

Short Sale Blueprint

A Guide to the Short Sale Process

Prepared by Short Sale Issues Work Group
NATIONAL ASSOCIATION OF REALTORS® - Spring 2008

Identify and qualify that you are dealing with a potential short sale situation.

- A short sale is one where title has transferred; where the sales price was insufficient to pay the total of all liens and costs of sale; and where the seller did not bring sufficient liquid assets to the closing to cure all deficiencies.
- A *potential* short sale is one where the listing agent reasonably believes the purchase price may not be enough to cover payment of all liens and costs of sale and the seller is unwilling or unable to bring sufficient liquid assets to the closing.

To determine whether you have a potential short sale situation

- Determine the liabilities of the Seller
 - Find out the payoff for each loan on the property.
 - Determine the priority of liens (to determine the negotiability of the lien holders)
 - Determine if there are tax or government-related liens
 - Their priority is usually federal, state then municipal
 - 2nd or third liens may be willing to accept less than par for the loan
- Perform a CMA to establish probable market value for the property.
- Determine if the homeowner has enough liquid assets to pay the difference?

Discuss the Seller's Options

- Keep the property
- Attempt a workout with the lender (resetting of payments or forgiveness of arrears)
- Sell the property and bring cash to close escrow
- Offer the lender a "short sale"
- Offer the lender a "deed in lieu of foreclosure"
- Allow the property to go to foreclosure.

The elements of a successful short sale are generally these:

- The property cannot be sold for an amount sufficient to satisfy all liens, encumbrances, and costs of sale
- The seller has some hardship that makes it impossible or extremely impractical for the seller to keep the property.
- The seller is cooperative and willing to work with a real estate broker to avoid foreclosure through the short sale process.
- The lender's loss mitigation department is contacted and they are willing to entertain a short sale.
- The property is listed at an appropriate price, with an effective marketing plan which includes protections for the seller and appropriate caveats for cooperating brokers and potential buyers.
- The lender is presented with an acceptable market price offer along with a completed short sale package and narrative explaining why the short sale is necessary and desirable.
- The lender accepts the offer and the property closes. No proceeds go to the seller.

If you determine that this is a potential short sale situation

- Have the homeowner sign a letter for each lien holder authorizing them to communicate with you on behalf of the homeowner
 - Put the name of the lien holder and the loan number on the letter.
 - Specifically list your name and the name of your title or escrow officer (if it's not a pending sale yet, then the name of the title company or escrow office that you intend to use.)
- Have your seller gather appropriate documentation (for a short sale package) to be sent to the lien holders which will include;
 - A hardship letter
 - Financial statement (1003 would suffice)
 - Last two years tax returns, W-2s and/or 1099s (if applicable)
 - Last two recent pay stubs.
 - Last two bank statements (complete with all pages)

When you Market the property

- List the property on the MLS immediately.
 - Contact the Loss Mitigation Department of the primary lien holder to let them know that the property is being listed.
 - During the entire process, keep them informed of the marketing, showings, and offers made.
- Disclose in the Agent Remarks section that the sale is subject to lien holder approval of a short sale, noting that the commission is possibly subject to third party approval.
- Keep a log of all agents who have shown the property.
- Keep records of all showing activity.
- Keep records of all advertising and marketing materials.
- Reduce price every two weeks or other period acceptable to the lien holder.

Upon receiving an offer to purchase.

- Inform the Loss Mitigation Department of the primary lien holder of the offer to purchase.
 - Counter the offer at their direction or at full price so that the lender is assured that you are negotiating for the maximum practical sale price.
- Explain to the buyer agent the circumstances of a short sale situation from the perspective of the lender, the need for their approval, and the implications to their compensation.
- Try to get a clean offer with no seller concessions.
- Try to negotiate discounts with all your service providers.
- If your state association of REALTORS® has a Purchase Agreement Addendum make sure that it contains a clause regarding Short Sales. If not, the following verbiage is an example of the type of verbiage that would be needed: *"This sale is contingent upon all of Seller's lien holders' approval of a short sale. Lien holders may not accept the terms in this contract and have the right to make changes that are acceptable to them including, but not limited to: Buyer closing cost credit, escrow fees, title fees, broker commissions and other transaction fees. If such approval is not granted in writing within 30 days and approved by all parties, then either the buyer or seller may cancel this agreement."* – Note that this language should not be inserted into an agreement without the approval of counsel.

After acceptance of an offer.

- Call the lien holder(s) and notify them of the offer if you have not already received their approval.
 - If they have already approved the agreement, provide them with copies of all documentation
- Request a short sale package if you don't already have one.
 - Get all documentation requested by the lien holder(s) from your seller as noted above.
- Make sure your escrow or title officer is aware of the short sale.
- Have your escrow or title officer priority rush the payoff demands.

- Get an estimated HUD 1 as soon as possible including all payoffs for all liens.
- Once all documentation is gathered, double-check; then triple-check that the entire package is complete and then over-night the package to the proper person at the bank. Be absolutely positive that you are sending it to an individual, not just to the Loss & Mitigation Department.

During the transaction

- Have the buyer complete all inspections as if it were a regular transaction paying close attention to any time frames established in the contract.
- Have the buyer's lender complete the loan package subject to appraisal.
- Keep in constant contact with the buyer's agent and the Loss Mitigation Department of the primary lien holder
 - Update each them of your progress.
- Follow-up with the lender 5 days after sending your package to confirm receipt.
- Monitor the Trustee Sale or Foreclosure date. Make sure that you have plenty of time to close before that date.
- If the sale date is too close for comfort call the Loss Mitigation or Foreclosure department and ask for an extension. **DO NOT WAIT UNTIL THE LAST MINUTE TO DO THIS!**

After approval of short sale

- Get the appraisal done quickly
- Have title or escrow company prepare an updated HUD 1 and compare it to the payoff that the bank is accepting. If there is a discrepancy, you need to address it ASAP.
- Go to closing and complete the transaction!

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Foreclosures - RE28RC07

Title: Foreclosures, Estate Sales & Auctions
Course ID: RE28RC07
Instructor: Michael Shepard
Date: Wednesday August 6, 2008
Time: 9:00-11:00
Location: Country Club of Pittsfield

About our Instructor Michael Shepard

Michael Shepard, drawing enthusiastic reviews from past teaching experiences for the REALTOR® Association is a practicing Attorney-at-law in Pittsfield. He and his firm specialize in Real Estate Law, Business and Corporate Law, Will, Estates and Trusts.

A volunteer instructor for the Berkshire Board of Realtors® since 1998, he is generously continuing to offer his services and expertise to our members. Mike holds membership in both the Massachusetts and Pennsylvania Bar Associations, is an approved direct writing attorney for title insurance companies and represents many national clients in relocation and real estate law.

You can reach Mike at the Law Offices of Michael Shepard located at 55 Church Street in Pittsfield
Phone – (413) 499-0316.

