIFIED SUBSTITUTE STATEMENT. The Affidavit of Non-Foreign Seller (Seller's Affidavit) is a sworn statement completed and signed by the Seller which includes the Seller's tax identification number (most often a Social Security number) and in which the Seller states under Penalty of Perjury that the Seller is not a foreign person as defined under FIRPTA, and thus, is not subject to tax withholding under FIRPTA. The Seller can provide a completed and signed Seller's Affidavit directly to the Buyer or to a Qualified Substitute. A Qualified Substitute is a person or entity as defined under FIRPTA that accepts a Seller's completed and signed Seller's Affidavit in the Buyer's stead. The Qualified Substitute retains the Seller's Affidavit and must provide the Buyer with a Qualified Substitute Statement. The Qualified Substitute Statement is a sworn statement made under Penalty of Perjury in which the Qualified Substitute states that the Qualified Substitute has a completed and signed Seller's Affidavit from the Seller. The Buyer must retain the Qualified Substitute Statement in his/her records. If the Buyer receives a Qualified Substitute Statement, the Buyer never receives the Seller's Affidavit, nor the Seller's tax identification number.

WHO MAY ACT AS A "QUALIFIED SUBSTITUTE" UNDER FIRPTA. Under FIRPTA, the Buyer's Broker or any person (including an attorney or Title Company) responsible for closing the transaction may be a "Qualified Substitute". **The Seller's Broker may NOT be a "Qualified Substitute".**

EXCEPTION FOR NON-FOREIGN SELLERS DOES NOT APPLY IF THERE IS KNOWLEDGE OR NOTICE THAT THE SELLER'S AFFIDAVIT OR QUALIFIED SUBSTITUTE STATEMENT IS FALSE. In the case of any of the following, the Buyer must retain and remit ten percent (10%) of the amount realized from the sale of the property to the IRS within 20 days of closing (Generally speaking, the "amount realized" is the sales/purchase price of the Real Estate):

1) The Buyer or Qualified Substitute has actual knowledge that either the Seller's Affidavit or the Qualified Substitute Statement is false;
2) The Buyer **receives notice** from the Seller's Broker, Buyer's Broker or the Qualified Substitute that the Seller's Affidavit or the Qualified Substitute Statement is false;
3) The Qualified Substitute **receives notice** from the Seller's Broker or Buyer's Broker that the Seller's Affidavit is false;
4) The United States Secretary of Treasury, by regulations, requires the Buyer or the Qualified Substitute to furnish a copy of the Seller's Affidavit or the Qualified Substitute Statement to the Secretary of Treasury and the Buyer or Qualified Substitute fails to furnish a copy of the Affidavit or Statement at the time and in the manner as required by the regulations.

AGENT TO THE TRANSACTION OR A QUALIFIED SUBSTITUTE LEARNS THE SELLER'S AFFIDAVIT OR QUALIFIED SUBSTITUTE STATEMENT, IS FALSE. Such agent or Qualified Substitute MUST notify the Buyer at such time and in such manner as required by the regulations. If the Seller's Broker, Buyer's Broker or Qualified Substitute fails to provide notice of a false affidavit as required by the regulations, such agent or Qualified Substitute shall have the same duty to deduct and withhold that the Buyer would have had if the agent or Qualified Substitute had complied with the notice requirements.

IRS PENALTIES FOR VIOLATIONS UNDER FIRPTA. Buyers who fail to withhold and fail to obtain proof of an approved exemption may be held liable for the Seller's tax that should have been withheld on the sale. In the event an agent or Qualified Substitute fails to notify a Buyer of a false Seller's Affidavit or false Qualified Substitute Statement as may be the case, the agent and/or Qualified Substitute may be liable for an amount up to the amount of compensation the agent or Qualified Substitute derived from the transaction. In addition to the above, criminal penalties and other civil penalties and interest may apply.

PARTIES SHOULD CONSULT WITH QUALIFIED PROFESSIONALS. Foreign Sellers and Buyers dealing with transactions involving Foreign Sellers should consult with the appropriate professional, i.e. a title company, accountant, and/or attorney.

IRS PUBLICATION. IRS Publication 515 *Withholding of Tax on Nonresident Aliens and Foreign Entities* provides more information and is available by going to www.irs.gov.