

## SHORT SALES

### For the Listing Agent

1. If your company permits you to engage in a short sale, be sure to follow your company's policy.
2. If you have a seller who needs to do a short sale and you are not knowledgeable, speak with your Broker-in-Charge. Review Article 11 of the REALTORS® Code of Ethics.
3. Before you do a short sale, you should read [NAR's Short Sale Workflow](#) and consider taking classes to become knowledgeable.
4. Make sure that the seller qualifies for a short sale. Some of the qualifications include hardship, loss of job, sickness, etc. The seller must be able to substantiate why they are asking the lien holder to accept less than what is owed on the property. Assist the seller in contacting the lien holder in advance, to ask if they would be willing to work with the seller on a short sale.
  - a. Consider using NCAR Form 110 ("Seller Estimated Net Sheet") to help determine whether the seller is in a short sale situation.
5. Consideration should be given to having an attorney perform a preliminary title search to determine whether there are other deficiency judgments/liens on the property. If there are, it may be impossible to do a short sale.
6. If you decide to take a short-sale listing, remember to go over NCAR Form 104 ("Short Sale Addendum to Exclusive Right To Sell Listing Agreement") with the seller and attach the signed addendum to your listing agreement. In particular, make sure the seller understands that:
  - a. A "short sale" (as defined in Paragraph 1), is a material fact that you must disclose
  - b. Once any sales contract is sent to the lien holder, the lien holder controls the process and the timeframe for responding (see last sentence in paragraph 4).
  - c. The seller should seek the advice of a CPA to determine the tax ramifications of a short sale for their specific situation (see paragraph 3).
  - d. The seller should speak with an attorney to make sure that a short sale is the best course of action for them (as opposed to filing bankruptcy, etc.)
  - e. There is a possibility that the seller will need to use other assets to pay some or all of the difference between the sales price and the amount the lien holder approves and/or the costs of sale (see paragraph 5).
7. Make sure that you follow all rules and regulations of your local MLS. Disclose in the MLS by answering "Yes" in the Short Sale field.
  - a. Also advise other participants whether and how any reduction in the gross commission established in the listing agreement, required by the lien holder as a condition of approving the sale, will be apportioned between listing and cooperating participants.
  - b. All confidential disclosures and confidential information related to short sales must be communicated in the Non Public Remarks available only to participants and subscribers.
  - c. The listing agent should review Section 5 of the MLS Rules and Regulations regarding commission disclosure.
8. Ask the seller to notify you if the lien holder sends information concerning foreclosure proceedings or if they begin bankruptcy proceedings.
  - a. If you become aware of a foreclosure or bankruptcy proceeding, or the filing of any tax liens, etc., question #18 of the Residential Property Disclosure statement will need to be revised unless the seller has checked "No Representations."
  - b. Regardless whether the seller discloses the existence of the foreclosure, bankruptcy, tax lien, etc., remember that these are material facts that you must disclose.
  - c. If a foreclosure or other judicial proceeding has been or is commenced, you must be careful to avoid conduct that might constitute the unauthorized practice of law (see last bullet in paragraph 9 of NCAR Form 104).
    - i. Remember that you may continue to solicit and negotiate offers to purchase the property, and contact, communicate with, obtain information from and supply information to lien holders.