Special Messages:

- ▶ In addition to this handout packet, please make sure that you have also taken a 3-part credit slip documenting your attendance in this session. You need to complete the slip by the end of the program, and present it to the Course Moderator for signature. You will receive your copy immediately for your license renewal records. You must keep this slip as proof of attendance, in the event the Board of Registration audits you for continuing education verification.
- ▶ **Please remember to turn off all cell phones** and pagers at the beginning of each session. As a courtesy to your instructor and fellow classmates, cell phone use during the program is prohibited, both inside and outside of the classroom.
- ▶ The Berkshire County Board of REALTORS is happy to provide you with a continental breakfast, snacks and refreshments throughout the day at no additional cost to you.
- ▶ We hope you enjoy these professional development programs! Please don't hesitate to contact the Board Office if we can be of any assistance to you. Thank you for choosing the Berkshire County Board of REALTORS® branch school for your license renewal requirements. 194 Fenn Street, Pittsfield, MA 01201
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I. Understanding the financing process

A. Credit

1. Credit Reports
2. Credit Score
3. Fair Credit Reporting Act (FCRA)

II. Types of financing instruments

A. Note

1. Promise to repay, IOU,
2. Installment sales contract/ Contract for Deed/Land Contract

III. The Mortgage

A. Who gives the mortgage?

B. Review sample mortgage

C. Types of Mortgages

1. Non-Recourse and Full Recourse
2. Conventional
3. Conforming
4. Adjustable Rate Mortgage (ARM)
5. Interest Only Mortgage/100% Plus
6. Piggyback Mortgage
7. Fixed/Adjustable
8. Balloon Mortgage
9. Negative Amortization Loan

D. Mortgage covenants

1. Principle and Interest
2. Taxes
3. Insurance
4. Not to commit waste or remove improvements

E. Mortgage Provisions

1. Power of Sale
 - a. A clause inserted into a mortgage or Deed of Trust granting the Lender or Trustee the right to sell the property upon default.
2. Acceleration Clause
 - a. A Loan provision that gives the lender the right to declare the entire loan balance immediately due and payable upon violation of certain loan provisions(such as making the payments on time.
3. Due on Sale Clause, Alienation or Non Alienation
 - a. Money due back upon the sale of the property.
4. Mortgagee in Possession or Assignment of Rent
 - a. a situation in which a lender takes possession and control of a property upon notice foreclosure of the loan. The purpose is to prevent damage to a property & to collect any income produced.
5. Defeasance Clause

F. Breach of Mortgage Covenants

1. Order of Notice from the lender
2. Workout Department/Loss Mitigation Department Forbearance

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3. PMI
 - a. If the loan contains PMI the lender has an obligation to attempt to work out a resolution.
4. Deed in Lieu of Foreclosure
 - a. Not a lenders first choice.
5. Right of Redemption
 - a. The borrower has the right to redeem the property by paying all the money due that is in arrears and any costs such as advertising costs, legal fees and notice fees accrued.

IV. Short Sales

A. Identify Situation

1. **Short Sale Definition:** A short sale is one where title has transferred; where the sales price was insufficient to pay the total of all liens and costs of sale; and where the seller did not bring sufficient liquid assets to the closing to cure all deficiencies.
2. **Potential Short Sale Definition:** A potential short sale is one where the listing agent reasonably believes the purchase price may not be enough to cover payment of all liens and costs of sale and the seller is unwilling or unable to bring sufficient liquid assets to the closing.

B. Educate and Prepare

1. Company Policies – Determine if your broker has company policies regarding the handling of such sales
2. Know State Law – Keep current on Massachusetts State law changes as it relates to foreclosures and liens
 - a. Judicial Foreclosure
 - b. Non-judicial foreclosure with right of redemption
3. Research – Understand foreclosure timeframes for the area. The process can take anywhere from 90 days – over 1 year nationwide – what is the norm for Berkshire county?
 - a. Obtain general foreclosure and short sale process information from reputable sources - many how-to websites and service providers offer advice or processes that are illegal and unethical. Use and refer trusted sources only.
 - b. Understand the terminology: For example: A lending institution's Loss Mitigation Department is entirely different than the Foreclosure Department. The Loss Mitigation Department seeks to find a resolution to the issue through negotiations of debt forgiveness and short sale processing while the Foreclosure Department proceeds with the state guidelines to take the property.
4. Obtain Professional Assistance and Guidance
5. Remember that you are the fiduciary agent for the seller. Disclosures, understanding and accurate information is of paramount importance.

C. Determine Liabilities for Seller

1. Find out the payoff for each loan on the property
2. Determine the priority of liens (to determine the negotiability of the lien holders)
3. Determine if there are tax or government-related liens
 - a. Priority is usually federal, state and then municipal
4. Perform a CMA to establish probable market value for property
5. Determine if the homeowner has enough liquid assets to pay the difference

D. Understand Seller Options

1. Keep the property
2. Attempt a workout with the lender (resetting of payments or forgiveness of arrears)
3. Sell the property and bring cash to close escrow

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4. Offer the lender a "short sale"
5. Offer the lender a "deed in lieu of foreclosure"
6. Allow the property to go to foreclosure

E. General Elements of a Successful Short Sale

1. The property cannot be sold for an amount sufficient to satisfy all liens, encumbrances, and costs of sale
2. The seller has some hardship that makes it impossible or extremely impractical for the seller to keep the property
3. The seller is cooperative and willing to work with a real estate broker to avoid foreclosure through the short sale process
4. The lender's loss mitigation department is contacted and they are willing to entertain a short sale
5. The property is listed at an appropriate caveats and protections for the seller, properly price, with an effective marketing plan which includes protections for the seller and appropriate caveats for cooperating brokers and potential buyers.
6. The Lender is presented with an acceptable market price offer along with a completed short sale package and narrative explaining why the short sale is necessary and desirable.
7. The lender accepts the offer and the property closes. No proceeds go to the seller.

F. To Proceed with Short Sale Situation

1. Have homeowner sign a letter for each lien holder authorizing them to communicate with you on behalf of the homeowner (sample attached)
 - a. Put the name of the lien holder and the loan number on each letter.
2. Have your seller gather appropriate documentation for a short sale package to be sent to the lien holders. This package will include:
 - a. A hardship letter
 - b. Financial Statement (1003 would suffice)
 - c. Last two years tax returns, W-2s and/or 1099's, if applicable
 - d. Last two recent pay stubs
 - e. Last two bank statements, complete with all pages
3. Disclose short sale ramifications to all parties:
 - a. Listing Agreement statement: Subject to Lender Approval
 - b. Listing Agreement statement: Seller will receive no proceeds, that there are significant tax, credit and legal ramifications to a short sale and the seller has been strongly urged to consult with an attorney and tax advisor before signing agreement. [sample language in NAR Short Sale Workflow Handout]
 - c. Listing Agreement statement indicating the listing broker will accept commission as approved by the lender
 - d. Offers to Purchase / Purchase and Sale statements: Third party / lender approval required
4. Prepare to offer the property for sale
 - a. Price the property to reflect realistic market price
 - b. Understand commission is also subject to lender approval and should be disclosed to reduce your liability to other cooperating brokers.

