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Tips & Tools for Successful Short Sale Transactions

Due to the current economic climate, many current listings are disclosed as short sales. A short sale is a transaction where the net proceeds from the sale of a property are not enough to cover the seller's mortgage obligations and closing costs, such as property taxes, transfer taxes and the real estate practitioner's commission. Short sales bring about a large number of additional considerations not found in a traditional transaction. Following are some of the most commonly asked questions in short sale transactions and use FAR's Short Sale Addendum:

The FAR Short Sale Addendum (SSA-2 revised 7/08) says the seller may "accept" other offers and submit them to the lender. Does the MLS status stay as "active" until the lender approves the short sale?

No. The FAR addendum, and ones like it, is designed to alert buyers under contract that the seller may continue to solicit offers and hold them in a back up position, and may share them with the lender. Even though a listing agent may solicit additional offers and share them with the lender, if a purchase contract is signed by both parties, with the FAR addendum (SSA-2 revised 7/08) included, then the contract is complete and is now *contingent* on bank approval. Therefore the status in MLS is now "pending with contingencies" or "pending with back up" or whatever pending status exists in your MLS. This is no longer an ACTIVE listing. The purchase contract cannot dictate the MLS status; rather that is dictated by MLS rules.

My MLS allows me to keep my listing as "active" if there is a *right of first refusal* in the contract? Does a short sale purchase contract contain a right of first refusal for the lender?

No. A right of first refusal is usually where the seller has a contractual right under which a seller must give a party an opportunity to match (within a specified timeframe) a price at which another buyer agrees to buy the listing, on the same terms offered to the third party. The requirement for the lender to approve a short sale is not a right of first refusal; rather it is a contingency of the sale.

Paragraph 1 of FAR's Short Sale Addendum states that either party may withdraw from the agreement five days after the expiration of the time period allotted for the lender to approve the short sale. If neither party withdraws and the lender fails to approve the short sale for another month, can the buyer walk away?

The buyer can terminate the agreement but their deposit could be in jeopardy. If more time is needed than originally agreed upon in the addendum, the parties should execute an extension to reflect a new time period for approval. *NOTE – Additional remedies may be available to both parties upon default of a purchase contract.*

Can a listing broker submit an unsigned offer to a lender for short sale approval? What are the pros and cons of such a practice?

The short answer is maybe. Some lenders may review an unsigned offer, some will decline. If a seller wishes to hold off signing a submitted offer there are several things that all parties should understand:

- There is no agreement of sale, which means the buyer can, at any time, purchase another property and there is nothing the seller can do to stop it. Buyers should ensure that if they choose to purchase a different property that the offer they presented is withdrawn accordingly.

- Most offers expire after a certain time period from the date they are presented. If the time period expires and has not been signed by the seller there is no agreement, the offer is null and void. There are possible exceptions, such as a waiver that enables the parties to revive the offer.
- If buyers do not receive an executed copy of the agreement they have no legal standing to purchase the property. Even if the lender APPROVES the short sale there is no obligation for the seller to sign the offer. Also, the seller can use this approval to solicit a higher offer from another buyer.

The FAR Short Sale Addendum (SSA-2, revised 7/08) has options in paragraph 3 regarding when deposits and inspections are required to commence. How does this affect the buyer and seller's obligations under the contract?

If the buyer and seller agree on the first option under paragraph 3 then the time periods for performing inspections, placing deposits and performing obligations under the contract are delayed as set out in the addendum.

If the lender is required to approve the short sale prior to closing is there actually a contract between the buyer and the seller?

Yes. Unless otherwise agreed there is a contract in place between the buyer and seller. It is contingent upon the lender's (and any other lien holder) approval, but is a contract.

How should a listing broker handle additional offers that come in *after* the seller has submitted an executed contract to the lender for approval?

Each transaction is different. Unless instructed otherwise, the listing broker should present all offers to the seller for review. The seller can then decide to hold the offer as a back up and present it to the lender. The lender generally wants the highest possible price, however, once a purchase contract is signed by the seller and the buyer, that contract must be disposed of before another may be accepted and the lender approves it. *The seller should refrain from signing more than one contract unless there is specific legal direction that the second offer is a back-up offer.*

May a listing broker refuse to present additional offers to the seller if the property is under agreement and the lender is reviewing an executed contract?

It depends. Listing agreements may contain a provision that once the seller has executed a purchase contract with a buyer the listing broker has no obligation to continue to present offers to the seller. Short sales are unique situations so listing brokers should discuss and get direction from the seller how they will handle additional offers if they are received after an offer has been submitted to a lender for approval.

May a listing broker refuse to submit additional offers to the lender at the direction of the seller?

Possibly. It is legal for a seller to refuse to present additional offers to their lender for approval, even if those offers are higher. The lender, however, is an essential party in these transactions so sellers should ensure that they understand the lender's preferences or requirements when processing a short sale for a borrower/seller. Realtors® should remember that the seller is still the legally responsible person so unless their direction is illegal or contrary to the lender's instructions you should follow their direction. The listing broker can only counsel the seller to the best of their ability regarding how to best sell their property.

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