

## **Short Sales and How to Handle them**

Many listing agents are finding themselves faced with a new set of challenges due to the rising tide of short sales and foreclosures, and are searching for guidance on how to successfully navigate this rocky terrain.

To get a proper handle on this issue, it is necessary to identify what a short sale is and how it differs from a “potential short sale.” 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, on the other hand, 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.

If, after full reflection and consultation with appropriate legal, credit and tax professionals, the homeowner decides that a short sale makes the best sense, there are a series of steps the listing agent can follow to help ensure the short sale process goes as smoothly and is as successful as possible.

First, the agent needs to make sure the property is worth less than is owed by doing a careful Comparative Market Analysis. 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.

It should also be established that the seller has some hardship that makes it impossible or extremely impractical for the seller to keep the property. The seller will need to help write a narrative of the hardship involved and will be asked by the creditor to reveal all details of the seller’s financial situation. In addition, if there is a formal short sale application, the seller will have to complete it. This can often be embarrassing and uncomfortable for the seller. As such, the agent will need to be supportive, but also must be prepared to explain that he or she can’t help the seller unless the seller cooperates.

The next step involves contacting the lender to find out if the lender will entertain a short sale. The agent should let the lender know the situation and the agent’s proposed short sale solution, and should request a list of documents that the lender will require. Unless the lender indicates it will categorically refuse a short sale under any circumstance (a rare occurrence), the agent can proceed with listing the property.

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.

With regard to pricing, it makes no sense in a short sale to start unreasonably high. A price that attracts no offers will hurt the seller. The agent should adjust the price quickly if he or she sees no activity or has no offers. To make the short sale work, the agent needs to get an offer to the lender quickly.

Short sales present a special problem with conditional compensation being offered to a cooperating broker. A listing agent is not entirely sure what his or her commission will be until the terms of a short sale are approved by the lender.

Multiple listing services, at their discretion, may adopt rules and procedures enabling listing brokers to communicate to potential cooperating brokers that gross commissions established in listing contracts are subject to court approval or to lender approval; and that compensation payable to cooperating brokers may be reduced if the gross commission established in the listing contract is reduced by a court or by a lender. In such instances, the fact that the gross commission is subject to court or to lender approval and either the potential reduction in compensation payable to cooperating brokers or the method by which the potential reduction in compensation will be calculated must be clearly communicated to potential cooperating brokers prior to the time they produce an offer that ultimately results in a successful transaction.

This provision allows listing brokers to identify listings in which the gross commission is subject to approval by a third party and that the compensation payable to the cooperating broker may be reduced by a specified method or formula.

When it comes to marketing the property, it's important for both the seller's sake and to generate lender confidence that the agent market the short sale listing as aggressively he or she would an ordinary listing. The agent may want to accelerate the marketing if there is a foreclosure deadline looming. The lender will need to understand that the agent has done everything possible to sell the property at the highest price.

The ideal offer should be from a pre-qualified or pre-approved buyer, with no unusual contingencies, and should be flexible in terms of closing. The ideal buyer is willing to be patient. Of course, not all offers will be ideal. If the agent receives a very low offer, he or she may wish to attempt to negotiate it between the seller and the buyer as in an ordinary sale setting. Once the offer is fully negotiated between buyer and seller, it should be signed by both, subject to the approval by the lender.

When an offer has been accepted by the seller, it should then be presented to the lender. The agent needs to recognize that lenders will want to see "as-is" offers without credits for repair or closing costs paid to buyers. License law requires that if an agent receives an offer on the low side of "reasonable" from a qualified buyer, he or she must still pass the offer along to the seller who will discuss the offer with 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 seller and then to lender for approval may persuade the lender to put the foreclosure process on hold, at least temporarily.

In addition to presenting the offer to the lender, the agent will want to submit a completed hardship letter, a short sale package and a narrative, written by the agent, about the market and market trends in the immediate area of the property being sold. Once these items have been submitted, the agent should stay in touch with the lender every day if possible.

The lender can do one of several things. The lender can ignore the offer. The lender can refuse the offer, either with or without an indication of what net proceeds would be acceptable. The lender can also ask the seller to bring some or the entire shortfall to escrow. In the best case scenario, the lender can approve the offer.

If the lender refuses the offer, the agent should try to determine the net proceeds the lender would accept. He or she should go back to the buyer and see if the buyer 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, the agent should obtain a cancellation and ask the lender to give him or her some time to place the property in the MLS as an "approved short sale" at the price and terms the lender will accept. If the agent then obtains a buyer who agrees to that price and those terms, the agent can proceed to close normally.

If the lender approves the offer, it will typically be with the conditions of a demand 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 the agent's commission. The agent can certainly argue with the lender about this, but ultimately, the lender will decide. That possibility with discussed at the short sale listing presentation.

This is why it is so important that the estimated closing statement be accurate. If the lender approves the short sale, it will generally not care what problems the agent might have closing the property on time or what unanticipated costs the agent might face. There will simply be a dollar amount that will need to be available at the close of the property. Once the closing attorney has the short sale approval letter, the agent can proceed to close in the ordinary way.

The agent needs to remember that the seller is responsible for all the usual disclosures of material defects in the property and in most instances will be required by law to give the buyer the Residential Property Condition Disclosure Form prior to the buyer's writing an offer to purchase. The seller is still the owner of the property and the seller is required to comply with all disclosure requirements.

You can find additional details on handling short sales online at <http://www.realtor.org/library/library/fg335>.