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- c. Prepare short sale package with seller

G. Marketing the Property

1. List the property in the MLS immediately
 - a. Notify the Loss Mitigation Department of the primary lien holder to let them know that the property is being listed.
 - b. During the entire process, keep the Loss Mitigation Department informed of the marketing, showings, and offers made.
 - c. Follow the newly amended MLS Rules and Regulations to properly disclose the potential for a short sale, the requirement for lender approval of any offers, how the commission is subject to third party approval and whether and how any reduction in the gross commission established in the listing agreement will be apportioned between the listing and cooperative participants. (regs attached)
2. Keep a log of all agents who have shown the property
3. Keep records of all showing activity
4. Keep records of all advertising and marketing materials
5. Reduce the price every two weeks or other period acceptable to the lien holder.

H. Receiving an Offer to Purchase / Purchase and Sale

1. Inform the Loss Mitigation Department of the primary lien holder of the offer.
2. Counter the offer at their direction or at full price so that the lender is assured that you are negotiating for the maximum practical sale price.
3. Disclose and explain to the buyer agent the circumstances of the short sale situation from the perspective of the lender, the need for their approval, and the implications to their cooperation.
4. Try to get a clean offer with no seller concessions
5. Try to negotiate discounts with all your service providers
6. Make sure your purchase and Sale agreement contains a clause regarding short sales. [See full example in NAR Short Sale Workflow]

Sample: "This sale is contingent upon all of Seller's lien holder's approval of a short sale. Lien holders may not accept the terms in this contract and have the right to make changes that are acceptable to them including, but not limited to: Buyer closing cost credit, escrow fees, title fees, broker commissions and other transaction fees. If such approval is granted in writing within 30 days and approved by all parties, then either the buyer or seller may cancel this agreement."

Note: This language should not be inserted into an agreement without the approval of counsel.

I. After Acceptance of an Offer

1. Call the lien holder(s) and notify them of the offer if you have not already received their approval (multiple liens)
2. If they have already approved the agreement, provide them with copies of all documentation.
3. Request a short sale package, if you don't already have one
4. Get all short sale package documentation from you seller if you haven't already done so.
5. Make sure your escrow or title offer is aware of the short sale

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6. Have your escrow or title officer priority rush the payoff demands
7. Get an estimated HUD 1 as soon as possible including payoff for all liens
8. Once all documentation is gathered, double check; then triple check that the entire package is complete and then over-night the package to the proper person at the bank. BE ABSOLUTELY POSITIVE YOU ARE SENDING IT TO THE CORRECT INDIVIDUAL. Do NOT send it just to 'The Loss Mitigation Department'.

J. During the Transaction

1. Have the buyer complete all inspections as if it were a regular transaction, paying very close attention to the time frames in the contract.
2. Have the buyer's lender complete the loan package subject to appraisal
3. Keep in constant contact with the buyer's agent and the Loss Mitigation Department of the primary Lien Holder
4. Provide updates to ALL parties on your progress.
5. Follow-up with lender 5 days after sending your package to confirm receipt.
6. Monitor the Trustee Sale or Foreclosure date. Make sure that you have plenty of time to close before that date.
7. If the sale date is too close for comfort, call the Loss Mitigation Department or Foreclosure Department and ask for an extension. DO NOT WAIT UNTIL THE LAST MINUTE!

K. After Approval of Short Sale

1. Get the appraisal done quickly
2. Have title or escrow company prepare an updated HUD-1 and compare it to the payoff that the bank is accepting. If there is a discrepancy, address it ASAP.
3. Go to closing and complete the transaction!

IV. Foreclosure Process

A. Pre Foreclosure - Judicial Foreclosure

1. Complaint to Foreclose Mortgage
 - a. Land Court or Superior Court
 - i. Most complaints are filed in Land Court. The complaint states the intent to foreclose under the Power of Sale Clause in the Mortgage and that the defendant is not subject to relief under the Service Members Civil Relief Act.
2. Service Members Civil Relief Act of 1940 - Dec.19, 2003 Formerly known as the Soldiers and Sailors Relief Act
 - a. History of SMCRA
 - b. Protection for Service Members
 - c. Legal Notices
3. Recording the Notice
 - a. A notice of Foreclosure must be filed at the appropriate Registry of Deeds
4. Securing the Property
 - a. Abandoned Property

B. Non Judicial Foreclosure/Ruebeck v. Attleboro Savings Bank - Case that set precedent of Foreclosure Proceeding in MA.

1. Notice of Sale
 - a. Advertising Requirements: Once a judgment has been issued by the court the mortgagee can proceed with foreclosure proceeding. Notice of the sale must be published in a newspaper within the city or town where the

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property is located or in a newspaper of general circulation in the town. (Boston Globe, Eagle Tribune) The notice must be published once a week for three successive weeks with the publication being at least 21 days prior to the scheduled sale.

- b. Mailing Requirements: A copy of the foreclosure notice must be sent by either certified or registered mail at least 14 days before the sale to the owner of record.

2. Additional Notices

- a. Brokers
- b. Auctioneer
- c. Public inquires
- d. Federal Tax Liens: If a Federal Tax lien existed a notice of foreclosure must be sent to the Secretary of the Treasury by certified or registered mail not less then 25 days before the sale.
- e. Junior Lien Holders: A copy of the foreclosure notice must be sent by either certified or registered mail at least 14 days before the sale to the owner of record

3. The Auction

- a. Postponements: If the mortgagor found a buyer and obtained a P&S and a firm commitment of evidence of financing the lender is required to stop the foreclosure. (Snowden v. Chase Manhattan)
- b. Required Deposit and Registration
- c. Reading of Notices by Lenders Attorney
- d. Municipal Lien Certificate/Priority Liens
- e. Questions & Answers
- f. Opening Bid
- g. Bidding Against the Bank
- h. Winning Bidder/Memorandum of Sale
- i. Other Bidders
- j. Lead Paint Notices.

4. After the Auction

- a. 30 Day Closing
- b. Acquiring Financing
- c. Appraisal Issues
- d. Failure to Close
- e. Occupied Properties
- f. Property condition

V. Finding And Buying Foreclosures

A. Sources of Information

- 1. Foreclosure Or Bank Owned/REO's
 - a. Pros and Cons
- 2. Newspapers/Banker & Tradesman
 - a. Online Access For A Fee/School Discount
 - b. Best Source
 - c. Free At The Library
- 3. Internet
 - a. For Sale Foreclosure Lists

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b. Lenders Website

4. Registry of Deeds

a. Online Access Free

B. Listing a Property

1. Doing The Research

a. Amount Owed To Lender

b. Junior Lien Holders

c. Registry Of Deeds

d. Letter from owner giving permission to speak to lender.