- ii. You should avoid negotiating with lien holders regarding the foreclosure or other judicial proceeding (example: negotiating with the attorney handling the foreclosure sale for a continuance of the sale). You should consider working with an attorney to reduce the risk of being involved in the unauthorized practice of law.
    - iii. Consider involving an attorney to help reduce the risk of any accusation that you are engaged in the unauthorized practice of law
9. Go over NCAR Form 2A14-T ("Short Sale Addendum" to Offer to Purchase and Contract) with the seller. In particular, make sure the seller understands that:
  - a. A lien holder may require some terms of the contract to be amended in exchange for approval of a Short Sale (see paragraph 4).
  - b. They are not obligated to agree to any of lien holders' proposed terms (see paragraph 4).
10. You should memorialize all lien holder conversations and provide a copy to the seller and the lien holder.
11. The seller and the listing agent must notify the lien holder that the property is on the market.
  - a. Educate lien holder that the seller will be sending a contract (not an offer) when one is accepted.
    - **Key Point:** The lien holder is not a party to the contract and cannot sign it.
12. Any offer must be executed by the buyer and the seller to create a contract. Make sure to attach NCAR Form 2A14-T to the Offer to Purchase and Contract and that it is signed by both the buyer and the seller.
  - a. The seller should be advised to consider consulting with a NC real estate attorney to discuss whether paragraph 18 of NCAR Form 2-T as it pertains to the effect of a delay in closing should be modified or stricken.
13. Consider using Alternative 2 of NCAR Form 2-T.
14. Carefully choose a closing date.
  - a. Consider using a number of days after lien holder's approval rather than a set date
15. Once there is a contract, you must send it to the lien holder.
16. If other offers are received, you must present them to the seller (see paragraph 6 of NCAR Form 2A14-T).
  - a. If the seller wants to accept one or more other offers, each contract must have a Back-up Contract addendum attached.
  - b. Any back-up contract (not an offer) must be submitted to the lien holder.
    - i. The NC Real Estate Commission considers the existence of the contract to be a material fact that must be disclosed to the lien holder.

### **For the Buyer Agent**

1. If your company permits you to engage in a short sale, be sure to follow the company's policy.
2. If you have a buyer who wants to purchase a property subject to a short sale and you are not knowledgeable, speak with your Broker-in-Charge. Review Article 11 of the REALTORS® Code of Ethics.
3. Before you do a short sale, you should read [NAR's Short Sale Workflow](#) .
4. You should have a substantive discussion with the buyer to:
  - a. Ascertain whether they want to purchase a property subject to a short sale.
  - b. Set realistic time expectations (up to 180 days), especially with regard to lien holder response time. If the buyer must close in a specified period of time, then he or she may not be a good candidate to purchase a short sale property.
  - c. Educate the buyer that the seller still owns the property, and has the right to negotiate and/or refuse an offer. It is not mandatory for the seller/listing agent to send any and all offers to the lien holder.

- d. Clarify that once the contract is sent to the lien holder, that the lien holder controls the process and the timeframe for responding (see last sentence in paragraph 4 of NCAR Form 104).
  - e. Consider using Alternative 2 of NCAR Form 2-T.
  - f. Go over NCAR Form 2A14-T ("Short Sale Addendum" to Offer to Purchase and Contract) with the buyer. In particular, make sure the buyer understands that:
    - i. A lienholder is not required or obligated to accept a short sale (see paragraph 4).
    - ii. A lienholder may require some terms of the contract to be amended in exchange for approval of a Short Sale (see paragraph 4).
    - iii. The buyer is not obligated to agree to any of lien holders' proposed terms (see paragraph 4).
    - iv. The seller may not be in a position to make any repairs that the buyer may request (see paragraph 5). Discuss with the buyer the option of performing inspections prior to making an offer.
    - v. Other contracts with a back-up contingency may be accepted and that the lien holder may ultimately approve only one (see paragraph 6).
  - g. Advise the buyer that any offer should have minimal contingencies such as not asking for home warranty to be paid by seller, etc.
  - h. Carefully choose a closing date.
    - i. Consider using a number of days after lien holder's approval rather than a set date
5. Advise the buyer not to lock-in rates until the lien holder responds favorably.
  6. Advise the buyer that all contracts (not offers) must be sent to the lien holder.
    - a. The NC Real Estate Commission considers the existence of the contract to be a material fact that must be disclosed to the lien holder.

#### **For Brokers-in-Charge**

1. Become educated on short sales.
2. Consider whether to add a short sale section in your policy manual. It might contain the following:
  - a. Rules regarding seller and buyer clients who want/need to be involved in a short sale working only with a broker who is knowledgeable in short sales.
  - b. Rules that state that only brokers who are knowledgeable may engage in short sale transactions.
  - c. A mentoring program to help brokers become knowledgeable.
  - d. A checklist that provides guidance on doing in a short sale (see [NAR's Short Sale Workflow](#) .
  - e. A consumer education paper for the seller and buyer to help them understand the process.
  - f. A referral policy for agents who do not want to engage in a short sale.