



**REALTORS® ASSOCIATION OF NEW MEXICO
SHORT SALE INFORMATION SHEET – 2009**

SHORT SALE DEFINED: A "Short Sale" is a sale where: 1) the Purchase Price is or may be insufficient to enable Seller to pay the costs of sale, which include but are not limited to the closing costs and all loans or debts secured by the Property that must be paid to Lienholder(s) upon closing; 2) Seller does not have other resources to pay the costs of sale; and 3) the Lienholder(s) agree to release or discharge their lien(s) upon payment of an amount less than the amount secured by their lien(s) with or without the Seller being released from any further liability.

DETERMINING IF SALE IS A SHORT SALE: The Seller should conduct a title search to determine the amount of the Property's lien(s) and have a comparative market analysis (CMA) or property appraisal performed. If the lien amounts exceed the Property's value, the Property may need to be sold for less than the lien(s) against it. Property transferred in this manner is sold "short."

LOAN MODIFICATION: There may be alternatives to a Short Sale. In a loan modification, the Lienholder(s) refinances at a lower interest rate, provides a new payment plan to bring payments current, or provides a forbearance period if the Seller's situation is temporary. The Seller should contact the Lienholder(s) to determine available options.

SELLER'S FINANCIAL SITUATION: Lienholder(s) need to know the Seller's current financial situation. The Seller should be prepared to provide tax returns, bank statements and other proof of income. If Seller has cash to pay off loans, or significant assets, Lienholder(s) may not accept a Short Sale offer. Lienholder(s) will likely want an explanation of why the Seller needs to sell the Property at a loss (a hardship letter), e.g., loss of job, medical bills. Lienholder (s) will also likely want to know if the Seller is able to contribute to closing costs. **WARNING: KNOWINGLY RELAYING INCORRECT INFORMATION TO LIENHOLDER(S) IS FRAUD AND IS A CRIME. CONFIRM THAT DATA PROVIDED TO LIENHOLDER(S) IS ACCURATE.**

JUNIOR LIENHOLDERS: Some Senior Lienholders will want the Seller to negotiate with Junior Lienholders, others will negotiate themselves. Protocol for negotiations with Junior Lienholders should be determined early. The Senior Lienholder should be told of prior negotiations between Seller and Junior Lienholders. **REMEMBER, ALL LIENHOLDERS MUST AGREE TO THE SHORT SALE.**

PROPERTY SOLD "AS-IS": The Seller is usually unable to afford repairs to the Property and the Lienholder(s) may refuse to make repairs. Generally, a Buyer has the right to terminate the Purchase Agreement based on results of inspections. Each Purchase Agreement should be evaluated to determine specific rights. Seller should be aware that even if the Property is sold "As-Is" Seller may still be held liable to Buyer for failure to disclose material defects in the Property.

PREPARATION FOR BUYERS IN SHORT SALES: Buyer should gather the following documents before submitting an offer to the Lienholder(s): proof of pre-approval from a reputable lender; credit reports; and proof of an arms-length transaction, i.e., Seller has not colluded with the Buyer (e.g., his brother) to manufacture a Short Sale. Without proof of an arms-length transaction, Lienholder(s) may suspect fraud. Affidavits signed by the Buyer and Seller satisfy most Lienholders. Falsifying this affidavit is mortgage fraud. Lienholder(s) may require additional documentation.

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SHORT SALES CONTINGENT ON LIENHOLDER(S) APPROVAL: Because the Property's sale can occur only if all Lienholders agree to accept less than what is owed on their respective liens, the performance of the Purchase Agreement will be contingent upon the Seller obtaining Short Sale approval from all Lienholders. Often, the Purchase Agreement will also be contingent on the Buyer and Seller agreeing to Lienholder(s) terms and/or conditions, e.g., Seller must sign a promissory note for any deficiency or Buyer agrees to close quickly. Most Purchase Agreements for Short Sales provide that the Seller and Buyer are not obligated to accept any of the changes requested by Lienholder(s).

INSPECTIONS: Often the time period for inspections does not start until the Seller notifies Buyer of Lienholders' approval. Each Purchase Agreement should be evaluated to determine deadlines for inspections.

SHORT-SALE PROCESS: Typically, the loan servicer reviews the Short Sale package, determines if investor or mortgage insurance company approval is involved, and negotiates Seller's participation. If investor or mortgage insurer approval is required, they review the package. The Lienholder and/or servicer may or may not deal with Junior Lienholders. **REGARDLESS, ALL PARTIES MUST APPROVE THE SALE.**

TIME-PERIOD FOR LIENHOLDER(S) RESPONSE: Lienholder response to a proposed Short Sale may take months and no one can guarantee the timeliness of Lienholders' approval or rejection. Most Purchase Agreements require written approval by Lienholder(s) by a certain date and allow Buyer to terminate if that date is not met. **PLEASE NOTE: ABSOLUTELY NO ONE INVOLVED IN A PROPOSED SHORT SALE HAS ANY CONTROL OVER THE TIMING OF LIENHOLDERS' RESPONSE, OR THEIR FINAL DECISION.**

OTHER OFFERS: The Short Sale Addendum to the Purchase Agreement will likely address additional offers that may be received on the Property. Lienholder(s) will usually require that the Seller keep the Property on the market, even after the Purchase Agreement is signed. Lienholder(s) may not even respond to a proposed Short Sale until seeing other purchase offers. **BUYER AND SELLER SHOULD CONSULT AN ATTORNEY FOR THEIR RIGHTS AND DUTIES.**

DEFICIENCY JUDGMENTS: A Deficiency Judgment may be entered against, and ultimately collected from, the Seller personally (e.g., by wage garnishment) for the difference between the amount received by the Lienholder(s) in the Short Sale and the amount originally owed. While Lienholder(s) may approve the Short Sale and release their lien(s), Lienholder(s) may refuse to waive rights under the mortgage to pursue the deficiency against the Seller personally. In addition, a Deficiency Judgment may adversely affect Seller's credit score. **SELLER SHOULD CONSULT AN ATTORNEY ABOUT EXPOSURE TO, AND LONG-TERM CONSEQUENCES OF, A DEFICIENCY JUDGMENT.**

TAXES: "Excused Debt" results when Lienholder(s) discharge lien(s) for less than full payment and do not pursue a Deficiency Judgment. Seller should consult a CPA and/or attorney because Excused Debt may constitute taxable income if not handled properly. The Mortgage Debt Relief Act of 2007 generally allows Seller to exclude from taxable income the Excused Debt on Seller's principal residence and applies to Excused Debt in years 2007 through 2012. Debt reduced through mortgage restructuring, as well as mortgage debt forgiven in connection with a Foreclosure or Short Sale, may qualify for relief. In a Short Sale, Lienholder(s) is usually required to report the amount of the cancelled debt to the Seller and to the IRS on Form 1099-C, "Cancellation of Debt."

PROFESSIONAL ADVICE: THE COMPLEXITY AND LEGAL PITFALLS OF SHORT SALES MERIT EARLY CONSULTATION WITH AN EXPERIENCED ATTORNEY AND/OR CPA. THESE PROFESSIONALS MAY IDENTIFY AND RESOLVE ISSUES WHICH MIGHT OTHERWISE LEAVE THE SELLER EXPOSED TO A DEFICIENCY JUDGEMENT AND/OR OTHER LIABILITIES. FAILURE TO ENGAGE APPROPRIATE PROFESSIONALS EARLY IN THE PROCESS CAN HAVE IRREPARABLE ADVERSE CONSEQUENCES.