2. Valuing The Property

a. Upside-down

b. Other Available Inventory

c. Marketplace Demand

3. Contacting Owner/Mortgagor

a. Short Sale

4. Arrange For Financing

a. Lender Requirements

5. Use Professionals

a. Lawyers

b. Appraisers

NAR Short Sale Issues Working Group

The Short Sale Workflow

This short sales work flow is an educational tool intended to give brokers and sales associates a comprehensive overview of the short sale process (listing, marketing, negotiating and closing properties subject to a potential short sale). It is not intended to and does not constitute legal, financial or tax advice, and should not be interpreted as policy of the national association. To the extent legal, financial or tax advice is needed by a member or a member's client or customer, those individuals should be encouraged to consult with their lawyer or accountant.

State and local associations may supplement or modify the short sales work flow based upon laws and regulations affecting their jurisdiction. Individual brokers may also use the short sale work flow as the basis for their firms' brokerage policies by modifying it, with the advice of counsel, to reflect not only state and local laws and regulations but also their firms' policies and procedures. REALTORS® and member boards are authorized to modify, reproduce and distribute the short sale work flow.

The contributions of REALTORS® serving on the NAR risk management, multiple listing issues and policies, professional standards, and conventional finance and lending committees to the development of this document and other educational and informational tools to assist realtors® dealing with short sales are gratefully appreciated.

The Short Sale Workflow¹

What the Listing Agent Should Know to Successfully Negotiate a Short Sale

What is a Short Sale?

The Work Group defined a “Short Sale” as follows:

A short sale is one where title has transferred; where the sales price was insufficient to pay the total of all liens and costs of sale; and where the seller did not bring sufficient liquid assets to the closing to cure all deficiencies.

What is a “Potential Short Sale”?

The Work Group defined a “Potential Short Sale” as follows:

A potential short sale is one where the listing agent reasonably believes the purchase price may not be enough to cover payment of all liens and costs of sale and the seller is unwilling or unable to bring sufficient liquid assets to the closing.

When first dealing with a potential short sale situation members are urged to consult with their broker, attorney and risk manager to determine the correct approach in their particular market area. The following is a suggested workflow for agents interested in representing sellers who are or who may be in a short sale situation. It is intended to educate members regarding issues that arise in connection with short sales. If modified by a broker as necessary to reflect local and state laws, requirements and procedures and the broker’s own office policies, which should be created with the advice of the broker’s counsel, it may also be used as a guide for agents operating within a broker’s office.

1. Educate and Prepare Yourself

- a. Ask your broker if your company has policies and procedures regarding short sales. Follow those guidelines to the extent they comport with federal, state, and local laws, MLS rules, the REALTOR® Code of Ethics, and your state’s real estate regulations.
- b. Know the laws, procedures, and timelines regarding foreclosure in your state. These vary widely. Some states use court proceedings to effectuate foreclosures. These are called “judicial foreclosures”. Other states use less formal procedures, such as trustees sales, referred to generally as “non-judicial foreclosures”. Some states, such as California, utilize both. The most obvious difference is that non-judicial states have a much shorter timeline to foreclosure, but generally offer a right of redemption, while states utilizing judicial foreclosures usually take longer to complete the foreclosure process, but the former mortgagor did not generally have recourse after the sale. An informal survey of foreclosure timelines suggests that a foreclosure can take as little as 90 days, and as long as a year or more. It is critical that you understand the procedures and timelines in your state, even if the property you are dealing with is not yet in foreclosure.

¹ Disclaimer: Nothing in these pages is intended to constitute legal advice. This material is intended to give real estate licensees an overview of the short sale process from the point of view of the real estate practitioner, some tools to help sellers through it, and a large dose of caution. A short sale or a foreclosure is a catastrophic event for any property owner, and has serious legal, credit, and tax implications. Always advise a property owner in writing to obtain legal, credit, and tax advice before undertaking a short sale.

- c. Read the most up-to-date material on short sales from reputable sources such as the National Association of REALTORS® and your local and state REALTOR® associations. Be aware that there are a number of illegitimate, ineffective and illegal approaches to short sales that are being heavily promoted to sellers and real estate agents alike. Be mindful that your fiduciary responsibility to your seller applies in a short sale situation just as it applies in any other sale.
- d. Research and read online articles and advice on short sales so you will be prepared for seller questions based on those materials. Sellers can become badly misinformed by relying solely on online short sale advice.
- e. Seek out other reputable agents and brokers in your area who are doing short sales. What have they learned? What are their best practices? What are the pitfalls?
- f. Speak with local attorneys and CPAs who are proficient in short sales.

2. Gather Information from the Seller and Other Sources

- a. It is important to be aware of how much is owed on the property and whether the seller is in default on any mortgage liens, taxes, or association dues. Ask the seller for copies of the most recent mortgage statement(s) including second mortgages and lines of credit. Ask for the most recent property tax statement and association dues bill. Check with the tax assessor, title company, and association, if necessary, to verify the total debt and any arrears and penalties. Know that the seller is not always aware of the total debt, and may minimize or misstate it if you simply rely on a verbal conversation.
- b. Is the seller in default on any liens? If so, has any legal action been taken by the lienholder(s)? This is where it will be important to know what the local procedures and timelines are. If you see that action has been taken, inform the seller in writing. Sellers do not always know they are about to lose their homes.
- c. Is the seller aware that there may be insufficient equity? This can be important because the seller may believe that the value of their home is higher than it actually is. It is especially important to be as accurate as possible in your market value assessment.
- d. Create a careful Comparative Market Analysis (CMA) or Broker Price Opinion (BPO) using the most current comparable sales. Be realistic about the value. Short sellers cannot usually afford to try a high price first then adjust down over time. Include all costs of sale, such as commissions, closing costs, any interest and penalties on loans or taxes in default. In your best judgment, will there be positive proceeds or does the seller owe more than the property is currently worth after all selling costs?
- e. Finally, find out whether the loan(s) that might be subject to a deficiency in a short sale are "Recourse" or Non-recourse". In a recourse loan, the borrower retains personal liability for any deficiency after a sale or foreclosure. The lender has "recourse" to the personal assets of the borrower to make up any deficiency. In a non-recourse loan the lender is limited to whatever funds are available from its security interest in the property itself, and cannot force the borrower to repay any deficiency. Each state has its own rules and in some states a loan can be either recourse or non-recourse depending on factors such as whether it was a purchase money loan or a refinance. These are legal questions. Do not try to answer them yourself. Always recommend professional legal, credit, and tax advice.

3. Meet with the Seller to Discuss and Evaluate the Options

- a. Assume you have concluded the seller owes more than the property is now worth. It is important at this point that you advise the seller, in writing, to obtain separate legal, credit, and tax advice. The decisions the seller will be making all have legal, financial, tax, and credit implications. A short sale should never be the first choice because it carries with it serious negative credit and, possibly, tax consequences. Potential short sellers should always be advised that any action they take other than full payment of the mortgage note will have negative credit consequences. Sellers should be encouraged to consult with a HUD-approved credit counseling agency prior to making any decisions.

Sellers should be cautioned that when selecting a credit counselor to carefully check the credentials of the agency as not every credit counselor or foreclosure rescue specialist is going to be HUD-approved. What are the options available to the seller? In rough order of “least damage to credit” to “most damage to credit” they are:

- i. Keep the Property. If the seller is unhappy that the property value is less than the loan balance, but is otherwise under no pressure to sell, keeping the property can be the best solution. Even if there is some short term financial distress, it need not result in loss of the property. Ask if there are family or other resources that can carry the seller through if there is some financial stress. Because of the lack of equity, a refinance may not be possible, but be aware of any special “hardship refinance” programs a particular lender may offer. These change frequently. If the sellers must move, could they rent the property (even at a negative cash flow) and sell it later in a better market?
- ii. Sell the Property and Bring Cash to Close Escrow. This might not sound appealing, but it can be a good choice for sellers who are in a financial position to pay a deficiency from other liquid assets. This approach avoids the credit damage that even a successful short sale will cause. An alternative in some circumstances is for the seller to agree to convert any deficiency into a personal note, or a note on another property owned by the seller. REALTORS® should always advise sellers to consult appropriate legal and tax professionals before considering such a note.²
- iii. Attempt a Workout with the Lender. Lenders are increasingly interested in helping financially distressed homeowners stay in their homes. In some cases, they have been willing to reduce or roll back interest rates, or reduce the allowable payment, to help sellers avoid short sales and foreclosures. It is not generally advisable for the agent to take the lead in representing a property owner in a workout. Workouts are not real estate transactions. They are complex contract modifications, and to date, relatively few homeowners in distress have been able to come to a permanent agreement with their lender. The homeowner should be advised to consult an attorney if this is the option they choose. Note that new laws and emerging policies and procedures by Fannie Mae, Freddie Mac, the VA, the FHA, and private lenders make the workout option more complex, but also present greater opportunities for financially distressed homeowners.
- iv. Offer the Lender a “Deed in Lieu of Foreclosure”. If the seller owes more money than the property is worth, is unable to make payments, and is likely to lose the property in foreclosure in the near future, offering to trade the property to the lender in exchange for the cancellation of the note might make sense. This approach is more likely to be successful in states with very long foreclosure timelines. The lender can obtain the property much sooner and may feel that the mitigation of loss is worth the cancellation of the note. Like workouts, this is a contract negotiation, and should be undertaken only after consulting with an attorney.
- v. Offer the Lender a “Short Sale”³. We will discuss the short sale process in greater detail below. Be aware that, on occasion, lenders have “approved” short sales that included personal notes for the deficiency, and unwitting sellers have signed the notes without a full

² **Article 13 REALTORS®** shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.

³ There are tax consequences associated with these options, some of which have changed under the **Mortgage Forgiveness Debt Relief Act of 2007**. Under the new law passed in December 2007, up to \$2 million of qualifying mortgage debt forgiven on the taxpayer’s principal residence in 2007, 2008 or 2009 will not be treated as income for the taxpayer. The limit is \$1 million for a married person filing a separate return. Mortgage debt reduced (forgiven) through restructuring, such as a workout or a short sale, as well as mortgage debt forgiven in connection with a foreclosure, all qualify for the tax exclusion. The Act applies only to principal residences, not vacation homes or investment property. Also the exclusion applies only to “acquisition indebtedness”, which is generally defined as debt used to originally build, purchase, or improve a property. Although short sales tend to minimize the difference between what is owed and the proceeds turned over to the lender, thereby minimizing the taxable income potentially accruing to the seller, the possibility remains. Sellers should be advised to consult with tax or legal counsel regarding the impact of the new law and other tax rules on their circumstances.

understanding of the consequences. Note that the lender is not a principal in the transaction. The agent represents the seller, not the lender. In a short sale, the offer is negotiated with the seller, just as in a traditional sale. The offer is then submitted to the lender, not for an “acceptance” but for approval of the terms and net proceeds.

The elements of a successful short sale are generally these:

- The property is worth less than is owed.
 - The seller has some hardship that makes it impossible or extremely impractical for the seller to keep the property.
 - The seller is cooperative and willing to work with a real estate broker to package the short sale.
 - The lender is contacted and expresses willingness to entertain a short sale.
 - The property is listed, with appropriate caveats and protections for the seller, properly priced, and effectively marketed.
 - The lender is presented with an offer, accepted by the seller, along with a completed short sale package and narrative explaining why the short sale is necessary and desirable.
 - The lender approves the offer and escrow closes as usual. No proceeds go to the seller.
- vi. Allow the Property to go to Foreclosure. Usually this is the worst option. It does the most damage to a property owner’s credit. There are circumstances, however, in which it might make sense for a property owner who has no other resources with which to obtain housing to simply stay in the property as long as possible. Also, as a practical matter, if you are contacted by a homeowner who is days or a few weeks away from a foreclosure sale, it will be difficult to stop the sale, though it is always worth trying.

4. Taking and Servicing the Short Sale Listing – A Typical Workflow

- a. Assuming that after full reflection and consultation with appropriate legal, credit, and tax professionals, the homeowner decides that a short sale makes the best sense. What are the factors that will lead to a successful short sale?
- i. The elements of a successful short sale are typically:
1. **The property is worth less than is owed.** *Establish this by doing a careful CMA or BPO, taking into account that the market may be declining. Pay special attention to similar properties that did not sell. The lender will need to see clearly that there is no chance that the property will sell for enough to cover all liens and closing costs. Short sales are considered by buyers to be distressed properties, and will typically command somewhat less than a non-distressed price. Remember that the lender may be thousands of miles away and not at all familiar with your market. Incorporate local newspaper articles about the local market and MLS statistics to strengthen your analysis.*
 2. **The seller has some hardship that makes it impossible or extremely impractical for the seller to keep the property.** *What are hardships as defined by most lenders? Most lenders focus on and require “changed financial circumstances”. Loss of job, unusual medical costs, death of an owner, natural disasters, even extended military service for reservists, can be hardships. There should be a nexus between the hardship and the need to sell. A job loss leading to a problem paying the mortgage is obvious, but an illness might require a family to move closer to specialized medical help, so even without an unbearable financial hardship, the homeowner simply cannot stay. Lenders do not consider a decline in value alone to be a hardship.*

3. **The seller is cooperative and willing to work with a real estate broker to package the short sale.** *Is the seller cooperative and willing to sell? You will need the seller to help write a narrative of the hardship involved. The seller will be asked by the creditor to reveal all details of the seller's financial situation. If there is a formal short sale application, the seller will have to complete it. This can be embarrassing, and some sellers simply won't do it. Prepare them and make sure they are willing to do what is required. If they are uncooperative, you will not be able to help them.*

Important Note: Many troubled loans today are "subprime loans" and/or "stated income loans". Be especially careful to explain in writing to all sellers that any representations of the seller's financial status that were made on the initial loan application will be scrutinized in the short sale application process. Sellers may expose themselves to charges of loan fraud if the short sale application information they provide is inconsistent with the material provided on the initial loan application. In other words, if the seller represented on the original loan application that his income was \$10,000/month, but on the short sale application represents that his income recently dropped from a high of \$5,000/month to \$3,000/month, this will raise the question of loan fraud. If the seller is concerned or has questions, it is advisable for the seller to consult with an attorney before completing a short sale application.

4. **The lender is contacted and expresses willingness to entertain a short sale.** *Contact the lender's "loss mitigation" department. Ask for the person who will be responsible for processing the short sale application. Try to speak with the same person each time you call. You will need an authorization letter from the seller verifying that you have permission to speak with the lender on the seller's behalf. Let the lender know the situation and your proposed short sale solution. Ask for a list of documents that the lender will require. This may vary with each lender. Ask for copies of any proprietary documents the lender specifically wants to see, such as a particular short sale application form or an income and assets sheet. These also will vary by lender. The lender may ask you and other area brokers to do a Broker Price Opinion (BPO) to verify your evaluation. If there is more than one loan subject to a shortfall, you will need to contact multiple lenders and go through the same process. Some lenders are proactive and will immediately send the short sale requirements to you. Others will be non-committal. Even institutions go into denial when faced with bad news. Unless the lender indicates that it will categorically refuse a short sale under any circumstance (a rare occurrence), you can proceed with the next steps.*
5. **The property is listed with appropriate caveats and protections for the seller, properly priced, and effectively marketed.**

- a. **Seller Protections:** *When you list the property it is important to have a record of the discussion you have had regarding the short sale with the seller. The listing agreement should state that the seller's acceptance of any offer will be subject to the lender's approval of the offer without requiring that the seller bring cash to close escrow, and an agreement by the listing broker to accept the commission as approved by the lender. Offers to purchase the property would need the same caveat regarding lender approval. This protects the seller against agreeing unconditionally to sell the home, only to have the lender disapprove the short sale. In such a case, the seller could be sued for specific performance or damages*

by a frustrated buyer. The seller should also explicitly acknowledge that the seller will receive no proceeds, that there are significant tax, credit, and legal ramifications to a short sale, and that the seller has been strongly urged to consult with an attorney and a tax advisor before signing the listing. Many states and real estate companies have addendums to the listing agreement that cover these topics. See Attachment 1 for examples. If neither your state nor local association of REALTORS® nor your broker has such a document, you should consider adapting (with the permission of your broker) some of the sample language in Attachment 1 as an addendum to your listing agreement. Here is some typical language from the California Association of REALTORS® Short Sale Listing Addendum:

- 1. SHORT SALE LISTING:** Broker has advised Seller that the amount of money necessary to pay in full all loans and other debt or obligations that are secured by a lien(s), including any IRS liens, on the Property (Loans/Liens) as well as Broker commissions and other costs of sale may exceed the current market value of the Property. Accordingly, in order to sell the Property, Seller may be required to: (1) deposit his/her own funds into escrow, (2) obtain the agreement of secured lender(s) or creditor(s) (Lender) to accept, as payment in full, less money than they are owed (Short Sale), and/or (3) pay back some or all of the shortage after the sale is complete. Broker has advised Seller that other options, such as, but not limited to, negotiating a modification of existing Loans/Liens, refinancing, bankruptcy, foreclosure, or deed in lieu of foreclosure may be more appropriate for Seller. Any sale of the Property will be contingent on Lender approval (C.A.R. Form PAA, paragraph 5).
- 2. TAX CONSEQUENCES:** Broker has advised Seller that if Lender agrees to accept less than full payment, the difference may result in taxable income to Seller even though Seller does not receive any cash proceeds from the sale. Seller may also be taxed on the gain in value of the Property from the date of Seller's purchase to the date of sale, regardless of the amount of any existing Loans/Liens.
- 3. CREDIT CONSEQUENCES:** A Short Sale may have a negative impact on Seller's credit rating even if a foreclosure process has not officially begun or once begun, is not completed.
- 4. LENDER CONSIDERATIONS:** Seller acknowledges that a Short Sale is subject to Lender approval. Lender is not obligated to accept a Short Sale. Lender may impose conditions prior to consideration or approval of a Short Sale, such as obtaining a new appraisal, or requiring Seller to demonstrate hardship or provide copies of tax returns, pay stubs, assets, or other financial information. Lender may inform the IRS or credit reporting companies of the payment shortage. Broker has no control over Lender's decisions. Accordingly, Seller agrees to hold Broker harmless for acts or omissions of Lender.
- 5. BROKER AUTHORITY:** Seller authorizes Broker to: (1) market the Property for sale, (2) contact Lender concerning Lender's approval of a Short Sale (C.A.R. Form ARC) and Seller agrees to give Broker any necessary information to negotiate with Lender, and (3) advertise in the MLS and other advertising medium that the Property transfer, sales price and payment of commissions are subject to Lender approval. If Lender will not cooperate, Broker may cancel this listing agreement.
- 6. TAX AND LEGAL ADVICE:** Broker has advised Seller to consult with legal and tax counsel, prior to signing this listing, regarding the decision to seek a Short Sale. Broker cannot give legal or tax advice.

By signing below, Seller acknowledges that Seller has read, understands and received a copy of this Short Sale Listing Addendum. Seller is encouraged to read it carefully.

- b. **Pricing:** It makes no sense in a short sale setting to start with an unreasonably high price. Some sellers will ask that you price the property at a "break-even" price for them initially. Use your best judgment, and follow your broker's policies and procedures, but know that a price that attracts no offers will hurt your seller. If the foreclosure clock is already running, you may run out of time. Price the home at a realistic market price today. Adjust the price quickly if you see no activity or if you have no offers. To make the short sale work, you will need to get an offer to the lender quickly.*
- c. **Commissions:** Short sales present a special problem with conditional compensation being offered to a cooperating broker. As a listing agent, you are not entirely sure what your commission will be until the terms of a short sale are approved by the lender. Your MLS may have adopted NAR-approved language such as the following based upon changes adopted by NAR at the May, 2008 meeting:*

Lender Approval Listings

Multiple Listing Services must give participants the ability to disclose to other participants any potential for a short sale. As used in these rules, short sales are defined as a transaction where title transfers; where the sale price is insufficient to pay the total of all liens and costs of sale; and where the seller does not bring sufficient liquid assets to the closing to cure all deficiencies. Multiple Listing Services may, as a matter of local discretion, require participants to disclose potential short sales when participants know a transaction is a potential short sale. In any instance where a participant discloses a potential short sale, they must also be permitted to communicate to other participants how any reduction in the gross commission established in the listing contract required by the lender as a condition of approving the sale will be apportioned between listing and cooperating participants. All confidential disclosures and confidential information related to short sales must be communicated through dedicated fields or confidential "remarks" available only to participants and subscribers.

Multiple Listing Services that permit, but do not require participants to disclose potential short sales should adopt the following rule:

Section 5.0.1: Participants may, but are not required to, disclose potential short sales to other participants and subscribers. When disclosed, participants may, at their discretion, advise other participants whether and how any reduction in the gross commission established in the listing contract, required by the lender as a condition of approving the sale, will be apportioned between listing and cooperating participants.

Alternatively, Multiple Listing Services that require participants to disclose potential short sales should adopt the following rule:

Section 5.0.1: Participants must disclose potential short sales when reasonably known to the listing participants. When disclosed, participants may, at their discretion, advise other participants whether and how any reduction in the gross commission established in the listing agreement, required by the lender as a condition of approving the sale, will be apportioned between listing and cooperating participants.

- d. **Marketing:** *Both for the seller's sake and to generate lender confidence, your short sale listings should be aggressively marketed. Whatever you would do for an ordinary listing, you should do for a short sale listing. Use multiple pictures, virtual tours, websites, and advertising as appropriate. You may want to accelerate the marketing if there is a foreclosure deadline looming. The lender will need to understand that you have done everything possible to sell the property at the highest price. The lender is not your client. You represent the seller, but everybody should understand that the lender is the true decision-maker. You will want to include the marketing history in the short sale package. Once again, if you have no offers within a reasonable time, adjust the price.*

6. The lender is presented with an offer, accepted by the seller, along with a completed short sale package, hardship letter, and narrative explaining why the short sale is necessary and desirable.

a. The Offer

- i. The ideal offer should be from a prequalified or preapproved buyer, with no unusual contingencies, such as the sale of the buyer's existing residence. It should be flexible in terms of closing. The ideal offer might provide "The close of escrow to occur 30 days after buyer's receipt of acceptance of the short sale by the lender". The ideal buyer is willing to be patient. Of course, not all offers will be ideal. If you receive a very low offer, you may wish to attempt to negotiate it between the seller and the buyer as in an ordinary sale setting. Certainly you should counter terms that affect the seller in a negative way, such as early possession without compensation or inclusion of seller's personal property. Remember that it is the seller who "accepts" the offer. Once the offer is fully negotiated between buyer and seller, it should be signed by both, subject to the approval by the lender as discussed elsewhere in this document. Recognize that lenders will want to see "as-is" offers without credits for repair or closing costs paid to buyers. Policies regarding short sale counter offers vary widely around the country, and also between brokers. Experience suggests that if you receive an offer on the low side of "reasonable" from a qualified buyer, you may still want to pass the offer along to the lender. In a short sale it is more important to get the lender a bona fide offer than it is to negotiate the perfect sale price. The very fact that an offer is presented to the lender for approval may persuade the lender to put the foreclosure process on hold, at least temporarily. The lender will have every opportunity to disapprove the offer and request a different price. Of course, just as in a traditional sale, all offers you receive must be presented to the seller throughout the course of your agency agreement.
- ii. If your state or local Association of REALTORS®, or your broker, provides a short sale addendum, use it in any counteroffer you make. It is designed to protect the seller against liability to the buyer in the event the lender disapproves the short sale. Here are some typical provisions from the California Association of REALTORS® Short Sale Addendum:

A. SHORT SALE APPROVAL. This Agreement is contingent upon Seller's receipt of written consent from all existing secured lenders and lienholders ("Short-Sale Lenders"), no later than 5:00 P.M. on [redacted] (date) ("Short-Sale Contingency Date"), to reduce their respective loan balances by an amount sufficient to permit the proceeds from the sale of the Property to pay the existing balances on loans secured by the Property, real property taxes, brokerage commissions, closing costs, and other monetary obligations the Agreement requires Seller to pay at Close Of Escrow (including, but not limited to, escrow charges, title charges, documentary transfer taxes, prorations, retrofit costs and Repairs) without requiring Seller to place any funds into escrow. If Seller fails to give Buyer written notice of all existing Short-Sale Lenders' consent by the Short-Sale Contingency Date, either Seller or Buyer may cancel the Agreement in writing, and Buyer shall be entitled to a return of any deposit. Seller shall reasonably cooperate with existing Short-Sale Lenders in the short-sale process.

B. TIME PERIODS. Time periods in the Agreement for inspections, contingencies, covenants and other obligations shall begin: (i) as specified in the Agreement; (ii) (if checked) the day after Seller delivers to Buyer a written notice of Short-Sale Lenders' consent; or (iii) (if checked) Other [redacted].

C. NO ASSURANCE OF LENDER APPROVAL. Buyer and Seller understand that Short-Sale Lenders (i) are not obligated to accept a short-sale; (ii) may require Seller to forward any other offer received; and (iii) may accept other offers. Additionally, Short-Sale Lenders may require that, in order to obtain their approval for a short sale, some terms of the Agreement, such as the Close of Escrow, be amended or that Seller sign a personal note or some other obligation for all or a portion of the amount of the secured debt reduction. Buyer and Seller do not have to agree to any of Short-Sale Lenders' proposed terms. Buyer, Seller and Brokers do not have control over whether Short-Sale Lenders will consent to a short-sale, or any act, omission, or decision by any Short-Sale Lender in the short-sale process.

D. BUYER AND SELLER COSTS. Buyer and Seller acknowledge that each may incur costs in connection with rights or obligations under the Agreement. These costs may include, but are not limited to, payments for loan applications, inspections, appraisals, and other reports. Such costs will be the sole responsibility of the party incurring them, if Short-Sale Lenders do not consent to the transaction or either party cancels pursuant to the Agreement.

E. OTHER OFFERS. Unless otherwise agreed in writing, Seller may continue to market the Property despite acceptance of Buyer's offer, and to present to Short-Sale Lender(s) any additional offers that are received on the Property.

F. CREDIT, LEGAL AND TAX ADVICE. Seller is informed that a short-sale may have credit or legal consequences and may result in taxable income to Seller. **Seller is advised to seek advice from an attorney, certified public accountant or other expert regarding such potential consequences of a short-sale.**

By signing below, Buyer and Seller each acknowledge that they have read, understand, accept and have received a copy of this Short Sale Addendum.

If you do not have such an addendum readily available, you may wish to ask your broker for similar language you can use in a counter offer.

b. The Completed Hardship Letter, Short Sale Package, and Narrative

i. Every lender is different, and each short sale package can be different as well. You may choose to submit most of the package to the lender when you obtain the listing, and then pass along the offer, or you may wait until you have an offer to submit a complete package. The following are the most common elements. Some will be required, and some are advisable because they help you explain to the lender why the short sale is a good alternative to foreclosure:

1. A hardship letter written by the seller describing the seller's circumstances. The seller should be as persuasive as possible in describing why the seller is in no position to continue with his or her financial obligations to the lender. This letter can make or break the short sale. The reasons given by the seller should be compelling and the seller should be both honest and frank in their disclosures to the lender. Include corroborating material. If the seller was fired, include the termination letter. If the seller has medical bills, summarize them. If the seller is ill or disabled, the seller should explain how that has made it impossible for the seller to keep the property. If there are tax problems, the seller should describe and document them. If

the property was damaged and not covered by insurance, as in several recent natural disasters, the seller should document the damage and the denial of the claim.

2. A copy of the purchase contract and all supporting documents signed by both the buyer and seller.
3. Written proof of the buyer's ability to purchase the property, i.e., a completed loan application, pre-approval by a lender or evidence of cash on hand (a current bank statement).
4. A copy of the certified escrow instructions.
5. A preliminary title report if applicable in your state.
6. An estimated net/closing statement (HUD-1) certified by an escrow officer who is acceptable to the lender. It is very important that this estimate be as complete and accurate as possible. Many lenders will reference the closing statement in their acceptance or rejection. You may receive an approval that states "Lender will accept net proceeds of no less than \$273,565 no later than November 30, 2009". If the estimate of net proceeds is wrong for any reason, you may have to attempt to renegotiate with the lender.
7. A completed and signed IRS Form 4506, "Request for Copy of Tax Form".
8. A completed and signed personal financial worksheet. This will include assets such as other real estate, stocks, bonds, 401Ks, etc.
9. Tax returns for the previous two years.
10. Employment paycheck stubs for the past two months.
11. Profit and Loss statement (if the seller is self-employed)
12. Bank statements for the past two to three months.
13. A completed Short Sale Application if the lender provides one. Many don't.
14. Your CMA/BPO with supporting sales data. You want to show that the offer you are presenting is the best market price offer the lender is likely to receive.
15. A short narrative, written by you, about the market and market trends in the immediate area of the property being sold. Highlight such data as average time on the market, number of short sale and REO listings in the MLS and price trends. Support your conclusions

with material such as recent economic data and newspaper articles. The decision maker may well be in another state and will not necessarily understand why the property is suddenly worth less than the loan.

16. Your marketing history, showings, and feedback. Here again, you need to show the lender that you have made a real effort to get the highest price. They must understand that you have done a better job than they would have and that you have presented them with a quick and attractive solution to a deteriorating situation.
17. A formal request signed by the seller that the short sale be approved as submitted.

***Important Note:** If there are multiple loans, you will repeat this process for each lender. It can be especially difficult to obtain a short sale approval from a second trust deed holder or other junior lienholder that is “wiped out” in a short sale. You will probably need to request that the first trust deed or mortgage holder offer at least a symbolic sum to the second trust deed holder to secure an approval. Anecdotally, second trust deed holders have recently been accepting partial payments as low as \$5,000 on trust deeds of \$100,000 or more.

- c. **Following Up.** Once you have submitted the short sale package, stay in touch with the lender every day if possible. Make sure they acknowledge that the package is complete. Try to talk to the same person in the Loss Mitigation Department each time and document your conversations. This is not a happy decision for the lender. It will get shoved to the bottom of the to-do list over and over again. Lenders are infamous for “losing” short sale paperwork. Keep the seller and the buyer’s agent up to date. If there is a drop-dead time limit to the offer, remind the lender of it often.

b. Subsequent Offers.

- i. There are different opinions and practices concerning whether to submit all offers received to the lender, or whether to limit the submission to the first offer the seller accepts. Many lenders will require in writing that all offers be submitted, as a condition of reviewing the short sale package. Consult with your broker concerning the broker’s policy regarding subsequent offers. Remember, once again, that all offers must be submitted to the seller, even if they are not then submitted to the lender.
 - ii. In some areas, agents are simply submitting all offers to the lender without having the seller negotiate or accept any particular offer. Recognize that, without an accepted offer signed by both buyer and seller, you will not have a contract even if the lender approves. This approach presents certain practical and risk management issues. Consult with your broker about this practice if it appears to be common in your area, or if you are inclined to follow the practice.

5. The Lender Response and the Close of Escrow

- a. The lender can do one of several things.
 - i. Ignore the offer. (This happens.)
 - ii. Refuse the offer, either with or without an indication of what net proceeds would be acceptable.
 - iii. Ask the seller to bring some or all of the shortfall to escrow. This is a typical first response. If the seller is unable or unwilling to do so, you will need to contact the lender immediately with a letter from the seller to that effect.
 - iv. Approve the offer.
- b. If the lender refuses the offer, try to determine the net proceeds the lender would accept. Go back to the buyer and see if he or she will increase the offer to provide those proceeds. This process can be similar to any counteroffer situation, but it takes more time. If the buyer refuses, obtain a cancellation and go your back-up buyers (if any) in order. If there are no back-up offers, ask the lender to give you some time to place the property in the MLS as an “approved short sale” at the price and terms the lender will accept. If you then obtain a buyer who agrees to that price and those terms, you can proceed to close normally. Note that you may need a new approval from the lender even if the price and terms are exactly the same. Check with the lender.
- c. If the lender approves the offer. It will typically be in the form of a demand to escrow (and possibly to you) to the effect that the lender will accept no less than X dollars in proceeds no later than X date. The lender may also attempt to reduce your commission. You can certainly argue with the lender about this, but ultimately, the lender will decide. Remember that the lender is not accepting the offer, but is simply agreeing to a smaller payment that the lender would otherwise be entitled to. This is why it is so important that the estimated closing statement be accurate. If the lender approves the short sale, it will not care what problems you might have closing the escrow on time, or what unanticipated costs you face. There will simply be a dollar amount that will need to be available at the close of escrow. Once escrow has the approval letter, you can proceed to close in the ordinary way. The buyer may have requested in the purchase contract that the seller move prior to the close of escrow so there are no holdover or possession problems. Remember that the seller is responsible for all the usual disclosures in your state, county, and city. The seller is still the owner of the property and the seller will be conveying title. You will be responsible for all the usual duties of a real estate agent in your state, county, and city.

6. Final Notes.

- a. Be aware that the Loss Mitigation and Foreclosure Departments are often different entities, and are staffed by different individuals. The Foreclosure Department might not be aware of what the Loss Mitigation Department has agreed to. In some cases, this has led to the property being foreclosed even after the Loss Mitigation Department has agreed to a short sale. Try to speak with the foreclosure department directly if the foreclosure date is close to your estimated closing date.

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